



# Bankruptcy (Scotland) Act 2016

## 2016 asp 21

### PART 7

#### SAFEGUARDING INTERESTS OF CREDITORS

##### *Gratuitous alienations and unfair preferences*

#### **98 Gratuitous alienations**

- (1) Subsection (2) applies where—
- (a) by an alienation (whether before or after the coming into force of this Act) by a debtor—
    - (i) any of the debtor's property has been transferred, or
    - (ii) any claim or right of the debtor has been discharged or renounced,
  - (b) any of the following has occurred—
    - (i) the debtor's estate has been sequestrated (other than, in the case of an individual, after the debtor has died),
    - (ii) the debtor has granted a trust deed which has become a protected trust deed,
    - (iii) the debtor has died and within 12 months after the date of death the debtor's estate has been sequestrated, or
    - (iv) the debtor has died, the debtor's estate was absolutely insolvent at the date of death and within those 12 months a judicial factor has been appointed under section 11A of the 1889 Act (see section 107) to administer that estate, and
  - (c) the alienation took place on a relevant day.
- (2) The alienation is challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before (as the case may be) the date of sequestration, the granting of the trust deed or the debtor's death, or
  - (b) (as the case may be) the trustee in the sequestration, the trustee acting under the trust deed or the judicial factor.

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*Status: This is the original version (as it was originally enacted).*

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- (3) For the purposes of paragraph (c) of subsection (1), the day on which an alienation takes place is the day on which the alienation becomes completely effectual.
- (4) In that paragraph, “relevant day” means, if the alienation has the effect of favouring—
- (a) a person who is an associate of the debtor, a day not earlier than 5 years before, or
  - (b) any other person, a day not earlier than 2 years before,
- (as the case may be) the date of sequestration, the granting of the trust deed or the date of death.
- (5) On a challenge being brought under subsection (2), the court must grant decree—
- (a) of reduction, or
  - (b) for such restoration of property to the debtor’s estate, or such other redress, as may be appropriate.
- (6) Except that the court is not to grant such decree if the person seeking to uphold the alienation establishes—
- (a) that immediately, or at any other time, after the alienation the debtor’s assets were greater than the debtor’s liabilities,
  - (b) that the alienation was made for adequate consideration, or
  - (c) that the alienation was—
    - (i) a birthday, Christmas or other conventional gift, or
    - (ii) a gift made, for a charitable purpose, to a person who is not an associate of the debtor,
 being a gift which, having regard to all the circumstances, it was reasonable for the debtor to make.
- (7) Subsection (6) is without prejudice to any right acquired, in good faith and for value, from or through the transferee in the alienation.
- (8) In subsection (6)(c)(ii), “charitable purpose” means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.
- (9) For the purposes of subsections (1) to (8), an alienation in implementation of a prior obligation is deemed to be one for which there was no consideration, or no adequate consideration, to the extent that the prior obligation was undertaken for no consideration, or no adequate consideration.
- (10) This section is without prejudice to the operation of section 2 of the Married Women’s Policies of Assurance (Scotland) Act 1880 (which provides that a policy of assurance may be effected in trust for spouse, future spouse and children) including the operation of that section as applied by section 132 of the Civil Partnership Act 2004.
- (11) A trustee in a sequestration, a trustee acting under a protected trust deed or a judicial factor appointed under section 11A of the 1889 Act has the same right as a creditor has under any rule of law to challenge an alienation of a debtor made for no consideration or for no adequate consideration.

## 99      **Unfair preferences**

- (1) Subsection (5) applies to a transaction entered into (whether before or after the coming into force of this Act) by a debtor which has the effect of creating a preference in

favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before—

- (a) the date of sequestration of the debtor's estate (if, in the case of an individual, a date within the debtor's lifetime),
- (b) the granting by the debtor of a trust deed which has become a protected trust deed,
- (c) the debtor's death where, within 12 months after the date of death—
  - (i) the debtor's estate is sequestrated,
  - (ii) a judicial factor is appointed under section 11A of the 1889 Act to administer the debtor's estate and that estate was absolutely insolvent at the date of death.

(2) But subsection (5) does not apply to—

- (a) a transaction in the ordinary course of trade or business,
- (b) a payment in cash for a debt which when it was paid had become payable,
- (c) a transaction by which the parties undertake reciprocal obligations (whether the performance by the parties of their respective obligations is to occur at the same time or at different times),
- (d) the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds, or part of the arrested funds, to the arrester where—
  - (i) there has been a decree for payment or a warrant for summary diligence, and
  - (ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.

(3) Paragraphs (b) and (c) of subsection (2) are to be disregarded if the transaction in question was collusive with the purpose of prejudicing the general body of creditors.

(4) For the purposes of subsection (1), the day on which a preference is created is the day on which it becomes completely effectual.

(5) The transaction is challengeable by—

- (a) any creditor who is a creditor by virtue of a debt incurred on or before (as the case may be) the date of sequestration, the granting of the protected trust deed or the debtor's death, or
- (b) (as the case may be) the trustee in the sequestration, the trustee acting under the protected trust deed or the judicial factor.

(6) On a challenge being brought under subsection (5) the court, if satisfied that the transaction challenged is a transaction to which that subsection applies, must grant decree—

- (a) of reduction, or
- (b) for such restoration of property to the debtor's estate, or such other redress, as may be appropriate.

(7) Subsection (6) is without prejudice to any right acquired, in good faith and for value, from or through the creditor in whose favour the preference was created.

(8) A trustee in a sequestration, a trustee acting under a protected trust deed or a judicial factor appointed under section 11A of the 1889 Act has the same right as a creditor has under any rule of law to challenge a preference created by a debtor.