

# Judicial Factors

## Consultation

August 2019

## CONSULTATION ON JUDICIAL FACTORS

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## Ministerial Foreword

In August 2013 the Scottish Law Commission (“the Commission”) published their Report on Judicial Factors. It contains recommendations which would provide for a new regime to bring clarity, accessibility and efficiency to an important but outmoded area of the law.

A Judicial Factor is a person appointed by the court to gather, hold, safeguard and administer property which is not being properly managed. The existing legislation on Judicial Factors dates back to 1849.

Although the volume of appointments of judicial factors are relatively rare, at around 12 a year, they have an important role to play. Examples of appointments are where there has been a breach of professional practice in a solicitors’ firm and the firm liabilities exceed, or appear likely to exceed, its assets; where a partnership is in dispute or where those running a charity appear to have been running it inappropriately.

This consultation seeks views on the draft Bill and some of the recommendations made by the Commission.

We are also asking in Part 2 of the consultation for views on the current procedure for the appointment of judicial factors in the case of missing persons. This picks up on the commitment by the Scottish Government to review the administrative options for handling missing person’s estates from the National Missing Persons Framework of Scotland implementation plan. The appointment of a judicial factor over a missing person’s estate would help conserve and protect the estate until their return or until they are declared dead. We want to make the appointment process as accessible as possible for family members.

In addition, Part 3 of the consultation seeks views on procedural issues in safeguarding children’s property under the Children Scotland Act 1995.

I am pleased therefore to publish this consultation paper seeking your views on the Commission’s recommendations in order to modernise Judicial Factors.



A handwritten signature in black ink, appearing to read 'Ash Denham' in a cursive style.

**Ash Denham**  
**Minister for Community Safety**

## PART 1

### Introduction

1.1 The purpose of this consultation is to seek views on some of the recommendations contained in the Scottish Law Commission's Report on Judicial Factors<sup>1</sup> and the corresponding content of the draft Bill contained in that Report.

1.2 In addition views are sought on the approach to be taken on the estates of missing people and specific points to improve the safeguarding of children's property under the Children (Scotland) Act 1995.

1.3 The Report on Judicial Factors was published in 2013 by the Scottish Law Commission ("the Commission") following a Discussion Paper of the same title in 2010. It includes a proposed draft Bill (the draft Bill) on the issue, which is included as **Annex A** with some minor changes to bring it up to date. As well as changes to reflect the outcome of this consultation some further minor changes to the draft Bill are likely.

1.4 The Report contained 113 recommendations and the draft Bill 61 sections and 3 schedules.

### Background

1.5 A judicial factor is an officer appointed by the court, supervised by the Accountant of Court, for the purpose of holding, managing, administering and protecting the property of another where the need arises.

1.6 A judicial factor can be appointed in many different situations. A common example today is those appointed at the instance of the Law Society of Scotland for firms of solicitors where there has been a breach of professional practice and the firm's liabilities exceed, or appear likely to exceed, its assets. Other examples include those appointed where a partnership is in dispute or where those running a charity appear to have been managing it inappropriately. **Annex C** includes an extract from the Scottish Courts and Tribunals Service website which describes the different types of judicial factor appointments and their prevalence.

1.7 The office of judicial factor has a long history in Scots law and there is a continuing need for capable administrators to be appointed to manage the property of those who cannot, should not or will not manage it properly themselves.

1.8 Although there is such a continuing need, judicial factor is now regarded by those who use it as a cumbersome procedure, sometimes involving disproportionate expense, which is no longer fit for purpose. Since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to the details of the procedure.

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<sup>1</sup> The Commission's Report, draft Bill and Discussion Paper can be found at: <http://www.scotlawcom.gov.uk/publications/>

1.9 Furthermore, some powers of judicial factors are to be found in legislation relating to trusts. In practice, it can be difficult for third parties dealing with judicial factors, and the judicial factors themselves, to know what such officers are or are not entitled to do.

1.10 The draft Bill sets out a comprehensive set of provisions governing all aspects of judicial factories, including appointment, powers, duties, remuneration, termination and the role of the Accountant of Court in relation to judicial factors. It also sweeps away the outmoded 19th century legislation.

1.11 The Scottish Government agree with many of the recommendations contained in the Report and where we have not provided comments in this consultation then subject to the result of the consultation, the Government's intention would be to implement the Commission's policy intentions. There are however some recommendations in the Report that we would like to test further and these are covered in Part 4.

1.12 In addition, there are some new and additional points covered by this consultation as set out at Part 2 and 3 of this paper. Note any resultant measures are yet to be reflected in the draft Bill.

1.13 The first is the importance of ensuring that appropriate measures are in place so that the estates of missing people can be properly managed. The second point relates to the Children (Scotland) Act 1995 and proposals to improve and assist the Accountant of Court in administration in safeguarding children's property.

### **Recommendations not being tested further**

1.14 As already stated, the intention of the draft Bill is to update and modernise existing legislation and it sets out a comprehensive set of provisions governing all aspects of judicial factories, including appointment, powers, duties, remuneration and termination as well as the role of the Accountant of Court in relation to judicial factors.

### **Chapter 2 of the SLC Report**

1.15 Chapter 2 of the Report examines the existing law as it relates to Judicial Factors. As already mentioned the office of Judicial Factor is one long established in Scots Law. As legislation has developed there has in some cases been no express revocation of some earlier legislation and we agree with the Commission that the legislative landscape could bear some tidying up. We therefore agree with recommendation 1 that the Acts of Sederunt of 31 July 1690, 25 December 1708, 22 November 1711, 31 July 1717 and 13 February 1730 be expressly revoked. This is provided for in the draft Bill at schedule 3, Part 2.

1.16 The second recommendation contained in Chapter 2 is that the now consolidated Bankruptcy legislation be amended to ensure that property held by a person as a Judicial Factor will not vest in the trustee in sequestration. While this may be the position already, we agree with the Commission that providing for this

would be a sensible clarification of a point of principle. Schedule 2, at paragraph 9, gives effect to this change.

### Chapter 3 of the SLC Report

1.17 Chapter 3 makes a series of recommendations about the process of appointment.

1.18 On the basis that the current method of bringing the matter before the court – the petition process – operates well and no concerns were raised by respondents to the Scottish Law Commission discussion paper about this issue, we are content with recommendation 3 that applications for the appointment of a Judicial Factor should continue to be made in this way and section 1(1) of the draft Bill gives effect to this recommendation.

1.19 In their report the Commission highlights that the Report of the Scottish Civil Courts Review by Lord Gill could bring an end to the petition procedure in the Court of Session and this could have consequences to judicial factors. No such procedural changes have been made to date. However, this is still under consideration.

1.20 The Commission also highlights the anomalous position whereby a Judicial Factor may be appointed in the course of other proceedings in the Court of Session but not in the Sheriff Court. Their view was that the jurisdiction of the Court of Session and the Sheriff Court on this matter should be generally concurrent and they therefore recommended that the discretion to appoint a Judicial Factor in the course of other proceedings should be extended to the Sheriff Court. Section 3 of the draft Bill gives effect to this recommendation with which we agree.

1.21 The Commission are of the view that the facility to appoint an interim Judicial Factor, particularly where speed of action is important, was both sensible and desirable. They therefore recommend that such appointments should remain competent and that they should be kept under review by the Accountant of Court. Again we agree with these recommendations as given effect to by sections 2(1) and 2(4) of the draft Bill.

1.22 The Commission also considered whether all of the powers available to a permanent appointment should be made available to an interim factor. They thought that generally speaking they should be, but that the courts should have the ability to limit these as they consider appropriate. Recommendation 11 gives effect to this policy and we agree that it is a sensible and measured approach.

1.23 Recommendations 12 and 13 deal with intimation and interest. The Commission recommends that a petition must be intimated to anyone with an interest and also recommends that the definition of 'interest' should be sufficiently wide as to deal with circumstances where potentially a person may not have an interest in the property per se, if the courts consider it appropriate. We agree with these recommendations.

1.24 The Commission examined the eligibility criteria for appointment as a Judicial Factor and concluded the current position should continue - any natural person of full legal capacity considered by the court to be a suitable person is eligible for appointment. A person may be eligible for appointment even if domiciled outside of Scotland and if such a person is appointed, they are deemed to prorogate the jurisdiction of the Scottish courts.

1.25 Chapter 3 also includes a short discussion about the reasons for a Judicial Factor being appointed. The Commission considered various developments in the law which have essentially reduced the grounds for appointment of a Judicial Factor but they concluded the essential rationale remains the same and recommended:-

“That the grounds for the appointment of a judicial factor should be that there is property which requires to be managed properly and:

- (a) that it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it; or
- (b) that there would otherwise be benefit in having it managed by a judicial factor.”

1.26 The final set of recommendations contained in Chapter 3 which we accept without further testing relates to the relationship between the appointment of a Judicial Factor and the extent to which they have control over the property they have been appointed to manage.

1.27 The Commission carried out a detailed analysis of case law in this area and recommend that the property which the Judicial Factor has been appointed to manage should vest in the appointee, in that capacity. Consequential recommendations to give effect to this policy are also made and we agree with those recommendations (20 to 25). Recommendation 25 relates specifically to the appointment of a Judicial Factor under the Solicitors (Scotland) Act 1980.

1.28 Chapter 3 also makes recommendations in relation to jurisdiction; caution; and the registration of appointments. These are discussed further in Part 4 of this consultation paper.

#### Chapter 4 of the SLC Report

1.29 This chapter of the Report recommends that the general duty – “to manage the estate for those who have an interest in it” be set out on the face of any legislation. Alongside that duty, the Commission considered the nature of the duty and whether it should be capable of being supplanted and in terms of how the general duty should be carried out, whether it should be qualified in some way.

1.30 On the basis of the rationale set out by the Commission on these matters, we agree with recommendations 28 to 32.

1.31 The Commission also recommends that duties of a more specific nature be placed on the Judicial Factor. Some of these duties are informed by the fact that some Judicial Factors act for more than one estate. They are:

- that a judicial factor should be under a duty to ingather the whole of the judicial factory estate;
- that the judicial factor should ensure that all cash accounts, share certificates and other assets of a like nature, appertaining to the judicial factory, should be readily identifiable as such;
- that the judicial factor should be under a duty to prepare an inventory of the estate, and send it to the Accountant of Court within 6 months of being appointed; and
- that the judicial factor should be under a duty to inform persons appearing to be creditors or debtors of the judicial factory estate of the fact of the appointment.

1.32 We would agree that these recommendations are appropriate and in some instances, a sensible restatement of the law as it currently stands.

1.33 The Commission gave further consideration to appropriate duties in relation to the management of the estate. We are satisfied that these are a pragmatic balance between enabling the Judicial Factor to carry out their role properly and ensuring that the necessary protections to the estate are in place. We therefore agree with recommendations 37 and 38.

1.34 The final issue examined by the Commission in this chapter was the role of the Judicial Factor in resolving disputes where they exist between those with an interest in the property and indeed where a Judicial Factor has been appointed *because* of a breakdown in the relationship of a business partnership.

1.35 They conclude that the Judicial Factor should be placed under a duty to seek a resolution and agreement between the parties through mediation or some other means. They also recognise however that such differences may be irreconcilable. In which case it is incumbent upon the Judicial Factor to prepare a scheme setting out a resolution. These recommendations (39 and 40) are made with the intention of ensuring that a judicial factory does not continue indefinitely at the expense and therefore to the detriment of the estate being managed. We would support these recommendations.

#### Chapter 5 of the SLC Report

1.36 There has been uncertainty about the extent of a Judicial Factor's powers and in the past this has resulted in litigation. In Chapter 5 the Commission examines the question of powers and makes a number of recommendations in order to address the issue of uncertainty.

1.37 The Commission recommend that the Judicial Factor should have "all the powers of a natural person beneficially entitled to the estate". But the proposals also

include the inclusion of a comprehensive list of powers on the face of the Bill which would be expressly included along with any powers applied by other legislation.

1.38 The list is non-exhaustive in so far as the courts would be given the power to add or exclude powers in any given case, at their discretion. In addition the Judicial Factor themselves would be able to apply to the court for additional powers. We agree that these are sensible provisions which enable the particular circumstances of any specific case to be properly addressed.

1.39 Finally, in relation to powers, the Commission helpfully recommends that Judicial Factors be given the power to require information in order to facilitate the management of the estate. We would support this and the other recommendations contained in Chapter 5.

### Chapter 6 of the SLC Report

1.40 Chapter 6 of the Commission's Report deals with 3 processes: the termination of a judicial factor; the recall of the appointment of a judicial factor; and the discharge of the judicial factor. These processes often run consecutively but sometimes only one or two of the processes may be relevant in a given case.

1.41 A judicial factor is terminated when the purpose for which the appointment was made has been fulfilled or it is no longer possible to fulfil. Recall of the appointment would follow, but recall may occur other than when a judicial factor is terminated. Discharge is the next step and if the formal acknowledgement that the Judicial Factor has properly satisfied all of their duties and that they have no further responsibilities to the estate.

1.42 Currently these 3 processes will occur in respect of the estate as a whole but the Commission provided examples of when it would be more appropriate for them to apply to only part of an estate and this forms one of their recommendations.

1.43 The Commission then went on to consider the current process for recall of appointment and discharge which is by petition to the court. There are however rules of court which promote an administrative discharge in certain circumstances. The obvious benefits of the administrative discharge is savings in costs and time.

1.44 The Commission therefore recommends that when there is no dispute over the disposal of the estate that the procedure for administrative discharge is extended to all judicial factories. Recommendations 48 to 51 give effect to this view and we agree that these are sensible reforms for the majority of cases.

1.45 In cases where there is a dispute over the disposal of the estate, the Commission recommend that the first part of the administrative procedure is followed and that only thereafter if the dispute remains, the Accountant of Court refers the matter to the court. Recommendations 52 to 55 apply here. We agree with the Commission that these revised procedures should act as a deterrent to less substantive or even trivial disputes.

1.46 The revised procedures all assume that the Accountant of Court is in agreement with the Judicial Factor's proposed distribution of the scheme. This will not always be the case. The Commission therefore recommend that where there is no such agreement either the Judicial Factor or someone with an interest in the settlement of the estate should be able to petition the court directly and in the case of the latter they should be required to find caution. Recommendations 56 to 59 are relevant here.

1.47 In line with the aim of keeping costs down, the Commission also recommend that matters relating to the termination of: the judicial factory; the recall of the appointment; and discharge should all be dealt with administratively. Even where has been litigation over the scheme of distribution, once settled the other procedures should be dealt with administratively.

1.48 On other related matters, the Commission recommends no change to the current procedure of write off by the Accountant of Court or to the process whereby a Judicial Factor seeks recall in the course of a judicial factory by petition to the court.

1.49 Recommendations are also made to the effect that anyone with an interest in the estate may petition the court to recall the appointment of a Judicial Factor in the course of the judicial factory, but as in the case where such a person may petition the courts where the Accountant of Court does not agree with the proposed distribution, they must too obtain caution.

1.50 In this chapter the Commission also make a series of recommendations around the discharge of a Judicial Factor before the purposes of the judicial factory have been fulfilled and the appointment of a replacement Judicial Factor. Recommendations 68 to 76 refer and are intended to ensure the continued maintenance of the proper management of the estate.

1.51 Finally in this chapter, the Commission make 2 further recommendations to the effect that a discharge should be registered in the Register of Inhibitions by the Accountant of Court and that once a discharge has been granted, save for where there are allegations of criminal conduct, the Judicial Factor should not be held to account for what has taken place during the course of the judicial factory.

### Chapter 7 of the SLC Report

1.52 This chapter in the Commission's Report deals with a number of miscellaneous matters which are described by the Commission as "small but significant matters".

1.53 The recommendations in this chapter which relate to the remuneration of judicial factors is briefly discussed in Part 4 of this paper.

1.54 The Commission then make a range of recommendations which are intended to clarify the position of the judicial factor where a third party is involved. These include that: liabilities should fall upon the estate and not the judicial factor; the expenses of the estate, if involved in litigation, fall upon the estate and not the

judicial factor; where a liability of the judicial factory estate is as a result of a breach by the judicial factor the factor may be found personally liable; that the judicial factor stands in place of the estate and those who have an interest in it for the purposes of dealing with third parties; and that those who have an interest in the estate may only raise questions as to the judicial factor's actions by making representations to the Accountant or by seeking the replacement of the judicial factor. We support the view that these recommendations will bring clarity to the law on these issues.

1.55 In terms of protection for third parties, the Commission also recommends that where a person has obtained title in good faith and for value from a judicial factor, it is not capable of challenge by reason of the appointment of the factor being subsequently recalled or because the transfer of title should not have been made.

1.56 On the law of prescription the recommendation is that the normal rules will apply and obligations owed by the judicial factor to the estate will not prescribe during the course of the judicial factory.

1.57 The Commission also recommends that it should no longer be competent to appoint a *curator bonis* to the estate in order to address the anomaly created by earlier legislation that *curators bonis* are not subject to oversight by either the Accountant of Court or the Public Guardian.

1.58 The final recommendations in this chapter relate to not re-enacting a couple of redundant provisions in earlier legislation.

### Chapter 8 of the SLC Report

1.59 The final chapter in the Report is about the role of the Accountant of Court. It makes a number of recommendations about the function, appointment, powers, duties and fee arrangements as they relate to the role.

1.60 The recommendations are a welcome package of sensible reforms. They recognise that the status of the role has changed and is now one set out in the Judiciary and Courts (Scotland) Act 2008. They will bring necessary clarity and certainty to the law.

#### **Question 1**

Should the Scottish Government implement the Report by the Scottish Law Commission?

Yes

No

Don't know

If you wish, please give reasons for your answer.

## **PART 2**

### **Missing Persons**

2.1 The Scottish Government launched the first National Missing Persons Framework for Scotland in May 2017. The main aims of the strategy are to prevent people from going missing and limiting the harm associated when they do. Provision on measures outlined in this Part is not yet contained in the draft Bill in this paper.

2.2 The Framework contained an implementation plan which set out actions for a wide range of organisations including the Scottish Government. One of those actions is reviewing the administrative options for handling missing person's estates. The Scottish Government commitment here was to consider those options as part of the consultation on Judicial Factors.

2.3 Where a person goes missing for a long time, there can be practical implications for family members, such as having to deal with their property and financial affairs while they are missing.

2.4 In Scotland, judicial factors can be appointed to manage an estate when a person goes missing. Such appointments are usually referred to as a Judicial Factor 'in loco absentis'.

2.5 The purpose of appointing a judicial factor in relation to the estate of a missing person is mainly to conserve and protect the estate until the missing person ceases to be missing or is declared dead.

#### The procedure to appoint a judicial factor "in loco absentis"

2.6 A judicial factor is appointed following an application to the court. Petitions for the appointment of a judicial factor in relation to the estate of a missing person are made to the Court of Session or to a sheriff court in the Sheriffdom in which the missing person was last known to the petitioner to be resident (if the last whereabouts of the missing person are unknown, petitions can be lodged at Edinburgh Sheriff Court).

2.7 Applications would normally be made by a spouse or a relative, although they could also be made by anyone with an interest such as a creditor. In common with other judicial factory appointments there is a requirement for the factor to: take such assets under their control; obtain caution; lodge an inventory of the estate; and lodge annual accounts for auditing by the Accountant of Court. If the missing person has previously granted a power of attorney and the attorney is willing to act then an application might not need to be made.

#### The duration

2.8 In these circumstances, the appointment of a judicial factor will usually continue until a certain trigger point, usually at 7 years, which is the point at which someone may raise an action for declarator of death under the Presumption of Death

(Scotland) Act 1977. Other trigger points can be, the missing person returns, is found dead or where a court has otherwise declared them dead.

### England and Wales

2.9 Unlike Scotland, England and Wales had no procedures in place to deal with administering or protecting missing person's estates.

2.10 Rather, under the Presumption of Death Act 2013, the missing person's spouse, civil partner, parent, sibling or child is required to wait at least 7 years or provide proof that the missing person 'is thought to have died' before they can apply for a 'Declaration of presumed dead'. The 7 year wait has been strongly criticised as too long a period during which families face a constant struggle to manage matters in their absence.

2.11 Often financial and other institutions are reluctant to allow family members to cancel, for example, direct debits or mortgage payments on behalf of a missing person due to legal uncertainty. As well as the emotional distress for the family, this also puts the missing person's financial situation at risk whilst they are missing and where there is an interdependence of finances, the family's financial position may also be placed in jeopardy.

2.12 As a direct consequence of the case of Claudia Lawrence who disappeared on her way to work at the University of York in 2009, a private member's Bill was passed by the UK Parliament in 2017 - the Guardianship (Missing Persons) Act 2017. This allows close relatives of people who go missing to continue to administer their financial affairs via a new form of guardianship order.

2.13 In the past the Scottish Government has received correspondence outlining difficulties with the current process of trying to deal with a missing person's estate. The main criticisms were focussed on the 1977 Act and the concern that 7 years was too long a period and that the court processes involved in obtaining a declarator of death were protracted and expensive.

2.14 Concern was also expressed about not having the necessary powers to, for example, rent out the missing person's property to cover mortgage payments. The powers given to in loco absentis factors are generally only those deemed necessary to allow them to discharge their duties, for example, looking after the missing person's bank accounts or ensuring that owned property is properly maintained. They can, however, apply to the courts for 'special powers' where for example extraordinary expenditure is needed or where the family home was to be sold. It would be for the court to grant, dismiss or refuse any such application.

2.15 It would seem that the powers are however rarely used and we have little experience in Scotland of this type of factory. Since 1985 the Accountant of Court has had to supervise only 12 in loco absentis cases. The last 2 cases were in 2007 and 2011 and in the case of the latter, because the factor was appointed in July and the missing person was found dead in August and the factor had not intromitted with the estate, the estate passed over to the executors and the appointment lasted only

for 2 months. It is not clear why there have been so few applications for this type of factory given that there are around 700 open cases of persons in Scotland classed as long-term missing i.e. missing for over 28 days and over the age of 18.

**Question 2**

Please provide any comments on the current procedure for the appointment of judicial factors in the case of a missing person.

Specific provision on Scottish jurisdiction for appointing judicial factors to the estates of missing people

2.16 In recognition that dealing with the estate of a missing person is a particularly stressful and difficult time, we want to ensure that the process for managing the estate of a missing person is accessible and relevant and does not present any unwarranted barriers. It would be the intention that the recommendations contained in the Commission’s Report would extend to factors in loco absentis.

2.17 We have looked at the new legislation in England and Wales (“the 2017 Act”) which came into force on 31 July 2019. The Ministry of Justice concluded a consultation<sup>2</sup> earlier this year on, amongst other things, the court processes and the supervisory regime of the Public Guardian which would apply. It was the intention of the Ministry of Justice to use standard court procedures where possible so that new procedures were only made where necessary. That consultation sets out what the 2017 Act does and this is replicated in the box below.

“To provide a means of resolving these problems, the Act creates a new legal status – the guardianship of the property and financial affairs of a missing person. The Act enables the court to appoint a guardian as an agent for the missing person. For an appointment to be made, someone with a sufficient interest must apply to the court. The court can hear the application if it is satisfied that there is sufficient connection between the missing person or the applicant with the court. This means that the missing person must have been domiciled\* or habitually resident\* in the United Kingdom for at least a year before he or she went missing; or, if their spouse or civil partner is the applicant, that he or she was so domiciled or habitually resident for at least a year before making the application. If this condition is satisfied, the court will only make an order if it considers the missing person has been missing for at least 90 days before the application (although the 90 day requirement may exceptionally be relaxed); that it is in the best interests\* of the missing person to make the appointment; and, that there is a suitable person to be appointed.

<sup>2</sup> Guardianship (Missing Persons) Act 2017 Implementing the Act – 19 December 2018, Ministry of Justice.

The court will decide on the evidence presented to it whether a guardian should be appointed. The court order making the appointment of the guardian will specify any particular terms and conditions that are to apply to the appointment. Two or more people may be appointed as the guardian in respect of one missing person's property and financial affairs and more than one guardianship order may be in force simultaneously in relation to different parts of the property and financial affairs of the missing person, but a single guardianship order can only ever relate to the property and financial affairs of one missing person. The maximum length of an appointment is four years, but a person can be re-appointed on a new application and there is no limit on the number of times applications can be made. The court order may provide for the suspension of the appointment.

No professional qualifications are required to be a guardian, but the position is one of great responsibility. It will require the guardian to act with the utmost integrity and may require high levels of skill in dealing with property and financial affairs. Guardians can recover reasonable expenses incurred in relation to the performance of their duties, but can only charge for their services if authorised to do so by the terms of their appointment as set out in the court order. Once appointed, the guardian will then "stand in the shoes" of the missing person in relation to so much of his or her property and financial affairs as are included in the appointment. The guardian will, subject to the terms on which the court makes the appointment, be able among other things to access bank accounts, stop or set up direct debits and standing orders, pay debts, authorise mortgage and insurance payments, sell or rent a property, and manage investments. The guardian may also be able to make payments to dependants of the missing person to meet ongoing expenses and other needs. The guardian must, however, act within the scope of his or her authority under the terms of the guardianship order and the Act; and must exercise the powers conferred in the best interests of the missing person."

2.18 Acknowledging that the starting point south of the border was different to that of Scotland but on the basis that there appears to be little practical experience of appointing judicial factors 'in loco absentis', we have considered whether there may be some useful lessons to be learned from the 2017 Act.

2.19 In broad terms the provisions in the 2017 Act are similar to those in the Commission's draft Bill. For example, in terms of qualification for appointment as a guardian or factor, draft section 6 of the Commission's Bill and section 4 of the 2017 Act cover much of the same ground. Where section 4 goes into more detail, for example at 4(2)(d) which deals with conflict of interests, the Commission when setting out that the courts had to be satisfied of suitability noted<sup>3</sup> that based on

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<sup>3</sup> Discussion paper - Page 13

existing case law<sup>4</sup>, “someone with an adverse interest will not usually be appointed”; It is therefore anticipated that the courts here when contemplating the suitability of the applicant, would include the consideration of whether or not the proposed factor has a conflict of interest.

2.20 There are a few areas of difference. Currently here in Scotland there is no qualifying period during which a factor in loco absentis cannot be appointed. The 2017 Act provides that 90 days from the date the person went missing must have lapsed before an application can be made. More significantly, the focus of the 2017 Act is very much on the guardian acting in the ‘best interests’ of the missing person and indeed section 18 sets out in some detail what must be considered in determining what is in the missing person’s best interests. The duty which would be placed on a factor under the Commission’s proposals would be to carry out their functions ‘for the benefit of such persons as have an interest in the estate’. This would appear to have a wider application than the interests solely of the missing person. It would be helpful to have views on whether or not these differences are material and or whether any modification to the Commission’s proposals are needed in respect of their application to factors who are appointed to manage the estate of a missing person.

2.21 In addition, section 2 of the 2017 Act sets out the jurisdiction of the courts in relation to guardianship order applications. It seems to us to be sensible to adopt a similar approach so that there is a consistent approach across Scotland, England and Wales.

2.22 As a result, in relation to applications to appoint a judicial factor to the estate of a missing person, the courts in Scotland would only have jurisdiction if:

- The missing person was domiciled in Scotland on the day before the person was first known to be missing; or
- The missing person had been habitually resident in Scotland for at least one year;
- The application is made by the person’s spouse or civil partner or cohabitee (i.e. living together as if married) and the applicant is domiciled in Scotland or has been habitually resident in Scotland for at least one year.

### Question 3

Should there be a qualifying period during which a factor in loco absentis cannot be appointed? If so, what should that period be?

Yes

No

Don’t know

If yes, how long?

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<sup>4</sup> see Leslie (1904) 12 SLT 359; Hagart (1893) 1 SLT 62 (OH).

**Question 4**

Should the duty of a judicial factor appointed in the case of a missing person be limited to acting in their best interests only?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 5**

Should the Scottish courts only have jurisdiction to appoint a judicial factor to an estate of a missing person if:

- The missing person was domiciled in Scotland on the day before the person was first known to be missing; or
- The missing person had been habitually resident in Scotland for at least one year;
- The application is made by the person's spouse or civil partner or cohabitee (i.e. living together as if married) and the applicant is domiciled in Scotland or has been habitually resident in Scotland for at least one year?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 6**

Are there any other provisions in the Guardianship (Missing Persons) Act 2017 which could be usefully replicated in any Scottish legislation?

Yes

No

Don't know

Please set out which provisions and give reasons for your answer.

2.23 It has also been raised that the term “in loco absentis” may be considered to be an old term. A change of name may improve the accessibility and promotion of appointing a judicial factor over a missing person.

2.24 While the term is not used in the legislation, using the term “missing person” would make it quite clear the type of estate involved. A suggested name which could be used is “Judicial Factor on a Missing Person’s estate”.

**Question 7**

Should there be a change of name of “loco absentis” cases?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 8**

If so, what are your views on “judicial factor on a missing person’s estate”?

Yes

No

Don't know

Alternatives

2.25 Other questions in relation to the appointment of a judicial factor in the case of a missing person are discussed in Part 4 of this paper.

## **PART 3**

### **Safeguarding of property: Children (Scotland) Act 1995**

3.1 The following paragraphs specifically deal with some issues raised by the Accountant of Court in the course of dealing with the safeguarding of property in children. Please note that any measures outlined in this Part are not yet contained in the draft Bill attached to this paper.

3.2 Sections 9 and 10 of the Children (Scotland) Act 1995 make provision on children's property being safeguarded in certain circumstances by the Accountant of Court, who is a court appointed officer. The Accountant of Court has raised the following issues with us:

- the circumstances in which the Accountant of Court can draw matters to the attention of the Court;
- whether the Accountant of Court can recall a direction or vary its terms;
- the procedure where no joint minute or subsequent decree has taken place; and
- any requirement for the court to take into consideration the views of the child where a parent is appointed to act as the child's legal representative

### **Drawing the court's attention to matters arising**

#### Background

3.3 The 1995 Act does not regulate procedure in circumstances where the Accountant of Court wishes to draw a matter to the attention of the Court. The Courts have sometimes questioned whether they have jurisdiction when matters relating to the administration of children's property are reported to them.

3.4 This issue could be rectified by specifying in section 9 of the 1995 Act the circumstances where the Accountant of Court may report issues to the court.

3.5 Possible circumstances include any circumstances when a direction of the Court would be in the child's best interests, but specifically if:-

- the Accountant of Court suspects that the person appointed fails to comply with a direction or condition in a direction made by the Accountant of Court
- the parent and guardian appointed fails to notify the Accountant of Court of a change to the parent or guardian or the child's address, and/or is currently present whereabouts unknown,
- the parent and guardian appointed fails to provide information or documentation when requested to do so by the Accountant of Court,
- the parent and guardian appointed suspected to have caused loss to all or part of the child's property, whether through misadministration or misappropriation.

## Pros/Cons

3.6 Allowing the Accountant of Court to draw a matter to the attention of the Court would benefit children as the proposed amendment to section 9 could provide that the Accountant of Court would only draw a matter to the Court's attention if it is in the child's best interests.

3.7 However, further consideration will need to be given as to which court would be best placed to deal with these notifications.

### **Question 9**

Should the Accountant in Court be able to draw matters of concern to the attention of the relevant sheriff court?

Yes

No

Why did you select your answer above?

## **Recalling or variation of directions**

### Background

3.8 Section 9(5) of the 1995 Act does not specify whether the Accountant of Court can recall a direction or vary its terms. In practice this is done frequently to allow heritable properties to be bought and sold and to vary maintenance allowances. The 1995 Act could be amended to make it clear that the Accountant of Court may recall a direction or vary its terms.

3.9 We would need to set out the circumstances in which the Accountant of Court can recall or vary a direction. For example this may be when:

- circumstances relative to the child or the property have changed, or
- the parent or guardian appointed fails to comply with a Direction or condition thereof, made by the Accountant of Court, or
- the parent or guardian fails to notify the Accountant of Court of a change to the parent or guardian's or the child's address, and/or is currently present whereabouts unknown, or
- the parent or guardian fails to provide information or documentation when requested to do so by the Accountant of Court, or
- the parent or guardian is suspected to have caused loss to all or part of the child's property, whether through misadministration or misappropriation.

### Pros/Cons

3.10 Allowing the Accountant of Court to vary or recall directions would reflect the current situation where this is done frequently. It would also allow the direction to be amended as a situation develops.

3.11 However, further consideration would be needed as to the circumstances where a variation or recall of a direction is appropriate.

#### **Question 10**

Should the Accountant of Court be able to vary or recall directions?

Yes

No

Why did you select your answer above?

### **Award of damages to children: procedure where no joint minute or subsequent decree has taken place**

#### Background

3.12 Damages actions on behalf of children are often settled outside of court. Therefore, if the matter is not formalised by means of a joint minute of agreement or subsequent court decree section 13 of the 1995 Act regarding award of damages does not apply.

3.13 In these circumstances it is common for the agreed sum of reparation to be paid directly to the pursuer's solicitor. The solicitor then has the option of retaining the funds until the child is 16, passing the funds to the child's parents/guardians or applying to the Accountant of Court for a direction. There may be benefit in specifying the procedure where no joint minute or subsequent decree has taken place.

#### Pros/Cons

3.14 Setting out the procedure where no joint minute or subsequent decree has taken place may benefit children where there has not been a court case. As mentioned above, damages actions are often settled outside of court. However, this would require further consideration of the procedure in the cases where there has not been a court case.

3.15 One possibility would be to follow section 13 of the 1995 Act and provide that the person receiving the money must:

- Apply to the court for a judicial factor to be appointed to invest, apply or otherwise deal with the money for the benefit of the child concerned until the child reaches 16; or
- Pass the money to the Accountant of Court to invest, apply or otherwise deal with the money for the benefit of the child concerned until the child reaches 16;
- Pass the money to the child's parents or guardians to invest, apply or otherwise deal with the money, subject to any directions by the Accountant of Court, for the benefit of the child concerned until the child reaches 16;

**Question 11**

Do we need to specify the procedure where no joint minute or subsequent decree has taken place?

Yes

No

Why did you select your answer above?

**Inheritance of property: taking into account the views of the child where a parent is appointed as the child's legal representative**

Background

3.16 Parents can sign a Deed of Variation or Family Arrangement on behalf of their children in cases where a child is due to inherit property. This instrument enables beneficiaries of a deceased's estate to alter the distribution of that estate, for example, to save inheritance tax costs or to avoid the loss of family assets. In the main they seem to be used in order to postpone a child's inheritance until they are much older.

3.17 Sections 1(1)(d) and 2(1)(d) of the 1995 Act give a parent the responsibility to act as the child's legal representative. There is a concern that it would be possible for a parent to sign a Deed of Variation or Family Arrangement which does not take the views of the child into account. This runs counter to the United Nations Convention on the Rights of the Child (UNCRC).

3.18 Section 6 of the 1995 Act already provides that when a person with parental responsibility is reaching a major decision they should have regard so far as practicable to the views (if the child wishes to express them) of the child taking account of the child's age and maturity. However, there is no definition of what constitutes a 'major decision' and this provision is largely untested.

**Question 12**

Do you agree that the views of the child should be taken into account (where practicable and taking account of their age and maturity) where a parent is appointed as the child's legal representative?

Yes

No

Why did you select your answer above?

**Question 13**

(a) What would be the most proportionate way of ensuring that a child's views are taken into account?

(b) Would it require legislative change (please provide details)?

Yes

No

Don't know

## **PART 4**

### **Further testing of recommendations**

#### Jurisdiction

4.1 Paragraphs 3.4 to 3.10 of the Commission's Report discussed the jurisdiction of the courts. The Commission concluded that petitions for the appointment of a judicial factor should continue to be competent in both the Court of Session and the Sheriff Court.

4.2 However, the Scottish Government's initial view is that applications to appoint judicial factors could be heard in the Sheriff Court rather than the Court of Session. There does not seem a particular need for cases of this nature to be heard in the Court of Session and hearing them in the Sheriff Court would reduce costs and legal expenses.

4.3 This is particularly important when applications to appoint a judicial factor may be made by individuals, such as, for example, may happen when a family member seeks the power to manage the estate of a missing person (see part 2 of this consultation paper).

4.4 Therefore, the Scottish Government proposes that any primary legislation to implement the Scottish Law Commission's report should provide that applications to appoint a judicial factor be heard in the sheriff court and not in the Court of Session. This would apply to all applications to appoint judicial factors and to "administrators" carrying out functions similar to judicial factors (but please see paragraphs 4.5 to 4.6 below).

4.5 The Court of Session would retain the power to appoint a judicial factor in the course of other proceedings should that seem necessary or desirable. As the Commission outlines in paragraphs 3.12 to 3.14 of their Report, any new legislation would make it clear that the Sheriff Court would also have the power to appoint a judicial factor in the course of other proceedings. Sections 3 and 5 of the draft Commission Bill make relevant provision.

4.6 Recommendation 7 of the Report which is discussed at paragraph 3.11 of the Report deals specifically with the appointment of judicial factors under the Solicitors (Scotland) Act 1980. Currently the rules of court provide that petitions for these appointments are made to the Inner House of the Court of Session. The Commission recommended that such appointments should no longer be made in the Inner House.

4.7 The Scottish Government sought a view on this issue from the Law Society of Scotland. The Law Society had no objection to such appointments being heard before the Outer House but did have some concerns about these appointments being made in the Sheriff Court.

4.8 Those concerns as advised by the Law Society were: -

- The appointments are made with insufficient frequency to develop significant procedural expertise and deep knowledge of the law and practice of judicial factories.
- Appointments often need to be made quickly to allow steps to be taken to secure documents and money. Such appointments could be compromised should hearings be required at short notice in remote Sheriff Court locations where we may be unable to secure local representation with the required expertise. This would mean legal representatives from Edinburgh would need to travel to the court, with additional costs and delay.
- Having the appointing court near the Society allows skills and expertise in this area of law to be built up amongst the Society's legal representation. This ultimately reduces cost in the long run to the estates which bear the costs of the action.
- Making appointments in the locality of the Solicitor's place of business could present a number of challenges, including possible difficulties in securing a Sheriff who would not need to recuse him or herself from hearing such an action. This could lead to delay, particularly where there are urgent transactions or client funds at risk (we had a case recently where the Sheriff Court was dealing with a matter involving a local Solicitor, they spent a great deal of time debating whether they could hear the case and then agreed they could not, it was moved to the next nearest sheriff Court where the Sheriffs there decided since they all knew the Solicitor they too could not deal with the matter, it was then moved to a third Sheriff court. This process created further cost and delay before the case was finally heard). It would of course be more problematic were a Sheriff to hear the case and then the interim appointment was challenged by the solicitor who was known to the Sheriff, and consequently the appointment fell.
- Speed is of the essence in these cases - the Petition Department of the Court of Session and the Accountant of Court have arranged a set of protocols to allow the quick exchange of documentation to take place given the onerous process required by the Judicial Factors Act 1849.

4.9 Concerns have also been expressed by those involved in rewriting the civil court rules as part of Courts Reform that such a proposal would place applications for the appointment of judicial factors under section 41 of the Solicitors (Scotland) Act 1980 out of step with other applications and appeals under the Solicitors (Scotland) Act 1980.

4.10 In addition they queried the rationale for treating applications for the appointment of judicial factors under section 41 of the 1980 Act differently from other applications and appeals under the 1980 Act. The focus of the Commission appeared to be harmonising the procedure for all applications for the appointment of judicial factors under section 41.

**Question 14**

Should applications to appoint a judicial factor be heard in the sheriff court rather than the Court of Session?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 15**

If applications to appoint a judicial factor are to be heard in the sheriff court rather than the Court of Session, should it be the same rule for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Which Sheriff Court?**

4.11 Section 1(4)(a) of the draft Commission Bill provides that the reference to “an appropriate sheriff court” is “where the petition relates to an estate a substantial part of which (that is to say a part comprising at least one fifth of its value) is situated in a particular Sheriffdom, to the sheriff court of that Sheriffdom”.

4.12 The Scottish Government does not consider that this provision assists with providing sufficient clarity on jurisdiction. Therefore, the Scottish Government proposes to remove section 1(4)(a) before any Bill is introduced into Parliament and rely on the other provisions of section 1(4) to determine jurisdiction.

4.13 In addition, the proposed provisions outlined in Part 2 of the consultation on jurisdiction to appoint a judicial factor to the estate of a missing person are also relevant.

4.14 Therefore, the “appropriate sheriff court” for an application in relation to the estates of missing persons would be:

- Where the missing person was domiciled the day before the person was first known to be missing; or

- Where the missing person had been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent); or
- Where the person’s spouse or civil partner or cohabitee is domiciled or has been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent);

4.15 In relation to the estates of natural persons other than missing persons, the “appropriate sheriff court” could be in the Sheriffdom where the applicant, or any person with an interest in the estate is domiciled or has been habitually resident.

4.16 In relation to the estates of persons other than a natural person, the “appropriate sheriff court” could be in the Sheriffdom where the person who has the estate has a place of business.

4.17 If none of the above applies, the “appropriate sheriff court” would be the sheriff court in Edinburgh.

**Question 16**

The Scottish Government proposes that the “appropriate sheriff court” for an application would be:

Estates of missing persons

- Where the missing person was domiciled the day before the person was first known to be missing; or
- Where the missing person had been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent); or
- Where the person’s spouse or civil partner or cohabitee is domiciled or has been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent).

Estates of other natural persons

- In the Sheriffdom where the applicant, or any person with an interest in the estate is domiciled or has been habitually resident.

Non-natural persons

- In the Sheriffdom where the person who has the estate has a place of business.

None of the above applies

If none of the above applies, the “appropriate sheriff court” would be the sheriff court in Edinburgh.

Does this seem a reasonable approach?

Yes

No

Don't know

If you wish, please give reasons for your answer.

### Grounds of appointment

4.18 Section 4 of the Commission's Bill sets out grounds on which judicial factors may be appointed. Section 4 provides that:-

“ The grounds on which a judicial factor may be appointed under this Act are that it appears to the court there is an estate which requires to be managed or in relation to which actings of some kind are required and (either or both)—

(a) for whatever reason, it is not possible, not practicable or not sensible for that management or those actings to be carried out by those who would ordinarily be responsible for carrying them out,

(b) it would be to the advantage of the estate were a judicial factor to be appointed to manage it or to carry out the requisite actings”.

4.19 In addition, section 6 makes further provision on qualifications so that the person appointed must be an individual, of full legal capacity and a suitable person. At the moment, the majority of those appointed as judicial factors are, however, either legal or financial professionals.

4.20 The Scottish Government considers it important to retain flexibility on who can be appointed to be a judicial factor. In particular, and as discussed in part 2 of this consultation, the Scottish Government wishes to ensure that it is straightforward for family members to apply to become a judicial factor in relation to the estate of a missing person.

4.21 South of the border, section 4 of the Guardianship (Missing Persons) Act 2017 makes provision on “choice of guardian” and lays down detailed provision on who may be appointed. The Scottish Government's view is that detailed provision of this nature is not needed in Scotland and that the approach outlined in sections 4 and 6 of the draft Commission Bill should be followed, including in relation to the appointment of judicial factors to the estates of missing people.

**Question 17**

Should sections 4 and 6 of the draft Commission Bill be followed in relation to who may be appointed as a judicial factor?

Yes

No

Don't know

If you wish, please give reasons for your answer.

### Requirement for caution (Scottish Law Commission Report paragraphs 3.28 to 3.36)

4.22 Caution<sup>5</sup> is usually arranged by obtaining a bond with an insurance company to be lodged with the court. The aim is to provide security against any improper actings by the factor.

4.23 Section 7 of the draft Bill introduces a discretion on the court's part as to whether or not to require a judicial factor to find caution but the discretion is to be exercised sparingly. This represents a change from the current position which is that all judicial factors must find caution.

4.24 Two policy points informed the Scottish Law Commission's recommendation to introduce a discretion. The first was that the cost of finding caution annually could be a substantial outlay for an estate. The second was that it was impossible to state that there would never be any circumstances where it would be appropriate to require a judicial factor to find caution. Under the Bill, the Accountant is to fix the amount of caution required, enabling that officer to take account of all the circumstances of the particular case, and that amount can be varied as circumstances require.

4.25 South of the border, section 6(3)(a) of the Guardianship (Missing Persons) Act 2017 provides that when appointing a guardian the court may "require the guardian to give the Public Guardian security for the exercise of the guardian's functions."

4.26 The Scottish Government has considered if the wording in section 7 about the court imposing a requirement for caution "only where it considers that exceptional circumstances peculiar to the particular appointment make it prudent to do so" give sufficient clarity. The Scottish Government's initial view is this wording is fine. As the Explanatory Notes to section 7 say, "it is intended that the court should exercise this discretion sparingly".

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<sup>5</sup> Pronounced "kay-shun".

**Question 18**

Do you agree that the wording at section 7 of the draft Bill reflects that caution is only required in exceptional circumstances?

Yes

No

Don't know

If you wish, please give reasons for your answer.

Registration of appointment (Scottish Law Commission Report paragraphs 3.84 to 3.86)

4.27 Section 8 of the draft Bill introduces two new requirements. First, it provides that the clerk of the court must intimate all appointments to the Accountant of Court, given the Accountant of Court's supervisory role in relation to judicial factors. Secondly, it provides that the clerk of the court must register the notice of appointment in the Register of Inhibitions. The fee for doing this would be met from the estate.

4.28 Publicity in the Register of Inhibitions would have the effect that, for example, should anyone other than the judicial factor attempt to transact in relation to any of the estate's heritable property, the fact of the appointment would appear in the usual searches conducted during such property transactions.

Proactive management of the estate

4.29 Section 14 of the draft Bill reflects the rationale for appointing a judicial factor by obliging the judicial factor, as an overarching duty, generally to carry out the functions of the office for the benefit of those with an interest in the estate. It is intended that this duty should strike a suitable balance between a duty merely to conserve and a duty to manage proactively.

4.30 As the circumstances of each appointment and of each judicial factor will vary, the standard of care has been deliberately couched in general terms against which the performance of an individual judicial factor can be measured.

4.31 The policy is that the general duty to carry out the functions of the office for the benefit of those with an interest in the estate should be subject both to the terms of the interlocutor of appointment and to any other statutory regime under which the particular judicial factor has been appointed.

**Question 19**

Do you consider that interlocutors should contain provisions on how proactively an estate should be managed?

Yes

No

Don't Know

If you wish, please give reasons for your answer

Remuneration of judicial factor (Scottish Law Commission Report paragraphs 7.2 to 7.11)

4.32 At present a judicial factor is paid a commission each year. Section 53 of the draft Bill provides that a judicial factor is entitled to be paid remuneration at agreed intervals and to recover outlays. It also requires the Accountant of Court to fix rates of remuneration for judicial factors, with different rates being able to be fixed for certain situations. Rates are to be reviewed at least annually and a judicial factor who is not satisfied with the Accountant's decision on the amount of remuneration or frequency of payment may apply to the court.

4.33 According to the Scottish Courts and Tribunal Service website, the hourly rate for the commission paid to a Judicial Factor takes account of their professional qualifications, experience and the hourly rate which would routinely be paid to them in the exercise of their normal duties (for example as a Solicitor or Accountant). The hourly rates payable from 1 April 2019 are:

- Partner - £246.84
- Manager - £178.50
- Support Staff - £89.25

**Question 20**

Should judicial factors continue to be paid a commission?

Yes

No

Don't know

If you wish, please give reasons for your answer

**Question 21**

Do you have any other comments on how judicial factors should be paid in future?

## **PART 5**

### **How to respond to the consultation process**

5.1 Consultation is an essential and important aspect of the Scottish Government's working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

5.2 The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors and no two exercises are likely to be the same.

5.3 Typically, Scottish Government consultations involve a consultation paper inviting answers to specific questions or more general views about the material presented. Consultation papers are distributed to organisations and individuals with an interest in the issue, electronically or in hard copy and are placed on the Scottish Government's consultations webpage to allow for participation from a wider audience.

5.4 Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises.

5.5 All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed online: <http://consult.gov.scot>.

5.6 The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence.

5.7 Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review,
- inform the development of a particular policy,
- help decisions to be made between alternative policy proposals, or
- be used to finalise legislation before it is implemented.

5.8 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## Impact assessments

5.9 In line with usual practice, Impact Assessments have been prepared. The Commission prepared a draft Business and Regulatory Impact Assessment or BRIA<sup>6</sup>.

5.10 The Scottish Government does not consider that the following Impact Assessments are required:

- Equality Impact Assessment (EQIA)
- Strategic Environmental Assessment (SEA)
- Privacy Impact Assessment (PIA)

5.11 If a Bill is introduced into the Scottish Parliament, the Scottish Government, in accordance with Parliamentary Standing Orders, will prepare Accompanying Documents:-

- A Policy Memorandum (the rationale for the Bill is outlined in the material produced by the Commission and will be drawn on for any Policy Memorandum)
- A Financial Memorandum (this will be drawn from the BRIA produced by the Commission)
- Explanatory Notes to the Bill (the Commission have already prepared Explanatory Notes for the draft Bill)

5.12 As the draft Bill currently stands, a Delegated Powers Memorandum would not be needed as the draft Bill has no powers for ministers to make secondary legislation.

### Question 22

Do you have any comments on the Impact Assessments?

## Responding to this consultation paper

5.13 We are inviting responses to this consultation by **20 November 2019**.

5.14 Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this

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<sup>6</sup>

[https://www.scotlawcom.gov.uk/files/9813/7776/7284/Business\\_and\\_Regulatory\\_Impact\\_Assessment.pdf](https://www.scotlawcom.gov.uk/files/9813/7776/7284/Business_and_Regulatory_Impact_Assessment.pdf)

consultation online at <https://consult.gov.scot/justice/consultation-on-judicial-factors>  
You can save and return to your responses while the consultation is still open.  
Please ensure that consultation responses are submitted before the closing date of **20 November 2019**.

5.15 If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send it together with your response to:

Private Law Team  
Scottish Government  
GW.15  
St Andrew's House  
Edinburgh  
EH1 3DG

### **Handling your response**

5.16 If you respond using the consultation hub, (<http://consult.scotland.gov.uk/>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

5.17 All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

5.18 To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

### **Next steps in the process**

5.19 Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot> If you use the consultation hub to respond, you will receive a copy of your response via email.

5.20 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

### **Comments and complaints**

5.21 If you have any comments about how this consultation exercise has been conducted, please send them to: [PropertyLaw@gov.scot](mailto:PropertyLaw@gov.scot)

## **ANNEX A**

### **Judicial Factors (Scotland) Bill [DRAFT]**

#### **PART 1 APPOINTMENT OF JUDICIAL FACTOR OR OF INTERIM JUDICIAL FACTOR**

- 1 Petition for appointment of judicial factor
- 2 Interim judicial factor
- 3 Appointment of judicial factor in course of proceedings
- 4 Grounds on which judicial factor may be appointed
- 5 Other powers of appointment
- 6 Qualifications for appointment as judicial factor
- 7 Finding of caution
- 8 Intimation and registration of notice of appointment
- 9 Vesting
- 10 Warrant to intromit with estate

#### **PART 2 POWERS AND DUTIES OF JUDICIAL FACTORS**

- 11 Powers of judicial factor: general
- 12 Power of judicial factor to require information
- 13 Further provision as to judicial factors' powers
- 14 Duties of judicial factor: general
- 15 Ingathering
- 16 Inventory and management plan
- 17 Submission of accounts etc.
- 18 Delegation
- 19 Taking of professional advice
- 20 Investment
- 21 Enforcing or defending claims
- 22 Duty where estate object of dispute
- 23 Further provision as to judicial factors' duties
- 24 Validity of certain transactions by judicial factor appointed on trust estate

#### **PART 3 DEALINGS ETC. WITH THIRD PARTIES**

- 25 Protection of person acquiring title
- 26 Entitlements and liabilities of judicial factor
- 27 Contracts entered into by judicial factor
- 28 Expenses of litigation on behalf of factory estate
- 29 Delict
- 30 Unjustified enrichment
- 31 Personal liability of judicial factor where breach of duty
- 32 Prescription of obligations

## PART 4 DISTRIBUTION, TERMINATION, RECALL AND DISCHARGE

- 33 Approval of judicial factor's scheme for distribution of factory estate
- 34 Petition for distribution of factory estate
- 35 Termination, recall and discharge after distribution of factory estate by virtue of section 33(5) or (8) or 34(4)
- 36 Registration where judicial factory terminated under section 35
- 37 Formulations, approvals, petitions and registrations relating to part only of factory estate
- 38 Duty of Accountant to apply for appointment of replacement where judicial factor has died undischarged etc.
- 39 Other petitions for recall and discharge
- 40 Inventory and balance sheet where judicial factor appointed by virtue of section 38 or 39
- 41 Writing off
- 42 Ending of judicial factor's accountability on discharge

## PART 5

### ACCOUNTANT

- 43 Accountant and Depute Accountant
- 44 Functions of Accountant: general
- 45 Power of Accountant to instruct judicial factor
- 46 Misconduct or failure of judicial factor
- 47 Power of Accountant to require information
- 48 Audit by Accountant
- 49 Further provision as regards audit and report under section 48
- 50 Annual review
- 51 Inspection of certain records held by Accountant

## PART 6

### MISCELLANEOUS AND GENERAL

#### *Miscellaneous*

- 52 Right of judicial factor to require determination as regards decision of Accountant: general
- 53 Remuneration and reimbursement of judicial factors
- 54 Diversity of judgment or practice
- 55 Competence of appointing curator bonis

#### *General*

- 56 Interpretation
- 57 Modification of enactments
- 58 Repeals and revocations
- 59 Ancillary provision

60 Commencement  
61 Short title

Schedule 1 Interpretation of section 11(1)  
Schedule 2 Modification of enactments  
Schedule 3 Repeals and revocations  
Part 1 Repeals  
Part 2 Revocations

# Judicial Factors (Scotland) Bill

## [DRAFT]

An Act of the Scottish Parliament to make new provision as respects judicial factors and the functions of the Accountant of Court; to make it incompetent to appoint a curator bonis to any person; and for connected purposes.

### PART 1

#### APPOINTMENT OF JUDICIAL FACTOR OR OF INTERIM JUDICIAL FACTOR

##### **1 Petition for appointment of judicial factor**

- (1) Any person who the court is satisfied has an interest in the appointing of a judicial factor on an estate may petition the court for such an appointment to be made.
- (2) The petitioner must, without delay, intimate the petition to all persons who, so far as is known to the petitioner after reasonable enquiry, have an interest in the estate.
- (3) For the purposes of subsection (1), “the court” is the Court of Session or an appropriate sheriff court.
- (4) In subsection (3), the reference to “an appropriate sheriff court” is—
  - (a) where the petition relates to an estate a substantial part of which (that is to say a part comprising at least one fifth of its value) is situated in a particular sheriffdom, to the sheriff court of that sheriffdom,
  - (b) where the petitioner, or any person who has an interest in the estate, is habitually resident in a particular sheriffdom, to the sheriff court of that sheriffdom,
  - (c) where the petition relates to the estate of a person other than a natural person, to the sheriff court of a sheriffdom in which the person has a place of business, or
  - (d) where none of paragraphs (a) to (c) is applicable, to the sheriff court at Edinburgh.

##### **2 Interim judicial factor**

- (1) The court may, at its own instance or on the motion of the petitioner, appoint an interim judicial factor on the estate if it considers it necessary or expedient to do so pending the disposal of a petition under section 1(1).
- (2) Except where the context otherwise requires, the provisions of this Act apply in relation to an interim judicial factor appointed under subsection (1) as they apply to a judicial factor.
- (3) Such provisions as apply by virtue of subsection (2) apply with such modifications (if any) as the appointing court may consider appropriate.
- (4) The Accountant is from time to time to review the progress of any such interim judicial factory.

### **3 Appointment of judicial factor in course of proceedings**

In the course of proceedings in the Court of Session or in the sheriff court, the court may at its own instance or on the motion of a party to the proceedings appoint a judicial factor on an estate if it considers it appropriate to do so.

### **4 Grounds on which judicial factor may be appointed**

The grounds on which a judicial factor may be appointed under this Act are that it appears to the court there is an estate which requires to be managed or in relation to which actings of some kind are required and (either or both)—

- (a) for whatever reason, it is not possible, not practicable or not sensible for that management or those actings to be carried out by those who would ordinarily be responsible for carrying them out,
- (b) it would be to the advantage of the estate were a judicial factor to be appointed to manage it or to carry out the requisite actings.

### **5 Other powers of appointment**

- (1) Sections 1 to 4 are without prejudice to—
  - (a) the power of the Court of Session to appoint a judicial factor (or interim judicial factor) by virtue of the *nobile officium*, or
  - (b) any power of that court or of the sheriff court to make such an appointment under or by virtue of any other enactment.
- (2) But the following provisions of this Act apply in relation to a judicial factor (or interim judicial factor) appointed under any of those powers as those provisions apply in relation to a judicial factor (or interim judicial factor) appointed under this Act.

### **6 Qualifications for appointment as judicial factor**

- (1) To be appointed a judicial factor on an estate, a person must be—
  - (a) an individual,
  - (b) of full legal capacity, and
  - (c) in the opinion of the court to which it falls to make the appointment, a suitable person to hold that office.
- (2) A person may be so appointed whether or not domiciled in Scotland; and if domiciled furth of Scotland prorogates the jurisdiction of the Scottish courts by accepting the appointment.

### **7 Finding of caution**

- (1) The court, in appointing a person as a judicial factor, may require the appointee to find caution for the observance and performance of the duties incumbent on the appointee by virtue of the appointment; but it is to

impose such a requirement only where it considers that exceptional circumstances peculiar to the particular appointment make it prudent to do so.

- (2) The Accountant—
  - (a) is to fix the amount of caution to be found, and
  - (b) may, at any time while the judicial factor subsists—
    - (i) require the person to find new, or additional, caution, or
    - (ii) authorise a reduction in the amount of caution to be found.

## **8 Intimation and registration of notice of appointment**

- (1) Where a person is appointed a judicial factor, the clerk of court must as soon as reasonably practicable and in any event within 7 days after the interlocutor containing the order for the appointment is pronounced—
  - (a) intimate the appointment to the Accountant, and
  - (b) register notice of the appointment in the Register of Inhibitions.
- (2) Notice under subsection (1)(b) must specify an address at which service of documents may be effected on the person so appointed.
- (3) And the judicial factor must re-register notice of the appointment in the Register of Inhibitions every 5 years until the appointment is recalled (on each occasion informing the Accountant, without delay, that the requirement for re-registration has been complied with).
- (4) Any amount payable by virtue of subsection (1)(b) is to be met from the factory estate.

## **9 Vesting**

- (1) The whole estate on which a judicial factor is appointed vests in the appointee (in the appointee's capacity as judicial factor) on the date on which the interlocutor containing the order for the appointment is pronounced.
- (2) Without prejudice—
  - (a) to the generality of subsection (1), and
  - (b) to sections 41 (appointment of judicial factor on estate of solicitor) and 42 (distribution of sums in client account) of the Solicitors (Scotland) Act 1980,in the case of an appointment under section 41 of that Act of a judicial factor on the estate of a solicitor, the estate vesting by of subsection (1) includes, unless the appointing court otherwise determines, all property held by the solicitor in a fiduciary capacity (irrespective of whether it is held at the credit of any client account or is held other than in the solicitor's professional capacity).

## **10 Warrant to intromit with estate**

- (1) A certified copy of an interlocutor containing the order for the appointment of a person as a judicial factor on an estate—
  - (a) is the appointee's warrant to intromit with the estate, and

- (b) is to be issued to the appointee without delay by the clerk of court.
- (2) But where the court has imposed on the appointee a requirement under section 7, that copy is not to be issued before—
  - (a) the appointee’s bond of caution is transmitted to the Accountant, and
  - (b) the Accountant—
    - (i) is satisfied that the requirement has been met, and
    - (ii) so informs the court.

## **PART 2**

### **POWERS AND DUTIES OF JUDICIAL FACTORS**

#### **11 Powers of judicial factor: general**

- (1) On the date mentioned in section 9(1) there vest in the judicial factor all the powers of a natural person beneficially entitled to the estate.
- (2) Subsection (1) is without prejudice to any other enactment conferring powers on, or by virtue of which powers vest in, a judicial factor.
- (3) Schedule 1 provides for the interpretation of the expression “all the powers of a natural person beneficially entitled to the estate”.

#### **12 Power of judicial factor to require information**

- (1) A judicial factor may by written notice require any—
  - (a) public body,
  - (b) other body corporate,
  - (c) unincorporated association, or
  - (d) individual,
 to disclose to the judicial factor such information specified in the notice as the judicial factor reasonably considers relevant to the judicial factor’s functions.
- (2) The judicial factor is to send with any such notice the certified copy interlocutor containing the order for the judicial factor’s appointment.
- (3) A body or association which, or individual who, receives such a notice and its accompanying interlocutor is to comply with the notice without delay.
- (4) Subsection (5) applies where the information specified in the notice can readily be obtained by the judicial factor (either or both)—
  - (a) free of charge,
  - (b) under or by virtue of any other enactment.
- (5) The body, association or individual complies with the notice if, without delay, it (or as the case may be the individual) directs the judicial factor to the means by which the information can be so obtained.
- (6) If the body, association or individual is entitled by, under or by virtue of any other enactment to charge a fee for supplying the information requested, this section is without prejudice to that entitlement.

### **13 Further provision as to judicial factors' powers**

- (1) In appointing a judicial factor the court may (either or both)—
  - (a) specify in the interlocutor of appointment powers which are granted to the appointee and are not mentioned in section 11(1) or 12(1),
  - (b) specify in that interlocutor that certain of the powers mentioned in section 11(1) are not to be exercisable by the appointee.
- (2) A judicial factor may, at any time, apply to the court to be granted powers additional to those which the judicial factor has by virtue of the interlocutor of appointment.
- (3) Any application under subsection (2) must be intimated to the Accountant who, after such inquiry (if any) as appears to that officer to be appropriate, must in a report to the court indicate whether in the opinion of that officer it would be expedient to grant the additional powers sought.

### **14 Duties of judicial factor: general**

- (1) It is the duty of a judicial factor to hold, manage, administer and protect factory estate for the benefit of such persons as have an interest in the estate.
- (2) But subsection (1) is subject to the provisions of any other enactment and to such provision as is made in the interlocutor appointing the judicial factor.
- (3) In the performance of the duty imposed by subsection (1), a judicial factor must exercise care, prudence and diligence.

### **15 Ingathering**

- (1) It is the duty of a judicial factor to ingather the factory estate.
- (2) The judicial factor may take such steps as are requisite to complete title to such property as is vested in the judicial factor by virtue of that person's appointment.
- (3) It is the duty of the judicial factor, on becoming aware that a person is a creditor or debtor of the factory estate, to inform the person of the judicial factor's appointment.
- (4) It is the duty of the judicial factor to ensure that all—
  - (a) cash accounts and share certificates, and
  - (b) other assets of a like nature,held by that person as judicial factor are readily identifiable as being so held.
- (5) This section is subject to section 23.

### **16 Inventory and management plan**

- (1) A judicial factor is, within 6 months after the date on which the certified copy of the interlocutor containing the order for the judicial factor's appointment is issued, to send to the Accountant—

- (a) an inventory of the factory estate,
  - (b) a management plan (that is to say a plan as to how the judicial factor intends to administer the estate), and
  - (c) such accompanying documents as may be required by rules of court.
- (2) The Accountant may require the judicial factor to produce such further documents relevant to the inventory or management plan as the Accountant considers it necessary to examine.
- (3) The judicial factor is to seek to obtain the Accountant's agreement both to the inventory and to the management plan.
- (4) The Accountant may suggest or require (either or both)—
  - (a) an amendment to the inventory before agreeing to that inventory,
  - (b) an amendment to the management plan before agreeing to that plan.
- (5) The inventory, when agreed by the Accountant, is to be signed by the judicial factor and the Accountant as constituting, as at the date mentioned in subsection (1), a definitive statement of the estate for which the judicial factor is accountable.
- (6) The judicial factor and the Accountant may, at any time and in such manner as the Accountant may determine, take account of information discovered after the inventory is signed under subsection (5).
- (7) If the agreement of the Accountant to the management plan can be obtained, the judicial factor must administer the estate in accordance with that plan; but, if that agreement cannot be obtained, the judicial factor must administer the estate in accordance with the directions of the Accountant.
- (8) The judicial factor is to review an agreed management plan—
  - (a) from time to time (and at least annually), and
  - (b) whenever required to do so by the Accountant.
- (9) If, whether or not by virtue of a review under subsection (8), the judicial factor considers that an amendment to the management plan is required, the judicial factor may make the amendment provided that the Accountant's agreement is first obtained.
- (10) The Accountant may suggest or require an additional amendment to the management plan before agreeing to the amendment mentioned in subsection (9).
- (11) But if an additional amendment which the Accountant requires under subsection (10) is not effected by the judicial factor, the judicial factor must administer the factory estate in accordance with the directions of the Accountant.
- (12) It is the duty of the judicial factor to report to the Accountant, at such intervals as the Accountant may determine, as to how the administration of the estate is progressing.
- (13) This section is subject to section 23.

## **17 Submission of accounts etc.**

- (1) It is the duty of a judicial factor to report to the Accountant (including by the submission of accounts) the judicial factor's intromissions with the factory estate.
- (2) Accounts prepared for the purposes of subsection (1) must be in such form as the Accountant may agree with the judicial factor (or, in the absence of such agreement, in such form as the Accountant may specify).
- (3) Without prejudice to subsection (2), reporting for the purposes of subsection (1) must be in a way agreed with the Accountant (or, in the absence of such agreement, in a way specified by the Accountant).
- (4) Accounts and other documents prepared for the purposes of subsection (1) must be submitted to the Accountant at such intervals as the Accountant may specify.
- (5) An interval specified under subsection (4)—
  - (a) is not to exceed 2 years, and
  - (b) is not ordinarily to be less than 1 year.
- (6) But, subject to subsection (5)(a), the Accountant may, on cause shown, defer a date by which accounts and other documents are to be submitted by virtue of subsection (4).
- (7) This section is subject to section 23.

## **18 Delegation**

- (1) The judicial factor is not to delegate any of the judicial factor's functions and responsibilities other than—
  - (a) with the consent of the Accountant, or
  - (b) in so far as given the power to do so by this Act, by any other enactment or by the interlocutor appointing the judicial factor.
- (2) This section is subject to section 23.

## **19 Taking of professional advice**

- (1) It is the duty of a judicial factor to take professional advice where it is appropriate to do so.
- (2) In determining whether it is appropriate to take professional advice in a particular case, a judicial factor may consult the Accountant.
- (3) This section is subject to section 23.

## **20 Investment**

- (1) It is the duty of a judicial factor to consider whether (and if so how) to invest some or all of the funds of the factory estate.
- (2) This section is subject to sections 19 and 23.

## **21 Enforcing or defending claims**

- (1) It is the duty of a judicial factor to enforce or defend any claim in relation to the estate provided that the judicial factor is satisfied that to do so would be sensible in all the circumstances.
- (2) In determining whether it is sensible in all the circumstances of a particular claim to enforce or defend the claim, a judicial factor may consult the Accountant.
- (3) This section is subject to sections 19 and 23.

## **22 Duty where estate object of dispute**

- (1) This section applies where—
  - (a) the factory estate was, immediately before the appointment of the judicial factor, not being managed adequately because persons who required to agree among themselves on how to manage it could not reach such agreement, and
  - (b) the appointment was made wholly or mainly for that reason.
- (2) It is the duty of the judicial factor, by whatever method the judicial factor considers appropriate in the circumstances, to promote agreement on how to manage the estate; and if that method is mediation or arbitration the mediator or arbitrator may, but need not, be the judicial factor.
- (3) If agreement is not attained, or does not appear to the judicial factor to be attainable, by virtue of subsection (2), it is the duty of the judicial factor to formulate a scheme, being a scheme which the judicial factor considers equitable, for the management or distribution of the estate.
- (4) Without prejudice to the generality of subsection (3), the scheme may comprise—
  - (a) the appointment of a manager by the persons mentioned in subsection (1)(a),
  - (b) the division and sale of all or part of the factory estate.
- (5) This section is subject to section 23.

## **23 Further provision as to judicial factors' duties**

- (1) In appointing a judicial factor the court may (either or both)—
  - (a) specify in the interlocutor of appointment duties which are imposed on the appointee and are not duties mentioned in sections 15 to 22,
  - (b) specify in that interlocutor certain duties (whether or not duties mentioned in those sections) from which the appointee is to be free.
- (2) A judicial factor may, at any time, apply to the court to be free from certain of the duties which the judicial factor has by virtue of the interlocutor of appointment.
- (3) Any application under subsection (2) must be intimated to the Accountant who, after such inquiry (if any) as appears to that officer to be appropriate,

must in a report to the court indicate whether in the opinion of that officer it would be expedient to grant what is sought by the judicial factor.

## **24 Validity of certain transactions by judicial factor appointed on trust estate**

- (1) This section applies where a judicial factor is appointed on a trust estate and in relation to that estate, or any part of that estate—
  - (a) thinks it expedient to exercise a power enjoyed by virtue of this Act, but
  - (b) considers that its exercise might be at variance with the purposes of the trust.
- (2) The judicial factor may apply to the Accountant for the Accountant's consent to the exercise of the power.
- (3) The Accountant may grant the application (subject to such conditions, if any, as the Accountant may think fit to impose) provided that—
  - (a) the exercise is, in the opinion of the Accountant, in the best interests of all parties interested in the trust estate,
  - (b) the Accountant is satisfied that the judicial factor has complied with subsection (4) and with the provisions of any rules under that subsection, and
  - (c) the Accountant is satisfied either—
    - (i) that no objection is made, under subsection (4), to the exercise, or
    - (ii) that any objection so made is not sufficient cause for dismissing the application.
- (4) A judicial factor who proposes to make an application under subsection (2) must give such notification as is mentioned in subsection (5) to such persons, or such class or classes of person, as may be specified in rules of court and must do so in such manner as may be so specified.
- (5) The notification is—
  - (a) of the proposal to apply to the Accountant for consent to the exercise in question,
  - (b) of what that exercise would comprise, and
  - (c) of the person notified being entitled, by virtue of this section, to object (within such time and in such manner as the rules of court may specify) to the exercise.
- (6) Where a judicial factor exercises any power in accordance with a consent duly obtained under this section, the exercise is to be treated as not being at variance with the purposes of the trust.
- (7) This section is without prejudice to section 13(2).

## **PART 3**

### **DEALINGS ETC. WITH THIRD PARTIES**

## **25 Protection of person acquiring title**

Where a person has, in good faith and for value, acquired title from—

- (a) a judicial factor, the title acquired is not challengeable on the ground that, subsequent to the acquisition, the judicial factor's appointment was recalled, or
- (b) a person deriving title directly from a judicial factor, the title acquired is not challengeable on the ground that the title should not have been transferred to that person.

## **26 Entitlements and liabilities of judicial factor**

A judicial factor stands in place of the factory estate in any dealings with a third party and accordingly the judicial factor, in the judicial factor's capacity as such—

- (a) is liable for any debt or obligation of the estate to the third party, and
- (b) is entitled to receive any amount due to the estate by the third party and to enforce any obligation of the third party to the estate.

## **27 Contracts entered into by judicial factor**

- (1) Where a judicial factor, in the judicial factor's capacity as such, enters into a contract with another person and that person either is aware, or ought to be aware, that the judicial factor is entering into the contract in that capacity—
  - (a) any rights which that person or any third party has under or by virtue of the contract are enforceable against the factory estate only, and
  - (b) if the contract gives rise to litigation, the action is to be raised by, or as the case may be directed against, the judicial factor in the judicial factor's capacity as such.
- (2) Subsection (1) is subject to section 31.

## **28 Expenses of litigation on behalf of factory estate**

- (1) Where a judicial factor engages in litigation on behalf of the factory estate, any expenses of the litigation awarded against the judicial factor fall to be met from the factory estate.
- (2) Subsection (1) is subject to section 31.

## **29 Delict**

- (1) Where the acts or omissions of—
  - (a) a judicial factor, in the judicial factor's capacity as such, or

- (b) an agent appointed, or person employed, by the judicial factor to carry out the business of the judicial factor, give rise to a claim in delict, any action to enforce the claim is to be brought against the judicial factor in that capacity.
- (2) Any damages awarded against the judicial factor by virtue of the action fall to be met from the factory estate.
- (3) This section is subject to section 31.

### **30 Unjustified enrichment**

- (1) Where the acts or omissions of a judicial factor, in the judicial factor's capacity as such, give rise to a claim for unjustified enrichment against the factory estate, any liability resulting from the claim falls to be met from the estate.
- (2) Subsection (1) is subject to section 31.

### **31 Personal liability of judicial factor where breach of duty**

- (1) This section applies where liability arises from a claim against a factory estate.
- (2) The claim falls to be met out of the estate unless the court—
  - (a) finds that the liability arose by virtue of a breach of duty on the part of the judicial factor, and
  - (b) considers it appropriate that the judicial factor be found personally liable for (as the court thinks fit) all, or some part of, the liability.

### **32 Prescription of obligations**

- (1) Subject to subsection (2), obligations due to or by a factory estate prescribe in the ordinary way; that is to say as if there had been no appointment of a judicial factor on the estate.
- (2) Obligations due by a judicial factor to the factory estate are imprescriptible during the course of the judicial factory.

## **PART 4**

### **DISTRIBUTION, TERMINATION, RECALL AND DISCHARGE**

### **33 Approval of judicial factor's scheme for distribution of factory estate**

- (1) This section applies where a judicial factor has formulated—
  - (a) a scheme for the distribution of the factory estate because it appears to the judicial factor —
    - (i) that the purpose for which that person was appointed is fulfilled or no longer exists, or
    - (ii) that there are not, or may not be, sufficient funds in the factory estate to meet the

- continuing expenses of the judicial factor,  
or
- (b) a scheme by virtue of section 22(3), being a scheme comprising a distribution of the factory estate.
- (2) The judicial factor must—
- (a) send to the Accountant—
- (i) a current inventory of the factory estate, and
- (ii) a copy of the proposed scheme, and
- (b) seek the Accountant's approval of a distribution in accordance with the scheme in question,
- and may, if to obtain that approval it seems to the judicial factor to be appropriate to do so, amend that scheme.
- (3) If the Accountant approves the scheme (or, if the scheme has been amended, the scheme as amended), the judicial factor must without delay—
- (a) intimate that approval to all persons who, so far as is known to the judicial factor after reasonable enquiry, have an interest in the factory estate, and
- (b) send each of those persons—
- (i) a copy of the current inventory of the factory estate, and
- (ii) a copy of the approved scheme.
- (4) A person to whom intimation is given under paragraph (a) of subsection (3) may, within 21 days after receiving the copy documents mentioned in paragraph (b) of that subsection, lodge with the Accountant an objection to there being any distribution in accordance with the approved scheme.
- (5) If no objection is lodged timeously under subsection (4) (or an objection is lodged timeously but is then withdrawn) the judicial factor must distribute the estate in accordance with the approved scheme.
- (6) If an objection is lodged timeously under subsection (4) (and is not withdrawn) the Accountant must refer the objection to the court which appointed the judicial factor; and the Accountant is in that event to inform accordingly—
- (a) the judicial factor, and
- (b) any person to whom intimation is given under subsection (3)(a).
- (7) The court to which an objection is referred by virtue of subsection (6) is to require the objector to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement.
- (8) The court, after hearing the objector, the judicial factor and any other person who it is satisfied has an interest in the matter may (unless it rejects the objection, in which case the judicial factor must distribute the estate in accordance with the approved scheme) instruct the judicial factor to distribute the estate in such manner as the court orders.

### **34 Petition for distribution of factory estate**

- (1) This section applies where the court is satisfied that a petitioner has an interest in seeking the distribution of a factory estate.
- (2) The petitioner may petition the court for the estate to be distributed in such manner as the court thinks fit.
- (3) The petitioner must intimate the petition to any person to whom the court considers intimation should be made.
- (4) The court, after hearing the petitioner, the judicial factor (if not heard by virtue of being the petitioner), the Accountant and any other person who it is satisfied has an interest in the petition may, unless it refuses the application, instruct the judicial factor to distribute the estate in such manner as the court orders.
- (5) If the petitioner is not the judicial factor, the court must be satisfied that reasonable steps have been taken to persuade the judicial factor—
  - (a) to formulate a scheme for the distribution of the factory estate, and
  - (b) to seek, under section 33(2)(b), the Accountant's approval of a distribution in accordance with a scheme so formulated,but that the judicial factor will not do those things (or cannot obtain the requisite approval).
- (6) If the petitioner is the judicial factor, the court must be satisfied that the petitioner cannot obtain the approval mentioned in subsection (5).
- (7) The court is to require the petitioner (other than the judicial factor) to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement.

### **35 Termination, recall and discharge after distribution of factory estate by virtue of section 33(5) or (8) or 34(4)**

- (1) This section applies where a judicial factor has distributed the factory estate by virtue of section 33(5) or (8) or 34(4).
- (2) The judicial factor is to apply to the Accountant—
  - (a) for the judicial factor to be terminated,
  - (b) for the judicial factor's appointment to be recalled, and
  - (c) to be granted a certificate of discharge.
- (3) With any application under subsection (2) the judicial factor is to send a copy of the judicial factor's final accounts.
- (4) After auditing those accounts the Accountant is, except where subsection (6) applies, to grant the judicial factor a certificate—
  - (a) terminating the judicial factor,
  - (b) recalling the judicial factor's appointment, and
  - (c) discharging the judicial factor.
- (5) Subsection (6) applies if, after auditing the judicial factor's final accounts, the Accountant considers or suspects there has been misconduct or failure on the part of the judicial factor.

- (6) The Accountant is to take action under section 46 rather than to proceed as mentioned in subsection (4).

### **36 Registration where judicial factor terminated under section 35 (1)**

- (1) This section applies where a judicial factor is terminated under section 35.  
(2) As soon as reasonably practicable (and in any event within 7 days after the date on which a certificate is granted under subsection (4)(a) of that section) the Accountant must register in the Register of Inhibitions a certified copy of that certificate.

### **37 Formulations, approvals, petitions and registrations relating to part only of factory estate**

Sections 33 to 36 apply in relation to any formulation, approval, petition or, as the case may be, registration in relation to a part only of a factory estate as they apply in relation to a factory estate.

### **38 Duty of Accountant to apply for appointment of replacement where judicial factor has died undischarged etc.**

- (1) Where a judicial factor (in this section referred to as “JF”)—  
(a) has died undischarged but no petition has been lodged by any person for a judicial factor to be appointed in place of JF, subsection (2) applies,  
(b) though undischarged, has ceased for whatever reason to perform the duties of a judicial factor but no petition has been lodged by any person for a judicial factor to be appointed in place of JF, subsection (3) applies.
- (2) If the Accountant is of the opinion that the purpose for which JF was appointed still exists, it is the duty of the Accountant to petition the court, under section 1(1), for a judicial factor to be appointed in place of JF.
- (3) If the Accountant is of the opinion that the purpose for which JF was appointed still exists, it is the duty of the Accountant to petition the court—  
(a) under section 1(1), for a judicial factor to be appointed in place of JF, and  
(b) for the recall of JF’s appointment.
- (4) A judicial factor appointed by virtue of subsection (2) or (3) must—  
(a) (in addition to fulfilling the duties imposed by sections 15 and 16) bring JF’s accounts up to date and close them as at the date on which the interlocutor containing the order for the appointment is pronounced, and  
(b) on its appearing to the appointee to be appropriate to do so, apply to the Accountant for JF’s discharge.
- (5) The Accountant may grant an application made under paragraph (b) of subsection (4) if satisfied that it is appropriate to do so.
- (6) The expenses of any petition lodged under subsection (2) or (3) are, unless the court determines otherwise, to be met from the factory estate.

### **39 Other petitions for recall and discharge**

- (1) In this section—
  - (a) subsection (2) applies where, in circumstances other than those mentioned in section 33(1), a judicial factor wishes to resign, and
  - (b) subsection (3) applies where, in such other circumstances, some person other than the judicial factor, being a person who the court is satisfied has an interest, seeks to have the judicial factor's appointment recalled.
- (2) The judicial factor may petition the court—
  - (a) to recall the judicial factor's appointment, and
  - (b) for the judicial factor's discharge.
- (3) The person may petition the court to recall the judicial factor's appointment and the judicial factor may apply by motion for the court, if it grants the petition, also to grant the judicial factor's discharge.
- (4) A petition under subsection (2) or (3) is to include a crave for the appointment of a judicial factor on the factory estate in place of the judicial factor whose appointment is to be recalled.
- (5) A petition under subsection (2) or (3) is not to be granted until the certified copy of an interlocutor containing an order for the appointment of a judicial factor on the factory estate in place of the judicial factor whose appointment has been recalled has been issued to that new judicial factor by the clerk of court.
- (6) The petitioner must intimate any petition under subsection (2) or (3) to—
  - (a) the Accountant, and
  - (b) any other person to whom the court considers intimation should be made.
- (7) When a petition is lodged under subsection (2), the petitioner must send a copy of the judicial factor's accounts to the Accountant.
- (8) In the case of any petition under subsection (3), the court—
  - (a) must require the petitioner to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement, and
  - (b) if minded to grant the petition, must require the judicial factor to prepare and send to the Accountant of Court a copy of the judicial factor's accounts.
- (9) On receiving a copy of the judicial factor's accounts by virtue of subsection (7) or (8)(b), the Accountant must audit those accounts and present to the court a report—
  - (a) with regard to the audit, and
  - (b) as to whether, in the Accountant's view, the judicial factor's appointment ought to be recalled and (if so) whether discharge ought to be granted.
- (10) Neither recall nor discharge is to be granted by virtue of a petition under subsection (2) or (3) without the court having received and considered a

report under subsection (9) and made such further inquiry (if any) as it considers necessary.

#### **40 Inventory and balance sheet where judicial factor appointed by virtue of section 38 or 39**

- (1) Where a judicial factor is appointed by virtue of section 38(2) or (3), the opening balance sheet of the appointee is to be such as is agreed between the appointee and the Accountant.
- (2) Where a judicial factor is appointed by virtue of section 39(4)—
  - (a) the final inventory and balance sheet of the judicial factor replaced constitute the opening inventory and balance sheet of the appointee, but
  - (b) if, in consequence of the judicial factor replaced having been replaced undischarged, there is—
    - (i) no agreed final inventory of the judicial factor replaced, the opening inventory of the appointee,
    - (ii) no agreed final balance sheet of the judicial factor replaced, the opening balance sheet of the appointee,is to be such as is agreed between the appointee and the Accountant.

#### **41 Writing off**

- (1) This section applies where the Accountant is satisfied that, were the judicial factor to formulate a scheme, under section 33(1), for the distribution of a factory estate and to seek approval of a distribution in accordance with the scheme, such funds (if any) as there are in the estate would not be sufficient even to meet the expenses of, or arising in connection with, doing those things.
- (2) The Accountant is, except where subsection (5) applies, to—
  - (a) direct the judicial factor to distribute such funds (if any) as there are in the estate in any way the Accountant considers appropriate,
  - (b) terminate the judicial factory,
  - (c) recall the judicial factor's appointment, and
  - (d) discharge the judicial factor.
- (3) As soon as reasonably practicable after terminating a judicial factory under subsection (2)(b) the Accountant must register a notice of its termination in the Register of Inhibitions.
- (4) Subsection (5) applies if the Accountant considers or suspects there has been misconduct or failure on the part of the judicial factor.
- (5) The Accountant is to take action under section 46 rather than to proceed as mentioned in subsection (2).

## **42 Ending of judicial factor's accountability on discharge**

On—

- (a) an interlocutor containing an order for discharge of a judicial factor being issued by the clerk of court, or
  - (b) a certificate of discharge being granted to a judicial factor, (whether in relation to the entire factory estate or to part only of that estate)
- the judicial factor's accountability for acts and omissions in the judicial factor's capacity as judicial factor in relation to that estate, or as the case may be in relation to that part, ends except if and in so far as the judicial factor has incurred criminal liability in the course of holding, managing, administering or protecting the estate.

## **PART 5**

### **ACCOUNTANT**

#### **43 Accountant and Depute Accountant**

- (1) The Accountant must be an individual knowledgeable in matters of law and accounting as must any Depute Accountant.
- (2) A Depute Accountant (if any is appointed) is to carry out the functions of the Accountant at any time when the Accountant is unable to do so.
- (3) Subject to the provisions of any other enactment, the Accountant is not to hold any other office.
- (4) The sole remuneration of the Accountant is to be of such amount as the Scottish Court Service may determine.
- (5) The Accountant is to charge a fee for anything done by that officer in connection with that officer's functions under this Act.
- (6) Without prejudice to the generality of subsection (5), the fees charged by virtue of that subsection are to be such as will ensure that the Accountant is reimbursed for any outlays reasonably incurred by that officer in connection with that officer's functions under this Act.
- (7) Any fee received by the Accountant by virtue of subsection (5), and any sum received by that officer other than as remuneration, is to be accounted for in such manner as the Scottish Court Service may direct.
- (8) Amounts payable by virtue of subsection (5) are to be met from the factory estate.
- (9) But subsection (8) is subject to section 51.
- (10) The Accountant may, if satisfied in relation to a particular case that a fee payable by virtue of subsection (5) is unlikely to be recovered, waive the right to recover it.

#### **44 Functions of Accountant: general**

- (1) The Accountant is—
  - (a) to supervise the performance by judicial factors of the functions conferred on them by this or any other enactment or by any rule of law, and

- (b) to ensure that they duly observe such legal requirements and guidance as affect that performance.
- (2) Subsection (1) is without prejudice to any duty imposed on the Accountant by or by virtue of any other enactment.

#### **45 Power of Accountant to instruct judicial factor**

The Accountant may instruct a judicial factor as to the manner in which that person is to carry out the functions of judicial factor.

#### **46 Misconduct or failure of judicial factor**

- (1) Subsection (2) applies where the Accountant has reason to believe that a judicial factor—
  - (a) has engaged, or is engaging, in misconduct,
  - (b) has failed, or is failing, to discharge certain duties, or
  - (c) has failed, or is failing, to comply with an instruction given under section 45.
- (2) The Accountant is to make such inquiries into the matter as that officer considers appropriate and is to seek comments and representations from the judicial factor as respects the matter.
- (3) Any other person who has reason to believe that a judicial factor—
  - (a) has engaged, or is engaging, in misconduct, or
  - (b) has failed, or is failing, to discharge certain duties, may so inform the Accountant.
- (4) On receiving information under subsection (3), the Accountant is to make such inquiries into the matter as that officer considers appropriate and is to seek comments and representations from the judicial factor as respects the matter.
- (5) Subsection (6) applies where, having made inquiries under subsection (2) or (4), the Accountant concludes that there has been, on the part of the judicial factor, some appreciable—
  - (a) misconduct, or
  - (b) failure.
- (6) The Accountant must report the misconduct or failure—
  - (a) to the court which appointed the judicial factor, and
  - (b) if the judicial factor is a member of a professional body, to that body.
- (7) If the court receives a report under subsection (6), it is to give the judicial factor an opportunity to make representations and to be heard before it disposes of the matter.
- (8) The court may dispose of the matter in whatever manner it considers appropriate.
- (9) A determination of the court under subsection (8) is final and is conclusive against both the Accountant and the judicial factor.
- (10) But any such determination is without prejudice to any right which a person may have in respect of any loss consequent upon the judicial factor's—
  - (a) misconduct,

- (b) failure to discharge a duty, or
  - (c) failure to comply with an instruction under section 45.
- (11) And subsections (1) to (8) are without prejudice to any right, under Part 4, to petition the court to recall the judicial factor's appointment and to the powers of the court in relation to any such petition.

#### **47 Power of Accountant to require information**

- (1) The Accountant may by written notice require any—
- (a) judicial factor,
  - (b) public body,
  - (c) other body corporate,
  - (d) unincorporated association, or
  - (e) individual,
- to provide such information as is specified in the notice (being information which the Accountant considers relevant to the Accountant's functions under this Act).
- (2) It is the duty of the judicial factor, body, association or individual to comply with the notice without delay.
- (3) Subsection (4) applies where the information specified in the notice can readily be obtained by the Accountant (either or both)—
- (a) free of charge,
  - (b) under or by virtue of any other enactment.
- (4) A body, association or individual complies with the notice if, without delay, the body, association or individual directs the Accountant to the means by which the information can be so obtained.
- (5) If a body, association or individual is entitled, by, under or by virtue of any other enactment, to charge a fee for supplying the information requested, this section is without prejudice to that entitlement.

#### **48 Audit by Accountant**

- (1) On receipt, by virtue of this Act, of accounts prepared by a judicial factor the Accountant is, after considering such further information as the Accountant thinks it appropriate to obtain, to audit the accounts.
- (2) The Accountant may, if the Accountant considers it necessary or expedient to do so, remit the accounts for auditing to such duly qualified persons as the Accountant may select.
- (3) But all such audits are to be supervised by the Accountant; and the Accountant is responsible for their correctness.
- (4) When the audit is completed, the Accountant is to set out its results in the form of a report.
- (5) On completing that report the Accountant is to send a copy of it to the judicial factor.
- (6) If in the course of the audit the Accountant (or as the case may be a person to whom the accounts have been remitted)—
- (a) comes to the view that some aspect of the accounts requires to be explained, then the judicial factor is to be

- given an opportunity to provide the requisite explanation before the audit is completed, or
- (b) has made any correction to the accounts, then the Accountant (or that person), on being required to do so by the judicial factor, must explain the correction and the reason for making it.
- (7) Persons to whom accounts are remitted by virtue of subsection (2) are be remunerated for their services.

#### **49 Further provision as regards audit and report under section 48**

- (1) Subject to subsections (2) to (6), the audit completed under section 48, together with the accounts to which that audit relates and the report of its results, are conclusive.
- (2) The judicial factor to whom the report relates may lodge a written objection to the report with the Accountant.
- (3) Any such written objection must be lodged within 21 days after the judicial factor receives the report by virtue of section 48(5).
- (4) The Accountant is to consider any objection which is lodged timeously under subsection (2) and may, if that officer considers it appropriate to do so, alter the results and report of the audit in order to take account of matters raised in the objection.
- (5) Where the Accountant dismisses an objection considered under subsection (4) the judicial factor may require that officer to refer the objection to the court which appointed the judicial factor.
- (6) The determination of that court in relation to an objection so referred is final and is conclusive.

#### **50 Annual review**

- (1) The Accountant must publish annually a review of that officer's activities in relation to the judicial factories mentioned in subsection (3).
- (2) The review—
- (a) is to contain such particulars, and be published in such manner, as may be prescribed by rules of court, and
- (b) may contain such other particulars as the Accountant thinks it appropriate to include.
- (3) The judicial factories are those which at any time subsist during the year in question (irrespective of whether they came into being before or after the coming into force of this section).

#### **51 Inspection of certain records held by Accountant**

- (1) The inventory, management plan, annual accounts and audit report relating to a particular judicial factory and kept by the Accountant are open to inspection, by any person with an interest in the factory estate, on cause shown and on payment to the Accountant of a fee by that person.

- (2) Copies of any such records or papers, attested by the Accountant, are to have the same authority as the originals and are to be provided to any person—
- (a) requiring them, and
  - (b) with an interest in the factory estate,
- on cause shown and on payment to the Accountant of a fee by that person.

## **PART 6**

### **MISCELLANEOUS AND GENERAL**

#### Miscellaneous

#### **52 Right of judicial factor to require determination as regards decision of Accountant: general**

- (1) A judicial factor may apply to the court which appointed the judicial factor for a determination as regards any decision of the Accountant which relates to the judicial factor.
- (2) But (without prejudice to sections 49 and 53) subsection (1) does not apply as regards—
- (a) a decision to dismiss an objection considered under section 49(4), or
  - (b) a decision by virtue of which an appeal is competent under section 53(7).
- (3) The determination of the court in relation to a decision so referred to it is final and is conclusive against both the Accountant and the judicial factor.

#### **53 Remuneration and reimbursement of judicial factors**

- (1) A judicial factor is entitled to be remunerated from the factory estate for carrying out the functions of that office.
- (2) The Accountant is, after such consultation as appears to that officer to be appropriate, to fix rates for the remuneration of judicial factors.
- (3) Different rates may be fixed by virtue of subsection (2)—
- (a) for interim judicial factors,
  - (b) for different kinds of work, and
  - (c) for different circumstances.
- (4) The Accountant and the judicial factor are to agree the frequency with which amounts are to be paid to the judicial factor by way of remuneration; but if they are unable to agree, the Accountant is to determine that frequency.
- (5) The Accountant must review at least annually the rates so fixed.
- (6) The Accountant may fix a rate of remuneration for a particular interim judicial factor other than by virtue of subsections (2) to (5).
- (7) A judicial factor may appeal to the court which appointed that person in respect of (either or both)—
- (a) the amounts paid to the judicial factor by way of remuneration,

- (b) any determination of the Accountant under subsection (4).
- (8) The decision of the court in an appeal to it under subsection (7) is final and is conclusive against both the Accountant and the judicial factor.
- (9) A judicial factor is entitled to be reimbursed from the factory estate—
  - (a) for any outlays reasonably incurred, and
  - (b) as and when those outlays are so incurred.

#### **54 Diversity of judgment or practice**

- (1) This section applies where it appears to the Accountant that—
  - (a) there is a diversity of judgment or practice in proceedings in judicial factories in the sheriff courts, and
  - (b) it is important to put an end to that diversity.
- (2) It is the duty of the Accountant to report the matter to the Lord President of the Court of Session, specifying the proceedings in which the diversity has appeared and proposing that a rule be framed to secure uniformity of judgment and practice in such proceedings.
- (3) The Lord President is to consider the report and take such action in the matter as the Lord President thinks appropriate.

#### **55 Competence of appointing curator bonis**

In any proceedings begun after the coming into force of this section it is not competent to appoint a curator bonis to any person.

#### *General*

#### **56 Interpretation**

In this Act—

“the Accountant” means the accountant of the Court of Session,  
“clerk of court” means the sheriff clerk or as the case may be a clerk of session,  
“estate” means whole estate, irrespective of whether the property in question is heritable or moveable,  
“factory estate” means the estate on which a judicial factor is appointed,  
“interest in the estate” means an interest in the residual estate (that is to say, in the estate after payment of any debts), and  
“judicial factor” means a person appointed as such by a court (whether under an enactment or a rule of law) to hold, manage, administer and protect property.

#### **57 Modification of enactments**

Schedule 2 makes provision for the modification of enactments.

## **58 Repeals and revocations**

Schedule 3 contains repeals and revocations.

## **59 Ancillary provision**

- (1) The Scottish Ministers may, by order, make such incidental, supplemental, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.
- (2) An order under subsection (1) may modify any enactment (including this Act).
- (3) An order under subsection (1)—
  - (a) is subject to the affirmative procedure if it modifies any enactment, and
  - (b) is otherwise subject to the negative procedure.

## **60 Commencement**

- (1) This section and section 61 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

## **61 Short title**

The short title of this Act is the Judicial Factors (Scotland) Act 2019.

## SCHEDULE 1

*(introduced by section 11(3))*

### INTERPRETATION OF SECTION 11(1)

- 1 Without prejudice—
  - (a) to the generality of section 11(1), and
  - (b) to section 13(1)(b),the powers mentioned in section 11(1) include powers to take any of the measures mentioned in paragraph 2.
- 2 (1) To take possession of, collect and ingather the property of the factory estate.
  - (2) On behalf of the factory estate—
    - (a) to bring or defend any action,
    - (b) to make any application to the court, or
    - (c) to engage in any other legal proceedings.
  - (3) To carry out works.
  - (4) To grant any deed necessary for carrying into effect a power vested in the judicial factor.
  - (5) To carry on—
    - (a) the business (if any) of the factory estate, or
    - (b) any part of that business.
  - (6) To enter into, or take over, a contract.
  - (7) To pay a debt due by the estate without requiring the creditor to constitute the debt, provided that the judicial factor is satisfied that the debt is a proper debt of the factory estate.
  - (8) To employ, or dismiss from employment, any person.
  - (9) To appoint an agent to carry out business which the judicial factor does not have the competence to carry out.
  - (10) To remunerate any person appointed under sub-paragraph (9).
  - (11) To sell the factory estate, or any part of the factory estate, (whether heritable or moveable).
  - (12) To grant, vary or accept the surrender of a lease or tenancy of any duration of the heritable factory estate or of any part of the heritable estate.
  - (13) To remove a tenant.
  - (14) To take a lease or tenancy of any duration of any property if it is a lease or tenancy required for the business of the estate.
  - (15) To make any kind of investment of the factory estate, including an investment in heritable property.
  - (16) To appoint a person as the judicial factor's nominee, to exercise the judicial factor's power of investment under sub-paragraph (15).
  - (17) To authorise an agent to exercise any of the judicial factor's investment management functions at the agent's discretion.
  - (18) To exchange any part of the heritable factory estate for heritable estate of a like, or greater, value.
  - (19) To acquire property (whether heritable or moveable).
  - (20) To borrow money on the security of the factory estate or of any part of the factory estate (whether heritable or moveable).
  - (21) On behalf of the factory estate, to draw, accept, make or endorse any bill of exchange or promissory note.

- (22) To refer to arbitration a question affecting the factory estate.
  - (23) To formulate and propose a scheme for division of the factory estate.
  - (24) To petition the court for (either or both)—
    - (a) authority to act at variance with the purposes of the judicial factory,
    - (b) a variation of the judicial factor's powers.
  - (25) To concur, in respect of any securities of a company which are comprised in the factory estate and in like manner as if the judicial factor was entitled to the securities beneficially, in any scheme or arrangement for—
    - (a) the reconstruction of the company,
    - (b) the sale of the property and undertaking of the company, or any part of that property and undertaking, to another company,
    - (c) the acquisition of the securities of the company, or of control of those securities, by another company,
    - (d) the amalgamation of the company with another company, or
    - (e) the release, modification or variation of any rights, privileges or liabilities attached to the securities or to any of the securities.
  - (26) To accept any securities of the reconstructed, purchasing or new company in lieu of, or in exchange for, all or any of the original securities.
  - (27) To retain any such securities for any period for which the judicial factor could properly have retained the original securities.
  - (28) To such extent as the judicial factor thinks fit—
    - (a) to exercise any conditional or preferential right to subscribe for any securities in a company,
    - (b) to apply capital of the factory estate in payment of the consideration for such subscription,
    - (c) to retain the securities for any period for which the judicial factor has power to retain the holding in respect of which the right to subscribe was offered (but subject to any conditions subject to which the judicial factor has that power),
    - (d) to renounce any such conditional or preferential right, or
    - (e) to assign to any person, for the best consideration that reasonably can be obtained the benefit of, or title to, any such conditional or preferential right.
- 3 "Person" in paragraph 2(28)(e) includes any person having an interest in the factory estate.

SCHEDULE 2  
(introduced by section 57)

MODIFICATION OF ENACTMENTS

*Trusts (Scotland) Act 1921*

- 1
- (1) The Trusts (Scotland) Act 1921 is amended as follows.
  - (2) In section 2 (definitions)—
    - (a) in the definition of “Trust”, paragraph (b) and the word “and” immediately preceding that paragraph are repealed,
    - (b) in the definition of “Trust deed”, paragraph (b) and the word “and” immediately preceding that paragraph are repealed,
    - (c) in the definition of “Trustee”, for the words “, executor nominate and judicial factor” there is substituted “or executor nominate”.
  - (3) In the proviso to section 3 (what trusts shall be held to include), paragraph (3) and the word “and” immediately preceding that paragraph are repealed.
  - (4) In section 8(2)(b) (conveyances to non-existing or unidentifiable persons), the words “or judicial factor”, in the second place at which they occur, are repealed as are the words from “, or a warrant” to “as the case may be”.
  - (5) In each of sections 22 (appointment of new trustees by the court) and 24 (completion of title by the beneficiary of a lapsed trust), the words from “in like manner” to “1874” are repealed.
  - (6) Section 25 (completion of title of judicial factors) is repealed.

*Conveyancing (Scotland) Act 1924*

- 2
- In section 5(3)(b) of the Conveyancing (Scotland) Act 1924 (deduction of title)—
- (a) for the words from the beginning to “are” there is substituted “Section 44 of the Conveyancing (Scotland) Act 1874 is”,
  - (b) for the words “section forty four of the said Act of 1874, as hereby amended,” there is substituted “that section”, and
  - (c) the words “shall be applicable to all judicial factors within the meaning of section three of the said Act of 1868, and both of such sections hereby amended” are repealed.

*Companies Act 1989*

- 3
- In section 182(3)(b) of the Companies Act 1989 (powers of court in relation to certain proceedings begun before the commencement of that section)—
- (a) the words “by a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889” are repealed, and

- (b) after the word “person” there is inserted “by a judicial factor appointed under the Judicial Factors (Scotland) Act 2019”.

*Pension Schemes Act 1993*

- 4 (1) The Pension Schemes Act 1993 is amended as follows.
- (2) In section 123 (interpretation of Chapter 2 of that Act), in subsection (2)(b), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section” there is substituted “the Judicial Factors (Scotland) Act 2019 is required by virtue of section 129A of the Bankruptcy (Scotland) Act 2016”.
- (3) In section 127(2)(b) (transfer to Secretary of State of rights and remedies), for the words “11A of the Judicial Factors (Scotland) Act 1889” there is substituted “51A of that Act”.

*Employment Rights Act 1996*

- 5 (1) The Employment Rights Act 1996 is amended as follows.
- (2) In each of sections 166(6)(b)(ii) (applications for payment) and 183(2)(b)(ii) (insolvency), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent” there is substituted “the Judicial Factors (Scotland) Act 2019 on his insolvent estate is required by section 129A of the Bankruptcy (Scotland) Act 2016 to divide the”.
- (3) In section 189(2)(b) (transfer to Secretary of State of rights and remedies), for the words “11A of the Judicial Factors (Scotland) Act 1889” there is substituted “51A of that Act”.

*Pensions Act 2004*

- 6 In section 121(2)(e)(ii) of the Pensions Act 2004 (insolvency event, insolvency date and insolvency practitioner), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) is required by that section to divide the individual’s” there is substituted “the Judicial Factors (Scotland) Act 2019 on the individual’s insolvent estate is required by section 129A of the Bankruptcy (Scotland) Act 2016 to divide the”.

*Bankruptcy and Diligence etc. (Scotland) Act 2007*

- 7 In section 168(2)(a) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (inhibition effective against judicial factor), for the words “under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) (application for judicial factor on deceased person’s estate)” there is substituted “, under the Judicial Factors (Scotland) Act 2019, on the insolvent estate of a deceased person”.

*Third Parties (Rights against Insurers) Act 2010*

- 8 In section 5(2)(c) of the Third Parties (Rights against Insurers) Act 2010 (individuals who die insolvent), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 in respect of” there is substituted “the Judicial Factors (Scotland) Act 2019 on”.

*Bankruptcy (Scotland) Act 2016*

- 9 (1) The Bankruptcy (Scotland) Act 2016 is amended as follows.  
(2) In section 88(1) (limitations on vesting), after paragraph (b) there is inserted—  
“(bb) property held by the debtor in the debtor’s capacity as a judicial factor.”.  
(3) After section 129 there is inserted—

**“129A Modification of section 129 and schedule 2 where judicial factor appointed**

- (1) This section applies where a judicial factor is appointed under the Judicial Factors (Scotland) Act 2019 on the estate of a deceased person and that estate is absolutely insolvent.  
(2) Section 129 of, and schedule 2 of, this Act shall apply as if for references—  
(a) to the trustee in the sequestration there were substituted references to the judicial factor; and  
(b) to the date of sequestration there were substituted references to the date of the judicial factor’s appointment.”.

SCHEDULE 3  
(introduced by section 58)

REPEALS AND REVOCATIONS

**Part 1**

Repeals

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Judicial Factors Act 1849	The whole Act.
Titles to Land Consolidation (Scotland) Act 1868	Section 24.
Conveyancing (Scotland) Act 1874	In section 44, the words “or judicial factor” in both places at which they occur.

Conveyancing and Land Transfer (Scotland) Act 1874	In section 43, the words “or judicial factor”.
	In section 44, the words “or judicial factor” in both places at which they occur.
Judicial Factors (Scotland) Act 1880	The whole Act.
Judicial Factors (Scotland) Act 1889	The whole Act.
Administration of Justice (Scotland) Act 1933	In section 25, the words “Accountant of Court,”.
Conveyancing Amendment (Scotland) Act 1938	Section 1, in so far as relating to judicial factors.
Trusts (Scotland) Act 1961	Section 2(3) to (6). Section 3.
Conveyancing and Feudal Reform (Scotland) Act 1970	In Schedule 3, in paragraph 9(2)(b), the words “under section 11A of the Judicial Factors (Scotland) Act 1889”.
Superannuation Act 1972	In Schedule 6, paragraph 2.
Law Reform (Miscellaneous Provisions) (Scotland) Act 1980	Section 7. Section 14.
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990	Section 67. In Schedule 8, paragraph 21.
Children (Scotland) Act 1995	In Schedule 4, paragraphs 2 and 4.
Adults with Incapacity (Scotland) Act 2000	In schedule 5, paragraphs 3 and 6.
Abolition of Feudal Tenure etc. (Scotland) Act 2000	In schedule 12, paragraph 8(8).
Bankruptcy and Diligence etc. (Scotland) Act 2007	In schedule 5, paragraph 5.

## Part 2

### Revocations

<i>Title and date</i>	<i>Extent of revocation</i>
Act of Sederunt (Aliments and Factors Being Liable for Annual Rent) July 31st. 1690	The whole Act of Sederunt
Act of Sederunt (Factors upon and Tacksmen of Sequestrate Estates) December 25th. 1708	The whole Act of Sederunt
Act of Sederunt (More Speedy Discussing of Compts and Reckonings) November 22nd. 1711	The whole Act of Sederunt
Act of Sederunt (Dispatch of Business) July 31st. 1717	The whole Act of Sederunt
Act of Sederunt (Factors Appointed by the Lords on the Estates of Pupils not Having Tutors and Others) February 13th. 1730	The whole Act of Sederunt

## **ANNEX B**

### **LIST OF RECOMMENDATIONS**

1. That the Acts of Sederunt of 31 July 1690, 25 December 1708, 22 November 1711, 31 July 1717 and 13 February 1730 be expressly revoked. (paragraph 2.14)
2. That section 33 (limitations on vesting) of the Bankruptcy (Scotland) Act 1985 be amended to ensure that property held by a person as a judicial factor will not vest in the trustee in sequestration. (paragraph 2.43)
3. That applications for the appointment of a judicial factor should continue to be made by way of petition. (paragraph 3.3)
4. That petitions for the appointment of a judicial factor should continue to be competent in both the Court of Session and the sheriff court.(paragraph 3.6)
5. That the provisions of the draft Bill attached to this Report should be without prejudice to the appointment of a judicial factor under any other enactment or rule of law. (paragraph 3.10)
6. That the provisions of the draft Bill should apply to any judicial factor, so called, appointed under that Bill or any other enactment or rule of law. (paragraph 3.10)
7. That petitions for the appointment of a judicial factor made under section 41 of the Solicitors (Scotland) Act 1980 should no longer be made in the Inner House of the Court of Session. (paragraph 3.11)
8. That it should be competent, in either the Court of Session or the sheriff court, for the appointment of a judicial factor to be made in the course of other proceedings. (paragraph 3.14)
9. That it should continue to be competent to appoint interim judicial factors. (paragraph 3.22)
10. That an interim appointment should be kept under review by the Accountant.(paragraph 3.22)
11. That, subject to any modifications which the appointing court may make, the provisions of the draft Bill should apply to an interim judicial factor as they apply to a permanent judicial factor. (paragraph 3.22)
12. That intimation of the petition should be made to those appearing to the petitioner to have an interest in the estate. (paragraph 3.23)

13. That the definition of "interest" should be expressed widely enough to enable the court to make an appointment whenever it considers it appropriate to do so. (paragraph 3.24)
14. That any natural person of full legal capacity, and who is in the view of the court a suitable person, should be eligible to be appointed as a judicial factor. (paragraph 3.27)
15. That it should be competent to appoint as a factor a person who is not domiciled in Scotland. (paragraph 3.27)
16. That a person domiciled outside Scotland who accepts appointment as a judicial factor is deemed thereby to prorogate the jurisdiction of the Scottish courts. (paragraph 3.27)
17. That the court should have a discretion as to whether or not to require a judicial factor to find caution; but that that discretion should be exercised sparingly. (paragraph 3.36)
18. That where caution is required, the amount of caution should be fixed by the Accountant, who should also be able to vary the amount from time to time. (paragraph 3.36)
19. That the grounds for the appointment of a judicial factor should be that there is property which requires to be managed properly and:
  - (a) that it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it; or
  - (b) that there would otherwise be benefit in having it managed by a judicial factor. (paragraph 3.45)
20. That all property in relation to which the factor is appointed should vest in the factor, in that capacity. (paragraph 3.74)
21. That a certified copy of the interlocutor of appointment should be sufficient warrant for the factor to intromit with the factory estate. Where, however, a requirement for caution has been imposed, the certified copy interlocutor should not be issued before the Accountant has informed the court that the requirement has been complied with. (paragraph 3.74)
22. That where the property is of a nature such that the completion of title to it requires some further formal step, such as the registration of a notice of title in the Land Register, the factor should have a discretion to take that step. (paragraph 3.74)
23. That section 24 of the Titles to Land Consolidation (Scotland) Act 1868, section 13 of the 1889 Act and section 25 of the Trusts (Scotland) Act 1921 should be repealed. (paragraph 3.74)

24. That section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed, in so far as relating to judicial factors. (paragraph 3.74)
25. That, without prejudice to sections 41 and 42 of the Solicitors (Scotland) Act 1980, a judicial factor appointed on the estate of a solicitor by virtue of that Act should be vested in all the property held by the solicitor in question, including, unless the court determines otherwise, all such property held by that solicitor in a fiduciary capacity. (paragraph 3.82)
26. That the appointment of a judicial factor should be:
  - (a) registered in the Register of Inhibitions; and
  - (b) intimated to the Accountant by the clerk of court. (paragraph 3.86)
27. That, where an appointment of a judicial factor subsists for 5 years, a fresh registration should be made in the Register by the judicial factor. (paragraph 3.86)
28. That a general duty should be imposed upon a judicial factor to manage the estate for the benefit of those who have an interest in it. (paragraph 4.14)
29. That that general duty should be subject to:
  - (a) any special statutory regime under which a judicial factor may be appointed; and
  - (b) the terms of the interlocutor appointing the judicial factor. (paragraph 4.14)
30. That a court appointing a judicial factor should have a discretion to add to, or subtract from, the duties which would otherwise be imposed upon a judicial factor under or by virtue of any enactment. (paragraph 4.14)
31. That a judicial factor should be able at any time to apply to the court to be relieved of any duty imposed by or by virtue of the interlocutor of appointment. (paragraph 4.14)
32. That a judicial factor should be required to exercise care, diligence and prudence in carrying out the functions of the office.(paragraph 4.14)
33. That a judicial factor should be under a duty to ingather the whole of the judicial factory estate. (paragraph 4.17)
34. That the judicial factor should ensure that all cash accounts, share certificates and other assets of a like nature, appertaining to the judicial factory, should be readily identifiable as such. (paragraph 4.17)
35. That the judicial factor should be under a duty to prepare an inventory of the estate, and send it to the Accountant within six months of being appointed. (paragraph 4.19)

36. That the judicial factor should be under a duty to inform persons appearing to be creditors or debtors of the judicial factor estate of the fact of the appointment. (paragraph 4.19)
37. That the factor should be under a duty to prepare a management plan, to be agreed with the Accountant, in such detail as the Accountant may stipulate. (paragraph 4.25)
38. That a judicial factor should be under a duty:
  - to prepare regular reports, including accounts, for the consideration of the Accountant, at such intervals and in such form as the Accountant may specify.
  - not to delegate any functions, unless authorised by the draft Bill, or permitted to do so by the appointing court or the Accountant.
  - to take professional advice where it is appropriate to do so.
  - to consider whether and, if so, how, to invest the funds of the estate.
  - where it is sensible to do so, to enforce or defend any claim in relation to the estate. (paragraph 4.33)
39. That, where the parties with an interest in the estate are in disagreement, the judicial factor should be under a duty, either personally or through others, to mediate, or otherwise to attempt to persuade them to come to an agreement. (paragraph 4.37)
40. That where it proves impossible to persuade the parties to resolve their differences, the judicial factor should be required to prepare a scheme for the solution of the difficulty, either by a suggested distribution of the estate or otherwise. (paragraph 4.37)
41. That a judicial factor should have all the powers of a natural person beneficially entitled to the estate. (paragraph 5.7)
42. That those powers should include the specific powers:
  - (a) mentioned in the schedule to the draft Bill; and
  - (b) conferred on the judicial factor by any other enactment. (paragraph 5.7)
43. That the statutory provision, currently in section 2(3) to (6) of the Trusts (Scotland) Act 1961, which enables a judicial factor on a trust estate, with the consent of the Accountant, to act in a way at variance with the trust purposes, should be re-enacted in the draft Bill attached to this Report. (paragraph 5.13)
44. That the court should have a discretion to add to, or to exclude, any of the judicial factor's powers in a particular case. (paragraph 5.15)

45. That the factor should be able to apply to the court for additional powers during the course of the judicial factory. (paragraph 5.15)
46. That, without prejudice to any other lawful means of requiring information to be provided, a judicial factor should have a specific power to request information from persons and bodies holding information as to the affairs of the judicial factory estate; and such persons and bodies should be under a duty to comply with any such request. (paragraph 5.18)
47. That the processes for termination of the judicial factory, recall of the appointment of the judicial factor, and discharge of the judicial factor, should apply to a part of the judicial factory estate as they apply to the whole. (paragraph 6.9)
48. That a judicial factor who considers that the purpose of the appointment has been fulfilled, or is impossible to fulfil, should seek the agreement of the Accountant to a scheme for the distribution of the estate. (paragraph 6.18)
49. That the judicial factor should be required to intimate the scheme so agreed, with the accompanying documentation, to those with an interest in the estate. (paragraph 6.18)
50. That any person with an interest in the estate should be entitled to lodge objections with the Accountant within 21 days of such intimation. (paragraph 6.18)
51. That, if no objection is lodged, the judicial factor should distribute the estate in accordance with the scheme. (paragraph 6.18)
52. That the procedure seeking the agreement of the Accountant to a scheme for the distribution of the judicial factory estate should be followed even in cases where the persons with an interest in the estate do not agree with the judicial factor's proposed distribution of it. (paragraph 6.22)
53. That where a person with an interest objects to the proposed distribution, the Accountant should refer the matter to the court.(paragraph 6.22)
54. That where such a matter is referred to the court, the person making the objection occasioning the reference should be required to find caution for the expenses of the ensuing litigation, unless that appears to the court to be unjust in the circumstances. (paragraph 6.22)
55. That in any such proceedings the court should make such orders as to the disposal of the estate as seem to it to be appropriate. (paragraph 6.22)
56. That it should be competent:
  - (a) for a judicial factor who considers that it is appropriate to distribute the factory estate with a view to the judicial factory

being terminated, but who has failed to persuade the Accountant of that position; or

- (b) for a person with an interest in seeking the distribution of the estate, who considers that it is appropriate to distribute the estate with a view to the judicial factor being terminated, but who has failed to persuade the judicial factor and/or the Accountant of that fact, to petition the court directly for distribution of the estate. (paragraph 6.25)

- 57. That, in either case, the petitioner should be required to satisfy the court that reasonable attempts have been made to persuade the judicial factor to formulate a scheme for distribution and seek the Accountant's approval of it, or to obtain the Accountant's approval, as the case may be. (paragraph 6.25)
- 58. That a person with an interest in seeking the distribution of the estate who raises such a petition should be required to find caution for the expenses of the litigation, unless that appears to the court to be unjust in the circumstances. (paragraph 6.25)
- 59. That where such a petition is successful, the court should direct the judicial factor to distribute the judicial factor estate as seems to it to be appropriate. (paragraph 6.25)
- 60. That a judicial factor who has distributed the estate in accordance with the scheme, or as instructed by the court, should apply to the Accountant for termination of the judicial factor, recall of the appointment, and discharge; and should submit with that application final accounts. (paragraph 6.27)
- 61. That the Accountant should audit the accounts and, where they are satisfactory, should issue a certificate terminating the judicial factor, recalling the judicial factor's appointment and, where so advised, discharging the judicial factor. (paragraph 6.27)
- 62. That it should remain open to the Accountant to write off a judicial factor, and, where appropriate, grant a formal discharge to the judicial factor, where the funds available are insufficient to meet the expenses of formulating, and obtaining approval of, a scheme for distribution of the estate. (paragraph 6.29)
- 63. That a judicial factor who seeks recall of the appointment, and discharge, before the purpose of the appointment is fulfilled, should do so by way of petition to the court. (paragraph 6.31)
- 64. That such a judicial factor should prepare accounts, and submit them to the Accountant. (paragraph 6.31)
- 65. That the Accountant should audit the judicial factor's accounts, and prepare a report on them, and on whether, in the Accountant's opinion, the appointment

should be recalled and discharge granted, for submission to the court.  
(paragraph 6.31)

66. That it should be competent for any person with an interest to petition the court for the recall of the appointment of the judicial factor. (paragraph 6.32)
67. That any person initiating such a petition should, unless the court determines that it would not be in the interests of justice, be required to find caution for the expenses of the litigation. (paragraph 6.32)
68. That any petition for the recall and discharge of a judicial factor, which does not also seek termination of the judicial factory, should contain a crave for the appointment of a successor.(paragraph 6.33)
69. That the appointment of the new judicial factor should take place at the same time as the recall of the appointment of the previous judicial factor. (paragraph 6.33)
70. That, upon consideration of the petition, and the Accountant's report, the court should, if so advised:
  - (a) recall the present judicial factor's appointment and appoint a successor;
  - (b) discharge the present judicial factor. (paragraph 6.34)
71. That, provided they have been approved by the Accountant, the outgoing judicial factor's closing accounts should be the opening accounts of the successor. (paragraph 6.37)
72. That, where there is no agreed closing inventory or balance sheet, the incoming judicial factor should make up an inventory and balance sheet, and agree them with the Accountant. (paragraph 6.37)
73. That where a judicial factor dies or becomes incapacitated in office, the Accountant should petition the court for the appointment of a replacement judicial factor and, where appropriate, for the recall of the appointment of the predecessor judicial factor. (paragraph 6.43)
74. That the replacement judicial factor should ingather the estate and prepare an inventory and management plan. (paragraph 6.43)
75. That the replacement judicial factor should, in addition, update and close the accounts of the predecessor factor as at the date of the replacement factor's appointment. (paragraph 6.43)
76. That a replacement judicial factor who considers it appropriate to do so should then apply to the Accountant for the discharge of the predecessor; and that the Accountant should, if it appears appropriate, grant a certificate of discharge. (paragraph 6.43)

77. That a certificate of termination granted by the Accountant should be registered in the Register of Inhibitions by the Accountant. (paragraph 6.44)
78. That, allegations of criminal conduct apart, a judicial factor who has been granted a discharge should not be accountable for what has taken place during the course of the judicial factory. (paragraph 6.45)
79. That judicial factors should be entitled to be remunerated for the work they do, on the basis of fees fixed by the Accountant after appropriate consultation. (paragraph 7.11)
80. That different rates should be able to be fixed for different levels of work, different circumstances and for interim judicial factors. (paragraph 7.11)
81. That judicial factors should be entitled to be paid, at intervals throughout the year as agreed with the Accountant, for the work done prior to the submission of the relevant fee note. (paragraph 7.11)
82. That the invoices which judicial factors submit should enable the Accountant to determine what work has been done, by which level of professional or administrative person, and how long it has taken. (paragraph 7.11)
83. That judicial factors should be entitled to recover all their reasonable outlays as and when they are incurred. (paragraph 7.11)
84. That in relations between the judicial factory estate and third parties, it should be made clear that liabilities fall upon the estate, and not upon the judicial factor. (paragraph 7.12)
85. That where the estate is involved in litigation, the expenses of that litigation should fall upon the estate, and not upon the judicial factor. (paragraph 7.13)
86. That where a liability of the factory estate is due to a breach of duty by the judicial factor, the factor may be found personally liable for all or part of that liability. (paragraph 7.14)
87. That it should be made clear that the judicial factor stands in place of the judicial factory estate, and any persons having an interest in it, for the purposes of dealings with third parties. (paragraph 7.15)
88. That a title obtained, in good faith and for value, from a judicial factor is not challengeable on the ground that the appointment of the factor is subsequently recalled. (paragraph 7.17)
89. That where a person has, in good faith and for value, obtained title to property from a person who has obtained that property from a judicial

factor, that title is not challengeable on the ground that the transfer from the judicial factor should not have been made. (paragraph 7.17)

90. That it should be made clear that:
  - (a) obligations to or by the estate should be subject to the normal rules of prescription, notwithstanding the appointment of a judicial factor; and
  - (b) obligations due by a judicial factor to the factory estate should not prescribe during the course of the judicial factory.(paragraph 7.19)
91. That persons with an interest in the estate should not have any locus directly to raise questions as to the judicial factor's actings, or, in particular, to the audited accounts, other than by making representations to the Accountant, or by seeking the replacement of the judicial factor. (paragraph 7.29)
92. That it should no longer be competent to appoint a curator bonis on the estate of any person. (paragraph 7.37)
93. That section 35 of the 1849 Act be repealed without re-enactment. (paragraph 7.41)
94. That section 37 of the 1849 Act be repealed without re-enactment. (paragraph 7.42)
95. That it should continue to be the function of the Accountant generally to supervise the conduct of judicial factors, and to see that they observe the terms of the relevant legislation and of their appointment. (paragraph 8.6)
96. That it should continue to be a requirement for the appointment of a person to the office of the Accountant or Depute Accountant of Court that that person should have a knowledge of law and accounts. (paragraph 8.8)
97. That, subject to the provisions of any other enactment, the Accountant should hold no other office. (paragraph 8.8)
98. That the Accountant should not be entitled to receive any income other than that set by the Scottish Court Service. (paragraph 8.8)
99. That the Accountant should be under a duty:
  - (a) to approve the inventory; and
  - (b) to approve, amend or, where necessary, set out the management plan to be implemented by the judicial factor. (paragraph 8.11)
100. That the Accountant should have a general power to direct a judicial factor as to the performance of the duties of the office. (paragraph 8.14)

101. That a judicial factor should be able to apply to the court to challenge a decision of the Accountant. (paragraph 8.14)
102. That the Accountant should be:
  - (a) required to charge fees in respect of the various functions carried out in relation to judicial factories; and
  - (b) empowered to remit payment of fees where it appears that it will not be possible or practicable to recover them. (paragraph 8.17)
103. That, without prejudice to any other lawful means of requiring the provision of information, the Accountant should have a power to require any person or body in the United Kingdom to supply information necessary for the carrying out of the duties of the office in relation to judicial factors. (paragraph 8.20)
104. That the inventory, management plan, annual accounts and audit report relating to a given judicial factory should be made available, either for inspection or in hard copy, to persons with an interest in the estate, upon cause shown and payment of the requisite fee. (paragraph 8.20)
105. That the Accountant, upon reaching the conclusion that the judicial factor is guilty of serious misconduct or has materially failed to discharge the duties of the office, may report this misconduct or failure to the court for determination, and to any professional body of which the judicial factor is a member. (paragraph 8.23)
106. That the court, on being satisfied that there has been such misconduct or failure on the part of the judicial factor, should have power to make such orders as it considers appropriate. (paragraph 8.23)
107. That the Accountant should be under a duty to audit, or to secure the audit of, the judicial factor's annual accounts.(paragraph 8.26)
108. That the costs of any external audit should also be borne by the judicial factory estate. (paragraph 8.26)
109. That the judicial factor should be entitled to challenge any decisions taken by the Accountant in relation to those accounts, if necessary by application to the court. (paragraph 8.26)
110. That, once any challenge has been dealt with, the audited accounts should be conclusive as between the Accountant and the judicial factor, and against all other persons. (paragraph 8.26)
111. That an Accountant who is of the view that there is diversity in terms of how judicial factory proceedings are dealt with in the sheriff court should report the matter to the Lord President of the Court of Session.(paragraph 8.28)

112. That the Lord President should deal with any such report in such a way as seems to him or her to be appropriate. (paragraph 8.28)
113. That the Accountant should be under a duty to make an annual review, in accordance with such requirements as may be set out in rules of court, and supplemented as the Accountant sees fit. (paragraph 8.29)

## **ANNEX C**

### **TYPES AND VOLUMES OF JUDICIAL FACTOR APPOINTMENTS**

The following data has been replicated from the Scottish Court and Tribunal Service website at this web address <http://www.scotcourts.gov.uk/the-courts/more/the-accountant-of-court/judicial-factors>

#### **Types of Judicial Factory**

There are many circumstances where a Judicial Factory may be required and appointed, these include:

#### **Section 41 of the Solicitors (Scotland) Act 1980**

Applications for the appointment of a Judicial Factor over a solicitors firm are normally made by The Law Society of Scotland where there has been a breach of Law Society Accounting Rules or where a sole practitioner dies. A Factor will normally be appointed to investigate the position of the firm and deal with client claims, and usually over the estate of the individual partners of the firm.

#### **Section 11A of the Judicial Factors (Scotland) Act 1889**

These appointments relate to the estate of a deceased person. It may be that the person nominated to be the executor of the estate is unable or unwilling to act, or where the executor has failed to carry out their duties. It can also be in situations where no one has been nominated as executor and no one is prepared to be appointed by the Court.

A Judicial Factor in these cases will ingather anything that may be due to the deceased's estate, settling any lawful debts and thereafter distributing the estate to anyone deemed to be a beneficiary.

#### **Section 35 of the Partnership Act 1980**

These appointments relate to the winding up of a partnership. They normally arise where the partners are unable to agree on how the partnership will operate or wound up. The Judicial Factor is responsible for determining how the partnership will be concluded and how the partnership assets will be distributed.

#### **Section 9(5)(a) of The Children (Scotland) Act 1995**

These appointments can be made where a child is due to receive funds in excess of £20K and/or where the child's estate is large or complicated. The Accountant of Court can seek to have a Judicial Factor appointed by the Court to administer the estate, until the child turns 16 (the age of legal capacity).

## **Appointments on Trust Estate**

These appointments can be made if the last Trustee has died without appointing a successor, or where Trustees are in disagreement. In these types of cases the Judicial Factor will take control of the estate and operate it in accordance with the trust provisions until such times as the purpose of the trust is fulfilled, or the estate is exhausted. These normally represent the longest running types of Judicial Factor, with the oldest active case relating to a trust drawn up in 1826.

## **Appointments relating to Limited Companies**

In rare occasions a Judicial Factor can be appointed on an interim basis over a limited company, where the relationship between the directors is adversely affecting the running of the company.

## **Appointments relating to Bankruptcy**

When someone dies with outstanding debts then one of the creditors may apply to have a Judicial Factor appointed, to wind the estate up and arrange for payments of the debts. This will only happen when there is no one willing or able to wind up the deceased person's estate. A Factor in these cases will be required to take control of the estate, investigate the debts due from the estate, and make payment of any debts. If the estate is insolvent then the Factor will arrange to pay all creditors a proportionate share of the available estate in settlement of the total debt due to them.

## **Appointments relating to Charities**

Applications for the appointment of a Judicial Factor over a charity are normally made by The Office of the Scottish Charity Regulator (OSCR). These applications normally arise where there are concerns that a charitable organisation is not being run for the benefit of the charity or where the trustees are otherwise acting inappropriately. A Factor will normally be appointed to investigate the position and take steps to safeguard the assets of the charity. In some cases where the charity is insolvent then it may be necessary for the Factor to apply to have the charity sequestrated.

## **Miscellaneous appointments**

This covers cases not mentioned above and may also include "Loco Absentis" cases. A Judicial Factor will be appointed in a "Loco Absentis" case where an individual goes missing and has not made any provision for their affairs to be managed on their behalf. A Judicial Factor will be appointed to administer their estate until the absentee returns, or is declared dead. It should be noted that a Judicial Factor is restricted to preserving the estate in these types of cases.

Other miscellaneous types of Judicial Factor may include, for example a Commissary Factor.

## Case Volumes by Type

Number of active Judicial Factory's (by type) at year end.

<b>CASE TYPE</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Bankruptcy	4	4	4
Charity	2	2	1
Children Scotland Act	1	1	1
Executry	15	12	17
Limited Co	1	0	0
Partnership	10	11	11
Misc	0	0	3
Solicitor Act *	42	35	26
Trust	9	7	11
<b>TOTAL</b>	<b>84</b>	<b>72</b>	<b>74</b>

\* Includes if appropriate the individual personal estates of the partners of the firm.

## ANNEX D

### Summary of Consultation questions

**Question 1**

Should the Scottish Government implement the Report by the Scottish Law Commission?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 2**

Please provide any comments on the current procedure for the appointment of judicial factors in the case of a missing person.

**Question 3**

Should there be a qualifying period during which a factor in loco absentis cannot be appointed? If so, what should that period be?

Yes

No

Don't know

If yes, how long?

**Question 4**

Should the duty of a judicial factor appointed in the case of a missing person be limited to acting in their best interests only?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 5**

Should the Scottish courts only have jurisdiction to appoint a judicial factor to an estate of a missing person if:

- The missing person was domiciled in Scotland on the day before the person was first known to be missing; or
- The missing person had been habitually resident in Scotland for at least one year;
- The application is made by the person's spouse or civil partner or cohabitee (i.e. living together as if married) and the applicant is domiciled in Scotland or has been habitually resident in Scotland for at least one year?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 6**

Are there any other provisions in the Guardianship (Missing Persons) Act 2017 which could be usefully replicated in any Scottish legislation?

Yes

No

Don't know

Please set out which provisions and give reasons for your answer.

**Question 7**

Should there be a change of name of "loco absentis" cases?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 8**

If so, what are your views on “judicial factor over a missing person estate”?

Yes

No

Don't know

Alternatives

**Question 9**

Should the Accountant in Court be able to draw matters of concern to the attention of the relevant sheriff court?

Yes

No

Why did you select your answer above?

**Question 10**

Should the Accountant of Court be able to vary or recall directions?

Yes

No

Why did you select your answer above?

**Question 11**

Do we need to specify the procedure where no joint minute or subsequent decree has taken place?

Yes

No

Why did you select your answer above?

**Question 12**

Do you agree that the views of the child should be taken into account (where practicable and taking account of their age and maturity) where a parent is appointed as the child's legal representative?

Yes

No

Why did you select your answer above?

**Question 13**

(a) What would be the most proportionate way of ensuring that a child's views are taken into account?

(b) Would it require legislative change (please provide details)?

Yes

No

Don't know

**Question 14**

Should applications to appoint a judicial factor be heard in the sheriff court rather than the Court of Session?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 15**

If applications to appoint a judicial factor are to be heard in the sheriff court rather than the Court of Session, should it be the same rule for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 16**

The Scottish Government proposes that the “appropriate sheriff court” for an application would be:

Estates of missing persons

- Where the missing person was domiciled the day before the person was first known to be missing; or
- Where the missing person had been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent); or
- Where the person’s spouse or civil partner or cohabitee is domiciled or has been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent).

Estates of other natural persons

- In the Sheriffdom where the applicant, or any person with an interest in the estate.

Non-natural persons

- In the Sheriffdom where the person who has the estate has a place of business.

None of the above applies

If none of the above applies, the “appropriate sheriff court” would be the sheriff court in Edinburgh.

Does this seem a reasonable approach?

Yes

No

Don’t know

If you wish, please give reasons for your answer.

**Question 17**

Should sections 4 and 6 of the draft Commission Bill be followed in relation to who may be appointed as a judicial factor?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 18**

Do you agree that the wording at section 7 of the draft Bill reflects that caution is only required in exceptional circumstances?

Yes

No

Don't know

If you wish, please give reasons for your answer.

**Question 19**

Do you consider that that interlocutors should contain provisions on how proactively an estimate should be managed?

Yes

No

Don't Know

If you wish, please give reasons for your answer

**Question 20**

Should judicial factors continue to be paid a commission?

Yes

No

Don't know

If you wish, please give reasons for your answer

**Question 21**

Do you have any other comments on how judicial factors should be paid in future?

**Question 22**

Do you have any comments on the Impact Assessments?

## ANNEX E

### Consultation on Judicial Factors

#### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

**Information for organisations:**

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

## ANNEX F

### Handling of personal data

The data protection legislation has recently changed in the UK with the introduction of the Data Protection Act 2018. It gives you greater powers to protect your own privacy, and places greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

#### ***The identity of the data controller and contact details of our Data Protection Officer***

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at [dpa@gov.scot](mailto:dpa@gov.scot).

#### ***Why we are collecting the data***

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

#### ***Legal basis for processing the data***

Part 2 of the Data Protection Act provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest e.g. a consultation.

#### ***With whom we will be sharing the data***

We will not be sharing personal data outside of the Scottish Government.

#### ***Your rights, e.g. access, rectification, erasure***

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you;
- b) To ask us to stop using your data, but keep it on record;
- c) To have all or some of your data deleted or corrected, and
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/> , or telephone 0303 123 1113.

The Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.



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