

SPICe Briefing

Inheritance law in Scotland

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Sarah Harvie-Clark

This briefing provides an introduction to inheritance law in Scotland, also known as succession law or the law of succession. This area of law says what happens to someone's property and possessions when he or she dies.

The briefing is divided into two parts:

- The first part of the briefing covers the current law and practice. It includes the law where somebody dies without making a will, as well as the law where a will is made.
- The second part of the briefing outlines the key recommendations for reform contained in a [report](#) of the [Scottish Law Commission](#). In June 2015 the Scottish Government published its [consultation](#) on these recommendations.

Please note that SPICe can only provide general information relating to the law of Scotland. If, for example, a constituent wishes to receive legal advice in relation to the circumstances of his or her individual case he or she should contact a solicitor.



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EXECUTIVE SUMMARY

Key terminology

In inheritance law the deceased person'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 person who manages the process of gathering in the estate, paying any debts and taxes due and distributing the remainder of the estate to the beneficiaries is called the **executor**.

Will-making practices in Scotland

The most recent research on the topic (by the former Scottish Consumer Council) would suggest that most people living in Scotland do not have a will. However, making a will is much more common amongst the over 65s and those people from higher socio-economic groups.

Useful information on making a will can be found on the webpage of [Citizens Advice Scotland](#) entitled [Wills](#). If a person is considering making a will it is advisable to consult a solicitor.

The distinction between heritable and moveable property

The current law of succession makes a distinction between heritable property and moveable property for various purposes. **Heritable property** (sometimes also called immoveable property) is land and buildings. **Moveable property** is everything else.

The family home is typically the deceased's main asset and it falls into the category of heritable property. A family farm would also fall into this category.

Movable property includes, for example, furniture, a car, money, and shares in a company.

Where somebody dies without leaving a will

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

Where there is no will, distributing the deceased person's estate involves a series of steps which must be carried out in a set order.

First of all, the executor has to pay debts and meet certain liabilities from the dead person's estate.

Then certain beneficiaries can exercise rights called **prior rights** and **legal rights**. The prior rights of the spouse or civil partner must be satisfied first, then the legal rights of any spouse or civil partner.

The next priority is the legal rights of any children of the deceased. Adult children can claim legal rights, as well as children under 16.

Finally, the remaining estate (the **free estate**), must be distributed according to a statutory list of potential beneficiaries contained in the Succession (Scotland) Act 1964. Children (including adult children) are top of the list of potential beneficiaries.

A cohabitant can also apply to the court for an award from the deceased's estate. If successful, the cohabitant's claim comes from the part of the estate which is left after the prior rights and the legal rights of the spouse or civil partner have been satisfied.

Requirements for a valid will

There are various requirements which must be met in order for a will to be valid. These include that the will is in writing and that it has been signed at the bottom of the last page by the person making the will. It must also have been made by a person of sound mind. Furthermore, it must have been made voluntarily and without pressure from another person.

It is standard practice for a solicitor to advise his or her client to make a **probative** or **self-proving** will. This is a will that is presumed to be validly executed. A probative will must satisfy certain additional requirements.

Cancelling or changing a will

A person 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 clause in it saying that any previous will is revoked. This cancels an earlier will, even if it is not destroyed.

However, where a will which revokes a previous will is itself revoked, the original will may take effect again (**revive**).

Where somebody dies and leaves a will: protection from disinheritance

When a will aims to exclude a particular person from inheriting any of the deceased's estate, the will aims to **disinherit** that person.

In Scotland it is not possible for a person to disinherit his or her spouse, civil partner or children entirely. This protection is provided by the concept of **legal rights** which give the people concerned a share of the deceased's **moveable property**. Hence, the family home is excluded from the scope of legal rights.

Where there is a will, cohabitants are not protected from disinheritance.

Recommendations for reform – an overview

The [Scottish Law Commission](#) (SLC) is the body which makes recommendations for law reform to Scottish Ministers. In 2009 it published a [report](#) recommending significant reforms to succession law.

Some specific aspects of the report were [consulted](#) on by the Scottish Government in 2014. Most of the recommendations consulted on now feature in the [Succession \(Scotland\) Bill](#) introduced in the Scottish Parliament in June 2015.

On the other hand, the more wide-ranging recommendations for reform are being consulted on separately, in a [consultation](#) published in June by the Scottish Government (2015c).

The SLC report recommended significant major changes to the law both where someone dies intestate, as well as to the law where someone has left a will.

The SLC recommended the abolition of the distinction between heritable and moveable property in the context of the law of succession. Accordingly, the key recommendations (discussed below) apply equally to heritable and moveable property.

The recommendations where somebody dies without leaving a will

Where a deceased person leaves a spouse or civil partner (but no children) the SLC report recommended that the spouse or civil partner should inherit the whole estate. This is a change to the current law where the spouse or civil partner might have to share the estate with the deceased's parents and siblings.

Where the person who has died leaves a spouse or civil partner and children, the report recommended that the spouse or civil partner should inherit the whole estate up to the value of a 'threshold sum'. The report then recommended that the remainder of the estate should be shared equally between the deceased person's children.

In 2009, the SLC recommended that the threshold sum should be £300,000 but the Scottish Government is consulting on a range of figures for this sum, between £335,000 and £650,000.

Where the deceased person leaves children (but no spouse or civil partner) the report recommended that the children should inherit the whole estate. This reflects the current law.

The recommendations where somebody dies and leaves a will

If there is a will and it purports to disinherit the deceased person's spouse or civil partner, the report recommended that the spouse or civil partner be entitled to a legal share amounting to 25% of what he or she would have inherited if the deceased had died intestate.

The SLC proposed two alternative options where someone dies having left a will which aims to disinherit his or her adult children. One option would limit the freedom of an individual to disinherit their adult children (option 1); the other option (option 2) would enhance that freedom.

Under option 1, the children would be entitled to a legal share amounting to 25% of what they would have inherited if the deceased had died intestate.

Under option 2 dependent children would be entitled to a capital sum calculated by reference to their maintenance needs: but otherwise a person would be free to leave his or her estate to whomsoever he or she chooses. His or her wishes could not be disturbed by claims from adult children.

The recommendations relating to cohabitants

The report recommended a new regime for cohabitants, which would apply regardless of whether the deceased person left a will or not.

The report recommended that cohabitants should be entitled to an "appropriate percentage" of what they would have received if they had been the deceased's spouse or civil partner. The

appropriate percentage would be determined by considering the length and quality of the cohabitant's relationship with the deceased.

The relationship with the land reform proposals

It is important to note that the Scottish Government proposals to reform the law of succession are separate from the [Land Reform \(Scotland\) Bill](#) introduced in the Scottish Parliament in June 2015.

However, the proposals to reform the law of succession have been linked to the land reform policy agenda both in the media and in key policy documents. For example, the [Land Reform Review Group](#) was set up by the Scottish Government to explore key questions of land reform. In [Part 6 of its final report](#) the Group expressed support for a key SLC recommendation, namely, the abolition of the distinction between heritable and moveable property.

Impact on agricultural units

Some stakeholders representing agricultural interests have expressed concerns about the effect of the abolition of the distinction between heritable and moveable property and, in particular, its relationship with the SLC's option 2 (discussed above at p 5).

At present, there is nothing to stop a farmer or landowner making a will in order to leave his farm to, for example, his firstborn son. Because legal rights only affect moveable property, any other children, as well as any spouse or civil partner, could not make a claim on the farm in such cases.

However, if adult children and spouses or civil partners were entitled to fixed legal shares of both the moveable *and* the heritable property this would no longer be the case. Regardless of what a will said, the adult children, the spouse or civil partner would all have a claim on the whole estate of the deceased, including the family farm.

Recognising the concerns of some stakeholders, as well the polarised views of stakeholders on this topic more generally, the Scottish Government (2015c) explored the matter in detail in chapter 3A of its recent [consultation document](#). The Government is consulting on various issues, including the possibility of an exemption relating to the agricultural sector which would satisfy the tests of robustness, fairness and proportionality.

INTRODUCTION AND OVERVIEW

This briefing provides an introduction to inheritance law in Scotland, also known as succession law or the law of succession.

This briefing is intended to assist in their constituency casework relating to inheritance issues, as well as being helpful to MSPs with a more general interest in the policy area of succession law.

PRACTICAL MATTERS

Funeral arrangements and registering a death

Note that this briefing does not cover practical issues associated with death such as funeral arrangements and registering a death. It also does not deal with the practicalities of gathering in a person's estate and distributing it to beneficiaries.

For a comprehensive treatment of these topics see [What to do after a Death in Scotland](#) published by the Scottish Government (2013).¹

Making a will

This briefing also does not deal in detail with the topic of making a will. Useful information on this can be found on the webpage of [Citizens Advice Scotland](#) entitled [Wills](#).

If a person is considering making a will, it is advisable to consult a solicitor. As the Citizens Advice webpage explains, otherwise:

“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 latter select 'Wills'). On the [Scottish Legal Aid Board](#)'s website a person can [search](#) for his or her nearest solicitors offering help through legal aid.²

Will-writing services are also available in books and on the internet. However, self-help will-writing books and will-writing firms are not regulated so there are few safeguards if things go wrong.³

Note that individuals often make a will as part of a wider exercise to mitigate the effects of inheritance tax. Accordingly, when a person has assets which will form a large estate on death it is typical for that person to receive detailed advice from various professional advisers, including solicitors.

¹ See also: <https://www.scotcourts.gov.uk/taking-action/dealing-with-a-deceased's-estate-in-scotland>

² If a person is a member of a trade union, he or she may find that the union offers a free will-writing service. A union will often use its own solicitors to undertake this work. A person may also have access to legal advice through an addition to an insurance policy which might cover the costs of a solicitor preparing or checking a will. If a person and his or her partner are both making wills a solicitor may be prepared to offer a discount if the terms of each will are similar. These are sometimes called 'mirror wills'.

³ Sections 101–107 of the Legal Services (Scotland) Act 2010 (asp 16) make provision for the regulation of will-writers. However, the key parts of these provisions are not in force.

A RANGE OF REFORMS

The SLC's work on succession

The [Scottish Law Commission](#) (SLC) is an independent statutory body which makes recommendations for law reform to the Scottish Government.

In 2009 the SLC published a [report](#) recommending major reforms to the existing law of succession (SLC 2009). This followed an earlier, largely unimplemented, [report](#) by the SLC in 1990, also making recommendations on the topic of succession (SLC 1990).⁴

Two Scottish Government projects on succession

The Scottish Government is considering the SLC recommendations for reform as two separate strands of work.

In 2014 the Government [consulted](#) on some of the topics covered by the 2009 SLC report. Most of the topics covered now feature in the [Succession \(Scotland\) Bill](#) introduced in the Scottish Parliament on 16 June 2015. The [Delegated Powers and Law Reform Committee](#) is the lead committee on this Bill. A separate SPICe Briefing will be published on this Bill very shortly.

On the other hand, the key SLC recommendations for reform, discussed in more detail below, are still at the consultation stage. The relevant [consultation document](#) was published by the Scottish Government in June 2015 (2015c).

Succession and the land reform agenda

A further potential source of confusion is that the proposals to reform the law of succession have been linked to the Scottish Government's [land reform agenda](#).

For example, the [Land Reform Review Group](#) was set up by the Scottish Government to explore key questions of land reform. [Part 6 of its final report](#) supported the abolition of the distinction between heritable and moveable property in the context of succession law. This was an important recommendation of the SLC in its 2009 report (SLC 2009a, recommendation 44).

In addition, there has been some media coverage conflating the land reform and succession projects – see, for example, [The Scotsman, 9 March 2015](#) (The Scotsman 2015)). Typically, this coverage has focused on the concerns of some stakeholders over the impact of the some of the SLC's proposals on the inheritance of family farms (see further below at p 22). However, these proposals are still being consulted on by the Scottish Government (2015c, chapter 3A).

The [Land Reform \(Scotland\) Bill](#) does *not* contain provisions relating to succession law, or indeed any aspect of the succession law.

⁴ Recommendation 17 of the 1990 report, which covers one aspect of the law on survivorship destinations, was implemented in section 19 of the Family Law (Scotland) Act 2006 (asp 2) and section 124A of the Civil Partnership Act 2004 (c 33). For a brief overview of survivorship destinations see pp 11–12.

THE CURRENT LAW AND PRACTICE

AN OVERVIEW WITH SOME KEY TERMINOLOGY

This section of the briefing outlines some of the key terminology associated with the law of succession.

A more detailed glossary of terms associated with the general law can be found in [Annex A](#) of the Scottish Government's 2015 consultation document (Scottish Government 2015c).

The basics

In inheritance law the deceased person'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**. His or her estate is described as **testate**.

Legacies and vesting

A **legacy** or a **bequest** is a provision in a will giving some benefit to the person or organisation named in the provision. There are various different types of legacies, for example, a **pecuniary legacy** is a legacy of a sum of money.

A legacy or bequest is said to **vest** when the beneficiary acquires a right to it. In almost all cases, this is at the point of the testator's death. However, sometimes vesting is postponed by the deed creating the legacy to another point in time.

The role of the executor and of confirmation

The person who manages the process of gathering in the estate, administering it and distributing it to the beneficiaries is called the **executor**.

Executors usually get their authority to carry out this task from a legal document known as the **confirmation** which can be obtained from the local sheriff court. However, confirmation may not be needed for estates where bodies holding funds belonging to the estate are prepared to release funds without it. There is also a streamlined procedure for obtaining confirmation to **small estates** (which have a total value of less than £36,000) (see further Scottish Government 2013, p 35).

A person may name somebody in his or her will whom he or she wishes to be the executor. The technical term for such a person is the **executor nominate**.

On the other hand, an **executor dative** is an executor appointed by the court. Such a person may be appointed in a variety of circumstances, including where there is no will or there is a will but no proposed executor was named in it.⁵ In most cases an executor dative will be required to obtain a special type of insurance, known as a **bond of caution** (pronounced 'KAY-shun').

⁵An executor dative may also be appointed where the proposed executor refused to take up the role or is incapacitated or deceased. The law provides a set order of people entitled to apply to be appointed executor dative. Where someone dies intestate it is usually their spouse or civil partner who will be appointed by the court. The deceased's spouse or civil partner is exclusively entitled to be appointed executor dative if he or she inherits the whole estate under prior rights (1964 Act, section 9(4)).

There is nothing in the general law which stops an executor being a beneficiary. In fact, in practice, an executor may be and almost always is, one of the beneficiaries, sometimes the sole beneficiary. However, where a solicitor is an executor it is a breach of his or her professional ethics for him or her also to be a beneficiary (Macdonald 2001, para 13.101).

An executor is subject to the fundamental principle that he or she must not allow his or her own personal interests to prevail over the interests of the estate. So, for example, he or she is not allowed to purchase assets of the estate, unless this was clearly authorised by the testator or, subsequently, by all the affected beneficiaries (Macdonald 2001, para 13.100–13.102).

Trusts and trustees

A trust is an arrangement whereby one party (the **trustor** or the **settlor**) passes ownership of assets to a trust to be used for the benefit of others (the **beneficiaries**). The **trustees** run the trust for the beneficiaries.

Trusts can be created in wills. For example, they might be used where a testator wants his or her children to inherit under his or her will but not until they reach a certain age. A trust allows the date of vesting to be postponed until the children reach that age.

Perhaps confusingly, even where there is no specific trust created in a will, executors are treated for most legal purposes as trustees too. Accordingly, they are subject to the legal regulation associated with trustees.

Intestacy

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 default rules which say who should inherit if somebody dies intestate. These favour the deceased person's spouse or civil partner and also provide some protection for the deceased's children (see further below at pp 12–16 of this briefing).

Disinheritance and the role of legal rights

When a will aims to exclude a particular person from inheriting any of the deceased's estate, the will aims to **disinherit** that person.

Where there is no will, a person also may be disinherited through the normal application of the rules of intestate succession.

In Scotland it is not possible to make a will entirely disinheriting your spouse or civil partner or your children (including your adult children). This is due to the concept of **legal rights** which is explained in detail at p 18 below.

PEOPLE'S WILL-MAKING PRACTICES IN SCOTLAND

The most recent research carried out on people's will-making practices in Scotland was by the former Scottish Consumer Council⁶ in 2006.⁷

Of those surveyed for that study, only 37% had made a will (O'Neill 2006, p 6).

However, the study also found that older people were more likely to make a will – 69% of study participants aged 65 or over had done so (O'Neill 2006, p 6 and Chart 1). The study also found that the higher the socio-economic group the study participants belonged to, the more likely they were to have made a will (O'Neill 2006, p 6 and Chart 2).

Overall, the research demonstrated that the number of people who die intestate and are subject to the rules of intestate succession is likely to be substantial.

The recent Scottish Government [consultation](#) identified various reasons why a person may not make a will:

“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 2015c, para 2.2)

THE ROLE OF SURVIVORSHIP DESTINATIONS

When considering people's will-making practices (and the law of succession more generally) it is important to note the role of **survivorship destinations** (a type of **special destination**).

These are legal provisions which appear in the legal title to land or a building which is owned by two or more people. They provide that, on the death of one of these individuals, his or her share of the property automatically passes to the surviving owner.⁸

One of the most common uses of survivorship destinations is by spouses, civil partners or cohabitants in relation to the family home.

Where there is no will, the effect of a survivorship destination is to remove what is typically one of the deceased's main assets from the intestate estate and from the scope of the rules of intestate succession.

Where there is a will, the property affected by a survivorship destination also does not form part of the deceased's estate. Furthermore, if the will purports to leave the property affected by a survivorship destination to someone other than the person named in the survivorship destination, that part of the will is ineffective. The property still passes to the person named in the survivorship destination.

⁶ In 2008, the Scottish Consumer Council was merged with a number of other bodies to create an NDPB which operated under the name 'Consumer Focus' until 2013. It was subsequently rebranded as 'Consumer Futures'. The functions of Consumer Futures transferred to [Citizens Advice Scotland](#) on 1 April 2014.

⁷ For slightly more up to date (but similar) figures see:

http://www.heraldscotland.com/business/13079446.60_of_Scots_do_not_have_up_to_date_will/

⁸ Survivorship destinations sometimes feature in relation to other types of property too, e.g. shares.

The use of survivorship destinations is fairly common in current practice.

THE DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY

Succession law makes a distinction for various purposes between how it treats heritable property and moveable property. **Heritable property** (sometimes also called immoveable property) is land and buildings. **Moveable property** is everything else.

The family home is typically the deceased's main asset and it falls into the category of heritable property. A family farm would also fall into this category.

Common examples of movable property include money, cars, furniture, jewellery and shares in a company.

WHERE SOMEBODY DIES WITHOUT LEAVING A WILL

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

The Succession (Scotland) Act 1964 (c 41) ('the 1964 Act') (as amended) contains the rules setting out how the intestate estate should be divided up between the beneficiaries. There is also a role for the law developed by the decisions of judges in individual cases (**the common law**).

The Family Law (Scotland) Act 2006 (asp 2) makes specific provision for cohabitants of people who have died intestate.

The stages of distributing an intestate person's estate

There are various stages of 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 dead person's estate.

Thereafter, certain beneficiaries have rights to claim from an intestate person's estate. These rights are called **prior rights** and **legal rights**. The prior rights must be satisfied first, then the legal rights of any spouse or civil partner.

The legal rights of any children of the deceased are the next priority under the current rules. Adult children can claim legal rights.

Finally, the remaining estate (the **free estate**), must be distributed according to a list of potential beneficiaries contained in the 1964 Act. The list ranks categories of potential beneficiaries in order of priority. Top of the list is any children (including adult children) of the deceased.

The court also has the discretionary power to make an award to a cohabitant where he or she applies to the court. This award is taken out of the estate which remains after the prior rights and the legal rights of the spouse or civil partner have been satisfied (Family Law (Scotland) Act 2006 (asp 2), section 29).

Prior rights

The prior rights are in favour of the deceased person's spouse or civil partner (if he or she has one). The rights are to a share of the deceased's house, furniture and money, subject to

maximum financial limits revised from time to time by secondary legislation (1964 Act, sections 8 and 9).

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 (1964 Act, section 8(1))
- The deceased's share of the furniture and furnishings⁹ associated with the house up to a value of £29,000 (1964 Act, section 8(3))
- A capital sum belonging to the deceased up to the value of £50,000 (if there are surviving children of the deceased) or £89,000 (if there are no surviving children)¹⁰ (1964 Act, section 9)

Note that the prior rights of the spouse or civil partner have the potential to exhaust the deceased's estate. This means that it may not be possible for any cohabitant or children of the deceased person to make a claim on the estate.

The legal rights of the surviving spouse or civil partner

The legal rights are to a share of the **moveable property** in the estate. In other words, heritable property, such as the family home or the family farm, is excluded. (This applies to legal rights generally, rather than just to the legal rights of the spouse or civil partner).

The box below explains precisely what the spouse or civil partner is entitled to under legal rights in different circumstances.

The legal rights of the surviving spouse or civil partner

A surviving spouse or civil partner is entitled to:

- **one third** of the remaining moveable estate if there are surviving children (or remoter descendants)¹¹ of the deceased person
- **one half** of the remaining moveable estate if the deceased person did not leave children (or remoter descendants)¹²

In some circumstances the deceased person may have a spouse or civil partner but also have a cohabitant. For example, he or she may be separated (but not divorced) from his or her spouse and in a new cohabiting relationship. The legal rights of the surviving spouse or civil partner have the potential to exhaust the estate and to prevent a claim on the estate by a cohabitant or, for that matter, any children of the deceased.

The legal rights of the children

The box on the next page of this briefing explains precisely what the children are entitled to under legal rights in different circumstances.

⁹ The term used in the 1964 Act for furnishings is 'plenishings'.

¹⁰ Strictly speaking, section 9 refers to 'issue', not children of the deceased. For further discussion of the concept of 'issue' see p 16.

¹¹ See further the discussion of the concept of 'issue' on p 16.

¹² *Ibid.*

The legal rights of the children

The children are entitled to:

- **one third** of the remaining moveable estate split between them if the person who died left a spouse or civil partner
- **one half** of the remaining moveable estate split between them if the deceased person 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 brothers do not rank before younger ones. As already mentioned, adult children can claim legal rights, as well as children under 16.

The free estate

What is the free estate?

The free estate is the estate remaining after prior rights, legal rights and any cohabitant's claim are satisfied.

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

Categories of relatives who can potentially inherit the free estate

In relation to 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.¹⁴ 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)

¹³ Confusingly, section 2 says that the categories of relatives listed are entitled to inherit the *whole* free estate. However, as Gretton and Steven point out (2009, para 28.23) the free estate is subject to prior rights and legal rights.

¹⁴ Categories 2 and 3 can include half siblings. However, if there are whole siblings of the deceased person, the whole siblings will inherit in preference to the half-siblings (1964 Act, sections 2(2) and (3)).

10. The Crown¹⁵

Once beneficiaries are identified from one category on the list those beneficiaries inherit the whole of the free estate. There is no need to consider categories that rank lower down on the list.

The cohabitant's claim

Section 29 of the Family Law (Scotland) Act 2006 ('the 2006 Act') allows a cohabitant to ask the court for a share of his or her cohabitant's estate.

This only applies where the person who died did not make a will.

Time limits

The application to the court must be made by the cohabitant within six months of the death of his or her partner.¹⁶

Definition of a cohabitant

A cohabitant is defined in the 2006 Act as either one of a couple who are¹⁷ (or were) living together as if they were husband and wife or civil partners.

Certain factors are relevant in determining whether a person is a cohabitant, including the length of time they lived together and the nature of the relationship during that time (2006 Act, section 25). For example, the court might look at what sort of arrangements the couple made about money, such as whether they had a joint bank account and whether they supported one another financially.

Factors the court must take into account

When the court is trying to decide whether to make an award, section 29 says it must take into account factors including:

- the size and the nature of the available estate;
- any benefit the cohabitant has received as a result of the death from somewhere other than the available estate (e.g. a payment under a life insurance policy¹⁸ or a survivor's pension)
- the nature and extent of other rights to, and claims on, the available estate

¹⁵ If the executor cannot trace any of the dead person's relatives, the estate may pass to the Crown as the 'ultimus haeres' (the ultimate heir). The person in Scotland who acts for the Crown in this capacity is the Queen's and Lord Treasurer's Remembrancer. See: <http://www.gltr.gov.uk/>

¹⁶ As previously discussed, in 2014 the Government (2014, chapter 4) [consulted](#) on some of the more minor, technical aspects of the SLC report. This included consultation on whether to extend the time limit for making a cohabitant's claim to one year. However, there was a lack of consensus on consultation (2015b, para 4.9) and so this proposal does not feature in the [Succession \(Scotland\) Bill](#). It may be revived in any later Succession Bill.

¹⁷ The definition in section 25 is relevant to a number of different provisions relating to cohabitants in the 2006 Act. Hence, the reference to living together in the present tense in section 25, despite the fact one person in the cohabiting relationship has died.

¹⁸ The proceeds of a life insurance policy do not always form part of the deceased's estate. See further: Hiram 2007, para 5.33.

'Representation' by the deceased's descendants

In the briefing up to this point, for simplicity, it is mainly the term 'children' which has been used in the context of legal rights.

However, legal rights actually belong to the 'issue'. Issue is the legal term for the children, grandchildren, great-grandchildren and even remoter descendants of the deceased person (Hiram 2007, para 3.6).

In practice, it is usually the children of the deceased person who inherit under legal rights. However, the law says that the issue of the deceased can inherit in the place of their parent who has already died (called 'representation') (1964 Act, section 11).¹⁹ For example, grandchildren can inherit in the place of their parent who has already died.

A similar rule applies in the context of the distribution of the free estate. Sometimes someone who would have fallen into a category on the above list might have died before the deceased did. 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)).

WHERE SOMEBODY DIES AND LEAVES A WILL

Requirements for a valid will

The legal requirements for a valid will are found in the Age of Legal Capacity (Scotland) Act 1991 (c 50) ('the 1991 Act'); the Requirements of Writing (Scotland) Act 1995 (c 7) ('the 1995 Act') and in the law developed by the decisions of judges in individual cases ('case law').

In order for a will to be valid, it must be made:

- by a person who is twelve years old or over (1991 Act, section 2)
- voluntarily and without pressure from any other person²⁰
- by a person of sound mind²¹
- in writing (1995 Act, section 1(2)(c))
- signed by the person making the will at the bottom of the last page (1995 Act, section 2(1))

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. To create a probative will two additional requirements must be satisfied:

- it must be signed *on every page* by the person making the will (1995 Act, section 3(2))

¹⁹ For more detail on this topic, see Hiram 2007, paras 3.6–3.8.

²⁰ Where this requirement is not complied with, case law refers to 'undue influence' having been exercised. See further Macdonald 2001, paras 8.25–8.35. Undue influence can exist alongside 'facility and circumvention'. See footnote 20 below in respect of the latter.

²¹ Case law recognises that when a person is insane they cannot consent to writing a will. Case law also recognises the concept of 'facility and circumvention' where a person has suffered a degree of mental deterioration which, without amounting to insanity, leaves him or her easily imposed upon by others. This can happen in old age. See further Macdonald 2001, paras 8.17–8.24 and 8.34–8.35.

- it must be signed by that person in front of a witness (1995 Act, section 3(1))

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. As mentioned above, the provisions of the will which achieve this are referred to as the **legacies** or **bequests**.

The most common types of legacy are as follows (Gretton and Steven 2008, para 27.23–27.28):

- **pecuniary legacy:** this is a legacy of money
- **special legacy:** this is a legacy of a particular asset or an identifiable set of assets (e.g. 'all my books')
- **universal legacy:** this is where the testator leaves his or her entire estate in single legacy (e.g. 'everything to my daughter Sarah')
- **residuary legacy:** this is a legacy of everything that remains (if anything does remain) after all the other claims on the estate have been met (e.g. 'everything else to my son Andrew'). Sometimes the person named in the residuary legacy will take most of the estate, sometimes he or she will inherit little or nothing.

Other common 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 under 16; the testator's funeral instructions; and 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 clause in it saying that any previous will is revoked. This cancels an earlier will, even if it is not destroyed.

However, where a will which revokes a previous will is itself revoked, the original will may take effect again (**revive**).

Divorce or dissolution of a civil partnership does *not* have the effect of cancelling an existing will. However, section 1 of the [Succession \(Scotland\) Bill](#), currently being considered by the Scottish Parliament, makes provision to reverse the current position.

Similarly, if the testator gets married or enters into a civil partnership after the drafting of a will this has no effect on the validity of the will. The Scottish Government (2015c, para 5.38–5.40) is [consulting](#) on whether this should be altered.

A will can also be amended by use of a **codicil**, i.e. a later document referring to the earlier will but varying its provisions. Because of the 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 rather than using a codicil.

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

Legal rights partially override the will

Legal rights operate differently where there is will, compared to how they operate where there is not a will. Specifically, 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.

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 are as outlined in the section on intestate succession at pp 13 and 14 above.

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. Where 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 as they exclude what is typically most people's major asset, i.e. the family home. They would also exclude, for example, a family farm when owed directly by the deceased.

The restriction of legal rights to moveable property at the moment 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 as is possible prior to that individual's death. (For further discussion see the 2009 [report](#) of the SLC (SLC 2009a) at paras 3.3 and 3.14 and Gretton and Steven 2009, para 26.31).

THE 2009 REPORT OF THE SCOTTISH LAW COMMISSION

The [report](#) of the SLC (SLC 2009a) on the law of succession ('the SLC report') makes no less than 79 recommendations for reform on a wide range of individual topics. The following summary of its recommendations is not an exhaustive treatment of the contents of the report. Rather, the summary highlights some of the key recommendations for reform.

A number of the recommendations for reform relate to the deceased person's 'issue', which, as already discussed, includes the deceased's children, grandchildren, great-grandchildren etc. As with the current law, the idea is that the deceased's remoter descendants can inherit in the place of a parent who has already died (SLC 2009a, recommendations 10 and 11).

However, for simplicity, the rest of this section of the briefing refers to ‘children’ not ‘issue’.

THE ABOLITION OF THE DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY

The SLC report recommended the abolition of the distinction between heritable and moveable property in the context of the law of succession (SLC 2009a, paras 2.3, 3.10, 3.71 and 7.22 and recommendation 44).

WHERE SOMEBODY DIES WITHOUT LEAVING A WILL

Overview

Part 2 of the SLC report made a range of recommendations for reform to the law where a person dies without leaving a will.

In its consultation document the Scottish Government (2015c, para 2.8) described these recommendations as “a radical new scheme”. The Government (2015c, para 2.9) also noted that one of the main policy aims of the recommendations was to allow a spouse or civil partner to remain in the family home. The Government expressed its support for this.

In relation to the scheme overall the Government commented:

“We are also supportive of the need for a simple approach on intestacy which is easily understood. Nonetheless we recognise that such an approach would not be sufficiently nuanced to take account of the more complex or diverse range of relationships and family groupings in the 21st century and would not provide for every set of circumstances. It will however, be easy to understand and if people understand what the default position is they are then in a better position to consider whether or not they need to make a will in order to achieve a different effect and we believe that there is considerable merit in this outcome” (Scottish Government 2015c, para 2.10)

The deceased leaves a spouse or civil partner but no children

Where the person who has died leaves a spouse or civil partner but no children the SLC report recommended that the spouse or civil partner should inherit the whole estate (SLC 2009a, para 2.5 and recommendation 1).

If implemented, this would be a change to the current law in respect of which the spouse or civil partner may have to share the estate with the deceased person’s parents and siblings (see p 14 above).

The SLC report said this recommendation received unanimous support when the SLC consulted on it (SLC 2009a, para 2.5).

The deceased leaves a spouse or civil partner and children

The SLC's recommendations

Where the person who has died leaves a spouse or civil partner and children, the SLC report recommended that the spouse or civil partner should inherit the whole estate up to the value of a 'threshold sum'.

The SLC report then recommended that the remainder of the estate should be shared equally between the deceased person's children.

The SLC report proceeded on the basis that the threshold sum should be £300,000 but said that the precise sum is a political question for the Scottish Parliament (SLC 2009a, paras 2.7–2.16 and recommendation 3).

The Scottish Government's consultation

The Scottish Government took part in "informal pre consultation dialogue at official level" with stakeholders in 2010 on issues including what level the threshold sum should be set at.

One of the concerns expressed was that the level the SLC suggested for the threshold sum did not reflect the variation in property prices across Scotland. At present, the Scottish Government is [consulting](#) on a range of possible higher values for the threshold sum (£335,000–£650,000) (Scottish Government 2015c, para 2.16–2.26).

Earlier in this briefing it was explained that it is fairly common for the legal title to heritable property owned by more than one person to contain a survivorship destination (see pp 11–12). The family home is often owned this way. The effect of a survivorship destination (whether there is a will or not) is that the share of the property owned by the deceased does not form part of the deceased's estate. Instead, on the death of one of the owners, it passes automatically to the other owner of the property (often the deceased's spouse or civil partner).

The Scottish Government is also consulting on several aspects of the relationship between survivorship destinations and the threshold sum. One issue is whether the value of any property received via a survivorship destination should be taken into account in calculating whether the threshold sum had been reached. The aim is to ensure an appropriate balance between the interests of any spouse or civil partner and any children of the deceased (Scottish Government 2015c, paras 2.27–2.31).

The deceased leaves children but no spouse or civil partner

Where the deceased person leaves children, but no spouse or civil partner, the SLC report recommended that the children should inherit the whole estate (SLC 2009a, para 2.6 and recommendation 2). This reflects the current law.

The deceased leaves neither children nor a spouse or civil partner

Where the deceased leaves no children (or remoter descendants) and no spouse or civil partner the SLC recommended that the current order of succession be retained. See above under the discussion of the 'free estate' at pp 14 – 15. However, the SLC recommended the removal of the distinction the current law makes between whole siblings and half siblings (see footnote 13)(SLC 2009a, para 2.35 and recommendation 9).

WHERE SOMEBODY DIES AND LEAVES A WILL: PROTECTION FROM DISINHERITANCE

Part 3 of the report made recommendations relating to the situation where there is a will and its effect would be that the deceased's surviving spouse, civil partner or children would be disinherited.

Protection for the spouse or civil partner

Specifically, the report recommended that instead the spouse or civil partner would be entitled to a legal share amounting to 25% of what they would have inherited if the deceased had died intestate (SLC 2009a, paras 3.2–3.7, recommendations 14 and 15).

Protection for children

Options 1 and 2

In relation to children the SLC suggested two options.

Under option 1, the children would be entitled to a legal share amounting to 25% of what they would have inherited if the deceased had died intestate (SLC 2009a, paras 3.14–3.65, recommendations 20 and 26).

Under option 2 dependent children would be entitled to a capital sum calculated by reference to their maintenance needs: but otherwise a person would be free to leave his or her estate to whomsoever he or she chooses. His or her wishes could not be disturbed by claims from adult children (SLC 2009a, paras 3.65–3.99, recommendations 27–36).

A political question for the Scottish Parliament

The SLC concluded that which scheme should be adopted is a political question for the Scottish Parliament. It commented as follows:

“we recognise that there are strong arguments in favour of both options. In addition, our respondents were deeply divided. In these circumstances, the Commission does not feel that it can recommend one option above the other” (SLC 2009a, para 3.35)

The Scottish Government's consultation

In the Scottish Government's consultation document the Scottish Government made similar remarks relating to the pre-consultation discussions which officials had had with key stakeholders:

“the divergence of views on protecting adult children from disinheritance was clear. This issue is particularly subjective and views are influenced by personal circumstances and experience, possibly changing over time.” (Scottish Government 2015c, para 3.13)

It went on to say:

“This is a difficult balancing act. Removing protection for adult children and only providing for dependent children may not reflect the views of significant numbers of Scottish families. On the other hand, we are aware from correspondence that some parents are unhappy that under the current system, (and increasingly under the new proposals) they cannot prevent children having a right to a part of their estate on death, especially those who are estranged” (Scottish Government 2015c, para 3.25)

Impact on agricultural units

Early in this briefing the media coverage of the suggested impact of the proposed reforms on the farming community was referred to (see p 8).

In particular, some stakeholders representing agricultural interests have expressed concerns about the effect of the abolition of the distinction between heritable and moveable property and its interaction with the SLC's option 2 (discussed above at pp 21–22).

The policy issue

At present, there is nothing to stop a farmer or landowner making a will in order to leave his farm to, for example, his firstborn son. Because legal rights only affect moveable property, any other children, as well as any spouse or civil partner, could not make a claim on the farm in this case.

However, if adult children and spouses or civil partners were entitled to fixed legal shares of both the moveable *and* the heritable property this would no longer be the case. Regardless of what a will said, the adult children, the spouse or civil partner would all have a claim on the whole estate of the deceased, including a family farm. The concern is then that relatively small parcels of land would have to be sold to fulfil a legal share and this would affect a unit's commercial viability.

The SLC's approach

The SLC rejected stakeholders' concerns for three main reasons. In the first place, the SLC pointed out that it was possible for children and spouses or civil partners to **renounce** (i.e. give up) their claim to a legal share of the estate before or after the death. The SLC commented:

“most farmers' wives are aware of and support the farm being inherited by one of their children: we envisage that in these circumstances it will become standard practice for them to renounce their right to a legal share on marriage or shortly thereafter” (SLC 2009a, para 3.64)

The SLC also noted that it would be possible under its proposals for the amount due under a legal share to be paid in instalments, easing any financial burden on the estate (SLC 2009a, para 3.64).

Finally, the SLC referred to the fact that farms are often assets of family-run partnerships or companies:

“Since shares and the partnership account constitute moveable property they are therefore subject to claims for legal rights...under the current law. Yet this does not appear to have given rise to any significant problems. In these circumstances, it is difficult to see why such problems would arise if legal share was introduced.” (SLC 2009a, para 3.64)

The Scottish Government's consultation

In its consultation document, the Scottish Government (2015c, paras 3.14; 3A.1–2; and 3A.16) acknowledged the strong representations received from some stakeholders with a direct interest

in the agricultural sector. It reported concern was greatest for small family farms and farms where the farmer was an agricultural tenant (Scottish Government 2015c, paras 3A.16 and 3A.17).

On the other hand, the Government reported its pre-consultation discussion with stakeholders had found “significantly polarised” views on the issue. The majority of those without a direct interest in the sector argued that farms should not form a special case in relation to the SLC’s proposals (Scottish Government 2015c, para 3A.15).

The Scottish Government’s consultation document summarises some additional analysis done by the Government. This illustrates the possible cost to the deceased’s estate in a range of farming situations. Overall, where a legal share claim is made on the estate by the spouse/civil partner and/or children, the Government estimates that there would be a claim on the deceased’s estate of between 20-25% of the value of the total estate (Scottish Government 2015c, para 3A.6–3A.8).

The Government is seeking views on whether an exemption could be formulated relating to the agricultural sector which would satisfy the tests of robustness, fairness and proportionality (Scottish Government 2015c, para 3A.18–3A.31).

Protection for a cohabitant

The SLC’s basic scheme for cohabitants

The SLC report recommended a new scheme aimed at protecting cohabitants from disinheritance which, in contrast to the existing law, would apply even where a will had been made. The SLC identified “strong public support” for this change (SLC 2009, para 4.1).

The SLC recommended that cohabitants should be entitled to an “appropriate percentage” of what they would have received if they had been the deceased’s spouse or civil partner. The appropriate percentage would be determined by considering only the length and quality of the cohabitant’s relationship with the deceased (SLC 2009a, para 4.9 and recommendations 37–43).

In relation to its pre-consultation discussions with stakeholders, the Scottish Government identified a lack of consensus about whether or not there should be protection for cohabitants from disinheritance where a will had been made. It commented:

“There was a fairly strong view, particularly among some of the younger stakeholders that individuals made a choice about whether to live together or get married and part of that decision was about the legal and other implications of each. Cohabitation was seen as a conscious and clear rejection of marriage at that point in the couple’s life and their view was that the decision not to marry should be respected and not regulated.” (Scottish Government 2015c, para 4.13)

The SLC’s recommendations where there is a spouse or civil partner and a cohabitant

The SLC report made a specific recommendation for the situation where there is both a spouse or civil partner *and* a cohabitant. As discussed earlier, this might occur, for example, where the deceased was separated (but not divorced) from his or her spouse and in a new cohabiting relationship.

Where there is no will the recommendation was that the spouse or civil partner and the cohabitant split the sum to which the spouse or civil partner would have been entitled. Specifically, the cohabitant would receive the appropriate percentage and the spouse or civil partner would receive the balance of the entitlement.

Where there is a will, the recommendation was that the cohabitant's legal share and the spouse or civil partner's legal share would be separate claims on the estate (rather than there being an amount split between them). However, the actual size of the cohabitant's share would be calculated as an appropriate percentage of the spouse or civil partner's share (SLC 2009a, para 4.30 and recommendation 22).

In relation to its pre-consultation discussions with stakeholders, the Scottish Government reported some concerns about the proposals including:

“...concerns about the fairness of provision for long term cohabitants where there was also a spouse from a short marriage many years before death. Set against this is the need to protect a spouse of a long marriage with responsibility for the dependents of the deceased, where the other party had been part of a short cohabitation before death. It would be possible for courts to be able to distinguish cases although this would add a layer of complexity.” (Scottish Government 2015c, para 4.22)

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