

# Scottish Government submission of 22 January 2024

PE2076/A: Require original wills made outside of Scotland to be accepted into safe custody, by Registers of Scotland or other safe custody providers, without prior mailing around

Thank your email dated 20 December 2023 requesting the Scottish Government's views on the action called for in Petition no 2076: *Require original wills made outside of Scotland to be accepted into safe custody, by Registers of Scotland or other safe custody providers, without prior mailing around.*

The petition is asking for the Scottish Government to introduce legislation to require that custody providers accept original wills from the outset, removing their power first to require an opinion on the validity of the will from a lawyer in the jurisdiction of origin.

It may be helpful if I set out the current legislation which sets down the requirements of the validity of a will before being registered by the Keeper of the Registers of Scotland ("The Keeper") as raised by the petitioner.

The Register of Deeds and Probative Writs in the Books of Council and Session is a register concerned with the preservation and execution of documents. Whilst there is no limit on the type of documents that can be accepted for registration, there are a number of basic requirements that must be satisfied.

Chief amongst these requirements is that the deed must be executed in a way that complies with the law on writing in Scotland, the statutory basis for which can be found in the Requirements of Writing (Scotland) Act 1995. This act, amongst other things, sets out the requirements for registrable documents.

Section 6 of the 1995 Act is where these requirements can be found, with documents created under Scots law having to be in self-proving form – in the majority of cases, this means the document needs to be signed by the granter and then witnessed. However, there are a number

of exceptions to these requirements, including for documents governed by a law other than Scots law.

Section 6(3)(c)(iii) of the 1995 Act specifies that such a document can be registered in the Books of Council and Session or in sheriff court books *“if the Keeper of the Registers of Scotland or (as the case may be) the sheriff clerk is satisfied that the document is formally valid according to the law governing such validity”*.

The Keeper takes the view that she can only be satisfied when the document in question is accompanied by confirmation from a person qualified to practice in that jurisdiction that the document is valid and that due to the resources involved in obtaining such confirmation, this should be provided by the applicant themselves – it is not for the Keeper to confirm validity of the will.

This provision is consistent with the principle that as the Register of Deeds is a Scottish public register, members of the public in Scotland (who are not familiar with the laws governing documents in other jurisdictions) should be able to view the register with confidence that the documents registered therein are formally valid. It is also analogous to (and, in fact, less onerous than) the process for legalisation/apostille used in the UK to enable UK documents to be used in other jurisdictions. In this process, original documents are sent to the Foreign and Commonwealth Office to be legalised by the attachment of an apostille.

The process on how an applicant may go about obtaining confirmation of validity (or the processes for doing so in other jurisdictions), is not set down. It may be possible for this process to be done electronically through a Scottish solicitor rather than posting the physical document to the jurisdiction in question but the petitioner should take their own legal advice.

I hope that this response is helpful to the Committee setting out the current position, why validity must be obtained and that there is the facility to do so.

**Civil Law and Legal System Division**