Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 69

Intestate Succession and Legal Rights

SEPTEMBER 1986

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31 January 1987. All correspondence should be addressed to:-

Dr. David Nichols
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR
(Telephone: 031-668 2131)

Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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PART I - INTRODUCTION

Purpose of memorandum

1.1. The purpose of this consultative memorandum is to seek comments on possible reforms of the law on intestate succession and the law on legal rights.

Background to memorandum

1.2. We have received over the years a large number of suggestions for reform of the law of succession. The subject was included in our Second Programme of Law Reform in 1968.[1] At that time the task for the Commission was seen as being the recommending of minor amendments to the Succession (Scotland) Act 1964, which was then quite recent and was giving rise to problems. In furtherance of this task a paper, which at the request of the Commission deliberately avoided considering fundamental changes of principle, was prepared for us by Professor M C Meston of Aberdeen University. This paper has been heavily relied on in the preparation of the relevant parts of this consultative memorandum. Its submission was followed by a debate within the Commission as to whether the Commission should go beyond an amending and tidying up exercise and seek views on some options for more fundamental reform. It was decided that this should be done. Before the necessary consultative memorandum could be prepared, however, it became clear that the Commission would have to give its attention

first to possible reform of the law on matrimonial property. It would clearly have been unwise to proceed with a review of succession law while the question remained outstanding whether a full system of community property should be introduced. Work on succession law was therefore put aside until matrimonial property law was dealt with. That has now been done. Our report on Matrimonial Property[2] has been implemented by the Family Law (Scotland) Act 1985 and the way is therefore clear for us to resume work on succession law.

Scope of memorandum

1.3. In this memorandum we discuss possible reforms in the law of intestate succession and legal rights. We are publishing at the same time two other consultative memoranda - one on the making and revocation of wills (Consultative Memorandum No. 70) and one on some miscellaneous topics in the law of succession (Consultative Memorandum No. 71). The memoranda are to some extent interrelated but each one can be read on its own. Some of the possible reforms canvassed in this memorandum are of a fundamental character. It is over 20 years since the enactment of the Succession (Scotland) Act 1964, which implemented the Mackintosh Committee's Report of 1950,[3] and it cannot now be convincingly argued that the time is not ripe for a further review. Moreover some of the more serious criticisms of the present law, such as the criticism that too much depends on the nature rather than the amount of the deceased's property, can only be dealt with satisfactorily by means of major reforms.

Historical development of the law

1.4. To give a full account of the historical development of the law of intestate succession and legal rights in Scotland would take many pages and contribute little to a discussion on reform of the present law. All that need be said here is that the pre-1964 law was extremely archaic in a number of respects. It had, for example, different rules for heritable and moveable property. In relation to heritable property males were preferred to females and the rule of primogeniture applied. Although the surviving spouse had limited statutory rights and legal rights he or she did not feature in the list of heirs on intestacy. Accordingly the bulk of a man's estate might pass to a distant cousin instead of to his widow.

1.5. Although the need for reform of these archaic rules had long been recognised by the legal profession and others, official action was delayed until the appointment, in July 1949, of the Committee of Inquiry into the Law of Succession in Scotland.[4] The Committee recognised that the existing law, adapted as it was to the distribution of large landed estates, failed to take account of changed social conditions. The rule of primogeniture in heritable succession, originally part of "feudal customs"[5] and preserved to perpetuate "the dignity and influence of great families for the security and defence of our country"[6] was "out-moded and inapplicable to the present day".[7] The law of intestate succession had to be relevant to the small estate. Account also had to be taken of the movement towards legal equality of the sexes and the complaint

that the surviving spouse was inadequately provided for.[8] The main aims therefore were; (1) to abolish the rule of primogeniture; (2) to remove the differentiation between the sexes in succession; (3) to ensure that all property regardless of its nature should devolve substantially according to the same rules; and (4) to improve the position of the surviving spouse. Despite the "strong ... demand for revision"[9] of the law further delay ensued. It was not until 1964[10] that the recommendations of the Committee were substantially implemented, although even then the third objective was by no means completely attained.[11]

Summary of the present law

1.6. The changes introduced by the 1964 Act apply with respect to deaths on or after September 10, 1964. The provisions of the Act do not however apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof.[12] The succession to these items is still regulated by the previous law. After the payment of debts,[13] the distribution of a deceased's estate may require the application of three sets of rules, any or all of which may be of relevance in a given succession.[14]

1.7. Prior rights of surviving spouse. The prior rights of the surviving spouse are available only on the intestacy of the deceased[15] and consist of a right under section 8 of the Act to the dwelling-house with furniture and plenishings and a right under section 9 to a fixed financial provision. Section 36(1) of the Act defines "an intestate" as one who has died leaving the whole or any part of his estate undisposed of by testamentary

disposition and in the case of a partial intestacy prior rights apply only to the part of the estate not disposed of by will. As the name suggests, these rights have priority over legal rights and the claims of intestate heirs.[16] Under the Conjugal Rights (Scotland) Amendment Act 1861, however, a decree of judicial separation obtained by a wife extinguishes all rights of her husband in the intestate succession to property acquired by her after the decree.[17] This does not apply in the converse situation where the husband obtains the decree.

1.8. Probably the most important prior right is the right to the dwelling-house under section 8 of the Act. The surviving spouse is entitled to receive the deceased spouse's interest, whether as owner or tenant, in any dwelling-house[18] in which the surviving spouse was ordinarily resident at the date of the deceased's death[19] (whether or not the deceased was so resident at that date). The deceased's "relevant interest" whether of ownership or tenancy is subject to any heritable debt secured over that interest and, as defined in section 8(6)(d), does not include a tenancy under the Rent Acts. If the value of the "relevant interest" exceeds £50,000[20] the surviving spouse's entitlement is not to the interest itself but to a payment of £50,000 in cash.[21] In two other cases the surviving spouse's right is to the value of the interest (up to £50,000) rather than to the interest itself. These are, firstly, where the house is part only of the subjects comprised in one tenancy or lease of which the deceased was the tenant; and secondly where the house is the whole or part of subjects used by the deceased for carrying on a trade, profession or

occupation, and the value of the estate as a whole would be likely to be substantially diminished if the house were disposed of otherwise than along with the assets of the trade, profession or occupation.[22] If the intestate estate comprises a relevant interest in two or more dwelling-houses to which section 8 applies, the surviving spouse must select within six months of the date of death of the deceased one dwelling-house to which the right is to attach.[23]

1.9. Where the intestate estate includes the furniture and plenishings of a dwelling-house (whether or not the dwelling-house is comprised in such estate) the surviving spouse is entitled to such furniture and plenishings up to the value of £10,000.[24] "Furniture and plenishings" are defined in the Act so as to cover a full range of house contents while excluding any article or animal used by the deceased for business purposes, money and heirlooms.[25] As with the dwelling-house right, if the intestate estate comprises the furniture and plenishings of two or more dwelling-houses the surviving spouse must select within six months of the date of death the furniture and plenishings of one dwelling-house only.[26] The right to the dwelling- house and the right to the furniture and plenishings are, however, totally independent and the furniture and plenishings selected need not necessarily be those contained in the dwelling-house selected.

1.10. After the prior rights in section 8 are satisfied the surviving spouse is entitled to a fixed sum[27] of £15,000 if the deceased is survived by children (or the issue of such children who predeceased), or £25,000 if

there are no such descendants of the deceased.[28] In the case of a partial intestacy where the surviving spouse has accepted a legacy out of the deceased's testate estate (other than a legacy of a dwelling-house or furniture covered by prior rights) the value of the legacy must be deducted from the sum due from the intestate estate under section 9.[29] Where the intestate estate is insufficient to meet this financial right it is satisfied by transferring the whole intestate estate to the surviving spouse. In such a case the surviving spouse has the right to be appointed executor.[30] Where, however, the intestate estate exceeds the financial right, it is met out of heritable and moveable property rateably i.e. in proportion to their total amounts. This is to preserve a proper balance prior to the calculation of legal rights, which are exigible only out of moveable estate.

1.11. Legal rights of spouses and children. The second set of rules to be considered are those governing the legal rights of spouses and children. Section 10(1) of the 1964 Act abolished the legal rights of terce and courtesy previously exigible out of the deceased's heritable estate. Section 37(2) of the Act preserves choice of law rules governing the administration, winding up or distribution of the estate of any deceased person. Since the choice of law rule in matters of heritable succession is that the lex situs governs, the result is that all heritage situated in Scotland is exempt from legal rights. After satisfaction of the surviving spouse's prior rights in the case of intestacy,[31] division of the remaining moveable estate (if any)

remains as in the previous law[32] i.e. the surviving spouse's jus relictae or jus relicti of one-third of the moveables if there are descendants of the deceased or one-half if there are no such descendants: the descendants' legitim of one-third or one-half dependent on the presence or absence of a surviving spouse; and the Dead's Part. Legal rights are calculated only after the deduction of liabilities exigible from the moveable estate. These can include inheritance tax, administration expenses, funeral expenses, debts, mournings and interim aliment for the surviving spouse to the first term of Whitsunday or Martinmas occurring after the death. At no stage in the division of an intestate estate is there representation of a predeceasing spouse and thus the jus relictae (jus relicti) is available only to a surviving spouse. Legitim, however, is no longer confined to surviving children,[33] the principle of infinite representation having been introduced by section 11 of the 1964 Act.[34] This changes the previous situation at common law where a single surviving child took the whole legitim fund to the exclusion of the issue of predeceasing children. Section 11(1) provides that where a person dies predeceased by a child who leaves lawful issue[35] who survive the deceased such issue have the like right to legitim as the child would have had had he survived the deceased. If all the claimants on the legitim fund are in the same degree of relationship to the deceased there is a division of the fund by heads (per capita) i.e. they share equally.[36] Where, however, the claimants are not all of the same degree of relationship to the deceased there is a division of the fund by stocks (per stirpes) i.e. the children of a

predeceasing relative take the share their parent would have taken.[37] The common law doctrine of collation inter liberos (by which advances must be added back to the legitim fund) is saved by section 11(3) of the Act. In addition, because there is now representation in legitim, any descendant claiming a share of the legitim fund must add back not only advances made by the deceased to him but also "the proportion appropriate to him" of any advances made to the predeceased through whom he derives a claim as a representative. An improvement made by section 12 of the Act is that it is no longer possible for the claims of children to be defeated by the provisions of an ante-nuptial marriage contract.

1.12. At common law a claim for legal rights did not automatically involve complete forfeiture of testamentary provisions unless the will contained an express forfeiture clause or a clause saying that testamentary provisions were in satisfaction of legal rights.[38] In the absence of such clauses, if a claimant claimed legal rights the doctrine of equitable compensation dictated that the testamentary provision was applied initially to restore to the estate that which had been taken away by virtue of the payment of legal rights and thereafter it remained for the benefit of the spouse or child concerned.[39] Section 13 of the 1964 Act simplifies the matter by providing that where a testamentary disposition contains a provision in favour of a spouse or issue of the testator which does not contain a satisfaction of legal rights clause, the disposition shall have effect as if it contained such a declaration (unless the disposition contains an express provision to the

contrary). The beneficiary must therefore elect either to take the bequest or to claim legal rights.[40]

1.13. As noted above, the policy of assimilating heritage and moveables for the purposes of succession does not extend to legal rights which are now exigible only from moveable estate. There are, however, several historical anomalies in the classification of certain types of property. Heritable securities are treated as moveable assets in the general succession of the creditor but remain heritable for the purpose of calculating legal rights in his estate.[41] Since 1964 ground annuals are similarly treated.[42] The value of such assets must be included in the moveable estate subject to the surviving spouse's prior financial right, then deducted for the purpose of calculating legal rights, and then added back to the free estate. Moreover the distribution of the estate can be significantly affected by the amount of such assets which are regarded as having been used up to meet prior rights. A further anomaly is possibly the position of personal bonds which purport to be in favour of heirs and assignees excluding executors. It is arguable that under the Act 1661 c.32 such bonds become heritable in the creditor's succession.[43]

1.14. Succession to the 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 the third set of rules to be found in Part I of the 1964 Act. Section 2 contains a statutory list of those entitled to succeed in order of preference. The list of statutory heirs closely follows the general pattern of the previous rules

of intestate moveable succession but includes for the first time a deceased's mother and maternal relatives andthe deceased's spouse. Where the succession opens to collaterals of the deceased or his ancestors the rule that those of the whole-blood have preference over those of the half-blood remains but where the latter become entitled they rank without distinction as between those related through the father (consanguinean) and those related through the mother (uterine).[44] Representation is applied throughout the succession except in relation to a parent or spouse of the deceased[45] and similar rules apply for division per capita or per stirpes as in the case of legitim.[46] Children have the same rights to share in the free estate of both parents whether or not the parents have ever been married to each other and surviving parents (including unmarried parents) have a reciprocal right.[47] However, there are, at the time when this is written, no succession rights as between collaterals and remote relatives on the one hand and persons born out of wedlock on the other.[48] The 1964 Act also gives adopted children full rights of succession in the estate of the adopting parent or parents, the adopted child being treated as the child of the adopter for all purposes.[49] If these rules are applied along with section 2 the order of succession is briefly as follows. If the deceased is survived by children or by the lawful issue of predeceasing children, they have the right to the whole of the free estate. Failing issue where the deceased is survived by a parent or parents and also by collaterals (brothers or sisters) the surviving parent or parents are entitled to one-half of the free estate and the collaterals to the other half. If the deceased is survived by collaterals but predeceased by

parents, or survived by parents but not by collaterals, the surviving collaterals or parents respectively succeed to the whole free estate. Collaterals of the whole blood have preference to collaterals of the half-blood. In the absence of any prior relative - issue, collateral or parents - the succession passes to the surviving spouse. In the absence of a surviving spouse the succession opens firstly to uncles and aunts of the deceased, then to grandparents, then to collaterals of grandparents and finally to remoter ancestors of the deceased without restriction in remoteness of degree. As in the previous law, where there is no person entitled to succeed the estate falls to the Crown as ultimus haeres.[50]

1.15. For the convenience of readers who may wish to refer to a brief summary of the present law from time to time as they read the rest of this memorandum we have appended such a summary as Appendix I to the memorandum.

Factual background

1.16. The survey on "Family Property in Scotland" carried out for us in 1979 showed that 80% of the informants in the large representative sample of adults in Scotland had never made a will.[51] In three quarters of married couples neither spouse had made a will and even in the case of older couples (where one was over 65 years of age) this was true of more than half.[52] The survey also showed the generally small amounts of property owned by married people in Scotland. Only 37% of married couples owned their home and of these only 16% estimated its value as more than £30,000.[53] Only 15% of married couples had savings and other financial assets

(excluding life insurance and pensions) estimated at over £5,000 in value.[54] In the case of non-owner-occupiers this figure was 8%.[55] These figures relate, of course, only to married couples and only to the position while both spouses are alive. Of more direct relevance for present purposes are the amounts of the estates included in inventories lodged for the confirmation of an executor.[56] The average amount, for the whole of Scotland, was £21,202 in 1982, £23,945 in 1983 and £27,707 in 1984. (Figures for 1985 are not yet complete.) In each of these years over a third of the confirmations were to small estates with an average value of £3,109, £4,478 and £4,799 respectively in 1982, 1983 and 1984. In 1984, for example, the total number of confirmations was 26,287 and the number for small estates was 9,304. In the case of many deaths each year no executor is confirmed, because the estate is of a size and nature which makes this unnecessary. Most of these estates will be very small indeed, perhaps a few items of personal property and a small amount of cash or savings. In 1984, for example, when 26,287 confirmations were granted the number of deaths in Scotland was 62,345 (of which about 1,500 were of people under 20 years of age). Although the two figures are not directly comparable (because, for example, confirmations for those dying towards the end of the year would not be obtained until the following year) there seems no doubt that most deaths in Scotland each year are not followed by the appointment of an executor. Yet succession problems may still arise. Should, for example, an old woman's money and possessions go entirely to her sister or be divided equally between her sister and her half-sister?

1.17. The rules of intestate succession have to apply to a whole range of estates. It is very important to bear in mind, however, that the majority will be small.

1.18. The results of more detailed research being carried out on the characteristics of deceased's estates in Scotland are not yet available but will be available to us when we come to analyse the comments on this memorandum and prepare recommendations.

Public opinion

1.19. The law of succession affects every member of the community and for this reason public opinion on the issues discussed in this memorandum is of the greatest importance. We are fortunate in having the results from two public opinion surveys to assist us. The first was the 1979 survey on "Family Property in Scotland" which we have already mentioned.[57] Only a section of this dealt with views on inheritance. We discuss the results in their context later but broadly speaking the survey showed

(a) a preference for the surviving spouse as the sole or a main beneficiary on intestacy (depending on the amount of the estate and whether or not children of the deceased survived),

(b) rejection of complete testamentary freedom in favour of some protection for spouse and children against disinheritance, and

(c) a division of opinion on whether this protection should be by means of fixed legal

rights or discretionary provision, with a small majority favouring discretionary provision (55% as opposed to 42% who favoured fixed rights).

As the survey on "Family Property in Scotland" has already been published we do not reproduce it here, although we later refer to its findings in some detail.

1.20. The second public opinion survey - on "Attitudes Towards Succession Law in Scotland" - was carried out for us in 1986 by System Three Scotland. As this has not been published elsewhere we reproduce it (minus the full computer tabulations) as Appendix II to this Memorandum. Again, broadly speaking, this survey showed a preference for the spouse as the sole, or a main, beneficiary on intestacy, a rejection of complete testamentary freedom in favour of some protection for spouse and children, and a fairly even division of opinion on whether this protection should be by means of fixed rights or discretionary provision. The survey also provided information on many other specific issues (such as whether a half-sister should share equally with a sister) which we dicuss later in the appropriate context.

1.21. Some interesting empirical research has been done in the United States on various succession law issues.[58] The results are generally in line with those of the Scottish surveys.

Comparative law

1.22. We have looked at the laws of many other countries, and at proposals for reform in a number of

other countries, in preparing this memorandum. It would take substantial volumes to describe these various laws and proposals in any detail. We refer to some of them later on in the context of particular issues. It may be helpful at this point to give a very general overview, with our reasons for paying more attention to some foreign laws than to others.

1.23. We have, naturally, looked carefully at the law of England and Wales. We have found the law on discretionary provision for family and dependants (which was recast in 1975 following on recommendations by the Law Commission[59]) very helpful and rely on it heavily in the succeeding pages as a model for one possible type of reform. We regret that we cannot say the same of the English law on intestate succession. This seems to us to be a model of what the law on intestate succession should not be. It is riddled with statutory trusts and is expressed in a way which very few non-lawyers could understand.

1.24. The law of succession in the Republic of Ireland was radically reformed, after considerable public discussion, by the Succession Act 1965. We have found this Act, and the Parliamentary debates leading up to it, of great value. The Irish experience is of particular interest to Scottish reformers and it is worth briefly describing the background. Before 1965 Irish law had freedom of testation, unrestrained by either legal rights of the Scottish type or discretionary family provision of the English type. When proposals for reform were being considered, officials of the Ministry of Justice visited

Scotland to study the legal rights system and consult with Scottish experts on the subject. They were favourably impressed and the result was that the first version of the Succession Bill provided for legal rights for the surviving spouse and issue. It was proposed to give the spouse a legal right to a third of the whole estate and the issue a right to a third. If there was no issue the spouse's legal right would be to a half of the estate. If there was no spouse the issue's legal right would likewise be to a half. These proposals attracted vociferous opposition. It was argued that they would impose unduly rigid limitations on a testator's discretion to divide his estate amongst the members of his family in the way best suited to the circumstances of the case. A commonly cited example was that of the small farmer with several sons. One had stayed on the farm for nominal wages, and others had made independent careers. In such a case the farmer might reasonably, it was argued, wish to leave the whole farm to the son who had worked on it. To meet these objections the government introduced amendments to restrict legal rights to a spouse and dependent children. They also proposed that where a testator left two-thirds or more of his property to his spouse, dependent children who were also children of that spouse would not be entitled to legal rights. This was to enable a testator to leave all or most of his estate to his wife, trusting her to provide for their children. (Stepmothers were not so trusted.) These amendments still did not satisfy the objectors and in the end of the day it was decided to give the surviving spouse legal rights but to give children only a right to apply to the court for a

discretionary award out of the estate on the ground that the testator had failed in his moral duty to make proper provision for the child in accordance with his means. The result was thus a new solution incorporating elements of the Scottish and English systems.

1.25. We have found the American Uniform Probate Code extremely useful and refer frequently to its solutions.[60] It was drafted by the National Conference of Commissioners on Uniform State Laws and approved in 1969. It does not have legislative force but is merely a model for adoption by state legislatures if they think fit. It has been adopted in at least fourteen states. We have also derived a great deal of assistance from legislation and law reform reports from individual states of the United States of America and from Canada, Australia, New Zealand and South Africa.

1.26 The laws of continental west European countries[61] have proved useful and interesting more as a source of information about general trends (e.g. lack of distinction between heritage and moveables, improvement in position of surviving spouse, limitation of succession by very distant relatives) than as a source of particular solutions. This is partly because of the interaction between succession and matrimonial property regimes in many continental countries and partly because the whole system in some countries is so different that solutions to particular problems cannot safely be considered out of context. It is also very difficult to know whether a foreign law, unless it has been recently reformed after thorough discussion, represents the solution which would

nowadays be considered desirable in the country in question. After all, a foreigner looking at Scottish succession law as it was in 1963 without making allowance for this time-lag factor would have taken away a very curious impression of the solutions thought acceptable in Scotland!

1.27. We have looked at the succession laws of a number of countries other than those mentioned above, including some east European and far eastern countries. The remarks made in the preceding paragraph also apply here with the additional caveat that the sources available to us are not always comprehensive and up to date. We have been reassured to note, however, that even in countries with political systems and traditions very different from our own the basic approaches to succession law often appear to be very similar.

PART II - ASSESSMENT OF PRESENT LAW

Assumptions made and criteria applied

2.1 Succession laws perform different functions, and may therefore be judged by different criteria, in different types of society.[1] In a society based on kinship solidarity, for example, the criterion may be simply whether the law preserves property within the kinship group, the wishes of the deceased being regarded as irrelevant. In a militaristic feudal society the criterion may be whether the law provides for succession by a vassal able to render the necessary military services, with a consequential preference for males and eldest sons. In a society which places a high value on the autonomy of the individual will, the criterion may be whether the law gives the fullest effect to the actual or supposed wishes of the deceased. In a society where the nuclear family of husband, wife and dependent children is a highly valued institution the criterion may be whether the succession law provides adequately for the surviving spouse and dependent children. We assume that, in contemporary Scotland, feudal ideas are no longer dominant, but that the ideas of keeping property within the kinship or family group, of respecting the wishes of the deceased and of providing for the surviving spouse and dependent children still have a part to play. In assessing the present law, and in formulating proposals for reform, we have applied fairly broad criteria of acceptability, clarity, coherence and efficiency. We think that the law of succession should be acceptable to a broad spectrum of public opinion, that it should be as clear and coherent as possible, and that it should be

easy to understand and apply. This means that, as a minimum, the law should not produce results which most people would consider wrong and that it should be free from anomalies, inconsistencies and unnecessary complications.

Criticisms of prior rights

2.2. Too variable in value. As we have seen,[2] the surviving spouse has a prior right on intestacy to the deceased's "relevant interest" in a house in which the surviving spouse was ordinarily resident at the date of the death. The fact that the right is expressed in terms of a specific item in the estate rather than in terms of a fixed sum means that too much depends on the accidental nature of the property in the estate or the way in which it was financed. A widow's share of her husband's estate may vary by as much as £50,000 depending on whether or not the estate includes a relevant interest in a qualifying house. There are several quite ordinary situations in which it will not.

(a) The husband may have rented the house.

(b) The husband may have occupied the house by virtue of his job.

(c) The house may have belonged to, say, a family farm partnership.

(d) The couple may have been living abroad in the course of employment and may have rented out the house from year to year: in this case the wife would not have been ordinarily resident in the house at the date of the husband's death.

(e) The wife may have had to leave the house shortly before the husband's death because of his

violence: she may not have realised that by ceasing to live in the house she was losing her prior right to it on the husband's death.

The same situations could, of course, occur the other way round and could deprive a surviving husband of his prior right to the matrimonial home. Even where the estate includes a relevant interest in a qualifying house the value of the interest may depend quite arbitrarily on the way in which the purchase of the house was financed. The "relevant interest" taken by a widow is subject to any heritable debt secured on the house.[3] So if her husband financed the purchase of the house by burdening it with a heritable security the widow may receive very much less on his death intestate than if he financed the purchase by realising moveable investments. This may still be the case even if the husband has taken out a life insurance policy on his own life with the intention that the proceeds of the policy will be used by his executor to wipe out any balance of the heritable debt remaining unpaid on his death. The difficulty here is that the house will still be burdened with the heritable debt at the moment of death, while the proceeds of the life policy will be part of the husband's moveable estate. Much the same kind of difficulty arises in the extremely common case where the heritable debt is partly secured by the assignation of a life insurance policy or mortgage protection policy to the lender, although in this case only the proportion of the debt corresponding to the proportion which the value of the heritable security bears to the value of the total security can be regarded as heritable. It is not a satisfactory response to these problems to say that a well-advised

couple can minimise the dangers. The law on intestate succession has to cater for those who have not arranged their affairs on the basis of good legal advice. Similar problems, although usually less serious in terms of financial value, can arise in relation to the surviving spouse's right to furniture. A widow will have no claim at all under this head if she was not ordinarily resident in the relevant dwelling house at the date of her husband's death. As we have seen, this can happen in some quite common situations. Even where the surviving spouse was ordinarily resident in the house, the value of the prior right to furniture will depend on how much, if any, of the furniture was rented (which is common in relation to items such as television sets) or was in the course of being acquired on hire purchase. Again, it seems wrong that the surviving spouse's share should depend on how the deceased spouse chose to finance the provision of household furniture. It is a serious criticism of the present system of prior rights that its results, in some quite commonly occurring situations, can vary in such an apparently arbitrary way. We are not saying here that it is always right that a surviving spouse should receive the whole or a large proportion of an intestate estate. In some situations, particularly where the spouses have been separated for many years, that may not be an acceptable result. We discuss later such questions as the rights of a surviving spouse in competition with other relatives and the rights of a separated spouse. The point we are making here is that it is a criticism of the present law that it does not adopt a consistent policy in relation to the surviving

spouse. He or she may receive a great deal more or a great deal less, depending on what form the deceased's property takes and how its purchase was financed.

2.3. Too complicated. The Scottish system of prior rights is much more complicated than similar systems in other countries where the surviving spouse's right is expressed in terms of a monetary amount. When the right is expressed in terms of specific assets it becomes necessary to deal with cases where it would not be appropriate for the surviving spouse to take those assets. So there is, for example, an exception for the case where the deceased's interest in the house was over £50,000 and an exception for the case, such as the farmhouse, where the house forms part of property used by the deceased for business purposes and the value of the estate as a whole would be likely to be substantially diminished if the house were disposed of separately.[4] In the case of furniture there is an exception for anything which is an heirloom, defined somewhat vaguely as

> "any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate."[5]

Most, if not all, of these exceptions would be unnecessary if the surviving spouse's right were expressed in terms of a monetary amount. The law would be easier to state, easier to remember and easier to apply.

Criticisms of legal rights

2.4. Exigible only out of moveables. One criticism of legal rights is that they are exigible only out of moveable property. This has three unfortunate consequences. First, it makes the law unnecessarily complex. In particular it makes it necessary to calculate how much moveable estate is left after prior rights have been met.[6] Secondly, it makes the successors' shares in the estate depend unduly on the nature of the property in the estate. It may be a matter of chance whether an estate is mainly heritable or mainly moveable at the time of death. The distribution of an estate may depend, for example, on whether an old person has sold, or delayed selling, his or her house on moving into an old people's home. Thirdly, the fact that legal rights are not exigible out of heritage seriously reduces the protection given to the surviving spouse and issue. In many modest estates the main item of value is a house - which, of course, is not subject to legal rights. A testator who wishes to disinherit his wife and children - the very thing legal rights are meant to prevent - can do so to some extent by investing in heritable rather than moveable property. It will generally be impracticable for a testator to convert his whole estate into heritage but it will be easy in many cases to diminish substantially the value of legal rights by this means.

2.5. Too rigid. Another criticism of legal rights is that they are too rigid. They take no account of whether the claimant needs or deserves a share in the deceased's estate. The well-off son in his fifties, who has not seen his father for twenty years or taken any

interest in his welfare, has the same claim to legitim as the needy daughter who has looked after her father for many years. The deserting husband, if not judicially separated, has the same claim to jus relicti as the loyal and devoted husband. The undeserving child or spouse may partially exclude the deserving relative or friend preferred by the deceased in his will. Conversely, the system of legal rights makes no provision for deserving claimants who are not within the category of spouse or issue. A woman who had lived with and looked after her brother for forty years has no claim on his estate if he chooses to leave it all by will to another person or institution. The woman who has cohabited with a man as his wife for fifty years but who never married him and cannot establish a marriage by cohabitation with habit and repute has also no claim. Neither has a stepchild even if he or she was brought up by the deceased as his own child in every way.

Criticisms of rules for division of intestate estates

2.6. Complexity. A major criticism of the Scottish rules for the division of intestate estates is that they are unnecessarily complicated. Even in quite simple estates where the end results are perfectly acceptable the process by which those results are reached is elaborate and circuitous. This is partly because of the need to apply three different sets of rules - (a) rules on prior rights (of three kinds) (b) rules on legal rights (of two kinds) and (c) rules on succession to what is left - and partly because of the need to distinguish between heritable and moveable property. It is instructive to compare the way a simple intestacy is

dealt with under Scots law and under the American Uniform Probate Code. Let us suppose that a man dies, survived by a wife and two children of the marriage, leaving property worth £66,000 after debts and tax. His property consists of his interest in the matrimonial home (£40,000), furniture and plenishings (£5,000) and other moveable property (£21,000). There are no complications, such as heritable bonds, or a business use of the house, or heirlooms, or legacies, or other heritable property apart from the house. The applicable laws are as follows.

Scotland	Uniform Probate Code[7]
1. "Where a person dies intestate leaving a spouse, and the intestate estate includes a relevant interest in a dwelling house to which this section applies, the surviving spouse shall be entitled to receive out of the intestate estate ... where the value of the relevant interest does not exceed £50,000 ... the relevant interest ..."[8]	1. "The intestate share of the surviving spouse is ...if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate."
2. "Where a person dies intestate leaving a spouse, and the intestate estate includes the furniture and plenishings of a dwelling house to which this section applies (whether or	2. "The part of the intestate estate not passing to the surviving spouse...passes as follows: (1) to the issue of the decedent: if they are all of the same degree of kinship to the decedent they take equally..."

not the dwelling house is comprised in the intestate estate), the surviving spouse shall be entitled to receive out of the intestate estate ... where the value of the furniture and plenishings does not exceed £10,000 ... the whole thereof .... 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 date of death of the intestate."[9]

3. "Where a person dies intestate and is survived by a husband or wife, the surviving spouse shall be entitled to receive out of the intestate estate ... if the deceased is survived by issue ... the sum of £15,000 ... together with ... interest at the rate of 7 per cent per annum ... from the date of the intestate's death until payment ...."[10]

4. [Under common law rules the widow receives a third of the moveable property by virtue of her <u>jus relictae</u> and the children receive a

third by virtue of their right to legitim.[11]]

5. "The amount of any claim to ... jus relictae or legitim out of an estate shall be calculated by reference to so much of the net moveable estate as remains after the satisfaction of any claims thereon under the two last foregoing sections."[12]

6. "If ... there are two or more persons having right among them to legitim, then the legitim shall -
(a) if all of those persons are in the same degree of relationship to the deceased, be divided among them equally ..."[13]

7. [Subject to the above] "where an intestate is survived by children, they shall have right to the whole of the intestate estate".[14]

8. "If, by virtue of the foregoing provisions of this Part of this Act, there are two or more persons having right among them to the whole ... of an intestate estate, then the said estate ... shall ... if all of those persons are in

> the same degree of relationship to the intestate, be divided among them equally ...."[15]

It will be seen that Scots law takes about five times as many words to regulate the situation as the Uniform Probate Code. The results of applying these rules are as follows.

Scotland		Uniform Probate Code	
Widow receives		Widow receives (at $1.3 to £1)	
House	£40,000	First $50,000	£38,460
Furniture	5,000	Half rest	13,770
Financial right	15,000		£52,230
Jus relictae	2,000		
	£62,000		
Children receive (equally between them)		Children receive (equally between them)	13,770
Legitim £2,000			
Share of free intestate estate. 2,000	4,000		
	£66,000		£66,000

The Scottish system happens to be more favourable to the widow in this particular case but would be less favourable if the house were replaced by moveables. The figures in the hypothetical examples are not, however, important: the widow's fixed share under the American type of system could be set at any appropriate level. The important point is that the same essential result - giving the major share to the widow and the rest to the

children equally - can be achieved very much more simply and efficiently under the American type of system than under the present Scots law. This is not intended as a criticism of the drafting of the Succession (Scotland) Act 1964. The difficulties in the Scottish system are the result of policy not drafting. It must be remembered that the above example is a very simple one. The contrast between the Scottish and American systems would be even more marked in more complicated cases involving, for example, a country cottage as well as the matrimonial home. One advantage of the Scottish system may be that it ensures that the widow can receive the house and furniture (up to a certain value) rather than just a cash sum representing their value. That could, however, be achieved by giving the surviving spouse the right to require the executor to allocate the house and furniture to the surviving spouse's share. Even that may not be necessary if the spouse would in most cases take the house by right (because entitled to the whole estate) or by agreement.[16]

2.7. Poor position of surviving spouse in some cases. In some cases of intestacy the surviving spouse fares badly in Scots law. Suppose, for example, that a man dies intestate at the age of 65 survived by his wife and a brother. The matrimonial home and most of the furniture belong to the wife, having been inherited by her from her mother. The main asset in the husband's estate consists of shares in a business which he has built up over the years but he also has some savings and insurance policies. After debts and taxes his assets are valued as follows.

Furniture in home	£ 500
Other moveable property	115,000
Total	£115,500

This is the type of situation which could arise if a businessman dies intestate at the point in life when he might be thinking of retiring. He has no occupational pension and would have been relying on his capital to provide an income for himself and his wife in their old age. He may, or may not, have had a good relationship with his brother. In this situation it might be thought that the whole estate would go to the wife. In fact well over a third of it goes to the brother. The reason for this is that, under the present law, the surviving spouse comes well down the list of those entitled to inherit the intestate estate left after prior and legal rights have been accounted for. The surviving spouse comes after issue, parents, brothers and sisters, and nephews and nieces. The distribution of the estate in the example given is as follows.

Surviving spouse	
Prior right to furniture	£500
Prior right to cash sum (which is a right to £25,000 if there are no issue).	25,000
Jus relictae (which is a right to half remaining moveables if there are no issue).	£45,000
	£70,500
Brother	
Rest of estate	45,000
	£115,500

If the deceased husband had run his business as an individual, rather than through a company, and if the business assets had included land and buildings worth,

say, £60,000 the widow would have received £47,022 and the brother £68,478. The widow's lower share in this situation is due to the fact that legal rights are not exigible out of heritable property. In England and Wales the surviving spouse in the example given would take the furniture (£500), a fixed sum of £85,000 and half the remaining estate, (£15,000) - i.e. £100,500 in all - while the brother would take £15,000.[17] Under the Uniform Probate Code the surviving spouse would simply take the whole intestate estate.[18] It is, in our view, a possible criticism of the present law of Scotland that the surviving spouse comes so far down the list of those entitled to the intestate estate left after prior and legal rights.

2.8. Unduly favourable position of surviving spouse in some cases. The combination of prior rights and legal rights can, as we have seen, give the whole or a very large part of a deceased's estate to the surviving spouse. This may be perceived by other relatives or claimants as unjust and unacceptable, particularly in cases where the spouses have been separated for many years, or where the surviving spouse is a second spouse whom the deceased married shortly before his death. We have already received forceful representations on this topic.

2.9. Different treatment of surviving spouse on intestacy and under will entirely in his or her favour. On intestacy, as we have seen, the surviving spouse's prior rights will often exhaust the estate, even if there are children of the deceased. If, however, a deceased

has left his whole estate to his wife by will, the children will be entitled to their legal rights. The wife will therefore have an incentive to renounce her testamentary provisions and create an intestacy.[19] It seems unsatisfactory that a surviving spouse should be better off on intestacy than under a will entirely in his or her favour. There is a lack of consistency in the law here. If the whole of an estate of a certain size and composition is prima facie destined to the surviving spouse then either the deceased's children should have a legal claim to part of it or they should not. It makes no sense to say that they can claim part of it if the deceased has left an actual will entirely in the spouse's favour, but have no claim if the law brings into existence, so to speak, a deemed will in the spouse's favour. If any distinction is justified here, which seems doubtful, it should be the other way round: the surviving spouse should be better off where actually chosen by the deceased than where notionally chosen.

2.10. Order of succession among other relatives. Where a person dies without a spouse or issue the order of succession among other relatives is laid down by section 2 of the Succession (Scotland) Act 1964. The way in which this is done is not by any means the only possible way and, indeed, may be open to criticism in one or two respects. Is it right, for example, that collaterals of the full-blood should wholly exclude collaterals of the half-blood? Is there something to be said for the solution adopted in a number of other countries of not allowing extremely remote relatives of

the deceased (such as third cousins) to inherit on intestacy? We consider questions of this type later and also the appropriate division of an estate between relatives of different lines.[20]

PART III - OPTIONS FOR REFORM: INTESTATE SUCCESSION

Introduction

3.1. In this part of the memorandum we discuss possible ways of meeting the criticisms of the present law on intestate succession, including prior rights, which have been identified above. We are assuming, for the purposes of this memorandum, that the Law Reform (Parent and Child)(Scotland)Act 1986 will be brought into force at an early date and that birth out of wedlock will make no difference to succession rights. References to children and issue therefore include those born out of wedlock. Adopted children are already regarded as the children of the adopter and not of their natural parent[1] and we suggest no change in that rule. In the following paragraphs we discuss the options for reform of the law on intestate succession and prior rights in the following situations:-

(a) where the deceased is survived by issue but not by a spouse

(b) where the deceased is survived by a spouse and issue

(c) where the deceased is survived by a spouse but not by issue, and

(d) where the deceased is survived by neither spouse nor issue.

In setting out and assessing these options we have thought it right to consider the problems afresh and not to be hidebound by existing concepts of prior rights, legal rights and rules of intestate division. There may well be other and better ways of achieving the desired results in the various situations mentioned.

Issue but no spouse

3.2. Under the present law, where a deceased dies intestate survived by issue (e.g. children, grandchildren or great-grandchildren) but not by a husband or wife, the issue take the whole estate. This simple result is achieved in a rather complicated way by giving the issue first a right to legitim and then a right, under the Succession (Scotland) Act 1964,[2] to the rest of the estate. We discuss later whether it is necessary to use legal rights in cases of total intestacy and we also discuss later the method of division of an estate (e.g. per capita or per stirpes) among surviving issue.[3] In the meantime we would welcome views on our provisional conclusion that:-

1. Where a person dies intestate survived by issue but not by a spouse, the issue should (as under the existing law) take the whole estate.

Spouse and issue

3.3. The main options. The three main options where a person dies intestate survived by a spouse and issue are (1) all to issue (2) all to spouse and (3) some to spouse and some to issue. Under this last option we include those solutions which in principle give some to the spouse and some to the issue but which confer a minimum entitlement on the spouse which means that in some, or even most, cases he or she takes the whole estate. This, of course, is the present Scots law. In considering these options we deal first with the normal case where the deceased has been married only once and where the spouses were not separated. Later we consider whether separated spouses and second or subsequent spouses should be treated differently.

3.4. Public opinion. In the 1979 survey of Family Property in Scotland informants were asked a series of questions about how a man's intestate estate should be dealt with if he was survived by a widow and three grown-up children. The first question concerned a small estate worth £500. 61% thought it should all go to the widow. 25% thought half should go to the widow and half to the children. 11% thought it should be divided equally between all four. 1% thought it should go entirely to the children. 2% gave other answers.[4] In the 1986 survey of Attitudes towards Succession Law in Scotland respondents were asked how the property of a man who was very poor should be divided on his death intestate survived by his wife and two grown-up children. 65% thought it should go entirely to the wife. 18% thought it should go mainly to the wife, with some to the children. 13% thought it should go half to the wife and half to the children. Again only 1% thought it should go entirely to the children.[5] There is strong public support for giving a man's small intestate estate entirely to his surviving spouse.

3.5. In the 1979 survey informants were next asked to consider the case where the man died intestate leaving the family home (worth £18,000) and other property worth £2,000. They were told that the widow would get the home and were asked to consider how the other £2,000 should be dealt with, again on the assumption that the man was survived by a wife and three grown up children. In this case 42% thought the £2,000 should go entirely to the wife, 21% thought it should be divided half and half, 20% thought it should be divided equally among all four

and 15% thought it should go to the children. 2% gave other answers.[6] It should be noted that in this case if the £2,000 were divided half and half the widow would still receive the bulk of the estate - £19,000 out of a total estate of £20,000. When the property over and above the house was increased to £20,000 (making a total estate of £38,000) the proportion giving the excess entirely to the wife fell to 31%, while 33% would have divided it half and half, 29% would have divided it equally among all four and only 5% would have given it entirely to the children.[7] The results were approximately the same (33%, 35%, 27% and 3% respectively) when the hypothetical situation was that the deceased left £20,000 and the wife already owned the house.[8] In the 1986 survey where the hypothetical deceased was neither poor nor wealthy 51% thought the estate should go entirely to the wife, 27% thought it should go mainly to the wife, with some to the children and 19% thought it should be divided half and half. Only 2% thought it should go mainly to the children and less than 1% thought it should go entirely to the children. Where the hypothetical deceased was very wealthy the figures were 38% (entirely to wife) 27% (mainly to wife) 30% (half to wife) 2% (mainly to children) and less than 1% (entirely to children).[9] Taken together the results of both surveys show that as the estate left by the deceased increases in value more and more people would give the children some share in it. Even in the case of large estates, however, there is still strong support for giving the widow <u>at least</u> half, while about a third of the respondents would still give her the whole estate.

3.6. The 1986 survey asked respondents whether they thought there should be any difference in the way a man's property and a woman's property should be disposed of on intestacy. Practically everybody (98%) said there should be no difference.[10]

3.7. All to issue? The option of giving the whole intestate estate to the issue, where the deceased is survived by a spouse and issue, would clearly be contrary to public opinion and contrary to the whole policy and development of the law in this country. It would also be inconsistent with the development of the law on financial provision on divorce by the Family Law (Scotland) Act 1985: it would be highly anomalous and unsatisfactory to recognise that a spouse had a claim on divorce for a share of the property built up during the marriage but had no such claim on the other spouse's death intestate. This option cannot, in our view, be regarded as a realistic one.

3.8. All to spouse? The option of giving all the intestate estate to the spouse even if the deceased is survived by issue has been seriously considered in several jurisdictions.[11] It has much to commend it. Most married testators leave their whole estate to their spouse, although this may, of course, be subject to legitim.[12] This is some indication, though not a conclusive indication, of the result which most people would find appropriate. The spouse's claims (whether based on need, or on contributions to the deceased's property or welfare, or on the likely disruption to standard of living resulting from the death) are likely

to be stronger than those of issue in most cases. Where the issue are issue of both spouses they will often succeed to the surviving spouse in due course anyway, while if they are young the surviving spouse has obligations to support them. A solution which gives the whole estate to the surviving spouse has the great merit of simplicity. It is easy for people to understand and remember: they can know clearly what the law is and can decide for themselves whether they need to make a will. The law would also be easy to apply: there would be no wrangles about who gets what and about the valuation of certain assets. This solution, unlike some others, would also avoid the need for complicated provisions designed to ensure that the surviving spouse always, or usually, received the house and furniture and the need to keep revising financial limits on the spouse's prior rights. It would reach the same results as the present system of prior rights in most cases where a married person dies intestate but would do so in a much more simple and direct way. The change would be mainly in relation to large estates and it might be argued that the law of intestate succession should not complicate itself to cater for the minority of large estates where the probability is that legal advice will be taken and the succession regulated by will.

3.9. Against the "all to spouse" option it can be argued that it goes too far in the case of very large estates. It is clear from the public opinion surveys[13] that most people regard the size of the estate as a significant variable in deciding on the respective claims of spouse and children. A large majority would allocate

the whole of a small estate to the spouse but the proportion of respondents favouring the "all to spouse" option diminishes as the estate increases in size. If the law can take account of this variable, without undue difficulty or complexity, then it ought to do so.

3.10. While there are attractions in a simple "all to spouse" solution, our preliminary view is that a system which gives the issue a share in larger estates is to be preferred, provided that it is reasonably free from complications and anomalies and adequately recognises the strong claims of the surviving spouse.

3.11. Some to spouse and some to issue? There are various possible ways of sharing an intestate estate between the deceased's surviving spouse and issue. These include (a) a system of prior rights in particular assets, coupled with legal rights, as in the present Scots law (b) a simple proportional system - such as two thirds to the spouse and one third to the issue, as in Irish law[14] (c) a fixed sum (or the whole estate if less) to the spouse with the excess to the issue and (d) a fixed sum (or the whole estate if less) to the spouse, with any excess divided between spouse and issue, as in a number of Commonwealth and American jurisdictions.[15] The excess could be divided either in a simple way (say, half and half) or by means of a more complicated "slice" system, whereby the spouse would take, say, 100% of the estate up to the fixed sum, 80% of the next £10,000, 70% of the next £10,000, 60% of the next £10,000, and 50% of the rest. The fixed sum could be set at a lower level under the slice system and the issue could therefore be brought in for a share in more cases.

3.12. We have already set out at some length the criticisms which can be made of the present system of prior rights.[16] It leads to complications and anomalies. Some of these could perhaps be dealt with by minor reforms but we cannot see any way of eliminating the major objection that the share taken by the surviving spouse will vary enormously according to the nature of the property held by the deceased spouse at the time of death. We have every sympathy with the objective of ensuring that the surviving spouse can inherit the house and furniture up to a certain value, if he or she so wishes, but there are ways of achieving this result which avoid the problems and anomalies of the present law. Our provisional view, therefore, is not in favour of the retention of the present system.

3.13. A system of simple proportions - say a half, or two thirds, or three quarters to the spouse and the rest to the issue - has three important advantages. It is simple. It ensures that the issue always receive something. It avoids the need to keep updating fixed sums to take account of changes in the value of money. Its disadvantage is that it may not give enough to the surviving spouse in the case of small or modest estates. In our view this disadvantage outweighs all the advantages. It is important that the rules of intestate succession should achieve satisfactory results in the case of small estates. The evidence which we have of public opinion suggests that it would not be regarded as satisfactory if the surviving spouse were required to share part of a small estate with the issue. Under the present law the system of prior rights means that in very

many cases the whole of a modest intestate estate will pass to the surviving spouse. Even if the housing right is not applicable because the deceased did not own the house, the surviving spouse will still receive the furniture and plenishings (up to a value of £10,000) and savings up to £15,000. In our view it would be a step backwards to allocate less to the surviving spouse. We do not therefore favour the simple proportional option.

3.14. A solution which gave a fixed sum to the spouse and the rest to the issue would, if the fixed sum were set at an appropriate level, ensure that the surviving spouse received the whole of a small estate. It would, however, mean that in the case of a very large estate the surviving spouse would receive only a small fraction of the total. This would not seem to be in accordance with public opinion. There would often, in such cases, be a drop in living standards and possibly a need to sell house and furniture. The spouse would be worse off than under the present law where, in addition to prior rights, he or she has a right to a third of the remaining moveables by way of legal rights. We do not favour this solution.

3.15. The option of giving a fixed amount to the surviving spouse (or the whole estate if less) and dividing the rest between spouse and issue has much to commend it. It is reasonably simple. It ensures that the whole of a small estate, and a suitable proportion of larger estates, goes to the surviving spouse, while recognising the claims of the issue in the case of larger estates. It continues the policy of the present law,

while getting rid of the anomalies caused by conferring rights in specific assets. It is a solution which has been found acceptable in a number of other jurisidictions and which would be in accordance with Scottish public opinion. Compared with the present system it has the disadvantage of not ensuring that the surviving spouse will receive the house and furniture (up to a certain value) but that result can be achieved by setting the spouse's share at a suitable level and giving the spouse an option to claim the house and furniture. (If the house and furniture were worth more than the spouse's share then, of course, he or she would have to make up the difference to the estate.)

3.16. The simplest way of giving effect to a system of the type outlined in the previous paragraph would be to give the surviving spouse a right to a fixed sum and to divide the excess equally between the spouse and issue. The amount of the fixed sum would be to some extent a political decision to be made at the time when implementing legislation was introduced. At present values it should probably not be less than £15,000 (the amount of the spouse's financial prior right under the present law, even if there is no house or furniture) nor more than £75,000 (the maximum a spouse can receive by way of prior rights under the present law). Setting the fixed sum at £75,000 would ensure that at present values (and given that many matrimonial homes are in the joint names of husband and wife) the surviving spouse could receive the house and furniture in a very large proportion of intestate estates. On the other hand it would exclude the issue altogether even in what could be

regarded as very large estates, and this would not seem to be in accordance with public opinion. We would be interested in consultees' views as to what would be an appropriate fixed sum under this option.

3.17. A more refined, but more complicated, way of giving effect to a policy of giving the spouse the whole of a small estate but a diminishing proportion of larger estates would be a slice system. Under a slice system the spouse would receive, say, 100% of the first £X,000, 80% of the next £10,000, 70% of the next £10,000, 60% of the next £10,000 and 50% of the rest. The difficulty lies in fixing the initial slice taken by the spouse. If this were, say, £20,000 the result would be that the surviving spouse would often not be able to keep the house and furniture. Out of an estate of £40,000 the spouse would receive £35,000 and the issue £5,000. (See the following tables.) The house and furniture might well be worth £36,000 so that the spouse, if he or she wished to keep them, would need to find £1,000 to pay to the issue. In such a case the spouse would be worse off than under the present law. It might therefore be desirable to set the initial slice at, say, £50,000. The question then becomes whether the extra complexity of the slice system is worth while. The following tables show how the results of a slice system, with the initial slice set at £20,000 or £50,000, would compare with the results of a fixed sum system (plus half the excess) with the sum set, for the purposes of illustration, at £50,000 and £75,000. The reader may wish to bear in mind that under the present law, if an estate consists of a house worth £50,000 or more, furniture and plenishings

worth £10,000 or more, and moveables of £15,000 or more the surviving spouse will receive £75,000 (or property worth that) by way of prior rights plus a third of any remaining moveables by way of jus relicti or jus relictae. (We are assuming that legal rights would not apply on total intestacy under the new schemes.)

Table 1. Fixed sum plus half excess

Amount of estate	Fixed sum of £50,000 plus half excess		Fixed sum of £75,000 plus half excess	
£	Spouse	Issue	Spouse	Issue
50,000	£	£	£	£
or less	All	-	All	-
60,000	55,000	5,000	60,000	-
70,000	60,000	10,000	70,000	-
80,000	65,000	15,000	77,500	2,500
90,000	70,000	20,000	82,500	7,500
100,000	75,000	25,000	87,500	12,500

Table 2. Slice system as described in preceding paragraph

Amount of estate	First slice £20,000		First slice £50,000	
£	Spouse	Issue	Spouse	Issue
20,000	£	£	£	£
or less	All	-	All	-
30,000	28,000	2,000	30,000	-
40,000	35,000	5,000	40,000	-
50,000	41,000	9,000	50,000	-
60,000	46,000	14,000	58,000	2,000
70,000	51,000	19,000	65,000	5,000
80,000	56,000	24,000	71,000	9,000
90,000	61,000	29,000	76,000	14,000
100,000	66,000	34,000	81,000	19,000

3.18. Clearly there is no "right" answer to the question of allocating an intestate estate between spouse and issue. Under the less generous fixed sum system and under either version of the slice system the surviving spouse would very often be worse off than under the present law. The issue, of course, would be correspondingly better off. All of these systems would avoid the anomalies caused by framing prior rights in terms of rights to particular assets. A fixed sum (plus half the excess) would be simpler to legislate for, to explain, to remember and to apply. We envisage that under all of the above systems the financial limits would be revised from time to time to keep pace with changes in the value of money. There is, of course, always a risk that this will not be done frequently enough and that the limits will get out of date. This risk exists under the present law.

3.19. It may happen that the deceased spouse has died partially testate. This gives rise to no difficulty if the will simply leaves legacies to people other than the surviving spouse. It also gives rise to no difficulty if the rule of intestate succession law is that the spouse takes the whole estate in any event. A question is raised if the law divides the intestate estate between spouse and issue by simple proportions (say, 3/4 and 1/4). It might be asked whether the surviving spouse's legacy should be deducted from his or her share of the whole estate. This would be, in effect, to require the spouse to collate the legacy. There would seem, however, to be no reason for doing this in the case of the surviving spouse but not in the case of issue (or

indeed in the case of any heir on intestacy who received a legacy). The real problem arises only under those systems which give the spouse a preferential claim to part of the estate - whether by means of a fixed sum or "slices". Here it is necessary to decide whether the legacy should come out of the part of the estate covered by the spouse's preferential rights - out of the fixed sum or the excess - out of the bottom slice or the top slice. The following examples show how this works. In each case it is assumed that the deceased is survived by spouse and issue and that there are no other legacies. It is also assumed that legal rights (ius relicti or relictae) do not apply.

Example 1. The total estate is worth £60,000 net. The spouse is left a legacy of £3,000.

(a) The law gives the spouse a fixed sum of £75,000 (or the whole intestate estate if less) plus half of the rest.

The spouse receives the whole estate in any event.

(b) The law gives the spouse 100% of the first £20,000, 80% of the next £10,000, 70% of the next £10,000, 60% of the next £10,000 and 50% of the rest.

(i) Legacy comes off bottom slice.

Spouse receives:-		
Legacy of	£3,000	£3,000
100% of next	17,000	17,000
80% of next	10,000	8,000
70% of next	10,000	7,000
60% of next	10,000	6,000
50% of next	10,000	5,000
Out of	£60,000	£46,000

(ii) Legacy comes off top slice.

Spouse receives:-		
100% of first	£20,000	£20,000
80% of next	10,000	8,000
70% of next	10,000	7,000
60% of next	10,000	6,000
50% of next	7,000	3,500
Legacy of	3,000	3,000
Out of	£60,000	£47,500

The result of taking the legacy off the bottom slice is that the spouse derives no benefit from the legacy. He or she would have received £46,000 if there had been no legacy. The result of taking the legacy off the top slice is that the spouse receives what he or she would have received on intestacy plus half the value of the legacy. It would, of course, be possible to ensure that the spouse receives what he or she would have received on

intestacy plus the full value of the legacy, but only by providing that the legacy would be notionally added to the intestate estate and then paid out of the issue's share - which would seem wholly unjustifiable.

Example 2. The total estate is worth £80,000 net. The spouse is left a legacy of £50,000.

(a) The law gives the spouse a fixed sum of £75,000 (or the whole intestate estate if less) plus half of the rest.

(i) Legacy comes out of fixed sum

Spouse receives:-	
Legacy	£50,000
Balance of fixed sum	25,000
Half rest	2,500
	£77,500

(ii) Legacy comes out of excess

Spouse receives:-	
Whole intestate estate	£30,000
Legacy	50,000
	£80,000

(b) The law gives the spouse 100% of the first £20,000, 80% of the next £10,000, 70% of the next £10,000, 60% of the next £10,000 and 50% of the rest.

(i) Legacy comes off bottom slice.

Spouse receives:-	
Legacy	£50,000
50% of rest	15,000
(Note. The first four bands have been used up by the legacy.)	
	£65,000

(ii) Legacy comes off top slice

Spouse receives:-	
100% of first £20,000	£20,000
80% of next £10,000	8,000
Legacy	50,000
	£78,000

In this case the spouse derives some benefit from the legacy in all cases except (a)(i) where the result is the same as if there had been no legacy.

Example 3. The total estate is worth £100,000 net. The spouse is left a legacy of £80,000.

(a) The law gives the spouse a fixed sum of £75,000 (or the whole intestate estate if less) plus half the rest.

(i) Legacy comes out of fixed sum.

Spouse receives:-	
Legacy	£80,000
(Fixed sum is reduced to nil.)	-
Half rest	10,000
	£90,000

(ii) Legacy comes out of excess.

Spouse receives:-	
Whole intestate estate	£20,000
Legacy	80,000
	£100,000

(b) The law gives the spouse 100% of the first £20,000 etc. as in example 2(b).

(i) Legacy comes off bottom slice.

Spouse receives:-	
Legacy	£80,000
50% of rest	10,000
	£90,000

(ii) Legacy comes off top slice.

Spouse receives:-	
100% of first £20,000	£20,000
Legacy	80,000
	£100,000

In this case the legacy is so large that the spouse derives some benefit from it even in case (a)(i).

3.20. All of this is a bit complicated and it may well be asked whether any special provision for deducting a legacy from the spouse's preferential share is necessary. If there were no special provision then the result would in effect be top slicing: the normal rules of intestate succession, including the full fixed sum and the full range of slices, would apply to whatever intestate estate was left after the legacy had been, as it were, taken off the top of the estate. This is the most principled solution: the rules on testate succession apply to the testate estate and the rules on intestate succession apply to the intestate estate. It is the solution which should be applied unless there is good reason not to apply it. It is the solution adopted by the Uniform Probate Code and in some Canadian and Australian jurisdictions[17] (although others adopt versions of the bottom slicing approach.)[18] Not much guidance can be derived from the probable wishes of testators. On the one hand it could be said that a testator leaving his wife a legacy would presumably intend that she should get some benefit from it. On the other hand it could be said that a testator limiting his wife to a legacy would not intend her to take more. This second argument is weak, however. A testator, if he knew the law, would not seek to limit his wife's rights by dying partially intestate, while a testator who did not know the law would probably not realise that a substantial legacy might be regarded as a limiting of his wife's rights. There is perhaps something to be said for the simple view that the average testator would expect legatees to receive their legacies and the normal rules of intestate succession to govern his intestate estate. In favour of

having no special rule it can be said that cases where a testator leaves a legacy to his spouse but dies partially intestate will be fairly rare and that in the overwhelming majority of cases it will make no difference which rule is adopted (because the spouse will take the whole estate anyway). In favour of a special rule it can be said that if the surviving spouse receives the legacy and the full amount of the preferential share of the intestate estate he or she will receive too much. What, however, is "too much" where someone benefits from a legacy? There are arguments both ways on this issue and we have reached no provisional conclusion.

3.21. A further question is whether the surviving spouse should be able to elect to take the matrimonial home and furniture in satisfaction or partial satisfaction of his or her rights on intestacy. In Irish law[19] the surviving spouse has such a right. The only objection we can see to it is that it may complicate the law unnecessarily. The problem would not arise where the surviving spouse was entitled to the whole estate in any event. The number of other cases where the executor (who may be, say, one of the children of the deceased) would not voluntarily allow the surviving spouse to take the home and furniture in satisfaction or partial satisfaction of his or her share would, we imagine, be very small and it may be that special provisions would be unnecessary. On the other hand it seems clearly desirable that the surviving spouse should be able to elect to take the house and furniture towards his or her share. Even if the house and furniture together are worth more than the spouse's share, the

spouse should be able to take them on making up the balance to the estate. A few extra statutory provisions may be regarded as a small price to pay to achieve these results. The provisions would not need to be much more complicated than those on the spouse's prior right to house and furniture in section 8 of the Succession (Scotland) Act 1964.[20] Like section 8 they would contain exceptions for the case where the house formed part only of subjects comprised in one tenancy under which the deceased was the tenant and for the case where the house was used by the deceased for business purposes and the value of the estate would be substantially reduced if the house were disposed of otherwise than with the assets of the business.

3.22. So far we have lumped house and furniture and plenishings together. There is, however, an argument for giving the surviving spouse an absolute right to the deceased's interest in the furniture and plenishings in the former matrimonial home up to a certain value. When section 25 of the Family Law (Scotland) Act 1985 comes into force there will be a presumption that husband and wife own most of their household goods in equal shares. The market value of household goods is not usually great and there would not usually be much risk of causing serious anomalies and distortions by giving the surviving spouse a prior right to the deceased's share in these assets. The situation of the house, which is often a very valuable part of the whole estate, is different. We note that in English law the surviving spouse takes the "personal chattels" absolutely and has an election to take the house towards his or her share of the estate.[21] A number of Australian jurisdictions have the same

rule.[22] This is a further option which ought to be considered. Against it, it could be argued that it is unnecessary, because the spouse's preferential rights under a fixed sum or slice system would almost always greatly exceed the value of the deceased's interest in the household goods, and that there would still be some danger of creating distortions. A spouse's share might be thousands of pounds less or more depending on whether the deceased had or had not sold a valuable painting shortly before his death.

3.23. We have tried to set out the arguments for and against various ways of distributing an intestate estate when the deceased dies survived by a spouse and issue. We would welcome the views of consultees on the following questions. Again we would stress that we are concerned with the non-separated first spouse. We consider later whether special rules should apply to separated and second or subsequent spouses.

2. Where a person dies intestate survived by a spouse and issue should his or her property be allocated
   (a) entirely to the issue,
   (b) entirely to the spouse, or
   (c) in such a way as to recognise the claimsof both spouse and issue?

3. In the case of option 2(c) should the spouse have a right to
   (a) house and furniture and plenishings (up to a certain value) and a financial sum, plus a share of the rest, as under the present law

(b) a simple proportion (e.g. 3/4, 2/3 or 1/2) of the whole estate

(c) a fixed sum (or the whole estate if less) with no share in the excess

(d) a fixed sum (or the whole estate if less) with a share in the excess

(e) decreasing proportions of "slices" of the whole estate (e.g. 100% of the first £X,000, 80% of the next £Y,000 70% of the next £Y,000 60% of the next £7,000 and 50% of the rest)

(f) the share provided by whichever of the last four options is favoured plus furniture and plenishings (up to a certain value), or

(g) some other share of the estate?

4. (a) In the case of option 3(a) are any changes in the present law suggested?

(b) In the case of option 3(b) what proportion would be regarded as appropriate?

(c) In the case of option 3(c) what fixed sum would be regarded as appropriate?

(d) In the case of option 3(d) what fixed sum would be regarded as appropriate and what should be the spouse's share in the excess?

(e) In the case of option 3(e) what proportions and slices would be regarded as appropriate?

5. In a case of partial intestacy where the surviving spouse has been left a legacy by the deceased

(a) should there be a special rule to the effect that the amount of the legacy is deducted from the part of the estate affected by the surviving spouse's prior financial right, fixed sum or preferential proportions of slices, or

(b) is this unnecessary?

6. Under any option which does not give the surviving spouse a prior right to the deceased's interest in the matrimonial home and household goods as such should the surviving spouse be given an option to require these assets to be allocated to him or her (any excess in the value of these assets over the spouse's share in the estate being made up by the spouse to the estate)?

Spouse and brothers or sisters

3.24. Under the present law, if a person dies intestate survived by a spouse, no issue, and brothers or sisters, the spouse takes his or her prior rights (which may, of course, exhaust the estate) and a half of the remaining moveable estate by way of legal rights. The rest goes to the deceased's brothers and sisters.[23] There is, we believe, no case for giving brothers and sisters the whole of an intestate estate to the exclusion of the surviving spouse. The options are therefore

(1) to allocate the whole estate to the surviving spouse, or

(2) to give the surviving spouse his or her prior rights, fixed sum or preferential shares of slices and to divide the rest between the spouse and the brothers or sisters.

For reasons which will appear later we are leaving legal rights out of account for the moment.

3.25. A number of legal systems allocate the whole intestate estate to the surviving spouse in all cases

where the deceased is survived by a spouse and brothers or sisters and no other close relative. This is, for example, the solution of the Uniform Probate Code,[24] of the Irish Succession Act, 1965[25] and the laws of several Canadian and Australian jurisdictions.[26] The South African Law Reform Commission has recently recommended the adoption of this rule.[27] It has the merit of simplicity. There is also clear public support for the view that the spouse should come before the deceased's brother in the list of those entitled to succeed on intestacy. In the survey on family property in Scotland carried out for us in 1979 informants were asked what should happen to the property of a man who had no children but was survived by his wife and his brother. Not one informant in the large random sample favoured the brother to the exclusion of the widow: 89% thought the property should go to the widow: 8% thought it should be divided equally between widow and brother: 3% thought the result should depend on the circumstances.[28]

3.26. There are, however, arguments the other way. A number of countries (including England)[29] share part of the intestate estate between the spouse and the brothers or sisters, although it is fair to say that in English speaking countries the trend seems to be away from this system and towards an all-to-spouse rule. Generous provision for the surviving spouse by way of prior rights, a fixed sum or a "slice" system would mean that he or she would take the whole estate in a great many cases. Only in the case of very large estates would a proportion have to be shared with the deceased's brothers or sisters. There are cases where the

deceased's brother, say, may strongly resent the whole estate passing to the surviving spouse. The property may have come from the deceased's parents and may be regarded as family property. The surviving spouse may be in an old people's institution and unable to enjoy the property which will simply pass out of the family on his or her death. On the other hand all of this could happen anyway if the deceased left a will in favour of the surviving spouse, and could happen in the case of small or modest estates as a result of prior rights or whatever replaced them (whether fixed sum or slice system). There may be cases where the deceased's brother is incapax and moribund and has no use for any part of the succession. There may be cases where the deceased has had no contact with his brother for forty years or more. The rules of intestate succession cannot cater for every special case. They have to be designed with the normal case in mind. In the normal case the deceased's spouse would probably be regarded as having a stronger claim to succeed than the deceased's brother or sister.

3.27. A further consideration is that under the principle of representation the issue of a deceased brother or sister would take the share of their parent. This could mean that the surviving spouse might have to share part of the estate with a nephew or grand-nephew.

3.28. We would be grateful for views on the question:-

7. If a person dies intestate survived by a spouse and a brother or sister (but no issue)

(a) should the brother or sister share in the part of the estate left after the spouse's prior rights (or preferential rights under a fixed sum or "slice" system) have been met, or

(b) should the whole estate be allocated to the surviving spouse?

Spouse and parents

3.29. A similar question arises in cases where the deceased is survived by a spouse and a parent but by no issue. Under the present law the parent takes what is left after the spouse's prior rights and legal rights have been satisfied.[30] The solutions adopted by other legal systems differ. Under the American Uniform Probate Code if there are no surviving issue but the deceased is survived by a parent or parents, the surviving spouse receives the first $50,000 plus one-half of the balance of the intestate estate.[31] The parents take the other half. A similar rule applies in English law.[32] Under the proposed Canadian Uniform Intestate Succession Act the surviving spouse excludes parents.[33] This is already the position in Ireland and in a number of Canadian and Australian jurisdictions.[34] The South African Law Reform Commission has also recommended this solution.[35]

3.30. There are several reasons for preferring the surviving spouse to a surviving parent of the deceased. Most married testators leave all their property to their spouse, and this is probably the case even if there is

still a parent alive. In the ordinary case the surviving spouse is likely to need the succession over a longer period of time than the deceased's parent. Indeed succession to an elderly person by a surviving parent would often be followed fairly soon afterwards by the death of that parent, with the result that property which could have gone to the deceased's spouse will instead go elsewhere. Parents probably do not have the same expectations of succession as the surviving spouse. Against all this it can be argued that elderly parents may well be needy and that the surviving spouse's prior rights (or preferential rights under a fixed sum or slice system) will provide for him or her to such an extent that there will be no hardship in sharing the excess with the deceased's parents.

3.31. When the surviving relatives are a spouse and parents of the deceased public opinion clearly favours giving the whole of a small or medium sized estate to the surviving spouse: in the case of a very large estate, however, a small majority would give the parents some share (although 80% would still give <u>at least</u> the bulk of the estate to the surviving spouse).[36]

3.32. We invite views on the question:-

8. <u>If a person dies intestate survived by a spouse and a parent (but no issue)</u>

   (a) <u>should the parent share in the part of the estate left after the spouse's prior rights (or preferential rights under a fixed sum or slice system) have been met, or</u>

(b) should the whole estate be allocated to the surviving spouse?

Spouse and remoter relatives

3.33. Where a person dies intestate survived by a spouse and relatives more remote than parents or brothers or sisters, the spouse takes the whole estate under the present law. We know of no demand to place the spouse further down the list of heirs on intestacy than uncles or cousins. Indeed the results of the 1979 public opinion survey on the relative position of spouse and brother point in the opposite direction. We suggest that:-

9. If a person dies intestate survived by a spouse and relatives more remote than parents or brothers or sisters the spouse should, as under the present law, receive the whole estate.

Two special problems

3.34. We have considered the position of the surviving spouse in the scheme of intestate succession from the point of view of the case where the spouses were living together before the deceased's death and where the surviving spouse was the deceased's only spouse. It is now necessary to consider whether there should be any special rules for the case of the separated spouse or the second or subsequent spouse.

3.35. The separated spouse. It is clear from representations already made to us that there is concern that generous treatment of surviving spouses may sometimes benefit unjustifiably a spouse who has been

separated from the deceased for many years. This is already a problem under the existing law and would be even more of a problem if the rights of the surviving spouse on intestacy were to be significantly improved. It is not easy to find a satisfactory solution. We set out below a number of options, with their advantages and disadvantages as we see them.

3.36. The first option would be a test based on judicial separation. The present law provides that if a wife obtains a decree of judicial separation any property afterwards acquired by her passes on her death intestate as if her husband had predeceased her.[37] This is riddled with anomalies. Why only the wife? Why only property acquired after the decree? Why only intestate? What about the jus relicti? It would be possible to remove these anomalies and to provide that after a decree of judicial separation neither spouse should have any legal rights or rights of intestate succession in the other's estate. This would be an improvement but it would not cover all cases. Many separated spouses are not judicially separated even at present, and changes in the law on aliment by the Family Law (Scotland) Act 1985 are likely to make decrees of judicial separation even more rare in future. Moreover, judicial separation, which leaves the parties married but ordained to live apart, is not in any event a remedy into which we would wish to breathe new life.

3.37. The second option would be a test based on factual separation. This option would exclude from succession to a deceased's intestate estate a spouse who

had in fact been separated for a number of years. The period should not be too short because there may be cases where the recently separated spouse has not had a chance to bring a divorce action and claim financial provision on divorce. It would be unfortunate if a separated spouse who had strong claims to financial provision on divorce were to lose all claims against the other spouse merely because the latter died before a divorce action could be raised. Under the present law a separated spouse can always seek a divorce after five years separation, even if the other spouse has not committed a matrimonial offence and refuses consent to divorce,[38] but may not be able to bring a divorce action before this. We suggest therefore that the period of separation which would cut off succession rights should not be less than five years but should preferably be a little longer so as to allow time for action to be taken and a decree of divorce to be obtained. Seven years would seem to be about right so long as the divorce law remains as it is. The period could be reviewed if the grounds of divorce were changed. In short, this option would be to the effect that a spouse who had been in fact separated from the deceased spouse for seven years or more immediately before the latter's death should not be regarded as a surviving spouse for the purposes of legal rights and intestate succession. This solution would probably work well in many cases - particularly those where the parties had been separated for decades. It would, however, have disadvantages. First, there would be practical difficulties in applying the test in some cases. A great deal could depend on the precise date, and nature, of a departure by one spouse about seven years before the

death. An important witness would be dead. The surviving spouse and the relatives of the deceased spouse would have an incentive to present conflicting versions of the facts. There could be difficulties, too, with temporary resumptions of cohabitation and with parties who were living separate lives under one roof. Quite apart from these practical problems the solution might seem rather arbitrary. A spouse separated for 6 years and 364 days would have full intestate rights on the other spouse's death. A spouse separated for a day or two longer would have none. In some cases the solution might seem harsh. A deserted wife who had remained in the matrimonial home, hoping against hope that her husband would return, would lose her succession rights through the mere lapse of time and through no fault of her own. One way of dealing with some of these objections would be to couple a seven-year exclusion rule with a dispensing power. A spouse who had been separated for seven years would be able to apply to the court for restoration of succession rights in whole or in part, on the ground that, having regard to the conduct of the spouses and the other circumstances, exclusion would be unreasonable. This would cater for the deserving deserted spouse and would also make the practical problems of proof less crucial: even if a spouse were narrowly held to have been separated for the requisite period the court could exercise a discretion in his or her favour.

3.38. Another option would be to allow an application to be made to a court on a spouse's death for an order disinheriting a separated spouse wholly or partially.

No specific period of separation would be required. The application could be made by anyone with an interest. The court could be given a discretion to make such order, if any, as it thought fit. This solution would have the advantage of flexibility. It would, however, invite litigation of a particularly distressing and unpleasant kind, the results of which would be completely uncertain. It would also be unprincipled. Why should a spouse, but not other heirs on intestacy, be subject to disinheritance at a court's discretion? Why should a separated spouse, but not an obnoxious cohabiting spouse, be subject to this risk? We appreciate that an answer which may be given to these questions is that there should be a right to apply for the total or partial disinheritance of any "unworthy" heir.[39] In our view, however, this would introduce too much uncertainty into the law and would encourage too much speculative litigation. It would be only too easy for someone to threaten "unworthiness" proceedings against a spouse or child or other relative in the hope of extracting a settlement to avoid unpleasantness. We discuss in Part IV whether there should be a limited power to modify legal rights. This can be more readily justified than a power to modify all intestate succession rights: legal rights cannot be avoided by the deceased by means of a will whereas intestate succession rights can. As at present advised we are not attracted by a general power to challenge any spouse, or any heir, as unworthy on unspecified grounds.

3.39. A final option would be to have no special rule for separated spouses. A spouse would be regarded as a

spouse until divorced. Although it would do nothing to meet the problems of the long-separated but undivorced spouse which have been put to us this solution is at least clear cut. If the grounds of divorce were further reformed in the direction, for example, of allowing divorce after one year's separation there would perhaps be little real objection to this solution.

3.40. We have found this a difficult question. We would welcome views and suggestions.

10. (a) Should any special provision be made for the separated but undivorced spouse?

(b) If so, should such a spouse be excluded from legal rights and intestate succession rights in the other spouse's estate

(i) if judicially separated

(ii) if in fact separated for seven years

(iii) if in fact separated for seven years, but with a discretion to the court, on application, to restore the spouse's succession rights in whole or in part on the ground that, having regard to the conduct of the spouses and the other circumstances, exclusion would be unreasonable

(iv) if found "unworthy" by a court or

(v) in some other circumstances and, if so, what?

3.41. The second or subsequent spouse. Where the deceased is survived by a spouse who is the parent of all his children there is a strong possibility that the children will eventually inherit from the surviving spouse. This is less likely if the surviving spouse is a second or subsequent spouse who is not the parent of the deceased's children. The deceased's children may well feel more resentment about his estate passing to someone whom he may have married just a year or so before his death than about it passing to their own mother. The same sort of situation could arise if the deceased had children by a woman to whom he was not married and then left her and married someone else. The question therefore arises whether there should be any special rule for the second spouse or, more precisely, for the case where the deceased is survived by a spouse and children but the spouse is not the parent of all the children.

3.42. The 1986 public opinion survey shows that there is significantly less support for giving the whole estate to the surviving spouse, where he or she is a second spouse and the deceased is also survived by children of an earlier marriage. Whereas 51% of respondents would have given the whole of an average sized estate to the first spouse, in preference to two grown-up children, only 19% would have given it to the second spouse. Correspondingly, the proportion opting to divide the estate half and half between spouse and children increased from 19% in the case of the first spouse to 39% in the case of the second spouse. Interestingly, however, 85% thought the second spouse should receive at least half of the estate, and this figure remained the

same even where the hypothetical deceased was very poor or very wealthy.[40] In short, the shift in public opinion in the case of the second spouse appears to be a shift towards giving the children half of the estate rather than allocating it all to the spouse.

3.43. Some legal systems distinguish the case of the surviving spouse who is also the parent of all the deceased's surviving children from the case of the surviving spouse who is not. The Uniform Probate Code, for example, provides that the intestate share of the surviving spouse is:-

> "(3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;
>
> (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate".[41]

The Manitoba Law Reform Commission has recently recommended that the surviving spouse should have a reduced fixed sum ($50,000 instead of $100,000) where one or more of the deceased's issue are not also issue of the surviving spouse.[42]

3.44. One unfortunate feature of the Uniform Probate Code's solution is that it could cause hardship to the second spouse, who will often receive half, instead of the whole, of a small or modest estate. Another unfortunate feature of the solution is that it confers an unnecessary benefit on the children of the second marriage, merely because of the existence of a child of an earlier marriage or a child of a non-marital or extra-

marital relationship. The same criticisms apply, but with less force, to the suggested Manitoba solution.

3.45. Another option, which would not confer uncalled for benefits on the surviving spouse's own issue and which would at the same time preserve more of the estate for the surviving spouse, would be to treat the issue of each marriage separately. This would be much more complicated, particularly in cases where a child had predeceased the deceased leaving issue. In the simple case where none of the children has predeceased the deceased the rules would be on the following lines.

> Where a person dies intestate survived by a spouse and children and one or more of the children are not also children of the surviving spouse the estate is divided into as many parts as there are children of the deceased. The parts corresponding to the children who are not also children of the surviving spouse are divided half and half between the surviving spouse and those children. In relation to the remaining parts the surviving spouse receives the appropriate proportion of his or her fixed sum (or the whole remaining estate, if less) and the rest of the estate (if any) is divided half and half between the surviving spouse and the remaining children.

Suppose, for example, that a man dies survived by his second wife leaving one child by his first wife and two by his second. He leaves an estate of £60,000 after debts and taxes. Let us suppose that the normal rule is that, where there are issue, the surviving spouse receives a fixed sum of £75,000 and the rest of the estate is shared half and half between the surviving

spouse and the issue. In this case the special rule for the spouse who is not the parent of all the deceased's issue would work as follows. First, the estate would be divided into three parts of £20,000 each. Second, the part corresponding to the child of the first marriage would be divided in two: £10,000 would go to the child of the first marriage and £10,000 to the spouse. Third, the remaining parts (£40,000 in total) would be dealt with by giving the surviving spouse the appropriate proportion of her fixed sum or the whole remaining intestate estate, if less. Here the appropriate proportion is two thirds because two of the deceased's three children are also children of the surviving spouse. So the surviving spouse would receive two thirds of £75,000, which is £50,000. As this exceeds the remaining intestate estate the surviving spouse would receive the whole remaining intestate estate and her own children would receive nothing. The overall result would be:-

Child of first marriage	£10,000
Surviving spouse	50,000
	£60,000

Although this solution would be more precisely adapted to the problem at issue it is not certain that the justice of the result would be immediately apparent to the children of the second marriage or indeed to the public at large. The children of the second marriage might, after all, inherit nothing from their mother when she dies, perhaps decades later.

3.46. The main difficulty in relation to the surviving spouse who is not also the parent of all the deceased's children is that there are many different ways in which

this situation can arise. The same rule is not necessarily appropriate in all cases. Here are some examples.

1. A man's wife dies intestate after 40 years of marriage. There are two grown-up children of the marriage. The whole of the wife's estate passes to the husband by virtue of prior rights. A year later he marries again. A month after that he dies leaving an estate worth about £70,000 which, under the normal rules, would pass to his wife by virtue of prior rights (or whatever replaced prior rights). This is the type of situation where there is the strongest case for protecting the position of the children.
2. A man is divorced by his wife after 40 years of marriage. There are two grown-up children of the marriage. The couple's property, which was all accumulated during the marriage, is divided equally between them at the time of the divorce. The man remarries immediately and dies two years later. Here there is a slightly less strong case for protecting the position of the children. They may still inherit their mother's share of their parents' property.
3. A man's wife dies after a year of marriage. There is one child of the marriage. Neither spouse has any significant property at that time. The man remarries a year later and has two children by his second wife. All three children are brought up together and are held in equal affection by the husband and wife. Forty

years after his second marriage the man dies intestate. By this time he has accumulated property worth about £30,000. His wife has savings of about £1,000 in her name but no other property apart from personal effects. Here there is only a weak case for departing from the normal rule. It is true that the first-born child would not inherit on intestacy from the second wife but a better remedy for this situation (which we consider later)[43] might be to enable stepchildren to claim a discretionary award out of their step-parent's estate.

4. A couple are divorced after seven years of marriage. The wife is awarded sole custody of the two children of the marriage and a small capital sum. Both parties remarry. The husband has two children by his second marriage. He sends aliment for his first two children until they are 16 but has little other contact with them. He is killed in a car crash twenty years after his second marriage. His property consists of the family home (burdened with a mortgage), furniture, and some life insurance. Again it is by no means obvious that the interests of the children of the first marriage require, or justify, any departure from the normal rules which (let us suppose) would give the whole estate to the second wife.

5. After twenty years of marriage a husband has an extra-marital affair as a result of which a

child is born. The husband dies twenty years after that. There are two children of the marriage. He leaves an estate of, say, £50,000 consisting mainly of the family home. Again it is by no means obvious that the existence of a child who is not also the child of the surviving spouse justifies any departure from the normal rule.

3.47. The above examples show that the problem is more complicated than it might appear at first sight and that the case for distinguishing between the surviving spouse who is, and the surviving spouse who is not, the parent of all the deceased's children is not always compelling. The Uniform Probate Code's solution would produce satisfactory results in some cases but not in all, and not necessarily in most. Significant variables are the amount of the deceased's estate, the length of the deceased's relationship with the surviving spouse, and the prospects of the children inheriting from the deceased indirectly. In relation to this last variable it is worth bearing in mind that, even where the surviving spouse is the parent of all the deceased's children there is no guarantee that the children will inherit from him or her. A modest estate may well be used up entirely by the surviving spouse. Even if the children do inherit from their surviving parent this may not happen for twenty or thirty years. Conversely, step-children may well inherit from the surviving spouse under a will in their favour.

3.48. We would welcome views on these issues.

11. (a) Where a person is survived by a spouse and issue, should the surviving spouse be treated less favourably in the law on intestate succession if he or she is not the parent of all the deceased's children?

(b) If so, should the rule be

(i) that the intestate estate is divided half and half between the surviving spouse and the issue (with no prior rights, or fixed sum or preferential slices for the surviving spouse), or

(ii) that the surviving spouse should receive diminished prior rights, or a smaller fixed sum, or smaller preferential slices, the rest of the intestate estate being divided half and half between the surviving spouse and the issue, or

(iii) that the estate should be divided into as many parts as there are surviving children of the deceased (or predeceasing children survived by issue), the normal rules applying to those parts corresponding to the children who are also children of the surviving spouse (subject only to a proportionate reduction in the prior rights, fixed sum or preferential slices) and the rest

of the estate being divided half and half between the surviving spouse and the issue who are not also his or her issue, or

(iv) something else and, if so, what?

Parents and brothers or sisters.

3.49. If a person dies intestate without a spouse or issue but survived by parents and brothers or sisters the rule of Scots law is that the parents take half the estate and the brothers or sisters the other half.[44] In English law - and the same appears to be true for most other jurisdictions in the English speaking world - the parents take to the exclusion of brothers or sisters.[45] Other solutions are possible,[46] but the main choice seems to us to be between the two just mentioned. In favour of preferring parents to brothers or sisters it can be argued that the links between a parent and an unmarried child are, in general, likely to be closer than the links between brothers and sisters. The parents are likely to have contributed more to the deceased's welfare and to have a stronger moral claim to succeed. If the parents are young, and the brothers and sisters still children, it would seem more appropriate and convenient that the whole estate should pass to the parents. If the parents are old, and the brothers and sisters adult, the parents may well be in greater need. Many intestate estates are very small, and this seems particularly likely to be the case where the deceased dies young and unmarried. In this kind of case fragmentation between parents and brothers or sisters seems undesirable. On the other hand it can be argued that there is no point in passing

property to elderly parents only to have it pass a few years later to the brothers or sisters when the parents die. There are arguments both ways.

3.50. So far as public opinion is concerned there is a preference for the parents, rather than a brother, as the sole or main beneficiary. In the case of an estate of average size, for example, 41% of respondents in the 1986 survey would have given the whole estate to the parents, 24% would have given it mainly to the parents and only 30% would have preferred the half and half solution of the present law. In the case where the deceased was very wealthy the figures were 29%, 27% and 37% respectively.[47] It would be possible to devise a rule which would give the parents, in competition with a brother or sister of the deceased, the whole of a small estate and diminishing proportions of larger estates. It may be doubted, however, whether the results would justify the added complexity in the law. We invite views on the question:-

12. (a) If a person dies intestate survived by a parent and a brother or sister (but by no spouse or issue)
    (i) should the whole estate be allocated to the parent or
    (ii) should the whole estate be allocated to the brother or sister, or
    (iii) should the estate be divided between the parent and the brother or sister?

(b) In the case of option (iii) should the estate be divided equally between the parent and the brother or sister or in some other way and, if so, how?

Collaterals of the half-blood

3.51. Under Scots law if a person dies intestate without being survived by spouse, issue or parents but survived by a brother and a half-brother (say, the son of his mother by a previous marriage) the brother takes the whole estate to the exclusion of the half-brother.[48] The effect of the rules on representation is that the half-brother will be excluded also by issue of a predeceasing brother of the deceased.[49] The increased number of divorces and remarriages and births out of wedlock makes this matter of greater importance than it was when the Mackintosh Committee reported in 1950 and it may be worth reconsidering the existing rule. The options appear to be as follows.

(a) Collaterals of the full-blood exclude collaterals of the half-blood.[50]

(b) Collaterals take equally, whether they are of the full-blood or of the half-blood.[51]

(c) Collaterals represent their parents per stirpes.[52] So if the deceased is survived by a brother of the full-blood and a brother of the half-blood uterine, the full brother will take three quarters of the estate (½ from the deceased's father and 1/4 from the deceased's mother) and the half-brother one quarter.

The last of these solutions works only if the mother and father are regarded as having been entitled to a half of

the deceased's estate each (with no accretion to the survivor) and only if succession is strictly per stirpes. It would not therefore be appropriate for Scots law unless the law were to be changed in ways which we would not wish to recommend. The realistic choice appears therefore to be between a system where the full-blood excludes the half-blood and a system where collaterals of the full or half-blood take equally. It is impossible to generalise about the family situation of half brothers and sisters. In some cases they will have been brought up together as members of the same family unit. In others they will not. If, however, collaterals of the half-blood are admitted to the list of heirs on intestacy at all, it is hard to see why they should be excluded by collaterals of the full-blood. To exclude them in a case where there has been a close family relationship with the deceased is, we suspect, likely to give rise to a greater feeling of injustice than to include them in a case where there has not been a close family relationship.

3.52. So far as public opinion is concerned the majority view supports equal treatment of collaterals of the full and the half blood. In the 1986 survey respondents were asked how a man's estate should be distributed if he died intestate survived by a sister and a half-sister but no other close relatives. Where the estate was of average size 58% thought it should be divided equally between the sister and the half-sister. Only 15% thought it should go entirely to the sister, while 24% thought it should go mainly to the sister. The general pattern was not very different when the

hypothetical deceased was very poor or very wealthy. The solution which attracted most support was an equal division between sister and half-sister. The full sister's claims were seen as being strongest where the deceased was very poor but even in this situation only 20% of respondents favoured the present policy of allocating the estate entirely to the full sister.[53] Our provisional conclusion, on which we invite views, is that:

13. Collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.

Uncles and aunts

3.53. In Scots law,[54] and also in English law,[55] uncles and aunts succeed per capita. This is not the only possible solution. In some countries the estate is divided in two, with one half going to the paternal uncles or aunts and the other half going to the maternal uncles and aunts.[56] In favour of the Scottish system it can be argued that people nowadays are likely to see their uncles and aunts as individuals, rather than as representatives of a maternal or paternal line, and to wish them to succeed equally. We would welcome views on this question but our provisional view is that:-

14. There is no need to change the present rule whereby when uncles and aunts succeed to an intestate estate they take equally without regard to whether they are from the father's or the mother's side of the family.

Grandparents and relatives traced through them

3.54. Under the Succession (Scotland) Act 1964 grandparents (or relatives traced through them, such as great-uncles or great-aunts) inherit per capita.[57] So if the deceased is survived by both paternal grandparents but only one maternal grandparent then each grandparent will take a third of the estate.[58] This is also the rule in English law.[59] In some countries, the estate would be divided into two - one half for the paternal grandparents and the other for the maternal grandparent.[60] Again, the present Scottish (and English) rule can be defended on the ground that people nowadays will see their grandparents as individuals rather than as representatives of a lineage and would wish them to share equally. It is not a conclusive counter-argument that, in the situation given above, the paternal grandparents will be living together and pooling their resources. They may not be. Similar considerations apply to the brothers or sisters of grandparents. Our provisional view is that:

15. There is no need to change the present rule whereby when grandparents (or their brothers or sisters) succeed to an intestate estate they take equally without regard to whether they are from the father's or the mother's side of the family.

Distribution per capita or per stirpes

3.55. The present Scottish rules on intestate succession contain elements of distribution per capita and per stirpes. The estate is divided per capita at the first level where there are surviving heirs(so that,

for example, four surviving grandchildren would take equally even if three are the issue of one predeceasing child and the fourth the issue of another predeceasing child). However, if there are both surviving heirs and the issue of a predeceasing heir at that level the issue take per stirpes (so that if two of the grandchildren in the last example had predeceased the deceased grandparent, their issue would take per stirpes and might therefore take unequally as between themselves). The present rules do not appear to be entirely consistent in their approach. Alternative solutions, which would be more internally consistent, would be (a) unqualified distribution per stirpes or (b) distribution per capita at each generation.

3.56. If the principle of representation per stirpes were applied without qualification,[61] this would mean that when the deceased was survived by four grandchildren, three of them the issue of a predeceasing son and one of them the issue of a predeceasing daughter, the first three would take half of the estate between them (i.e. 1/6th each) while the fifth grandchild would take half of the estate for himself or herself. Research in the United States of America suggests that people there would clearly prefer grandchildren to take equally per capita in this situation.[62] In one survey, over 95% of informants preferred this approach.[63] In another survey, 87% of respondents also preferred the per capita approach - "equally near, equally dear" - dividing the estate equally among the four grandchildren.[64] We know of no system which has moved from equal treatment of grandchildren to a per stirpes

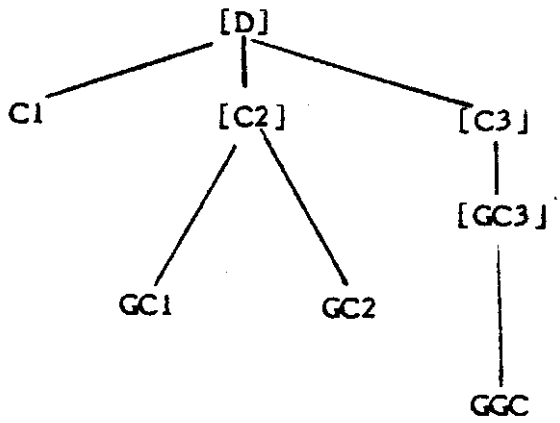
system. On the other hand there have been strong suggestions in some jurisdictions that the per stirpes system should be changed so as to provide for equal treatment of all surviving grandchildren.[65] Our provisional conclusion is that:

16. There is no need to alter the existing rule that where all of those entitled to an intestate estate are in the same degree of relationship to the deceased the estate is divided among them equally.

3.57. A system of distribution per capita at each generation would carry one stage further the principle of treating equally those who are in the same degree of relationship to the deceased.[66] Under the existing law, as we have seen, grandchildren who succeed to the deceased are treated equally if only grandchildren survive. However, they are not treated equally if a child of the deceased also survives: in this situation the division is per stirpes.[67] Under a system of distribution per capita at each generation all of the grandchildren entitled to succeed would take an equal share, whether or not a child of the deceased also survived. This system has been described as follows:

> "... the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship which contains any surviving heirs and deceased persons in the same degree who left issue who survived the decedent. Each surviving heir in the nearest degree which contains any surviving heir is allocated one share and the remainder of the estate is divided in the same manner as if the heirs already allocated a share and their issue had predeceased the decedent."[68]

So where the deceased is survived by a child, a grandchild who is the issue of a predeceasing child, and two grandchildren who are the issue of another predeceasing child the three grandchildren would each share equally in the two thirds of the estate left after the surviving child's third has been paid. The system of distribution per capita at each generation ensures that heirs of the same generation are treated equally. It also ensures that a member of a more remote generation will never take a larger share than a member of a closer generation. This could happen under the existing law in the following type of case. The deceased (D) is survived by a child (C1), by two grandchildren (GC1 and GC2) who are the issue of a predeceasing child (C2), and by one great-grandchild (GGC) who is the issue of a predeceasing grandchild (GC3) who was himself the issue of a predeceasing child (C3).



Under the existing Scots law GC1 and GC2 take 1/6th each but GGC takes 1/3rd. Under the system of distribution per capita at each generation GC1 and GC2 would take 2/9ths each and GGC would also take 2/9ths. The per capita at each generation system represents a more

consistent application of the principle (already applied in Scots law as between grandparents, uncles and aunts, and issue representing a deceased ancestor where all are of the same degree) that persons of the same generation should be treated equally. On the other hand, it is probably not such an obvious solution as the solution of the present law and might strike some people as slightly artificial. The equality it achieves among succeeding grandchildren could also be short-lived. If a child of the deceased (for example, C1 in the above diagram) dies shortly after the deceased then his child may take the whole of his share and may therefore receive more of the grandparent's estate than the other grandchildren. We have reached no provisional conclusion on this question but would welcome views.

17. Where the deceased is survived by a child and four grandchildren (three of them the offspring of one predeceasing child and one of them the offspring of another predeceasing child) should the two-thirds of the estate left after paying the surviving child's share be (a) divided equally among all four grandchildren or (b) divided among them according to the shares their parents would have taken?

Succession by remote relatives

3.58. A number of other countries exclude remote relatives beyond a certain degree from the list of heirs on intestacy. Such relatives are unlikely to have had any close connection with the deceased. They may be widely scattered and trying to trace them may be extremely time-consuming and expensive. Research in

America suggests that where they are traced (sometimes by professional heir hunters who exact a share of the estate for their efforts) they are unlikely to succeed to very much.[69] The same research suggests that the term "laughing heir" may be a misnomer.

> "Almost uniformly, the so-called laughing heirs were perturbed by their good fortune. None of these people were wealthy.... The money was welcome, but they felt they did not deserve it."[70]

Another American research project found that respondents were reluctant to allocate a hypothetical estate to a distant relative (such as a great uncle).[71] More people were prepared to see the estate go to friends, or the state education fund, or other recipients than were prepared to see it go to the distant relative. The authors of this project conclude that

> "administrative costs and the lack of a strong allocative preference in favour of those distant relatives support a cut off point in the consanguinity chain beyond which remote heirs will be prohibited from inheriting estate assets.".[72]

However a telephone survey in another state found that 54% of respondents favoured distant relatives over allocation to the state or charity.[73] It would not be surprising if most people did favour succession by distant relatives over forfeiture to the state. They have nothing to lose and something to gain (in the form of a remote chance of inheriting from a remote relative) by preserving the present law. There is probably moreover a fairly widespread reluctance to see anything forfeited to the state. Nonetheless the public interest in the efficient administration of estates and the weakness of the moral claims of very remote relatives against the estate may suggest that a limitation is desirable. We invite views on the question:

18. Should relatives more remote than grandparents or their issue be precluded from succeeding on intestacy?

This is the rule in English law and in the Uniform Probate Code.[74] It would, in fact, be a modest restriction. It would still allow succession by nephews, nieces, first cousins and their descendants, but would exclude great uncles and great aunts and their descendants.

PART IV - OPTIONS FOR REFORM: LEGAL RIGHTS OR FAMILY PROVISION

Introduction

4.1. The purpose of this part of the memorandum is to consider different ways of reconciling a general principle of testamentary freedom with protection for the surviving spouse and children and others with legitimate claims against a testator's estate.[1] The two main methods are (a) a fixed portion determined by law[2] and (b) discretionary family provision assessed by the court according to the needs of the applicant and the circumstances of each case.[3] Other methods include legal liferents, such as courtesy and dower, and "homestead" rights.[4] In many legal systems the surviving spouse is partially provided for on the death of the deceased spouse by a system of community of property.[5]

Freedom of testation.

4.2. The principle of absolute freedom of testation, though once prevalent in the English speaking world,[6] survives in few jurisdictions today. In South Africa, the abolition of the legitimate portion of Roman-Dutch law in 1874[7] established complete freedom of testation and although a system of full community between spouses exists it is more often than not avoided by ante-nuptial marriage contract.[8] Recently, however, attempts have been made in South Africa (as yet unsuccessful) to introduce a family maintenance statute and this has been strongly supported by legal commentators.[9] In the interim the courts have developed an obligation of

support subsisting on death for the support of minor children from the estates of their parents and grandparents. Historically, absolute freedom of testation in English law (from which the concept spread to the British colonies) was not purposely sought after but was the result of "accidental coincidences of interest which found freedom of testation convenient and desirable".[10] It was a convenient method of avoiding the rules of primogeniture and descent in the devolution of land and the rules of distribution on intestacy which were at that time inadequate. Freedom of testation was not a threat against provision for the family but was the method by which a fair distribution of property could be secured.[11] Restriction on testamentary freedom was only advanced after the rules of intestacy became coherent and acceptable.[12] Conversely it has been pointed out that in Scots law the legal rights of legitim and jus relictae were not historically restrictions on freedom of testation because the rights either existed before or at least came into existence at the same time as testation: in Scotland complete freedom of testation never extended to more than one-third of a man's moveable estate, where he had both a wife and children.[13]

4.3. Nevertheless the following arguments have been put forward in favour of testamentary freedom.[14]

(a) It is a logical extension of private property.[15]

(b) To fail to give respect to a man's last injunction is a form of "injury" against the deceased.[16]

(c) The power of testation is of value to a testator because it permits him to extract support and attention from others in return for the hope of reward on the testator's death.[17]

(d) The knowledge that one can dispose of one's property on death encourages saving and industry while the knowledge of the testator's dependants that they may be disinherited and have no guaranteed inheritance discourages idleness.[18]

(e) Each testator knows best the needs of his particular circle of relatives and friends.[19]

(f) Restrictions on testation lead to restrictions on inter vivos dispositions so as to prevent avoidance of the former. This threatens security of inter vivos transactions.

However, even if these arguments are sound reasons for respecting a testator's wishes it does not follow that this respect must be absolute and that controlled restrictions are not desirable. Points (a) - (d) merely suggest that an element of free testation is desirable while, in relation to (e), a testator may indeed know best the needs of his family but may choose to do nothing about it. Point (f) raises a difficult point. It may be necessary to balance the desire to protect the security of inter vivos transactions against the desire to make effective provision for spouses and dependants. In fact restrictions on testation need not include anti-avoidance provisions.[20]

4.4. The arguments against an absolute power of disposal on death are as follows.

(a) Free testation is not an inevitable incident of private property. There are many restrictions on private property designed to ensure that it is not employed to the detriment of other recognised interests.[21] These include the interests of those with legitimate claims against the testator's estate.

(b) It seems clear that at one time the jus relictae was a right of division of a conjugal community of goods.[22] This concept of partnership of family property is still of great relevance as between spouses. This suggests that a surviving spouse should have a right to a share in the deceased's estate (a point to which we will return below).

(c) During life a person is under a legal obligation to aliment various members of his or her family.[23] The fact of death does not lessen dependants' needs and the testator should not be permitted to shift to the community the burden of supporting his dependants after his death.

(d) There may be people with strong moral claims on the testator's bounty - for example, those who have sacrificed much to devote themselves to looking after him in his declining years. To ignore such claims altogether may give rise to avoidable feelings of injustice.[24]

(e) Research shows that there is strong public support for the idea that the surviving spouse and children should have legally recognised rights to share in the property of the

deceased. Although there is a difference of opinion as to how this might best be achieved, there is a clear rejection of the idea of complete testamentary freedom.[25]

4.5. In our view absolute freedom of testation is not a viable option. The question therefore remains - to what extent and in what manner should a person's freedom to dispose of his property on death be restricted to ensure adequate provision for a surviving spouse, children and others with claims worthy of recognition. In the following paragraphs we discuss the advantages and disadvantages of fixed legal rights and discretionary family provision systems. We consider various options - including schemes which would attempt to combine the two systems in order to obtain advantages of both. We have not reached firm conclusions but invite views on a number of possible schemes.

Family provision systems: some common features.

4.6. Before discussing the advantages and disadvantages of discretionary family provision systems and comparing them with legal rights it is necessary to outline the common features of such systems. To simplify this task we here set out the main provisions of the English Inheritance (Provision for Family and Dependants) Act 1975, pointing out where necessary the distinguishing features of other systems.[26]

4.7. Applicants. In England and Wales the persons entitled to apply for financial provision out of a deceased's estate are: a wife or husband of the

deceased; a former spouse of the deceased who has not remarried; a child of the deceased; a person treated by the deceased as a child of the family in relation to a marriage to which the deceased had at some time been a party; and a person who was being maintained by the deceased immediately before his death.[27] In other countries the class of applicant varies, the most contentious issue being the definition of those entitled to apply beyond the immediate family of the deceased (surviving spouse and children). This tends to be related to the function the Act is intended to serve. For example, if it is intended to preserve support obligations subsisting during the lifetime of a person this leads to a clearly defined class of applicants and avoids open-ended categories.[28] If, on the other hand, the legislation is designed to enforce a testator's moral obligations this leads to a wider class of potential applicants.[29]

4.8. The right to apply. Under section 4 of the 1975 Act an application for an original order must be made within the period of six months from the date on which representation with respect to the estate of the deceased is first taken out. After this date an application will only be considered with the permission of the court. Although similar time restrictions exist in other jurisdictions the limitation periods differ considerably.[30] The reasoning underlying all such restrictions is that distribution of the estate must not be held up indefinitely and that beneficiaries should be able to ascertain the burden of any order reasonably

quickly. In general, however, the right to apply cannot be lost by an agreement to contract out of a family provision statute.[31]

4.9. The standard of provision. In order to succeed in an application the applicant must prove: (1) that the disposition of the deceased's estate (whether by will or on intestacy or by a combination of both) is not such as to make "reasonable financial provision" for him or her;[32] and (2) that in the circumstances of the case the court should make an order for such reasonable provision. The expression "reasonable financial provision" in the 1975 Act has two different meanings. In relation to a surviving spouse the expression means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for maintenance".[33] In relation to other applicants it means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".[34] This dual meaning of "reasonable financial provision" was introduced in 1975 so as to ensure that the standard of provision for a surviving spouse should be higher than for any other class of applicant. The Law Commission were of the opinion that the surviving partner of a marriage should have a claim upon the family assets at least equivalent to that of a divorced spouse and that "in the normal case a wife should be entitled to a share in the capital assets of the family"[35] and not merely to maintenance. In other systems there is no differentiation made between the spouse applicant and other applicants, the standard

applicable being "proper maintenance or support"[36] or "proper maintenance, education and advancement in life"[37] or some such similar phrase indicating adequate maintenance. It should be remembered, however, that in some of the countries where a family provision statute is in operation the surviving spouse is also entitled to seek a division of marital property on the death of the spouse.[38]

4.10. Ascertaining reasonable financial provision. The question whether reasonable financial provision was made for the applicant is determined according to the facts known to the court at the date of the hearing.[39] In exercising its discretion the court is directed to have regard to the following matters:-

(a) the financial resources and needs at present and in the foreseeable future of the applicant, any other applicant and the beneficiaries under the deceased's will or on intestacy;

(b) the deceased's obligations and responsibilities towards the applicant, any other applicant or beneficiary, whether moral, financial or legal;

(c) the size and nature of the deceased's estate;

(d) any physical or mental disability of any applicant or beneficiary; and

(e) any other relevant matter including the conduct of the applicant or any other person.[40]

The court is further directed to consider particular factors in relation to specific categories of applicant. For example, if the applicant is a child of the deceased the court must have regard to the manner in which the applicant was educated or trained, while if the applicant

is the surviving spouse the court must take into account the age of the applicant, the duration of the marriage and the contribution made by the applicant to the welfare of the family of the deceased.[41] Under section 21 of the Act any statement made by the deceased, whether oral or written, is admissible as evidence including statements explaining or justifying the disposition of property. The provisions of section 21 can therefore assist the court in determining whether the testator's disposition of his property is reasonable in the circumstances. These provisions are similar to those found in the Canadian, Australian and New Zealand legislation.

4.11. The powers of the court. The powers of the court are contained in section 2. The court can order a periodical payment or a lump sum payment out of the estate. It can order the transfer of property to the applicant; the settlement of property in favour of the applicant; or the purchase of property and the transfer of that property for the benefit of the applicant. This last power is of assistance where there is no home contained in the estate or the surviving spouse wishes to move to a smaller house. The court also has the power to vary, discharge, or suspend the original order.[42] Again similar measures can be found in the Commonwealth legislation, often analogous to the powers available to the court to provide financial provision in matrimonial proceedings.

4.12. Anti-avoidance provisions. The 1975 Act contains lengthy and complex sections to ensure the

effectiveness of family provision laws. The underlying philosophy is that such effectiveness overrides the principles of freedom of disposal of property and security of inter vivos transactions.[43] Briefly, the provisions of the 1975 Act are as follows.

(1) The concept of "net estate" is extended to include property passing on the deceased's death by virtue of a nomination by the deceased under any enactment, property over which the deceased had a general power of appointment, property the subject of a donatio mortis causa, and property held at the date of death of the deceased by the deceased and another as joint tenants.[44]

(2) Inter vivos will contracts (by which the testator agrees to leave his property to a person by will and which have the effect of removing property from the "net estate"[45]) can now be reviewed. If the contract was made with the intention of defeating an application for financial provision under the Act, then, to the extent that any sum of money paid or property transferred exceeds the value of any valuable consideration given for the contract, the court can order the donee to provide a specified sum of money or other property for the purpose of making financial provision for an applicant under the Act. Such an order is only made if the deceased's estate is insufficient to provide financial provision.[46] The standard of proof of intention to defeat an application under the Act is on the balance of

probabilities and section 12 provides that this need not be the deceased person's sole intention. Further there is a rebuttable presumption that the deceased made the contract with the intention of defeating such an application.[47]

(3) A similar power of review is given in relation to inter vivos dispositions made by the deceased within six years of his death.
Again, an intention to defeat an application for financial provision and lack of valuable consideration are prerequisites to the making of a court order. The court can order the donee to provide money or property up to the value of the disposition even if he has spent or otherwise disposed of the gift.[48]

4.13. Such anti-avoidance provisions are common. In some countries however the provisions are not predicated upon the intention of the deceased to defeat an application under family provision legislation. Such an intention is often difficult to prove and can result in lengthy litigation. A non-subjective approach is embodied in sections 20 and 21 of the Canadian Uniform Dependants' Relief Act and in section 79 of the Ontario Succession Law Reform Act. These sections provide that the capital value of specified transactions "shall be included as testamentary dispositions".

4.14. In other countries it has been concluded that complex anti-avoidance provisions are both unnecessary and undesirable.[49] This conclusion is based on the

belief that avoidance of family provision legislation by inter vivos alienation of property occurs so infrequently that complex provisions are not merited. The British Columbia Law Reform Commission recently put forward the following arguments against the inclusion of such provisions: that anti-avoidance legislation cannot be framed to ensure that it will operate fairly and effectively; that tax planning transactions would be open to attack; that surviving joint tenants would be unnecessarily prejudiced; and that innocent donees would be injured by having to repay gifts perhaps spent some time before the testator's death.[50]

Family provision systems: advantages and disadvantages.[51]

4.15. An applicant under a family provision statute has no rights in the deceased's estate until an order is made. As a result the applicant depends solely on the court's discretion. The principal advantage of this discretionary power conferred upon the court is that it enables appropriate and sophisticated orders to be made in deserving cases. The position of everyone likely to be affected by an order can be taken into account and curbs on disinheritance can be associated with either or both individual needs and meritorious deeds. If the right to apply extends to cases of intestacy, special circumstances such as a handicapped child's greater need, or the claims of a child who has cared for an elderly parent, can be taken into account. Such special circumstances cannot be catered for in a general statutory scheme of intestate succession.[52] The extensive powers of the court also enable the award to be

tailor-made to suit the circumstances of the applicant. For example, a widow can be provided with a life interest in the matrimonial home, or the award may take the form of a trust or other arrangement suitable to protect not only the applicant but all others interested in the estate. The list of potential applicants can be framed in such a way as to allow justice to be done in unusual cases - such as a case where a cohabitee has been the supportive partner of the deceased and his surviving wife has been a wife in name only. In short, the advantages of the system derive from its flexibility. It has further been argued that the existence of this power of variation makes a testator conscious of his obligations and therefore less likely to avoid them.[53]

4.16. The disadvantages of the discretionary system also derive from its flexibility. The applicant must make an application to a court and is dependent on that court's discretion. The embarrassment of having to assert a claim in court may well deter many claimants, particularly the less aggressive. The outcome is never certain and may be influenced by the importance attached by the individual judge to the criteria to which he is directed by statute to have regard. Where statutory guidelines are laid down to assist the court in exercising a discretion, with no indication as to which factors should be given most weight, there is room for subjective differences between judges. The problems were neatly summed up by Lord Wilberforce, then senior Chancery Lord of Appeal, in the House of Lords Parliamentary Debate on the Bill which preceded the 1975 Act -

> "It is really a very difficult jurisdiction. In the first place, it has the disadvantage that it places a premium upon those who can go to good legal advisers, prepare a good legal case and make a good presentation before the court. It certainly encourages disputes between families. It is also a very difficult jurisdiction for a judge to exercise. We are given in clause 3 of the Bill a whole list of considerations which are meant to guide the judge. But I can assure your Lordships that when one is sitting there trying to make up one's mind what is fair and right for a particular man, of whose life history one knows little, what is fair and right to do as regards his divorced wife, his widow, a possible mistress, illegitimate children - to decide how to distribute the merits and demerits between these people is painful and exceedingly difficult. I am by no means certain that one is able in many cases to reach the right result."[54]

In addition, the proceedings may involve distasteful disclosure of the history of the relationship between the deceased and the applicant, causing distress and embarrassment, while the cost of the proceedings may be substantial and may reduce the amount the applicant ultimately receives. Finally, despite the time-limit imposed upon applications, in some cases there will be delays in the final distribution of the estate. This may lead to unmeritorious applications being settled out of court in order to avoid the expense of legal proceedings and the ensuing delay.[55] One argument commonly directed against family provision legislation seems, however, to be fallacious. Such legislation does not result in an overwhelming number of court applications.[56]

Legal rights - advantages and disadvantages.

4.17. A summary of the present law on legal rights is

contained in Part I of this memorandum. In Part II some criticisms of legal rights were outlined. The criticism that legal rights are exigible only out of moveables could be easily remedied. Other criticisms go to the very nature of legal rights.

(1) Legal rights are too rigid and take no account of the needs or merits of a claimant.

(2) Because legal rights are proprietary rights to a fixed portion of the deceased's estate the class of claimants must be limited.[57]

As a result legal rights provide a very generalised form of justice and do not cater for the unusual case. Undeserving claimants may receive too much. Deserving claimants may receive nothing at all.

4.18. The rigidity of legal rights, however, is also their great advantage. The very fact that the portions are fixed and automatic precludes the need to go to court. This makes administration and distribution of the estate a simpler task, avoids the erosion of the estate in the payment of court fees, and causes the minimum of distress to surviving relatives who can be advised immediately of their position. Rather than emphasising the duty of the deceased to make provision for his dependants after his death, a system of legal rights concentrates on a person's right to share in a deceased's estate.

Public opinion

4.19. Public opinion in Scotland, while clearly against complete freedom to disinherit spouse or children, is fairly evenly divided on the best way of protecting their

interests. In the 1979 survey on Family Property in Scotland informants were asked to consider what would be the better way of providing for a wife and children left out of a will - (1) entitlement to a fixed share or (2) being able to ask a court to award them a share of the estate and to decide how large that share should be. Informants were told that the advantages of the first method were that it was certain what each dependant would receive and that there was no need to go to a court to claim a share. They were told that the advantage of the second method was that the court could take account of all the circumstances of the marriage and of the needs and expectations of the wife and children. A small majority preferred the second method (55%, as against 42% who preferred the method of fixed shares).[58] In the 1986 survey separate questions were asked in relation to wife and children. In the case of the wife 42% thought she should receive a fixed share and 44% thought she should have to apply to a court. In the case of the children 40% thought they should receive a fixed share and 45% thought they should have to apply to a court. This was in relation to a widower leaving all his property to charity. Where the hypothetical deceased was a widower who left all his property to one daughter and nothing to his other daughter there was less support for a fixed share for the excluded daughter: 36% favoured a fixed share, as against 44% who thought she should have to apply to a court. Where the hypothetical deceased was a married man who left everything to his wife and nothing to his children the majority (58%) thought the will should stand, while 22% thought the

children should receive a fixed share and 18% thought they should have to apply to a court.[59] Apart from this last case, which introduces the idea of children depriving the widow of her testamentary provisions, the general result of the Scottish surveys is a fairly even division of opinion with a slight preference for a discretionary system. It is interesting that in a survey carried out in England in 1971 there was a slight majority in favour of automatic protection for surviving spouses as opposed to protection by application to a court, but a clear majority the other way in the case of children.[60]

Preliminary assessment

4.20. There are clearly arguments both ways on the question of legal rights or discretionary family provision and this seems to be reflected in the state of public opinion. It may be that the same solution is not appropriate for spouses and children. In the case of the surviving spouse a fixed legal right can be justified on the ground that it represents a rough and ready way of giving that spouse a share in the "matrimonial property" which may have been built up by the efforts, direct or indirect, of both spouses over the years. In the case of children this argument is not normally applicable and there is a case for recognising their claims by means of a discretionary provision. For these reasons we consider the claims of spouse and children separately. We also consider whether there are any other claims which ought to be provided for.

Providing for the surviving spouse

4.21. Legal right or discretionary provision. In the case of the surviving spouse arguments of principle, convenience, acceptability and continuity all suggest that provision should be by way of a fixed legal right rather than by way of discretionary court orders. The argument of principle is that a fixed share is a better way of recognising the surviving spouse's claim to a share of the "matrimonial property". Both spouses may have contributed to the building up of property during the marriage but, for one reason or another, legal ownership may have been vested in the deceased spouse alone. A typical case is that where the wife gives up work to bring up the children of the marriage. On the dissolution of the marriage by the husband's death the wife ought, it may be thought, to have a claim to share in the property he has acquired even if he has left it by will to someone else. Under section 10 of the Family Law (Scotland) Act 1985 there is a norm of equal sharing of "matrimonial property" on divorce. The definition of matrimonial property used on divorce, and the techniques used on divorce, are not necessarily appropriate on dissolution of a marriage by death, where a simpler, more rough and ready, rule may be called for, but the principle remains that there ought to be some recognition of a spouse's claims on the matrimonial property. It would be anomalous to recognise these claims on divorce but not on death.

4.22. The argument of convenience is that, as by far the greatest number of claims in opposition to the terms of a will are likely to be by surviving spouses, it is

convenient to dispose of them by means of a simple fixed rule even if other claims, of a less usual nature, are left to judicial discretion. In England and Wales

> "the vast majority of applications under [the family provision legislation] were and are made by widows."[61]

Claims by surviving spouses for a discretionary provision are also quite likely to resurrect arguments about past matrimonial disputes and the spouses' conduct towards each other in general. This would be distasteful and distressing. It would also not be easy for courts to decide what share the surviving spouse should be awarded. As we have seen, the standard of provision for the surviving spouse under English law is now reasonable provision in all the circumstances, whether or not that provision is required for maintenance. It has been pointed out that

> "The case law has revealed no completely authoritative guidance as to what the larger standard of provision for the spouse means in practice."[62]

4.23. The argument of acceptability is that the idea of a fixed share for the surviving spouse is clearly acceptable. The main criticisms of the existing system in Scotland are directed not against the idea of the spouse's legal right but against remediable defects in the present system - for example, the fact that it is confined to moveables. The public opinion surveys referred to above show that opinion is fairly evenly divided as between a fixed share system and a discretionary system.

4.24. The argument of continuity is simply that, as we have a system of legal rights for spouses at present and as the arguments for changing to a discretionary system do not seem to be overwhelming, we ought to continue with the existing system, with such improvements as may be necessary or desirable.

4.25. Although comparative law only shows what solutions have been adopted and not what solutions ought to be adopted, we have been interested to note that the American Uniform Probate Code provides a fixed "elective share" for the surviving spouse but not for the children[63] and that the Irish Succession Act 1965 provides for the surviving spouse by means of a fixed legal right but provides for the children by means of discretionary court provision.[64] The arguments used by the Law Commission in 1973 to justify retention of discretionary provision for the surviving spouse, in the face of the survey results indicating a public preference for automatic provision, are also interesting. A legal right for the spouse was rejected by the Commission, firstly, because it would introduce a new and possibly complex set of rules into English law and, secondly, because it was thought that statutory co-ownership of the matrimonial home would be introduced.[65] Neither of these arguments applies in Scotland.

4.26. Our provisional conclusion is that:-

19. <u>The surviving spouse should continue, as of right, to be entitled to a fixed share of the deceased spouse's property</u>.

4.27. Should right be restricted to moveable property? One of the main criticisms of the existing law is that legal rights are exigible only out of moveable property. This gives rise to needless complications and reduces the protection afforded by legal rights.[66] We discuss later the amount of the spouse's legal right. It is in that context that the question whether the legal right gives the surviving spouse too much falls to be considered. That question apart, we can see no good reason for restricting the legal right to moveable property.

4.28. Should right be restricted to assets acquired during marriage otherwise than by gift or inheritance? If the surviving spouse's legal right is seen as an equivalent to a claim to a share of the property built up during the marriage by the joint efforts of the spouses then it might be thought that it should not extend to property acquired by the other spouse before the marriage or by gift or inheritance from a third party. There would be advantages in this approach in some cases, particularly those involving second marriages. It would, for example, enable a husband to leave all of the property inherited from his first wife to the children of his first marriage without fear that his second wife would take any of it by virtue of her legal right. There would, however, be great practical difficulties in this type of solution. It would require the excluded property, and any property into which it had been converted, to be distinguished from the deceased's other property. In cases of lengthy marriage this would often be a virtually impossible task. An alternative would be simply to abandon the idea of attempting a

calculation based on current values (which would inevitably involve "tracing" property) and to deduct from the deceased's total property (1) the value, at the time of the marriage, of property owned then and (2) the value, at the time of acquisition, of property acquired by gift or inheritance during the marriage. This too would be very difficult, or practically impossible, in many cases and even where it could be done would lead to distorted results because of changes in the value of money. For these practical reasons we reject the idea of restricting the surviving spouse's legal right in either of the ways just considered.

4.29. Should right be affected by survivance of issue? Under the present law the surviving spouse's legal right is less (a third rather than a half of the deceased's moveable estate) if the deceased is survived by issue. As a matter of principle it is not clear why this should be so. The surviving spouse's moral claims on the estate, and his or her needs, are likely to be the same whether or not there are adult children and may well be greater if there are dependent minor children. If, however, issue are to have a legal right to legitim there is a case for giving the surviving spouse less by way of legal rights where issue survive: the argument is that it would encroach too much on the deceased's testamentary freedom to give both spouse and issue, say, a third of the whole estate. It is not possible to reach a view on this question until legitim has been considered. In the meantime we confine ourselves to the situation where there are no surviving issue.

4.30. Should right take form of a liferent? At first sight the idea of giving the surviving spouse a legal right in the form of a liferent of the whole or part of the deceased's estate has attractions. The surviving spouse is provided for, while there is only a postponement, rather than a frustration, of the distribution desired by the deceased. There are, however, powerful objections to provision by way of a liferent. If the liferent interest were confined to, say, the matrimonial home and furniture the surviving spouse's rights would depend too much on the nature rather than the amount of the deceased's estate. This solution would also have all the practical disadvantages and inconveniences of terce and courtesy, which had very few supporters before their abolition. If the liferent interest extended to the whole, or a proportion, of the deceased's estate it would require the appointment of a trustee and continuing administration which would be quite inappropriate in the case of most estates. A liferent interest in a small estate would, in any event, be worth very little and would, we suspect, be generally regarded as an inadequate provision. Some of these objections would not apply if the surviving spouse were given the option of, say, a proportion of the estate or a liferent of a larger proportion of the estate. The objections based on administrative expense, inconvenience and complexity would, however, still apply. Moreover a liferent of the whole or a very large proportion of the estate could in some cases cut out testamentary beneficiaries altogether or at least for a very long time. For these reasons we would not suggest that the surviving spouse's legal right should take the form of a liferent in the whole or part of the deceased's estate.

4.31. Fixed sum or graduated proportion? Under the present law the surviving spouse's legal right is to a third or a half of the moveable estate. The most obvious reform would be to convert the right into a right to, say, a third or a half of the deceased's whole estate. One possible objection to this solution is that it could leave the surviving spouse badly off if the estate were very small. For that reason it might be suggested that the surviving spouse's legal right should be to a fixed sum (say, £20,000) or to the prescribed proportion of the estate, whichever was greater: so as not to remove all testamentary freedom from a great many married people the deceased might in all cases be allowed to dispose of, say, 10% of his estate.[67] Another possible solution would be to express the surviving spouse's legal right in the form of a sliding scale - say, 90% of the first £10,000, 80% of the next £10,000, 70% of the next £10,000, 60% of the next £10,000 and so on, until the appropriate percentage for the bulk of the estate is reached.[68] The disadvantage of both these solutions (apart from the need to keep revising the figures to keep pace with changes in the value of money) is that they would amount to a very severe restriction on the testamentary freedom of those of small or modest means - that is, of the majority of the population. They could mean, for example, that a woman of modest means who had been married twice would be unable to leave more than a very small fraction of her estate to the children of her first marriage. Moreover, both solutions assume that the needs of the surviving spouse bear a direct correlation to the size of the deceased spouse's estate. This is not necessarily so. A wife

of modest means may be survived by a wealthy husband and vice versa. There is no reason why the wealthy surviving spouse should take 90% of the deceased spouse's property, in opposition to the terms of a will, merely because the deceased spouse's estate is under a certain figure.

4.32. Another possible criticism of a system based on a simple proportion (say a third or a half) of the deceased's estate is that it bears no relation to the length of the marriage and could give too much to the widow or widower who has been married for only a short time. To meet this objection it would be possible to base the surviving spouse's right on a sliding scale depending on the length of the marriage. The surviving spouse could, for example, be given a right to 2% of the deceased's estate per completed year of marriage, up to a maximum of 50%.[69] While this solution might lead to satisfactory results in some cases, in others it would be most unsatisfactory. If all of the deceased spouse's property had been acquired during the marriage, if the surviving spouse had contributed to its acquisition, and if the marriage were short (say, five years) it would be very hard to justify restricting the surviving spouse's legal right to 10% of the deceased's property. In most cases a couple's property increases in any event during their marriage, as mortgages are paid off and small savings accumulate. Under a sliding scale based on years of marriage the young widow or widower would in effect be penalised twice - once because there would be less property than after the long marriage and twice because he or she would receive a smaller proportion of

it. There might be considerable attractions in this solution under a matrimonial property regime where the graduated proportion of the deceased's property was in addition to the survivor's share of the community property. Under a separate property system, where the survivor's share has to serve as a substitute for community property rights on death, we think it would not produce satisfactory results in a wide range of ordinary cases.

4.33. Should right be based on spouse's rights on intestacy? This is not a realistic option in the context of the Scottish approach to the spouse's rights on intestacy, but we mention it for the sake of completeness and because this type of solution is used in some other countries.[70] It would not be realistic in Scotland to give the surviving spouse a legal right, in testate cases, to what he or she would take on intestacy because in many cases, both under the present law and under the alternative systems we have discussed, this would exhaust the whole or most of the estate and deny the deceased all or virtually all testamentary freedom. In fact the considerations applying on testacy and intestacy are quite different. The rules on intestacy are based on the fact that the deceased has not made a will. There is no question of interfering with testamentary freedom and there is good reason to take into account the fact that most testators provide generously for their spouses. In testate cases the deceased has made a will. There is the question of interfering with testamentary freedom and there is no reason to have regard to what other testators do.

4.34. Should right be to an "equalisation claim"? This is another solution which we mention only for the sake of completeness. The Law Commission in 1971 mooted the possibility of giving the surviving spouse

> "the right to claim from the estate an amount which, when added to the survivor's assets, would be sufficient to give the survivor one-half of the total assets of both deceased and survivor."[71]

We can see no reason of principle, policy or practical convenience to support this solution. In the case of a long marriage where one spouse had contributed indirectly to the building up of assets held in the name of the other spouse it would be quite unjust to deny the surviving spouse a legal right merely because he or she had assets of a certain amount derived from a third party. It would be anomalous in the extreme, for example, to distinguish between the case where the surviving spouse had acquired assets by gift or inheritance from a third party a week before the other spouse's death and the case where the acquisition was a week after that spouse's death. It would, moreover, add greatly to the complexity of executry work if the surviving spouse's assets had to be valued. There would be more to be said on grounds of principle for this type of solution if it were confined to assets built up by the joint efforts of the spouses during the marriage. The practical difficulties of operating a scheme of this kind would, however, be overwhelming. We do not think that surviving spouses, or their legal advisers, would welcome a system which necessitated an investigation into the whole history of the property transactions of both spouses during the marriage. The time taken to wind up estates, and the expenses of administration, would be greatly increased.

4.35. Should right be to a third of whole estate (if no issue)? The objections made to the present Scottish system of jus relictae and jus relicti are not, so far as we are aware, directed at the principle of allowing the surviving spouse a proportion of the deceased's estate notwithstanding testamentary provisions but are directed at the way in which that principle is put into effect and, in particular, at the rule that the surviving spouse's legal right is confined to moveables. The simplest and most obvious reform would therefore be to replace the present right by a right to a proportion of the whole of the deceased's estate. This is the solution which we provisionally favour. It is admittedly a rough and ready solution which does not take account of such factors as needs or contributions or the length of the marriage. That, however, is the price which has to be paid for certainty and simplicity.

4.36. The surviving spouse's legal right should, we think, be a right to a substantial proportion of the estate. In cases where there are no issue, anything less than a third would probably be seen as leaving the surviving spouse with too little in the case of small or medium sized estates. On the other hand, anything more than a half would probably be seen as interfering too much with the deceased spouse's testamentary freedom. Our preliminary view is that the realistic choice is between a third and a half.

4.37. In favour of setting the proportion at a third (where there are no issue) is the argument that this would represent, across a wide range of cases, less of a

change in the law. Instead of a half of the moveables the survivor would receive a third of the whole estate. It could also be argued that the proportion allotted to the surviving spouse ought to take into account that in many cases the property built up by the couple during the marriage will already be split between the spouses and that in many cases the deceased spouse will have made some provision for the surviving spouse by insurance policies or otherwise.[72] Many couples have their house in joint names[73] savings are often split between the spouses[74] and, under section 25 of the Family Law (Scotland) Act 1985, there is a presumption that spouses own their household goods in equal shares. Most married people have some life insurance.[75] Where the surviving spouse is already partly provided for it might be thought excessive to give him or her as much as a half of the deceased spouse's property in opposition to the terms of a will.

4.38. In favour of setting the proportion at a half are the arguments that this would produce a more satisfactory result in small estates (which make up the majority); that anything less would worsen the position of surviving spouses in cases where there is no heritable property and where the deceased is not survived by issue; that one of the functions of the surviving spouse's legal right is to do justice in cases where both spouses have contributed to the acquisition of property which happens to stand in the deceased's name; and that it is better to choose a solution which might be too generous to some surviving spouses than one which might not treat some surviving spouses fairly.

4.39. We would be grateful for views on this question. Our preliminary view is that:-

20. The surviving spouse's legal right, in cases where the deceased is not survived by issue, should be to a third of the deceased spouse's property, without distinction between heritage and moveables. (We consider later what the right should be where the deceased is survived by issue.)

Providing for issue

4.40. Legal right or discretionary provision? Although legitim is a long established part of Scots law there are arguments in favour of its replacement by a more flexible system of discretionary provision for children. We have already considered the rules of intestate succession and are therefore concerned here only with legitim or discretionary provision as a means of protecting children against disinheritance by the parent's will. The question of such protection could arise in many different circumstances and it may be helpful to give some examples.

Example 1. A man dies survived by his wife and their child, aged 11. By his will he leaves everything to his wife. His estate is worth £20,000.

Example 2. A man has been married twice. By his will he leaves everything to his second wife. He leaves nothing to the two children of his first marriage, who are young adults.

Example 3. A man dies survived by his elderly wife and their adult child, aged 50. By his will he leaves everything to his wife. His estate is worth £60,000.

Example 4. A widow dies survived by her three children, all adult. By her will she leaves small bequests to two of her children and the residue to the third.

Example 5. A widow dies survived by her son aged 55. By her will she leaves all her property to an evangelical church.

It is not clear that in all these cases, regardless of any special circumstances, the children should have a claim to a fixed share of the parent's estate notwithstanding the express terms of the will. In the first case - where a testator of modest means is survived by a wife and 11 year old child - a fixed share for the child would normally be just a nuisance but some provision for the child might be justified in special circumstances - for example, if since the date of the will the wife had left the child to be brought up by grandparents and had abandoned herself to a life of drugs and dissolution. In the second case - where there is a competition between the testator's children and his second wife - a fixed share might be appropriate but again it might not. The children may, for example, already have received half of their parents' joint estate through their mother. Their father may have taken the view that he was leaving only his half to his second wife whose need may be greater than that of the children. In

the third case - where the testator leaves an elderly wife and 50 year old son - a fixed share might be inappropriate if the son is well-off and if the widow's home had to be sold in order to meet the son's claim. On the other hand some provision for him might be reasonable if he were needy and incurably ill and the widow already well-off. In the fourth case - where a widow prefers one child to others in her will - it is clear that the merits of any claim by the non-preferred children will depend entirely on the circumstances. They may have neglected their mother whereas the preferred child may have looked after her in a devoted manner for many years. The last case - where the testatrix leaves everything to her church and nothing to her son - is the classic case of disinheritance by a bequest outside the family altogether. Even here, however, the merits of a claim by the son would depend on the circumstances. The son may have no need for any provision and there may be other very good reasons for the terms of the will. In short, it seems likely that in many typical cases a discretionary provision for disinherited children would be more appropriate than a fixed share of the parent's estate.

4.41. In the case of the surviving spouse a fixed share can be justified on matrimonial property principles. No such justification exists in the case of children. The main justification for giving children a claim against the parent's estate in opposition to the terms of the parent's will is that it may, in the circumstances, be reasonable that they should be provided for out of the estate rather than by public funds. Another

justification is that it may, in the circumstances, be fair to recognise contributions made by the child to the deceased's welfare or disadvantages suffered by the child in the interests of the deceased's welfare. Neither justification applies exclusively to children. Neither points in the direction of a fixed share regardless of the circumstances of the case.

4.42. In the case of the surviving spouse there are arguments of convenience in favour of a fixed share. Under a discretionary system claims by a surviving spouse would be likely to be by far the most numerous and the most contentious. The experience in England and Wales suggests that claims by children would be much less numerous. They would be much less likely to involve questions of conduct.

4.43. As we have seen, there is evidence that replacing fixed rights for children by a discretionary system would not be unacceptable to public opinion which is fairly evenly divided on the question.[76] It would have the advantage of avoiding a number of complications and making the law on legal rights simpler. As we shall see later it is difficult for a legal system to accommodate both a substantial fixed share for the surviving spouse and a substantial fixed share for issue. This problem has not been acute in Scotland because jus relictae(i) and legitim have been confined to moveables. It would become acute if they were extended to the whole estate. Difficulties and complications inevitably arise when the law attempts to recognise both the interest in a reasonable degree of testamentary freedom and substantial

fixed shares for spouse and issue. The most basic problem (which we consider later in more detail) is what the fixed shares should be. A third for the spouse and a third for the issue may make too great an inroad into testamentary freedom. These difficulties and complications are avoided if legitim is replaced by a discretionary provision.

4.44. The improved position of the surviving spouse in the modern law of succession, and the further improvements already suggested in this memorandum, mean that legitim is often useless. On intestacy the surviving spouse often takes the whole estate under the existing law and could do so in even more cases under other options.A discretionary system for children, which could encroach on the surviving spouse's prior rights, could in fact provide more protection for children in deserving cases than a fixed right to legitim which could not encroach on prior rights.

4.45. There are, however, arguments of acceptability, continuity and convenience for retaining legitim and not replacing it by a system of discretionary provision. Legitim appears to be acceptable to Scottish public opinion which is fairly evenly divided as between fixed rights and discretionary provision.[77] There has been no demand for radical change. Although we know from informal contacts that some Scottish lawyers question whether legitim should remain, none of the formal proposals for reform made to us so far has suggested its abolition. The continuity factor also applies here: if the arguments for and against legitim are evenly balanced

it should be retained in the interests of continuity. Perhaps the strongest argument for retaining legitim is that it is more convenient than a discretionary system. People can be advised of their rights with certainty. There is no question of court applications and the uncertain exercise of discretion. A partial answer to this argument is that a discretionary system need not be open ended. It could, for example, give children a right to apply only for reasonable maintenance and recompense for any contributions or sacrifices made in the interests of the deceased, such as those made in looking after him in his old age or in working unpaid, or at a low wage, in his business for many years. While this would restrict discretion to some extent it would not remove all uncertainty. Moreover it might be seen as too narrow: many children would not qualify under either head. Section 117 of the Irish Succession Act 1965 uses a broader formula. If the court is of opinion that the testator "has failed in his moral duty to make proper provision for the child in accordance with his means whether by his will or otherwise" then the court can order such provision for the child out of the estate" as the court thinks just".[78] The court is directed to consider an application "from the point of view of a prudent and just parent".[79] The merit of this approach is that it caters for a wide variety of circumstances. It is, however, extremely vague. Different judges may perfectly properly have different ideas of a person's moral duty to make proper provision for his child. Some might take the view that a parent who has brought a child up to be a useful, well-adjusted, independent adult, and has given the child every chance to make the most of his

or her abilities and opportunities, has no further moral duty to provide for the child. Others might take the view that a parent had a moral duty not to disappoint, without good reason, expectations of succession which the child might have, because, perhaps, of prevailing attitudes at the time. The cases in Ireland suggest that the courts have not found section 117 easy to apply in a consistent way.[80] It must be regarded as a major argument in favour of legitim that it avoids the dangers of uncertainty and inconsistency.

4.46. We have found this a very difficult question. Clearly there are arguments both ways. Public opinion is divided.[81] On a matter of such importance we would prefer not to reach even a provisional conclusion without the benefit of full consultation. We would be very grateful for views in response to the question:-

21. Should the children of a deceased person continue to be entitled to legitim?

In the following paragraphs we dicuss a number of questions which arise if legitim is to be retained.

4.47. If legitim continues, should it be restricted to moveable property? We can see no good reason for restricting legitim to moveable property. On the contrary there are good reasons for not so restricting it: this would remove a number of anomalies from the law and make legitim more effective.

4.48. If legitim continues, should it be restricted to any other type of property? In discussing the legal right of the surviving spouse we considered various ways

of restricting the right. We considered, for example, arguments for restricting it to assets acquired during the marriage otherwise than by gift or inheritance. These arguments were based on matrimonial property ideas which have no counterpart in relation to legitim. We can see no good reason for restricting legitim to any particular type or class of property.

4.49. If legitim continues, should it be a right to a third of whole estate (if there is no surviving spouse)? This is the solution which we would provisionally prefer, if legitim were to be retained. It would leave two thirds of the estate for the testator to dispose of as he wished by his will. It would be a reasonable development of the present law. Instead of a half of the moveables the issue would take a third of the whole estate. We invite views on the proposition that:-

22. If legitim continues then, in cases where there is no surviving spouse, it should be a right to a third of the deceased's property, without distinction between heritage and moveables.

4.50. If legitim continues, who should be entitled to it? The Succession (Scotland) Act 1964 introduced representation in legitim.[82] Whereas formerly only children were entitled, now the issue of a predeceasing child can take the share to which their parent would have been entitled had he survived. It is not by any means obvious that grandchildren and great-grandchildren should be entitled to legitim in place of their deceased parent. Their claims will usually be weaker than the claims of children. While a parent may have a certain moral duty

to provide for his children on his death (although this is arguable) it is perhaps going too far to say that this extends to the issue of predeceasing children. Why, it might be asked, should an old woman not be able to disinherit the issue of a deceased son who emigrated to a distant country thirty years ago and with whom she had no contact in the years between his emigration and his death, say, twenty years later? Why should she not be able to leave her whole estate to a sister or a cousin or a friend or even to a charity of her choice? On the other hand it can be argued that it would be anomalous not to allow issue to represent their deceased parent in relation to legitim. Grandchildren could be deprived of a share of the estate by the fact that their parent died a week before, rather than a week after, their grandparent. We would welcome views on this question. As the law was deliberately changed in 1964 to allow representation in legitim, and as we have received no suggestions for change, our provisional view is that:-

23. If legitim continues, the issue of a predeceasing child of the deceased should continue to be entitled to the legitim to which his or her parent would have been entitled.

Cases where both spouse and issue survive (if legitim continues)

4.51. Amount of legal rights. If legal rights extend to the deceased's whole property, heritable and moveable, as we think they should, a difficult problem arises if legitim is retained and if the deceased is survived by both spouse and issue. There are three main competing interests - those of the deceased in being able to

dispose of his own property by will as he thinks best; those of the surviving spouse who may have not only expectations based on current attitudes and assumptions but also "harder" claims based on matrimonial property principles; and those of the issue who may have similar expectations but who will not have any claims based on notions of sharing the assets of a matrimonial partnership. It is not easy, within the framework of a system of fixed legal rights which cannot take account of the needs or merits of individual claimants, to satisfy all three interests. The interests of the deceased and the surviving spouse seem in general to be stronger than those of children and remoter issue. In addition to these three main interests there are also the interests of the testamentary beneficiaries and the interests of the state in not having to support a dependent spouse or children who could have been provided for out of the deceased's estate.

4.52. There are various possible ways of dividing up an estate between the dead's part, the surviving spouse's share and the issue's share. The most obvious solution is a simple division into thirds. This would leave the deceased with only a third of his property to dispose of by will and might be thought to involve too great an inroad into testamentary freedom. It was rejected by the Mackintosh Committee for this reason.[83] It is worth noting, however, that under the present law, where an estate consists entirely of moveable property, the deceased may be left with only a third for disposal by will. This so far as we know, is not considered unacceptable.

4.53. Another option would be to give the spouse a quarter of the estate and the issue a quarter of the estate. This would ensure that the deceased was always left with a half of his estate for testamentary disposal. It would, however, involve a reduction in the surviving spouse's share and this may not be acceptable, particularly in the case of small estates. The Mackintosh Committee thought that this solution "might lead to great hardship" and rejected it for that reason.[84] The reasons for giving the surviving spouse a third of the estate if there are no issue apply equally if there are issue: contributions to the matrimonial property will be the same: need will be the same or greater.

4.54. A third option would be to give the spouse a third of the estate and the issue a sixth. This would meet the objections to both the previous solutions. The deceased would always be left with a half of the estate and the spouse would receive a third whether or not there were issue. These desirable results would be achieved at the expense of the issue, and this may not be acceptable. On the other hand, the claims of the issue are probably the least strong of the three and if something has to give way perhaps it should be legitim. Certainly, the development of the law on prior rights suggests that where there is an inevitable clash between the claims of the spouse and the claims of the issue in the case of an estate of average size the policy has been to prefer the claims of the spouse.

4.55. A fourth option would be to divide the estate in two. One half would be dead's part. The other half would be distributed between spouse and issue as if it were intestate estate. Suppose, for example, the deceased left an estate of £40,000, but left it all by will to a charity. The rules on intestacy (let us suppose) are that the surviving spouse has a right to a fixed sum of £75,000 or the whole estate, if less, any excess being shared equally with the issue. Under this fourth option half the estate (i.e. £20,000) would go to the charity under the deceased's will. The other half (£20,000) would go to the spouse because it would be within the amount of her fixed sum. If the deceased had left £160,000 then, on these assumptions, the charity would receive £80,000, the surviving spouse £77,500 (i.e. fixed sum of £75,000 plus half of £5,000) and the issue £2,500. Although this solution would be even harder on the issue than the previous ones it has the great merit of adopting a coherent approach to the respective claims of spouse and issue. The estate available for distribution between them by operation of law would be allocated in accordance with the same rules whether it was originally intestate estate or testate estate. This would avoid the major anomaly in the present law that a spouse may be better off on intestacy than under a will entirely in his or her favour. This solution would, however, have the very odd result that, if the spouse's legal right is to a third of the estate if there are no issue, the spouse would be better off, in most testate cases, if there were issue than if there were not. It would be hard to justify a law which gave the spouse half of the estate if there were issue but only a third if

there were not. For this reason we do not think that this option could be regarded as a serious one unless the spouse's legal right in cases where there are no issue were to be half of the estate.

4.56. We would be very grateful for views on this question.

24. Where a deceased person is survived by both a spouse and issue, should the legal rights (if legitim is retained) be

(a) a third of the estate for the spouse, and a third for the issue,

(b) a quarter of the estate for the spouse, and a quarter for the issue,

(c) a third of the estate for the spouse and a sixth for the issue, or

(d) some other shares and, if so, what?

4.57. Legitim and spouse's rights on intestacy. Under the present law the surviving spouse's prior rights on intestacy prevail over legitim. The result is that, in many intestate cases, the spouse excludes the children entirely. It is implicit in our discussion of intestate succession that we would suggest no change in policy here. Indeed there is a good case for saying that legal rights should have no application at all in intestate succession. We discuss this below.[85]

4.58. Legitim and spouse's testamentary rights. Under the present law legitim is available in the normal way even where the estate is left by will wholly or substantially to the surviving spouse. Prior rights do

not come into operation if there is no intestate estate. The result is absurd. A spouse is better off on intestacy than under a will entirely in his or her favour. If anything, it should be the other way round. The present law means that the spouse has an incentive to create an intestacy, if possible, by renouncing his or her rights under the will.[86] It is not always possible for the spouse to create an intestacy in this way. There may be a residue clause or destination over which would carry the renounced share to someone else. The result of the present law is also out of touch with public opinion. When asked whether a man's children should receive a share of his estate when he left all his property to his wife a clear majority (58%) thought they should not and only 22% thought the children should receive a fixed share.[87]

4.59. In order to bring some consistency into the law we suggest that, if legitim is retained, it should be provided that legitim should never be able to reduce the spouse's testamentary provisions below the amount which he or she would have received if his or her testamentary provisions had been intestate estate. The following examples show how this would work. In all of them it is assumed that the deceased is survived by a wife and a son. It is assumed, for the sake of simplicity, that on intestacy the surviving spouse would have a right to £75,000 or the whole estate if less, any excess being shared with the son. It is also assumed that a person could not claim both legal rights and testamentary provisions or intestate rights (including prior or preferential rights on intestacy).

1. The deceased's estate is £20,000. He leaves it all to his wife by will. In this case the wife would receive the whole £20,000. The son could not successfully claim legitim. There would be no need, as under the present law, for her to renounce her testamentary provision in order to achieve this result.

2. The deceased's estate is £95,000. He leaves it all to his wife by will. In this case the wife would receive £85,000 (i.e. £75,000 plus half the excess - the same as she would have received on intestacy) and the son's legitim would be restricted to £10,000.

3. The deceased's estate is £95,000. He leaves £20,000 to a charity and the rest to his wife. In this case the wife would take £75,000. Any legitim would reduce the wife's share below her intestate share. So the son cannot receive any legitim out of the wife's testamentary share of the estate. However, the rule about legitim not encroaching on the spouse's share is designed only to regulate the competition between issue and spouse, not the competition between issue and other legatees. There is no reason why the son should not receive a rateable proportion of his legitim out of the estate destined to the charity. Let us suppose that legitim is a third of the estate in a case where the spouse is not claiming legal rights. The son would take a third of the legacy of £20,000 and the charity would receive the rest.

We would welcome views on the proposition that:-

25. If legitim is retained, it should never be able to reduce a surviving spouse's testamentary provisions below the amount which he or she would have received if his or her testamentary provisions had been intestate estate.

General questions on reformed legal rights.

4.60. Under this heading we deal with a number of questions which would arise if legal rights were retained for a surviving spouse or issue or both.

4.61. When should legal rights be available? The purpose of legal rights is to prevent complete or substantial disinheritance of those entitled to them. As legal rights complicate the law and the administration of estates, they should come into operation only where necessary. If the rules on intestacy provide fairly for those entitled to legal rights then there is no need for legal rights in cases of total intestacy. There is also no need to bring legal rights into operation where there are testamentary provisions but those entitled to legal rights would receive as much under the laws of testate and intestate succession as would be received if legal rights applied. It would be tempting to suggest, therefore, that a person should be entitled to legal rights if, but only if, the amount he or she would receive by way of legal rights exceeds the amount he or she would receive under the normal rules of testate and intestate succession. In many simple cases this would provide a satisfactory solution. It would not work, however, in those cases where, because of difficulties of

valuation, it was not clear whether legal rights would in fact be more valuable. Liferents would cause problems of valuation and discretionary trusts even greater problems. We consider later how cases of testacy or partial testacy should be dealt with. A large number of people, however, die totally intestate. It would be a considerable simplification of the law to exclude all questions of legal rights in such cases. We therefore suggest for consideration that:-

26. Legal rights should not come into operation in cases of total intestacy.

4.62. In cases other than total intestacy a question arises whether legal rights should arise automatically or only if claimed within a certain time. Under the former solution legal rights could still be renounced. Under both solutions we envisage that a person would not be able to take both legal rights and other succession rights (whether on intestacy or under a will). So there is not much difference between the two solutions. Either a person receives legal rights unless he renounces them and takes normal succession rights instead, or a person receives his normal succession rights unless he claims legal rights instead. In effect there is an election, whatever the starting point may be. Under the present law of Scotland legal rights vest on death. Although it is sometimes convenient to talk of legal rights being claimed, in strict law they do not have to be claimed. They arise automatically and the real question is whether they are to be renounced. Under the Uniform Probate Code the surviving spouse's right arises only if it is claimed within certain time limits: it is

an elective share.[88] Under the Irish Succession Act, 1965 the surviving spouse's legal right also comes into effect only if he or she elects to claim it.[89] In favour of having legal rights arise only if claimed within a certain time it can be said that this furthers the policy of not disturbing the deceased's testamentary arrangements unless this is necessary. It may also simplify the law and the administration of estates. Executors and their advisers know where they stand once the time limit has passed. In favour of having legal rights vest on death it can be said that this provides better protection for those who, because of incapacity, could not make a claim within the time period. This argument cuts both ways, however. There may be cases where it would be advantageous for such persons to receive normal succession rights instead of legal rights. To vest legal rights in such persons, and thereby bring about a forfeiture of other provisions, would be unfortunate. In any event, the problem of lack of capacity is one with which the law is familiar and for which it makes provision. A tutor could claim legitim (if it is retained) on behalf of a pupil child, a curator could consent to a claim for legal rights by a minor child, and a curator bonis could claim legal rights on behalf of an adult incapax. Where the surviving spouse was also tutor or curator there could, of course, be a conflict of interest but, under some of the options mentioned above, this would not arise very often. Where necessary a special tutor could be appointed. We have reached no concluded view but invite comments.

27. In cases other than those of total intestacy, should legal rights arise automatically (unless renounced) or should they arise only if claimed?

4.63. Should legal rights be in lieu of other succession rights? Legal rights are intended as a protection against disinheritance and not as an extra share in addition to other rights under the law of succession. In general, therefore, they should be in lieu of other rights under the laws of intestacy or testamentary provisions. Under the present law a will may expressly declare that a bequest is to be in addition to legal rights.[90] Although such declarations are unusual, and can lead to great complications, we can see no justification for rendering them ineffective. We suggest for consideration that:-

28. Legal rights should be (i) in lieu of all rights under the rules on intestate succession and, (ii) unless the will expressly provides that a bequest is in addition to legal rights, in lieu of all testamentary provisions.

4.64. Renunciation or discharge of legal rights. It should clearly continue to be possible for a person to renounce his or her legal rights either during the deceased's lifetime or, (if legal rights vest on death) after his death. There can be no justification for forcing someone to accept a right which exists only for his or her protection. A subsidiary question arises. Should express renunciation in writing be required? Under the present law an inter vivos discharge of legal rights may be implied from a person's agreement to accept a provision (e.g. under a marriage contract or family trust) which is inconsistent with the retention of legal rights.[91] The typical example in the past has been the acceptance by a spouse in a marriage contract of a

liferent of the other spouse's whole estate after his or her death. This was normally held to amount to an implied discharge of the legal right in the fee of that estate. It is for consideration whether, in a reformed law on legal rights, it should continue to be possible to hold that a person has impliedly renounced or discharged his or her legal rights. The argument for recognising only express renunciation or discharges in writing is that this would reduce uncertainty without causing injustice or inconvenience: a well-drafted marriage contract or other inter vivos provision should contain an express renunciation if that is what the parties intend. Similarly in the case of renunciations after the deceased's death there would be a gain in certainty if only written renunciations were effective. We therefore invite views on the following:-

29. (a) It should continue to be possible to renounce legal rights.

(b) Should any such renunciation have to be in subscribed writing in order to be effective?

4.65. Collation of advances. This falls to be considered both in relation to the surviving spouse's legal right and in relation to legitim (if it is retained). We begin with the spouse's right. There is no provision in Scots law for collation by a spouse of advances which he or she may have received from the deceased during the deceased's lifetime or of provisions made by the deceased by such means as insurance policies or pension arrangements. This is also the position under the Irish Succession Act 1965, apart from a

transitional provision for advances made before the Act came into force.[92] The Uniform Probate Code, on the other hand does contain provisions for collation.[93] The main argument for collation is that it is unfair to other beneficiaries, and an unnecessary interference with the deceased's testamentary freedom, if the surviving spouse is allowed to claim the legal right when he or she has already been adequately provided for. The main arguments against collation are that it can lead to complexity, inconvenience and disputes, that it may result in under-provision for the surviving spouse in some cases, and that it is unnecessary in the great majority of cases. Before assessing these arguments it will be useful to consider in more detail the system adopted in the Uniform Probate Code and an alternative system considered by the English Law Commission in 1971.

4.66. The Uniform Probate Code provides for the deceased's estate to be notionally "augmented", for the purpose of calculating the surviving spouse's elective share, by

(a) the value of property owned by the surviving spouse at the deceased's death which was derived from the deceased by any means other than testate or intestate succession without full consideration in money or money's worth and

(b) the value of any such property which had belonged to the surviving spouse but which he or she had transferred to another person in certain specified ways without full consideration.[94]

The Code provides that property derived from the deceased includes -

> "any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceedings of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent."[95]

The property is valued either at the date of death or, if the surviving spouse had earlier transferred the property, at the date when the transfer became irrevocable.[96] There is a presumption that property

owned by the surviving spouse at the deceased's death, or previously transferred by the surviving spouse, was derived from the deceased except to the extent that the surviving spouse establishes that it was derived from another source.[97]

4.67. In their review of the advantages and disadvantages of a system of legal rights the English Law Commission in 1971 considered a solution which would take account of certain specified types of property which had been the subject of inter vivos dispositions by the deceased in favour of the survivor.[98] These might include:-

(a) outright gifts, other than gifts forming part of the normal expenditure of the deceased and gifts under £500.

(b) any property in joint names passing to the survivor by survivorship (which in Scotland would apply only if there were a survivorship clause)

(c) benefits by way of life insurance, annuities or pensions.

In the case of interests under trusts the Law Commission suggested that

> "in view of the difficulties of valuation in such cases, especially where there was a discretionary trust, ... the survivor should be put to an election, that is, if she claimed legal rights she should be required to abandon for the future her interest under the settlement."[99]

The Law Commission stressed that there would be disadvantages in a system of this type. In the end they decided not to recommend the introduction of a system of legal rights and did not, therefore, need to form a final view on the question of collation.[100]

4.68. It is obvious that provisions on the lines of the Uniform Probate Code or of the type considered by the English Law Commission would lead to great complexity and expense in at least some cases. They would be likely to result in disputes and litigation "which could well be bitter, expensive and in its outcome uncertain".[101] In some cases the obligation to collate, with all the complications it entails, would discourage a surviving spouse from claiming his or her legal right even where something would be due. In other cases, particularly where the estate was small, collation of, say, insurance proceeds or a half share in the home and furniture would result in little being obtained by way of legal right. If, as we believe, the purpose of the legal right is not merely to effect a sharing of matrimonial property then the result of collation in such cases could be under-provision for the surviving spouse. We doubt, in any event, whether the types of double provision which would most often occur in the absence of collation would be perceived as unjust by third parties or, even, in many cases, by the testamentary beneficiaries. Few people, we imagine, would feel a sense of grievance if a widow received her legal right in addition to the proceeds of a life insurance policy or occupational pension scheme. In those cases where a person wishes to make some exceptional provision for his spouse during his lifetime so as to be able to leave his whole estate by will free from any risk of a claim for legal right his remedy is to make the inter vivos provision conditional on a renunciation of the legal right. Our provisional view is that:-

30. There should continue to be no requirement on a surviving spouse to collate advances and other benefits as a condition of claiming his or her legal right.

4.69. So far as legitim is concerned there is in the existing law a rule of collation. In its simplest form this means that a child taking legitim can be required by other children taking legitim to add back into the legitim fund certain advances received from the deceased during his lifetime. It is not all advances which have 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 claimant for legitim 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 affect the moveable fund from which legitim is computed. 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 dead's part of which the deceased was completely free to dipose. In any event, if the beneficiary of such a testamentary provision accepted it, he could not 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."[102]

When legitim was made available, by representation, to grandchildren and remoter descendants in 1964 it was provided that any such claimant should

> "be under the 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 legitim otherwise than by [representation]"[103]

It is by no means clear what is meant by an appropriate proportion in this context.[104] If, for 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, and if there was a collatable advance of £1,000 to the son during his lifetime, must the grandson collate the whole £1,000 or only £400 (on the view that as his father would have had to collate £1,000 to obtain half the legitim fund he should only have to collate £400 to receive a fifth of it)?

4.70. If legitim were retained it would be possible, although perhaps not easy, to clarify any doubt on this point by amending legislation. A more fundamental question, however, is whether the requirement of collation should be abolished altogether. It seems odd that it should apply only in relation to legitim and not,

for example, in relation to shares on intestacy. It is also odd that, under the present law, a child can take legitim without collating advances, if there are no other people taking legitim: the child does not need to collate for the benefit of the surviving spouse or heirs on intestacy or testamentary beneficiaries. It is a curiously limited justice which the present law on collation seeks to achieve. Moreover, it may be open to doubt whether a parent making an advance to a child would expect it to be set against that child's share in his estate. A person who wishes advances to be treated as loans rather than gifts can easily make them as loans. There is something to be said for the view that collation should apply either generally to anyone taking a non-testamentary share of an estate or not at all. We would not favour applying it generally. This would complicate the law for no sufficient reason. We are inclined to agree with the Law Reform Commission of British Columbia that the function of the rules on intestate succession

> "is to distribute what remains of the [deceased's] estate after his death, not to remedy any injustices which may have occurred during his lifetime."[105]

We would be interested to hear from experienced executry practitioners whether collation often arises in practice and whether, when it does arise, it is regarded as satisfactory. We would also be interested in views on the following options.

31. (a) <u>If legitim is retained, should the requirement of collation inter liberos be abolished</u>?

(b) If collation inter liberos is not abolished, should it be amended to remove any doubt as to what is an "appropriate proportion" for the purposes of s.11(3) of the Succession (Scotland) Act 1964?

(c) Whether or not legitim is retained, should collation of advances be required by anyone taking a share of an estate otherwise than by virtue of a testamentary provision?

Our preliminary view is in favour of abolition rather than amendment or extension.

4.71. Discretion to modify. One of the main criticisms of legal rights is that they are too rigid. This could be met by enabling them to be modified by a court in exceptional circumstances. If a scheme could be devised which would ensure that applications for modification would only be made in a few exceptional cases then, in theory at least, the law would have the best features of legal rights and discretionary systems. In the following paragraphs we consider what such a scheme might involve.

4.72. The first question is who should be able to apply for a modification. Clearly a person entitled to legal rights should be able to apply for an increase in his or her share and this, if awarded, might result in a decrease in someone else's share. Should anyone not claiming an increase in his or her legal rights, be able to apply for a decrease in someone else's legal rights? If a power to modify is to serve its function this should, we think, be possible in at least some cases.

It may be, for example, that the deceased has left the whole of a small estate to his sister who lived with him and has great need of it. The person claiming legal rights may have behaved very badly towards the deceased, and may have no need of any share in the estate. If a power to modify were to be available at all, it should, arguably, be available in this type of case. It is different, however, if the person wishing to have someone else's legal rights decreased stands to gain no benefit from it. In such a case, where the motivation may be nothing more than spite, we do not think an application should be allowed. It might be possible to achieve the right result by simply providing that anyone with an interest could apply. A tighter formula, however, would give title to apply for a diminution of someone else's legal rights only to a person whose share of the estate would be increased if the application were granted.

4.73. Perhaps the main difficulty in relation to a discretionary power to modify legal rights is in deciding whether any grounds of application should be specified and, if so, what. One possibility would be to have no grounds of application. A person could simply apply for whatever modification was desired and the court could be given a discretion to make such order, if any, as it thought fit. This, however, would be far too vague and would do nothing to confine applictions to exceptional cases. Another possibility would be to require an applicant to establish that there were "exceptional circumstances". Yet another possibility would be to require an application to be based on need: an application for an increase would have to show that his

or her legal rights were not such as to make reasonable provision for his or her needs: an applicant for a diminution of someone else's legal rights would have to show that they were such as to make more than reasonable provision for his or her needs. This, however, would not seem to be the right approach. Legal rights are not based exclusively, or even mainly, on considerations of need and to make need the criterion for modification would be to invite an excessive number of applications for diminution. Similar considerations would apply if conduct were made the criterion, or if a combination of needs and conduct were to be used. There must be many cases where legal rights could not be justified by needs or conduct but where an application for diminution would be widely regarded as inappropriate. Perhaps the best solution, although it is admittedly vague, is to make the ground of application the existence of exceptional circumstances making the normal amount of legal rights unreasonable. This would leave the matter very much in the hands of the courts, but that is no doubt the price that has to be paid for a discretionary provision. One possible use of a discretionary power of this nature would be to exclude, wholly or partially, a claimant who had been guilty of a serious crime against the deceased.[106]

4.74. There is less difficulty in relation to the powers of the court on an application. If the grounds of application are based on the unreasonableness of the existing provision by way of legal rights it would be appropriate to give the court power to make such order as it considers would result in a reasonable provision. It

would have to be provided that the court could make orders as to the parts of the estate which should provide an increase, or benefit from a diminution, in legal rights.

4.75. If a power to modify legal rights were to be introduced we envisage that it would be exercisable by the Court of Session or a sheriff court. Procedural rules would be required in relation, for example, to those entitled to notice of an application but these are matters of detail to be worked out later if the principle is approved. The important point at present is whether a power to modify legal rights should be introduced. At first we were very attracted by this approach. We confess, however, that the difficulty of specifying a ground of application which would be wide enough to cover all suitable cases yet narrow enough to confine applications to exceptional cases and to provide some guidance to the courts has caused us some concern. There is a danger that instead of getting the best of two systems the law would end up with the worst of two systems. Legal rights are of their nature rather arbitrary and it may be that any attempt to make them less so is doomed to failure. We would welcome comments.

32. (a) Should the courts be given a power, on the application of any person whose share of the estate would be increased if the application were granted, to order an increase or diminution of the amount a person is entitled to by way of legal rights?

(b) If so, should the ground of application be the existence of exceptional circumstances making the normal amount of legal rights unreasonable or some other ground and, if so, what?

Providing for others with claims against deceased's estate

4.76. Is there a need for reform? Legal rights, even if retained for the surviving spouse, children and the issue of predeceasing children, would not protect anyone else - such as a cohabitee of many years standing, a step-child brought up as one of the deceased's family, parents, grandparents, brothers and sisters, dependants and those who have rendered services to the deceased. The question for consideration is whether, if the deceased's will or the rules of intestate succession passed the deceased's estate to someone else, any of these people should have some claim against the estate. There is an argument for saying they should not. A person would have no reason to expect that such people would succeed to his estate on intestacy. If he wished to provide for them he should realise that he should do so by will. The law of succession cannot afford to be too concerned with what other people might think the deceased ought to have done. It can reasonably protect the immediate family from disinheritance but is liable to create more discontent and difficulty than it avoids if it goes beyond that. Against all this, however, it can be argued that if the law of succession can prevent results being reached which most people would find

unacceptable or unjust then it ought to do so. It can also be argued that "the immediate family" should not necessarily be limited to surviving spouse and issue.

4.77. Legal rights or discretionary provision. If it were decided to give others, apart from spouse and issue, claims against the deceased's estate even in opposition to the terms of a will the question arises whether this should be by way of legal rights or discretionary provision. The strongest cases for legal rights are those of the cohabitee and the step-child. It might be suggested that they could be given fixed legal rights without too much difficulty. The matter, however, is not quite so clear.

4.78. Certainly, if a deceased man has no legal surviving spouse but is survived by a woman who has lived with him as man and wife for, say, forty years there is much to be said for the view that such a woman ought to be treated exactly as a wife and indeed that this should apply not only to legal rights but also to prior rights and intestate succession generally. There are, however, difficulties in this approach. It could not be applied where there was a legal wife, or indeed another cohabitee or ex-cohabitee, also surviving. So it would, at best, cover only some cases. There would be difficulties of definition. How long must the cohabitation have lasted? Must it have been continuing at, or within a certain period of, the date of death? These problems would exist under a discretionary system but at least there the amount awarded could be tailored to the situation. Under a legal rights system it would be all or nothing.

Children might find themselves excluded by their parent's "live in friend" of a few years standing even although their parent had deliberately avoided marriage and had no desire to see any part of his or her estate go to the friend. There would also be difficulties of proof. If a period of, say, three years' cohabitation as husband and wife were required, a great deal could depend on the precise date of arrival and on the precise nature of the relationship. The cases on marriage by cohabitation with habit and repute show just how difficult such questions of proof can be, particularly after the death of one of the parties. An executor could not reasonably be expected to distribute a substantial share of the estate to a person who claimed to have been living with the deceased as his or her spouse for the requisite period, unless the claim were not disputed by any other beneficiary or were judicially established. Although we are open to persuasion on this point our preliminary view is that fixed legal rights would not be an appropriate way of providing for cohabitees and that discretionary provision would be much safer.

4.79. In the case of step-children the main objection to giving them a fixed right to legitim is that the step relationship can vary greatly in its nature. At one extreme is the child whose parent remarries when the child is a baby and who is brought up as a child of the new family in every way. At the other is the adult whose parent remarries later in life and who has no family relationship at all with the step-parent. It would be difficult to draw a line at an appropriate point

between these extremes and, for this reason, our provisional conclusion is that (whatever may be decided in relation to legitim generally) a discretionary system would be more appropriate in the case of step-children.

4.80. In the case of other relatives and others with a possible moral claim against the deceased's estate it seems clear that fixed legal rights would be quite inappropriate and unworkable and that, if any provision is to be made, it would have to be by way of a discretionary system. Our provisional conclusion is therefore that

33. (a) Legal rights should not be extended beyond the surviving spouse and issue.

(b) Accordingly, if any provision is to be made for other people with possible claims against the deceased's estate, it should be by means of a discretionary system.

4.81. Title to apply for discretionary provision. It is of interest to see how other jurisdictions, which already have a discretionary family provision system, have solved or are proposing to solve the question of who should be able to apply.

4.82. Before 1975 only the surviving spouse and children of the deceased could claim family provision under English law. The law was altered by the Inheritance (Provision for Family and Dependants) Act 1975 which now enables an application to be made by

> "any person (not being a person included in the foregoing paragraphs of this subsection) who

immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased."[107]

4.83. This provision has been criticised on the grounds that it is over-inclusive (in that it allows claims by too wide a category of actual dependants) and under-inclusive (in that it does not allow a claim by those who have made contributions or sacrifices in the interests of the deceased).[108] It seems to us that there is force in both criticisms. Dependency by itself seems an unsatisfactory basis for entitlement to apply. Why, to take an extreme example, should the fact that a wealthy philanthropist has voluntarily maintained twenty old people in a charitable home enable them all to claim financial provision out of his estate? It is true that they might have little prospect of success but it does not seem desirable to open up the possibility of speculative actions to this extent.

4.84. Law reform bodies in other jurisdictions have considered extending the category of those entitled to apply for financial provision on death.[109] A number of them have concluded that there should be some extension beyond spouse and children but that a simple test of dependency is not appropriate. A common approach is to supplement dependency by some other criterion such as a specified family relationship or membership of the deceased's household. The Law Reform Commission of British Columbia, for example, has recommended that, in addition to spouses, former spouses, children and stepchildren the following people should be eligible to apply.

(1) "[a] common law spouse who, immediately preceding the death of the deceased,

(i) was cohabiting with the deceased for not less than two years, or

(ii) was receiving or entitled to receive maintenance ... from the deceased"

and (2) "if they were dependent on the deceased immediately prior to his death:

(a) grandchildren;

(b) grandparents;

(c) parents;

(d) brothers, sisters, half-brothers and half-sisters."[110]

The New South Wales Law Reform Commission has recommended the following provision.

"(1) In this Act, "eligible person", in relation to the estate or notional estate of a deceased person, means--

(a) the widow or widower of the deceased person;

(b) any child of the deceased person; and

(c) subject to subsection (2), any person--

(i) who was, at any time, wholly or partly dependent upon the deceased person;

(ii) who was, at any time, a member of a household of which the deceased person was a member; and

(iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without

adequate provision for his proper maintenance, education or advancement in life.

(2) Subsection (1)(c)(ii) does not apply to any person who is a grandchild of the deceased person."[111]

4.85. There can be no "right" answer to the question which people should be able to apply for financial provision out of a deceased person's estate. It is a matter of what is acceptable and workable. We are attracted by the type of solution which begins by limiting eligibility to persons with certain close family relationships with the deceased. Succession law is concerned primarily with family relationships and it seems to us that, at least to begin with, a discretionary family provision system should be confined to members of the family. The system could possibly be extended later when experience of its working has been gained. That, however, still leaves the question of who should be regarded as a family member for this purpose. We consider below some candidates for inclusion.

4.86. Cohabitees There is a clear case, in our view, for allowing a cohabitee to apply for a provision out of the deceased's estate. Many such relationships are in fact, though not in law, indistinguishable from marriage. Indeed some may ripen into marriage by cohabitation with habit and repute. That doctrine cannot, however, be regarded as a complete answer to the problem. First, it does not apply where one of the parties is already married - a not uncommon situation. Secondly, it does

not apply unless the couple have held themselves out as being husband and wife. Nowadays cohabiting unmarried couples are often quite open about the fact that they are not legally married. It would not be desirable to reward those who lie and penalise those who are honest. One objection which could be made to allowing cohabitees to claim a provision out of their deceased partner's estate is that this would downgrade marriage. We do not accept that it would. It would merely be providing for a case factually akin to marriage.

4.87. If cohabitees were allowed to claim we suggest that a three year period of cohabitation should be required. This would provide for the long term relationship while avoiding the problems which might arise if short term cohabitation of, say, a matter of weeks were recognised for this purpose. It should not be necessary for the cohabitation to be continuing at the date of death. Not only would any such requirement lead to hard cases where the deceased had been, say, in hospital or some other institution for a period before death but it would also provide no protection for a cohabitee abandoned by the deceased after a long relationship.

4.88. Former spouses. A divorced spouse of the deceased should not, we suggest, be eligible to apply for family provision out of the deceased's estate. This is because financial provision for divorced spouses is dealt with under the Family Law (Scotland) Act 1985. The winding up of the economic aspects of the marriage takes place under that Act. If the spouse paying a periodical

allowance under the Act dies, the order continues to operate against the deceased's estate but may be varied on the application of the former spouse or the deceased's executor.[112] The variation could, if appropriate, take the form of a commutation of the order into an order for payment of a capital sum or transfer of property.[113] In these circumstances there is no need to allow a divorced spouse to claim family provision out of the deceased's estate. Indeed to allow such a claim would lead to overlappping remedies and confusion.

4.89. Step-children. We have received suggestions that we should consider the position of step-children in the law of succession. At present a step-child (unless legally adopted by the step-parent) has no succession rights in relation to the step-parent. Yet the step-child may have been brought up since infancy as a member of the step-parent's family. It would not, as we have seen, be appropriate simply to equiparate step-children to natural children for succession purposes. Situations vary too much. However, it would be possible to give the step-child a right to apply for discretionary family provision out of the step-parent's estate. In deciding how much, if anything, to award the court could take the duration and nature of the actual relationship into account. The step-relationship differs from the normal parent-child relationship in that it can terminate on divorce. This raises the question whether a former step-child should be able to apply for family provision on the death of the step-parent. We think such a child should be able to apply. The factual relationship may not have terminated on divorce. Indeed the step-parent

may have been awarded custody of the child and may have continued to bring the child up as a child of his or her family. Again the nature of the relationship in any case could be taken into account in quantifying an award. Another question is whether a step-child should be able to apply if he or she was never, (while under, say, the age of 18) accepted by the step-parent as a child of his or her family. A rule excluding applications in such a case would exclude (a) an adult whose parent remarried later in life and (b) a child whose father married again but who remained in the custody of his or her mother. It is not readily apparent that there is any relationship justifying title to apply in either of these cases and our provisional inclination would be to confine eligibility to a step-child who was accepted, while under the age of 18, by the step-parent as a child of his or her family.

4.90. Other children accepted into family. It may happen that an orphan child, or a child whose parents cannot look after him or her, is taken in by a relative or friend and brought up as one of that person's family. It may also happen that a man accepts his cohabitee's child into his family, or she accepts his. Should such a child, if accepted into the family while under the age of 18, be able to apply for family provision out of the accepting person's estate. The situation may be very like adoption or the step-relationship in fact, and there is a case for giving a right to apply. On the other hand, it can be argued that a person's generosity in taking in a child does not, and should not, involve anyincurring of moral responsibility to provide for that

child by will or otherwise. It can also be argued that even if "accepted children" generally are given a right to apply, this should not apply to children who are fostered or boarded out by a local authority or other body. The Family Law (Scotland) Act 1985 draws this distinction for the purposes of aliment. It provides that an obligation of aliment is owed by

> "a person to a child (other than a child who has been boarded out with him by a local or other public authority or a voluntary organisation) who has been accepted by him as a child of his family."

Although we have formed no concluded view on these questions we find it difficult to justify drawing a distinction between children which depends on whether two adults have married each other. We are inclined to think, therefore, that any child (whether or not a step-child) who had been accepted, while under the age of 18, by a person as a child of that person's family should be eligible to apply for family provision out of that person's estate on his death.

4.91. Parents. If there were to be the possibility of discretionary provision for family members other than spouse and issue there is clearly a very strong case for including parents within the list of those entitled to apply. If step-children and/or accepted children are included in the list of applicants then it is arguable that step-parents and/or those who have accepted a child into their family should be correspondingly included. A step-parent or "accepting parent" may be factually in the same position as a natural parent and may have just as strong a moral claim to some provision out of the

deceased child's estate. Cases where this was not so could be dealt with by a suitable exercise of the discretion.

4.92. Other relatives. Once we get beyond spouse, cohabitee, parent, child, step-parent, step-child and accepted child we get beyond those who are regarded as members of a deceased's "immediate family" for the purposes of the Damages (Scotland) Act 1976 (and who are accordingly entitled to claim not only damages for loss of support but also compensation for the loss of the deceased's society and guidance).[114] The relatives outside the "immediate family" who can claim damages for loss of support under the 1976 Act are

> "(d) any person who was an ascendant or descendant (other than a parent or child) of the deceased
>
> (e) any person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased."[115]

Relationships by affinity are, under the 1976 Act, treated as relationships by consanguinity.[116] So the list is quite wide. It will be noted that descendants are included. If legitim were to be available to the issue of predeceasing children there would be no need to make discretionary family provision available also (at least if an application could be made to increase legitim). However, there might be a case for enabling grandchildren and other descendants not entitled to legitim to apply for discretionary provision. A particular grandchild, for example, might have a very strong moral claim against the deceased's estate even although his or her parent is still alive. We would

welcome views as to whether any list of those eligible to apply for family provision should include all, or some, of those eligible to claim damages for loss of support under the 1976 Act. It may be that those outwith the "immediate family" should be able to claim not by virtue of mere relationship but only if they satisfied some other test, such as dependency, in addition.

4.93. Other non-relatives. We have already criticised the test of dependency used in the English legislation. Nonetheless, consultees may consider that a test of dependency either by itself or coupled with a requirement of membership in the same household would be appropriate as a test of eligibility to apply, any questions as to the nature and quality of the relationship being dealt with on quantification of the award, if any. Yet another possibility would be to allow a claim by a person who had made contributions or sacrifices in the interests of the deceased of such a nature as to merit recognition in the distribution of the deceased's estate. This would cater for the devoted friend or distant relative who had, for example, given up a job in order to look after the deceased.[117] A more general solution still would be to allow an application by anyone who could reasonably have expected the deceased to have made provision for him or her. This would, however, be an extremely vague criterion of eligibility which would, in effect, merge into a ground of application.

4.94. Summary and invitation for views. There is, in our opinion, a strong case for making some provision for de facto members of the deceased's immediate family - by

which we mean cohabitees and children in fact accepted by the deceased into his family. Beyond that the arguments are more evenly balanced. On the one hand it can be said that there will be cases where most people would say that the deceased had a certain moral obligation to provide for, say, an aged parent, or a brother, or a devoted friend and that the law ought to enable some claim to be made. On the other hand it can be said that it is unrealistic to expect perfect justice from succession law and that the price of attempting to achieve it will be an unacceptable level of disputes and uncertainty. To try to provide for all meritorious claims runs the risk of opening the doors of the courts to a host of speculative and unmeritorious claims. We ourselves have reached no provisional view on these difficult questions although we would feel uneasy about extending the list of applicants too widely. To a large extent it is a question of what would be generally regarded as acceptable and appropriate. We would therefore be very grateful for views on the following options.

34. If a system of discretionary provision out of the estate of a deceased person were to be introduced which of the following should be eligible to apply-

    (a) a person who had cohabited with the deceased, as husband and wife, for a specified period (say, three years)

    (b) a step-child of the deceased

    (c) a step-child of the deceased but only if accepted, before the age of 18, by the deceased as a child of his family

(d) any child (whether or not a step-child) accepted, before the age of 18, by the deceased as a child of his family

(e) a parent of the deceased

(f) a step-parent of the deceased

(g) a step-parent of the deceased but only if he had accepted the deceased, before the deceased was 18, as a child of his family

(h) a person who had accepted the deceased before the deceased was 18, as a child of his family

(i) a grandparent or other ascendant of the deceased

(j) a descendant of the deceased, if not entitled to legitim

(k) a brother or sister of the deceased

(l) an uncle or aunt of the deceased

(m) the issue of a brother or sister or uncle or aunt of the deceased

(n) any person who was dependent on the deceased immediately before his death

(o) any person who had made contributions or sacrifices in the interests of the deceased of such a nature as to merit recognition in the distribution of the deceased's estate

(p) any person who could reasonably have expected the deceased to have made suitable provision for him or her by will or otherwise?

35. Should any additional criterion have to be satisfied by any of the above before they would

be eligible for financial provision out of the deceased's estate?

4.95. Grounds of application. In England and Wales, as we have seen, the ground of application for financial provision out of the estate of a deceased person is

> "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.".[118]

In the case of an application by a spouse (other than a judicially separated spouse) this means simply reasonable provision: it is not limited to maintenance. In the case of other applicants "reasonable financial provision" is limited to such provision as it would be reasonable for the applicant to receive for his maintenance.[119] Whether a split definition of reasonable financial provision would be appropriate in Scottish legislation would depend partly on whether, as we have suggested above, a spouse should continue to have a legal right. If so there would be no need for a special rule for spouses in the context of discretionary provision. The way would be clear to adopt a single maintenance-based ground for all applicants. The advantage of this would be that the court's discretion would be less open-ended. The maintenance approach to family provision legislation has recently been strongly supported by the Manitoba Law Reform Commission. The Commission rejected the idea that it was

> "properly the function of the courts to ensure that a testator's will should conform to what is inevitably a subjective standard of reasonableness respecting all persons who may have a moral claim.".

They considered that reform

> "should start from the premise that the statute should preserve a legal lifetime support obligation by transferring it to the estate, in appropriate circumstances, on the death of the person who owed the obligation."[120]

While we can see attractions in this approach we consider that in some respects it is too narrow. It seems to us to be too narrow in the case of cohabitees and step-children, whose claims could be regarded in many cases as equivalent to the claims of spouse and children to legal rights and hence not limited to maintenance. The maintenance-based approach would also seem inappropriate if, and in so far as, the legislation is designed to recognise the claims of those who have made contributions or sacrifices in the interests of the deceased. Even in the case of other applicants, maintenance may not be the appropriate criterion. This, of course, depends on the view taken of the purpose of discretionary provision. If it is seen, as we believe it reasonably can be, as a way of recognising certain moral claims against the deceased's estate then there is no reason to base the law on the provision of maintenance. If the law on discretionary provision on death is seen, as seems realistic, as part of succession law then it is difficult to see any reason of principle for basing it on maintenance. The basis of succession law is not maintenance. The Irish Succession Act 1965 enables a child to apply if the parent "has failed in his moral duty to make proper provision for the child in accordance with his means".[121] This seems a more suitable test in the succession context but it is perhaps unwise to focus on the deceased's failure in a moral duty. This introduces an element of criticism of the deceased which

might be resented and might lead to unnecessary disputes. If there is to be a discretionary system at all there is something to be said for having an objectively stated ground, without qualification or limitation. We invite views on the question:-

36. If a system of discretionary provision were introduced, should the ground of application be (a) that the disposition of the deceased's estate which would fall to be made in the absence of an order is not such as to make reasonable financial provision for the applicant or (b) something else and, if so, what?

4.96. Which court? We can see no reason for not treating applications for family provision in the same way as other litigation relating to succession and therefore suggest that:-

37. If a system of discretionary provision were introduced, applications should be competent in either the Court of Session or a sheriff court.

So far as jurisdiction is concerned we suggest for consideration that:-

38. If a system of discretionary provision were introduced, the Court of Session should have jurisdiction to hear an application if the deceased was at the time of his death domiciled in Scotland. A sheriff court should have jurisdiction if the deceased was at the time of his death (a) domiciled in Scotland and (b) habitually resident in the sheriffdom.

4.97. Powers of the court. The Inheritance (Provision for Family and Dependants) Act 1975 regulates this matter in some detail. It enables the court to make orders for periodical payments, lump sums, transfers or settlements of property, and the variation of ante-nuptial or post-nuptial marriage settlements. With the exception of the power to vary settlements, which has been criticised as interfering with third parties' rights and which seems to have been very rarely employed,[122] these seem to be useful powers (although careful consideration would have to be given at a later stage to procedural and other points, particularly in relation to the power to order the making of settlements). In many cases a lump sum will no doubt be the most appropriate and convenient form of award but there are cases - such as those where there is a continuing testamentary trust and a claim by an elderly dependant - where a periodical allowance would make reasonable provision for the applicant while involving the minimum interference with the rights of the beneficiaries. The 1975 Act also gives the court power to make interim orders, to vary or discharge orders for periodical payments and to order the payment of a lump sum by instalments.[123] Again these seem useful powers. At this stage we are primarily concerned to seek views on the principle of family provision rather than on the details of its operation. We envisage, however, that if such a system were introduced the courts would have a range of powers similar to those set out in the 1975 Act.

39. If a system of discretionary provision were introduced the courts should have power to make orders for the payment of a periodical allowance, or a capital sum (including a capital

sum payable by instalments) or for the transfer or settlement of property. The courts should also have power to make interim orders and to vary or discharge orders for payment of a periodical allowance.

4.98. Matters to which court should have regard. The Inheritance (Provision for Family and Dependants) Act 1975 contains a list of matters to which a court should have regard in deciding whether the disposition of the deceased's estate makes reasonable provision for the applicant and in deciding whether and how to exercise its powers under the Act. We are not convinced that a detailed list of factors of this nature is necessary or desirable, particularly as the list concludes with "any other matter ... which in the circumstances of the case the court may consider relevant". There is one matter, however, on which some guidance would be desirable and that is the relationship between the claims of the applicant and those of others with an interest in the estate. We think it would be essential in, for example, a claim by a parent to take into account the position of the surviving spouse. An applicant's claim should not, in other words, be viewed in isolation . A point which has given rise to difficulty under family provision legislation in other countries is whether the court must have regard only to the circumstances existing at the time of the death or whether it can have regard to circumstances at the date of the application.[124] The modern view - and, it is submitted, the more realistic view - is that the court should take into account the

facts as known to it at the date of the hearing.[125] We suggest, for consideration, therefore that

40. If a system of discretionary provision were introduced, the court, in deciding what order, if any, to make should have regard not only to the circumstances of the applicant but also to the circumstances of others with an interest in the deceased's estate. The court should take into account the facts as known to the court at the date when it determines the application.

4.99. Time limits. In the interests of certainty and the speedy administration of executries it is clearly desirable that there should be a fairly short time limit on applications for family provision. Experience in other jurisdictions shows, however, that it would also be desirable to allow the court to permit late applications on cause shown.[126] We suggest, therefore, that:-

41. If a system of discretionary provision were introduced, an application should not, without the permission of the court on cause shown, be competent after the end of the period of six months from the date of confirmation.

4.100. Property subject to court's powers. The court's powers should clearly extend to the net estate belonging to the deceased at the time of his death. This would include property belonging to the deceased but disposed of by him as from his death by testamentary disposition or by nomination under an enactment permitting this to be done.[127] It would also, unless qualified, include property belonging to the deceased but

passing to someone else under a special destination or a survivorship clause, the most common example of this being the house held in the names of husband and wife or the survivor. The Succession (Scotland) Act 1964, for its purposes, excludes from the estate of a deceased person heritable property subject to an unevacuated special destination in favour of another person.[128] Should a similar exclusion be made for the purposes of family provision? There are arguments both ways on this. On the one hand it could be argued that a special destination taken by the deceased himself is simply a will-substitute and that property belonging to the deceased but passing under a non-contractual special destination created by himself ought therefore to be available for family provision. On the other hand it could be argued that it would often give rise to hardship and a disappointment of reasonable expectations to interfere with a half-share in a house passing to the survivor of a married couple under a survivorship clause in the title.[129] Against this, however, it could be said that the interests of the survivor would be taken into account by the court in deciding what orders, if any, to make and that in cases where a special destination was used by the deceased simply as a means of passing property to an unrelated donee it would be highly anomalous to exclude the property subject to it. Special considerations may apply to special destinations created by third parties. Suppose, for example, that a man gives a house to his daughter and her husband and the survivor. On the husband's death should his half-share of the house be available for family provision? In this situation the husband could not under the present law

have disposed of his half-share by will. The same would apply if the destination were contractual - the husband and wife, say, each having contributed to the price of the house on the understanding that one of them would become sole owner on the other's death. We discuss the law on special destinations in another memorandum in this series,[130] because they give rise to other problems. In the meantime we leave this question open.

42. (a) If a system of discretionary provision were introduced, the property subject to the court's powers should be the net estate belonging to the deceased at the time of his death.

(b) It is for consideration, in the light of consultation on Consultative Memorandum No. 71, whether there should be an exception to this rule in the case of property belonging to the deceased but passing under a special destination which he had no power to evacuate.

4.101. The incidence of any provision ordered. If an applicant is successful and an order for provision is made, the order has to be satisfied out of the deceased's net estate. The question therefore arises as to the incidence of any provision ordered. Under section 2(4) of the Inheritance (Provision for Family and Dependants) Act 1975, the court is given the power to direct which part of the estate shall bear the burden of any order by making consequential directions -

> "for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another."

Similarly, under section 10 of the New South Wales Family Provision Act 1982, the court has power to make such orders -

> "as the court thinks necessary to adjust all the interests concerned and to do justice in all the circumstances."

Such a provision seems a logical extension of the court's discretion in determining the size and the nature of an award. In exercising this power the court could take into account the presumed intention of the deceased and could have regard to any express declaration of the deceased as to those legacies which are to have priority over others. In relation to the testate or intestate rights of a surviving spouse the court would be able to direct, to the extent that it considered it necessary, that these rights should be subject to the order. This may be particularly useful in cases where, for example, the surviving spouse is a second or subsequent spouse and there are blood relatives of the deceased who have successful claims for provision out of the deceased's estate. We therefore provisionally conclude that:-

43. If a system of discretionary provision were introduced the court should have the power to direct which parts of the net estate will bear the burden of any order.

Anti-avoidance provisions

4.102. There are at least three possible approaches to attempts to defeat, by inter vivos transfer, claims for legal rights or discretionary provision. The first is to do nothing. The second is to deal with the more obvious cases of avoidance. The third is to attempt to deal with all cases. We consider the first two in the

following paragraphs. The third is not, in our view, a realistic option. It would require legislation of the complexity of the estate duty and inheritance tax provisions designed to counter devices adopted to prevent property passing on death. The complexity of the provisions required, and the difficulty of applying them, would be quite disproportionate to the mischief to be remedied.

4.103. The "do nothing" approach is that currently adopted in Scots law. It has the great merit of simplicity. It can be supported on the view that the purpose of the law of succession is only to regulate succession to the property left by the deceased at death and not to interfere with what he does with his property during his life. It might also be argued that avoidance measures would be most likely to be taken in cases where, in the view of the deceased, spouse or children or other claimants had no moral claims against him, that often the view of the deceased would be justified and that the result of the "do nothing" approach would not necessarily be greater injustice. On the other hand it may seem to make a mockery of the law if the claims for which it provides, particularly those of the surviving spouse, can be avoided by such obvious devices as a transfer of property by the deceased with a reservation of a liferent in his own favour.

4.104. There are various ways in which the law could deal with the more obvious cases of avoidance without attempting to deal comprehensively with all cases. One option would be to deal only with avoidance of legal

rights, on the grounds that being fixed rights of substantial value, they are more likely to be the subject of avoidance attempts than claims for discretionary provision. One way of dealing with the more obvious attempts to defeat legal rights would be to provide that for the purposes of calculating the estate subject to legal rights the property owned by the deceased at death should be notionally augmented by the value of specified dispositions made by him during his lifetime (without the consent of those entitled to legal rights) otherwise than for full consideration.[131] The specified dispositions might be -

(a) any disposition of property of which the possession, enjoyment or income was retained by the deceased at the time of his death

(b) any disposition to the extent that it could be revoked, or diverted to his own benefit, by the deceased at the time of his death

(c) any gifts made within three years before death, other than gifts below a certain value (say, £250 per year to any one donee) and gifts made out of income as part of the deceased's normal expenditure.[132]

A provision on the above lines would leave many avoidance devices open. The purpose would not, however, be to defeat all attempts at avoidance but merely to counter the more obvious attempts and to make avoidance more difficult. Even limited provisions of this nature could, however, lead to complications and difficulties in practice. Quite apart from the difficulties of applying the provisions and valuing the property in question, there would be the problem of knowing what to do if the

property left in the deceased's actual estate was not enough to satisfy the legal rights. In this type of case the recipients of the property disposed of by the deceased would presumably have to be made liable to contribute to the estate in proportion to the value of the property received.[133] That would lead to further practical problems and no doubt, in some cases, litigation.

4.105. Another way of dealing with the more obvious avoidance attempts would be to concentrate on the deceased's intentions and to give the courts powers to counteract transfers within, say, three years before death which are proved to have been intended to defeat legal rights (and possibly also other claims). This is the approach taken by the Irish Succession Act 1965.[134] It gives the court power to order any such disposition to be deemed, in whole or in part, to be a bequest by the deceased and to form part of his estate. The court also has power to make orders to the effect that the donee shall owe the estate such amount as the court may direct. Like the approach considered in the previous praragraph, this type of provision would not deal with all avoidance devices. It would be difficult or impossible, in many cases, to prove the requisite intention, and transfers outwith the time limit would escape.

4.106. Our provisional view is that it would be undesirable to introduce anti-avoidance measures. We are not satisfied that there is a great need for them or that they would add greatly to overall justice. We are satisfied that they could never be fully effective and

that they would complicate the law and the administration of estates.

44. (a) Our provisional view is that anti-avoidance provisions are not necessary or desirable in relation to legal rights and, if it is introduced, discretionary provision.

(b) If, contrary to our provisional view, anti-avoidance provisions were to be introduced, should they take the form of

(i) augmenting the deceased's estate by including the value of specified dispositions made by the deceased (such as transfers of property in which he retained an interest, or gifts within three years before death) without regard to intention, or

(ii) giving the courts power to counteract dispositions by the deceased made within three years before death with the intention of defeating, or substantially diminishing the value of, claims against his estate for legal rights or discretionary provision?

Options if legal rights not retained for spouse and issue

4.107. Surviving spouse. Our provisional view is in favour of retaining a legal right for the surviving spouse. It may be, however, that consultees will disagree. An alternative would be to include the spouse

in the list of those entitled to apply for a discretionary provision under a scheme of the type outlined above. Indeed the surviving spouse, if not entitled to a legal right, has probably the strongest claim of all to be included in that list. We suggest therefore that:-

45. If a legal right for the surviving spouse is not retained, the surviving spouse should be included in the list of those entitled to apply for discretionary provision.

4.108. Issue. We have formed no provisional view as to whether legitim should be retained. If it is not, and if there is to be a list of those entitled to apply for discretionary provision, then it seems clear that children, and the issue of predeceasing children, should be included in that list. We suggest, therefore, that:-

46. If legitim is not retained, children and the issue of predeceasing children should be included in the list of those entitled to apply for discretionary provision.

4.109. Abolition of common law rules on aliment jure representationis. Under the common law on aliment ex jure representationis, which is now little known and little used, a person entitled to aliment from the deceased during his life can claim aliment from the deceased's executors or from those enriched by his succession. In our Report on Aliment and Financial Provision we recommended the retention of aliment jure representationis but only as an interim measure until the law of succession could be reviewed.[135] We explained

the development of the law on aliment *jure representationis* in our Memorandum on Aliment and Financial Provision.[136]

> "A typical situation in the early law was that a landowner died leaving heritable property but little or no moveable property. The eldest son succeeded to the heritable property as heir: the younger children were unprovided for. The law had no difficulty in concluding that the heir was bound to aliment the younger children in so far as he was enriched by the succession. He was said to represent his father and to be liable for aliment *jure representationis*. The principle was soon extended to moveable property, to succession to the mother and to testate succession. By the twentieth century, it was recognised that the child's claim lay against any gratuitous beneficiary of the parent's estate, to the extent of the benefit taken and also against trustees holding the deceased parent's estate under a continuing trust (at least if the trustees were liable for his debts). The executors of the deceased parent might also be liable, but not in such a way as to prevent them distributing an estate which was otherwise ready for distribution; in this respect the legitimate child's claim was not like an ordinary claim of debt. The executors did not have to retain funds to provide for his future aliment: they could distribute the estate, leaving the child to make his claim for aliment against the beneficiaries."

In the late 18th and early 19th centuries it became established that the widow also had a claim for suitable aliment against her husband's heirs if, for some reason, she was not entitled to legal rights or her legal rights were not sufficient for her support.[137] If the law on legal rights were improved by, among other things, making them exigible out of the whole estate or if legal rights were replaced by a system of discretionary provision, there would seem to be no need to retain aliment *jure representationis*. Clearly, however, a final decision on

this point must await the results of consultation on legal rights or their replacement. It would be useful, however, to have the views of consultees on the question.

47. If legal rights were suitably reformed, or replaced, should aliment jure representationis be abolished?

PART V - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Note. Attention is drawn to the notice at the front of the memorandum concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this memorandum may be referred to or attributed in our subsequent report.

1. Where a person dies intestate survived by issue but not by a spouse, the issue should (as under the existing law) take the whole estate.
   (Para. 3.2)

2. Where a person dies intestate survived by a spouse and issue should his or her property be allocated
   (a) entirely to the issue,
   (b) entirely to the spouse, or
   (c) in such a way as to recognise the claims of both spouse and issue?
   (Paras. 3.3 to 3.10 and 3.23)

3. In the case of option 2(c) should the spouse have a right to
   (a) house and furniture and plenishings (up to a certain value) and a financial sum, plus a share of the rest, as under the present law
   (b) a simple proportion (e.g. 3/4, 2/3 or 1/2) of the whole estate

(c) a fixed sum (or the whole estate if less) with no share in the excess

(d) a fixed sum (or the whole estate if less) with a share in the excess

(e) decreasing proportions of "slices" of the whole estate (e.g. 100% of the first £X,000, 80% of the next £Y,000 70% of the next £Y,000 60% of the next £7,000 and 50% of the rest)

(f) the share provided by whichever of the last four options is favoured plus furniture and plenishings (up to a certain value), or

(g) some other share of the estate?

(Paras. 3.11 to 3.23)

4. (a) In the case of option 3(a) are any changes in the present law suggested?

(b) In the case of option 3(b) what proportion would be regarded as appropriate?

(c) In the case of option 3(c) what fixed sum would be regarded as appropriate?

(d) In the case of option 3(d) what fixed sum would be regarded as appropriate and what should be the spouse's share in the excess?

(e) In the case of option 3(e) what proportions and slices would be regarded as appropriate?

(Paras. 3.11 to 3.18 and 3.23)

5. In a case of partial intestacy where the surviving spouse has been left a legacy by the deceased

(a) should there be a special rule to the effect that the amount of the legacy is deducted from the part of the estate affected by the surviving spouse's prior financial right, fixed sum or preferential proportions of slices, or

(b) is this unnecessary?

(Paras. 3.19, 3.20, 3.23)

6. Under any option which does not give the surviving spouse a prior right to the deceased's interest in the matrimonial home and household goods as such should the surviving spouse be given an option to require these assets to be allocated to him or her (any excess in the value of these assets over the spouse's share in the estate being made up by the spouse to the estate)?

(Paras. 3.21 to 3.23)

7. If a person dies intestate survived by a spouse and a brother or sister (but no issue)

(a) should the brother or sister share in the part of the estate left after the spouse's prior rights (or preferential rights under a fixed sum or "slice" system) have been met, or

(b) should the whole estate be allocated to the surviving spouse?

(Paras. 3.24 to 3.28)

8. If a person dies intestate survived by a spouse and a parent (but no issue)

(a) should the parent share in the part of the estate left after the spouse's prior rights (or preferential rights under a fixed sum or slice system) have been met, or

(b) should the whole estate be allocated to the surviving spouse?

(Paras. 3.29 to 3.32)

9. If a person dies intestate survived by a spouse and relatives more remote than parents or brothers or sisters the spouse should, as under the present law, receive the whole estate.

(Para. 3.33)

10. (a) Should any special provision be made for the separated but undivorced spouse?

(b) If so, should such a spouse be excluded from legal rights and intestate succession rights in the other spouse's estate

(i) if judicially separated

(ii) if in fact separated for seven years

(iii) if in fact separated for seven years, but with a discretion to the court, on application, to restore the spouse's succession rights in whole or in part on the ground that, having regard to the conduct of the spouses and the other circumstances, exclusion would be unreasonable

(iv) if found "unworthy" by a court or

(v) in some other circumstances and, if so, what?

(Paras. 3.34 to 3.40)

11. (a) Where a person is survived by a spouse and issue, should the surviving spouse be treated less favourably in the law on intestate succession if he or she is not the parent of all the deceased's children?

(b) If so, should the rule be

(i) that the intestate estate is divided half and half between the surviving spouse and the issue (with no prior rights, or fixed sum or preferential slices for the surviving spouse), or

(ii) that the surviving spouse should receive diminished prior rights, or a smaller fixed sum, or smaller preferential slices, the rest of the intestate estate being divided half and half between the surviving spouse and the issue, or

(iii) that the estate should be divided into as many parts as there are surviving children of the deceased (or predeceasing children survived by issue), the normal rules applying to those parts corresponding to the children who are also children of the surviving spouse (subject only to a proportionate reduction in the prior rights, fixed sum or preferential slices) and the rest of the estate being divided half and half between the surviving spouse and the issue who are not also his or her issue, or

(iv) something else and, if so, what?

(Paras. 3.41 to 3.48)

12. (a) If a person dies intestate survived by a parent and a brother or sister (but by no spouse or issue)

(i) should the whole estate be allocated to the parent or

(ii) should the whole estate be allocated to the brother or sister, or

(iii) should the estate be divided between the parent and the brother or sister?

(b) In the case of option (iii) should the estate be divided equally between the parent and the brother or sister or in some other way and, if so, how?

(Paras. 3.49 and 3.50)

13. Collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.

(Paras. 3.51 and 3.52)

14. There is no need to change the present rule whereby when uncles and aunts succeed to an intestate estate they take equally without regard to whether they are from the father's or the mother's side of the family.

(Para. 3.53)

15. There is no need to change the present rule whereby when grandparents or their brothers or sisters)

succeed to an intestate estate they take equally without regard to whether they are from the father's or the mother's side of the family.
(Para. 3.54)

16. There is no need to alter the existing rule that where all of those entitled to an intestate estate are in the same degree of relationship to the deceased the estate is divided among them equally.
(Paras. 3.55 and 3.56)

17. Where the deceased is survived by a child and four grandchildren (three of them the offspring of one predeceasing child and one of them the offspring of another predeceasing child) should the two-thirds of the estate left after paying the surviving child's share be (a) divided equally among all four grandchildren or (b) divided among them according to the shares their parents would have taken?
(Para. 3.57)

18. Should relatives more remote than grandparents or their issue be precluded from succeeding on intestacy?
(Para. 3.58)

19. The surviving spouse should continue, as of right, to be entitled to a fixed share of the deceased spouse's property.
(Paras. 4.21 to 4.26)

20. The surviving spouse's legal right, in cases where the deceased is not survived by issue, should be to a third of the deceased spouse's property, without distinction between heritage and moveables. (We consider later what the right should be where the deceased is survived by issue.)
(Paras. 4.27 to 4.39)

21. Should the children of a deceased person continue to be entitled to legitim?
(Paras. 4.40 to 4.46)

22. If legitim continues then, in cases where there is no surviving spouse, it should be a right to a third of the deceased's property, without distinction between heritage and moveables.
(Paras. 4.47 to 4.49)

23. If legitim continues, the issue of a predeceasing child of the deceased should continue to be entitled to the legitim to which his or her parent would have been entitled.
(Para. 4.50)

24. Where a deceased person is survived by both a spouse and issue, should the legal rights (if legitim is retained) be
    (a) a third of the estate for the spouse, and a third for the issue,
    (b) a quarter of the estate for the spouse, and a quarter for the issue,
    (c) a third of the estate for the spouse and a sixth for the issue, or

(d) some other shares and, if so, what?
(Paras. 4.51 to 4.56)

25. If legitim is retained, it should never be able to reduce a surviving spouse's testamentary provisions below the amount which he or she would have received if his or her testamentary provisions had been intestate estate.
(Paras. 4.58 and 4.59)

26. Legal rights should not come into operation in cases of total intestacy.
(Para. 4.61)

27. In cases other than those of total intestacy, should legal rights arise automatically (unless renounced) or should they arise only if claimed?
(Para. 4.62)

28. Legal rights should be (i) in lieu of all rights under the rules on intestate succession and, (ii) unless the will expressly provides that a bequest is in addition to legal rights, in lieu of all testamentary provisions.
(Para. 4.63)

29. (a) It should continue to be possible to renounce legal rights.
(b) Should any such renunciation have to be in subscribed writing in order to be effective?
(Para. 4.64)

30. There should continue to be no requirement on a surviving spouse to collate advances and other benefits as a condition of claiming his or her legal right.
(Paras. 4.65 to 4.68)

31. (a) If legitim is retained, should the requirement of collation inter liberos be abolished?
(b) If collation inter liberos is not abolished, should it be amended to remove any doubt as to what is an "appropriate proportion" for the purposes of s.11(3) of the Succession (Scotland) Act 1964?
(c) Whether or not legitim is retained, should collation of advances be required by anyone taking a share of an estate otherwise than by virtue of a testamentary provision?
(Paras. 4.69 and 4.70)

32. (a) Should the courts be given a power, on the application of any person whose share of the estate would be increased if the application were granted, to order an increase or diminution of the amount a person is entitled to by way of legal rights?
(b) If so, should the ground of application be the existence of exceptional circumstances making the normal amount of legal rights unreasonable or some other ground and, if so, what?
(Paras. 4.71 to 4.75)

33. (a) Legal rights should not be extended beyond the surviving spouse and issue.

(b) Accordingly, if any provision is to be made for other people with possible claims against the deceased's estate, it should be by means of a discretionary system.

(Paras. 4.76 to 4.80)

34. If a system of discretionary provision out of the estate of a deceased person were to be introduced which of the following should be eligible to apply-

(a) a person who had cohabited with the deceased, as husband and wife, for a specified period (say, three years)

(b) a step-child of the deceased

(c) a step-child of the deceased but only if accepted, before the age of 18, by the deceased as a child of his family

(d) any child (whether or not a step-child) accepted, before the age of 18, by the deceased as a child of his family

(e) a parent of the deceased

(f) a step-parent of the deceased

(g) a step-parent of the deceased but only if he had accepted the deceased, before the deceased was 18, as a child of his family

(h) a person who had accepted the deceased before the deceased was 18, as a child of his family

(i) a grandparent or other ascendant of the deceased

(j) a descendant of the deceased, if not entitled to legitim

(k) a brother or sister of the deceased

(l) an uncle or aunt of the deceased

(m) the issue of a brother or sister or uncle or aunt of the deceased

(n) any person who was dependent on the deceased immediately before his death

(o) any person who had made contributions or sacrifices in the interests of the deceased of such a nature as to merit recognition in the distribution of the deceased's estate

(p) any person who could reasonably have expected the deceased to have made suitable provision for him or her by will or otherwise?

(Paras. 4.81 to 4.94)

35. Should any additional criterion have to be satisfied by any of the above before they would be eligible for financial provision out of the deceased's estate?
(Paras. 4.81 to 4.94)

36. If a system of discretionary provision were introduced, should the ground of application be (a) that the disposition of the deceased's estate which would fall to be made in the absence of an order is not such as to make reasonable financial provision for the applicant or (b) something else and, if so, what?
(Para. 4.95)

37. If a system of discretionary provision were introduced, applications should be competent in either the Court of Session or a sheriff court.
(Para. 4.96)

38. If a system of discretionary provision were introduced, the Court of Session should have jurisdiction to hear an application if the deceased was at the time of his death domiciled in Scotland. A sheriff court should have jurisdiction if the deceased was at the time of his death (a) domiciled in Scotland and (b) habitually resident in the sheriffdom.
(Para. 4.96)

39. If a system of discretionary provision were introduced the courts should have power to make orders for the payment of a periodical allowance, or a capital sum (including a capital sum payable by instalments) or for the transfer or settlement of property. The courts should also have power to make interim orders and to vary or discharge orders for payment of a periodical allowance.
(Para. 4.97)

40. If a system of discretionary provision were introduced, the court, in deciding what order, if any, to make should have regard not only to the circumstances of the applicant but also to the circumstances of others with an interest in the deceased's estate. The court should take into account the facts as known to the court at the date when it determines the application.
(Para. 4.98)

41. If a system of discretionary provision were introduced, an application should not, without the permission of the court on cause shown, be competent after the end of the period of six months from the date of confirmation.
(Para. 4.99)

42. (a) If a system of discretionary provision were introduced, the property subject to the court's powers should be the net estate belonging to the deceased at the time of his death.
(b) It is for consideration, in the light of consultation on Consultative Memorandum No. 71, whether there should be an exception to this rule in the case of property belonging to the deceased but passing under a special destination which he had no power to evacuate.
(Para. 4.100)

43. If a system of discretionary provision were introduced the court should have the power to direct which parts of the net estate will bear the burden of any order.
(Para. 4.101)

44. (a) Our provisional view is that anti-avoidance provisions are not necessary or desirable in relation to legal rights and, if it is introduced, discretionary provision.
(b) If, contrary to our provisional view, anti-avoidance provisions were to be introduced, should they take the form of

(i) augmenting the deceased's estate by including the value of specified dispositions made by the deceased (such as transfers of property in which he retained an interest, or gifts within three years before death) without regard to intention, or

(ii) giving the courts power to counteract dispositions by the deceased made within three years before death with the intention of defeating, or substantially diminishing the value of, claims against his estate for legal rights or discretionary provision?

(Paras. 4.102 to 4.106)

45. If a legal right for the surviving spouse is not retained, the surviving spouse should be included in the list of those entitled to apply for discretionary provision.
(Para. 4.107)

46. If legitim is not retained, children and the issue of predeceasing children should be included in the list of those entitled to apply for discretionary provision.
(Para. 4.108)

47. If legal rights were suitably reformed, or replaced, should aliment jure representationis be abolished?
(Para. 4.109)

NOTES TO PART I

1. Scot. Law Com. No. 8 (1968), Item 7.

2. Scot. Law Com. No. 86 (1984).

3. Report of the Committee of Inquiry on the Law of Succession in Scotland (Cmd. 8144, 1950).

4. The committee (the "Mackintosh Committee") reported in 1950. (Cmd. 8144).

5. Stair, III.4.25.

6. Erskine, III.8.6.

7. Mackintosh Committee, para. 7.

8. See e.g. 1958 S.L.T. (News) 184.

9. Mackintosh Committee, para. 6.

10. The Succession (Scotland) Act 1964 came into force on September 10, 1964 to regulate the succession to the estates of persons dying on or after that date.

11. See paras. 1.11, 1.13 and 2.4 below.

12. Succession (Scotland) Act 1964, s.37(1)(a).

13. The incidence of liabilities is of considerable importance in ascertaining the moveable estate for the purposes of legal rights.

14. See the Parliament House Book, M 316, for a Table giving the results of applying these rules in various situations.

15. Succession (Scotland) Act 1964, ss.8(1) and 9(1).

16. Succession (Scotland) Act 1964, ss.1(2) and 10(2).

17. Conjugal Rights (Scotland) Amendment Act 1861, s.6.

18. As defined in s.8(6)(a) of the Succession (Scotland) Act 1964.

NOTES TO PART I

19. Succession (Scotland) Act 1964, ss.8(1) and 8(4).

20 Maximum values in ss.8 and 9 of the 1964 Act were increased by the Succession (Scotland) Act 1973 and by subsequent statutory instruments made under that Act. The latest increase was contained in the Prior Rights of Surviving Spouse (Scotland) Order 1981 (S.I. 1981, No. 806) applying to deaths on or after August 1, 1981.

21. Succession (Scotland) Act 1964. s.8(1)(a)(i) and (ii).

22. Succession (Scotland) Act 1964, s.8(2)(a) and (b).

23. Succession (Scotland) Act 1964, s.8(1).

24. Succession (Scotland) Act 1964, s.8(3) as amended by S.I. 1981, No. 806.

25. Succession (Scotland) Act 1964, s.8(6)(b).

26 Succession (Scotland) Act 1964, s.8(3).

27. See Succession (Scotland) Act 1964, s.9.

28. The Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 extended this provision to include children of the deceased born out of wedlock.

29. Succession (Scotland) Act 1964, s.9(1).

30. Succession (Scotland) Act 1964, s.9(4).

31. Succession (Scotland) Act 1964, s.10(2).

32. See para. 1.6 above.

33. This includes adopted children: Succession (Scotland) Act 1964, s.23. It also includes children born out of wedlock: Succession (Scotland) Act 1964, s.10A added by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.2 in respect of persons dying on or after November 25, 1968.

NOTES TO PART I

34. Implementing the recommendation of the Mackintosh Committee para. 20.

35. See the definition of "issue" in s.36(1) of the 1964 Act.

36. Succession (Scotland) Act 1964, s.11(2)(a).

37. Succession (Scotland) Act 1964, s.11(2)(b).

38. Rose's Trs. 1916 S.C. 827.

39. Macfarlane's Trs. v. Oliver (1882) 9 R. 1138; Munro's Trs. 1971 S.L.T. 313.

40. If a beneficiary elects to accept the testamentary provision he can still claim legal rights if part of the estate falls into intestacy. Tindall's Trs. v. Tindall 1933 S.C. 419.

41. See Titles to Land Consolidation (Scotland) Act 1868, s.117 as amended by Succession (Scotland) Act 1964, s.34, Sch.3.

42. Sch. 3 of the Succession (Scotland) Act 1964 repealed a proviso to s.30 of the Conveyancing (Scotland) Act 1874 with the result that ground annuals fell to be treated in the same way as heritable securities under s.117 of the 1868 Act.

43. See Meston, The Succession (Scotland) Act 1964 (3rd edn. 1982) p.47 (hereinafter cited as "Meston").

44. Succession (Scotland) Act 1964, s.3.

45. Succession (Scotland) Act 1964, s.5.

46. Succession (Scotland) Act 1964, s.6. See para. 1.11 above.

47. Succession (Scotland) Act 1964, s.4 as amended by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.1.

NOTES TO PART I

48. The Law Reform (Parent and Child)(Scotland) Act 1986, which implements our Report on Illegitimacy (Scot. Law Com. No. 82, 1983), will remedy this defect.

49. Succession (Scotland) Act 1964, s.23(1).

50. Succession (Scotland) Act 1964, s.7.

51. Manners and Rauta, Family Property in Scotland (OPCS, 1981) Tables 4.1 and 4.2.

52. Ibid.

53. Tables 2.1 and 2.15.

54. Table 2.16. Sums in current accounts were also excluded as were assets held jointly with someone other than the spouse.

55. Table 2.17.

56. The figures in the rest of this paragraph are derived form information supplied by the Central Research Unit, Scottish Office.

57. See note 51 above.

58. See e.g. "A Comparison of Iowan's Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes", 63 Iowa Law Rev. 1041 (1978); Durham, "The Method, Process and Frequency of Wealth Transmission at Death", 1963 University of Chicago Law Rev. 241; Glucksman, "Intestate Succession in New Jersey: Does it Conform to Popular Expectations?" (1976) Col. Journal of Law and Social Problems 253; Fellows, Simon, Snapp and Snapp, "An Empirical Study of the Illinois Statutory Estate Plan", 1976 University of Illinois Law Forum 717.

59. Law Com. No. 61, Second Report on Family Property: Family Provision on Death (1974).

60, The Code is published in Volume 8 of Uniform Laws Annotated.

NOTES TO PART I

61. A convenient source of information on the succession laws of fourteen European jurisdictions is Régimes Matrimoniaux, Successions et Libéralités (1979) published by the Union Internationale du Notariat Latin (Commission des Affaires Européennes) with Professor Michel Verwilghen as editor.

NOTES TO PART II

1. See J.G. Fleming, "Changing Functions of Succession Laws" (1978) 26 Amer. J. Comp. L. 233.

2. See paras. 1.7 and 1.8 above.

3. Succession (Scotland) Act 1964, s.8(6)(d).

4. Succession (Scotland) Act 1964, s.8(1) and (2).

5. Succession (Scotland) Act 1964, s.8(6)(c).

6. See Meston, pp.38-39, 109-110. The difficulty here is that prior rights have to be allocated to heritable or moveable estate or apportioned between them before it can be known how much moveable estate is left for legal rights. This is particularly difficult when the deceased's estate includes investments in the form of heritable securities - which are heritable for purposes of legal rights but moveable for other purposes. See para. 1.13 above.

7. See s.2-102. The code has been adopted in at least fourteen states of the U.S.A.. The figure of $50,000 may be modified.

8. Succession (Scotland) Act 1964, s.8(1).

9. Succession (Scotland) Act 1964, s.8(3) and (4).

10. Succession (Scotland) Act 1964, s.9(1).

11. Stair, Institutions, III, 4, 24.

12. Succession (Scotland) Act 1964, s.10(2).

13. Succession (Scotland) Act 1964, s.11(2).

14. Succession (Scotland) Act 1964, s.2(1)(a).

15. Succession (Scotland) Act 1964, s.6.

16. See para. 3.21 below.

NOTES TO PART II

17. Administration of Estates Act 1925, s.46 as substituted by the Intestates' Estates Act 1952, s.1(2)(a). The fixed sum was increased to £85,000 by the Family Provision (Intestate Succession) Order 1981 (S.I. 1981 No. 255).

18. S.2-102 - "The intestate share of the surviving spouse is: (1) if there is no surviving issue or parent of the decedent, the entire intestate estate ...."

19. See Kerr, Petr. 1968 S.L.T. (Sh.Ct.) 61. Renunciation by the widow of her rights under the will would not, of course, create an intestacy if there were a destination over in favour of someone else.

20. See paras. 3.49 to 3.58 below.

NOTES TO PART III

1. Succession (Scotland) Act 1964, s.23.

2. Ss. 2 and 5.

3. See paras. 3.55-3.57 and 4.61-4.63 below.

4. Table 4.3.

5. See Appendix II, p.227.

6. Table 4.4.

7. Table 4.4.

8. Table 4.5.

9. See Appendix II, p.227.

10. See Appendix II, p.234.

11. See the Ontario Law Reform Commission, Report on Family Law; Part IV; Family Property Law (1974) pp.164-166; the Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) pp.24-25 and 159-161; Manitoba Law Reform Commission, Report on Intestate Succession (1985) pp.10-14; South African Law Commission, Report on the review of the law of succession: Intestate Succession (1985) pp.15-16. All of these reports eventually rejected the all to spouse option in favour of giving the spouse a substantial preferential right (e.g. to $100,000 or the whole estate if less) plus a share in the excess, thus allowing the issue to share in very large estates.

12. The proportion of wills by married persons which leave everything to the spouse has been found to be about 80% or more in all studies of this question. See the Report of the Committee on the Law of Intestate Succession, Cmd. 8310, 1951 p.7; South African Law Commission, Working paper 2 Intestate Succession, 1983, p.11); Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) p.24; Sussman, Cates and Smith, The Family and Inheritance (U.S.A., 1970) p.133; Dunham, "The Method, Process and Frequency of Wealth

Transmission at Death" (1963) 30 Univ. of Chicago L. Rev. 241 at pp.252-253. We have commissioned research to ascertain the precise position in Scotland. The information available to us at present suggests that in this country too most married testators leave everything to their spouse.

13. See paras. 3.4 to 3.6 above. The American results are similar. In Dunham's study (referred to in note 12 above) in Chicago the proportion of informants allocating all to the surviving spouse fell from 85% where the estate was small ($36,000) to 40% where the estate was large ($180,000). A study in Iowa produced similar results. Where the hypothetical situation was that the respondent was survived by spouse and children, the percentage of respondents who would give all of the estate to the spouse decreased from 68% to 44% as the size of the imaginary estate was increased from $10,000 to $500,000. See 63 Iowa L. Rev. (1978) 1041 at p.1089.

14. Succession Act 1965, s.62(2). "If an intestate dies leaving a spouse and issue-
(a) the spouse shall take two-thirds of the estate, and
(b) the remainder shall be distributed among the issue ...."

15. See e.g. for Canada, the Manitoba Devolution of Estates Act, s.6, the British Columbia Estate Administration Act, s.6: and the proposed Canadian Uniform Intestate Succession Act, s.3(1): for Australia and New Zealand, Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand (1983) pp.341, 346, 350, 355, 364, 369, 374, 380, 384: for the U.S.A., Uniform Probate Code S.2-102.

16. See paras. 2.2 and 2.3 above

17. Uniform Probate Code S.2-102; Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) pp.19 and 44-45; Law Reform Commission of Western Australia, Report on Distribution on Intestacy (1973) p.11.

NOTES TO PART III

18. See Manitoba Law Reform Commission, Report on Intestate Succession (1985) pp.25-26 and 62; Law Reform Commission of Western Australia, Report on Distribution on Intestacy (1973) pp.11-12; Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, pp.425-430.

19. Succession Act 1965, s.56.

20. Cf. also the Second Schedule to the (English) Intestates' Estates Act 1952.

21. Administration of Estates Act 1925, s.46; Intestates' Estates Act 1952, Second Schedule.

22. See Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, p.341. The Law Reform Commission of Tasmania has recently, after consultation which revealed unanimous support for the proposal, recommended that the surviving spouse should receive the intestate's personal chattels in addition to his or her statutory legacy. Report on Succession Rights on Intestacy (Report No. 43) 1985 p.12.

23. Succession (Scotland) Act 1964, s.2(1).

24. S.2-102.

25. S.67.

26. E.g. British Columbia, Manitoba, Victoria, New South Wales, South Australia, Tasmania. This is also the solution adopted in the proposed Canadian Uniform Intestate Succession Act.

27. Report on the review of the law of succession (1985) p.18.

28. Manners and Rauta, Family Property in Scotland (O.P.C.S. 1978) Table 4.7.

29. Administration of Estates Act 1925, s.46.

30. Succession (Scotland) Act 1964 s.2(1).

NOTES TO PART III

31. S.2-102. Research in America suggests that on this point the Uniform Probate Code may be out of touch with public opinion. In a study in Iowa 73% of respondents allocated all of the estate to the surviving spouse when the deceased was survived by spouse and parents. See 63 Iowa L. Rev. (1978) 1041 at pp.1099-1100.

32. Administration of Estates Act 1925, s.46.

33. S.3(1).

34. See the Irish Succession Act 1965, s.67; Manitoba Law Reform Commission, Report on Intestate Succession (1985) p.27; Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) p.6; Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, p.341. The authors of this book "query the wisdom and generosity of requiring a spouse to share intestate property with relatives of the intestate spouse other than his issue.".

35. Report on the review of the law of succession (1985) p.18.

36. See Appendix II, p.229.

37. Section 6 of the Conjugal Rights (Scotland) Amendment Act 1861, as amended by the Family Law (Scotland) Act 1985, s.28(2) and Sched. 2, provides that-

> "After a decree of separation a mensa et thoro obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead."

38. Divorce (Scotland) Act 1976, s.1.

39. This was proposed, as part of an interesting and radical new approach to intestate succession, by Mr Jeremy Connell in an article in "The Scotsman" of 12 Jan. 1981 and in a submission to us.

NOTES TO PART III

40. See Appendix II, p.228.

41. S.2-102.

42. Report on Intestate Succession (1985) pp.16-20.

43. Para. 4.89.

44. Succession (Scotland) Act 1964, s.2(1)(b).

45. For English law, see the Administration of Estates Act 1925, s.46. For Australia and New Zealand, see Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, pp.346, 351, 357, 360, 369, 375, 381, 385. Under both the American Uniform Probate Code s.2-103, and the proposed Canadian Uniform Intestate Succession Act s.4(1) the parents are preferred to the brothers or sisters. The same is true under Irish law: Succession Act 1965, s.68.

46. For example, in West Germany the parents take to the exclusion of brothers or sisters but if one parent has predeceased the deceased his or her share goes to his or her descendants who would, in the situation supposed, be the deceased's siblings or half siblings. So the result is that both parents exclude siblings but one parent shares with siblings. BGB art. 1925. In French law, if both parents survive along with brothers or sisters, the estate is divided in two - one half going to the parents equally between them and the other part to the brothers or sisters. Code Civil, art. 748. However, if only one parent survives he or she takes a quarter of the estate and the other three quarters go to the brothers or sisters. Code civil, art. 751. In the Netherlands the estate is divided per capita among the parent(s) and sibling(s), with the proviso that a parent's minimum share is a quarter. Union International du Notariat Latin, Régimes Matrimoniaux, Successions et Libéralités (ed. Verwilghen, 1979) Vol. II p.257.

47. See Appendix II, p.230.

NOTES TO PART III

48. Succession (Scotland) Act 1964, s.3. This rule is derived from the common law. See Stair III.4.24. The Mackintosh Committee simply said "We see no reason to alter this" without any discussion of arguments for or against change. Cmd. 8144 (1950) p.15.

49. Succession (Scotland) Act 1964, s.5.

50. This is the present Scots law (see above) and also the solution in English law. Administration of Estates Act 1925, s.46(1).

51. This is the rule in Irish law: Succession Act 1965, s.72. It is also the rule in almost all Australian states and in New Zealand. See Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, p.342 (New South Wales is the only exception). It is the prevailing rule in the United States and is the rule under the Uniform Probate Code (ss.2-103(3), 2-106, 2-107) and under the proposed Canadian Uniform Intestate Succession Act (ss.1(4)(a), 4(1)(c), 4(2)).

52. This is the solution in French law. Code civil art. 752.

53. See Appendix II, p.231.

54. Succession (Scotland) Act 1964, ss.2(1)(f) and 6.

55. Administration of Estates Act 1925, s.46(1).

56. This is the solution in French law, (Code civil, art. 753) under the Uniform Probate Code (s.2-103), and in New Zealand (Administration Act 1969, s.77(1)(da).

57. Ss.2(1) and (6).

58. Uncles and aunts come before grandparents in s.2 of the 1964 Act. So there is no question of the deceased grandparent being represented by issue under section 5(1).

NOTES TO PART III

59. Administration of Estates Act 1925, s.46(1).

60. See e.g. French code civil, art. 746; Uniform Probate Code, s.2-103; New Zealand Administration Act 1969, s.77(1)(da).

61. As it is in, e.g., French law. See Code civil arts. 739-744.

62. See 3 Univ. Illinois Law Forum (1976) 717 and 63 Iowa Law Rev. (1978) 1041, both cited more fully in Part I note 58 above.

63. See 3 Univ. Illinois Law Forum (1976) 717 at p.741.

64. See 63 Iowa Law Rev. (1978) 1041 at p.1111.

65. See ibid. at p.1116; 3 Univ. Illinois Law Forum (1976) 717 at p.741.

66. See Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants", 66 Northwestern University Law Rev. (1971) 626. This system has been used in North Carolina for many years and was favoured in principle by the Joint Editorial Board of the Uniform Probate Code when they reconsidered the question in 1975. The Board, however, decided not to recommend changing the code because its existing scheme (similar to the existing Scottish scheme) was already in force in a number of States and it would have been undesirable to introduce a lack of uniformity on this question. See comment to s.2-103.

67. See Succession (Scotland) Act 1964 s.6. So if the deceased is survived by one child (C), one grandchild (GC1) who is the issue of a predeceasing child and two grandchildren (GC2 and GC3) who are the issue of another predeceasing child, the estate will be divided into three. C will take one third, GC1 will take one third. GC2 and GC3 will share the remaining third equally.

68. Uniform Probate Code, editorial comment on s.2-103.

NOTES TO PART III

69. See Sussman, Cates and Smith, The Family and Inheritance pp.138-142. In one case, the sum inherited by three of the twelve heirs was $18 each. Most of the heirs in this case were grandchildren of the deceased's half-sibling.

70. Ibid. at pp.139-140.

71. See 63 Iowa Law Rev. (1978) 1041 at p.1119.

72. Ibid.

73. See 12 Columbia Journal of Law and Social Problems (1976) 253 at p.276.

74. Administration of Estates Act 1925, ss.46 and 47; Uniform Probate Code S.2-103.

NOTES TO PART IV

1. See para. 2.1 above, for the assumptions underlying this approach.

2. Under this head falls the Scottish system of legal rights. Fixed right provisions also exist in many other countries. See J. P. Dawson - Gifts and Promises (1980) App. X, p.231 for tables showing the fixed portions of 24 European and Latin American countries. A majority of States of the United States of America also give the surviving spouse an indefeasible share in the estate of a deceased spouse. See e.g. the Uniform Probate Code ss.2-201 to 2-207. However only a few States protect children and further descendants.

3. Freedom of testation existed in England from 1833 to 1938 (although it was not absolute until 1891 when the Mortmain and Charitable Uses Act removed all restrictions from testamentary gifts to charity) and as a result most British colonies received this concept in the nineteenth century. In 1900 the New Zealand Parliament in an attempt to compromise between freedom of testation and protection of the family passed the Testators Family Maintenance Act. This enabled the widow, widower and child of the testator to apply to the court for provision out of the deceased's estate if the testator's will made inadequate provision for the "proper maintenance and support" of the applicant. The class of beneficiaries has since been extended and the provisions made applicable to intestate cases by the Family Protection Act 1955. Family provision legislation is now operative in all the Australian States and in a majority of Canadian Provinces. In England and Wales a discretionary system was introduced by the Inheritance (Family Provision) Act 1938, since superseded by the Inheritance (Provision for Family and Dependants) Act 1975. The system was introduced into Northern Ireland in 1960 and is now governed by the Inheritance (Provision for Family and Dependants)(N.I.) Order 1979 (S.I. No. 924, N.I. 8.)

4. "Homestead Acts" are found in many American States and usually entitle the surviving spouse to the enjoyment for life of the homestead.

NOTES TO PART IV

5. For a comparative survey see our Consultative Memorandum No. 57, Matrimonial Property, Part III.

6. See note 3 above.

7. The Succession Act 1874 (Act 23 of 1874).

8. See Hahlo, "The Case Against Freedom of Testation", 76 S.A.L.J. 435; Beinart, "The Forgotten Widow - Provision by a Deceased's Estate for Dependants", Acta Juridica 1965/1966, p.285; Carey-Miller, "Rights of the Surviving Spouse", Acta Juridica 1980, p.49.

9. Ibid.. See also Himsworth - "A New Family Provision Act", 89 S.A.L.J. p.128; Hahlo, "The Sad Demise of the Family Maintenance Bill 1969", 89 S.A.L.J., p.201.

10. Oughton & Tyler, Tyler's Family Provision, 2nd. edn. (1984) p.5.

11. Ungar, "The Inheritance Act and the Family", 6 M.L.R. 215 at 217.

12. Ibid.

13. Gardner, Origin and Nature of Legal Rights in Succession, p.75.

14. For a comprehensive exposition of these arguments see Oughton & Tyler op. cit., Ch. 2.

15. Gold, "Freedom of Testation", 1.M.L.R. 296 (1937); J.S. Mill, Principles of Political Economy, 6th. edn. Vol. I, Book II, Ch. II, s.4.

16. Adam Smith, Lectures, p.121.

17. Sedgwick, The Elements of Politics, 3rd edn. p.103; J.S. Mill, Principles, loc. cit.

18. Wedgwood, The Economics of Inheritance, p.201.

19. Oughton & Tyler, op. cit. at p.33.

NOTES TO PART IV

20. For example, the present system of legal rights in Scots law does not utilise anti-avoidance measures, unless collation inter liberos is regarded as such. See para. 4.69 below.

21. Gold, "Freedom of Testation", 1 M.L.R. 296; J.S. Mill, Principles, Book II, Ch. II.

22. Gardner, Origin and Nature of Legal Rights in Scotland; Carey-Miller, "Rights of the Surviving Spouse", Acta Juridica 1980 p.49; Anton, "The Effect of Marriage Upon Property in Scots Common Law", 19 M.L.R. 653; Meston, "Matrimonial Property in Scotland" 1970, J.R. 193.

23. Family Law (Scotland) Act, 1985, ss.1 to 7.

24. See para. 4.93 below.

25. In the 1979 survey in Scotland 95% of informants thought that a surviving spouse should be legally entitled to some part of the deceased spouse's estate in spite of omission from the will. Manners and Rauta, Family Property in Scotland (OPCS, 1981) table 4.8. In the 1986 survey 86% thought the widow should receive a share of the estate even though it was left by will to charity and 85% thought the children should receive a share. 80% thought one child should receive a share even though the whole property was left by will to another child. However only 40% thought the children should receive a share where the property was left to the widow. See Appendix II pp.5-8.

26. The law in Northern Ireland is virtually identical to that in England and Wales. See the Inheritance (Provision for Family and Dependants) (N.I.) Order 1979 (S.I. No. 924, N.I. 8).

27. Inheritance (Provision for Family and Dependants) Act 1975, s.1(1).

28. This is the general premise upon which the Albertan Institute of Law Research and Reform in 1978 based their review of family maintenance legislation

(Report No. 29 Family Relief at pp.23 to 26). See also the Manitoba Law Reform Commission, Report on the Testators Family Maintenance Act (1985).

29. E.g. the Family Provision Act of New South Wales (Act No. 160 of 1982) includes in its list of "eligible persons" - "a person (i) who was at any particular time, wholly or partly dependant upon the deceased person; and (ii) who is a grandchild of the deceased person, or was, at that particular time or at any other time, a member of the household of which the deceased person was a member" (s.6(1)).

30. E.g. 18 months in New South Wales (Family Provision Act 1982, s.16(1)(b)); 12 months in New Zealand (Family Protection Act 1955, s.9); 6 months in South Australia (Inheritance (Family Provision) Act 1972-75, s.8(1)); and 3 months in Tasmania (Testators Family Maintenance Act 1912, s.11(1)). See also Prime, "Time Limits on Dependants' Applications for Family Provision" 31 I.C.L.Q. 862 (1982).

31. The Law Commission generally approved of the parties' inability to contract out of the Act (Law Com. No. 61 Second Report on Family Property: Family Provision on Death, paras. 185-188). However they recommended that on divorce or a decree of judicial separation or nullity the court, with the consent of the parties could order that either party to the marriage should not subsequently be able to apply under the 1975 Act. This was implemented by s.15 of the Act. S.8(1) of the Matrimonial & Family Proceedings Act 1984 has substituted a new ss(1) into s.15 of the 1975 Act. The court may now make such an order (if it considers it just to do so) on the application of either party. However the position remains that an agreement between the spouses will not be effective to prevent a subsequent application under the Act unless the court has approved this attempt to "contract out" by making an order under s.15.

32. Inheritance (Provision for Family and Dependants) Act 1975 s.2(1).

NOTES TO PART IV

33. Inheritance (Provision for Family and Dependants) Act 1975, s.1(2)(a).

34 Inheritance (Provision for Family and Dependants) Act 1975, s.1(2)(b). Case law shows that "maintenance" does not mean mere subsistence but is determined by reference to the applicant's social position and situation in life.

35. Family Law: First Report on Family Property: A New Approach Law Com. No. 52, paras. 40-41.

36. Wills Variation Act R.S.B.C. 1979 c.435, s.2 (British Columbia).

37. Family Provision Act 1982 No. 160, s9(2) (New South Wales).

38. E.g. Saskatchewan (The Matrimonial Property Act S.S. 1979, s.30(1)) and Nova Scotia (Matrimonial Property Act S.N..S. 1980, s.12(1)(d)). New Brunswick and Newfoundland have similar provision. The Manitoba Law Reform Commission have also recently recommended the introduction of a deferred property sharing scheme on death to replace the existing system of dower. This scheme is to be executive alongside the Testators Family Maintenance Act. See, Manitoba Law Reform Commission Report on An Examination of the Dower Act (1984) and Report on The Testators Family Maintenance Act (1985).

39. Inheritance (Provision for Family and Dependants) Act 1975, s.3(5); Re Goodwin [1969] 1 Ch. 283.

40. Inheritance (Provision for Family and Dependants) Act 1975, s.3(1)(a) to (g).

41. Inheritance (Provision for Family and Dependants) Act 1975, s.3(2) and (3).

42. Inheritance (Provision for Family and Dependants) Act 1975, s.6.

43. See e.g. Law Com. Working Paper No. 42, Family Property, para. 3.69.

NOTES TO PART IV

44. Inheritance (Provision for Family and Dependants) Act 1975, ss.8(1), 25(1), 8(2)(2) and 9 respectively.

45. Schaefer v. Schuhmann [1972] A.C. 572.

46. Inheritance (Provision for Family and Dependants) Act 1975, s.11(1) to (6).

47. Inheritance (Provision for Family and Dependants) Act 1975, s.12(2).

48. Inheritance (Provision for Family and Dependants) Act 1975, s.10.

49. See Queensland Law Reform Commission, Report on the Law Relating to Succession (1978) No. 22 at p.29 and the British Columbia Law Reform Commission, Report on Statutory Succession Rights (1983) at pp.95-97.

50. Ibid. at p.97.

51. See generally MacDonald, Fraud on the Widow's Share (1960); Sherrin, "Disinheritance of a Spouse: A Comparative Study of the Law in the U.K. and the Republic of Ireland" 31 N.I.L.Q. 21 (1980) 34; Tyler, Family Provision (1st. edn. 1971).

52. See "A Comparison of Iowan's Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Code", 63 Iowa L. Rev. 1041 (1978) at pp.1120-1130.

53. See e.g. Tyler, Family Provision (1st. edn. 1971) at p.113 and Law Com. Working Paper No. 42, para 3.69.

54. 358 H.L. Parl. Deb. Col. 9233.

55. This problem was noted by the British Columbia Law Reform Commission op. cit. at p.78.

56. Judicial statistics in England show a relatively limited use of the right to apply for financial provision. See Appendix B in Oughton & Tyler, Tyler's Family Provision 2nd. edn. (1984) - 557

applications in 1979 (although the figures - derived from Judicial Statistics - are apparently thought to be understated).

57. Compulsory heirs are generally limited to descendants and/or ascendants and/or the surviving spouse.

58. Manners and Rauta, Family Property in Scotland (OPCS, 1981) p.21.

59. See Appendix II, pp.231-234.

60. Todd and Jones, Matrimonial Property (OPCS, 1972) pp.45-52. The sample in this case was limited to married and formerly married people and the relevant questions may have given the impression that under a fixed rights system a person would somehow be forced to include his or her spouse and children in the will. The results are nonetheless interesting.

61. Oughton & Tyler, Tyler's Family Provision (2nd. edn., 1984) p.129.

62. Ibid. p.30.

63. S.2-201.

64. Part IX.

65. Law Com. No. 52, First Report on Family Property: A New Approach (1973) para. 41.

66. See para. 2.4 above.

67. This type of solution was considered by the Law Commission in 1971. See Law Com. Working Paper No. 42, Family Property Law (1971) para. 4.20.

68. Cf. ibid. para. 4.21.

69. Cf. ibid. para. 4.25.

70. In West Germany, for example, a descendant of the testator may demand one-half of his intestate share. See BGB art. 2303.

NOTES TO PART IV

71. See Law Com. Working Paper No. 42, (1971) para. 4.29.

72. Ibid. para. 4.19.

73. Manners and Rauta, Family Property in Scotland (OPCS, 1981) table 2.4.

74. Ibid. tables 2.10 and 2.11.

75. Ibid. table 2.13.

76. See para. 4.19 above.

77. See para. 4.19 above.

78. S.117(1).

79. S.117(2).

80. See Bacon, "The Rights of Children and the Discretion of the Courts under Section 117 of the Succession Act, 1965", 77 Incorporated Law Society of Ireland Gazette (October 1983) p.223 at p.229 - "The variety of judges has produced a certain lack of consistency in the extent of the Court's interpretation of the section with the apparently liberal approach of earlier judgments being curtailed in subsequent cases". Earlier (at p.228) the author notes that "few of the applications to the court have failed to secure better provision for the applicant out of the estate." In one case this meant selling the small farm which the testator had left to his (second) wife so that two fifths of his estate could go to his son aged 43 who was employed as a motor mechanic and was in no way dependent on the testator. In other cases, however, the courts have emphasised that a just parent in considering what provision to make for a child must take into account all his moral obligations, including those to his wife. See also McGuire, The Succession Act 1965 (2nd. edn. by R A. Pearce, 1986) pp.260-288.

NOTES TO PART IV

81. See para. 4.19 above.

82. S.11.

83. Cmd. 8144 (1950) p.17. After considering other possible solutions the Committee eventually recommended retention of the status quo, with changes in the widower's right to courtesy.

84. Ibid.

85. Para. 4.61.

86. See Kerr Petr. 1968 S.L.T. (Sh.Ct.) 61; Meston, pp.37-38.

87. See Appendix II, p.234.

88. Ss.2-201; 2-205.

89. S.115(5).

90. See Succession (Scotland) Act 1964, s.13.

91. See e.g. Buntine v. Buntine's Trs. (1894) 21 R. 714; Smart v. Smart 1926 S.C. 392.

92. S.116(1) to (4).

93. S.2-202. The word "collation" is not used but the same results are achieved by "augmenting" the deceased's estate.

94. S.2-202.

95. S.2-202-2.

96. Ibid.

97. Ibid.

98. Law Com. Working Paper No. 42, Family Property Law (1971) paras. 4.45-4.57.

99. Para. 4.52.

NOTES TO PART IV

100. See Law Com. No. 52, First Report on Family Property: A New Approach (1973) paras. 31-45.

101. Law Com. Working Paper No. 42, para. 4.55.

102. Meston, p.48.

103. Succession (Scotland) Act 1964, s.11(3).

104. See Meston, "Collation of Advances to Ancestors", 1967 S.L.T. (News) 195 and subsequent letters at pp.224 and 247.

105. Report on Statutory Succession rights (1983) p.39. It is also interesting to note that in New Zealand and three Australian jurisdictions (New South Wales, Queensland and Western Australia) "there is now no requirement that intestate successors bring into account inter vivos benefits received from the intestate. The hotchpot doctrine has been abandoned because of its uncertainty, its complexity, its diminishing relevance, and the difficulties of administration which it produces." Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand, p.343.

106. We deal further with the question of the criminal heir in Consultative Memorandum No. 71.

107. S.1(1)(e). Section 1(3) provides that "a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person". This excludes employees but can give rise to problems in the case where a dependant provides household services. See Re Wilkinson [1978] Fam. 22.

108. Oughton and Tyler, Tyler's Family Provision (2nd. edn. 1984) pp.78-81.

109. See e.g. Law Reform Commission of New South Wales, Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916 (1977) pp.20-30;

Alberta Institute of Law Research and Reform, Report on Family Relief (1978) pp.20-59; Queensland Law Reform Commission, Report on the Law relating to Succession (1978) pp..24-29; Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) pp.78-89; Manitoba Law Reform Commission, Report on The Testators Family Maintenance Act (1985) pp.49-50.

110. Report on Statutory Succession Rights (1983) pp.78-89.

111. Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916 (1977) pp. 20-30.

112. S.13(7).

113. S.13(4)(c).

114. See Damages (Scotland) Act 1976, s.1(3) and (4), s.10 and Sched. 1.

115. Sched. 1, para. 1. Divorced spouses are also included but they are not relevant for present purposes.

116. Sched. 1, para. 2.

117. The need to provide for such cases was stressed in the House of Lords debate on the Inheritance (Provision for Family and Dependants) Bill 1974. See 359 H.L. Parl. Deb. cols. 1071-2. It might be thought that the common law of recompense would provide a remedy. In fact, however, claims based on recompense have poor prospects of success. Recompense is available only where there is no intention of donation. It is not available where services are provided with gratuitous intent. Even if the person providing the services hoped to inherit, recompense will not be available if he went into the situation with his eyes open and deliberately took the risk that he might not inherit. See Gray v. Johnston 1928 S.C. 659, followed in MacKechnie v. Cameron (1935) 52 Sh. Ct. Rep. 44 and (in relation to the claim based on

services) in Horne v. Horne's Exr. (1963) 79 Sh. Ct. Rep. 107. See also Kemp v. Robertson (1948) 64 Sh. Ct. Rep. 190 (where the claim failed because it was held that there was a contract between the claimant and the deceased and that the contract had been implemented).

118. Inheritance (Provision for Family and Dependants) Act 1975, s.1.

119. 1975 Act, s.1(2).

120. Report on The Testators Family Maintenance Act (1985) p.49.

121. S.117.

122. See Oughton and Tyler, op. cit. pp.288-290.

123. Ss.5-7.

124. See Oughton and Tyler, op. cit. pp.96-100.

125. This is now expressly provided for in s.3(5) of the 1975 Act. The Law Reform Commission of British Columbia has recommended a similar provision. Report on Statutory Succession Rights (1983) p.91. See also the Law Reform Commission for New South Wales, Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916 (1977) pp.34-37.

126. The original English legislation in 1938 did not give the court any power to extend the six month time limit. This was altered in 1952 to allow extensions on specified grounds (such as late discovery of a will or codicil, or the late determination that a particular person had an interest in the estate). A general power to permit late applications was introduced by s.4 of the 1975 Act. Provision for the protection of personal representatives is made by s.20.

127. Some such enactments are listed in Sched. 2 to the Administration of Estates (Small Payments) Act 1965.

See also the National Savings Bank Act 1977 s.892 and the Administration of Estates (Small Payments)(Increase of Limit) Order 1975, (S.I. 1975 No. 1137).

128. S.36(2)(b).

129. See Oughton and Tyler, op. cit., p.215.

130. See Consultative Memorandum No. 71.

131. This kind of approach is adopted by the Uniform Probate Code s.2-202.

132. Cf. Capital Transfer Tax Act 1984, ss.7(2), 20, 21.

133. Cf. the Uniform Probate Code s.2-207.

134. S.121.

135. Scot. Law Com. No. 67, 1981 para. 2.153.

136. Scot. Law Com. Memo. No. 22 (1976) para. 4.4 (footnotes omitted).

137. Ibid. para. 4.6.

APPENDIX I

SUMMARY OF PRESENT LAW

ON

INTESTATE SUCCESSION AND LEGAL RIGHTS

(N.B. This is an abridged summary of the present law prepared for easy reference while reading the Memorandum. It is not a comprehensive description of the present law. A fuller description of the present law is to be found in paras. 1.6 to 1.14 of the Memorandum.)

(i) Prior rights of surviving spouse

- Right to dwelling house up to £50,000 in value

  Furniture and plenishings in a dwelling house up to value of £10,000

  Fixed sum: £15,000, if deceased survived by children, or issue of predeceased children
  £25,000, if no such descendants.

(ii) Legal rights of spouses and children (after satisfaction of prior rights, and applicable to moveable estate only)

- Jus relictae or jus relicti of surviving spouse: one third of moveables if there are descendants of deceased, one half if no such descendants.

Legitim: entitlement of children or issue of predeceased children to one third or one half of moveables, depending on whether there is a surviving spouse.

(iii) Free estate - Remaining free estate (heritable and moveable) passes in accordance with statutory order of preference. Subject to points of detail not covered in this summary, the order is: children, parents and brothers and sisters, husband or wife, uncles and aunts, grandparents, great uncles and great aunts, more remote ancestors.

APPENDIX II

ATTITUDES TOWARDS SUCCESSION LAW IN SCOTLAND

To: Scottish Development Department
New St. Andrew's House
Edinburgh EH1 3SZ

From: System Three Scotland
16 York Place
Edinburgh EH1 3EP

SOS 386
15 April 1986

A. BACKGROUND AND METHOD

As part of their continuing programme of work examining aspects of the law in which reforms may be appropriate, the Scottish Law Commission intend to issue a series of consultative memoranda on the law relating to succession (i.e. the disposal of property on a person's death). When a person dies, how his or her property is divided depends on whether a will was left, the nature of the property and its value, and on what relatives survive. The Commission wished to obtain information on what Scottish adults think would be an appropriate division in a range of different circumstances, in order to gauge whether the present law is generally acceptable and as a guide to possible reforms.

A total of 992 adults aged 18 and over was interviewed in-home in 39 sampling points throughout Scotland over the period 19-24 March 1986.

To ensure that the sample was representative of the adult population of Scotland in terms of age, sex and class, it was weighted to match JICNARS population estimates from the National Readership Survey, January - December 1983. Sample profiles, both unweighted and weighted, are shown below:

		Unweighted	Weighted
	N =	992 (%)	992 (%)
Age:	18 - 24	14	17
	25 - 34	26	19
	35 - 54	33	31
	55 +	27	33
Sex:	Male	47	47
	Female	53	53
Class:	AB	11	15
	C1	24	21
	C2	30	29
	DE	35	35

A copy of the questionnaire used in the survey is appended.

B. SUMMARY OF FINDINGS

Full computer tabulations are appended.[1] The main findings were as below:

1. Initially, respondents were asked to consider a number of situations in which a man has died without making a will and to give their views on how his property should be divided among his surviving relatives. In each case, a prompt card was used giving a range of options, and opinion was sought for varying degrees of wealth of the deceased - neither very poor nor very wealthy, very poor, and very wealthy.

   a) A married man survived by his wife and two grown-up children

	Neither poor nor wealthy (%)	Very poor (%)	Very wealthy (%)
Entirely to his wife	51	65	38
Mainly to his wife, but some to his children	27	18	27
Half to his wife and half to his children	19	13	30
Mainly to his children, but some to his wife	2	1	2
Entirely to his children	*	1	*
Some other way	*	*	1
Don't know	1	2	2

(* = Less than 1%, but not zero)

Overall, then, in the situation of average means, a bare majority of respondents felt that the wife should be the sole beneficiary, with slightly fewer of the opinion that the children should benefit in some way. As wealth decreased, so support in favour of the wife as sole recipient increased and vice versa, and indeed this trend

[1] Note by S.L.C.. These are omitted from this Appendix for reasons of space.

was apparent throughout. The wealthier the deceased, then the stronger the opinion that his property should be more evenly spread among the eligible parties.

Perhaps not surprisingly, younger respondents were more inclined to feel that the children should be given a share, with support for this view decreasing as age increased, and a similar situation existed in relation to social class. Then, sympathy with the children's case increased down-market. There was, however, little difference between the views of men and women.

b) A married man survived by his second wife (first wife dead) and two grown-up children from first marriage

	Neither poor nor wealthy (%)	Very poor (%)	Very wealthy (%)
Entirely to his wife	19	32	12
Mainly to his wife, but some to his children	27	22	26
Half to his wife and half to his children	39	31	47
Mainly to his children, but some to his wife	9	7	9
Entirely to his children	4	5	3
Some other way	-	-	*
Don't know	2	3	3

The introduction of the second marriage into the situation thus had a considerable bearing on attitudes, in that there was generally much stronger support for the children by the deceased's first wife receiving a reasonable share of the property - although this varied according to wealth, as before. The wife was, however, still seen as more the major beneficiary.

There were some interesting variations among the sub-groups, compared to the initial situation. Whilst those aged 35 and over were still more likely to favour the wife's case than were the younger respondents, they did so much less strongly, and there was thus a less marked difference of opinion according to age. Divergence of views according to class also all but disappeared, with AB's now slightly less likely to support the wife's sole claim than C2DE's! Men were marginally more inclined to give the wife the entire property than were women.

c) A married man survived by his wife and his parents, but with neither children nor other close relatives

	Neither poor nor wealthy (%)	Very poor (%)	Very wealthy (%)
Entirely to his wife	62	73	48
Mainly to his wife, but some to his parents	26	17	32
Half to his wife and half to his parents	9	7	16
Mainly to his parents, but some to his wife	1	*	1
Entirely to his parents	1	1	1
Some other way	*	*	1
Don't know	1	1	*

Opinion was thus very much or the wife being by far the main, if not actually sole, beneficiary, and indeed only in a situation of considerable wealth was there a slight majority in favour of the parents receiving some share.

In this case, those under 25 or over 55 showed a slightly higher inclination to involve the parents - perhaps reflecting the situation of the former as either unmarried or closer to their parents, and of the latter as the type of

parents in question! Married respondents generally tended to favour the wife exclusively, whereas those currently single - whether at one time married or not - were more willing to involve parents.

d) An unmarried man survived by his parents and a brother

	Neither poor nor wealthy (%)	Very poor (%)	Very wealthy (%)
Entirely to his parents	41	48	29
Mainly to his parents, but some to his brother	24	19	27
Half to his parents and half to his brother	30	27	37
Mainly to his brother, but some to his parents	3	2	3
Entirely to his brother	1	2	1
Some other way	*	*	1
Don't know	1	2	1

In this situation, the parents were clearly identified as the next of kin and main beneficiary, filling the role previously ascribed to the wife. Approximately one third of all respondents felt that the brother should receive at least half, with his case strengthening in circumstances of extreme wealth.

Younger respondents, and particularly those aged under 25, viewed the brother's position more favourably.

e) An unmarried man survived by a sister and half-sister but with no other close relatives

	Neither poor nor wealthy (%)	Very poor (%)	Very wealthy (%)
Entirely to his sister	15	20	10
Mainly to his sister, but some to his half-sister	24	21	24
To both sister and half-sister equally	58	55	62
Mainly to his half-sister but some to his sister	*	1	1
Entirely to his half- sister	-	*	-
Some other way	1	1	1
Don't know	2	2	2

Whilst, of the two, the sister was thought to have a stronger claim over the half-sister, the majority view supported an equal division between the two, regardless of the financial situation of the decreased. This opinion was relatively consistently held throughout.

2. The second half of the questionnaire concerned a variety of cases where a man dies and does leave a will, but one which excludes some or all of his relatives. The issue here was whether the excluded parties should receive or be able to claim any share of his property and, if so, whether this should be "a fixed share, say a third" or they should "have to apply to the court for whatever the court thinks reasonable in the circumstances". (These two options were stated on the prompt card shown to respondents who felt there was some entitlement to a share).

a) A married man, survived by his wife but no children, leaves all his property to charity. Should his wife receive any share?

	(%)
No	12
Yes, receive a fixed share	42
Yes, but have to apply to the court	44
Don't know	2

There was, then, overwhelming support overall for the wife's case, but opinion was evenly divided as to whether she should receive a fixed share or have to apply to the court.

Whilst it was not surprising that a slightly higher proportion of men (16%) than women (9%) felt that the will should stand, the former were nevertheless strongly in favour of the wife being eligible for some share. Age in fact provided more of a discriminator in this respect, with around 20% of 18-24's opposed to any entitlement. Support for a fixed share also increased with age, and this was in fact the option preferred by 50% of those aged 55 and over.

As the figures below indicate, class proved to have a considerable bearing on the chosen alternative, with the preference for a fixed share increasing down through the social grades. As this pattern was similar throughout, it may reflect more some personal unease with legal proceedings and a selection of the easy option than an objective assessment of the situation:

	AB (%)	C1 (%)	C2 (%)	DE (%)
A fixed share	29	38	44	48
Have to apply	58	48	40	39

b) A widower, survived by two daughters, leaves all his property to a charity. Should they receive any share?

	(%)
No	14
Yes, receive a fixed share between them	40
Yes, but have to apply to the court	45
Don't know	1

Opinion in this case was much as before, with the large majority feeling that the daughters had some entitlement, but divided on how this should be determined.

Patterns among demographic sub-groups also remained essentially similar, with younger respondents the more inclined to support the status quo (although overall in favour of some share being given).

c) A widower, survived by two daughters, leaves all his property to the one, and nothing to the other.
Should the latter receive share?

	(%)
No	18
Yes, receive a fixed share	36
Yes, but have to apply to the court	44
Don't know	2

Overall, the general feeling was that the excluded daughter did have some entitlement. However, not only were slightly more in favour of the will standing in this case, but there was less of an inclination to award a fixed share. Similar age and social class patterns as noted above were again in evidence.

d) A man leaves all his property to his wife. Should his children receive a share?

	(%)
No	58
Yes, receive a fixed share between them	22
Yes, but have to apply to the court	18
Don't know	1

In contrast to the earlier situations, this was the one case where the majority were of the opinion that the will should stand or, at best, that the children should receive a fixed share, say a third, between them. This view was generally endorsed, and it is interesting that even younger respondents, who may stand most to gain, remained consistent with their stronger propensity to impose the conditions of the will.

3. Finally, since all questions had featured a situation in which a man had died, respondents were asked whether they thought there should be any difference in the way a man's property and a woman's property is disposed of, if either dies without making a will. The response was almost universally negative, with 98% expressing the view that there was no difference.

SECTION E ASK ALL

I would now like to ask you some questions about legal matters.

READ OUT IN FULL: As part of their work on law reform, the Scottish Law Commission would like to find out how Scottish adults think a person's property should be divided on their death. By property, we mean all kinds of property, including a house, possessions and money.

To start with, a few questions about a person who dies without making a will.

E.1 SHOW CARD

Suppose that a married man dies. He has not made a will. He is survived by his wife and their two grown-up children. Here are a number of ways in which his property might be divided.

a) Which of these ways best represents your view of where his property should go if he was neither very poor not very wealthy?

b) What would your answer be if he was very poor?

c) And if he was very wealthy?

	(a) Neither poor nor wealthy (53)	(b) Very poor (54)	(c) Very wealthy (55)
Entirely to his wife	1	1	1
Mainly to his wife, but some to his children	2	2	2
Half to his wife and half to his children	3	3	3
Mainly to his children, but some to his wife	4	4	4
Entirely to his children	5	5	5
Some other way (PLEASE EXPLAIN)	.....		
	.....		
Don't know	Y	Y	Y

E.2 SHOW CARD

Suppose that a man who has married twice dies. He has not made a will. His first wife is dead, and he has no children by his second marriage. He is survived by his second wife AND two grown-up children who are the children of his first marriage. Here are a number of ways in which his property might be divided.

a) Which of these ways best represents your view of where his property should go if he was neither very poor nor very wealthy?

b) What would your answer be if he was very poor?

c) And if he was very wealthy?

	(a) Neither poor nor wealthy (56)	(b) Very poor (57)	(c) Very wealthy (58)
Entirely to his wife	1	1	1
Mainly to his wife, but some to his children	2	2	2
Half to his wife and half to his children	3	3	3
Mainly to his children but some to his wife	4	4	4
Entirely to his children	5	5	5
Some other way (PLEASE EXPLAIN)	.....		
	.....		
Don't know	Y	Y	Y

E.3 SHOW CARD

Suppose that a married couple have no children. The husband dies. His parents are still alive, but he has no other close relatives. Again he has not made a will. Here are a number of ways in which his property might be divided.

a) Which of these ways best represents your view of where his property should go if he was neither very poor nor very wealthy?

b) What would your answer be if he was very poor?

c) And if he was very wealthy?

	(a) Neither poor nor wealthy (59)	(b) Very poor (60)	(c) Very wealthy (61)
Entirely to his wife	1	1	1
Mainly to his wife, but some to his parents	2	2	2
Half to his wife and half to his parents	3	3	3
Mainly to his parents, but some to his wife	4	4	4
Entirely to his parents	5	5	5
Some other way (PLEASE EXPLAIN)	.....	.....	.....
Don't know	Y	Y	Y

E.4 SHOW CARD

Suppose that an UNmarried man dies without making a will. He is survived by his parents AND a brother. Here are a number of ways in which his property might be divided.

a) Which of these ways best represents your view of where his property should go if he was neither very poor nor very wealthy?

b) What would your answer be if he was very poor?

c) And if he was very wealthy?

	(a) Neither poor nor wealthy (62)	(b) Very poor (63)	(c) Very wealthy (64)
Entirely to his parents	1	1	1
Mainly to his parents, but some to his brother	2	2	2
Half to his parents and half to his brother	3	3	3
Mainly to his brother, but some to his parents	4	4	4
Entirely to his brother	5	5	5
Some other way (PLEASE EXPLAIN)	.....		
	.....		
Don't know	Y	Y	Y

E.5 SHOW CARD

Suppose that an UNmarried man dies and is survived by a sister AND a half-sister. He has no other close relatives and has not made a will. Here are a number of ways in which his property might be divided.

a) Which of these ways best represents your view of where his property should go if he was neither very poor nor very wealthy?

b) What would your answer be if he was very poor?

c) And if he was very wealthy?

	(a) Neither poor nor wealthy (65)	(b) Very poor (66)	(c) Very wealthy (67)
Entirely to his sister	1	1	1
Mainly to his sister, but some to his half-sister	2	2	2
To both sister and half-sister equally	3	3	3
Mainly to his half-sister, but some to his sister	4	4	4
Entirely to his half-sister	5	5	5
Some other way (PLEASE EXPLAIN)	.....	.....	.....
Don't know	Y	Y	Y

READ OUT: Now let's think about some cases where a person dies and leaves a will from which some or all of his relatives are excluded.

E.6 Suppose that a married man dies without children. He is survived by his wife. For reasons of his own, he leaves all his property by his will to a charity. In spite of what is said in the will, should his wife receive or be able to claim any share of his property?

No

IF YES, SHOW CARD AND READ OUT:
Should she ..... Receive a fixed share, say a third
or Have to apply to the court for whatever the court thinks reasonable in the circumstances
(Don't know)

E.7 Now suppose that a man's wife has died before him. He has two daughters. For reasons of his own, he leaves all his property by his will to a charity. Should his daughters receive or be able to claim any share of his property, in spite of what is said in his will?

No

IF YES, SHOW CARD AND READ OUT:
Should they .... Receive a fixed share, say a third between them
or Have to apply to the court for whatever the court thinks reasonable in the circumstances
(Don't know)

E.8 Suppose that a man's wife has died before him. He has two daughters. For reasons of his own, he leaves all his property by his will to one daughter and nothing to the other. Should the excluded daughter receive or be able to claim any share of the property in spite of what is said in the will?

No

IF YES, SHOW CARD AND READ OUT:
Should she .... Receive a fixed share, say a third
or Have to apply to the court for whatever the court thinks reasonable in the circumstances
(Don't know)

E.9 If a man leaves all his property to his wife by his will, should his children receive or be able to claim any share of his property, in spite of what is said in the will?

No

IF YES, SHOW CARD AND READ OUT:
Should they .... Receive a fixed share, say a third between them
or Have to apply to the court forwhatever the court thinks reasonable in the circumstances
(Don't know)

E.10 You have answered these questions about what happens when a man dies. Do you think that there should be any difference between the way in which a man's property and a woman's property is disposed of when either dies without making a will?

IF YES: In what way? PROBE FULLY

.....

.....

.....

.....

.....

No/no difference
Don't know