

SCOTTISH PARLIAMENT PUBLIC PETITIONS COMMITTEE

PETITION PE1412: BOND OF CAUTION

Comments on Scottish Government's second response to Petition PE1412

The Public Petitions Committee wrote to the Scottish Government on 8 March 2012 asking for a response to two questions regarding this petition: (1) the Scottish Government was asked to confirm that the abolition of Bonds of Caution is one of the topics that is being considered for separate progress in connection with the review of the law of succession; and (2) the Scottish Government was also asked to confirm when a decision will be taken on this.

The Scottish Government's response is very disappointing because there is no clear commitment to separate abolition of Bonds of Caution or any date when a decision will be made about this. The reply is, in effect, a recipe for further delays. The Scottish Government acknowledges that the Scottish Law Commission stated in its 2009 Report on Succession that there was an 'overwhelming response' in favour of abolishing Bonds of Caution in relation to estate administration. However, the Scottish Government now indicates that it is aware that some reservations were expressed about ending the requirement for these bonds. But which stakeholders are in favour of retaining these bonds and what are their arguments for doing so? The Scottish Government's reply refers to 'notable support for the continuation of the current approach' and that 'the current approach might be replaced with something else, rather than simply repealed'. However, the Scottish Law Commission has stated that it was preferable that the requirement for caution be abolished in its entirety. It added that courts should not be given a discretionary power to order that Bonds of Caution be obtained by executors.

The principal beneficiaries of the current approach are the two large insurance companies (Royal & Sun Alliance, and Zurich) who benefit financially through charging non-refundable high premiums for providing these bonds where few claims are made. Some legal firms also benefit financially by charging their clients fees for preparing applications to obtain the bonds. The losers are members of the public because they are subject to unnecessary and unfair administrative burdens, significant delays and additional financial expense. Given that most people do not leave a valid Will, the requirement that executors obtain such an insurance bond consequently affects a considerable number of families.

The current requirement for Bonds of Caution is deeply flawed. The Scottish Law Commission concluded that the arguments for retaining these bonds were weak in comparison with the arguments for abolishing them. For example, why should a next of kin and sole executor be required to pay a large premium to an insurance company to obtain a Bond of Caution which is intended to protect the inheritance of that same next of kin who is the sole beneficiary under the 1964 Law of Succession? This is illogical. In other words, if the executor retains the primary legal liability to beneficiaries, and if the executor is the sole beneficiary, then there is no purpose in requiring an executor to obtain a Bond of Caution. Does the law expect an executor to act dishonestly against his or her own interests!

For the past 40 years the citizens of England and Wales have not been subject to any legal requirement similar to Bonds of Caution, for example sureties. Similarly, in the Republic of Ireland there is no requirement to provide sureties. Why then should families in Scotland continue to be placed at an unfair disadvantage? Why does an SNP administration refuse to implement this recommendation of the Scottish Law Commission when it is obvious that there are compelling reasons for doing so? The Bond of Caution has been in existence since well before the 19th century. Indeed, it was only from 1 January 1824 that executors-nominate (i.e. those appointed by a Will) were no longer required to obtain a Bond of Caution. It is now long overdue for this rule to be extended to cover all executors-dative. These bonds are simply not fit for purpose in the 21st century.

The Scottish Law Commission was established in 1965 to recommend reforms to improve, simplify and update the law of Scotland. In 2009 it recommended the abolition of Bonds of Caution, but in 2012 the Scottish Government has still not taken any action to implement this recommendation. The Scottish Law Commission states in a general information leaflet: 'Society is constantly developing and it is important that the law keeps pace with changes in the way we live and work. 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 serves no useful purpose in a modern Scotland, particularly one where the current Scottish administration aspires to independence. Abolition of the Bond of Caution is a reform which the Scottish Parliament and Scottish Government should welcome and endorse.

The Scottish Government has not given any firm commitment that abolition of Bonds of Caution will be progressed separately. It has also not stated when a decision will be made about this. The timescale is said to be dependent on the Scottish Government's dialogue with stakeholders. This dialogue appears to be open-ended and everlasting. It is now 3 years since the Scottish Law Commission published its report but no action has been taken or is forthcoming over even the simple issue of abolishing these bonds. On 13 July 2009 the Minister for Community Safety gave his initial response to the Report on Succession by stating 'the case for review and reform is a strong one'. However, during the past 3 years no action has been taken to implement at least the recommendation regarding Bonds of Caution. In the Scottish Government's statement of July 2009 the Minister also referred to a couple of issues which required further consideration, including, in his words, 'the impact on the insurance market for Bonds of Caution'. The financial interests of two large commercial insurance companies who wish to retain these bonds are being given precedence over the interests of the citizens of Scotland who want them abolished. Scottish Ministers should act swiftly in the interests of the Scottish people.

The quickest and most effective method for abolishing these bonds would be for the Scottish Government to introduce a Scottish Statutory Instrument. However, the Scottish Government has responded to the Scottish Parliament stating that this would not be an option because primary, not secondary, legislation would be required. The reasons given are not convincing. Is the Scottish Government implying that no primary legislation exists at present which provides the legal underpinning of the requirement for Bonds of Caution? If so, how can these bonds be lawful? Zurich insurance states in its published literature that: 'The Bond of Caution is required by Scottish law'. If so, which law are they referring to? The Succession (Scotland) Act of 1964 (section 20) still requires that executors-dative obtain a Bond of Caution before Confirmation will be granted.

If these bonds are lawful, then a Scottish Statutory Instrument is the appropriate method for abolishing them. The Scottish Government's response to the Public Petitions Committee states that Ministers probably do not have the power to introduce a Statutory Instrument to abolish Bonds of Caution. But then how do Ministers have the lawful power to retain these bonds as at present? This matter needs to be resolved. A Statutory Instrument represents delegated legislation which arises when the Scottish Parliament empowers a Minister to make rules and regulations which have the effect of law. Scottish Ministers do have the power to make, confirm or approve orders, rules, regulations or other subordinate legislation. They should have the power to abolish the requirement placed upon executors-dative to obtain a Bond of Caution. The means by which that power is exercised would be a Statutory Instrument, which could be worded 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 Statutory Instrument.

The Scottish Government states that existing legislation 'does not generally empower Ministers to make wider changes to the law on succession'. However, as the Scottish Law Commission acknowledged, Bonds of Caution do not form part of the law of succession but instead relate to the way in which an estate is administered. A Scottish Statutory Instrument could be introduced to abolish Bonds of Caution if there is the political will to do so.

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