

Lessons Learned From Abroad About Intestate Inheritances for Unmarried Cohabitants

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E. Gary Spitko, [Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience](#), 103 *Iowa L. Rev.* 2175 (2018).

In 2002, [Professor Spitko](#) published [An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners](#) in the Oregon Law Review. Since then, in 2006, Scotland statutorily began to provide intestate inheritance rights to unmarried cohabitants. Three years later, the Scottish Law Commission recommended reforming and replacing the 2006 law with rights for unmarried cohabitants that would apply to intestate and testate estates. Several years later, in March of 2016, the Justice Committee of the Scottish Parliament published [Post-Legislative Scrutiny of the Family Law \(Scotland\) Act 2006](#). Professor Spitko analyzed these developments in Scotland and used them as a basis for reexamining his 2002 proposal.

I must admit that I am a huge fan of looking to other countries' experiences for insight into our own legal system. I also think our intestacy laws need to be updated to reflect societal changes that have happened in recent years. As a result, I found Professor Spitko's article to be fascinating.

Part I of the article starts by noting that no state in the U.S. grants inheritance rights to unmarried, unregistered cohabitants. It then explains why it makes sense to look at the Scottish experience. Significantly, it notes that the norms of Scottish and U.S. succession law are very similar in that they both prefer limited judicial discretion and fixed entitlements and they both value certainty. Given that the 2006 Scottish law has been extensively critiqued by practitioners, academics, and courts, it's worth examining it. Part I then notes that its examination focuses on three "issues of principle" and two "issues of execution." The issues of principle are (1) does the law fulfill its purpose?; (2) what is the impact of the law on certainty and administrative convenience?; and (3) what are the implications of the law on marriage? The issues of execution are (1) what is the impact of the duration of the cohabitation?; and (2) what is the impact of will substitutes?

In Part II of his article, Professor Spitko analyzes the 2006 Scottish law and focuses on the three issues of principle mentioned above. The law defines a "cohabitant" as "a man and a woman who are (or were) living together as if they were husband and wife; or...to persons of the same sex who are (or were) living together as if they were civil partners." The law says that a court must consider three factors in determining whether somebody is a cohabitant: (1) length of time living together, (2) nature of their relationship, and (3) extent and nature of financial arrangements during their time living together. The law does not provide a fixed intestate share to the surviving cohabitant. Instead, it gives the court near unlimited discretion to determine if people qualify as cohabitants and to decide the share, with one key limitation: the intestate share cannot exceed the amount the person would have received had he or she been a spouse or civil partner of the deceased. In determining the size of the intestate share, the court is to consider will substitutes.

The article then focuses on the three issues of principle. First, with respect to the purpose of the law, critics of Scotland's 2006 law have focused on the law's lack of clarity with respect to its purpose. The article notes that the law does not seek to convey marriage-like rights on unmarried, unregistered cohabitants, but there is little clarity regarding what exactly it is attempting to convey. Second, with respect to certainty and administrative convenience, the discretion of the court is so unfettered that there is virtually no certainty regarding the outcome. Interestingly, the lack of a specific time period for people to live together to qualify as cohabitants has not really created any significant administrative issues. Finally, with respect to implications for marriage, the law's drafters focused on protecting the

special status of marriage by differentiating the rights of cohabitants from those of spouses, by capping the amount that a cohabitant can receive at a spousal or civil partner's share, and by subordinating the rights of a surviving cohabitant to those of a spouse or civil partner of the deceased cohabitant.

The article then discusses the Scottish Law Commission's (SLC) 2009 reform proposal. The SLC urged parliament to repeal the law and replace it with rights for surviving cohabitants that would apply to both testate and intestate estates. The reform proposal would focus on the contributions of the surviving cohabitant to the partnership. It does not take into account will substitutes. The SLC proposal defines a cohabitant as somebody who was "living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners." The proposal urges the court to focus on five factors: (1) whether they were members of the same household, (2) stability of the relationship, (3) whether the relationship was sexual, (4) whether they had (or accepted) children together, and (5) whether they appeared to others as if they were married, in civil partnership, or cohabitants with each other. The proposal lets the court determine the appropriate percentage of the estate to be received, considering the length of the cohabitation, the interdependence of the parties, and what the survivor contributed to their life together. A surviving cohabitant can assert a claim even if there is a surviving spouse.

In Part III of his article, Professor Spitko uses the Scottish experience to analyze how a U.S. state might best craft an intestacy statute that provides for cohabitants. Here, Professor Spitko refers to [his own 2002 article](#), which proposed an accrual/multi-factor approach to cohabitants, and uses the Scottish experience to update and improve his proposal. He appropriately notes that we cannot just do exactly what Scotland has done. We need to consider where U.S. values are different from Scottish values and adjust accordingly.

First, Professor Spitko notes that it is critically important for the statute to clearly state the purposes and values behind the law. Also, in a country that values certainty and predictability, the law cannot give the court unfettered discretion to apply the law. Finally, any law in the U.S. must be mindful of the political reality that it will be difficult to garnish sufficient support for any law that is perceived as undermining the institution of marriage.

Second, Professor Spitko revisits his 2002 accrual/multi-factor approach proposal. He notes that the 2002 proposal's stated purpose is (1) to promote the decedent's unexpressed donative intent, (2) to recognize the survivor's contributions, and (3) to protect the survivor's reliance interest. I should be revised to note that any of those three is a qualifying purpose. More specifically, the revised proposal would qualify a couple as cohabitating if (1) they lived together in a physically and emotionally intimate partnership and (2) there is evidence that either (a) the decedent intended to benefit the survivor, (b) the survivor contributed to the decedent's well-being, or (c) the survivor relied on the relationship.

As to administrative convenience and certainty, the original proposal was clear and simple in that it provided an inheritance schedule that gave the survivor a percentage of the intestate estate based on years of living together but it required a minimum three-year period before any inheritance would happen. The revised proposal would keep the same basic schedule, but it would allow short-term cohabitants (*i.e.*, living together less than three years) to inherit, if circumstances warrant it, up to the amount that somebody might inherit after living together three years. For longer periods together, the schedule would not be as rigid as in the 2002 proposal. Instead, there would be limited flexibility by giving the court limited discretion to deviate from a fixed percentage, up or down within a range.

As to implications for marriage, the revised proposal would do two things that were not done in the 2002 proposal so as to not discourage marriage. First, it would limit the amount that a surviving cohabitant may receive to the amount that that person would have received had the cohabitants been married. Second, it would prohibit a surviving cohabitant from making a claim on the intestate estate if there actually is a surviving spouse of the decedent.

Professor Spitko has written an excellent, thought-provoking piece. Our society is changing, and a greater number of couples are choosing to cohabit. Because intestacy laws, in theory, reflect the presumed intentions of the decedent, intestacy laws need to change to reflect this reality. By looking at the Scottish experience, Professor Spitko is moving

the conversation forward and helping states that might want to update their intestacy laws to conform with modern realities.

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