



Briefing for the Public Petitions Committee

Petition Number: [PE1412](#)

Main Petitioner: Bill McDowell

Subject: Bonds of caution

Calls on the Parliament to urge the Scottish Government to amend the law of succession to end the requirement for a Bond of Caution by an executor-dative when seeking Confirmation of any intestate estate.

Background

The law of succession is concerned with the distribution of the property of a person who has died. It is divided into two parts – intestate succession (covering the situation where no will is left) and testate succession (where a will is left).

An “executor” is the person responsible for gathering in the property of the deceased person and then distributing it to those entitled to inherit it. An executor appointed by a will is an “executor-nominate”, an executor appointed by a sheriff (as occurs when someone dies intestate) is an “executor-dative”.

Before being confirmed by the court, an executor-dative is required to take out a “bond of caution”.¹ A bond of caution is an obligation by a third party, “the cautioner”, to indemnify any creditor or beneficiary of an estate against loss caused by maladministration, negligence or fraud on the part of the executor. It is usually provided by an insurance company, although it can also be provided by a private individual.

A bond of caution provides protection in those cases where suing the executor would not provide an effective legal remedy, for example because the executor has disappeared or is unable to meet the legal claims arising. However, where the insurance company is providing caution, the estate will bear the cost of the associated premium. Only two insurance companies currently provide bonds of caution (Zurich SGS and Royal & Sun Alliance (RSA)) and it has been suggested that monopoly of provision has a negative effect on the quality of service, as well as the level of premium charged.²

¹ SPICe has referred to the term in lower case, reflecting the Scottish Law Commission’s publications on the topic. ‘Caution’ is pronounced to rhyme with ‘nation’.

² Scottish Law Commission, Discussion Paper on Succession (DP 136), pages 110–111.

The Scottish Law Commission (SLC) undertook a detailed review of the law of succession (including bonds of caution) publishing a [Discussion Paper](#) (DP 136) in 2007 and a final [Report](#) (Scot Law Com No 215) in 2009.

In the final report, the SLC made a number of recommendations relating to bonds of caution. In particular, after an “overwhelming response” in support of such a move (SLC Report, para 7.11), the SLC recommended abolition of the requirement on an executor-dative to obtain caution before obtaining confirmation (recommendation 66).

The SLC further recommended that this change should only take effect in relation to deaths occurring on or after the implementing legislation in question comes into force (recommendation 78).

Scottish Government Action

The Scottish Government gave its [response](#) to the SLC’s Report in July 2009. In relation to the bonds of caution, the Scottish Government commented:

“We are grateful to the Commission for also reviewing the law on executors dative and the requirement for Bonds of Caution. The recommendation is that these should no longer be required and that the court should have the discretion to refuse to appoint executors. We understand this recommendation was positively received. There are, however, a couple of issues which will need to consider further, including the impact on the insurance market for Bonds of Caution”

SPICE contacted the Scottish Government on 22 November 2011 to obtain the Government’s up to date position on the issue. Government officials responded as follows:

“The Scottish Government has undertaken a period of pre-consultation dialogue on a number of the potentially contentious recommendations contained in the Scottish Law Commission’s Report on Succession. This included discussion on the abolition of the requirement for caution by executors-dative and on how to mitigate any risk to the estate. That dialogue will inform consideration of how best to take this, and other issues, forward in a public consultation which would precede any reform of the law.

Progress on this work has been slower than anticipated because of the need to respond to other pressures.”

Scottish Parliament Action

A public petition ([PE1134](#)) was submitted to the Scottish Parliament in March 2008 by the current petitioner calling on the Scottish Parliament to urge the Scottish Government to amend the law of succession to end the requirement for a Bond of Caution by an executor-dative when seeking Confirmation of any intestate estate.

This petition was closed in April 2008 on the grounds that the SLC was at that time considering responses to its Discussion Paper on its review of succession law and was not due to report on this until early 2009. The Public Petitions Committee also agreed to forward the petition to the SLC for its information as part of that review.

Succession law has been the topic of several Parliamentary Questions including the following:

Question S3W-29780 - Ian McKee (Lothians) (Scottish National Party) (Date Lodged 07/12/2009) : To ask the Scottish Executive what plans it has to take action in response to the Scottish Law Commission reports on succession and on damages.

Answered by Fergus Ewing (08/12/2009): The Scottish Law Commission has produced helpful reports on succession and on damages. The Commission's report on Succession (No.215, 2009) was published on 15 April and, having provided the Scottish Government's initial response on 13 July, I subsequently met with the chairman of the commission to discuss its proposals. The intention now is to engage with stakeholders, through a programme of dialogue and formal consultation, so that determination of the way forward can take account of all relevant perspectives, including any potential financial and regulatory implications. Similar integrated work is being developed in relation to damages for personal injury, bringing together the Commission's report on Damages for Psychiatric Injury (No.196, 2004), their Report on Personal Injury Action: Limitation and Prescribed Cases (No.207, 2007) and their report on Damages for Wrongful Death (No.213, 2008).

Oral Question selected for answer on 21 January 2010:

Rob Gibson (Highlands and Islands) (SNP): To ask the Scottish Government what plans it has to legislate in relation to the Scottish Law Commission's "Report on Succession", published in April 2009. (S3O-9233)

The Minister for Community Safety (Fergus Ewing): The "Report on Succession" recommends significant reforms to the law. I provided an initial response in July. Subsequently, in answer to a parliamentary question from Ian McKee, I confirmed that I had also met the commission's chairman. The Scottish Government is now having a dialogue with and consulting stakeholders to inform the way forward. Plans for legislation will be finalised in the light of that work, taking account of all relevant perspectives.

Rob Gibson: Succession was last legislated on in the 1960s, and indeed the Scottish Law Commission's 1990 review was not acted on in the Parliament's first eight years. I am delighted with the indicated timetable, which I presume means that an answer will emerge only after 2011. However, it is important that, as far as equality in family law is concerned, the interpretation of heritable property succession rights is legislated on as early as possible.

Fergus Ewing: Rob Gibson is entirely correct to say that the current law rests on the Succession (Scotland) Act 1964, which, although it has served Scotland well, now needs considerable updating. We hope to take that forward through consultation, and in that regard I am delighted that the

Justice Committee has responded positively to my suggestion of meeting the commission informally to discuss the report. Given the complexity of the issues, not least the recommendation to abolish the distinction between heritable and movable property—something, indeed, that Rob Gibson raised in his member's bill in 2006—the widest consultation should be carried out to ensure that we maintain a consensual approach. With that in mind, it is more likely than not that legislation will emerge only after the end of this parliamentary session.

Bill Aitken (Glasgow) (Con): Like everything else that comes before the Justice Committee at the moment, the matter is complex. However, does the minister agree that a degree of urgency is needed, given that, apart from anything else, the 1964 act was predicated on the concept of the so-called nuclear family, which, of course, is quite different from the realities of modern life?

Fergus Ewing: I am sure that the convener of the Justice Committee bears up well under the heavy burdens that rest on his shoulders. I entirely agree with his sentiment that there be a degree of urgency. However, given the range of issues involved, the nature of the SLC's specific recommendations and issues arising from the different family background that the member correctly referred to, we advocate an approach based on the maxim "Festina lente"³.

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³ie to do things the proper way instead of in a hurry.