

# Citizen Participation and Public Petitions Committee

8th Meeting, 2021 (Session 6), 1 December  
2021

## PE1904: Change Scots law to disqualify estranged spouses from making claims on an estate

### Note by the Clerk

**Petitioner** Christina Fisher

**Petition  
summary** Calling on the Scottish Parliament to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple, for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets.

**Full petition** <https://petitions.parliament.scot/petitions/PE1904>

### Introduction

1. This is a new petition that has been under consideration since 21 October 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 32 signatures have been received.
4. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. This response is included at **Annexe B** of this paper.

## Petitioner submission

5. The petitioner notes that if a married non-cohabiting couple have chosen to live apart (other than to receive care), that an estranged spouse can 'still demand the bulk of their spouse's estate when they die'.
6. The petitioner believes that when a couple choose to live apart 'they should forfeit their claims to each other's estates' and that, in doing so, this would 'enable other family members to manage their loved one's affairs without the possible malice of an estranged spouse' noting that 'currently the natural family of the spouse that dies is effectively disinherited' and suggesting that Scots law should be modernised to reflect that many people have second marriages or common law spouses.

## Current legal situation

7. The SPICe briefing accompanying this petition notes that inheritance law (also known as 'succession law') treats divorce or dissolution of a civil partnership, rather than the point a couple separates, as the key date that associated rights to inherit from a spouse or partner's estate stop applying.
8. It notes that section 1 of the Succession (Scotland) Act 2016 sets out that, where a person has made a will, when that person gets divorced or their civil partnership is dissolved, any provision in a will benefitting their former spouse or civil partner ceases to apply.
9. However, there is no equivalent statutory provision to section 1 covering the situation where the person is estranged from their spouse or civil partner, but there has been no divorce or dissolution of the civil partnership. There is also no provision covering where a person has made a will benefitting their cohabitant, but the cohabiting relationship later breaks down.
10. If a person makes a will in which they try to disinherit (leave nothing) to a spouse or civil partner, the law says that a spouse or civil partner will still inherit a share of the deceased's estate (other than land or buildings). This still applies if the person is estranged from their spouse or civil partner. There is no equivalent protection from disinheritance, though, for cohabitants (i.e. where they are not married or in a civil partnership).
11. Where someone does not make a will, the Succession (Scotland) Act 1964 gives the spouse or civil partner certain rights to the estate. These rules apply regardless of whether the person is estranged from their spouse or civil partner at the time of death.
12. Cohabitants do not have an automatic right to inherit a share of the estate. However, section 29 of the Family Law (Scotland) Act 2006 means that the court has discretion to award a cohabitant such a share, when an application is made to it by that cohabitant.

13. The SPICe briefing notes that a formal separation agreement (also known as a 'minute of agreement') is a legally binding document that sets out what a separating couple has agreed, including in relation to their finances and property.
14. These agreements can be used at the end of a cohabiting relationship or can cover the period from the date of separation until divorce or dissolution of a civil partnership. If an agreement is registered, it is legally binding and can be enforced in the same way as a court order.
15. SPICe understands that such agreements can contain provisions relating to the couple's rights to inherit from each other until a divorce or dissolution of a civil partnership is finalised, however, it is unclear how common and how effective such provisions are in practice.
16. Further information on this topic can be found in [SPICe's broader briefing on Inheritance Law](#).

## Scottish Government submission

17. In its written submission, the Scottish Government states that it has carried out consultation in recent years to keep the law of succession under review, including its [most recent consultation](#), analysis of which was published in May 2020.
18. The Scottish Government sets out that 'where parties have chosen to separate but not pursue a divorce, then legally they are still married' noting that 'it is marital status which informs how an estate is distributed' and that 'parties have the option to enter into a settlement agreement prior to any grant of divorce, which may deal with any rights of succession.'
19. Further, the submission notes that 'as prior rights [to an estate] can only be claimed from intestate estate, another way to prevent a claim of prior rights in these circumstances is for an estranged spouse or civil partner to prepare a valid will.'
20. The Scottish Government notes that 'the law was changed in 2016 so that any provision in a will in favour of an ex-spouse/civil partner is revoked on divorce' stating that this was 'on the assumption that that a testator would not want an ex-spouse or ex-civil partner to inherit' and noting that 'previously divorce had no effect on a will in Scotland.'
21. The Scottish Government concludes its submission by stating that 'while the law of succession affects everyone it can also divide opinion' and that 'there must be some degree of consensus on what reforms will deliver outcomes that are appropriate for the majority of people in Scotland' before stating that it intends to carry out more research on the law on intestate succession' and that it will 'continue to keep the law of succession under review in light of these findings'.

## Action

The Committee is invited to consider which action it wishes to take.

**Clerk to the Committee**

# PE1904: Change Scots law to disqualify estranged spouses from making claims on an estate

## Petitioner

Christina Fisher

## Date Lodged

21/10/21

## Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple, for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets.

## Previous action

I have contacted my local MSP, the First Minister Nicola Sturgeon, and the Cabinet Secretary for Justice, Keith Brown, but feel that I've been fobbed off with politeness.

## Background information

Currently, even if a married non-cohabiting couple have chosen to live apart, other than to receive care, an estranged spouse can still demand the bulk of their spouse's estate when they die.

I believe that, when a couple choose to live apart, they should forfeit their claims to each other's estates. This would enable other family members to manage their loved one's affairs without the possible malice of an estranged spouse.

Organisations like the Scottish Public Pensions Agency can acknowledge such a marriage separation without seeking a legal document, other than proof of address.

I believe that Scots law should be modernised, to reflect that many have second marriages or common law spouses.

Currently, the natural family of the spouse that dies is effectively disinherited, receiving only a portion of one quarter of the remaining estate after the prior rights claim is settled while the estranged spouse receives the bulk of the estate.

**SPICe**

**The Information Centre**  
An t-Ionad Fiosrachaidh

## Briefing for the Citizen Participation and Public Petitions Committee on petition [PE1904](#): Change Scots law to disqualify estranged spouses from making claims on an estate, lodged by Christina Fisher

### Brief overview of issues raised by the petition

Inheritance law (also known as ‘succession law’) treats divorce or dissolution of a civil partnership, rather than the point the couple separate, as the key date that associated rights to inherit from a spouse or partner’s estate stop applying. The position is outlined in more detail below.

### Where a person has made a will

Where a person has made a will, section 1 of the [Succession \(Scotland\) Act 2016](#) sets out the general rule that, when that person gets divorced, or their civil partnership is dissolved, any provision in a will benefiting their former spouse or civil partner ceases to apply.

There is no equivalent statutory provision to section 1 covering the situation where the person is estranged from their spouse or civil partner but there has been no divorce or dissolution of the civil partnership.

There is also no equivalent statutory provision covering the situation where a person has made a will benefiting their cohabitant, but the cohabiting relationship later breaks down.

If a person makes a will which purports to disinherit (leave nothing to) a spouse or civil partner, the law says that, spouse or civil partner will still inherit a share of the deceased's estate (other than land or buildings). This rule against disinheritance still applies if the person is estranged from their spouse or civil partner. There is no equivalent protection from disinheritance for cohabitants.

## Where a person does not make a will

If a person does not make a will, the [Succession \(Scotland\) Act 1964](#) applies to give the spouse or civil partner certain rights to the estate. These rules apply regardless of whether the person is estranged from their spouse or civil partner at the time of death.

Cohabitants do not have an automatic right to inherit a share of the estate. However, under section 29 of the [Family Law \(Scotland\) Act 2006](#), the court has discretion to award a cohabitant such a share, when an application is made to it by that cohabitant. Section 25 of the 2006 Act defines cohabitant for this purpose. In deciding whether someone is a cohabitant, section 25 requires the court to consider factors including:

- the length of the period during which the couple have been living together (or lived together);
- the nature of their relationship during that period; and
- the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

## Separation agreements

A formal separation agreement (also known as a 'minute of agreement') is a legally binding document that sets out what a separating couple has agreed, including in relation to their finances and property.

Separation agreements can be used at the end of a cohabiting relationship or they can cover the period from the date of separation until divorce or dissolution of a civil partnership. If an agreement is registered, it is legally binding and can be enforced in the same way as a court order.

SPICe understands such agreements can contain provisions relating to the couple's rights to inherit from each other until a divorce or dissolution of a civil partnership is finalised. For example, a couple might agree to waive any rights they have in relation to each other during that period. The Committee may wish to explore with the [Law Society of Scotland](#) or the [Family Law Association](#) how common and how effective such provisions are in practice.

## Scottish Government consultations

[Scottish Government efforts to reform inheritance law have a long history](#), including government consultations in 2015 and 2019. On several important policy issues, there has been an absence of consensus, making it difficult for the Scottish Government to proceed with more fundamental, wide-ranging reforms.

In 2020, [the Government did highlight a variety of discrete proposals](#) which it thought could progress, with the Government aiming for some legislation at "the next available ...opportunity." There are no relevant commitments in this year's Programme for Government. None of these proposals address the issue raised by the petitioner.

**Sarah Harvie-Clark**

**Senior Researcher**

21/10/2021

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@parliament.scot](mailto:spice@parliament.scot)

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP



# Scottish Government submission of 27 October 2021

## PE1904/A - Change Scots law to disqualify estranged spouses from making claims on an estate

The Scottish Government has carried out consultation in recent years to keep the law of succession under review. In situations where a spouse or civil partner dies intestate, then the surviving spouse or civil partner has prior rights to the estate, which can include property and furnishings up to a certain value. In addition the surviving spouse or civil partner has rights to the moveable estate, and the amount depends on whether the deceased person left children or descendants such as grandchildren. If there are children or descendants then the surviving spouse or civil partner is entitled to the first £50,000 out of the estate. The entitlement is to the first £89,000 where there are no children or descendants.

Where parties have chosen to separate but not to pursue a divorce then legally they are still married. Accordingly the surviving spouse has rights to the estate. It is marital status which informs how an estate is distributed. Parties have the option to enter into a settlement agreement prior to any grant of divorce, which may deal with any rights of succession. As prior rights can only be claimed from intestate estate, another way to prevent a claim of prior rights in these circumstances is for an estranged spouse or civil partner to prepare a valid will.

In line with recommendations made by the Scottish Law Commission, the law was changed in 2016 so that any provision in a will in favour of an ex-spouse/civil partner is revoked on divorce - this is on the assumption that a testator would not want an ex-spouse or ex-civil partner to inherit. Previously divorce had no effect on a will in Scotland.

The Scottish Government's most recent consultation paper in 2019 focussed on intestacy and the response to the consultation was published in May 2020. It can be accessed at

<https://www.gov.scot/publications/scottish-government-response-consultation-law-succession>.

One of the areas where views were sought was on extending an alternative approach to cohabitants, to test whether views on the rights of cohabitants' rights on intestacy have shifted. The term cohabitants in this situation refers to couples who live together as though they were married or in a civil partnership but have not formalised their relationship in this way.

In considering whether to base rights on whether a couple are or are not living together, account needs to be taken for example, of those couples where one may live for many years in a care setting away from their home or where one works abroad and therefore lives predominantly abroad, but there is nevertheless a strong and enduring relationship.

While the law of succession affects everyone it can also divide opinion. It is because it affects everyone that there must be some degree of consensus on what reforms will deliver outcomes that are appropriate for the majority of people in Scotland, and in line with their expectations. The Scottish Government intends to carry out more research on the law on intestate succession and will continue to keep the law of succession under review in the light of these findings.