**Judicial Factors (Scotland) Bill**

**Scottish Parliament – Delegated Powers and Law Reform Committee**

**Consultation Response**

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**Question Page 1**

1. What is your view on the proposal to update the law in relation to judicial factors? Do you agree with the approach taken? If you would like to, please give reasons for your views.

**Information:**

*When the Scottish Law Commission consulted on possible reforms in relation to judicial factors, it considered two main policy approaches (with option 1 now appearing in the Bill):*

*• Under option 1, the existing system of judicial factors would be retained but improvements made to it. Under the existing system, also proposed for the Bill, a particular individual is appointed by the court to be a judicial factor in a specific situation. Under current practice, such a person is often a lawyer or accountant.*

*• Under option 2, a public official, most likely an existing one who gets additional functions, would undertake the role of judicial factor in most situations.*

We agree with the approach taken to update and reform the law relating to judicial factors, subject to the points noted below. Given the current state of the law and the reliance upon a variety of legislation, much of which is rather dated, it is appropriate to modernise this area of law.

Judicial factors provide an important function in difficult circumstances. It is true that judicial factories are not particularly common, but there are new cases each year of various types and a reasonable number of live cases. Relevant data in this regard has been obtained from the Office of the Accountant of Court and is provided in the tables below.

**Table 1: New Cases Per Year**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Case Type** | **2017** | **2018** | **2019** | **2020** | **2021** | **2022** | **2023** |
| Bankruptcy |  | 2 |  | 1 | 2 |  |  |
| Charity |  |  | 2 | 1 |  |  |  |
| Childrens Scotland Act |  |  |  |  |  |  |  |
| Executry | 1 | 3 | 6 | 3 | 3 | 2 | 3 |
| Limited Co |  |  |  |  |  |  |  |
| Partnership | 3 |  | 1 | 1 | 1 | 2 |  |
| Misc |  |  |  |  |  |  |  |
| Solicitor Act \* | 1 | 2 | 3 |  | 3 | 3 | 4 |
| Trust |  | 1 |  |  |  |  |  |
| **Total** | **5** | **8[[1]](#footnote-1)** | **12** | **6** | **9[[2]](#footnote-2)** | **7** | **7** |

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

**Table 2: Total Live Cases at Year End**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case Type** | **2021** | **2022** | **2023** |
| Bankruptcy | 6 | 5 | 5 |
| Charity | 4 | 3 | 2 |
| Childrens Scotland Act | 1 | 1 |  |
| Executry | 19 | 21 | 13 |
| Limited Co |  | 1 |  |
| Partnership | 8 | 9 | 7 |
| Misc | 1 | 1 |  |
| Solicitor Act \* | 16 | 20 | 14 |
| Trust | 3 | 3 | 1 |
| **Total** | **58** | **64** | **42** |

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

2. What are your views on the proposals as set out in Part 1 of the Bill relating to the appointment of a judicial factor?

**Information:**

*Part 1 of the Bill includes the following proposals:*

*• a discretion for the court to appoint a judicial factor to manage an estate where:*

*- it is not, “possible, practicable or sensible” for the person who would otherwise do it to undertake that role; and/or*

*- it would be “to the advantage of” the estate (sections 1 and 3)*

*• to be appointed by the court as a judicial factor, the main qualification required is that the court considers the person “suitable” for that role (section 4)*

*• it would be possible to appoint an ‘interim judicial factor’ (a temporary one) who, for the duration of their appointment, would usually have the same powers and duties as a permanent judicial factor (section 2)*

*• when appointing a judicial factor, the court may only require a ‘bond of caution’ (pronounced cay-shun) in exceptional circumstances – a bond of caution is a type of insurance policy relating to the judicial factor’s management of the estate (section 5)*

*• notice of the appointment of a judicial factor must be registered in an existing public register, the Register of Inhibitions (section 6)*

*• judicial factors are to be paid for their work out of the estate, according to rates fixed by an existing official, the Accountant of Court (section 9).*

As noted in our response to the Scottish Government’s earlier consultation, we agree that there is value in the courts having concurrent jurisdiction (but we would favour the Court of Session’s jurisdiction being the Outer House in the first instance rather than the Inner House). We appreciate that there is a trend in favour of moving legal business to the sheriff court but that is not always justified and there are also resource implications to be considered in this area.

For section 1(5)(b)(iii), we agree with the inclusion of place of business but wonder whether a non-natural person’s registered office should be included as an additional category or at least specified as being included within the meaning of place of business in this context (as a registered office may not in fact be a place of business as such).

Also with reference to courts, there could be a provision for transfer of the matter to a court in a different location, on cause shown.

In section 3(1)(b)(i), the term “sensible” is ambiguous and implies a value judgement. Although we realise there are potentially issues with alternative terms, perhaps “reasonable” or “appropriate” would be preferable. If a word with a more subjective meaning such as “sensible” is used, it may be desirable to specify that it is to be sensible in the court’s view, for example.

We broadly agree with the provisions on the finding of caution. However, “exceptional circumstances” in section 5(2) is a very high threshold. It may be more appropriate to specify that caution is to be provided where the particular appointment makes it “prudent” for it to be provided (or some equivalent to this). A wider understanding of “security” in this context could also be considered to extend beyond caution in the narrow sense of the term, to include e.g. indemnities, depositing an asset or consigning funds in court etc.

The following points might be borne in mind when considering the definition of caution for the purposes of the draft legislation. In *Centenary 6 Ltd v Caven* [2018] CSIH 27, Lord Glennie, delivering a dissenting judgment, raised the question whether the term ‘find caution’ used in the Companies Act 1985, section 726, referred not simply to a personal obligation to fulfil another’s obligation (i.e. suretyship) but to security more generally. He referred to a comment by Lord Hope in *Anderson v Shetland Islands Council* [2012] UKSC 7[11] to the effect that, in a broad sense, the term ‘caution’ can be viewed as the ‘Scots word for security’. Lord Glennie suggested that, on one view, the effect of section 726(2) of the 1985 Act was ‘simply to translate’ an English provision regarding the finding of ‘sufficient security’ into ‘Scots legal terminology’, which would suggest that by the term ‘caution’ all that was meant there was ‘security’. Ultimately, Lord Glennie reserved his opinion on the matter, which, in any case, involved the interpretation of a statutory provision that does not concern judicial factors. But he did note that consignation ‘surely provides even greater security for a defender than a bond of caution’. Bearing those points in mind, if ‘caution’ is to be understood more broadly for the purposes of legislation on judicial factors than at common law, it would be worthwhile to make that broader meaning explicit.

Conversely, it may be that, for some purposes, a narrower definition of ‘caution’ than would apply at common law is appropriate. Again, the precise respects in which a given statutory definition is narrower could be made explicit in the new legislation. Ultimately, in a statute, the meaning of the word ‘caution’ may be both broader for some purposes and narrower for other purposes than at common law.

In section 6(1), the provision ought to state that the clerk of court should send the notice of appointment to the Keeper of the Register of Inhibitions for registration, rather than the clerk of court actually registering the notice in the Register of Inhibitions. See e.g. section 26(1) of the Bankruptcy (Scotland) Act 2016 for an example of wording that could be adapted.

Section 6(3) should refer to sending for re-registration in the Register, rather than specifying that the judicial factor actually does the re-registration of the notice in the Register.

More broadly, attention should be given as to whether the effect of registration should have the effect of an inhibition – and thereby be more than just for advertising and information purposes only. This is a particularly pertinent issue given that vesting in the appointee in this context (see section 7) is analogous to vesting of property in a trustee in sequestration. There are various circumstances, especially with respect to non-natural persons, where an inhibition effect would be of value. It seems from paragraphs 43 and 44 of the Policy Memorandum that there is an assumption that mere registration in the Register of Inhibitions would have the effect of an inhibition; however, this is not certain without a provision to that effect. For example, for sequestration, there is a provision at section 26(3) of the Bankruptcy (Scotland) Act 2016 expressly specifying that recording has the effect of an inhibition.

However, there may need to be consideration of circumstances in which it is not appropriate for there to be an inhibition effect, i.e. where a party should still have the ability to deal with the property in spite of the appointment of a judicial factor (but maybe this should not be permitted given the vesting of the estate in the judicial factor).

In section 7(1) it is unclear whether the reference to the “whole estate on which a judicial factor is appointed” means that it will always be the case that the entirety of an estate will vest in a judicial factor, or whether this is actually just referring to the extent of an estate that vests with the judicial factor (i.e. that it might be possible for less than the entirety of a party’s estate to vest). We assume that the intention is for the entirety of an estate to vest; however, it may be desirable to clarify what precisely is meant by this (whether in a provision or in the Explanatory Notes).

Given that there is to be vesting of an estate in a judicial factor, attention should be given as to whether any of the additional provisions relating to e.g. a trustee in sequestration should also apply here. For example, should there be a limitation on the ability of a judicial factor to acquire title to heritable property within a certain time period, as there is for trustees in sequestration under section 78(3) and (4) (to give disponees a head start in the “race to the register”)?

3. What are your views on the proposed functions of a judicial factor as set out in Part 2 and schedule 1 of the Bill?

**Information:**

*The Bill uses the term ‘functions’, which refers to both powers and duties. The functions of a judicial factor proposed in the Bill include:*

*• holding, managing, administering, and protecting the estate for the benefit of those with an interest in it (section 10)*

*• all the powers someone who owns the estate would have, with a list of examples of such powers set out in schedule 1*

*• with some exceptions, the power to request information relating to the estate from both bodies and individuals (for example, financial information could be requested from banks) (section 12)*

*• a new duty to prepare a ‘management plan’ relating to the estate, which must be approved by the Accountant of Court (section 15)*

*• to regularly report to the Accountant of Court, including by submitting accounts to that official at least every two years (section 16)*

*• a duty to consider whether it would be appropriate to invest the funds which form part of the estate and a duty to then make any such appropriate investments (section 17)*

*• if the judicial factor was appointed because people were unable to agree how an estate should be managed, the judicial factor must, by whatever methods they think appropriate, “promote agreement” between such people (section 19).*

It may be desirable to provide more clarity as to the fiduciary nature of the judicial factor’s role in relation to the management of the estate (as per trustees, directors etc).

Under section 10(6), there should be consideration of whether “vest” is the appropriate word to use here – as there could be confusion with vesting of the estate outlined in section 7. Instead, it could just be said that “[o]n the appointment date the judicial factor has the standard powers” or “[o]n the appointment date the standard powers are conferred on the judicial factor”. See also the reference to vesting of functions in Schedule 1, which should be amended as well.

In section 10(7), “the factory functions” is defined for the purposes of sections 10 and 11; however, there is no reference to “the factory functions” as such in section 11. We note that section 11 relates to specifying and varying functions, but also refers to the standard powers, and in section 10(7) the factory functions includes the standard powers, but apart from in section 11(1) there are only references to functions and not to powers. We consider that this requires clarification. We note what is stated in the Policy Memorandum, para 55, but we do not think the desired effect has been achieved.

With reference to section 12, attention should be given to whether there should be additional exclusions. While the exclusion of commercially sensitive information might be a possibility this could be misused in some cases, a stronger argument could be made in favour of excluding information on the basis of professional privilege. Perhaps the most appropriate approach would be to also exclude disclosure of information where there is “any other statutory provision or rule of law which prevents or excuses its disclosure”.

In section 13(4), “financial assets” is defined as meaning “cash accounts”, “share certificates” and “other assets of a similar nature”. It is not entirely clear to us why these particular assets have been singled out and why there is only specific reference to cash accounts and share certificates.

**Question page 2**

1. Part 3 of the Bill covers the legal relationships which, as part of the process of managing the estate, the judicial factor might create with individuals or organisations not otherwise connected to the estate. What are your views on Part 3 of the Bill?

**Information:**

*Part 3 makes it clear that, legally, the judicial factor takes the place of those who otherwise would be responsible for the estate in any relationships created with those not otherwise connected to the estate. Part 3 also contains specific proposals including:*

*• certain protections for a buyer of property who purchases that property from an estate managed by a judicial factor (section 20)*

*• if a judicial factor is involved in court proceedings on behalf of the estate, Part 3 says any legal costs associated with this will come out of the estate (section 23)*

*• if a court decides a judicial factor must pay financial damages (compensation), the general rule in Part 3 is that the damages will come out of the estate, but with some discretion for the court to decide otherwise in a particular case (section 24).*

The wording “stands in place of the factory estate” does not seem to be appropriate. The judicial factor does not stand in place of the estate, which itself has no legal personality. Rather, they stand in the place of the debtor, or other party in whom the estate was previously vested. More appropriately, the judicial factor could be considered to be an agent/representative in relation to the estate. In addition, consideration should be given to whether the wording of section 21(a) and (b) would also need to be re-worded as a result.

With reference to Schedules 2 and 3, there are other sections of the Bankruptcy (Scotland) Act 2016 that refer to judicial factors appointed under the 1889 Act. See sections 25, 98-100, 107 and Schedule 8, paragraph 1. It may be planned to deal with these under consequential amendments but it is important that these matters are actually addressed.

2. Part 4 of the Bill sets out the procedures for distributing the estate and ending a judicial factor’s involvement in an estate. What are your views on Part 4 of the Bill?

**Information:**

*Part 4 of the Bill contains administrative procedures which allow the Accountant of Court, on application by the judicial factor, to:*

*• authorise distribution of the estate; and*

*• end the factor’s role in the estate (sections 27 and 29).*

*The administrative procedure for distribution can be used when:*

*• the purpose of the judicial factor appointment has been fulfilled, or no longer exists; or*

*• there are insufficient funds for the arrangement to continue (section 27).*

*If someone objects to the scheme for distribution proposed by the judicial factor as part of the application, the issue must be referred to the court to determine (section 27).*

*Part 4 also contains court-based procedures including:*

*• a procedure for someone with an interest in the estate to apply to the court for distribution of the estate - where this court application is successful, an administrative procedure can then be used to remove the judicial factor (sections 28 and 29)*

*• a procedure for the judicial factor, or someone with an interest in the estate, to apply to the court to end the judicial factor’s role in an estate in circumstances other than those covered by the administrative procedure (section 31)*

*• a duty on the Accountant of Court to apply to court in order that they can appoint a new judicial factor, where the original factor has either died or is not performing their functions (and no application for a new appointment has otherwise been made) (section 30).*

*Ending the judicial factor’s role will include ‘discharge’, that is, relieving a judicial factor of all future liabilities in respect of the estate under civil, but not criminal, law (section 34).*

In relation to the distribution of an estate, we wonder whether any consideration has been given to the ongoing status of a non-natural person in whom the estate was previously vested. For example, if there was a partnership or company and their estate was vested in a judicial factor and this was followed by a distribution, can the partnership or company continue in existence, with e.g. the capability of acquiring new estate (for example, after discharge of a judicial factor)? Perhaps you may wish to take the view that this should be dealt with by the normal rules of partnership law or company law but clarity would be desirable.

In section 33(1), should the use of “and” between (b) and (c) actually be “or”? In other words, should the section apply only where the Accountant is satisfied that there are insufficient funds to meet the expenses of (a), (b), and (c) or should it also apply where, for example, there are sufficient funds for (a) and (b) but not (c).

The interrelationship between section 34 (on the ending of a judicial factor’s accountability on discharge) and section 38 (on the misconduct or failure of a judicial factor) could be clearer. Presumably it is intended that if a judicial factor is discharged but certain forms of misconduct later come to light and are reported to the court, then the court “may dispose of the matter in whatever manner it considers appropriate” and thereby hold the discharged judicial factor accountable/liable, perhaps most likely on an individual basis. If this is the intention, it should be made more express, with e.g. a statement that section 38 can apply (at least in some instances) irrespective of whether a judicial factor’s accountability has been discharged under section 34. By way of a comparator, the Insolvency Act 1986, section 212, provides that it is possible to bring misfeasance proceedings against an officeholder following their release but only with the leave of the court. In relation to judicial factors, we do not think that restricting the exception to freedom from liability following discharge to criminal liability is the best approach. Presumably it should also extend to conduct falling within s 38 which is only reasonably discovered after discharge.

In addition, while section 38(6)(b) notes that a disposal by the court under section 38(5)(b) does not affect any right which any other person may have in respect of loss consequent upon a judicial factor’s conduct, the relationship between such rights and the discharge of a judicial factor may also benefit from an express statement.

3. What are your views on the proposal that the Accountant of Court should continue to supervise judicial factors, as set out in Part 5 of the Bill? If you would like to, please include any suggestions for alternative approaches to the supervision of judicial factors.

**Information:**

*The Accountant of Court, appointed and employed by the Scottish Courts and Tribunal Service currently carries out various functions, including supervision of judicial factors.*

*The same person who holds the office of the Accountant of Court also acts as the Public Guardian under the Adults with Incapacity (Scotland) Act 2000. The Scottish Government’s policy intention is that this overlap of roles will continue.*

We are generally supportive of the proposal here.

**Question page 3**

1. What are your views on the detailed arrangements relating to the Accountant of Court as set out in Part 5 of the Bill?

**Information**

*Part 5 of the Bill contains various proposals relating to Accountant of Court (‘the Accountant’), including that:*

*• the person appointed as Accountant must, in the opinion of the Scottish Courts and Tribunal Service (SCTS), be “appropriately qualified” in law or accountancy (section 35). Formal qualifications in these disciplines are not necessarily required (Policy Memorandum, para 105)*

*• the Accountant can be paid for their role by the SCTS, but must also charge fees relating to their work, to cover their costs reasonably incurred, and these fees are to be met by out of the estate managed by the judicial factor (section 35)*

*• there is a power for the SCTS to appoint a Depute Accountant (section 36)*

*• the Accountant must supervise the performance of judicial factors, and can issues instructions to factors as to how they carry out their functions (section 37)*

*• when misconduct or certain failures are alleged in respect of a judicial factor, the Accountant has powers to ‘make inquiries’ and give the judicial factor the opportunity to make ‘representations’ (section 38)*

*• when serious misconduct or failures are found, the Accountant must report them to the court and, where applicable, the judicial factor’s professional body (section 38)*

*• the Accountant must audit accounts received from judicial factors (section 40)*

We are generally supportive of the proposals outlined here.

2. The Bill retains two existing terms, ‘judicial factor’ and ‘Accountant of Court.’ What are your views on the suitability of those terms to describe the two roles? Please give details of any alternative terms which you think might suit these roles.

These terms are well-established and broadly understood, and it makes it easier to draw comparisons with and to use earlier law. It is difficult to identify suitable alternatives that would not create difficulties or cause confusion.

3. Is there anything you think should have been in the Bill which is not in the Bill?

We have not identified anything in particular, except the points noted above.

**Question page 4**

1. Is there any other comment you would like to make on the Bill more generally?

We have no further comments.

1. Figure of 7 provided by Office of the Accountant of Court. We have assumed that the figures for individual case types are correct and that the total figure provided was incorrect. [↑](#footnote-ref-1)
2. Figure of 7 provided by Office of the Accountant of Court. We have assumed that the figures for individual case types are correct and that the total figure provided was incorrect. [↑](#footnote-ref-2)