
STATUTORY INSTRUMENTS

1992 No. 272

Act of Sederunt (Judicial Factors Rules) 1992

PART I
GENERAL

Citation, commencement and revocation

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Judicial Factors Rules) 1992 and shall come into force on 9th March 1992.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

(3) Chapter VIII of Book L of the Codifying Act of Sederunt⁽¹⁾ and the Act of Sederunt (Judicial Factors) 1980⁽²⁾ are revoked.

Interpretation

2.—(1) In these Rules unless the context otherwise requires—

“the 1849 Act” means the Judicial Factors Act 1849;

“the 1880 Act” means the Judicial Factors (Scotland) Act 1880;

“the 1889 Act” means the Judicial Factors (Scotland) Act 1889;

“Accountant” means the Accountant of Court;

“factor” includes a curator bonis, a factor loco absentis, a factor on trust or other estates and a guardian where caution is required.

(2) Any reference in these Rules to a numbered form shall, unless the context otherwise requires, be construed as a reference to the form so numbered in the Schedule to these Rules or a form substantially to the same effect, with such variation as circumstances may require.

Application

3.—(1) The provisions of Part I of these Rules shall have effect in relation to—

(a) factors appointed under section 4 of the 1880 Act;

(b) guardians appointed under the Law Reform Parent and Child (Scotland) Act 1986⁽³⁾; and

(c) except as provided in Part II of these Rules, factors appointed under section 11A of the 1889 Act.

(2) The provisions of Part II of these Rules shall have effect only in relation to factors appointed under section 11A of the 1889 Act.

⁽¹⁾ S.R. & O. 1913/638.

⁽²⁾ S.I. 1980/1803.

⁽³⁾ 1986 c. 9.

Applications to be summary

4. An application for the appointment of a factor shall be made by summary application.

Incidental application

5.—(1) Except as otherwise provided in these rules, all incidental applications to the court shall be made by note in the proceedings.

(2) Unless included in the application for appointment of a factor an application for special powers shall be made by note in the proceedings.

Intimation and service

6.—(1) Subject to rule 15(2), 23 and 36, the first order in an application shall provide for—

- (a) intimation of a copy of the application by display on the walls of court;
- (b) intimation to the Accountant by first class recorded delivery post of the application together with copies of any schedules or productions lodged with the application;
- (c) such service on those having an interest as may be deemed proper by the sheriff; and
- (d) the lodging of answers.

(2) The sheriff may also direct notice by advertisement of the applications to be made in Form 1.

Paper to be copied to the Accountant

7.—(1) A person who has lodged answers, a note, or any other principal paper (other than an application for appointment of a factor) shall serve forthwith such answers, note or other paper on the Accountant by any competent method of service.

(2) Copies of all interlocutors issued in the process of an application for appointment of a factor shall be supplied to the Accountant forthwith by the sheriff clerk.

Accountant to send information on any prior application

8. The Accountant, on receiving intimation of an application for the appointment of a factor, shall, in the event of an application for a similar appointment to the same ward or estate having been previously intimated to him—

- (a) forthwith report to the sheriff clerk; and
- (b) communicate any information he may possess which may be of use to the sheriff in disposing of the application.

Procedure in fixing caution

9.—(1) The Accountant shall forthwith, on receiving intimation of an application for the appointment of a factor, fix the caution to be found in the event of appointment being made and shall notify the amount to the sheriff clerk and the applicant.

(2) During the subsistence of a judicial factory, the Accountant may, at any time—

- (a) require the factor to increase the amount of or find new or additional caution; or
- (b) authorise the factor to decrease the amount of existing caution.

Time for finding caution

10.—(1) Where the time within which caution is to be found is not stipulated in the interlocutor appointing a factor, the time allowed for finding caution shall be, subject to paragraph (2) of this rule, limited to one calendar month from the date of the interlocutor.

(2) The sheriff may, on application made before the expiry of the period for finding caution, and, on cause shown, allow further time for finding caution.

Procedure on finding caution

11.—(1) All bonds of caution offered by a factor shall be delivered to the Accountant.

(2) Except in relation to rule 9(2), where caution has been found to the satisfaction of the Accountant, he shall notify the sheriff clerk.

Issue of certified copy interlocutor

12. A certified copy interlocutor of appointment shall not be issued by the sheriff clerk until he receives notification from the Accountant in accordance with rule 11(2).

Factor's title to act

13. A factor shall not be entitled to act until he has obtained a certified copy interlocutor of his appointment.

Requisition of process by Accountant

14. The sheriff clerk shall transmit to the Accountant the whole or any part of the process as the Accountant may request unless such part of the process is not at the time of request required by the court.

Application to encroach on capital

15.—(1) Where the income from the estate of a ward is insufficient for the maintenance of the ward, the factor may apply to the Accountant for his consent to encroach on the capital of the estate for the purpose of maintaining the ward.

(2) An application under paragraph (1) of this rule shall be made by letter and shall be supported by such information as the Accountant may require.

- (a) (3) (a) On receipt of such an application, the Accountant shall—
 - (i) appoint the factor to intimate the making of the application in accordance with paragraphs (4) and (5) of this rule; or
 - (ii) require him to apply by note to the sheriff for special powers.
- (b) Any person to whom intimation is appointed to be given in accordance with paragraphs (4) and (5) of this rule shall have the right to object to the application by lodging any objection in writing with the Accountant, and intimating a copy thereof to the factor within 28 days of the date on which the intimation was given.
- (4) The persons to whom intimation under paragraph (3)(a)(i) of this rule is to be given are—
 - (a) the cautioner of the factor;
 - (b) the applicant for the appointment of the factor;
 - (c) the ward, unless the circumstances of the ward are such as would warrant dispensing with service on him of an application for the appointment of his factor;

- (d) the persons upon whom the application for appointment of the factor was served and whose whereabouts are known to the factor; and
 - (e) all other persons who have an interest in the estate and whose identity and whereabouts are known to the factor.
- (5) Intimation under paragraph (3)(a)(i) of this rule shall be given by posting by registered or recorded delivery post or the nearest equivalent which the available postal service permits—
- (a) a copy of the letter of application; and
 - (b) a notice setting out—
 - (i) the right of the person receiving the notice to object to the application in the manner provided in paragraph (3)(b) of this rule; and
 - (ii) that, in the absence of any such objection, the Accountant may consent to the application.
- (6) The factor shall, on giving intimation under paragraph (3)(a)(i) of this rule, send to the Accountant a certificate of execution of service with a copy of the notice sent attached to it.
- (7) Where no objections have been lodged, the Accountant may, on the expiry of the period for lodging objections, consent to the application (subject to such conditions as he thinks fit) or require the factor to apply to the sheriff for special powers.
- (8) Where objections have been lodged, the factor shall, on expiry of the period for lodging objections, apply to the sheriff for special powers.

Applications under section 2(3) of the Trusts (Scotland) Act 1961

16.—(1) An application under section 2(3) of the Trusts (Scotland) Act 1961⁽⁴⁾ to the Accountant for his consent to the doing of an act to which that section applies shall be made by letter and shall be supported by such information as the Accountant may require.

(2) Any person to whom intimation requires to be given in accordance with paragraphs (3) and (4) of this rule shall have the right to object to the application by lodging any objections with the Accountant, and intimating a copy thereof to the factor, within 28 days of the date on which the intimation was given.

(3) On the day on which he makes application or as soon as possible thereafter, the factor shall give intimation thereof to—

- (a) the cautioner of the factor;
- (b) the applicant for the appointment of the factor;
- (c) the ward, unless the circumstances of the ward are such that would warrant dispensing with service on him of a petition for the appointment of his factor;
- (d) the persons upon whom the application for appointment of the factor was served and whose whereabouts are known to the factor; and
- (e) all other persons who have an interest in the estate and whose identity and whereabouts are known to the factor.

(4) Intimation under paragraph (3) of this rule shall be given by posting by registered or recorded delivery post or the nearest equivalent which the available postal service permits—

- (a) a copy of the letter of application; and
- (b) a notice setting out—

(4) 1961, c. 57; sub-section (3) was inserted by section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c. 55).

- (i) the right of the person receiving the notice to object to the application in the manner provided in paragraph (2) of this rule; and
- (ii) that, in the absence of any such objection, the Accountant may consent to the application.

(5) The factor shall, on giving intimation under paragraph (3) of this rule, send to the Accountant a duly completed execution of service with a copy of the notice sent attached to it.

Special powers

17.—(1) Except as provided for in rules 5, 15 and 16, where the factor desires special powers, he shall submit an application to the Accountant, who, after making such enquiries as may appear to him proper, shall transmit the application together with a written opinion on the application to the factor who shall submit the application and the Accountant's opinion to the court in accordance with rule 5.

(2) Upon receipt of the application and opinion, the sheriff shall, after ordering such intimation and service in terms of rule 6 as may seem to him appropriate and such procedure as he may think necessary, deal with and dispose of the application.

(3) The factor shall provide the Accountant with a copy of the interlocutor disposing of the application within two days of the disposal.

(4) An application for special powers under this rule shall not be made by the factor until the factor has obtained a certified copy interlocutor of his appointment.

Outlays of Accountant, sheriff clerk etc.

18. All outlays incurred by the Accountant and sheriff clerk, and office fees in the factory, shall form a charge against the estate, and shall be satisfied and paid by the factor therefrom, unless the sheriff shall see cause to find the factor personally liable to any extent, in which case the factor shall be bound to relieve the estate of such outlay.

Applications for discharge to the Accountant

19.—(1) This rule shall apply only to a judicial factor appointed as a—

- (a) curator bonis;
- (b) guardian;
- (c) factor loco absentis; or
- (e) commissary factor.

(2) Where a factory is terminated by reason of the recovery, death or coming of age of the ward, or by reason of the exhaustion of the estate, the factor, or where he died, his representative, may apply to the Accountant for a certificate of discharge.

(3) The factor shall send a notice in Form 2 by first class recorded delivery post of an application under paragraph (2) to—

- (a) the cautioner; and
- (b) any person with an interest in the estate of the ward.

(4) Any person to whom notice has been given under paragraph (3) of this rule may make written representations relating to the application to the Accountant within 21 days from the date of such notice.

(5) On the expiry of the period specified in paragraph (4) of this rule, the Accountant shall—

- (a) consider the application and representations made; and

- (b) intimate to the factor, to the sheriff clerk and to any party who has made representations, a copy of his determination to issue or refuse to issue a certificate of discharge together with a note of his reasons for making such determination.
- (6) The Accountant—
 - (a) shall not sign a certificate of discharge until the time for lodging an appeal under rule 20 has expired; and
 - (b) shall, on issuing a certificate of discharge, give notice of such issue to the sheriff clerk.
- (7) The issue of a certificate of discharge shall be sufficient authority for the factor to uplift his bond of caution.

Appeals against Accountant's determination of application for discharge

20.—(1) The factor, or any person who has made representations under rule 19(4), may within 14 days of intimation under rule 19(5)(b), appeal to the sheriff against the determination of the Accountant.

(2) An appeal under paragraph (1) of this rule shall be by letter to the sheriff clerk containing a statement of the grounds of appeal, and intimated to the Accountant.

(3) On receipt of an appeal under paragraph (1) of this rule, the sheriff clerk shall place the papers before the sheriff in chambers for determination of the appeal.

(4) On disposing of such appeal, the sheriff may—

- (a) direct the Accountant to sign the certificate of discharge;
- (b) appoint the factor to lodge an application for his discharge; or
- (c) make such further order as he considers appropriate.

Applications for discharge to the sheriff

21.—(1) Where the discharge is desired of a factor, to whom the provisions of rule 19 do not apply, the factor, or where he has died, his representative, shall lodge an application in process.

(2) On receipt of such application the sheriff shall order intimation and service in terms of rule 6 and, where applicable, rule 36.

(3) The Accountant shall issue his written opinion to the sheriff on the application.

PART II

ADDITIONAL RULES APPLYING TO FACTORS APPOINTED UNDER SECTION 11A OF THE JUDICIAL FACTORS (SCOTLAND) ACT 1889 ON ESTATES OF DECEASED PERSONS

Form of application

22. An application for the appointment of a factor under section 11A of the 1889 Act⁽⁵⁾ shall include the following matters—

- (a) the grounds of jurisdiction;
- (b) the name, last address and date of death of the deceased person;
- (c) the reasons for the appointment being necessary;

(5) 1989 c. 39; section 11A was inserted by paragraph 4 of schedule 7 to the Bankruptcy (Scotland) Act 1985 (c. 66).

- (d) the interest of the person(s) making the application, ie if a creditor or creditors, the nature and amount of the debt(s), how constituted, vouched or established, if a person or persons having an interest in the succession to the estate, the nature of that interest;
- (e) details of the deceased person's estate so far as known to the applicant(s) including heritable and moveable property, any stock in trade, any interests in any business or partnership, debts owed to or by the deceased and any other relevant facts;
- (f) the names and addresses of all persons known to the applicant(s) as having an interest in the estate either as creditors or as having an interest in the succession to the estate and the nature of the interest in each case; and
- (g) the name, designation and address of the person nominated to be the judicial factor.

Intimation and service

23. The first order in an application under rule 22 shall, in addition to the requirements of rule 6 provide for—

- (a) advertisement of the application in the Edinburgh Gazette in Form 3; and
- (b) service of the application on such persons named therein as personal representatives of the deceased who are not parties to the application.

Interim appointment

24. The sheriff may make an interim appointment of a factor when the application is presented or at any time thereafter.

Notice calling for claims

25.—(1) In order to ascertain the claims upon the estate, the factor shall, within 14 days of the issue to him of the first certified copy interlocutor of his appointment, insert in the Edinburgh Gazette and in such other appropriate newspaper, a notice in Form 4.

- (2) The factor shall lodge in process—
 - (a) a copy of each newspaper containing the notice under paragraph (1) of this rule; or
 - (b) a certificate of publication by the publisher of each such newspaper stating the date of publication and text of the notice.

(3) The period of notice for creditors to intimate their claims to the factor on the estate shall be 4 months from the latest date of advertisement in accordance with paragraph (1) of this rule.

Claims

26.—(1) The factor shall examine the claims of the creditors in order to ascertain whether the debts are properly due from the estate of the deceased, and may—

- (a) call for further evidence in support of the claims;
- (b) if he sees fit, require a creditor to constitute such claim by decree in a competent court in an action in which the factor shall be called as a defender.

(2) For the purpose of ranking and payment of creditors, the date of the factor's appointment shall be equivalent to the date of sequestration.

Inventory of estate and report of state of debts

27. The inventory of estate, when adjusted and approved by the Accountant and signed by him and the factor together with a report on the state of debts and all subsequent accounts submitted by

the factor shall remain in the possession of the Accountant and shall be open to inspection, within his office, by any creditor or person interested in the succession of the deceased.

Administration, deathbed and funeral expenses

28.—(1) Out of the first funds realised by him, the factor shall reserve sufficient to defray the estimated costs of his administration including the legal expenses of the factory.

(2) Thereafter on the expiry of the period for lodging claims, the factor shall be entitled to pay out of such funds, with the prior approval of the Accountant, those claims given a preference by section 51(1) and (2) of, and Schedule 3 to, the Bankruptcy (Scotland) Act 1985(6).

Procedure where there are creditors

29.—(1) Where claims are lodged, the factor shall—

- (a) where funds remain available for division after payment of the debts specified in rule 28, prepare a state of funds and scheme of division amongst the creditors; or
- (b) where no such funds remain after payment of those specified debts, prepare a state of funds only.

(2) The factor shall lodge with the Accountant the state of funds and scheme of division, or state of funds, as the case may be, together with all writings and documents relevant thereto, and shall provide the Accountant with such explanations as he shall require.

(3) The Accountant shall prepare a written report on the state of funds and scheme of division, or state of funds, as the case may be, containing such observations thereon as he considers appropriate for consideration by the Sheriff.

(4) The Accountant shall issue the report under paragraph (3) of this rule to the factor.

Notice to creditors

30.—(1) As soon as the Accountant's report under rule 29 has been issued, the factor shall—

- (a) lodge it together with the state of funds and scheme of division or state of funds, as the case may be, in process;
- (b) send to each person who has lodged with him a claim on the estate of the deceased a notice by first class post, or if that person is abroad by air mail, stating—
 - (i) that the state of funds and scheme of division or state of funds only, as the case may be; and a report thereon have been lodged in court; and
 - (ii) the amount for which the creditor has been ranked and whether his claim is to be paid in full or by a dividend and the amount thereof; or
 - (iii) that his claim has been rejected; or
 - (iv) that no funds are available for division;
- (c) insert in the Edinburgh Gazette a notice in Form 5; and
- (d) if any person, other than those who have lodged claims with him are stated in the application or in the books, deed of settlement, or other papers of the deceased, to be a creditor of the estate or interested therein, or if he otherwise has reason to believe that any other person is either a creditor of the estate or interested therein, give notice to such person by first class post or if that person is abroad by air mail, that no dividend is allotted to him in the scheme of division.

(2) Any creditor or person interested in the succession to the deceased's estate shall be entitled to examine—

- (a) the state of funds and scheme of division or state of funds, as the case may be, lodged in process; and
- (b) the claims and the supporting vouchers or evidence lodged with the factor.

Approval of state of funds or scheme of division with or without objections

31.—(1) Any creditor or person interested in the succession to the deceased's estate who is dissatisfied with either the state of funds and scheme of division or state of funds may lodge with the sheriff clerk a notice of objections within 28 days of the last date of the notices given under rule 30(1)(b) and, until the lapse of said period, the court shall not approve the state of funds and scheme of division or state of funds.

(2) Where a notice of objections under paragraphs (1) of this rule is lodged, the sheriff shall dispose of such notice after hearing any objector and the factor and making such investigations as he considers necessary.

(3) If the objections are sustained to any extent, the necessary alterations shall be made to the state of funds and scheme of division or state of funds, and shall be approved by the sheriff.

(4) Where no notice of objections is lodged, the sheriff shall approve the state of funds and scheme of division or state of funds.

Payment following approval of scheme of division

32. After the sheriff has approved a scheme of division, the factor shall pay, deliver or convey to the parties the sums or other property to which they are entitled under the scheme.

Partial division on first scheme of division

33.—(1) Where, in the opinion of the factor, a partial division of funds among the creditors who have claimed may be made with safety to the interests of all concerned, the factor may, with the approval of the Accountant, prepare a state of funds and first scheme of division as soon as may be after the time for lodging claims has expired.

(2) The provisions of rules 29(2) and (3), 30 and, subject to paragraph (3) of this rule, 31, shall apply to a state of funds and first scheme of division prepared under paragraph (1) above as they apply to a state of funds and scheme of division prepared under rule 29(1)(a).

(3) The sheriff may, not earlier than 6 months after the death of the deceased, approve the first scheme of division and, where he so approves, the factor shall pay, deliver or convey accordingly provided always that there shall be retained and deposited in an appropriate bank or institution a sufficient sum to meet—

- (a) the amount of the claims of creditors whose debts have not at that period been admitted by the factor, or whose debts are future or contingent; and
- (b) the full amount of such debts as are claimed as preferable but the priority of which is not admitted by the factor.

Procedure where no creditors

34. Where, on the expiry of the period for lodging claims, no creditor has lodged a claim, the factor shall not lodge a state of funds but shall prepare forthwith a report with regard to the disposal of the surplus estate in accordance with rule 35.

Disposal of surplus estate

35.—(1) Where after payment of the creditors, there is a surplus, the factor shall lodge with the Accountant a statement of the amount of the surplus, of the parties claiming that surplus and their respective grounds of claim, and of those parties who, in the opinion of the factor, are entitled to the surplus and the reasons therefor.

(2) The Accountant shall prepare a written opinion on the factor's statement lodged under paragraph (1) of this rule and issue that opinion to the factor.

(3) On receipt of the Accountant's opinion under paragraph (2) of this rule, the factor shall—

- (a) lodge it in process together with the statement prepared under paragraph (1) of this rule;
- (b) give notice by first class post or, if abroad, by air mail to each party claiming an interest or apparently entitled to any part of the estate, that—
 - (i) the factor's statement and the Accountant's opinion have been lodged in process;
 - (ii) should any such party desire to lodge objections to the statement he shall lodge with the sheriff clerk a notice of such objections within 28 days of the date of the posting of the notice by the factor.

(4) On expiry of the time for lodging objections, the sheriff shall consider the statement, opinion, and any objections and, after such procedure as he considers appropriate, shall—

- (a) determine the party or parties entitled to the surplus estate and direct the factors to make payment accordingly; or
- (b) if he considers that it is desirable that the factor should continue to administer the surplus estate, direct accordingly.

(5) Where the sheriff makes an order under paragraph (4)(a) of this rule, the factor shall pay over the surplus accordingly.

Discharge of factor appointed under of section 11A of the 1889 Act

36. Every application for discharge of a factor on the estate of a deceased person shall be intimated and served as required under rule 6 and shall also be served on the cautioner and on the personal representatives of the deceased and notice of the application shall be inserted in the Edinburgh Gazette in Form 6.

Edinburgh,
12th February 1992

J.A.D. Hope
Lord President, IPD