

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Testamentary documents and special destinations

Section 6 – Death before legacy vests: entitlement of issue

24. This section replaces the *conditio si institutus sine liberis decesserit*. This rule provides that where by a will a testator leaves a legacy to a direct descendant or a group of direct descendants and a direct descendant who is to receive that legacy dies between the will being made and receiving that legacy that direct descendant's issue would 'step into the shoes' of the individual and inherit the legacy unless the will expressly provides for an alternative beneficiary to inherit the legacy. As per the current common law rule, an alternative legatee will be favoured over the direct descendants of a direct descendant who has failed to survive the date of vesting of the legacy but a residual legatee will not be favoured over those direct descendants.
25. In legal terms "the issue" are considered to be that person's children or other lineal descendants such as grandchildren and great grandchildren.
26. In their 1990 report the Commission considered that it was difficult to determine whether the old rule was to apply where it involved a nephew or niece as this would depend on whether a testator treated them as a parent would treat a child which was not always easy to ascertain. The class of beneficiaries to whom this section applies is therefore now limited only where a legacy is left to one direct descendant of the testator or a group of people, all of whom are direct descendants (subsection (1)(a)).
27. Separately, it was previously unclear whether the rule should be displaced if the bequest contained a survivorship clause or a provision that another person was to take the legacy if the specified legatee did not survive the testator. Those are two ways in which a testator may recognise the possibility of a beneficiary dying before the date of payment and which regulates how the property will pass. For example, where there are two beneficiaries A and B and B dies before they date of payment then A would inherit B's share – this is known as survivorship. On the other hand if the testator sets out that A should inherit, whom failing B (known as a destination over) then B will only inherit if A predeceases the date of payment.
28. Subsection (2) therefore makes it clear that this provision will not apply where there is any clear provision in the will which indicates that the testator intended otherwise. The fact that a legacy is left to a direct descendant A with residuary provision to other direct descendants would not on its own be sufficient to suggest that the legacy was specific to A. Subsection (3) sets out two particular types of situation in which the will is to be read as providing to the contrary: firstly where will contains a clause (survivorship clause) regulating what should happen to the legacy if the legatee dies before the date of payment and secondly where the will contains a clause (a destination over) which names the original legatee and then a further legatee to whom the property may pass in the original legatee's place (to A, whom failing B).

*These notes relate to the Succession (Scotland) Act 2016
(asp 7) which received Royal Assent on 3 March 2016*

29. Subsection (4) provides that the issue (children and direct descendants) of the relevant beneficiary get the share which that beneficiary would have got had the beneficiary survived to receive the legacy. Under the existing law, the issue get only the original share which the beneficiary would have got in terms of the will. This is best illustrated with an example. Say D leaves an estate to 3 children E, F and G. If E, F and G all survive to the vesting of the legacy, they take a third share each. If F predeceases without issue, E and G take half each (on a rule of succession law called ‘accretion’). But if F predeceases without issue and E predeceases leaving a child the current law provides that there is no accretion in favour of E’s child. E’s child will only take the original third share that E would have got at the time the will was executed, not what E would have taken if he or she had survived to the date of vesting (i.e. E’s original third share plus half of the third which would have gone to F). The third share which would have gone to F had F survived goes to G, who therefore ends up with two-thirds. Under this new section, E’s child stands in the shoes of E at the point of the legacy vesting rather than at the point of the will being made. So E’s issue takes a half share (i.e. E’s own third share plus half of the third which would have gone to F).
30. Subsection (5) provides that where two or more of the descendant’s issue are to inherit their share under this section, the rules of intestacy will apply (the legal rules that apply if a person dies without making a will). Subsection (6) defines “intestate estate” and “issue” for the purposes of this section.