



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 8 December 2015

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.uk or by contacting Public Information on 0131 348 5000

Tuesday 8 December 2015

CONTENTS

	Col.
BANKRUPTCY (SCOTLAND) BILL: STAGE 1	1
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE	4
Community Empowerment (Scotland) Act 2015 (Consequential Modifications and Savings) Order 2016 [Draft]	4
Continuing Care (Scotland) Amendment Order 2016 [Draft]	4
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	5
Seed Potatoes (Scotland) Regulations 2015 (SSI 2015/395)	5
Management of Offenders etc (Scotland) Act 2005 (Commencement No 8 and Consequential Provisions) Order 2015 (SSI 2015/397)	5
Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400)	7
Seed Potatoes (Fees) (Scotland) Regulations 2015 (SSI 2015/396)	8
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE	9
Community Empowerment (Scotland) Act 2015 (Commencement No 3 and Savings) Order 2015 (SI 2015/399)	9
CRIMINAL JUSTICE (SCOTLAND) BILL: AFTER STAGE 2	10
INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC (SCOTLAND) BILL: AFTER STAGE 2	11
SMOKING PROHIBITION (CHILDREN IN MOTOR VEHICLES) (SCOTLAND) BILL: AFTER STAGE 2	12
SUCCESSION (SCOTLAND) BILL: STAGE 2	13

DELEGATED POWERS AND LAW REFORM COMMITTEE
35th Meeting 2015, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)

*John Scott (Ayr) (Con)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 8 December 2015

[The Convener opened the meeting at 11:12]

Bankruptcy (Scotland) Bill: Stage 1

The Convener (Nigel Don): I welcome members to the 35th meeting in 2015 of the Delegated Powers and Law Reform Committee and I ask them to switch off mobile phones, please.

Agenda item 1 is for the committee to consider the drafter's response to the committee's questions on the consolidation in parts 9 to 14 of the Bankruptcy (Scotland) Bill. As members have no comments on the response, are we content to note it?

Members indicated agreement.

The Convener: Agenda item 2 is for the committee to consider whether the consolidation in parts 15 to 18 of the Bankruptcy (Scotland) Bill, together with the schedules to the bill, correctly restates the enactments that are being consolidated and whether the consolidation is clear, coherent and consistent. The committee is invited to agree the questions that it wishes to raise with the drafter of the bill in written correspondence.

There appears to be a drafting error in section 200(3)(a). The drafting in that section suggests that the words

"of which particulars have been registered in the register of insolvencies during the year to which the report relates"

apply only to

"the winding up and receivership of business associations."

However, in the original section of the Bankruptcy (Scotland) Act 1985, those same words appear to apply to both

"the winding up and receivership of business associations"

and

"the state of all sequestrations."

Does the committee agree to draw that to the drafter's attention?

Members indicated agreement.

The Convener: Section 200(5) sets out the circumstances in which the Accountant in

Bankruptcy—the AIB—must report a matter to the Lord Advocate. Some of the wording from the equivalent section of the 1985 act is not restated, or is modified, in section 200(5). Does the committee agree to ask the drafter why the words

"in the performance of his functions under this Act or any other enactment or any rule of law"

have not been restated in section 200(5)(a) of the bill; what effect that is considered to have on the meaning of that section; why the word "suspect" in section 1A(3) of the 1985 act has been changed to "suppose" in section 200(5) of the bill; and what effect that is considered to have on the meaning of that section?

Members indicated agreement.

11:15

The Convener: Does the committee agree to ask the drafter why in section 206 one reference to "co-obligant" is retained in subsection (5), while the other references are restated as "obligant", and whether there is any reason for that difference in terminology?

Members indicated agreement.

The Convener: Section 223 gives a power to the Scottish ministers to make regulations in relation to a disqualification provision in any enactment.

The equivalent section of the 1985 act—section 71B—provides that a disqualification provision is a provision that disqualifies, whether permanently or temporarily and whether absolutely or conditionally, a debtor from holding a relevant office. The words

"and whether absolutely or conditionally"

are not restated in section 223(2) of the bill. Does the committee agree to ask the drafter why the words

"and whether absolutely or conditionally"

have not been restated in section 223(2) of the bill?

Members indicated agreement.

The Convener: Under paragraph 5(4) of schedule 1 to the bill, a statement of the debtor's current state of affairs must be provided, in certain circumstances, within six months after the previous statement was given. Under the equivalent provision of the 1985 act, the statement must be provided on the expiry of those six months. Does the committee agree to ask the drafter why the words

"on the expiry of the period of 6 months"

in paragraph 5(4) of schedule A1 to the 1985 act have been changed to "within 6 months" in

paragraph 5(4) of schedule 1 to the bill and what effect that is considered to have on the meaning of the provision?

Members *indicated agreement.*

The Convener: In paragraph 10(3) of schedule 3 it appears that the word “or” in line 4 should instead be “of”. Does the committee agree to draw that to the drafter’s attention?

Members *indicated agreement.*

The Convener: Does the committee agree to ask the drafter why the words

“or receives payment in respect of an attached article upon its redemption”

in paragraphs 24(3) and 24(7) of schedule 7 to the 1985 act have not been restated in schedule 7 to the bill?

Members *indicated agreement.*

The Convener: It appears that the reference at paragraph 27 of schedule 8 to the bill to the Further and Higher Education (Scotland) Act 2013 should be to the Further and Higher Education (Scotland) Act 2005. Does the committee agree to draw that to the drafter’s attention?

Members *indicated agreement.*

The Convener: Part 2 of schedule 9 lists the enactments that are to be revoked by the bill, including regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011. However, regulation 45 has been revoked by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. Does the committee agree to draw that to the drafter’s attention?

Members *indicated agreement.*

The Convener: The word “or” has been inserted into the following delegated powers provisions in parts 15 to 18 and the schedules: section 223(6), between paragraphs (a) and (b); section 224(1), between paragraphs (b) and (c); and schedule 1, paragraph 2(7), between paragraphs (a) and (b). The committee has already explored that issue with the drafter. Does the committee agree to take those further examples into consideration?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

11:18

The Convener: Agenda item 3 is consideration of the Succession (Scotland) Bill at stage 2, but in the absence of the minister I propose that we go straight to agenda item 4, which is instruments subject to affirmative procedure. We will return to agenda item 3.

Community Empowerment (Scotland) Act 2015 (Consequential Modifications and Savings) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Continuing Care (Scotland) Amendment Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Seed Potatoes (Scotland) Regulations 2015 (SSI 2015/395)

11:19

The Convener: The regulations contain a drafting error. In paragraph (1) of regulation 18, which is entitled “Information regarding seed potatoes”, the words “and of” have been inserted in error. A breach of the requirements in regulation 18(1) is an offence under section 16(7) of the Plant Varieties and Seeds Act 1964. The Scottish Government has undertaken to amend that provision at the next available opportunity. Does the committee agree to draw those regulations to the attention of Parliament on the general reporting ground, as they contain a drafting error?

Members indicated agreement.

The Convener: Does the committee agree that the Scottish Government should lay an amendment as soon as possible?

John Mason (Glasgow Shettleston) (SNP): Yes, convener. It is important that we send quite a strong message, because the drafting error is linked to an offence. An amendment should be agreed as soon as possible; it should not wait until it suits somebody to lay one.

The Convener: Thank you. Are members agreed?

Members indicated agreement.

Management of Offenders etc (Scotland) Act 2005 (Commencement No 8 and Consequential Provisions) Order 2015 (SSI 2015/397)

The Convener: Article 4 of the order makes a consequential amendment to the Management of Offenders etc (Scotland) Act 2005 (Specification of Persons) Order 2007. That is by virtue of the powers contained in sections 22(2) and 22(4) of the Management of Offenders etc (Scotland) Act 2005. The consequential amendment must be subject to the affirmative procedure and the provision should be laid in draft, as a result of the enabling powers and section 29 of and schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010.

The vires of article 4 is doubtful, given that the affirmative procedure has not been followed. The order also contains a drafting error. Article 3 brings into force section 10(2)(b) of the 2005 act, in so far as it is not already in force, but only for the

purposes of section 10(1)(e) of the 2005 act. In article 3 the qualification

“for the purposes of section 10(1)(e)”

is duplicated, which confuses the provision.

The Scottish Government has undertaken to introduce corrective legislation to come into force on 31 March 2016. Does the committee agree to draw the order to the attention of the Parliament on reporting ground (e) as there is doubt as to whether article 4 is *intra vires*?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I welcome the fact that the Government will take action to ensure that the proper order is in place before the date planned. However, by laying a negative order rather than the affirmative order that we would have expected, we carry the risk that something that the Government agrees is *ultra vires* and outwith the powers granted by the primary legislation will end up on the statute book, even though it will never have legal effect.

I urge the Government to explore whether it can take steps such as revocation, a motion not to proceed and to do nothing further or another method to ensure that the instrument does not reach the statute book. Of course, if it had been an affirmative instrument in the first place, it would have reached the statute book only after a resolution in Parliament. Given that it is a negative instrument, it can reach the statute book by other means. I therefore urge the Government to take all the action that it can to ensure that the instrument does not reach the statute book.

John Scott (Ayr) (Con): I support what Stewart Stevenson has just said. I do not think that the instrument should reach the statute book and be sorted thereafter, so to speak, as that would cause the Parliament as well as the Government reputational damage—people would ask why it got there in the first place. We should urge the Government to try in every possible way to amend the instrument and keep it off the statute book.

John Mason: This case is unusual because we have not had many cases where an instrument has been potentially *ultra vires*, so I think that we need to take firmer and more serious action on this occasion. I therefore support referring the instrument back to the Government initially; depending on the Government’s response, this committee or another parliamentary committee might need to look at it again.

The Convener: Right. We are required to report to Parliament this week, so we need to make that decision this week. We need to encourage the Government to find a way of ensuring that the instrument is not on the statute book. There are routes open to the Government and, on reflection,

to us. The committee clearly agrees to draw the order to the attention of the Parliament on the basis discussed. Does the committee also agree to draw the order to the attention of the Parliament on the general reporting ground, as it contains a drafting error?

Members indicated agreement.

Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400)

The Convener: Regulation 1(3)(d)(ii) is defectively drafted. The reference to “15th April 2015” should be to “15th April 2016”. The Scottish Government proposes to lay a correcting instrument before commencement of the regulations on 15 April 2016.

The meaning of regulation 20(2) could be clearer in that it does not specify to whom the Scottish ministers must provide a copy of a community body’s modified memorandum, articles of association, constitution or registered rules. The Scottish Government has undertaken to clarify the provision through a further instrument.

The meaning of regulations 1 and 23 could be clearer. Regulations 1 and 23 relate to, respectively, application and savings. Their effect is that the regulations will apply in respect of community rights to buy deriving from an application that is made by a community body on or after 15 April 2016. The previous legislative regime is saved in respect of applications that are made prior to that date. The regulations do not contain any interpretative provision specifying when an application is regarded as made for these purposes.

There appears to have been an unusual or unexpected use of the enabling power in section 52(3) of the Land Reform (Scotland) Act 2003. The power enables the Scottish ministers to prescribe the form of return to be used by a balloter for the purpose of notifying the Scottish ministers and various other parties of the information that is specified in section 52(3)(a) to (f). Section 52(3)(a) specifies the result of the ballot as a piece of information that must be so notified by the balloter, but the form that is prescribed in schedule 11 to the regulations does not contain an entry for the balloter to notify the result of the ballot.

It is therefore suggested that the committee agrees to draw the regulations to the attention of the Parliament on reporting ground (i) for defective drafting, under reporting ground (h) as the meaning of regulations 20(2), 1 and 23 could be clearer, and under reporting ground (g) as the way that the enabling power in section 52(3) of the 2003 act has been used appears to be unusual. Do we agree to do so?

Members indicated agreement.

Seed Potatoes (Fees) (Scotland) Regulations 2015 (SSI 2015/396)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members indicated agreement.

Instruments not subject to Parliamentary Procedure

Community Empowerment (Scotland) Act 2015 (Commencement No 3 and Savings) Order 2015 (SSI 2015/399)

11:27

The Convener: The meaning of article 3 in the order could be clearer. Article 3 provides that the modifications of parts 2 and 4 of the Land Reform (Scotland) Act 2003, made by the provisions of the Community Empowerment (Scotland) Act 2015 and commenced by this order, have no effect in relation to a number of specified rights, interests and powers deriving from a community interest in land where the application to register that interest was made by a community body before 15 April 2016. The instrument does not contain any interpretative provision specifying when an application is regarded to have been made.

Does the committee agree to draw the instrument to Parliament's attention under reporting ground (h) as the meaning of article 3 could be clearer in that respect?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: After Stage 2

11:27

The Convener: The purpose of this item is to consider the delegated powers provisions in the Criminal Justice (Scotland) Bill, as amended at stage 2. The stage 3 debate on the bill will take place later today, and the committee should therefore agree its conclusions today, so that they can be captured in a report prior to the debate.

Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and they will have seen the briefing paper for the committee. It is proposed that members may wish to find each of the new or substantially amended delegated powers to be acceptable. Members will also note the correspondence from the Scottish Government regarding proposed stage 3 amendments that relate to delegated powers. It is proposed that members may also wish to find those amendments to be acceptable in so far as they relate to delegated powers.

Does the committee agree to report that it is content with the delegated powers in the bill that have been inserted or substantially amended at stage 2?

Members *indicated agreement.*

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill: After Stage 2

11:30

The Convener: At item 8, members are invited to consider the delegated powers contained in the Inquiries into Fatal Accident and Sudden Deaths etc (Scotland) Bill as amended after stage 2. The stage 3 debate will take place on Thursday 10 December, so members should agree their conclusions today.

After stage 2, one power to make subordinate legislation has been added. Section 10A(3) inserts new subsections (2A) to (2C) into section 15 of the Legal Aid (Scotland) Act 1986, which is on financial conditions. Subsection (2B) places a duty on the Scottish ministers to make regulations providing for the alternative financial conditions that will apply where certain family members make an application for civil legal aid in respect of a fatal accident inquiry. Regulations affecting financial conditions in the 1986 act are usually subject to the affirmative rather than negative procedure.

Does the committee agree to report that it is content in principle with the power in section 10A(3) and that it recommends that the bill be amended at stage 3 to make the power subject to affirmative procedure?

Members *indicated agreement.*

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill: After Stage 2

11:31

The Convener: At item 9, we will consider the delegated powers provisions in the Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill as amended at stage 2. The stage 3 debate on the bill will take place on Thursday 17 December, so members should agree their conclusions today.

It is proposed that members may wish to find all the new and amended powers acceptable. Does the committee agree to report that it is content with the delegated powers in the bill that have been amended or removed at stage 2?

Members *indicated agreement.*

Succession (Scotland) Bill: Stage 2

11:32

The Convener: I am delighted to welcome Paul Wheelhouse, Minister for Community Safety and Legal Affairs, whom I suspect has come hot-foot from elsewhere in the building.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): Yes, convener—good morning.

The Convener: I am delighted to say that we have managed to get through the rest of the agenda, so we now come back to item 3, which is the Succession (Scotland) Bill. I just need to make sure that everyone is comfortable and that I have the right papers in front of me.

We turn to the formal stage 2 proceedings on the bill. I welcome the Minister for Community Safety and Legal Affairs, who is accompanied by Jill Clark, the head of the civil law reform unit; Rosalind Wood, solicitor; and Amanda Macfarlane, parliamentary counsel, all from the Scottish Government.

For the purposes of stage 2, members should have copies of the bill, the marshalled list and the groupings.

Section 1—Effect of divorce, dissolution or annulment on will

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 to 9.

Paul Wheelhouse: I apologise for the delay, convener—I am glad to be here, and to get away from the Justice Committee for a while.

These amendments do a number of things. First, amendments 1, 5 and 6 amend section 1 to ensure that a provision in a will appointing a person's spouse or civil partner as guardian continues to take effect even if the marriage or civil partnership is terminated. We are grateful to the Law Society of Scotland for highlighting the potential for an anomalous situation under the bill in respect of the appointment of guardians.

As we set out in a letter to the committee following the stage 1 evidence sessions, we acknowledge the concerns raised in evidence that, as the appointment of a guardian can be made not only in a will but in separate documentation, there may be a risk of treating guardians differently according to the documentation that has appointed them. For that reason, we concluded that it is not appropriate to apply different outcomes to guardianship provisions that are made in a will as

opposed to those that are made in any other documentation.

Amendments 4 and 9 change the term “failed to survive” in sections 1 and 2 of the bill to ensure that it is clear that what is meant is that the person died before the testator. As the committee is aware from its scrutiny of the bill, the timing of deaths is critical in succession law, as someone must survive to inherit. Equally, sometimes, for another person to inherit, it must be clear that the person on whom their inheritance is conditional has died before the testator. The same may be applicable to other testamentary wishes such as appointments.

Failure to survive does not necessarily mean that a person can be regarded as dying before another person. A person who fails to survive the testator might have died at the same time as them. In some cases, to achieve the policy objectives in the bill it is important that it is clear that a person died before another person. For example, in section 1, if the testator appointed their ex-spouse or ex-civil partner as executor and also made provision that their sibling should be the executor if their spouse or civil partner predeceases them, it is arguably not clear from the section as it stands that the sibling could be appointed, because it is not clear that the ex-spouse or ex-civil partner would be treated as having predeceased.

Amendment 4 will therefore amend section 1 to ensure that a former spouse or civil partner is to be regarded as dying before the testator for the purposes of the will. Amendment 9 will amend section 2 to make it clear that a former spouse or civil partner is to be regarded as dying before the other spouse or civil partner where there is a special destination of property in favour of a spouse or civil partner and the marriage or civil partnership is terminated.

There are other references in the bill to failure to survive and we propose similar amendments to some of those other references. We will come on to discuss those amendments later.

Amendments 2 and 8 are small but nevertheless important amendments that are intended to place beyond doubt that death must occur after the termination of a marriage or civil partnership in order for the presumptions introduced by sections 1 and 2 to apply.

Section 1 provides that wills made in favour of a former spouse or civil partner are effectively revoked by the legal end to the relationship. Section 2 makes equivalent provision for the revocation of special destinations.

It is not the policy intention that the presumption of revocation introduced by sections 1 and 2 of the bill should apply where a marriage or civil partnership is annulled after the death of the

testator. A presumption that the testator intended to sever ties with the former spouse can be drawn only if the testator was aware of the legal separation.

The circumstances in which this could occur are both narrow and unlikely. Nevertheless, we see merit in amending those sections to put beyond doubt that they apply only where the legal termination takes place before the testator dies. That ensures that there is no possibility of the arrangements under a will or special destination being picked apart years after the testator's death.

In its written evidence, the Law Society of Scotland suggested that section 1 should apply where the testator either died domiciled in Scotland or has heritable property in Scotland. In effect, the society wanted section 1 to apply where Scots law of succession currently applies under private international law. At present, section 1 applies only where the testator is domiciled in Scotland.

We agree with the society's view. Under Scots rules of private international law, succession to immoveable estate is governed by *lex situs*—the location where the property is situated. In contrast, succession to moveable property is governed by the domicile of the deceased at death. Scots law of succession will therefore apply where a testator dies domiciled outwith Scotland but owns heritable property in Scotland.

As I said, section 1 as drafted does not provide for that. To remedy the position, amendment 3 will remove the condition at section 1(1)(d), which requires the testator to be domiciled in Scotland. That means that section 1 will apply in accordance with the normal rules of private international law. It will therefore apply where the testator had heritable property in Scotland but died domiciled outwith Scotland. The Law Society of Scotland is content with the approach.

Amendment 7 is a minor amendment that addresses the suggestion made by the Law Society of Scotland in written evidence to the committee that, as it stood, section 2 might not apply in the situation in which property such as business premises is held in the name of a couple and a number of other people, so that a special destination in favour of a former spouse or civil partner would not be revoked in these circumstances.

Generally, we would rely on the provisions of the Interpretation and Legislative Reform (Scotland) Act 2010 to extend the singular to plural. However, we noted that in section 2 we expressly refer to "the survivor or survivors" and do not rely on the 2010 act, so amendment 7 is intended to provide consistency and clarity in the terminology.

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 to 6 moved—[Paul Wheelhouse]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Effect of divorce, dissolution or annulment on special destination

Amendments 7 to 9 moved—[Paul Wheelhouse]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Rectification of will

The Convener: Amendment 10 is grouped with amendments 11, 12, 13, 35, 36 and 37.

Paul Wheelhouse: The draft Scottish Law Commission bill contained a provision at section 27(10)(c) that enabled a sheriff in the sheriffdom where confirmation of the will was obtained to have jurisdiction to consider an application for rectification of a will or to take action to give effect to the will as rectified. The other grounds for jurisdiction in the bill are based on the habitual residence of the testator.

At introduction, an equivalent provision was inadvertently not included in the bill. Shrieval jurisdiction for confirmation hinges on the domicile of the testator, which may in a small number of cases be different from the testator's habitual residence. We therefore consider that the bill should be amended in line with the Scottish Law Commission bill to ensure that the sheriffdom in which confirmation is obtained always has jurisdiction, as it is foreseeable that beneficiaries may be located where confirmation is obtained.

Amendment 10 remedies the oversight and reflects that our policy intention was always to mirror the provisions of the SLC bill in that respect. The amendments to section 14 are simply to alter the corresponding provisions there, so that the drafting structures of the two similar provisions are more aligned.

I move amendment 10.

Amendment 10 agreed to.

Amendments 11 to 13 moved—[Paul Wheelhouse]—and agreed to.

Section 3, as amended, agreed to.

Sections 4 and 5 agreed to.

Section 6—Death before legacy vests: entitlement of issue

The Convener: Amendment 14 is grouped with amendments 15 to 25.

Paul Wheelhouse: There presently exists a common-law rule that if a legatee within a certain class dies after the date of the will, but before the date of vesting, his or her issue take the legacy unless the will provides otherwise. Section 6 of the bill places that common-law rule on a statutory footing with some modification.

One modification that the Scottish Law Commission recommended was that the class of legatee should be confined to direct descendants of the testator. In the course of discussions with the Scottish Law Commission, we came to the conclusion that, as presently drafted, section 6 may not give effect to that intention because, although section 6 clearly applies where there is a legacy to several people, there is nothing to say that all those people require to be direct descendants of the testator.

The amendments in this group are intended to place beyond doubt that section 6 should apply only when the legacy is left to one or more direct descendants. It should not apply when a legacy is given to several people, some of whom are not direct descendants.

During the evidence sessions on the bill, Professor Roddy Paisley raised another issue about this section. He suggested that the section should be amended to change the reference from “names” to “identifies” because, in his view, the provision may not apply if a testator failed to actually name a beneficiary and instead identified them by class—for example, “my son” or “my brother”. We note that, in its stage 1 report, the committee recommended that that suggestion be taken on board.

The amendments also deal with that point as there is no longer a reference to “names” and the provision will clearly apply where a testator identifies a beneficiary, however that is done—for example, by class, by category or by name.

I move amendment 14.

Amendment 14 agreed to.

Amendments 15 to 25 moved—[Paul Wheelhouse]—and agreed to.

Section 6, as amended, agreed to.

Sections 7 and 8 agreed to.

11:45

Section 9—Uncertainty of survivorship treated as failure to survive

The Convener: Amendment 26 is grouped with amendments 27 to 32.

Paul Wheelhouse: Section 9 is another section where the term “failed to survive” is used. The

section deals specifically with what should happen in a common calamity. Amendment 26 ensures that, when a benefit is conferred on a third party on the condition that another person predeceases the testator and that person dies in a common calamity with the testator, they will be treated as having died before the testator, to enable the legacy to pass to the third party.

By ensuring that a legacy can pass to a secondary beneficiary where the testator and the primary beneficiary have died in a common calamity, it is also less likely that in those circumstances the estate will become intestate.

Additionally, in evidence, a number of witnesses have said that the interactions between sections 9 and 10, which deal with survivorship, are not clear. The committee had some sympathy with those concerns and recommended in the stage 1 report that section 10(4) should be amended so that in some circumstances both sections may apply, and that that would avoid an estate falling into intestacy.

I appreciate the committee’s concerns. The rules to deal with survivorship are by their nature quite complex, given the need to take account of a range of different situations and avoid unintended effects. Before turning to my proposed amendments to section 10, it may assist if I set out for the committee what we are trying to achieve through sections 9 and 10.

Section 9 is a modified restatement of the existing general survivorship rule, which states that, when two people die at the same time, for all purposes of succession they will each be treated as failing to survive the other. In effect, they are written out of each other’s estates. For the purposes of succession, the policy intention is that estates should go to the surviving family or beneficiaries.

In contrast, section 10 deals with a narrow and particular set of circumstances, for which the existing law does not provide a satisfactory solution. Those circumstances cover where property is to pass to one member of a group of people depending on the order of death and members of the group are involved in a common calamity. All members of the group are potential beneficiaries and have equal status in the sense that the testator’s intention is that any one of them could benefit from the legacy. In those circumstances the new rule provides that the property will be divided equally among their estates.

Section 10 does not apply if the property is to pass under a will and the testator is part of the common calamity. That is because the general rule is that a beneficiary should survive the testator in order to benefit from a right of

succession under a will. Where the testator is part of the common calamity, the rule in section 9 should apply. It would not be appropriate for other people who have died in the calamity to benefit from the testator's estate. That ensures that any legacies will vest in the estates of living family members or legatees rather than in the estates of deceased beneficiaries who have not survived the testator.

We therefore do not think that it is appropriate to amend section 10(4) so that the rule in section 10 applies when the testator is part of the common calamity, but we accept that there is merit in clarifying the circumstances in which section 10 is to apply. Amendment 30 therefore sets out in full the various scenarios when property may transfer to one member of a group depending on the order of death. In doing so, we hope that this sets out more clearly the different scenarios that were intended to be covered by the Law Commission's "Report on Succession", as set out at paragraph 6.60.

I also propose some other minor amendments to section 10 to make it clear that the rule applies whatever the means by which property is to pass to members of a group. That is to address a separate concern that has been raised that the reference to property passing under a will or obligation might not cover property that passes under trust provisions.

Separately, although I do not accept that sections 9 and 10 will necessarily result in more cases of intestacy, the amendment proposed to section 9 will have the effect of avoiding one of the intestacy scenarios that has been raised. We are therefore confident that we are addressing the concerns that the interaction between the sections is unclear and may result in more estates falling into intestacy.

I move amendment 26.

Amendment 26 agreed to.

Section 9, as amended, agreed to.

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

Amendments 27 to 32 moved—[Paul Wheelhouse]—and agreed to.

Section 10, as amended, agreed to.

Section 11 agreed to.

Section 12—Person forfeiting to be treated as having failed to survive victim

The Convener: We now move on to forfeiture. Amendment 33, in the name of the minister, is grouped with amendment 34.

Paul Wheelhouse: The forfeiture rule is a rule of public policy that, in certain circumstances, precludes a person who has unlawfully killed another from acquiring a benefit in consequence of that killing. Section 12 provides that, in circumstances where a person has forfeited their rights to the estate of the deceased, their beneficial interest in trust property or their title to property by virtue of a special destination, they are to be treated as having failed to survive the deceased, so that the estate can pass to other beneficiaries where appropriate.

I have already outlined the reasons why the term "failed to survive" does not necessarily mean that a person can be regarded as dying before another person. For that reason, amendment 33 amends section 12 to make it clear that, where a person forfeits rights of succession in the estate of the deceased under the forfeiture rule, they are regarded as having died before the victim.

As regards what is forfeited, section 12(1)(a) refers to the

"rights of succession to the estate of the deceased".

In its written evidence on section 12, the trust and succession law sub-committee of the Law Society of Scotland said that it

"agrees with this provision but would point out that legal rights are not technically a right of succession, as classically defined."

The sub-committee suggested

"that the provision is amended to expressly include legal rights within the definition for the purpose of this section."

We accept that there may be an issue here. Section 36(1) of the Succession (Scotland) Act 1964 refers to the "net estate" as meaning the estate that remains after dealing with the debts that have

"priority over legal rights, the prior rights ... and rights of succession,"

the latter being undefined. That definition suggests that a distinction is to be made between "legal rights", "prior rights" and "rights of succession" under the current law.

The intention is that the forfeiture rule applies to any right that a person has to succeed to the estate of an individual who has been unlawfully killed. The amendment will put it beyond doubt that the rights that are forfeited include legal and prior rights. The Latin terms in the first limb of the amendment are more commonly known as "legal rights".

I move amendment 33.

Amendment 33 agreed to.

Amendment 34 moved—[Paul Wheelhouse]—and agreed to.

Section 12, as amended, agreed to.

Section 13 agreed to.

Section 14—Power of sheriff to order sheriff clerk to execute document

Amendments 35 to 37 moved—[Paul Wheelhouse]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 to 19 agreed to.

Section 20—Gifts made in contemplation of death

The Convener: Amendment 38, in the name of the minister, is grouped with amendment 39.

Paul Wheelhouse: 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, the gift is returned to the donor.

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.

Section 20 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.

In evidence, the view was expressed that the words "in contemplation of death" in section 20(2) do not appear to be necessary. The Scottish Government explained to the committee that the wording aimed to make it clear that, although donation mortis causa as a distinct legal entity is abolished, a gift may still be transferred to a donee on the same terms that a donation mortis causa was.

The Scottish Government undertook to reflect further on the drafting of section 20 and has lodged amendments 38 and 39 to address the point. The amendments do not change the effect of section 20.

I move amendment 38.

Amendment 38 agreed to.

Amendment 39 moved—[Paul Wheelhouse]—and agreed to.

Section 20, as amended, agreed to.

Sections 21 to 24 agreed to.

Schedule agreed to.

Sections 25 to 27 agreed to.

Long title agreed to.

The Convener: That completes stage 2 consideration of the Succession (Scotland) Bill. Thank you. That also completes our agenda.

Meeting closed at 11:56.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

Information on non-endorsed print suppliers
Is available here:

www.scottish.parliament.uk/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@scottish.parliament.uk
