

POLICY NOTE

THE SUCCESSION (SCOTLAND) ACT 2016 (COMMENCEMENT, TRANSITIONAL AND SAVING PROVISIONS) REGULATIONS 2016

SSI 2016/210 (C. 19)

1. The above instrument is made by Scottish Ministers in exercise of the powers conferred by sections 31(2) and (3) of the Succession (Scotland) Act 2016 (“the Act”) and is not subject to any parliamentary procedure.

Policy Objective

2. The Act received Royal Assent on 3 March. Sections 18 to 22 and 30 to 32 came into effect on 4 March 2016, the day after Royal Assent.

3. The policy objectives relating to the Act are set out in the Policy Memorandum which accompanied the Bill for the Act (“the Bill”). The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum:

<http://www.parliament.scot/parliamentarybusiness/Bills/90123.aspx>.

4. These Regulations bring into force the remaining provisions in the Act on 1 November 2016.

5. The remaining provisions of the Act are sections 1 and 2 on the effect of divorce, dissolution or annulment on a will; sections 3 and 4 which reform how wills may be rectified by the courts; section 5 which changes the law so that a revoked will, no longer revives an earlier revoked will; section 6 which replaces the rule of law known as the *conditio si institutus sine liberis decesserit* - where a beneficiary dies before the legacy has vested; section 7 which enables a liferent to vest other than on death; section 8 which clarifies how destinations in wills and certain trusts will be treated; sections 9-11 which reform how survivorship will operate; sections 12-17 which change the law relating to forfeiture; sections 23 and 24 on protections relating to the administration of an estate; sections 25 and 26 which abolish both the expense of mournings and ‘donations mortis causa’; section 27 which closes a number of jurisdictional gaps so that where Scots law is the applicable law, the Scottish courts will have jurisdiction, section 29 which abolishes the rule of law known as the *conditio si institutus sine liberis decesserit* and the schedule which repeals provisions in the law that are no longer required

Approach to Commencement

6. The policy aim is to preserve the integrity of arrangements made prior to commencement where appropriate and allow individuals the opportunity to make changes to their arrangements if they so wish following commencement. The Scottish Law Commission recommended that in general the provisions of the Act should apply in relation to deaths on or after commencement subject to certain provisions applying only if wills and other relevant documents were also executed on or after commencement. The Commission also recommended that section 5 should have retrospective effect. The Scottish Government was content with the Commission’s approach except in relation to section 5.

Commencement

7. Under Regulation 2(1)(a) sections 1-6, 8-17, 26, 27 and 29(1) and 29(2) for the purpose of paragraphs 1(1) to (4) and 1(5)(c) and 3 and 4 of the schedule of the Act come into force on 1st November 2016 in relation to the estate of a person who dies after 1 November 2016. Regulation 2(1)(b) provides that sections 7, 23 to 25, 28 and 29(2) for the purpose of paragraphs 1(5)(a) and (b) and 2 of the schedule of the Act come into force on 1st November 2016. Regulation 2(2) provides that if it is uncertain whether a person died before or on or after commencement, they will be presumed to have died on or after commencement

Saving and Transitional Provisions

8. The coming into force of the provisions specified in regulation 2 is subject to the transitional and savings provisions in regulation 3.

9. Regulation 3(1) provides that section 5 of the Act only applies where the subsequent will or part of it is revoked on or after 1 November 2016. Under the current law a will that is revoked by a subsequent will revives if the subsequent will itself is revoked. Section 5 of the Act reverses that position so that where a will is executed, and then revoked by a subsequent will, the revocation of that subsequent will does not revive the first will. As noted above, the Scottish Law Commission recommended that section 5 should have retrospective effect and apply to all deaths occurring after commencement, irrespective of when the revocation takes place. The Scottish Government took the view that section 5 should apply only where the subsequent will or part of it is revoked on or after commencement to ensure that where a person revoked their will on the basis that their old will would revive, the old will would not be invalidated under the Bill. A person who revokes their will after the provisions in the Act come into force can be expected to do so on the understanding that their old will is not revived.

10. The Faculty of Advocates' Trust, Fiduciaries and Executries Bar Group ("TrustBar"), in written submission to the Delegated Powers and Legislative Reform Committee of the Scottish Parliament during the Bill's passage raised doubts as to whether section 5 has or has not retrospective effect¹. The legal presumption is that section 5, like any change to the law, does not have retrospective effect and the Act does not include the provision that was contained in the SLC draft Bill which gave section 5 retrospective effect.. The then Minister for Community Safety and Legal Affairs, Paul Wheelhouse MSP, in oral evidence to the Delegated Powers and Law Reform Committee, on 29 September 2015, confirmed that the Scottish Government would deal with the application of section 5 in Commencement Regulations².

11. Regulation 3(2) makes clear that sections 6, 8 and 29(1) will only apply in relation to the estate of a person who dies on or after 1st November 2016 if the will or trust was also executed on or after 1 November 2016. The *conditio si institutus sine liberis decesserit* will continue to apply to any will executed before 1st November 2016.

¹ [http://www.parliament.scot/S4_Bills/Succession%20\(Scotland\)%20Bill/TrustBar.pdf](http://www.parliament.scot/S4_Bills/Succession%20(Scotland)%20Bill/TrustBar.pdf)

² <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10122>

12. Regulation 3(3) makes clear that the coming into effect of section 25 which abolishes the customary mode of making a conditional gift in contemplation of death known as a donation mortis causa will not affect such a gift made before 1 November 2016.

13. Regulation 3(4) provides that the protection under section 17 of the Succession (Scotland) Act 1964 will continue to apply to acquisitions of heritable property, which is or was vested in the deceased's executor by virtue of confirmation, which have taken place before 1 November 2016.

14. Regulation 3(5) provides that section 24(2) of the Succession (Scotland) Act 1964 and section 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, under which there are protections available to trustees and executors where they distribute an estate in ignorance of certain facts which would affect the proper distribution of the estate, will continue to apply to distributions which have taken place before 1 November 2016.

Consultation

15. There has not been any formal consultation with stakeholders. However, as noted above, the drafting of the commencement regulations has been informed by the evidence sessions that took place during the passage of the Bill where issues relevant to commencement were discussed and stakeholders were informed of the proposed approach to commencement.

Impact Assessments

16. No impact assessments are required in consequence of these Regulations. All relevant impact assessments were completed on the Succession (Scotland) Bill prior to its introduction to Parliament.

Links to the Policy Memorandum and Equality Impact Assessment (EQIA):

[http://www.parliament.scot/S4_Bills/Succession%20\(Scotland\)%20Bill/b75s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd-pm.pdf)

<http://www.gov.scot/Publications/2015/07/3848>

Financial Effects

17. The provisions in the Act are intended to bring clarity to the law and to plug some gaps in the law to ensure a consistency of approach. They therefore have no financial implications, save for those associated with the legal profession and other stakeholders becoming familiar with the changes in the law.

Link to the Financial Memorandum:

[http://www.parliament.scot/S4_Bills/Succession%20\(Scotland\)%20Bill/b75s4-introd-en.pdf](http://www.parliament.scot/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd-en.pdf)

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