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# Inheritance law in Scotland

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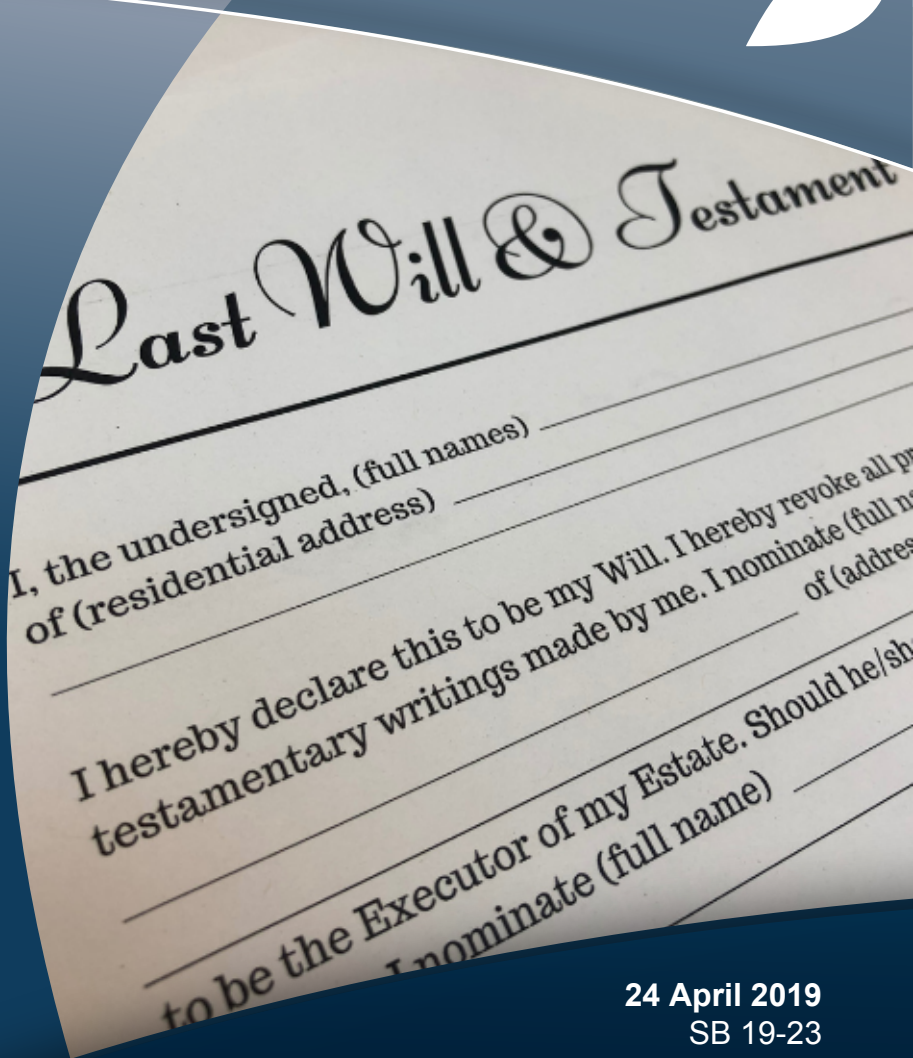
Inheritance law provides the rules about what happens to a person's property and possessions when they die. The briefing looks at both at the current law in this area and the recent attempts by the Scottish Government to reform it.

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# Executive Summary

Inheritance law (also known as **succession law** or **the law of succession**) says who should inherit when somebody dies. The law sets out the rules for when a person has died leaving a will and when he or she has died without doing so.

**Where no will has been made**

There is a detailed statutory scheme for the second situation (no will). This favours spouses (and civil partners) and provides some protection for the children of the deceased.

However, the main piece of legislation - the Succession (Scotland) Act 1964 - is now over fifty years old. It has been amended several times, for example, to give equivalent rights to civil partners as exist for spouses. It has also been supplemented - section 29 of the Family Law (Scotland) Act 2006 now provides some (much more limited) protection for cohabitants. However, there is a strong feeling that, overall, the law does not match with the variety of family structures which exist in Scotland today.

The Scottish Government is currently consulting on reform. [1] However, attempts to reform the law in this area have a long history, including a significant consultation in 2015, [2] where several key proposals were ultimately not implemented.

**Where a will has been made - protection from disinheritance**

Where a will has been made, it might aim to leave nothing to a spouse, civil partner or child. However, it is actually **not** possible in Scotland to disinherit (leave nothing to) these relatives. Instead, the concept of **legal rights** applies, to give these relatives a fixed share of the deceased's property. Land and buildings are excluded though, so the deceased's home (or share of a home) is outside the scope of legal rights.

In the last session of the Scottish Parliament, the Scottish Government consulted on reforming this area of law (via the 2015 consultation). In particular, the Government was wrestling with the issue of whether it should ever be possible to disinherit adult children.

One proposal was to include land and buildings, as many people's main asset, within the scope of the replacement for legal rights. This would have further restricted freedom to disinherit adult children. This proposal met with particular opposition from parts of the farming community. They were concerned about the impact on inheritance of the family farm (often left to the firstborn son).

Towards the end of last year, a low-key announcement from the Scottish Government confirmed what had long been suspected - that the Government's original plans to legislate to replace legal rights have been dropped. [3]

**The 2019 consultation**

On the other hand, where a will has not been made, the Government's current consultation revisits some thornier policy issues on which consensus could not be found last time round.

The Scottish Government is still trying to decide in what circumstances a cohabitant should be able to inherit from the deceased. (At present, they have no automatic right to inherit). The Government is also considering how to divide up an estate in so-called 'blended families'. In particular, where there are children from a previous relationship but also a current spouse, civil partner or cohabitant.

The consultation draws on ideas from countries around the world and shows a willingness to think about difficult issues afresh. However, as noted above, history tells us that the challenges that lie ahead for the Scottish Government remain considerable.

# What this briefing does

This briefing is divided into two parts:

- the first part covers the current law
- the second part explains efforts to reform inheritance law over the last two parliamentary sessions, including a summary of the latest consultation paper

The briefing will help MSPs with their constituency casework relating to inheritance issues. It will also be useful to those with a general interest in inheritance law as a policy area.

SPICe can only provide general information relating to the law of Scotland. For legal advice on the circumstances of his or her individual case, a constituent should consult a solicitor.

# Practical matters

## Making a will

There are other online sources which deal with the process of making a will - for example, the webpage of Citizens Advice Scotland entitled Wills.

A key point is that if a person wants to make a will, they should consult a solicitor. Otherwise, as the Citizens Advice webpage explains:

> " it is easy to make mistakes and if there are errors in the will this can cause complex problems after your death. Sorting out misunderstandings and disputes may result in considerable legal costs which will reduce the amount of money in the estate."

The Law Society of Scotland's website enables a person to search for a solicitor by geographical area and/or legal specialism. (For the specialism, select 'wills, executries and trusts'.)

Note that **September** is Will Relief Scotland month. Will Relief is a scheme which enables people to have a will drawn up by a solicitor in exchange for a donation to charity. Suggested minimum donations are **£80 for a single basic will** and **£120 for a pair of basic 'mirror' wills** for a couple. See further: https://willreliefscotland.org/

Will-writing services are also available in books and on the internet. However, these services are not regulated so there are few safeguards if things go wrong. Sections 101-107 of the Legal Services (Scotland) Act 2010 would have regulated the industry but the relevant part of the Act was never brought into force.

## Funeral arrangements and registering a death

Note that there are other publications that deal in-depth with practical issues associated with death, such as funeral arrangements; registering a death; gathering in a person's estate and distributing it to beneficiaries. For example, see the very useful What to do after a Death in Scotland [4] published by the Scottish Government.

# The current law and practice

## Overview and key terminology

### The basics

In the context of the current law, it is helpful to be familiar with some of the key terminology which is used by legal practitioners.

The deceased's property and possessions are called the **estate**. The people or organisations that will benefit from the estate when it is distributed are called the **beneficiaries**.

Where a person makes a will he or she is sometimes referred to as the **testator**.

The **executor** is the person who:

- gathers in the estate;
- pays any debts and taxes due; and
- distributes the remainder of the estate to the beneficiaries

There is nothing which stops an executor also being a beneficiary. In fact, in practice, it is very common for this to happen.

A person may name somebody in his or her will that he or she wishes to be the executor (**an executor nominate**). On the other hand, an executive can be appointed by the court (**an executor dative**). Such a person may be appointed in a variety of circumstances, including where there is no will - or there is a will but no executor was named in it.

The law provides a set order of people entitled to apply to be appointed executor dative. It is usually the deceased's spouse or civil partner who will be appointed by the court. In fact, he or she is the only one entitled to be appointed if he or she will inherit the whole estate under what is called **prior rights** (Succession (Scotland) Act 1964, section 9(4)). (See later in the briefing on prior rights).

Where there is no spouse or civil partner, another person entitled to inherit the estate will usually be appointed by the court. Potential competition for the role of an executor (dative) is legally complex and the advice of a solicitor is recommended.

### The authority to deal with the estate

Executors usually get their authority to carry out their role from a legal document known as the **confirmation**. This can be obtained from the local sheriff court.

Confirmation may not be needed where bodies holding money belonging to the estate, such as banks, are prepared to release funds without it.

**There is a streamlined procedure for obtaining confirmation to small estates.**

These have a total value of **less than £36,000**. (In calculating the total value you should **not** deduct any debts due by the deceased, such as the mortgage on a house).

Small estates procedure can be used without legal advice, although the executor is still liable for any mistakes. It may be helpful to talk to a citizens advice bureaux or solicitor on specific points.

Related to this, small estates procedure is only regarded as suitable for the least complicated estates. Examples of estates where the procedure is not suitable are:

- where there is competition for the office of executor
- where there is a legal challenge to the validity of the will
- where the deceased died while permanently living somewhere other than Scotland
- where the deceased had no fixed permanent address [5]

See also the Scottish Court and Tribunal Service's guidance on small estates. [6]

## Leaving someone out of a will

When a will aims to prevent a particular person from inheriting, the will aims to **disinherit** that person.

In Scotland, it is **not** possible for a person to use a will to entirely disinherit their spouse, civil partner or children, including their grown up children. This is due to the (slightly oddly named) concept of **legal rights**.

## Where there is no will

If a person dies without leaving a valid will, then, on his or her death, that person is described as **intestate**, as is his or her estate.

The law provides rules to fall back on which say who should inherit if somebody dies intestate. These rules favour the deceased's spouse or civil partner and also provide some protection for the deceased's children in some circumstances. **Legal rights**, again, form part of the protection for these categories of relatives.

## Different types of property

Inheritance law makes a distinction for various purposes between how it treats heritable property and moveable property.

**Heritable property**, is land and buildings, such as the family home. **Moveable property** is everything else. Common examples of moveable property in practice include money, cars, furniture, jewellery and shares in a company.

This technical-sounding distinction between heritable and moveable property - or rather its proposed abolition for inheritance law purposes - was at the centre of the controversy associated with some of the Scottish Government's 2015 proposals for reform.

# How common is it for people to make wills in Scotland?

The most recent research on whether people make wills or not in Scotland is actually not very recent at all. It was by the former Scottish Consumer Council in 2006. Nevertheless, it does give a flavour of how people approach this issue. [7]

Of those surveyed for that study, **only 37% had made a will**.

Older people were more likely to make a will – 69% of those aged 65 or over participating in the study had done so. Furthermore, the higher the socio-economic group the study participants belonged to, the more likely they were to have made a will.

However, overall, the research suggested that the number of people who die without making a will is likely to be substantial. [7]

In 2015, the Scottish Government's consultation document offered some thoughts on why this might be:

> " they may find it hard to deal with the prospect of death and to make plans to deal with their affairs; they may have put it off as something which they will do much later in life and have never got round to it; they may be satisfied that the law as it stands in relation to intestacy will fulfil their wishes; or they may think that it's not necessary because everything will go to their spouse or partner and/or children."
>
> Scottish Government, 2015[8]

Against this background, the fallback rules which apply when someone dies without leaving a will are important.

# Where someone dies without leaving a will

## The Succession (Scotland) Act 1964 and the Family Law (Scotland) Act 2006

The Succession (Scotland) Act 1964 ('the 1964 Act') contains the main rules setting out how the intestate estate should be divided up between the beneficiaries.

Section 29 of the Family Law (Scotland) Act 2006 ('the 2006 Act') has specific rules relating to **cohabitants** of people who have died intestate.

The law developed by the decisions of judges in individual cases is also important in this context.

## The stages of distributing an intestate person's estate

There are various stages an executor must go through when distributing an intestate person's estate. They must be carried out in a set order.

In the first place, the executor has to pay debts and meet certain liabilities from the deceased's estate. Certain beneficiaries then have rights to claim from an intestate person's estate:

1. **Prior rights** in favour of the deceased's spouse or civil partner must be satisfied first.
2. Next is the **legal rights** of any spouse or civil partner.
3. The **legal rights** of any children of the deceased are the next priority under the current rules. Adult children can claim legal rights.
4. Finally, the remaining estate (the **free estate**), must be distributed according to a list of potential beneficiaries contained in the 1964 Act.

Any **cohabitant** of the deceased can also apply to the court and the court has **discretion** to make a financial award to this person (2006 Act, section 29).

This briefing will now explore these different categories in more detail.

## Prior rights

Prior rights are a first claim on the estate in favour of the deceased person's spouse or civil partner, if he or she had one.

The rights are to a share of the deceased's house, furniture and money (1964 Act, sections 8 and 9). These shares are subject to maximum financial limits, revised from time to time by secondary legislation.

At present, the deceased's spouse or civil partner has a right to the following:

- the deceased's share of **a house** up to the value of £473,000
- the deceased's share of **the furniture and furnishings** associated with the house up to a value of £29,000
- **money** up to £50,000 (if there are surviving **issue** of the deceased) or £89,000 (if there are no surviving **issue**)

In relation to the last bullet point, **issue** is the legal term for the children and remoter descendants of the deceased, such as grandchildren and great-grandchildren.

Also note that, in relation to the last bullet point, the sum of money can be generated using both heritable and moveable property in the estate.

The prior rights of the spouse or civil partner have the potential to use up the deceased's estate. (Indeed, this is common in practice.)

This means that it may not be possible for any cohabitant, children or remoter descendants of the deceased to make a claim on the estate.

## The legal rights of the surviving spouse or civil partner

The legal rights of the spouse or civil partner are to a share of the deceased's **moveable property**.

Heritable property, such as the family home or the family farm, is excluded.

A surviving spouse or civil partner is entitled to:

- **one third** of the remaining moveable estate, if the deceased left surviving children or remoter descendants
- **one half** of the remaining moveable estate, if the deceased person did not leave surviving children or remoter descendants

## The legal rights of the surviving children

The surviving children are entitled to:

- **one third** of the remaining moveable estate split between them, if the deceased left a spouse or civil partner
- **one half** of the remaining moveable estate split between them, if the deceased did not leave a spouse or civil partner

Legal rights do not make a distinction relating to age or gender. For instance, brothers do not rank before sisters; elder sisters do not rank before younger ones. As already mentioned, adult children can claim legal rights, as well as children under 16.

In practice, it is usually the surviving children of the deceased who inherit. However, legal rights actually belong to the **issue**, which, as discussed earlier, includes remoter descendants of the deceased. This means grandchildren of the deceased, for example, can inherit in the place of their parent who has already died (1964 Act, section 11).

# The free estate

### What is the free estate?

Under the 1964 Act, the free estate is the estate remaining after the prior rights and legal rights are satisfied.

> Where there is no spouse or civil partner, children, grandchildren or remoter descendants of the deceased the free estate is the whole of the deceased's estate.

### Categories of relatives who can potentially inherit

For the free estate the categories of relatives of the deceased who can potentially inherit are, in order of priority, as follows: (1964 Act, section 213):

1. Children
2. Parents *and* brothers or sisters. If someone survives from both classes each class takes half the free estate
3. Brothers and sisters (if no parents are alive)
4. Parents (if no brothers and sisters are alive)
5. Spouse or civil partner
6. Uncles and aunts (on either parent's side)
7. Grandparents (on either parent's side)
8. Brothers and sisters of the grandparents (on either parent's side)
9. Ancestors of the deceased person more distant than grandparents (on either parent's side)
10. The Crown

Once there is a relative on a particular level of the list that is the point where it is known who can inherit the free estate. There is no requirement to explore the possible existence of relatives lower down the list.

> As the list shows, where the deceased is survived by a spouse or civil partner and children, the children will inherit the free estate.

Categories 2 and 3 can include half siblings. However, if there are whole siblings of the deceased, the whole siblings will inherit in preference to half-siblings (1964 Act, section 2(2) and (3)).

Sometimes, someone who would have fallen into a category on the above list might have died before the deceased. Unless the person dying before the deceased was a parent,

spouse or civil partner, then that person's children (or remoter descendants) can inherit in their place (1964 Act, section 5(1)).

In relation to category 10, if the executor cannot trace any of the deceased's relatives, the estate may pass to the Crown as the ultimate heir. The person in Scotland who acts for the Crown in this capacity is the Queen's and Lord Treasurer's Remembrancer (QLTR). See: http://www.qltr.gov.uk/

Since Scottish devolution, the money raised by the QLTR from ownerless property has gone to the Scottish Government (rather than the UK Treasury, as was previously the case).

## The cohabitant's claim

Any cohabitant of the deceased currently has **six months** to apply to the court to ask it to exercise its discretion and give them a share of the deceased's estate (2006 Act, section 29).

The law in question has been criticised for not providing clear guidance on what factors are relevant for making a claim. [9]

### Where there is both a cohabitant and a spouse and civil partner

Sometimes there is both a cohabitant and a spouse or civil partner for inheritance law purposes. This happens if the deceased was separated from the spouse or civil partner, but legally the marriage or civil partnership had not ended.

> Any award in favour of a cohabitant comes out of the estate which remains **after** the prior rights and legal rights in favour of a spouse or civil partner are met (2006 Act, section 29(10)).

However, this issue is sometimes dealt with in advance in a **separation agreement**. This sets out the arrangements for the couple for the period after separation but **before** divorce or dissolution of the civil partnership. Here the deceased and his or her spouse or civil partner can agree to give up their inheritance rights at the time of separation. [10]

### The cohabitant's claim compared to the rights of children and other relatives

Section 29(10) of the 2006 Act suggests that the cohabitant's award can be taken out of the estate **before** 1) the legal rights of the children; and 2) relatives' rights relating to the free estate; have been satisfied.

On the other hand, other parts of section 29 say that the court should take into account other potential claims against the deceased's estate in exercising its discretion (section 29(2)(a) and (3)(c)). Arguably, overall, section 29 does not provide clear guidance on how the cohabitant's claim should rank, compared to the claims of children and other relatives. Legal advice is recommended in individual cases.

The wording of section 29 has particular implications for 'blended families', where the deceased has both children from an earlier relationship and a cohabitant.

## Where somebody dies and leaves a will

As already mentioned, the person who makes a will is sometimes referred to as a **testator**.

### Requirements for a valid will

The legal requirements for a valid will are found in the Age of Legal Capacity (Scotland) Act 1991 ('the 1991 Act'); the Requirements of Writing (Scotland) Act 1995 ('the 1995 Act') and in the law set out in the decisions of judges in individual cases (case law).

*Capacity*

In order for a will to be valid, it must be made by a person with **legal capacity** to do so. This has several elements to it. First of all, it must be made by a person who is twelve years old or over (1991 Act, section 2(2)). (In practice though, very few young people make a will.)

Second, it must be made by a person of sound mind. This means the person must be fully aware of the nature of the document being written or signed, the property involved and the identify of the people who may inherit.

*Writing and signature*

A valid will must be in writing (1995 Act, section 1(2)(c)). It must also be signed by the person making the will at the bottom of the last page (1995 Act, section 2(1)).

In addition, as standard practice, a solicitor will aim to have his or her client make a **probative** or **self proving** will. Such a will is presumed as a matter of law to be validly executed. In the event of a subsequent legal dispute, this can be very helpful to a person relying on the will. (On the other hand, if a will is valid but not probative, then, in the event of a dispute, its validity must be proved in court).

To create a probative will, three additional requirements must be satisfied:

- **the testator's signature:** the will appears to have been signed at the bottom of *every separate sheet of paper* by the testator (1995 Act, section 3(1)(a) and 3(2)). (In practice, it is usually signed on *both* sides of each sheet of paper, although this is not a legal requirement.)
- **the witness:** it appears to have been signed by someone who witnessed the testator's signature at the bottom of the page. The name and address of that witness must be given in the will (1995 Act, section 3(1)(b)). (There is no requirement that the witness's signature appears at the bottom of the relevant page but in practice it usually does.)

- **the rest of the document:** there must be nothing else in the document showing it was not actually signed by the testator or validly witnessed (1995 Act, section 3(1)(c))

### Other possible grounds for challenge

The law recognises two further potential grounds of challenge to wills.

First, a will can be challenged if it was not made voluntarily, i.e. where there been **undue influence** from another person.

Second, it can be challenged if affected by **facility and circumvention**. This is where a person has suffered some degree of mental deterioration, such as can sometimes happen in old age or illness. It is not sufficiently severe to prevent them from having capacity to write a will but it leaves them easily imposed on by others. Indeed, in specific cases, it can exist alongside a person exercising undue influence on a vulnerable person.

Legal advice is recommended in individual cases.

### Common aspects of wills

A key feature of a will is that it identifies all the people or organisations the testator wishes to benefit from his or her will and what he or she wishes them to receive. The parts of a will which achieve this are referred to as **legacies or bequests**.

Other common (but not essential) features of a will include:

- who the testator wants to be his or her executor or executors
- who the testator wants to look after any of his or her children who are under 16
- the testator's funeral instructions
- whether the testator wants to donate all or part of his or her body to medical research or for transplant purposes

### Cancelling or changing a will

A testator may wish to cancel (**revoke**) an existing will. The normal method of doing this is to physically destroy it.

A will prepared by a solicitor will almost invariably have a section in it saying that any previous will is revoked. This cancels an earlier will, even if it is not destroyed.

When a current will is revoked (but no new will made it its place) it used to be that any earlier will could take effect again (**revive**). However, section 5 of the Succession (Scotland) Act 2016 says revocation of a will does not revive an earlier will.

Section 1 of the 2016 Act also says that a **divorce or dissolution of a civil partnership** means that part of a will benefiting the testator's former spouse or civil partner will not take

effect. (Section 1 also says that the testator can say in his or her will that he or she does not wish this general rule to apply.)

A will can also be amended by the use of a **codicil**, that is to say a later document referring to the earlier will but varying its provisions. Because of potential difficulties in practice of working out the combined effect of these two documents, solicitors usually recommend destroying the old will and making a new one instead.

## Protection from disinheritance

A key point to note is that, even if a person makes a will, there is not complete freedom in Scotland to leave his or her estate to whomsoever he or she chooses.

In particular, as mentioned earlier, spouses, civil partners and children (including adult children) are protected from complete disinheritance by the concept of legal rights.

### *Legal rights partially override a will*

Legal rights operate differently where there is a will, compared to how they operate where there is not a will. Legal rights partially override the provisions of the will, rather than taking second place to any other type of right.

### *Legal rights are restricted to moveable property*

As with the situation where there is no will, where there is a will legal rights still only apply to **moveable property**, that is to say property other than land and buildings.

### *The proportions of the moveable estate to which the beneficiaries are entitled*

The proportions of the moveable property that any spouse, civil partner or any children are entitled to inherit under legal rights is the same regardless of whether a will is left or not. The relevant proportions were outlined earlier in this briefing in The legal rights of the surviving spouse or civil partner and The legal rights of the surviving children.

While the proportions are the same, it is worth emphasising that the value of the estate available for legal rights is not necessarily the same in both scenarios.

> On intestacy, it is the moveable property left after prior rights are satisfied which are available for legal rights. (This may be nothing). Where a will has been made, all the deceased's moveable property is eligible for legal rights.

### *Beneficiaries must choose legal rights or a legacy under the will*

If a spouse, civil partner or child of the deceased is entitled to inherit as a result of a legacy in the will, they cannot have both their entitlement under the will and their entitlement under legal rights. They must make a choice.

When a person gives up his or her claim to legal rights, he or she **renounces** them.

*The practical effect of the restriction of legal rights to moveable property*

The current restriction of legal rights to moveable property limits their effect in practice. They exclude what is typically most people's major asset, that is to say the family home.

They would also exclude, for example, a family farm where it has been owned directly by the deceased. But there are other models, such as where a family company owns a farm and the deceased owns shares in that company. In these scenarios, the deceased's shares would be moveable property and fall within the scope of legal rights.

The restriction of legal rights to moveable property also provides a determined (and well-advised) individual with the opportunity to further limit the impact of legal rights. This would be done by attempting to convert as much of an individual's assets into heritable property prior to the individual's death.

# Reform of inheritance law

## The case for reform - and difficulties for policymakers

The main piece of legislation on inheritance in Scotland (the 1964 Act) is over fifty years old. The law is widely recognised as being overdue for reform, as society has changed significantly over the past half century.

People are living longer and many more people own their own homes. Families have changed too, with more 'blended families' and many people choosing to live with their partner, rather than marry. Just over a third of our population is single. Scotland's population is also ageing, with the percentage of those aged over 65 having increased fairly significantly. [11]

What hasn't changed of course is that death comes to us all and so there is a need for clear and fair laws which reflect modern society. In practice though, inheritance law is a difficult area to reform, particularly for minority governments wary of policy controversy.

People disagree on many aspects of inheritance law, including how large a role governments should have in deciding what should happen to people's money and possessions on death. Policy debates can also rage on topics such as what extent a cohabitant of the deceased should be treated like a spouse (or civil partner) in law.

## Reform efforts so far - an overview

The most recent project to reform Scottish inheritance law spans over ten years and, to date, two parliamentary sessions of the Scottish Parliament. The slow pace of reform is a source of frustration to some interested individuals and organisations.

The project began with the Scottish Law Commission (SLC), the public body that makes recommendations for law reform to Scottish Ministers. The SLC first looked at succession in the late 1980s, cumulating in a report recommending reform. [12] Most of these recommendations were not taken forward by any government. Then, in 2009, after an earlier Discussion Paper in 2007, [13] the SLC published a lengthy Report on Succession, [14] making no less than 79 recommendations for reform (some of which were carried forward from the earlier SLC report).

A handful of the more technical proposals from the 2009 report became law in the Succession (Scotland) Act 2016. However, most of the SLC's report has not been implemented.

Furthermore, after consulting on the report's key proposals in 2015, the Scottish Government has since made it clear that it will not be implementing a significant part of it. [15]

The remainder of this briefing explains what happened with the SLC's proposals and provides an update on more recent developments.

## Protection from disinheritance

The SLC's report (and the 2015 consultation) covered both the situation where a will had been made and the situation where a person had died intestate.

The SLC's proposals relating to the first situation were among the most controversial. An important policy issue in this context was the extent to which there should continue to be protection from disinheritance for adult children.

### The SLC's proposals

The SLC detected a strong absence of consensus from interested groups and individuals on its protection from disinheritance proposals from the earliest stages of the project. Accordingly, it suggested two alternative replacement schemes for the current law. One scheme would have greatly increased the freedom to disinherit adult children; another would have decreased it. The choice of scheme the SLC left as "a political question for the Scottish Parliament" [16] . In practice, this made it an issue for the government of the day who had to introduce the relevant legislation.

### The response of the farming community

Significant changes would have been introduced by either of the policy options for replacing legal rights (where a will has been made). However, most of the media attention focused on the second option. This was driven by the particular concerns of some parts of the farming community.

Under the second option, the SLC said that children (including adult children) should be able to inherit a fixed share (25%) of what they would have inherited if there had been no will. Crucially, the SLC also said that the distinction between heritable and moveable

property should be abolished in inheritance law. This opened up the possibility that the 25% share could be applied to land and buildings, including the family farm.

Under the current law, farms (as heritable property) are outside the scope of legal rights. A farmer, therefore, is able to leave their farm to their first born son in their will, in the knowledge that this would not be disturbed by the operation of Scots law.

The concern was that, if the law changed in this way, small parcels of land might have to be sold to meet the legal claims of other children and the spouse (or civil partner). This, it was said, would affect a farming unit's commercial viability. Differing views have been offered on the policy merits of these concerns.

## The fate of the SLC's report

After a flurry of media activity focusing on the agricultural sector, the Government then went (mostly) quiet on the SLC's proposals. There was a period of speculation as to the fate of the SLC's proposals, which extended into the first part of the current parliamentary session. Then, in a low-key media announcement towards the end of 2018, the Scottish Government issued its long-awaited response to the 2015 consultation, [17] along with its analysis of the consultation responses.

### Protection from disinheritance

In its response to the 2015 consultation, the Government ruled out reforming the law which protects from disinheritance. The Government said it would be retaining the current system of legal rights in this context.

It also said that it would **not** get rid of the distinction between heritable and moveable property, [18] while recognising this went against a 2014 recommendation of the Land Reform Review Group. [19] This means that legal rights will be calculated as at present – from the deceased's net moveable estate at the date of death.

### Where no will been made

For the situation where there is no will, the Scottish Government agreed to future legislation containing two of the SLC's proposals. These were not controversial on consultation.

First, that the spouse or civil partner should receive the whole estate if there are no children or remoter descendants. (Under the existing statutory scheme, the spouse or civil partner sometimes has to share the estate with other relatives of the deceased, such as brothers or sisters).

Second, if there is no spouse or civil partner, but there are children (or remoter descendants), the latter should inherit the whole estate.

There was no consensus among interested individuals or organisations on other aspects of the SLC's proposals on intestacy, so the Scottish Government said that it would consult further. See The Scottish Government's 2019 consultation.

The key area which remains unresolved is how an estate should be split if there is both a surviving spouse or civil partner and children, particularly where those children are from an earlier relationship.

## Cohabitants

*Where a will has been made*

Under the 2006 Act, as noted earlier, a cohabitant can only make a claim on an estate where no will has been made. There were mixed views on consultation as to whether cohabitants should have a right to make a claim when a will *has* been made. In its response to the consultation, the Government said that it would not be making any change to the law in this respect,

> " ensuring no further encroachment on testamentary freedom, preserving individuals' ability to arrange their affairs as they please"
>
> Scottish Government, 2018[20]

*Where no will has been made*

For situations where no will has been made, the Scottish Government consulted on a replacement scheme for the (much criticised) section 29 of the 2006 Act. Following the approach of the SLC, the Government suggested allowing the cohabitant to apply to the court to fix "an appropriate percentage" for the cohabitant of the deceased's estate. This would be calculated having regard to the nature and quality of the cohabiting relationship.

However, there was a lack of enthusiasm among consultees for parts of the proposals. Criticisms included, for example, that there was too much emphasis on the quality of the cohabitants' relationship. This, it was argued, might be difficult to prove and lead to an increase in litigation. [21]

In its response to the 2015 consultation, the Scottish Government said it would not implement this aspect of the SLC's report. Instead, it committed to consult on "a fresh approach" to cohabitants' rights on intestacy. [22] See The Scottish Government's 2019 consultation.

*The time limit for making a claim*

Under section 29 of the 2006 Act, a cohabitant has **six months** from the date of death to make a claim to the court. This aspect of the law has been much criticised, including for not giving the grieving partner sufficient time to recover from the emotional impact of bereavement.

*The Government's position*

In its response to the 2015 consultation, the Scottish Government said it would legislate to give to the cohabitant **twelve months** from the date of death to make a claim on the deceased's estate.

*The Law Society's view*

Since the Government response was published, the Law Society of Scotland has published a report on cohabitants. [23]

This report suggested the period should either be up to **twelve months after the date of death** or up to **six months from the date of confirmation**. (The latter is meant to cover situations where confirmation is obtained more than twelve months from the date of death.) The Law Society also said there should be a further discretion for the court to accept late applications 'on cause shown'.

See the full report, Rights of Cohabitants, [24] and the associated Executive Summary. [25]

## The Scottish Government's 2019 consultation

The Programme for Government [26] promised 'a fresh look' at inheritance law and, in February 2019, the Scottish Government delivered step one, with a further consultation paper. [27]

As expected, the paper covers two main topics:

- the general law where no will has been made
- providing for cohabitants.

The paper also looks at some interesting miscellaneous topics. These include, notably, unlawful killers as executors. There was a recent high-profile case where a person convicting of killing the deceased was named as the executor in the will. An application to court would have been necessary to remove him. The Scottish Government is consulting on various aspects of **an automatic ban on unlawful killers as executors**.

In the consultation, the Scottish Government also asks if it is time to review the financial limit associated with the small estates procedure. The procedure is discussed earlier in this briefing and the relevant limit is currently set at £36,000. Its policy significance is that it is not usually necessary to appoint a solicitor to use the small estates procedure.

The following section summarises the consultation's key proposals.

**Where no will has been made - general proposals**

*Where there is a spouse or civil partner and children*

The Scottish Government considers what should happen to a person's estate if they die without a will, leaving a surviving spouse or civil partner *and* children.

The current law strongly favours a surviving spouse or civil partner in the above scenario.

This time round, the Scottish Government gives special consideration to the position of 'blended families'. In particular, the situation where the deceased has children from a prior marriage (or civil partnership). He or she has then remarried (or entered into a new civil partnership).

At present, if the estate is of average size, it will pass to the surviving spouse or civil partner. On the later death of that spouse or civil partner, the property may then pass to *that spouse or civil partner's children* - effectively disinheriting any children of the person who died first.

Two possible solutions from other countries are suggested. Both involve a more even distribution of the estate between the spouse or civil partner and the children than the current law.

*The approach in Washington State*

The approach in Washington State is similar to that taken in Scotland to the division of property following divorce (or the dissolution of a civil partnership). The assets are split into **community property** (property acquired during the marriage) and **separate property** (which one spouse got before the marriage or during the marriage by gift or inheritance).

In Washington State, if the deceased is survived by a spouse and children, the spouse takes the deceased's share of the net community property. He or she also takes one-half of the net separate property, with the remainder passing to the children of the deceased. If there are no dependants, the spouse's share increases to three-quarters of the net separate property.

*The approach in British Columbia*

The Government's alternative suggestion comes from British Columbia. Here it is more like the current position in Scotland in that it gives a financial threshold below which the entire estate passes to the surviving spouse.

One key difference in British Columbia is that the level of the threshold depends on whether the children are the children of both spouses or the deceased's children from a previous relationship. For the first situation the threshold is CAD $300,000, for the second the threshold is CAD $150,000.

The remainder of the estate (after deduction of the household furnishings, which would all pass to the surviving spouse) is divided into two equal shares. One share passes to the surviving spouse and the other share passes to the deceased's children.

The surviving spouse also has the right to buy the family home within a certain period of time.

### Providing for a cohabitant

> The consultation paper focuses on the situation where a person has died without leaving a will.

At present, a cohabitant (including a long-term cohabitant) has to apply to the court for a share of the deceased's estate. The court can decide whether or not to grant this - and on what terms (2006 Act, section 29).

Again, drawing inspiration from approaches around the world, the Scottish Government is seeking views on a number of important policy issues including:

- whether rights for cohabitants should be automatic, rather than requiring a court claim. The Scottish Government refers to a number of other countries where cohabitants have automatic rights, at least if they were with their partner for a certain number of years
- whether the approach in Washington State for spouses could be applied to cohabitants in Scotland.

The Scottish Government also looks at the situation where there the deceased also had an estranged spouse or civil partner (in other words, a separation without a divorce). In this regard it asked:

- whether a cohabitant should inherit where there is also a surviving spouse or civil partner (and vice versa)
- whether, in these circumstances, any share should be split between the two people involved, and how this might happen in practice.

### The task ahead

The Scottish Government has produced an interesting set of proposals, which depart significantly from the consultation in 2015. It is noteworthy in the current (time-pressured) policy climate that it has taken the time to commission research [28] and is using ideas from other countries to take a fresh look at the reform of inheritance law.

Nevertheless, given the history of the project to reform inheritance law to date, the Government still has a difficult task ahead of it.

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