

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Estate Administration

Section 18 - Confirmation of executors: no requirement to find caution in relation to small intestate estates

54. Currently all executors dative, except spouses whose prior rights exhaust an estate, are required to find caution. Caution is a guarantee that the executor – dative will perform his or her duties and not embezzle the estate.
55. Subsection (1) amends the Intestates Widows and Children (Scotland) Act 1875 to remove the requirement for an executor-dative to find caution in estates subject to the ‘small estates’ confirmation process. A “small estate” is one whose gross value, without deducting debts and funeral expenses, does not exceed £36,000. This figure is subject to change from time to time.
56. Subsection (2) provides that the changes in subsection (1) to section 3 of the Intestate Widows and Children (Scotland) Act 1875 apply to applications under that Act which have been made before the section comes into force but have not been determined at that point.

Section 19 - Confirmation of executors: general exceptions to requirement to find caution

57. Subsection (1) amends the Confirmation of Executors (Scotland) Act 1823 to extend the exemption for spouses from the requirement to obtain caution in certain circumstances to civil partners.
58. Subsection (2) provides powers to Scottish Ministers to make Regulations to add other categories of person to those who do not require to find caution.

Section 20 - Confirmation of executors: power of Ministers to abolish requirement for executors dative to find caution

59. This section provides powers to Scottish Ministers to make Regulations to abolish the requirement for executors dative to find caution.

Section 21 - Power of Ministers to make provision requiring conditions to be met before courts appoint persons as executors dative

60. Subsection (1) provides powers to Scottish Ministers to make Regulations so that courts are not to appoint executors dative unless particular conditions are met.
61. Subsection (2) sets out that these conditions might include the court being satisfied that the person is suitable for appointment; and that the court is to be provided with particular information about the person seeking appointment or about the estate.

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(asp 7) which received Royal Assent on 3 March 2016*

62. Subsection (3) sets out that these Regulations may apply to all executor dative appointments or to appointments of persons of particular descriptions as executors-dative.
63. Subsection (4) sets out that the Regulations may set out factors or information which courts should have regard to in determining if the person is suitable for appointment; that the court should be satisfied that the individual is suitable if certain conditions are met; or to require the court to impose conditions which must be satisfied before a person is suitable for appointment.
64. Subsection (5) sets out that the Regulations may make different provision in relation to the appointment of different categories of person as executors dative.

Section 22 - Sections 19, 20 and 21: regulations

65. Subsections (1) and (2) provide that Regulations made in exercise of the powers under sections 19, 20 and 21 may include supplementary, incidental, consequential, transitional, transitory or saving provision considered appropriate by the Scottish Ministers.
66. Subsection (3) provides that these Regulations may modify enactments.
67. Subsection (4) provides that these Regulations will be subject to the affirmative procedure.

Section 23 – Errors in distribution: protection of trustees and executors in certain circumstances

68. This section amends the Trusts (Scotland) Act 1921 by inserting a new section which brings together in one place the 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. These facts generally relate to making a distribution in ignorance of the existence of either an adoption order or of a child whose parents are not, or have not been married to each other. Subsection (1)(b) of the new section provides that in order for the trustee not to be personally liable, the distribution requires to be made in good faith after having made reasonable enquiries, or, in accordance with an order of the court. What amounts to ‘reasonable enquiries’ will be dictated by the particular circumstances of each case. There is no express requirement to advertise for beneficiaries and it is envisaged that whether this is appropriate will depend on the circumstances and is a matter for the discretion of the executors tasked with distributing the estate.
69. This change does not affect the right of a person under the law of unjustified enrichment to seek restitution in respect of property forming part of the estate from persons to whom it has been distributed in error as provided for in subsection (2). Subsection (3) clarifies that the right to get recompense in relation to an unlawful distribution does not enable a person to get property back from a good faith purchaser as set out in subsection (3). Subsection (4) makes it clear that this section applies only to distributions which occur after the section comes into force (i.e. it does not catch distributions which have already occurred).
70. The protections are currently provided for in section 24(2) of the Succession (Scotland) Act 1964 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 which are repealed and replaced by this section.

Section 24 – Protection of person acquiring title

71. This section re-enacts in wider terms, section 17 of the Succession (Scotland) Act 1964, which protects those who purchase heritable property which is or was vested in the deceased’s executor by virtue of confirmation. In their 1990 report the Commission took the view that section 17 was deficient because purchasers of items other than heritage

or goods, such as shares or book debts were not protected, and second that onerous acquirers of goods otherwise than by purchase (for example by exchange with another beneficiary or foregoing a claim) were not protected.

72. The existing common law protects a person who acquires property in good faith and for value, from someone whose title is voidable, regardless of the type of property. The 1990 report also noted that section 17 may cover cases that would be outwith the scope of this rule. For these reasons the Commission recommended that section 17 be repealed and re-enacted. This section gives effect to this recommendation by providing a more complete statutory protection which protects those who acquire property in good faith and for value directly or indirectly from the executor or a person (such as a legatee) who derived it directly from the executor.
73. Subsection (2) makes express provision about factors which cannot be relied on as grounds of challenge. These factors are: where the court has overturned (reduced) the confirmation; where the will has been subject to rectification after the property has been distributed; and where the title was not necessarily 'good' title.

Section 25 – Gifts made in contemplation of death

74. A donation *mortis causa* is a gift with the following characteristics: it is made by the donor in anticipation of their death; it is made on the understanding that when the donor dies the recipient keeps the gift but that if the donor survives it should be returned to them; the donor can change their mind at any point and ask for the gift to be returned; and if the recipient dies first then the gift is returned to the donor.
75. This special form of gift is counted as part of the donor's estate for the purposes of any claim for legal rights in the event of intestacy. It is also liable for the donor's debts on death in the event that the rest of the donor's estate is insufficient to meet them.
76. This section abolishes this special form of gift as a distinct legal entity. It does not prevent people from continuing to make gifts on such express conditions as they wish to impose and which the recipient is prepared to accept. An individual may even make a gift, subject to the same conditions, in similar circumstances (i.e. in contemplation of death) but as noted above, the only change in the law is that the conditions are no longer automatic.

Section 26 – Abolition of right to claim in respect of expense of mournings

77. This section abolishes the common law right to claim the expense of mournings – the right of a widow and family to claim an allowance for the cost of special mourning clothes from the estate of the deceased.

Section 27 – Additional ground of jurisdiction: executor confirmed in Scotland

78. As a matter of principle the Scottish courts should have jurisdiction whenever Scots law is the applicable law to the succession issue in question. At present there is a jurisdictional gap where the deceased's executor is not domiciled in Scotland. Unless the will creates an express trust it may be that none of the provisions in Schedule 8 of the Civil Jurisdiction and Judgements Act 1982 which deals with the jurisdiction of the Scottish courts will apply. As a result, those raising actions against executors in connection with the administration of a Scottish estate may have to do so in the courts of the country in which the executors are domiciled.
79. This section amends rule 2 of Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 so that a person wishing to raise an action in respect of the administration of a Scottish estate by an executor who is not domiciled in Scotland may do so in the Scottish courts if the executor obtained the legal documentation necessary to authorise the making and receiving of payments on the estate known as confirmation, in Scotland. 'Confirmation' is a legal document from the court giving the executor(s) authority to

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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.