

Minister for Community Safety
Fergus Ewing MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk



The Hon Lord Drummond Young
Chairman
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR



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Our ref:
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Dear Lord Drummond Young

On behalf of the Scottish Government, as the Minister with responsibility for policy in this area, I would like to thank you for providing the Scottish Law Commission's Report on Succession (Scot Law Com No 215). We are grateful to the Commission for its thorough and considered treatment of the law of succession. Though the report was received less than three months ago and will require further careful, in-depth consideration, I am writing now to provide you with an initial response.

We recognise that the issues are important and some are less than straightforward. We also recognise that the legislation in relation to intestate succession is now over 40 years old and may not, therefore, meet the needs, or reflect the relationships, of the citizens of a modern Scotland. The case for review and reform is a strong one. I believe that the Commission's work provides us with a firm foundation for taking this forward.

At the same time, we are aware that fundamental reform of the law in this crucial and sensitive area is likely to be possible only once in a generation. It will be important, therefore, for the Government to proceed to engage with stakeholders in order to facilitate general understanding of the issues and to provide confidence that the proposals which are taken forward are appropriate and robust.

Against this background, I am sure you will appreciate that at this point our conclusions are necessarily of a provisional nature. Nevertheless, I hope that they will be of interest.

Intestate Succession

The recommendations on the division of an estate among spouses, civil partners and children appear attractively straightforward and clear and have the support of those who responded to the earlier discussion paper. It certainly does not seem unreasonable that, where there is a spouse or civil partner and no children, the spouse or civil partner should take the whole estate and similarly where there are only children and no spouse or civil partner, the children should take the whole. Likewise, we can certainly see that there is a case for providing that, where there is a spouse or civil partner and also children, the spouse or civil partner should take the first £300,000 (the threshold sum) of the estate and the remainder should be divided one half to the spouse or civil partner and one half divided among the children.

The Report does, however, suggest that there are issues which may require further debate including the level set as the 'threshold sum'. We agree with that. We recognise that setting the value at a different level will not only have an impact on the beneficiaries in intestate succession but will also have an impact on other areas of succession. We also recognise that we may need to consider the issues around whether a spouse or civil partner who is not the parent of the deceased's children should be treated differently, albeit that it is the case that a parent could make a will in these circumstances if the law of intestate succession did not reflect his or her wishes.

We note that as a matter of principle (i.e. that succession rights should not be property specific) that you have not recommended that a spouse or civil partner should have a right to acquire the couple's home and furniture but that if the 'threshold sum' is set at £300,000 this should allow a spouse or civil partner to acquire them in all but exceptional cases. We also note the recommendation that where a spouse or civil partner acquires the deceased's right in the couple's dwelling house, the value of the property should be taken into account when calculating the survivor's entitlement to the estate. We recognise that this will only be relevant where a deceased is also survived by issue.

Protection from disinheritance

In order to remove some of the complexity of the current law, the Report recommends that legal shares, which it recommends to protect spouses and civil partners, and possibly also children, from disinheritance, should be calculated by reference to the whole estate. The recommendation that a spouse or civil partner should be entitled to a legal share of the estate amounting to 25% of what he or she would have received on intestacy again has the merit of simplicity. We accept that the simplicity of the rules and, therefore, these recommendations have attractions.

However, probably the most difficult issue which we will have to consider, and which divided consultees, is the extent to which issue should be protected from disinheritance. We will wish to reflect – in consultation with others – on the two options put forward in the Report. At this point, we have no fixed view on whether it would be preferable that issue should have a right to a legal share of the deceased's estate which would be 25% of what he or she would have received on intestacy (the first option) or whether only dependent children should be protected from disinheritance and they should have a claim against the estate for a capital sum payment to provide reasonable financial support, although this would not be payable out

of estate which is inherited by a person who owes the dependent child an obligation of aliment (the second option).

In considering this further, we will want to take account of the fact that the farming and land owning communities have on-going concerns about legal shares for children coming out of the whole estate and the impact this might have on the continued operational viability of land holdings.

It was interesting to note that your consultees expressed no support for anti-avoidance provisions designed to protect close relatives in cases where a deceased may have given away or undervalued assets during his or her lifetime which reduced the amount of estate available to meet relatives' claims. The reasons given for the lack of support, the potential for the creation of practical difficulties, the complexity of any provision and the frustration of otherwise legitimate and intentional acts are understandable, but we may wish to look again at this aspect.

Cohabitation

The Report recommends extending a cohabitant's right to claim from a deceased partner's estate to testate cases as well as intestate, but at the same time recognises that this may be controversial. We will wish to consult on this general issue as well as on the particular scheme envisaged by the Report, i.e. that an application will be made to the court within a year of death and the court will first determine whether the survivor is a cohabitant and then consider what percentage the cohabitant should be awarded. Likewise, we will wish to seek views on the Report's further recommendation that where there is both a cohabitant and a spouse or civil partner, the amount which the spouse or civil partner would otherwise receive should be shared with the cohabitant, although the cohabitant's entitlement can never exceed that of the spouse or civil partner.

Private International Law

The Report makes recommendations in the area of private law. The European Union is expected later this year to issue a Regulation seeking to harmonise the laws of Member States in relation to succession. In relation to recommendations 46 and 47, the Commission advises that the proposed Regulation would not affect these recommendations as property rights created or transferred otherwise than by succession are intended to be excluded from its scope. At present we accept that this is probably correct. However, this matter may require to be revisited at the stage of the Regulation being published.

Testamentary writings and special destinations

It is helpful that the Commission has reviewed recommendations made in its 1990 Report and has included those which remain relevant in the current Report.

Miscellaneous matter

Part of this section covers unimplemented but still relevant recommendations from the 1990 Report. We are grateful to the Commission for also reviewing the law on executors dative and the requirement for Bonds of Caution. The recommendation is that these should no longer be required and that the court should have the discretion to refuse to appoint executors. We understand this recommendation was positively received. There are, however, a couple of issues which will need to consider further, including the impact on the

insurance market for Bonds of Caution. We note also that having sought views on prescriptive periods, the Commission has decided not to make recommendations in this regard.

Turning back to the Report as a whole, it is extremely helpful that many of the recommendations appear to reflect a significant degree of consensus, having secured the support of consultees. However, there are several issues identified in our initial assessment, some flagged up in the Report itself, which will require further consideration and on which we may revert to the Commission at a future date. We intend to put in hand work on these and other issues, with a view to refining our policy and facilitating the consideration of legislative options. Meantime, it would be helpful to hear if the Commission has any further comments at this stage.

Yours sincerely



FERGUS EWING