

Briefing Note

Succession (Scotland) Bill

On June 16th 2015, the Succession (Scotland) Bill (“the Bill”) was introduced to the Scottish Parliament. The Bill deals broadly with some technical amendments to the law of succession.

The draft reforms are designed to clarify aspects of succession law which are uncertain. Some are general reforms that will be useful for anyone involved in or affected by the administration of the estate of a deceased person and others are reforms that will only be used in the event that an estate becomes contentious.

As a separate matter, the Scottish government is consulting on more fundamental reforms to the law of succession: see our briefing note “Consultation on the Law of Succession”.

The effect of divorce, dissolution or annulment on Wills and Special Destinations

The Bill provides that, in the event of a testator being divorced, having his or her civil partnership dissolved or having his or her marriage or civil partnership annulled, the former spouse or civil partners will be treated, for the purposes of that person’s Will, as having failed to survive the deceased testator unless the Will specifically provides otherwise.

The former spouse or civil partner will therefore not receive any benefit under the Will and his or her appointment as a trustee, executor or guardian will cease to have effect. If there is a fallback appointment (typically a “whom failing” clause), that clause will apply.

The Bill also provides that, where a couple holds title to property in joint names and in the title deeds the property passes to the survivor of them automatically on the first death, that survivorship clause shall not have effect. The wording of this provision is a little unclear but it will no doubt be clarified during the Bill’s passage through parliament.

Rectification

It is not possible to seek rectification of a Will in Scotland, unlike the position in England. Instead, there is an unsatisfactory method by which a court is able to declare that parts of a Will shall be treated as not having been included and other parts shall be interpreted in a particular manner.

Under the Bill, it will be possible to make an application to either the Sheriff Court or to the Court of Session for rectification of a Will that has been prepared by someone other than the testator, so this will not apply to homemade Wills drawn up by the testator himself. A person may request that the court rectifies any part of a Will and, in deciding whether to do so, the court may consider external evidence such as notes of meeting when instructions were given or even letters that were sent back and forth between parties if they contain relevant information.

Any such application must be made within six months of Confirmation being granted or, in cases where no grant of Confirmation will be sought, within six months of the person's death.

These provisions could, potentially, be very useful for dealing with clerical errors and badly-worded and competing legacy clauses. It is to be welcomed that there will be some clarity as to how beneficiaries and executors can deal with ambiguities and missing elements of formality. Contentious estates are becoming more common and it is important that advice is taken when documents are being prepared, as well as when estates are being administered in order to reduce the likelihood of requiring court intervention.

Wills

Under the current law, if a person revokes or destroys his or her current Will and his or her former Will still exists, that former Will can be revived and given effect. This can lead to difficulties and unintended consequences.

This will no longer be the case. Once revoked by a subsequent Will, a former Will will no longer be capable of being revived.

The Bill also provides that where a legacy is given to a direct descendant of the testator who dies before the legacy vests in him/her, the legacy will pass to his/her children unless it is clear from the Will that the testator intended otherwise. For example, if the legacy contains a "whom failing" clause, the legacy will pass according to the legacy clause and not to the children of the first-named beneficiary.

Survivorship

Where there is uncertainty as to whether one person has survived another, in future each of them will be treated as having failed to survive one another. This provision will be helpful in a situation where, for example, a married couple die together in an accident. Without a provision such as this, the estate could pass from one of the couple to the other and then under that other's Will or under the laws of intestacy, meaning that the entire estate would pass only to the family of one party rather than being divided between both. This is a particular issue if the couple have no children or grandchildren.

Another important clarification comes in relation to the rules surrounding forfeiture. Forfeiture is the legal rule which stops a person who is responsible for the unlawful death of another person benefitting from that person's estate. It is a public policy rule which prevents a wrongdoer from benefitting from the wrongful act.

At the moment, there is some doubt under the law as to how a forfeiting beneficiary should be treated. If he or she is treated as being barred from inheriting but he or she has children, it is uncertain whether his or her children are able to step into his or her shoes or whether that whole branch of a family is prevented from inheriting.

The Bill provides that the forfeiting beneficiary shall be treated as having failed to survive the deceased person. This is an important clarification and means that the children of a wrongdoer are not punished for the unlawful acts of their parent.

Administration of Estates

The Bill includes a provision by which executors of an estate will be protected from liability arising from an error in the distribution of a deceased person's estate if the error was caused by the executor not knowing of the existence of a beneficiary, that he or she distributed the estate in good faith and he or she made all reasonable enquiries that he or she would be expected to make.

This is a useful and practical addition to the administration rules and should prevent situations where it remains uncertain whether an estate can be distributed as it may be difficult to gain information about a deceased person's family. This can lead to long periods of inactivity. It will also reduce the need for executors to seek indemnities from beneficiaries in such circumstances.

General Observations

The Bill contains some useful and welcome clarifications to the existing law. The Bill does not deal with more fundamental issues in the laws of succession which are now the subject of a government consultation. This is covered in a separate briefing note: Consultation on the Law of Succession.

If you believe that your personal affairs will be affected by anything in the Bill or if you would like to discuss any of the issues mentioned above in more details, please speak to your usual contact at Turcan Connell.

Please note that this briefing note is intended as a short summary of Succession (Scotland) Bill. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.

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