

Citizen Participation and Public Petitions Committee

19th Meeting, 2022 (Session 6), Wednesday
21 December 2022

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

Petitioner	Mark MacLeod
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to limit married, informally separated, non-cohabiting couples' claim of prior right over descendants of the deceased after 7 years of separation
Webpage	https://petitions.parliament.scot/petitions/PE1965

Introduction

1. This is a new petition that was lodged on 7 September 2022.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**. This highlights similar petitions considered by the Committee in 2021 and early 2022 ([PE1904](#)). PE1904 was closed in March 2022.
4. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected not to collect this information.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.

Action

The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Annexe A

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

Petitioner

Mark MacLeod

Date lodged

7 September 2022

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to limit married, informally separated, non-cohabiting couples' claim of prior right over descendants of the deceased after 7 years of separation.

Previous action

I have contacted Keith Brown MSP's office, but no reply was given. I also spoke with a family lawyer and was advised to petition the Scottish Government to address failings in the legal system.

Background information

Currently a married couple can separate and have other families after a relationship has ended. Decades later if no formal divorce has occurred the surviving spouse and their families have more claim of prior rights to the deceased's estate than any biological or legally adopted survivors of the deceased. If the surviving spouse dies before the estate has been settled the unrelated family have more rights than biological or adopted children.

To amend this imbalance, I would remove the right of prior claim after 7 years of non-cohabiting separation for still legally married couples bringing it in line with current law regarding no fault divorces.

People are often unaware of the legal imbalance that occurs within the law. This proposed change will not include those separated for medical needs but would affect couples who separate with the deliberate intention of living separately, informally and practically, ceasing the relationship in every way except legally.

Annexe B

The logo for SPICe, featuring the text 'SPICe' in white on a purple-to-blue gradient background.

The Information Centre
An t-Ionad Fiosrachaidh

Briefing for the Citizen Participation and Public Petitions Committee on petition PE1965: Limit estranged couples' claim on an estate after 7 years of non-medical separation, lodged by Mark MacLeod

Brief overview of issues raised by the petition

- Inheritance law (also known as 'succession law') treats divorce or dissolution of a civil partnership, rather than the point the couple separate, as the key date that associated rights to inherit from a spouse or civil partner's estate stop applying.
- This aspect of inheritance law affects couples who separate but, for whatever reason, choose not to later divorce or dissolve their civil partnership. It is these couples who are the focus of this petition.
- The Committee considered a similar petition to the current one in 2021 and early 2022 ([PE1904](#)). PE1904 was closed in March 2022.
- In the [Programme for Government 2022-23](#), the Scottish Government announced a Trusts and Succession Bill. This may contain a proposal relevant to this petition, although there are not enough details about the Bill yet to be able to confirm this.

The current law and practice, as well as the possible law reform relevant to this petition, are set out in more detail below.

The current law and the role of separation agreements

If a person does not make a will (known as 'dying intestate') the [Succession \(Scotland\) Act 1964](#) ('the 1964 Act') applies to give their spouse or civil partner certain key rights to the estate.

These rights under the 1964 Act include what is known as **prior rights** in favour of the spouse or civil partner. Prior rights are rights to [a share of the deceased's house, furniture and money](#), subject to maximum financial limits.

Prior rights [must be satisfied first out of the estate before other types of inheritance claim under the 1964 Act](#). Claims that rank below prior rights include [two types of potential claim](#) by any children of the deceased (including adult children), [as well as potential claims by other relatives of the deceased](#).

Notwithstanding the provisions of the 1964 Act, it is open to a separating couple to make a legally binding separation agreement. [In such agreements, a couple usually agree to give up any inheritance rights they have in relation to each other after the date of separation](#).

A valid will made by the deceased can also exclude a claim relating to prior rights by a spouse or civil partner. However, another type of claim on the estate can still be made by such a spouse or civil partner, called [a legal rights claim](#), even where a will has been made.

Possible law reform

The Government [consulted in 2019](#) on reform of the law where someone dies without leaving a will, publishing [its response to the consultation in 2020](#).

In the Government's response, it divided its consultation proposals into two categories: a) a variety of discrete proposals which are suitable for future legislation; and b) those on which policy consensus was not achieved and on which there will need to be further work, both by the Government and potentially the [Scottish Law Commission](#). On the first category, [the latest Programme for Government](#) has now announced a Trusts and Succession Bill.

[In its 2020 response](#), the Government said it was committed to legislating on the proposal that, where someone dies without leaving a

will or having children, **the spouse or civil partner should inherit the whole estate.**

This would be a change to the current law which, as discussed earlier, says that a spouse or civil partner has [prior rights to a share of the deceased's house, furniture and money](#), up to certain financial limits. Once those financial limits are exceeded, [other relatives of the deceased](#) are entitled to what is known as 'the free estate'.

In [its response to the 2019 consultation](#), [as well as its written submission in January 2022](#) on the (now closed) petition [PE1904](#), the [Law Society of Scotland](#) said that, in its view, it was important that this legislative proposal distinguished between couples who had been living together as spouses or civil partners and those who had been separated for a long time.

Sarah Harvie-Clark
Senior Researcher

20 September 2022

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

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

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

Annexe C

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.