



PUBLIC PETITION NO.

PE01412

Name of petitioner

Bill McDowell

Petition title

Bond of Caution

Petition summary

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.

Action taken to resolve issues of concern before submitting the petition

A solicitor was initially contacted to provide legal advice. The advice given was that it is a legal requirement that an insurance bond is taken out before any executor can seek confirmation of an intestate estate. The Commissary Department of the Sheriff Clerk's Office in Edinburgh was also contacted and confirmed that a Bond of Caution is required by law in all cases by executors-dative. The only exception is where the executor is a spouse.

A petition was submitted to the Scottish Parliament in March 2008 (PE1134) to amend the existing law. That petition was closed in April 2008 by the Public Petitions Committee because the Scottish Law Commission was, at that time, reviewing succession law. The Law Commission's report was published on 15 April 2009 and on 22 April 2009 I wrote to the Scottish Government regarding the issue of the Bond of Caution. So far the Scottish Government has not indicated if, or when, it intends to amend the law so that a Bond of Caution would no longer be required. That is why I am submitting this new petition to the Scottish Parliament.

Petition background information

Under Scottish law a person dies intestate if they do not leave a Will or if the Will made is no longer valid because it has not been updated to take account of changing circumstances, such as the birth of a child. A next of kin will normally apply to the Sheriff Court to be appointed as executor and then will seek Confirmation of that individual's estate because that is required to sell or transfer a property or administer other assets belonging to a deceased person. If the person seeking Confirmation of the estate is not a surviving spouse then a financial guarantee, a Bond of Caution (pronounced "Kayshun") is required before a certificate of Confirmation can be issued by a Commissary Department of the Sheriff Clerk's Office. A Bond of Caution is therefore required before Confirmation is granted in favour of an executor-dative (i.e. an

executor appointed by the Court to administer an intestate estate in contrast to an executor-nominate who is appointed by a Will). This rule of law applies even if the person seeking Confirmation is the next of kin, sole executor and the only child, and therefore the sole beneficiary of an estate under the Scottish Laws of Succession (see Succession (Scotland) Act 1964 (c.41), ss 2(1)(a), 20).

The Bond of Caution required under Scottish Law for intestate estates is intended: (1) to protect the inheritance of beneficiaries from the mistakes of executors by ensuring that an estate is distributed according to the Scottish Laws of Succession; and (2) to ensure that the person applying for Confirmation is entitled to do so.

The Bond of Caution is normally obtained from an insurance company, but most insurance companies do not provide this service. Only two insurance companies offer these bonds: Royal and Sun Alliance and Zurich GSG. Both insurance companies charge a fee for acting as cautioner and issuing a bond. Royal and Sun Alliance only accepts applications from solicitors appointed to act on behalf of executors and will not issue a bond directly to an individual. If an executor wishes to apply for Confirmation without using the services of a solicitor that individual can only apply for a bond from one insurance company, Zurich. In the absence of competition, Zurich is in a monopoly position and has freedom to charge whatever premium it deems appropriate. The premium will normally be higher if the executor does not appoint a solicitor to assist in obtaining Confirmation. If an estate includes property, the fee requested can be several thousand pounds because the insurance company premium is based on a percentage of the value of the estate. The value of an estate is inevitably much larger where it includes heritable property. The cost of obtaining a Bond of Caution is therefore excessive in comparison with the statutory fee which all Commissary departments charge for obtaining Confirmation. The requirement under Scottish Law for a Bond of Caution therefore presents an unnecessary and unfair financial burden and obstacle to executors of intestate estates who apply for Confirmation, with or without the professional services provided by a solicitor.

Commissary departments encounter very few instances where the existence of a Bond of Caution has been found to be necessary in order to compensate individuals for the maladministration of any estate by an executor. In particular, one Commissary office commented that the Bond of Caution has, in practice, proved to be a very useful and lucrative additional source of revenue for insurance companies because few claims are made and the premium paid to obtain the bond is not refundable.

Under English Law, if there is no Will (or no valid Will) and neither spouse is alive then an estate passes to the next of kin (e.g. a child or children) who can then apply for Letters of Administration (the equivalent of Confirmation in Scotland) without the need to provide a Bond of Caution. It is possible under Scottish Law for an executor to ask an individual, rather than an insurance company, to act as cautioner. Under the Insurance Companies Act of 1982 an individual cautioner would not be permitted to charge a premium unless they were authorised to carry out insurance business. However, Commissary departments rarely encounter individual cautioners because few individuals have the financial resources to provide a written assurance from a bank guaranteeing to any Commissary department the gross value of an estate, particularly if the estate includes heritable property.

After the passage of the Confirmation of Executors (Scotland) Act 1823 caution ceased to be a requirement of executors-nominate but was required for all other executors dealing with intestate estates until in 1980 the Law Reform Act no longer imposed this obligation on any surviving spouse who was an executor. Given that a Bond of Caution is not required under English Law for executors who seek Letters of Administration, there is no reason to indicate that it should continue to be a requirement under Scottish Law for executors-dative seeking Confirmation.

A public petition (PE1134) was submitted to the Scottish Parliament in March 2008 regarding the Bond of Caution. This petition was closed in April 2008 on the grounds that the Scottish Law Commission was considering responses to its consultation on its review of Succession Law and was not due to report on this until early 2009. The petition was forwarded to the Scottish Law Commission for its information as part of that

review. Information relating to Bonds of Caution is covered on pages 108 to 115 of the Scottish Law Commission's Discussion Paper on Succession (DP 136) which was published in August 2007. Paragraph 4.117 of that Paper provides the arguments for abolishing the Bond of Caution. The Scottish Parliament's Information Centre prepared a briefing on the subject of the Bond of Caution. Moreover, the Scottish Law Commission states in its public information leaflet that "outdated or unnecessarily complex law makes for injustice and inefficiency and leads to the law being out of step with the needs of ordinary people". The Bond of Caution offers an example where this principle applies. The Scottish Law Commission published its Report on Succession (report no. 215) on 15 April 2009. Information relating to Bonds of Caution is outlined on pages 105 to 107 of the report. Recommendation 66 stated that the Bond of Caution should be abolished (see p.106, para 7.11). But recommendation 78(1) stated that changes should only apply in relation to deaths occurring on or after the date on which new legislation commenced but this would be unfair for a number of reasons.

Recommendation 78(1) detailed on page 116, para 7.43 should be modified so that a Bond of Caution is not required of any executor-dative where an application for Confirmation is submitted on or after the introduction of new legislation. The principal reasons are: (1) Recommendation 78(1) states that "in general" the new rules on succession should only apply to deaths occurring after new legislation is introduced, thereby leaving room for exceptions to the general rule; (2) the law of caution does not form part of the law of succession but instead relates to the way in which an estate is administered; (3) there is no direct relationship between the law of caution required for Confirmation and the date of death of any person because an executor could apply for Confirmation within days, weeks, months or even years after the death of an individual; (4) it is fairer to link the abolition of the law of caution to the date on which an executor seeks Confirmation, not the date on which a death occurred; (5) it would avoid the complication referred to in paragraph 7.44 of the Report on Succession covering circumstances where there is uncertainty whether a person died before or after the commencement of new legislation; and (6) it would be unfair to create a two-tier system whereby, after new legislation is implemented, some executors-dative would have to obtain a Bond of Caution whereas most others would not. It would be very unjust to impose additional expense as well as administrative delays on some executors but not on others.

On 22 April 2009 I sent a letter to the Scottish Government stating that I hoped that the Scottish Law Commission's recommendation 66 and a modified version of recommendation 78(1) in relation to Bonds of Caution would be implemented. An official wrote back on 28 April 2009 to say that the Scottish Government was considering the Report of the Scottish Law Commission and that my comments would form part of that consideration. Succession Law was subsequently referred to in Scottish parliamentary questions on 13 July 2009, 8 December 2009 and 21 January 2010.

On 7 September 2011 the Scottish Government announced its legislative programme but it was disappointing that after a delay of several years Succession Law was omitted from the list of proposed legislation. I contacted the Scottish Government on 27 September and was informed that there were no immediate plans for any changes to Succession Law. I would like the Scottish Law Commission's recommendation on the abolition of the Bond of Caution to be implemented and in the event of its being implemented, it should apply to applications for Confirmation, not only to deaths, submitted on or after implementation.

Sources:

1. The Confirmation of Executors in Scotland 8th edn (1995)

This is the standard text used by Commissary departments. Chapter 9 covers the Bond of Caution. The supplement to the volume was published in 1996.

2. The Confirmation of Executors (Scotland) Act 1823 (4 Geo.4, c.98), s.2

3. Succession (Scotland) Act 1964 (c.41), ss 2(1)(a), 20

4. Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), s.5

5. Insurance Companies Act 1982 (c.50), s.95(a)

6. Scottish Law Commission, Discussion Paper on Succession (DP 136) (2007)

7. Scottish Law Commission, Report on Succession (report no.215) (2009)

Unique web address

<http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01412>

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