

## SPICe Briefing

# Succession (Scotland) Bill

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The law of succession, also known as inheritance law, determines what happens to somebody's property and possessions when he or she dies. This briefing considers the [Succession \(Scotland\) Bill](#) introduced in the Scottish Parliament in June 2015. This Bill makes provision for changes to some specific areas of the existing law.

Separately, the Scottish Government is [consulting](#) on more wide-ranging reforms to the law of succession. For an overview of this topic, along with a summary of key aspects of the existing law, see the separate SPICe Briefing entitled '[Inheritance Law in Scotland](#)' (Harvie-Clark 2015)



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## EXECUTIVE SUMMARY

### Introduction and background to the Bill

The [Succession \(Scotland\) Bill](#), a Scottish Government bill, was introduced in the Scottish Parliament in June 2015.

In 2014, the Scottish Government (2014a) consulted on a number of specific proposals for reform to the law of succession. Twenty two written [responses](#) were received. Only the proposals which attracted majority support from the respondents addressing them feature in the Bill.

The origin of the proposals in the Bill is a 2009 [report](#) of the [Scottish Law Commission](#) (SLC). This report also contained proposals which would make more wide-ranging reforms to the law of succession. These proposals are being [consulted](#) on separately (Scottish Government 2015c), with a view to further legislation in this policy area.

The [Land Reform \(Scotland\) Bill](#), also introduced in June 2015, does not contain provisions relating to succession law. However, on occasion, the two pieces of legislation have been conflated in the media. In particular, the media coverage has focused on the concerns of some stakeholders over the impact of some of the SLC's major policy proposals on succession on the agricultural sector. These are still being [consulted](#) on by the Scottish Government (2015c, chapter 3A).

### Key terminology

In inheritance law the deceased person's property and possessions are called the **estate**. The people or organisations that will benefit from the estate when it is distributed are called the **beneficiaries**.

Where a person makes a will he or she is sometimes referred to as the **testator**.

The person who manages the process of gathering in the estate, paying any debts and taxes due and distributing the remainder of the estate to the beneficiaries is called the **executor**.

### Requirements for a valid will

There are various requirements which must be met in order for a will to be valid. These include that the will is in writing and that it has been signed at the bottom of the last page by the testator. Furthermore, it must have been made voluntarily and without pressure from another person.

It is standard practice for a solicitor to advise his or her client to make a **probative** or **self-proving** will. This is a will that is presumed to be validly executed. A probative will must satisfy certain additional requirements.

## **Cancelling or changing a will**

A person may wish to cancel (**revoke**) an existing will. The normal method of doing this is to physically destroy it.

A will prepared by a solicitor will almost invariably have a clause in it saying that any previous will is revoked. This cancels an earlier will, even if it is not destroyed.

However, where a will which revokes a previous will is itself revoked, the original will may take effect again (**revive**).

## **Where there is no will**

If a person does not have an existing will, then, on his or her death, that person is described as **intestate**, as is his or her estate. Rules are provided by the Succession (Scotland) Act 1964 (c 41) determining what should happen to a person's estate when he or she dies intestate.

## **Protection from disinheritance**

When a will aims to exclude a particular person from inheriting any of the deceased's estate, the will aims to **disinherit** that person. In Scotland it is not possible for a person to disinherit his or her spouse, civil partner or children entirely. This protection extends to adult children.

The protection is provided by the concept of **legal rights**, which give the people concerned a share of the deceased person's **moveable property**. Moveable property is all property other than land or buildings. Hence, the family home is excluded from the scope of legal rights.

## **Provisions of the Bill relating to wills (sections 1–8)**

To a large extent, the Bill deals with a series of discrete topics. However, it is possible to group some of its provisions into common themes.

Sections 1–8 of the Bill makes a series of reforms of the law relating to wills.

In particular, sections 1 of the Bill says that a divorce or dissolution of a civil partnership should cancel (**revoke**) an existing will. This is a change to the existing law.

Sections 3–4 of the Bill create new (or perhaps supplementary) powers for the court to change (**rectify**) a will after the death of the testator. The aim is to allow simple and obvious errors to be corrected.

Section 5 provides that an earlier will does not come back into effect (**revive**) when the most recent will is cancelled (**revoked**). This reverses the current law.

Sections 6 and 8 of the Bill reform the law relating to **destinations** (or **destinations over**). These are legal devices which attempt to deal with the situation where the original beneficiary a testator names in his or her will dies, either before the testator or very shortly after his or her death. Destinations provide an alternative beneficiary to deal with these scenarios. Destinations can be expressly created in a will or implied by separate rules of law.

## **Provisions of the Bill relating to survivorship (sections 9–11)**

Sections 9–11 of the Bill seek to reform a part of succession law called **survivorship**.

It is a fundamental principle of succession law that to inherit from the deceased person you must live longer than him or her. However, a situation may arise where deaths are simultaneous or it is not clear who died first. Survivorship provides special rules to deal with these situations for the purposes of inheritance.

Section 9 of the Bill tries to improve the operation of these rules for individuals other than spouses or civil partners, such as cohabitants. Sections 10–11 aim to clarify or improve other aspects of the law.

### **Provisions of the Bill relating to forfeiture (sections 12–17)**

Sections 12–17 of the Bill deal with another distinct part of succession law; often called the law of **forfeiture**. This area of law deals with the inheritance rights of people who have unlawfully killed the person they stand to inherit from. The broad principle is that people should not inherit in these circumstances. However, the courts have a power to provide for a different outcome should the circumstances warrant it.

The Bill would make various reforms to this area of law. These include increasing the court's discretion when dealing with such cases (section 15). The Bill also seeks to lengthen the period of time the unlawful killer has to apply to the court, from three to six months (section 16).

### **Other miscellaneous reforms (sections 18 – 22 of the Bill)**

Other provisions of the Bill relate to the administration of the deceased's estate. Sometimes when the deceased's assets are being distributed, mistakes are made. For example, after the estate has been distributed, new beneficiaries occasionally may be discovered at a later stage.

Section 18 of the Bill provides protection for executors and trustees from personal liability as a result of these mistakes in two specific situations. The protection provided for in section 18 is similar but not identical to the protection provided by the existing law.

Section 19 of the Bill offers protection to a buyer of land or buildings from the estate in good faith. Some protection exists for a buyer of property associated with the estate already but section 19 aims to strengthen the protection available.

Section 22 of the Bill relates to **private international law**. This is the branch of law which applies where a person dies whose estate is connected with more than one part of the UK (or more than one country). Section 22 seeks to close what the Scottish Government has identified as a gap in the existing rules of private international law.

# INTRODUCTION

In June 2015 the Scottish Government introduced the [Succession \(Scotland\) Bill](#) in the Scottish Parliament. It was accompanied by a [Policy Memorandum](#), [Explanatory Notes and a Financial Memorandum](#).

The Bill follows a [consultation](#) in August 2014 (Scottish Government 2014a) and an [Analysis of the Written Consultation Responses and Scottish Government response](#) to this consultation in June 2015 (Scottish Government 2015b). Twenty two written [responses](#) to the consultation were received by the Scottish Government.

The Scottish Parliament's [Delegated Powers and Law Reform Committee](#) ('the Committee') was designated as the lead committee at Stage 1 of the Parliament's consideration of the Bill. It issued a [Call for Evidence](#), which closed on 7 August 2015. To date, the Committee has received six [written submissions](#) on the Bill.

This briefing provides an introduction to the current law of succession and summarises the changes which would be made by the Bill. Whilst this briefing provides a thorough overview of the Bill, its treatment is not exhaustive. See the [Explanatory Notes to the Bill](#) for a detailed analysis of each provision.

## BACKGROUND TO THE BILL

### The 2009 and the 1990 reports

The Bill has its origins in a 2009 [report](#) of the [Scottish Law Commission](#) (SLC)(SLC 2009). The SLC is an independent statutory body which makes recommendations for simplifying, updating and improving the law of Scotland.

A number of the recommendations of the 2009 report were carried over from an earlier [report](#) of the SLC on succession in 1990, which has been largely unimplemented (SLC 1990).<sup>1 2</sup>

### Two separate Scottish Government projects on succession

The Scottish Government is undertaking two separate projects on succession law, although both are based on the SLC's reports.

The Bill only contains provisions considered by the Scottish Government to be uncontroversial in policy terms. These changes have been described in various places as "technical" (e.g. Scottish Government 2014a and [Policy Memorandum](#) to the Bill). The SLC (2015, p 2) thinks this is, in part, a reference to the comparatively limited scope of the Bill. However, the SLC has also commented recently:

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<sup>1</sup> Recommendation 17 of the 1990 report, which covers one aspect of the law on special destinations, was implemented in section 19 of the Family Law (Scotland) Act 2006 (asp 2) and section 124A of the Civil Partnership Act 2004 (c 33). For a brief overview of special destinations see pp 13–14 in the context of the section 2 of the Bill. Section 2 seeks to repeal these provisions and re-enact them in one place.

<sup>2</sup> Prior to publishing its final reports on succession, the SLC issued a [Discussion Paper](#) (SLC 2007) and three consultative memoranda (SLC 1986a; SLC 1986b; SLC 1986c) in order to seek the views of interested people on a detailed set of preliminary proposals (which included two draft bills). The individual responses received to these documents were not available to SPICe; or to the public more generally.

“This description should not in any way be seen as diminishing the importance or effect of the Bill’s provisions. Indeed for those who find themselves in situations to which the provisions apply, they are likely to be highly important” (SLC 2015, p 2)

The proposals which would make more wide-ranging changes to succession law are being [consulted](#) on separately, with a view to further legislation in due course. This second consultation closes on 18 September 2015. A separate SPICe Briefing entitled [Inheritance Law in Scotland](#) (Harvie-Clark 2015) explores the major reforms being considered.

## **The land reform proposals are separate from the succession proposals**

The Scottish Government’s major policy proposals on succession have been linked to its [land reform agenda](#).

In particular, some media coverage has focused on the concerns of some stakeholders over the impact of some of them on the inheritance of family farms (see Harvie-Clark 2015 at p 8 and 22–23 on this topic). However, the relevant proposals are still being [consulted](#) on by the Scottish Government (2015c, chapter 3A). The [Land Reform \(Scotland\) Bill](#) does *not* contain provisions relating to these proposals, or indeed any aspect of succession law.

## **The proposals which did not make it into the Bill**

The first Scottish Government consultation in 2014 (2014a) consulted on various SLC recommendations which ultimately did not make it into the Bill. However, it is thought that a number of these recommendations may be taken forward as part of future work by the Scottish Government.

All the proposals in question, as well as any known plans for further policy development, are summarised in the Annex to this briefing.

# **THE CURRENT LAW AND PRACTICE**

## **THE ROLE OF LEGISLATION AND THE COMMON LAW**

A good deal of the law of succession is found in legislation. The Succession (Scotland) Act 1964 (c 41) (“the 1964 Act”), which has been amended many times, is the key piece of legislation.

Succession law is also found in the **common law**. In Scotland, the common law has various components, including the law developed by the decisions of judges in individual cases.<sup>3</sup>

## **KEY WORDS AND TERMS**

This section of the briefing outlines some of the key terminology associated with the law of succession.<sup>4</sup>

Other key terms associated with the Bill are explained in relevant sections of this briefing.

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<sup>3</sup> The SLC (2015, p 3) has described the common law associated with succession law as “a blend of Roman law, medieval canon (or church) law and customary law”.

<sup>4</sup> A more detailed glossary of terms associated with the general law can be found in [Annex A](#) of the Scottish Government’s latest consultation document (Scottish Government 2015c). A glossary of terms featuring the Bill is also found in para 101 of the Policy Memorandum to the Bill.

## Basic terminology

In succession law, the deceased person's assets (from which any debts and taxes due will be deducted) is called the **estate**. The people or organisations that will benefit from the remaining estate when it is distributed are called the **beneficiaries**.

Where a person makes a will he or she is sometimes referred to as the **testator** and his or her estate is described as **testate**.

## Legacies and vesting

A **legacy** or a **bequest** is a provision in a will giving some benefit to the person or organisation named in the provision. There are various different types of legacies (see below at p 11).

A legacy or bequest is said to **vest** when the beneficiary acquires a right to it. In most cases, this is at the point of the testator's death. However, sometimes vesting is postponed by the deed creating the legacy to another point in time.

## The role of the executor and the role of confirmation

The person who manages the process of gathering in the estate, paying any debts or taxes due, and distributing the remainder to the beneficiaries is called the **executor**.

Executors usually get their authority to carry out this task from a legal document known as the **confirmation** which can be obtained from the court. However, confirmation may not be needed for estates where bodies holding funds belonging to the estate are prepared to release funds without it. There is also a streamlined procedure for obtaining confirmation to **small estates** (which have a total value of less than £36,000) (see further, Scottish Government 2013, p 35).

A person may name somebody in his or her will he or she wishes to be the executor. The technical term for such a person is the **executor nominate**. On the other hand, an **executor dative** is an executor appointed by the court. Such a person may be appointed in a variety of circumstances, including where there is no will or there is a will but no proposed executor was named in it.<sup>5</sup> In most cases, an executor dative will be required to obtain a special type of insurance known as a **bond of caution** (pronounced 'KAY-shun').

An executor is subject to the fundamental principle that he or she must not allow his or her own personal interests to prevail over the interests of the estate (Macdonald 2001, para 13.100–13.102).

The general position in law is that an executor can be a beneficiary and in practice this is very common. However, where a solicitor is an executor (as is sometimes the case) it is a breach of professional ethics for him or her also to be a beneficiary (Macdonald 2001, para 13.101).

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<sup>5</sup>An executor dative may also be appointed where the proposed executor refused to take up the role or is incapacitated or deceased. The law provides a set order of people entitled to apply to be appointed executor dative. Where someone dies intestate it is usually their spouse or civil partner who will be appointed by the court. The deceased's spouse or civil partner is exclusively entitled to be appointed executor dative if he or she inherits the whole estate under prior rights (1964 Act, section 9(4)). On prior rights, see Harvie-Clark 2015, at pp 12–13.

## Trusts and trustees

A trust is an arrangement whereby one party (the **trustor** or the **settlor**) passes ownership of assets to a trust to be used for the benefit of others (the **beneficiaries**). The **trustees** run the trust for the beneficiaries.

Trusts can be created in wills. For example, they might be used where a testator wants his or her children to inherit under his or her will but not until they reach a certain age. A trust allows the date of vesting to be postponed until the children reach that age.

Perhaps confusingly, even where there is no specific trust created in a will, executors are treated for most legal purposes as trustees too. Accordingly, they are subject to the legal regulation associated with trustees, both at common law and in relevant legislation.<sup>6</sup>

## Intestacy

If a person does not have an existing will, then, on his or her death, that person is described as **intestate**, as is his or her estate.

The 1964 Act sets out the rules which say who should inherit if somebody dies intestate. These favour the deceased person's spouse or civil partner and also provide some protection for the deceased's children. For a summary of these rules see the separate SPICe Briefing entitled [Inheritance Law in Scotland](#), pp 12–16 (Harvie-Clark 2015).

Someone who inherits under these rules is sometimes referred to as an **heir**.

## Disinheritance and the role of legal rights

When a will aims to exclude a particular person from inheriting any of the deceased's estate, the will aims to **disinherit** that person.

In Scotland it is not possible to make a will entirely disinheriting your spouse or civil partner or your children, including your adult children. This is due to the concept of **legal rights** which gives these individuals a share of the **moveable property** of the deceased, that is to say his or her property other than land and buildings. (Land and buildings are referred to as **heritable property**). See further [Inheritance Law in Scotland](#) (Harvie-Clark 2015) at p 18.

## Where a potential beneficiary or heir dies before the deceased

Where a person (usually a potential beneficiary or heir) dies before the deceased individual whose estate is now being distributed, that person is said to have **predeceased** the individual in question. It is a fundamental principle of succession law that to inherit, a potential beneficiary or heir must have lived longer than the deceased.

## REQUIREMENTS FOR A VALID WILL

The legal requirements for a valid will are found in the Age of Legal Capacity (Scotland) Act 1991 (c 50) ('the 1991 Act'); the Requirements of Writing (Scotland) Act 1995 (c 7) ('the 1995 Act') and in the common law.

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<sup>6</sup> The main pieces of legislation are the Trusts (Scotland) Act 1921 (c 58), the Trusts (Scotland) Act 1961 (c 57) and the Charities and Trustee Investment (Scotland) Act 2005 (asp 10).

In order for a will to be valid, it must be made:

- by a person who is twelve years old or over (1991 Act, section 2)
- voluntarily and without pressure from any other person<sup>7</sup>
- by a person of sound mind<sup>8</sup>
- in writing (1995 Act, section 1(2)(c))
- signed at the end of the last page by the person making the will (1995 Act, section 2(1))

As standard practice a solicitor will aim to have his or her client make a **probative** or **self-proving** will. Such a will is presumed as a matter of law to be validly executed. In the event of a subsequent legal dispute, this can be very helpful to a person relying on the will. For a probative will two additional requirements must be satisfied:

- it must be signed *on every page* by the person making the will (1995 Act, section 3(2))
- it must be signed by that person in front of a witness (1995 Act, section 3(1))

## COMMON ASPECTS OF WILLS

A key feature of a will is obviously that it identifies all the people or organisations the testator wishes to benefit from his or her will and what he or she wishes them to receive. This is achieved by **legacies** or **bequests**. The most common types of legacy include (Gretton and Steven 2008, para 27.23– 27.28):

- **a pecuniary legacy:** a legacy of money
- **a special legacy:** a legacy of a particular asset or an identifiable set of assets (e.g. 'all my books')
- **a residuary legacy:** a legacy of everything that remains (if anything does remain) after all the other claims on the estate have been met (e.g. 'everything else to my daughter Sarah').

Other common features of a will include: who the testator wants to be his or her executor or executors; who the testator wants to look after any of his or her children under 16; the testator's funeral instructions; and whether the testator wants to donate all or part of his or her body to medical research or for transplant purposes.

## CANCELLING OR CHANGING A WILL

A testator may wish to cancel (**revoke**) an existing will. The normal method of doing this is to physically destroy it.

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<sup>7</sup> Where this requirement is not complied with, case law refers to 'undue influence' having been exercised. See further Macdonald 2001, paras 8.25–8.35. Undue influence can exist alongside 'facility and circumvention'. See footnote 8 below in respect of the latter.

<sup>8</sup> Case law recognises that when a person is insane they cannot consent to writing a will. Case law also recognises the concept of 'facility and circumvention' where a person has suffered a degree of mental deterioration which, without amounting to insanity, leaves him or her easily imposed upon by others. This can happen in old age. See further Macdonald 2001, paras 8.17–8.24 and 8.34–8.35.

A will prepared by a solicitor will almost invariably have a clause in it saying that any previous will is revoked. This cancels an earlier will, even if it is not destroyed.

A will can also be amended by use of a **codicil**, i.e. a later document referring to the earlier will but varying its provisions. Because of the potential difficulties in practice of working out the combined effect of these two documents, solicitors usually recommend destroying the old will and making a new one rather than using a codicil.

In certain circumstances, a revoked will is capable of taking effect again (**reviving**).

## THE CONTENT AND STRUCTURE OF THE BILL

The content and structure of the Bill can be summarised as follows:

- **wills (sections 1–8)**: this part of the Bill would make a series of reforms to the law relating to wills and to (a lesser extent) **special destinations**, which are provisions in the title deeds to property which can also transfer property on death. This part of the Bill covers the effect of certain life events, including divorce and the death of the person that the person making a will had intended should inherit. It also looks at the circumstances where a will can be changed (**rectified**) after a person's death.
- **survivorship (sections 9–11)**: these provisions would make reforms to the law of survivorship. This branch of law addresses the situation where people die simultaneously or in circumstances where it is unclear who died first.
- **forfeiture (sections 12–17)**: the law of forfeiture addresses the relatively rare situation where someone has unlawfully killed the person he or she stood to inherit from.
- **protections for executors, trustees and buyers of property (sections 18–19)**: sometimes when a deceased person's property and possessions are being distributed after death, mistakes are made. This part of the Bill deals with the need to protect other people, such as executors, in certain circumstances, from the consequences of these mistakes.
- **miscellaneous reforms (sections 20–22)**: the Bill deals with several other discrete topics, including **private international law**. This is the law which applies when a person dies whose estate is connected with more than one part of the UK or more than one country.

## THE PROVISIONS OF THE BILL

This section of the briefing looks at the individual provisions of the Bill in greater detail. The provisions are grouped as much as possible in common themes. Note this grouping does not match exactly the sequence of the provisions in the Bill.

### EFFECT OF DIVORCE AND DISSOLUTION OF CIVIL PARTNERSHIPS ON WILLS (SECTION 1)

#### The current law

At present, where a marriage or civil partnership comes to a legal end, this has no effect on any provision in a will.

## Section 1 of the Bill

Section 1 of the Bill would reverse the current rule. Accordingly, if a (same sex or opposite sex) marriage ends by **divorce**, or a civil partnership terminates by **dissolution**, any provision in a will benefiting the testator's former spouse or civil partner will not take effect.<sup>9 10</sup> Other parts of the will are unaffected by section 1.

The rule in section 1 only applies where the deceased died **domiciled** in Scotland; that is to say, is treated in law as having his or her permanent residence there.

Section 1 also provides that the testator can include provision in his or her will saying he or she does not wish the rule in section 1 to apply.

## The Scottish Government's consultation

All of the respondents to the Scottish Government's consultation who addressed the issue (which was ten out of 22 respondents) agreed that divorce or dissolution of a civil partnership should revoke a will (Scottish Government 2015b, para 3.27).

There was slightly less consensus in relation to the domicile requirement. Two out of the ten stakeholders who responded on the topic felt that the change now contained in section 1 should apply regardless of the testator's domicile at the time of death (Scottish Government 2015b, para 3.31).

## Related work by the Scottish Government

It may be of interest to note that the Scottish Government (2015c, para 5.38–5.40) is consulting at present on whether *entering* into a marriage or civil partnership, as opposed to the *termination* of those legal relationships, should also revoke an existing will.

## EFFECT OF DIVORCE AND DISSOLUTION OF CIVIL PARTNERSHIPS ON SPECIAL DESTINATIONS (SECTION 2 AND SCHEDULE)

### The current law

Section 2 applies to **special destinations**. A title deed or its modern equivalent (the Land Register entry), or a lease can have a person named as owner subject to another person becoming owner upon the death of the owner.

A very common type of special destination is the **survivorship destination**. Here the property is usually held in the name of 'A and B and the survivor'.<sup>11</sup> On the death of one of these individuals, his or her share of the property automatically passes to the surviving owner.<sup>12</sup>

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<sup>9</sup> As well as applying to provisions in wills benefiting the testator's former spouse or civil partner, section 1 also applies to provisions in wills appointing the testator's former spouse or civil partner as a guardian of a child, an executor or a trustee.

<sup>10</sup> As well as divorce or dissolution, section 1 also applies to the annulment of a marriage or civil partnership. Rare in practice, this refers to where a marriage or civil partnership is declared by the court to be invalid. This is only possible on certain limited grounds, e.g. that one of the parties to the marriage or civil partnership is under 16 or is in a marriage or civil partnership with someone else. See further Sutherland (2008) para 12-083 and Thomson (2011) chapter 2.

<sup>11</sup> However, the property can also be held by more than two people and the survivor of them.

<sup>12</sup> Consequently, even if one party made a will leaving the property covered by a survivorship destination to a third party, this would be ineffective and the property would still pass to the person named in the survivorship destination on death.

The use of survivorship destinations is particularly common in relation to the joint legal title of spouses, civil partners or cohabitants to the family home.

Note that whilst survivorship or special destinations usually appear in the legal titles relating to **heritable property** (land and buildings) they sometimes appear in the legal title to property other than land and buildings (**moveable property**) such as shares in a company.

The current law provides that special destinations in favour of a spouse or civil partner should come to an end on divorce, dissolution or annulment. At present, the rule only applies to special destinations associated with heritable property, not those associated with moveable property.

The rule relating to the effect of a marriage ending is found in the Family Law (Scotland) Act 2006 (asp 2), section 19. The equivalent rule in relation to the ending of a civil partnership is found in the Civil Partnership Act 2004 (c 33), section 124A.

## **Section 2 of the Bill (and the schedule to the Bill)**

The schedule to the Bill would repeal the existing provisions and section 2 would re-enact them in a single provision. Section 2 applies to heritable property (in accordance with the current law) but also extends to moveable property.

### **The Scottish Government's consultation**

The Scottish Government's consultation (2015b, para 3.63 and 3.65) indicated that there was a high level of consensus amongst respondents, both as to the general principle behind what is now section 2, as well as the proposed scope of the provision.

## **THE COURT'S POWER TO RECTIFY A WILL (SECTIONS 3 AND 4)**

### **The current law**

When the SLC published its report in 2009, it was thought that, whilst a testator can alter or revoke a will during his or her lifetime, there was no legal power enabling wills to be amended (**rectified**) after the testator's death.

A recent UK Supreme Court case (*Marley v Rawlings* [2014] UKSC 51) has suggested that the power *may* exist under the common law. However, the matter is not free from doubt. The case in question was decided under English law and so Lord Hope's comments on the possible scope of Scottish law were **obiter**. In other words, they were not part of the reasoning of the decision in question and so are not binding on future courts.

### **Sections 3 and 4 of the Bill**

Sections 3 and 4 of the Bill aim to give effect to the Scottish Government's policy intention that errors in a will which are "simple and obvious" (Policy Memorandum, para 26) should be able to be corrected after the testator's death.<sup>13</sup>

In the light of the decision in *Marley* (discussed above) this may be a new power or, possibly, an alternative to a power which exists at common law.

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<sup>13</sup> The SLC gave various examples of some potentially applicable situations from relevant court cases. See SLC 1990, para 4.21.

### *The scope of the court's powers*

Section 3 empowers the Court of Session (which sits in Edinburgh) and a local sheriff court to rectify a will prepared by someone other than the testator, e.g. by a solicitor (section 3(1)(b)). The court must be satisfied that the will failed to give effect to the testator's instructions (section 3(1)(d)).

The deceased must also have died **domiciled** (i.e. permanently resident) in Scotland (section 3(1)(a)).

### *Instructions from the testator*

Section 3 is drafted in such a way that there needs to have been instructions from the testator about the will to compare to the will (section 3(1)(d)). However, these instructions need not be in writing (Explanatory Notes, para 14).

### *A six month time limit (with a discretion to waive it)*

The application to the court must be made within six months of the date of confirmation, if confirmation is required, or from the date of death if not (section 4(1)). (On confirmation, see p 9 above). The court has discretion to waive this time limit **on cause shown**, i.e. the court considers there is a good reason for waiving the time limit (section 4(2)).

## **Scottish Government consultation**

There was strong support for the proposals now contained in sections 3–4, with nine out of the eleven respondents agreeing with them (Scottish Government 2015b, para 3.22).

One respondent who disagreed pointed to the risk of a disappointed beneficiary claiming the will did not reflect the testator's intentions when actually the testator may have said one thing to that person, for instance to keep the peace but intending to do something else in his or her will (Scottish Government 2015b, para 3.23).

Various other points were made by the dissenting respondents.<sup>14</sup> These included that rectification should be confined to drafting errors in implementing instructions. This, it was said, would avoid every disappointed beneficiary seeking to use the courts' powers (Explanatory Notes, para 28).

Another suggestion was that the legislation should specify a specific class of people who could use the courts' powers, e.g. the executor, beneficiaries under the will and potential beneficiaries (Explanatory Notes, para 29). The Bill leaves the court to decide who has sufficient connection with the will in question to be able to use the courts' powers (using the test the court normally uses of who has **title and interest to sue**).

## **REVOCAION OF A WILL NOT TO REVIVE EARLIER WILL (SECTION 5)**

### **The current law**

As discussed at pp 11–12 above, a person may make a will and later desire to change his or her plans by cancelling that will (**revocation**). The most common ways to do this are by physically destroying the first will or making a new will containing a statement that the previous will is revoked.

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<sup>14</sup> For a fuller discussion of the points raised, see the [Explanatory Notes to the Bill](#), para 28.

A person's intentions as to who should inherit after his or her death can change several times over the course of his or her lifetime, resulting in him or her making several wills.

The existing rule is that if the current will is revoked, any earlier will takes effect again, that is to say it **revives**.<sup>15</sup>

## Section 5 of the Bill

The SLC suggested that the current rule can lead to outcomes which the testator probably did not intend. It gave four examples of such situations from reported court cases (see, most recently, its [written submission](#) to the Committee, at para 23).

Accordingly, section 5 of the Bill would reverse the current rule so that there would be no revival of an earlier will where the latest will is revoked.

## The Scottish Government's consultation

Eight out of the nine respondents to the Scottish Government's consultation who addressed this topic agreed with the proposed change (Scottish Government 2015b, para 3.43).

The respondent who disagreed was focused on the situation where the latest will was successfully challenged in court on the basis the testator was not of sound mind when he or she made the will (on this topic see p 11 and footnote 8 earlier in this briefing).

By virtue of section 5, any earlier will may not revive in this situation. The person would be treated as dying intestate and subject to the separate statutory rules on inheritance on intestacy.

The dissenting respondent thought the new rule might lead to increased legal challenges to wills. Specifically, these would be by people who stood to gain under the rules relating to intestacy (Scottish Government 2015b, para 3.44).

## LIFERENT: VESTING OF A FEE OTHER THAN ON DEATH (SECTION 7)

### The current law

In a will, a piece of the deceased's property can be left to 'person A in **liferent** and person B in **fee**'. Person A is known as the **liferenter** and person B is known as the **fiar**.

Person A (the liferenter) has a right to use the property and to enjoy it (but not to sell or otherwise dispose of it) for the duration of their lifetime. Person B (the fiar) inherits the property absolutely (with all the usual rights associated with ownership) on the liferenter's death.

A common example of the use of this type of arrangement in practice relates to the family home which is sometimes left to the testator's spouse in liferent and the children of the testator in fee.<sup>16</sup>

It is possible for the liferenter to give up (**renounce**) the liferent. At present, unless the will makes an express statement about what is to happen in these circumstances, it is thought that the fee still does not vest in the fiar until the liferenter's death. This can create difficulties in practice.

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<sup>15</sup> There might be an exception to this rule where it can be proved by external evidence that the testator did not mean the earlier will to revive. See SLC 2009, para 6.31.

<sup>16</sup> This type of arrangement was more common in the early part of the last century, when a woman was thought not to be able to manage her own property and finances.

## Section 7 of the Bill

Section 7 of the Bill seeks to resolve the current uncertainty in the law. It provides that the property in question passes to the fiar at the point at which the liferenter gives up the liferent. This rule is to apply unless i) the document creating the liferent stated that something else should happen; or ii) there is a competing legal obligation requiring that something else should happen.

### The Scottish Government's consultation

From the respondents to the Scottish Government's consultation who addressed this topic (nine out of 22 respondents), there was unanimous support for the change proposed (Scottish Government 2015b, para 3.47).

## DESTINATIONS IN WILLS AND CERTAIN TRUSTS (SECTION 8)

### The current law and practice

When a person makes a will, or creates a trust to take effect on his or her death, it is possible that the first person he or she may want to benefit from a legacy or trust provision dies before him or her.

A well-drafted will or trust tries to anticipate this possibility. It makes use of a legal device known as a **destination** or **destination over** to provide for an alternative beneficiary should this scenario arise. The destination says the property should pass to 'person A, whom failing person B'. In other words, the property will go to person A, unless he or she dies, when it will go to person B.

Another possible scenario is that the first choice of beneficiary lives longer than the person making the will or creating the trust but dies shortly after testator.

At present, in this situation the law is complex. It rests on a distinction between **heritable property** (land and buildings) and **moveable property** (everything else).

Where the legacy is of moveable property (or a mixture of heritable and moveable property) person A will take the legacy but person B will have no rights in it (**conditional institution**). It then becomes part of person A's estate.

Note that this is not a fixed rule but a legal **presumption**. In other words, it can be overturned in a particular case when someone produces evidence in court that it was intended by the testator that something else should happen.

Where the legacy is of heritable property it is thought that, in such circumstances, person B can still act as a 'substitute' for person A. Accordingly, it is presumed that person B will take the legacy, rather than it passing into A's estate (**substitution**). However, this separate presumption is not widely known and this can create difficulties in practice.

## Section 8 of the Bill

Section 8 addresses the situation where there is a destination in a will and the 'first choice' beneficiary dies shortly after the original death.

Specifically, section 8 provides that, regardless of the type of property at issue, conditional institution should apply. In other words, person A's estate will benefit from the legacy in question.

However, the rule in section 8 will not apply if the will or trust expressly provides otherwise.

### **The Scottish Government's consultation**

There was unanimous support for this change from all the respondents who addressed this topic in the Scottish Government's consultation, i.e. eight out of 22 respondents (Scottish Government 2015b, para 3.60).

## **DEATH BEFORE A LEGACY VESTS: THE ENTITLEMENT OF CHILDREN AND REMOTER DESCENDANTS (SECTIONS 6 AND 24)**

### **The current law and practice**

As discussed earlier in this briefing, in cases where a testator's 'first choice' beneficiary, **predeceases** (dies before) the testator, **destinations** in wills can play an important role in avoiding the deceased's estate falling, all or part, into intestacy.

However, some wills make no express provision for the scenario discussed. The common law tries to help by implying an alternative beneficiary or beneficiaries in some circumstances (an **implied destination** or **destination over**).

One type of implied destination is usually referred to by its Latin name, i.e. **conditio si institutus sine liberis decesserit**.<sup>17</sup> It is a legal presumption which applies where the testator left a legacy to any of his or her **issue**, namely, his or her children or other direct descendants (such as grandchildren or great-grandchildren).

It is also thought that this might apply where the testator leaves a legacy to his or her niece or nephew who had been accepted as a child of the family but the law is not entirely clear on this aspect of things (see Gretton and Steven 2008, para 27.49).

The law presumes that i) if the legacy is to the testator's issue (or possibly to his or her niece or nephew in the circumstances discussed); and ii) where the 'first choice' beneficiary has died before the testator; that the will should be read as if the legacy was in favour of the first choice beneficiary's *own* issue.

### **Sections 6 and 24 of the Bill**

The Bill would abolish the common law version of this doctrine (section 24) and re-state the doctrine in a statutory form, removing its Latin name (section 6).

Section 6 also clarifies certain aspects of the doctrine that were previously uncertain. In particular section 6(2) makes it clear that the doctrine will not apply where any clear provision in the will indicates that the testator did not mean it to apply.

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<sup>17</sup>It is important not to confuse this presumption (**conditio si institutus sine liberis decesserit**) with another presumption of a very similar Latin name (**conditio si testator sine liberis decesserit**). The Scottish Government consulted on abolishing the latter presumption but ultimately did not include in the Bill. See further the Annex to this Briefing.

In addition, section 6 would restrict the scope of the doctrine to the situation where the legacy in question was to issue. The situation where the legacy is to nieces and nephews of the deceased is excluded from the doctrine's scope.

Finally, section 6 would enlarge the share of the legacy to which the first choice beneficiary's issue are entitled in certain circumstances. This point is elaborated on in para 27 of the [Explanatory Notes](#) with an example.

### **The Scottish Government consultation**

Of the ten respondents who addressed this issue, eight agreed with the Scottish Government's proposals (Scottish Government 2015b, para 3.39).

One respondent who disagreed was not in favour of 'implied rules', even if restated in statute. The respondent believed that it could not be assumed that a testator would wish issue to benefit by default. The other respondent who disagreed considered that the rule should be abolished and the testator should instead make appropriate provision in their will (Scottish Government 2015b, para 3.40).

## **UNCERTAINTY AS TO SURVIVORSHIP TREATED AS FAILURE TO SURVIVE (SECTION 9)**

Sections 9–11 of the Bill deal with the law relating to survivorship in the event of common calamity (such as a car accident) where two or more people's deaths were simultaneous or it is not clear which person lived longer.

### **The current law: spouses or civil partners**

Section 31 of the 1964 Act provides a presumption that, where the people who die are spouses or civil partners, it is presumed that neither survived the other.

One effect of this provision can be illustrated by way of a practical example: Spouses or civil partners have each made wills leaving everything to each other, but to a third party if his or her spouse or civil partner was not alive at the time of his or her death. One spouse or civil partner names this third party as his or her child from a previous relationship; the other names his or her third party as his or her best friend. Section 31 provides that, after the accident, each third party will inherit according to the terms of both wills.

### **The current law: people other than spouses or civil partners**

If the people who died were not spouses or civil partners, section 31 presumes, in most cases, that the younger person survived the older person.

One possible effect of this can again be illustrated by way of an example: Two cohabitants have made wills leaving everything to each other. However, their wills also provide that everything should go to a third party if the testator's cohabitant was not alive at the time of his or her death. One cohabitant (the older person) names the third party as his or her parents. The other cohabitant (the older person) names his or her sister as the relevant third party.

Section 31 provides that the older cohabitant's estate goes into the younger cohabitant's estate, as the younger cohabitant was treated as being alive at the time of the older cohabitant's death. The sister of the younger cohabitant then inherits the estate of *both* cohabitants.

## Section 9 and the schedule of the Bill

The schedule to the Bill would repeal section 31 of the 1964 Act. Section 9 creates a replacement rule, which applies regardless of the relationship between the people concerned.

This provides that where two people die simultaneously, or in circumstances where it is uncertain who survives who, each is treated as failing to survive the other for the purposes of inheritance.

Section 9 applies both where a will has been made and where there is no will.

Section 9 does not apply in the situation where the special rule in section 10 applies (see below).

## The Scottish Government consultation

Of the ten respondents who addressed this issue, nine agreed with the change proposed. However, some of those respondents expressed concern about the use of the word 'uncertain' on the basis that it could be interpreted to include any state of knowledge rather than absolute certainty (Scottish Government 2015b, para 3.50).

The one respondent who disagreed felt that this subject should be discussed in the [second consultation](#) on the major policy reforms (Scottish Government 2015b, para 3.51).

## EQUAL DIVISION OF PROPERTY IF ORDER OF BENEFICIARIES' DEATH IS UNCERTAIN (SECTION 10)

### Section 10 of the Bill

By virtue of section 10(4) of the Bill, section 9 of the Bill applies if it is the *testator* who is one of the people who die simultaneously, or in an uncertain order.

On the other hand, section 10 covers the situation where the property in question is coming from a third party and it is only the *beneficiaries* of this property whose deaths are simultaneous or uncertain in order. Furthermore, the property in question was to be transferred to one (or more) of two (or more) beneficiaries, depending on the order of their deaths (section 10(1)(b) and (c)).

The third party in question envisaged by section 10 might be the estate of another deceased person (section 10(1)(a)) but its potential scope is broader than that. For example, the SLC (2009, para 6.60) and the Scottish Government (Explanatory Notes, para 37) refer to the example of a life insurance company which is obliged to pay out on the deaths of two or more people.<sup>18</sup>

Section 10 provides that where the beneficiaries' order of death is uncertain, the property is to be divided equally between the estates of the people in question (section 10(2)). So, 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 estates of the two people equally if it is uncertain which death was first (Explanatory Notes, para 37).

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<sup>18</sup> Another example provided by the SLC is where a will leaves property to someone in life interest and in fee to the survivor of two siblings. (See p 16–17 above on life interests). Section 10 would cover the situation where the siblings die simultaneously or in an uncertain order (SLC 2015, para 35).

The rule in section 10 only applies if no alternative provision has been expressly made, e.g. by a testator in his or her will (section 10(1)(d)).

### **The Scottish Government's consultation**

All 9 respondents who addressed the proposal now contained in section 10 agreed with it (Scottish Government 2015b, para 3.57).

## **REQUIREMENT OF SURVIVAL FOR A PARTICULAR PERIOD (SECTION 11)**

### **The current law**

As already stated, it is a fundamental principle that for a person to inherit he or she must live longer than the deceased. However, in the context of intestate succession, survival for a mere instant longer is in fact sufficient.<sup>19</sup>

This also applies where there is a will, unless the will states otherwise. However, solicitors advising clients recognise that a person may not wish to leave a legacy to someone who only survives for a few hours or indeed a few days after them, so wills do sometimes contain survival requirements. In particular, it is common practice for wills to require survival for one month when spouses or civil partners are providing for each other (SLC 2009, para 6.58).

Where a will makes this provision and it is uncertain whether the intended beneficiary did in fact live for the required period the law does not, at present, give any guidance on how to deal with this situation.

### **Section 11 of the Bill**

Section 11 of the Bill provides that where i) a will leaves a legacy to someone on the condition that he or she survived for a specified period; but ii) it is not clear whether the person did in fact survive for this period; he or she is to be treated as having failed to live longer than the testator.

### **The Scottish Government's consultation**

All nine respondents who addressed this issue agreed with what was proposed (Scottish Government 2015b, para 3.54).

## **INHERITANCE AND UNLAWFUL KILLERS (SECTIONS 12, 15–17)<sup>20</sup>**

### **The current law – an overview**

A person who is otherwise entitled to inherit may forfeit any rights to inherit from a person he or she has unlawfully killed. This area of succession law is often referred to as **forfeiture**.

Specifically, the Parricide Act 1594 (c 30) disinherits anyone convicted of killing a parent or grandparent. The killer's inheritance rights pass to those who would have inherited had the killer *and* his or her direct descendants (i.e. his or her **issue**) failed to live longer than the deceased person.

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<sup>19</sup> This is also the case in relation to legal rights where there is a will but legal rights are operating to protect someone from disinheritance. On the topic of legal rights where there is a will, see the separate SPICe Briefing entitled [Inheritance Law in Scotland](#) at p 18 (Harvie-Clark 2015).

<sup>20</sup> Sections 13 and 14 of the Bill make other changes to the law of forfeiture not addressed by this briefing. See the Explanatory Notes, paras 42–45 for more details.

There is also a common law rule that a person who has unlawfully killed another cannot take any benefit from the deceased's estate. This is an aspect of the wider rule that the law will not permit people to profit from their crimes.

The Forfeiture Act 1982 (c 34) allows a civil court, where the killer applies to that court, to grant relief from forfeiture, except in cases of murder, where the court thinks the circumstances warrant it. A successful application means the killer can inherit part of the victim's estate.

In its written submission to the Committee the SLC gave two examples of situations where relief might be appropriate:

“Relief may be justified, for instance, where a wife kills her husband after having been subjected to prolonged mental and physical cruelty. Or where, perhaps at the end of a relationship of a very different nature, she assists him to end his life in accordance with his wishes” (SLC 2015, p 10)

### **The Hunter's Executors case**

When the SLC (1990, para 7.15) wrote its report in 1990, it said that the common law of forfeiture probably included the rule that the killer shall be deemed to have failed to live longer than the deceased for the purposes of inheritance.

However, in the case of *Hunter's Executors, Petitioners* ([1992] SC 474) the court decided otherwise. A man had murdered his second wife. Her will said she wanted her estate to go to her husband in the first instance. However, if he died before her and there were no children of the second marriage, or other direct descendants of the couple, she wanted the estate to be split between his son (by his first marriage) and her own sister.

The court was clear that the killer should not benefit from his late wife's estate. However, it also ruled that he shouldn't be treated as having died before her. As the will only covered the situation where the husband was alive and entitled to inherit or the situation where he had died before her, the estate became an intestate one. By virtue of the rules of intestate succession the wife's sister had to share the estate with her parents.

### **What section 12 does**

Section 12 of the Bill says that the law is as the SLC described it in 1990. In other words, for the purposes of the common law of forfeiture, the killer is treated as having died before his or her victim.

### **The Scottish Government's consultation**

All respondents who addressed the proposal now contained in section 12 of the Bill agreed with it (Scottish Government 2015b, para 3.72).

### **What section 15 does**

Sections 15 (and section 16) of the Bill are related to the Forfeiture Act 1982 (c 34).

The decision of a court in a previous court case<sup>21</sup> suggested that there are limitations on the scope of the court's power to grant the killer relief from forfeiture under the 1982 Act.

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<sup>21</sup> *Cross, Petr* 1987 SLT 284.

Specifically, it was said that the court cannot grant the killer 100% relief (so that the unlawful killing has no effect on the killer's inheritance).

Section 15 of the Bill would provide the courts with the power to grant 100% relief, which the Scottish Government intends will be used "in the rare case" where that is appropriate (Explanatory Notes, para 47).

### **The Scottish Government's consultation**

All nine respondents who addressed the proposal now contained in section 15 of the Bill agreed with what was proposed (Scottish Government 2015b, para 3.75).

### **What section 16 does**

At present, the killer has three months from the date of his or her conviction to make an application under the 1982 Act. Section 16(2) extends this to six months. Section 16(3) says the relevant time period will only start to run when it is too late to appeal the conviction or the court proceedings relating to the appeal have finished. When the SLC recommended the changes covered by section 16 it described them as:

"the right balance between allowing the killer sufficient time to make an application while not holding up unduly the administration of the victim's estate." (SLC 2009, para 7.5)<sup>22</sup>

### **The Scottish Government's consultation**

There was unanimous support for this recommendation from the respondents who addressed the topic in the Scottish Government's consultation (Scottish Government 2015b, para 3.78).

### **What section 17 does**

Section 17 of the Bill would repeal the Parricide Act 1594 (c 30). The rationale for this is that the Act deals with a limited class of victims; disinherits the killer's direct descendants too; appears to only apply to land and buildings (not other types of property); and was ignored in a relatively recent court case<sup>23</sup> ([Explanatory Notes](#), para 49).

This repeal leaves the common law of forfeiture intact, as described above. In 1990 the SLC (1990, recommendation 34(a)) had recommended that this law should be placed on a statutory footing. By 2009 the SLC (2009, para 7.2) had changed its mind. This was on the basis that forfeiture is rare, and, it said, having it in the common law had not created any difficulties (apart from the issue specifically addressed in section 12 of the Bill).

### **The Scottish Government's consultation**

Eight out of the nine respondents who addressed the proposal now contained in section 17 of the Bill agreed with it. The one respondent who disagreed thought that the repeal of the Parricide Act 1594 (c 30) should wait until the Scottish Government had an opportunity to place the whole of the law of forfeiture on a statutory footing (Scottish Government 2015b, para 3.69).

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<sup>22</sup> For a fuller discussion of the policy rationale for any change to the current time limit, see the SLC's first [Report on Succession](#) (SLC 1990) at para 7.23.

<sup>23</sup> *Ibid.*

## **PROTECTION FOR TRUSTEES AND EXECUTORS (SECTION 18)**

### **The current law**

Trustees and executors have a duty to distribute the estate to those entitled to it. They are generally liable to the correct beneficiaries if they make payments to those not entitled to receive them. This means that a court action can be raised against them.

However, some protection is provided for trustees and executors. Section 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 (c 70)('the 1968 Act') provides that a trustee or executor is not personally liable where he or she has distributed part of the estate in ignorance of a child born as a result of a relationship where the parents are not married to each other. Section 24(2) of the 1964 Act makes equivalent provision for a trustee or executor who has distributed the estate in ignorance of an adoption order.

Both protections require the trustee or executor to have acted in good faith.

The protections for trustees or executors do not affect any right of an individual detrimentally affected by a mistake to raise a court action against those who have gained from the error.

### **Section 18 of the Bill**

The Schedule to the Bill would repeal section 7 of the 1968 Act (children born to parents not married to each other) and section 24(4) of the 1964 Act (adoption orders). Section 18 of the Bill replaces these two provisions with an overarching provision to be contained in the Trusts (Scotland) Act 1921 (c 11) (in a new section 29A).

Section 18 would extend the scope of the statutory protection to cases where the entitlement of the beneficiaries comes to light later for reasons unconnected with adoption and birth outwith marriage.

It also requires the trustees and executors not only to act in good faith but also to make reasonable enquiries about the existence of potential beneficiaries. No requirement to advertise for beneficiaries is included in section 18. However, if section 18 is implemented, it remains to be seen how the duty to make reasonable enquiries would be interpreted in practice.<sup>24</sup>

### **The Scottish Government's consultation**

All the respondents who addressed the question relating to the subject matter of section 18 of the Bill (nine out of 22 respondents) agreed with what was proposed (Scottish Government 2015b, para 3.81).

## **PROTECTIONS FOR THIRD PARTIES BUYING IN GOOD FAITH (SECTION 19)**

### **The current law**

Section 17 of the 1964 Act offers protection to a buyer who purchases heritable property (i.e. land and buildings) in good faith. Section 17 applies both where the buyer has acquired legal ownership directly from the executor and where the seller of the property has acquired legal ownership from the executor.

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<sup>24</sup> See further the discussion in SLC 1990, para 8.18.

Broadly speaking, section 17 provides that the buyer's legal ownership of the property cannot be challenged because there was an issue with the confirmation to the estate (see p 9 on confirmation) or because somebody received part of the estate who shouldn't have received it.

Section 23 of the Sale of Goods Act 1979 (c 54) provides a similar protection where the buyer acquires legal title to certain types of moveable property in these (and other) circumstances.

## Section 19 of the Bill

The Schedule to the Bill would repeal section 17 of the 1964 (protection of buyers of heritable property in good faith).

Section 19 of the Bill would re-enact this provision and extend its scope to all types of property (heritable and moveable). This is because the SLC reported in 1990 that the wording of the existing provisions excluded certain types of property, such as shares and book debts (SLC 1990, para 8.20).

In addition, if implemented, section 19 would protect people who acquired property other than through purchase. For example, it is not uncommon for a beneficiary to have desired a particular asset of the deceased (e.g. a painting) and to exchange his or her own legacy with another beneficiary in order to achieve this. Section 19 now covers property acquired through exchange.

Section 23 of the Sale of Goods Act 1979 (c 54) would remain in force if section 19 of the Bill was enacted, as section 23's scope is broader, including circumstances not related to the administration of estates.

## Scottish Government consultation

Nine out of the ten respondents who expressed a view on the subject matter of section 19 of the Bill were supportive of what was proposed (Scottish Government 2015b, para 3.84).

## GIFTS MADE IN CONTEMPLATION OF DEATH (SECTION 20)

### The current law and practice

Under the law of succession, a donation **mortis causa** is a specific type of gift with the following characteristics ([Explanatory Notes to the Bill](#), para 56):

- it is made by the donor in anticipation of his or her death;
- it is made on the understanding that when the donor dies the recipient keeps the gift but if the donor survives it should be returned to him or her;
- the donor can change his or her mind at any point and ask for the gift to be returned;
- if the recipient dies first then the gift is returned to the donor

It is very rare for someone to make such a gift these days, as it is not efficient for inheritance tax planning purposes.<sup>25</sup>

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<sup>25</sup> An outright gift, as opposed to a donation mortis causa, does not reserve any benefit of the gift to the donor. Accordingly, an outright gift does not fall foul of inheritance tax law's rules relating to 'reservation of benefit' but a donation mortis causa does. On the rules relating to reservation of benefit, see further: <http://www.hmrc.gov.uk/manuals/ihtmanual/ihtm14301.htm>

## Section 20 of the Bill

Section 20 of the Bill abolishes a donation mortis causa as a distinct legal entity. However, 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 ([Explanatory Notes to the Bill](#), para 58).

### The Scottish Government's consultation

There was a high level of consensus amongst respondents to the consultation who addressed the issue that the proposal now contained in section 20 should be implemented (Scottish Government 2015b, para 3.90).

## MOURNINGS (SECTION 21)

### The current law

At present, under the common law, a widow (but not a widower) and the family of the ceased person are entitled to an allowance out of the deceased's estate for items such as special mourning clothes (**mourning**s).

A widow and the children of a deceased man are also entitled to a temporary payment (**temporary aliment**) out of the estate to enable them to pay their bills until the estate is distributed.

Finally, under the common law, a person entitled to aliment from the deceased person (such as children of the deceased) become entitled to aliment from a person inheriting the deceased's estate (**aliment jure representationis**).<sup>26</sup>

## Section 21 of the Bill

Section 21 of the Bill abolishes the right of a widow and family to claim an allowance for the cost of special mourning clothes from the estate of the deceased (**mourning**s).

### The Scottish Government's consultation

The Scottish Government's first consultation indicated support for the abolition of the right of mourning but less consensus associated with the other common law rights described above. Hence, no provision for the latter's abolition was made in the Bill (Scottish Government 2015b, paras 3.87–3.88).<sup>27</sup>

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<sup>26</sup> This rule has its origins in a time when the eldest son inherited the deceased's heritable property and his or her brothers and sisters might need to be provided for via some alternative route.

<sup>27</sup> Concerns expressed first time round included that if a bank account was frozen as a result of a death and the family had no alternative source of funds then, in the absence of the right to a temporary allowance, genuine hardship could result (Policy Memorandum to the Bill, para 94).

## PRIVATE INTERNATIONAL LAW (SECTIONS 22 AND SECTIONS 3–4)

### The current law

*What is private international law?*

Private international law is the branch of law which regulates legal issues with a cross-border element.

This includes those which affect more than one of the three legal jurisdictions in the UK, namely, Scotland, England and Wales and Northern Ireland. For example, a person may die permanently resident in Scotland. However, he or she may own property in England.

*The Civil Jurisdiction and Judgements Act 1982 – which courts should hear the case?*

In some circumstances, a person may wish to raise a court action against an executor in relation to the administration of a Scottish estate with a cross-border element.

The Civil Jurisdiction and Judgements Act 1982 (c 27) ('the 1982 Act') determines which court has **jurisdiction** (authority to hear and determine a case) when there is a cross-border matter relating to more than one part of the UK (e.g. Scotland and England).

The main ground on which the Scottish courts have jurisdiction under the 1982 Act relates to where the person being sued is **domiciled** (permanently resident) in Scotland (1982 Act, schedule 8, para 1). Yet sometimes the deceased person may have nominated an executor who is not permanently resident in Scotland, for example, his or her sister, who lives in England.

There is an alternative ground of jurisdiction where an express Scottish trust has been created (1982 Act, schedule 8, para 2(g)). However, whilst some wills contain express trusts (e.g. relating to inheritance by children under 16) it is far from the case that all wills do.

The consequence of this is that sometimes an executor of a Scottish estate may end up being sued in the courts of a different part of the UK.

### Section 22 of the Bill

Section 22 of the Bill is based on the principle that the Scottish courts should have jurisdiction whenever Scots law is the applicable law to the succession issue in question.<sup>28</sup>

Implementing SLC's (2009) recommendation 49, section 22 gives the Scottish courts jurisdiction where the executor has obtained **confirmation** in Scotland, i.e. the legal document giving executor the authority to gather in, administer and distribute the deceased's estate.

This means that even where an executor has his or her permanent residence somewhere other than Scotland, he or she can still be sued in Scotland, as long as confirmation was obtained.

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<sup>28</sup> Whether the applicable law is Scots law in any given instance is determined according to the **scission principle**. This in turn relies on the distinction between **heritable or immoveable property** (land and buildings) and **moveable property** (everything else). Inheritance to moveable property is governed by the country or part of the UK where the deceased was permanently resident (no matter where the property is situated). However, inheritance to heritable or immoveable property is governed by the law of the country or part of the UK where the property is situated. This rule has been the subject of academic criticism.

## The Scottish Government's consultation

All ten respondents to the Scottish Government's consultation who addressed the subject matter of section 22 of the Bill agreed with the approach proposed (Scottish Government 2015b, para 3.13).

### Sections 3–4 of the Bill (private international law aspects)

Note that, as mentioned earlier, for some estates it may not be necessary to obtain confirmation (see Scottish Government 2013, p 35).

The SLC (2009, recommendation 50) recognised this issue and, in its 2009 report, set out additional circumstances where it thought the Scottish courts should have jurisdiction. These included where the deceased died permanently resident (**domiciled**) in Scotland and where he or she owned land and buildings in Scotland.<sup>29</sup>

This recommendation is partially implemented in relation to the specific type of court procedure created by sections 3–4 of the Bill, i.e. the procedure for rectifying a will after someone's death (see above at pp 14–15 for a general discussion of these provisions).

However, not all the grounds of jurisdiction suggested by recommendation 50 are reflected in sections 3–4. The focus is only on the deceased's domicile (section 3(1)(a)) rather than the location of any property owned.

## The Scottish Government's consultation

Recommendation 50 of the SLC's 2009 report attracted majority support from those responding on the topic when the Scottish Government consulted on it (Scottish Government 2015b, paras 3.16–3.17).

Two out of ten respondents dissented on the basis that it seemed "wrong and excessive" that merely because a deceased died domiciled in Scotland, any foreign equivalent of an executor, whose interest in Scotland may be minimal or non-existent, should be liable to be sued in Scotland (Scottish Government 2015b, para 3.18).

### A number of recommendations relating to private international law

In its reports, the SLC made a number of recommendations relating to private international law.<sup>30</sup> Two omissions from the Bill are worthy of note:

- **recommendation 45:** this related to a person's capacity to make a will. The recommendation is being consulted on at present by the Scottish Government (2015c, para 5.2). It was not consulted in the 2014 consultation
- **recommendation 46:** this related to certain types of jointly owned foreign property. The recommendation did not attract majority support on consultation (2015b, para 3.6–3.10) and the Scottish Government has decided not to implement it

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<sup>29</sup> Recommendation 50 was also designed to address the situation where the deceased had died domiciled in England, Wales or Northern Ireland and so the equivalent to confirmation (**probate** or **letters of administration**) had been issued.

<sup>30</sup> As well as recommendations 49–50, recommendation 47 was about domicile and the reform relating effect of divorce, dissolution etc. on a will. It is implemented by section 1(1)(d) of the Bill. Recommendation 48 related to domicile and the procedure for rectification of wills. It seems to overlap with the scope of recommendation 50 and has been implemented by sections 3–4 of the Bill.

## ANNEX: THE ORIGINAL PROPOSALS WHICH DO NOT FEATURE IN THE BILL

In its consultation relating to succession in 2014, the Scottish Government (2014a) consulted on certain topics which were not included in the Bill.

### Bonds of caution

A **bond of caution** (pronounced 'KAY-shun'), a special type of indemnity insurance, is currently required when winding up an estate in certain circumstances. The Scottish Government (2014a, chapter 2) consulted on the abolition of this requirement.

Consultation responses suggested agreement regarding abolition in principle but that more work needed to be done to address alternative protections for estates and beneficiaries (Scottish Government 2015b, paras 2.41–2.46). The Scottish Government (2015c, para 5.10–5.31) is consulting again on this topic, with a view to taking the reforms forward in future legislation.

### Effect of the birth of a child

At present, in certain circumstances, the subsequent birth to the testator of a child cancels (**revokes**) his or her existing will. (The Latin name for this rule is **conditio si testator sine liberis decesserit**).<sup>31</sup> The Scottish Government (2014a, paras 3.15–3.17) consulted on the abolition of this rule but there was a lack of consensus on the appropriate way forward.

The Scottish Government (2015c, paras 5.3–5.5) is consulting again on this issue in its latest consultation.

### Allowances

As discussed in the main body of the briefing (see p 26), on consultation there was a lack of consensus on whether to abolish the common law rights to **temporary aliment** and **aliment jure representationis**. The Scottish Government (2015c, paras 5.6–5.9) is consulting on the topic again.

### A cohabitant's share

Where a person dies without leaving a will, his or her cohabitant can apply to the court for the share of the estate in certain circumstances. Currently he or she has six months to do this. However, the Scottish Government (2014a, chapter 4) consulted on extending that time limit to one year.

There was a lack of consensus on consultation first time round and so the Scottish Government (2015c, chapter 4) has revisited the issue in its current consultation. This is in the context of consultation on its proposals for an entirely new scheme relating to cohabitants' rights.

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<sup>31</sup> It is important not to confuse this presumption (**conditio si testator sine liberis decesserit**) with another presumption of a very similar name which would be reformed by sections 6 and 24 of the Bill, i.e. **conditio si institutus sine liberis decesserit**. See pp 18–19 above on this presumption.

## Private international law

As discussed in the main briefing (at p 28) one of the SLC recommendations on private international law (SLC 2009, recommendation 46) did not attract support on consultation. It is not in the Bill and there are no plans to revive it in any future work.

The Scottish Government's consultation also considered developments at an EU level. Each EU country currently has its own rules of private international law. However, there have been various EU policy initiatives aiming to harmonise member states' rules of private international law, including in the area of wills and succession. The [relevant EU Regulation](#) (No 650/2012) recently came into force and applies to people dying on or after 17 August 2015.<sup>32</sup>

The UK is not party to the Regulation. However, the Scottish Government consulted on whether aspects of the Regulation could be adopted in Scots law. A majority of respondents who provided a view thought some aspects of it could be usefully incorporated (Scottish Government 2015b, paras 5.4–5.7). However, the Scottish Government (2015b, para 5.8) decided not to progress this in the current Bill. Its reasons included a lack of consensus amongst respondents as to which parts of the Regulation should be adopted.

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<sup>32</sup> On this regulation see further the section on the European Commission's website entitled [Succession and Wills](#).

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