



# 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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- (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

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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.

*Recall of certain orders*

**100 Recall of order for payment of capital sum on divorce or on dissolution of civil partnership**

- (1) This section applies where—
- (a) a court has, under section 8(2) of the Family Law (Scotland) Act 1985 and whether before or after the coming into force of this Act, made—
    - (i) an order for the payment by a debtor of a capital sum,
    - (ii) an order for the transfer of property by the debtor, or
    - (iii) a pension sharing order,
  - (b) on the date of the making of the order the debtor was absolutely insolvent or was rendered so by implementation of the order, and
  - (c) within 5 years after the making of the order—
    - (i) the debtor’s estate has been sequestrated other than on the death of the debtor,
    - (ii) the debtor has granted a trust deed which has (whether or not within the 5 years) 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 and, within those 12 months, a judicial factor has been appointed under section 11A of the 1889 Act to administer the debtor’s estate.
- (2) The court, on the application of (as the case may be) the trustee in the sequestration, the trustee acting under the trust deed or the judicial factor, may make an order for recall of the order in question and—
- (a) for the repayment to the applicant of the whole or part of any sum already paid under the order,
  - (b) for the return to the applicant of all or part of any property already transferred under the order, or
  - (c) (where such property has been sold) for payment to the applicant of all or part of the proceeds of sale.
- (3) But before making an order under subsection (2), the court must have regard to all the circumstances including, in particular, the financial and other circumstances (in so far as made known to the court) of the person against whom the order would be made.

*Excessive contributions*

**101 Recovery of excessive pension contributions**

- (1) Where a debtor’s estate has been sequestrated and the debtor—
- (a) has rights under an approved pension arrangement, or
  - (b) has excluded rights under an unapproved pension arrangement,
- the trustee in the sequestration may apply to the court for an order under this section.
- (2) Subsection (3) applies where the court is satisfied—
- (a) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions, and

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- (b) that the making of any of the relevant contributions (“the excessive contributions”) has unfairly prejudiced the debtor’s creditors.
- (3) The court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made.
- (4) Subsection (5) applies where the court is satisfied that the value of the rights under the arrangement is, as a result of rights of the debtor under—
  - (a) the arrangement, or
  - (b) any other pension arrangement,having at any time become subject to a debit under section 29(1)(a) of the 1999 Act (see section 107), less than it would otherwise have been.
- (5) Where this subsection applies—
  - (a) any relevant contributions which were represented by the rights which became subject to the debit are, for the purposes of subsection (2), to be taken to be contributions of which the rights under the arrangement are the fruits, and
  - (b) where the relevant contributions represented by the rights under the arrangement (including those so represented by virtue of paragraph (a)) are not all excessive contributions, relevant contributions which are represented by the rights under the arrangement otherwise than by virtue of paragraph (a) are to be treated as excessive contributions before any which are so represented by virtue of that paragraph.
- (6) In subsections (2) to (5), “relevant contributions” means contributions to the arrangement or to any other pension arrangement—
  - (a) which the debtor has at any time made on the debtor’s own behalf, or
  - (b) which have at any time been made on the debtor’s behalf.
- (7) The court must, in determining whether it is satisfied under subsection (2)(b), consider in particular—
  - (a) whether any of the contributions were made for the purpose of putting assets beyond the reach of, or of any of, the debtor’s creditors, and
  - (b) whether the total amount of any contributions—
    - (i) made by or on behalf of the debtor to pension arrangements, and
    - (ii) represented (whether directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pensions arrangements,is an amount which is excessive in view of the debtor’s circumstances when those contributions were made.
- (8) For the purposes of this section and of sections 102 and 103, rights of a debtor under an unapproved pension arrangement are excluded rights if they are rights which are excluded from the debtor’s estate by virtue of regulations under section 12 of the 1999 Act.
- (9) In the recovery provisions (see section 103(7))—
  - “approved pension arrangement” has the same meaning as in section 11 of the 1999 Act, and
  - “unapproved pension arrangement” has the same meaning as in section 12 of that Act.

## **102 Orders under section 101**

- (1) Without prejudice to the generality of section 101(3), an order under that section may include provision—
  - (a) requiring the person responsible for the arrangement to pay an amount to the trustee,
  - (b) adjusting the liabilities of the arrangement in respect of the debtor,
  - (c) adjusting any liabilities of the arrangement in respect of any other person that derive, directly or indirectly, from rights of the debtor under the arrangement,
  - (d) for the recovery by the person responsible for the arrangement (whether by deduction from any amount which that person is ordered to pay or otherwise) of costs incurred by that person in complying in the debtor's case with any requirement under section 103(1) or in giving effect to the order.
- (2) In subsection (1), references to adjusting the liabilities of the arrangement in respect of a person include, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (3) In subsection (1)(c), the reference to liabilities of the arrangement does not include liabilities in respect of a person which result from giving effect to an order or provision falling within section 28(1) of the 1999 Act (pension sharing orders).
- (4) The maximum amount which the person responsible for an arrangement may be required to pay by an order under section 101 is the lesser of—
  - (a) the amount of the excessive contributions, and
  - (b) the value of the debtor's rights under the arrangement (if the arrangement is an approved pension arrangement) or of the debtor's excluded rights under the arrangement (if the arrangement is an unapproved pension arrangement).
- (5) An order under section 101 which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (6) For the purposes of subsection (5), liabilities are correspondingly reduced if the difference between—
  - (a) the amount of the liabilities immediately before the reduction, and
  - (b) their amount immediately after the reduction,is equal to the restoration amount.
- (7) An order under section 101 in respect of an arrangement—
  - (a) is binding on the person responsible for the arrangement, and
  - (b) overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.

## **103 Orders under section 101: supplementary**

- (1) The person responsible for—
  - (a) an approved pension arrangement under which a debtor has rights,
  - (b) an unapproved pension arrangement under which a debtor has excluded rights,  
or
  - (c) a pension arrangement under which a debtor has at any time had rights,

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must, on the trustee in the sequestration making a written request, provide the trustee with such information about the arrangement and rights as the trustee may reasonably require for, or in connection with, the making of applications under section 101.

- (2) Nothing in—
- (a) any provision of section 159 of the Pension Schemes Act 1993 or section 91 of the Pensions Act 1995 (which prevent assignation and the making of orders that restrain a person from receiving anything which the person is prevented from assigning),
  - (b) any provision of any enactment (whether passed or made before or after the passing of the 1999 Act) corresponding to any of the provisions mentioned in paragraph (a), or
  - (c) any provision of the arrangement in question corresponding to any of those provisions,
- applies to a court exercising its powers under section 101.
- (3) Where any sum is required by an order under section 101 to be paid to the trustee, that sum is to be comprised in the debtor's estate.
- (4) Regulations made by the Secretary of State may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
- (a) any such value as is mentioned in section 102(4)(b),
  - (b) any such amounts as are mentioned in section 102(6)(a) and (b).
- (5) The power conferred by subsection (4) includes power to provide for calculation or verification—
- (a) in such manner as may, in the particular case, be approved by a prescribed person, or
  - (b) in accordance with guidance from time to time prepared by a prescribed person.
- (6) References in the recovery provisions to the person responsible for a pension arrangement are to—
- (a) the trustees, managers or provider of the arrangement, or
  - (b) the person having, in relation to the arrangement, functions corresponding to those of a trustee, manager or provider.
- (7) In this section and in section 101, “the recovery provisions” means this section and sections 101 and 102.
- (8) Regulations under subsection (4) may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.
- (9) In subsection (5), “prescribed” means prescribed by the regulations.

#### **104 Excessive contributions in pension-sharing cases: general**

- (1) For the purposes of section 98, a pension-sharing transaction is taken—
- (a) to be a transaction, entered into by the transferor (in this section referred to as “TR”) with the transferee (in this section referred to as “TE”), by which the appropriate amount is transferred by TR to TE, and
  - (b) to be capable of being an alienation challengeable under that section only so far as it is a transfer of so much of the appropriate amount as is recoverable.

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- (2) For the purposes of section 99, a pension-sharing transaction is taken—
  - (a) to be something (namely a transfer of the appropriate amount to TE) done by TR, and
  - (b) to be capable of being an unfair preference given to TE only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- (3) For the purposes of section 100, a pension-sharing transaction is taken—
  - (a) to be a pension sharing order made by the court under section 8(2) of the Family Law (Scotland) Act 1985, and
  - (b) to be an order capable of being recalled under that section only so far as it is a payment or transfer of so much of the appropriate amount as is recoverable.
- (4) Subsection (5) applies where—
  - (a) an alienation is challenged under section 98,
  - (b) a transaction is challenged under section 99, or
  - (c) an application is made under section 100 for the recall of an order made in divorce proceedings.
- (5) If any question arises as to whether, or the extent to which, the appropriate amount in the case of a pension-sharing transaction is recoverable, the question must be determined in accordance with subsections (6) to (10).
- (6) The court is first to determine the extent, if any, to which TR’s rights under the shared arrangement at the time of the transaction appear to have been, whether directly or indirectly, the fruits of contributions (“personal contributions”) to the shared arrangement or any other pension arrangement—
  - (a) which TR has at any time made on TR’s own behalf, or
  - (b) which have at any time been made on TR’s behalf.
- (7) Where it appears that those rights were to any extent the fruits of personal contributions, the court is then to determine the extent, if any, to which those rights appear to have been the fruits of personal contributions whose making has unfairly prejudiced TR’s creditors (“the unfair contributions”).
- (8) If it appears to the court that the extent to which those rights were the fruits of the unfair contributions is such that the transfer of the appropriate amount could have been made out of rights under the shared arrangement which were not the fruits of the unfair contributions, then the appropriate amount is not recoverable.
- (9) If it appears to the court that the transfer could not have been wholly so made, then the appropriate amount is recoverable to the extent to which it appears to the court that the transfer could not have been so made.
- (10) In making the determination mentioned in subsection (7) the court must consider in particular—
  - (a) whether any of the personal contributions were made for the purpose of putting assets beyond the reach of TR’s creditors or any of them, and
  - (b) whether the total amount of any personal contributions represented, at the time the pension sharing arrangement was made, by rights under pension arrangements is an amount which is excessive in view of TR’s circumstances when those contributions were made.
- (11) In this section and sections 105 and 106—



“appropriate amount”, in relation to a pension-sharing transaction, means the appropriate amount in relation to that transaction for the purposes of section 29(1) of the 1999 Act (creation of pension credits and debits),

“pension-sharing transaction” means an order or provision falling within section 28(1) of that Act (orders and agreements which activate pension-sharing),

“shared arrangement”, in relation to a pension-sharing transaction, means the pension arrangement to which the transaction relates,

“transferee” (or “TE”), in relation to a pension-sharing transaction, means the person for whose benefit the transaction is made, and

“transferor” (or “TR”), in relation to a pension-sharing transaction, means the person to whose rights the transaction relates.

### **105 Excessive contributions in pension-sharing cases: recovery orders**

- (1) In this section and section 106, “recovery order” means, in any proceedings to which section 104 applies—
  - (a) a decree granted under section 98(5),
  - (b) a decree granted under section 99(6), or
  - (c) an order made under section 100(2).
- (2) A recovery order may include provision—
  - (a) requiring the person responsible for a pension arrangement in which TE (see section 104(11)) has acquired rights derived directly or indirectly from the pension-sharing transaction (again see that section) to pay an amount to the trustee,
  - (b) adjusting the liabilities of the pension arrangement in respect of TE,
  - (c) adjusting any liabilities of the pension arrangement in respect of any other person that derive, directly or indirectly, from rights of TE under the arrangement,
  - (d) for the recovery by the person responsible for the pension arrangement (whether by deduction from any amount which that person is ordered to pay or otherwise) of costs incurred by that person in complying in the debtor’s case with any requirement under section 106(1) or in giving effect to the order.
- (3) Subsection (2) is without prejudice to the generality of section 98(5), 99(6) or 100(2).
- (4) In subsection (2), references to adjusting the liabilities of a pension arrangement in respect of a person include, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (5) The maximum amount which the person responsible for an arrangement may be required to pay by a recovery order is the smallest of—
  - (a) so much of the appropriate amount (see section 104(11)) as is recoverable in accordance with section 104,
  - (b) so much, if any, of the amount of the unfair contributions (within the meaning given by section 104(7)) as is not recoverable by way of an order under section 101 containing provision such as is mentioned in section 102(1)(a), and
  - (c) the value of the debtor’s rights under the arrangement acquired by TE as a consequence of the transfer of the appropriate amount.

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- (6) A recovery order which requires the person responsible for an arrangement to pay an amount (“the restoration amount”) to the trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (7) For the purposes of subsection (6), liabilities are correspondingly reduced if the difference between—
  - (a) the amount of the liabilities immediately before the reduction, and
  - (b) their amount immediately after the reduction,
 is equal to the restoration amount.
- (8) A recovery order in respect of an arrangement—
  - (a) is binding on the person responsible for the arrangement, and
  - (b) overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.

## **106 Recovery orders: supplementary**

- (1) The person responsible for a pension arrangement under which TE has, at any time, acquired rights by virtue of the transfer of the appropriate amount (see section 104(11)) is, on the trustee making a written request, to provide the trustee with such information about the arrangement and the rights under it of TR and TE as the trustee may reasonably require for, or in connection with, the making of an application for a recovery order.
- (2) Nothing in the provisions mentioned in subsection (3) applies to a court exercising its power to make a recovery order (see section 105(1)).
- (3) The provisions are—
  - (a) any provision of section 159 of the Pension Schemes Act 1993 or section 91 of the Pensions Act 1995 (which prevent assignation and the making of orders which restrain a person from receiving anything the person is prevented from assigning),
  - (b) any provision of any enactment (whether passed or made before or after the passing of the 1999 Act) corresponding to any of the provisions mentioned in paragraph (a), or
  - (c) any provision of the arrangement in question corresponding to any of those provisions.
- (4) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
  - (a) any such value as is mentioned in section 105(5)(c),
  - (b) any such amounts as are mentioned in section 105(7)(a) and (b).
- (5) The power conferred by subsection (4) includes power to provide for calculation or verification—
  - (a) in such manner as may, in the particular case, be approved by a prescribed person, or
  - (b) in accordance with guidance from time to time prepared by a prescribed person.
- (6) References in the recovery provisions to the person responsible for a pension arrangement are to—

- (a) the trustees, managers or providers of the arrangement, or
  - (b) the person having, in relation to the arrangement, functions corresponding to those of a trustee, manager or provider.
- (7) In this section—
- “prescribed” means prescribed by regulations,
  - “the recovery provisions” means this section and sections 98, 99, 100 and 105, and
  - “regulations” means regulations made by the Secretary of State.
- (8) Regulations under the recovery provisions may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.

#### **107 References in Part 7 to “the 1889 Act” and to “the 1999 Act”**

In this Part, references—

- to “the 1889 Act” are to the Judicial Factors (Scotland) Act 1889, and
- to “the 1999 Act” are to the Welfare Reform and Pensions Act 1999.