The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 26 January 2016

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
4th Meeting 2016, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Lesley Brennan (North East Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Charles Garland (Scottish Law Commission)
John Kerrigan (Law Society of Scotland)
Jane MacDonald (Scottish Courts and Tribunals Service)
Neel Mojee (Scottish Government)
Dr Dot Reid (University of Glasgow)
Eilidh Scobbie (Burnett & Reid LLP)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 26 January 2016

[The Convener opened the meeting at 11:15]

Interests

The Convener (Nigel Don): I welcome members to the fourth meeting in 2016 of the Delegated Powers and Law Reform Committee. As always, I ask everyone to switch off their mobile phones.

Agenda item 1 gives us the opportunity to welcome Lesley Brennan to the committee and to invite her, in accordance with section 3 of the code of conduct, to declare any relevant interests.

Lesley Brennan (North East Scotland) (Lab): I have no relevant interests to declare.

The Convener: Thank you very much.

Decision on Taking Business in Private

11:16

The Convener: Agenda item 2 is a decision on taking business in private. Do members agree to take in private item 8, which is consideration of the evidence that we will receive on the Succession (Scotland) Bill?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016 [Draft]

11:16

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No 2) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Kinship Care Assistance (Scotland) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Children and Young People (Scotland) Act 2014 (Modification of Schedules 2 and 3) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

National Health Service (Scotland) Act 1978 (Independent Clinic) Amendment Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Air Quality (Scotland) Amendment Regulations 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Reservoirs (Enforcement etc) (Scotland) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Children and Young People (Scotland) Act 2014 (Part 4 and Part 5 Complaints) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Bodies (Joint Working) (Scotland) Act 2014 (Consequential Modifications) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Services Reform (Insolvency) (Scotland) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Services Reform (Social Work Complaints Procedure) (Scotland) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Letting Agent Code of Practice (Scotland) Regulations 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Pharmacy (Premises Standards, Information Obligations, etc) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2016 (SSI 2016/12)

11:18

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Bodies (Joint Working) (Prescribed Health Board Functions) (Scotland) Amendment Regulations 2016 (SSI 2016/15)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Named Persons (Training, Qualifications, Experience and Position) (Scotland) Order 2016 (SSI 2016/16)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Child's Plan (Scotland) Order 2016 (SSI 2016/17)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Fireworks (Scotland) Amendment Regulations 2016 (SSI 2016/18)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Water Environment (Remedial Measures) (Scotland) Regulations 2016 (SSI 2016/19)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2016 (SSI 2016/23)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Products Containing Meat etc (Scotland) Amendment Regulations 2016 (SSI 2016/24)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2016 (SSI 2016/25)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Healthcare Improvement Scotland (Fees) Regulations 2016 (SSI 2016/26)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2016 (SSI 2016/27)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Scottish Parliament Elections (Regional Returning Officers and Constituency Returning Officers) Order 2016 (SSI 2016/9)

11:19

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Serious Crime Act 2015 (Commencement No 1 and Saving Provision) (Scotland) Regulations 2016 (SSI 2016/11)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Courts Reform (Scotland) Act 2014 (Commencement No 6 and Transitional Provisions) Order 2016 (SSI 2016/13)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Water Resources (Scotland) Act 2013 (Commencement No 3) Order 2016 (SSI 2016/14)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Services Reform (Scotland) Act 2010 (Commencement No 7) Order 2016 (SSI 2016/22)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

The Convener: On behalf of the committee I thank our lawyers, who have done a vast amount of work in the last week to get through all the instruments.

Members: Hear, hear.

Education (Scotland) Bill: After Stage 2

11:20

The Convener: This item is for the committee to consider the delegated powers provisions in the Education (Scotland) Bill as amended at stage 2.

The stage 3 debate on the bill will take place on Tuesday 2 February 2016; members should therefore agree their conclusions today.

Paragraph 3 of the schedule to the bill inserts a new section 3AA into the Education (Additional Support for Learning) (Scotland) Act 2004. This new section sets out a list of wellbeing factors that are to be taken into account by an education authority or tribunal when considering whether a child's wellbeing is adversely affected.

Those wellbeing factors also appear in section 96 of the Children and Young People (Scotland) Act 2014. New section 3AA(3) of the 2004 act as inserted by the bill provides that the Scottish ministers may by regulation modify this list of wellbeing factors. A similar power exists in section 96(6) of the 2014 act.

The supplementary delegated powers memorandum notes that the new power is necessary to enable the list of wellbeing factors to be updated in the 2004 act to meet any amendments made to the list of factors in section 96 of the 2014 act. Therefore, the intention is for the new power to be consequential on changes to the 2014 act.

The power to amend the list of wellbeing factors in section 96 of the 2014 act is subject to the affirmative procedure whereas the power to be inserted into the 2004 act by the bill is subject to the negative procedure. For reasons of consistency with the 2014 act, the committee may consider that this power ought also to be subject to the affirmative procedure.

Does the committee agree to: draw to the attention of the Parliament the power in the new section 3AA of the 2004 act, as inserted by paragraph 3 of the schedule to the bill; and recommend that the bill is further amended at stage 3 to make this power subject to the affirmative procedure?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Convener, you said that the powers in the 2004 act and the 2014 act are "similar". They go beyond similarity to being identical.

While I am content that we draw Parliament's attention to the insertion of new section 3AA in the terms that are suggested, it is also worth noting that it might have been more satisfactory to amend one of the acts to consolidate into a single list, so that there is always continuity within what would be one list rather than two.

Having the negative procedure for one list, as is currently provided for in the bill, and the affirmative for the other, there is a substantial danger that the timescales for implementation would be different, even if the orders were laid on the same day.

Aligning the procedures is certainly necessary. It is slightly remiss, however, that we have not taken the opportunity to end up with one list, if the intention is that the lists should always be identical.

The Convener: Indeed. Are we therefore content to draw those points to the Parliament's attention?

Members *indicated agreement.*

The Convener: Does the committee also agree that it is content with the remaining delegated powers in the bill that have been added or substantially amended at stage 2?

Members *indicated agreement.*

The Convener: That concludes item 6. I will briefly suspend the meeting to allow the panel of witnesses for item 7 to come in.

11:24

Meeting suspended.

11:26

On resuming—

Succession (Scotland) Bill: Before Stage 3

The Convener: Our penultimate agenda item is oral evidence on the Succession (Scotland) Bill, more specifically on the stage 3 amendments that have been lodged by the Government in relation to bonds of caution. We will take evidence from three panels: first from officials, secondly from experts, and lastly from the Minister for Community Safety and Legal Affairs.

I thank all the witnesses who are attending today, given the very short notice that we have been able to provide. I also thank the trusts, fiduciaries and executries bar group—TrustBar—for providing evidence in writing in that short timescale.

I welcome panel 1. Jill Clark is the head of the civil law reform unit at the Scottish Government; Neel Mojee is a solicitor in the Scottish Government legal directorate; Caroline Drummond is a commissioner at the Scottish Law Commission; Charles Garland is a project manager at the Scottish Law Commission; and Jane MacDonald is head of policy and legislation branch at the Scottish Courts and Tribunals Service. Good morning to all of you.

We will go straight to questions, which will be led by John Scott.

John Scott (Ayr) (Con): Welcome back to the committee, which is an unexpected pleasure for us and, I dare say, for you, too.

What are the circumstances in which it is currently required to obtain a bond of caution, and how common is it for there to be such a requirement?

Jill Clark (Scottish Government): I can give some background about that. If no executor is named in a will, and if there is no will, the court will appoint an executor dative. Normally, that will be the surviving spouse or civil partner. If there is no such person, another person who is eligible to inherit will probably apply.

Before obtaining confirmation, an executor dative must find caution for the administration of the estate. That is for the executor dative and, in a very few circumstances, executors nominate. The bond of caution is intended to protect the inheritance of beneficiaries and also debts owed to creditors of the estate against the wrongful actions of the executor. The only exception to that requirement is where the executor dative is the spouse of the deceased and his or her prior rights would effectively use up the whole estate.

There are currently only two providers of bonds of caution: Zurich Insurance and Royal Sun Alliance. Zurich has taken the business decision to withdraw from the market with effect from 1 February—which is next week. The sole remaining provider, Royal Sun Alliance, has a requirement that providing a bond is conditional on a solicitor being appointed to administer the estate. Zurich did not have such a requirement. Zurich's decision impacts mainly on small estates that are subject to what is known as the simplified procedure, which currently does not require a solicitor. There will now be the additional burden of appointing a solicitor in order to obtain the necessary bond of caution.

I think that there were just short of 4,000 dative petitions in 2013-14. We cannot break that down into small estates. Jane MacDonald might have something to offer on the numbers.

Jane MacDonald (Scottish Courts and Tribunals Service): I think that the most recent number that we came up with was 800 or so small estates that required bonds of caution.

The Convener: For those who are listening to this or might be reading it, am I right in thinking that an executor nominate is one who is named in the will and an executor dative is someone who is given that power by the court?

Jill Clark: Yes.

The Convener: Thank you. I thought that it would be helpful to put that bit of Latin on the record.

11:30

John Scott: Thank you for that.

Are there any further implications for small estates more generally of Zurich withdrawing the provision of bonds of caution?

Jill Clark: Not that we have considered. The impact is the cost that small estates will have to bear of having a solicitor and the potential delay for the SCTS.

John Scott: What is the purpose and effect of the amendments that you have lodged on small estates? How will they address the problem that has been created by Zurich's decision to withdraw the provision of bonds of caution?

Jill Clark: There is a series of amendments. The main one removes the requirement for executors who are administering a small estate subject to the simplified procedure to obtain a bond of caution by amending the Intestates Widows and Children (Scotland) Act 1875 and the Confirmation of Executors (Scotland) Act 1823. That is to ensure that estates that currently benefit from a streamlined supported process to minimise

costs and enable individuals to administer an estate without the need to engage a solicitor can continue to benefit from the facility.

In addition, an amendment is being made to the Confirmation of Executors (Scotland) Act 1823 to ensure that civil partners enjoy the same exemption from the requirement to obtain a bond of caution when they are the executor dative. Through prior rights, they would also inherit the whole estate, which puts them on a par with the law as it relates to spouses. We have also lodged amendments to give ministers a range of powers as a way of future proofing against any further changes in the caution market.

John Scott: Which small estates are eligible for the small estate procedure and therefore will be affected by the proposed exemption? Can you explain the process by which small estates that are not suitable for the procedure are identified and removed?

Jill Clark: I will start with an answer and then Jane MacDonald will perhaps help out a bit. An estate is classed as a small estate when its gross value, subject to confirmation, is under £36,000. The ones that qualify for the simplified procedure are the ones where there would be no competition for the office of executor or where there is no question as to the validity of the will, what is contained in the will, whether the will is formed correctly and whether the deceased died in Scotland; the procedure does not apply if the deceased did not die in Scotland. There is a mechanism for filtering out estates that might be more contentious and therefore cannot use the simplified procedure.

Jane MacDonald: The sheriff clerk has the authority to administer small estates without reverting to any judicial considerations. They have to be simple estates for which the information is clearly laid out in a form. No one looks deeper into the information that is on the form; we accept it at face value. It is a factual listing of details. The estates involved are those for which there is a simple list of contents in the inventory, for example. If any titles to land were included, we would say that the advice of a solicitor might be sought. The same would be true if there was any complication in the line of succession and if it was not a matter of simply working through the Succession (Scotland) Act 1964, which lays out a clear line to succession. If there was any difficulty with such matters, we would suggest that the administration was not suitable for the small estate procedure and we would ask the executors to go through the large estate procedure, which would mean taking the case to a sheriff.

The Convener: Forgive me for going back on that point, but I want to extend the issue. Who, if there is no executor, draws up the inventory? Who gets a gross valuation? How does the process start?

Jane MacDonald: The person who thinks that they are entitled to be an executor usually phones up the various financial institutions that hold the money—the bank or whatever—and they are told what sum of money is in the account and the account numbers. They must then bring that information to us before we can confirm them as the executors to the estate. They must get information without being an executor before they can apply to have that confirmed fully.

The Convener: That sounds enormously complicated. If a person is not an executor, how do they even have authority to ask the bank for someone else's account balance? I do not think that that question affects the legalities of the bill, but I am trying to get to who starts the whole process before they get anywhere near being appointed executor.

Jane MacDonald: I simply do not know the answer to that in a small estate. All I know is that family members are able to turn up at court with that information, which they have obviously managed to get from the bank of the family member. They—it is usually a father or a brother—have been able to satisfy the bank that they are the person who at least has an entitlement to the estate, even though they have not been confirmed as the executor.

The Convener: Perhaps I am going back further in the process than we need to.

Stewart Stevenson: It would be useful to get confirmation that it is the general practice of registrars, who will, of course, register the death, to hand the person registering the death a leaflet that will introduce them to the activities that they should be considering undertaking. That is probably the starting point. Is my understanding correct? I am seeing nodding in the public gallery, so I suspect that I am correct.

The Convener: That might be an issue to which we can return to, but let us deal with the substance of what we have before us today. Stewart, will you carry on with the questions?

Stewart Stevenson: Clearly, the bonds of caution are a type of insurance. It might be useful to say what attributes this insurance policy must have that make it a valid bond of caution under the law.

Jill Clark: My understanding is that the bond is more of a guarantee against the actions of the executor and a means of protecting the beneficiaries and creditors. Are you able to offer anything on that, Jane?

Jane MacDonald: Not particularly. It is a fairly simple bond that gives the executor insurance

cover. I have an example here with me that I could pass around, although it is fairly tied up in legal phraseology. Would you be interested in seeing that?

Stewart Stevenson: Possibly—it might be useful. If it is a bond, there is presumably a limit to the cover that is provided; there is a value associated with the bond.

Jane MacDonald: That is right. The amount of the bond fully covers the amount of the confirmation in the estate.

Stewart Stevenson: I suppose that the questions around this subject are as follows: who in essence is paying out and who is liable, ultimately, to the beneficiaries? Does the bond of caution's existence make the primary liability to beneficiaries under circumstances of fraud, negligence or maladministration the company or person who has issued the bond?

Jane MacDonald: The executor remains liable. Indeed, a beneficiary should pursue the executor first to get back any loss. The bond is there to pick up the pieces should that not be possible, perhaps because the executor is bankrupt or does not have the means to meet the claim.

Stewart Stevenson: Does that suggest, therefore, that the bond of caution is a protection for the executor rather than for the beneficiaries?

Jill Clark: It is intended as a protection for the beneficiaries and for creditors to the estate, to ensure that they are paid out of any money that the estate has. The estate may not have sufficient money to meet its debts, but—

Stewart Stevenson: Indeed. It is, therefore, ultimately the beneficiaries who benefit—or do not, one hopes—from the bond of caution process.

Jill Clark: Yes.

Stewart Stevenson: In order to recover what they might have been due from the distribution of the estate had it not been subject to fraud, negligence or maladministration, the beneficiary may have to undertake a legal process. Under what circumstances is the beneficiary able to access civil legal aid to progress such a claim?

Jill Clark: It would depend on whether the beneficiary is eligible for civil legal aid. Civil legal aid could be available to provide advice and assistance, or full legal aid, or both. The aid may be partial, and the beneficiary may have to contribute towards the costs depending on their income. If they qualified for legal aid, they would obtain it. The system for small claims of under £3,000 is designed not to require a solicitor, so the beneficiary could raise such a claim themselves. Legal aid would not be payable for a small claim because a solicitor would not be required.

Stewart Stevenson: If the claim is proved, are any costs that are initially borne by the beneficiary who is pursuing the legal claim ultimately for the estate to bear?

Jill Clark: No, that is not my understanding. My understanding is that the bond would not cover the beneficiary's legal costs.

Jane MacDonald: If the beneficiary is raising a civil action, they will quite often ask for the money that they are due and the expenses of raising the action. That is the standard procedure in court for raising any action to reclaim a debt, and this particular matter would be considered in the same way.

Stewart Stevenson: So the estate itself, provided that the claim is constructed appropriately, would bear the costs of pursuing the action.

Jane MacDonald: Yes, usually, if that is what the court allows.

John Scott: In the absence of sufficient funds in the estate, the bond of caution would ultimately pick up the costs for someone who has had to pursue their entitlement through the courts.

Jill Clark: Yes—it would guarantee the loss of the estate.

John Scott: But not the costs of retrieving—

Jill Clark: No.

Jane MacDonald: That is right.

The Convener: How often do such actions happen? I appreciate that the law says that there must be a bond of caution, and therefore everyone is going to have one, but how often are claims made against the bond?

Jill Clark: Our understanding is that such actions happen very rarely. The Scottish Law Commission found the same when it looked into the matter.

The Convener: Does anyone have any data at all—even historical data—on how often such things happen and what the implications are?

Jill Clark: I spoke to a representative from Royal Sun Alliance earlier this week, but they felt that they could not provide commercial data of that sort.

Stewart Stevenson: It would be fair to suggest—the witnesses may agree or disagree, or decline to comment—that if this applies to 800 estates, and the average cost is £150 or thereby so the total income per annum for the insurance company is £120,000, the claims that the company might pay out, if it is still in the market at all, must be substantially less than that. Given that the average claim is likely to be more than the cost

of the bond of caution, we can begin to see that the numbers must inevitably—simply for the commercial operation—be pretty small indeed. I am seeing nodding heads, so it seems that nobody is picking up a flaw in my comment.

There is one final issue on the subject that it might be useful to cover. I referred to the leaflet that is passed out to people when they register deaths, which, for small estates in particular, is likely to be the starting point of a process. Might that leaflet be updated in the light of the changes in the law that we are now contemplating, or is that probably not necessary because we are merely protecting the existing process through the changes that we are making?

11:45

Jill Clark: The leaflet is not due a significant overhaul, as we are waiting for any subsequent legislation. However, we update it through addenda and inserts—we will do that—and we keep the guidance on our website up to date as well. As you say, updating the leaflet is probably not essential.

Jane MacDonald: We also provide information on the Scottish Courts and Tribunals Service website, which will be updated depending on the decisions that are made about the bond of caution. We have guidance on that.

The Convener: Okay. Does John Mason want to take over at this point?

John Mason (Glasgow Shettleston) (SNP): On the face of it, there are not a huge number of amendments, yet three times we see the phrase,

"The Scottish Ministers may by regulations",

so there are quite a lot of delegated powers in the amendments. Why has that been necessary? Is it a consequence of time pressure, or is that how you believe matters should be handled?

Jill Clark: I think that we are acting responsibly and trying to future proof the legislation. We previously had only two providers of bonds of caution, which was not ideal, but we are now down to one, which is very undesirable. Although Royal Sun Alliance has assured us that it has no desire to stop providing bonds of caution, we cannot say unequivocally that it will never happen—we are far warier than that and its business model may change.

We are trying to look ahead and ensure that if we were left with no cautioners we would not be in the position that we are in now—having to react very quickly to a change in the market. The delegated powers will enable new cases to be created in which caution was not required to be found. They will enable the requirement for bonds of caution to be abolished completely and enable the setting of conditions that would have to be met before an executor dative could be appointed. That could apply to all executors dative or just to certain types. We could apply different processes to different types of executors dative, as well.

The delegated powers reflect the facts that the market may change in the future and that we need to be ready to respond effectively and not with a knee-jerk reaction. Without them, we would have to draft emergency legislation—potentially now and in the future—but that would not be desirable.

John Mason: I understand that. Would it have been possible to put a bit more detail in the bill—for example, about who would be excluded from being an executor dative?

Jill Clark: The bill was supposed to be the vehicle for abolishing bonds of caution, but it is not. That is not because of the responses that we got to the consultation; people agreed that caution should be abolished, but there is not a lot of consensus around what alternative safeguards might look like. Not everyone agrees that judicial discretion is the only answer; people feel that there should be other things, but the combination of safeguards is not clear, which is why we have consulted again.

We are trying to target those whom we think are affected now by Zurich's decision on small estates, and to deal with that issue. We will then take powers that will enable us either to react to there being no cautioners in the future, or to reform bonds of caution once we have analysed the responses to the second consultation and can see whether things are clearer. Those are the two options.

John Mason: Fair enough.

Were any other options considered, or was it felt that there had to be legislation?

Jill Clark: Doing nothing is always the first option, but for the reasons that we have set out we did not think that that was tenable. The Scottish Courts and Tribunals Service had already spoken with Zurich about delaying its decision or being flexible about its decision, but there was no flexibility around that, so those options were not going anywhere.

John Mason: Would it have caused a problem if we had waited until the next session of Parliament to legislate?

Jill Clark: Yes. Waiting could have caused a problem in terms of the expense to which it would have put some people who do not currently have to pay solicitor fees. People might have been reluctant to wind up an estate for that reason, which would have had a quite significant impact on

the Scottish Courts and Tribunals Service. Jane MacDonald may be able to say more about that.

Jane MacDonald: Our main concern is that you would be asking the court to grant confirmation on small estates. That is simply not possible because the law requires a bond of caution, so we would be unable to operate the small-estate procedure. That would have an impact on people dealing with small estates under £36,000. I ought to say that at least a quarter of such estates in the past year were under £15,000: some were only £4,000 or £5,000—the estates of people with one bank account who do not have anything much else. The bank will not release the money to a brother or sister or to an aunt or uncle, so the confirmation is needed. Our initial concern was to do with the impact on people who would then have to seek legal advice and pay for it, which is unnecessary, given the simplicity of winding up the relative's estate. The knock-on effect would be that if all such people could not confirm the estates—quite apart, perhaps, from being unable even to meet funeral expenses if they cannot claim the money from the estate—there would be a backlog of work that it would take us some time to work through. Our principal concern, however, is about the impact on people who might otherwise be able to administer and wind up a relative's small estate.

John Mason: We were told in one of our briefing papers that a bond of caution is usually provided by an insurance company. Does anyone else, or can anyone else, provide bonds of caution?

Jill Clark: I will ask Jane MacDonald to comment again, but yes—you can get a private caution from someone who is willing to guarantee the value of an estate.

Jane MacDonald: Perhaps Charles Garland should explain.

Charles Garland (Scottish Law Commission): I can perhaps do no more than read out of a book whose author will be appearing before you shortly. The position appears to be that

"private individuals were formerly permitted to be cautioners but"

in practice, now,

"only persons authorised to carry on a regulated"

investment

"activity under"

the appropriate legislation

"can be cautioners",

which effectively means that insurance companies will shortly be limited to one.

John Mason: So it would not be possible for the public sector to step in and do that because it would not fulfil that requirement.

Charles Garland: The information in the book that I quoted suggests that a regulatory requirement—probably a fairly onerous one—would need to be met if a bond of caution was the sole purpose of public sector involvement.

The Convener: It is extraordinary that something so small can become a regulated financial transaction, but that is where we have got to.

Charles Garland: Indeed. As I understand it, because there is a requirement on the continuing provider—the insurance company—to have a solicitor instructed regardless of the size of the estate, that adds to the cost for the estate and further insulates the company from any claim, because the executor is the first line and then there is a solicitor, and if there is any negligence it is automatically covered by the indemnity policy. You would have to get over those two hurdles before there could be any possible claim on the cautioner.

The Convener: That is rather clever insurance broking.

Stewart Stevenson: Is not it the case that solicitors would in any event, in fact, be covered for defalcations by the professional body of which they are members? Therefore, we are left almost in a position in which the issuer of the bond of caution has all but no liability and is merely raking in the money, because of a quirk in the law. I see nodding heads at the other end of the table, convener.

The Convener: Thank you for that intervention. It was wonderful to see Charles Garland reading from a book. It is lovely to know that one does not have to be dead before one is an authority.

On that happy note, we move on to Lesley Brennan, who will take us through the next bit.

Lesley Brennan: The Scottish Government indicated that it would not pursue matters in relation to bonds of caution in the context of the bill. Will you set out for the committee why you took that decision and why you now feel compelled to seek to amend the bill in this way?

Jill Clark: I will take a step back. In the 2009 report, the Scottish Law Commission recommended that bonds of caution, in their entirety, for anybody, be abolished. We consulted on that basis as part of the consultation for the bill.

As I mentioned earlier, although there was consensus that bonds of caution should be abolished, there was no clarity or consensus on what additional safeguards might be needed:

people thought that there should be something. Some proposals were light touch, but some would have been a lot more burdensome than bonds of caution. We needed to consult again on what additional safeguards might look like, which is why we decided not to take the matter forward in the bill.

In the interim, we have had an unexpected decision from Zurich, and we have tried to consider the immediate impact of that. As Jane MacDonald ably described, that impacts on small estates and we want to remedy the situation, so we are making a targeted narrow amendment to deal with it. We are not addressing the bigger issue of reform of bonds of caution at this time. We want to take our time to do that.

Lesley Brennan: That helpfully leads to my next question. Do you intend to return to consider bonds of caution further in a subsequent succession bill?

Jill Clark: As I said, the subject was included in our second consultation. The responses to that are being analysed and a report will come out soon. That is when we will turn our minds to what to do on bonds of caution. Potentially, we have two options—another bill, or use of the regulation-making powers, if they are agreed to.

Lesley Brennan: Will you give us some more detail on the consultation that you undertook to inform your decision?

Jill Clark: We consulted on the two things that the Scottish Law Commission recommended—first, that bonds of caution be abolished, and secondly that there be judicial discretion not to appoint an executor dative. There is no such discretion at present.

I think that it is fair to say that the commission's solution was for judicial discretion to provide the safeguard, but we got a mixed response on whether that, in itself, would be sufficient. Concerns were also raised about whether judicial discretion would change what is quite an administrative process that can be contained in the way that Jane MacDonald described, to a judicial process that involves sheriffs, costs, time and resource.

We have looked at the other suggestions that people have made for safeguards that might be put in place, including a focus on the due-diligence aspect of the executor dative—that they must be fit for purpose, must understand their role, and can produce a scheme of distribution or a family tree. Those requirements are the kind that cautioners place on executors dative at present, and they have to go through an extensive gathering of information before the caution is agreed. We have taken that a step further in the next consultation and asked what the safeguards should look like.

Lesley Brennan: Okay. Thank you.

12:00

Stewart Stevenson: Are similar requirements in existence for executors nominate?

Jill Clark: I will defer to a colleague to explain the circumstances in which an executor nominate requires a bond of caution but, yes—the same requirements would apply.

Stewart Stevenson: I am sorry, but before anyone else answers, I should say that I was perhaps pursuing a slightly different point. In essence, you have been telling the committee that executors dative must demonstrate an understanding of what they are doing and so forth. I merely seek to know, slightly independent of bonds of caution, whether executors nominate have, similarly, to demonstrate that.

Jill Clark: They must do so only if they are getting a bond of caution. My understanding is that it is the cautioners who require those steps to be followed. An executor nominate who did not need a bond of caution would, I presume, just have to do the normal stuff in terms of winding up the estate.

Stewart Stevenson: So an executor nominate is purely somebody who is legally capable: in other words, they are not legally incapable. That is it.

Jill Clark: They may or they may not be legally capable.

Stewart Stevenson: No—I mean, when I say "legally capable", that they have the mental faculties of a normal person. This is perhaps not the right place to pursue the issue, convener, because it is tangential to the main subject.

The Convener: I want to pick up on what I hope Ms Clark might have meant. Are there currently any rules about what a sheriff can do to disallow someone who is an executor nominate who appears to the outside world to be a bad choice? Are such people, in fact, not only nominate but entitled to proceed?

Jill Clark: Again, I am looking at Jane MacDonald on that one. A person who is nominated in a will might later lose capacity, so they would not be capable of administering the estate.

The Convener: Right—but does the court decide that?

Jane MacDonald: If it was suggested to us that the person who had been named in a will was incapax, we would suggest that an application be made to the sheriff. That would never happen without the involvement of a solicitor, who would

make an application to the court to have somebody else appointed as executor nominate—for example, a person who is referred to in the body of the will who is not the named person.

The Convener: So, the court has a common-law right to supplant the executor nominate if there is good reason for doing so, if I can put it that way. Does that sound roughly right?

Jane MacDonald: Off the top of my head, I am afraid that I cannot tell you whether it is common law or not. However, that would happen only on application by a party. A sheriff would not do it of his or her own accord; somebody would have to apply to replace the person who is named in a will.

The Convener: They would have to have an interest in the will.

Jane MacDonald: Yes.

Charles Garland: Can I add a couple of points?

The Convener: Yes—please do.

Charles Garland: Putting it very crudely, the position is that for somebody named in a will as an executor nominate, there is essentially no requirement to obtain a bond of caution. That situation is found in a few old cases, but it is normally not the case. The court has no power to refuse to appoint that person. Obviously, if the person lacks capacity, they cannot put themselves forward to the court to be appointed. There might be a different way of cracking that nut, but my understanding is that if the person is capable and willing, the court has, at the moment, no power to refuse, given that the person has been chosen by the testator.

The Convener: Yes, indeed.

What does the Government see as the protections against fraud, in the circumstance that what we have before us is agreed by Parliament? What steps are you proposing, please?

Jill Clark: It is probably not possible to remove all risk of fraud. The approach that we have taken is to limit the exceptions from the requirement to find caution to estates that currently benefit from the small estate special procedure and the extension to civil partners of the spousal exemption. However, we are also seeking a range of powers that offer flexibility to ensure that, if necessary, we are in a position to restrict the exemptions by, for example, requiring further information.

On any losses that are suffered, beneficiaries will continue to have recourse to suing the executor, as they have now. Indeed, even now, there is an expectation that a beneficiary would initially try to claim against the executor. The protection that will be removed is that they will no longer have recourse to an insurance fund if there is little or no prospect of recovery from the executor.

That is why the amendments are targeted at the specific and narrow group of small estates. A separate case has already been made for those small estates in one way, because they qualify for the simplified procedure, so they are already treated differently, and there is already a filtering mechanism in the court that means that, if a small estate is contentious, it does not qualify for the simplified procedure. In some small estates, fund holders already pay out without the need for confirmation, and our understanding is that that is not problematic.

Therefore, we think that the approach balances the risk to beneficiaries against the certainty of having to pay for all those estates legal fees that are likely to be a drain on the estate.

The Convener: Okay. That makes sense.

I move to the amendments to give the Government powers to change things in the future, which, again, we understand. There is a list of possible conditions, although they are put in the generality. I am conscious that we have received advice from TrustBar, which I hope that the Government has seen. Is that fair comment?

Jill Clark: We have seen that.

The Convener: Right. It is clear that TrustBar used slightly different words. I am not commending its words in particular, other than that they came from it, and we are grateful for them. Can you respond to the issues of which particular conditions ought to be met, whether the generality of what is in the regulation as drafted is the best way to do things, and whether we should look for you to put some more detail in that, perhaps by amendment?

Jill Clark: We are trying to have quite responsive and flexible powers, which is probably why they are drafted in those terms. The conditions that might be included are around the court being satisfied that the person is suitable for appointment, its having to be provided with particular information about the person who is seeking appointment or about the estate, or certain material having to be produced before the court can grant confirmation.

Does Neel Mojee want to say anything about the powers?

Neel Mojee (Scottish Government): Yes. The powers that have been taken in respect of suitability divide into two parts. The court can look at the suitability of the individual—that is more along the lines of judicial discretion—and there is the more administrative process, in which it can consider certain pieces of tick-box information that

are needed before it can accept the person as executor dative.

The Convener: I think that what concerns the committee is whether there is the right balance at this stage between the generality of trying to solve every possible problem, and the specificity of solving the problem that is in front of us and trying, quite simply, not to give the Government too wide discretion to do things that Parliament will always jealously guard. What I am looking at does not suggest to me that the Government is doing anything unreasonable, but I wanted to test whether you felt that any of the other comments that had been received at least suggested that you should do something differently.

Jill Clark: The short answer to that is no. The regulations are subject to the affirmative procedure, as well. That would mean that we would come back and respond to any issues.

The Convener: Have you considered, even with small estates, the possibility of giving the court the option of requiring a bond of caution? I know that we are trying to abolish them, but should an executor be required to find a bond of caution in order to be appointed? Should the court have that discretion, at least for the time being?

Jill Clark: That brings us back to the difficulties of putting such a discretion in place and the question of how it would be exercised, who would exercise it and the things that that person might consider in exercising it. Moreover, if that were done at a judicial level—after all, it would be felt inappropriate for that to happen at an administrative level—there would be resource and cost implications that we think would be disproportionate to what we are doing in the bill.

The Convener: The proposal, then, is that we increase—albeit very lightly—the risk of fraud and maladministration in order to take a huge amount of complexity and cost out of the system and that that, on balance, would seem to be a reasonable thing to do.

Jill Clark: That is right.

The Convener: Thank you.

I think that that brings us to the end of the issues that we had thought we needed to discuss; indeed, my colleagues seem to be implying that that is the case. However, because this is an expedited process, I want to make sure that everyone feels that they have had their say. Ladies and gentlemen, is there anything else that you want to put on the record, simply because we have failed to ask you the right question?

I find it encouraging when no one speaks.

John Scott: Given the expedited process that the convener has referred to and our very much limited timescale for considering the expert advice that you and others are providing, would you reserve the option to reconsider any of this area of law with regard to bonds of caution in the next succession bill?

Jill Clark: It is up for consideration in the next bill. We will certainly look at the experience and impact of this change and, if they are not as we anticipate, we will obviously have an opportunity to remedy the situation. However, we hope that we do not have to.

John Scott: Quite. Thank you.

The Convener: Thank you very much for your evidence. I suspend the meeting to allow the panel to be changed.

12:12

Meeting suspended.

12:20

On resuming—

The Convener: It is my pleasure to welcome our panel of experts: John Kerrigan, partner at Morisons LLP and member of the Law Society of Scotland; Eilidh Scobbie, private client partner, Burnett & Reid LLP; and Dr Dot Reid, senior lecturer in private law, University of Glasgow. Thank you very much for coming what, in some cases, has been a very considerable distance in some pretty foul weather and for listening to the previous panel's evidence to ensure that you are well informed about what is going on.

John Scott will once again lead our questioning.

John Scott: Thank you, convener. I, too, thank the witnesses for making such an effort to come here and help us at such short notice.

How common is it to require a bond of caution to be obtained, particularly with regard to small estates?

Eilidh Scobbie (Burnett & Reid LLP): My thoughts with regard to bonds of caution are not just about the number of them, but the fact that most of them are required in cases where people die suddenly, often in accidents. The families in question are extremely upset about the suddenness of what has happened and are faced with the anxiety of having to deal with the additional paperwork; requiring a bond of caution just adds to the challenges of getting confirmation. In short, the issue is not just the number of bonds of caution—after all, we are probably not talking about an enormous number here—but the impact on the affected families.

I do not know whether anyone else is in a position to comment more on the numbers

involved. I thought that the information from the Scottish courts side was helpful and probably reflective of the situation. I would also say that the issue affects not only small estates; I have a case just now involving a £3 million estate and the cost of the bond of caution is considerably more than £160.

John Scott: Would you say that fewer than 1 per cent of estates are settled in this way, or is the figure more like 10 per cent?

Eilidh Scobbie: Solicitors would say that the figure lies somewhere between 5 and 10 per cent, but that will depend a little bit on where they are and what their practice area is. Of course, the really small cases go straight to the Scottish courts; if they came to us, we would usually send them straight to the sheriff clerk for help.

John Scott: I wonder whether you can put on the record the implications of Zurich's withdrawal of the provision of bonds of caution for both small estates and more generally.

John Kerrigan (Law Society of Scotland): It was never good to have only two providers in the first place, but what happens if the one monopoly provider that you are left with takes fright? There were problems with Zurich, which was asking solicitors who were winding up intestate estates to sign undertakings that they would do certain things that actually left them wide open to personal liability. Royal Sun Alliance does not do that, but it insists that anyone who wants a bond of caution must have a solicitor. If Royal Sun Alliance saw that it was more at risk as the only provider, it might start to adopt Zurich's position of trying to get the solicitors winding up the estates to further underwrite the risk.

John Scott: That certainly would not be a beneficial effect. It would ultimately lead to more cost to the estate.

John Kerrigan: Yes.

John Scott: I imagine that the Law Society might also have something to say about that.

John Kerrigan: The Law Society has concerns, but it was waiting to see what would happen in the Parliament before becoming involved. It did not want to cause a situation in which Zurich might say, "If you've got concerns, we'll withdraw. We won't bother doing this any more; we're doing you a favour." It was not doing a favour, in my view, but I am speaking personally when I say that. However, Zurich changed the whole ball game by itself when it said that it was withdrawing from executries and financial guardianships, which also concerns me, although I know that that issue is not before the committee.

John Scott: Do you see it as a real threat that Royal Sun Alliance might also withdraw?

John Kerrigan: I would be guessing. My firm has always used Royal Sun Alliance for bonds of caution and we have never had a particular problem with it. If a tricky estate arose, I or one of my colleagues would ask for a meeting with Royal Sun Alliance. We were invariably able to thrash the issues out and we were not asked to grant the type of undertaking that Zurich was starting to ask for from solicitors who were winding up estates.

Your next question might be about my personal view on bonds of caution. I am probably one of those who caused confusion by responding as an individual to the first consultation when I said that I was concerned that total abolition might leave certain estates vulnerable, and that I would prefer a sheriff to have discretion to decide whether a bond of caution was required, coupled with the right to not appoint someone as an executor dative because they were not a fit and proper person on grounds shown to the sheriff. That was me speaking as a practitioner and a semi-academic and, I must confess, my view did not take into account the economic costs to the legal system of the amendments. I accept that those are valid considerations.

John Scott: Given your practical disposition, given the apparently real risk that there might be no providers left, and given the need for providers that you have outlined, who could be providers of last resort, shall we say?

John Kerrigan: There could be a Government scheme, although I know that you do not want to hear that.

John Scott: We want to hear exactly what you want to say.

The Convener: We are looking for your evidence, so please do not worry about what we want to hear. Please tell us the way you see it.

John Kerrigan: In relation to financial guardianships, it is fair to say that public guardian Sandra McDonald had concerns that there were only two providers: Zurich and Royal Sun Alliance. She suggested that, if problems arose with either or both of those providers, there could be a Government scheme.

I accept entirely what Charles Garland said about private caution no longer being available because of the regulatory system, but I am sure that the Government could have a regulated system. The question would be about the cost of such a scheme. I asked Royal Sun Alliance about the history of claims against bonds of caution and the person to whom I spoke said that there had been hardly any. They were very relaxed about it.

I have not done any empirical research on the history of claims against financial guardianships, which is a burgeoning area of law for all private

client practitioners. Courts are now setting up dedicated incapacity courts to deal with work on financial guardianship and intervention orders.

It is not beyond the bounds of possibility that, if the sole provider indicated that they were going to withdraw from the market, the Government would be faced with either having no bond of caution or doing something itself, which would be a Government-backed scheme.

12:30

The Convener: Your comments about financial guardianship are very much appreciated, but I do not think that they are precisely relevant to what we are talking about just now. We need to be careful to ensure that we stick to bill that is before us.

John Kerrigan: I accept that.

The Convener: What you said was interesting, though, and it is fair to comment on parallel matters.

John Mason: Mr Kerrigan, you said that you feel that the Government might have the power, willingness or ability to step in. Can you clarify whether you mean the United Kingdom Government or the Scottish Government? Would the Scottish Government have the power to do what you described?

John Kerrigan: I mean the Scottish Government, because bonds of caution are not required in England.

John Mason: Yes, but the evidence that we were given earlier was that it would have to involve somebody who was financially regulated, and I am not sure whether that would include the Scottish Government.

John Kerrigan: I do not know the answer to that.

John Mason: Okay, fair enough.

The Convener: Thank you. It is a fair question and John Mason is not the only one who thought of it, but I do not think that it is a question for this discussion. Stewart?

John Scott: But given that there—sorry, I beg your pardon.

The Convener: Sorry, but I think that Stewart Stevenson has a relevant point to make.

Stewart Stevenson: I just want to probe something. Will a lawyer be covered by professional indemnity?

John Kerrigan: Yes.

Stewart Stevenson: Is it fair to suggest that if the law said nothing about bonds of caution, the safeguard would be the professional indemnity of the lawyer? The bond of caution exists only because of the history of the law, and its purpose is to protect against lawyers getting things wrong, is it not?

John Kerrigan: Lawyers have to act under the instructions of their clients. We can advise a client to follow a particular course, but they might not do that. If the client says, "You are no longer my lawyer. I dismiss you. Please send me the whole funds that you're holding to the order of the estate," then the lawyer has to accept those instructions and no professional negligence would be involved in that case. If that executor then went off and wholly ignored all the advice from the lawyer as to who was entitled to the estate, I do not think that there would be much that the lawyer could do about that.

Eilidh Scobbie: If Joe Public thinks about bonds of caution, they imagine that the benefit is that the bonds protect beneficiaries, who are in law entitled because of their relationship with the deceased, from the money disappearing into the pockets of someone else. My experience with claiming on bonds of caution thus far is not great, but it seems that when the claim is made, the insurance company will say, for example, "But you filled in the family tree without mentioning the illegitimate child of the deceased's uncle." In that case, you are stuffed, because you made a high-faith claim when you signed the insurance proposal. The insurer will therefore say, "You have failed on the claim and it is not appropriate that we, the insurance company, pay out." That is a practical problem with the bond of caution.

Although I would have said that I was relatively experienced these days in handling clients and trying to get information out of them, there can be problems, for example when they say, "Oh, but they've been ill for 20 years and they must be dead by now"—it is a fair supposition, but the health service has kept them alive—or when they genuinely did not know about the illegitimate child of uncle such and such, which might involve relationships going back a couple of generations. Such cases are probably not protected anyway, because certain information is not known about unless the heir searcher is put on the job. The insurance protection in such cases is therefore slightly illusory.

John Scott: Going back to the generality of bonds of caution, Mr Kerrigan said that they do not exist in England and Wales.

John Kerrigan: Yes.

John Scott: Is there a consequence of that? It is self-evident that there is a difference between the two legal systems, but do a higher number of

people who would otherwise have been beneficiaries lose out in England and Wales?

John Kerrigan: I cannot answer that, because I am not an expert on English estates. With an English intestate estate, you have to obtain letters of administration from the probate court, but I do not know what information you have to give to an English probate court in order to get such letters. You certainly do not have to give a family tree to the Scottish equivalent of the probate court—the Scottish commissary court—to have an executor dative appointed.

John Scott: If it were to arise that there were no providers of bonds of caution in Scotland, could there be lessons learned or models copied from the English situation?

John Kerrigan: There could well be, but I am not qualified to comment on that.

Dr Dot Reid (University of Glasgow): In my response to the consultation, I suggested that, as well as the inventory—in effect, the valuation of the estate—that is currently all that is required for an executor to be appointed in the case of a simple estate, a statement of distribution be included. I do not think that such an approach would be all that complicated, and it would act as an additional safeguard.

Stepping back a little bit, I think that one of the astonishing things about succession is that nobody checks who gets what. In fact, the whole rationale behind having bonds of caution is that they are insurance against the wrong people getting the wrong amounts. In most families, the question of what happens with an intestate estate will be quite straightforward: if there is a spouse or civil partner or if there are children or grandchildren, they will almost certainly take the whole estate. There are probably only a fairly small number of estates where the distribution is complicated, where relatives have to be searched for or where there is an illegitimate child to take into account. Those cases are very much the exception with regard to small estates. If the executor were required to take an inventory of the estate and provide a statement of distribution that said, for example, that the estate would be divided among the children, the court would be able to see that everyone knew what they were doing and the right amounts would go to the right people.

Anecdotally, succession appears to be very murky. Despite the fact that the issue is highlighted on the websites of the Scottish Courts and Tribunal Service and the Scottish Government, members of the public are not well educated about their succession rights. Anecdotal evidence suggests that families sometimes think that it is up to them to randomly distribute the deceased's property as they see fit, especially if we are talking about a small estate. Sometimes it might even be the first person who gets to the house who gets the estate.

I think that, with succession law, all sorts of things go on under the radar, but I do not think that it would complicate things if the sheriff clerk took a look at the inventory and whom it was going to. In most cases, the issue would be straightforward.

Eilidh Scobbie: Along the same lines, it might be helpful if the commissary papers that the applicant gets were to make it clear that misinformation would be treated very seriously by the sheriff, given that it hinted at fraud and—in some cases—contempt of court. I am not sure, though, that a sheriff would take such an approach.

John Kerrigan: I agree in principle with Dr Reid. All I would say, however, is that a solicitor would surely be required to draw up the statement of division, which takes us back to people with a small estate being required to instruct a solicitor.

Dr Reid: I am not sure about that—after all, this is not rocket science. If the sheriff clerk is already involved in the process, it is not unimaginable for them to be trained to know how to divide an intestate estate among a family tree. I do not think that the issue is that complicated.

Eilidh Scobbie: Or there could be a little computer model that changes the figures as required.

Dr Reid: Indeed.

John Kerrigan: But is the sheriff clerk going to ask for a family tree prepared by a genealogist, then?

Dr Reid: In most cases, the close family will be known.

Stewart Stevenson: Can I just ask a layman's question? Do forgive me—it is very naive. Does the inventory cover both moveable and fixed assets? You are nodding. I just wanted to be clear about that. Thank you.

John Scott: Can you explain to the committee your understanding of the purpose and effect of the amendments that the Government has lodged, and whether in your view they address the problem created by Zurich's decision to withdraw the provision of bonds of caution? Are there any other routes that the Government could have pursued? We have skirted around that issue, but I would like your response to that specific question on the record.

Dr Reid: I repeat what I said previously; I think that there is an alternative for the majority of cases, using the existing sheriff clerk involvement. Given the small number of claims that are made

on bonds on caution, that may solve the vast majority of problems.

John Scott: Excellent. Thank you.

John Kerrigan: I agree with what the Scottish Government has proposed, because I think that an immediate problem is caused by the withdrawal of Zurich. I appreciate that it is a quick fix, but I think that it is a very fair quick fix. I support it on the basis that there are more fundamental questions about bonds of caution across the board and about whether sheriffs should be given the right to say that they will not appoint a particular individual, which they do not have at the moment. As long as someone qualifies as a beneficiary in the estate, the sheriff has to appoint them. That means that some very unprepossessing people are appointed as executors dative.

A classic example that I have seen more than once is that a client comes to me and says, "I need your help. Our mother died four months ago. There's me, my older brother and my younger brother. Our older brother was quick off the mark—he's been to a solicitor and had himself discerned as executor dative, but me and my other brother do not believe that he is a fit and proper person." When I ask why they take that view, the client might say, "Well, he's not been in contact with the family for 30 years and he has been in jail four times for crimes of dishonesty. We do not think he is the person who should wind up mum's estate."

I have to say to those people that there is nothing that I can do about that. If confirmation has been issued, it is a very different state of affairs, but if confirmation has not been issued, the best that I can do is to put in a petition for recall of the appointment of the older, bad brother, but the sheriff has no discretion in the matter. Where the sheriff sees that my client is upset about the matter, he will appoint them both. He will say "Right; you are both executors dative." If they do not get on, that is a recipe for disaster.

I support the proposal as a quick fix on the basis that I would like to see more debate about the powers of sheriffs and whether or not bonds of caution should be retained in connection with the second succession bill, which will obviously have to be enacted.

John Scott: Do you wish to add anything, Ms Scobbie?

Eilidh Scobbie: My only thought is that, a long time ago as law students, we were told that delegated powers were not the best way of making good law. That is what I carry through life. I do not know what the current view on that matter is. It is a different house.

John Scott: I am certain that we could spend the rest of the day discussing whether that is currently seen as a good idea—or indeed fashionable.

Dr Reid: I think that I agree with that as well; that is probably still the view that would be taken. It would be better for the Parliament to make a decision that was in primary legislation, particularly in succession law, which affects everybody. That is the area of law that most affects the general public—everybody has experience of death. It is desirable for there to be as little discretion as possible within the operation of succession law. If the rules are clear and certain, people know where they are. Particularly in the aftermath of a bereavement, people want certainty in the law.

12:45

John Scott: They also want accessibility.

Dr Reid: Yes.

John Scott: If measures are in primary legislation, that is much easier, particularly for beneficiaries of small estates.

The Convener: That probably takes us on to the area that Lesley Brennan was hoping to explore.

Lesley Brennan: Would it have been possible to forego pursuing the issue until a further succession bill was brought forward in the next session?

Eilidh Scobbie: Given the rate at which succession bills go through any Parliament, the family of somebody who died with a small estate in the next few months might find that they had to wait for 30 years until they did not need to employ a lawyer to get the bond of caution. I exaggerate, but the measure gives a quick remedy that is appropriate. For that, I welcome it.

Dr Reid: Those of us who have been waiting for a succession bill for a long time think that it may not happen quickly. Therefore, a temporary solution probably is needed.

Lesley Brennan: That is because of the market failure and the Zurich—

Dr Reid: It is because of the cost of lawyers.

Lesley Brennan: Would there be benefit in having further consultation on the matter?

Eilidh Scobbie: Perhaps it would have been nice if Zurich had given us a year's warning of its decision, which would have allowed for proper consultation. However, given where everybody is, it has to be done, and what is proposed is fine.

John Kerrigan: I agree. As I said, it is a quick fix in the circumstances, but it is proportionate and fair.

Dr Reid: It is certainly to be hoped that, when the main succession bill comes along, the delegated powers aspects could be revisited at that point.

The Convener: You can be clear that the committee would endorse that view. We would rather have appropriate detail on the face of any bill. That is one of the drums that we have banged in this session of Parliament. Clearly, it will not be my committee, but I suspect that our successor committee will feel roughly the same. However, there is always an issue about having an appropriate balance and, sometimes, when time is not on our side, the balance is very definitely to use delegated powers.

John Mason: Dr Reid suggested that a lot of people in the general public, including beneficiaries, may not be aware of their rights and what the processes are. Will the measure complicate the situation further or does it not really matter because beneficiaries already know nothing? Will it confuse things for beneficiaries because there will be no bond of caution and they will not know where to go and how to get their rights?

Dr Reid: There really is enormous public ignorance about succession law and how it operates. Most people probably find out from a website what they need to do when someone dies and they are very much under the guidance of the court. I suspect that there will not be any change in that.

John Kerrigan: It is a matter of choice for people whether or not to instruct a solicitor. If my memory serves me, there is something in the wee leaflet "What to do after a death in Scotland" that directs people to solicitors if they feel that they need legal advice. It is the personal choice of an individual to take or not to take legal advice, but it is always there and available.

John Mason: As we heard, the Government previously decided to postpone legislation on bonds of caution because there was the question that Mr Kerrigan mentioned about what other protection should be in place. We have specific suggestions from TrustBar on what could be stated. For example, it suggests that people who have unspent convictions for crimes or offences of dishonesty should not be executors dative. Should more of that be in the bill? Could it have been put in the bill rather than ministers being given so much discretion?

John Kerrigan: That is a more complex question and is tied up with the second consultation document, which was published in June 2015. The bill is a reaction to the responses that were received to the consultation document that was published in August 2014. In that document, the Scottish Government raised the question of bonds of caution and whether sheriffs should be given discretion to refuse to appoint. However, the Government decided—appropriately, I think—as a result of the wide-ranging nature of the responses received that it should reconsult on the matter. I understand that that is happening now.

The June 2015 consultation is now closed, but we are waiting to hear about the responses and how the Scottish Government will react. The more substantive law that we are discussing would be for the next succession bill, which will be based on the Government's assessment of the responses to the June 2015 consultation.

John Mason: So if we were to pass the legislation before us, it would provide for quite wide discretion, but the matter would be revisited—we would hope—when the Parliament considers another succession law. Are you comfortable with that process?

John Kerrigan: I do not think that the current proposal gives a sheriff discretion.

John Mason: I am thinking that it would give ministers more discretion.

John Kerrigan: Oh yes—sorry.

John Mason: Perhaps I did not put that very well. Are other folk happy with that process, too?

Dr Reid: There are two sides to providing protection. One side concerns the discretion for the executor, on which some of the bill is focused, and the other side provides protection in the division of the estate. Both elements are forms of protection. It would be possible to put them into the bill, but that could be done with too much haste, given the late stage that we are at. It would probably be desirable to put that aspect in the next succession bill instead.

John Mason: Yes. As a committee, we do not like very wide powers for ministers, but you are saying that, given the speed of the current process, it would be better to go down that route and look at the specifics later on.

Dr Reid: Yes.

The Convener: I want to ask a specific question that I put to the officials. Am I right in thinking that the proposal represents a slight increase in the risk of fraud, with a compensatory reduction in the total costs?

Eilidh Scobbie: I suppose that there is a theoretical increase, and a theoretical opportunity for fraud, but there is always an opportunity for fraud. In cases where I have had a bond of

caution, we have discovered in discussions with the client that there were unknown family members who had a right on the succession.

That situation would not arise if someone had to do a family tree with an independent person overseeing it, as long as the person is, and their ancestors are, Scotland born and bred. However, I would hesitate to say what the situation would be with people who are arriving as refugees just now with regard to how their family trees would be traced. The evidence shows that people who have come here in the past have done very well in one generation, and their family trees can be extremely complex to work out.

You win and you lose. It is perhaps the reason that everybody should have a will.

The Convener: I do not think that we have ever disputed that everyone should have a will. It has been suggested that, in addition to the document "What to do after a death in Scotland", there should be a document that tells us what to do before death. That would make much of what we are discussing redundant.

I think that Stewart Stevenson has some final comments.

Stewart Stevenson: I will be relatively brief, convener. I make the observation, as someone who has a certificate in genealogy, palaeography and heraldic studies, that those for whom it is easiest to draw up family trees are the aristocracy and criminals. Their lives are better documented than others—let us merely put it like that.

John Scott: How far back can you take your own family tree? [*Laughter*.]

Stewart Stevenson: For 38 generations.

John Scott: Thank you. I have no further questions.

Stewart Stevenson: Let us return to the immediate issue. John Kerrigan made the interesting point that it should be for an individual to decide whether to take legal advice. However, in the circumstances in which we find ourselves, a commercial company outside the legal system appears to be depriving people in certain circumstances of that particular choice. In that case, as an alternative to what is before us, should the legislation that is being contemplated give the courts discretion as to whether a bond of caution should be required by assessing the circumstances as they see them? That is often a useful way of dealing with other things in the legal system.

John Kerrigan: The Scottish Courts and Tribunals Service said that 800 small estates had required bonds of caution. I am a great believer in fairness across the board. The risk of serious fraud is small. I am comfortable with the situation but I can see an argument as to why, at this stage, a sheriff might be given discretion. However, again, that might be complicating matters unduly. That decision can probably be made in the wider discussion in respect of the next succession bill.

Eilidh Scobbie: What has been completely omitted from our discussions on the issue is the fact that, depending on how an estate is spread, it may not be necessary for people with estates around the small estate level to need confirmation. Most of the UK high street banks will allow the money in the bank account to be handed out to someone who appears to be the heir with nothing more than requiring them to sign some sort of indemnity and usually without any special insurance charge being taken.

If someone is fortunate enough to have £10,000 in Lloyds TSB, for example, or whatever it is trading as just now, they can get that money out but if the money is in shares in Lloyds Banking Group, they need confirmation in order to be able to sell the shares. That seems quite odd. If someone can get the money out without confirmation, a lot of our concerns should apply to that situation as well.

Stewart Stevenson: Is it correct, however, to say that although the possession of the money may be achieved by the process that the bank undertakes, the legal entitlement to that money, which is now in your possession, remains pending until confirmation has taken place? Is that a reasonable statement for a layperson to make?

Eilidh Scobbie: That is technically accurate. If you do not have confirmation, you are classed as something that is called a vicious intromitter in Scotland. It is all in the textbook, which was mentioned earlier, but I have only ever seen that being threatened. It sounds really nasty. The reality is that you get the money and then you pay it out to the people whom you think are the heirs. The people who think that they are the heirs can come and hassle you for the money if they know that the bank account exists.

However, I am sure that there are lots of estates that never go near the confirmation process because the money is all in small bank accounts.

Stewart Stevenson: Just to be clear, it is possible to wind up a small estate without any process of confirmation. That is legally permissible.

Eilidh Scobbie: Yes, it is legally possible.

John Kerrigan: It is possible, yes.

Stewart Stevenson: But I am also hearing the suggestion that it is not uncommon.

Eilidh Scobbie: In small estates, it is not uncommon.

Stewart Stevenson: Is the definition of small estates that you are using in this context the same as the definition that we are dealing with in the context of the legislation?

Eilidh Scobbie: Each banking organisation and insurance company has different rules that apply to its assets. A lot of them use £20,000 or under as the amount, so if you had one bank account in that category, you would be within the small estates definition. Sometimes they also require you to say what the total estate is; sometimes they do not. The forms seem to change from time to time.

John Kerrigan: Sometimes insurance companies will ask you to give details of the family so that, if they give the money to you, they have some assurance that you will pay out the money to those in the family who are entitled to it. Stewart Stevenson's point is an entirely fair one. It is possible to take command of a small estate without confirmation.

There is a difference between who is entitled to the funds and who can take command of them. You are then relying on the person who takes command being the good big brother who says, "My two younger sisters are each entitled to a third of this," and not the baddie who I mentioned earlier, who is likely to go off to Tenerife for six months and then come back and say that the money is gone.

13:00

Stewart Stevenson: Forgive me; remember that I am a layperson, so my question may be hopelessly naive. I am now uncertain as to when confirmation is required in law in the process of winding up an estate. Is there a concise and accessible explanation of when it is required?

Eilidh Scobbie: I suppose that the answer is that, in theory, there should be confirmation on all occasions. However, the reality is that if the deceased had their money in the right things at the right time, it is possible to ingather the estate without having to get confirmation.

Stewart Stevenson: Forgive me; I want to be as clear as it is possible for me to be. In the absence of confirmation, the risk that what has been done will be challenged will be retained indefinitely.

Eilidh Scobbie: That is correct.

Dr Reid: The truth is that no one knows enough to challenge. I repeat the point that a lot of succession law is operating under the radar and outwith the confirmation process completely. I made a freedom of information request to the statistical division of the Scottish Courts and Tribunals Service and to Her Majesty's Revenue and Customs; the estates on which they record figures in Scotland are confirmed estates. You can get information on what proportion of the confirmed estates are small estates, but when you look at the number of deaths in the country, you see that the recorded, confirmed estates are a tiny proportion of them. In discussion with the statistical division, we worked out a rough estimate that probably half of all deaths in Scotland are not confirmed.

Stewart Stevenson: Convener, I think that, if anything, we have merely confirmed that academics are in the business of giving us questions as much as answers. I am fascinated by where we have got to, but we have probably covered everything that I might reasonably raise.

The Convener: I think that you have. I am delighted that academics come here and give us questions; it is absolutely part of the process, and that is no criticism at all.

Is there an alternative way of getting scrutiny of who is given the power of an executor dative? Is there an alternative method of scrutiny that would allow a sheriff to get the right kind of information, assuming that he has a discretion? Is the system missing something that would allow somebody to say whether giving a certain person that power is a good idea?

Eilidh Scobbie: At the present moment, there is no requirement for intimation of the petition for the appointment of an executor to anybody with either a prior claim or an equal ranking claim on the estate. Perhaps that could be looked at. I think that such a requirement would have a small cost implication for the court service, because it would need to check that everybody had received intimation, but intimation would primarily be a responsibility of the person who is petitioning to be executor. However, it would not be an unduly burdensome responsibility; it is a letter sent.

The Convener: If I have understood you correctly, intimation would be along the lines of saying, "I want to present myself to be the executor dative. I know that I have three brothers and a couple of grandchildren, and I need to tell the court that I have written to them to tell them that I am putting myself in this position so that they have an opportunity to disagree with me."

Eilidh Scobbie: Yes. We could put it into more legalese, but that is fine.

The Convener: I am not good at legalese, I am afraid. In that case, I will pick up on what I think I heard you suggest and then I have one further question.

I think that I heard you suggest that there might be a greater involvement of the sheriff clerk in what goes on, and that they might not be just the first port of call—the person who hands out the bits of paper and the advice—but be in a position to provide some advice on who the heirs might be.

Dr Reid: For estates below a certain value, the sheriff clerk is already involved in helping people to manage the inventory and the confirmation process. If a family tree were included, it would be easy to say, "This is the estate and this is the family tree. There are very concrete rules and, therefore, on the basis of those two documents, here is who it should go to."

The Convener: That would be technical advice from a court official.

Dr Reid: It would provide some level of supervision, which succession law is crying out for.

The Convener: I am trying to explore whether you feel that that would represent an increase in the duties of the court.

Eilidh Scobbie: That is not a question for us, but I fear that any increase in workload would be noticeable. The commissary process in some courts is not running quickly now.

The Convener: Could I rephrase the question? I accept that it is more work; that is not in dispute. I wondered whether it constituted an increase in the duties of the court, although presumably not the powers. Are we putting a duty on the court in the person of the clerk to do something that it is not duty bound to do currently?

Eilidh Scobbie: Yes.

The Convener: That would bring a workload—

John Kerrigan: I agree, but there are some commissary clerks who are very good and, when someone turns up with a small estate that qualifies for the small estate procedure, they give the layperson very good advice. They are doing that already, without necessarily having a duty to do so.

Dr Reid: It is not a duty, but the sheriff clerk will help someone with the information that is available to the public for estates below a certain value. Undertaking that process of assistance may require some additional training for sheriff clerks, but it is not very complicated. If the paperwork, which does not need to be very onerous, were in place, it would allow the sheriff to see that information when confirmation is granted. The duty is on the sheriff rather than the sheriff clerk.

John Scott: To develop that theme, if that were to become a service offered by sheriff clerks, who would bear responsibility where, notwithstanding the best of intentions, poor advice was given?

Dr Reid: Perhaps the Government should invest in an app that could be programmed.

John Scott: Really?

Dr Reid: Yes.

John Scott: Then it would be up to the individual to make the decisions, rather than relying on the advice of a sheriff clerk.

Dr Reid: Yes. There is always the backstop—

John Scott: I am thinking about liability, because that is what bonds of caution were about in the first place. We have strayed from that but—

Dr Reid: It always has to go before the sheriff.

Eilidh Scobbie: My understanding, never having been a sheriff clerk or a sheriff, is that, if there is a case that the sheriff clerk is uncomfortable about, he or she will discuss it with the sheriff who does commissary work routinely, without us being told. That should apply to lay applicants as well.

John Kerrigan: If a lawyer is negligent in the winding up of an intestate estate, that is not of itself grounds for the cautioner paying out. The beneficiaries have a claim against the lawyer. The cautioners will say that that is nothing to do with them.

A bond of caution is an indemnity guarantee. I have heard that, if cautioners have had to pay out because the executor has done something silly, the first thing that they do is to exercise what is known as the right of relief, and they go against the executor to recover what they have paid out. They do not go against the solicitors for professional negligence: that is covered by a different policy.

The Convener: That concludes everything that we want to ask, but we might not have covered everything that our experts want to say, because I think that you have some thoughts on drafting. I do not know who wants to lead on that.

Eilidh Scobbie: I have a couple of thoughts, although they do not involve anything beyond changing the order of words. Amendment 5 states:

"Regulations under this section may make provision in relation to ... appointments of persons as executors dative of particular descriptions."

I think that the wording should be

"appointments of persons of particular descriptions as executors dative",

on the basis that it involves preventing people who have criminal convictions from being executors dative so that we do not get an executor dative qua criminal.

The Convener: I am with you. Thank you. I am sure that that has been noted by those who hold the red pens.

Eilidh Scobbie: I had great problems in reading paragraph 2 in amendment 2, which is written in the best legal mumbo jumbo. It reads:

"As well as in relation to applications under section 3 of the Small Intestate Estates Act made after this section comes into force, the amendments made by subsection (1) apply in relation to applications under that section of that Act made before this section comes into force which are not by then determined."

A simple alteration could be made at the end, where it says,

"comes into force which are not by then determined".

It would help enormously if that was changed to,

"came into force which were not by then determined".

I also have a more substantive improvement to suggest, although I can see reasons for not doing it. The paragraph should read:

"the amendments made by subsection (1) apply in relation to applications under section 3 of the Small Intestate Estates Act made after this section comes into force and to those made before this section came into force which were not by then determined."

I can let you have that in writing.

The Convener: I was going to say that it would be helpful if you could give us—and indeed the Government—a copy of those suggestions. The Government might want to reflect on whether it feels that they are significant.

Eilidh Scobbie: Yes.

The Convener: I am grateful to you for your thoughts, because such things can be important.

Stewart Stevenson: Once again, I just want to make sure that this layperson understands what is being said. Are you suggesting that the process should be changed after it has started but before it is completed? Is that the essence of what you are saying?

Eilidh Scobbie: I am trying to make the legislation easier to read. I am not trying to change what is proposed. What is proposed is that, in the future, once this is law, there will be no need to get bonds of caution where people go to the sheriff clerk. However, there will be cases before the bill becomes an act. If somebody goes along on the day before the bill is passed, they will probably have missed the point when they could get a bond of caution from Zurich. If so, they will have to go to Royal Sun Alliance, which will say that they have to hire a lawyer. If they do that, we are probably talking about £1,000 of extra costs.

To get round that, the bill says that, in that short period, if people just wait until it becomes an act, the sheriff clerk will not require them to have caution. Technically, they made the application when the old law applied, so they should have caution. The bill says that, for those people, we want the application to slide under the new rules. Technically, we are entitled to insist on caution, but we know that that would cost people extra money, so the bill says that that small group of people do not need to get caution.

Stewart Stevenson: I think that what I am hearing is a plea for retrospection, which is not something that we as legislators leap at with any great willingness.

Eilidh Scobbie: The retrospective aspect is in the bill. If you are trying to ensure that this group of, usually, relatively poor people only have to meet the minimum costs, you will have to go along with it in this case. It is only a narrow window, and it is probably only about 10 cases.

The Convener: We might argue that it is not retrospective but transitional, because we are doing it now for the future, but only until we get to the next gate.

Thank you for those suggestions. Unless you have anything else that you want to put on the record—it is wonderfully good to see you here—I think that we are done. I am grateful to you.

13:15

Meeting suspended.

13:19

On resuming—

The Convener: It is my pleasure to welcome to the meeting Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, who is supported by Jill Clark and Neel Mojee. Before we move to questions, does the minister wish to make a statement on the basis of what we have just heard?

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): If I may, convener. I apologise in advance for what will be reasonably lengthy introductory remarks, but I hope that they will put on record a number of things that will help the committee.

Good afternoon, everyone. Thank you for inviting me to talk about bonds of caution. I appreciate that the committee will have questions about the amendments that we have lodged, but I thought that it might be helpful to take a bit of time to set out some background to our proposal. Some of what I will say was set out in my letter to the committee of 14 January, but I am sure that it will help if I place our approach on the record. My officials have also provided the committee with a

detailed note on the issues around bonds of caution.

The Scottish Law Commission recommended the abolition of the statutory requirement that is placed on executors dative—those who are appointed by the court, usually because there is no will to administer an estate—to obtain a bond of caution, which is an insurance policy that protects beneficiaries and creditors from, as we have heard, loss as a result of maladministration, negligence or fraud. The SLC made the recommendation on the basis of the financial and administrative burden that those provisions create because of the current difficulties in obtaining bonds of caution; the costs; the limited number of providers; delays in the bonds being issued; and the conditions that providers sometimes attach to the bonds.

We consulted on the abolition of bonds of caution along with the other provisions that are in the bill. Although there was support for abolition, it became clear that alternative safeguards would be needed, at least in some circumstances, so we indicated that we would not abolish bonds of caution without further consultation on those safeguards.

At the moment, there are only two providers of bonds of caution for executry purposes: Zurich Insurance and Royal Sun Alliance. Zurich has taken the business decision to withdraw from the market from 1 February 2016, and the sole provider from that date, Royal Sun Alliance, requires provision of a bond of caution to be conditional on the appointment of a solicitor to administer the estate. Zurich does not have such a requirement. Zurich's decision was not anticipated and, in real terms, the period of notice is very short; we were alerted to the decision by the Scottish Courts and Tribunals Service, which was concerned about the impact, especially on small estates.

Estates with a total gross value of less than £36,000 are classed as small, but the threshold is subject to change from time to time. An executor of a small estate might in certain cases employ a solicitor to get confirmation or might obtain confirmation without a solicitor. In the latter case, simplified procedures are in place and the sheriff clerk can assist, as we have heard. Those who seek confirmation without a solicitor avoid having to pay legal fees that could drain a small estate, and a separate case has already been made for them.

We have had to act quickly to consider whether something needs to be done now and, if so, what the best solution is. We agree that the impact on small estates is of concern and that the obligation to instruct a solicitor could be a significant burden that severely diminishes or, in some cases, even drains a small estate. In other cases, the impact could create hardship.

For example, a widow with a 19-year-old daughter in tertiary education might die without leaving a will. The family lived in rented accommodation. The mother's estate is valued at £10,000; she has been saving over the years to ensure that her daughter can go to university and has been using those savings to fund her daughter's living and associated expenses. The daughter will need all of the £10,000 to complete her education, but the obligation to instruct a solicitor and the corresponding fees will mean that the daughter will not be able to afford to complete her education at a difficult time when she is coming to terms with the loss of her mother.

With Zurich's regrettable and somewhat precipitate withdrawal, we consider that it would be appropriate to exempt such small estates from the requirement to obtain a bond of caution. In such cases, preserving as much of the estate as possible will make a difference to the beneficiaries. As a result, our amendments focus on a small estate that is subject to the simplified procedure.

The court already has a filtering mechanism to ensure that any contentious small estates do not qualify for the simplified procedure, but the flipside of the coin is that the circumstances that a bond of caution would indemnify could still occur. An executor dative could distribute the estate incorrectly, with a beneficiary losing out. Instead of that beneficiary being recompensed by the bond of caution, they would instead have to make a claim against the executor.

If the executor benefited from their maladministration, they should have the necessary assets to pay any damages that are due to the beneficiary. A beneficiary might qualify for legal aid—that would depend on their income. Moreover, if their loss was less than £3,000, they could raise a small claims action, which has been designed to ensure that a solicitor is not required and to keep costs to a minimum.

In some small estates, fundholders are already paying out without the need for confirmation, but the threshold varies depending on the fundholder. In those cases, no bond of caution will have been put in place—and, as far as we are aware, that has not created problems.

There are few calls on bonds of caution. For example, in a similar instance to the one that I outlined, if there was a surviving son as well as a daughter and the son was estranged, and if the son applied to be the executor dative with the aim of taking the full benefit of the estate, the daughter would also be likely to apply. As they would be competing executors, the estate would not qualify

for the simplified procedure and there would be a requirement for a bond of caution and for a solicitor to be involved. That is probably the right outcome in such circumstances, to ensure that the estate is distributed properly.

We have had to balance the impact on small estates with the need to protect beneficiaries, but we consider that, in all circumstances, our proposal is proportionate and targets only the most vulnerable estates, which are small and uncontentious and where it is far less likely that there would be a concern about the distribution of the estate.

Having just one provider is also undesirable, and although the remaining provider has assured us that it has no intention of withdrawing from the market, we cannot say what business decisions it might make in the future. We therefore need a solution to deal with the possibility of the remaining provider, Royal Sun Alliance, withdrawing; otherwise, we could be in the position where a bond of caution is required as a matter of law before confirmation can be granted, but there is no ability to obtain that bond of caution.

That is why we also propose to take powers in relation to the abolition of caution and the powers of court to appoint an executor dative. The future landscape is uncertain and we might need to deal with a range of matters, although I have heard the general concerns that people have about the delegated powers. We propose a power for Scottish ministers to set out further circumstances in which caution should not be required to be found, including a power to abolish the requirement for caution altogether. We propose a power for ministers to make regulations that set out conditions that must be satisfied or information that must be provided before the court appoints an executor dative. We also propose a power that could require the courts to be satisfied that a person is suitable for appointment as an executor dative.

The intention is not to use the powers unless the remaining provider withdraws. Alternatively, the powers could be used to reflect the outcome of further consultation on the issues that we identified as needing to be explored before bonds of caution are abolished. The regulations could also be used to deal with any issues that arise in relation to the abolition of caution for small estates. I have no doubt that the committee will look at those issues in the context of its delegated powers role.

We propose that the provisions in the amendments should come into force immediately after royal assent, to minimise any delays in confirmation that Zurich's withdrawal might cause. The abolition of the requirement of caution will apply to any applications for caution that have not been determined before the provisions come into force. The SCTS has assured us that the small gap between Zurich's withdrawal and the coming into force of the amendments can be managed administratively.

Finally, I will say something about the fact that the committee is having to turn its mind to a topic that has not featured in the bill to date and that involves amending the bill in a different way from the SLC bill proposal. I am entirely sympathetic to the view that this is an undesirable position to be in, and I very much appreciate why the committee is taking evidence today. I would not envisage such a situation occurring even irregularly in the context of the Scottish Law Commission bill procedure.

The situation is not one of our making but, given the concerns about the impact of Zurich's decision, it would have been remiss of the Scottish Government not to act quickly and do what it could to remedy the position. Doing nothing would place a new and unwelcome burden on small uncontentious estates, leave the market further exposed should Royal Sun Alliance also withdraw and create a position where a legal requirement was incapable of being met, which could result in estates being incapable of being wound up. Any delay in acting would impact adversely on the public and on the operational ability of the Scottish Courts and Tribunals Service. I am sure that the committee will agree that those outcomes would be undesirable.

The Convener: Colleagues want to ask questions, but I will start by picking up on your point about bringing in something that was not in the original bill. We entirely understand why that is the case and we recognise that the provisions could not have been in the bill as introduced, but nobody seems to have any trouble with their being introduced later, which is an interesting quirk of the process. That is absolutely fine and we understand why it is the case.

I will pick up on the issue of a sole insurer. Without casting any aspersions, I note that a sole provider is at an economic advantage. It was suggested earlier that the Government might provide some kind of insurance, but it was also suggested that the Scottish Government is not in a position to do that, whereas the Westminster Government might be. Will you address that issue?

Paul Wheelhouse: The point is important. I understand that, as was said earlier, the legal requirement to be financially regulated would discount the Scottish Government from providing caution. There are many considerations, such as state aid tests because of the impact on commercial markets, and there are obvious financial budget implications. The Scottish Government would be involving itself in what is

essentially a private matter, which we are not sure would be appropriate or desirable from the Government's point of view. I heard what was said earlier, but the more fundamental thing is that the Scottish Government is not regulated by the Financial Conduct Authority and therefore would not be able to provide the service.

The Convener: That is what I expected. I am grateful for your advice.

13:30

Stewart Stevenson: I want to ensure that we are not putting on the record something that might misrepresent the position. Early in the minister's remarks, he talked about a case where an executor does not employ a solicitor, which means that they avoid paying legal fees—I think that I am quoting correctly. Will you clarify that you were talking only about the costs that are associated with employing a solicitor and confirm that fees might still be associated with the confirmation process before the court?

Paul Wheelhouse: That is correct. We are referring to the costs of employing a solicitor, rather than any fees that are associated with—

Stewart Stevenson: So the word "costs" would be better than "fees".

Paul Wheelhouse: Yes.

Stewart Stevenson: That is what I wanted to make clear.

John Scott: Forgive my naivety, but is it correct that you are not in favour of the proposal that Dr Reid made, because the courts are essentially part of the Government? Is that what you are saying? You would not encourage sheriff clerks to act in accordance with Dr Reid's proposal if Royal Sun Alliance withdrew as well and there were, consequently, no providers?

Paul Wheelhouse: Unfortunately, I was not here when Dr Reid was discussing that point. However, I understand that you are referring to the Scottish Government becoming an insurer, on which I have set out my perspective. I think that a similar issue would arise in relation to the SCTS not being financially regulated. My colleague Jill Clark can comment on that.

John Scott: That would be helpful. Jill Clark heard all the evidence.

Jill Clark: We are talking about the public sector stepping in—

John Scott: The sheriff clerks—so, that would, essentially, be a function of Government.

Jill Clark: Yes.

John Scott: So that solution would not find favour with you.

Jill Clark: For the reasons that the minister has set out, it would not.

John Scott: Have you received any adverse comment from any source whatsoever about the proposed amendments? I acknowledge that they have not been in the public domain for long—indeed, they might not even be in the public domain yet.

Paul Wheelhouse: With the exception of the comment that has been made today about the drafting of one provision, we have had no negative feedback. I believe that we have had positive feedback from the SCTS and the Law Society, which are key consultees, and I am not aware of any objections having been lodged with the Government.

Jill Clark: No negative reactions have come to us. We are aware that TrustBar has submitted a memorandum that states that it would like us to go further in terms of discretion.

John Scott: How do you view TrustBar's view that the discretionary element should be developed?

Paul Wheelhouse: I note the debate that I just witnessed about the second succession bill. There are more fundamental reforms that could be undertaken at that point. Mr Kerrigan fairly described the proposals as a quick fix—he was positive about it being a proportionate one.

If we had considered that a change in the law was possible without the further consultation that we have undertaken, the bill would have been introduced with such a provision, but that was not the case. However, there was no consensus about the detail, and the resource impact needed more investigation. Should we make provision for the proposal in the future, it will be on the basis of the outcome of the further consultation that we have carried out, which we have yet to report back on, and further discussion with the key stakeholders who might be impacted.

It is worth remembering that the proposed change relates to the wider issue of abolishing bonds of caution for everyone and not to the narrow remedy that the amendments represent, which involves a particular problem that has arisen following the withdrawal of Zurich. The area was not the clearest-cut one in the consultation that we carried out, and we surely need to engage with stakeholders further on proposals that we can take forward to implement more fundamental reforms to bonds of caution. We can do that through the second succession bill, should that come forward.

Lesley Brennan: I want to go back to a point that you have been asked about twice. Obviously,

Zurich will withdraw from the market on 1 February and we will have only one provider left, so that is a market failure. We would hope that, when there was a market failure, the Government would step forward. We have heard that the level of risk seems to be pretty small—there are 800 cases of small estates affected. We have heard from the experts that very few people currently make claims against bonds of caution. Is there scope to change the current regulations to make the Scottish Government the insurer of last resort in such cases, given that the exposure to risk will be so small? Given that the market does not exist in the rest of the UK, is there not a case for a Scottish solution? The proposal that Dr Reid outlined seems pretty sensible and low risk—the sheriff clerk would use a wee model.

Paul Wheelhouse: I understand the point that is being made, but there are a couple of issues. First, as I said, there is the fundamental issue that we are not allowed to provide insurance products because we are not financially regulated by the Financial Conduct Authority and, given that we do not have competence in this Parliament to legislate on such matters, any such changes would have to take place in the UK Parliament.

The second issue is that we would be involving ourselves in a private matter, which I am not sure would necessarily be appropriate in such circumstances. I am happy to look at what Dot Reid said in her evidence but, as I have not seen it, I obviously cannot comment on the detail of it. We need to consider whether those two key barriers could be overcome. The first one is fundamental: the Scottish Government currently cannot provide insurance, because we are not regulated by the Financial Conduct Authority, so we cannot legally offer insurance products.

Jill Clark: Can I clarify something? The committee has mentioned the sheriff clerk a couple of times. I did not pick up what Dr Reid said about a role for the sheriff clerk in connection with the Government stepping in as a last-resort insurer. Could you explain what she said, because I obviously missed it?

Lesley Brennan: My understanding is that the estate would go to the sheriff clerk, who would draw the family tree. There was another bit—

Jill Clark: It was the statement of distribution and the family tree. Sorry—that is a slightly different point.

Lesley Brennan: If there were any errors in that, I suppose that the liability would rest with the sheriff clerk and therefore the Scottish Government. That was my interpretation, although I do not know whether it is correct.

Paul Wheelhouse: There are certainly possible ways to improve the information that is available. The sheriff clerk could have a role in looking at matters. However, that is distinct from the issue of whether people should be insured by the Scottish Government—it is a sort of secondary issue.

The Convener: I asked the previous panel whether that would generate a duty on the courts to do something because it comes with a responsibility to get things right. If the court merely has the power to provide advice, which it manifestly does, that does not necessarily make it responsible for the advice that it gives. That appears to be the present situation. Do you feel that we are in a perfectly sensible place at the moment in which there probably is not a duty to provide that information and therefore there is not a responsibility in the way that there is with a bond of caution?

Paul Wheelhouse: If I understand you correctly, you are talking about a responsibility on the Scottish Courts and Tribunals Service in the event of some form of maladministration that it had not picked up. I take that point. Clearly, we are trying to ensure that the risks of maladministration or fraudulent activity are minimised. We have a provision about the kind of person who can be appointed as an executor dative, which will also help to reduce the risk.

We have addressed a number of issues in our quick fix to try to reduce the risk of maladministration.

The Convener: Thank you. Several members want to come in, but I remind everyone that we have only 20 minutes of the meeting left.

I am told that, in the context of land registration, there is a state indemnity scheme. Is that right?

Paul Wheelhouse: I am not aware of that, although we can look into it to see whether that is the case.

The Convener: That might be something for all parties to ponder.

John Mason: The general point has been made that quite wide powers are being given to ministers, with the suggestion that there is a balance to strike between the speed at which all this has to happen and the need to think through all the details. We had specific suggestions from TrustBar, in particular about executors dative and what might be excluded. Are you defending the amount of powers that are being given to ministers?

Paul Wheelhouse: I am slightly nervous about that and I fully acknowledge that it is far from ideal. We have to move quickly because of the timescale for the completion of the bill. Previous witnesses made the fair point that another suitable legislative opportunity might be some way in the distance, so if we do not act now, there is a danger that we

could be put on the back foot if Royal Sun Alliance were to change its position and withdraw from the market.

The amendments are the first step to finding a suitable solution for smaller estates—those under £36,000. We are more comfortable about that, because it is proportionate and sensible. The second set of amendments relate to additional powers to allow us to deal with the immediate situation should Royal Sun Alliance withdraw from the market. My ministerial colleagues and I have no intention of using those unless we are left high and dry. They would allow us to move reasonably quickly, rather than waiting for a later opportunity to act through primary legislation.

John Mason: If you were to continue as minister—obviously no one knows what is going to happen—

Paul Wheelhouse: Indeed, there are a number of factors involved.

John Mason: If you were to continue, how high a priority would the next succession bill be? Are we talking about introducing such a bill in two years, five years or 10 years? Do you have any idea?

Paul Wheelhouse: It is not in my gift to announce the Government's legislative programme should we be re-elected. We have given a commitment to consult—and we have done so—in relation to the Scottish Law Commission's more substantive proposals. We are committed to reporting back on that consultation and would intend to take forward any suitable new measures in the next Parliament. Beyond that, I am not at liberty to determine the schedule of bills. We have a small matter of an election to get through first.

John Mason: In other words, it could be some time ahead.

Finally, Eilidh Scobbie suggested specific amendments. I have not got my head around them yet—I do not know whether you have—but do you have any comments on them?

Paul Wheelhouse: We are happy to look at them. There is obviously an issue around the process of how we would amend the amendments at stage 3—a manuscript amendment might be required. I understand that Professor Scobbie will supply the draft wording to the committee and the Scottish Government, so we will consider it.

John Scott: Has the Scottish Government approached Royal Sun Alliance about its willingness—or unwillingness—to continue providing bonds of caution?

Paul Wheelhouse: Yes, we consulted the company recently about its future plans in light of Zurich Insurance's decision. Royal Sun Alliance has confirmed that it has no plans to withdraw from the market and that it will continue to provide bonds of caution but will also continue to require a solicitor to be appointed as a condition of providing a bond, which is entirely within its right—I do not question that. We have no reason to believe that Royal Sun Alliance will withdraw from the market—it now has a clear field, being the only player. However, we will continue to engage with the company so that if its plans change we will be given as much notice as possible.

The Convener: There are a couple of other things that are worth putting on record, although they may not require a response. First, there was a suggestion that those seeking to become executors dative be required to intimate that fact to any obvious alternative applicants. I wonder whether that might be put into the mix for future consideration. Secondly, a general point was made about the public's understanding of the issue. It is a fair point, because I have to say that until we considered the issue in the committee I knew very little about it and I am quite sure that 99.9 per cent of the population is in the same position.

13:45

Paul Wheelhouse: I am on record as agreeing with you on the latter point. As you put it, convener, guidance on what to do before a death would be useful for members of the public to ensure that they are aware of how the law of succession works and how they need to prepare for scenarios in order to look after their loved ones in the event of their death.

There is a general need to improve awareness of the legal provisions. That cuts across a number of areas, but, as Dr Reid said, succession is fundamental because we are all touched by death at some point, so the law has a profound impact on us all.

Can you remind me of the other point, convener?

The Convener: It was on intimations to other beneficiaries.

Paul Wheelhouse: In a theoretical sense, it would be attractive to ensure that there was a degree of communication between those who would potentially take on the role of executor dative. However, as we heard from Mr Kerrigan, in practice, there may be examples where estranged siblings do not talk to one another and have absolutely no desire to collaborate. If there were a requirement to do that, rather than a suggestion that it would be nice to do it, that might change matters.

There is certainly a cost regarding that—it is £40 or £60 per intimation. We are looking at that as part of our wider consideration of the law of succession.

The Convener: That sounds like an awfully expensive letter, but I will take your advice on that. If I were the person writing such letters, I would be fairly rich.

Stewart Stevenson: Minister, in your introductory remarks you said that you planned to exercise the powers under secondary legislation only in the event of the withdrawal of the final provider. Would you consider using those powers if, in the Government's view, the conditions that that final provider associates with a bond of caution become unduly onerous?

Paul Wheelhouse: That is a fair question. I must emphasise that we have had no indication that Royal Sun Alliance will abuse its monopoly position. However, should that happen, we would be in a position to do something about it, using the powers. However, that is not the assumption and we have no reason to believe that RSA will not act honourably.

The Convener: That seems to be all that anyone wants to say. Do you want to add anything, minister?

Paul Wheelhouse: I regret the fact that we have to introduce new amendments at this stage of the bill. I am grateful to the committee for taking additional evidence at short notice to ensure that the issue is properly aired and scrutinised before it comes to the chamber. I appreciate the time and effort that members, clerks and witnesses have put in.

The Convener: Thank you. I thank everyone involved for their efforts.

13:48

Meeting continued in private until 13:54.

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