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

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)).

Section 2 – Effect of divorce, dissolution or annulment on a special destination

9. This section makes similar provision to section 1 but in relation to what is known as a special destination of property. Special destinations, also sometimes known as

survivorship destinations, are conditions that commonly appear in the title of property held by more than one person, usually spouses, which provide that on the death of one of the spouses their title automatically passes to the survivor. A special destination might also apply where property such as business premises is held in the name of a couple and a number of other people. Consequently even if one party executed a will leaving their interest to a third party, such a term would be ineffective and the property would still transfer to the survivor on death.

10. This section provides that a special destination of property in favour of a former spouse or former civil partner is revoked by the legal end to the relationship, provided the death of the testator occurs after the legal termination of the marriage or civil partnership. This is given effect to in subsection (2) which treats the former spouse or former civil partner as having died before the testator where the criteria in subsection (1) are met. Section 2(3), like section 1(3) explained above, enables provision to be made which disapplies the new rule.

11. As recommended in the Commission's Report No. 124, 1990[1] and Commission's Report No. 219, 2009[2], this section re-enacts section 19 of the Family Law (Scotland) Act 2006 and section 124A of the Civil Partnership Act 2004 (which are repealed by the schedule to the Act) and extends their effect to moveable as well as heritable property.

12. Subsection (4) protects the title of a third party who acquires property in good faith and for value from the former surviving spouse unaware of the divorce, dissolution or annulment.

13. This section applies only 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 (6)).

Section 3 – Rectification of will

14. This section enables the Court of Session or the relevant sheriff court to rectify a will prepared by someone other than the testator where the court is satisfied that the will failed to give effect to the testator's instructions. Rectification is confined to situations in which a person other than the testator prepared the will on the testator's instructions (subsection (1)(b)) and where a person applies to the court for rectification of that will (subsection(1)(c)). Rectification is only competent where the court is satisfied that the will fails to express accurately what was instructed (subsection (1)(d)) and there must therefore be instructions with which to compare the executed will. Those instructions need not necessarily be in writing. In reaching a decision on whether or not a will requires to be rectified, the court may take account of evidence which is extrinsic to the will (subsection (3)). Rectification under this section may only take place where the deceased died domiciled in Scotland (subsection)(1)(a)).

15. These provisions would for example cover: the situation where instructions have been incorrectly transposed by a third party drafter, whether or not the drafter was a solicitor; or wills made 'online' where a third party is taking instructions to produce the will. In any situation it would need to be clear to the court, based on evidence, that the will fails to express the testator's instructions. The intention of the provision is that the power to rectify a will should be confined to cases where the will has been prepared by someone other than the testator where a comparison can be made between the testator's instructions, supported by relevant evidence, and the will itself. The critical factor in the application of the provision is the involvement of another person. If a testator draws up their own will – whether on paper or online this section would not apply.

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1 Recommendation 17(a)(iv), para 4.45, SLC Report on Succession No. 124, January 1990
2 Recommendation 61, para 6.66, SLC Report on Succession No. 219, April 2009

16. The process for seeking rectification of a will is by application and the normal rules of standing will apply, meaning that the court must be satisfied that the applicant, on cause shown, has sufficient interest in the application.

17. Subsections 5, 6 and 7 provide that the Court of Session, a sheriff of the sheriffdom in which the testator was habitually resident at the time of death, or, if the testator was not habitually resident in a part of Scotland at the date of death, or if it is unknown or uncertain the part of Scotland in which the deceased was habitually resident, a sheriff at Edinburgh, has jurisdiction to rectify the will on receipt of the application. In addition, a sheriff in the sheriffdom where confirmation was obtained will have jurisdiction to rectify a will on receipt of an application. Under section 3 of the Confirmation of Executors (Scotland) Act 1858, confirmation is based on where the testator was domiciled. In most cases a person will be domiciled where they are habitually resident but this is not always the case. Subsection (6)(b) would enable jurisdiction in a case where the testator was habitually resident in one sheriffdom but was domiciled in another sheriffdom

18. Subsection (4) provides that while the rectification will take effect from the date that the will was executed, regard should be had to sections 4(7) and section 24 of the Act. Section 4(7) protects executors and trustees from being held personally liable for distributing property in good faith, in accordance with a will which is subsequently rectified. Section 19 provides that where a beneficiary has sold property conveyed to him or her by the deceased's executor under the unrectified will, subsequent rectification will not prejudice the title of whoever acquired the property in good faith and for value. Title is also protected if acquired directly from the executor.

Section 4 – Rectification of will: supplementary

19. This section provides that an application made under section 3(1)(c) for rectification of a will must be made within 6 months from the date of confirmation, if applicable, or the date of death if not (subsection (1)). Confirmation is a legal document from the court giving the executor(s) authority to uplift any money or other property belonging to a deceased person from the holder (such as the bank), and to administer and distribute it according to law. The court has discretion to waive the time limit on cause shown (subsection (2)).

20. Subsection (3) provides that where the court makes an order requiring a will to be rectified, the order will be registered in either the Books of Council and Session or the sheriff court books, depending on where the will is registered.

21. Subsections (4) and (5) provide that where execution of a document is necessary to give effect to a rectified will and the person who requires to execute the document is unable or unwilling to do so, then the court may dispense with this requirement and direct a clerk of session or a sheriff clerk to execute the document. In the above circumstances, subsection (6) provides that such a document executed by a clerk of session or the sheriff clerk will have the same force and effect as if it had been executed by that person who is unable or unwilling to execute the document.

22. As noted above, subsection (7) provides that where a trustee or executor has distributed property in good faith in accordance with a will which is subsequently rectified after the distribution, they will not be held personally liable for that distribution where subsequent rectification of the will means that the property should not have been distributed in that way.

Section 5 – Revocation of will not to revive earlier revoked will

23. Under the current law, a will which is revoked by a subsequent will, revives if the subsequent will is itself revoked. This section changes the law so that in these circumstances the revocation of the subsequent will, or part of it, does not revive the earlier will or the revoked part of the earlier will. This does not prevent the person who

made the will from reviving the will by other means – such as re-executing it or making a new will in the same terms as the one which was revoked.

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).

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.

Section 7 – Liferent: vesting of fee other than on death

31. A liferent is where a beneficiary has the right to receive for the duration of their lifetime, the benefits of an asset. Where a legacy is given without limitation of time, it is referred to as having been given in fee. For example a parent may leave a property in liferent to their spouse or civil partner but in fee to their child. So the spouse may live in the property and enjoy the property but they never own it and may not dispose of it. In these circumstances the child is known as the fiar, or the person in whom the fee vests subject to a liferent. The parent is known as the liferenter.

32. In some cases, the fee does not vest until the death of the liferenter. An example is where the identity of the fiar is dependent on who is alive at the point when the liferenter dies. Problems can arise here where there is early termination of the liferent – for example, where the liferenter renounces the liferent. One such problem is what to do with the income from the property which arises during the life of the liferenter after the point of renunciation or termination. Section 7 removes some of the difficulties where the liferent terminates but the fee does not vest in the fiar. This section allows the fee to vest in the fiar where the liferent terminates but the liferenter has not died.

33. Subsection (1) provides that this section applies when a liferent is terminated otherwise than on the death of the liferenter or where the liferent does not operate because of the effect of divorce, dissolution or annulment on a will or because of the application of forfeiture.

34. Subsection (2) provides that the fee will vest in the fiar on the date of termination of the liferent unless the document creating the liferent expressly provides otherwise or there is an obligation which requires that it should not operate in this way. For example, if a liferent is created by a document, the document itself may provide that the fee is to vest on the death of the liferenter even if the liferent terminates early. If a liferent is created orally, the granter of the liferent may specify at the time of its creation that the fee is to vest on the death of the liferenter even if the liferent terminates early. In both of those situations, the fee would vest on the death of the liferenter as the granter of the liferent intended. The section applies to liferents created by *inter vivos* or testamentary documents.

Section 8 – Destinations in wills and certain trusts: conditional institution

35. Where property is the subject of a destination (that is, a provision in a will or trust for its transfer to "person A, whom failing person B"), there are currently different presumptions about how the property will pass depending on the type of property in question. So where property may be transferred to person A, whom failing person B, by way of a destination in a will or a trust taking effect during a truster's lifetime and the property is heritable it will be presumed that B is a substitute. This means that if A dies still owning the property it will then still pass to B by virtue of the destination. On the other hand, where the property is moveable, if A inherits the property then any right that B had falls at that point. This presumption is known as a "conditional institution". This section creates a new rule that provides that where any kind of property goes to A, B loses all rights to take the property under the destination in the will or trust. The effect is that B is a "conditional institute" and not a "substitute" even where the property is heritable.

36. Subsection (2) provides that this presumption does not apply where it is clear from the will or trust that a different result is intended.