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Inheritance law in Scotland

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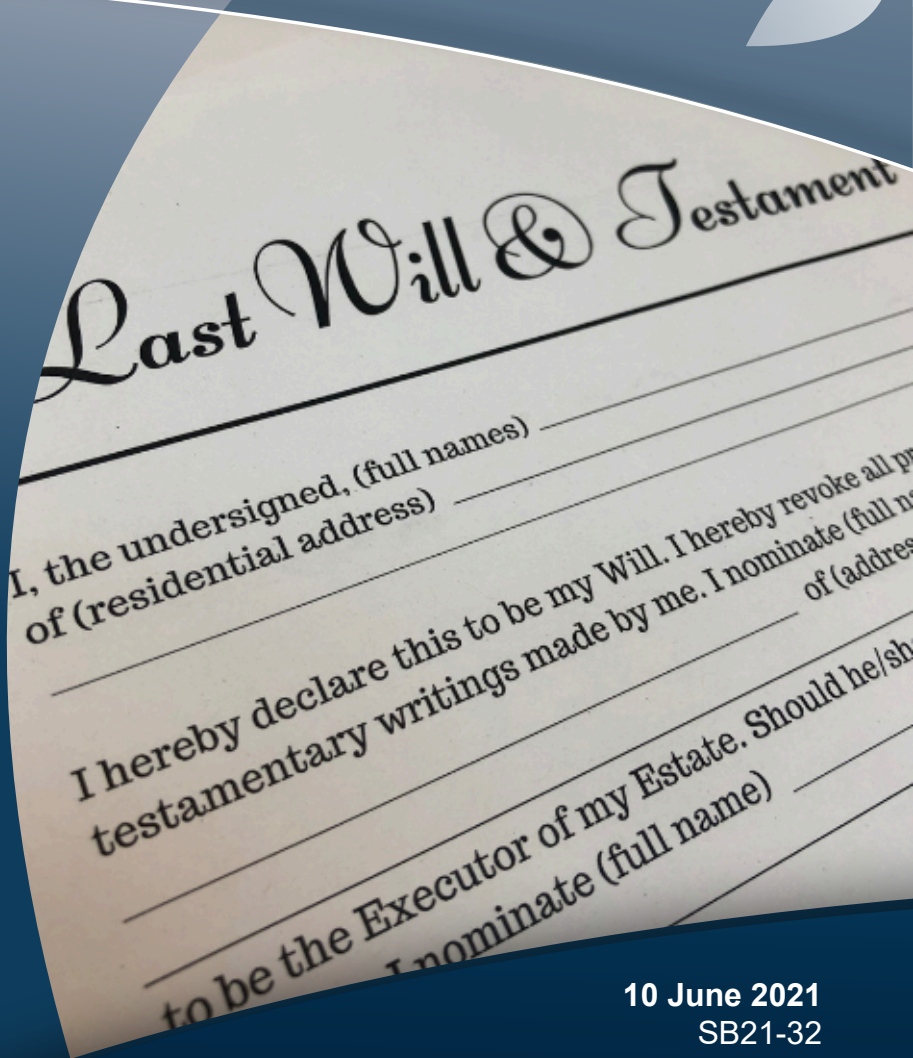
Inheritance law, also known as succession law, provides the rules about what happens to a person's property and possessions when they die. This briefing summarises the current law in this area. It looks at attempts to reform the law in previous parliamentary sessions, where the Scottish Government found the public divided on the merits of key proposals. It also considers what might happen next with these reform efforts.



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Inheritance law says who should inherit someone's money, property and possessions in the event of a death. The law sets out the rules both:

- where a person has died leaving a will (known as **dying testate**)
- where a person has died without doing this (known as **dying intestate**).

The current law in Scotland

Where a will has been made, the intention may be to leave nothing to a spouse, civil partner or child of the deceased. However, in Scotland, it is not possible to disinherit (leave nothing to) these relatives, including where any children concerned are now adults.

Instead, the law gives spouses, civil partners and children a fixed share of the deceased's property through the (slightly oddly named) concept of **legal rights**. Significantly though, the family home, some people's main asset, as well as other land and buildings, are excluded from the scope of the protection. Other types of property, such as money, shares, cars, furniture and jewellery, are included.

There is a detailed statutory scheme for the situation where someone dies intestate, which has been amended several times. The scheme favours spouses and civil partners and provides some protection for the children of the deceased. It also gives some, much more limited, protection to cohabitants.

However, the main piece of legislation here is almost sixty years old. There is a strong feeling that, overall, this law does not match the variety of family structures which exist in Scotland today. For example, 'blended families,' where there is a current partner and children from an earlier relationship, raise difficult questions about what is fair for everyone concerned.

Attempts to reform inheritance law in Scotland in previous parliamentary sessions

Efforts to reform inheritance law have a long history, including a wide-ranging Scottish Government consultation in 2015, [1] based on earlier work by the Scottish Law Commission. [2] There was also a further, more focused, Scottish Government consultation in 2019. [3] The only legislative output to date has been the Succession (Scotland) Act 2016, largely focused on the more technical aspects of the law.

On the law which applies where a will has been made, difficult topics were explored on consultation. For example, both the Commission and Government considered whether protection from disinheritance should continue to apply to adult children, and, if so, whether that protection should be greater or less than the current law. They also considered whether that protection from disinheritance should be extended to a cohabitant of the deceased. No set of proposals attracted majority support on consultation and attempts to reform the law have been abandoned.

The law which applies where no will has been made is still being considered by the Scottish Government. After two rounds of consultation, two, sometimes overlapping, issues are still causing difficulty. One is what the correct approach should be to 'blended

families', the other is how the law should treat cohabitants. In 2020, the Government acknowledged that there was no consensus around any key proposal produced to date.[4] It committed to further evidence gathering and research.

What lies ahead in Session 6?

Based on what the Scottish Government said in 2020, in Session 6 of the Scottish Parliament we are likely to see some proposals on discrete policy topics in the field of inheritance law. However, fundamental reforms to the law are probably still some way off.

What this briefing does

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

The briefing has two goals. First, it is intended to help MSPs and their constituency offices with casework relating to inheritance issues. Second, the briefing aims to be useful to those with a general interest in inheritance law as a policy area.

The briefing is divided into three parts:

- a short section on making a will and the practical issues that need to be sorted out after a death. This signposts to more detailed resources on these topics
- a description of the current law and practice
- a description of several previous government consultations on the possible reform of the law. With one minor exception, these have not progressed to legislative proposals.

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

Practical matters

This section of the briefing covers how to make a will and how to sort out the affairs of someone who has died.

Making a will

If a person dies without making a will, everything that person owns will largely be divided up according to statutory rules (set out later in this briefing). This distribution may or may not be what the person wanted to happen.

If a person wants to make their wishes known in advance of their death, it is recommended they **make a will.** To make a will, or change an existing will, they should **consult a solicitor**. Otherwise, as Citizens Advice Scotland 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 Find a Solicitor webpage allows a person to search for an individual solicitor or firm of solicitors. Searches can be done by geographical area and by legal specialism. For the relevant specialism, select **wills, executries and trusts**.

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. These are matching wills which are suitable for a couple whose main intention is to leave everything to each other.

Will-writing services are also available in books and, increasingly, on the internet. These services may or may not understand that inheritance law in Scotland differs significantly from the law in other parts of the UK.

These services are **not regulated** so there are few safeguards if things go wrong. The Legal Services (Scotland) Act 2010 would have regulated the will-writing industry but the relevant part of the Act was never brought into force.

For more detail on the process of making a will, see the website of Citizens Advice Scotland.

What to do after a death in Scotland

The mygov.scot website has comprehensive information on death and bereavement which is very useful in the initial period after a death. Topics covered include but are not limited to:

- bereavement support and advice
- an introduction to inheritance tax

- information on benefits, money and the home
- what to do if someone dies outside Scotland.

The Scottish Government also has a 2016 publication called What to do after a death in Scotland [5] , which, although not up to date in all respects, covers in detail what happens during the period from the time of death to the funeral and beyond.

Some issues or topics which are relevant during the initial period after the death include:

- **the possibility of donating body parts for transplantation**. Note that, at the time of writing, the Government's 2016 publication does not reflect the new law on organ and tissue donation which came into effect on 26 March 2021. This changed the system to one where a deceased person's consent to donation will be presumed unless they have indicated otherwise.
- **the requirement to obtain a medical certificate** stating the cause of death before a person can be buried or cremated.
- **the Procurator Fiscal's role** in investigating all sudden, suspicious, accidental, unexpected and unexplained deaths, as well as any deaths occurring in circumstances that give rise to serious public concern. Detailed information on this is available on the website of the Crown Office and Procurator Fiscal Service.
- **the need to register the death** - this must happen within **eight days** of the death. It must also take place before a burial or cremation can happen. Various people can register a death, including any relative of a deceased.
- **how to plan a funeral** - including the costs and possible sources of financial help to pay for it. Note that final funeral arrangements, involving fixing a date, cannot be made until it is certain the death does not have to be reported to the Procurator Fiscal.

Tell us Once is a useful service which allows a person to report a death to a range of government organisations in one go.

Organisations contacted by this service include HM Passport Office, HM Revenue and Customs, the Driver and Vehicle Licensing Agency and the UK Government Department for Work and Pensions. The person's local council can also be informed in this way.

The service does **not** contact certain organisations, such as banks and building societies and the NHS (although the service does contact pension schemes for NHS staff).

The current law and practice

This section of the briefing provides an overview of current inheritance law, covering the following topics:

- the main legal terms associated with this area of law
- the role of a key person called 'the executor'
- the law which applies when someone dies without leaving a will
- conversely, the law which applies when someone has made a will.

Some key terms

At the outset, it is helpful to be familiar with some of the **key terms** used by legal practitioners.

Where a person makes a will, he or she is called the **testator** by legal practitioners.

The deceased's money, investments, property and possessions are usually referred to as the **estate**. The people or organisations that will benefit from the estate when it is distributed are called the **beneficiaries**.

When someone dies, 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.

When a will aims to prevent a particular person from inheriting, the will aims to **disinherit** that person. Complete disinheritance of someone's spouse, civil partner or children, including their adult children, is not possible in Scotland.

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. Statutory rules then determine what should happen to the estate.

The term **cohabitant** refers to a person who lived with the deceased as part of a couple. Where no will has been made, some cohabitants may have limited statutory rights on the death of their partner. Alternatively, a deceased person might have a made a will benefiting their cohabitant.

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. For example, moveable property includes money, investments, cars, furniture and jewellery. Proposals to abolish the distinction between heritable and moveable property (at least in the context of inheritance law) have been controversial in the past.

The role of the executor

This section considers the role of the executor, that is to say the person who gathers in and distributes the deceased's estate. The section covers:

- how it is decided which person should be appointed to the role
- the process by which the executor obtains the legal authority to undertake the tasks associated with the role.

Who will be the executor?

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 executor can be appointed by the court (**an executor dative**).

Appointing an executor dative will be necessary if there is no will. However, it may also be required in other circumstances, for example, if there is a will but the executor named in it is unable to undertake the role.

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. Indeed, where there is no will and the spouse or civil partner is entitled to inherit the whole estate, he or she will be **the only person** entitled to be appointed in that role.[i]

Where there is no spouse or civil partner, the court will usually appoint another person entitled to inherit the estate.

> Potential competition for the role of an executor dative is legally complex and the advice of a solicitor is recommended in those circumstances.

How the executor obtains the authority to deal with an 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.

Separately, there is a streamlined procedure for obtaining confirmation to small estates. These have a total value of **£36,000 or less**. In calculating the total value, one 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 Bureau or solicitor on specific points. See also the Scottish Court and Tribunal Service's guidance on small estates. [6] Note the sheriff clerk (of the sheriff court in the area where the deceased last

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i Succession (Scotland) Act 1964, section 9(4).

lived) will help prepare the forms for confirmation.

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 among individuals for the role 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. [7]

When someone dies without leaving a will

This section of the briefing considers the legal rules that determine who benefits when someone dies without leaving a will.

Key legislation

The Succession (Scotland) Act 1964 ('the 1964 Act') sets out the **main rules** on who benefits and how an estate should be divided up between them when there is no will.

Section 29 of the Family Law (Scotland) Act 2006 ('the 2006 Act') has specific rules relating to **cohabitants** of people who have died without leaving a will.

The stages of distributing a person's estate

There are various stages an executor must go through when distributing the estate of a person who has died without leaving a will. 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. Specific beneficiaries then have rights to claim from an intestate person's estate.

- Prior rights in favour of the deceased's spouse or civil partner must be satisfied first.
- The next priority is the legal rights of any spouse or civil partner.
- The legal rights of any children of the deceased are the third-ranked priority under the current rules. Grown up children can claim legal rights.
- Finally, the remaining estate, called **the free estate**, must be distributed according to a list of potential beneficiaries contained in the 1964 Act.

Any cohabitant of the deceased also has **six months** to apply to the court and the court has **discretion** to make a financial award to this person.[ii]

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ii Family Law (Scotland) Act 2006, section 29.

Children and remoter descendants

Sometimes for simplicity, we refer to **children** in the context of inheritance law. However, the law is often interested in **issue**. This is a broader legal term covering both children and remoter descendants, such as grandchildren and great-grandchildren.

The law is interested in the wider category of people because of the possible situation where a child has died before their parent. When their parent then later dies, their remoter descendants (e.g. their grandchildren) may inherit what the child would have received had they lived.

This applies both in relation to legal rights and, with some qualifications, the division of the free estate.[iii]

This briefing will now explore the different categories of rights available to the beneficiaries in more detail.

The prior rights of the surviving spouse or civil partner

Prior rights are a first claim on the estate. They exist 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**.[iv] 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 children of the deceased) or **£89,000** (if there are no surviving children).

In relation to the last bullet point, note that the sum of money can be generated from all types of available asset in the estate. For example, shares could be sold to raise the necessary cash.

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 or children of the deceased to make a claim on the estate.

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iii Succession (Scotland) Act 1964, sections 5(1) and 11.

iv Succession (Scotland) Act 1964, sections 8 and 9.

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 (e.g. money, shares and possessions).

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 any children of the deceased

The surviving children (or remoter descendants)[v] 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 gender or birth order. 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.

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.

The 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:[vi]

1. Children

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v Succession (Scotland) Act 1964, section 11.

vi Succession (Scotland) Act 1964, section 2(1).

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 beneficiary on a particular level of the list identified, that is the point when you know which level of beneficiary will inherit the free estate. There is no requirement to explore the possible existence of individuals 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**.

If there is a spouse or civil partner but **no children**, the spouse or civil partner will inherit the estate up to the prior rights limit. If any (free) estate remains, the spouse or civil partner may have to share this with the deceased's other relatives, such as the deceased's brothers or sisters. (This is due to the combined effect of the financial thresholds associated with prior rights and the operation of the above list associated with the free estate.)

Note **categories 2 and 3** on the list associated with the free estate can include half siblings. However, if there are whole siblings of the deceased, **the whole siblings will inherit in preference to half-siblings**.[vii]

As discussed earlier, someone who would have fallen into a category on the above list might have died before the deceased person whose estate is now under consideration. Unless the person on the list was a parent, spouse or civil partner, then that person's children (or remoter descendants) can inherit in their place.[viii]

Under **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). The money raised by the sale of property falling to the Crown used to go the UK Treasury. However, since Scottish devolution, it has gone to the Scottish Government.

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vii Succession (Scotland) Act 1964, section 2(2) and (3).

viii Succession (Scotland) Act 1964, section 5(1).

The cohabitant's claim on the estate

Any cohabitant of the deceased currently has **six months** from the date of death to apply to the court to ask it to exercise its discretion and give them a share of the deceased's estate.[ix] As the Scottish Government consultation in 2015 noted, the law in question has been criticised for not providing clear guidance on what factors are relevant in deciding what the size of that share should be. [8]

Not everyone who lived with a deceased as part of a couple will qualify as a cohabitant of the deceased under the legislation. The 2006 Act says the court should consider various factors in deciding whether someone is a cohabitant, including their financial arrangements and the length of time they have been living together.[x]

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.

The general rule in the statute is that an 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.[xi]

However, this issue is sometimes dealt with in advance for a particular couple in a **separation agreement**. This sets out the arrangements for a 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.

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

Section 29(10) of the Family Law (Scotland) Act 2006 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.[xii]

Arguably, overall, the section 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.

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ix Family Law (Scotland) Act 2006, sections 25 and 26.
x Family Law (Scotland) Act 2006, section 25(2).

xi Family Law (Scotland) Act 2006, section 29(1).

xii Family Law (Scotland) Act 2006, section 29(2)(a) and (3)(c).

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

As explored in more detail in the second part of this briefing, this type of family was a focal point for the Scottish Government's consultation in 2019.

Where someone dies leaving a will

This part of the briefing considers various aspects of the law associated with making a will, as well as what happens when someone dies having left 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 Requirements of Writing (Scotland) Act 1995 and in the law set out in the decisions of judges in individual cases (**case law**).

The capacity of the person making the will

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**.[xiii] In practice though, it is thought 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 identity of the people who may inherit.

The requirement for writing and further requirements relating to signatures

A valid will must be **in writing**. It must also be **signed by the person making the will** at the bottom of the last page (a process known as **subscription**).[xiv]

In addition, as standard practice, a solicitor will aim to have his or her client make a **probative** or **self-proving will**. Additional requirements must be satisfied for a will to be probative.

xiii Age of Legal Capacity (Scotland) Act 1991, section 2(2).

xiv Requirements of Writing (Scotland) Act 1995, sections 1(2)(c) and 2(1).

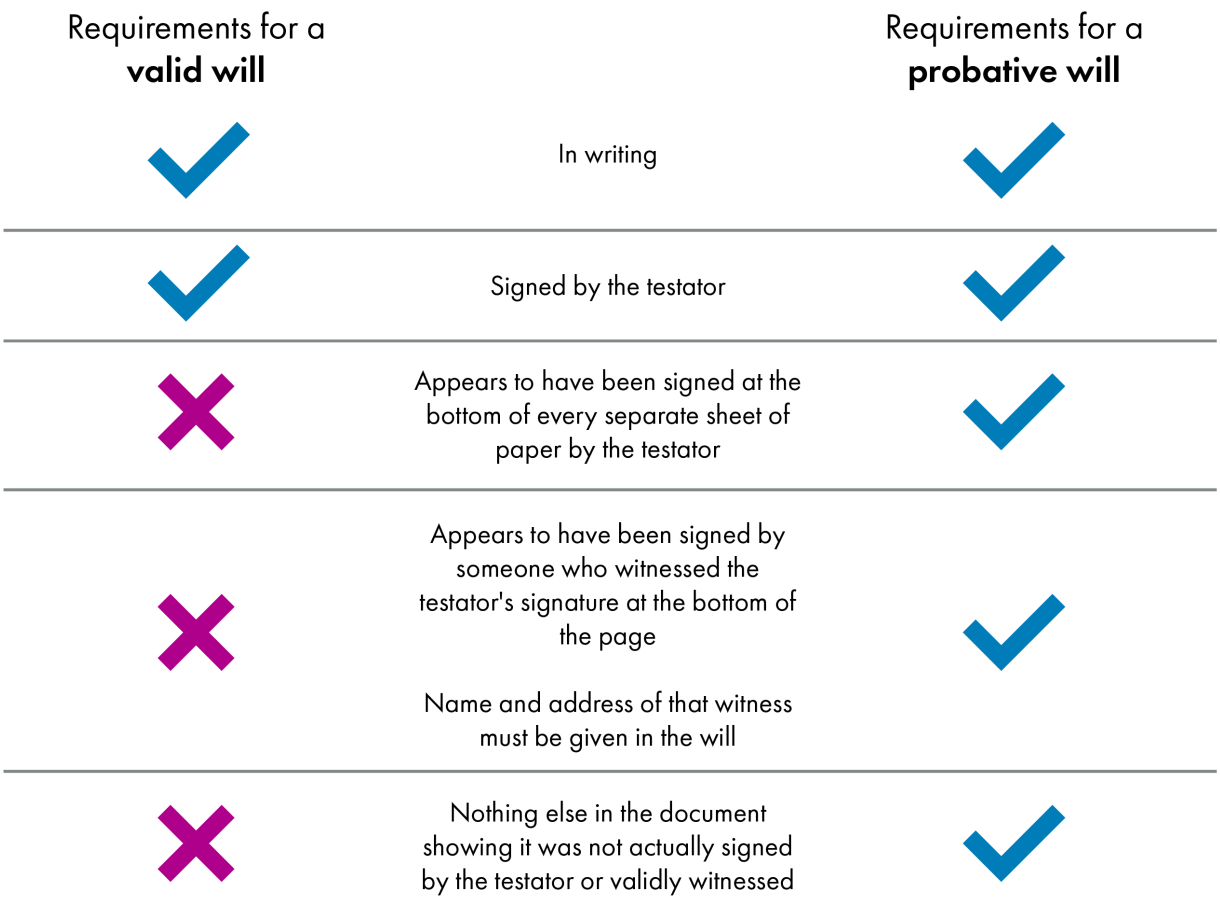
A probative will is **presumed in law** to be validly executed. In other words, this is the starting point for any court.

Furthermore, a court cannot overturn the presumption in an individual case unless enough evidence is produced by a person challenging the will to rebut (i.e. disprove) the presumption.

In the event of a legal dispute, a probative will can be very helpful to the person relying on it. On the other hand, if a will is valid but not probative, then, for example, an executor relying on that will to take out a grant of confirmation must first prove that the will was validly executed. So that person must (as a first step) produce, to the court, sworn written evidence (**an affidavit**) related to the deceased's handwriting.

The **first column** of the diagram below summarises the requirements for a valid will. The **second column** summarises the various requirements for a probative will:[xv]

The requirements for a valid will and the requirements for a probative will



Source: SPICe

xv Requirements of Writing (Scotland) Act 1995, sections 1(2)(c), 2(1), 3(1)(a), 3(1)(b) and 3(2).

Other possible grounds for challenge

The law recognises two further potential grounds on which a will can be challenged:

- if it was not made voluntarily, that is to say where there been **undue influence** from another person
- 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. In some circumstances, it can exist alongside a person exercising undue influence on a vulnerable person.

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 wishes for his or her funeral
- whether the testator wants to donate all or part of his or her body to medical research or for transplant purposes.

On the last bullet point, note that the recommended way to record an organ or tissue donation decision during your lifetime is via the NHS Organ Donor Register.

If you do not register a donation decision this way, then, with some exceptions, it will be considered that you agree to donate certain organs and tissue for transplantation in the event of your death.

There are separate bequest registers for those who wish to donate their body to medical science. These are held by the five Universities with Anatomy departments. More information on this can be found in the Scottish Government guidance on Body Donation.

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 the case that any earlier will could take effect again (**revive**). However, legislation from 2016 says revocation of a will does **not** revive an earlier will.[xvi]

The 2016 legislation also sets out that a **divorce or dissolution of a civil partnership** means that the part of a will benefiting the testator's former spouse or civil partner will **not** apply. This legislation also says that the testator can choose in the will for this general statutory rule not to apply.[xvii]

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

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.

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

> Cohabitants, on the other hand, do **not** benefit from any protection from disinheritance.

An overview

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 (as they do to prior rights on intestacy).

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.**

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.

Furthermore, 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 any children of the deceased.

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xvi Succession (Scotland) Act 2016, section 5.

xvii Succession (Scotland) Act 2016, section 1.

While the proportions associated with legal rights are the same, regardless of whether there is a will or not, **the value of the estate** available for legal rights is not necessarily the same in both scenarios.

Where there is no will, it is the moveable property left **after** prior rights are satisfied which are available for legal rights. This may be none of it. Where a will has been made, **all** the deceased's moveable property is eligible for legal rights.

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 many people's main 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 (as opposed to by, for example, a family-run company).

The restriction of legal rights to moveable property does provide 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

This section discusses the reform of inheritance law.

- First, it looks at the policy case for reform to happen, as well as the challenges associated with such a move.
- Second, it summarises the Scottish Government's attempts at reform so far, where it failed to find a policy consensus among interested individuals and organisations on key proposals.
- Finally, the briefing considers what might lie ahead by way of reform in the current session of the Scottish Parliament.

The case for reform - and the difficulties for policymakers

The main piece of legislation on inheritance in Scotland, the Succession (Scotland) Act 1964, is almost sixty 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.

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 concerned about 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. As the remainder of the briefing highlights, there are a range of key issues on which it is difficult to find public consensus.

The attempts to reform inheritance law (1986-2021)

This section of the briefing explores what happened when the Scottish Law Commission, and later the Scottish Government, tried to reform inheritance law.

Table 2 below provides a high level summary of attempts to reform the law over the last thirty years or so.

Table 2: Timeline of the attempts to reform Scottish inheritance law (1986-2021)

Date	Proposals
1986-1990	The Scottish Law Commission, the independent public body which makes recommendations for law reform, first published proposals on inheritance law. [9] They remain largely unimplemented.
2007-2009	Recognising that society had moved on since its previous work in the area, the Scottish Law Commission revisited the topic of inheritance law. The Commission published a report in 2009 recommending wide ranging reforms, covering both the situation where a will has been made and the situation where there is no will. [2]
2014	In **May 2014**, the Land Reform Review Group, an independent review group set up by the Scottish Government, published its final report. [10] Its wide-ranging report included a recommendation to abolish the distinction between heritable property (land and buildings) and moveable property (everything else) in inheritance law. In **August 2014**, the Scottish Government consulted on the more technical aspects of the Scottish Law Commission's 2009 report. [11]
2015	The Scottish Government launched its main consultation on the bulk of the Scottish Law Commission's 2009 report. [1]
2016	Following on from the 2014 consultation, [11] the Succession (Scotland) Act 2016 became law. It largely contains technical changes on which the Scottish Government had found policy consensus on consultation.
2018	In its response to the 2015 consultation, [12] the Scottish Government confirmed that, **on the law which applies when a will has been made**, it would not be progressing with its key proposals for reform. This was one of the most controversial policy areas from that consultation. **On the law which applies where there is no will**, the Government also acknowledged the absence of consensus on consultation on significant aspects of the 2015 reform proposals. The Government committed to further consultation.
2019	In the first half of 2019, the Scottish Government consulted on new proposals to reform the law which applies where a will had not been made. [3] The Government drew fresh inspiration from the law in Washington State and British Columbia (in Canada). [13]
2020	The Scottish Government published its response to the 2019 consultation. [4] The Government confirmed that, once again, it had been unable to achieve policy consensus on key aspects of its proposals. Significant reforms now seem some way off.

What happened - in more detail

This section considers key policy proposals put forward by the Scottish Law Commission and the Scottish Government and why they failed to progress, even after several consultations.

The law which would apply when a will has been made

The Scottish Law Commission and the Government looked at the law which would apply where a will has been made aiming to exclude certain family members.

There were two key areas of controversy. First, whether protection from disinheritance should continue to apply to adult children and, second, whether the protection should be extended to cohabitants.

Should adult children still be protected from disinheritance?

The position of adult children proved a particularly tricky area for those involved in the

reform efforts.

What was proposed

In 2009, the Commission suggested **two alternative replacement schemes** for the current law. [2]

- The first option would have **greatly increased** the freedom to disinherit adult children.
- The second option would have **decreased** that freedom.

Significant changes would have been introduced by either of the replacement schemes. However, most of the later media attention focused on the second option.

Under the **second option**, the Commission 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
- The distinction between heritable and moveable property should be abolished.

Why was option 2 controversial?

Under option 2, the proposed 25% share could be applied to land and buildings, including the family farm.

This contrasts with the current law, where farms which are directly owned by the deceased (as heritable property) are outside the scope of legal rights. A farmer can safely make a will (and often does so) leaving the farm to the firstborn son.

It was the impact on the family farm that worried parts of the farming community. It lobbied the Government hard on this topic, arguing that if parts of farms had to be sold (to meet such claims) this would affect their commercial viability.

Other interested individuals and organisations had offered alternative views. For example, the report of the Land Reform Review Group (at para 16) considered it:

> " should be a straightforward matter of social justice based on the current disadvantaged position of spouses and [the other] children"
>
> Land Reform Review Group, 2014[10]

What the outcome was

After a small flurry of related media headlines, it all went largely quiet on the government side.

Finally, in late 2018, the Scottish Government confirmed what had long been suspected - that any scheme to reform legal rights in this way had been abandoned. [12]

It seems it was not just the farming community that had concerns about what was planned – more generally, the Government had consulted and found the Scottish public divided. [14]

Should cohabitants be protected from disinheritance?

In 2009, the Commission had also recommended that, if a will was made which attempts to exclude a cohabitant, he or she should be protected from disinheritance. [2]

When the Scottish Government consulted in 2015, it heard mixed views on this idea. Some people argued that someone might have deliberately chosen not to marry to allow other people or organisations to benefit from the estate. For example, this might be the case where there were children from an earlier relationship who the testator wanted to benefit. [14]

In 2018, the Government also announced that it had decided to retain the current legal position. In other words, a person can make a will which does not leave anything to their cohabitant. [12]

The law which applies where no will was made

On consultation in 2015, the Scottish Government found more consensus around the idea of reforms to the law which applies on intestacy, that is to say the law which applies where no will has been made. [14] However, in 2019, it had to consult again on two key issues from the first consultation. [3]

Issues faced by 'blended families'

One such issue was how to divide up the estate where there was a spouse or civil partner **and** children.

This has particular significance for 'blended families', where there are children from an earlier relationship. The Commission's original proposals here received some academic criticism. One concern was they had the effect of step-children inheriting (via their surviving parent) everything, at the expense of the children of the earlier relationship. [15]

The Scottish Government suggested two new (alternative) proposals, [3] drawing inspiration from other countries. [13]

What should the law be for cohabitants?

In 2019, Government also suggested alternatives to the original approach proposed for cohabitants in 2015. [3] The original approach retained the court's discretion on whether someone qualified as a cohabitant and how much they should get from the estate if they did.

Some changes suggested by the Government in 2019 were aimed at creating a simpler scheme. The Government was also willing to revisit fundamental policy questions, such as whether cohabitants should have an automatic right to inherit and whether they should get as much as a spouse or civil partner.

The outcome of the 2019 consultation

On key policy issues, the overwhelming majority of respondents to the 2019 consultation agreed that the current law needs to be reformed. Despite this, the Government identified no clear consensus among those responding on the way forward. This was both in terms of what the reforms should aim to achieve and, furthermore, how those aims should be delivered. [4]

In its response to the consultation, the Scottish Government said it would carry out further research and evidence gathering on areas of difficulty.

Over thirty years from the Scottish Law Commission's original work in this area, the Government also said that the project might be referred back to the Commission once more. [4]

What might come in Session 6 of the Scottish Parliament

In 2020, the Government did also highlight a variety of discrete topics on which there was policy consensus and on which it said there would be further work. [4]

(Note the Government was not entirely breaking new ground here, as some policy commitments mentioned in 2020 had first been made in 2018.) [12]

In 2020, the proposals the Government identified as falling into this category included: [4]

- a review of the financial limits associated with the small estate procedure, the procedure that allows an estate to be wound up with less legal involvement than is required for larger estates
- a change to the law on executors so that someone convicted of murder or culpable homicide is not allowed to be an executor to the victim's estate
- further consideration of what personal information about the deceased and other family members should be publicly available from the documentation associated with the estate. Concerns about the risk of fraud have been raised with the current position
- a change to the existing law on prior rights, meaning that, where there is a spouse or civil partner but no children, the spouse or civil partner will inherit the whole estate. At present, it might have to be shared between the spouse or civil partner and other relatives.
- separately, a consultation on raising the various financial thresholds associated with prior rights, which were last increased in 2012.

In 2020, the Government said that, where legislation was necessary, it was committed to legislating at "the next available legislative opportunity." [4]

However, while we can now reasonably expect some changes in these specific areas, **more fundamental reforms to the system of inheritance law still seem some way off.**

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