

SCOTTISH PARLIAMENT PUBLIC PETITIONS COMMITTEE

PETITION PE1412: BOND OF CAUTION

Additional comments

At its last meeting, on 13 November 2012, the Public Petitions Committee agreed to continue the above petition and await publication of the Scottish Government's consultation on succession law. But the process of ending the requirement for Bonds of Caution in estate administration has been very protracted, as the committee acknowledged at its meeting on 15 May 2012. The original petition (PE1134) was submitted in March 2008 and in April 2009 the Scottish Law Commission recommended the abolition of the Bond of Caution, but no reform of the law has been considered or implemented. In the meantime, in the absence of any commitment to take forward separately abolition of Bonds of Caution or give a timescale for wider reform of succession law, perhaps the Scottish Government should consider restricting the categories of executors for whom a Bond of Caution is required.

Most of the respondents to the Scottish Law Commission's Discussion Paper on Succession, published in 2007, were in favour of abolition of the Bond of Caution for intestate estates. Indeed, only four respondents were in favour of retaining caution. In particular, the Faculty of Advocates, Help the Aged, the Law Society of Scotland, prominent law firms and also academics argued for abolition of Bonds of Caution. The view of most respondents was that the Bond of Caution involved considerable time, effort, expense and administrative delays where there was minimal risk.

One major law firm commented that they were aware of only two claims on such bonds in a period of more than 30 years. Their conclusion was that for virtually all intestate estates where caution is required, the Bond of Caution was simply an additional expense providing no benefit. Indeed, one solicitor noted that he had never been aware of any claim under a Bond of Caution over a period of many decades. Another prominent law firm stated that there should be no requirement for caution to be found if the executor-dative was a sole beneficiary entitled to the whole intestate estate. Bonds of Caution offer protection to beneficiaries and creditors. But if the executor is the sole beneficiary then there should be no need for a Bond of Caution to offer protection to beneficiaries; and if there are no debts on an estate then there should be no need for a Bond of Caution to offer protection to creditors.

Zurich Insurance and Royal & Sun Alliance are the only two large insurance companies that issue Bonds of Caution. However, it is significant that although Zurich has a financial interest in opposing abolition of Bonds of Caution, it recommended to the Scottish Law Commission that caution should not be required where executors are sole beneficiaries. In situations where there were unsatisfied creditors, Zurich accepted that creditors had a right to sue executors/beneficiaries.

Scotland is the only part of the UK where a surety is required. Bonds of Caution should be abolished and this change should apply to applications for confirmation submitted on or after implementation of a change in the law. However, if the Scottish Government is unsure or unwilling to abolish these bonds then it should at least take action now to extend the categories of executors not required to find caution to include those executors who are sole beneficiaries. I hope that the Public Petitions Committee will explore this option with the Scottish Govt.

BILL McDOWELL

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