



Scottish Law Commission  
*promoting law reform*

## Discussion Paper on Succession

August 2007

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**The Commission would be grateful if comments on this Discussion Paper were submitted by 31 December 2007.**

**Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page.** Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

# Contents

	<i>Paragraph</i>	<i>Page</i>
<b>Abbreviations</b>		viii
<b>Part 1 INTRODUCTION</b>		
Background	1.1	1
Advisory group	1.5	2
Outline of the discussion paper	1.6	3
Legislative competence	1.14	5
<b>Part 2 INTESTATE SUCCESSION</b>		
Overview	2.1	6
<b>A: SURVIVING SPOUSE OR CIVIL PARTNER AND OTHER RELATIVES</b>		
The pre-1964 position	2.6	7
The current position	2.8	8
Prior rights	2.9	8
Legal rights	2.13	9
Free estate	2.15	9
1). Deceased survived by a spouse or civil partner but not by issue	2.17	10
Proposals for reform	2.18	12
2). Deceased survived by a spouse or civil partner and by issue	2.27	14
Options for reform	2.33	16
All to surviving spouse or civil partner	2.33	16
Liferent to surviving spouse or civil partner, fee to issue	2.40	19
The Dutch system	2.41	19
Sharing the estate between spouse or civil partner and issue	2.46	20
Proposals for reform	2.49	21
<b>B: SEPARATED SPOUSES OR CIVIL PARTNERS</b>		
The present position	2.58	25
Options for reform	2.61	26
<b>C: SPOUSE OR CIVIL PARTNER NOT PARENT OF ALL THE CHILDREN</b>		
The present position in Scotland and some other jurisdictions	2.65	27
Options for reform	2.68	28
<b>D: STEPCHILDREN AND ACCEPTED CHILDREN</b>		
The current law in Scotland	2.71	29
Should it be changed?	2.73	30
<b>E: EFFECT OF TESTAMENTARY PROVISIONS ON INTESTATE SHARES</b>		
The present position in Scotland and some other jurisdictions	2.81	32

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Proposals for reform	2.83	32
F: OUR 1990 RECOMMENDATIONS	2.87	34
<b>Part 3</b>		
<b>PROTECTION FROM DISINHERITANCE</b>		
Introduction	3.1	36
A: SURVEY OF CURRENT SCHEMES		
The present position in Scotland	3.4	37
Defects of existing Scottish legal rights	3.11	39
Other jurisdictions	3.15	40
Court-based	3.15	40
Rule-based	3.27	43
The schemes compared	3.33	45
B: PROPOSALS FOR REFORM		
Preliminary	3.35	46
1). Surviving spouses and civil partners	3.37	46
Fixed share or discretionary award?	3.38	47
The amount of the legal share	3.41	47
Renunciation of the legal share	3.49	51
Entitlement to aliment	3.53	51
The former matrimonial or family home	3.56	52
2). Cohabiting partners	3.58	52
Overview	3.58	52
Proposals for reform	3.63	54
Entitlement to aliment	3.76	59
3). Children and issue of the deceased	3.78	60
An alimentary scheme for dependent children	3.80	60
Fixed shares for children	3.92	65
Should adult children have a claim?	3.94	65
Legal protection for all children	3.102	68
Court-based discretionary system	3.103	68
Fixed legal share	3.104	69
Accepted children	3.111	73
Grandchildren	3.113	74
4). Other relatives and other persons	3.114	74
C: EXCLUDING CERTAIN KINDS OF PROPERTY FROM LEGAL SHARE	3.120	76

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
<b>Part 4 MISCELLANEOUS</b>		
Overview	4.1	78
<b>A: ANTI-AVOIDANCE PROVISIONS AND COLLATION</b>		
Introduction	4.2	78
1). Anti-avoidance provisions	4.3	78
The current position in Scotland	4.3	78
Should anti-avoidance provisions be introduced?	4.5	79
General	4.5	79
Arguments in favour of anti-avoidance provisions	4.10	80
Arguments against anti-avoidance provisions	4.14	80
Form of anti-avoidance scheme if introduced	4.17	81
Possible refinements	4.24	83
2). Collation <i>inter liberos</i>	4.25	83
The present law	4.25	83
Proposals for reform	4.29	85
<b>B: TIME LIMITS</b>		
The present law	4.36	87
Proposals for reform	4.45	90
<b>C: PRIVATE INTERNATIONAL LAW</b>		
Introduction	4.50	91
1). Jurisdiction	4.54	92
The general rules	4.54	92
Cohabiting partners	4.65	96
Dependent children	4.70	98
2). Choice of law and <i>renvoi</i>	4.75	99
General	4.75	99
Intestate succession	4.80	100
Spouses, civil partners and children	4.80	100
Cohabiting partners	4.87	103
Protection from disinheritance	4.90	104
Spouses, civil partners and children	4.90	104
Cohabiting partners	4.100	106
3). Anti-avoidance provisions	4.101	107
Jurisdiction	4.102	107
Choice of law	4.105	107
<b>D: EXECUTORS AND BONDS OF CAUTION</b>		
Introduction	4.107	108
1). Bonds of caution	4.113	109
The current position in Scotland and other jurisdictions	4.113	109
Should caution be abolished?	4.116	110
Should caution be retained for some cases only?	4.119	112
Caution for executors-nominate?	4.124	114

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Civil partners	4.128	115
2). Refusal to appoint or confirm executors	4.130	115
Executors-dative	4.131	116
Refusal to confirm executors	4.135	117
<b>Part 5</b>	<b>LIST OF PROPOSALS AND QUESTIONS</b>	<b>119</b>
<b>APPENDIX A</b>	<b>OTHER JURISDICTIONS</b>	<b>127</b>
<b>APPENDIX B</b>	<b>ADVISORY GROUP ON SUCCESSION</b>	<b>152</b>

# Abbreviations

## *Anton with Beaumont*

A E Anton with P R Beaumont, *Private International Law*, (2<sup>nd</sup> edn, 1990)

## *Currie and Scobbie*

J G Currie and E M Scobbie, *The Confirmation of Executors in Scotland* (8<sup>th</sup> edn, 1995).

## *Family Law Report*

Scottish Law Commission, *Report on Family Law*, (Scot Law Com, No 135, 1992).

## *Johnston*

D Johnston, *Prescription and Limitation*, (1999).

## *McLaren*

The Hon. John McLaren, *The Law of Wills and Succession*, (3<sup>rd</sup> edn, 1894).

## *Meston*

Michael C Meston, *The Succession (Scotland) Act 1964*, (5<sup>th</sup> edn, 2002).

## *SOCRU Succession Survey*

Scottish Office Central Research Unit,

## *Succession Report*

Scottish Law Commission, *Report on Succession*, (Scot Law Com, No 124, 1990).

## *Succession Opinion Survey*

*Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey*, Scottish Executive Social Research (2005).



# Part 1 Introduction

## Background

1.1 This discussion paper is issued in connection with our review of the law of succession. Succession was included in our Seventh Programme of Law Reform as a medium term project that we anticipated completing within the duration of the programme which runs to the end of 2009.<sup>1</sup>

1.2 We last examined succession some 20 years ago. In 1986 we conducted a public opinion survey and published three consultative memoranda.<sup>2</sup> After extensive consultation we published a wide-ranging *Succession Report* in 1990. The Report made recommendations in many areas of intestate and testate succession but these remain almost entirely unimplemented.<sup>3</sup> The current review focuses on two main areas: the position of surviving spouses, civil partners and cohabitants on intestacy; and the protection of close relatives from disinheritance by the deceased. The term "protection from disinheritance" implies, somewhat inaccurately, that certain persons have a right to inherit on the death of an individual and the deceased has frustrated this right by his or her testamentary dispositions. But the term is widely used as a convenient label for the remedies provided by the law to close relatives of the deceased who have been left nothing or an inadequate provision and we use it in this sense throughout the rest of this paper. We are not re-examining the more technical aspects of succession law that formed a substantial part of our 1990 Report as the recommendations we made in that context were not controversial and the social and legal background against which they were made has not changed to any significant extent. The same cannot be said for the intestacy and disinheritance sections of our Report.

1.3 Scottish society and the family and other relationships in which people live have changed over the last 20 years since our last examination of succession and even more so in the 40 or so years since the last major piece of legislation, the Succession (Scotland) Act 1964. Civil partnership, a legal status open to same-sex couples who register their relationship, was introduced by the Civil Partnership Act 2004. Surviving civil partners have the same succession rights as surviving spouses.<sup>4</sup> The increase in the number of divorces and subsequent repartnering means that steprelationships are now more important.<sup>5</sup> It is

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<sup>1</sup> Scot Law Com No 198, paras 2.21-2.30.

<sup>2</sup> *Intestate Succession and Legal Rights* (No 69), *The Making and Revocation of Wills* (No 70) and *Some Miscellaneous Topics in the Law of Succession* (No 71).

<sup>3</sup> Recommendations 17 and 39 dealing with the effects of divorce on special destinations and of judicial separation on a wife's intestacy respectively have been implemented by s 19 of and Sch 3 to the Family Law (Scotland) Act 2006.

<sup>4</sup> Civil Partnership Act 2004, s 131 and Sch 28, Pt 1.

<sup>5</sup> In 1965 there were 2,656 divorce decrees granted in Scotland, *Civil Judicial Statistics Scotland 1965*. The figures for 1985 and 2005 are 13,373 and 10,940 respectively, *Scotland's Population 2005 – The Registrar General's Annual Review of Demographic Trends*, p 45. The number of marriages has decreased from over 40,000 in the early 1970s to 30,881 in 2005: *Scotland's Population 2005*, p 42. In 2001 and 2002 29% of marriages were between parties resident outside Scotland: Scottish Executive Research Findings, *Family formation and dissolution: Trends and attitudes among the Scottish population* (No 43/2004), p 2. The percentage of people marrying who had been divorced rose from just under 6% in 1971, to over a quarter in 2005 (28% for males, 27% for females): *Scotland's Population 2005*, p 43.

estimated that about one in every eight children now experience life in a stepfamily.<sup>6</sup> Many more couples are living together as unmarried cohabitants in same-sex or opposite-sex relationships.<sup>7</sup> The Family Law (Scotland) Act 2006 introduced limited rights for cohabitants whose partners die without a will, but there is no protection for those whose partners die leaving a will which fails to provide for them.<sup>8</sup> In our previous examination we found the question of protecting children, especially adult children, against disinheritance to be difficult and controversial. The recommendations in our *Succession Report* were not accepted and the then Secretary of State for Scotland asked us to reconsider the matter. On reconsideration we recommended replacement of the existing system of legitim by a scheme based on aliment available to dependent children only.

1.4 We commissioned a public opinion survey, jointly with the Scottish Executive and this was carried out in April 2005.<sup>9</sup> 1,000 people, sampled so as to be representative of the Scottish population, were asked for their views on various topics related to intestate and testate succession. Fifteen short scenarios of different family situations were presented by an interviewer in turn to each participant in his or her own home. The participants then had to give their views on how the deceased's estate should be divided or who should have claims on it. We have found the results of this survey helpful in deciding on the proposals for reform to put forward in this paper. We have also taken account of the findings of the Scottish Consumer Council's survey *Wills and Awareness of Inheritance Rights in Scotland*, published in September 2006.

### **Advisory group**

1.5 We have been greatly assisted in the preparation of this discussion paper by an Advisory Group comprising both practitioners and academics, whose members are listed in Appendix B. The Group commented on drafts of the paper at various stages. We also had the benefit of comments on an early draft from representatives of the Scottish Estates Business Group in connection with the effect of our proposals on landed estates, farms and the wider rural economy.

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<sup>6</sup> Scottish Executive's *Report for Scotland's Children* (2001). However, less than 1% of children aged about 34 months or less lived in a family containing a step-parent or partner indicating perhaps that the trend to stepfamilies is less likely to affect younger age groups: Scottish Executive's *Growing up in Scotland: A Study following the lives of Scotland's Children* (2007) at 2.3.1. UK wide, in 2001, 10% of all families with dependent children were stepfamilies; 38% of all cohabiting couple families with dependent children were stepfamilies, compared with 8% of married couple families with dependent children: National Statistics Online at [www.statistics.gov.uk](http://www.statistics.gov.uk).

<sup>7</sup> In the UK, the proportion of women under 50 who have cohabited at some point in their lives rose from 9% in 1976 to 29% in 1998: *Research Findings No 43/2004*, p 2. Again in the UK, only 2% of those born before 1930 cohabited before marriage compared with almost 50% of those born since 1960: ESRC Population and Household Change Research Programme *Family Change: Demographic and Attitudinal Trends Across Nations and Time*, [www.brookes.ac.uk/schools/social/population-and-household-change/1\\_scott.html](http://www.brookes.ac.uk/schools/social/population-and-household-change/1_scott.html). From 1991 to 2001 the proportion of cohabiting couple families in Scotland increased from 4% of total households to 7%: *Research Findings No 43/2004*, p 2 and 2% of cohabiting couples in Scotland in 2001 were of the same sex, p 1. In 2005, 9% of the adult population in Scotland were cohabiting: *Scotland's People: Annual Report: Results from the 2005 Scottish Household Survey* (2005). UK wide, the number of cohabiting couple families increased by over 50% to 2.2 million from 1996 to 2004: National Statistics Online at [www.statistics.gov.uk](http://www.statistics.gov.uk).

<sup>8</sup> S 29.

<sup>9</sup> *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey*, Scottish Executive Social Research, July 2005.

## Outline of the discussion paper

1.6 Part 2 is concerned mainly with intestacy and Part 3 mainly with protection against disinheritance. However, there are close links between the two Parts and some proposals in one affect those in the other. For example, the proposed protection against disinheritance for surviving spouses and civil partners (and perhaps also for children) is a fraction of the amount to which they would have been entitled had the deceased died intestate. And the deceased's dependent child may be able to claim an award out of an intestate estate going wholly to the surviving spouse or civil partner under the rules of intestacy, if the surviving spouse or civil partner does not owe the child an obligation of aliment.

1.7 In Parts 2 to 4 we illustrate the existing rules and our proposals for reform by means of worked examples. These examples do not take inheritance tax into account in order to focus on the main issues.<sup>10</sup>

1.8 The existing rules of intestacy where the deceased leaves a spouse or civil partner are very complex and require consideration of five different rights with the estate being divided into its heritable and moveable components. They also sometimes fail to provide a fair result. The first topic in Part 2 is the position of a surviving spouse or civil partner where the deceased dies intestate and is not also survived by children or other issue. At present in a large estate or where the estate is mainly heritable the surviving spouse or civil partner will be the major beneficiary but a substantial proportion may go to the deceased's parents, siblings and even issue of predeceasing siblings. We propose that in this situation the surviving spouse or civil partner should be entitled to the whole estate. We turn next to the division of an intestate estate between the deceased's surviving spouse or civil partner and his or her issue. We are continuing the policy of the existing law by giving a measure of priority to the deceased's surviving spouse or civil partner but their share under our proposal is calculated in a very much simpler way – the whole estate up to £300,000 and then half of any excess. The question of whether a spouse or civil partner who was separated from the deceased or a spouse or civil partner who is not the parent of all the deceased's children should be entitled to a lesser share is considered. We conclude that the range of possible circumstances for each of these categories is so large that there is no simple rule that would produce a substantially fairer result than the existing law which treats all spouses or civil partners identically. Stepchildren do not inherit on intestacy from their step-parents. We conclude that this should continue to be the position as otherwise a stepchild would be entitled to inherit from the step-parent as well as the natural parents. Adopted children inherit from their adoptive parents but lose the entitlement to inherit from their natural parents, but we do not think that the formation of a steprelationship should have this effect.

1.9 Part 3 is concerned with protection from disinheritance. There is strong and consistent public support for some protection for spouses, civil partners and issue and dissatisfaction with the existing regime of legal rights applicable to them. We consider each class of claimant in turn as the balance of advantage between a rule-based and a court-based scheme of protection is not the same for each class. We think that whatever scheme is adopted it should apply to the whole estate. The present position whereby legal rights (the present system of protection for spouses, civil partners and children) are exigible only out of

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<sup>10</sup> Also the rules have to operate on the estate before deduction of inheritance tax otherwise a circularity may arise when the amount of tax payable depends on the sums due to persons other than the surviving spouse or civil partner which in turn depends on the amount of tax payable.

the deceased's moveable estate is unsatisfactory. Although the value of the deceased's heritage would thus be included, a special regime may be needed for owners of landed estates and farms in order to avoid forced sales to meet close relatives' claims.

1.10 For surviving spouses and civil partners we favour a rule-based scheme of protection. We propose that the survivor should be entitled to 25% of what he or she would have received had the deceased died intestate under our new intestacy proposals. On the other hand, we propose extending to testate estates the recently enacted court-based protection scheme in section 29 of the Family Law (Scotland) Act 2006 for people whose cohabiting partners died intestate. We also favour a court-based scheme for dependent children to whom the deceased owed an obligation of aliment. Where the deceased's estate is not inherited by a person who is under an obligation to aliment the deceased's child (eg the other natural parent or a step-parent who has accepted the child as a child of the family) that child should be entitled to an award from the estate. The award would be based on the child's need for aliment but would take the form of a lump sum. Whether adult children should also be protected, and if so by what scheme, is a difficult issue. We tend to think there should be no protection. If they are to be protected, then we put forward a rule-based scheme with the entitlement being 25% of what the child would have received on intestacy.

1.11 Part 4 contains some miscellaneous issues arising out of our proposals in Parts 2 and 3. The first is whether provisions should be introduced in order to prevent a deceased person evading the proposed protections against disinheritance for close relatives by giving property to the intended legatees during life instead of leaving it to them by will. Another issue is when disinheritance claims should prescribe. We have taken the opportunity to propose a single time limit for succession claims generally. The private international law section deals with which system of law should apply to estates with a non-Scottish element and on what grounds the Scottish courts should have jurisdiction. It puts forward several proposals to fill gaps and accommodate our new substantive proposals.

1.12 In the course of preparing this discussion paper we were made aware of dissatisfaction with bonds of caution. Executors-dative are appointed by the sheriff court to administer the estates of those who die intestate. Before they can be confirmed – authorised to administer the estate listed in an inventory – they must obtain, with one exception,<sup>11</sup> a bond of caution from an insurance company.<sup>12</sup> The insurance company guarantees to make good any losses suffered by the beneficiaries due to the negligence or fraud of the executors-dative where recovery cannot be obtained from the executors-dative themselves. We have decided that Part 4 of this discussion paper is a suitable vehicle to obtain views on bonds of caution even though they lie outwith its main focus.

1.13 Part 5 lists our proposals. We have examined the law of many other jurisdictions relating to the areas covered by the discussion paper and have found this comparative study very fruitful. Appendix A summarises the rules in other jurisdictions and is arranged by topic. Appendix B lists the members of our Advisory Group.

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<sup>11</sup> Caution is not required where the surviving spouse inherits the whole estate by virtue of prior rights; Confirmation of Executors (Scotland) Act 1823, s 2 as amended by s 5 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980.

<sup>12</sup> An individual can act as the cautioner but this is encountered only in estates of small value.

## **Legislative competence**

1.14 The proposals in this discussion paper relate to the succession to the estates of deceased persons which is not a reserved matter under the Scotland Act 1998.<sup>13</sup> They therefore lie within the legislative competence of the Scottish Parliament.

1.15 In our view our proposals if enacted would not give rise to any breach either of the European Convention on Human Rights or of European law.

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<sup>13</sup> Succession to the Crown of the United Kingdom is reserved in terms of para 1(a) of Part 1 of Sch 5 to the Scotland Act 1998, but none of our proposals affect that aspect of succession.

## Part 2 Intestate succession

### Overview

2.1 In this Part we examine the present rules for the division of intestate estates. Intestate estate is defined in the Succession (Scotland) Act 1964 as being so much of the deceased's estate as is not disposed by testamentary disposition. Testamentary disposition has a wide meaning and includes any deed taking effect on the deceased's death which disposes any part of the estate or under which a succession thereto arises.<sup>1</sup> Wills are the most common form of testamentary disposition, but other deeds have testamentary effect including destinations in titles to property, marriage contracts and nominations. The housing and furniture and plenishings prior rights are due out of the intestate estate; the cash sum prior right is due out of the intestate estate left after the previous two prior rights; legal rights are due out of the net moveable intestate estate remaining after all the prior rights; and the rules relating to the free estate apply to the net intestate estate left after "inheritance tax and other liabilities of the estate having priority over legal rights, the prior rights of the surviving spouse or civil partner and rights of succession ....".<sup>2</sup>

2.2 The rules of intestate succession are default rules in that they apply only in the absence of a valid testamentary disposition by the deceased.<sup>3</sup> The rules of intestate succession are shaped by various principles to which each jurisdiction gives different weights and by its own legal tradition. These principles include keeping the property in the deceased's family or kinship group. Accordingly, intestate heirs are generally limited to those related by blood to the deceased.<sup>4</sup> Another principle is the presumed wishes of the deceased. This means that the rules on intestacy should by and large mirror the provisions for their family that people usually make in their wills.<sup>5</sup> Closely linked with this is the principle that the rules of intestacy should be acceptable to a broad spectrum of public opinion. They should constitute, as far as rules of general application can, a fair and rational system that adequately reflects majority views. Finally, the rules should be clear, consistent, free from anomalies and relatively easy to understand and operate. The rules should be as simple as possible in order that people were aware what would happen to their property if they died intestate: if they were unhappy with the result there would be an incentive to make a will.

2.3 In Part 3 we consider whether certain persons including members of the deceased's close family should be entitled to claim a part of the deceased's estate when reasonable provision has not been made for them. Under our proposals a claim could be made out of the whole estate, testate and intestate. The existence of these protective schemes impinges on the rules for distribution on intestacy but those rules would continue to be necessary as

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<sup>1</sup> S 36 "intestate estate" and "testamentary disposition".

<sup>2</sup> S 36(1), as amended by Pt 1 of Sch 28 to the Civil Partnership Act 2004, "net intestate estate". The definition goes on to provide that in the case of partial intestacy the tax and other liabilities have to be apportioned between the testate and intestate portions of the estate.

<sup>3</sup> We consider at para 2.80 below the question of partial intestacy.

<sup>4</sup> But spouses or civil partners may be heirs and adopted children are equated with biological children.

<sup>5</sup> Rather than the provisions which the particular deceased might have made if he or she had made a will.

the default position and would govern the distribution of the estate unless and until a successful claim was made.

2.4 The rules set out in the Succession (Scotland) Act 1964 apply only to an estate whose distribution falls to be regulated by the law of Scotland.<sup>6</sup> In general, succession to movables<sup>7</sup> is regulated by the law of the domicile of the deceased at death while succession to immovables depends on the law of the country in which they are situated. We consider the private international law rules of succession further in Part 4.

2.5 The two main issues in this Part concern the position of the surviving spouse or civil partner. The first is the division of the intestate estate where the deceased was survived by a spouse or civil partner and by one or more parents or siblings<sup>8</sup> but was not survived by any issue. The second is the division of an intestate estate where the deceased was survived by either a spouse or a civil partner and by issue. We look first at the situation where a couple were living together before the death of one of them. The question whether a surviving spouse or civil partner who had ceased to live with the deceased prior to the latter's death should have lesser rights on intestacy is considered later at paragraphs 2.58 to 2.64.

#### A: SURVIVING SPOUSE OR CIVIL PARTNER AND OTHER RELATIVES

##### **The pre-1964 position**

2.6 The pre-1964 law was based on the common law with piecemeal amendments by various statutes. Before 1964 there were separate rules on intestacy for succession to heritage<sup>9</sup> and for succession to moveables.<sup>10</sup> In neither set of rules was the surviving spouse an heir. Instead the surviving spouse had what were termed legal rights in both the deceased's heritage and moveables. The rights in heritage took the form of a liferent. The widow's right was called *terce* and amounted to a liferent of one third of the heritage; the widower's right was called *courtesy* and amounted to a liferent of the whole of his deceased's wife heritage in which she was *infert*.<sup>11</sup> *Courtesy* was claimable only if the husband was the father of a child of the marriage who was at some point the heir presumptive to the wife's heritage.<sup>12</sup> The amount of the surviving spouse's legal right to moveables varied according to the existence of children. Where the deceased was not survived by any children, the surviving spouse was entitled to one half of the net moveable estate but where the deceased was also survived by children, the surviving spouse's portion was reduced to one third.

2.7 A surviving spouse had a statutory preferential right to a lump sum where the deceased died intestate and left no issue.<sup>13</sup> This sum was originally £500 and was increased

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<sup>6</sup> Ss 1(1) and 37(2).

<sup>7</sup> We use the terms "moveable" and "immoveable" (or heritable) for property in the context of the internal rules of Scots law, but the terms "movable" and "immovable" in the context of the rules of private international law.

<sup>8</sup> Or the surviving issue of predeceasing siblings.

<sup>9</sup> Before the Conveyancing (Scotland) Act 1874 there were slightly different rules for heritage which the deceased had acquired by succession and heritage which the deceased had acquired by gift or purchase (called conquest).

<sup>10</sup> See *Meston*, ch 1 for further details.

<sup>11</sup> This is a very simplified account. There were many rules as to what counted as heritage for the purpose of *terce* and *courtesy*, eg the deceased's husband had to have been *infert* and the mansion house and policies of an estate were excluded, see *McLaren*, pp 88-95.

<sup>12</sup> For further details see *McLaren*, pp 95-97.

<sup>13</sup> Intestate Husband's Estate (Scotland) Acts 1911 and 1919 applied to widowers by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, s 5.

to £5,000 in 1959.<sup>14</sup> In the event of partial intestacy the surviving spouse had to deduct the value of any testamentary provision.

### The current position

2.8 The Succession (Scotland) Act 1964 made sweeping changes to the provision for spouses. First, the rights of a surviving spouse exigible from heritable property – *terce* and *courtesy* – were abolished in relation to deaths occurring after commencement.<sup>15</sup> The legal rights exigible from moveables were however retained. Secondly, a more elaborate system of prior rights (a housing right, a right to furniture and plenishings and a right to a cash sum) replaced the lump sum due under the Intestate Husband's Estate (Scotland) Acts 1911 and 1959. Finally, the surviving spouse was for the first time made an heir, ranking below the deceased's issue, parents, siblings and issue of predeceasing siblings but in preference to remoter relatives, on the balance of any estate (heritable and moveable) left after prior rights and legal rights. The Civil Partnership Act 2004 gave civil partners the same succession rights in their deceased partners' estates as surviving spouses.<sup>16</sup>

2.9 **Prior rights** The prior rights of a surviving spouse or civil partner are three in number; the dwelling house right under section 8 of the Succession (Scotland) Act 1964, the furniture and plenishings right also under section 8 and the cash sum under section 9. Probably the most important right is the dwelling house right. The surviving spouse or civil partner is entitled to receive the deceased's interest, whether as owner or tenant, in any dwelling house in which the surviving spouse or civil partner was ordinarily resident at the date of the deceased's death. Tenancies of dwellings under the Rent Acts 1971 to 1974 are expressly excluded.<sup>17</sup> Other residential tenancies are subject to separate statutory schemes of succession and must be considered to be impliedly excluded from prior rights. The deceased's interest in the dwelling house is subject to any debt secured over it.<sup>18</sup> Where the value of the deceased's interest exceeds £300,000 the survivor's entitlement is to that amount of money rather than the interest itself. Other cases where the surviving spouse or civil partner gets cash (up to £300,000) in lieu are:

- if the interest forms parts of a larger property used for carrying out a trade, profession or business and the estate as a whole would be substantially reduced in value by splitting off the dwelling house,<sup>19</sup>
- if the dwelling house is part of property held on a single lease by the deceased.

2.10 Very occasionally the deceased will have had an interest in two or more dwelling houses in which the surviving spouse or civil partner was ordinarily resident. In that case the survivor may choose which interest to take as a prior right and has six months in which to decide.

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<sup>14</sup> Intestate Husband's Estate (Scotland) Act 1959.

<sup>15</sup> S 10(1).

<sup>16</sup> S 131 and Sch 28, Pt 1.

<sup>17</sup> S 8(6)(d).

<sup>18</sup> *Ibid.* Where a loan is secured over the dwelling house and other property, such as a life policy or business premises, then only a rateable proportion has to be deducted from the value of the interest in the dwelling house; *Graham v Graham* (1898) 5 SLT 319.

<sup>19</sup> The paradigm example is a farm house on a working family farm.



2.11 Where the intestate estate includes the furniture and plenishings of a dwelling house in which the surviving spouse or civil partner was ordinarily resident at the date of the deceased's death (whether or not the dwelling house is also part of such estate) the surviving spouse or civil partner is entitled to such furniture and plenishings up to the value of £24,000. "Furniture and plenishings" are defined in the 1964 Act so as to cover the full range of household contents, but money, heirlooms and any article or animal used by the deceased for business purposes are excluded. As with the dwelling house right, if the intestate estate comprises furniture and plenishings of two or more dwelling houses the survivor has six months in which to select which furniture and plenishings to take. The right to the dwelling house and the right to the furniture and plenishings are independent so that the furniture and plenishings of a different house may be selected from that for the dwelling house right.

2.12 After the prior rights in section 8 are satisfied the surviving spouse or civil partner is entitled to a fixed sum of £42,000 if the deceased is survived by issue or £75,000 if there are no surviving issue.<sup>20</sup> Where the remaining intestate estate is insufficient to meet this financial right it is satisfied by transferring the whole intestate estate to the surviving spouse or civil partner. Where, however, the remaining intestate estate exceeds the financial right it is met out of heritable and moveable property rateably. This is to preserve a proper balance for the calculation of legal rights which are exigible only out of net moveable estate.

2.13 **Legal rights** Next come the legal rights of the surviving spouse or civil partner (known as *jus relictæ* for a widow or *jus relicti* for a widower) and the legal rights of any issue (known as legitim). Where the deceased left both a surviving spouse or civil partner and issue, the survivor's legal rights amount to one third of the net moveable intestate estate and the issue take another third between them. If there is a surviving spouse or civil partner but no issue, the survivor's legal rights amount to one half of the net moveable intestate estate. If there are issue but no surviving spouse or civil partner, the issue's legal rights are one half of the net moveable intestate estate shared between them. Net moveable intestate estate means the moveable intestate estate less the deduction of debts properly chargeable against the moveable intestate estate and it is calculated on the amount left after the surviving spouse's or civil partner's prior rights have been satisfied.

2.14 For the purpose of legitim, "issue" is not confined to the deceased's surviving children. The principle of infinite representation was introduced by section 11 of the Succession (Scotland) Act 1964. The legitim fund is divided into equal shares at the level where there is at least one surviving descendant. Each surviving descendant takes a share as do the issue of each predeceasing descendant.<sup>21</sup> In addition, any grandchild claiming a share of the legitim fund must collate not only advances made to the deceased by him or her but also "the proportion appropriate to him" of any advances made to his or her predeceasing parent.<sup>22</sup>

2.15 **Free estate** After satisfying any claims for prior and legal rights the remainder of the net intestate estate, taking heritage and moveables together, devolves in accordance with

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<sup>20</sup> In the case of a partial intestacy where the surviving spouse has accepted a legacy of the deceased's testate estate (other than a legacy of a dwelling house or furniture and plenishings covered by prior rights) the value of the legacy must be deducted from the sum due from the intestate estate under s 9.

<sup>21</sup> See para 3.5 below for a worked example.

<sup>22</sup> S 11(3). Collation is discussed further at paras 4.25-4.35 below.

the rules in section 2 of the 1964 Act. Section 2 contains a statutory list of those entitled to succeed in order of preference. Representation of predeceasers by their issue is applied throughout the list, except in relation to a direct ascendant or a spouse or civil partner of the deceased. Adopted children are treated as the children of the adopter for all succession purposes. First in the list are the children of the deceased, with surviving issue of a predeceasing child taking the share the child would have taken had he or she survived. Failing issue, where the deceased is survived by a parent or parents and also by siblings, the surviving parent or parents are entitled to one half of the free estate and the siblings to the other half. If the deceased is survived by at least one sibling but predeceased by both parents, or survived by at least one parent but not by siblings, the surviving sibling(s) or parent(s) respectively succeed to the whole free estate. Siblings of the whole blood have preference to siblings of the half blood. Again, surviving children of a predeceasing sibling represent their parent. In the absence of any issue, siblings (or their issue) or parents, the succession passes to the surviving spouse or civil partner.<sup>23</sup>

2.16 These rules require both assets and debts to be classified as heritable or moveable. There is a good deal of complex law on what property is heritable or moveable for the purposes of succession, especially in the area of timber, minerals and crops.<sup>24</sup> Some forms of property, heritable securities for example, are treated as moveable for general succession purposes but are regarded as heritable in the creditor's estate for the purpose of calculating legal rights.<sup>25</sup> Debts have to be set off against assets to calculate the net estate. Generally, heritable debts have to be set against heritable property and moveable debts against moveable property. But if there is insufficient property of one kind, the balance of the debt has to be set against the other kind. Moreover, some debts may have to be apportioned between the two categories of property and only certain debts are deductible for legal rights purposes.<sup>26</sup>

### **1). Deceased survived by spouse or civil partner but not by issue**

2.17 One of the main problem areas is where the deceased was survived by a spouse or civil partner and at least one sibling (or issue of a predeceasing sibling) or parent, but not by any issue. The surviving spouse or civil partner is entitled to prior rights and legal rights but the free estate, ie the net intestate estate after prior and legal rights have been satisfied, will pass to the siblings and/or parents as they come before the spouse or civil partner in the section 2 list of heirs. Unless the estate is such that it is exhausted by the prior rights, the surviving spouse or civil partner will have to share the intestate estate with the deceased's siblings and/or parents. For large estates these relatives may receive a greater portion than the surviving spouse or civil partner. Indeed it is possible that the surviving spouse or civil partner may inherit only a small proportion of the estate because of the asset-specific nature of the section 8 prior rights and the fact that legal rights are due only out of moveable estate. The examples below illustrate these points.

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<sup>23</sup> In the absence of a surviving spouse or civil partner the succession thereafter opens firstly to uncles and aunts of the deceased, then to grandparents, then to collaterals of grandparents then to great-grandparents, collaterals of great-grandparents and so on without restriction in remoteness of degree. Where no person entitled to succeed under these rules can be found the estate falls to the Crown as *ultimus haeres*.

<sup>24</sup> Gordon, *Scottish Land Law*, (2<sup>nd</sup> edn, 1999), see ch 1 on classification of property generally and paras 1-29 to 1-37 in relation to matters of succession in particular.

<sup>25</sup> See *Meston*, p 188 for the problems this can create.

<sup>26</sup> *Russel v Attorney General* 1917 SC 28.

(a) A man's intestate estate consists of the following assets:

A dwelling house worth	£600,000
Furniture and plenishings worth	£64,000
Investments worth	£560,000
Total	£1,224,000

He leaves no issue and is survived by his wife and his mother. The widow's prior rights are:

£300,000 as the house is worth more than that sum

£24,000 of furniture and plenishings

£75,000 as the cash sum.

After the first two prior rights have been taken the remaining heritable estate is £300,000 and the remaining moveable estate is £600,000. The cash sum is taken as to £50,000 out of moveables and as to £25,000 out of heritage. The net moveable estate for legal rights purposes therefore amounts to £550,000, of which the widow is entitled to half (ie £275,000).

The widow receives in total £674,000. The remaining estate goes to the mother who thus ends up with £550,000, representing 45% of the estate.

(b) A woman dies intestate survived by her husband and her sister. She and her husband lived in rented accommodation and she leaves the following estate:

Furniture and plenishings worth	£5,000
Savings	£6,000
A small shop worth	£174,000
Total	£185,000

The widower's prior rights are:

£5,000 of furniture and plenishings

£75,000 as the cash sum.

The cash sum prior right is taken as to £72,500 from heritage and £2,500 from moveables. The net moveable estate after prior rights amounts to £3,500, half of which (£1,750) is taken by the widower. His total share comes to £81,750 and he will also be entitled to remain in the former matrimonial home as a tenant. The deceased's sister will inherit the rest of the estate, ie £103,250.

## Proposals for reform

2.18 The present rules applicable where the deceased was survived by a spouse or civil partner and a parent or sibling (or issue of predeceasing sibling) are out of line with public opinion in Scotland. Surveys carried out over the last 25 years show that clearly. Manners and Rauta in their 1979 survey *Family Property in Scotland*<sup>27</sup> considered various intestate scenarios. Where a man was survived by his widow and his brother, 89% of those questioned thought that the widow should receive the entire estate. In 1986 a survey commissioned by us, *Attitudes Towards Succession Law in Scotland*,<sup>28</sup> asked for views on the division of his estate where a man died intestate leaving a widow and his parents. Where the man was neither poor nor wealthy 62% favoured giving the estate entirely to the widow, 26% mainly to the widow and 9% half to the widow and half to the parents. The computable figures for a very poor man were 73%, 17% and 7% and for a very wealthy man 48%, 32% and 16%. In Consultative Memorandum No 69 *Intestate Succession and Legal Rights*, published in 1986, we asked for views on whether the surviving spouse should succeed to the whole estate or have to share the balance after some preferential share with the deceased's parents or siblings.<sup>29</sup> Most of those who responded were in favour of the spouse being entitled to the whole estate. The results of the survey commissioned jointly by ourselves and the Scottish Executive Justice Department in April 2005 for this project were similar.<sup>30</sup> People were asked how an intestate estate should be divided where a man died survived by his widow, his mother and his brother. 43% strongly agreed and 45% agreed with the proposition that the entire estate should go to the widow

2.19 As the examples above show, the present form of prior and legal rights and the continued distinction between heritable and moveable property makes the rules of intestacy where a surviving spouse or civil partner is involved both complicated and full of anomalies. The other jurisdictions that we have looked at show a variety of approaches. Some give the surviving spouse the whole intestate estate where the deceased left no issue.<sup>31</sup> Others provide that the surviving spouse may have to share a substantial estate with the deceased's parents but not with siblings or their issue.<sup>32</sup> A few, like Scotland, provide for sharing with the deceased's parents, siblings or their issue.<sup>33</sup> But all of them achieve this in a very much simpler way and without distinguishing between heritable and moveable property.

2.20 It would be possible to improve the present position by radically simplifying the way in which the surviving spouse's prior and legal rights were calculated. This would remove some of the anomalies illustrated by the examples in paragraph 2.17 above. Thus for example, if the surviving spouse were to be entitled to say the first £300,000<sup>34</sup> of the whole intestate estate (whether heritable or moveable) plus say one half of any excess, then the deceased's parents, siblings or their issue would receive a share only when the intestate estate was large. But this still leaves the problem of substantial intestate estates and we do

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<sup>27</sup> Office of Population Censuses and Surveys, HMSO, 1981. The sample size was 1,919.

<sup>28</sup> Consultative Memorandum, *Intestate Succession and Legal Rights* (No 69), Appendix 2. The sample size was 992.

<sup>29</sup> Proposal 7, para 3.28.

<sup>30</sup> *Succession Opinion Survey*. Just over 1,000 adults were surveyed.

<sup>31</sup> Canada (except Quebec), Australia (except Northern Territory and Western Australia), South Africa, Ireland and the Netherlands.

<sup>32</sup> New Zealand, France and the USA under the Uniform Probate Code.

<sup>33</sup> England and Wales, Quebec and France.

<sup>34</sup> The maximum value of prior rights is currently £399,000.

not think that these can be ignored. From a study of a sample of confirmations granted in 1986/87 in the 35 intestate cases where the deceased was survived by a spouse but not by issue, the surviving spouse's prior rights applicable at that date did not exhaust the whole estate in three of them (almost 10%).<sup>35</sup>

2.21 In our view the root of the problem is that the surviving spouse comes below the deceased's parents, siblings and their issue in the order for the division of the free estate. A major trend over the last 100 or so years has been the extent to which the deceased's surviving spouse – a non blood relative – has become entitled to an ever-increasing share of the estate. A spouse or civil partner is now seen as a key member of the family, not an interloper.<sup>36</sup> As Glendon writing in 1989 said:<sup>37</sup>

"One of the great transforming trends that has moulded the development of western family law over the past two centuries has been the gradual attenuation of legal bonds among family members outside the conjugal unit of husband, wife and children. Nowhere is this more visible than in the law of inheritance, where the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives."

2.22 We are in favour of the solution that in the absence of any issue, a surviving spouse or civil partner should succeed to the deceased's entire intestate estate irrespective of its size. The surviving spouse or civil partner succeeding to the entire intestate estate is the simplest solution and would probably be in line with what most childless testators would provide in their wills.<sup>38</sup>

2.23 It might be argued that succession by siblings or parents is justified where the surviving spouse or civil partner is wealthy in their own right and the deceased's siblings or parents are struggling financially. We are not convinced by this argument. While he was alive, the deceased had no obligation to aliment his parents or siblings: in these circumstances, we cannot see why they should be entitled to a share of his estate when he dies. In contrast, the deceased had an obligation to aliment his surviving spouse or civil partner.<sup>39</sup> Moreover, we take the view that the personal wealth of the survivor should be treated as a neutral factor when devising rules which are to have general effect and apply to persons in all financial situations.

2.24 Again it could be argued that siblings should be entitled to succeed when the deceased's property came from his or her parents and could thus be regarded as family property which should pass to other issue of the parents rather than the deceased's spouse or civil partner. We consider that the situation where most of a person's estate is derived from property inherited from his or her parents is likely to be fairly uncommon and should not influence the form of a rule that has to produce acceptable results for all estates.

2.25 Where there has been a short marriage or civil partnership involving a young couple, it may be argued that the deceased's parents and siblings will have enjoyed a far longer relationship with the deceased than the surviving spouse or civil partner. Even here we do

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<sup>35</sup> *SOCRU Succession Survey*, para 6.4.

<sup>36</sup> See also *International Encyclopaedia Comparative Law*, vol V, ch 3, p 3.

<sup>37</sup> M A Glendon, *The Transformation of Family Law*, p 238.

<sup>38</sup> *SOCRU Succession Survey*, paras 5.2 to 5.6. 79% of married testators left their entire estate to their spouses but it is not clear whether or not they had children.

<sup>39</sup> Family Law (Scotland) Act 1985, s 1(1)(a), (b) and (bb).

not think that the survivor should have to share with the deceased's parents or siblings. Such circumstances are unusual. The increased lifespan of people nowadays means that parents are likely to be very old when a child dies. There is also the consideration that if an estate passes to ascendants they are likely to die in their turn soon after succeeding so deriving little benefit and giving rise to additional taxation.

2.26 Given the importance we attach to having simple rules of intestate succession,<sup>40</sup> we therefore propose that:

- 1. Where a person dies leaving a spouse or civil partner but no issue, the surviving spouse or civil partner should be entitled to the deceased's whole intestate estate.**

## **2). Deceased survived by spouse or civil partner and by issue**

2.27 One of the more difficult issues in intestacy is how an estate should be divided where the deceased leaves both a surviving spouse or civil partner and issue. In the following paragraphs we assume that the spouse or civil partner<sup>41</sup> is the parent of all the issue and that he or she had been living with the deceased prior to the latter's death. We deal with second or subsequent spouses or civil partners later in paragraphs 2.65 to 2.70. We are concerned here with the division between the surviving spouse or civil partner and the issue as a class, rather than with the division of the issue's share amongst the issue. In the *SOCRU Succession Survey*, carried out in 1986/87, the commonest category of intestate estate was where the deceased was survived by both spouse and issue.<sup>42</sup> The increasing incidence of cohabitation since then may have reduced the number of surviving spouses but this could be offset to some extent by the extension of succession rights to civil partners.

2.28 It might be expected that Scots law would provide a simple solution to division between a surviving spouse or civil partner and issue. However, because new rights were added in 1964 to the common law in an attempt to achieve a fairer result, the rules are extremely complex and can produce unjust and anomalous results. The surviving spouse or civil partner is entitled to prior rights and legal rights but the free estate, ie the net intestate estate after prior and legal rights have been satisfied, will pass to the issue as they come before the spouse or civil partner in the section 2 list of heirs. Unless the estate is such that it is exhausted after the satisfaction of the prior rights, the surviving spouse or civil partner will have to share the intestate estate with the deceased's issue. The *SOCRU Succession Survey* found that in 1986/87 just over 20% of intestate estates where the deceased was survived by both spouse and issue fell into this latter category. This usually happens only for substantial estates whose value is greater than the maximum total value of the prior rights. Situations can arise, however, where the prior and legal rights amount to only a small proportion of the estate. This is because legal rights are exigible from only the net moveable estate and because the housing and the furniture and plenishings prior rights are asset-specific. As we pointed out in Consultative Memorandum No 69 there are several quite

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<sup>40</sup> However, a surviving cohabitant may be entitled to apply to the court for an award out of the intestate estate under s 29 of the Family Law (Scotland) Act 2006, and we propose that dependent children may have an alimentary claim out of the whole estate, see paras 3.58-3.75 and paras 3.80-3.91 below respectively.

<sup>41</sup> While it is not possible for a civil partner to be a natural parent of the deceased's children he or she may be a legal parent by adoption.

<sup>42</sup> One third of all estates were in this category.

ordinary situations where the surviving spouse or civil partner will not be entitled to the very substantial dwelling house prior right.<sup>43</sup> These are:

- The couple's home may have been rented or provided by the deceased's employer.
- The house may have belonged to a family farming partnership rather than to the deceased personally.
- The couple may have been working abroad and have rented out the house until they planned to return to Scotland.
- The couple may have sold and vacated their previous house but not yet taken entry to their new home.

Moreover, the value of the deceased's interest in the dwelling house will vary according to how its purchase was financed. In the normal case of a loan being secured over the dwelling house, the net value of the deceased's interest will be the current value less the outstanding balance of the loan as at the date of death. This remains the case even if a life policy was taken out to provide the surviving spouse or civil partner with sufficient money to pay off the loan.<sup>44</sup> The dwelling house interest would have been much more valuable if there had been no loan or the loan had been secured over other assets such as business property or a life policy. It is also a condition of the housing right that the surviving spouse or civil partner was ordinarily resident in the house at the date of the deceased's death. Where a couple separate, the housing right will be lost if the survivor does not remain in the deceased's house. For example, H and W separate. W remains in the house owned by H. She retains the housing right should he die intestate because she was ordinarily resident there at the time of H's death: it does not matter that she was not living with H at the date of his death. But if W leaves at the date of separation and lives in property in which H does not have an interest, she loses the housing right as she is not ordinarily resident in H's house at the date of his death.

2.29 Similar problems, although on a smaller financial scale, apply to the prior right to furniture and plenishings. This prior right may be of little value if the major items were being acquired under a hire purchase or conditional sale agreement or belonged to the landlord. If most of the furniture and plenishings had been placed in store until the couple had finished refurbishing a new home, these would also be excluded from the survivor's prior right since they were not situated in a house in which the surviving spouse or civil partner was ordinarily resident. It should also be remembered that in relation to household goods there is a statutory presumption that they are owned in common and that therefore at the date of death the survivor already owns half of their value.<sup>45</sup>

2.30 The jurisdictions we have studied have widely differing solutions. Under the USA Uniform Probate Code the surviving spouse will succeed to the entire intestate estate. In Ireland the estate is simply divided in the ratio of two thirds to the surviving spouse, one third

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<sup>43</sup> Para 2.2.

<sup>44</sup> If the loan was secured over both the house and the policy then it has to be apportioned in line with the values of each security subject, *Graham v Graham and others* (1898) 5 SLT 319.

<sup>45</sup> Family Law (Scotland) Act 1985, s 25.

to the issue.<sup>46</sup> South Africa is similar in that the surviving spouse is entitled to a child's share or a statutory share whichever is the greater.<sup>47</sup> Many other countries give a surviving spouse a fixed sum plus a fraction of the balance with the issue getting the remainder of the estate.<sup>48</sup> The surviving spouse may be entitled to the contents of the matrimonial home as well.<sup>49</sup> The entitlement of surviving spouses under many civil law systems such as France, Germany and Spain to only a small fraction of the deceased's estate seems ungenerous, but in these countries spouses are generally in matrimonial property regimes. The less rich survivor will therefore receive a substantial benefit from an equalisation of the matrimonial property on death in addition to the succession rights in the predeceaser's share.

2.31 Liferents, usufructs or other lifetime interests are also employed. In England and Wales the surviving spouse or civil partner is entitled to the deceased's personal chattels,<sup>50</sup> a statutory sum of £125,000<sup>51</sup> and a life interest of half the balance. The issue get the fee of that half plus the other half outright. The surviving spouse in France has an option of a usufruct over the deceased's whole estate or absolute ownership of one quarter. Usufructs were more common in the past, but they have now given way to other means of providing for spouses.<sup>52</sup> In the Netherlands, which has recently revised its law on succession,<sup>53</sup> the surviving spouse<sup>54</sup> becomes the owner of the whole estate but the issue have a pecuniary claim<sup>55</sup> against the spouse in respect of their shares<sup>56</sup> which they can enforce in certain circumstances as a result of which the spouse is restricted to a usufruct.

2.32 In Sweden the surviving spouse inherits the whole estate if he or she is the parent of all the deceased's children. On the death of the surviving spouse the children are entitled to half the estate notwithstanding any contrary testamentary provisions of the surviving spouse.<sup>57</sup> There are further provisions covering: (a) increases in the value of the surviving spouse's estate between the predeceaser's death and the spouse's own death,<sup>58</sup> and (b) compensation to the children for alienation or other acts by the surviving spouse which reduced the value of the estate.<sup>59</sup>

### Options for reform

2.33 **All to surviving spouse or civil partner** The surviving spouse or civil partner could be given the whole of an intestate estate outright, irrespective of its size, with the deceased's issue having no rights to any part of it. As far as we are aware only the USA Uniform Probate Code<sup>60</sup> has adopted this rule, having changed in 1990 from a scheme whereby the

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<sup>46</sup> Quebec has the same system but with the fractions reversed.

<sup>47</sup> If the deceased left a surviving spouse and two children then each gets one third of the estate.

<sup>48</sup> Australia and Canada (except Quebec) with sums and fractions varying from state/province to state/province.

<sup>49</sup> New Zealand.

<sup>50</sup> Defined in the Administration of Estates Act 1925, s 55(1)(x) in very similar terms to the definition of furniture and plenishings in the Succession (Scotland) Act 1964.

<sup>51</sup> Proposals to increase this to £350,000: Department for Constitutional Affairs Consultation Paper, *Administration of Estates – Review of the Statutory Legacy* (CP11/05, June 2005).

<sup>52</sup> International Encyclopaedia of Comparative Law, Intestate Succession, vol V, ch 3, para 3-125.

<sup>53</sup> Civil Code, Book 4 in force since 1 January 2003.

<sup>54</sup> Marriage is open to persons of the same sex.

<sup>55</sup> See paras 2.42-2.45 below for further details.

<sup>56</sup> Art 13.3. A child's share is the same as the spouse's share, Arts 10.1(a) and 11.1. Thus if the deceased leaves a spouse and three children each child's share is a quarter of the estate.

<sup>57</sup> Inheritance Code, ch 3, ss 1 and 2.

<sup>58</sup> *Ibid*, s 4.

<sup>59</sup> *Ibid*, s 3.

<sup>60</sup> S 2-102, as amended in 1990. So far 12 of the 50 states have adopted, with some modifications, the 1990 amendments to s 2-102 of the Uniform Probate Code.



surviving spouse got the first \$50,000 and half of the balance.<sup>61</sup> In the late 1980s the Law Commission of England and Wales made a similar recommendation in its *Report on Distribution on Intestacy*.<sup>62</sup> It was motivated by the need to ensure that the surviving spouse was adequately provided for out of the deceased's estate. It rejected the ideas of increasing the proportion taken by the surviving spouse (by way of increased statutory legacy and/or increased fraction of the balance) or by automatically giving the surviving spouse the matrimonial home as well as a statutory legacy and/or a share of the balance.<sup>63</sup> The Commission considered that a substantial increase in the statutory legacy would mean that the children would only share in the very largest intestate estates. Such estates were uncommon and it was considered inappropriate for them to determine the rules for all intestacies. Furthermore, the current system of uprating the statutory legacy from time to time to reflect changes in the value of money was thought unsatisfactory. And most married people left their whole estate to their surviving spouse unless the estate was of such a size that inheritance tax mitigation strategies became important.

2.34 Giving the surviving spouse an automatic right to the matrimonial home whatever its size was rejected for England and Wales because it would create anomalies between those couples who owned their home, those who rented it and those who had sold their home on going into residential accommodation. Entitling the surviving spouse to the whole estate was also perceived to have several technical advantages. Firstly, there would be no need of provisions allowing the surviving spouse to appropriate the matrimonial home in satisfaction of succession rights. Secondly, the life interest for a surviving spouse<sup>64</sup> would not be needed and statutory trusts for minor children would be avoided. The interests of minor children were thought to be best served by giving their surviving parent the whole estate as she or he would be under a duty to maintain them.

2.35 This recommendation by the Law Commission was not accepted by the then government.<sup>65</sup> The main objection was that it failed to protect the issue of a first marriage or relationship.<sup>66</sup> This is achieved under the current rules by restricting the surviving spouse or civil partner to a life interest in half the balance after deduction of the statutory legacy and personal chattels.

2.36 The Uniform Probate Code provision was driven by the rise of divorce and stepfamilies in America whereby a person was likely to die leaving children from more than one relationship. Most married testators left their entire estate to their spouses even when they had surviving children so this could be taken to be the presumed intention of those who died intestate.<sup>67</sup> Surviving spouses were seen as having a dual role: primary beneficiaries and as conduits through which to benefit their joint children; by aliment if still dependent and by succession on their eventual death. The Uniform Probate Code does, however, protect

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<sup>61</sup> S 2-102; plus prior rights by way of homestead allowance, exempt property and family allowance, ss 2-401 to 2-404.

<sup>62</sup> Law Com No 187 (1989), para 33.

<sup>63</sup> The surviving spouse was entitled in 1989 to the personal chattels, a statutory legacy (£75,000 if there were issue or £125,000 if there were no issue) and a life interest of half the balance.

<sup>64</sup> In half the balance over the statutory legacy.

<sup>65</sup> Only some minor technical recommendations (abolition of hotchpot and the introduction of a 28 day period of survival for spouses) in the Law Commission's report were accepted. They were enacted in the Law Reform (Succession) Act 1995.

<sup>66</sup> Lord Chancellor (MacKay), HL debs 561 col 503 (13<sup>th</sup> February 1995 on the Law Reform (Succession) Bill [HL]), see also 538 cols 170-178 (16<sup>th</sup> June 1992 on Intestacy: Law Commission's Report).

<sup>67</sup> Commentary on s 2-102 of the Uniform Probate Code, available at [www.nccusl.org](http://www.nccusl.org).

the issue of the first marriage to some extent should the surviving spouse remarry and die intestate. The surviving spouse's surviving spouse would then get only the first \$100,000 plus half the balance. This recognises that the conduit theory may not apply because the surviving spouse's surviving spouse may have little attachment to his or her stepchildren. Admittedly it is a crude solution, but it tries to strike a balance between the rights of surviving spouses and children.

2.37 While giving the entire intestate estate to the surviving spouse has some attractions we do not favour such a solution. First, the public attitude surveys carried out in Scotland have consistently shown support for giving the surviving spouse all of a modest estate with the children only becoming entitled to a share when the deceased left a substantial estate. In the 1979 survey of family property in Scotland three intestate estates left by a man with a wife and three grown up children were posited: an estate of £500, an estate having the house worth £18,000 and other property of £2,000, and an estate having a house worth £18,000 and other property of £20,000. 65% of the respondents would have given the whole of the small estate to the widow, the proportion dropping to 31% in the largest. In 1986 respondents were asked about the division on an intestate estate between the widow and two grown up children. Where the deceased was neither poor nor wealthy 51% thought the estate should go entirely to the widow and a further 27% though it should go mainly to her. The comparable figures where the deceased was very poor was 65% and 18%, and where he was very wealthy 38% and 27%. The responses to our Consultative Memorandum *Intestate Succession and Legal Rights* in 1986 also supported the idea that issue should share in a large intestate estate. Finally, in the 2005 *Succession Opinion Survey* 46% agreed with the statement that where a married woman died without a will, leaving a widower and two grown up children, the whole estate should go to the widower however rich the woman was, while 47% disagreed.<sup>68</sup> The same respondents were then asked for their views on the surviving spouse getting a fixed amount plus half of the excess, the other half going to the children. This was supported by two thirds of those surveyed.<sup>69</sup> Introducing a rule which would give the entire intestate estate to a surviving spouse, irrespective of the size of the estate, seems out of line with Scottish public opinion. It is interesting to note that the public opinion survey results for England and Wales in the late 1980s were very different from the Scottish results in that they strongly favoured giving the surviving spouse the entire estate (79% where the children were dependent and 72% where they were grown up).

2.38 Secondly, we do not consider that the intestacy rules should be framed exclusively for modest estates. Although most intestate estates are modest and the average value of the intestate estates is less than that of testate estates,<sup>70</sup> there are a not insubstantial number of high value intestate estates. Injustice would be likely to result if the "all to surviving spouse or civil partner" rule appropriate for small and modest estates were to be applied to substantial estates. As can be seen from paragraphs 2.49 to 2.57 below, with quite a simple rule it is possible to give the surviving spouse or civil partner the whole of a modest estate and still allow children to share a substantial estate.

2.39 The "all to surviving spouse or civil partner" option arguably becomes more attractive if the deceased's children can apply to the court for an award to be made out of the estate.

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<sup>68</sup> Para 2.6. There were 7% don't knows.

<sup>69</sup> 23% disagreed and 10% offered no view.

<sup>70</sup> *SOCRU Succession Survey*, Table 2 on p 15 and para 4.14. There is no reason to think that the position has changed over the last 20 years since the survey was carried out.

But much depends on the principles and guidelines to which the court is to have regard and the norms of the society in question. The case law in England and Wales indicates that able-bodied grown up children are unlikely to be awarded anything in the absence of special considerations, although Australia and New Zealand are more generous. Moreover, we think that the rules of intestacy should be framed so as to provide an acceptable division between a surviving spouse or civil partner and the deceased's issue without the need for family litigation.

**2.40 Liferent to surviving spouse or civil partner, fee to issue** One way of providing for the surviving spouse or civil partner and protecting the interest of the deceased's children would be for the deceased's intestate estate to be held in a statutory trust in which the surviving spouse or civil partner had a liferent and the issue had the fee. We are not in favour of liferent provisions as they seem to us to suffer from serious disadvantages. First, a statutory trust would not be sensible for a small or even a modest estate. Even if liferents were available only to estates above a certain value anomalies would be created. Where the value of the estate was just below the limit a surviving spouse or civil partner would have very different succession rights from one where the estate was slightly larger. Secondly, unless the trustees had a power to encroach on capital a surviving spouse or civil partner may be left in need. Where the bulk of the estate consisted of a dwelling house the income of the remainder could prove insufficient for the survivor's aliment. Thirdly, setting up and running a statutory trust would involve extra expense. Trustees would have to be appointed (and remunerated if acting in the course of business), accounts prepared and disputes between the surviving spouse or civil partner and the children adjudicated. Finally, liferents in heritage were abolished in 1964 because they did not work well in practice; in particular, terce was of little value to widows. For these reasons we are not in favour of creating a statutory trust in which the surviving spouse or civil partner and the deceased's children have the liferent and fee respectively. To do so would go against the current trends in the current law of succession in other jurisdictions.<sup>71</sup>

**2.41 The Dutch system** If the surviving spouse or civil partner is given the whole intestate estate the deceased's children's expectations of eventual succession may be defeated in a number of ways. First, the surviving spouse or civil partner may give the property away whilst alive. Secondly, he or she may dispose of it by will otherwise than to the children. Thirdly, he or she may remarry or enter into a new civil partnership and die intestate, in which case the new surviving spouse or civil partner would inherit the bulk, if not all, of the estate. Finally, the surviving spouse or civil partner may exhaust the estate in order to meet living expenses, especially residential accommodation costs. Only the last is unlikely to give rise to a sense of grievance. Scots law presently protects children against testamentary alienation only to the extent that they are entitled to claim legitim on the death of the surviving spouse or civil partner where he or she is the children's remaining parent.<sup>72</sup>

**2.42** The Netherlands has recently enacted a new succession code<sup>73</sup> which attempts to deal with these issues. It does so in a novel way. The surviving spouse (who may be the parent or step-parent of the intestate's children) and each of the children inherit a share, but the surviving spouse becomes owner of the entire estate with the children having merely a

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<sup>71</sup> International Encyclopaedia of Comparative Law, Intestate Succession, vol V, ch 3, para 3-125.

<sup>72</sup> But only if the surviving spouse is the remaining parent of the claimant.

<sup>73</sup> Civil Code, Book 4 in force since 1 January 2003.

money claim<sup>74</sup> against the estate for the value of their shares.<sup>75</sup> The children's claims become enforceable on the bankruptcy or death of the surviving spouse.<sup>76</sup> Each child also has an option to enforce the claim in the circumstances set out below. This option (termed a *wilsrecht*) is purely personal and cannot be assigned to, or exercised by, the child's creditors.<sup>77</sup>

2.43 Where the surviving spouse is the child's other parent and remarries, the child may demand that the spouse transfers assets up to the value of his or her claim plus interest.<sup>78</sup> But the surviving spouse can claim a usufruct over the transferred assets.<sup>79</sup> Cohabitation does not give rise to a similar option.<sup>80</sup>

2.44 If the surviving spouse was the child's step-parent the child may request a transfer of assets up to the value of his or her claim plus interest *at any time*. Again the surviving spouse can claim a usufruct over the transferred assets. If the child does not exercise this option during the lifetime of the surviving spouse then on death the assets are transferred to the child.<sup>81</sup>

2.45 The provisions in the new Dutch legislation are an ingenious way of balancing the interests of the surviving spouse or civil partner against those of the deceased's children on intestacy. However they do not prevent the surviving spouse or civil partner from simply dissipating the estate to which he or she has succeeded. They postpone the children's rights until the survivor's death, bankruptcy or remarriage and even then still entitle the survivor to a usufruct of the estate. Nevertheless, we do not think that they would be a suitable model for Scotland. They rely too heavily on usufruct – a proper liferent. The disadvantages of a statutory liferent and fee trust have been set out in paragraph 2.40 above. A proper liferent suffers from the additional disadvantage that there are no trustees to administer the estate and hold the balance between the liferenter and fiar. For this reason, proper liferents have lost their utility and are now uncommon in Scotland.<sup>82</sup> We do not think that they should be reintroduced for this purpose.

2.46 **Sharing the estate between spouse or civil partner and issue** If the deceased's surviving spouse or civil partner and the deceased's issue are to share in the intestate estate, we are strongly of the view that instead of building in restrictions on the disposal and use of the estate by the survivor, the estate should be divided between the parties at the date of death. This has been the approach that Scots law has taken since 1964 when liferent rights in relation to heritage were abolished. However it is our opinion that the existing method of division involving a distinction between heritable and moveable property and three kinds of rights viz, prior rights, legal rights and a right to the free estate, is

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<sup>74</sup> Their claims bear simple interest at the legal rate, Art 13.4.

<sup>75</sup> Arts 10.1, 11.1 and 13.3.

<sup>76</sup> Art 13.3, or other circumstances as provided for in the will.

<sup>77</sup> Art 25.5.

<sup>78</sup> Art 19.

<sup>79</sup> The surviving spouse may waive this usufruct.

<sup>80</sup> J C Sonnekus, "The new Dutch Code on Succession as evaluated through the eyes of hybrid legal system", 2005 Zeitschrift für Europäisches Privatrecht 80.

<sup>81</sup> Art 22.

<sup>82</sup> It is also difficult to see how a proper liferent over moveables would operate in practice.

exceedingly complex and gives rise to unjustifiable anomalies.<sup>83</sup> Simpler rules have to be found.

2.47 The Republic of Ireland adopts a straightforward proportional system; two thirds to the surviving spouse, one third to the children. It is easy to understand and would be easy to operate in practice. There is no fixed sum that has to be updated periodically to reflect changes in the value of money. However, it fails to provide adequately for the surviving spouse or civil partner when the estate is modest. The 1986 and 2005 surveys indicate that this solution would not be in line with public opinion. Even where the surviving spouse or civil partner is not entitled to the dwelling house prior right, in Scotland he or she would be entitled to £24,000 worth of furniture and furnishings and a cash sum of £42,000. We do not think the widow of a man who leaves only £30,000 of household goods and savings should have to share this with his children.

2.48 Giving a fixed sum to the spouse or civil partner and the rest to the issue would, if the fixed sum was set at an appropriate level, ensure that the surviving spouse or civil partner received the whole of a modest estate. But it would also mean that in the case of a very large estate the survivor would receive only a small fraction of its value. This does not seem to be in accordance with public opinion. The surviving spouse or civil partner would often face a drop in living standards and may have to sell the home and its contents. He or she would be worse off than under the present law where, in addition to prior rights, the surviving spouse or civil partner has legal rights to a third of the remaining moveable property. We do not favour this solution.

### **Proposals for reform**

2.49 Our preferred solution is to give the surviving spouse or civil partner a fixed sum plus a half of any excess. This is slightly more complicated than the two preceding options but is still reasonably simple both to understand and to operate. It has the advantage that it ensures that all of a modest estate passes to the survivor and that in the case of a substantial estate the issue get a reasonable (but not disproportionately large) share. It continues the underlying policy of the existing law while avoiding the anomalies which can arise because two of the current prior rights are asset-specific. It reflects the views of the participants in the 1986/87 survey that the balance between spouse and issue varies according to the size of the estate. It has been adopted in many of the common law jurisdictions we have studied.<sup>84</sup> In our 1990 *Succession Report* we recommended this solution as it had been supported on consultation.<sup>85</sup> Continued support for this solution was demonstrated in the 2005 *Succession Opinion Survey*. The sample of 1,008 people interviewed were asked whether they agreed with the proposition that where a woman died intestate leaving a husband and two children he should get a fixed amount plus half of the excess with the other half of the excess going to the children. 67% strongly agreed or agreed, 23% disagreed or strongly disagreed and 10% did not express any view.<sup>86</sup>

2.50 What the fixed sum should be is a matter for political judgment at the time when the legislation is before Parliament. The maximum amount of the current prior rights, which

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<sup>83</sup> See paras 2.9-2.17 above.

<sup>84</sup> Australia, New Zealand, Canada. Often the surviving spouse inherits the personal chattels as well.

<sup>85</sup> Recommendation 3, para 2.7.

<sup>86</sup> Para 2.9.

were updated in 2005, is £366,000.<sup>87</sup> But since most married persons and civil partners own only a one half pro indiviso share in the home and there is often a substantial loan secured over the home it is rare that the £300,000 housing prior right is utilised in full. Moreover, the survivor at present also receives as legal rights one third of any remaining moveables whereas under our proposed scheme he or she would get one half of the remaining estate be it heritable or moveable. This suggests that a lower figure for the fixed sum, say £300,000, would be more appropriate. The following examples illustrate the current rules and our proposed replacement.

#### Example 1

A man dies survived by a widow and a son and leaving the following estate:

A dwelling house worth	£681,000
Furniture and plenishings worth	£ 45,000
Investments worth	£360,000
Total	£1,086,000

At present the widow would be entitled to £366,000 (£300,000, £24,000 and £42,000) in prior rights and £120,000 in legal rights making a total of £486,000; the son getting £600,000. Under the new rules she would get £693,000 and the son £393,000.

#### Example 2

A man dies survived by a civil partner and a son by an earlier relationship and leaving the following estate:

A dwelling house worth	£270,000
Furniture and plenishings worth	£45,000
Investments worth	£771,000
Total	£1,086,000

At present the civil partner would be entitled to £336,000 in prior rights and £250,000 in legal rights making a total of £586,000; the son getting £500,000. Under the new rules he would get £693,000 and the son £393,000.

#### Example 3

A man dies survived by a widow and a son and leaving the following estate:

A dwelling house worth	£300,000
Furniture and plenishings worth	£24,000
Investments worth	£42,000

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<sup>87</sup> Where the deceased is survived by a spouse or civil partner and issue, see the Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252.

Total £366,000

At present the widow would be entitled to the whole estate by virtue of her prior rights and the son would get nothing. Under the new rules she would get £333,000 and the son would get £33,000.

#### Example 4

A woman dies survived by a civil partner and a son by an earlier relationship and leaving the following estate:

Furniture and plenishings worth	£8,000
Investments worth	£72,000
Total	£80,000

At present the civil partner would be entitled to £50,000 in prior rights and £10,000 in legal rights making a total of £60,000; the son getting £20,000. Under the new rules the civil partner would get the whole estate and the son would get nothing.

2.51 It can be seen that putting the fixed sum at £300,000 ensures that in all but one of the above examples the surviving spouse or civil partner does somewhat better under the new scheme. Even in Example 3, where the estate in terms of value and composition is the most favourable to a surviving spouse or civil partner under the existing rules, he or she is only £33,000 worse off out of an estate of £366,000. For the purposes of this discussion paper we shall proceed on the basis that the fixed sum is £300,000. Nevertheless, we invite views on what the fixed sum should be.

2.52 At present it is irrelevant whether the surviving spouse or civil partner is wealthy in her own right and the children are indigent or indeed vice versa.

#### Example 5

A man dies survived by a widow and two grown up children and leaving the following estate:

Furniture and plenishings worth	£8,000
Investments worth	£72,000
Total	£80,000

The widow runs a very profitable business and she has assets of her own in excess of £1,000,000, including the matrimonial home. The children are not well-off, have poorly paid jobs and live in rented accommodation. The estate is the same as in Example 4 and will be distributed in the same way. At present the widow would be entitled to £50,000 in prior rights and £10,000 in legal rights making a total of £60,000; the children getting £20,000 between them. Under the new rules the widow would get the whole estate and the children would get nothing.

2.53 The current rules regard the wealth of the survivor and children as neutral factors. We think that this is the correct policy. If the wealth of the recipient of the whole, or part, of the estate had to be taken into account, this would render any rule-based system

unworkable. We therefore consider that the wealth of the survivor and children should be neutral factors under the system we propose.<sup>88</sup>

2.54 One defect of prior rights and any scheme involving fixed sums is that the figures require adjustment from time to time to avoid inflation eroding their value. The prior rights figures are capable of being varied by subordinate legislation but changes have been made only five times since 1964.<sup>89</sup> The last uprating in 2005 saw the dwelling house prior right more than double from £130,000 to £300,000,<sup>90</sup> leading to very considerable differences in prior rights between an estate where the deceased died just before the change came into effect on 31 May 2005 and an estate of the same value where the deceased died a few days later. More frequent and therefore smaller increases would avoid these anomalies. We suggest that the proposed fixed sum of £300,000 be uprated annually by an order made by the Scottish Ministers in line with changes in the Retail Price Index. This is the method used to set the nil rate band for inheritance tax.<sup>91</sup> It may be argued that as the main asset in most estates is the dwelling house and as house prices generally increase faster than the basket of goods used for the Retail Price Index, a house price inflation index should be used instead of the Retail Price Index. But in our new scheme the figure of £300,000 is not simply a replacement for the housing prior right; it was chosen to ensure that most estates would be divided fairly between spouse or civil partner and issue as Examples 1 to 4 in paragraph 2.50 show. Moreover, house price inflation is very far from uniform across Scotland. Finally, we think that the Scottish Ministers should be empowered by the legislation not to uprate according to the Retail Price Index in any particular year. They might decide to have no increase at all or an increase well in excess of that indicated by changes in the Retail Price Index.

2.55 The new rule, £300,000 plus half the balance, should be applied to the intestate estate after deduction of debts due by the deceased but before inheritance tax and the expenses of administration. Not taking inheritance tax into account avoids the circularity which would otherwise develop due to the tax on the estate depending on the amount passing to persons other than surviving spouse or civil partner which in turn depends on the amount of tax payable.<sup>92</sup>

2.56 One of the undoubted benefits of the existing system of prior rights is that the surviving spouse or civil partner is entitled to the dwelling house (or a share of it) which belonged to the deceased and is therefore unlikely to be forced to move out of the family home. This desirable policy objective could be met under our proposed scheme by giving the survivor an entitlement to acquire the family home and the furniture and plenishings in satisfaction, or in partial satisfaction, of his or her share of the estate. Even where these items were worth more than the survivor's share we think that the surviving spouse or civil partner should be entitled to acquire them on paying the balance to the estate. This right

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<sup>88</sup> Unless the widow and the children are estranged the children would stand to inherit when the widow dies.

<sup>89</sup> Ss 8(1), 8(3) and 9(1) of the Succession (Scotland) Act 1964. S 9A empowers the Scottish Ministers to make the variation by negative resolution statutory instrument.

<sup>90</sup> The furniture and plenishings right went up from £22,000 to £24,000 and the cash sums from £35,000 and £58,000 to £42,000 and £75,000 respectively.

<sup>91</sup> Inheritance Tax Act 1984, s 8.

<sup>92</sup> For example with an estate of £2 million the surviving spouse gets £300,000 plus half the balance ie £1,150,000; the children get £850,000. Tax at 40% of (£850,000 - £300,000, the 2007-08 nil-rate band), ie £220,000 would be due by the children.



would be subject to the same exceptions that exist for the dwelling house prior right under the 1964 Act.<sup>93</sup>

2.57 We therefore propose:

2. (1) **Where a person dies intestate survived by issue and by a spouse or civil partner, the spouse or civil partner should be entitled to a fixed sum or the whole intestate estate if it is worth less than this amount. Any excess over the fixed sum should be divided equally, half to the spouse or civil partner and half to the issue. Our provisional view is that the fixed sum should be £300,000 but views are invited on whether that sum is appropriate.**
- (2) **The fixed sum applicable to the estates of those dying in the following year should be set annually by an order made by the Scottish Ministers. The order should uprate the figure in line with the change in the Retail Price Index unless the Scottish Ministers decide otherwise.**
- (3) **The spouse or civil partner who is entitled to a share of the intestate estate which includes the deceased's interest in the dwelling house or its furniture and plenishings should have an option to acquire the deceased's interest in them in satisfaction or part satisfaction of his or her share. If the value of the interest exceeds the spouse's or civil partner's share, he or she should still be able to acquire it on paying the excess to the estate.**

B: SEPARATED SPOUSES OR CIVIL PARTNERS

### **The present position**

2.58 So far we have been considering a spouse or civil partner as the survivor of a marriage or civil partnership where the couple had been living together prior to the death of one of them. The current position is that neither judicial nor factual separation affects the survivor's intestate succession rights. An individual whose marriage to the deceased had been ended by divorce or annulment prior to the deceased's death cannot, of course, succeed as a surviving spouse and a similar result obtains with civil partners. But why, it may be asked, should a spouse or civil partner turn up after 20 or so years separation to claim the estate to the prejudice of children with whom the deceased had been living?

2.59 Until recently where a wife in Scotland obtained a decree of judicial separation and died intestate her husband had no right to any estate she had acquired after the date of the decree of separation. In terms of section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 the property passed as if he had predeceased her. There was no equivalent rule

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<sup>93</sup> S 8(2); leased or business premises where the house cannot be split off from the rest or where splitting off the house would diminish substantially the value of the remainder; see para 2.9 above.

for husbands who obtained a decree of separation. The 1861 Act has now been repealed by the Family Law (Scotland) Act 2006.<sup>94</sup>

2.60 Other jurisdictions have provisions disinheriting separated spouses. The Netherlands Civil Code provides that the rights of a spouse on intestacy do not apply to a spouse who is judicially separated.<sup>95</sup> England and Wales had a similar rule to the former Scottish rule until 1970. Now the whole estate of a judicially separated spouse (male or female) or civil partner is distributed as if the other had predeceased.<sup>96</sup> In France the existence of a decree of judicial separation against the surviving spouse disentitles him or her from succeeding in that capacity.<sup>97</sup> In Germany a surviving spouse is barred from succeeding on intestacy if the deceased had raised an action of divorce or the spouses had agreed to divorce.<sup>98</sup> In some Australian states and Canadian provinces a cohabiting partner may succeed in place of a spouse where the deceased had lived with the cohabiting partner for at least a specified period immediately prior to death.<sup>99</sup>

### Options for reform

2.61 Should the existing position in Scotland be changed? In view of the recent repeal of section 6 of the Conjugal Rights (Scotland) Amendment Act 1861, we do not think that disentitling a judicially separated spouse or civil partner from succeeding to the other's estate on intestacy is a viable option. Moreover, few decrees of judicial separation are granted nowadays as spouses whose marriages have broken down use other remedies.<sup>100</sup> Judicial separation is available to civil partners but we do not envisage it being used any more frequently than for spouses.<sup>101</sup> However, a surviving spouse or civil partner could be disentitled from succeeding on intestacy by the fact of separation for a specified period of time or by an order from the court.

2.62 The principal objection against disinheritance based on factual separation for a specified period would be that it would deprive the surviving spouse or civil partner of any financial provision. If the couple had divorced or their civil partnership had been dissolved financial provision would have been negotiated or awarded by the court. If the couple remain married or in a civil partnership it seems right that the rules of intestate succession should provide for the survivor. One spouse or civil partner should not be able to disinherit the other simply by ceasing to cohabit for a certain length of time and dying intestate.<sup>102</sup> Furthermore, as we pointed out in our *Succession Report*,<sup>103</sup> it would produce an unjust result for the loyal spouse of a long-term prisoner or a deserted spouse who hoped against hope that the other would return. Any specified period would be arbitrary and give rise to anomalies between couples who had lived apart for just more than the requisite period and those who had done so for just short of it. There would also be problems with determining

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<sup>94</sup> Sch 3. S 6 was the only remaining operative provision.

<sup>95</sup> Book 4, Arts 10.1(a) and 13.6.

<sup>96</sup> Matrimonial Proceedings and Property Act 1970, s 40, now Matrimonial Causes Act 1973, s 18(2).

<sup>97</sup> Code Civil, Art 732.

<sup>98</sup> BGB, § 1933(1).

<sup>99</sup> The existence of issue from the relationship can also be an important factor.

<sup>100</sup> There were 234 judicial separations in 1985, 215 in 1986, 174 in 1987, 158 in 1988 and 116 in 1989: *Family Law Report*, para 12.5. We have no reason to think that the number of judicial separations will have increased since 1989.

<sup>101</sup> Civil Partnership Act 2004, s 120.

<sup>102</sup> Separating couples may negotiate a capital settlement soon after separation, but the agreement then usually provides that neither may make any claim on a subsequent divorce or death of the other.

<sup>103</sup> Para 7.31.

the date of separation and allowing for periods of reconciliation, although these could be solved along the lines of existing legislative provisions in the context of divorce<sup>104</sup> and financial provision.<sup>105</sup>

2.63 A discretionary system enabling the court to disinherit a separated spouse or civil partner seems to us to suffer from many disadvantages. It would create uncertainty and delay in winding-up the intestate estates of separated persons as the executors would have to wait until the time limit for applying had expired.<sup>106</sup> The litigation would be unpleasant and distressing to the family and one of the principal protagonists, the deceased, would no longer be available to give evidence.

2.64 We think that the present law is correct in that nothing short of divorce, dissolution or annulment should affect a surviving spouse's or civil partner's intestate succession rights. The shortening by the Family Law (Scotland) Act 2006 of the periods of non-cohabitation required for divorce or dissolution adds to the attractions of this simple clear-cut position.<sup>107</sup> A person who had been living apart from their spouse or civil partner can now prevent the other from succeeding to their estate by obtaining a decree of divorce or dissolution based simply on two years separation. Moreover, immediately after separation each of the spouses or civil partners could restrict the other to a claim for legal rights by the simple process of making a will containing no provisions in favour of the other. Also, a spouse or civil partner who leaves home at separation will not be entitled to the very valuable housing prior right as it is a condition of entitlement that the survivor was ordinarily resident there at the date of the deceased's death.<sup>108</sup> In order to elicit views we put forward the following negative proposal:

3. **There should be no change in the existing law whereby separation (whether or not a decree of judicial separation had been obtained) has by itself no effect on the succession rights of spouses or civil partners in each other's estates.**

C: SPOUSE OR CIVIL PARTNER NOT PARENT OF ALL THE CHILDREN

### **The current position in Scotland and some other jurisdictions**

2.65 Should a surviving spouse's rights on intestacy be different if she or he is not the parent of all or any of the deceased's children? Most civil partners will fall into this category as they cannot be parents of the deceased's children unless they have adopted them. The paradigm case is the surviving spouse who is the step-parent of the deceased's children of an earlier marriage or relationship. Public opinion surveys show markedly less support for such a spouse. In the 1986 Attitudes to Succession Survey respondents were asked about two situations where the intestate estate of a man who was neither poor nor wealthy was divided between his surviving wife and two grown up children. In the first question the wife was the mother of both the children; in the second she was the stepmother of both the

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<sup>104</sup> Divorce (Scotland) Act 1976, s 2(4).

<sup>105</sup> Family Law (Scotland) Act 1985, s 10(7).

<sup>106</sup> S 29 of the Family Law (Scotland) Act 2006 allows a cohabitant to apply for an award out of the deceased's intestate estate, but only out of any estate left after meeting any prior and legal rights of a surviving spouse. See para 3.61 below.

<sup>107</sup> The five year period is reduced to two years and the two year period to one year, s 11.

<sup>108</sup> Succession (Scotland) Act 1964, s 8(4).

children, their mother having died and their father having remarried. The responses were as follows:

	Mother of both children	Stepmother of both children
All to wife	51%	19%
Mainly to wife	27%	27%
Half to wife, half to children	19%	39%
Mainly to children	2%	9%
Other ways and don't knows	1%	6%

2.66 Where the surviving spouse is also the surviving parent of the children the latter have a reasonable expectation of succession when the surviving spouse/parent dies. This expectation is lessened if the surviving spouse is their step-parent. In Waggoner's phraseology a step-parent is not as reliable a conduit of family wealth to the next generation as a parent.<sup>109</sup>

2.67 Scotland makes no distinction between the various kinds of surviving spouse. England and Wales adopts the same position. Some other legal systems confer lesser rights on surviving spouses who are not the parents of all the deceased's children. Under the Uniform Probate Code, which was revised in 1990, a surviving spouse generally takes the entire estate but one who is not a parent of all the deceased's children is restricted to the first \$100,000 plus one half of the balance. Where the surviving spouse is the parent of all the deceased children but also has other children of his or her own, the spouse gets the first \$150,000 plus one half of the balance. In the Netherlands a surviving spouse becomes the owner of the entire estate on intestacy but the children can demand an immediate transfer of assets subject to the surviving spouse's usufruct. Where the surviving spouse is their surviving parent their claim is exigible only on the surviving spouse's death, remarriage or insolvency.

### Options for reform

2.68 Possible solutions are that: (1) the spouse or civil partner who is not the parent of all the deceased's children (the "second" spouse or civil partner) should be entitled to a smaller lump sum and/or a smaller fraction than a surviving spouse or civil partner would get under Proposal 2 above, or (2) the survivor's entitlement should be of a life interest rather than absolute ownership.<sup>110</sup> These might be seen as providing a fair result where all the issue are of the first marriage and the second marriage was short and took place when the deceased was relatively old. However, this is only one of many situations where the surviving spouse is not a parent of all the issue. For example the deceased might have left issue by both marriages. Why, it may be said, should the issue of the second marriage gain (at the expense of their surviving parent) simply because of the existence of other issue? This problem could be addressed by apportioning the estate between the first and second families and applying different rules to each portion. The resulting provision would however be rather complex.

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<sup>109</sup> L M Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", 1991 76 Iowa L Rev 223, p 233.

<sup>110</sup> We understand that it is not uncommon for wealthy people who have children by a previous spouse and remarry later in life to leave their second spouse only a life interest.

2.69 In many cases the children of the first marriage may have inherited or stand to inherit from their other parent so reducing their need for an enhanced share from the deceased's estate. Where the first marriage ended on the death of the children's mother and their father remarried the children may have succeeded to part or all of their mother's estate. Similarly, if the first marriage had ended in divorce their mother would probably have obtained a share of the couple's property then and her issue could reasonably expect eventually to succeed to her estate. Children of the first marriage are likely to be middle aged when a parent dies and are less likely to be in need of money than the surviving spouse. If the children were still young and had been accepted as children of the family by the surviving spouse then he or she would have an obligation to aliment them.<sup>111</sup> If, unusually, the children had not been accepted by the surviving spouse we are putting forward in Part 3 a scheme whereby children (or at least those under 25 and in need) would be able to apply to the court for an award of aliment out of the estate.

2.70 Our inclination at present is that there should continue to be no distinction made between the various classes of surviving spouse or civil partner. The range of possible situations is too great and it is not clear that any new rule would produce more satisfactory results than the existing one. Also it would draw a sharp distinction between spouses and civil partners in that the latter are far less likely to be the legal parents of their partner's children. However, we acknowledge that the issue is controversial and therefore ask the following question:

4. **Should a surviving spouse or civil partner continue to be treated in the same way with regard to succession to an intestate estate whether or not he or she was the legal parent of all the deceased's children? If not, what changes should be made?**

D: STEPCHILDREN AND ACCEPTED CHILDREN

### **The current law in Scotland**

2.71 Under the current law in Scotland a stepchild of the deceased or a child who had been accepted by the deceased as a child of his or her family has no rights on intestacy. In this section we consider whether any such rights should be introduced. The high rate of separation and repartnering, whether in married or cohabiting relationships, over the past few decades has resulted in a substantial number of children who have been brought up otherwise than by both their natural parents.<sup>112</sup>

2.72 The 2005 *Succession Opinion Survey* included two questions on the succession rights of stepchildren on intestacy. The first concerned a man who had been married twice. He was survived by his two stepchildren whom he had accepted as children of his family. Three-quarters (75%) of those surveyed thought that the stepchildren should be entitled to some part of his intestate estate.<sup>113</sup> The second question posited a similar situation except that the man was survived by children of his own from his first marriage as well as

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<sup>111</sup> Family Law (Scotland) Act 1985, s 1.

<sup>112</sup> See para 1.3, fn 6 above.

<sup>113</sup> Para 2.10.

stepchildren.<sup>114</sup> Some two-thirds of those responding (68%) agreed that the two categories of children should be treated in exactly the same way.<sup>115</sup>

### Should it be changed?

2.73 The main argument in favour of giving stepchildren and accepted children intestate succession rights is that the current law can produce harsh anomalies. Suppose a married couple have a child and the father dies shortly afterwards. The mother remarries, her new husband accepts her baby as a child of his family and the couple go on to have two more children of their own. In terms of upbringing and emotional relationship, the three are treated identically by the couple and probably regard each other as full siblings.<sup>116</sup> Yet for succession purposes only the new husband's own children will succeed him on intestacy.<sup>117</sup> He has to make a will if he wishes his stepchild to succeed to part of his estate. This may well have been the type of situation participants in the 2005 survey had in mind when responding to the two stepchildren questions.

2.74 There has also been increasing recognition of non-biological relationships for various legal purposes. Members of the deceased's immediate family can claim damages for non-patrimonial losses from the wrongdoer whose negligence caused the deceased's death. In terms of Schedule 1 to the Damages (Scotland) Act 1976 a person whom the deceased had accepted as a child of his or her family is regarded as a member of the immediate family.<sup>118</sup> The Matrimonial Homes (Family Protection)(Scotland) Act 1981 confers occupancy rights in relation to the matrimonial home on a non-entitled spouse together with any child of the family and empowers the court to grant an exclusion order where the person sought to be excluded has been violent or threatened violence against, among others, any child of the family. Furthermore, in making other orders the court has to consider the needs of any child of the family. "Child of the family" is defined as any child or grandchild of either spouse and any person brought up or treated by either spouse as if he or she were a child of that spouse, irrespective of age. The Family Law (Scotland) Act 1985 imposes an alimentary obligation on a person who has accepted a child as a child of his or her family.<sup>119</sup>

2.75 On the other hand intestate succession is traditionally a matter of blood relationships or their legal equivalents such as adoption or a parental order under section 30 of the Human Fertilisation and Embryology Act 1990. Arguably, it should not be widened to include social relationships. None of the other jurisdictions we have looked at except China confer automatic rights of succession on children other than biological or adopted children. Scots law already provides ways in which a person can ensure that his or her stepchildren or accepted children succeed; making a will or adopting them. The recognition of a steprelationship or an accepted child-accepting adult relationship in existing Scottish legislation is based on different considerations. Thus in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 it is based on the need to protect a child living in the matrimonial or family home, while it is the existence of close emotional links through living

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<sup>114</sup> Para 2.12.

<sup>115</sup> Respondents aged 55 to 64 were more in favour (77%).

<sup>116</sup> We recommended in our *Succession Report* (Recommendation 4) that half siblings should succeed in the same manner as full siblings, but that was in relation to collateral succession and not succession to a parent or step-parent.

<sup>117</sup> On the mother's intestacy all three would succeed equally as they are all her biological children.

<sup>118</sup> S 35 of the Family Law (Scotland) Act 2006 also treats the accepting adult as the parent of a deceased accepted child for the purposes of a 1976 Act claim.

<sup>119</sup> S 1(1)(d).

together or being brought up in the same household that lies behind entitlement to damages for non-patrimonial loss under the Damages (Scotland) Act 1976. Furthermore, there could be practical difficulties where the deceased died many years later in establishing whether or not the deceased had accepted a child to the required extent.

2.76 A girl could be accepted as a teenager and have little contact with the other, much younger, children of the family. It is difficult to see why they should have to share their parent's intestate estate with her.<sup>120</sup> Again, a couple with grown up children might accept and bring up a five-year old nephew whose parents had recently died. Why should this act of family generosity prejudice the succession rights of the couple's own children?

2.77 We do not think that accepted children should cease to have rights of succession on intestacy from their biological parents. That would be to give acceptance a legal status equivalent to the much more formal procedure of adoption. Acceptance of a child by itself does not remove the parental responsibilities and rights from the non-resident biological parent or that parent's obligation of aliment. Therefore treating an accepted child as a child of the accepting adult for the purposes of intestate succession would produce the somewhat odd result that an accepted child would have three "parents", his or her own biological parents and the accepting adult. Indeed, if that relationship ended and the child was subsequently accepted by another adult, the child would end up with four "parents". The accepted child would therefore be in a better position than an adopted or biological child.

2.78 If a link is to be created by acceptance for intestate succession purposes is it to be limited to the accepted child being entitled to succeed, or should the accepting adult also be entitled to succeed to the accepted child's estate or should the link apply throughout intestacy? We think that equating accepted children with adopted or biological children for all purposes of intestate succession would go too far.

2.79 In Part 3 we put forward in the context of protection from disinheritance a scheme whereby a person who was accepted by the deceased as a child of the deceased's family could apply to the court for an award out of the estate, at least where the child was under 25 and still in need of support. This would deal more satisfactorily with the situation where a stepchild of the deceased has been regarded as equal to his or her biological children than changing the rules of intestacy.

2.80 Our provisional view is that the disadvantages of a change in the law outweigh the advantages, particularly as there are other ways of dealing with the problem. However, in order to elicit views we ask the following questions:

5. **(1) Should a child who had been accepted by an adult as a child of his or her family be treated as the adult's own child for the purposes of intestate succession to that adult?**
- (2) If so, should such a child also be treated as the adult's own child:**
  - (a) in relation to succession by the adult to the accepted child's intestate estate; or**

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<sup>120</sup> On the other parent's intestacy all the children would succeed equally as they are all his or her biological children.

## **(b) for the purposes of intestate succession generally?**

### **E: EFFECT OF TESTAMENTARY PROVISIONS ON INTESTATE SHARES**

#### **The present position in Scotland and some other jurisdictions**

2.81 People may die only partially intestate. With one exception the rules of intestacy take no account of benefits a successor may also have received by way of testamentary disposition. In general a successor is entitled to take or share in the intestate estate in addition to enjoying any benefit under the will or other testamentary disposition. The exception relates to the surviving spouse's or civil partner's prior rights. Where a surviving spouse or civil partner is entitled to a legacy (other than a legacy of a dwelling house or furniture and furnishings which would have been covered by prior rights) the value of the legacy must be deducted from the lump sum due under section 9 and the survivor is due only the balance, if any.<sup>121</sup> The surviving spouse or civil partner may, however, renounce the legacy and become entitled to the full lump sum. Legacy means any benefit conferred by testamentary disposition.<sup>122</sup>

2.82 In England and Wales before 1996 the statutory legacy<sup>123</sup> of a surviving spouse was reduced by the value of any benefit received under the will. Issue were also required to bring any beneficial interests under the deceased's will into account in settling their rights on intestacy.<sup>124</sup> These so-called hotchpot rules were abolished by the Law Reform (Succession) Act 1995 for deaths arising on or after 1 January 1996.<sup>125</sup> However, many of the states or provinces in Australia and Canada have retained the hotchpot rule for spouses when reforming their intestacy laws. Where the entitlement of the spouse on intestacy is to a fixed sum plus a portion of the excess, any legacy is usually deducted from that fixed sum. Where the legacy exceeds the fixed sum the spouse is entitled to the legacy plus a portion of the excess intestate estate.<sup>126</sup> If, as we propose above, a similar formula should apply to surviving spouses and civil partners in Scotland, then the effect of legacies has to be considered. Should the existing rule that legacies are taken into account to some extent in relation to the spouse's or civil partner's share of an intestate estate be retained or even extended to other beneficiaries?

#### **Proposals for reform**

2.83 The simplest approach is for the intestacy rules to apply to the intestate estate without taking account of any other testamentary provision in its widest sense. Valuation of testamentary provisions other than sums of money could be difficult. Assessing the value of paintings, life interests or rights of occupation would be burdensome, involve paying experts, and might give rise to disputes. The argument for taking a testamentary provision into account is that otherwise the surviving spouse or civil partner or other beneficiary gets too much but this begs the question of what the right level of provision is. Moreover, if testamentary provisions are to be taken into account on this basis then perhaps pension provisions and

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<sup>121</sup> £75,000 if deceased not also survived by issue, £42,000 if deceased also survived by issue; Succession (Scotland) Act 1964, s 9(1) and the Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252.

<sup>122</sup> Succession (Scotland) Act 1964, s 9(6)(b).

<sup>123</sup> Currently £125,000 or £200,000, the larger sum being due if the deceased left no surviving issue.

<sup>124</sup> Administration of Estates Act 1925, s 49(1)(aa) and (a) respectively.

<sup>125</sup> S 1(2). The abolition implemented recommendations by the Law Commission in its *Report on Distribution on Intestacy*, Law Com No 187 (1989), para 55.

<sup>126</sup> See App A, paras 88-94.



life insurance in favour of the surviving spouse or civil partner ought to be included as well since they too have a major impact on the survivor's financial situation. Our tentative view is that Scotland should in general adopt the simple straightforward approach that the intestacy rules apply to the intestate estate without modification.<sup>127</sup> We came to the same conclusion in our 1990 *Succession Report*.<sup>128</sup>

2.84 This proposed general rule whereby the intestate estate is to be treated independently from the testate estate would be breached to some extent where a claim for a share of the estate is made by a surviving spouse or civil partner, a child or a cohabitant of the deceased. In the cases of a surviving cohabitant or a dependent child we are proposing that they would be able to apply to the court for an award out of the whole estate, testate and intestate, and in deciding the level of the award the court would be able to take into account any testamentary provision for the applicant.<sup>129</sup> We are also proposing that a surviving spouse or civil partner and possibly also a child aged 25 or over would be entitled to claim a fixed share of the total estate, testate or intestate.<sup>130</sup> These claims are discussed in detail in Part 3. But the default position in the absence of a claim would be that the testate and intestate portions of an estate would be subject to separate rules that did not impinge on each other.

2.85 A possible variation would be to take account of any testamentary provision regarding the dwelling house. Earlier in this Part we proposed that where the deceased was survived by issue the surviving spouse or civil partner should be entitled to a fixed sum plus one half of any excess out of the intestate estate.<sup>131</sup> The size of this fixed sum is based to some extent on the value of the dwelling house prior right, currently £300,000, so ensuring that in most situations a surviving spouse or civil partner is treated as well if not better under the new rule. But if the surviving spouse or civil partner receives the dwelling house by way of a legacy or by virtue of a survivorship destination in the title then it may be thought that a lesser sum should be substituted.<sup>132</sup> We imagine it is not uncommon for a person to die without a valid will yet for the surviving spouse or civil partner to succeed to the dwelling house by virtue of a special destination. The testamentary provision relating to the dwelling house would be taken into account by deducting the value of the property passing by testamentary disposition from the proposed fixed sum. However, it may be asked why a legacy of the dwelling house should be treated differently from a large pecuniary legacy. We find it difficult to justify taking the former into account but not the latter.

2.86 In order to elicit comments we put forward the following proposal and ask the following question:

- 6. The rules for the division of a deceased person's intestate estate should apply irrespective of any testamentary disposition by the deceased in favour of any beneficiary of the intestate estate.**

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<sup>127</sup> This is also the position in the Republic of Ireland, Succession Act 1965, s 74; and in South Africa, The Law of South Africa (Butterworths), vol 31, para 219.

<sup>128</sup> Para 2.8.

<sup>129</sup> Proposals 17-24 at para 3.75 (cohabitant); Proposal 26 at para 3.91 (dependant child).

<sup>130</sup> Proposal 10 at para 3.48 (spouse or civil partner); Proposal 29 at para 3.110 (adult child).

<sup>131</sup> Proposal 2 at para 2.55 above.

<sup>132</sup> This could also apply where there was no dwelling house interest in the intestate estate because the couple lived in rented accommodation or the surviving spouse owned the house already.

7. **Where the deceased is survived by a spouse or civil partner and issue so that the spouse or civil partner is entitled to a fixed sum and half the excess from the deceased's intestate estate, should (as an exception to the rule in Proposal 6) the fixed sum be reduced by the value of the deceased's interest in the dwelling house which passes to the spouse or civil partner by way of testamentary disposition?**

F: OUR 1990 RECOMMENDATIONS

2.87 Our 1990 *Succession Report* examined many issues in the field of intestacy. In this project we are taking a narrower approach focusing mainly on surviving spouses, civil partners and stepchildren. For this discussion paper we are working on the basis that many of our previous recommendations (both for reform and for no change) should stand. These are:

- (1) Where a person dies intestate survived by issue but not by a spouse or civil partner, the issue should (as under the existing law) inherit the whole intestate estate.<sup>133</sup>
- (2) Collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.<sup>134</sup>
- (3) There should be no change in the existing rules of division of an intestate estate where the deceased leaves no spouse, civil partner or issue but is survived by one or both parents and one or more brothers or sisters (or their issue). Accordingly the surviving parent or parents should continue to be entitled to one half of the estate and the surviving brothers or sisters (or their issue) to the other half.<sup>135</sup>
- (4) There should be no change in the existing system whereby when ascendants or collaterals of ascendants succeed to the deceased intestate estate they take equally without regard to whether they are from the mother's or father's side of the family.<sup>136</sup>
- (5) New rules should not be introduced for the division of intestate estate amongst issue of the deceased or issue representing a predeceasing relative.<sup>137</sup>
- (6) Relatives however remote should continue to be entitled to succeed to the deceased intestate estate in the absence of nearer heirs.<sup>138</sup>

In order to elicit whether these recommendations continue to enjoy support we ask the following questions:

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<sup>133</sup> Recommendation 2, para 2.4.

<sup>134</sup> Recommendation 4, para 2.23.

<sup>135</sup> Negative recommendation 2, paras 2.18-2.20.

<sup>136</sup> Negative recommendation 3, para 2.25.

<sup>137</sup> Negative recommendation 4, para 2.27.

<sup>138</sup> Negative recommendation 5, para 2.28.

8. Do you agree with the statements set out in heads (1) to (6) of paragraph 2.87? If not, which do you disagree with and what would you put in its place?

## Part 3            Protection against disinheritance

### Introduction

3.1     In one sense persons cannot be disinherited as no-one has an indefeasible right to succeed to another's estate. However, we have seen that when a person dies intestate the law identifies the members of the deceased's family who are his heirs and who are entitled to succeed to the estate. But if the deceased makes a will, these default rules are displaced and the estate will be distributed to the beneficiaries chosen by the deceased in his will. To that extent we can say that the persons who would have succeeded under the rules of intestate succession have been disinherited by the will. Further, it can be argued that certain relatives of the deceased, for example a spouse or a civil partner or children, have a moral right to inherit at least a share of the deceased's estate. If the deceased fails to make provision for them in his will, such persons may feel that they have been disinherited. While neither rationale is entirely compelling, nevertheless, the idea of disinheritance is one in general use and we have decided to use the term. Accordingly, in this Part we shall consider how the law should protect the deceased's close relatives and others from being disinherited by the deceased.

3.2     The public attitude surveys in 1979, 1986 and 2005 have consistently shown strong support for providing some protection from disinheritance for the deceased's surviving spouse and children. Even where the deceased leaves the whole estate to a surviving spouse, a substantial proportion of those responding still thought that any children should be entitled to claim a share.<sup>1</sup> Moreover, all the jurisdictions that we have studied provide in one way or another some protection from disinheritance for a deceased's close relatives or dependants. For these reasons we think that complete freedom to test is not a viable option for the basis of reform and shall not pursue it further.

3.3     There is also strong and consistent public support for some protection from disinheritance for the deceased's cohabiting partner. In the OPCS survey, "Family Property in Scotland", carried out some 25 years ago, 73% of respondents were in favour of giving a surviving cohabitant a right to some part of the deceased partner's estate in spite of being omitted from his or her will.<sup>2</sup> The responses to the Commission's Consultative Memorandum No 86, *The Effects of Cohabitation in Private Law*, published in 1986, indicated considerable support for giving some protection<sup>3</sup> as did the responses in 2004 to the Scottish Executive's Consultation Paper, "Improving Family Law in Scotland".<sup>4</sup> Finally, the Scottish Parliament has recently passed legislation whereby a surviving cohabiting partner may apply to the court for an award out of the deceased cohabitant's net intestate estate.<sup>5</sup>

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<sup>1</sup> 1986, 40%; 2005, 53%.

<sup>2</sup> Manners and Rauta (1981), p 21 and table 4.8.

<sup>3</sup> *Family Law Report*, paras 16.25-16.26.

<sup>4</sup> *Improving Family Law in Scotland: Analysis of Written Responses*, Linda Nicholson, Scottish Executive Social Research (2004), p 37. 68% were in favour of a surviving cohabitant being entitled to apply to the court for provision out of the deceased's estate.

<sup>5</sup> Family Law (Scotland) Act 2006, s 29.

## A: SURVEY OF CURRENT SCHEMES

### The present position in Scotland

3.4 The surviving spouse or civil partner and the issue<sup>6</sup> of the deceased are each entitled to a fixed proportion of the deceased's net moveable estate irrespective of the terms of any will. These entitlements are generally referred to as "legal rights". More specifically, a surviving spouse's legal rights are known as *jus relictæ* (for a widow) or *jus relictî* (for a widower) while the children's legal rights are called legitim. The surviving spouse's or civil partner's legal rights amount to one third of the net moveable estate if the deceased was also survived by issue or to one half if there are no surviving issue. Likewise, the legitim fund available for the deceased's issue amounts to one third of the net moveable estate if there is a surviving spouse or civil partner and one half if there is not. Legal rights is the right to a sum of money, being the appropriate proportion of the value of the net moveable estate, rather than to specific assets in the estate up to the value of that sum. Where a testamentary disposition contains a provision in favour of a spouse or civil partner or any issue it is deemed to be in satisfaction of that beneficiary's legal rights.<sup>7</sup> The beneficiary must therefore elect either to take the testamentary provision or to claim legal rights. It should also be noticed that legal rights can also be claimed out of an intestate estate but they are only exigible after the prior rights of the deceased's surviving spouse or civil partner have been satisfied.<sup>8</sup>

3.5 The legitim fund is divided among the surviving issue by first ascertaining the level of relationship to the deceased at which there is at least one surviving person. Each survivor at that level plus the surviving issue (as a class) of any predeceasing person takes an equal share. Further division amongst the surviving issue of a predeceaser is *per stirpes*.<sup>9</sup> The following example illustrates these rules:

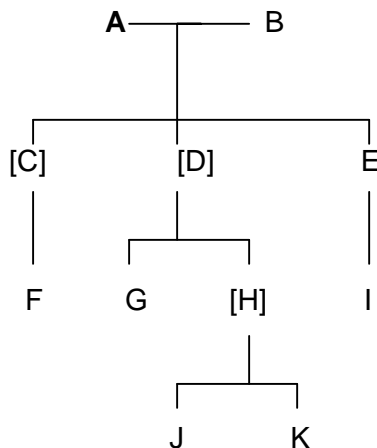
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<sup>6</sup> The issue will usually be the deceased's children. Where a child has predeceased the deceased leaving children, those children will be entitled to their parent's share of legitim. The surviving spouse will often be the deceased's children's parent but may be their step-parent. A surviving civil partner cannot be the deceased's children's biological parent as civil partners have to be the same sex, but he or she could have become their adoptive parent, see Adoption and Children (Scotland) Act 2007, s 29.

<sup>7</sup> Unless the will contains an express provision to the contrary, which would be extremely uncommon; Succession (Scotland) Act 1964, s 13; Civil Partnership Act 2004, s 131(4).

<sup>8</sup> Succession (Scotland) Act 1964, s 10(2).

<sup>9</sup> *Ibid*, s 11.



C and D predecease A, but as E survives A the legitim fund is divided into three at the level of children. F takes C's share. D's share is divided into two; G takes one half, the other half is shared by H's two children, J and K.

The shares are therefore: E 1/3, F 1/3, G 1/6, J 1/12 and K 1/12.

Should E also predecease A in the example above then the legitim fund would be divided into four at the level of grandchildren with the following result:

F 1/4, G 1/4, I 1/4, J 1/8, and K 1/8.

3.6 Legal rights were and are a fraction of the net moveable estate only. Since 1964 there are no rights claimable out of Scottish heritable property by those disinherited by the deceased.<sup>10</sup> Where the deceased died domiciled in Scotland legal rights are due out of the net movable property wherever situated. The rights of the spouse or civil partner and issue of a deceased who died domiciled in Scotland in relation to non-Scottish immovable property depend on the *lex situs*. The classification of property as movable or immovable depends on the *lex situs*: this may be different from the classification which is used in that country for its own internal purposes.<sup>11</sup>

3.7 In a testate estate funeral expenses, debts, inheritance tax and administration expenses up to its realisation have to be deducted insofar as these are exigible out of moveable property.<sup>12</sup> Where the deceased died intestate, the prior rights of any surviving spouse or civil partner have to be deducted in order to arrive at the net intestate moveable

<sup>10</sup> Terce and courtesy were abolished by s 10(1) of the Succession (Scotland) Act 1964.

<sup>11</sup> *MacDonald v MacDonald* 1932 SC(HL) 79. Land in Canada was held to be immovable according to its private international law rules although movable in Canadian succession law. No legal rights were therefore due out of it to the spouse or issue of the deceased owner who died domiciled in Scotland.

<sup>12</sup> *Russell v Attorney General* 1917 SC 28.

estate out of which the legal rights of the surviving spouse or civil partner and issue are due.<sup>13</sup>

3.8 Where more than one of the issue claims legitim certain types of lifetime advances made by the deceased may have to be taken account of. This is called collation *inter liberos* which is discussed in detail in paras 4.25 to 4.35 below.

3.9 In addition there are rights of an alimentary nature available out of a deceased's estate to his widow<sup>14</sup> and children. The widow and children may claim temporary aliment - a sum required for their reasonable aliment for up to six months from the date of death.<sup>15</sup> The widow or children may also claim aliment *jure representationis* if they are in need and otherwise unprovided for.<sup>16</sup> In the case of children their entitlement to such aliment is thought to end when they become 25.<sup>17</sup> Aliment *jure representationis* is claimed from the executors if the estate is undistributed and afterwards from the beneficiaries to whom it has been distributed. But the executors do not have to hold up the distribution of the estate against the possibility that a claim may be made. Both temporary aliment and aliment *jure representationis* are hardly ever claimed nowadays.<sup>18</sup>

3.10 Finally, under various statutory provisions, a surviving spouse or civil partner or cohabitant of the deceased or a member of the deceased's family may be entitled to succeed to the deceased's tenancy of a dwelling house.

### **Defects of existing Scottish legal rights**

3.11 The present system of legal rights under which the surviving spouse or civil partner and issue of the deceased are entitled to a fixed proportion of the net moveable estate suffers from several serious flaws. First, legal rights are exigible only from the net *moveable* estate. This means that there is very limited protection from disinheritance where the estate consists largely of heritage. Put another way, as legal rights only apply in respect of moveable property, a person is free to test, ie make legacies in his will, in relation to heritable property without any restriction. On the other hand, legal rights may give the deceased's surviving spouse, civil partner or issue too much protection. If for example the estate was wholly moveable, the deceased's surviving spouse would be entitled to half the estate if there were no children, even if the marriage had lasted only a few months. Similarly, in the absence of a surviving spouse, the deceased's issue are entitled to half a wholly moveable estate. In each of these examples the deceased would have been free to test only on half his property regardless of the merits of the claims of his spouse or issue.

3.12 Second, both assets and obligations have to be classified as either heritable or moveable: heritable debts are then in the first place set against heritable property and likewise moveable debts against moveable property.<sup>19</sup> This gives rise to much complex law. Consider the case of pre-death contracts for the sale or purchase of land. The deceased's dwelling house (or other land) is heritable property but if he had entered into a contract to

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<sup>13</sup> Succession (Scotland) Act 1964, s 10(2).

<sup>14</sup> It is not clear whether a surviving civil partner can claim aliment *jure representationis*.

<sup>15</sup> See for example *Barlass v Barlass's Trs* 1916 SC 741.

<sup>16</sup> *Anderson v Grant* (1899) 1F 484 (widow), *Beaton v Beaton's Trs* 1935 SC 187 (children).

<sup>17</sup> A B Wilkinson and K M Norrie, *The Law of Parent and Child in Scotland*, (2<sup>nd</sup> edn) para 13-21.

<sup>18</sup> *Greig v Grieg's Exs* 1990 GWD 15-834 is the only modern reported case.

<sup>19</sup> Some debts, such as a loan secured over land and a life policy, have to be apportioned between heritage and moveables: *Graham v Graham and others* (1898) 5 SLT 319.

sell it before he died, the estate consists of the house (heritable property), the obligation to convey the property (a heritable liability of the same value as the property itself) and the right to the price (moveable property). Conversely, if prior to his death the deceased had contracted to buy land, the estate consists of the money which is to be the price (moveable property), the obligation to pay the price (a moveable liability of the same value as the price) and the right to have the house conveyed to the estate which is a heritable right (heritable property). On an intestacy, the fact that legal rights are exigible only from the moveable estate means that the cash sum due to a surviving spouse or civil partner has to be apportioned between the heritable and moveable estate remaining after her prior rights in respect of housing and plenishings have been satisfied.<sup>20</sup> Moreover the value of legal rights can vary enormously between estates of the same overall value depending on how any land is held. For example, if the deceased owned a farm which was occupied and farmed by a farming partnership, the deceased's real right in the land would be heritable. But if the land was owned by the partnership, the deceased's rights in the partnership would be moveable.<sup>21</sup> However the decision on how farm land is to be owned is rarely taken with legal rights in mind.

3.13 Third, legal rights are rigid. The rules take no account of the recipient's needs, resources or conduct and there is no balancing of the claims of the recipient against those of the testamentary beneficiaries. A widow who is wealthy in her own right is entitled to the same fraction of her late husband's estate as a widow who has no assets of her own. A middle-aged son who has had nothing to do with his mother since leaving home 30 years ago will get the same from her estate by way of legal rights as his sister who has looked after their mother in her declining years. Moreover, legal rights can cater for only a very limited range of persons. Fixed rule systems become very complex and difficult to operate once they go beyond the core relationships of spouse<sup>22</sup> and children.<sup>23</sup>

3.14 Finally, in theory legal rights vest in the surviving spouse or civil partner and issue on the date when the deceased died: this is also true of any testamentary provisions in their favour.<sup>24</sup> In this situation a choice has to be made between legal rights and the testamentary provisions. But the right to choose is only brought to an end by the long negative prescription ie 20 years after the death of the deceased. Where a potential legal rights claimant is either unable or unwilling to make an election, there can be long delays in winding up estates as the amount representing legal rights may have to be set aside until an election is made.

### **Other jurisdictions**

3.15 **Court-based** Many jurisdictions in the common law tradition have family protection legislation in terms of which a person can apply to the court for an award on the basis that the disposition of the deceased's estate does not make reasonable financial provision for the

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<sup>20</sup> Succession (Scotland) Act 1964, s 9(3).

<sup>21</sup> Partnership Act 1890, s 22 (unless the partnership agreement provides otherwise).

<sup>22</sup> Including civil partners and also cohabitants who have registered their relationship or fulfilled some easily established factual criteria.

<sup>23</sup> These could include issue of predeceasing children and children accepted by the deceased as children of his or her family.

<sup>24</sup> However, some testamentary provisions can vest later for example on the death of a life-renter or on attaining the age of 25.



applicant. The Inheritance (Provision for Family and Dependants) Act 1975<sup>25</sup> which applies in England and Wales will be used to illustrate the main features of such schemes.

3.16 The list of applicants under the Inheritance (Provision for Family and Dependants) Act 1975 is as follows:

- The surviving spouse or civil partner of the deceased;
- A surviving former spouse or former civil partner of the deceased who has not remarried or registered a new civil partnership;
- A surviving cohabitant of the deceased, opposite sex or same sex;
- A child of the deceased;
- A person treated by the deceased as a child of the family in relation to any marriage of the deceased; and
- A dependant of the deceased.

3.17 The court has to be satisfied "that the disposition of the deceased's estate effected by his will or the law relating to intestacy or the combination of his will and that law is not such as to make reasonable financial provision for the applicant".<sup>26</sup> There are two different standards of reasonable financial provision:<sup>27</sup>

- The standard for surviving spouses<sup>28</sup> or civil partners.<sup>29</sup> This is such financial provision as it would be reasonable in all the circumstances for a spouse or civil partner to receive whether or not it is required for maintenance.
- The standard for all other claimants. This is such financial provision as it would be reasonable in all the circumstances for the claimant to receive for maintenance. This is known as the maintenance standard.

3.18 The 1975 Act contains general guidelines that apply to all applications and also guidelines that apply to particular applications such as those by a surviving spouse or a child. The general guidelines are:

- The present and foreseeable financial needs and resources of the applicant, other applicants and the beneficiaries;
- Any obligations and responsibilities of the deceased towards the applicant or the beneficiaries;
- The size and nature of the estate;

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<sup>25</sup> As amended by the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2004.

<sup>26</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 2(1).

<sup>27</sup> S 1(2).

<sup>28</sup> This can also apply to ex-spouses who have not remarried if no financial provision was awarded on divorce, s

14.

<sup>29</sup> Added by the Civil Partnership Act 2004, Sch 4, Part 2.

- Any physical or mental disability of the applicant or any beneficiary; and
- Any other matter, including conduct of the applicant and others.

3.19 For a surviving spouse in addition to the general guidelines above there are the following three specific guidelines:

- The age of the applicant and the duration of the marriage;
- The contribution made by the applicant to the welfare of the deceased's family; and
- The provision the applicant might have expected to receive if divorced at the date of the deceased's death.

3.20 Where the estate is substantial the court awards a surviving spouse around half the value of the property:<sup>30</sup> this reflects what happens on divorce in English law.

3.21 In order to be entitled to apply, a cohabitant has to have lived in the same household as the deceased as if they were spouses or civil partners for at least two years immediately prior to the death. Only the first two of the three additional guidelines for a surviving spouse or civil partner apply to a cohabitant.

3.22 For children there is only one additional guideline viz the manner in which the child was educated or trained. Applications on behalf of the deceased's own minor children are usually successful if the deceased left the estate to persons other than the children's other parent or carer. Applications from adult children who were being supported by the deceased either because they were undergoing further education or training or because of disability<sup>31</sup> are generally regarded sympathetically. An able-bodied child earning, or capable of earning, his or her own living is unlikely to succeed in an application unless there is some special factor present.

3.23 Where the applicant is a child who was treated by the deceased as a child of the family there are four additional guidelines viz:

- The manner in which the child was educated or trained;
- Assumption of financial responsibility and its duration;
- Whether the deceased knew that the claimant was not the deceased's own child; and
- The liability of any other person for the applicant.<sup>32</sup>

The applicant has to show not merely that the deceased treated him well, but also that the deceased assumed, expressly or impliedly, the responsibilities of a parent.<sup>33</sup>

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<sup>30</sup> *Bheekhun v Williams* [1999] 2FLR 229; *Adams v Lewis* [2001] WTLR 493, [2001] CLYB 5156; *Singer v Isaac* 2001 WTLR 1045; *Stephanides v Cohen* [2002] EWHC 1869; *Re Cunliffe deceased* [2006] Ch 361.

<sup>31</sup> *Hanbury v Hanbury* [1999] 2FLR 255.

<sup>32</sup> S 3(3).

<sup>33</sup> *Re Callaghan* [1985] Fam 1; *Re Leach* [1986] Ch 226.

3.24 In order to be able to claim, a dependant must have been maintained wholly or partly by the deceased immediately before death. This means that the deceased was making a substantial gratuitous contribution to that person's reasonable needs. The court has to have regard to whether the deceased had assumed responsibility for the dependant's maintenance and how long he had done so for.<sup>34</sup> It is presumed that if the deceased was in fact maintaining the applicant, such responsibility has been assumed.<sup>35</sup>

3.25 Financial provision can take one or more of the following forms:<sup>36</sup>

- An order for periodical payments or the income of all or a proportion of the estate;
- A lump sum (which can be paid by instalments);
- A transfer or settlement of property;
- A variation of a marriage settlement.

3.26 The 1975 Act contains anti-avoidance provisions to prevent potential applicants' rights being defeated by lifetime transactions.<sup>37</sup> Where the court is satisfied that a disposition before death or a contract to leave property on death was made for less than full value with the intention of defeating an application then it may make an order against the donee requiring payment towards the award of financial provision. Only dispositions made within six years prior to the date of death are vulnerable to an anti-avoidance order.<sup>38</sup>

3.27 **Rule based** Like Scotland, many jurisdictions have rule-based entitlements for certain categories of persons for whom the deceased has not provided. They are generally to be found in civilian systems but also occur in some common law countries.

3.28 In France unless the couple have entered into a marriage contract or other agreement (which is not usual) the surviving spouse is entitled to half of the community property.<sup>39</sup> The other half and the deceased's separate property form the deceased's own estate. Where the deceased leaves descendants, they succeed as heirs to a certain fraction of the deceased's own estate which for this purpose includes substantial lifetime gifts made by the deceased. The deceased cannot dispose of this fraction by will and it is called "la réserve héréditaire". If the deceased was survived by only one child (or issue of a predeceasing single child), the child (or issue) succeed to one half of the estate, the deceased being free to dispose of the other half by will. The fraction reserved to descendants rises to two thirds if the deceased leaves two children and three quarters if three or more children are left.<sup>40</sup> In the absence of any ascendants or descendants, the surviving spouse is entitled to one quarter of the estate.<sup>41</sup> A surviving spouse also has a right to aliment from the estate if in need,<sup>42</sup> rights of occupancy in relation to the family

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<sup>34</sup> S 3(4).

<sup>35</sup> *Jelley v Iliffe* [1981] Fam 128; *In Re B, dec'd* [2000] 2 WLR 929.

<sup>36</sup> S 2(1).

<sup>37</sup> Ss 10–13.

<sup>38</sup> S 10(2)(a).

<sup>39</sup> Very roughly corresponding to the Scottish concept of matrimonial property, Code Civil, Art 1440ff. Germany, Spain, Portugal and Italy have similar default matrimonial regimes.

<sup>40</sup> Code Civil, Arts 913 and 913-1.

<sup>41</sup> Art 914-1.

<sup>42</sup> Art 767.

home,<sup>43</sup> and may also have claims against the estate based on unjustified enrichment, contract or delict.

3.29 Under German law, a person is free to test on his whole estate. Therefore he can overlook his family and make a complete stranger his heir. However, certain near relatives of the deceased are entitled to receive benefits from the deceased's *heir* when they have not been appointed as heirs themselves. Provided they would have been successors if the deceased had died intestate, the deceased's descendants, his parents and his spouse or civil partner are entitled to what is called a *Pflichtteil* or compulsory portion of the estate from the heir. The *Pflichtteil* amounts to one half of the amount which the applicant would have received if the deceased had died intestate and the applicant would have qualified as a successor. If the applicant would not have qualified, for example being the deceased's parent when the deceased has been survived by a child, then he no longer has the right to seek a compulsory portion from the heir.

3.30 In the Republic of Ireland the surviving spouse is entitled to a fixed share of the deceased's estate. The share is one half if the deceased leaves no surviving issue and one third where there are surviving issue.<sup>44</sup> In a wholly testate estate, the surviving spouse can choose whether to claim the fixed share or take the testamentary provisions unless the will makes it clear that the surviving spouse can take both. The surviving spouse can elect to take any testamentary provisions up to the value of the fixed share.<sup>45</sup> In a partially testate estate, the surviving spouse chooses between the fixed share of the whole estate or the total of his or her rights in the testate and intestate portions.<sup>46</sup> Provision made by the deceased during his or her lifetime to the surviving spouse counts towards the fixed share unless it took the form of periodical maintenance. Children have to apply to the court for provision out of the estate.

3.31 The United States Uniform Probate Code has an elaborate fixed share system for surviving spouses but only alimentary rights for minor children.<sup>47</sup> The spouse's elective share depends on the length of the marriage, starting at 3% for a marriage which lasted for one year and climbing to 50% for marriages of over 15 years. This is in addition to the surviving spouse's homestead allowance (currently \$15,000), exempt property ie household goods and cars, up to a total value of \$10,000 (the current limit) and family allowance - a year's maintenance. A claim for an elective share has to be made within nine months of the deceased's death or six months of probate, whichever is the earlier.

3.32 The spouse's elective share is calculated as a fraction of the augmented estate using the appropriate percentage for the length of the marriage. The augmented estate is the sum of the values of four categories of property: the deceased's net probate estate; non-probate transfers of property owned by the deceased to persons other than the surviving spouse; non-probate transfers of property owned by the deceased to the surviving spouse; and the surviving spouse's own property including the surviving spouse's non-probate transfers to others. The concept of augmented estate is used in order to prevent the deceased from making lifetime transactions to defeat the elective share and to stop the surviving spouse

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<sup>43</sup> Art 763.

<sup>44</sup> Succession Act 1965, s 111.

<sup>45</sup> *Ibid*, s 115(3).

<sup>46</sup> *Ibid*, s 115(2). A surviving spouse's share on intestacy exceeds the fixed share so the question of choosing in a wholly intestate estate does not arise.

<sup>47</sup> Ss 2-201 to 2-214.

claiming when he or she has got a fair share from sources other than the probate estate. The elective share is to be taken from: (a) any testamentary provisions out of the deceased's probate estate, any entitlement on intestacy and any non-probate transfers to the surviving spouse; and (b) a fraction of the surviving spouse's own property up to double the elective share percentage for the length of the marriage. The following example shows how the scheme works in a fairly simple situation.

A and B were married for 10 years when A died. His estate was worth \$500,000 and he left nothing to B in his will. Three years before his death, A set up a trust for his brother: A transferred \$200,000 into the trust with the income to be paid to A, while he was alive. B's own assets at A's death were worth \$300,000. A and B owned their home worth \$160,000 jointly so A's share worth \$ 80,000 passes to B by survivorship.

The augmented estate is:

A's probate estate	\$500,000
A's non-probate estate transferred to others	\$200,000
A's non-probate estate transferred to B	\$80,000
B's own assets	<u>\$300,000</u>
Total	<u>\$1,080,000</u>

The percentage for a 10 year marriage is 30%. B's elective share is therefore \$324,000. This is to be set against:

A's half share of the home passing to her	\$80,000
60% (ie twice 30%) of her own assets	<u>\$180,000</u>
	\$260,000

The balance of the elective share amounting to \$64,000 is due from A's probate estate.

### The schemes compared

3.33 The advantages of a fixed share scheme or a scheme whereby the claimant's share can be quantified according to rules<sup>48</sup> are certainty and convenience. People can plan their testamentary dispositions knowing the likely outcome should a claim be made. Litigation involving the deceased's estate is minimised as the rules are comparatively simple and well known so that disputes about how they apply to the particular set of circumstances in an individual case will be uncommon. This in turn lessens the expenses of administration and the time taken to wind up estates.

3.34 The main disadvantage of a fixed rule scheme is its rigidity. A court-based discretionary system is very flexible. The award can take into account many factors such as

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<sup>48</sup> The share need not be the same for every spouse. For example, the length of marriage could be factored in as is done under the Uniform Probate Code.

the length of a marriage or civil partnership, the conduct of the parties, the needs of the claimant, the nature of the estate and the needs of the beneficiaries to whom the estate has been left. The award may take the form of a lump sum, transfer of property or periodical payments and can be tailored to the particular estate in question. Another disadvantage of a fixed share system is that it can cope with only a small number of classes of claimants. By contrast, discretionary systems can deal with a much larger number of classes of claimants. However, this is not a consideration when deciding which scheme is best for surviving spouses, civil partners, cohabitants and non-adult children because any new Scottish scheme, whether fixed share or discretionary, would have to include them. The main disadvantages of a court-based system are uncertainty and inconvenience. Previous cases will show how the courts in general tend to exercise their discretionary powers, but in a particular case much still depends on the facts and circumstances and how the various factors are evaluated. Moreover, a discretionary system can provoke litigation in that an application has to be made for an award. This is likely to involve re-opening any matrimonial and family discord with distasteful averments of past conduct. It would also take place at a time when the family were still adjusting to bereavement.

## B: PROPOSALS FOR REFORM

### **Preliminary**

3.35 Whatever system is used to protect close relatives and others from disinheritance by the deceased we think that prima facie the rules should apply to the whole estate of the deceased.<sup>49</sup> The present Scottish system whereby legal rights are exigible only out of moveable property making the protection depend on the composition of the estate produces unjust and anomalous results. It also provides an easy way of avoiding legal rights. Having stated this general principle, it has to be realised that interfering with a deceased's provisions for succession to a farm, a landed estate or a family business may give rise to special problems. But these arise from the nature of those assets, in particular the difficulty and at times the undesirability of dividing them up, rather than their categorisation as heritable or moveable. The problems raised by such property are discussed later in this Part.<sup>50</sup>

3.36 We consider the various possible classes of claimants for protection separately as the considerations in favour of the various protective schemes are not necessarily the same for each class.

#### **1). Surviving spouses and civil partners**

3.37 By a surviving spouse or civil partner we mean someone who immediately before the death was married to or had registered a civil partnership with the deceased. In Part 2 we set out the arguments for and against disqualifying such a spouse or civil partner from succeeding on intestacy when she had been judicially or factually separated from the deceased. In the end it was our provisional view that neither type of separation should affect the succession rights of a surviving spouse or civil partner on an intestacy. Equally, we think that neither factual nor judicial separation should by themselves disentitle a surviving spouse or civil partner from making a claim out of the testate estate. On the other hand, we do not

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<sup>49</sup> We consider augmentation of the value of the estate by the deceased's lifetime gifts at paras 4.3-4.24 below.

<sup>50</sup> See paras 3.120-3.126 below.

consider that a former spouse or civil partner should qualify as a surviving spouse or civil partner for this purpose.<sup>51</sup> Whether a former spouse or civil partner should qualify as a member of another category, such as a dependant, is addressed later.<sup>52</sup>

### **Fixed share or discretionary award?**

3.38 In our 1990 *Succession Report* we recommended fixed shares for surviving spouses. We considered that this was the best way to recognise the surviving spouse's claim to a share of the property acquired by the couple during the marriage. The written responses to the consultative memorandum<sup>53</sup> were strongly in favour of fixed shares. The 2005 public opinion survey also showed a strong preference for fixed shares.

3.39 While we appreciate the merits of a discretionary system of protection, we are strongly of the view that in the case of a surviving spouse or civil partner these are outweighed by the disadvantages of uncertainty and the stress and expense of litigation. This is particularly the case where as in England and Wales, the courts have been given a very wide discretion.<sup>54</sup> But even if the court's discretion was to be governed by principles similar to those used in claims for financial provision on divorce or dissolution,<sup>55</sup> so many uncertainties remain that it would still be difficult for the parties to agree what constituted a fair and reasonable share of the deceased's estate to which the surviving spouse was entitled. Accordingly, we have rejected the adoption of a protective system on the lines of that in New Zealand, for example, where on the death of a spouse, the surviving spouse can elect to seek the same financial provision that she would have obtained if the marriage had been terminated by divorce rather than death.<sup>56</sup> Our preferred method of protection for surviving spouses or civil partners is to entitle them to a fixed share of the deceased's estate. We term this fixed share the "legal share".

3.40 Accordingly we ask:

- 9. Are we correct in our preliminary view that a surviving spouse or civil partner should be entitled to a fixed share, called a legal share, from the deceased's estate?**

### **The amount of the legal share**

3.41 Having rejected a discretionary system of protection for a surviving spouse or civil partner, the question arises what should be the nature of the legal share to which the survivor is entitled. We are strongly of the view that the legal share should be exigible from the whole of the deceased's estate ie heritable as well as moveable property.<sup>57</sup> Given the increase in value of heritable property, in many cases the matrimonial or family home will represent the largest proportion of the value of a deceased's estate. Our proposal that the legal share should include the value of the deceased's heritable as well as moveable property amounts to a substantial inroad into the freedom to test which a spouse or civil

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<sup>51</sup> Except in the rare situation where decree of divorce or dissolution has been granted but the question of financial provision had been adjourned to a later date and has not been finalised before the death.

<sup>52</sup> See paras 3.114-3.119 below.

<sup>53</sup> *Intestate Succession and Legal Rights*, No 69, September 1986.

<sup>54</sup> For discussion, see paras 3.15-3.26 above.

<sup>55</sup> Family Law (Scotland) Act 1985, s 9.

<sup>56</sup> See Appendix A, paras 153-159.

<sup>57</sup> On the possible exclusion of agricultural or business property, see paras 3.120-3.126 below.

partner has under the current law. We are therefore anxious that the size of the legal share should not be such as to render the deceased's freedom to test in effect meaningless. Moreover, it is also important that the rules should be relatively straightforward so that in the case of small estates recourse to legal advice will not be necessary and accordingly we have rejected sophisticated but complex schemes such as that in the Uniform Probate Code.<sup>58</sup>

3.42 What happens if we simply apply the current rules for legal rights to the whole of a deceased's estate in order to calculate the legal share? Consider the following examples:

H dies leaving a house worth £300,000 and £100,000 of investments. He is survived by his wife. There are no children. In his will he leaves all his property to charity. Under the current law, W is entitled to half the moveable property, ie £50,000. If the legal share was exigible out of all the estate, W would be entitled to £200,000.

H dies leaving a house worth £300,000 and investments worth £100,000. His wife predeceased him. He is survived by two children. In his will he leaves all his property to charity. Under the current law, the children share £50,000, half of the moveables, as legitim. If the legal share was exigible out of the whole estate, the children would share £200,000.

H dies leaving a house worth £300,000 and investments worth £90,000. He is survived by his wife and two children. In his will he leaves all his property to charity. Under the current law, W is entitled to £30,000, a third of the moveables, and the children share £30,000, a third of the moveables as legitim. If the legal share was exigible out of the whole estate, W would be entitled to £130,000 and the children would share £130,000 and the charity would receive £130,000.

3.43 It is clear from those examples that if we simply applied the existing rules in many cases a testator will only be able to test on 50% of his property: where he is survived by a spouse or civil partner and children, this proportion shrinks to 33%. We think that this is too great an inroad into a person's freedom to test on his own property. On the other hand if we were simply to lower the percentage of the estate to which the surviving spouse or civil partner or children were entitled, the protection provided by fixed legal shares could be seriously undermined. In this section we shall consider the options for reform where the deceased is survived by a spouse or civil partner and there are no issue. The options for reform when the deceased is survived by issue will be discussed later.<sup>59</sup>

3.44 It was in order to preserve an appropriate balance between freedom to test and protection from disinheritance that in our 1990 *Succession Report* we recommended that a surviving spouse's share of the deceased's estate should be tapered. A surviving spouse was to be entitled to 30% of the first £200,000 and 10% of the estate in so far as it exceeds that sum.<sup>60</sup> It was envisaged that the sum of £200,000 would be increased from time to time to reflect general rises in the value of property, in particular dwelling houses. For the purpose of the present discussion, we shall proceed on the basis that the sum of £200,000 has been increased to £400,000. Consider the following examples:

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<sup>58</sup> Para 3.32 above.

<sup>59</sup> Paras 3.78ff below.

<sup>60</sup> Recommendation 8(a), para 3.29.



- (i) H dies leaving a house worth £300,000 and moveable property worth £90,000. In his will he leaves all his property to a charity. H is survived by W. There are no children.

Under the current law, W's legal rights are £45,000 ie 50% of the net moveable property. Under the 1990 proposal, W was to get 30% of the net value of the whole estate if less than £400,000. Therefore she is entitled to £117,000.

- (ii) H dies leaving a house worth £300,000 and moveable property worth £900,000. In his will he leaves all his property to a charity. H is survived by W. There are no children.

Under the current law, W's legal rights are £450,000 ie 50% of the net moveable property. Under the 1990 proposal, W is entitled to 30% of the first £400,000 and 10% of the rest of the estate. Here the total estate is £1,200,000. Therefore W's share is 30% of £400,000 and 10% of £800,000 = £120,000 + £80,000 = £200,000.

- (iii) H dies leaving a house worth £900,000 and moveable property worth £300,000. In his will he leaves all his property to charity. H is survived by W. There are no children.

Under the current law, W's legal rights are £150,000 ie 50% of the net moveable property. Under the 1990 proposal, W is entitled to 30% of the first £400,000 and 10% of the rest of the estate. Here the total estate is £1,200,000. Therefore W's share is 30% of £400,000 and 10% of £800,000 = £120,000 + £80,000 = £200,000.

3.45 The last two examples illustrate how the 1990 recommendations remove the arbitrary nature of the current law where the amount of protection the surviving spouse or civil partner enjoys turns on the nature of the property owned by the deceased ie whether it is heritable or moveable. They also illustrate that the scheme will not always further restrict the freedom to test enjoyed by H under the current law for this is dependent on the proportion of the estate which is made up of heritable property.

3.46 While the fixed share under the 1990 recommendations is not without merit, we believe that we can simplify the law even further. This can be done if the rules on legal share were simply a variation of the rules on intestate succession. As we have seen<sup>61</sup> under German law a surviving relative's compulsory share, *Pflichtteil*, is 50% of what the relative would have inherited if the deceased had died intestate. Our proposed rules on intestacy are particularly generous to a surviving spouse or civil partner who in the absence of any children inherits the whole estate. To set the legal share at 50% would therefore mean that a deceased person who has a spouse or civil partner could only test on half his or her property. It is our view that 25% provides a more appropriate balance between freedom to test and protection for a surviving spouse or civil partner. In these examples, it has been assumed that our proposals in Part 2 on the law of intestacy have been implemented.

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<sup>61</sup> Para 3.29.

- (i) H dies leaving a house worth £300,000 and moveable property worth £90,000. In his will he leaves all his property to charity. H is survived by W. There are no children.

Under the current law, W's legal rights are £45,000 ie 50% of the net moveable property. Under our proposal, W's legal share is 25% of the value of the property to which she would have been entitled if H had died intestate. This is 25% of the whole estate ie 25% of £390,000 = £97,500.

- (ii) H dies leaving a house worth £300,000 and moveable property worth £900,000. In his will he leaves all his property to charity. H is survived by W. There are no children.

Under the current law W's legal rights are £450,000 ie 50% of the net moveable property. Under our proposal, W's legal share is 25% of the value of the property to which she would have been entitled if H had died intestate. This is 25% of the whole estate ie 25% of £1,200,000 = £300,000.

- (iii) H dies leaving a house worth £900,000 and moveable property worth £300,000. In his will he leaves all the property to charity. H is survived by W. There are no children.

Under the current law W's legal rights are £150,000 ie 50% of the net moveable property. Under our proposal, W's legal share is 25% of the value of the property to which she would have been entitled if H had died intestate. This is 25% of the whole estate ie 25% of £1,200,000 = £300,000.

3.47 As with the 1990 recommendations, examples (ii) and (iii) illustrate how the arbitrary nature of the protection afforded by the current law of legal rights - which is dependent on the proportion of the deceased's estate which is made up of heritable property - is also removed under this proposal. However, the legal share is easier to calculate being a simple proportion, 25%, of what the surviving spouse would inherit if the deceased had died intestate. In our opinion, directly linking the surviving spouse or civil partner's legal share to the proposed rules on intestate succession simplifies the law even further than the 1990 scheme, and is now our preferred option.

3.48 Accordingly we ask:

- 10. Should a surviving spouse's or civil partner's legal share be calculated as a percentage of what he or she would have inherited if the deceased had died intestate? If so, do you agree with our provisional view that 25% is a reasonable percentage: if not, what percentage is reasonable?**
- 11. If you do not agree with Proposal 10 should we proceed on the 1990 scheme as amended to take account of the rise in the value of residential property?**
- 12. If you do not agree with Proposals 10 or 11, what would you suggest should be the rules for calculating a surviving spouse's or civil partner's legal share?**

## Renunciation of the legal share

3.49 Like existing legal rights, the right to claim a legal share from the deceased's estate would vest in a surviving spouse or civil partner when the deceased died. The surviving spouse or civil partner would, as now, have to elect between any testamentary provisions and legal share. We discuss in Part 4 the time limits for claiming legal share or electing.<sup>62</sup> Payment of the legal share would disentitle the surviving spouse or civil partner from any other succession rights: rights under the will, rights to any intestate estate and rights under a special destination.<sup>63</sup> This disentitlement is best achieved by deeming a surviving spouse who received payment of the legal share to have predeceased the deceased in relation to all other rights of succession to the deceased's estate.

3.50 It is also envisaged that as at present,<sup>64</sup> a surviving spouse or civil partner should be able to renounce the right to claim legal share either before or after the deceased's death. We also adhere to the recommendation in our 1990 *Succession Report* that such a renunciation should not enlarge the legal share of any potential claimant.<sup>65</sup>

3.51 In our 1990 *Succession Report* we recommended that the surviving spouse's fixed share should be taken first from intestate estate, then from residue, then from general legacies and finally from all other items in the estate.<sup>66</sup> We think these rules should also apply to the legal share when it is calculated as a percentage of what the survivor would obtain on intestacy. However, since these rules mirror the common law of abatement, we are now of the view that there is no need for them to be enacted.

3.52 We propose that:

- 13. A spouse or civil partner should be able to renounce (either before or after the deceased's death) the right to a legal share and such a renunciation should not enlarge the legal share of any other claimant.**
- 14. A surviving spouse or civil partner who claims a legal share should be deemed to have predeceased the deceased for all other purposes of succession to the deceased's estate.**

## Entitlement to aliment

3.53 Existing Scots law recognises that a surviving wife can have a right to aliment from the deceased's estate in addition to her legal rights. However the law on aliment *jure representationis* is not well known and is uncertain in a number of aspects. It is not clear whether widowers can claim or whether a widow can claim well after her late husband's death should she then become in need. It would appear that a surviving civil partner does not have the right. There is also doubt about the basis of the claim. On one view the

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<sup>62</sup> Paras 4.36-4.49.

<sup>63</sup> But not any widow's or widower's pension or the proceeds of a policy on the deceased's life payable directly to the surviving spouse.

<sup>64</sup> See H Hiram, *Scots Law of Succession*, paras 4.30ff.

<sup>65</sup> Recommendation 10, para 3.33. Under the present law if legal rights are renounced before the deceased's death this enlarges the rights of others entitled to legal rights because the renouncer is treated as having died: *Hog v Lashley* (1792) 3 Paton 247. A post-death renunciation does not enlarge the rights of others because the renouncer's legal right vests when the deceased died and if renounced becomes part of the residuary estate: *Fisher v Dixon* (1840) 2D 1121, aff'd (1843) 2 Bell's App 63; *Campbell's Trs v Campbell* (1862) 24D 1321.

<sup>66</sup> Recommendation 12, para 3.38.

deceased's liability to aliment transmits first to the executors and then to the beneficiaries. The other approach is that the beneficiaries have an independent obligation to aliment the deceased's dependants by virtue of their enrichment from the succession.

3.54 Few claims are now made for aliment *jure representationis*. In our view a surviving spouse or civil partner should be protected by being entitled to an appropriate legal share of the deceased's whole estate, heritable and moveable. Like divorce or dissolution, as a matter of principle death should end the deceased spouse's or civil partner's obligation to aliment. Accordingly it is our provisional view that the current law on aliment *jure representationis* should be abolished and not replaced by any new statutory scheme for the aliment of a surviving spouse or civil partner.

3.55 Accordingly we ask:

15. **Do you agree with our preliminary view that the existing law on aliment *jure representationis* from the deceased's estate should be abolished and not replaced by any new statutory scheme for the aliment of a surviving spouse or civil partner?**

### **The former matrimonial or family home**

3.56 One of the consequences of the death of a married person or civil partner is that the surviving spouse or civil partner may be obliged to leave the former matrimonial or family home.<sup>67</sup> In Part 2 we proposed that where the deceased's intestate estate included the former matrimonial or family home the surviving spouse or civil partner should be entitled to acquire it and its contents with his or her share of the intestate estate plus other money if necessary.<sup>68</sup> However, we do not think that the surviving spouse or civil partner should have an equivalent right in testate cases, as that would be too great an interference with the deceased's intentions.

3.57 Accordingly we ask:

16. **Do you agree with our preliminary view that when the deceased has died testate a surviving spouse or civil partner should not have a right to acquire the former matrimonial or family home and its contents?**

## **2). Cohabiting partners**

### **Overview**

3.58 In this section we consider cohabiting partners ie those who were living together as if they were husband and wife or civil partners. Cohabitants have no right to property from their deceased partners' estates except in so far as there are testamentary provisions in their favour. The legal rights of spouses and civil partners do not extend to them and they have no prior rights on intestacy. However section 29 of the Family Law (Scotland) Act 2006 allows the surviving cohabitant to apply to the court for an award of provision out of his or her deceased partner's net intestate estate. The amount of the award, if any, is entirely a

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<sup>67</sup> Any right of occupancy of a non-entitled spouse under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 terminates on the entitled spouse's death. The same is true for civil partners.

<sup>68</sup> Proposal 2(3), para 2.57.

matter for the discretion of the court. The provision was limited to *intestate* estates because our current project would look at cohabitants as part of a wider review of protection against disinheritance.

3.59 There is strong public support for cohabiting partners to have some protection against disinheritance. 73% of respondents in a Scottish public opinion survey published in 1981 supported the idea of giving a surviving cohabitant a right to some part of the deceased partner's estate in spite of being omitted from the will.<sup>69</sup> A survey carried out a few years later showed people were generally in favour of giving cohabitants some succession rights on intestacy, but the results varied according to the length of the cohabitation and which relatives of the deceased also survived.<sup>70</sup> In our *Family Law Report* we rejected giving the surviving cohabitant an automatic share of the deceased partner's intestate estate and the right to claim a fixed share of the deceased partner's estate if not provided for by will. Instead we recommended a more flexible scheme whereby the surviving cohabitant would have to apply to the court for an award out of the deceased partner's estate, whether testate or intestate.<sup>71</sup> We considered that restricting entitlement to those who had cohabited for more than a specified period would give rise to harsh anomalies between those who just qualified and those who just failed to qualify. Moreover, we thought that the strength of a cohabitant's claim depended to some extent on who were the beneficiaries under the will or rules of intestacy.

3.60 In order to see whether public opinion in this area had shifted over the last fifteen to twenty years, two questions relating to cohabiting partners were asked in the 2005 *Succession Opinion Survey*. In each case the couple had lived together for a number of years, the exact period not being stated. The first scenario concerned a childless couple where one partner (gender unspecified) had died leaving the whole estate to charity. Just over 80% of the survey sample thought that the surviving partner should have a claim. Of those who were in favour of some provision for the surviving partner, three quarters of them preferred it to take the form of a fixed share rather than a discretionary award from a court. Virtually identical results were obtained in relation to the second scenario where the deceased partner had left the whole estate to a surviving spouse from whom he or she had separated but had not divorced.

3.61 The provisions of section 29 of the Family Law (Scotland) Act 2006 are modelled on the discretionary court-award scheme we recommended in our *Family Law Report*.<sup>72</sup> The surviving cohabitant is not made an heir on intestacy and therefore has no automatic right to succeed to any part of the deceased's intestate estate. Instead the surviving cohabitant may apply to the court (the Court of Session or sheriff court) for an award out of the deceased's net intestate estate. The court has first to consider whether the couple were cohabitants, ie had been living together as if husband and wife or civil partners. In doing so it has to have regard to the nature and length of the relationship and the nature and extent of couple's financial arrangements during that relationship.<sup>73</sup> The couple must also have been cohabiting immediately before the death of the applicant's partner.<sup>74</sup> The court in deciding what award, if any, to make must have regard to the following factors: the size and nature of

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<sup>69</sup> Manners and Rauta, *Family Property in Scotland (OPCS)*, Table 4.8 at para 4.2.

<sup>70</sup> Summarised in our *Family Law Report*, para 16.25.

<sup>71</sup> Paras 16.24-16.37.

<sup>72</sup> Recommendation 83 at para 16.37. There are however a number of differences.

<sup>73</sup> S 25(2).

<sup>74</sup> S 29(1)(b)(ii).

the deceased's intestate estate, any non-estate benefit received by the survivor as a result of the death, for example life insurance, other rights to or claims on the estate and any other appropriate matter.<sup>75</sup> The court's award may take the form of a capital sum (payable in a lump sum or by instalments) and/or a transfer of property.<sup>76</sup> The surviving cohabitant cannot be awarded more than he or she would have received if he or she had been a surviving spouse or civil partner.<sup>77</sup> Where the deceased was also survived by a spouse or civil partner the net intestate estate out of which any award can be made is restricted to the amount left after satisfaction of the prior and legal rights of the surviving spouse or civil partner.<sup>78</sup>

3.62 Section 29 can be criticised on two main grounds.<sup>79</sup> First, the factors set out in section 29(3) to guide the court in the exercise of its discretion, are not sufficiently complete, and some of the factors that one might expect to see there (such as the nature and length of the relationship) are instead in section 25(2) where they form part of the definition of a qualifying cohabitant. Other factors that might be thought useful are: the needs and resources of the applicant and the other beneficiaries, any physical or mental disability of the applicant, the age of the applicant, and the extent to which the applicant contributed to the welfare of the deceased and the family. On the other hand there are dangers in having too long a list of factors. It may lead to a box-ticking approach so ignoring other factors which are important in the particular case under consideration. Furthermore, most of the factors listed above are fairly self-evident. The second, and perhaps more fundamental, criticism is that section 29 contains no aim; the court is not told what it should be trying to achieve by making an award. Merely adding factors will not help and may even confuse as they will not all point in the same direction. A more detailed map is of no assistance to a walker who is not told the destination. Other jurisdictions with similar legislation for cohabitants use the concept of maintenance for the aim: "such as would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance"<sup>80</sup>, "reasonable provision for maintenance and support"<sup>81</sup> or "proper maintenance and support".<sup>82</sup> We do not favour a maintenance basis as the deceased while he or she was alive did not owe any obligation of aliment to the surviving cohabitant. One possibility would be recognition of the contributions (financial and non-financial) which benefited the deceased economically and where there are young children of the relationship the economic burden of child-care that the survivor will have to bear. This would have the advantage that similar principles would apply on death as apply under section 28 when the relationship is terminated by separation rather than death. In the following paragraphs, our proposals for reform assume that section 29 may have to be amended in the light of these criticisms.

### **Proposals for reform**

3.63 It might be argued that while it is appropriate to entitle a surviving cohabitant to apply for an award out of the deceased cohabitant's intestate estate, this remedy should not be extended to testate estate. On intestacy, as the deceased left no specific instructions, the

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<sup>75</sup> S 29(3).

<sup>76</sup> S 29(2).

<sup>77</sup> S 29(4).

<sup>78</sup> S 29(10). Debts and taxes are also deducted.

<sup>79</sup> See also T Guthrie and H Hiram, *Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006*, (2007) 11 ELR 208.

<sup>80</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(b).

<sup>81</sup> Alberta Dependents Relief Act, RSA 2000, c D-10.5.

<sup>82</sup> New Zealand Family Protection Act 1955, s 4.

law can justifiably distribute the estate in conformity with current social norms. But in a testate case the deceased has left express instructions and, so the argument goes, a cohabitant's position is not sufficiently strong to over-ride the terms of the will. We do not agree and the public opinion survey results are also against such a view. Like a spouse or civil partner, a cohabitant is a member of the deceased's immediate family to whom he or she is bound by ties of love and affection and for whom the law should make some provision on the termination of the relationship by death. The absence of a public commitment in cohabitation may mean that the protection the law provides for a surviving cohabitant is less than that for a surviving spouse or civil partner but should not deny any protection at all.

3.64 The 2005 *Succession Opinion Survey* indicated that the preferred method of protecting cohabitants against disinheritance was by way of fixed shares. However, by enacting section 29 of the Family Law (Scotland) Act 2006 which provides for a discretionary court-award scheme on intestacy, it would appear that the Scottish Parliament has rejected fixed shares for cohabitants. There are sound reasons for doing so. Marriage and civil partnership involve a public commitment by the parties to each other which justifies a fixed share. Cohabitation does not. Moreover, the variations found in cohabitation can be accommodated by a discretionary system. For example, the survivor of a couple who had lived together for 20 or more years deserves to be treated more generously than one whose relationship lasted only for a year or so. A cohabitant who has been financially dependent on the deceased while she raised their children deserves greater protection than a childless cohabitant who has retained her financial independence. Another consideration against fixed shares is that what a cohabitant receives should to some extent at least depend on who the testate beneficiaries or heirs on intestacy are.<sup>83</sup> For these reasons we remain convinced that cohabitants should be protected by a discretionary court-award scheme in which they have to apply for an award of provision from the deceased's estate.

3.65 The scheme should apply to the deceased's whole estate, testate and intestate. In our view the simplest way to do so is to extend the provisions in section 29 of the Family Law (Scotland) Act 2006 to testate as well as intestate estates. However, this will involve making some important modifications to take account of our proposals for the legal share<sup>84</sup> and intestate succession rights of surviving spouses and civil partners.<sup>85</sup>

3.66 At the outset it should be noticed that, as a matter of property law, in most cases the surviving cohabitant is the co-owner with the deceased of the household goods the couple acquired during their relationship and any savings (or property derived from such savings) that have been made from an allowance made by one partner to the other.<sup>86</sup> The surviving cohabitant's one half pro indiviso share of that property is part of his or her patrimony and does not form part of the deceased's estate. Any award to the survivor of provision out of the deceased's estate (which includes the deceased partner's one half pro indiviso share of the household goods and savings etc described above) is *in addition* to these property rights, although the court would take them into account in deciding what award, if any, to make.

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<sup>83</sup> See our *Report on Family Law*, para 16.24.

<sup>84</sup> See Proposals 10-12 at para 3.48 above.

<sup>85</sup> Paras 2.26 and 2.57 above.

<sup>86</sup> Family Law (Scotland) Act 2006, ss 26 and 27.

3.67 As at present in relation to intestate estates, we envisage that the surviving cohabitant would apply to the court for an award of provision out of the deceased partner's net testate estate. In working out what award, if any, to make the court would continue to have regard to all the circumstance of the case including the factors listed in section 29(3) of the 2006 Act<sup>87</sup> viz:

- "(a) the size and nature of the deceased's net estate;
- (b) any benefit received or to be received by the survivor-
  - (i) on, or in consequence of, the deceased's death; and
  - (ii) from somewhere other than the deceased's net estate;
- (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
- (d) any other matter the court considers appropriate."

3.68 Section 29 currently contains two restrictions on the surviving cohabitant's claim for provision out of the deceased's net intestate estate. First, a surviving cohabitant cannot be awarded more than she would have obtained had she been the deceased's surviving spouse or civil partner. We agree with this policy and think it should also apply to claims from a testate estate. Where the estate is intestate a surviving spouse's entitlement would be easy to calculate, particularly if the formulae we propose in Part 2 are adopted.<sup>88</sup> This would then be the *maximum* amount that the surviving cohabitant could be awarded. Where the deceased died testate, the maximum that the surviving cohabitant could be awarded would be the amount of the legal share that could have been claimed had the cohabitant been married to or registered a civil partnership with the deceased. As we discussed above,<sup>89</sup> the legal share would amount to 25% of the share of the estate to which a spouse or civil partner would have been entitled had the deceased died intestate. Consider the following examples:

- (i) A dies intestate leaving a house worth £300,000 and moveable property worth £50,000. He is survived by his cohabitant, B, of 10 years and his children from a previous marriage. If B had been married to A or his civil partner, under our proposals she would be entitled to the first £300,000 of his intestate estate plus half the excess, ie £325,000. Therefore the *maximum* that the court can award B is £325,000 but it will probably be less when the court takes into account the interests of the children who are A's heirs on intestacy since A was not in fact married to or in a civil partnership with B.
- (ii) A dies leaving a house worth £300,000 and moveable property worth £50,000. He is survived by his cohabitant, B, of 10 years and his children from a previous marriage. In his will he leaves all his property to the children. If B had been married to or in a civil partnership with A, her legal share would have been 25% of what she would have obtained if A had died intestate ie 25% of £325,000 = £81,250. Therefore the *maximum* that B can be awarded

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<sup>87</sup> For discussion see para 3.62 above.

<sup>88</sup> Surviving spouse or civil partner to get whole estate if deceased leaves no issue (Proposal 1 at para 2.26), or £300,000 plus half the balance if deceased leaves issue (Proposal 2 at para 2.57).

<sup>89</sup> Para 3.47.



as provision from A's estate is £81,250. Given the length of the relationship, a figure towards the maximum appears to be reasonable though it must be re-emphasised that the determination of the award is ultimately a matter for the discretion of the court. And so for example, if the relationship had lasted only for a couple of years, a court could be justified making an award well below the maximum. After B's claim has been satisfied, the balance of the estate will be transferred to the children who are the beneficiaries under the will.

3.69 The second restriction in section 29 is that where the deceased is survived by both a spouse or civil partner and a cohabitant, the surviving spouse or civil partner's prior and legal rights are deducted from the estate *before* an award can be made to the cohabitant, ie the surviving spouse's or civil partner's prior and legal rights are ring-fenced. Any award to the cohabitant can only be made out of the balance, if any, of the intestate estate remaining after the prior and legal rights of the surviving spouse or civil partner have been deducted.

3.70 Two questions arise. First, how should this policy be given effect to where the deceased partner has left a will? There is no difficulty when neither the surviving spouse nor the cohabitant is a legatee. If for example the deceased left all his property to a charity, the surviving spouse will be entitled to her legal share and the balance will be available for the cohabitant's claim though the maximum she could obtain would be equal to the surviving spouse's legal share. After the cohabitant's claim has been satisfied, the balance of the estate can be paid to the legatees. The difficulty arises when the surviving spouse is a legatee. In our view even in these exceptional circumstances the simplest solution is that the surviving cohabitant should have a claim for provision to a maximum of the legal share she would have had if she was married to or in a civil partnership with the deceased. Consider the following example:-

H dies leaving a house worth £300,000 and moveable property worth £50,000. In his will he leaves all his property to his wife, W. He is survived by W and his cohabitant, B, of 10 years. B is entitled to make a claim for provision out of the estate. The court could award up to the legal share she could have claimed had if she had been married to H. This is 25% of what she would have obtained if H had died intestate, ie £81,250. After B's claim has been satisfied, the balance goes to W as the beneficiary under the will.

3.71 Second, we doubt whether the existing policy on intestacy can continue to apply if the surviving spouse's rights on intestacy are altered as we have proposed. Where the deceased has not left issue the surviving spouse is to take the whole estate.<sup>90</sup> This would leave no estate upon which a surviving cohabitant could have a claim. Even where the deceased left issue, the estate would have to be over £300,000 in value before it could become the subject of a claim by the surviving cohabitant.<sup>91</sup> These results seem too harsh. Instead we now think that the amount that should be ring-fenced for the surviving spouse should only be her legal share rather than the estate to which she would have been entitled on intestacy. In other words, the surviving spouse's or civil partner's legal share would be deducted from the estate to give the net intestate estate which is subject to the cohabitant's claim. After the cohabitant's claim has been satisfied, the balance will be distributed according to the rules of intestate succession. Consider the following example:

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<sup>90</sup> Proposal 1 at para 2.26 above.

<sup>91</sup> Proposal 2 at para 2.57 above.

H dies intestate leaving a house worth £300,000 and moveable property worth £50,000. He is survived by W, and his cohabitant, B, of 10 years. There are no children. In these circumstances, prima facie W is only entitled to her legal share of 25% of the whole estate (£87,500), rather than her rights on intestacy (£350,000). The rest of the estate (£262,500) constitutes the net intestate estate and is available for B's claim although she cannot obtain more than what she would have inherited if she had been married to H when he died.<sup>92</sup> After B's claim has been satisfied, the balance, if any, would be transferred to W who would be entitled to the property as the heir on intestacy under our proposals.

3.72 We do not think that it is unfair to a surviving spouse or civil partner in this situation that their rights are prima facie restricted to their legal share rather than their rights under the proposed law on intestacy. First, if the deceased had made a will in favour of his cohabitant, the surviving spouse's or civil partner's right would be restricted to the legal share. Second, in most of these cases, the marriage or civil partnership has broken down irretrievably. The fact that the survivor's rights may be restricted to a legal share should the deceased die intestate survived by a cohabitant may encourage an early divorce or dissolution when an appropriate financial provision can be awarded. Third, it is thought that it will only be in exceptional circumstances that a person will be survived by a spouse or civil partner *and* a person who qualifies as a cohabitant who can bring a claim. In so far as this proposed rule amounts to an exception to the existing policy under section 29 of the 2006 Act, it is thought that the exception is justified.

3.73 As section 29 of the 2006 Act only applies on intestacy, at present a person can avoid a surviving cohabitant's claim by the simple expedient of making a will. This is often done when the couple are young and financially independent. This option will not be available if section 29 is extended to include testate as well as intestate estates. Given the absence of financial dependence, however, it is unlikely that the surviving cohabitant of such a relationship would receive much, if any, financial provision. However, we take the view that, like a spouse or civil partner,<sup>93</sup> a cohabitant should be able to discharge her right to claim financial provision from the deceased cohabitant's estate before or after the death. Thus for example during their lifetimes a young and financially independent couple will be able to agree to discharge their rights to bring a claim in respect of each other's estate.

3.74 A surviving cohabitant should have to elect between the testamentary provisions and making a claim. Indeed, making a claim should disentitle the surviving cohabitant from any other succession rights: rights under the will and rights under a special destination.<sup>94</sup> This disentitlement is best achieved by deeming a surviving cohabitant who receives an award out of the deceased's estate to have predeceased the deceased in relation to all other rights of succession to the deceased's estate. In order to avoid disturbing the deceased's dispositions more than necessary the award should come first out of any rights forfeited by the cohabitant.

3.75 Summing up we ask for views on the following proposals and questions:

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<sup>92</sup> As there are no children the cohabitant would have inherited the whole estate had she been married to the deceased.

<sup>93</sup> Proposal 13 at para 3.52 above.

<sup>94</sup> But not any cohabitant's pension or the proceeds of a policy on the deceased's life payable directly to the surviving cohabitant.

17. **Section 29 of the Family Law (Scotland) Act 2006 should be amended to allow claims for provision by a deceased's cohabitant out of testate as well as intestate estates.**
18. **Should section 29 of the Family Law (Scotland) Act 2006 be amended so as to state the aim in making an award for provision? If so should an award serve to recognise (a) the survivor's contributions (financial and non-financial) which benefited the deceased economically and (b) the survivor's economic burden of caring for any children of the relationship under the age of 16? If this is not thought appropriate, what other aim would be better?**
19. **Should section 29 of the Family Law (Scotland) Act 2006 be amended so as to include additional factors that the court should take into account in making an award? If so what should they be?**
20. **On an intestate estate, the court should continue to be unable to award the cohabitant more than that to which she would have been entitled had she been the spouse or civil partner of the deceased, ie the maximum award equals what a surviving spouse or civil partner would obtain from the deceased's intestate estate.**
21. **On a testate estate, the court should be unable to award the cohabitant more than that to which she would have been entitled had she been the spouse or civil partner of the deceased, ie the maximum award equals a surviving spouse or civil partner's legal share.**
22. **Where a person dies leaving a spouse or civil partner and a cohabitant on both an intestacy and testacy, the net estate for the purposes of a cohabitant's claim should be the estate after deduction of the surviving spouse's or civil partner's legal share.**
23. **A cohabitant should be able (before or after the death of the deceased) to renounce her right to apply for financial provision from the deceased's estate.**
24. **The effect of receiving an award should be that the cohabitant is deemed to have predeceased the deceased for the purposes of succession to the deceased partner's estate and accordingly forfeits all other rights of succession. The award should be taken in the first place from the cohabitant's forfeited rights.**

### **Entitlement to aliment**

3.76 In paragraphs 3.53 to 3.55 above, we provisionally rejected any alimentary claim by a surviving spouse or civil partner against the estate of the deceased spouse or civil partner. As a matter of principle we think that it is wrong that an executor should be under an obligation to aliment a surviving cohabitant when the deceased did not owe such an obligation while alive. For this and the reasons discussed in the above paragraphs it is our provisional view that a surviving cohabitant should not have an alimentary claim against the estate of her deceased partner.

3.77 Nevertheless we ask for views on the following negative proposal:

**25. A surviving cohabitant should not be entitled to aliment from the deceased's estate following the deceased's death.**

**3). Children and issue of the deceased**

3.78 We have found protection from disinheritance for the children or issue of the deceased<sup>95</sup> a difficult problem, particularly where the children are grown up and self-supporting. The present protection, legal rights or legitim, entitles a child (or the issue of a predeceasing child) to a portion of the deceased's net moveable estate, irrespective of the provisions of the deceased's will. It suffers from the major defects already described. In brief these are:

- limited protection if the estate is mainly heritable, but overprotection if the estate is mainly moveable;
- unjustifiable differences in protection according to the composition of the estate; and
- complex rules required for the classification of assets and debts as heritable or moveable;

3.79 We do not think the status quo is an option. The question of protection of adult children raises different issues from that of the protection of dependent children and we therefore deal with these two categories separately. Thereafter we consider those who have been accepted by the deceased as a child of his or her family (paragraphs 3.111 to 3.112) and the position of remoter issue, such as grandchildren (paragraph 3.113).

**An alimentary scheme for dependent children**

3.80 While alive, a parent owes an obligation of aliment to his or her children up to the age of 18. If the child is aged 18 or over and is reasonably and appropriately undergoing further education or training, the alimentary obligation of a parent persists until the child's twenty-fifth birthday.<sup>96</sup> We term these children "dependent children". Children to whom no parental obligation of aliment is owed we term "adult children". No jurisdiction of which we are aware takes freedom of testation to such lengths that it permits testators to leave their own dependent children without any recourse against their estates. The Scottish public opinion surveys consistently show that only a small percentage of respondents are in favour of disinherited children having no claim. While Scots law currently appears to allow a dependent child to claim aliment (*aliment jure representationis*) from the executors or beneficiaries of the deceased parent's estate, claims are virtually unknown in modern practice. But we can envisage that a claim might be brought if the deceased's estate was mainly heritable and legitim consequently minimal and there was no other person from whom the child could claim aliment. We consider that parents who have adequate

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<sup>95</sup> An adopted child is a child of the adopter for succession purposes (ss 23 and 24 Succession (Scotland) Act 1964) unless both adoptive parents died before 10 September 1964 and the natural parent died on or after 3 August 1966. Accepted children are considered separately later at paras 3.111-3.112.

<sup>96</sup> Family Law (Scotland) Act 1985, s 1(5). The age at which a child ceases to be dependent varies from country to country. In some jurisdictions, France for example, there is a life-long reciprocal obligation of aliment between parents and children.

resources should not be free to leave their dependent children without provision after their death. The existence of social security benefits does not alter this view: the deceased's beneficiaries should not be enriched at the expense of the public purse.

3.81 It is our provisional view that dependent children are best protected from disinheritance by way of an entitlement to aliment. A fixed share of the estate is too simplistic as it may bear no relationship at all to a child's need. It may also be a disproportionate interference with the deceased's testamentary freedom. A dependent child's claim is based on the need for the continuation of the support that was due by the deceased until the child is launched in life and becomes self-supporting. An alimentary system best meets this need but the existing rules of aliment *jure representationis* are uncertain in many respects. It would therefore be better to have a new statutory scheme. The new statutory right would only arise when the obligor died. In our view it should therefore be characterised as a right of succession by way of aliment from the obligor's estate. This right would be exigible from an intestate as well as testate estate.<sup>97</sup> We consider the details of such a scheme in the following paragraphs.

3.82 The new alimentary obligation should be available to a child of the deceased. The child should not have been adopted by another person. As with the present law of aliment between living people, "child" should mean a person under the age of 18, or if undergoing appropriate education or training, a person under the age of 25.

3.83 Those owing the obligation would be the executors of the deceased's estate and when the estate had been distributed to the beneficiaries, those beneficiaries. The alimentary payment would be paid from the estate they inherit. But it would be a fundamental principle of the new scheme that no obligation would arise in respect of any part of the estate that is left to a person who *already* owes an obligation of aliment to the child. Thus in the common case where a parent with young children naturally leaves the whole estate to the surviving parent, the new obligation will not arise. This is because the children already have a right to claim aliment from the surviving parent whose resources will now include the property to which he or she succeeded. The same would be true where the deceased had divorced the children's other parent and the deceased's new partner had accepted the children as children of the family: if the new partner was the beneficiary, the new obligation does not arise as she is already under an obligation to aliment the children because she has accepted them as children of the family. Estate would include both income and capital rights. So where a man left his estate in liferent to his widow and to his sister in fee, the children should have no alimentary claim against the estate where the widow was their mother or she had accepted them as children of her family. Consequently, we envisage that alimentary claims by disinherited dependent children would be rare.

3.84 We imagine that most claims would be met by the executors before the estate was distributed to the beneficiaries. For example: the deceased leaves pecuniary legacies of £5,000 to each of ten charities and the residue of £200,000 to his wife who is the mother of his children. As the wife has an obligation to aliment the children, there is no claim in respect of her residuary legacy. Accordingly, the children have only a claim in respect of the £50,000 left to the charities. We would not expect the executors to distribute the estate until the children's claims, if any, had been satisfied. Inevitably, some claims against

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<sup>97</sup> For further discussion see para 3.89 below.

beneficiaries will arise, for example where an extra-marital child becomes aware of his or her parent's death years later or a child becomes in need of support while still under the age of 25.<sup>98</sup> These, however, should be uncommon events.

3.85 We do not think that the deceased's estate should be free from an obligation to aliment a child merely because there are other persons who are already under an obligation to do so. In our view the existing alimentary obligor must also be a beneficiary under the deceased's will (or an heir on intestacy) before the deceased's estate is relieved from the obligation to aliment a dependent child. Any rule which prohibited a child from claiming aliment from the deceased's estate whenever he is owed an existing obligation of aliment could result in hardship for the child. In particular, the existing obligor might have so few resources that the child's entitlement to aliment would exist only on paper. For example, suppose a man abandoned his wife and young children and left his whole estate to his new cohabiting partner. The children should be able to claim from the estate even though they are also due aliment from their mother who would be entitled to claim her legal share. As with two living obligors, there should be no ranking: the court in assessing aliment due from one obligor (the estate) would take account of the ability of the other (the mother) to pay.

3.86 Much of the existing law of aliment contained in sections 1 to 7 of the Family Law (Scotland) Act 1985 could with appropriate modifications apply to the new alimentary obligation. We think that the award should always take the form of a lump sum, although it might be expressed to be payable by instalments. While the court should be able to alter the manner of payment<sup>99</sup> afterwards on application by either party, it should not have power to alter the sum itself. Only in this way can the obligation to the children of the estate, the executors and the beneficiaries be clear and certain. It should not be a defence to such a claim for aliment by a child aged 16 or over that the obligor is willing to aliment the child in his or her own home.<sup>100</sup> This defence may be appropriate in the normal case where the obligor will usually be closely related to the child but in a claim from the deceased's estate the executors or beneficiaries could be strangers or institutions such as a bank or a charity.

3.87 In deciding what amount is due, the current law of aliment balances the needs and resources of the child against those of the obligor.<sup>101</sup> Under our proposal, as far as the beneficiaries are concerned their resources must be limited to the value of the estate to which they succeed. By virtue of accepting a legacy a beneficiary cannot, become liable to aliment the deceased's children out of his or her own patrimony. Even based on current Child Tax Credit rates, a child's aliment could be up to £2,390 per year.<sup>102</sup> Attendance at a university or other educational or training establishment would be more expensive as would private primary and secondary schooling. While aliment at these rates could exhaust a small or modest estate, nevertheless we do not support the idea that there should be a cap on the amount due as a proportion of the estate. In our opinion responsible parents with dependent children should ensure their welfare by leaving their estates to a person who owes the children an obligation of aliment or by making some other arrangement such as a trust for

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<sup>98</sup> Children should be able to claim as long as they are still alimentary creditors (ie below 18 or 25 if undergoing further education or training), see Proposal 48 at para 4.49 below.

<sup>99</sup> Such as altering the timing of the instalments or directing that the balance be paid forthwith.

<sup>100</sup> Family Law (Scotland) Act 1985, s 2(8) and (9).

<sup>101</sup> Family Law (Scotland) Act 1985, s 4(1). Also relevant are the earning capacities of the parties and all the circumstances of the case.

<sup>102</sup> If the family element of the Child Tax Credit (£545) is taken into account in addition to the child element (£1,845 per child); both figures are for 2007-08.

the children's maintenance. If they choose not to do so, we do not see why their whole estates should not be used to aliment the children.

3.88 The following examples show how the proposed new statutory scheme might work:

- (i) A woman dies with an estate of £600,000. She leaves her half share of the family home, worth £300,000, to her husband and the residue of £300,000 (all moveable property) to her sister who is mentally ill and unable to earn her own living. She leaves nothing to her two children, aged 10 and 12. The children have no right in respect of the property inherited by their father as he already owes them an obligation of aliment. They would be entitled to claim aliment under our scheme only out of their aunt's £300,000. In fixing the amount of the children's aliment, the court would take account of the father's resources as well as the aunt's: if he was wealthy or had a substantial income, the court might consider that no contribution was due from her. Under the existing law the children's legitim would amount to £100,000 which would be taken from the sister's share.
- (ii) H dies leaving heritable property worth £300,000 and moveable property worth £90,000. He leaves everything to his surviving spouse, W. He has a daughter from a previous marriage who is 18 and has just started studying at university and a son, aged 10, who is his and W's child. The son has no claim as W, the beneficiary, already owes him an obligation of aliment. Similarly, the daughter would have no claim if W had accepted her as a child of her family. On the assumption that W has not done so, the daughter has a claim even although her mother (who is not a beneficiary under the will) has an existing obligation to aliment her. Therefore the daughter is entitled to claim reasonable aliment from the estate. In deciding what was reasonable, at this stage the court could take into account the fact that the claimant's mother is also under an obligation to aliment her. So if for example H had been supporting her at say £400 a month ie £4,800 a year (in addition to any support the mother was providing), a reasonable award would be in the region of £20,000.<sup>103</sup> Under the current law she is entitled to legitim of £15,000, ie one half of £30,000.
- (iii) H dies leaving heritable property worth £300,000 and moveable property worth £100,000. In his will he leaves all his property to a charity. He is survived by two children; A, aged 10 and B, aged 8. Their mother predeceased H several years ago. A and B are entitled to claim aliment from the estate. Since the children are young and may become engaged in higher education, the amount of aliment will be considerable. If support is taken as an average of £5,000 a year, A is likely to be awarded £60,000 and B £70,000.<sup>104</sup> Under the current law, A and B would share the legitim fund of £50,000 (with possibly an additional claim for aliment *jure representationis*).
- (iv) H dies leaving heritable property worth £300,000 and moveable property worth £100,000. In his will he leaves all his property to a charity. He is survived by his wife, W, and two children; A, aged 10 and B, aged 8. W claims her legal share which is 25% of what she would get if H had died intestate, ie £87,500. As she owes the children an obligation of aliment they

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<sup>103</sup> Assuming four years at university at £4,800 a year. A discount for immediate payment might be applied although the court might consider that the daughter's needs would increase over the years.

<sup>104</sup> Assuming they become self-supporting after leaving tertiary education at 22.

have no claim against her legal share. A and B are entitled to claim aliment from the remainder of the estate as in (iii) taking into account the fact that W is also under an obligation to aliment them.

3.89 As we mentioned above,<sup>105</sup> children would also be entitled to claim aliment from the deceased's estate where the deceased died intestate. This would only arise when the deceased's surviving spouse or civil partner did not owe the children an obligation of aliment ie when she was not the children's parent or had not accepted the children as children of her family. Where, of course, there is no surviving spouse or civil partner the children will inherit the estate as they will be the heirs on intestacy. For example H dies intestate leaving a house worth £200,000 and moveable property worth £100,000. He is survived by his wife, W, and two children from a previous marriage, A aged 10 and B aged 8. W would inherit the whole estate under our proposals. If W has accepted them as children of her family, A and B have no claim against the estate as W has inherited the property and already owes them an obligation of aliment. If she has not accepted them, a claim arises even although their biological mother may owe them an obligation of aliment. The amount of aliment will be as in example (iii) above.

3.90 We find the idea of a claim out of the estate for the commutation of the deceased's obligation to pay aliment to his children very attractive. Because the new statutory obligation will not arise when the beneficiary already owes the children an obligation of aliment, we do not think that many cases will arise in practice and of these many would be settled by negotiation. Moreover, as we shall see,<sup>106</sup> an alimentary scheme would also remove any discrimination between the deceased's biological or adopted children and children whom the deceased has accepted as children of the family.

3.91 We therefore ask for comments on the following proposal:

**26. Legal rights and aliment *jure representationis* for dependent children of the deceased should be replaced by a statutory alimentary scheme along the following lines:**

**(a) An obligation of aliment should subsist between a child of the deceased and the executors or beneficiaries of the deceased's estate which the child has the right to enforce on the death of the deceased.**

**(b) No right to aliment should exist in relation to any part of the estate which passes to an individual who at the date of death is already under an obligation to aliment the child.**

**(c) The provisions relating to aliment in the Family Law (Scotland) Act 1985 (such as age limits, quantification and powers of the court) would generally apply, but there should be no defence of alimentering the child at the obligor's home: aliment should take the form of a lump sum (although this could be payable by instalments) which would not be capable of being varied or recalled later on a change of circumstances.**

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<sup>105</sup> Para 3.81.

<sup>106</sup> Paras 3.111-3.112 below.



**(d) The amount of the aliment should not be capped at a fixed proportion of the beneficiary's inheritance.**

**Fixed shares for children**

3.92 It can be argued that the statutory alimentary scheme outlined above suffers from the defects of any discretionary protective regime viz, uncertainty and the delay and costs of potential litigation. Accordingly, we should continue to provide protection for children by giving them a fixed share of their parents' estates which cannot be defeated by will. As we have seen under the existing law,<sup>107</sup> the children of the deceased and the issue of any predeceasing children are entitled to legitim out of the deceased's estate. But while a parent's obligation of aliment towards his or her own child ceases once the child attains 18 (or 25 years of age if engaged in appropriate training or higher education), a child is entitled to legitim whatever his age or circumstances. This is because legitim is not based on the child's need for support from the parent's estate: it derives from the parent-child relationship itself. Thus a man of 70 who is a self-made millionaire and has not visited his aged mother for twenty years is entitled to legitim from her estate in exactly the same way as his impoverished unmarried sister who nursed their mother during her last illness: and he remains entitled to legitim even if his mother has bequeathed all her property to her daughter in recognition of the care she has received from her.

3.93 In this section we will first consider whether adult children, ie those beyond the age of being owed an obligation of aliment by the deceased, should have any claim at all other than their testamentary provisions or rights on intestacy. Thereafter the question of what form the claim might take is addressed.

**Should adult children have a claim?**

3.94 The arguments for entitling adult children to claim a share in their parent's estate, irrespective of the terms of any will are:

- The parent's property is to be regarded as family property which should be passed on to their children. This is particularly so when the deceased parent was the surviving spouse of the children's other parent. The latter's expectation would have been that his surviving spouse would pass on to the children the property that she had inherited and which was not required for her needs during her lifetime.
- Parents have a moral duty to pass on their wealth to their own children rather than to more distant relative or strangers.
- Disinheritance signals that the testator no longer regards the child as a member of the family. Claims can be seen as allowing the child to regain a place within the family.
- Claims by adult children have always been part of Scots law and in the absence of strong arguments to the contrary should continue to be so.

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<sup>107</sup> Paras 3.4-3.8 above.

- The public opinion surveys carried out over the last 30 years show strong support for protection of children from disinheritance.
- Adult children may be in need or they may have made substantial financial or non-financial contributions to their parents' welfare.

3.95 The arguments against entitling adult children to claim a share are:

- A parent's obligation to aliment a child ceases when the child reaches the age of 18, or 25 if engaged in appropriate training or education. Accordingly, an adult child should not be entitled to make a claim on his parent's estate that he could not have made during the parent's lifetime.
- The parent's property is his or her own property: it is not family property. He should therefore be free to dispose of his property as he wishes. This is, of course, subject to a surviving spouse or civil partner's legal share or the claim of a surviving cohabitant. If he desires to pass on property to his children while at the same time providing benefits for a surviving spouse or civil partner during their lifetimes, this can be done by utilising legal devices such as trusts.
- Nowadays children tend to be middle aged when their parents die. Therefore they are not in need of substantial capital to set themselves up in life.
- There is a difference between moral duties and legal duties. While parents may be expected or even be under a moral duty to pass on their wealth to their children, it does not follow that the law should enforce this duty should the parents decide not to do so.
- The obligation to relieve the needs of adult children rests on the state not the parent's estate.
- Legal rights are seldom claimed by adult children.
- Legal rights promote the interests of children who will generally not be in need over the beneficiaries, for example charities, chosen by the deceased.
- The prospective entitlement of a spouse or civil partner can be terminated before death by divorce or dissolution. There is no legal machinery available for parents to dissolve the parent-adult child relationship so as to prevent their children's claims although a child may agree to discharge her legal rights during the parent's lifetime.

3.96 Having a compulsory share for adult children is being increasingly called into question even in civil law jurisdictions. Our tentative and preliminary view is that legitim should cease to be available to adult children and that dependent children should be entitled to claim aliment under a new statutory scheme outlined above.<sup>108</sup> It is difficult to see why after they have discharged their obligation of aliment parents should be unable to dispose of their estate as they wish. Since 1986, children have not been under any obligation to aliment indigent parents:<sup>109</sup> why then should parents be unable to test on their property free

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<sup>108</sup> Proposal 26 at para 3.91.

<sup>109</sup> Family Law (Scotland) Act 1985, s 1 which came into force on 1 September 1986.

from the legal rights of their adult children to whom they no longer owe an obligation of aliment? Compulsory shares for children reflect a static society where inherited wealth was very important: nowadays there are many more opportunities for people to amass their own wealth and indeed are expected to do so. Inheritance from a parent should no longer be viewed as a right.<sup>110</sup> And, of course, many parents choose their children as beneficiaries under their will or deliberately die intestate so that their children will inherit their estates as the heirs on intestacy.

3.97 Moreover the existence of a fixed legal share for children, particularly adult children, can disrupt perfectly sensible family transactions. For example:

A farmer has two children. He wishes to pass on his farm to the child who is interested in taking it on and has been working the farm with him.

A father has two children. He wishes to pass on his business to his daughter who has built up the business with him.

Parents have a child who is disabled. They intend to leave her nothing as any bequest would simply diminish the state benefits available to that child. Alternatively, the parents might wish to leave that child the bulk of their estates on the view that the disabled child's needs are greater than those of their other children.

A parent may wish to "generation skip", by-passing the children and leaving the estate to the grandchildren.

A daughter who had looked after her parents assiduously for many years is left the entire estate while her siblings who had showed no interest in their parents and failed to keep in touch are left nothing.

3.98 If adult children did not have the right to a legal share none of these transactions would be challengeable. This is one of the major reasons why we think that adult children should no longer have a legal entitlement to any part of their parent's estate and that dependent children should have only a claim for aliment. We accept that a fixed legal share can alleviate hardship caused by a capricious testator. So for example, if in the last scenario above the parents left all their estate to the children who had ignored them and nothing to the child who had cared for them, she would at least be able to claim some property from their estates. But if the child was anxious to ensure that she inherited the estates, she could have obtained a promise from her parents that they would leave her their property: in the event of their failure to do so, the child could sue the executor in respect of the breach of promise. In short we doubt whether this type of situation is so common that it is necessary for adult children to have a legal share of their parent's estate.

3.99 It also appears that under the current law, children rarely seek to enforce their legal rights when their father wills all his property to their mother. But legal rights are more likely to be claimed if their father wills all his property to his wife who is not the children's mother ie to their stepmother. We have argued that for the purposes of intestate succession a second

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<sup>110</sup> Rowlingson and McKay, *Attitudes to inheritance in Britain* (2005) at p 6 available at [http://www.pfrc.bris.ac.uk/publications/Reports/Attitudes\\_to\\_Inheritance\\_Report.pdf](http://www.pfrc.bris.ac.uk/publications/Reports/Attitudes_to_Inheritance_Report.pdf).

or subsequent spouse or civil partner should be treated in exactly the same way as a first.<sup>111</sup> We also argue that where a surviving spouse or civil partner has been bequeathed the whole estate, she must be no worse off than if the deceased spouse or civil partner had died intestate.<sup>112</sup> This means that even if adult children are to have the right to legal share, it would not affect estates of less than £300,000. In addition, it must be remembered that *ex hypothesi* the father has chosen to leave all his property to the surviving spouse or civil partner: he was free to make provision for his children if he had chosen to do so. Again we do not think that providing a weapon to undermine provision that has been made for a step-parent is sufficient to justify adult children having the right to a legal share from their parent's estate.

3.100 While many people consider that parents have a moral duty not to disinherit their issue, we have come to the conclusion that it is anachronistic to continue to make such a duty legally enforceable. In practice, large numbers of parents make testamentary provision for their children or die intestate so that their children (and issue of any predeceasing children) will be their heirs on intestacy. But as we have seen, there can be situations where it is sometimes morally and economically sensible that children - or some of the children - should not inherit. Provided the obligation to aliment dependent children has been fulfilled, we do not see why in the twenty first century parents should be unable to disinherit their adult children should they choose to do so. We think that the time has come for this legal disability to be removed.

3.101 And so we ask for comments on the following proposal:

**27. Should legitim and aliment *jure representationis* be abolished as regards adult non-dependent children?**

The effect of this would be that adult non-dependent children would have no claim against their parents' estates unless they were heirs on intestacy or beneficiaries under their wills. Dependent children would however have a statutory right to claim aliment under Proposal 26 above.

**Legal protection for all children**

3.102 If in spite of these arguments, it is still thought that children - including adult children - should be entitled to protection from disinheritance, the question arises as to the form this protection should take. The choice appears to be a court-based discretionary system or the right to claim a fixed legal share from the deceased parent's estate.

3.103 **Court-based discretionary system** The general advantages and disadvantages of a court-based discretionary system as regards spouse and civil partners are set out in paragraphs 3.33 to 3.34 above. The disadvantages loom large for claims by children, in particular adult children, as there are probably no social norms that would be available to guide the court in the exercise of its very wide discretion. The difficulties of finding workable principles indicate that introducing a court-based discretionary system for children would not be easy. The courts would find the exercise of the jurisdiction challenging. Moreover, the fundamental problems of uncertainty and the delay and costs of potential litigation remain.

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<sup>111</sup> Paras 2.65-2.70 above.

<sup>112</sup> For full discussion see para 3.108 below.

As in the case of protection for surviving spouses and civil partners, we are not convinced that a court-based discretionary system is the way to protect children. Accordingly we ask:

**28. Are we correct in rejecting a court-based discretionary system as the way of protecting children and issue from disinheritance? If not, what criteria should the court use in exercising its discretion?**

3.104 **Fixed legal share** If all children are to be protected we are sure that it should take the form of a fixed legal share. But we do not think that legitim can be left as it is. It suffers the same fundamental defects as the current legal rights for spouses and civil partners.<sup>113</sup> The most serious perhaps is that legitim is only exigible from the deceased's net moveable property at the time of his death. It seems to us that any new form of fixed share should be exigible from the whole of the deceased's estate, both heritable and moveable. This is necessary to simplify the law and reflects the fact that the protection provided by legitim has often been rendered nugatory because of the proportion of the value of an estate which is represented by the deceased's heritable property.

3.105 In our *Succession Report* we recommended that the present system of legitim should be replaced by a new system of fixed rights called legal share.<sup>114</sup> Legal share would be due out of the whole estate, testate and intestate, heritable and moveable. Where there was no surviving spouse the legal share for issue was to be 30% of the first £200,000 of the net estate (heritable and moveable) and 10% of any excess. But where the deceased was also survived by a spouse, she would also be entitled to legal share of 30% of the first £200,000 of the net estate (heritable and moveable) and 10% of any excess. This meant that where the deceased was survived by a spouse and children he would only be able to test on 40% of any estate below £200,000. We thought that this was too great an inroad on freedom of testation. In these circumstances, we took the view that the claim of the surviving spouse was more important than that of the issue and should not be reduced. Therefore we recommended that where the deceased was survived by a spouse and issue, the issue's legal share would be 15% of the first £200,000 of the net estate and 5% of the excess. In order to take account of inflation since 1990 and in particular the sharp increase in the value of residential property, we think that the figure of £200,000 should now be increased to £400,000. Consider the following examples:

(i) H dies survived by two children and leaving the following estate to a charity:

A house worth	£350,000
Moveable property worth	£120,000
Total	£470,000

The children's legal share is £127,000, ie 30% of £400,000 and 10% of £70,000. Under the current law they would share the legitim fund of £60,000, ie half the net moveable property.

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<sup>113</sup> Paras 3.11-3.14 above.

<sup>114</sup> Recommendations 6-8.

- (ii) H dies survived by two children and leaving the following estate to a charity:

A cottage worth	£120,000
Moveable property worth	£350,000
Total	£470,000

The children's legal share is £127,000, ie 30% of £400,000 and 10% of £70,000. Under the current law they would share the legitim fund of £175,000, ie half the net moveable property.

- (iii) H dies survived his wife and two children and leaving the following estate to a charity:

A house worth	£350,000
Moveable property worth	£120,000
Total	£470,000

The widow's legal share is £127,000, ie 30% of £400,000 and 10% of £70,000.

The children's legal share is £63,500, ie 15% of £400,000 and 5% of £70,000.

Under the current law the widow's legal rights would be £40,000 and the children would share the legitim fund of £40,000.

- (iv) H dies survived by his spouse, his elder son, A, and his younger son, B and leaving the following estate to his elder son A who runs the farm:

A farm worth	£3,000,000
Moveable property worth	£300,000
Total	£3,300,000

The widow's legal share is £410,000, ie 30% of £400,000 and 10% of £2,900,000. B's legal share is £102,500, ie  $\frac{1}{2}$  (15% of £400,000 and 5% of £2,900,000).

Under the current law the surviving spouse's legal rights are £100,000 and B's share of the legitim fund is £50,000.

3.106 In relation to a surviving spouse's or civil partner's legal share, we have now taken the view that the law would be simpler and the balance between protection and freedom of testation fairer, if her legal share was calculated as 25% of what she would have inherited if the deceased had died intestate.<sup>115</sup> We think that a similar formula might be appropriate in respect of the issue's legal share, ie the issue should receive as their legal share 25% of what they would have received if the deceased had died intestate. Consider the following examples:

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<sup>115</sup> Proposal 10 at para 3.48 above.

- (i) H dies survived by two children and leaving the following estate to a charity:

A house worth	£350,000
Moveable property worth	£120,000
Total	£470,000

The children's legal share is 25% of what they would have received if H had died intestate. Under our proposals if H had died intestate they would have inherited the whole estate. Therefore their legal share is 25% of £470,000, ie £117,500.

Under the current law, they would share the legitim fund of £60,000, ie half the net moveable property.

- (ii) H dies survived by two children and leaving the following estate to a charity:

A cottage worth	£120,000
Moveable property worth	£350,000
Total	£470,000

Their legal share is 25% of what they would have received if H had died intestate. Under our proposals if H had died intestate they would have inherited the whole estate. Therefore their legal share is 25% of £470,000, ie £117,500.

Under the current law they would share the legitim fund of £175,000, ie half the net moveable property.

- (iii) H dies survived by his spouse and two children and leaving the following estate to a charity:

A house worth	£350,000
Moveable property worth	£120,000
Total	£470,000

The spouse's legal share is 25% of what she would have inherited if H had died intestate. Her intestate share would be the first £300,000 and half of the excess of £170,000, ie £385,000. Therefore her legal share is £96,250. The children's legal share is also 25% of what they would have received if H had died intestate. Their intestate share would be £85,000. Therefore their legal share is £21,250.

Under the current law the surviving spouse's legal rights would be £40,000 and the children would share the legitim fund of £40,000.

- (iv) H dies survived by his spouse, his elder son, A, and his younger son, B and leaving the following estate to A who runs the farm:

A farm worth	£3,000,000
Moveable property worth	£300,000
Total	£3,300,000

The spouse's legal share is 25% of what she would have inherited if H had died intestate. Her intestate share would be the first £300,000 and half of the excess of £3,000,000, ie £1,800,000. Therefore her legal share is £450,000. B's legal share is also 25% of what he would have received if H had died intestate. His intestate share would be half of £1,500,000, ie £750,000. Therefore his legal share is £187,500.

Under the current law the surviving spouse's legal rights are £100,000 and B's share of the legitim fund is £50,000.

- (v) H dies survived by his spouse and his elder son, A, and his younger son, B. He leaves his business worth £3,300,000 (which is wholly moveable property) to A who runs it.

The estate is of the same total value as that in (iv). Therefore under our proposals the spouse's legal share is £450,000 and B's legal share is £187,500.

Under the current law, the surviving spouse's legal rights are £1,100,000 and B's share of the legitim fund is £ 550,000.

3.107 It will be clear that where the estate is less than £300,000 and the deceased is survived by a spouse or civil partner and children, the children's legal share is nil as they would not obtain anything on intestacy because under our proposals the surviving spouse or civil partner inherits the first £300,000 outright. This means that on estates below £300,000 it is pointless for a child to dispute a legacy of the whole estate to a surviving spouse or civil partner and that consequently there is no need - as can happen at present - for a spouse or civil partner to renounce her legacy and thereby precipitate an intestacy in order to prevent the deceased's issue claiming legal rights before her prior rights have been satisfied.<sup>116</sup> Moreover, on estates below £300,000 the deceased would be free to test on three quarters of the estate regardless of whether it is made up of heritable or moveable property. As the value of the estate increases above £300,000, the estate on which the deceased can test decreases proportionately as the issue's legal share sets in but it will never be less than 50%. There is also a satisfying simplicity that the rule for the calculation of the legal share of a surviving spouse or civil partner and the legal share of any issue is the same, viz 25% of what they would have received if the deceased had died intestate. For these reasons if children are to continue to be entitled to legal share our preliminary view is that it should be 25% of what they would have obtained if the deceased died intestate, rather than the slightly more complicated provisions that we recommended in our 1990 *Succession Report*.

3.108 It is not uncommon for a person to leave all his property to a surviving spouse or civil partner. Where there are children, we consider it to be axiomatic that the effect of their claim for legal share must not be to leave the surviving spouse or civil partner worse off than if the

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<sup>116</sup> *Kerr, Petr* 1968 SLT (Sh Ct) 61.



deceased had died intestate. Thus in our 1990 *Succession Report* we recommended<sup>117</sup> that in this situation the estate which was subject to the issue's legal share should not include the amount which if the deceased had died intestate the surviving spouse or civil partner would obtain before the estate was shared equally with the issue.<sup>118</sup> But there is no need for a special rule if legal share is based on a proportion of what the issue would inherit under the law of intestacy. We have proposed that on intestacy a surviving spouse or civil partner takes the first £300,000 before the balance has to be shared equally with the issue. So for example if H died intestate leaving £500,000, his surviving spouse would inherit the first £300,000 and half the balance ie £100,000: the children would share £100,000. If H died testate leaving all his property to W, the issue's legal share is 25% of what they would inherit if H had died intestate, ie £25,000. Indeed it is only when an estate is worth more than £300,000 that the issue are entitled to any legal share at all. But since it is only 25% of what they would inherit on intestacy, even where the issue are entitled to legal share a surviving spouse or civil partner who has been bequeathed the whole estate will always receive more than she would have inherited had the deceased died intestate.

3.109 A claim for legal share should vest in the child when the parent dies. A predeceasing child should continue to be represented by issue. When a claim is made, all the claimant's rights in the deceased's estate under the law of intestate succession and all testamentary provisions should be forfeited. Legal share should be capable of being renounced before or after the parent's death and this should not enlarge the legal share of any other potential claimant.

3.110 We seek views on the following:

29. **If children are to be protected by fixed legal shares do you favour a system based on a percentage of the estate which the issue would obtain under our proposals if the parent had died intestate or an updated version of the system we recommended in our 1990 Report on Succession?**
30. **If the former, is 25 per cent a suitable figure?**
31. **A child should be able to renounce (either before or after the deceased's death) the right to claim legal share and such a renunciation should not enlarge the legal share of any other potential claimant.**

### **Accepted children**

3.111 So far we have assumed that the child is an adopted or biological child of the deceased. To what extent, if any, should children who have been accepted by the deceased as part of his or her family be protected against disinheritance? Section 1 of the Family Law (Scotland) Act 1985 lays an obligation of aliment on a person who accepts a child as a child of his or her family in the same way as both parents owe an obligation of aliment towards their own children. An accepted child below 25 should therefore have the same alimentary remedies against the estate as the deceased's own child. It therefore follows that a

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<sup>117</sup> Recommendation 8(c).

<sup>118</sup> This amount was £100,000.

dependent accepted child should be able to claim aliment from the deceased's estate under the statutory scheme we have proposed in paragraphs 3.80 to 3.91 above.

3.112 If the proposal to give the deceased's children a right to aliment from the estate is not accepted the question arises whether an accepted child should have a legal share in the acceptor's estate. It is our provisional view that accepted children should not be entitled to such a share. Arguably the claims of an adult accepted child are not as strong as those of an adult natural child. The accepting parent-accepted child link is only a social link; there is no blood tie. It could be said that they are not part of the deceased's family to the same extent and that the deceased would have done all that could be expected by bringing up the child to adulthood. But accepted children vary from those who were brought up from a very young age with the deceased's other children to those who came into the family as teenagers. It can be argued that the former at least ought to be treated in the same way as natural children. On the other hand when a child is accepted by a person as a child of the family, unlike an adopted child, the child does not lose his rights vis-a-vis his biological parents. They remain under an obligation to aliment him along with the acceptor. When the biological parents die the accepted child continues to have rights in relation to their biological parents' estates, ie the accepted child would be their heir on intestacy and, if testate, would be entitled to a legal share from their estates. We find this a difficult issue but for the latter reason our provisional view is that the fact of acceptance should not be sufficient to entitle an accepted child to a legal share of the acceptor's estate. We therefore propose that:

- 32. A dependent accepted child should be entitled make an alimentary claim from the acceptor's estate under the new statutory scheme set out in Proposal 26 above.**
- 33. If adult children are to have a legal share out of their parent's estate, an adult accepted child should not be entitled to have a legal share out of the acceptor's estate.**

## **Grandchildren**

3.113 If a child is to continue to have a fixed legal share, we have taken the view that the doctrine of representation<sup>119</sup> should continue. This means that if a child predeceases his or her parent, the child's issue ie the deceased's grandchildren will be able to claim a share of their deceased grandparent's estate through their deceased parent. Otherwise we think that grandchildren and remoter issue are best considered as part of the final miscellaneous category of other persons who might be considered as having a claim on the deceased's estate.

## **4). Other relatives and other persons**

3.114 So far we have looked at protection from disinheritance in the context of surviving spouses or civil partners, surviving cohabitants, children of the deceased and children accepted by the deceased as part of his or her family. We turn now to consider whether any other persons should be protected. If they are to be protected it would have to be by means of a discretionary system under which they could apply to the court for an award out of the estate. The difficulty of extending protection beyond the core relationships set out above is

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<sup>119</sup> Succession (Scotland) Act 1964, s 11.

where to draw the line. Since we doubt that there should be an enforceable legal duty on parents to leave a significant portion of their estate to their adult children we are not convinced that there should be a legal duty to do so in respect of a wider range of family or dependents.

3.115 Nevertheless in England and Wales the Inheritance (Protection of Family and Dependents) Act 1975 includes as a final category of applicant a dependant, being a person "who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased".<sup>120</sup> Being maintained means that the deceased was making a substantial gratuitous contribution in money or money's worth towards the person's reasonable needs.<sup>121</sup> In addition to the general guidelines applicable to all applicants, in relation to a dependant the court has to have regard to "the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility".<sup>122</sup>

3.116 The National Committee for Uniform Succession Laws in Australia have produced a model law for adoption by the various state legislatures.<sup>123</sup> They recommended that, apart from spouses<sup>124</sup> and minor children, an application should be capable of being made by "a person for whom the deceased person had responsibility to provide for the person's maintenance, education or advancement in life".<sup>125</sup> There is then a long list of matters to which the court was to have regard in determining whether the deceased had such responsibility. That the applicant had been maintained by the deceased before death is only one of the matters. In construing similar legislation<sup>126</sup> the Court of Appeal in Victoria said that while "responsibility" connoted essentially a moral responsibility or duty it had to be determined in accordance with the list of matters in the relevant statute.<sup>127</sup> The general formula set out above was recommended to avoid omitting those with good claims to be awarded provision out of the deceased's estate. Confining applicants to specified relatives or members of the deceased's household would omit some deserving cases. A general formula was more likely to be acceptable to the various Australian states in view of the considerable diversity among them as to the categories of persons entitled to apply.

3.117 The Australian formula for the residual category highlights the opposing views as to the purpose of family provision on death. The first, and narrow, view is that it is to relieve the needs of those to whom the deceased had a legal obligation of maintenance. This tends to limit applicants to spouses, civil partners, cohabiting partners and children. The second, more expansive, approach is that family provision should be available to all those for whom the deceased had made provision while alive. We favour the narrow approach. Succession law should be confined to family relationships, constituted by blood, marriage, civil partnership, cohabitation and acceptance of a person as a child of the family. Some testators may have accepted financial responsibilities to people outside these relationships. However we do not consider that these are responsibilities which the law of succession

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<sup>120</sup> S 1(1)(e).

<sup>121</sup> S 1(3).

<sup>122</sup> S 3(4).

<sup>123</sup> Queensland Law Reform Commission, Miscellaneous Paper No 28, 1997.

<sup>124</sup> A later supplementary report recommended that de facto partners should be expressly mentioned as a category of applicant, Queensland Law Reform Commission, Report No 58, 2004, p 10.

<sup>125</sup> Queensland Law Reform Commission, Report No 58, 2004, para 2.4.

<sup>126</sup> Administration and Probate Act 1958, s 91(4).

<sup>127</sup> *Coombes v Ward* [2004] VSCA 51.

should seek to quantify and enforce when testators fail to make the appropriate testamentary provisions.<sup>128</sup>

3.118 Our provisional view is that no one outwith the deceased's core family should be entitled to a legal share out of the deceased's estate and that such a person should not be entitled to apply for financial provision out of the estate even where that person had been financially dependent on the deceased. There may be thought to be a place for a temporary continuation of support so that those who were financially dependent on the deceased are not suddenly left without support after the deceased's death. But the executors would have to borrow money to meet such a claim as they have no funds available until they obtain confirmation to the deceased's estate.

3.119 Accordingly we ask:

- 34. Do you agree with our preliminary view that only the deceased's spouse, civil partner, children (biological, adopted and accepted) and cohabiting partner should be entitled to claim a share of the deceased's estate if he or she is not a beneficiary under the will or the rules of intestacy?**
- 35. Should those whom the deceased had been supporting to a substantial extent whilst alive, be entitled to a temporary continuation of that support, and if so for how long?**

#### C: EXCLUDING CERTAIN KINDS OF PROPERTY FROM LEGAL SHARE

3.120 We have regarded it as axiomatic that our proposed legal shares for spouses, civil partners and children would be exigible from the whole of the deceased's estate ie heritable as well as moveable property. In doing so, this raises difficulties for a testator who is anxious that only one child should inherit his or her business. This is particularly acute in relation to agricultural property where it is traditional for the farm to be left to the child who will work the farm: this prevents the fragmentation of the estate. This can be done relatively easily under the current law since legal rights are only exigible from moveable property. But even then it is often difficult to reconcile a painless transfer of the whole farm to one child while making reasonable provision for a surviving spouse or civil partner and other sons or daughters.

3.121 We have immense sympathy for these concerns. Indeed, it was in part to enable such dispositions to continue that we have made the radical proposal that adult children and issue should not have a legal share in respect of their parents' estates. If this proposal is adopted, this ought to allay some of the fears that a consequence of our proposals would be the fragmentation of agricultural properties.

3.122 Nevertheless, there is no doubt our proposals would lead to a potential increase in liability in respect of the legal share of a surviving spouse or civil partner and in that respect the problem remains. One solution would be to exclude all business assets including agricultural land from such claims. At present we think that this would be too drastic.

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<sup>128</sup> The law of promise (unilateral obligation) or unjustified enrichment may provide the disappointed "legatee" with a remedy.

Businesses are not excluded from the concept of matrimonial or partnership property for the purposes of financial provision on divorce or dissolution (though it is true that they would be excluded if they had been inherited by one of the spouses or civil partners). It seems difficult to maintain that, for example, a wife who had worked unpaid in her husband's business should automatically be excluded from having a share in its value on his death.

3.123 A second solution might be to recognise the particular problems of agricultural farms and estates. This has been said to be "an industry rich in wealth and poor in cash"<sup>129</sup>. Even if an estate was faced only by a claim for legal share by a surviving spouse or civil partner there could be difficulty in raising the funds and servicing the loans to enable the share to be paid. The legal share could be made payable in instalments but again the annual profit may be insufficient to meet the instalments. Alternatively, the agricultural property could be valued for the purposes of legal share at a multiple of its profitability (say 3 or 5 times the average annual profit over the 5 years preceding the death) rather than its capital value (which may be greatly inflated because of its potential non-agricultural development value).

3.124 In reality, if agricultural land were excluded, it is farmers' wives who would lose their protection from disinheritance. Many of these women are readily aware that when they marry and have a family the farm will pass to only one of their children and they have no expectation of having a share of its value when their husbands die. In these circumstances even if no exception was made for agricultural property, it is thought that many of these women would be prepared to renounce their legal share either on marriage or later during the lifetime of their spouse.

3.125 The awards that would be made under our proposed alimentary scheme for dependent children and discretionary award for cohabitants are not a fixed percentage of the value of the deceased's estate. While the court would take the size of the estate into account, it would also consider the nature of an agricultural or other business forming the major item of the estate and the executors' ability to pay an award without fragmenting the business. We do not think that any special measures are necessary for disinheritance claims by cohabitants and dependent children.

3.126 At this stage we ask these questions:-

- 36. Should businesses, including agricultural farms and estates, be excluded from claims for legal share by surviving spouses, civil partners and adult non-dependent children?**
- 37. If not, should special provision be made for agricultural property and businesses?**
- 38. If so, what form should these special provisions take?**

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<sup>129</sup> C W Pagan, "Farm Taxation Planning" in *Aspects of Agricultural Law* (Law Society of Scotland, 1981), p 60.

# Part 4            Miscellaneous

## Overview

4.1     In this Part we deal with four different matters. First, we consider whether it would be desirable for anti-avoidance provisions to be introduced into the Scots law of succession, before turning our attention to the doctrine of collation *inter liberos*. Next we examine the issue of time limits as applicable to succession matters. We then turn to the private international law of succession. Finally, we explore the topic of bonds of caution and whether other methods of protecting beneficiaries from wrongful administration by executors should be introduced.

A:     ANTI-AVOIDANCE PROVISIONS AND COLLATION

## Introduction

4.2     In this section we look at the extent to which lifetime gifts made by the deceased are, or should be, taken into account in connection with claims on the estate. We consider first anti-avoidance provisions in general; whether and to what extent close relatives of the deceased should be protected from disinheritance by the deceased disposing of his or her property while alive. The second part examines the narrower doctrine of collation *inter liberos* which attempts to ensure equality between legitim claimants by taking account of the deceased's lifetime gifts to children.

### 1). Anti-avoidance provisions

#### The current position in Scotland

4.3     The current Scottish rules of succession contain very few anti-avoidance provisions. Apart from the minor exceptions mentioned below, there is no protection against disinheritance by lifetime transactions. People can defeat the legal rights of surviving spouses, civil partners or children by giving away their moveable property before they die even if this is done shortly before death and with the express intention of defeating legal rights.<sup>1</sup> Moreover, people can continue to enjoy the fruits of their own property and put it beyond the reach of legal rights claimants by creating an *inter vivos* trust in which they, the trusters, have a liferent and the prospective testamentary beneficiaries the fee.<sup>2</sup> A surviving spouse who is left the entire estate by will may be able to defeat any claim for legitim by the deceased's children by renouncing the succession and precipitating intestacy. In an estate of moderate size the surviving spouse's prior rights will exhaust the estate leaving nothing for the children.<sup>3</sup> A surviving cohabitant's right to seek an award out of the deceased's

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<sup>1</sup> *Allan v Stark* (1901) 8 SLT 468.

<sup>2</sup> *Lawrence v Lawrence's Trs* 1974 SLT 174.

<sup>3</sup> *Kerr, Petr* 1968 SLT (Sh Ct) 61.

estate can be avoided by the deceased making a will since the claim is currently exigible only out of intestate estate.<sup>4</sup>

4.4 Some very limited protection is provided by section 18 of the Family Law (Scotland) Act 1985. This empowers the court to set aside or vary transactions that have had the effect of defeating in whole or in part certain pecuniary claims. The only one that is relevant in the succession field is a claim for aliment *jure representationis* out of the estate by the deceased's children or surviving spouse. Such claims are almost unknown in modern practice. The transactions that are capable of being set aside or varied are those carried out by the deceased not more than five years before the making of the alimentary claim. Another limited protection against defeating legitim claims by way of lifetime gifts is the doctrine of collation *inter liberos*, described below.<sup>5</sup> Finally, lifetime transactions may be set aside if mental incapacity of the deceased, facility and circumvention or undue influence is established.

### **Should anti-avoidance provisions be introduced?**

4.5 **General** Many other jurisdictions, such as England and Wales, France, Ireland, New South Wales and some states in the United States of America have anti-avoidance provisions to protect the operation of certain rules of succession. Before considering whether, as a matter of principle, anti-avoidance provisions should be introduced into Scots succession law the scope of such provisions needs to be addressed. We think that any anti-avoidance provisions should be limited to protecting disinheritance claims, ie claims that may be made against the deceased's estate by the surviving spouse or civil partner, children (including those accepted by the deceased as part of his or her family), issue of predeceasing children and cohabitants. As we saw in Part 3 these are claims that the law entrenches since they cannot be defeated by the deceased by will. On the other hand there is no justification for protecting the expectations of others, such as siblings, friends or charities, as they have merely a *spes successionis* that can be defeated by the deceased making alternative testamentary provision.

4.6 Any anti-avoidance provisions should be applicable whether the deceased died testate or intestate. Limiting the provisions to cases of testacy would mean that people could defeat disinheritance claims by their close relatives by the simple expedient of giving away most of their property while alive and then dying intestate.

4.7 Only lifetime transactions that were outright gifts or had a substantial gift element should be caught by the anti-avoidance regime, subject to a "small gift" exemption. These would include transactions that took effect on death, such as nominations, life policies and special destinations. Where the deceased had sold property for its full value, the estate would have suffered no diminution of value so that a claim by a close relative would not have been impaired.<sup>6</sup>

4.8 It would be competent for a person to renounce in advance the right after the deceased's death to require a lifetime gift made by the deceased to be taken into account.

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<sup>4</sup> Family Law (Scotland) Act 2006, s 29, but we propose (Proposal 17, para 3.75) that an award could be made out of testate estate too.

<sup>5</sup> Paras 4.25-4.35.

<sup>6</sup> S 18(3) of the Family Law (Scotland) Act 1985 protects purchasers in good faith.

This would be in line with legal rights where spouses, civil partners and issue can currently discharge their right to claim.<sup>7</sup> Thus for example, a man could make over his business to his daughter. The agreement of his wife and son to this transaction would bar them from requiring its value to be taken into account in assessing the amount of any disinheritance claims they made after his death.

4.9 We set out the arguments in principle for and against anti-avoidance schemes before considering what form a Scottish scheme might take. It has to be recognised that no scheme will be completely effective unless the legislation were to be extremely complex. We think that any scheme should to be fairly simple and confine itself to tackling the obvious avoidance steps that people might take.

**4.10 Arguments in favour of anti-avoidance provisions** Where rules of law set out to protect people from disinheritance, that protection should be capable of withstanding attempts to circumvent it. There is little value in having protective rules which can be easily evaded. In particular, it makes a mockery of the law if protection from disinheritance can be avoided by such a simple and obvious device as an *inter vivos* transfer of property to trustees with the reservation of a liferent. The strength of this argument increases when the protective provisions in question are modern, newly enacted and in line with public opinion, rather than legal rights which may be perceived as outdated and unfair.

4.11 As far as spouses and civil partners are concerned, section 18 of the Family Law (Scotland) Act 1985 protects their claims for financial provision on divorce or dissolution from transactions which defeat or diminish their claims. Transactions within the period of five years before the divorce or dissolution can be set aside or varied. Similar protection should be available where the marriage or civil partnership is ended by the death of one of the parties. On the other hand it can be argued that death and divorce are not the same, the interested parties are not the same, and items of property such as pension rights which form a major part of matrimonial property are not part of an estate on death.

4.12 Section 18 also covers alimentary claims by children against living parents. Our proposed protection from disinheritance for dependent children takes the form of a quasi-alimentary claim against a deceased parent's estate which would replace aliment *jure representationis*. It would be anomalous if there was protection for lifetime claims but none for post-death claims.

4.13 Most of the other jurisdictions we have studied have some kind of anti-avoidance provisions. It is interesting to note that in Australia the National Committee for Uniform Succession Laws has recommended that those states and territories which do not have anti-avoidance provisions should adopt those in force in New South Wales.<sup>8</sup>

**4.14 Arguments against having anti-avoidance provisions** Legitimate and sensible financial planning transactions or inter-generational wealth transfers may be affected. The force of these arguments depends on how far back before death transactions remain challengeable. Most schemes, apart from that in France, have a period of only a few years.

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<sup>7</sup> See paras 3.49-3.52 (spouses and civil partners), and 3.109 (children).

<sup>8</sup> National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper No 28 (1997), p 93 and Queensland Law Reform Commission, Report No 58 (2004), pp 11 - 41.



4.15 Anti-avoidance provisions may be viewed as being too great an interference with an owner's freedom to dispose of property during life. As the Law Reform Commission of British Columbia said, the function of the rules of succession:

"is to distribute what remains of the testator's estate after his death, not to remedy any injustices which may have occurred during his lifetime".<sup>9</sup>

4.16 Anti-avoidance provisions complicate the law and make the administration of estates more difficult. However, a simple provision notionally augmenting the estate by gifts made by the deceased within a short period before death would add little to the length of any succession statute. Moreover, executors are already under a duty to investigate for inheritance tax purposes whether the deceased made any substantial lifetime gifts within seven years prior to death. At this stage we ask for views on the principle of introducing an anti-avoidance scheme.

**39. Should there be new legislative provisions protecting claims by close relatives against the deceased's estate from being defeated or diminished by gratuitous lifetime transactions made by the deceased within a specified period prior to death?**

#### **Form of anti-avoidance scheme if introduced**

4.17 The anti-avoidance schemes in other jurisdictions that we have looked at vary in their complexity and sophistication. But they share the basic concept of augmenting the estate by property gifted by the deceased while alive, including will substitutes such as nominations or special destinations.<sup>10</sup> Claims by close relatives are then quantified by reference to the value of the augmented estate and may have to be paid, wholly or partly, by the *inter vivos* donees or recipients.

4.18 We have considered and rejected introducing a court-based scheme modelled on section 18 of the Family Law (Scotland) 1985. In Part 3 we expressed the view that rule-based systems were to be preferred over discretionary court-based systems for quantifying the disinheritance claims of surviving spouses or civil partners and adult children. We thought that rule-based systems were more certain and predictable. Moreover the courts are not routinely involved in succession as they are in divorce. Disinheritance claims by cohabitants are assessed by the courts and we propose a similar route for dependent children. Even here we consider that they should base the award on the value of the augmented estate whose value would be calculated in accordance with fixed rules and apportion any award between the donee and the estate.<sup>11</sup>

4.19 Our preference is for a simple rule-based scheme where the value of any gift made by the deceased within a specified period before death is notionally added to the value of the estate. The relative's disinheritance claim is calculated by reference to the value of the augmented estate and apportioned pro rata between the estate and the gift. The donee then comes under a personal obligation to pay the rateable proportion of the claim to the executors to enable them to settle the relative's claim. The following example illustrates the proposed scheme:

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<sup>9</sup> *Report on Statutory Succession Rights*, LRC 70, 1983, p 39.

<sup>10</sup> Eg, Uniform Probate Code, see para 3.32 above.

<sup>11</sup> They would then have a discretion in allocating the estate portion of the award between the beneficiaries.

A married man dies survived by a widow, a son and a daughter. He bequeaths his whole estate worth £600,000 to his son. Shortly before he died he gave his daughter property to the value of £300,000. His augmented estate for legal share is:

Testamentary estate	£600,000
Lifetime gift	£300,000
Total	£900,000

His widow claims legal share which under our proposals would be 25% of what she would get on intestacy. Her intestate share would be £600,000 (£300,000 plus half of the remainder) so that her legal share amounts to £150,000. This is taken rateably from the estate and the gifted property, ie £100,000 from the estate and £50,000 from the gift. The daughter is therefore liable to pay her father's executors £50,000.

4.20 We do not favour a scheme that reduces or sets aside the gifts themselves. The benefit in increased effectiveness of the anti-avoidance scheme would be more than offset by the uncertainties generated by past transactions being liable to be set aside at some future date; the so-called "social evil of insecure titles".<sup>12</sup> Reduction can create difficulties not only for the donees but also for their successors in title, particularly in relation to heritable property registered in the Land Register. Reduction would enable property to be recovered from a third party to whom the original donee had given it. A mere personal obligation on the original donee does not enable recovery from the third party, but problems arise only if the original donee has insufficient assets to meet the obligation. However, the executors could sequestrate the original donee's estate and the trustee in sequestration could then recover the gifted property from the third party as it would have been a gratuitous alienation.<sup>13</sup>

4.21 Only gifts made by the deceased within a specified period before death would be subject to the anti-avoidance regime. The time period in other jurisdictions varies: six years in England and Wales, three years in Ireland and either one or three years depending on the transaction in New South Wales. Too long a period exposes donees to potential liability for many years and may prevent them dealing with their property as they would wish to do. A long period increases the investigations that the executors would have to carry out in order to discover whether relevant lifetime gifts had been made. On the other hand too short a period makes the anti-avoidance scheme easy to circumvent. We tend to think that a period of two years strikes the right balance between these competing considerations.

4.22 We think that there should be an exception for modest gifts as the mischief the anti-avoidance scheme is aimed at is the defeat or substantial diminution of disinheritance claims by means of lifetime gifts. The exemption could either take the form of an annual monetary limit of say £5,000, as is done for inheritance tax, or an exemption for birthday, Christmas or other conventional gifts and charitable donations that are reasonable in amount, which is the formula used for gratuitous alienations in section 34 of the Bankruptcy (Scotland) Act 1985. The latter seems fairer as what is reasonable would be judged against the size of the estate. Gifts totalling £10,000 over the two year period by a wealthy person would barely affect the

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<sup>12</sup> New South Wales Law Reform Commission, *The Testator's Family Maintenance and Guardianship of Infants Act 1916* (LRC 28, 1977), p 72.

<sup>13</sup> Bankruptcy (Scotland) Act 1985, s 34.

size of the estate, but the same gifts by a poor person would result in little or no estate being left. We envisage that litigation about what constituted reasonable gifts would be very rare.

4.23 To elicit views on the difficult issues raised in the previous paragraphs we ask the following questions:

40. **If anti-avoidance provisions are to be introduced, should the scheme impose a personal liability on a donee to pay to the deceased's executors a rateable proportion of a close relative's claim attributable to the gift?**
41. **Should the specified period be two years? If not, what would be a suitable period?**
42. **Should there be an express exemption for birthday, Christmas or other conventional gifts and charitable donations that are reasonable in amount?**

4.24 **Possible refinements** A pure rule-based scheme which imposed liability in respect of all substantial gifts might lead to harsh results. It would fail to distinguish between gifts made with the express intention of defeating disinheritance claims and gifts for a just and reasonable purpose. An example of the latter would be a gift by the deceased to a child to meet necessary medical expenses arising out of an accident abroad. Also the donee may find it difficult to pay the imposed liability, as could happen where the donee had used the gift to buy a house or business and had no other readily realisable assets. Yet another source of unfairness would arise where the value of the gifted property decreased substantially between the date of the gift and the time when the liability to pay materialised. All these points could be met by entitling donees to apply to the court for their liabilities under the scheme to be decreased or cancelled. However, it would not be easy to limit the circumstances in which an application could be made. Having criteria that were too generous or vague would risk applications being made in so many cases that the advantages of a rule-based scheme were destroyed. We ask the following question:

43. **Should donees be entitled to apply to the court for their liability under a rule-based anti-avoidance scheme to be decreased or cancelled by a court where the liability would lead to undue hardship in the circumstances?**

## 2). Collation *inter liberos*

### The present law

4.25 Under the doctrine of collation *inter liberos* a person who claims legitim from a deceased's intestate or testate estate can be required by others claiming legitim to add to the legitim fund *inter vivos* gifts of a certain type made by the deceased to that person so that the fund available for distribution is increased by the amount of those gifts. The recipients of the gifts are then required to abate their shares of the increased legitim fund by the amount of the gifts. Collatable gifts are usually termed advances because the origin of the doctrine is that a lifetime gift of a certain type was merely an advance payment from the portion of the moveable estate reserved to the issue as legitim.

4.26 Only certain advances require to be collated:

"The advances which must be collated are limited to those which affect the legitim fund. Thus they do not include payments in discharge of a parent's natural duty of maintenance and education of his child, nor do they include payments by way of remuneration for services which arise out of an onerous contract. Loans made to the legitim claimant are not advances to be collated under this doctrine, for they are due to the deceased's executor and form part of the deceased's gross estate from which the legitim fund is computed. Advances made out of the deceased's heritage are not subject to collation *inter liberos*, because they do not directly affect the moveable fund from which legitim is taken, but payments to the child to permit the child to purchase a house or business premises clearly would be included. Testamentary provisions, as distinct from *inter vivos* advances, need not be collated, as they do not affect the legitim fund. Such testamentary provisions, in so far as they are moveable, are paid out of the dead's part which is what is left after legal rights and of which the deceased was completely free to dispose. In any event, if the beneficiary of such a testamentary provision accepts it, he cannot also claim legitim unless there was a partial intestacy, and, if he is not a claimant for legitim, no one can require the collation of advances made to him. Finally even if *inter vivos* advances of a type otherwise appropriate for the operation of this doctrine have been made, the donor may expressly or impliedly have indicated that the recipient's right to legitim is to be unaffected thereby.

The typical examples of advances which may have to be collated in securing the equitable division of the legitim fund are advances to set the recipient up in trade, for a marriage portion or for settlement in a station in life."<sup>14</sup>

4.27 The following examples illustrate the operation of collation:

- (i) A man dies intestate, survived by a wife, a daughter and two sons. He leaves the following estate:

The matrimonial home worth	£200,000
Furniture and plenishings worth	£20,000
Other moveable property worth	£177,000
Total	£397,000

In satisfaction of her prior rights, the widow takes the house, its furniture and plenishings and the cash sum of £42,000. This leaves moveable estate of £135,000. Since there are both spouse and issue, a third of this, £45,000, is available as legitim. The widow takes another third as her legal rights and the final third is taken by the children as heirs on intestacy. When his daughter married, the deceased made a collatable *inter vivos* gift to her of £12,000. In order to take her legal rights the daughter must collate the gift. The gift is notionally added to the legitim fund, increasing it to £57,000. Each child is therefore entitled to £19,000, being a third of £57,000. However, the gift of £12,000 is set against the daughter's share so that she takes only £7,000 from the fund. The end result is as follows:

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<sup>14</sup> *Meston*, pp 62-63.

Widow: House, furniture and plenishings and £87,000 (£42,000 plus £45,000)

Daughter: £22,000 (£7,000 plus £15,000).

Each son £34,000 (£19,000 plus £15,000).

- (ii) The facts are the same as above, except that the gift to the daughter is £30,000. If £30,000 is notionally added to the legitim fund, the fund increases to £75,000. Each child would therefore be entitled to £25,000. However, if the gift of £30,000 is set against the daughter's share, it means that she would have to pay £5,000 into the fund. In practice the daughter would renounce her share of legitim in order to avoid this. The sons would take their one third share of the original legitim fund (£45,000), that is to say £15,000 each. The remaining £15,000 of the fund would be added to the free estate of £45,000, making £60,000 in total. The end result, assuming the daughter renounces her legitim, is as follows:

Widow: House, furniture and plenishings and £87,000 (£42,000 plus £45,000)

Daughter: £20,000

Each son £35,000 (£15,000 plus £20,000).

4.28 Where legitim is claimed by virtue of representation under section 11(3) of the Succession (Scotland) Act 1964, the remoter descendant claiming by virtue of representation is under a like duty to collate "any advances made by the deceased to him, and the proportion appropriate to him of any advances so made to any person through whom he derives such entitlement, as if he had been entitled to claim such legitim otherwise than by representation." The meaning of the words "proportion appropriate" in this context is not clear. This can create difficulties where all the children have predeceased and only the grandchildren claim legitim which is distributed among them per capita. Consider this example: The deceased is survived by five grandchildren; one of them the son of a predeceasing son and the other four, the daughters of a predeceasing daughter. The son received a collatable *inter vivos* gift of £10,000. It is not clear whether the grandson requires to collate the whole £10,000 (since he is the sole representative of his father to whom the money was given),<sup>15</sup> or only £4,000 (on the view that his father, had he survived, would have required to collate £10,000 in order to obtain half<sup>16</sup> the legitim fund so the grandson should only have to collate £4,000 in order to obtain a fifth<sup>17</sup> of it).

### Proposals for reform

4.29 The purpose of collation is to ensure equality between issue claiming legitim. It operates only if there is more than one claimant of legitim. If only one child is eligible to claim legitim, he or she need not collate any advances. Similarly, if only some of the children claim legitim, those not claiming legitim cannot be required to collate advances

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<sup>15</sup> This is the view taken in *Meston*, p, 187.

<sup>16</sup> The legitim fund would have been divided equally between the son and the daughter (or her issue if she predeceased).

<sup>17</sup> Since both children have predeceased the legitim fund is divided equally among the five grandchildren.

made to them.<sup>18</sup> Moreover, collation can be avoided by renouncing legitim yet the child who renounces gets to share the renounced portion as it falls into the free estate as illustrated by the second example in paragraph 4.27 above. Conversely, if one child receives substantial *inter vivos* advances, but not being provided for in the will, claims legitim, that child does not have to collate the advances if the other children are content with the terms of the will and do not claim legitim. These other children could claim legitim too, thus forcing the claimant to collate or withdraw. But if their legacies are large, it may not be advantageous for them to reject their legacies and claim legitim. Even if it is financially advantageous the other children might not wish to create family strife by upsetting their parent's will.

4.30 Collation is confined to issue and legitim whereas the problem of succession rights being defeated or diminished by way of *inter vivos* gifts is a more general one. If the issue of *inter vivos* gifts is to be tackled at all then arguably it should be done by means of a more general anti-avoidance scheme such as we put forward in Proposals 40 to 43 above. Nevertheless a suitably reformed collation scheme might be thought to be useful if a more general anti-avoidance scheme is not favoured.

4.31 If collation *inter liberos* is to be retained we think it should be expanded into a more general scheme for promoting equality amongst children who are heirs on intestacy or claimants for legal share. Under our proposals in Part 3 legitim from testate estates might be replaced by an alimentary claim limited to dependent children. If these were implemented collation *inter liberos* would simply disappear from the law along with the rules of legitim.

4.32 We suggest the following scheme for intestacy:

- Any child claiming a share should have to add notionally all lifetime gifts (whether of heritable or moveable property) made by the deceased, other than Christmas, birthday and other conventional gifts of a reasonable amount, to the share of the deceased's estate to be shared by the children.
- Each child would then get a share of the augmented estate but have to impute the value of his or her gift.
- Where issue of a predeceasing child claim legitim and that child had received a gift from the deceased, the full value of the gift should have to be collated in calculating the amount due to the issue.

The following example illustrates it:

A woman dies intestate leaving a husband, a son and a daughter. Her estate is worth £400,000. When her daughter married she gave her £20,000 and she gave her son £10,000 to help him buy a house. Under our proposed formula for intestacy the portion of the estate going to the children would be £50,000, the widower getting £350,000. The gifts have to be added in, making the children's share £80,000, of which each is entitled to one half, ie £40,000. But the son must impute £10,000 so he receives £30,000 while the daughter must impute £20,000 so she receives £20,000. Without collation each would receive £25,000. The widower's share has not been affected as collation is designed only to promote equality amongst children.

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<sup>18</sup> *Coat's Trs v Coats* 1914 SC 744.

4.33 In the example above if the son had received a much larger gift of £80,000 he would have to impute more than he would receive from the estate. He should be able to renounce his rights on intestacy and his share should fall to the daughter as follows:

The children's share of the estate is £50,000 but the gifts totalling £100,000 (son £80,000, daughter £20,000) increase this to £150,000, making the shares £75,000 each. The son can get this only by imputing £80,000 so he will disclaim and keep his gift. The daughter therefore takes the whole of the £50,000 children's share.<sup>19</sup>

4.34 Under our proposals if all children are to continue to be able to claim fixed shares if disinherited, their legal share will be 25% of what they would have got on intestacy. This means that the collation scheme for intestacy could be applied to legal share. But not claiming legal share to avoid collation would not increase the amount of legal share claimable by other children.<sup>20</sup>

4.35 Our tentative preference at this stage is for a general anti-avoidance scheme that takes *inter vivos* gifts into account which would supersede collation; and if no general scheme is to be introduced, then to abolish collation rather than reform it. It seems somewhat unprincipled to confine taking account of lifetime gifts to children. But collation has the advantage over a general anti-avoidance scheme in that it does not require the executors to demand money from lifetime donees. To elicit views we ask the following question:

**44. If no general anti-avoidance scheme is to be introduced should collation *inter liberos* be reformed along the lines suggested or should it be abolished?**

B: TIME LIMITS

### **The present law**

4.36 It is generally accepted that prior rights and legal rights prescribe twenty years from the date of the deceased's death. The rights are expressly excluded from the operation of the five years prescription by para 2(f) of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"); since they do not appear to be listed as imprescriptible in Schedule 3 to the 1973 Act it would seem to follow that they are subject to the twenty years prescription.<sup>21</sup> This was the position prior to the enactment of the 1973 Act.

4.37 The right to a legacy and the right to succeed as heir in the case of an intestacy are not mentioned expressly in the 1973 Act. They are not listed in para 1 of Schedule 1 and are therefore not expressly made subject to the five years prescription: conversely, they are not expressly excluded from the five years prescription by being listed in para 2 of Schedule 1. In these circumstances it is thought that as a matter of principle they should also prescribe twenty years from the date of the deceased's death unless they are listed as imprescriptible in Schedule 3. Like prior rights and legal rights, the right to a legacy and the right to succeed as an heir on intestacy are not referred to expressly in that list.

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<sup>19</sup> It makes no difference to an only child's share whether or not he or she collates.

<sup>20</sup> This is the existing law for post-death renunciations of legitim, see also Proposal 31 above.

<sup>21</sup> Prescription and Limitation (Scotland) Act 1973, ss 6 and 7, Sch 1 para 2(f) and Sch 3. See *Johnston*, para 6.64.

4.38 However, Schedule 3 paragraph (e) provides that the following are imprescriptible:

"any obligation of a trustee-

(i) to produce accounts of the trustee's intromissions with any property of the trust;

(ii) to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was a party or was privy;

(iii) to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use."

4.39 For these purposes, trustee includes an executor.<sup>22</sup> In relation to para (e)(i), it appears that it is only the executor's obligation to produce accounts of his intromissions which does not prescribe as opposed to his obligations to pay a legacy or transfer property to an heir on intestacy.<sup>23</sup> Para (e)(ii) only applies when an executor was a party or knew about a fraudulent breach of trust. Thus for example if an executor deliberately withheld a legacy from the rightful beneficiary, the right to sue the executor for fraud does not prescribe: but this is different from being able to demand payment of the legacy. Moreover, para (e)(ii) only applies when the executor has been dishonest. If a legacy has not been paid to the rightful beneficiary, the right to sue the executor in delict or in debt is not imprescriptible and will prescribe after five years<sup>24</sup> from the date of the executor's breach of duty.

4.40 Para (e)(iii) applies when the executor has trust property in his possession or has appropriated such property to his own use. The executor does not have to have acted fraudulently but the property must be in his possession or have been appropriated to his own use. If a legatee or heir on intestacy could be regarded as a person entitled to trust property then it would appear that this provision applies where an executor has not paid a legacy or has not distributed the intestate estate to the deceased's heirs. And by the same reasoning, para (e)(iii) also applies to the non payment of prior and legal rights. Accordingly, contrary to the generally held view, the executor's duties to pay prior rights and legal rights would be imprescriptible as well as the duties to pay legacies and transfer the estate to the deceased's heirs on intestacy.

4.41 On the other hand, while treated as a trustee for some purposes, in *Jamieson v Clark* the Lord President (Inglis) opined<sup>25</sup>:

"An executor is not a trustee in the sense of being a depositary. A trustee has to hold as a depositary: not so an executor, who has to administer, not to hold. An executor must pay legacies and debts within a certain time, and is liable in interest if he does not. An executor is nothing else than a debtor to the legatees or next of kin. He is a debtor with a limited liability, but he is nothing else than a debtor; and the creditors of the deceased and the legatees who claim against him do so as creditors".

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<sup>22</sup> Prescription and Limitation (Scotland) Act 1973, s 15 incorporating the definition of trustee in s 2 of the Trusts (Scotland) Act 1921 as qualified by the Succession (Scotland) Act 1964, s 20.

<sup>23</sup> For full discussion see *Johnston*, paras 3.27-3.29.

<sup>24</sup> Prescription and Limitation Act 1973, s 6 and Sch 1 para 1(d) and (g).

<sup>25</sup> (1872) 10 M 399 at 405.



In other words, the executor's obligation to pay a legacy or transfer the intestate estate to an heir is a debt in which the heir or legatee is the creditor and the executor is the debtor ie it is a personal obligation and not a trust obligation. If that be the case it does not constitute an entitlement to trust property any more than any other debt for which the executor is liable and para (e)(iii) does not apply.<sup>26</sup> If this argument is accepted, an executor's obligation to pay a legacy or transfer the intestate estate to an heir will prescribe after twenty years. The obligations are not listed in paragraph 1 of Schedule 1 to the 1973 Act and are therefore not subject to the five years prescription: the fact that they are not expressly excluded from the five years prescription by being listed in paragraph 2 of Schedule 1 is not thought to be important in this context. As they are not imprescriptible obligations listed in Schedule 3, the obligations must be subject to the twenty years prescription in section 7 of the 1973 Act. This would bring the right to a legacy and the right to succeed as an heir on intestacy into line with prior and legal rights in that all would prescribe within twenty years.

4.42 In practice the difficulty is not so much the wrongful retention of the estate by the executor but rather the wrongful distribution of the estate. Any action by the rightful heir or legatee against a careless – but not fraudulent – executor prescribes after five years.<sup>27</sup> It is unclear whether the claim is one of reparation or debt. However, the rightful heir or legatee may have a claim against the persons who were enriched when the estate was wrongfully distributed. But this right to recompense (or restitution or repetition) is generated by the obligation to redress unjustified enrichment and prescribes five years from the date on which the defender was enriched.<sup>28</sup>

4.43 However, Schedule 3 paragraph (f) to the 1973 Act provides that *for the purposes of the twenty years prescription* the following is imprescriptible:

"(f) any obligation of a third party to make forthcoming to any person entitled there to any trust property received by the third party otherwise than in good faith and in his possession."

4.44 For reasons discussed above, a legatee or heir on intestacy may simply be a creditor of the estate and therefore not a person entitled to the trust property. If so, paragraph (f) will not apply. But even if it does, paragraph (f) does not apply if the third party received the property in good faith; nor does it matter that the transfer was not for value. Put another way, paragraph (f) only applies when the obligation to return the property is generated by the third party's bad faith ie by a wrong rather than by unjustified enrichment. Accordingly where a person receives a legacy by mistake but in good faith, the obligation to return the property still prescribes after five years.

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<sup>26</sup> *Johnston*, para 3.41.

<sup>27</sup> Prescription and Limitation (Scotland) Act 1973, s 6 and para 1(d) of Sch 1: this is, of course subject to the "knowledge" provision in s 11(3) of the 1973 Act. By s 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 and s 24(2) of the Succession (Scotland) Act 1964, an executor is not personally liable to a person entitled to an interest in an estate through a non-marital parent-child relationship or by virtue of adoption, where the executor had failed to ascertain such a relationship before distributing the estate provided he had no notice of the claim at the time of the distribution. In our 1990 *Succession Report*, we recommended (Recommendation 42) that an executor should not be liable for any error in distribution based on ignorance of the existence or non-existence of persons or their relationships, provided the executor acted in good faith and made such enquiries as a reasonable and prudent trustee or executor would make in the circumstances.

<sup>28</sup> Prescription and Limitation (Scotland) Act 1973, s 6 and para 1(b) of Sch 1. This is not subject to the "knowledge" provision in s 11(3) of the 1973 Act.

## Proposals for reform

4.45 There is little doubt that the current law on prescription of rights of succession is difficult and uncertain. In particular, there is no authority on whether the rights are subject to the twenty years prescription or are imprescriptible. After some hesitation, we have come to the view that the opportunity should be taken to clarify the law in this area. In practice the problem arises where the estate has been distributed and owing to the negligence of the executor a legatee or heir on intestacy has been omitted. In these circumstances any action for reparation against the executor or for recompense against the persons who have wrongly received the property will prescribe within five years. In these circumstances, the fact that the right to claim a legacy or legal rights or prior rights or a share of the intestate estate for a period of twenty years after the death of the deceased is of theoretical rather than practical significance.<sup>29</sup> It is our provisional view that prescriptive period for the exercise of the substantive right should mirror the prescriptive period for the exercise of remedies for infringement of these rights by executors and third parties viz five years. Accordingly we think that these rights should prescribe under section 6 of the Prescription and Limitation (Scotland) Act 1973. Section 11 provides that for reparation claims time does not run against a claimant who is unaware of the right to claim or could not have with reasonable diligence been so aware. This "knowledge provision" would apply to succession claims if they are correctly characterised as being actions based on reparation but as indicated in paragraph 4.42 above this is somewhat uncertain. In order to clarify matters we think it should be expressly applied. Section 6(1) provides that prescription will be interrupted by a relevant claim being made and section 8 defines a relevant claim in terms of legal proceedings. We think succession claimants should not be forced into litigating merely to preserve their rights and consider that making a claim in writing against the executors should also interrupt prescription. However, we think that the obligations of fraudulent trustees and trustees who have acted *in rem suam* should continue to be imprescriptible.

4.46 We have recommended that the prior rights of a spouse or civil partner should be abolished. Moreover their legal rights should be replaced by a right to claim a fixed share of the deceased's estate, the right to legal share. This right would vest in the surviving spouse or civil partner at the date of their spouse's or civil partner's death. This means that the right forms part of the patrimony of the surviving spouse or civil partner and can be claimed by their executor if they should die before successfully doing so. However, we are strongly of the view that there should be a time limit within which the surviving spouse or civil partner - or their executor - should elect to make such a claim. Our initial view is that like our recommendations in respect of the right to claim a legacy and the estate due to an heir on intestacy, the right to claim legal share should prescribe five years after the date of the deceased's death ie should prescribe under section 6 of the Prescription and Limitation (Scotland) Act 1973, subject to the modifications in the previous paragraph.

4.47 Similarly, if children are to retain a right to claim legal share, this should also prescribe under section 6 of the 1973 Act. It should be noticed that by section 6(4)(b) any period during which the creditor is a child under the age of 16<sup>30</sup> is not reckoned as part of the prescriptive period. But if the only claim is to be that of a dependent child for aliment, then it is our preliminary view that the child should be able to make a claim for as long as the child

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<sup>29</sup> *A fortiori* this is the case if some succession rights were imprescriptible.

<sup>30</sup> Age of Legal Capacity (Scotland) Act 1991, s 1(2).

is an alimentary creditor ie until he reaches the age of 18 or 25 if reasonably and appropriately engaging in higher education or training.

4.48 In relation to a surviving cohabitant's right to claim financial provision from the deceased cohabitant's net estate, we are content with the current time limit of six months from the date of the death.<sup>31</sup>

4.49 Accordingly we ask:

45. **Do you agree with our provisional view that the right to claim a legacy and the right to claim a share of an intestate estate should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?**
46. **Do you agree with our provisional view that the right of a surviving spouse or civil partner to claim legal share should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?**
47. **Do you agree with our provisional view that if a child is to have a right to claim legal share that right should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?**
48. **Do you agree with our provisional view that if a dependent child should have a right of aliment from a parent's estate, the child should be able to exercise that right until the child ceases to be an alimentary creditor?**
49. **Do you agree with our provisional view that the time limit for bringing a claim by a surviving cohabitant for financial provision out of the deceased cohabitant's net estate should remain at six months?**

C: PRIVATE INTERNATIONAL LAW

## Introduction

4.50 This part considers the private international law of succession so far as relevant to the proposals in this Paper. It also identifies the difficulties with the current law and makes a number of limited proposals. In our *Succession Report* we made two minor recommendations in areas not covered by the draft *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons* concluded in 1989.<sup>32</sup> The

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<sup>31</sup> Family Law (Scotland) Act 2006, s 29(6).

<sup>32</sup> Capacity to make or revoke a will should be determined by the law of the testator's domicile at the time of making or revoking the will (Recommendation 67), and the effect of the terms of a title to moveable property

United Kingdom has not acceded to the Convention, and as yet it has not entered into force. There are no current plans to accede to the Convention.

4.51 The private international law of succession is currently the subject matter of a European Union legislative initiative to harmonise the laws of Member States in this area. The European Commission produced a Green Paper on *Succession and Wills* in March 2005 which opened a broad-based consultation process on the form that harmonised private international law rules of succession should take.<sup>33</sup> The Green Paper identified a "clear need for the adoption of harmonised European rules" based on the "growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries ... [creating] a major source of complications in succession to estates".<sup>34</sup>

4.52 The Commission has recognised that harmonisation of the rules of substantive law in Member States is "inconceivable" and therefore the Green Paper is concerned only with private international law rules.<sup>35</sup> Nevertheless, the Green Paper is very wide-ranging, covering: applicable law, jurisdiction, recognition and enforcement (of judicial and extra-judicial documents) in matters relating to wills and succession and administration of estates, mutual wills, protection from disinheritance and trusts. It also canvasses the matter of a European Certificate of Inheritance and the registration of wills. It is proposed that the resulting legislation should apply not only to intra-Community international situations but also to those involving non-EU member states.

4.53 At this stage,<sup>36</sup> it is impossible to assess the scope of any future European legislation or indeed the specific impact it might have on Scots law. For this reason, we consider that it would not be desirable to make any comprehensive changes to Scots private international law now. Nevertheless, we are proposing some changes which clarify the current law, take account of our substantive proposals in Part 2 and 3 and address gaps in the rules of jurisdiction.

## 1). Jurisdiction

### The general rules

4.54 The rules of civil jurisdiction for Scotland are generally found in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"). These rules are based on, but not identical to, those contained in the Council Regulation 44/2001 on Jurisdiction and the

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which purports to pass property on a person's death should be determined by the law of the deceased's domicile at death (Recommendation 68).

<sup>33</sup> European Commission's "Green Paper on Wills and Succession" COM (2005) 65 Final, published 1 March 2005. Responses to the Green Paper can be found on the European Commission's website: [http://ec.europa.eu/justice\\_home/news/consulting\\_public/successions/news\\_contributions\\_successions\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions_successions_en.htm). The deadline for responses expired on 30 September 2006.

<sup>34</sup> Green Paper, p 3. The difficulties in this respect had been commented on before then, see for example D Hayton, "Cross Border Estates" 1994 PCB 3 168; 1994 PCB 4 250 and 1994 PCB 5 329.

<sup>35</sup> Green Paper, p 3.

<sup>36</sup> A legislative proposal is foreseen for 2008. The Law Societies Joint Brussels Office, *Brussels Agenda*, January 2007 available from the Law Society of Scotland's website at [http://www.lawscot.org.uk/Members\\_Information/international/brussels\\_office/brussels\\_agenda.aspx](http://www.lawscot.org.uk/Members_Information/international/brussels_office/brussels_agenda.aspx).

Recognition and Enforcement of Judgments in Civil and Commercial Matters.<sup>37</sup> As *Anton with Beaumont* note, although "wills and succession" are excluded from the scope of the Regulation, they are not excluded from Schedule 8; therefore, in substance, jurisdiction in matters of succession is governed by Schedule 8.<sup>38</sup>

4.55 The general rule in Schedule 8 is that "persons shall be sued in the courts for the place where they are domiciled". Therefore an action can be raised in the Scottish courts against an executor who is domiciled in Scotland.<sup>39</sup> But, where an executor is not domiciled in Scotland, it follows that the beneficiaries will have to sue the executor abroad, even if all other aspects of the case are most closely or solely connected with Scotland, unless the action can be brought within any of the special rules of jurisdiction. We think it would be extremely difficult to bring an action against an executor for payment under any of the special rules of jurisdiction, unless there was a testamentary writing setting up a proper trust.<sup>40</sup>

4.56 We now turn to consider a number of the special rules which could potentially be founded on in matters of succession.

4.57 Under rule 2(a) where the executor has no fixed residence, the executor may be sued in a court within whose jurisdiction he or she is personally cited.

4.58 Under rule 2(c) an action in a matter relating to a delict may be raised in the courts for the place where the harmful event occurred or may occur. We do not think that a court would regard most actions for payment against an executor where the executor has refused to make payment as delictual in nature.<sup>41</sup>

4.59 Under rule 2(g) an action against a trustee of a trust domiciled in Scotland may be raised in the Court of Session or in an appropriate sheriff court.<sup>42</sup> Some wills do set up *mortis causa* trusts to administer the truster's estate after his or her death. This ground of jurisdiction will probably apply where in his will a testator expressly sets up a proper *mortis causa* trust. Where the testator does not do so, the question arises whether an executor-nominate is acting as a trustee or simply in a fiduciary capacity. Section 2(b) of the Trusts (Scotland) Act 1921 defines a "trustee" as including an executor-nominate, and arguably therefore "trust" should be construed accordingly. If so, this gives rise to the possibility that rule 2(g) applies to all executors whether or not the relevant will expressly sets up a trust.

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<sup>37</sup> [2001] OJ L12/1, known as Brussels I. This regulation superseded the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

<sup>38</sup> *Anton with Beaumont*, pp 668-669. There are however certain exceptions, a notable one being commissary proceedings (see s 21(1) and Sch 9, and *Anton with Beaumont*, 668). In addition, the rules in Schedule 8 will not apply where legislation confers jurisdiction on a court to hear a particular matter on specified grounds (see for example s 29(5) of the Family Law (Scotland) Act 2006, at para 4.67). In relation to our proposal for new statutory alimentary claims by dependent children against their parents' testate estates, see paras 4.70-4.74 below.

<sup>39</sup> It should be noted that the concept of domicile used by the 1982 Act is different and distinct from the Scots common law concept of domicile. The domicile of individuals for the purposes of the 1982 Act is defined in s 42 of that Act and is based on "residence" and "substantial connection" with a state.

<sup>40</sup> See commentary on rule 2(g) relating to trusts below at para 4.59.

<sup>41</sup> An action might be based on delict where the executor had been negligent.

<sup>42</sup> A trust is domiciled in Scotland if Scots law is the system of law with which the trust has its closest and most real connection, Civil Jurisdiction and Judgments Act 1982, s 45.

4.60 In this context, it should be remembered that "wills and succession" are excluded from Council Regulation 44/2001 on which Schedule 8 of the 1982 Act is based. Indeed, the Explanatory Report on the Brussels Convention as amended in 1978 states:

"The expression 'wills and succession' covers all claims to testate or intestate succession to an estate. It includes disputes as to the validity or interpretation of the terms of a will setting up a trust, even where the trust takes effect on a date subsequent to the death of the testator. The same applies to proceedings in respect of the application and interpretation of statutory provisions establishing trusts in favour of persons or institutions as a result of persons dying intestate. The 1968 Convention does not, therefore, apply to any disputes concerning the creation, interpretation and administration of trusts arising under the law of succession including wills."<sup>43</sup>

Although it has been argued that the above quotation does not necessarily exclude testamentary trusts from the Convention unless "one focuses upon disputes concerning administration of trust *arising under the law of succession* as opposed to disputes arising under the law of trusts",<sup>44</sup> there is nevertheless a tension between the European legislation and the inclusion of testamentary trusts in the jurisdictional rules based on that legislation.<sup>45</sup>

4.61 Under rule 2(h) where the executor is not domiciled in the United Kingdom, the executor may be sued in the courts for the place where (i) any movable property belonging to him or her has been arrested or (ii) any immovable property in which he or she has any beneficial interest is situated.

4.62 Under rule 5(1)(a) in proceedings which have as their object rights *in rem* in immovable property, the courts for the place where the property is situated have exclusive jurisdiction. It is unlikely that a beneficiary or heir will be able to rely on this ground of jurisdiction in his or her claim against an executor for, say, a dwelling house under a legacy in a will or as a prior right. Such a claim is not a claim *in rem* but a personal one. In *Webb v Webb*,<sup>46</sup> the aim of the court proceedings in England was to obtain a declaration that a son held a flat in France for the exclusive benefit of his father and that in that capacity he was under a duty to execute certain documents which were necessary to convey ownership of the flat to the father, the European Court of Justice held that the proceedings did not concern rights *in rem*. It stated that:

"[I]t is not sufficient, for Article 16(1) [the equivalent provision in the now superseded 1968 Brussels Convention] to apply, that a right *in rem* in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right *in rem* and not a right *in personam* . . .

. . . [A]n action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action *in rem* within the meaning of Article 16(1) . . . "<sup>47</sup>

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<sup>43</sup> Professor Schlosser, 1979 OJ C59/71, para 52.

<sup>44</sup> D Hayton, "The Need for Harmonisation of Private International Law Rules on Succession – Topicality in view of the European Commission Green Paper" available on the European Commission's website at [http://ec.europa.eu/justice\\_home/news/consulting\\_public/successions/contributions/contribution\\_ls\\_appc\\_en.pdf](http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_ls_appc_en.pdf).

<sup>45</sup> Although of course "wills and succession" are not excluded from Sch 8 to the 1982 Act itself.

<sup>46</sup> C-294/92 [1994] ECR I-1717.

<sup>47</sup> *ibid*, para 14 and the ruling of the court.

Since a claim against an executor is to enforce a personal right it does not constitute proceedings which have as their object rights *in rem* in immovable property.

4.63 Under rule 2(i) in an action to assert, declare or determine proprietary or possessory rights in or over movable property, the defender may be sued in the courts for the place where the property is situated.<sup>48</sup> It is likely that this rule will be interpreted by Scottish courts in a similar way to rule 5(1)(a) above so that it only applies to claims which concern rights *in rem* in the movable property, but the position is unclear as there does not appear to be any case-law on the interpretation of this rule.<sup>49</sup> Even if beneficiaries or heirs were allowed to found a claim under this rule against an executor, they would also require to identify which item(s) of movable property their claim concerned and this may not always be possible. For example, where an estate has not been realised, and the testator has not directed that a monetary legacy be satisfied from a specific fund or other movable property, it is not possible to identify which movable property the legacy should be satisfied from. In that case, it is difficult to argue that the legatee is raising an action to assert a proprietary right in movable property as the property from which the right is being claimed cannot be identified. If a specific item of property can be identified it is also necessary that it is classified as movable, rather than immovable. Classification is performed by the *lex situs* and may differ from the classification used by that system for internal purposes: "Some items may be heritable (eg by destination) for the purposes of Scots private law, but still movable as opposed to immovable for the purposes of private international law."<sup>50</sup>

4.64 It can be seen from the above that there may be a serious jurisdictional gap if an executor of a Scottish estate is not domiciled in Scotland. Moreover, there is a tension between the exclusion of "wills and succession" by the Brussels Convention and subsequent Regulation and the potential inclusion of testamentary trusts within rule 2(g). Although these difficulties and uncertainties might be resolved if the United Kingdom opted into any new EU legislation on the matter, we think that the present difficulties are sufficiently serious to warrant the introduction of a new ground of jurisdiction. We are of the view that jurisdiction should be connected to the confirmation of the executor in Scotland. The law of the forum of the grant is treated as determining all questions in regard to the administration of assets recovered by virtue of that grant.<sup>51</sup> The executor should therefore be amenable to the jurisdiction of the Scottish courts – the courts best placed to declare and apply Scots law. Accordingly we propose that:

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<sup>48</sup> Note that this rule does not form part of either the 1968 Brussels Convention or Council Regulation 44/2001. Therefore, by virtue of Art 3 of the both the Convention and Regulation it cannot be applied to a person domiciled in a Member State party to the Convention or the Regulation.

<sup>49</sup> The rule seems to have been "designed to encapsulate in statutory form the common law rules relating to jurisdiction in proprietary and possessory actions in relation to moveable property within the jurisdiction". *Anton with Beaumont*, p 195. The cases cited at pp 195-196 deal principally with landlords' rights of hypothec and multiplepointings. A right of hypothec has been stated to be a real right (*Duncan v Lodiensky* (1904) 11 SLT 684, Lord Kinnear at 686). A multiplepointing is said not to create a personal jurisdiction against the claimants but a jurisdiction over the fund, *Anton with Beaumont*, pp 195-196.

<sup>50</sup> *Meston*, pp 132-133. *MacDonald v MacDonald* 1932 SC (HL) 79.

<sup>51</sup> *Scottish National Orchestra Society Ltd v Thomson's Ex* 1969 SLT 325, Lord Robertson at 327. But the distribution of the estate; prior rights, legal rights and the heirs on intestacy are governed by the law of Scotland including its rules of private international law, *Anton with Beaumont*, p 660.

50. **Where a person has been confirmed as an executor in Scotland that person may be sued in any matter relating to his or her powers and duties as an executor in relation to the estate confirmed to in the Court of Session or in the sheriff courts for the sheriffdom in which confirmation was granted.**

### **Cohabiting partners**

4.65 In Part 3 of this Paper, we proposed that section 29 of the Family Law (Scotland) Act 2006 ("the 2006 Act") under which a cohabitant is entitled to apply to the court for a discretionary award out of the deceased's net intestate estate should be extended to also apply to testate estates. Section 29(1) provides:

"This section applies where – . . .

(b) immediately before the death the deceased was –

(i) domiciled in Scotland . . . "

4.66 In addition, subsection (5) provides:

"An application under this section may be made to –

(a) the Court of Session;

(b) a sheriff in the sheriffdom in which the deceased was habitually resident at the date of death;

(c) if at the date of death it is uncertain in which sheriffdom the deceased was habitually resident, the sheriff at Edinburgh."

4.67 Raising an action under section 29 appears to involve two connecting factors – domicile and habitual residence – at least where the action is raised in the sheriff court. The drafting of section 29 is not altogether clear. The wording of subsection (1) implies that the requirement that the deceased dies domiciled in Scotland is a matter relating to competence and not jurisdiction. Section 29(1)(b) states that section 29 does not apply unless the deceased dies a Scots domiciliary. Thus a surviving cohabitant cannot raise his or her action *at all* unless the deceased dies domiciled in Scotland; if the deceased does not die domiciled in Scotland the matter of jurisdiction (or choice of court) does not arise. The interpretation that domicile is a matter of competence and not jurisdiction appears to be confirmed by the fact that the connecting factors of domicile and habitual residence are in different subsections. If this construction is correct, then provided the deceased died domiciled in Scotland, the action may be raised in a sheriff court in the sheriffdom in which the deceased was habitually resident, or if it is not known in which sheriffdom the deceased habitually resided, in Edinburgh Sheriff Court.<sup>52</sup> But there is no jurisdictional link for the Court of Session within the 2006 Act. For this reference has to be made to the jurisdictional

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<sup>52</sup> S 29(5) can therefore be said to confer "jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds" thereby falling within s 21(1)(a) of the 1982 Act and disapplying the jurisdictional rules in Sch 8.



rules contained Schedule 8 to the 1982 Act as regards the Court of Session.<sup>53</sup> It seems unlikely that this was the result intended by Parliament.

4.68 It is undesirable that the basis of the Court of Session's jurisdiction should be in doubt. We think that the legislation should be amended to provide a clear basis. Three options seem reasonable:

- Jurisdiction based on the confirmation of the executor in Scotland. This would bring actions raised by surviving cohabitants in the Court of Session into line with the general jurisdictional rule which we proposed above. If our interpretation of the current rule of jurisdiction applying to Court of Session actions above is correct, this suggestion would not change, but simply clarify the law.
- Jurisdiction based on the habitual residence of the deceased in Scotland. This would keep the jurisdictional basis of actions brought by surviving cohabitants to the Court of Session consistent with that of actions brought by them to the sheriff courts. This suggestion would have the effect of changing the law. However, we think that such a change is warranted in that it is not desirable for the basis of jurisdiction to differ depending on whether the action is raised in the Court of Session or the sheriff courts when the subject matter of the action is the same.
- Jurisdiction based simply on the domicile of the deceased in Scotland.<sup>54</sup> Under section 29, this would mean that domicile was both a matter of competence and jurisdiction so far as Court of Session actions were concerned.

4.69 Our provisional view is that the Court of Session should have jurisdiction to hear an action if *any* of these three grounds of jurisdiction is established. We accordingly make the following proposal:

- 51. There should be a new statutory provision to specify the jurisdictional basis or bases on which applications by surviving cohabitants for a discretionary award out of their deceased cohabitant's net intestate estate under section 29 of the Family Law (Scotland) Act 2006, or their deceased cohabitant's net testate estate under our proposals, may be brought in the Court of Session.**

**The Court of Session should have jurisdiction to entertain such actions if:**

**(a) the executor was confirmed in Scotland;**

**(b) the deceased was habitually resident in Scotland at the date of his or her death; or**

**(c) the deceased was domiciled in Scotland immediately before his or her death.**

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<sup>53</sup> Explained above at paras 4.54 to 4.63.

<sup>54</sup> There may be little practical difference between jurisdiction based on domicile of the deceased and that based on confirmation of the executor in Scotland since the general rule in Scotland is that the right to be executor is determined by the law of the deceased's domicile.

**If you do not agree with the above proposal, on which ground(s) do you think the jurisdiction of the Court of Session should be based?**

**Dependent children**

4.70 In Part 3 of this paper we proposed a new statutory scheme in terms of which dependent children would have an alimentary claim against their deceased parent's estate. An award would usually take the form of a lump sum payment. For the purposes of jurisdiction, the obligations on the deceased's estate under such a scheme would be viewed as maintenance obligations within the meaning of Council Regulation 44/2001<sup>55</sup> and thus the 1982 Act.<sup>56</sup>

4.71 The jurisdiction provisions of the Regulation, mirrored in Schedule 8 to the 1982 Act, so far as they relate to aliment, are as follows:

"... [P]ersons domiciled in a Member State shall ... be sued in the courts of that Member State."<sup>57</sup>

.... A person domiciled in a Member State may, in another Member State, be sued ... in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."<sup>58</sup>

4.72 Although the Regulation provides that it "shall not apply to ... rights in property arising out of .... wills and succession",<sup>59</sup> the European Court of Justice decision of *Van den Boogaard v Laumen*<sup>60</sup> suggests that the proposed scheme may be seen as imposing maintenance obligations and thus falling within the scope of the Regulation. *Van den Boogaard* concerned a reference by a Netherlands court to which a former wife had applied for enforcement of an English decree for ancillary relief ordering the transfer of certain property and the payment of a lump sum on divorce. The husband argued that the order of the English court concerned rights in property arising out of a matrimonial relationship (which are excluded from the scope of the Regulation) and not maintenance and therefore the Regulation was not applicable. The European Court of Justice disagreed, stating that:

"If this [the reasoning of the decision of the national court] shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance . . .

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<sup>55</sup> Art 5(2). Applicable only to intra-EU cases.

<sup>56</sup> s 20 and Sch 8, rr 1 and 2(e) apply to cases involving non-EU states. Note that proceedings concerning status are excluded unless they consist solely of proceedings of aliment (Sch 9, r 1); for intra-UK cases see s 16 and Sch 4 rr 1 and 3(b). The latter jurisdictional rules are very similar to those applying under the Regulation and Sch 8 of the Act as far as they relate to aliment.

<sup>57</sup> Art 2(1).

<sup>58</sup> Art 5(2).

<sup>59</sup> Art 1(2)(a).

<sup>60</sup> C220/95, [1997] All ER (EC) 517. Applied in *AB v CD and Bank of Scotland Trust Company (International) Limited* [2006] CSOH 200.

It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income."<sup>61</sup>

The court concluded that the English decree:

"... must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse's maintenance".<sup>62</sup>

4.73 Since it relates to financial provision on divorce this case differs from what is envisaged under the alimentary scheme we propose. However, it is easy to see that the court's reasoning could be applied to our proposal especially since the needs and resources of the children and beneficiaries would be taken into account.<sup>63</sup>

4.74 Applying the jurisdictional provisions of the Regulation quoted above, not only could executors (or the beneficiaries where the estate has been distributed) be sued in the Member State where they are domiciled, but the dependent child, as the "maintenance creditor", could also raise an action in the Member State of the child's habitual residence or domicile.<sup>64</sup> We do not think that these rules are unsatisfactory and even if they were it is not possible for the Scottish or UK Parliaments to change them unilaterally as they are a matter of European Union law.

## 2). Choice of law and *renvoi*

### General

4.75 Turning to choice of law,<sup>65</sup> Scots law adopts the scission principle.<sup>66</sup> Accordingly, succession to movable property is governed by the law of the deceased's domicile irrespective of where the property is situated whereas succession to immovable property is governed by the *lex situs* regardless of the deceased's domicile at the date of death.<sup>67</sup> Classification of property as movable or immovable is performed by the *lex situs* and may differ from the classification used by that system for internal purposes and from that used by the *lex fori* for its own internal purposes: "Some items may be heritable (eg by destination) for the purposes of Scots private law, but still movable as opposed to immovable for the purposes of private international law."<sup>68</sup>

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<sup>61</sup> *ibid*, at paras 22 and 23.

<sup>62</sup> *ibid*, at para 27.

<sup>63</sup> We are not aware of any European Court of Justice cases dealing with maintenance obligations arising out of succession rights.

<sup>64</sup> If the issue of maintenance is ancillary to status proceedings, eg proceedings for declarator of death or declarator of paternity or maternity, the court could hear the maintenance proceedings on the basis of its jurisdiction in the main action unless that jurisdiction is based on nationality.

<sup>65</sup> Unless otherwise stated the commentary on choice of law which follows assumes that a Scottish court has jurisdiction.

<sup>66</sup> Many European countries operate a unitary approach whereby the whole estate is governed by one law, the law of the deceased's habitual residence or nationality at death. The new alimentary provision for dependent children raises an important choice of law question and is dealt with below at paras 4.92 to 4.99.

<sup>67</sup> *Anton with Beaumont*, p 676.

<sup>68</sup> *Meston*, pp 132-133; *MacDonald v MacDonald* 1932 SC (HL) 79.

4.76 As a consequence of these rules, the "estate" of a Scottish domiciliary to which the Scots law of succession applies consists of the movables wherever situated and immovables situated in Scotland. No account is taken of immovables situated elsewhere.<sup>69</sup>

4.77 It is widely acknowledged that the scission principle leads to wide variations in the distribution of the estate depending on the location of the assets.<sup>70</sup> The difference in treatment between immovables and movables for the purposes of private international law would become even less defensible if, as we propose, the difference in treatment is abolished for Scots domestic law. However, we do not think that it would be desirable to undertake a review of the scission principle as part of this project. We suggest that such a review should be carried out along with The Law Commission for England and Wales and the Northern Ireland Law Commission unless the EU initiative<sup>71</sup> has produced uniform rules in this area which would apply within the United Kingdom.

4.78 Theoretically, the concept of *renvoi* is connected to identifying the applicable law but very rarely arises in practice. There are three accepted theories of *renvoi*: the internal law theory, the partial or single *renvoi* theory and the double *renvoi* or the foreign court theory. The operation of the theories is best illustrated by way of an example:

A UK national dies intestate domiciled in Scotland. He leaves a house in Italy in which his wife is ordinarily resident. The Scottish court would look to Italian law as the *lex situs* to determine the devolution of the house. Italian choice of law rules apply the law of the deceased's nationality to the question referring the question back to Scots law.

4.79 A Scottish court would apply Italian internal law as the *lex situs* under the internal law theory, Scots law as the law of the deceased's nationality under the partial or single *renvoi* theory (thus allowing the widow to claim prior rights in relation to the house in Italy), or, applying double *renvoi*, it would place itself in the position of the Italian court and ask which model of *renvoi* the Italian court would use. There is no Scottish authority on which of the various options would be selected.<sup>72</sup> This suggests that, at least in Scotland, the problem very rarely arises in practice. For this reason and in view of the European Union initiative mentioned above, we do not intend to make any proposals in relation to *renvoi*.<sup>73</sup> The following sections explore further the application of the choice of law rules to the current domestic law and our proposals for its reform in Parts 2 and 3.

## Intestate succession

4.80 **Spouses, civil partners and children** As the law stands, the prior right of the surviving spouse or civil partner to the deceased's interest in a dwelling house, being a right

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<sup>69</sup> Subject to the comments made in connection with s 29 of the Family Law (Scotland) Act 2006 at paras 4.87-4.89 below.

<sup>70</sup> *Meston*, p 133, and J H C Morris, "Intestate Succession to Land in the Conflict of Laws" (1969) 85 LQR 339. For judicial criticism of the scission principle see dicta of Browne-Wilkinson VC in the English case of *Re Collens* [1986] 2 WLR 919 at pp 923 and 925. See also the position in the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons which does not make the distinction between movables and immovables. See also our Consultative Memorandum No 71, para 6.3 for an example of how this distinction can lead to anomalous results.

<sup>71</sup> See para 4.51 above.

<sup>72</sup> See E B Crawford and J M Carruthers, *International Private Law in Scotland*, (2<sup>nd</sup> edn, 2006), ch 5.

<sup>73</sup> Unification of choice of law rules within the European Union would make *renvoi* superfluous between the member states.

to immovables, is exigible from a residential property situated in Scotland irrespective of the deceased's domicile.<sup>74</sup> Residential property situated furth of Scotland will be distributed according to the laws of that country. Where a Scottish court has no jurisdiction, this prior right may still be available against residential property in Scotland provided a foreign court seised of the matter applies the *lex situs*. Where section 8(2) of the Succession (Scotland) Act 1964 applies, for example where the dwelling house was also used by the deceased in connection with a business instead of the property the surviving spouse or civil partner is entitled to a cash sum equal to the value of the deceased's interest in the dwelling house.<sup>75</sup> Since the entitlement is *in lieu* of the dwelling house it remains a right to immovable property and is governed by the *lex situs*.<sup>76</sup> Similarly, the right of the surviving spouse or civil partner under section 8(1)(b) to a cash sum of £300,000 where the value of the deceased's interest in the dwelling house exceeds that amount, is thought to be classified as immovable on the basis that it is simply a provision placing an upper limit on the right to claim the dwelling house itself.<sup>77</sup>

4.81 The prior right under section 8(3) to furniture and plenishings applies only where the deceased is domiciled in Scotland since these assets are clearly movable.<sup>78</sup> Since the assets are movable a logical extension would be for the right to furniture and plenishings to be available to the deceased's survivor irrespective of where the items are situated, provided the deceased dies domiciled in Scotland.<sup>79</sup> However, it has been argued that, since section 8(3) applies only to "the furniture and plenishings of a dwelling-house to which . . . [section 8] applies" and since section 8 does not apply to dwelling-houses situated furth of Scotland (by virtue of the *lex situs* rule), the right under section 8(3) is only available against furniture and plenishings in Scotland.<sup>80</sup> But the same author opines that there is another possible interpretation of the statute:

"It could be argued that the requirement in s. 8(3) that the furniture and plenishings be in a house "to which this section" applies must be viewed solely in the context of s. 8(4) which provides, "This section applies, in the case of any intestate, to any dwelling-house in which the surviving spouse of the intestate was ordinarily resident at the death of the intestate". Section 8(4) does not in any way limit the international dimension of the claim: as a claim on the moveable estate of a deceased domiciled at death in Scotland, it continues to be available against his moveable estate, wherever situated."<sup>81</sup>

Unfortunately, there does not seem to be any authority for which is the correct approach, although it has been suggested that:

"Perhaps the balance of the sense of the statute suggests that the house must be in Scotland. . ."<sup>82</sup>

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<sup>74</sup> Provided the other conditions in s 8 of the Succession (Scotland) Act 1964 are satisfied, for example the surviving spouse or civil partner was ordinarily resident there.

<sup>75</sup> S 8(1)(a)(ii) and (2).

<sup>76</sup> *Meston*, p 134.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Anton with Beaumont*, p 675 and *Meston*, p 134.

<sup>79</sup> Indeed, this was the view taken in our Consultative Memorandum, *Some Miscellaneous Topics in the Law of Succession* (No 71, 1986), para 6.2(b).

<sup>80</sup> R D Leslie, "Prior Rights in Succession: The International Dimension" 1988 SLT (News) 105.

<sup>81</sup> *Ibid.*, p 106.

<sup>82</sup> E B Crawford and J M Carruthers, *International Private Law in Scotland*, para 18-13, fn 48.

4.82 The prior right to a cash sum under section 9 of the 1964 Act, being "borne by, and paid out of, the parts of the intestate estate consisting of heritable and movable property respectively", is a right out of both immovable and movable property. Where the deceased died domiciled in Scotland the cash sum can therefore be claimed out of movable property wherever situated and immovable property in Scotland. Conversely, if the deceased dies domiciled elsewhere, the whole cash sum can be claimed only out of immovable property in Scotland without reference to any part of the estate situated elsewhere.<sup>83</sup>

4.83 The choice of law rules explained at paragraphs 4.75 to 4.76 above also apply to the distribution of the free estate.

4.84 In Part 2 of this paper we proposed that where a person died intestate leaving a spouse or civil partner but no issue, the surviving spouse or civil partner should be entitled to the deceased's whole intestate estate. Accordingly, where the deceased died domiciled in Scotland the surviving spouse or civil partner would be entitled to all the movables wherever situated and the immovable property situated in Scotland. If the deceased did not die domiciled in Scotland, the surviving spouse or civil partner would only be entitled under Scots law to the immovable property situated in Scotland. However, the survivor may well have rights to the rest of the estate under the law of other jurisdictions.

4.85 We also proposed that where a person dies intestate survived by issue and by a spouse or civil partner, the spouse or civil partner would be entitled to the whole intestate estate if it is worth £300,000 or less. Any excess over £300,000 would be divided equally between the spouse or civil partner and the issue. This formula is simply a way of calculating the respective entitlements of the heirs which may be satisfied by payments of money or transfers of the assets of the estate and would therefore apply to the net value of the whole estate subject to Scots law.<sup>84</sup> Thus where the deceased died domiciled in Scotland the whole entitlement (£300,000 and half the balance of the estate) would be exigible from all movables wherever situated and immovable property situated in Scotland. Any immovable property in another jurisdiction would devolve in accordance with the law of that jurisdiction. Conversely, where the deceased did not die domiciled in Scotland, the whole entitlement would only be exigible from immovable property in Scotland.

4.86 This can lead to anomalous results. The operation of these choice of law rules on the proposed rights can be illustrated by the following examples:

- (i) A man dies intestate and domiciled in Scotland survived by his wife and his son and leaving the following estate:

A house in Scotland valued at	£600,000
Savings and investments worth	£380,000
A holiday cottage in Scotland worth	£120,000
Total	£1,100,000

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<sup>83</sup> M C Meston, "Prior Rights in Scottish Heritage" 1967 JLSS 401.

<sup>84</sup> The argument becomes even stronger if the sum of £300,000 is reduced by the value of the deceased's interest in any dwelling house which may pass to a spouse or civil partner by way of testamentary disposition. See paras 4.75-4.76 above for an explanation of the estate subject to Scots law.

Under our proposals the widow would receive £700,000 (£300,000 plus 50% of the balance of £800,000) and the son £400,000 (50% of the balance).

- (ii) A man dies intestate and domiciled in Scotland survived by his wife and his son and leaving the following estate:

A house in Scotland valued at	£600,000
Savings and investments worth	£380,000
A holiday cottage in England worth	£120,000
Total	£1,100,000

The estate governed by Scots law is £980,000. Under our proposals the widow would receive £640,000 (£300,000 plus 50% of the balance) and the son would receive £340,000. English law as the *lex situs* governs the devolution of the cottage in England. Under English law the widow in this situation is entitled to the cottage as it is worth less than her fixed sum prior entitlement of £125,000. The son takes nothing under the English provisions. This brings the widow's total entitlement to £760,000.

The two estates have the same overall value and composition, yet the widow receives a greater share in the second example merely because there is an immovable asset in another jurisdiction.

**4.87 Cohabiting partners** Under section 29 of the 2006 Act a surviving cohabitant is entitled to apply to the court for a discretionary award out of the deceased cohabitant's net intestate estate. In Part 3 of this Paper, we proposed that this entitlement should be retained. References to "net intestate estate" in section 29 mean the net intestate estate that is to devolve according to Scots law including Scots private international law, namely movables wherever situated where the deceased dies domiciled in Scotland and immovables in Scotland. However, the court can have regard to 'any other matter the court considers appropriate'.<sup>85</sup> Accordingly the court could take into account immovables situated furth of Scotland by making a larger award out of the net estate devolving according to Scots law including Scots private international law that it might otherwise have done. But any award made could never exceed the value of that net estate.

**4.88** The consequences of applying the rules on choice of law and jurisdiction are illustrated by the following examples:

- (i) A man dies intestate domiciled in Scotland and habitually resident in Edinburgh survived by a cohabitant and leaving the following estate:

A house in England worth	£200,000
A car worth	£10,000
Savings worth	£20,000
Total	£230,000

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<sup>85</sup> 2006 Act, s 29(3)(d).

Under section 29 of the 2006 Act the deceased must be domiciled in Scotland in order for the section to apply and the action must be raised in a sheriff court in the sheriffdom in which the deceased was habitually resident. The surviving cohabitant therefore raises the action in Edinburgh Sheriff Court. The maximum award the court could make would be £30,000, ie the value of the movables. She is not entitled to raise an action under similar legislation in the English courts as the deceased was not domiciled in England or Wales.<sup>86</sup>

- (ii) A man dies intestate domiciled in England survived by a cohabitant and leaving the following estate:

A house in Scotland worth	£200,000
A car worth	£10,000
Savings worth	£20,000
Total	£230,000

The English courts would have jurisdiction under the Inheritance (Provision for Family and Dependents) Act 1975 which applies whether the deceased died testate or intestate.<sup>87</sup> Any award is made out of the net estate which is likely to include foreign immovables if the deceased could have disposed of them by will<sup>88</sup> and, even if it does not, the court can take their existence into account.<sup>89</sup> The result is different from that in Example (i) because of the different definition of "net estate" in the English and Scottish statutes. The cohabitant is not entitled to raise an action under section 29 of the 2006 Act as the deceased was not domiciled in Scotland, even though the major asset of the estate is situated in Scotland.<sup>90</sup>

4.89 These examples further illustrate the anomalies referred to in paragraph 4.86 above created by restricting jurisdiction to the domicile of the deceased and not allowing the court of the deceased's domicile to deal with the whole estate.

### Protection from disinheritance

4.90 **Spouses, civil partners and children** Scots law currently attempts to protect heirs from disinheritance through the use of legal rights. These are exigible solely out of movable property. They only apply when the deceased died domiciled in Scotland but can be claimed out of the whole movable estate wherever situated.<sup>91</sup> Since succession to immovables is

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<sup>86</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1, even though the English courts would have jurisdiction, see fn 92 below and *Anton with Beaumont*, p 672.

<sup>87</sup> S 1(1). Jurisdiction depends on the deceased leaving property in England (irrespective of domicile) and a properly constituted representative of the estate being before the court, Dicey, Morris and Collins, *The Conflict of Laws*, (14<sup>th</sup> edn, 2006), para 27-002. In this example the defender would be the administrator appointed by an English court.

<sup>88</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 25.

<sup>89</sup> Theobald on Wills (18<sup>th</sup> edn, 2001), 16-47. See also *Anton with Beaumont*, p 672. The court will not order the transfer of foreign immovables unless the order would be recognised by the foreign state. But the court could order the English administrator to deal with the foreign immovables in a particular way.

<sup>90</sup> S 29(1).

<sup>91</sup> *Hog v Hog* (1791) Mor 4619; *Hog v Lashley* (1792) 3 Paton 247 and *Lashley v Hog* (1804) 4 Paton 581. However, the fact that a foreign legal system treats land as movable property does not entitle the children and surviving spouse or civil partner of a Scottish domiciliary the right to claim legal rights out of that land: *MacDonald v MacDonald*, 1932 SC (HL) 79.



governed by the *lex situs*, it follows that neither Scottish legal rights, nor any foreign equivalent rights, may be claimed against immovable property in Scotland.<sup>92</sup> In Part 3 of this paper, we proposed that the spouse's or civil partner's legal share should be 25% of what he or she would have received if the deceased had died intestate.

4.91 Since the surviving spouse or civil partner would be entitled to a percentage of what he or she would have inherited if the deceased had died intestate, the choice of law rules would be the same as for intestate succession. Thus the value of a claim by the survivor of a Scottish domiciliary would be calculated by reference to the immovable property in Scotland and movable property wherever situated. For a survivor of a non-Scottish domiciliary only the value of immovable property in Scotland would be taken into account for the purposes of a claim under Scots law.<sup>93</sup>

4.92 In Part 3, we also proposed that dependent children's claims against the estate should be governed by a statutory alimentary scheme in which the award would take the form of a lump sum. An appropriate choice of law rule must therefore be identified. Identification of the appropriate rule depends on how the new alimentary scheme is classified. It can either be classified as an alimentary claim on death broadly equivalent to an *inter vivos* claim for aliment, or as a succession claim by way of alimentary provision. If it is classified as a succession claim, the usual choice of law rules for succession claims apply. Consequently, if the deceased died domiciled in Scotland the "estate" out of which the claim is exigible will be the deceased's movable property wherever situated, and his or her immovable property situated in Scotland.

4.93 If the children's claim is to be classified as a true alimentary claim then the effect of section 40 of the 2006 Act must be considered. It provides:

"a court in Scotland shall apply Scots internal law in any action for aliment which comes before it".<sup>94</sup>

4.94 The effect of this section is to prevent a court from taking into account Scots private international law rules. And so, in addition to ignoring choice of law rules, a court is also prevented from limiting the meaning of "estate" to its private international law meaning. If section 40 were to be applicable to the proposed alimentary scheme, the court would require to take into account the deceased's whole estate, movable and immovable, in Scotland and elsewhere, whether or not the deceased was domiciled in Scotland.

4.95 On one view, section 40 should not be applied to the proposed alimentary scheme. There are two main reasons. First, the scheme differs from alimentary claims raised against a parent while the latter is alive. This is because the value of the estate is fixed in the sense that it cannot be increased by the efforts of the deceased. In making the appropriate alimentary award other competing claims on the estate must also be considered. This is a different exercise from that carried out in determining the amount of aliment to award in an

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<sup>92</sup> *Meston*, p 135.

<sup>93</sup> Similar rules would apply if all children were given a fixed share of the testate estate regardless of whether or not they were dependent children.

<sup>94</sup> Subject to the Maintenance Orders (Reciprocal Enforcement) Act 1972.

action for *inter vivos* aliment where the needs and resources and earning capacities of both the obligor and the obligee are considered.<sup>95</sup>

4.96 Second, from a policy point of view, it is also argued that section 40 should not be applied to the proposed alimentary scheme because it would encourage forum shopping. If for example, the dependent child was domiciled in Scotland<sup>96</sup> the child would be able to invoke section 40 and ask a Scottish court to make an award out of any estate, wherever situated, without establishing any other connections with Scotland.

4.97 But it can also be argued that the proposed alimentary scheme shares enough similarities with claims for aliment made during the parent's lifetime that it should be classified as alimentary and therefore subject to section 40. In addition, the possibility of forum shopping is largely theoretical and there are already sufficient safeguards to prevent it. For under the Family Law (Scotland) Act 1985 in determining the amount of aliment to award a court must have regard to all the circumstances of the case.<sup>97</sup> In doing so, it may consider Scotland's connection (or lack thereof) to the case and what maintenance might be awarded in any other, more closely connected, jurisdiction. Moreover, where the court does make an order relating to foreign estate difficulties can be anticipated in enforcing that order in the country where the property is situated, especially where the property is immovable.

4.98 Our preferred view is that a claim under the new alimentary scheme should be characterised as one of succession by way of alimentary provision rather than one of aliment simpliciter. Thus section 40 would not apply to displace the normal choice of law rules and their limiting effect on the definition of "estate".

4.99 We accordingly propose that:

**52. The new statutory alimentary claim by dependent children should be characterised as one of succession by way of alimentary provision. The normal choice of law rules should apply so that a court can only make an award out of movables wherever situated where the deceased died domiciled in Scotland and immovables situated in Scotland.**

4.100 **Cohabiting partners** Scots law at present contains no remedy for the surviving partner of a cohabiting couple if left unprovided for by the deceased partner's will. Section 29 of the Family Law (Scotland) Act 2006 entitles a surviving cohabitant to apply to the court for an award out of the deceased partner's intestate estate. In Part 3 we proposed that a surviving cohabitant should be protected from disinheritance by extending the section 29 scheme to testate situations with some modifications that do not affect either the Scottish courts' jurisdiction or what constitutes the deceased's estate. Accordingly, the private international law aspects of the protection disinheritance scheme for cohabitants would be the same as those for the section 29 scheme discussed at paragraphs 4.87 to 4.89 above.

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<sup>95</sup> Under the Family Law (Scotland) Act 1985, s 4(1).

<sup>96</sup> Or the child established any of the other jurisdictional bases summarised in paras 4.57-4.63.

<sup>97</sup> S 4(1)(c).

### 3). Anti-avoidance provisions

4.101 Earlier in this Part we considered whether provisions should be introduced to deal with substantial lifetime gifts that reduced the deceased's estate and hence the protection against disinheritance given to close relatives. We now turn to consider the private international law implications of these rules.

#### Jurisdiction

4.102 Schedule 8 to the 1982 Act provides the rules of jurisdiction for Scotland. The starting point is the general rule whereby "persons shall be sued in the courts for the place where they are domiciled". In other words, the executors may raise an action in the Scottish courts against a donee of a lifetime gift only if the donee is domiciled in Scotland: otherwise the action must be raised in the foreign jurisdiction of the donee's domicile.<sup>98</sup> The rules of special jurisdiction of Schedule 8 are explained at paragraphs 4.56 to 4.63 above, but do not appear to provide any alternative bases of jurisdiction.

4.103 We think that the general rule contained within Schedule 8 is too restrictive. For example, a Scots domiciliary may gift property to a friend domiciled in England when all the donor's estate is in Scotland, his or her family are in Scotland and his or her executor is confirmed in Scotland. In addition to having jurisdiction under Schedule 8 it seems sensible for Scottish courts to have jurisdiction to apply the anti-avoidance rules when the deceased died domiciled in Scotland.

4.104 We therefore propose that:

- 53. The Scottish courts should have jurisdiction to apply the anti-avoidance provisions when the deceased died domiciled in Scotland.**

#### Choice of law

4.105 Where a Scottish court has jurisdiction because the deceased died domiciled in Scotland, it should be able to enforce the anti-avoidance provisions only in relation to immovables in Scotland and movables wherever situated. The court could look to any anti-avoidance provisions of the *situs* in relation to foreign immovables. However, a court could take account of any foreign immovables in calculating the amount by which the estate should be notionally augmented and order that payment be made from the Scottish estate only.

4.106 We therefore propose that:

- 54. A court should apply the anti-avoidance rules to movables wherever situated and immovables in Scotland.**

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<sup>98</sup> Provided that the foreign jurisdiction is governed by Regulation 44/2001.

## D: EXECUTORS AND BONDS OF CAUTION

### Introduction

4.107 An executor-dative is appointed by the court to administer a deceased's estate. In the vast majority of cases, an executor-dative is appointed where a person dies intestate.<sup>99</sup> In Scotland, there is a strict order of preference for the appointment of executors-dative<sup>100</sup> and the court has no discretion to refuse to appoint a petitioner entitled to be appointed in terms of the order of preference (or select a more appropriate person to be so appointed) even if the proper administration of the estate is likely to be jeopardised thereby.<sup>101</sup>

4.108 However, beneficiaries have a number of protections against an executor-dative administering an estate negligently or fraudulently. These are summarised by Sheriff Principal Cox in *Russo v Russo* as follows:

"There are checks and balances. All those within the same degree are entitled to be appointed. They may keep an eye on each other. The executor dative has to find caution, which might prove difficult for a person with a record for dishonesty. The beneficiaries have their interests in the estate protected by the bond of caution. Moreover, once confirmed, executors become trustees and as such may be removed if their performance as trustees warrants this course."<sup>102</sup>

4.109 Thus, an important protection available to the beneficiaries (and creditors) against wrongful actings by an executor-dative is the bond of caution. An executor-dative<sup>103</sup> requires to find caution before being confirmed unless he or she is the surviving spouse of the deceased and the whole estate is exhausted by his or her prior rights.<sup>104</sup> A bond of caution is an obligation by a third party, the cautioner, to indemnify any creditor or beneficiary of an estate against loss caused by maladministration, negligence or fraud on the part of the executor. In modern times, the third party is usually an insurance company although it may be a private individual.<sup>105</sup> However, the executor retains the primary legal liability to the beneficiaries or creditors. Bonds of caution therefore provide protection in those cases where suing an executor would not provide an effective remedy.<sup>106</sup> Insurance companies providing caution will seek reimbursement from the executor after indemnifying the beneficiary or creditor.<sup>107</sup>

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<sup>99</sup> For a list of the circumstances where it is necessary or desirable to appoint an executor-dative to testate estates see *Currie and Scobbie*, para 9.14.

<sup>100</sup> See *ibid*, paras 6.02-6.125 for a detailed analysis of the order of preference.

<sup>101</sup> *Russo v Russo* 1998 SLT (Sh Ct) 32; *Lady Denman v Torry* (1899) 1F 881. Other cases have left open the question of whether the court has such a discretion: *Crolla* 1942 SC 21; *Schulze* 1917 1 SLT 176.

<sup>102</sup> *Russo* at 36-37.

<sup>103</sup> Subject to certain minor exceptions, an executor-nominate does not require to find caution: Confirmation of Executors (Scotland) Act 1823, s 2, as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 5. For exceptions see below at para. 4.124 and *Currie and Scobbie*, para. 9.03.

<sup>104</sup> Confirmation of Executors (Scotland) Act 1823, s 2. This exception has not been extended to civil partners taking the whole estate by virtue of prior rights.

<sup>105</sup> Private cautioners are very rarely encountered nowadays, except for small estates. The court requires evidence that an individual cautioner's financial status is sufficient to guarantee the amount of estate covered by the bond.

<sup>106</sup> For example, where the defaulting executor becomes insolvent or disappears.

<sup>107</sup> See, for example, *Your guide to Bonds of Caution in connection with executry estates in Scotland* available on Zurich SGS's website [www.zurich.co.uk](http://www.zurich.co.uk). They may decide that the prospects of success make litigation not worth while.

4.110 In our 1990 *Succession Report* we did not recommend any change to the rule that executors-dative are required to find caution. However, we recommended that:

- 1) unless restricted by the court, the sum for which a bond of caution should be granted should be the full gross value of the estate to be administered by the executor, and
- 2) there should be no change to the rule whereby a surviving spouse appointed as executor-dative is not to be required to find caution where the deceased died intestate and the spouse is entitled to the whole estate.<sup>108</sup>

4.111 The first recommendation has not been implemented. However, in the course of preparing this discussion paper we have been made aware of further concerns by practitioners surrounding bonds of caution.<sup>109</sup>

4.112 This section of the paper is divided into two parts. The first considers whether the requirement for executors to find caution should be modified or abolished. The second explores whether it would be desirable to amend the current system for appointing executors by introducing other protections for beneficiaries.

## 1). Bonds of caution

### The current position in Scotland and other jurisdictions

4.113 The current Scots law on bonds of caution is summarised in paragraph 4.106 above. In England and Wales, the general requirement for a guarantee by sureties (the equivalent of caution) was abolished with effect from 1 January 1972.<sup>110</sup> However, the High Court has a residual discretion to require one or more surety guarantees.<sup>111</sup> We understand that this discretion is virtually never invoked.

4.114 Similarly, in Western Australia, section 26 of the Administration Act 1903, was amended<sup>112</sup> so that the general requirement for sureties was abolished<sup>113</sup> but the court retains a discretion to require sureties to be furnished.<sup>114</sup> In 1990, the Law Reform Commission of Western Australia recommended that sureties should be abolished in Western Australia<sup>115</sup> but this recommendation has not been implemented.

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<sup>108</sup> *ibid* at paras 8.32–8.39.

<sup>109</sup> See also *Meston*, p 121.

<sup>110</sup> Administration of Estates Act 1971, s 8, now the Supreme Court Act 1981, s 120. The abolition implemented the recommendations of the Law Commission in its Report on *Administration Bonds, Personal Representatives Rights of Retainer and Preference and Related Matters*, Law Com No 31 (1970).

<sup>111</sup> Supreme Court Act 1981, s 120. For further details of the position in England, see J H G Sunnucks, J G Ross Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (2000) at paras 21-43 to 21-44.

<sup>112</sup> Administration Act Amendment Act 1976, ss 5 and 6.

<sup>113</sup> The abolition resulted from the recommendation of the Law Reform Commission of Western Australia. See the *Final Report on Administration Bonds and Sureties*, (1976) WALRC 34(II). See also the Commission's *Working Paper on Administration Bonds and Sureties*, (1976) WALRC 34(II).

<sup>114</sup> S 26(1) of the 1903 Act. Rule 27(1) of the Non-contentious Probate Rules 1967 further provides that sureties shall not be required, except in certain specified circumstances.

<sup>115</sup> *Final Report on Administration Act*, WALRC 88, para 3.10-3.13.

4.115 In the Republic of Ireland the High Court Probate Officer or a district probate registrar may require sureties to be furnished, but there is no general requirement to do so.<sup>116</sup>

### **Should caution be abolished?**

4.116 The advantages of retaining bonds of caution in executry cases are twofold:

- (a) They provide an effective remedy where the executor has acted negligently or fraudulently in administering the estate and disappears or is unable to meet any claims arising. In such cases, the insurance company cautioner will settle the claim and carry the risk that it may not be able to recover reimbursement from the executor. Claims under bonds of caution are rare, but this is to some extent due to the checks carried out by and the detailed information required by the cautioner before deciding whether to issue a bond, with or without conditions.
- (b) We understand that they provide protection for beneficiaries below the age of legal capacity as insurance company cautioners ensure, where possible, that funds are securely invested on behalf of under-age beneficiaries until they attain 16 years.<sup>117</sup> However, substantial protection is also provided by section 9 of the Children (Scotland) Act 1995 which requires executors (other than parents) to seek directions from the Accountant of Court as to how the property should be administered (before the property is passed onto the parents for administration) if they are holding property worth more than £20,000 for a child. Executors can also voluntarily seek directions if the property they hold is worth between £5,000 and £20,000. For children not resident in Scotland the child's share is usually required to be put into a trust.

4.117 However, there are a number of substantial difficulties with the requirement that executors-dative find caution:

- (a) It puts the estate to additional expense. Firstly, where an insurance company is providing caution, the estate will bear the cost of the premium.<sup>118</sup> This will usually depend on the size and complexity of the estate. One insurance company currently charges a single premium of £150 for estates up to £20,000, £200 for estates of more than £20,000 up to £25,000, and £150 for estates of up to £25,000 where a solicitor is involved. Where estates are greater than £25,000 (the majority of cases), the same insurance company states that it will provide written terms on application.<sup>119</sup> In addition, we have been made aware of one case where the cost of a bond for an estate of £4,000 was £270. The view among at least some members of the legal

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<sup>116</sup> Succession Act 1965 s 34(1), see also High Court Practice Direction HC34.

<sup>117</sup> By contrast, in England, two administrators or a trust corporation normally have to be appointed where one of the beneficiaries is a minor (or a life interest is involved) in order to provide the protection afforded by caution in Scotland. The court may however waive this requirement and allow a sole individual administrator under the Supreme Court Act 1981, s 114(2).

<sup>118</sup> It appears that because cautioners have a contingent liability for a longer period of time, bonds may be more expensive for estates in which there are children under the age of legal capacity who ironically are most likely to have greater need of the financial resources of the estate.

<sup>119</sup> Anecdotally, we have been made aware that for estates worth "millions" Lloyds market can provide cover but the premiums are very large.

profession is that the premiums charged are excessive and it appears that relatives of the deceased sometimes have difficulty in understanding the requirements for a bond and in a number of cases object to the premium charged. On the other hand provision of bonds of caution is a "low frequency, high severity" activity in that claims are rare but they tend to be large when they do occur and the premiums merely reflect the risks. It is possible to apply to court to have the amount of caution reduced which would lessen the premium, but the expense of the application is usually more than the reduction in premium.<sup>120</sup> Secondly, in certain circumstances, particularly in complex cases, insurance companies will grant a bond of caution only if a solicitor is appointed to assist the executor with the administration of the estate in general or to retain part of the realised estate until a dispute is resolved or missing beneficiaries found. Legal costs therefore require to be factored in.

- (b) Related to point (a) is the fact that bonds of caution are required where there is no, or very little, possibility of a claim being made. Estates are therefore put to needless expense. Firstly, most intestate estates of any size are administered by solicitors on the executors' behalf: if the solicitors are negligent, their insurance will make good the loss. Secondly, bonds of caution are not required where executors are also sole beneficiaries. Section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 restricted the scope of bonds of caution by providing that where a surviving spouse inherits the whole estate by virtue of prior rights he or she does not require to find caution before being confirmed as executor-dative. However, there are other instances where the executors are also the sole beneficiaries, such as where two children inherit the whole estate of a widow or widower. In these circumstances it is difficult to see why caution is required. It is not necessary for the protection of the beneficiaries as they are the executors. Nor is it necessary for the protection of creditors as they can just as easily sue the beneficiaries as the executors.
- (c) Claims under bonds of caution are rare. Nevertheless all<sup>121</sup> intestate estates are put to expense in order to protect a very small number of people.<sup>122</sup> But without the assistance of the insurance company cautioner before issuing the bond or the imposition of conditions the number of claims against executors-dative might rise, perhaps substantially.
- (d) Only two insurance companies currently offer bonds of caution.<sup>123</sup> Issues of quality of service and cost are likely to arise where there is a near monopoly of provision. We have been made aware of delays of several months in the issuing of some bonds which of course delays the administration of the estate. Outright refusals to issue a bond of caution are rare, although at least

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<sup>120</sup> An application must be made to the sheriff with an inventory of the estate, the extent to which caution is to be limited and the grounds on which such demand is founded. The procedure is set out in *Currie and Scobbie*, paras 19.18–19.27.

<sup>121</sup> Except of course those estates which are exhausted by a surviving spouse's prior rights.

<sup>122</sup> There were 4,086 petitions for the appointment of executors-dative presented in 2002: *Civil Judicial Statistics Scotland 2002*, Table 3.13.

<sup>123</sup> Zurich SGS and Royal & Sun Alliance.

one practitioner has reported difficulties in obtaining a bond for a very sizeable intestate estate.

- (e) A considerable amount of administrative work is necessary in order to obtain the information required to be disclosed in the application for a bond of caution. For example, in normal cases the whereabouts and identities of all the beneficiaries have to be disclosed. This gives rise to delay in the preparation of the application. It also creates practical difficulties in that there are no funds available from the estate to finance the work as executors must obtain confirmation (which they are unable to obtain without caution) in order to access estate funds.<sup>124</sup> However, nearly all of this work would have to be done anyway in order to distribute the estate correctly. At least one of the insurance company cautioners will generally issue a bond subject to conditions rather than wait until all the difficulties are resolved.<sup>125</sup>
- (f) In *Harrison v. Butters*<sup>126</sup> the divorced wife of the deceased applied to an insurance company for a bond of caution so that she might be confirmed to his estate as executrix-dative. She described herself as "widow" of the deceased in the application. In an action raised by the true "widow" against the executor and cautioners it was held, on the cautioners' averments, that the bond of caution was void *ab initio* as the cautioners "had acted under essential error as to the identity of the person with whom they were purporting to contract".<sup>127</sup> This decision may not represent the position in Scotland as there are other cases that point in the opposite direction.<sup>128</sup> Moreover, at least one of the insurance company cautioners does not refuse to pay claims on the ground that it had been misled by the executor-dative.

4.118 The above analysis highlights the main advantages and disadvantages of requiring nearly all executors-dative to find caution. In order to elicit views we ask the following question:

**55. Should it cease to be a requirement for an executor-dative to have to find caution before being confirmed?**

**Should caution be retained for some cases only?**

4.119 The requirement to find caution could be restricted to those cases where there is some risk of default, for example where there are doubts about the competency or honesty of the executor-dative. Western Australia requires sureties in the circumstances specified in its Non-contentious Probate Rules 1967,<sup>129</sup> but the court has a general discretion to require the administrator to produce sureties. In England and Wales and in the Republic of Ireland the court is simply given a discretion to require sureties. If caution is to be retained to any

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<sup>124</sup> Unless the solicitor acting in the executry is prepared to hold the outlays involved to account.

<sup>125</sup> A Walsh, "Intestacy, missing beneficiaries and Bonds of Caution" [www.titleresearch.com/docGallery/54.pdf](http://www.titleresearch.com/docGallery/54.pdf). An abridged version is available at 2006 JLSS 27.

<sup>126</sup> 1969 SLT 183

<sup>127</sup> Lord Walker at p 185.

<sup>128</sup> *Wardlaw v Mackenzie* (1859) 21D 940; *Clydesdale Bank v Paul* (1877) 4R 626 and *Zurich v Gray & Kellas* 2007 CSOH 91.

<sup>129</sup> Rule 27.



extent we would favour the discretionary model as it would be difficult to list all the circumstances in which the court might wish to order caution to be found.

4.120 There is the practical difficulty of bringing a case where caution might be ordered to the attention of the court. In general a petition for the appointment of an executor-dative is intimated only by the sheriff clerk displaying a full copy of the petition at the sheriff court house. There is no intimation to the deceased's relatives or others, unless the sheriff so orders.<sup>130</sup> Occasionally, the sheriff may order intimation to specified persons and intimation is also made to persons who have lodged caveats.<sup>131</sup> The sheriff may decern the executor nine days after intimation provided that no answers to the petition, competing petitions or caveats have been lodged and the sheriff is satisfied with the petition.<sup>132</sup> The process of appointment of executors-dative is in the vast majority of cases an administrative process during which it is very unlikely that any concerns will be raised about the proposed executors. We do not think that the scale of the problem is such as to turn an application for appointment of an executor-dative into a procedure where postal intimation to relatives or others occurs in every case. It has to be up to those with an interest in the estate to take steps to make any objections known. Lodging a caveat is simple and inexpensive and affords the caveator an opportunity to make representations to the court.

4.121 A bond of caution may not cover the whole estate administered by the executor. Since the sum for which a bond of caution is required must not exceed the value of the estate confirmed to<sup>133</sup> items of the estate which are administered by the executor but not confirmed to are not protected. This can include estate situated outwith the United Kingdom; estate which the deceased was administering as a trustee or executor and to which the executor acquires title by appending a note of trust estate to the inventory,<sup>134</sup> and a death gratuity payable to the executors of deceased civil servants.<sup>135</sup> An executor is just as likely to commit embezzlement or an error of administration in respect of these items as in respect of estate confirmed to.

4.122 The interval between intimation of the petition at the sheriff court house and the granting of it (in the absence of any objections) is nine days. Currently, time limits in the sheriff court tend to be based on multiples of seven. There is merit in executry petitions being consistent with this and we suggest a period of fourteen days. This should give caveators enough time after receiving intimation to make representations to the court.

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<sup>130</sup> Act of Sederunt (Edictal Citations, Commissary Petitions and Petitions of Service) 1971, para 2(2) (SI 1971/1165). Under s 44 of the Sheriff Courts (Scotland) Act 1876 Act, as amended by the Act of Sederunt (Confirmation of Executors Amendment No 2) 1971 para 2 (SI 1971/1655), special intimation is required to be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appointment of an executor which may be presented with reference to the estate of the same deceased person. According to *Currie and Scobbie*, para 7.45 in practice intimation is also made even if decree or confirmation has not been granted.

<sup>131</sup> *Currie and Scobbie*, para 7.45. Intimation is made by recorded delivery letter.

<sup>132</sup> Act of Sederunt (Unopposed Executory Petitions) 1948, SI 1948/621.

<sup>133</sup> Confirmation of Executors (Scotland) Act 1923, s 2.

<sup>134</sup> Executors (Scotland) Act 1900, section 6 as amended by the Succession (Scotland) Act 1964 and the Administration of Estates Act 1971.

<sup>135</sup> The practice is to include this item, but not its value, in the inventory of the estate confirmed to. See 1967 JLSS 258 for an instance of misappropriation of a civil service gratuity.

4.123 To elicit views we ask the following questions and make the following proposal:

- 56. If the general requirement for bonds of caution is abolished, should the court nevertheless have a discretionary power to order bonds of caution to be furnished by executors-dative?**
- 57. Should the sum for which a bond of caution should be granted be the full gross value of the estate to be administered by the executor unless restricted by the court?**
- 58. The sheriff may decern an executor-dative fourteen days after the sheriff clerk certified intimation, provided that no answers to the petition or competing petitions have been lodged and the sheriff is satisfied with the petition.**

### **Caution for executors-nominate?**

4.124 Although the Confirmation of Executors (Scotland) Act 1823<sup>136</sup> dispensed with the need for executors-nominate to find caution, the courts have required executors-nominate to find caution in the following exceptional circumstances:

- "1. Where the testator had been a party to a mutual will which appointed executors, but had also signed subsequently a further testamentary writing which did not revoke the mutual will, the appointment of executors under the second deed failed and confirmation was granted to one of the executors under the mutual will on his finding substantial caution.
2. In a mutual will, a husband and wife appointed, as their executors, on the death of the survivor 'their respective next-of-kin'. The next-of-kin were very numerous, and some were abroad, and one of them, with the consent of the majority, was confirmed alone on his finding caution.
3. Where the deceased nominated as an executor an individual whose current address could not be ascertained, and the executor had a beneficial interest under the testamentary writing, caution to the extent of the interest of the absent executor had to be obtained before confirmation was granted in favour of the other named executors."<sup>137</sup>

4.125 If the court were to have power to order caution to be furnished in appropriate intestate cases then this discretionary remedy could be extended to executors-nominate. Executors-nominate have not been subject to the requirement to find caution since 1823.<sup>138</sup> This is generally explained on the basis that testators take care to select executors in whom they have confidence and usually appoint at least one person familiar with business or financial matters in order to ensure the proper administration of the estate. Whilst this may be true, such a person may still make a careless error in the administration of the estate and it is always possible that the testator may misjudge the prospective executor's character or abilities. Furthermore, it is difficult to see why the protection afforded to creditors and beneficiaries should differ depending on whether the estate is distributed in accordance with the laws of intestacy or under a will. In addition, executors-dative, unlike many executors-

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<sup>136</sup> S 2, as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 5.

<sup>137</sup> *Currie and Scobbie*, para 9.03.

<sup>138</sup> The Confirmation of Executors (Scotland) Act, s 2 removed this requirement for executors-nominate.

nominate, often have a substantial beneficial interest in the estate and therefore a personal interest in its proper administration. In short the need to protect beneficiaries of a testate estate may be as great as that where the deceased died intestate.

4.126 The court is not involved in the appointment of executors-nominate and the granting of confirmation to them is a purely administrative process. We would be strongly against turning confirmation into an application to the court that had to be intimated to the beneficiaries who would thereafter be given an opportunity to request that the court impose a requirement to find caution. A beneficiary should have to raise the matter with the court before confirmation was granted. In that way the vast majority of confirmations where no intervention was appropriate would be able to be dealt with as expeditiously as at present.

4.127 We accordingly ask whether:

- 59. If the court is to have power to order bonds of caution to be furnished by executors-dative in appropriate cases, should this be extended to executors-nominate?**

### **Civil partners**

4.128 The rules relating to bonds of caution should apply to civil partners in the same way as they do to spouses, as should any reforms resulting from the above proposals. We noted in paragraph 4.109 above that an executor-dative does not have to find caution if he or she is the surviving spouse of the deceased and the whole estate is exhausted by prior rights. This exception has not been extended to civil partners in the same circumstances, and if it is to be retained, it should also apply to civil partners.

4.129 We accordingly propose that:

- 60. The rules governing bonds of caution should apply to spouses and civil partners in the same way.**

## **2). Refusal to appoint or confirm executors**

4.130 In the vast majority of cases, caution usually only offers protection once a wrong in the administration of the estate has already taken place by compensating beneficiaries for that wrong.<sup>139</sup> Arguably, it would better to prevent that wrong from occurring in the first place. The present law does not allow such pre-emptive action to be taken because the court must adhere to the order of preference when appointing executors-dative and has no discretion to refuse appointment to a person it considers unsuitable for office. Only a person who ranks above the petitioner in terms of the order of preference is able to prevent the latter from being appointed by competing for appointment. A person equally entitled to be appointed as the petitioner or ranking below the latter, cannot prevent the petitioner from being appointed.<sup>140</sup>

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<sup>139</sup> Although the practice of the insurance company cautioners in demanding detailed information from executors and making their own investigations may prevent some estates from being administered wrongly, see para 4.116 above.

<sup>140</sup> See *Russo v Russo* 1998 SLT (Sh Ct) 32.

## Executors-dative

4.131 In some jurisdictions the courts have a discretion to pass over a petitioner otherwise entitled to be appointed to the office of executor-dative (or the office of administrator in common law jurisdictions) if the court deems it to be necessary or expedient. For example, the Tasmanian legislation, provides that "[i]n granting letters of administration the Court shall have regard to the rights of all persons interested in the real and personal estate of the deceased .... and any such administration may be limited in any way the Court thinks fit". It further provides that "where the deceased died wholly intestate .... administration shall .... be granted to some one or more of the persons interested in the residuary estate of the deceased. Crucially, it also provides:

"if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may in its discretion . . . appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit."<sup>141</sup>

4.132 The courts in England also have the discretion to refuse to appoint administrators who would otherwise be entitled to the office. Section 116 of the Supreme Court Act 1981 provides:

"(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

(2) Any grant of administration under this section may be limited in any way the court thinks fit."

4.133 In the context of the exercise of the discretion as between applicants entitled in the same degree, four grounds have been identified for refusing a grant to an applicant in England:

"(1) The bad character etc., of an applicant

Not only the bad character of the applicant, but bankruptcy or insolvency are sufficient grounds for refusing him a grant. Even ill-health in a severe degree has been held to disqualify an applicant on the objection of another. Complete disregard of business matters or ineptitude in such matters are also grounds for refusing a grant.

(2) Incompatible interest of the applicant

The court will exclude an applicant who has an interest which conflicts with the proper administration of the estate. Thus where the son of the applicant had a claim on the estate, his father was refused a grant lest he should not support the case of the estate against his son with sufficient strength ....

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<sup>141</sup> Administration and Probate Act 1935, s 13.

### (3) Majority of interest

Where there is animosity between members of the class entitled but no specific ground of objection to the applicants can be alleged, it is the practice to prefer the applicant with the largest interest or who is supported by the majority of interest ....

### (4) Personal objection where the applicants have equal interests

Where two applicants are equally entitled to share in the whole of the estate but each objects to the other, the dispute can sometimes be settled by their agreeing on the appointment of solicitors representing each of them or a neutral third party, e.g. a trust corporation. Failing agreement the court may appoint such neutral person under its discretionary powers....."<sup>142</sup>

4.134 We think that a discretion to refuse to appoint the proposed executor-dative would be a useful power in dealing with the rare problem of unsuitable applicants. The power to refuse should be untrammelled by legislative guidelines as the circumstances in which it might be used are very diverse. This power together with a discretion to require caution would give sheriffs a flexible package. If the sheriff considered that the objections were insufficiently serious to warrant a refusal to appoint, imposing a requirement to find caution would go some way towards protecting the beneficiaries and creditors against possible default by the executor-dative. In more serious cases the sheriff could simply refuse the application. For the reasons stated in paragraph 4.120 above it should have to be for those wishing to object to take steps to ensure that their objections are lodged before the application is granted under the normal procedure.

### Refusal to confirm an executor

4.135 Executors-nominate are appointed by the deceased, not the sheriff. Preventing unsuitable executors-nominate from acting would therefore have to take the form of a refusal to confirm them. At present the court does not seem to have power to refuse to confirm an executor-nominate on the basis of ability or character alone.<sup>143</sup> The problem of unsuitability is the same for all executors, whether nominate or dative. Moreover, conferring an express power of refusal to confirm on the basis of ability or character could be useful for those cases where well-founded objections to a proposed executor-dative were not made in time to prevent his or her appointment. On the other hand, refusing confirmation to executors chosen by the deceased may be regarded as too great an infringement of testamentary freedom.

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<sup>142</sup> J H G Sunnucks, J G Ross Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (2000) at paras 26-20 to 26-23.

<sup>143</sup> However, a petition for confirmation of an executor-nominate may be sisted and a judicial factor appointed pending the outcome of litigation to reduce the testamentary writing appointing the executor, provided that there is a risk of the estate being dissipated or lost if left in the hands of the petitioner: *Kerr v Simpson* 1912 1 SLT 187, *Campbell v Barber* 1895 23 R 90, *Hamilton v Hardie* 1888 16 R 192 and *Grahame v Bannerman* 1822 1 S 362. But see *Henderson v Henderson* 1930 SLT 23 where a petition for the appointment of a judicial factor was granted by the Outer House pending the interpretation (rather than reduction) of a will whereby the testator left his whole estate to his wife who thereafter divorced him. There was no petition for confirmation before the Outer House to be sisted, as this had been lodged by the former wife with the Commissary Court and was indeed pending on the date of the judgment. Therefore, there were no averments that there was a danger to the estate if the former wife was appointed (although Lord Pitman was influenced by the fact that if the former wife was "confirmed as general donee, she would take up the estate under no trust condition, but for her own behoof only" (at p 23)), but the decision nevertheless sits uncomfortably with the four cases cited immediately above.

4.136 In order to obtain views on these issues we make the following proposal and ask the following question:

- 61. The sheriff should have a discretionary power to refuse to appoint a petitioner who appears to be unsuited to the office of executor-dative.**
- 62. Should the sheriff have power to refuse to confirm an executor-nominate who appears to be unsuited to the office?**

## Part 5 List of proposals and questions

### Intestate Succession

1. Where a person dies leaving a spouse or civil partner but no issue, the surviving spouse or civil partner should be entitled to the deceased's whole intestate estate.

(Paragraph 2.26)

2. (1) The spouse or civil partner should be entitled to a fixed sum or the whole intestate estate if it is worth less than this amount. Any excess over the fixed sum should be divided equally, half to the spouse or civil partner and half to the issue. Our provisional view is that the fixed sum should be £300,000 but views are invited on whether that sum is appropriate.

(2) The fixed sum applicable to the estates of those dying in the following year should be set annually by an order made by the Scottish Ministers. The order should uprate the figure in line with the change in the Retail Price Index unless the Scottish Ministers decide otherwise.

(3) The spouse or civil partner who is entitled to a share of the intestate estate which includes the deceased's interest in the dwelling house or its furniture and furnishings should have an option to acquire the deceased's interest in them in satisfaction or part satisfaction of his or her share. If the value of the interest exceeds the spouse's or civil partner's share, he or she should still be able to acquire it on paying the excess to the estate.

(Paragraph 2.57)

3. There should be no change in the existing law whereby separation (whether or not a decree of judicial separation had been obtained) has by itself no effect on the succession rights of spouses or civil partners in each other's estates.

(Paragraph 2.64)

4. Should a surviving spouse or civil partner continue to be treated in the same way with regard to succession to an intestate estate whether or not he or she was the legal parent of all the deceased's children? If not, what changes should be made?

(Paragraph 2.70)

5. (1) Should a child who had been accepted by an adult as a child of his or her family be treated as the adult's own child for the purposes of intestate succession to that adult?

(2) If so, should such a child also be treated as the adult's own child:

(a) in relation to succession by the adult to the accepted child's intestate estate; or

(b) for the purposes of intestate succession generally?

(Paragraph 2.80)

6. The rules for the division of a deceased person's intestate estate should apply irrespective of any testamentary disposition by the deceased in favour of any beneficiary of the intestate estate.

7. Where the deceased is survived by a spouse or civil partner and issue so that the spouse or civil partner is entitled to a fixed sum and half the excess from the deceased's intestate estate, should (as an exception to the rule in Proposal 6) the fixed sum be reduced by the value of the deceased's interest in the dwelling house which passes to the spouse or civil partner by way of testamentary disposition?

(Paragraph 2.86)

8. Do you agree with the statements set out in heads (1) to (6) of paragraph 2.87? If not, which do you disagree with and what would you put in its place?

(Paragraph 2.87)

### **Protection from disinheritance**

9. Are we correct in our preliminary view that a surviving spouse or civil partner should be entitled to a fixed share, called a legal share, from the deceased's estate?

(Paragraph 3.40)

10. Should a surviving spouse's or civil partner's legal share be calculated as a percentage of what he or she would have inherited if the deceased had died intestate? If so, do you agree with our provisional view that 25% is a reasonable percentage: if not, what percentage is reasonable?

11. If you do not agree with Proposal 10 should we proceed on the 1990 scheme as amended to take account of the rise in the value of residential property?

12. If you do not agree with Proposals 10 or 11, what would you suggest should be the rules for calculating a surviving spouse's or civil partner's legal share?

(Paragraph 3.48)

13. A spouse or civil partner should be able to renounce (either before or after the deceased's death) the right to a legal share and such a renunciation should not enlarge the legal share of any other claimant.



14. A surviving spouse or civil partner who claims a legal share should be deemed to have predeceased the deceased for all other purposes of succession to the deceased's estate.

(Paragraph 3.52)

15. Do you agree with our preliminary view that the existing law on aliment *jure representationis* from the deceased's estate should be abolished and not replaced by any new statutory scheme for the aliment of a surviving spouse or civil partner?

(Paragraph 3.55)

16. Do you agree with our preliminary view that when the deceased has died testate a surviving spouse or civil partner should not have a right to acquire the former matrimonial or family home and its contents?

(Paragraph 3.57)

17. Section 29 of the Family Law (Scotland) Act 2006 should be amended to allow claims for provision by a deceased's cohabitant out of testate as well as intestate estates.

18. Should section 29 of the Family Law (Scotland) Act 2006 be amended so as to state the aim in making an award for provision? If so should an award serve to recognise (a) the survivor's contributions (financial and non-financial) which benefited the deceased economically and (b) the survivor's economic burden of caring for any children of the relationship under the age of 16? If this is not thought appropriate, what other aim would be better?

19. Should section 29 of the Family Law (Scotland) Act 2006 be amended so as to include additional factors that the court should take into account in making an award? If so what should they be?

20. On an intestate estate, the court should continue to be unable to award the cohabitant more than that to which she would have been entitled had she been the spouse or civil partner of the deceased, ie the maximum award equals what a surviving spouse or civil partner would obtain from the deceased's intestate estate.

21. On a testate estate, the court should be unable to award the cohabitant more than that to which she would have been entitled had she been the spouse or civil partner of the deceased, ie the maximum award equals a surviving spouse or civil partner's legal share.

22. Where a person dies leaving a spouse or civil partner and a cohabitant on both an intestacy and testacy, the net estate for the purposes of a cohabitant's claim should be the estate after deduction of the surviving spouse's or civil partner's legal share.

23. A cohabitant should be able (before or after the death of the deceased) to renounce her right to apply for financial provision from the deceased's estate.

24. The effect of receiving an award should be that the cohabitant is deemed to have predeceased the deceased for the purposes of succession to the deceased partner's

estate and accordingly forfeits all other rights of succession. The award should be taken in the first place from the cohabitant's forfeited rights.

(Paragraph 3.75)

25. A surviving cohabitant should not be entitled to aliment from the deceased's estate following the deceased's death.

(Paragraph 3.77)

26. Legal rights and aliment *jure representationis* for dependent children of the deceased should be replaced by a statutory alimentary scheme along the following lines:

(a) An obligation of aliment should subsist between a child of the deceased and the executors or beneficiaries of the deceased's estate which the child has the right to enforce on the death of the deceased.

(b) No right to aliment should exist in relation to any part of the estate which passes to an individual who at the date of death is already under an obligation to aliment the child.

(c) The provisions relating to aliment in the Family Law (Scotland) Act 1985 (such as age limits, quantification and powers of the court) would generally apply, but there should be no defence of alimentering the child at the obligor's home: aliment should take the form of a lump sum (although this could be payable by instalments) which would not be capable of being varied or recalled later on a change of circumstances.

(d) The amount of the aliment should not be capped at a fixed proportion of the beneficiary's inheritance.

(Paragraph 3.91)

27. Should legitim and aliment *jure representationis* be abolished as regards adult non-dependent children?

(Paragraph 3.101)

28. Are we correct in rejecting a court-based discretionary system as the way of protecting children and issue from disinheritance? If not, what criteria should the court use in exercising its discretion?

(Paragraph 3.103)

29. If children are to be protected by fixed legal shares do you favour a system based on a percentage of the estate which the issue would obtain under our proposals if the parent had died intestate or an updated version of the system we recommended in our 1990 Report on Succession?

30. If the former, is 25 per cent a suitable figure?

31. A child should be able to renounce (either before or after the deceased's death) the right to claim legal share and such a renunciation should not enlarge the legal share of any other potential claimant.

(Paragraph 3.110)

32. A dependent accepted child should be entitled make an alimentary claim from the acceptor's estate under the new statutory scheme set out in Proposal 26 above.

33. If adult children are to have a legal share out of their parent's estate, an adult accepted child should not be entitled to have a legal share out of the acceptor's estate.

(Paragraph 3.112)

34. Do you agree with our preliminary view that only the deceased's spouse, civil partner, children (biological, adopted and accepted) and cohabiting partner should be entitled to claim a share of the deceased's estate if he or she is not a beneficiary under the will or the rules of intestacy?

35. Should those whom the deceased had been supporting to a substantial extent whilst alive, be entitled to a temporary continuation of that support, and if so for how long?

(Paragraph 3.119)

36. Should businesses, including agricultural farms and estates, be excluded from claims for legal share by surviving spouses, civil partners and adult non-dependent children?

37. If not, should special provision be made for agricultural property and businesses?

38. If so, what form should these special provisions take?

(Paragraph 3.126)

### **Anti-avoidance**

39. Should there be new legislative provisions protecting claims by close relatives against the deceased's estate from being defeated or diminished by gratuitous lifetime transactions made by the deceased within a specified period prior to death?

(Paragraph 4.16)

40. If anti-avoidance provisions are to be introduced, should the scheme impose a personal liability on a donee to pay to the deceased's executors a rateable proportion of a close relative's claim attributable to the gift?

41. Should the specified period be two years? If not, what would be a suitable period?

42. Should there be an express exemption for birthday, Christmas or other conventional gifts and charitable donations that are reasonable in amount?

(Paragraph 4.23)

43. Should donees be entitled to apply to the court for their liability under a rule-based anti-avoidance scheme to be decreased or cancelled by a court where the liability would lead to undue hardship in the circumstances?

(Paragraph 4.24)

44. If no general anti-avoidance scheme is to be introduced should collation *inter liberos* be reformed along the lines suggested or should it be abolished?

(Paragraph 4.35)

### **Time limits**

45. Do you agree with our provisional view that the right to claim a legacy and the right to claim a share of an intestate estate should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?

46. Do you agree with our provisional view that the right of a surviving spouse or civil partner to claim legal share should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?

47. Do you agree with our provisional view that if a child is to have a right to claim legal share that right should prescribe after five years from the date of death under section 6 of the Prescription and Limitation (Scotland) Act 1973 (with express incorporation of the knowledge provisions in section 11 and subject to a written claim to the executors interrupting prescription)?

48. Do you agree with our provisional view that if a dependent child should have a right of aliment from a parent's estate, the child should be able to exercise that right until the child ceases to be an alimentary creditor?

49. Do you agree with our provisional view that the time limit for bringing a claim by a surviving cohabitant for financial provision out of the deceased cohabitant's net estate should remain at six months?

(Paragraph 4.49)

## Private international law

50. Where a person has been confirmed as an executor in Scotland that person may be sued in any matter relating to his or her powers and duties as an executor in relation to the estate confirmed to in the Court of Session or in the sheriff courts for the sheriffdom in which confirmation was granted.

(Paragraph 4.64)

51. There should be a new statutory provision to specify the jurisdictional basis or bases on which applications by surviving cohabitants for a discretionary award out of their deceased cohabitant's net intestate estate under section 29 of the Family Law (Scotland) Act 2006, or their deceased cohabitant's net testate estate under our proposals, may be brought in the Court of Session.

The Court of Session should have jurisdiction to entertain such actions if:

- (a) the executor was confirmed in Scotland;
- (b) the deceased was habitually resident in Scotland at the date of his or her death; or
- (c) the deceased was domiciled in Scotland immediately before his or her death.

If you do not agree with the above proposal, on which ground(s) do you think the jurisdiction of the Court of Session should be based?

(Paragraph 4.69)

52. The new statutory alimentary claim by dependent children should be characterised as one of succession by way of alimentary provision. The normal choice of law rules should apply so that a court can only make an award out of movables wherever situated where the deceased died domiciled in Scotland and immovables situated in Scotland.

(Paragraph 4.99)

53. The Scottish courts should have jurisdiction to apply the anti-avoidance provisions when the deceased died domiciled in Scotland.

(Paragraph 4.104)

54. A court should apply the anti-avoidance rules to movables wherever situated and immovables in Scotland.

(Paragraph 4.106)

## Caution and executors

55. Should it cease to be a requirement for an executor-dative to have to find caution before being confirmed?

(Paragraph 4.118)

56. If the general requirement for bonds of caution is abolished, should the court nevertheless have a discretionary power to order bonds of caution to be furnished by executors-dative?

57. Should the sum for which a bond of caution should be granted be the full gross value of the estate to be administered by the executor unless restricted by the court?

58. The sheriff may decern an executor-dative fourteen days after the sheriff clerk certified intimation, provided that no answers to the petition or competing petitions have been lodged and the sheriff is satisfied with the petition.

(Paragraph 4.123)

59. If the court is to have power to order bonds of caution to be furnished by executors-dative in appropriate cases, should this be extended to executors-nominate?

(Paragraph 4.127)

60. The rules governing bonds of caution should apply to spouses and civil partners in the same way.

(Paragraph 4.129)

61. The sheriff should have a discretionary power to refuse to appoint a petitioner who appears to be unsuited to the office of executor-dative.

62. Should the sheriff have power to refuse to confirm an executor-nominate who appears to be unsuited to the office?

(Paragraph 4.136)

# Appendix A Other jurisdictions

This Appendix contains the current law in a number of civil and common law jurisdictions in the areas covered by this discussion paper. The rules are set out under the following headings and within each heading the jurisdictions are listed alphabetically.

## Intestacy

- Surviving Spouse, No Issue
  - All to Surviving Spouse
  - Estate Shared Between Surviving Spouse and Parents
  - Estate Shared Between Surviving Spouse, Parents and Siblings
- Surviving Spouse and Issue
- Unmarried Partners

## Forced Shares and Protection From Disinheritance

### A: INTESTACY: SURVIVING SPOUSE, NO ISSUE

#### ALL TO SURVIVING SPOUSE

1. *Australia*. In six of the Australian territories, where an intestate is survived by a spouse but no issue the surviving spouse is entitled to the whole of the intestate estates.<sup>1</sup>
2. *Canada*. In all the provinces other than Quebec,<sup>2</sup> where there is a surviving spouse but no issue the whole estate goes to the surviving spouse on intestacy.<sup>3</sup>
3. *The Netherlands*. The default matrimonial regime in the Netherlands is one of total community of property i.e. everything owned and all debts owed before marriage become common upon marriage, as do all property acquired and debts incurred subsequently.<sup>4</sup> It is however possible to enter into an agreement derogating from the default position and if parents make a gift or leave a bequest by will, they can stipulate that the gift/bequest will not

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<sup>1</sup> Australian Capital Territory: Administration and Probate Act 1929, Sch 6; New South Wales: Wills, Probate and Administration Act 1898, s 61B(2); Queensland: Succession Act 1981, Sch 2; South Australia: Administration and Probate Act 1919, s 72G(a); Tasmania: Administration and Probate Act 1935, s 44(2); Victoria: Administration and Probate Act 1958, s 51(1). For the Northern Territory and Western Australia see paras 16 and 17 below.

<sup>2</sup> For the position in Quebec see para 18.

<sup>3</sup> Alberta: Intestate Succession Act, RSA 2000, c.1-10, s 2; British Columbia: Estate Administration Act, RSBC 1996, c. 122, s 83; Manitoba: Intestate Succession Act, CCSM 1990, c. 185, s 2(1); New Brunswick: Devolution of Estates Act, RSNB 1973, c. D-9, s 24; Ontario: Succession Law Reform Act RSO 1990, c. S.26, s 44; Newfoundland and Labrador: Intestate Succession Act, RSNL 1990, c. 1-21, s 6; Northwest Territories: Intestate Succession Act (also applying to Nunavut), RSNWT 1988, c. 1-10, s 4; Nova Scotia: Intestate Succession Act, RSNS 1989, c.236, s 5; Saskatchewan: Intestate Succession Act, SS 1996, c. 1-13.1, s 8; Yukon: Estate Administration Act SY 1998, c.7, s 80.

<sup>4</sup> Civil Code, Art 1:93 *et seq.*

fall into community property.<sup>5</sup> Where there are no surviving issue, the surviving spouse inherits the whole estate.<sup>6</sup>

4. *Republic of Ireland.* On intestacy in Ireland, the surviving spouse will inherit the whole of the intestate estate where the deceased was not survived by issue.<sup>7</sup>

5. *South Africa.* The default matrimonial regime in South Africa is one of community of property where all assets before and after marriage are united in one estate which is divided equally between the spouses on dissolution of the marriage by death.<sup>8</sup> On intestacy the surviving spouse becomes entitled to the whole estate where the deceased has not been survived by issue. This is the case regardless of whether or not the deceased was survived by parents or siblings.<sup>9</sup>

6. *Sweden.* Where the intestate is survived by a spouse but no issue the surviving spouse will receive one half of the combined balance of the spouses' marital property as a consequence of the marital property regime. The remaining half, the estate of the deceased, goes to the surviving spouse as inheritance.<sup>10</sup>

#### ESTATE SHARED BETWEEN SURVIVING SPOUSE AND PARENTS

7. *France.* In France the community of matrimonial property is dissolved on the death of one of the spouses,<sup>11</sup> and so the surviving spouse will receive his or her share of the matrimonial property before inheritance rules apply. If the deceased has left no issue or parents the surviving spouse takes the whole intestate succession.<sup>12</sup> If parents did survive the deceased they share one half of the estate while the surviving spouse receives the remaining half. If one parent has predeceased, the share which the predeceasing parent would have taken also devolves to the surviving spouse.<sup>13</sup>

8. *Germany.* Where the deceased dies intestate the estate is shared between the spouse and relatives. Relatives are divided into degrees which determine the order of succession, with the existence of closer relatives ruling out the entitlement of more distant relatives. The first class consists of issue of the deceased and their descendants, the second class of parents and their descendants, the third class of grandparents and their descendants. Where there are no relatives of the first or second classes and no grandparents, the surviving spouse will receive the whole estate.<sup>14</sup> Otherwise, the spouse's entitlement depends on whether a matrimonial property regime or one of separation of property applied to the marriage.<sup>15</sup>

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<sup>5</sup> Civil Code, Art 1:94.

<sup>6</sup> Civil Code, Art 4:10.

<sup>7</sup> Succession Act 1965, s 67(1).

<sup>8</sup> Joubert, *The Law of South Africa*, (2<sup>nd</sup> edn, 2006), Vol 16, paras 67 and 86-88.

<sup>9</sup> Intestate Succession Act 81 of 1987, s 1(1)(a).

<sup>10</sup> When the surviving spouse dies, half of their estate will then be taken by those who have the best right to take as heirs from the first-deceased spouse, who would be that person's parents, whom failing siblings, or their children. Inheritance Code, Chapter 3, s 1.

<sup>11</sup> Code Civil, Art 1441.

<sup>12</sup> Code Civil, Art 757-2, although where there are no parents surviving and part of the succession consists of gifts to the deceased from the predeceasing parents, the deceased's brothers and sisters are entitled to receive these gifts under Art 757-3.

<sup>13</sup> Code Civil, Art 757-1.

<sup>14</sup> BGB, §1931.

<sup>15</sup> See para 34 below.



9. The spouse may also be entitled to a right of maintenance for 30 days,<sup>16</sup> in addition to all wedding presents and all matrimonial property excluding accessories of land.<sup>17</sup>

10. *New Zealand.* The surviving spouse or civil union partner<sup>18</sup> will take the whole intestate estate where neither issue nor parents survive the deceased. If the intestate is survived by one or both parents then the spouse or civil union partner will take all personal chattels absolutely (unless subject to a hire purchase or similar agreement) and the prescribed amount. The spouse or civil union partner and the parent(s) share the residue, receiving two thirds and one third respectively.<sup>19</sup>

11. *Portugal.* In Portugal, spouses may choose whether to opt for community property or keep their property separate. Community property takes two different forms, either embracing everything the parties owned before marriage and everything they subsequently acquire or only the assets the parties acquire during marriage. Where there are no surviving issue<sup>20</sup> or ascendants, the surviving spouse is the sole heir on intestacy.<sup>21</sup> Where there are both ascendants and a surviving spouse, the latter is entitled to two-thirds of the intestate estate, with the ascendants taking one third.

12. *Spain.* Under the Spanish Civil Code,<sup>22</sup> the default matrimonial regime is one of community of property<sup>23</sup> but it is possible, though unusual, to opt for a separate property system. Where there are no surviving issue,<sup>24</sup> but the spouse competes with the deceased's parents, he or she is entitled to a usufruct of one half of the estate.<sup>25</sup> If there are neither descendants nor ascendants, the spouse is entitled to a usufruct of two-thirds of the estate.<sup>26</sup>

13. Following the enactment of Act 13/2005 which amended the Civil Code, same sex couples throughout Spain are able to marry and benefit from the same rights as heterosexual married couples.

14. *United States.* The Uniform Probate Code has been adopted in its entirety by at least 18 states, with some other states adopting it in an incomplete form.<sup>27</sup> Under the Code, if the deceased has not been survived by descendants or parents, then the surviving spouse will inherit the entire intestate estate.<sup>28</sup> If at least one parent has survived the deceased, the surviving spouse takes the first \$200,000 of the intestate estate, and three quarters of the surplus, with the parent(s) receiving the remaining quarter.<sup>29</sup>

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<sup>16</sup> BGB, §1969(1).

<sup>17</sup> BGB, §1932(1).

<sup>18</sup> Civil Union Partnerships have the same effects as marriage and are open to both same sex and heterosexual couples: Civil Union Act 2004.

<sup>19</sup> Administration Act 1969 (as amended), s 77.

<sup>20</sup> Representation of predeceasing children of the intestate is allowed under Art 2042.

<sup>21</sup> Civil Code, Art 2133.

<sup>22</sup> Note that there are regional differences as autonomous territories, such as Aragon, Catalonia, Navarra and the Basque country and the Balearic Islands have the power to enact legislation on the civil law of their own territories which may differ from the Civil Code.

<sup>23</sup> Civil Code, Art 1316.

<sup>24</sup> Representation of predeceasing issue by is allowed: Civil Code, Art 921.

<sup>25</sup> Civil Code, Art 837.

<sup>26</sup> Civil Code, Art 838.

<sup>27</sup> <http://www.law.cornell.edu/uniform/probate.html>.

<sup>28</sup> Uniform Probate Code, § 2-102. All references to the UPC are to the revised 1990 version.

<sup>29</sup> Uniform Probate Code, § 2-102.

15. In addition to any testamentary or intestacy entitlements, the surviving spouse is entitled to a 'homestead allowance' of \$15,000 and 'exempt property' worth up to \$10,000, comprising household furniture, automobiles, furnishings, appliances and personal effects. The surviving spouse and minor children to whom the deceased owed an obligation of support and was supporting are entitled to reasonable maintenance for up to one year.<sup>30</sup>

#### ESTATE SHARED BETWEEN SURVIVING SPOUSE, PARENTS AND SIBLINGS

16. *Australia.* In the Northern Territory and Western Australia,<sup>31</sup> the surviving spouse will only be entitled to the whole estate on intestacy where there is no issue and the deceased has also left no parents or siblings (or their issue), or if the value of the estate is less than a certain amount.<sup>32</sup> Where the value of the estate is higher than that amount, or the deceased has been survived by parents, siblings or siblings' issue, the relatives will share in the intestate's estate along with the surviving spouse.

17. In the Northern Territory the surviving spouse would receive the prescribed amount plus half of the residue, with any surplus going to the deceased's parents whom failing the deceased's siblings and their issue.<sup>33</sup> Similarly, in Western Australia the spouse receives the prescribed amount plus half of the residue, but the rules regarding the surplus are more complex:<sup>34</sup> if the value of the surplus is below \$6,000 or if there are no siblings or their children surviving, then the parents will receive it. In any other case, the parents receive \$6,000, and half of any remainder, with the other half being shared between the siblings and their children. If no parents survived the intestate, the siblings receive the other half of the surplus.

18. *Canada – Quebec.* In Quebec,<sup>35</sup> the surviving spouse will inherit the whole estate on intestacy only where there are no descendants, 'privileged ascendants' (the deceased's parents) or 'privileged collaterals' (the deceased's siblings).<sup>36</sup> Where there are privileged ascendants, they receive one third and the surviving spouse two thirds.<sup>37</sup> If there are no privileged ascendants, but there are privileged collaterals, they receive one third and the surviving spouse two thirds.<sup>38</sup>

19. *England and Wales.* If the intestate leaves a surviving spouse but no issue, parents or siblings, the surviving spouse takes the whole estate.<sup>39</sup> If the intestate leaves no issue but leaves parents or siblings or their issue, the surviving spouse takes the personal chattels absolutely in addition to a fixed sum.<sup>40</sup> Half of the remaining residuary estate is then taken

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<sup>30</sup> Uniform Probate Code, §§ 2-401–2-404.

<sup>31</sup> See para 1 for the position in the other six states and territories.

<sup>32</sup> Northern Territory: Administration and Probate Act, Sch. 6; Western Australia: Administration Act 1903, s 14. Under this section the amount in Western Australia is \$75 000 where there is no issue.

<sup>33</sup> Administration and Probate Act, Sch. 6.

<sup>34</sup> Administration Act 1903, s 14.

<sup>35</sup> For all other Canadian jurisdictions, see para 2.

<sup>36</sup> Civil Code, Art 671.

<sup>37</sup> Civil Code, Art 672.

<sup>38</sup> Civil Code, Art 673.

<sup>39</sup> Administration of Estates Act 1925, s 46.

<sup>40</sup> Administration of Estates Act 1925, s 46. The fixed sum currently stands at £200,000: Family Provision (Intestate Succession) Order 1993, Art 2(b).

by the spouse, while the other half is taken by the parents, or if there are no parents, the deceased's siblings.<sup>41</sup>

20. The surviving spouse also has a right to the intestate's interest in the matrimonial home if the surviving spouse was resident in it at the time of the intestate's death.

21. *United States – Louisiana.* In Louisiana property owned by spouses is classified into community and separate property. Normally, community property is property acquired during the marriage, except for donations (but not joint donations) and inheritances.<sup>42</sup> Separate property includes property acquired prior to marriage, by inheritance or donation to one spouse, property acquired with separate property and damages for personal injury.<sup>43</sup> Where an intestate is survived by a spouse but no issue, the community property is inherited by the spouse.<sup>44</sup> Separate property is inherited by parents and siblings (or their descendants) to the exclusion of the surviving spouse. Where there are both surviving siblings (or their descendants) and surviving parents, the siblings inherit subject to a usufruct in favour of the parents.<sup>45</sup> If there are only surviving siblings (or their descendants) or only surviving parents, then the surviving siblings or parents (as the case may be) inherit free of usufruct.<sup>46</sup> If there are no surviving parents or siblings the surviving spouse (if not judicially separated from the deceased) inherits the separate property.<sup>47</sup>

## **B: INTESTACY: SURVIVING SPOUSE AND ISSUE**

22. *Australia.* Where the intestate estate is worth less than a prescribed amount (the value of which varies by jurisdiction) the spouse will take the whole amount. In the Australian Capital Territory, Northern Territory, Queensland and Western Australia, if the estate has a value above this figure the spouse will receive the prescribed amount plus half of the residue if one child has survived the deceased, or one third where there are two or more children. The issue then receive the balance.<sup>48</sup> In New South Wales and South Australia if the estate is worth more than the prescribed amount, the spouse receives this amount plus half of the balance left regardless of the number of children. Issue then receive the balance equally between them.<sup>49</sup> This is almost identical to the rule in Tasmania and Victoria, with the exception that in these jurisdictions the spouse's share of the surplus is fixed at one third rather than one half.<sup>50</sup>

23. Surviving spouses are entitled to the intestate's personal chattels in the Australian Capital Territory, Northern Territory, South Australia, Victoria and Western Australia;<sup>51</sup> and

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<sup>41</sup> Administration of Estates Act 1925, s 46.

<sup>42</sup> Code Civil, Art 2338.

<sup>43</sup> Code Civil, Art 2341 and 2344.

<sup>44</sup> Code Civil, Art 889.

<sup>45</sup> Code Civil, Art 891.

<sup>46</sup> Code Civil, Art 892.

<sup>47</sup> Code Civil, Art 894.

<sup>48</sup> Australian Capital Territory: Administration and Probate Act 1929, Sch. 6; Northern Territory: Administration and Probate Act, Sch. 6; Queensland: Succession Act 1981, Sch 2; Western Australia: Administration Act 1903, s 14.

<sup>49</sup> New South Wales: Wills, Probate and Administration Act 1898, s 61B; South Australia: Administration and Probate Act 1919, s 72G.

<sup>50</sup> Tasmania: Administration and Probate Act 1935, s 44(3); Victoria: Administration and Probate Act 1958, s 51(2).

<sup>51</sup> Australian Capital Territory: Administration and Probate Act 1929, ss 49-49A; Northern Territory: Administration and Probate Act, ss66-67; South Australia: Administration and Probate Act 1919, s 72H; Victoria: Administration and Probate Act 1958, s 51(2); Western Australia: Administration Act 1903, s 14.

are entitled to the 'household chattels' in New South Wales and Queensland.<sup>52</sup> Spouses also have a right to have the intestate's interest in the matrimonial home appropriated as part of their share in all states except Tasmania, where instead the court may grant the spouse a life interest in a dwelling house belonging to the estate under dependants relief legislation.<sup>53</sup>

24. *Canada.* In Alberta, the surviving spouse receives the entire intestate estate where its value is below \$40,000. Where the value is higher, the spouse is entitled to the first \$40,000 and a share of the residue totalling one half if the deceased was survived by one child, or one third if the deceased was survived by more than one child. The balance is then distributed *per stirpes* amongst the issue. If the intestate is survived by the issue of a predeceasing child, then the surviving spouse will receive a share as if the child of the intestate had not predeceased the intestate.<sup>54</sup>

25. The position is identical in British Columbia,<sup>55</sup> the Northwest Territories,<sup>56</sup> Nova Scotia,<sup>57</sup> Ontario,<sup>58</sup> Saskatchewan,<sup>59</sup> and the Yukon,<sup>60</sup> except that the prescribed amounts differ in value. A modified system operates in New Brunswick, where the surviving spouse receives the intestate's share of marital property,<sup>61</sup> plus half of the residue where there is one child, and one third where there is more than one child. The balance is subsequently divided between the issue *per stirpes*.<sup>62</sup>

26. In Manitoba, the entitlement of the spouse depends partly on whether the deceased's children are also children of the spouse. Where this is the case the entire intestate estate devolves to the spouse. Where this is not the case the spouse will receive \$50,000 or half of the intestate estate, whichever is the greater. The spouse then receives half of the remainder, with the issue sharing the balance.<sup>63</sup>

27. In Newfoundland and Labrador the surviving spouse receives half of the intestate estate if there is one child, and one third where there is more than one child. The balance is then divided *per stirpes* between any issue.<sup>64</sup> In Quebec the surviving spouse receives one third of the succession and descendants take the remaining two thirds.<sup>65</sup>

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<sup>52</sup> New South Wales: Wills, Probate and Administration Act 1898, s 61B(3)(a); Queensland: Succession Act 1981, Sch 2.

<sup>53</sup> Australian Capital Territory: Administration and Probate Act 1929, s 49G; New South Wales: Wills, Probate and Administration Act 1898, s 61D; Northern Territory: Administration and Probate Act, s 73; Queensland: Succession Act 1981, s 39A; South Australia: Administration and Probate Act 1919, s 72L; Victoria: Administration and Probate Act 1958, s 37A; Western Australia: Administration Act 1903, Sch 4; Tasmania: Testators' Family Maintenance Act 1912, s 3(2)(b).

<sup>54</sup> Intestate Succession Act, RSA 2000, c.1-10, ss 3 and 4.

<sup>55</sup> Estate Administration Act, RSBC 1996, c.122, s 85.

<sup>56</sup> Intestate Succession Act (also applying to Nunavut), RSNWT 1988, c. 1-10, s 2.

<sup>57</sup> Intestate Succession Act, RSNNS 1989, c.236, s 4.

<sup>58</sup> Succession Law Reform Act, RSO 1990, c. S.26, ss 45-46.

<sup>59</sup> Intestate Succession Act, SS 1996, c.1-13.1, s 6.

<sup>60</sup> Estate Administration Act SY 1998, c. 6, s 82.

<sup>61</sup> Devolution of Estates Act, RSNB 1973, c.D-9, s 22(1): the definition of 'marital property' is that given in the Marital Property Act S.N.B. 1980, c.M-1.1, s 1. Essentially, marital property is all property of either spouse, except for gifts and property agreed by the spouses not to be treated as marital property.

<sup>62</sup> New Brunswick: Devolution of Estates Act, RSNB 1973, c.D-9, ss 22-23.

<sup>63</sup> Intestate Succession Act, CCSM 1990, c.185, ss 2 and 4.

<sup>64</sup> Intestate Succession Act, RSNL 1990, c.1-21, ss 4 and 5.

<sup>65</sup> Civil Code, Art 666.

28. In Alberta, a surviving spouse is entitled to a life interest in the homestead where it has devolved by will or intestacy rules to another person. In British Columbia the surviving spouse (or common law spouse) receives the household furnishings and is entitled to a life interest in the spousal home if it has not devolved to the spouse under intestacy rules. In Manitoba, a surviving spouse (and common law partner) is entitled to a life interest in the homestead. In New Brunswick, a surviving spouse may apply to the court to receive the family home and household goods as part of the division of marital property. In Newfoundland and Labrador a surviving spouse has a survivorship right in the matrimonial home, and so beneficial ownership is vested in the survivor without the need for probate or administration of the deceased spouse's estate. In the Northwest Territories the surviving spouse may choose to receive the prescribed amount or the matrimonial home where the estate is less in value than the prescribed amount, or can include the matrimonial home as part of their share if the value is higher. In Yukon, the surviving spouse receives the household furnishings, and also a life interest in the family home if it devolves to someone else.<sup>66</sup>

29. *England and Wales.* The personal chattels of the intestate are taken by the surviving spouse, who is also entitled to payment from the residuary estate of a fixed sum.<sup>67</sup> The remaining residuary estate, if any, is divided with the spouse receiving one half for life, and then to issue on statutory trust, with the other half going immediately to the issue on statutory trust. The spouse remains entitled to the right to the matrimonial home. The surviving spouse may also require the personal representative, within one year and in writing, to redeem or purchase the life interest, in order to receive its capital value.<sup>68</sup> This election may only be exercised if the whole of the relevant part of the estate consists of property in possession.<sup>69</sup>

30. *France.* The surviving spouse's position depends on whether children surviving the deceased are also children of the surviving spouse. If this is the case, the spouse may either take a usufruct over the whole of the deceased's property, or ownership of one quarter. If this is not the case, the spouse is only entitled to ownership of one quarter.<sup>70</sup>

31. In addition to property rights, the surviving spouse is entitled to both a temporary and a permanent lodging right, although these are matrimonial rights rather than succession rights. Unless otherwise provided by the deceased's will, a surviving spouse is entitled to live in the spouses' main residence, whether it is owned by them or whether the devolution of which is entirely dependant on the law of succession, gratuitously for one year. The spouse is also entitled to use the furniture within it. If the spouse was living in rented accommodation, the rent is repaid to the spouse by the estate.<sup>71</sup>

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<sup>66</sup> Alberta: Dower Act, RSA 2000, c.D-15, s 18; British Columbia: Estate Administration Act, RSBC 1996, c.122, s 96(2); Manitoba: Homesteads Act CCSM 1992, c. H80, s 21(1); New Brunswick: Marital Property Act SNB c.M-1.1, s 4(1); Newfoundland and Labrador: Family Law Act, RSNL, 1990, c.F-2, s 8(1); Northwest Territories: Intestate Succession Act RSNWT 1988, c.1-10, s 2(5); Yukon: Estate Administration Act SY 1998, c.7, s 92(2).

<sup>67</sup> Administration of Estates Act 1925, s 46. The fixed sum currently stands at £125,000: Family Provision (Intestate Succession) Order 1993, Art 2(a).

<sup>68</sup> Administration of Estates Act 1925, ss 47A(1), (5) and (6).

<sup>69</sup> Administration of Estates Act 1925, s 47A(3).

<sup>70</sup> Civil Code, Art 757.

<sup>71</sup> Civil Code, Art 763. These rights are mandatory.

32. There are a number of limitations on the use which the surviving spouse may make of the property, including limitations on letting and transfer.<sup>72</sup> The spouse is also liable for running expenses, maintenance and taxes. Where the value of the spouse's habitation rights is less than the rights of succession, the spouse may take the remainder of the existing property, but where it is worth more, the spouse need not compensate the estate for the excess.<sup>73</sup> The spouse can convert the habitation right into a life annuity or a capital sum with the agreement of the heirs.<sup>74</sup>

33. The heirs of the deceased owe a surviving spouse in need an obligation of maintenance which must be claimed by the latter within one year of the death or of the cessation of payments by the heirs. The payments are borne by all the heirs (and in the case of insufficiency, by all the specific legatees in proportion to their legacies).<sup>75</sup>

34. *Germany.* The inheritance entitlement of the spouse depends on which matrimonial property regime applies to the marriage. Under the default 'community of surplus' a matrimonial property regime the original property of the spouses during the marriage remains separate but the increase in value of the property which the spouses acquired during the marriage is normally divided equally between the spouses when the community of surplus regime ends.<sup>76</sup> Where the deceased is survived by both spouse and issue, and the marriage was subject to the default matrimonial property regime, the spouse will receive one quarter of the estate as inheritance and a further quarter representing matrimonial property.<sup>77</sup> The remaining half is then shared amongst the descendants.

Where the community of surplus regime does not apply and property is separate, and there are one or two children, the spouse and each child inherit in equal parts.<sup>78</sup> If there are three or more children, the surviving spouse will receive one quarter and the remaining three-quarters is inherited by the children in equal shares.<sup>79</sup>

If the couple were in a full community of property regime the deceased's estate consists of his or her share which is divided according to the rules of intestate succession,<sup>80</sup> unless the marriage contract provides for the continuation of community property.<sup>81</sup>

35. Where the deceased leaves both a surviving spouse and issue, the former is entitled to the objects belonging to the matrimonial home is as long as those objects are necessary for the management of an appropriate household.<sup>82</sup> The spouse is also entitled to claim 30 days' maintenance, as are other members of the deceased's family who lived in the household.<sup>83</sup>

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<sup>72</sup> Civil Code, Art 764.

<sup>73</sup> Civil Code, Art 765.

<sup>74</sup> Civil Code, Art 766. Minor or protected adult heirs require their consent to be authorised by the judge of guardianships.

<sup>75</sup> Civil Code, Art 767.

<sup>76</sup> BGB, § 1363. K Kühne, S Dollinger and D Krome, *Germany*, in *European Succession Laws*, (ed. D Hayton) at pp 248-249.

<sup>77</sup> BGB, §§1931 and 1371. It is presumed that the statutory share of the surviving spouse is increased to one-quarter without consideration of whether any surplus has actually been acquired.

<sup>78</sup> BGB, §1931(4).

<sup>79</sup> BGB, §§1931(1) and 1924(4).

<sup>80</sup> BGB, §1482.

<sup>81</sup> BGB, §1483.

<sup>82</sup> BGB, §1932(1).

<sup>83</sup> BGB, §1969.

36. *The Netherlands.* The Netherlands has recently enacted new succession provisions in their Civil Code, details of which are found in Part 2 of the Discussion Paper.<sup>84</sup>

37. *New Zealand.* The surviving spouse or civil union partner<sup>85</sup> takes the personal chattels, and is entitled to payment of the prescribed amount. The remainder is then divided between the spouse or civil union partner and issue: one third is held on trust for the spouse, and two thirds are held on statutory trust for the issue.<sup>86</sup>

38. *Portugal.* Where issue compete with the surviving spouse on intestacy, the estate is normally divided per capita,<sup>87</sup> subject to the rule that the surviving spouse can never receive less than one-quarter of the estate. Therefore the estate is only divided into equal parts if there are no more than three descendants. Where there are more than three, the spouse will receive one-quarter of the estate, with the remainder being divided into equal parts among the issue.<sup>88</sup>

39. *Republic of Ireland.* Where an intestate is survived by a spouse and issue, the spouse receives two thirds of the intestate estate, with issue sharing the remainder.<sup>89</sup>

40. The personal representative must inform the spouse of the right to the matrimonial home and the household chattels, which is as follows: where the intestate estate includes an interest in the dwelling house where the spouse was ordinarily resident at the time of the intestate's death, the spouse may require the personal representative to appropriate the dwelling as part of the share of the spouse. This is also the case with household chattels. If the spouse's share is insufficient, the right may also be exercised in relation to the share of any infant for whom the spouse is also a trustee.<sup>90</sup>

41. *South Africa.* In South Africa the surviving spouse will either receive a child's share or the spouse's minimum share, whichever is greater.<sup>91</sup> The child's share is calculated by dividing the intestate estate equally by the number of surviving children<sup>92</sup> plus one.<sup>93</sup> If the spouse takes the minimum share, then the residue is distributed to descendants *per stirpes*.

42. *Spain.* Under the Spanish Civil Code, where the deceased is survived by both spouse and issue, the spouse will receive a usufruct of one third of the estate.<sup>94</sup>

43. *Sweden.* On the death of one spouse, the spouses' marital property is divided equally between each spouse's estate (unless the surviving spouse opts to retain his or her

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<sup>84</sup> At paras. 3.31, 2.42-2.45, 2.58 and 2.65.

<sup>85</sup> See fn 18 above.

<sup>86</sup> Administration Act 1969, s 77.

<sup>87</sup> Civil Code, Art 2133.

<sup>88</sup> F Pinto, *Portugal*, in *European Succession Laws*, (ed. D Hayton), at p 419.

<sup>89</sup> Succession Act 1965, s 67(2).

<sup>90</sup> Succession Act 1965, s 56. Under s 57, the personal representative may appoint a trust corporation or two or more persons to be trustees of an infant's share. An infant is a person under 21 years: s 3(1).

<sup>91</sup> Intestate Succession Act 81 of 1987, s 1(1)(c)(i). The spouse's minimum share is fixed by the Minister of Justice in the *Government Gazette* and at 2001 stood at R125,000 (GN 483 GG 11188 of 18 March 1988). Corbett et al, *The Law of Succession in South Africa* at p 572, fn 41, states that "taking inflation into account, it ought to be at least R300,000." Note the regime of community of property applicable in South Africa: see para. 5 above.

<sup>92</sup> Or those who have predeceased the intestate but left children of their own.

<sup>93</sup> Intestate Succession Act 81 of 1987, s 1(4)(f).

<sup>94</sup> Civil Code, Art 834. But note that the default matrimonial regime is one of community property: see para 12 above.

marital property where it exceeds that of the deceased spouse<sup>95</sup>). Where the deceased is survived by children who are also children of the surviving spouse, the latter also inherits the whole of the deceased's estate.<sup>96</sup> On the death of the surviving spouse, the share which the latter inherited from the deceased will be inherited by the children.<sup>97</sup> If the deceased's children are not also children of the surviving spouse, the children are entitled to their inheritance immediately, unless they agree that it be postponed until the death of the surviving spouse. The spouse is always entitled to take an amount of four times the 'base amount' effective under the National Insurance Act.<sup>98</sup>

44. *United States.* Under the Uniform Probate Code, if the only surviving descendants of the deceased are also descendants of the surviving spouse, and the surviving spouse has no other descendants, then the spouse is entitled to receive the entire intestate estate. The spouse receives \$150,000 plus one half of the balance of the intestate state if all of the deceased's surviving descendants are also descendants of the spouse, and the spouse also has one or more descendants who are not descendants of the deceased. Finally, the spouse's share where one or more of the deceased's surviving descendants are not also descendants of the spouse is \$100,000 plus half of the balance of the intestate estate.<sup>99</sup> Any part of the intestate estate remaining after the surviving spouse's share passes to the deceased's descendants by representation per capita at each generation.<sup>100</sup>

45. The Uniform Probate Code also grants various allowances to surviving spouses or issue.<sup>101</sup> A surviving spouse is entitled to a "homestead allowance" of \$15,000. If there is no surviving spouse, surviving minor and dependent children will share this amount between them.<sup>102</sup> The spouse, if any, or the children, are also entitled to \$10,000 in "household furniture, automobiles, furnishings, appliances and personal effects," if the unencumbered value of these goods is below the \$10,000 level.<sup>103</sup> Additionally, the surviving spouse and minor children whom the deceased was obliged to support and children who were in fact being supported by the deceased are entitled to a "reasonable allowance in money . . . for their maintenance during the period of administration."<sup>104</sup> The allowance is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children.<sup>105</sup>

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<sup>95</sup> The surviving spouse may choose to do this in order to control the amount which the heirs of the deceased will inherit: See L Herslow, *Sweden*, in *European Succession Laws*, (ed. D Hayton) at p 468.

<sup>96</sup> Inheritance Code of Sweden, Chapter 3.

<sup>97</sup> The surviving spouse may dispose of the inheritance during life, but may not do so by will.

<sup>98</sup> [http://europa.eu.int/comm/justice\\_home/doc\\_centre/civil/studies/doc/report\\_conflits\\_suede.pdf](http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/report_conflits_suede.pdf), p 733. This is inclusive of the spouses own share of the estate and his or her separate property. See also L Herslow, *Sweden*, in *European Succession Laws*, (ed. D Hayton) at p 470.

<sup>99</sup> Uniform Probate Code, §2-102.

<sup>100</sup> Uniform Probate Code, §2-103.

<sup>101</sup> Uniform Probate Code, Part 4. These are available both from intestate and testate estates and have priority over all other claims against an estate.

<sup>102</sup> Uniform Probate Code, § 2-402. In states with a constitutional homestead allowance, the value of the latter is charged against the homestead allowance granted by the Code: § 2-402A.

<sup>103</sup> These goods are "exempt property": Uniform Probate Code, § 2-203.

<sup>104</sup> Uniform Probate Code, § 2-404. The allowance may not continue for more than one year if the estate is inadequate to discharge allowed claims.

<sup>105</sup> If a minor or dependent child is not living with the surviving spouse, the allowance may be made partially to that child and partially to the spouse as appropriate to their needs.



46. In Louisiana, the surviving issue will inherit the deceased's one-half of the community property, subject to a usufruct in favour of the surviving spouse and his or her separate property free of usufruct. The usufruct lasts until death or remarriage.<sup>106</sup>

### **C: PROVISION ON INTESTACY FOR UNMARRIED PARTNERS**

47. *Australia.* In the Australian Capital Territory, 'eligible partners' are entitled to the same provision on intestacy as spouses. An eligible partner is an intestate's domestic partner who had been a domestic partner for two years or more, or who is the parent of the intestate's child where that child was under 18 at the time of the intestate's death.<sup>107</sup> A domestic partnership is defined as "the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis."<sup>108</sup> If there is an eligible partner and a spouse, the length of the domestic partnership determines each person's share: where the eligible partner had been the intestate's domestic partner for less than five years, the partnership share of the intestate estate is distributed equally between the spouse and the eligible partner. If the domestic partnership had been in existence for more than five years, the eligible partner receives the whole partnership share.<sup>109</sup>

48. In New South Wales, a de facto spouse will receive the spouse's share where there is no spouse and no issue.<sup>110</sup> If there is a spouse and a de facto spouse, the de facto spouse will only receive the spouse's share if they had been the intestate's de facto spouse for two years or more, and the intestate did not live with the spouse in that time.<sup>111</sup> Where there is a de facto and issue, but no spouse, the de facto spouse receives the spouse's share if the de facto relationship had been longer than two years, or if the issue are also children of the de facto spouse. If the de facto spouse does not get a share in this situation, the issue inherit as if there was a no spouse/de facto spouse.<sup>112</sup> A de facto relationship is defined as the relationship between two unrelated adult persons who live together as a couple but are not married to each other.<sup>113</sup>

49. In the Northern Territory, if there is no surviving spouse a de facto partner will receive the spouse's share where there is no issue; where the issue include issue of the intestate and the de facto partner; or where the de facto relationship had lasted for over two years at the date of the intestate's death. Otherwise the issue are entitled to the whole intestate estate.<sup>114</sup> Where there is a surviving spouse and a de facto partner, the de facto partner will only receive the spouse's share if the de facto relationship had lasted for two continuous years prior to the death and the intestate did not at any time live with the spouse, or the intestate is also survived by issue of the intestate and the de facto partner.<sup>115</sup> A de facto

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<sup>106</sup> Code Civil, Arts 888 and 890.

<sup>107</sup> Administration and Probate Act 1929, s 44.

<sup>108</sup> Legislation Act 2001, s 169. This section includes a non-exhaustive list of ten factors which might indicate if a relationship is a domestic partnership, including length of the relationship, cohabitation, sexual relationship, and financial dependence.

<sup>109</sup> Australian Capital Territory Administration and Probate Act 1929, s 45A. The "partnership share" is the share of the estate to which the intestate's partner would be entitled to: s 45A(2).

<sup>110</sup> Wills, Probate and Administration Act 1898, s 61B(3B).

<sup>111</sup> Wills, Probate and Administration Act 1898, s 61B(3A).

<sup>112</sup> Wills, Probate and Administration Act 1898, s 61B(3B).

<sup>113</sup> Property (Relationships) Act 1984, s 4. In a provision similar to that in the Australian Capital Territory Administration and Probate Act 1929 s 44, there is a non-exhaustive list of factors to help determine whether a relationship is a de facto relationship.

<sup>114</sup> Administration and Probate Act, Sch 6, Part 2.

<sup>115</sup> Administration and Probate Act, Sch 6, Part 3.

partnership is defined as a marriage-like relationship between two people (of the same or opposite gender)<sup>116</sup> who are not married.

50. In Queensland a de facto partner is included in the definition of 'spouse' for intestate succession, and therefore receives a spouse's share on intestacy, provided that they had lived with the intestate for a continuous period of at least two years ending on the intestate's death.<sup>117</sup> A de facto partner is defined as one of two persons living together on a genuine domestic basis, who are not married to each other or related by family. This includes opposite and same-sex couples.<sup>118</sup> Where there is more than one spouse, the entitlement distribution provisions provide that there are three ways in which the distribution of the spouse's share can be made: in accordance with a written agreement between the spouses, in accordance with a court order, or in equal shares as decided by the personal representative (executor) where the spouses have been given three months written notice that such distribution will be made if they do not enter into a written agreement or apply to the court.<sup>119</sup>

51. In South Australia, where there is both a lawful spouse and a 'domestic partner', they will be entitled to divide the spouse's share equally.<sup>120</sup> A person is a domestic partner of another person if he or she is living in a close personal relationship with that person and has lived with that person for three years, continuously or as an aggregate over four years prior to that person's death, or has a child with that person.<sup>121</sup>

52. In Tasmania, a partner is defined as either a person in a 'significant relationship', or a person in a registered 'caring relationship'.<sup>122</sup> A significant relationship is a relationship between two adult persons who have a relationship as a couple and are not related or married to each other. It may be registered, otherwise the existence of the relationship is determined by taking account all the circumstances of the relationship, including those factors mentioned in the statute.<sup>123</sup> A caring relationship is a relationship other than a marriage or significant relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care. It may also be registered or otherwise may be inferred from the circumstances.<sup>124</sup> Both types of relationships may be entered into by opposite or same-sex persons. If there is no surviving spouse, a partner is entitled to the spouse's share if they have been living with the intestate for two years, if there are no issue of the intestate, or if any issue are children of the partner and the intestate.<sup>125</sup> Where there is a surviving spouse and a partner, the spouse will

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<sup>116</sup> De Facto Relationships Act 2004, s 3A. There is a non-exhaustive list of factors in this section which may be relevant in determining whether such a relationship exists.

<sup>117</sup> Succession Act 1981, s 5AA(2).

<sup>118</sup> Acts Interpretation Act 1954, s 32DA. This section also includes a non-exhaustive list of factors which may indicate whether or not there is a de facto partnership.

<sup>119</sup> Succession Act 1981, s 36.

<sup>120</sup> Administration and Probate Act 1919, s 72H.

<sup>121</sup> Family Relationships Act 1975 s.11A. A 'close personal relationship' is defined in s 11 as a relationship between two unmarried adults (whether or not related by family and irrespective of gender) who live together as a couple on a genuine domestic basis, but does not include a relationship where one of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation.

<sup>122</sup> Administration and Probate Act 1935, s 44(9).

<sup>123</sup> Relationships Act 2003, s 4.

<sup>124</sup> Relationships Act 2003, s 5. Only a registered relationship is relevant for intestate succession.

<sup>125</sup> Administration and Probate Act 1935, s 44(3B).

receive the spouse's share unless the intestate had been living with the partner for over two years at the time of death and did not live with the spouse in this time.<sup>126</sup>

53. In Victoria, a spouse or a domestic partner is entitled to the partner's share.<sup>127</sup> A domestic partner is defined as someone who was living with the intestate at the time of their death as a couple on a genuine domestic basis, and either lived in that manner continuously for the two years immediately preceding the intestate's death, or is the parent of the intestate's child who is under 18 at the time of death. Couples of the same or opposite gender may be domestic partners.<sup>128</sup> If there is a surviving spouse and a domestic partner, distribution of the partner's share between them depends on the length of the domestic partner's cohabitation with the intestate. The domestic partner receives one third of the partner's share where continuous cohabitation had lasted between two and four years; half if between four and five years; two thirds if between five and six years; and the full amount where it was over six years.<sup>129</sup>

54. If there is no surviving spouse, a de facto partner in Western Australia is entitled to spousal rights on intestacy, provided that the de facto relationship had lasted for over two years at the time of the intestate's death.<sup>130</sup> A de facto relationship is defined as a relationship between two persons who are not married but live together in a marriage-like relationship, and can exist between couples of the same or opposite gender.<sup>131</sup> If there is a spouse and a de facto partner with whom the intestate lived continuously for two years, they will receive half of the spousal share each if the spouse did not live with the intestate during the two years prior to the date of death. If the intestate lived with the de facto partner and not the spouse for five years or more, the de facto partner receives the whole of the spouse's share. If there is more than one de facto partner, they divide the de facto share equally.<sup>132</sup>

55. *Canada.* In Alberta, an 'adult interdependent partner' is entitled to the same provision as a surviving spouse would have received on intestacy,<sup>133</sup> as are common law spouses in British Columbia,<sup>134</sup> common law partners in Manitoba,<sup>135</sup> certain cohabitants in the Northwest Territories and Saskatchewan,<sup>136</sup> and civil union spouses in Quebec.<sup>137</sup> Common-law spouses in the Yukon may apply to the court for an allowance from the intestate estate.<sup>138</sup> There is no automatic provision on intestacy for unmarried partners in New Brunswick, Ontario, Newfoundland and Labrador or Nova Scotia.

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<sup>126</sup> Administration and Probate Act 1935, s 44(3A).

<sup>127</sup> As the definition of partner includes both: Administration and Probate Act 1958, s 3(1).

<sup>128</sup> Administration and Probate Act 1958, s 3(1).

<sup>129</sup> Administration and Probate Act 1958, s 51A(1).

<sup>130</sup> Administration Act 1903, s 15.

<sup>131</sup> Interpretation Act 1984, s 13A. There is a list of factors in this section which may indicate the existence of a de facto relationship.

<sup>132</sup> Administration Act 1903, s 15.

<sup>133</sup> Intestate Succession Act, RSA 2000, c. 1-10, ss 2 and 3. s 3(2) provides that an adult interdependent partner taking under this Act may not inherit in any other capacity.

<sup>134</sup> Estate Administration Act, RSBC 1996, c.122, s1 defines spouse as including a common law spouse. Same-sex couples can also marry.

<sup>135</sup> Intestate Succession Act, CCSM 1990, c.185, s2.

<sup>136</sup> The Intestate Succession Act (also applying to Nunavut), RSNWT 1988, c.1-10, s1(1) refers to the definition of "spouse" in the Family Law Act 1997, s 1 which defines spouse as including certain cohabitantes, as does s 2 of the Saskatchewan Intestate Succession Act, SS 1996, c.1-13.1.

<sup>137</sup> Civil Code, Art 653.

<sup>138</sup> Estate Administration Act SY 1998, c.7, s 74.

56. Each state or territory stipulates criteria which must be fulfilled before relationships can be considered to be those of adult interdependent partners, entitling the partners to a share in the estate. Some jurisdictions require the fulfilment of formal requirements such as the completion of a ceremony (eg Quebec) or registration of the relationship (eg Alberta) while others have no such formal requirements so that the character and length of cohabitation are the main criteria (eg British Columbia, Saskatchewan, Northern Territory and Yukon).

57. The relevant provisions in Alberta use gender-neutral terminology, as do the equivalents in Manitoba, British Columbia, Saskatchewan and Yukon. In the Northwest Territories, cohabitants are defined as a man and a woman.

58. Where there is more than one person who could claim a spouse's rights on intestacy, each jurisdiction has a different method of ranking their claims. In Alberta, entitlement depends on cohabitation: where there is a surviving spouse and also an adult interdependent partner, whoever is currently living with the intestate, or lived with the intestate most recently, is entitled to the full spouse's share.<sup>139</sup> In British Columbia, where there are two or more persons entitled as a spouse they share the spousal share in the estate in the portions determined by the court.<sup>140</sup> In Manitoba, where there is a surviving spouse and one or more common law partners, only the most recent relationship is generally treated as existing for the purposes of the spouse's share.<sup>141</sup>

59. In the Northwest Territories competition of entitlements is avoided. Cohabitation (of some permanence, at the very least) is required in order for an unmarried partner to obtain intestacy rights, but where the spouses had separated and the intestate had entered into a spousal relationship with another person the spouse receives nothing on intestacy. The spouse also gets nothing if they were cohabiting with another person at the time of death.<sup>142</sup> In Saskatchewan, a cohabitant may only take the spousal share where there is no married surviving spouse, or the latter was cohabiting in a spousal relationship with someone other than the deceased at the time of death. Under these circumstances, the cohabitant would receive the spousal share at the expense of the married spouse.<sup>143</sup>

60. *England and Wales.* In England, a cohabitant has no succession rights on intestacy under the Administration of Estates Act 1925. However, a surviving cohabitant may apply to the court for financial provision from the estate of their deceased partner if during the two years immediately preceding the deceased's death the partner lived in the same household as the deceased as the husband or wife or civil partner of the deceased.<sup>144</sup> If a cohabitant does not satisfy these criteria, then an application could be made on the basis that they were a person who was being maintained wholly or partly by the deceased.<sup>145</sup>

61. *France.* Unmarried partners who are cohabiting or have entered into a PaCS (Pacte Civile de Solidarité)<sup>146</sup> do not have any automatic rights to inherit on intestacy. However,

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<sup>139</sup> Intestate Succession Act, RSA 2000, c.1-10, s 3.1.

<sup>140</sup> Estate Administration Act, RSBC 1996, c.122, s 85.1.

<sup>141</sup> Intestate Succession Act, C.C.S.M. c.185, ss 3(1), (2) and (4).

<sup>142</sup> Intestate Succession Act (also applying to Nunavut), RSNWT 1988, c.1-10, s 13.

<sup>143</sup> Intestate Succession Act (also applying to Nunavut), RSNWT 1988, c.1-10, ss 2(b) and 20.

<sup>144</sup> Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1)(ba) and 1(1A) and (1B).

<sup>145</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(e).

<sup>146</sup> Civil Code, Art 515.

unless they have contracted to the contrary, couples in a PaCS relationship will be subject to a common-property regime: property acquired for value by either party after the date of signing the agreement is owned in equal shares where the instrument of acquisition or of subscription does not otherwise provide.<sup>147</sup> PaCS agreements are open to same and opposite sex couples.

62. *Germany.* Surviving cohabitants have no statutory entitlement to a share in the intestate's estate. A cohabitant's only right on succession is to continue a tenancy.<sup>148</sup> Since 2001, registered same-sex partners have the same rights as spouses under the law of inheritance.<sup>149</sup>

63. *The Netherlands.* A surviving cohabitant is not entitled to a share of his or her deceased partner's intestate estate.<sup>150</sup>

64. *New Zealand.* A de facto partnership is defined as a relationship between two adults who live together as a couple but are not married. The couple may be of the same or opposite gender, and all circumstances of the relationship are to be taken into account in determining whether or not they live together as a couple.<sup>151</sup> If there is no surviving spouse or civil union partner<sup>152</sup> a de facto partner is entitled to the same rights on intestacy as a surviving spouse or civil union partner.<sup>153</sup> However, if it is a de facto relationship of short duration<sup>154</sup> then the de facto partner is only entitled if there is a child of the relationship or the de facto partner has made a substantial contribution to the relationship, and the court is satisfied that not being entitled to succeed would result in serious injustice to the partner.<sup>155</sup> If there are one or more de facto partners and a spouse or civil union partner entitled to succeed, or two or more de facto partners, all entitled spouses, civil union partners and de facto partners share the spousal share in the intestate estate equally.<sup>156</sup>

65. *Portugal.* A surviving cohabitant is not entitled to a share of his or her deceased partner's intestate estate.<sup>157</sup>

66. *Republic of Ireland.* There is no provision for unmarried cohabitants on intestacy in Ireland. However, the Irish Law Reform Commission has proposed that unmarried 'qualified cohabitantes' should be able to apply to the court for maintenance from their deceased partner's estate.<sup>158</sup>

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<sup>147</sup> Civil Code, Art 515-5.

<sup>148</sup> BGB, §563(2).

<sup>149</sup> Lebenspartnerschaftsgesetz, §10.

<sup>150</sup> Cohabitants are not listed in Art 4:10 of the Civil Code as persons entitled to inherit on intestacy. However, see the protections available against the payment of forced shares to forced heirs on testacy at para 86 below.

<sup>151</sup> Property (Relationships) Act, s 2D.

<sup>152</sup> See fn 18 above.

<sup>153</sup> Administration Act 1969, s 77.

<sup>154</sup> Defined in Property (Relationships) Act, s 2E. This is either a relationship of less than three years, or any de facto relationship the court considers it just to treat as a relationship of short duration.

<sup>155</sup> Administration Act 1969, s 77B.

<sup>156</sup> Administration Act 1969, s 77C.

<sup>157</sup> They are not listed as intestate heirs in Art 2133 of the Civil Code.

<sup>158</sup> Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitantes* (LRC CP-32 2004), para 4.27.

67. *South Africa*. There is no provision on intestacy for unmarried cohabitants.<sup>159</sup> Furthermore, the Constitutional Court of South Africa held in *Volks NO v Robinson and Others*<sup>160</sup> that an unmarried partner is not a 'spouse' for the purposes of the Maintenance of Surviving Spouses Act 27 of 1990, and so is unable to make a claim under the Act for maintenance out of the deceased's estate.

68. *Spain*. There is no provision in the Civil Code for surviving cohabitants to inherit on intestacy. However, most regions have enacted legislation enhancing the rights of both same-sex and opposite-sex cohabitants. In Aragon, for example, long-term cohabitants are able to register their relationship in order to benefit from certain rights.<sup>161</sup> In absence of such contracts or wills, a registered surviving cohabitant is entitled to a usufruct in the couple's dwelling house for a period of one year and ownership of certain common assets.

69. *Sweden*. There is no automatic provision for unmarried partners, either heterosexual or homosexual, on intestacy in Sweden. However, same sex couples may register under the Registered Partnership Act of 1994, and, subject to a few exceptions, obtain the same legal rights as married couples, including the same rights on intestacy.<sup>162</sup>

70. *United States*. The Uniform Probate Code does not include provisions affording succession rights on intestacy to unmarried cohabitants. Although several states allow either same sex marriage<sup>163</sup> or registered domestic partnership,<sup>164</sup> couples (of the same or opposite sex) who are not married or who have not registered their partnership do not automatically inherit on intestacy.

## **D: FORCED SHARES AND PROTECTION FROM DISINHERITANCE**

71. *Australia*. Although there are no fixed shares on death in Australia all states have some form of family provision legislation overriding the normal rules of succession, whereby an eligible person may make an application to the court for an order making provision out of the deceased's estate for maintenance or other purposes where adequate provision has not been made in the will, or any share the person received on intestacy is insufficient.<sup>165</sup>

72. In the Australian Capital Territory, in order to be eligible for provision, the applicant must be a partner; a person who was in a domestic relationship with the deceased for over two years continuously at any time; a child;<sup>166</sup> a stepchild who was being maintained by deceased immediately before death; a grandchild whose parent was a child of the deceased

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<sup>159</sup> The legislation governing intestacy, the South Africa Intestate Succession Act 81, only includes spouses and relatives.

<sup>160</sup> 2005(5) BCLR 446 (CC); 2005 2 BPLR 101 (CC).

<sup>161</sup> Act 6/1999, 16<sup>th</sup> March.

<sup>162</sup> Registered Partnership Act of 1994, Chapter 3.

<sup>163</sup> Eg Massachusetts, since *Goodridge et al v Department of Public Health* 798 N E 2d. 941 (Mass 2003), available at <http://www.marriagelawfoundation.org/mlf/cases%5CGoodridge%20v.%20Department.pdf>.

<sup>164</sup> Eg California Domestic Partners Rights and Responsibilities Act 2003. In September 2005, the California state assembly became the first state legislature in the US to pass a bill endorsing gay marriages but the Governor vetoed the bill. The California Supreme Court is currently considering whether not allowing same-sex marriage violates the guarantee of equal protection under the constitution.

<sup>165</sup> Australian Capital Territory: Family Provision Act 1969; New South Wales: Family Provision Act 1982; Northern Territory: Family Provision Act; Queensland: Succession Act 1981, Part 4; South Australia: Inheritance (Family Provision) Act 1972; Tasmania: Testator's Family Maintenance Act 1912; Victoria: Administration and Probate Act 1958, Part IV; Western Australia: Inheritance (Family and Dependents Provision) Act 1972.

<sup>166</sup> *Vigolo v Bostin* [2005] HCA 11 (unsuccessful application by adult child), *Curran v Duncan, Executor* [2006] WASC 9 (successful application by two adult children).

had died before the deceased, or who is not maintained by any living parent; or a parent who had been maintained by the deceased immediately before death, or where the deceased was not survived by any partner or any children. A 'partner' includes a domestic partner, the deceased's spouse at any time, someone who was a domestic partner for over two years at any time, or is the parent of the deceased's child.<sup>167</sup> The equivalent legislation in the other states includes similarly broad provisions as to eligibility.<sup>168</sup> However, some jurisdictions, for example, the Northern Territory, also allow former spouses and former de facto partners, to apply to the court for provision out of the deceased's estate.<sup>169</sup>

73. The court in the Capital Territory may make such provision as it thinks fit for proper maintenance, education or advancement in life of the applicant where this is not available from the will, the laws of intestacy, or by the combination of the will and intestacy. The court may take any matters into account when determining whether to make an order, including the character and conduct of the applicant.<sup>170</sup> Indeed, the court is expressly entitled to consider such character and conduct in all Australian jurisdictions.<sup>171</sup> In the Australian Capital Territory, the Northern Territory, Tasmania and Victoria, the legislation states that the court may consider the deceased's reasons for making dispositions in the will, or for failing to provide adequately for the applicant.<sup>172</sup> In New South Wales, evidence of the deceased's statement is admissible under certain circumstances.<sup>173</sup>

74. *Canada.* No Canadian province has a system of forced heirship.<sup>174</sup> There are no fixed shares for surviving spouses, issue or other dependants. However, every province has dependants' relief legislation allowing dependants or their representatives to apply to the court for an order making reasonable provision for their maintenance and support out of the deceased's estate where such provision has not been made in the will, or the dependant's share on intestacy is insufficient.<sup>175</sup>

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<sup>167</sup> Australian Capital Territory: Family Provision Act 1969, s 7.

<sup>168</sup> New South Wales: Family Provision Act 1982, s 6; Northern Territory: Family Provision Act, s 7; Queensland: Succession Act 1981, ss 40-41; South Australia: Inheritance (Family Provision) Act 1972, ss 4 and 6; Tasmania: Testators Family Maintenance Act 1912, ss 2(1) and 3A; Victoria: Administration and Probate Act 1958, s 91(1); Western Australia: Inheritance (Family and Dependents Provision) Act 1972, s 7(1).

<sup>169</sup> Northern Territory: Family Provision Act, s 7.

<sup>170</sup> Family Provision Act 1969, s 8.

<sup>171</sup> New South Wales: Family Provision Act 1982, s 9(3)(9b); Northern Territory: Family Provision Act, s 8(3); Queensland: Succession Act 1981, s 41(2)(c); South Australia: Inheritance (Family Provision) Act 1972, s 7(3); Tasmania: Testator's Family Maintenance Act 1912, s 8(1); Victoria: Administration and Probate Act 1958, s 91(4)(o); Western Australia: Inheritance (Family and Dependents Provision) Act 1972, s 6(3).

<sup>172</sup> Australian Capital Territory: Family Provision Act 1969, s 22(1); Northern Territory: Family Provision Act [date?] s 22(1); Tasmania: Testator's Family Maintenance Act 1912, s 8A; Victoria: Administration and Probate Act 1958, s 94(c).

<sup>173</sup> Family Provision Act 1982, s 32.

<sup>174</sup> Although Quebec is a civil law jurisdiction, it does not have forced heirship. This has been the case since the Quebec Act 1774 was enacted, enshrining the principle of testamentary freedom in s 10. But note the survival of the obligation of the deceased to provide support for his or her spouse and descendants for 6 months after death: Civil Code, Arts 684 – 695.

<sup>175</sup> Alberta: Dependents Relief Act, RSA 2000, c.D-10.5; British Columbia: Wills Variation Act, RSBC 1996, c.490; Manitoba: Dependents Relief Act, CCSM c.D37; New Brunswick: Provision for Dependents Act, RSNB 1973, c.P-22.3; Newfoundland and Labrador: Family Relief Act, RSNL 1990, c.F-3; Northwest Territories: Dependents Relief Act, RSNWT 1988, c. D-4; Nova Scotia: Testators' Family Maintenance Act, RSNS 1989, c. 465; Ontario: Succession Law Reform Act RSO 1990, c. S.26; Prince Edward Island: Dependents of a Deceased Person Relief Act, RSPEI 1988, c.D-7; Saskatchewan: Dependents Relief Act, SS 1996, c.D-25.01; Yukon: Dependents Relief Act, RSY 2002, c.56.

75. Only surviving spouses and children are entitled to apply as dependants in British Columbia, Newfoundland and Labrador and Nova Scotia.<sup>176</sup> In British Columbia, 'spouse' includes a cohabitant of two years or more, including same sex cohabitants. Other provinces have a much wider definition of 'dependant', and therefore a larger class of potential applicants for maintenance. The most inclusive jurisdiction in this respect is Manitoba, where the definition of 'dependant' includes surviving spouses; former spouses entitled to support under an agreement or court order; common law partners who were cohabiting or entitled to support under an agreement or court order; children of the deceased who are under 18, unable to support themselves, or substantially dependant on the deceased; substantially dependant grandchildren, substantially dependent parents or grandparents and substantially dependant brothers and sisters of the deceased, whether of the whole or the half blood.<sup>177</sup> In Quebec, every creditor of support may claim a financial contribution from the succession as support. The right exists even where the creditor is an heir or a legatee by particular title or where the right to support was not exercised before the date of the death, but does not exist in favour of a person unworthy of inheriting from the deceased.<sup>178</sup>

76. Although dependants' relief legislation entitles dependants to apply to the court for an order overriding the will, in making an order the court may have regard to any evidence it considers relevant, including evidence of the deceased's reasons for making dispositions in a will, or not making reasonable provision for a dependant. In addition, in all provinces other than Manitoba the court is expressly entitled to consider the character and conduct of a dependant, and may refuse to make an order on the basis of such character and conduct.<sup>179</sup>

77. *England and Wales.* The position in England and Wales is set out in paragraphs 3.15 to 3.26.

78. *France.* In France, freedom of testation is limited by the Code Civil. The deceased's estate is divided into two parts, one of which is disposable by will, with the other portion being reserved for the testator's spouse and children.<sup>180</sup> The proportion of the estate to be reserved varies depending on the number of children. Where there is one child surviving the deceased, the reserved portion is half of the estate. If there are two children, the portion is two thirds, and if there are three or more children the portion is three quarters of the estate.<sup>181</sup> Where there no descendants surviving the deceased, the surviving spouse is entitled to receive a reserved portion of one quarter of the estate.<sup>182</sup>

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<sup>176</sup> British Columbia: Wills Variation Act, RSBC 1996, c.490, s 2; Newfoundland and Labrador: Family Relief Act, RSNL 1990, c. F-3, s 2; Nova Scotia: Testators' Family Maintenance Act, RSNS 1989, c. 465, s 2.

<sup>177</sup> Dependants Relief Act, CCSM c.D37, s 1.

<sup>178</sup> Civil Code, Arts 684 – 695.

<sup>179</sup> Alberta: Dependants Relief Act, RSA 2000, c.D-10.5, ss 3(2) and s3(5); British Columbia: Wills Variation Act, RSBC 1996, c.490, ss 5 and 6(b); Manitoba: Dependants Relief Act, CCSM c.D37, s 8; New Brunswick: Provision for Dependants Act, RSNB 1973, c.P-22.3, ss 9 and 2(3); Newfoundland and Labrador Family Relief Act, RSNL 1990, c.F-3, ss 5(3) and 5(1); Northwest Territories: Dependants Relief Act, RSNWT 1988, c. D-4 ss 4(1); Nova Scotia: Testators' Family Maintenance Act, RSNS 1989, c. 465, ss 5(3) and 5(1); Ontario: Succession Law Reform Act RSO 1990, c. S.26, s 62 if spouse or same sex partner; Prince Edward Island: Dependants of a Deceased Person Relief Act, RSPEI 1988, c.D-7, ss 5(1); Saskatchewan: Dependants Relief Act, SS 1996, c.D-25.01, ss 8(2) and 8(3); Yukon: Dependants Relief Act, RSY 2002, c.56, s 5(1).

<sup>180</sup> Representation is allowed: Art 913-1.

<sup>181</sup> Code Civil, Art 913.

<sup>182</sup> Code Civil, Art 914-1.



79. The surviving spouse is also entitled to continue to reside in the spouses' main residence (and use the fittings therein) and, if in need, also has a right of maintenance against the heirs and legatees.<sup>183</sup>

80. These above succession rights of the surviving spouse are in addition to his or her share of the matrimonial property received when the matrimonial property regime is dissolved on the testator's death.<sup>184</sup>

81. *Germany.* Descendants, surviving spouses and parents of the deceased are protected from total disinheritance by a statutory fixed share (*Pflichtteil*).<sup>185</sup> Registered civil partners have the same rights to statutory forced shares as surviving spouses.<sup>186</sup> These legal rights are not a right to a share in the estate, but a claim for payment of a certain sum of money against the heirs. Normally parents and grandchildren will not be able to claim a forced share where the deceased has been survived by children, as remoter descendants and the parents of the deceased are excluded where a descendant who would exclude them in the event of intestacy is entitled to a forced share or accepts any bequest.<sup>187</sup>

82. The legal right generally amounts to one half of the statutory share that would have been received on intestacy.<sup>188</sup> In determining the value of the statutory share for the purpose of calculating the forced share, those who have been excluded from succession by testamentary disposition or declared unworthy to inherit and those who have disclaimed the inheritance are counted, but persons who had renounced their inheritance in advance are left out of consideration.

83. In determining the amount of a descendant's legal right, the statutory share of a surviving spouse whose marriage was subject to the community of surplus includes the increase of one quarter reflecting matrimonial property equalisation.<sup>189</sup> In a case where the surviving spouse has neither become an heir nor been left a legacy, he or she will be entitled to demand a posthumous equalisation of surplus and a forced share.<sup>190</sup> The legal right, however, is determined according to the statutory share in the estate of the spouse without taking into account the one quarter increase. The spouse has no right to choose between equalisation of surplus plus small forced share (*kleiner Pflichtteil*) and large forced share (*grosser Pflichtteil*).<sup>191</sup> As an exception to the usual rules regarding the forced share,<sup>192</sup> a surviving spouse may demand the forced share in addition to equalisation of surplus where he or she has disclaimed the inheritance rather than being disinherited.

84. *The Netherlands.* The new Civil Code has limited provisions of forced heirship. The deceased's children are forced heirs.<sup>193</sup> The forced share amounts to one half of the value of the estate<sup>194</sup> divided by the number of persons left behind by the deceased as mentioned

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<sup>183</sup> See paras. 31-33 for details.

<sup>184</sup> Civil Code, Art 1441.

<sup>185</sup> BGB, §2303.

<sup>186</sup> Lebenspartnerschaftsgesetz, §10(6).

<sup>187</sup> BGB, §2309.

<sup>188</sup> BGB, §2303(1).

<sup>189</sup> *Bundesgerichtshof* (BGHZ 37, 58 et seq); BGB, §1931 (1),(3), 1371(1) and 2303(2).

<sup>190</sup> BGB, §1371(2). Equalisation is according to the provisions of §1373 et seq.

<sup>191</sup> *Bundesgerichtshof* (BGHZ 42, 182).

<sup>192</sup> BGB, §2303 (2).

<sup>193</sup> Civil Code, Art 4:63, read with Art 4:10. Representation is allowed: Art 4:63(2).

<sup>194</sup> Which is the value of the assets of the deceased's estate, as increased by certain gifts and reduced by liabilities: Art 65.

in Article 10(1)(a), ie the surviving spouse and deceased's children.<sup>195</sup> A child of the deceased may also claim a lump sum for his care and upbringing up to the age of eighteen and for his maintenance and education until the age of twenty-one.<sup>196</sup>

85. Although the surviving spouse is not a forced heir, he or she receives half of the community property and is given the right to continue living in the dwelling house he or she is living in if it is part of the deceased's estate or of the dissolved community of property or the deceased had a right of use otherwise than by tenancy. The same applies to household goods. The spouse may also demand the right of usufruct in the house of household goods from the heirs.<sup>197</sup> If he or she does so, the heirs must co-operate to establish the usufruct and may not dispose of or let the property to usurp the usufruct.<sup>198</sup> The heirs must also co-operate to establish a usufruct in any other items of the estate which the spouse needs for his or her support.<sup>199</sup>

86. The Civil Code also provides limited protection for cohabitants who have entered into a cohabitation agreement. In this case, if the testator makes a testamentary disposition in favour of his or her cohabitant and provides that any claims for forced share should not become exigible until after the surviving cohabitant's death, that wish will be given effect.<sup>200</sup> The testator may also make the exigibility of the forced share dependent on other circumstances.<sup>201</sup>

87. *New Zealand.* Although New Zealand inheritance law does not include fixed shares for heirs, there are three statutes under which applications may be made to the court which, if successful, will override the will.

88. Under the Property (Relationships) Act 1976, a surviving partner (either spouse, civil union partner<sup>202</sup> or de facto partner) may choose between taking their testamentary provisions and/or rights on intestacy and making an application under Part 8 of the Act for division of relationship property.<sup>203</sup> Where such an application is made, any testamentary provision for the partner is treated as revoked, the partner is treated as having predeceased in any interpretation of the will, and the partner has no entitlement under intestacy rules.<sup>204</sup> However, claims may still be made under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955 in respect of the deceased's estate.<sup>205</sup>

89. The partner's entitlement under an order or agreement made under Part 8 has priority over the will and intestacy rights of others, orders made under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949 and estate duties.

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<sup>195</sup> Civil Code, Art 4:64. The testator may provide a forced share, to the extent it is payable by the spouse, will only become exigible after the spouse's death: Art 82. He or she may also make the exigibility of the forced share dependent on other circumstances: Art 83. In the meantime, they may demand payment from others who have received a legacy which has the effect of diminishing their portion.

<sup>196</sup> Civil Code, Art 4:35. Unless the spouse or an heir of the deceased is legally or contractually obliged to provide for the cost thereof.

<sup>197</sup> Civil Code, Arts 4:28-4:29.

<sup>198</sup> Civil Code, Art 4:29.

<sup>199</sup> Civil Code, Art 4:30.

<sup>200</sup> Civil Code, Art 4:82.

<sup>201</sup> Civil Code, Art 4:83.

<sup>202</sup> See fn 18 above.

<sup>203</sup> Property (Relationships) Act 1976, s 61.

<sup>204</sup> Property (Relationships) Act 1976, s 76. Although under s 77, the court may permit the partner to receive a portion or all of their will or intestacy shares where it is satisfied that this is necessary to avoid injustice.

<sup>205</sup> Property (Relationships) Act 1976, s 57.

However, this entitlement comes after debts properly incurred by the personal representative in the ordinary course of administration and reasonable funeral expenses.<sup>206</sup>

90. Nearly all property owned by either or both partners and acquired during the relationship, or immediately before and in contemplation of the relationship and intended for common use or benefit of the partners, will come under the definition of 'relationship property' in section 11 of the Act, unless acquired by succession, survivorship or gift from a third party. There is a presumption that all property owned by the deceased partner at the date of death, and all property acquired by the estate of the deceased partner is relationship property. Property of the deceased which passes to the surviving partner other than by succession is not automatically to be treated as separate property, instead its status is determined according to the status it would have had if the deceased partner had not died.<sup>207</sup>

91. Under the normal application of the Act, sections 11 to 13 will apply: on division of relationship property each of the partners is entitled to an equal share in the family home,<sup>208</sup> family chattels and other relationship property. If the family home has been sold, each of the partners is entitled to a half share in the proceeds, so long as the home was sold with the intention of applying all or part of the proceeds of the sale towards the acquisition of another family home, that home has not been acquired, and at the date of the application not more than two years have passed since the date when the proceeds were received or became payable. If the court considers that there are extraordinary circumstances that make equal sharing of property or money repugnant to justice, the share of each partner is to be determined in accordance with the contribution<sup>209</sup> of each partner to the marriage or relationship. However, marriages and de facto partnerships of short duration can be subject to different rules.<sup>210</sup> In terms of marriages of short duration the foregoing rules apply unless the court considers that this would be unjust, in which case the contribution of each partner to the marriage is the determining factor. The court cannot make an order where a de facto relationship is of short duration unless there is a child of the relationship or the surviving de facto partner has made a substantial contribution to the relationship, and the court is satisfied that failure to make the order would result in serious injustice. Misconduct of a partner is not taken into account except in determining the contribution of a spouse and other limited situations. Even where it may be considered, such misconduct must have been gross and palpable and must have significantly affected the extent or value of the relationship property.<sup>211</sup>

92. Under the Family Protection Act 1955, application may be made for provision out of the deceased's estate where adequate provision has not been made for the applicant's proper maintenance and support in terms of the will or law of intestacy.<sup>212</sup> Applications may be made by: spouses, civil union partners, de facto partners, children,<sup>213</sup> grandchildren, having regard to all the circumstances of the case; stepchildren who were being maintained by the deceased or were so entitled at the date of death; and parents of the deceased where

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<sup>206</sup> Property (Relationships) Act 1976, s 78.

<sup>207</sup> Property (Relationships) Act 1976, ss 81-83.

<sup>208</sup> Unless it is a homestead owned by either partner or both of them, in which case each partner is entitled to share equally in a sum of money equal to the equity of either partner or both of them in the homestead: s 12.

<sup>209</sup> Defined in Property (Relationships) Act 1976 s 18.

<sup>210</sup> Property (Relationships) Act 1976, s 85.

<sup>211</sup> Property (Relationships) Act 1976, s 18A.

<sup>212</sup> Family Protection Act 1955, s 4.

<sup>213</sup> *Williams v Aucutt & Anor* [2000] NZCA 289 concerns a successful application made by an adult child with no need for maintenance or support. The Court of Appeal however reduced the award made by the High Court.

they were being maintained, or were entitled to be maintained at the date of death, or where the deceased was not survived by a spouse, de facto partner or child.<sup>214</sup> The court may have regard to the deceased's reasons for making the dispositions made by his will or for not making provision for any person.<sup>215</sup> The court may refuse to make an order on the basis of the applicant's character or conduct.<sup>216</sup>

93. Application may also be made under the Law Reform (Testamentary Promises) Act 1949 on the basis that the claimant can prove that the deceased made an express or implied promise to reward the claimant for the rendering of services to or the performance of work for the deceased in his lifetime. Regard should be had to all circumstances of the case, including the circumstances in which the promise was made and the services or work were performed, the value of the work and the provision promised, the amount of the estate, and the nature and amounts of other claims against the estate.<sup>217</sup>

94. *Portugal.* In Portugal, freedom of testation is limited by the Civil Code. The proportion of the estate reserved depends on the number and category of surviving forced heirs. Where only a spouse survives, the reserved part is one half of the estate. Where there are both issue<sup>218</sup> and a surviving spouse, the reserved part is increased to two-thirds of the estate, divided per capita, subject to the surviving spouse's share not being less than one quarter of the estate.<sup>219</sup> If there is no surviving spouse, the issue's reserved part is either one-half or two thirds of the estate, depending on whether there is either one or two or more children. In the latter case, the reserved part is shared per capita.<sup>220</sup> Where a surviving spouse and ascendants apply for the estate, the reserved part will be two thirds of the estate, with the surviving spouse receiving two thirds of that part and the ascendants one third.<sup>221</sup> If only ascendants survive, the reserved part is either one half or one third, depending on proximity of the relationship between the deceased and the ascendants. The part is shared equally between the ascendants.<sup>222</sup>

95. *Republic of Ireland.* Surviving spouses are entitled to a fixed share of half of the estate if no issue survived the deceased and one third where there are issue.<sup>223</sup> This right, which the personal representative must inform the spouse of, has priority over devises or bequests in a will and shares on intestacy.<sup>224</sup> Where property has been left to the spouse in a will, and expressed as being in addition to the share arising from the legal right, the testator is deemed to have made a gift to the spouse consisting of a sum equal to the legal right share, plus the property devised or bequeathed by the will. In any other case, a devise or bequest in a will to the spouse is deemed to have been intended by the testator to be in satisfaction of the legal right share.<sup>225</sup> If the deceased died wholly testate, the spouse may choose the will rights or the legal right. If the deceased died partly testate, the spouse may choose the legal right share, or the will and intestacy rights combined. If the legal right is

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<sup>214</sup> Family Protection Act 1955, s 3.

<sup>215</sup> Family Protection Act 1955, s 11.

<sup>216</sup> Family Protection Act 1955, s 5.

<sup>217</sup> Law Reform (Testamentary Promises) Act 1949, s 3(1).

<sup>218</sup> Representation is allowed, Portuguese Civil Code, Art 2160.

<sup>219</sup> See above at para 31.

<sup>220</sup> Civil Code, Arts 2158-2159 read with 2157 and 2139.

<sup>221</sup> Civil Code, Art 2161/1.

<sup>222</sup> Civil Code, Art 2161/2.

<sup>223</sup> Succession Act 1965, s 111.

<sup>224</sup> Succession Act 1965, ss 112 and 115(4).

<sup>225</sup> Succession Act 1965, s 114.

chosen, the spouse may take any lesser value devises and bequests in partial satisfaction of it.<sup>226</sup>

96. If the testator has made permanent provision for the surviving spouse during his lifetime, all property which is subject to such provision, other than periodical maintenance payments, are considered to be part of the legal right share. If this provision is less in value than the legal right share, the spouse may take enough of the estate to increase the value to that amount.<sup>227</sup>

97. Although children have no equivalent to the surviving spouse's legal right share, an application may be made to the court by or on behalf of a child for provision to be made out of the deceased's estate. Where the court is of opinion that the testator failed in his moral duty to make proper provision for the child in accordance with his means, by will or otherwise, the court may order that such provision be made out of the estate as the court thinks just.<sup>228</sup> The court should consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the applicant and other children.<sup>229</sup> Any order made by the court will not burden the legal right share of the spouse, and if the spouse is the parent of the child seeking provision, an order will not affect a devise or bequest to the spouse or the spouse's intestate share.<sup>230</sup>

98. *South Africa.* Although a mixed jurisdiction like Scotland, South African law does not have forced heirship.<sup>231</sup> However, both children and surviving spouses may have a right to maintenance out of the estate of the deceased.

99. A child in need has a common law claim against the estate of a parent which is preferred to claims of heirs and legatees, even where the child has been disinherited.<sup>232</sup> The claim is based on the need of the child, which is determined by reference to factors including any benefits of capital or income received by the claimant, or whether or not the claimant was married, in which case their spouse would have the primary obligation to support.<sup>233</sup>

100. A spouse's claim for support is made under the Maintenance of Surviving Spouses Act 27 of 1990.<sup>234</sup> A surviving spouse is entitled to the provision of reasonable maintenance out of the estate until death or remarriage, in so far as that provision cannot be made from the spouse's own means and earnings.<sup>235</sup> This claim is equal in order of preference to a claim by a dependent child.<sup>236</sup> In the determination of reasonable maintenance needs, the court may take into account 'any other factor which should be taken into account', along with the three factors listed in section 3 of the Act. These factors are the amount in the estate available for distribution to heirs and legatees; the existing and expected means, earning

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<sup>226</sup> Succession Act 1965, s 115.

<sup>227</sup> Succession Act 1965, s 116.

<sup>228</sup> Succession Act 1965, s 117(1).

<sup>229</sup> Succession Act 1965, s 117(2). *C v T* [2003] IEHC 6 (unsuccessful application by adult children), *C v F* [2003] IEHC 109 (successful application by adult children).

<sup>230</sup> Succession Act 1965, s 117(3).

<sup>231</sup> But note that a system of community property will operate for most marriages: para 5 above.

<sup>232</sup> Corbett et al, *The Law of Succession in South Africa*, p 41.

<sup>233</sup> Corbett, p 42, citing *Ex parte Jacobs* 1982 (2) SA 276(O).

<sup>234</sup> As noted above at para 38, 'spouse' means a married partner.

<sup>235</sup> Maintenance of Surviving Spouses Act 27 of 1990, s 2(1).

<sup>236</sup> Maintenance of Surviving Spouses Act 27 of 1990, s 2(3)(b).

capacity, financial needs, and obligations of the survivor and the subsistence of the marriage; and the standard of living of the survivor during the subsistence of the marriage and the survivor's age at the date of death of their spouse.

101. *Spain.* The entitlement of the surviving spouse to a share of the estate in usufruct is outlined above and remains the same in cases of testate succession. The Spanish Civil Code also has a system of forced heirship<sup>237</sup>: issue of the deceased are entitled to two thirds of the estate.<sup>238</sup> If there are no surviving issue, parents and ancestors of the deceased are entitled to this share. Division of the forced share is *per stirpes*.<sup>239</sup>

102. It is worth mentioning the *reserva*: where a surviving spouse enters into a subsequent marriage, he or she is required to hand over to the issue of the first marriage the ownership of assets received from the deceased, by will or donation but not by equalisation of the matrimonial property.<sup>240</sup> Rights of usufruct in such assets are also lost unless otherwise provided by the testator.

103. Following the enactment of Act 13/2005 which amended the Civil Code, same sex couples throughout Spain are able to marry and benefit from the same rights as heterosexual married couples.

104. In addition, most regional Parliaments have enacted legislation enhancing the rights of both same-sex and opposite-sex cohabitants. In Aragon, for example, long-term cohabitants are able to register their relationship in order to benefit from certain rights.<sup>241</sup> In that territory, cohabitants may enter into contracts of economic rights and duties, including in respect of matters of succession, which have similar effects to marriage, enter into contracts of succession or make mutual wills.

105. *Sweden.* The surviving spouse's right to receive a minimum amount of four times the base amount effective under the National Insurance Act at the time of death (see para 43 above) prevails against provisions in the will which would otherwise encroach on it. Direct descendants are entitled to an indefeasible fixed share (*laglott*) of the deceased's estate which amounts to one half of the share that they would have received on intestacy.<sup>242</sup>

106. *United States.* The Uniform Probate Code includes a two-part 'elective share' for surviving spouses rather than a system of forced shares on death. If the elective share is chosen, then the spouse will receive a share of the 'augmented estate' and a supplemental elective share intended for maintenance. These rights are in addition to the homestead allowance, the exempt property allowance and the family allowance.<sup>243</sup> The augmented

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<sup>237</sup> Civil Code, Art 806.

<sup>238</sup> Note that the testator may dispose by will of one third of the share in order to improve the situation of one of his issue on his death; the forced heirs must then share the other third amongst them: J D G Campos, *Spain*, in *European Succession Laws*, (ed. D Hayton) at pp 140-141. In Aragon, the forced share can be distributed among the descendants at the testator's discretion. For example, the testator can provide that only one of his descendants will receive the whole indefeasible share and can even bypass children and leave everything to a grandchild: Act 6/1999, 16<sup>th</sup> March, Art 174.

<sup>239</sup> Civil Code, Art 933.

<sup>240</sup> Civil Code, Art 968.

<sup>241</sup> Act 6/1999, 16<sup>th</sup> March.

<sup>242</sup> Inheritance Code, Chapter 7, ss 1-3.

<sup>243</sup> Uniform Probate Code, §2-202.

estate is composed of four elements, and is intended to reflect the value of the couple's combined assets.<sup>244</sup>

107. The elective share is a percentage of the augmented estate, the amount increasing incrementally based on the length of the marriage. A marriage of one year would entitle the surviving spouse to an elective share of 3%, whereas a marriage of 15 years or more would entitle the spouse to 50% of the augmented estate.<sup>245</sup> In addition to the elective share the surviving spouse may be entitled to a supplemental elective share amount. If after receiving the elective share the survivor's assets are less than US\$ 50,000, they are entitled to a payment out of the estate so that their assets equal this minimum amount.<sup>246</sup>

108. In Louisiana, freedom of testation is limited by the Code Civil, but only in relation to children. *Inter vivos* and *mortis causa* gifts may not exceed three quarters of the property of the deceased if, at his death, he or she leaves one child, and one half if he or she leaves two or more children.<sup>247</sup> Children who are under 24 years are forced heirs, as are those who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates (regardless of age).<sup>248</sup> Representation is allowed if the predeceased child would have been under 24 years at the testator's death or the person succeeding by way of representation is mentally or physically incapable.<sup>249</sup>

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<sup>244</sup> See paras 3.31-3.32 above.

<sup>245</sup> Uniform Probate Code, §2-202(a).

<sup>246</sup> Uniform Probate Code, §2-202(b).

<sup>247</sup> Code Civil, Art 1495. These portions were introduced by Act 77 of 1996 following amendment of the Louisiana Constitution, Art 12, s 5. The legislature had attempted to introduce similar rules by Act 147 of 1990, but the Louisiana Supreme Court struck down those provisions of the 1990 Act as unconstitutional in *Succession of Lauga*, 624 So. 2d 1156 (La.1993).

<sup>248</sup> Code Civil, Arts 1493-1494.

<sup>249</sup> Code Civil, Art 1493.

## Appendix B      Advisory Group on Succession

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