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LEGACY 2014
XX COMMONWEALTH GAMES SCOTLAND

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Dear Deborah,

SUCCESSION (SCOTLAND) BILL

Thank you very much for your letter of 8 September in which following our Stage One evidence session, you advise that the Committee have identified a number of additional questions. For ease of reference I have responded to the questions in the order asked.

Section 2

Does the Scottish Government think there is merit in TrustBar's view that the protection for people acquiring property in good faith is unnecessary because property subject to a special destination passes automatically without any need for an executor?

We do not share TrustBar's view that the protection for people acquiring property in good faith in section 2(4) of the Bill is unnecessary. Section 2 gives effect to recommendation 61 of the SLC report. This section re-enacts section 19 of the Family Law (Sc) Act 2006 in relation to marriages and section 124A of the Civil Partnership Act 2004 in relation to civil partnerships repealed by the Schedule to the Bill. The reason for doing so is to have both provisions in the same legislation.

Section 2 provides that special destinations (which are clauses in title deeds dealing with the ownership of property on death) become ineffective when the marriage or civil partnership is terminated. In our view, it is foreseeable that a person could acquire title in good faith and for value from a person who it later transpires has lost their entitlement to that property as a result of divorce, dissolution or annulment.

By way of example, where property subject to a special destination passes automatically to a former spouse, and that spouse sells the property to a third party (who was unaware that the former spouse has lost their entitlement to that property through divorce, dissolution or

annulment) we are of the view that it is necessary to protect that third party, whose title would otherwise be challengeable.

Are there real benefits associated with having a consolidating provision at this stage (re-enacting provision on special destinations) when there is an argument for a more general piece of consolidating legislation at a later stage?

One of the main policy aims of the Bill is to make the law clearer and more consistent. There can be no guarantee about when or if a Bill to amend the fundamental law of succession will be introduced to the Scottish Parliament. For that reason, bringing together relevant provisions where we can, at this time, makes sense and will go some way to aiding the user of the law.

What does the Scottish Government think of the Law Society's point that the current drafting of section 2(1)(a)(ii) may not adequately account for the situation where business premises are owned by a special destination involving four or more people.

The Scottish Government are of the view that section 22 of Interpretation and Legislative Reform Act 2011 can be relied upon so that the singular also includes the plural in this regard. Having said this, we note that the same subsection refers to "survivor and survivors" we will therefore consider whether we would wish to make a minor amendment to the wording in this section to address the Law Society's comment and ensure consistency in drafting.

Sections 3 and 4

Why the Scottish Government didn't consider extending the law relating to rectification of trusts to wills, given the established body of case law found in trust law?

TrustBar have pointed out that under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 there is already a facility to rectify a trust deed and that as there is a body of case law on rectification under section 8 it would make sense to extend the relevant sections of that Act to the rectification of wills.

We are of the view, for the following reasons, that these provisions require to be standalone in the current Bill rather than as an amendment to the 1985 Act.

In the recent Supreme Court case of *Marley v Rawlings* 2014 UKSC 51, Lord Hodge made some interesting observations as to how the case may have been dealt with under Scots law, if it had applied. He described that the remedy of rectification of legal documents was put on a statutory footing in Scotland in the 1985 Act, implementing an earlier report of the SLC. Deliberately, however, wills were excluded, on the basis that consideration of the appropriate remedy would be better in a project on succession.

We agree with this position. The circumstances in which wills are to be capable of being rectified are narrower than the circumstances in which other documents may be rectified under section 8 of the 1985 Act. Under section 8(1)(b), a document may be rectified if it does not express "the intention of the grantor" whereas a will is only to be capable of being rectified if it does not express "the instructions" given by the testator to the person drafting the will. It is only the instructions which are relevant (not any other intention which a disappointed beneficiary may believe to have been missed out of the instructions).

Finally we consider it is more helpful for the reader if the provisions on rectification of wills are located in the Succession Bill with other similar provisions, particularly given that the sections on rectification cross-refer to another section of the Succession Bill (section 19).

Whether the Scottish Government is satisfied that the Bill would provide protection to third parties who rely on a will which is subsequently rectified?

A beneficiary under the will as executed is obliged under the law of unjustified enrichment to restore any bequest (or the value of the bequest) to the executor if he or she is not a beneficiary under the will as rectified *(please see page 161 of the SLC Report on Succession No. 215).* The aim of the measure is to ensure that the rightful beneficiary receives the property that they were entitled to and the need to protect that person's rights outweighs any property rights of the beneficiary who was not entitled to receive the bequest.

TrustBar submit that section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 gives protection to third parties (a court may only rectify a will where the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification) and no similar protection exists under sections 3 and 4 of the Bill.

We are of the view that the Bill provides adequate protection to third parties who rely on a will which is subsequently rectified. Section 3 expressly protects a third party who derives title from a beneficiary under a will that is subsequently rectified. In addition to this, rectification is at the discretion of the court who will have regard to the rights of all those affected.

What is the rationale for selecting a testator's habitual residence instead of domicile as the criteria to determine which local sheriff court can hear an application to rectify a will? Does the Scottish Government think there is any merit in an alternative approach based on domicile?

This is consistent with the SLC Bill's use of the term "habitual residence".

At the date of a testator's death, his or her domicile may have been in one particular sheriffdom although he or she was habitually resident in another sheriffdom. In some cases, it may be more difficult to establish a testator's domicile than the sheriffdom in which he or she was habitually resident.

The use of the term "habitual residence" rather than "testator's domicile" was to avoid any uncertainty which may be created where the sheriffdom in which the testator was "domiciled" before death is uncertain as a result of their having been based in a number of different care homes or hospital at the time of death.

For the reasons above, we are not of the view that an alternative approach based on domicile should be taken in the Bill.

Additionally, this approach is consistent with that taken in the Courts Reform (Scotland) Act 2014, section 43 of which provides that jurisdiction will be determined with reference to residence.

Section 10

What is the Scottish Government's view on the criticisms the Law Society and TrustBar make of section 10(4) of the Bill?

The purpose of subsection 10(4) is to achieve the desired policy in a situation where the testator dies in the common calamity with one or more other people. For example, 'A' writes a will leaving property to 'B' whom failing 'C' but all three (A, B and C) then die in a common calamity. The policy intention in that case is that each deceased person is to be treated as having failed to survive the other. The property is not to be divided equally among their estates as would be the case in the absence of subsection (4). There are circumstances in which the rule in section 10 is to apply and which are not affected by subsection (4). An example is the situation where A writes a will leaving property to the survivor of B and C, A then dies and B and C die later in a common calamity. In that example, the testator, A, did not die at the same time as B and C so the rule in section 10 applies. Subsection (4) does not affect this. Another example is the life assurance policy on two lives where a payment is to be made to the estate of the first deceased. There is no testator in that case so subsection (4) does not affect this.

Sections 9 -11

Whether the Scottish Government thinks the use of the word 'uncertain' in the context of sections 9-11 of the Bill is likely to lead to unnecessary litigation?

The term "uncertain" is not a defined term in the Bill and is therefore given its ordinary meaning of "not known or not definite". Sections 9 and 10 will therefore apply in circumstances where people die simultaneously or in circumstances in which the order of death is not known or is not definite. The term "uncertain" was used in the Law Commission Bill. It reflects section 31 of the Succession (Scotland) Act 1964 on the same issue and as far as we are aware there has not been any litigation around its meaning.

In a common calamity situation, it is foreseeable that persons may wish to submit evidence to prove an order of death to secure their inheritance. If the executor is persuaded by this evidence and agrees that the order of death is known and definite, then they may distribute the estate accordingly without regard to sections 9 and 10. If however they are not persuaded the order of death is known and definite, the matter might be litigated. Such litigation would however arise from disagreement on the facts, not from disagreement on the meaning of the word uncertain. In the case of Lamb v Lord Advocate, 1976 SC 110 it was held that the timing of two deaths as against each other is "uncertain" if it cannot be established on the normal civil standard of proof when each death occurred relative to the other.

Section 13

What is the rational for having section 13 (protecting people who acquire property from forfeited estates) as well as section 19 of the Bill (which provides a protection for people who acquire property in a range of situations)?

Section 13 of the Bill implements recommendation 63 of the SLC report, specifically in relation to forfeiture. Section 19, on the other hand, is a catch all. Sections 13 - and also 2(4) are intended to provide additional clarity that a third party will be protected in the specific circumstances to which sections 13 and 2 refer and are intended to place the matter beyond doubt.

Section 14

Whether it would be preferable to use the test of domicile rather than habitual residence of the deceased to determine which sheriff court should hear forfeiture court actions?

As before, the use of the term "habitual residence" rather than "testator's domicile" was to avoid any uncertainty which may be created where the sheriffdom in which the testator was "domiciled" before death is unclear as a result of their having been based in a number of different care homes or hospital at the time of death.

What does the Scottish Government make of TrustBar's view that the powers in section 14 to order a sheriff clerk to execute a document either already exist or are unnecessary?

The SLC Report pre-dates the Court Reform (Scotland) Act 2014, section 87 of which provides sheriffs with a power to order a sheriff clerk to execute a deed relating to heritage and understandably does not take account of such supervening legislation. Having said this, in considering section 87 of the 2014 Act, it is clear that these provisions only cover heritage and as section relates to heritable and moveable property there would appear to be the need to set out the sheriff's remedial powers under this section. We also consider that placing the relevant succession legislation in this Bill contributes to making the law, clear and easy to understand.

Section 15

Does the Scottish Government think there is any merit in the Law Society's view which queries whether the Scottish Parliament has the legislative competence to amend the United Kingdom Forfeiture Act and the desirable scope of section 15?

It is within competence to amend a UK Act as a matter of Scots law where the amendment relates to a matter that is within the competence of the Scottish Parliament. The relevant provisions in the Forfeiture Act that are being amended do not relate to reserved matters but are concerned with the law of succession. The amendment will leave the law in the rest of the UK unaffected.

The private international law which determines whose law of forfeiture applies in a given case will answer the question as to whether the amended Scots law here applies or not. The Bill leaves all of this intact: therefore section 2 of the 1982 Act will apply in relation to a Scottish forfeiture, as determined in accordance with those rules.

Section 18

What does the Scottish Government think of TrustBar's view that the protection intended by section 18 of the Bill is already provided by section 32 of the Trusts (Scotland) Act 1921? If the Scottish Government agrees, should section 18 be drafted in a way that is consistent with section 32 and allows section 32 to remain the principal provision?

Section 18 of the Bill implements recommendation 71 of the SLC report. Section 18 directs the court that a trustee/executor will not be liable for errors in distribution in certain circumstances. Section 32 of the 1921 Act merely affords the court discretion. We therefore

see no issue with section 18 of the Bill, the two provisions are not mutually exclusive, as it does not prevent the court from exercising their discretion under section 32 of the 1921 Act. For that reason there is no need to provide in section 18 that it is without prejudice to section 32 of the Act.

STAGE 1 EVIDENCE SESSION

When we appeared before the Committee on 8 September, there were additional issues on which we undertook to write to the Committee or consider further. We thought it may be helpful to include that information in this letter – we hope this is in order.

How long would the whole process take for writing to the court to set up a new guardianship order, in the event that an existing guardianship involving a former/ex-spouse becomes void?

We are still making enquiries about this point but the Committee will have noted the evidence of John Kerrigan on 15 September when he suggested that in an undefended case the timescale may be 3 to 4 months and in a defended case it may take more than 18 months. He also estimated that in the latter case this may result in costs of around £6 000.

This issue will arise where a step parent as opposed to a natural parent has been named as guardian. Where 2 people have divorced or had their civil partnership dissolved we think it would be wrong to presume that they would have wished a step-parent to continue to be the guardian. If they do there is of course the facility to make such express provision.

In the absence of express provision, we remain of the view that it is appropriate for the court to take a view in these rare circumstances in order to protect the position of the child or children.

TrustBar's proposal that the time limit for seeking rectification of a will be extended.

The Committee will be aware that we have written to both TrustBar and the Law Society of Scotland in connection with their written evidence to the Committee and we can confirm that we have set out our concerns that the suggestion made by TrustBar to amend the 6-month period set out at section 4(1) (Rectifying a will – supplementary) to a period of 2 years from death would not meet our objective of ensuring that applications are made within a reasonable time. Beneficiaries and interested parties will not be able to rely on the will as executed until the time limit for raising an application for rectification has expired.

The Law Society's proposal that section 6 of the bill should be extended to cover stepchildren

We remain of the view that section 6 should apply to adopted children but not stepchildren. This is on the basis that adopted children lose the right on adoption to claim any rights against their natural parents. The same is not true for stepchildren, and including them in the provision would in effect give them two bites of the cherry.

In respect of the question around whether or not section 6 needs to be amended to make it clear that the definition of issue includes adopted children but excludes step children, we have reflected on the committee comments but remain of the view that the section is clear and that issue includes adopted but not step-children.

We are still considering the suggestion made by TrustBar in relation to the survivorship provisions (sections 9 and 10) about how to avoid property falling to the crown as ultimus haeras.

I hope this information is of some help to the Committee and we will write further to the committee on these issues in due course.

Yours sincerely

J Clark.

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