25.1.2016

Supplementary Memorandum to Written Submissions By Trust Bar on the Succession (Scotland) Bill 2015: Comments on (i) Bonds of Caution in so far as relating to Confirmation to certain intestate "Small Estates"; and (ii) certain other matters related to survivorship, vesting *etc*. arising from the penultimate paragraph of the Minister's Letter of 14th January 2016.

0.1.1 We refer to the brief telephone conversation on the afternoon of 19th January 2016 between Euan Donald (Clerk to the DPLRC) and Nick Holroyd (Chairman of TrustBar) and the subsequent e-mail from Mr. Donald of the same date, which e-mail attached a copy of a letter from the Minister of Community Affairs (Paul Wheelhouse, MSP) to Gavin Don (as Convenor of the DPLRC) dated 14th January 2016 ("the Minister's Letter of 14th January 2016").

0.1.2 We also refer to TrustBar's Written Evidence to the DPLRC, TrustBar's oral evidence to the DPLRC, and TrustBar's various Supplementary Memoranda to the Scottish Government but copied to the DPLRC.

0.1.3 We also refer to TrustBar's written response to the Scottish Government's recent consultation document on succession.

0.1.4 The comments in the body of this Supplementary Memorandum are focused on the topic of Bonds of Caution in respect of intestate estates, denoted "small estates".

0.1.5 We also touch upon certain matters mentioned in the penultimate paragraph of the Minister's Letter of 14th January 2016: related to a cluster of issues, including survivorship, the *conditio si institutus*, the Succession (Scotland) Bill and the Succession (Scotland) Act 1964.

Caveats

0.2.1 Before turning to either of these matters, we enter certain caveats.

0.2.2 Certain of the provisions of the Bill, even as amended at Stage 2 are inconsistent with our suggestions. Our comments on bonds of caution and the penultimate paragraph of the Minister’s Letter of 14th January 2016 and lack of comment on other matters should not be considered indicate a departure by TrustBar from our previously expressed views.

0.2.3 We do not know the precise wording of the Stage 3 amendments.

0.2.4 We have not been asked to comment on the current circumstances in which an estate may be distributed without Confirmation.

Bonds of Caution

1.1.1 TrustBar has commented on Bonds of Caution on previous occasions.

1.1.2 Broadly speaking, bonds of caution are obtained when either there is no executor nominated under a will (*i.e.* an "executor-nominate") or the nominated executor does not wish to act.

1.1.3 The rationale for executors-nominate not requiring to obtain bonds of caution is that they have been selected by the testator or testatrix to administer his or her estate. In appointing them the testator or testatrix has in effect deemed them to be trustworthy and has taken on the risk to his estate and to his or her beneficiaries of their failure to distribute correctly.

1.1.4 On some occasions, the rationale may be imperfect. By way of a non-exhaustive example, a testator may have executed the Will when the executor was or was perceived to be of sound covenant, then the testator becomes incapable and then the named executor acts in a way connoting lack of suitability for the office. The Will may not have been changed to reflect the new circumstances.

1.1.5 Executors-dative, do not have the approval of the deceased and are self-appointed.

1.1.6 There is, at present, no very real opportunity to assess the executor-dative's suitability to ingather all of the assets (estate) of the deceased and to distribute them according to the legal entitlement of those entitled to inherit.

1.1.7 Broadly speaking, if the applicant for the position of executor-dative is one of a certain list of relatives or beneficiaries the court must appoint. Hence the requirement for the applicant to provide a bond of caution except where the applicant is a spouse who inherits the whole estate.

1.1.8 The perceived difficulty with bonds of caution is that their cost may be disproportionate to the value of the estate. Having said that it is can be as important to beneficiaries of a so-called “small estate” that there be correct distribution as it is to beneficiaries of larger estates. As estate of £36,000 is not immaterial to those standing to inherit.

1.1.9 Moreover, the costs of seeking redress in the courts for wrongful distribution of estates of a small size may make it impossible to obtain any real redress. Some of our members took the view that the limit for bonds of caution should therefore be £ 10,000, but others took the view that it should be £ 36,000 as is now suggested.

1.1.10 Rather than focus on such figures, we suggest that whatever size of estate is relieved of the need for a bond of caution as a prerequisite to Confirmation, there should be some procedure to provide basic assurance that the person to be entrusted with the estate is not unfit to act as an executor.

1.1.11 Accordingly, we make the proposal, sheriff should be empowered to refuse an application for appointment if it should appear that the proposed executor is not a fit and proper person to act as executor-dative of the estate.

1.1.12/

1.1.12 Sheriffs should be given statutory guidance on the factors to be taken into account in applying the fit and proper test in the context of an objection to the appointment of a proposed executor-dative. The list of factors should be non-exclusive and should relate to the applicant's financial probity and his ability to act in a fiduciary capacity in relation to the beneficiaries of the intestate estate. The factors should include (non-exclusively):

(i) whether the applicant has at any time been sequestrated and/or has entered into a trust deed for the benefit of creditors;

(ii) whether he or she has any unspent convictions for crimes or offences of dishonesty;

(iii) whether he or she has been disqualified from being involved in the management of a limited company or a limited liability partnership;

(iv) whether he or she has been the subject of a prohibition order under section 56 of the Financial Services and Markets Act 2000; and

(v) where there are any other circumstances indicating that the applicant is not be a fit and proper person to be appointed executor dative.

1.1.13 If a person is disqualified from acting as a fiduciary, such as a director, it seems appropriate that this should be taken into account in deciding whether or not he or she should be allowed to act as a fiduciary in administering an intestate estate. The "fit and proper person" test is one used in other administrative situations (*e.g.*, under the Financial Services and Markets Act 2000, and in licensing).

1.1.14 In addition to discretionary "fit and proper" rule, there should be a mandatory rule precluding a person being an executor-dative if he is an undischarged bankrupt or person with an unspent conviction for a crime or offence of dishonesty.

1.1.15 The applicant should be required to make a declaration to the sheriff clerk of his best knowledge and belief on the above criteria as a condition precedent to being appointed and confirmed as executor-dative.

1.1.16 While we take the view that with larger estates an application should be intimated to all beneficiaries to allow them to object to the applicant as not being fit and proper, we take the view that the cost of this may be disproportionately high for smaller estates, particularly those under £ 10,000. However the sheriff should have the power on his or her own initiative to refuse an application if it should appear, for whatever reason that the applicant may not be fit and proper.

The penultimate paragraph of the Minister's Letter of 14th January 2016: related to a cluster of issues, including survivorship, the *conditio si institutus*, the Succession (Scotland) Bill and the Succession (Scotland) Act 1964

2.1.1 We are concerned at any equation of "dying before the vesting" in section 6 with "predecease" or "survivance" in section 9. The two sections have quite different roles. That in section 6 is much broader in scope of time than that in section 9.

2.1.2 Where a testator specifies that the identification of legatees from a potential class is to take place some time after this death, and the vesting of those legacies takes place after the death (*e.g.*, if the legacy is a trust with a lifetime interest over an asset to a spouse and the ultimate inheritance of the capital asset being assessed on the occurrence of some uncertain event in the future) death of a potential legatee can take place after the death of the testator but before the moment of identification (*i.e.*, vesting). Hence the need for section 6 to cover failure of vesting after the death of the testator as well as before his death. Section 6 should not be restricted to failure of vesting through a potential legatee predeceasing the testator.

2.1.3 Section 9 which deals with survivance and conditions of survivance only, is much more limited in its scope.

2.1.4 We have no difficulty subject to what we have said with the wording in the Act being consistent with the Succession (Scotland) Act 1964 although we have not identified any difficulty in that regard. We note that the section 5(1) of the 1964 Act refers to, "a person who, if he had survived an intestate [deceased] . . . has predeceased the intestate [deceased]". Section 11 of the 1964 Act refers to "where a person [the deceased] dies predeceased by a child who has left issue who survive the deceased".

2.1.5 We cannot comment further on the drafting without seeing the actual words proposed other than to note that on any normal reading a person who "fails to survive" the a person predeceases that person. Equally a person who predeceased a person fails to survive him."

Conclusion

3.1.1 Whilst we are disappointed that many of TrustBar's suggestions have not found their way into the Bill, we have nonetheless greatly valued the opportunity of participating in the consultation process.

Nick Holroyd as Chairman of TrustBar. I acknowledge the substantial assistance of David Bartos, immediate past Chairman of TrustBar