

# Citizen Participation and Public Petitions Committee

4th Meeting, 2022 (Session 6), Wednesday 9  
March 2022

PE1904: Change Scots law to disqualify  
estranged spouses from making claims on an  
estate

## Note by the Clerk

<b>Lodged on</b>	21 October 2021
<b>Petitioners</b>	Christina Fisher
<b>Petition summary</b>	Calling on the Scottish Parliament to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple, for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets.
<b>Webpage</b>	<a href="https://petitions.parliament.scot/petitions/PE1904">https://petitions.parliament.scot/petitions/PE1904</a>

## Introduction

1. The Committee last considered this petition at its meeting on [1 December 2021](#). At that meeting, the Committee agreed to write to the Law Society of Scotland, the Family Law Association, the Faculty of Advocates and the Scottish Law Commission.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from the Scottish Law Commission and the Law Society for Scotland which are set out in **Annexe C**.
4. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.

5. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

## **Action**

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

Options include:

**Clerk to the Committee**

## Annexe A

# PE1904: Change Scots law to disqualify estranged spouses from making claims on an estate

## Petitioner

Christina Fisher

## Date Lodged

21/10/21

## Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple, for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets.

## Previous action

I have contacted my local MSP, the First Minister Nicola Sturgeon, and the Cabinet Secretary for Justice, Keith Brown, but feel that I've been fobbed off with politeness.

## Background information

Currently, even if a married non-cohabiting couple have chosen to live apart, other than to receive care, an estranged spouse can still demand the bulk of their spouse's estate when they die.

I believe that, when a couple choose to live apart, they should forfeit their claims to each other's estates. This would enable other family members to manage their loved one's affairs without the possible malice of an estranged spouse.

Organisations like the Scottish Public Pensions Agency can acknowledge such a marriage separation without seeking a legal document, other than proof of address. I believe that Scots law should be modernised, to reflect that many have second marriages or common law spouses.

Currently, the natural family of the spouse that dies is effectively disinherited, receiving only a portion of one quarter of the remaining estate after the prior rights claim is settled while the estranged spouse receives the bulk of the estate.

## Annexe B

### Extract from Official Report of last consideration of PE1904 on 1 December 2021

#### **Inheritance Law (Estranged Spouses) (PE1904)**

**10:26**

**The Convener:** PE1904, which was lodged by Christina Fisher, seeks to change Scots law to disqualify estranged spouses from making claims on an estate. It calls on the Scottish Parliament to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets.

The SPICe briefing accompanying the petition sets out the current legal position in relation to inheritance law in Scotland. It notes that section 1 of the Succession (Scotland) Act 2016 sets out that, where a person has made a will, when that person gets divorced or their civil partnership is dissolved, any provision in a will benefiting their former spouse or civil partner ceases to apply. However, there is no equivalent statutory provision in section 1 covering the situation where the person is estranged from their spouse or civil partner, but there has been no divorce or dissolution of the civil partnership. There is also no provision covering where a person has made a will benefiting their cohabitant, but the cohabiting relationship later breaks down.

In its submission, the Scottish Government states that it has carried out consultation to keep the law of succession under review, with the most recent consultation analysis published in May 2020. It notes that

“while the law of succession affects everyone it can also divide opinion”,

and that

“there must be some degree of consensus on what reforms will deliver outcomes that are appropriate for the majority of people in Scotland.”

The petitioner's anomaly is actual. In light of that, what comments might colleagues wish to make?

**Alexander Stewart:** There is scope for us to ask the advice of organisations—possibly the Law Society of Scotland and the Family Law Association—that may be able to give us some views on the scope of what the petition is trying to engage with. As a first stage, it would be useful for us to clarify and take more evidence on the process.

**The Convener:** I would like to write to those organisations on the basis that it appears that the anomaly exists. We would be interested in their confirming that that is the case and what they see as the potential risk to justice arising from that. We

could add the Faculty of Advocates and the Scottish Law Commission to the list of organisations that we will write to.

Are there any other comments?

**Paul Sweeney:** I agree with that. I do not know whether it is easy to define in law at what point estrangement takes place. I do not know whether that is clearly defined in legislation, so that might be the complexity that arises from the petition.

**The Convener:** Yes. Although the word “estrangement” sounds quite formal and technical, it is perhaps not legal. Therefore, it could mean different things to different people. It would be useful to obtain evidence on that.

## Annexe C

# Scottish Law Commission submission of 15 December 2021

## PE1904/B - Change Scots law to disqualify estranged spouses from making claims on an estate

Thank you for your letter of 8 December. You ask for the Scottish Law Commission's views on the actions called on in this petition.

We concentrate on the question of how estrangement is defined in Scots law (if at all) and at which point estrangement is deemed to have occurred. What follows is the work of two of our Commissioners, Kate Dowdalls QC and Professor Gillian Black.

There is no legal definition of "estrangement" for the purpose of Scots family law. The term is not commonly used by Scots family lawyers. When spouses and civil partners separate, there is no change of legal status; they remain married/ civil partners. It is only when they divorce or their civil partnership is dissolved that their status changes (and therefore their rights in succession fall away).

Further, section 1 of the Succession (Scotland) Act 2016 provides that where a person (the testator), by a will, confers a benefit on a person who is or becomes their spouse or civil partner and the marriage or civil partnership is later terminated by divorce, dissolution or annulment, the person on whom the benefit was conferred is treated as if they died before the testator.

The date on which spouses and civil partners cease to cohabit is, however, significant for other reasons. Section 10 of the Family Law (Scotland) Act 1985 sets out the basis upon which the value of matrimonial or partnership property shall be shared on divorce.

It provides that the net value of the matrimonial property shall be the value of the property at the "relevant date" after deduction of any debts incurred by one or both of the spouses/ partners. Section 10(3) defines the "relevant date" as the earlier of (a) the date on which the persons ceased to cohabit (subject to subsection (7), which provides that no account shall be taken of a continuous period of cessation of cohabitation of more than 90 days followed by resumption of cohabitation for less than 90 days) or (b) the date of service of the summons for divorce/ dissolution.

Section 27(2) of the 1985 Act provides that parties to a marriage shall be held to cohabit with one another "only when they are living together as man and wife".

The date of cessation of cohabitation is also significant for the purpose of establishing whether a ground of divorce is established in terms of section 1(1) and (2)(d) or (e) of the Divorce (Scotland) Act 1976. Subsections (2)(d) and (e) provide

that a marriage shall be taken to have irretrievably broken down; (d) where there has been no cohabitation between the parties for a continuous period of one year immediately prior to bringing the action (for divorce) and the defender consents to the granting of decree; and (e) there has been no cohabitation between the parties at any time during a continuous period of two years immediately prior to bringing the action.

In terms of section 2(4), in considering whether either of the periods mentioned in section 1(2)(d) or (e) is continuous, no account shall be taken of any period or periods not exceeding 6 months during which the parties cohabited, but any such period(s) shall not count as part of the periods of non-cohabitation required.

Similar provisions apply in relation to dissolution of civil partnership, in terms of sections 117 and 119 of the Civil Partnership Act 2004.

Section 13(2) of the 1976 Act provides that, for the purposes of that Act, “the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife and “cohabitation” shall be construed accordingly”. There is no equivalent interpretive provision in the 2004 Act.

The question whether spouses have ceased to cohabit for the purpose of section 10(3)(a) of the 1985 Act was considered in the case of *Banks v Banks* 2005 Fam LR 116, in which Lord Carloway held that the task of the Court was to determine when the parties ceased to cohabit, having regard to the statutory provision that cohabitation occurs only when parties are “in fact living together as husband and wife”; the Court must look at the matter objectively; the intention of the parties was not determinative; however their intention and any communication may be relevant (para 33).

This approach in was followed in *Bain v Bain* 2008 Fam LR 81. The formulation of the test in *Banks* was approved by the Second Division in the Inner House of the Court of Session in *S v S* 2015 SC 513.

Judicial separation, available to spouses under section 4 of the 1976 Act and to civil partners under section 120 of the 2004 Act, remains available but is rarely used. The grounds upon which decree may be granted are the same as for the granting of decree of divorce or dissolution of civil partnership.

Issues relating to financial provision may not be resolved in proceedings for separation and the granting of a judicial separation does not affect matters of status. The Scottish Law Commission recommended abolition of this remedy in its 1992 Report on Family Law (Scot Law Com No 135, para 12.19), but that recommendation was not implemented.

In practice, many couples who separate reach agreement on financial matters before divorce/ dissolution. These agreements are binding and usually contain a clause in which each member of the couple relinquishes their rights in succession on the death of the other.



# Law Society for Scotland submission of 5 January 2022

## PE1904/C - Change Scots law to disqualify estranged spouses from making claims on an estate

Thank you for your letter of 8 December 2021 seeking the Law Society of Scotland's views on matters relating to this petition. Our Trust and Succession Law Subcommittee are pleased to provide the following comments.

### **General comments**

In relation to this matter generally, we consider it appropriate to draw a distinction between the treatment of testate estates and intestate estates.

### **Testate cases**

We note that the petition calls on the Scottish Parliament "to urge the Scottish Government to define in law the difference between a legally married cohabiting couple and a legally married non-cohabiting couple, for the purposes of ensuring that an estranged spouse cannot inherit their spouse's assets." Taken literally, this could have the effect of imposing a prohibition on parties who are married but separated, from making a will leaving property to each other should they wish to do so. It seems unlikely that this is what is intended by the Petitioner and indeed, in the interests of freedom of testation, we would not support such a change in the law.

There is already some degree of protection provided in relation to separated spouses or civil partners where there has been a divorce, dissolution or annulment. Section 1 of the Succession (Scotland) Law 2016 provides that where a marriage or civil partnership is terminated by divorce, dissolution or annulment, any benefit under a will conferred by the testator upon the former spouse or civil partner will be revoked, unless the will expressly provides otherwise. This applies only where the deceased has died after the divorce, dissolution or annulment has been obtained and after 1 November 2016.

However, in both testate and intestate cases, an estranged spouse or civil partner will be able to claim legal rights in their deceased partner's estate, no matter the terms of the will. This will amount to the value of one half or one third (depending on whether there are children) of the deceased's moveable estate. The Scottish Government has indicated an intention to leave this part of the law of succession unchanged. Of course, while the deceased was alive, an estranged partner may have had a claim under family law and leaving the estranged partner able to make a

claim to legal rights following their spouse or partner's death may be regarded as a something of a substitute for such lifetime rights.

### **Intestate cases**

The model of intestate succession in Scotland is a default system for those who die without a valid will. We note, however, that a significant proportion of individuals in Scotland do not have a will and therefore the law of intestacy has the potential to apply to a large part of our society.

In relation to intestate succession, we note that the Scottish Government has previously indicated an intention to legislate without further consultation in two circumstances:

Where the deceased is survived by children/issue and no spouse/civil partner, in which case the issue would take the whole estate.

Where the deceased is survived by a spouse/civil partner and no issue, in which case the spouse/civil partner would take the whole estate.

In the second circumstance under the present law, a surviving spouse/civil partner would take prior rights and legal rights. The entitlement under prior rights to a dwelling house (or share thereof) and to furniture/furnishings will be dependent on the place of residence of the surviving spouse/civil partner at the time of the deceased's death, and therefore the circumstances of an estranged couple may restrict the entitlement.

In our response to the Scottish Government's 2019 consultation, we suggested alternative treatment of a spouse who was separated from the deceased at the time of their death. Our comments in this regard are set out in full in our response to that consultation.

The Committee particularly sought comments on the following matters:  
How estrangement is defined in Scots Law (if at all) and at which point estrangement is deemed to have occurred.

We are not aware of any definition of estrangement within Scots law, either as set out in legislation or case law.

As set out in our response to the Scottish Government consultation, we would suggest that using a test of 'living together as husband and wife/spouses/civil partners' would be most appropriate to determine the separation of spouses/civil partners for any change in the law in connection with intestate estates. This is a test which is well understood, legislated, and litigated in the realms of family law (for example, in the context of assessing the date of separation for the purposes of divorce in Scots law) and in tax law.

If the approach in the petition were to be followed, we suggest that there may be merit in considering the potential introduction of a time-requirement before excluding a survivors' prior rights and legal rights. This may help to reduce the potential for

unfair situations, such as, by accommodating circumstances where parties have separated and may have been considering re-kindling their relationship at the time of death of one of them. For example, it could be provided that separated spouses/civil partners would be entitled to benefit if they been living together as husband and wife/spouses/civil partners at any time in the six months before the death.

In addition, we recognise that there may be some circumstances where imposing a 'living together as if husband and wife/spouses/civil partners' test could present unfair results if applied without some discretion – for example, where one partner is in long-term care. There are likely to be some cases where some involvement of the courts is necessary so as to accommodate the variety of circumstances in which separation can occur.

Whether there is an anomaly arising from the surviving partner of an estranged couple being able to benefit from the other's estate (i.e. where they are no longer living together, but divorce has not yet taken place) and whether, in your view, the current situation poses any risk to justice.

The surviving partner of a separated couple will currently be able to benefit from the other's testate estate before the granting of a divorce, dissolution or annulment if provided for in the deceased's will, or as noted above by the operation of legal rights, and after a divorce, dissolution or annulment if expressly provided for in the will. As highlighted above, we do not consider that the current situation in terms of testate estates should be amended. It is open to a testator to alter the terms of their will following a separation should they wish to do so. While there may be situations where a deceased had no longer intended or wished for a separated spouse or civil partner to benefit from their estate, but they had not amended their will accordingly, we suggested such 'hard cases' would not merit altering the law to the infringement of freedom of testation. Given the freedom of testation recognised in Scots law, we do not consider this creates an anomaly, sufficient to give rise to a change of the law.

In relation to intestate estates, we recognise that the current law may be contrary to a deceased's wishes in some cases and so it could be said that an anomaly arises from the surviving partner being able to benefit. Indeed, our response to the Scottish Government's 2019 consultation anticipated, in certain respects, the point now raised by the Petition. As indicated above, in our consultation response we suggested using the test of 'living together as husband and wife/civil partners' before the surviving spouse could inherit on intestacy to "resolve current anomalies (i.e. those which can arise where spouses or civil partners are separated at the time of the death of one of the parties)."

More generally, but importantly, the stated intention of the Scottish Government to alter the law on intestacy (so that, in particular, where a deceased is survived by a spouse/civil partner and no issue, the survivor would take the whole estate) goes some way further than the current legal position and we consider that this could pose a risk to justice which merits limitation as we suggested in our response to the 2019 consultation.

All this said, it remains essential to recognise the benefits and importance of making a will, and keeping it updated, and we consider that this should be the subject of greater promotion in Scotland.

We hope this information is helpful. If we can be of any further assistance, please do not hesitate to contact me.