

PE1441/B

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(by email: petitions@scottishparliament.uk)



Our Ref: A4472511

23 November 2012

Dear Ms Wilson

PETITION PE 1442

Thank you for your letter of 2 November 2012, seeking our response to issues raised in petition 1442, 'calling on the Scottish Parliament to urge the Scottish Government to amend the law to provide that a person's dead body is part of their estate and in effect clearly invokes their will'.

We are asked to consider and respond to specific issues raised

- within the petition itself
- during the discussion on the petition
- by the written question 'What are your views on what the petition seeks and what should the considerations be?'

Because the petition relates to how a proposed legislative change would affect both general disposal arrangements and specific body donation arrangements, the following response has been informed by both succession law and health policy areas.

The petitioner is concerned that individuals' wishes in respect of the disposal of their bodies can be over-ridden by family members on their death. To address his concerns, he suggests that having the deceased's body included as part of the deceased's estate would ensure that instructions about disposal of the body would be carried out. Whilst appreciating what the petitioner is seeking to achieve, his proposal raises a number of issues.

The law of succession in Scotland consists of part common law and part statute law, including the Executors (Scotland) Act 1900 and the Succession (Scotland) Act 1964. The petitioner's proposal raises two key succession law issues, both of which may lead to delays in disposal arrangements.

The first is in relation to the consequences of subjecting the disposal of the deceased's body to a regime which deals with the administration of the deceased's property and financial affairs. On this issue, the law of succession in Scotland currently provides for processes for the proper administration of an estate. It is designed to ensure that all of the assets of the deceased are identified and ingathered, debts and taxes paid and the remaining estate distributed according to the will made by the deceased or in accordance with the 1964 Act.

The process of administering an estate, however, does not usually begin immediately on death. In most cases it requires the appointment of an executor. Where an executor is named in a deceased's will, the executor must still apply to the sheriff court for the confirmation which provides him or her with the authority to deal with the estate. As queried at the Committee's meeting on 30 October, however, it is the case that over 60% of deaths in Scotland do not involve a valid will¹, and in this situation it is usually necessary to apply to the court for the appointment of an executor dative. This process can take weeks or even months. It is likely, therefore, to be some time after the deceased's death before an executor is in place and has authority to deal with the estate. If the estate included the body this would mean that no steps could be taken to arrange for disposal of the body until then.

The second issue is the extent to which a will at present can be deviated from or challenged. Whilst in principle an executor should administer the deceased's estate in accordance with the deceased's will, there is no absolute guarantee that this will be possible. There are a number of factors which may impact on a deceased's wishes as expressed in a will. A surviving spouse, civil partner or children might claim legal rights to a part of the moveable estate even though the deceased did not wish them to have any part of the estate. It is also possible for the estate to be distributed differently from the terms of the will under a Deed of Family Arrangement if all beneficiaries agree, for instance, for tax purposes. Similarly, a charitable beneficiary might have ceased operation or amalgamated with another charity since the will was written and the executor might have to arrange for the will to be varied as it applies to that beneficiary. Any claims on the estate or variations will affect whether the deceased's wishes are carried out, and are likely to further delay the administration of the estate. Wills can also be challenged on certain grounds and, again, where there is a dispute this may take some time to resolve.

As the implicit rationale for the petitioner's suggestion is to address instances where there is already dispute or conflict amongst the living over the arrangements for the disposal of the deceased's body, some or similar factors as noted above could come into play, possibly resulting in increased delay, financial cost and / or emotional distress to those involved. The Committee may also wish to consider whether a further unintended consequence might be, in some circumstances, to create conflict or dispute where previously there was none.

Although less directly related to the petitioner's proposal, the Committee might still be interested in a recommendation put forward by the 2008 Burials and Cremations Review Group and mentioned within the SPICe briefing note accompanying the petition. This recommendation was to legally invest the duty to instruct on disposal with the nearest

¹ Research found that only 37% of Scots had made a will but that this increased to 69% of those aged 65 or over: S O'Neill *Wills and Awareness of Inheritance Rights, Scottish Consumer Council (2006), p 5 n 40*

relative of the deceased (rather than an executor), where the definition of 'nearest relative' was the same as used within Section 50 of the Human Tissue (Scotland) Act 2006.

It must be stressed that the Review Group did not specifically look at the rights of the deceased, as is the case with the petitioner's suggestion, but of some relevance is that the Review Group's rationale for recommending the nearest relative rather than the executor was partly in recognition of the need to avoid the same delay concerns as already set out above. Also of relevance is that, although this recommendation was to clarify existing law and practise in Scotland and not to address dispute resolution, the Review Group did express the view that disputes over disposal should ideally be settled amicably between those closest to the deceased. This Review Group recommendation is one of many that will be considered further when the Scottish Government takes forward activity relating to the updating of burial and cremation legislation in Scotland.

Another matter the Committee queried on 30 October was whether there was evidence of instances when a person's wish to donate their body to medical science had been overturned by surviving family members. It may be that one or more of the five universities will offer a view on this, although evidence is likely to be minimal and / or anecdotal in nature. Persons wishing to bequeath their body in this way may do so many years before their death, therefore there is no correlation between the number of consent forms currently held by a university and the number of bodies it receives. Additionally, universities are only usually notified when it has already been agreed by the family that a person's body will be donated, therefore they would not normally be in a position to advise on how often the donation does not take place or why it does not take place.

Her Majesty's Inspector of Anatomy for Scotland, Professor R.A. Wood, has already responded to the Committee's request for views specific to the matter of persons wishing to donate their body to medical science. Rather than re-iterate the same information, the Scottish Government is content instead to fully support and endorse his setting out of current arrangements and his view that bequeathal directly arranged with an Anatomy Department is the best way to attain donation of a body. We are also content to defer to his experience where he sets out his views on the possible impact of the suggested legislative change on body donation in Scotland.

I trust this response will be of assistance to the Committee when it next discusses this petition.

Yours sincerely,

ALISON KERR