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# Death, Divorce and Defective Drafting

## A. INTRODUCTION

The law of survivorship destinations is notoriously complex and ill-understood. In 1984, Professor Gretton stated that it was “33 years since Lord President Cooper denounced destinations in titles to heritage as anachronistic and productive of litigation (*Hay’s Tr v Hay’s Trs* 1951 SLT 170). Conveyancers disregarded this advice. The litigation has continued.”<sup>1</sup> A further 33 years later, litigation is still being generated on this topic as shown by the recent cases of *Povey v Povey’s Executor Nominated*,<sup>2</sup> *Hill v Hill*<sup>3</sup> and *Machin’s Trustees (Chalmers) v Machin*.<sup>4</sup> This note will not consider these cases, which have been discussed elsewhere.<sup>5</sup> Instead, I will analyse recent legislative provisions concerning survivorship destinations in the Succession (Scotland) Act 2016, the drafting of which has unintentionally contributed to the complexity of this area of law.

## B. REFORMING THE LAW OF SUCCESSION

To remind ourselves briefly of this difficult area of law, it is useful to summarise what a survivorship destination is before considering the way in which the law has been recently amended. A destination is a provision which regulates what happens to a particular right in the event of the death of the grantee. A special destination is one which is contained in the title to property. A survivorship destination is a type of special destination, which provides that title is held by “A and B and the survivor”. This is co-ownership of property, with each *pro indiviso* share being subject to a destination in favour of the other co-owner. In other words, one half is owned by A whom failing B and the other is owned by B whom failing A. The result of this destination is that when one co-owner dies, the deceased’s share transfers

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<sup>1</sup> G Gretton, “Death and Debt” 1984 SLT (News) 299.

<sup>2</sup> 2014 SLT 643.

<sup>3</sup> [2016] CSOH 10.

<sup>4</sup> [2017] SC GLA 29 (Sh Ct Glasgow).

<sup>5</sup> See J Kerrigan, “Survivorship Destinations – the Debate Continues” 2014 SLT (News) 175; K G C Reid and G L Gretton, *Conveyancing 2014* (2015) pp169-174; G Junor, “Surviving Special Destinations: Hill v Hill” 2016 84(1) SLG 14; K G C Reid and G L Gretton, *Conveyancing 2016* (2017) pp203-210; J Kerrigan, “Survivorship Destinations – Yet More Developments” 2017 SLT (News) 125.

automatically to the surviving co-owner without the need for further conveyancing.<sup>6</sup> A survivorship destination is commonly inserted into the title of property when it is purchased by spouses or civil partners. In 2009, the Scottish Law Commission noted that approximately 42% of homes in Scotland are owned by spouses or civil partners, and about 75% of these titles include a survivorship destination,<sup>7</sup> although it is possible these figures underestimate the incidence of such destinations.<sup>8</sup>

The law of survivorship destinations has recently been amended by the Succession (Scotland) Act 2016. The 2016 Act was the first piece of primary legislation wholly dedicated to succession since 1964. Despite much of the Scottish law of succession being badly in need of reform and the numerous Scottish Law Commission publications on the topic, significant reform has not been forthcoming so far.<sup>9</sup> Before undertaking wide-ranging changes, the 2016 Act was intended to implement some reforms on the “technical” aspects of succession in order to make the “law on succession fairer, clearer and more consistent.”<sup>10</sup> The aim of the Bill stated in accompanying Policy Memorandum was “addressing anomalies within the current legislative framework rather than the more comprehensive and controversial proposals”<sup>11</sup> which would, presumably, follow in due course.<sup>12</sup>

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<sup>6</sup> G Gretton, “Destinations” (1989) 34 JLSS 299 at p299. For a historical and comparative perspective on survivorship destinations see G L Gretton, “Fideicommissary Substitutions: Scots Law in Historical and Comparative Perspective” in K G C Reid, R Zimmermann and M J de Waal (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007).

<sup>7</sup> Report on *Succession* (Scot Law Com No 215, 2009) para 2.19.

<sup>8</sup> These figures do not include ownership by parties with different surnames and the sample size for the survey was fewer than 140 properties: see Report on *Succession* (Scot Law Com No 215, 2009) para 2.10, n20.

<sup>9</sup> Memorandum on *Intestate Succession and Legal Rights* (Scot Law Com Memo 69, 1986); Memorandum on *Some Miscellaneous Topics in the Law of Succession* (Scot Law Com Memo 71, 1986); Report on *Succession* (Scot Law Com No 124, 1990); Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007); Report on *Succession* (Scot Law Com No 215, 2009). One recommendation of the 1990 Report was implemented by section 19 of the Family Law (Scotland) Act 2006 discussed further below.

<sup>10</sup> Scottish Government, Policy Memorandum to the Succession (Scotland) Bill (Jun 2015) para 2. Available here:

[http://www.parliament.scot/S4\\_Bills/Succession%20\(Scotland\)%20Bill/b75s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd-pm.pdf) (last accessed 19 Feb 2018).

<sup>11</sup> *Ibid* para 6.

<sup>12</sup> There has, however, been no mention of succession in Scottish Government, *A Nation with Ambition: The Government’s Programme for Scotland 2017-18* (Sep 2017). The Scottish Law Commission proposals have been subjected to criticism: see D Reid, “From the cradle to the grave: politics, families and inheritance law (2008) 12(3) Edin LR 391; D Reid, “Reform of the law of succession: inheritance rights of children” (2010) 14(2) Edin LR 318 and R

One of these technical aspects was the effect of the termination of a marriage or civil partnership through divorce, dissolution or annulment on wills and survivorship destinations. Before the 2016 Act, termination of a marriage or civil partnership did not revoke provisions contained in a pre-existing will in favour of the (now) ex-spouse or ex-civil partner unless it was clear that the provisions were conditional on the legatee remaining a spouse or civil partner.<sup>13</sup> The Scottish Law Commission recommended that on termination of a marriage or civil partnership, any testamentary provisions conferring a benefit in favour of an ex-spouse or ex-civil partner should be revoked unless the will provided otherwise.<sup>14</sup> This proposal obtained support during the Scottish Government's consultation on the issue and section 1 of the 2016 Act implements the recommendation by treating the ex-spouse or ex-civil partner as having died before (predeceasing) the testator for the purposes of the will.<sup>15</sup>

Survivorship destinations were already subject to a legislative provision to the effect that they were revoked on divorce or annulment of marriage contained in section 19 of the Family Law (Scotland) Act 2006 and this was extended to civil partnership by section 124A of the Civil Partnership Act 2004. The Scottish Law Commission recommended these sections should be repealed and re-enacted to ensure that both provisions were contained in the same place.<sup>16</sup> This recommendation was then implemented in section 2 of the 2016 Act.

### **C. SURVIVORSHIP DESTINATIONS AND DIVORCE**

The (now repealed) section 19 of the Family Law (Scotland) Act 2006,<sup>17</sup> was passed to avoid two issues which can arise in relation to survivorship destinations in the event of subsequent termination of a marriage. The first issue is that the spouses divorce and one ex-spouse remains in the family home but no conveyancing takes place. Before the 2006 Act, on death of one of the parties, the deceased's share of ownership of the family home would then automatically transfer to the surviving ex-spouse, which was unlikely to be what the deceased

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Kerridge, "A View from England" (2010) 14(2) Edin LR 323. The Scottish Government consulted on the SLC's proposals for intestacy, legal rights and cohabitants in June 2015 but no further action was taken: see Scottish Government, Consultation on the Law of Succession (Jun 2015).

<sup>13</sup> *Couper's JF v Valentine* 1976 SLT 83.

<sup>14</sup> Report on *Succession* (Scot Law Com No 215, 2009), para 6.17.

<sup>15</sup> Succession (Scotland) Act 2016, section 1(1)-(2).

<sup>16</sup> Report on *Succession* (Scot Law Com No 215, 2009) para 6.66.

<sup>17</sup> The effect of these provisions was extended to civil partnership by section 124A of the Civil Partnership Act 2004.

would have intended. This issue was compounded by the fact that destinations are difficult to evacuate.<sup>18</sup>

The second “trap” is delightfully described by Prof Gretton:

“Suppose that Mr and Mrs Smith own a house in joint names with a survivorship clause. Mr Smith goes on the razzle-dazzle and leaves home. His guilty conscience makes him agree to sign over to Mrs Smith his share in the house, where Mrs Smith is going to continue living with the screaming children and Jimmy Young on the radio. So the court department, who have the file, send a memo down to the conveyancing department to draw up a disposition of Mr Smith’s one-half share. It is done, and duly recorded. The result is that Mrs Smith is the sole owner. All well? Alas, alas. Half of Mrs Smith’s title is still subject to an unevacuated destination in favour of that scum-of-the-earth, Mr Smith. When she dies seven years later, that half reverts to Mr Smith. At which point the lawyer involved had better change his name, or emigrate.”<sup>19</sup>

With impeccable timing, this trap was then demonstrated seven years after Professor Gretton’s description in the case of *Gardner’s Executors v Raeburn*.<sup>20</sup>

To address this, section 19 of the Family Law (Scotland) Act 2006 therefore provided:<sup>21</sup>

**19 Special Destinations: revocation on divorce or annulment**

(1) Subsections (2) and (3) apply where –

(a) heritable property is held in the name of –

- (i) a person (“A”) and A’s spouse (“B”) and the survivor of them;
- (ii) A, B and another person and the survivor or survivors of them;
- (iii) A with a special destination on A’s death, in favour of B;

(b) A and B’s marriage is terminated by divorce or annulment; and

(c) after the divorce or annulment A dies.

(2) In relation to the succession to A’s heritable property (or part of it) under the destination, *B shall be deemed to have failed to survive A*.

This section therefore effectively evacuated the destination by creating the fiction that the surviving ex-spouse had not survived the deceased. This fiction is the same as the one used

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<sup>18</sup> See G L Gretton and K G C Reid, *Conveyancing* (4<sup>th</sup> edn, 2011) ch 26 and most recently *Hill v Hill* [2016] CSOH 10.

<sup>19</sup> G Gretton, “Destinations” (1989) 34 JLSS 299 at 302-303.

<sup>20</sup> 1996 SLT 745.

<sup>21</sup> Emphasis added.

for common calamity.<sup>22</sup> As a result, the deceased's *pro indiviso* share would not pass to the surviving ex-spouse and the two problems highlighted above are avoided.<sup>23</sup> The section went on to also provide for protection of third party acquirers who are in good faith and give value, in the event they acquire from the surviving ex-spouse without knowledge of the divorce.<sup>24</sup>

#### **D. SECTION 2 OF THE SUCCESSION (SCOTLAND) ACT 2016**

It was intended that section 19 of the Family Law (Scotland) 2006 and the corresponding section 124A of the Civil Partnership Act 2004 were repealed and replaced, with a minor expansion of the new section to also apply to moveable property. Section 2 of the Succession (Scotland) Act 2016 reads:<sup>25</sup>

##### **2 Effect of Divorce, Dissolution or Annulment on Special Destination**

(1) This section applies where -

(a) property is held in the name of –

(i) a person (“A”) and A’s spouse or civil partner (“B”) and the survivor of them,

(ii) A, B and another person or other persons and the survivor or survivors of them,

(iii) A with a special destination, on A’s death, in favour of B,

(b) A and B’s marriage or civil partnership is terminated, and

(c) A then dies.

(2) In relation to the succession to the property mentioned in subsection (1)(a) on A’s death, *B is to be treated as having died before A.*

Through emphasising the final clause in both section 19(2) of the 2006 Act and section 2(2) of the 2016 Act, I wish to highlight the change of wording between the two provisions. There is a crucial difference between the surviving ex-spouse or ex-civil partner “failing to survive” and “having died before” the deceased. This difference is due to the nature of survivorship destinations. Often in legislative drafting, just like in TV dramas, when the drafter wants to

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<sup>22</sup> The provisions are now contained in the Succession (Scotland) Act 2016, section 9.

<sup>23</sup> The destination could provide that it will take effect regardless of termination of the marriage, Family Law (Scotland) Act 2006, section 19(4) (now repealed).

<sup>24</sup> Family Law (Scotland) Act 2006, section 19(4) (now repealed).

<sup>25</sup> Emphasis added. The destination can expressly provide that succession is to be unaffected by the termination of the marriage or civil partnership, Succession (Scotland) Act 2016, section 2(3).

get rid of someone, she just kills him off, or in other words, makes him predecease.<sup>26</sup> This is what section 2(2) of the 2016 Act does. The effect of this, however, is the opposite of what is intended. The intention of the section is that A's half share does not transfer automatically to B. However, where there is a survivorship destination, and B is treated as *having died before* A, B's half share of the property will have automatically transferred to A before A's death. The result of this literal reading of section 2 is that, when applying the section to ex-spouses or ex-civil partners holding property subject to a survivorship destination, on A's death, the entire property will be owned by A and distributed according to his or her will, or the rules on intestacy. B, the surviving ex-spouse or ex-civil partner, will have been unwittingly deprived of his or her *pro indiviso* share. This interpretation is supported by the use of the words "in relation to the succession to the property" at the beginning of section 2(2), rather than "in relation to the succession to A's property", which seems to suggest the sub-section governs the whole property and not just A's *pro indiviso* share.<sup>27</sup>

There is a further complication in that the section does not specify whether B is deemed to have died before or after the end of the marriage. If B is deemed to have died after the end of the marriage, B would be the first to die – B would become, using the language of the sub-section, A. Then the effect of the section is circular and provides that the entire property goes to A and also goes to B. If B is deemed to have died before the end of the marriage, this issue does not arise.<sup>28</sup>

A similar and connected error, although one which will be far less commonly encountered, is contained in section 12 of the Succession (Scotland) Act 2016 regarding forfeiture. Section 12(3)(c) states the offender, this being the person who unlawfully killed the deceased, is to be treated as having died before the deceased in relation to title to property which, but for the forfeiture, the offender would have acquired by virtue of a special destination.<sup>29</sup> Applying this section where the offender and the deceased held property subject to a survivorship destination, it could be interpreted to mean the deceased owned the entire property on death and the offender had been deprived of his or her share.<sup>30</sup> These errors

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<sup>26</sup> See, for example, Succession (Scotland) Act 2016, section 1(2) regarding the effect of termination of a marriage or civil partnership on a will, discussed above.

<sup>27</sup> Although, this phrase is rather inconsistent with section 2(1)(ii) of the Succession (Scotland) Act 2016 which applies where property is held by A, B and another person and the survivor or survivors.

<sup>28</sup> My thanks to Professor Gretton for bringing this further complication to my attention.

<sup>29</sup> Succession (Scotland) Act 2016, section 12(1)(c) and (3)(c).

<sup>30</sup> The argument in relation to this section is weaker as it expressly governs the deceased's original *pro indiviso* share unlike section 2.

have a common source, namely the amendments to the Succession (Scotland) Bill at Stage 2 by Paul Wheelhouse, then Minister for Community Safety and Legal Affairs. The Minister proposed amendments to the Bill's original use of "failed to survive" in these sections in order to "ensure that it is clear that what is meant is that the person died before the testator."<sup>31</sup> Although aware of the difference between the two phrases "failed to survive" and "having died before", the Minister did not appreciate the effect these amendments would have with regard to survivorship destinations.

These errors do not appear to have been noticed by those scrutinising the Succession (Scotland) Bill. In relation to section 2, a contributing factor may have been that the section was deemed merely to be a re-enactment of an existing rule and therefore not worthy of detailed attention. Further, the Bill and its amendments were passed at speed using the new parliamentary process designed to implement Scottish Law Commission reports and subjected to limited scrutiny by the Delegated Powers and Law Reform Committee.<sup>32</sup> If these sections ever became the subject of a court action, it is possible that they would be interpreted in light of the underlying intention rather than the literal wording, although little can be taken for granted in the law of survivorship destinations.

### **E. REMEDYING DEFECTIVE DRAFTING**

What can be done in the event of defective drafting? Fortunately, in this case, section 30 of the Succession (Scotland) Act 2016 contains a provision which allows the Scottish Ministers to amend the Act by regulations. Such regulations would be subject to the affirmative procedure. A regulation would have to replace the wording "B is to be treated as having died before A" in section 2(2) with the previous "B shall be deemed to have failed to survive A." Changing "in relation to the succession to the property" to "in relation to the succession to A's property" would be recommended. Section 12(3) would also have to be amended so that the offender is deemed to have "failed to survive" the deceased in relation to the title to property held subject to a survivorship destination. Section 30 is a so-called "Henry VIII clause". These clauses have become controversial during the debates on Brexit and the Great

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<sup>31</sup> Delegated Powers and Law Reform Committee, Official Report of Succession (Scotland) Bill Stage 2 (8 Dec 2015) col 14.

<sup>32</sup> For background on this process, see: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59039.aspx> (last accessed 19 Feb 2018). The first piece of legislation to use this process was the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.



Repeal Bill.<sup>33</sup> However, the possibility of easily amending these sections of the 2016 Act provides a demonstration of the value of such clauses for correcting drafting errors which are discovered after an act has come into force.

## F. CONCLUSION

Despite the decades of academic discussion and case law which have continued to expose the complexities of the law of survivorship destinations, the enthusiasm of solicitors for using this institution which seems to cause more problems than it solves has not waned.

Nevertheless, it is highly undesirable that recent legislative provisions, the aim of which was to address anomalies, have merely added further anomalies to this already perplexing area of law. It is hoped that these mistakes will be remedied and the lesson will be learned particularly in relation to the drafting of the next succession bill.

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<sup>33</sup> See, for example, J Grogan, “Rights for the chop: how a Henry VIII clause in the Great Repeal Bill will undermine democracy” London School of Economics Brexit Blog (30 Nov 2016) available here: <http://blogs.lse.ac.uk/brexit/2016/11/30/rights-for-the-chop-how-a-henry-viii-clause-in-the-great-repeal-bill-will-undermine-democracy/> (last accessed 19 Feb 2018).