

Justice Directorate  
Civil Law and Legal System Division

T: 0131-244 4212  
E: Frances.macqueen@scotland.gsi.gov.uk



Anne Peat  
Clerk to the Public Petitions Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
EH99 1SP



12 December 2013

Dear Ms Peat,

## **CONSIDERATION OF PETITION PE1412**

Thank you for your letter of 18 November to Jim Wilson, CLO Learning and Justice, the Scottish Government, regarding the petition by Bill McDowell 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. You asked for a response by 13 December to two particular questions. I am replying as Civil Law and Legal System Division has policy responsibility for wills and succession.

### 1. What scope is there for restricting the categories of executor for which a bond of caution is required and what would the process be?

The general position in Scots law is that an executor-dative requires to obtain a bond of caution before they can be granted confirmation, conferring upon them the full powers to administer the estate.

The Confirmation of Executors (Scotland) Act 1823 dispensed with the need for an executor-nominate under a will to obtain a bond of caution before they can be granted confirmation, although, the sheriff or commissary clerk may, in some exceptional cases, still require an executor nominate to find caution .

Section 2 of the 1823 Act, as amended, does provide an exception from the requirement to find caution where the executor dative is a surviving spouse who will inherit the whole estate in the satisfaction of their prior rights.

Under the Succession (Scotland) Act 1964 provision is made for a spouse to have a share of the estate in cases of intestacy (where no will is left). This is known as prior rights, which extend to:

- a dwelling house in which the surviving spouse or civil partner lived as long as the value is below £473,000;

- furniture in that dwelling house as long as the value is below £29,000; and
- a capital payment which can vary - £89,000 if there are no children or £50,000 if there are.

This means that if an estate is at or below the above thresholds and would therefore be inherited in its entirety by a surviving spouse, then no bond of caution is required.

The Scottish Law Commission (SLC) in their Report on Succession (SCOT LAW COM No 215) when recommending that mandatory caution for executors dative should be abolished, also considered whether courts should have a discretionary power to order bonds of caution to be obtained by executors-dative where it was thought appropriate. The majority of their consultees were in favour of the introduction of such a power. However, the SLC were persuaded by those who argued against that this could have the effect of collapsing the current market for bonds making them very expensive to obtain. They took the view that it was preferable that the requirement for caution should be abolished in its entirety. They also suggested that giving courts a discretionary power to require caution to be found would introduce judicial elements into what is better seen as an administrative process. They also recommended that in abolishing mandatory caution it would be advisable for the courts to have the power to refuse to appoint to the office of executor-dative persons who appear unsuited to the post.

In terms of the process for making any changes in relation to executors dative, consultation will inform the way forward. As previously advised, it is likely that, following consultation, changes will require primary rather than secondary legislation.

2. When will the consultation on succession law be published and what degree of priority is this being given?

The SLC Report remains under review and the SG will consult when other priorities allow. The Scottish Government's priorities are set out in our Programme for Government announced by the First Minister on 3 September - <http://www.scotland.gov.uk/About/Performance/programme-for-government>

I hope that this information is of assistance to the Committee.

Yours sincerely

Frances MacQueen