

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Testamentary documents and special destinations

Section 1 – Effect of divorce, dissolution or annulment on a will

5. Under the existing law, provision in a will in favour of the spouse or civil partner of the testator (the person making the will) stands even where the relationship comes to a legal end (that is, by divorce, dissolution or annulment). This section reverses that position. So testamentary provisions in favour of a former spouse or former civil partner or appointing a former spouse or former civil partner as a trustee or executor, are effectively revoked by the legal end to the relationship. Subsection (1) as read with subsection (2) provides that the former spouse or civil partner is to be treated as having died before the testator for the purposes of the will in any case where the will confers a benefit or power of appointment on the former spouse or former civil partner or appoints that person as a trustee or executor. In other words, so long as the will contains any provision as set out in subsection 1(a)(i) or (ii) and the other conditions in subsection (1) are met then the former spouse or civil partner is treated as having died before the testator in relation to any aspect of the will. This is subject to one exception set out in subsection (2). The former spouse or civil partner will not be treated as having died before the testator for the purposes of a provision in the will that appoints the former spouse or civil partner or another person as a guardian. If a provision in the will appoints the former spouse or civil partner as a guardian, that provision will have effect despite the subsequent divorce, dissolution or annulment. If a provision in the will appoints another person as guardian in the event that the former spouse or civil partner dies before the testator, that other person will not be appointed as guardian since the former spouse or civil partner will not be treated as having died before the testator for the purposes of that provision.
6. Subsection (3) is an important qualification to the new rule. It means that the new rule does not apply where the will provides that the former spouse or civil partner is to continue to benefit or hold appointment even where there has been a divorce, dissolution or annulment. So the person making the will can, at the time of doing so, give effect to a desire for that situation to apply.
7. The section applies to same sex marriages and opposite sex marriages without distinction.
8. This provision applies only where the deceased dies after the divorce, dissolution or annulment has been obtained and where the divorce, dissolution or annulment is obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man or is otherwise recognised in Scotland (subsection (5)).