

Citizen Participation and Public Petitions Committee  
Wednesday 1 May 2024  
7th Meeting, 2024 (Session 6)

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

### **Introduction**

**Petitioner** Maurice Frank

**Petition summary** Calling on the Scottish Parliament to urge the Scottish Government to introduce legislation to require that custody providers accept original wills from the outset, removing their power first to require an opinion on the validity of the will from a lawyer in the jurisdiction of origin.

**Webpage** <https://petitions.parliament.scot/petitions/PE2076>

1. This is a new petition that was lodged on 20 December 2023.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition collects signatures while it remains under consideration. At the time of writing, 6 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered.
6. The Committee has a received submission from the Scottish Government, which is set out in **Annexe C** of this paper.

### **Action**

7. The Committee is invited to consider what action it wishes to take.

**Clerks to the Committee**  
April 2024

## **Annexe A: Summary of petition**

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

### **Petitioner**

Maurice Frank

### **Date Lodged**

20 December 2023

### **Petition summary**

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

### **Previous action**

I have raised this with Foyso Choudhury MSP. Then to the reply he obtained, I wrote directly a follow-up to Scottish ministers, addressed to the Minister for Victims and Community Safety, trying to pin down this issue. Both answers were just descriptions of the status quo. Earlier, I had asked the Edinburgh Sheriff Court Commissary Section to fairly specify what costs would result if a will gets lost because of the requirement to post it around.

### **Background information**

All institutions of law are reformable by legislation. The Registers of Scotland hence has no sovereign supra-parliamentary immunity from legislation forcing to operate sensibly. Nothing makes that its own domain, it is properly a role of government to deprive it of power of unjust decision on how to treat the public.

It needs depriving of the power of decision not to accept a will made outside Scotland until given an opinion that the will is valid, by a lawyer practising in the jurisdiction where the will was made. For, to obtain this requires mailing the original will to them, creating risk of the will being lost in the post. This before it can be received exactly into safe custody against loss and extract copies being providable, is kafkaesque unsafe, absurd and unjust. Loss results in a more expensive and slower process of intestacy.

Even insured tracked delivery only exists for mailing within the UK. So, if the will comes from further abroad, an applicant is trapped to completely risk it untracked into the international mail system, easily losable and at the mercy of adequacy of practice abroad to return it uncorruptly.

## Annexe B: SPICe briefing on PE2076



### **An overview of issues raised by the petition**

This petition seems to relate to the petitioner's attempts to register a will, which was made outside Scotland, in Scotland.

### **Registering a will in Scotland: an overview**

At present, prior to a person's death, there is no requirement in Scotland to register a will with a public body.

However, a person might choose to register their will for safekeeping in the [Register of Deeds](#) (RoD), a register which has the full title 'The Register of Deeds and Probative Writs in the Books of Council and Session'.

The Register of Deeds is kept and maintained by the public body, [Registers of Scotland](#), as one of 21 registers it manages. The RoD is a register of original documents, and wills are a common form of document registered in it. The RoD is publicly searchable for a fee and both copy deeds or 'extracts' (that is, official copies, which can be relied on in court) [can be ordered for a fee](#).

After someone has died, the 'executor', the person responsible for managing a person's estate, is usually required to obtain 'confirmation' from the court. Confirmation gives the executor the legal authority to gather in, manage and distribute the deceased person's estate.

When making an application for confirmation, the will (or an extract of it) is lodged with the court. After confirmation is granted, a copy of the will can be obtained for a fee from the court.

Separately, the executor might also choose to register the will in the RoD. Again, via this route, a copy or extract of the will could be ordered for a fee.

### **The RoD and wills made outside Scotland**

It is competent to register a will made under another legal system in the RoD. This typically happens when a person is resident in Scotland when they die, however, they drafted the will when they previously resided in another country or part of the UK (such as England or Wales).

The [Requirements of Writing \(Scotland\) Act 1995](#) ('the 1995 Act') makes specific provision on the requirements for this. Section 6(3)(c)(iii) says that a document whose formal validity is governed by a law other than Scots law can be registered in

the RoD if the Keeper is satisfied that the document is formally valid according to the law governing such validity.

The long-standing approach of [Registers of Scotland](#) to this provision is to insist that any application to register a will made outside of Scotland is accompanied by evidence from someone qualified to practice in that jurisdiction that the will is valid.

Given that the documents are submitted physically, this evidence typically takes the form of a letter from a solicitor qualified to practice in the relevant jurisdiction.<sup>1</sup>

### **Routes to registration in the RoD**

At present, there are two routes to registration in the RoD. Both routes permit only registration of original documents, not copies. That is because the RoD is primarily about preservation of original documents and permitting registration of copies is considered inconsistent with that principle.

In most circumstances, two types of original document may be submitted to the RoD: paper documents, and documents satisfying the statutory definition of ‘electronic documents.’ The latter are signed by way of a special type of secure signature known as a ‘qualified electronic signature’.

However, the law on electronic documents (contained in Part 3 of the 1995 Act) has not been brought into force for ‘testamentary documents’<sup>2</sup>, a class of documents that only take effect on death, such as wills. Consequently, RoS currently only receives wills for registration as paper documents.

Registers of Scotland has commented to SPICe as follows:

“The vast majority of deeds we receive to the Register of Deeds come via the postal system, but if a customer insisted on making an in-person delivery to our Edinburgh office, we could accommodate that via an appointment.”<sup>3</sup>

### **Registers of Scotland: complaints process**

Registers of Scotland has a two-stage complaints process, with the details of the process set out on its website:

<https://www.ros.gov.uk/support/contact-us/making-a-complaint>

**Sarah Harvie-Clark**  
**Senior Researcher**  
**24/1/24**

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<sup>1</sup> Email from Registers of Scotland to SPICe, dated 23 January 2024.

<sup>2</sup> See the schedule to The Land Registration etc. (Scotland) Act 2012 (Commencement No. 2 and Transitional Provisions) Order 2014 for the relevant exclusions.

<sup>3</sup> Email from Registers of Scotland to SPICe, dated 23 January 2024.

## Annexe C: Written submission

### Scottish Government submission of 22 January 2024

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

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

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

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

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

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

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

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

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

This provision is consistent with the principle that as the Register of Deeds is a Scottish public register, members of the public in Scotland (who are not familiar with

the laws governing documents in other jurisdictions) should be able to view the register with confidence that the documents registered therein are formally valid. It is also analogous to (and, in fact, less onerous than) the process for legalisation/apostille used in the UK to enable UK documents to be used in other jurisdictions. In this process, original documents are sent to the Foreign and Commonwealth Office to be legalised by the attachment of an apostille.

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

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

**Civil Law and Legal System Division**