

# Scottish Government submission of 6 October 2022

## PE1965/A: Limit estranged couples' claim on an estate after 7 years of non-medical separation

The Scottish Government has carried out consultations in recent years to keep the law of succession under review. In situations where a spouse or civil partner dies intestate (that is, without leaving a valid will) then the surviving spouse or civil partner has prior rights to the estate. There are two elements to prior rights. There may be rights in any dwelling house left by the deceased and its contents, but those rights only apply where the surviving spouse or civil partner was ordinarily resident in the property at the date of death, so are unlikely to apply where the spouses or civil partners had separated before the death. There is also a right to financial provision, the amount of which depends on whether or not the deceased was survived by issue. If there are children or descendants then the surviving spouse or civil partner is entitled to the first £50,000 out of the estate. The entitlement is to the first £89,000 where there are no children or descendants.

Where parties have chosen to separate but not to pursue a divorce then legally they are still married. Accordingly the surviving spouse has rights to the estate. Marital status informs how an estate is distributed in intestate estates. As prior rights can only be claimed from intestate estate, one way to prevent a claim under the current legal system is for the separated spouse or civil partner to prepare a valid will.

Where a spouse or civil partner dies, whether testate (that is, with a valid will) or intestate then the surviving spouse or civil partner has rights (known as “legal rights”) to part of the moveable estate of the person who died. The moveable estate can include things like money, shares, cars, furniture and jewellery. The other part of the estate is called the “heritable estate” and covers land and buildings. Legal rights are also not affected by the couple’s separation and can be claimed regardless of the terms of any will.

If there are children or descendants then the surviving spouse or civil partner is entitled to one third of the moveable estate, otherwise they are

entitled to one half of the moveable estate. If the will includes provision for the person making a legal rights claim, that person must decide whether to accept their provision under the will or claim their legal rights (or neither). They cannot take both. If the person claiming legal rights accepts any asset or share of the estate left to them in the will, they are presumed to have discharged their legal rights claim.

A married but separated spouse would lose their entitlement to any prior rights and legal rights upon divorce. It is also possible for a separation agreement to be used to renounce parties' succession rights.

The Scottish Government would have concerns were the law changed as the petitioner requests. One unintended consequence could be an increase in disputed commissary cases concerning when parties separated; it may be difficult to state when any period of informal separation began, let alone provide evidential records. In addition, one of the two parties who will know this information would have already died, leaving only the evidence of the married but separated spouse.

The Scottish Government also has concerns about the type of relationships that may be caught up in any definition of the problem outlined in the petition. For instance, not all married couples are able to live together – one partner may be in long term care or in prison. As mentioned above, the evidential burden of proving that parties were or were not separated might be difficult given that the other party to the relationship has died.

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

The Scottish Government's most recent consultation paper in 2019 focussed on intestacy and the response to the consultation was published in May 2020. It can be accessed at <https://www.gov.scot/publications/scottish-government-response-consultation-law-succession>.

While the law of succession affects everyone it can also divide opinion. It is because it affects everyone that there must be some degree of consensus on what reforms will deliver outcomes that are appropriate for

the majority of people in Scotland, and in line with their expectations. The Scottish Government intends to carry out more research on the law on intestate succession and will continue to keep the law of succession under review in the light of these findings.

Finally, in case it would be of assistance, I would draw the Committee's attention to the similarity between the terms of this petition and Petition PE1904 that it considered last year.