The Succession (Scotland) Bill is a Scottish Government bill which was introduced in the Scottish Parliament in June 2015. The law of succession, also known as inheritance law, determines what happens to someone’s property and possessions when he or she dies. This Bill makes provision for changes to a number of specific areas of the existing law.

Stage 3 of the Bill’s parliamentary passage will take place on 28 January 2016. This briefing focuses on the key amendments lodged by the Scottish Government for Stage 3.
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INTRODUCTION AND BACKGROUND

The Succession (Scotland) Bill (‘the Bill’) contains provisions for reform to a number of discrete topics associated with succession law.

The Bill has its origins in a 2009 report of the Scottish Law Commission (‘the SLC’)(SLC 2009a). The SLC is an independent statutory body which makes recommendations for simplifying, updating and improving the law of Scotland.¹

The Scottish Government is undertaking two separate projects on succession law, although both are based on the SLC’s report. As well as the Bill, the Scottish Government (2015) consulted on more wide-ranging reforms to the law of succession in 2015, with a view to further legislation in this policy area.²

The provisions of the Bill have been described in various places by the Scottish Government as “technical” (e.g. the Policy Memorandum to the Bill). The SLC (2015, p 2) thinks this is, in part, a reference to the comparatively limited scope of the Bill. However, at Stage 1 of the Bill the SLC also commented:

“This description should not in any way be seen as diminishing the importance or effect of the Bill’s provisions. Indeed for those who find themselves in situations to which the Bill’s provisions apply, they are likely to be highly important” (SLC 2015, p 2)

THE CONTENT AND STRUCTURE OF THE BILL

The content and structure of the Bill can be summarised as follows:

- **wills (sections 1–8):** this part of the Bill would make a series of reforms to the law relating to wills and to (a lesser extent) ‘special destinations’, which are provisions in the title deeds to property which can also transfer property on death. This part of the Bill covers the effect of certain life events, including divorce and the death of the person that the person making a will had intended should inherit. It also looks at the circumstances where a will can be changed (‘rectified’) after a person’s death.

- **survivorship (sections 9–11):** these provisions would make reforms to the law of survivorship. This branch of law addresses the situation where people die simultaneously or in circumstances where it is unclear who died first.

- **forfeiture (sections 12–17):** the law of forfeiture addresses the relatively rare situation where someone has unlawfully killed the person he or she stood to inherit from.

- **protections for executors, trustees and buyers of property (sections 18–19):** sometimes when a deceased person’s property and possessions are being distributed after death, mistakes are made. This part of the Bill deals the with need to protect other people, such as executors, in certain circumstances, from the consequences of these mistakes.

- **miscellaneous reforms (sections 20–22):** the Bill deals with several other discrete topics, including ‘private international law’. This is the law which applies when a person

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¹ A number of the recommendations of the 2009 report were carried over from an earlier report of the SLC on succession in 1990 (SLC 1990), which has been largely unimplemented. See: [http://www.scotlawcom.gov.uk/files/6812/7989/6684/rep124.pdf](http://www.scotlawcom.gov.uk/files/6812/7989/6684/rep124.pdf)

² For an overview of the contents of this consultation paper see the separate SPICe Briefing entitled ‘Inheritance Law in Scotland’ (Harvie-Clark 2015a).
dies whose estate is connected with more than one part of the UK or more than one country.

THE SCOPE OF THIS BRIEFING

When the Bill was introduced it only contained provisions considered by the Scottish Government to be uncontroversial in policy terms. However, the Scottish Government has now lodged Stage 3 amendments which would make changes to the law relating to ‘bonds of caution’ (pronounced ‘KAY-shun’).

In view of the potential policy impact of this proposed reform, as well as the absence of parliamentary opportunity to consider this aspect of the Bill at Stages 1 and 2, this briefing focuses mainly on the Stage 3 amendments relating to bonds of caution.

The briefing also summarises parliamentary consideration of this Bill to date and issues arising at Stage 1 and at Stage 2 of the Bill. Note that the Stage 1 Report was supportive of the Scottish Government’s position on a number of matters and there were a limited number of amendments at Stage 2 of the Bill.

PARLIAMENTARY CONSIDERATION

The Bill was introduced in the Scottish Parliament on 16 June 2015. As introduced it was considered suitable for what is sometimes referred to as ‘the Scottish Law Commission bill procedure’. This can be used for bills based on SLC reports where a number of criteria are satisfied. These include that there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.

The Delegated Powers and Law Reform Committee (‘the Committee’) was designated the lead committee for the purposes of Stage 1 scrutiny of the Bill on 24 June 2015. It took Stage 1 evidence on the Bill at its meetings on 8 September, 15 September, 22 September and 29 September 2015.

The Committee (2015a) published its specific report on the Bill’s Delegated Powers Memorandum on 23 September 2015. The Finance Committee issued a call for evidence on the Bill, but received no responses and did not undertake any further consideration of the Bill.


Stage 2 proceedings took place on 8 December 2015. There were a limited number of Scottish Government amendments, all of which were agreed to.

On 25 January 2016 the Scottish Government lodged Stage 3 amendments relating to bonds of caution (and other more technical matters). Previously, on 14 January 2016 the Scottish Government (2016a) wrote to the Committee highlighting the key draft Stage 3 amendments and the policy rationale for them. On 26 January 2016 the Committee took evidence on these amendments from key stakeholders. This was a separate initiative on the part of the Committee and not part of the bill procedure. Key themes from this evidence session are summarised later in this briefing at pp 9–10.
BONDS OF CAUTION

This section of the briefing considers the amendments lodged at Stage 3 by the Scottish Government relating to bonds of caution. The Stage 1 Report and Stage 2 are considered in the final section of this briefing.

WHAT IS A BOND OF CAUTION?

A bond of caution is a guarantee, almost invariably provided by an insurance company. It is usually required where a person dies without leaving a will, or when leaving a will that does not name an ‘executor’ (the person with authority to gather in and distribute the estate to the beneficiaries). The aim of the guarantee is to protect the beneficiaries and creditors of the estate from fraud, negligence or maladministration by the executor of the estate.

The amount of caution is usually the full gross amount of the value of the estate. Where an insurance company provides a bond of caution this costs in the region of £150–£300.

THE SCOTTISH GOVERNMENT’S APPROACH TO BONDS OF CAUTION

The Scottish Government (2014) originally consulted on abolition of bonds of caution in 2014, with a view to including relevant provisions in the Bill. However, whilst there was majority support for abolition from consultees, some consultees also highlighted the need for appropriate safeguards for beneficiaries in the event of abolition. Furthermore, there was a lack of consensus amongst consultees as to the required nature of these safeguards. The Scottish Government committed to further consultation on this topic, which took place in the 2015 consultation on succession law. Consultation responses are not yet publicly available, nor any analysis of those responses.

Whilst the reforms to bonds of caution were originally intended for any further legislation on succession, one of the two providers of the specialist type of insurance associated with bonds of caution (Zurich) has indicated their intention to withdraw from the market on 1 February 2016. Accordingly, for reasons which will be explained in more detail below, the Scottish Government now considers it necessary to amend the Bill to include provisions relating to bonds of caution.

SOME RELEVANT BACKGROUND RELATING TO BONDS OF CAUTION

Executors-dative

When a person dies without leaving a will, or leaves a will that does not identify an executor, the court appoints such a person to act as the executor (known as an ‘executor-dative’).

There is a strict order of preference for who can apply to the court to be appointed as an executor-dative. The court has no discretion to refuse to appoint an applicant if that individual is entitled to be appointed in terms of the order of preference. This is the case even where there are concerns that the estate will not be properly administered (Scottish Government 2014, para 2.4).

However, an executor is subject to what are referred to as ‘fiduciary duties’. In particular, he or she is subject to the fundamental principle that he or she must not allow his or her personal interests to prevail over the interests of the estate, so he or she must derive no personal
advantage at the expense of the estate. A breach of an executor’s fiduciary duties can be the subject of a legal challenge in the civil courts by affected people, such as beneficiaries.

Executors are also ‘trustees’ and the law relating to trusts is well developed. It provides beneficiaries with legal remedies through the civil courts in a range of circumstances should beneficiaries wish to challenge the actions, or failure to act, of an executor.

Note it is permissible, and indeed common, for an executor to be one of the beneficiaries as well.\(^3\)

Confirmation

Executors usually get their authority to carry out their duties from a legal document known as the ‘confirmation’ which can be obtained from the local sheriff court. However, confirmation may not be needed from estates where bodies holding funds belonging to the estate (e.g. banks) are prepared to release funds without it. Practices vary amongst fundholders in relation to this matter and no official statistics are available as to how often funds are released without confirmation.

There is also a simplified procedure available in some circumstances for obtaining confirmation to ‘small estates’, the details of this are explained below.

Bonds of caution

Where confirmation is required, an executor must get a bond of caution before confirmation can be obtained.

The only exception to this is where the deceased person’s spouse is entitled to inherit the whole estate under the statutory rules which apply when a person dies without leaving a valid will.\(^4\)

Small estates – estates with a gross value of less than £36,000

Currently, estates with a total gross value of less than £36,000 are classed as small.\(^5\) For such estates the simplified procedure for obtaining confirmation may be available. The guidance on this procedure can be accessed here:


Normally, an executor to an estate receives the advice of a solicitor in carrying out his or her duties (and legal fees are incurred in this process). However, one of the advantages of the simplified procedure is that the sheriff clerk in the sheriff court is available to assist the executor instead.

Not all small estates can benefit from the small estate procedure, the details of this are explained under ‘Safeguards’ on pp 8–9.

\(^3\) Except where the executor is a solicitor where being a beneficiary as well would be a breach of his or her professional ethics.

\(^4\) Under these rules a deceased’s spouse or civil partner has “prior rights” to any house, furnishing and money up to certain statutory limits. Under the current law, if an intestate’s spouse is a) an executor dative; and b) is also entitled to the whole estate by virtue of prior rights; there is no requirement to get a bond of caution. The rule does not apply where the deceased person’s civil partner is entitled to inherit the whole estate under prior rights.

\(^5\) Changes to the threshold can be given effect to by secondary legislation.
EXEMPTION FROM THE REQUIREMENT TO HAVE A BOND OF CAUTION FOR CERTAIN SMALL ESTATES (AMENDMENT 2)

The policy issue

From 1 February 2016 there will be one remaining insurance provider of bonds of caution in Scotland – Royal Sun Alliance. Royal Sun Alliance makes the provision of a bond of caution conditional on a solicitor being appointed to administer the estate (whereas Zurich, who are withdrawing from the market place, did not have this requirement).

The Scottish Government (2016c, p 3) is concerned that this development will impact financially on small estates which, at present, may be able to take advantage of the simplified small estate procedure and not employ a solicitor to advise the executor. The Scottish Government (2016c, p 3) also fears significant delays in the court process resulting from inability of any small estate to take advantage of the small estate procedure, which, in turn, would have a negative effect on creditors of the estate and beneficiaries.

What the amendment seeks to do

The policy aim of Amendment 2 is to remove the requirement for executors who are administering a small estate (where it is eligible for the small estate procedure) to obtain a bond of caution.

How beneficiaries will recover a loss in future

An executor is liable for any fraud, negligence or maladministration associated with his or her management of the estate. At present, should the beneficiaries of a small estate suffer a loss associated with any of these things, and they fail to recover their losses from the executor, they can make a claim relating to this loss under the bond of caution.6

However, in future, small estates subject to the simplified procedure would only be able to sue in respect of their losses through the civil courts. In relation to this, some claims would be of a size which would make them eligible for the small claims procedure (i.e. claims up to and including £3,000).7 Small claims procedure is designed to be used without the help of a solicitor, although some areas of law are sufficiently complex that claims associated with them are challenging to pursue without the help of a solicitor.

Legal aid is not available for actions raised under the small claims procedure. It may be available for other types of civil court actions to cover some or all of the applicant’s costs, depending on financial eligibility and other eligibility criteria being satisfied. At the end of a court action ‘clawback’ may be used by the Scottish Legal Aid Board. This involves it recovering its costs from assets associated with a successful court claim. It will do this if the contributions of the person raising the court action, and the costs recovered from the person defending the action, are not sufficient to cover what was paid out in legal aid.

6 The provider of the bond of caution would then seek to recover its costs from the executor.
7 At some point during 2016/2017 the small claims procedure will be replaced with the ‘simple procedure’ created under the Courts Reform (Scotland) Act 2014. It is also intended that this will be suitable for use without legal representation by a solicitor.
THE POSSIBILITY THAT THE REMAINING INSURANCE PROVIDER MAY WITHDRAW FROM THE MARKET PLACE (AMENDMENTS 3 TO 6)

Royal Sun Alliance has not indicated an intention to withdraw from the market place. However, whether it will do so at some future date is unknown. Accordingly, Amendments 3 to 6 seek to confer powers on Scottish Ministers to pass secondary legislation to deal with this situation should it arise. The Scottish statutory instruments in question would be subject to the affirmative procedure.8

Power to modify the cases where caution is not required

Section 2 of the Confirmation of Executors (Scotland) Act 1823 sets out the cases where a bond of caution is not required. Amendment 3 provides power to Scottish Ministers to modify section 2 to add to the cases in which caution is not required.

Power to abolish the requirement for caution

Amendment 4 provides a power for Scottish Ministers to abolish the requirement for caution altogether.

Power to provide for conditions to be met before the courts can appoint someone as an executor-dative

Amendment 5 provides broad powers for Ministers to be able to make regulations setting out conditions which must be met before the courts may appoint an executor-dative.

CIVIL PARTNERS (AMENDMENTS 2 AND 3)

As discussed above, under the current law, an executor-dative is not required to find caution for an estate where a deceased person’s spouse is entitled to inherit the whole estate under the statutory rules which apply when a person dies without leaving a valid will. Amendment 2 (and the first part of Amendment 3) extends the scope of this exemption to civil partners.

SAFEGUARDS FOR BENEFICIARIES

It is very likely that most beneficiaries suffering losses associated with the executor’s administration of an estate would prefer to avoid court action to recover those losses. Accordingly, it is arguable that a key policy aim associated with any exemption from the requirement to obtain a bond of caution should seek to minimise the circumstances in which this is likely to occur.

Existing safeguards for beneficiaries associated with the simplified procedure

Some existing safeguards are built into the simplified procedure for small estates which are designed to select the least contentious estates as being suitable for this procedure. For example, the following estates are not regarded as suitable (Scobbie 2011, para 11-11) :

- where there is competition for the office of executor
- where there is a legal challenge to the validity of the will

8 See further: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Affirmative_instrument_flowchart.pdf
where the deceased died while permanently residing ('domiciled') somewhere other than Scotland

- where the deceased had no fixed permanent residence

Other safeguards suggested on consultation

In the consultation which preceded the Bill in 2014, some consultees suggested safeguards for beneficiaries over and above what was provided by the existing law and practice. In particular, there was strong support for the idea that the court should have a discretionary power to refuse to appoint an executor-dative, where it had concerns about how the estate would be managed (Scottish Government 2014, para 2.28). As discussed above, Amendments 3–6 now empower Scottish Ministers to make regulations on this topic.

Some consultees thought safeguards additional to this court power were required. For example, at the moment, the existence of an application for appointment as executor is advertised in the court buildings (on the ‘walls of court’). Some consultees suggested that alternative people who might be eligible for appointment should be personally notified and have a longer period to challenge the application (Scottish Government 2014, para 2.39).

Other ideas included requiring the executors to produce an account of their actions for approval by the court, or other suitable person, as an ordinary part of the executry process (Scottish Government 2014, para 2.26).

The view of one consultee was that the main cause of beneficiaries not receiving their share of an intestate estate might be ignorance on the part of the executor of those entitled to inherit and suggested that a family tree with a proposed Scheme of Division could be lodged with the court with the petition for appointment (Scottish Government 2014, para 2.37).

Note that these suggested safeguards related to the general abolition of the requirement to obtain a bond of caution by executors-dative, not an abolition limited to small estates under the simplified procedure.

THE COMMITTEE’S EVIDENCE SESSION ON THE STAGE 3 AMENDMENTS

As discussed above, on 26 January 2016 the Committee took evidence on the Stage 3 amendments from Scottish Government officials, a panel of experts from academia and legal practice and the Minister for Community Safety and Legal Affairs.9

The panel of legal experts agreed that there was a key policy issue that needed addressing and it was appropriate (although not ideal) to amend the Bill, rather than address the topic in later primary legislation. The panel suggested various additional safeguards for beneficiaries, largely reflecting suggestions from respondents to the 2014 consultation. However, they suggested that the policy should be developed after further reflection by the Government, rather than the detail of the safeguards being prescribed on the face of the Bill.

Placing the proposed reforms in a wider context, Dr Dot Reid highlighted that, at present, she believed a significant number of estates were being wound up without confirmation being obtained (and therefore without a bond of caution being obtained).

On the topic of legal remedies for beneficiaries, Dr Reid suggested that members of the public would be largely unaware of their rights to claim for a loss through the court process. However,

9 The Official Report of the meeting was not available at the time of publication of this SPICe Briefing.
she highlighted that this was also the case at present and so it was not a direct outcome of the proposed change to the law relating to bonds of caution.

There was some discussion during the evidence session as to whether the Government would step in and provide an indemnity for aggrieved beneficiaries suffering a loss. Officials and the Minister said the current legal framework requires the provider to be financially regulated and this would prevent the Scottish Government from providing caution. Furthermore, they did not consider it appropriate for the Government to do this, as they would be intervening in a situation which had arisen between private individuals.

The situation where the remaining insurance provider could be seen to be taking advantage of its monopoly in the market place, for example by significantly raising the cost of obtaining a bond of caution, was considered. The Minister confirmed that the Government would seek to use its proposed delegated powers to deal with this situation.

THE STAGE 1 REPORT AND STAGE 2

This part of the briefing summarises the key recommendations made in the Stage 1 Report and what action (if any) the Scottish Government took in respect of these recommendations at Stage 2. It also summarises the other main changes to the Bill at Stage 2.

The Committee was thorough in its consideration of the competing evidence received on various policy issues at Stage 1. However, ultimately it was supportive of the position of the Scottish Government on several key matters, leaving a limited number of points to discuss in this section of the briefing.

EFFECT OF DIVORCE AND DISSOLUTION OF CIVIL PARTNERSHIPS OF WILLS (SECTION 1)

Guardians

At present, where a marriage or civil partnership comes to a legal end, this has no effect on any provision in a will. However, section 1 of the Bill provides that if marriage ends by divorce, or a civil partnership terminates by dissolution, certain provisions in a will benefiting the deceased person’s former spouse or civil partner would not take effect.

In the Bill as introduced, the effect of section 1 extended to provisions in wills appointing the deceased person’s former spouse or civil partner as a guardian of a child. The Committee received evidence to the effect that this would mean there would different outcomes in relation to guardianship provisions in wills, as opposed to those contained in other documentation, and that this was not appropriate. The Committee (2015, para 45) and the Scottish Government agreed with this evidence. At Stage 2, the Bill was amended to exclude guardianship provisions in wills from the scope of section 1.

When section 1 should apply

In the Bill as introduced, for section 1 to apply the deceased had to die ‘domiciled’ (permanently residing) in Scotland. At Stage 2, in response to the Law Society of Scotland’s written evidence, a Scottish Government amendment was agreed to which expanded the scope of section 1. In the Bill as amended at Stage 2, section 1 would also apply where the deceased had died.
leaving ‘heritable property’ (land and buildings) in Scotland. The Committee did not make a specific recommendation in its Stage 1 Report on this topic.10

DEATH OF THE ‘FIRST CHOICE’ BENEFICIARY – IMPLIED RULE (SECTIONS 6 AND 24)

Sometimes a deceased person’s first choice of beneficiary in a will has actually died before them and the will makes no provision for what should happen in this situation. The current law tries to help by giving implied rules which should generate an alternative beneficiary or beneficiaries. The Bill abolishes one of these implied rules (contained in case law) (section 24) and re-states it in a statutory form, clarifying aspects of it which were previously uncertain (section 6).

In light of some of the evidence received at Stage 1, the Committee recommended a drafting change to the Bill to clarify when the implied rule should take effect. Specifically, it should apply not only in situations where the will names the ‘first choice’ beneficiary but also when the will identifies a beneficiary by class (e.g. ‘to my brother’). A Scottish Government amendment was agreed to at Stage 2 in relation to this proposed change (see section 6(1)(a)).

SURVIVORSHIP (SECTIONS 9 – 11)

Sections 9–11 of the Bill deal with the law relating to survivorship in the event of a common calamity (such as a car accident) where two or more people’s deaths were simultaneous or it is not clear which person lived longer. Survivorship provides special rules to deal with these situations for the purposes of inheritance and the aim of sections 9–11 is to improve upon the current versions of these rules.

In Stage 1 evidence a number of issues arose in relation to these sections. In its Stage 1 Report the Committee (2015, para 109) made a recommendation relating to the interrelationship between sections 9 and 10, having received evidence that, in some circumstances, they may operate to result in the deceased’s estate falling to the Crown (rather than a living relative). The Scottish Government agreed to reflect on this matter. At Stage 2 a Scottish Government amendment was agreed to which aimed to reduce the circumstances where the estate would fall to Crown. However, the Scottish Government decided not to introduce an amendment at Stage 2 which followed the specific approach to the issue suggested by TrustBar in evidence to the Committee.

GIFTS MADE IN CONTEMPLATION OF DEATH (SECTION 20)

Under the current law, a ‘donation mortis causa’ is a type of gift which has certain specific characteristics, including that it is made in contemplation of death and returnable if the person in question ultimately survives. Section 20 abolishes this type of donation as a distinct legal entity but ensures that it will still be possible for people to make gifts with conditions attached in future. In light of some evidence received at Stage 1, the Committee (2015, para 128) welcomed the Scottish Government’s commitment to reflect further on the drafting of section 20. At Stage 2 a Scottish Government amendment was agreed to which did slightly revise the drafting of section 20. However, the Scottish Government did not consider it necessary to amend section 20 to specifically address the point raised in evidence.

10 The focus of the Stage 1 oral evidence had been on when section 1 should take effect from (i.e. the death or the termination of the relationship). Ultimately, the Committee supported the Scottish Government’s position on this latter issue.
“FAILED TO SURVIVE” (SECTIONS 1, 9 AND 12)

In various places in the Bill, as introduced, the phrase “failed to survive” was used. At Stage 2 the Scottish Government explained that to achieve the policy objectives of the Bill it was important to be clear that a person died before another person. However, it had concluded that the aforementioned phrase might not be appropriate to achieve this, as it might include the situation where two people had died at the same time.

A number of relevant Scottish Government amendments were passed at Stage 2 affecting several provisions of the Bill. The aim of these amendments was to remove from the Bill the phrase now regarded as problematic and insert, in its place, appropriate alternative wording.
SOURCES


Law Society of Scotland [Online]. Available at: http://www.lawscot.org.uk/


Scottish Legal Aid Board [Online]. Available at: [http://www.slab.org.uk/](http://www.slab.org.uk/)


RELATED BRIEFINGS

SB 15-48 Succession (Scotland) Bill

SB 15-45 Inheritance Law in Scotland

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