

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Survivorship

Section 9 – Uncertainty of survivorship treated as failure to survive

37. This section applies where two persons die simultaneously or in circumstances where it is uncertain who survived whom. It replaces the current rules of survivorship in section 31 of the Succession (Scotland) Act 1964. Under the current rules of survivorship, if the people who die were spouses or civil partners, it is presumed that neither survived the other. If they were not spouses or civil partners, it is presumed, in most cases, that the younger survived the elder. This section changes the current rules. It provides that, where two persons have died simultaneously or in circumstances where it is uncertain who survived whom, neither is to be treated as having survived the other. This section applies both on testacy and intestacy and applies for all purposes affecting title or section to property (other than where the particular rule in section 10 applies).
38. Subsection (2) provides that where a benefit is conferred on a third party on condition that another person died before the testator and that person dies in a common calamity with the testator, that condition will be treated as a condition that the person failed to survive the testator to enable the legacy to pass to the third party through the application of subsection (1).
39. This section does not change the law on the standard of proof for establishing whether deaths occurred in a particular order. It was established in the case of *Lamb v Lord Advocate* (1964 SC 110) that this was the civil standard of the balance of probabilities. So the order of deaths is uncertain if it is not possible to prove, on a balance of probabilities, a particular order.

Section 10 – Equal division of property if order of beneficiaries' deaths uncertain

40. This section applies instead of section 9 where a will provides that property is to pass or be transferred (whatever the means of transfer or passing, for example, whether by a written or oral obligation or trust provisions) to one member of a group of people depending on the order of death and members of the group are involved in a common calamity. All members of the group are potential beneficiaries and have equal status in the sense that it is the testator's intention that any of them could benefit from the legacy. Section 10(1)(a) sets out the different ways in which provision might be framed to allow property to pass or be transferred to members of a group depending on the order of death as envisaged by paragraph 6.60 of the Commission's Report.
41. In those circumstances, the property is to be divided equally among the estates of the members of the group who die in the common calamity (subsection (2)). For example, a life assurance policy on the joint lives of a married couple payable to the estate of the first person to die will benefit the two estates equally if it is uncertain which death was first.

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

42. This section applies only where no other provision has been made to deal with the situation in question (subsection (1)(d)). Where the document regulating the devolution of the property in these circumstances provides for a different rule of division, that will override the statutory equal division rule (subsection (1)(d)).
43. Subsection (4) provides that where the testator is amongst those who die simultaneously or in an uncertain order, then section 9 and not section 10 will apply. This ensures that any legacies vest in the estates of living family members/legatees rather than in the estates of deceased beneficiaries who have not survived the testator.

Section 11– Testamentary requirement of survival for a particular period

44. Although it continues to be competent for people to specify in their wills a period that a successor has to survive in order to take the testamentary provisions, this section provides for the situation where there is uncertainty as to whether the successor survived the testator for the specified period. Where a testator makes a bequest which is subject to the condition that the beneficiary survives the testator for a specified period, and in the circumstances it is uncertain whether the beneficiary did survive the testator for that period, they are to be treated as having failed to survive the testator.