

CHAPTER 61

JUDICIAL FACTORS

PART I

GENERAL PROVISIONS

Application and interpretation of this Chapter

61.1.-(1) This Chapter applies to an application for the appointment of a judicial factor, and to a judicial factor appointed by the court.

(2) In this Chapter, unless the context otherwise requires-

"the Act of 1849" means the Judicial Factors Act 1849(a);

"the Act of 1995" means the Children (Scotland) Act 1995(b); and

"judicial factor" includes a curator *bonis*, a factor *loco absentis*, a factor on trust or other estates, and a guardian.

Application for appointment of judicial factor

61.2.-(1) An application for the appointment of a judicial factor shall be made by petition.

(2) An application under section 9(5)(a) of the Act of 1995 (application by Accountant of Court for appointment of judicial factor to administer certain property of a child) shall be made by petition in form 61.2; and Chapter 14 shall not apply as respects any such petition.

(3) A petition in form 61.2 shall, after being lodged in the Petition Department and recorded in the Petitions Register but without appearing in the Motion Roll, be presented to the Lord Ordinary in court or in chambers, and he may-

(a) forthwith make the appointment sought; or

(b) make an order-

(i) for such intimation, service and advertisement of the petition as he considers appropriate; and

(ii) for a hearing, on such date as he may specify, as respects the petition.

(4) Without prejudice to the generality of paragraph (3)(b)(i), any order under that paragraph as to intimation may specify that rule 16.4 shall not apply and that the Accountant of Court shall make intimation by post in such manner as the Lord Ordinary thinks fit.

Crave to dispense with service on incapax

61.3. Where, in a petition for the appointment of a *curator bonis* to an incapax, dispensation of service on the *incapax* is craved on the ground that such service would be injurious to the health of the incapax, two medical certificates to that effect shall be lodged in process.

Incidental applications

61.4. Unless otherwise provided in this Chapter, an incidental application to the court in a petition for the appointment of a judicial factor shall be made by note.

(a) 1849 c.51

(b) 1995 c.36.

Intimation and service

61.5.-(1) The order for intimation and service under rule 14.5 (first order in petitions) in a petition or note relating to a judicial factory shall include a requirement for intimation to the Accountant of Court (except where the petition is in form 61.2) by first class recorded delivery post of the petition or note, as the case may be, and any production lodged with the petition or note.

(2) The Lord Ordinary may order publication of an advertisement of the petition in Form 61.5-A in the case of a petition for the appointment of a judicial factor or in Form 61.5-B in the case of a petition for the discharge of a judicial factor.

(3) Where publication of an advertisement has been made under paragraph (2), there shall be lodged in process-

- (a) a copy of the newspaper or other publication containing the advertisement; or
- (b) a certificate of publication by the publisher stating the date of publication and the text of the advertisement.

(4) After a petition for the appointment of a judicial factor is lodged in the Petition Department, the Clerk of Session in that department may (whether or not any order is made, or is competent, under rule 14.5(1)(a)) provide any interested party with details of the petition.

Documents for Accountant of Court

61.6.-(1) A person who lodges any document in a cause relating to a judicial factory (other than a petition for appointment of a judicial factor) shall send a copy of that document to the Accountant of Court.

(2) The clerk of session in the Petition Department shall transmit to the Accountant of Court any part of a process in a cause relating to a judicial factory as the Accountant of Court may request unless such part of the process is, at the time of request, required by the court.

Accountant of Court to send information on prior application

61.7. The Accountant of Court, on receiving intimation of a petition for the appointment of a judicial factor, shall report any information he may possess which he considers may be of use to the court in disposing of the petition.

Transmission of process to Accountant of Court to find caution

61.8. The clerk of session in the Petition Department shall, on the appointment of the judicial factor being made by the court, transmit the process of the petition to the Accountant of Court for the fixing and finding of caution.

Finding caution

61.9.-(1) The appointment of a person as a judicial factor shall be subject to his finding caution; and the interlocutor appointing a judicial factor shall ordain him to find caution.

(2) The court may, on cause shown, on a motion made before the expiry of the period for finding caution specified by virtue of rule 33.3 (orders to find caution or other security), allow further time for finding caution.

(3) The Accountant of Court shall, on receiving the process in a petition for the appointment of a judicial factor transmitted to him under rule 61.8, fix the caution to be found by the judicial factor.

(4) Where the Accountant of Court considers that any caution fixed by the court under section 27 of the Act of 1849(a) (amount of caution limited by court), should be increased-

- (a) the Accountant of Court may increase the amount unless the judicial factor requires him to report to the court;
- (b) where the judicial factor requires him to report to the court, the Accountant of Court shall do so; and
- (c) on the report mentioned in sub-paragraph (b) being received, the cause shall be put out on the By Order Roll before the Lord Ordinary to determine the amount of caution.

(5) A bond of caution or other security offered by a judicial factor shall be delivered to the Accountant of Court; and rule 33.4(3) (lodging of bond of caution in process) and rule 33.7(1) (Deputy Principal Clerk to satisfy himself that the bond of caution or other security is in proper form) shall not apply.

(6) Except in relation to paragraph (7), where caution has been found to the satisfaction of the Accountant of Court, he shall endorse and sign, on the interlocutor sheet of the process appointing the judicial factor, a certificate stating that caution has been found, the amount of caution and the date of the certificate.

(7) During the subsistence of a judicial factory, the Accountant of Court may, at any time-

- (a) require the judicial factor to increase the amount of, or find new or additional, caution; or
- (b) authorise the judicial factor to reduce the amount of existing caution.

Issue of official certified copy interlocutor

61.10. An official certified copy of the interlocutor appointing a judicial factor shall not be issued by a clerk of session without a certificate having been endorsed on the interlocutor sheet in accordance with rule 61.9(6).

Judicial factor's title to act

61.11. A judicial factor shall not be entitled to act until he has received the official certified copy of the interlocutor appointing him.

Remission or modification of penal interest

61.12. The Accountant of Court may, if satisfied that the circumstances justify it, remit or modify any interest incurred by a judicial factor under section 5(1) of the Act of 1849(b) (interest incurred for failure by factor to lodge money in bank etc.).

Applications to encroach on capital

61.13.- (1) Where the income from the estate of a ward is insufficient for the maintenance of the ward, the judicial factor may apply to the Accountant of Court for his consent to encroach on the capital of the estate for the purpose of maintaining the ward.

(a) Section 27 was amended by the age of Legal Capacity (Scotland) Act 1991 (c.50), Schedule 1, paragraph 10.

(b) Section 5 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), section 7 and by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), Schedule 8, paragraph 21(1)(a).

(2) An application under paragraph (1) shall be made by letter and shall be supported by such information as the Accountant of Court may require.

(3) On receipt of such an application, the Accountant of Court-

- (a) may, if the proposed encroachment does not exceed 5% of the capital value of the estate as at the date when application is first made under paragraph (1), consent to the application subject to such conditions as he thinks fit to impose; and
- (b) if he is unable, or declines to consent under sub-paragraph (a), shall-
 - (i) ordain the judicial factor to intimate, in accordance with paragraphs (5) and (6), the making of the application; or
 - (ii) ordain him to apply by note to the Lord Ordinary for special powers.

(4) A person to whom intimation is given in accordance with paragraphs (5) and (6) may object to the application by-

- (a) lodging an objection in writing with the Accountant of Court; and
- (b) sending a copy of his objection to the judicial factor within 28 days after the date on which intimation was given to him.

(5) The persons to whom intimation under paragraph (3)(b)(i) is to be given are-

- (a) any cautioner of the judicial factor;
- (b) any petitioner for the appointment of the judicial factor (other than a petitioner using form 61.2);
- (c) the ward, unless the circumstances of the ward are such as would warrant dispensing with service on him of a petition for the appointment of a judicial factor on his estate;
- (d) the persons on whom the petition for appointment of the judicial factor was served and whose whereabouts are known to the judicial factor; and
- (e) all other persons who have an interest in the estate and whose identity and whereabouts are known to the judicial factor.

(6) The intimation under paragraph (3)(b)(i) shall include-

- (a) a copy of the letter of application; and
- (b) a notice setting out-
 - (i) the right of the person receiving the notice to object to the application in the manner provided in paragraph (4); and
 - (ii) that, in the absence of any such objection, the Accountant of Court may consent to the application.

(7) The judicial factor shall, on giving intimation under paragraph (3)(b)(i), send to the Accountant of Court a certificate of intimation in Form 16.7 with a copy of the notice sent attached to it; and rule 16.7(2) (attaching certificate of intimation to principal writ or lodging it in process) shall not apply.

(8) Where no objections have been lodged under paragraph (4), the Accountant of Court may, on the expiry of the period for lodging objections-

- (a) consent to the application subject to such conditions as he thinks fit; or
- (b) require the judicial factor to apply to the court for special powers.

(9) Where any objection has been lodged under paragraph (4), the judicial factor shall, on expiry of the period for lodging objections, apply to the court for special powers.

Applications under section 2(3) of the Trusts (Scotland) Act 1961

61.14.- (1) An application under section 2(3) of the Trusts (Scotland) Act 1961(a) to the Accountant of Court for his consent to the doing of an act to which that section applies shall be made by letter and shall be supported by such information as the Accountant of Court may require.

(2) Any person to whom intimation requires to be given in accordance with paragraph (3) may object to the application by lodging any objection with the Accountant of Court, and sending a copy of it to the judicial factor, within 28 days after the date on which the intimation was given.

(3) On the date on which he makes the application referred to in paragraph (1), the judicial factor shall intimate the application to-

- (a) any cautioner of the judicial factor;
- (b) any person who petitioned for the judicial factor to be appointed (except where the petitioner was in form 61.2);
- (c) the ward, unless the circumstances of the ward are such that would warrant dispensing with service on him of a petition for the appointment of a judicial factor on his estate;
- (d) the persons upon whom the application for appointment of the judicial factor was served and whose whereabouts are known to the judicial factor; and
- (e) all other persons who have an interest in the estate and whose identity and whereabouts are known to the judicial factor.

(4) The intimation to be given under paragraph (3) shall include-

- (a) a copy of the letter of application, and
- (b) a notice setting out-
 - (i) the right of the person receiving the notice to object to the application in the manner provided in paragraph (2); and
 - (ii) that, in the absence of any such objection, the Accountant of Court may consent to the application.

(5) The judicial factor shall, on giving intimation under paragraph (3), send to the Accountant of Court a certificate of intimation in Form 16.7 with a copy of the notice required under paragraph (4) attached to it; and rule 16.7(2) (attaching certificate of intimation to principal writ or lodging it in process) shall not apply.

Applications for special powers or authority under section 5 of the Trusts (Scotland) Act 1921

61.15.- (1) This rule applies to an application by a judicial factor-

- (a) for special powers at common law or under section 7 of the Act of 1849(b); or
- (b) under section 5 of the Trusts (Scotland) Act 1921(c) (application for authority to do an act at variance with terms or purposes of the judicial factory).

(2) An application may be made-

- (a) in the petition for the appointment of the judicial factor; or
- (b) by note in the process of that petition.

(a) 1961 c.57; sub-section (3) was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), section 8.

(b) Section 7 was amended by the Mental Health (Scotland) Act 1960 (c.61), Schedule 4.

(c) 1921 c.58.

(3) Before making an application, the judicial factor shall apply to the Accountant of Court for an opinion by lodging with him a report explaining why the special powers or authority are necessary and concluding with a statement of the precise powers he seeks.

(4) The Accountant of Court shall, after making any necessary inquiry, send his written opinion to the judicial factor.

(5) The judicial factor shall lodge in process his report to, and the opinion of, the Accountant of Court.

(6) The judicial factor shall send to the Accountant of Court a copy of the interlocutor disposing of the application within 2 days after the date of the interlocutor.

(7) An application by a judicial factor for special powers under this rule shall not be made before he has received an official certified copy of the interlocutor appointing him.

(8) An application by a judicial factor in respect of special powers sought in the petition for his appointment shall be made by him by motion.

PART II

APPLICATIONS UNDER SECTION 11A OF THE JUDICIAL FACTORS (SCOTLAND) ACT 1889

Application of this Part

61.16. This Part applies to a petition under section 11A of the Judicial Factors (Scotland) Act 1889(a) (appointment of a judicial factor on estate of person deceased).

Form of applications under section 11A of the Judicial Factors (Scotland) Act 1889

61.17. A petition to which this Part applies shall include averments stating-

- (a) the name, last known address and date of death of the deceased person;
- (b) the reasons for the appointment being necessary;
- (c) the interest of the petitioner, including-
 - (i) if a creditor, the nature and amount of the debt, how constituted, vouched or established, or
 - (ii) if a person having an interest in the succession to the estate, the nature of that interest;
- (d) details of the estate of the deceased person so far as known to the petitioner including heritable and moveable property, any stock in trade, interests in any business or partnership, debts owed to or by the deceased and any other relevant facts;
- (e) the names and addresses of all persons known to the petitioner as having an interest in the estate either as creditors or in the succession to the estate, and the nature of the interest in each case; and
- (f) the name, designation and address of the person nominated to be the judicial factor.

Intimation and service of section 11A petition

61.18. The order for intimation and service under rule 14.5 (first order in petitions) in a petition under this Part shall include a requirement for-

(a) 1889 c.39; section 11A was inserted by the Bankruptcy (Scotland) Act 1985 (c.66), Schedule 7, paragraph 4.

- (a) a notice of the petition in the Edinburgh Gazette in Form 61.18; and
- (b) service of the petition on such persons named in the petition as personal representatives of the deceased who are not parties to the petition.

Interim appointment

61.19. The court may make an interim appointment of a judicial factor in a petition to which this Part applies when the petition is presented or at any time thereafter.

Notice calling for claims

61.20.- (1) In order to ascertain the claims on the estate, the judicial factor shall, within 14 days after he has received the official certified copy of the interlocutor appointing him, place a notice in the Edinburgh Gazette, and in such other newspaper as he thinks fit, in Form 61.20.

(2) The judicial factor shall lodge in process-

- (a) a copy of each newspaper containing the notice under paragraph (1); or
- (b) a certificate of publication by the publisher of each such newspaper stating the date of publication and text of the notice.

(3) The period within which a creditor shall intimate a claim on the estate to the judicial factor shall be 4 months from the date of publication of the notice under paragraph (1).

Claims

61.21.- (1) The judicial factor shall examine the claims of creditors in order to ascertain whether the debts are properly due from the estate of the deceased, and may-

- (a) call for further evidence in support of the claims;
- (b) if he thinks fit, require a creditor to constitute such claim by decree in a competent court in an action in which the judicial factor shall be called as a defender.

(2) For the purpose of ranking and payment of creditors, the date of the appointment of the judicial factor shall be deemed to be equivalent to the date of sequestration.

Custody and inspection of inventory of estate, etc.

61.22. There shall remain in the possession of the Accountant of Court and be open to inspection, within his office, by any creditor or person in the succession of the deceased-

- (a) the inventory of estate, when adjusted and approved by the Accountant of Court and signed by him and the judicial factor;
- (b) any report of the state of debts; and
- (c) all subsequent accounts submitted by the judicial factor to the Accountant of Court.

Administration, deathbed and funeral expenses

61.23.- (1) Out of the first funds realised by him, the judicial factor shall reserve sufficient funds to defray the estimated costs of his administration including the legal expenses of the judicial factory.

(2) On the expiry of the period for lodging claims, the judicial factor shall be entitled to pay out of such funds, with the prior approval of the Accountant of Court, those debts listed in paragraphs (a) to (e) of section 129(1) of the Bankruptcy (Scotland) Act 2016 (priority in distribution).

(3) The Accountant of Court shall prepare a written report on the state of funds and any scheme of division containing such observations as he thinks fit for consideration by the court.

(4) The Accountant of Court shall issue the report under paragraph (3) to the judicial factor.

Procedure where there are creditors

61.24.- (1) Where claims are lodged, the judicial factor shall-

- (a) where funds remain available for division after payment of the claims referred to in rule 61.23(2), prepare a state of funds and scheme of division amongst the creditors; or
- (b) where no such funds remain after payment of those claims, prepare a state of funds only.

(2) The judicial factor shall-

- (a) lodge with the Accountant of Court-
 - (i) the state of funds and any scheme of division,
 - (ii) all relevant writings and documents; and
- (b) provide the Accountant of Court with such explanations as he may require.

Notice to creditors

61.25.- (1) As soon as the report of the Accountant of Court under rule 61.24(3) has been issued, the judicial factor shall-

- (a) lodge in process that report, the state of funds and any scheme of division;
- (b) send to each person who has lodged with him a claim on the estate of the deceased a notice by first class post, or, if that person is furth of Europe, by air mail, stating-
 - (i) that the state of funds and scheme of division or state of funds only, as the case may be, and a report have been lodged in court; and
 - (ii) the amount for which the creditor has been ranked and whether his claim is to be paid in full or by a dividend and the amount of it; or
 - (iii) that his claim has been rejected; or
 - (iv) that no funds are available for division;
- (c) place a notice in Form 61.25 in the Edinburgh Gazette; and
- (d) if-
 - (i) any person, other than a person who has lodged a claim with him, is stated in the application or in the books, deed of settlement, or other papers of the deceased, to be a creditor of the estate or has an interest in the estate, or
 - (ii) he has reason to believe that any other person is either a creditor of the estate or has an interest in the estate,

give notice to such person, by first class post or, if that person is furth of Europe, by air mail, that no dividend is allotted to him in the scheme of division.

(2) Any creditor or person having an interest in the succession to the deceased's estate shall be entitled to examine-

- (a) the state of funds and any scheme of division lodged in process; and
- (b) the claims and supporting vouchers or evidence lodged with the judicial factor.

Approval of state of funds or scheme of division

61.26.- (1) Any creditor or person having an interest in the succession to the estate of the deceased who is dissatisfied with the state of funds or any scheme of division may lodge in process a note of objection within 28 days after the date of the notice given under rule 61.25(1)(b) and, until the expiry of that period, the court shall not approve the state of funds and any scheme of division.

(2) Where a note of objection under paragraph (1) is lodged, the court shall dispose of the note after hearing any objector and the judicial factor and making such investigations as it thinks fit.

(3) If any objection is sustained to any extent, the necessary alterations shall be made to the state of funds and any scheme of division, and shall be approved by the court.

(4) Where no note of objection is lodged, the court shall approve the state of funds and any scheme of division.

Payment following approval of scheme of division

61.27. After the court has approved a scheme of division, the judicial factor shall pay, deliver or convey to the parties the sums or other property to which they are entitled under the scheme.

Partial division on first scheme of division

61.28.- (1) Where, in the opinion of the judicial factor, a partial division of funds among the creditors who have claimed may be made with safety in the interests of all concerned, the judicial factor may, with the approval of the Accountant of Court, prepare a state of funds and first scheme of division as soon as possible after the period for lodging claims has expired.

(2) The following provisions of this Part shall apply to a state of funds and first scheme of division prepared under paragraph (1) of this rule as they apply to a state of funds and scheme of division prepared under rule 61.24(1)(a):-

- rule 61.24(2) (lodging of state of funds etc. with Accountant of Court),
- rule 61.24(3) (report by Accountant of Court on state of funds),
- rule 61.25 (notice to creditors),
- rule 61.26 (approval of state of funds or scheme of division) subject to paragraph (3) of this rule.

(3) Subject to paragraph (4), the court may, not earlier than 6 months after the death of the deceased, approve the first scheme of division and, where it so approves, the judicial factor shall pay, deliver or convey to the parties the sums or other property to which they are entitled under the first scheme.

(4) Out of the funds there shall be retained and deposited in an institution authorised under the Banking Act 1987(a) or other appropriate institution a sufficient sum to meet-

- (a) the amount of the claims of creditors whose debts have not at that time been admitted by the judicial factor, or whose debts are future or contingent; and
- (b) the full amount of such debts as are claimed as preferable but the priority of which is not admitted by the judicial factor.

Procedure where no creditors

61.29. Where, on the expiry of the period for lodging claims, no creditor has lodged a claim, the judicial factor shall not lodge a state of funds but shall prepare a report with regard to the disposal of the surplus estate in accordance with rule 61.30.

Disposal of surplus estate

61.30.- (1) Where, after payment of the creditors, there is a surplus, the judicial factor shall lodge with the Accountant of Court a statement of-

- (a) the amount of the surplus;
- (b) the parties claiming that surplus and their respective grounds of claim; and
- (c) those parties who, in the opinion of the judicial factor, are entitled to the surplus and the reasons for his opinion.

(2) The Accountant of Court shall prepare a written opinion on the statement of the judicial factor lodged under paragraph (1) and issue that opinion to the judicial factor.

(3) On receipt of the opinion of the Accountant of Court under paragraph (2), the judicial factor shall-

- (a) lodge in process that opinion and the statement prepared under paragraph (1); and
- (b) give notice to each party claiming an interest or apparently entitled to any part of the estate, by first class post or, if that person is furth of Europe, by air mail, that-
 - (i) the statement of the judicial factor and the opinion of the Accountant of Court have been lodged in process; and
 - (ii) should any such party wish to lodge any objection to the statement, he shall lodge a note of objection with the Deputy Principal Clerk within 28 days after the date of the posting of the notice by the judicial factor.

(4) On expiry of the period for lodging objections under paragraph (3)(b)(ii), the court, on considering the statement, opinion, and any note of objection and, after such procedure as it thinks fit, shall-

- (a) determine which parties are entitled to the surplus estate and direct the judicial factor to make payment accordingly; or
- (b) if the court considers that it is desirable that the judicial factor should continue to administer the surplus estate, direct the judicial factor to do so.

PART III

DISCHARGE OF JUDICIAL FACTORS

Applications for discharge to Accountant of Court

61.31.- (1) This rule applies to a judicial factor appointed as a-

- (a) curator *bonis*;
- (b) guardian;
- (c) factor *loco absentis*; or
- (d) commissary factor.

(2) Where a judicial factory is terminated by reason of the recovery, death or coming of age of the ward, or by reason of the exhaustion of the estate, the judicial factor, or where he has died, his representative, may apply to the Accountant of Court for a certificate of discharge.

(3) The judicial factor shall intimate a notice in Form 61.31 of an application under paragraph (2) to-

- (a) the cautioner; and
- (b) any person having an interest in the estate of the ward.

(4) Any person to whom intimation has been given under paragraph (3) may make written representations relating to the application to the Accountant of Court within 21 days after the date of such intimation.

(5) On the expiry of the period specified in paragraph (4), the Accountant of Court shall, after considering the application and representations made, send to-

- (a) the factor,
- (b) the Deputy Principal Clerk, and
- (c) any person who has made representations,

a copy of his decision to issue or refuse to issue a certificate of discharge and a note of his reasons for making that decision.

(6) The Accountant of Court-

- (a) shall not sign a certificate of discharge until the time for lodging an appeal under rule 61.32 has expired; and
- (b) shall, on issuing a certificate of discharge, give written intimation of the issue of the certificate to the Deputy Principal Clerk.

(7) The issue of a certificate of discharge shall be sufficient authority for the judicial factor to uplift his bond of caution.

Appeals against decisions under rule 61.31

61.32.- (1) The judicial factor, or any person who has made representations under rule 61.31(4), may, within 14 days after intimation of a decision to him under rule 61.31(5), appeal to the Lord Ordinary against the determination of the Accountant of Court.

(2) An appeal under paragraph (1) shall be-

- (a) made by letter to the Deputy Principal Clerk containing a statement of the grounds of appeal; and
- (b) intimated to the Accountant of Court.

(3) On receipt of an appeal under paragraph (1), the Deputy Principal Clerk shall place the appeal before the Lord Ordinary in chambers for determination.

(4) On disposing of such an appeal, the Lord Ordinary may-

- (a) direct the Accountant of Court to sign the certificate of discharge;
- (b) ordain the judicial factor to lodge a petition for his discharge; or
- (c) make such other order as he thinks fit.

(5) The decision of the Lord Ordinary on an appeal to him under paragraph (1) shall be final and not subject to review.

Applications for discharge to court

61.33.- (1) Where a judicial factor, other than one to whom rule 61.31 (applications for discharge to Accountant of Court) applies, seeks his discharge, he, or where he has died, his representative, shall apply to the court by petition for his discharge.

(2) The order for intimation and service under rule 14.5 (first order in petitions) in a petition for discharge of a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 shall include a requirement for-

- (a) a notice of the petition in the Edinburgh Gazette in Form 61.33; and
- (b) service on the cautioner and on the personal representatives of the deceased person in respect of whom the appointment was made.

(3) The court shall remit a petition under paragraph (1) to the Accountant of Court to report to the court on the petition.