

SCOTTISH PARLIAMENT PUBLIC PETITIONS COMMITTEE

PETITION PE1412: BOND OF CAUTION

Comments on Scottish Government's third response to Petition PE1412

The Public Petitions Committee wrote to the Scottish Government on 17 May 2012 asking for a response to issues raised in the petitioner's submission of 12 April 2012. It also asked the Scottish Government when a decision would be taken in relation to Bonds of Caution. The Scottish Government's response of 4 July 2012 continues to be disappointing. There is no commitment about the abolition of Bonds of Caution; no commitment about whether its abolition will be progressed separately from wider reform of the law of succession; and no commitment to a date when a decision will be taken about all this.

The Scottish Law Commission assessed all the evidence about Bonds of Caution several years ago and concluded in its 2009 Report on Succession that executors should no longer be required to obtain a Bond of Caution. The case for retaining these bonds was weak in comparison with the case for their abolition. The Scottish Government acknowledges that there was an 'overwhelming response' in favour of the abolition of the Bond of Caution in relation to the administration of estates but it still remains part of Scottish law.

The Scottish Government states in its response that there is a rationale for the current requirement that executors-dative must continue to pay for a Bond of Caution even in cases where an executor is the sole beneficiary of an estate. The rationale is stated to be that a Bond of Caution indemnifies not only a beneficiary but also a creditor of an estate against loss caused by negligence, maladministration or fraud on the part of the executor. There are two points to consider on this matter. Firstly, if there are no creditors of an estate (i.e. no debts relating to an estate) then the requirement for any executor (who is also a sole beneficiary of an estate) to obtain a Bond of Caution is superfluous. Secondly, in cases where there are outstanding debts, by law creditors can only claim debts up to 6 months from the date of death: if they do not do so they do not have legal authority to recover any debts. In other words, if an executor applies for Confirmation over 6 months after the date of death, claims by creditors would be disallowed and so the protection offered by a Bond of Caution to creditors would be unnecessary.

The Scottish Law Commission noted that if an executor is a sole beneficiary, it is difficult to understand why caution is required. The Commission stated: 'It is not necessary for the protection of the beneficiaries as they are the executors. Nor is it necessary for the protection of creditors as they can just as easily sue the beneficiaries as the executors'. [Scottish Law Commission, Discussion Paper on Succession, DP 136, August 2007, para. 4117(b)] Moreover, as the Commission also stated: 'It is difficult to see why the protection afforded to creditors and beneficiaries should differ depending on whether the estate is distributed in accordance with the laws of intestacy or under a Will. In addition, executors-dative, unlike many executors-nominate, often have a substantial beneficial interest in the estate and therefore a personal interest in its proper administration. In short the need to protect beneficiaries of a testate estate may be as great as that where the deceased died intestate'. [DP 136, para. 4.125]

The Scottish Government's Minister for Community Safety stated on 13 July 2009 that the case for review and reform of the law of succession was a strong one. However, no major recommendations of the Scottish Law Commission have been implemented. Bonds of Caution do not form part of the law of succession, as the Scottish Law Commission has acknowledged, but even this minor recommendation has not been implemented. As regards the impact of abolition of the Bond of Caution on the insurance market, the Scottish Law Commission did not argue that abolition of bonds in relation to estate administration would have any adverse impact on the existence of bonds covering other totally different risks. In any case, claims under Bonds of Caution are rare. Also, if an estate is administered by a negligent solicitor then the solicitor's professional insurance would cover any financial loss. Bonds have only been retained in Scotland, and not in England and Wales, because they represent an additional lucrative source of income for two large insurance companies and some legal firms.

Petition PE1412 argued that a Scottish Statutory Instrument could be introduced to abolish the Bond of Caution more quickly than waiting for wider reform of the law of succession. The Scottish Government states that the requirement for an executor-dative to obtain a Bond of Caution is contained in the Confirmation of Executors (Scotland) Act 1823. It goes on to state that this Act does not include powers to abolish the requirement for caution by subordinate legislation, such as a Scottish Statutory Instrument, and that therefore primary legislation would be required to repeal or amend existing legislation. The following points are relevant here. Firstly, the requirement for caution pre-dated the Confirmation of Executors (Scotland) Act 1823 and so it is questionable if this was the primary legislation: the title of the 1823 Act is 'An Act for the better granting of Confirmations in Scotland'. The change brought about by section 2 of the 1823 Act was that from 1 January 1824 caution was no longer required by executors-nominate (i.e. those named in a Will) but continued to be a requirement for executors-dative (i.e. those appointed by a court where there was no valid Will). Section 20 of the current Act of Parliament, the Succession (Scotland) Act 1964, merely affirms that executors-dative must continue to find caution in connection with the administration of an estate. Secondly, the Scottish Government states that the current rules are contained in primary legislation which can only be repealed or amended by way of further primary legislation, not by secondary legislation such as a Statutory Instrument. But the Scottish Government has already introduced two Scottish Statutory Instruments relating to succession law, in one of which (SI 2011 no. 436) Scottish Ministers are exercising powers conferred by the Succession (Scotland) Act 1964. Is it therefore absolutely certain that the Bond of Caution cannot be repealed under any circumstances by a Scottish Statutory Instrument?

The Bond of Caution is not fit for purpose in a modern Scotland aspiring to independence in the 21st century. A similar requirement to Bonds of Caution was abolished in England and Wales during the last century. The Scottish Government regards abolition of the Bond of Caution as a very low priority yet the continued requirement for these bonds places unfair financial and administrative burdens on executors. On 21 January 2010 the Scottish Government Minister stated in the Scottish Parliament that the current law needed considerable updating, that there was a degree of urgency about this, and that legislation would emerge after the end of the parliamentary session. This did not occur.

The Scottish Law Commission has stated that the Bond of Caution does not form part of the law of succession but instead relates to the way in which an estate is administered. This change in the law can and should take place prior to any wider reform of the law of succession. The change in the law which is requested is not complex and can be concisely summarised as follows:

- (1) The general requirement upon an executor-dative to obtain caution before he or she may be confirmed as executor is abolished; and
- (2) This change applies to all applications for Confirmation submitted on or after the date of implementation of this legislation.

I hope that the Scottish Government will move quickly to bring about a change in the law for which there is 'overwhelming support', according to the Scottish Law Commission. The alternative option is the initiation of legislative change by a committee of the Scottish Parliament or by a Member of the Scottish Parliament.

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