



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 215)

# Report on Succession

report



**Scottish Law Commission**  
*promoting law reform*

## **Report on Succession**

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

**April 2009**

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



# SCOTTISH LAW COMMISSION

*Item No 5 of our Seventh Programme of Law Reform*

## **Report on Succession**

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Succession.

(Signed)

JAMES DRUMMOND YOUNG, *Chairman*  
GEORGE GRETTON  
PATRICK LAYDEN  
JOSEPH M THOMSON  
COLIN TYRE

Malcolm McMillan, *Chief Executive*  
20 March 2009

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# Abbreviations

## *Anton with Beaumont*

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

## *Currie and Scobbie*

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

## *Family Law Report*

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

## *Meston*

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

## *Reid*

D Reid, *From the Cradle to the Grave: Politics, Families and Inheritance Law* (2008)  
12 Edinburgh Law Review 391

## *Succession Opinion Survey*

*Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey*, Scottish Executive Social Research (2005)  
(available at <http://www.scotland.gov.uk/Resource/Doc/55971/0015792.pdf>)

## *the discussion paper*

Scottish Law Commission, *Discussion Paper on Succession* (DP No 136)

## *the 1964 Act*

Succession (Scotland) Act 1964 (c 41)

## *the 1990 Report*

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

# Part 1 Introduction

## Background

1.1 As long ago as 1986 this Commission published three consultative memoranda on the law of succession.<sup>1</sup> This led to a wide-ranging Report published in 1990.<sup>2</sup> It contained recommendations in many areas of intestate and testate succession. Unfortunately, these recommendations remain largely unimplemented.<sup>3</sup> Our Seventh Programme of Law Reform, which runs to the end of 2009, includes succession as a medium term project.<sup>4</sup> We issued a discussion paper on Succession, which was published in August 2007,<sup>5</sup> and this Report follows on from it.

1.2 Our Report focuses on two main areas: first, the distribution of intestate estates, particularly in relation to a surviving spouse, civil partner or cohabitant; and, secondly, the protection of close relatives (including a surviving spouse, civil partner or cohabitant) from disinheritance by the deceased. Although the 1990 Report made recommendations on both of these topics we think that it is timely to reconsider them. This is in large part because of developments both in Scottish society and in relevant areas of the law since 1990.

1.3 Since our last examination of succession, there have been significant changes in Scottish society and in the way in which people live. This is even more true of the 40 years or so since the major current legislation, the Succession (Scotland) Act 1964, came into force.<sup>6</sup> Some of these societal changes have already been reflected in new legislation. In particular, the Civil Partnership Act 2004 has given same-sex couples legal parity with married couples. However, in our view the law has not kept pace with all the changes which are occurring. For instance, many more people are cohabiting, either in same-sex or opposite-sex relationships.<sup>7</sup> Step-families are becoming more common. People are living much longer so that many children are middle-aged or older when their parents die, leading to difficult questions about the protection to be afforded to children who are adults at the time of the parent's death. And wealth is more widely distributed, particularly through increased ownership of heritable property.

1.4 In order to assist us to determine public opinion we commissioned a survey jointly with the Scottish Executive which was carried out in April 2005.<sup>8</sup> 1,008 people, sampled so as to be representative of the Scottish population, were asked for their views on various

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<sup>1</sup> *Intestate Succession and Legal Rights* (No 69), *The Making and Revocation of Wills* (No 70) and *Some Miscellaneous Topics in the Law of Succession* (No 71). We also commissioned a public opinion survey.

<sup>2</sup> *Report on Succession* (Scot Law Com No 124). We refer to this as "the 1990 Report".

<sup>3</sup> Recommendations 17 and 39 have been implemented. They deal with the effects of divorce on special destinations and of judicial separation on a wife's intestacy. They have been implemented by s19 of and sch 3 to the Family Law (Scotland) Act 2006.

<sup>4</sup> *Seventh Programme of Law Reform* (Scot Law Com No 198), paras 2.21-2.30.

<sup>5</sup> Scottish Law Commission, *Discussion Paper on Succession* (DP No 136). Comments were sought by 31 December 2007. References to "the discussion paper" are to this document.

<sup>6</sup> We refer to this as "the 1964 Act".

<sup>7</sup> Cohabitants now have some succession rights under the Family Law (Scotland) Act 2006.

<sup>8</sup> *Succession Opinion Survey*.

topics related to intestate and testate succession. Fifteen short scenarios of different family situations were presented to each participant in his or her own home. The participants then gave their views on how the deceased's estate should be divided or who should have claims on it. We have found the results of this survey helpful in forming the recommendations set out in this Report. We have also taken into account the findings of the Scottish Consumer Council's survey *Wills and Awareness of Inheritance Rights in Scotland*, published in September 2006.<sup>9</sup> In addition, we have been assisted by the responses submitted to the discussion paper and have taken account of the views expressed in formulating our recommendations. The list of those who responded is in Appendix B.

## **Advisory Group**

1.5 We have derived great assistance in the development of the recommendations in this Report from the members of our Advisory Group, who also helped in the preparation of the discussion paper. The Group, whose members are listed in Appendix C, consists of practitioners and academics. It met on several occasions to give views on particular aspects of the developing policy. Members' comments and insights have been of great value.

## **Summary of the Report**

### *Part 2 – intestate succession*

1.6 Part 2 discusses intestate succession. We deal first with cases where the deceased is survived by a spouse or civil partner but not by issue (which we define as issue however remote, ie children, grandchildren, great-grandchildren, and so on). We recommend that the surviving spouse or civil partner should take the whole estate. Under the current law the survivor may have to share the estate with the deceased's parents and/or siblings (or their issue, if they die before the deceased).

1.7 Secondly, where the deceased is survived by issue but not by a spouse or civil partner we recommend that the current rule, whereby the issue take the whole estate, should continue.

1.8 The third scenario is where the deceased is survived by a spouse or civil partner and also by issue. Under our recommendations, the spouse or civil partner will inherit the whole estate if it falls below the "threshold sum" (which we recommend should be set at £300,000); otherwise they will take the first £300,000 and half of any balance in excess of the threshold sum. The issue will share the other half of the balance. Those who responded to the discussion paper were almost unanimously in support of this principle of division of the estate.<sup>10</sup> However, there are two aspects which merit particular note.

1.9 The first is what the threshold sum should be. Under the current law, the maximum sum to which a surviving spouse or civil partner is entitled by way of prior rights is £366,000 where the deceased leaves issue. In addition, he or she is entitled to legal rights, ie (assuming there are also issue) to a sum equal to the value of one third of any remaining moveable estate. However, the value of the survivor's prior rights and legal rights will depend on various factors such as the division of the estate between heritable and moveable

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<sup>9</sup> S O'Neill, *Wills and Awareness of Inheritance Rights in Scotland*, Scottish Consumer Council (2006).

<sup>10</sup> See proposal 2(1) in the discussion paper.

property. After considering the matter at length we came to the view that, at the present time, it is appropriate to set the threshold sum at £300,000.<sup>11</sup> The great majority of our consultees supported this figure when we proposed it in the discussion paper.<sup>12</sup> But we recognise that the setting of this figure is a matter calling for further debate, and is very much a question for political judgment. It is properly something on which the Scottish Parliament should have the final say. The effect of setting a different figure will not only be felt in the distribution of intestate estates, with a lower figure favouring issue at the expense of the spouse or civil partner, and a higher figure doing the opposite. In addition, if our recommendations are accepted, the effect will be felt in other areas of succession. For instance, we recommend that legal share (which will replace legal rights and may replace legitim) is to be 25% of what the person would have received if the deceased had died intestate.<sup>13</sup> And a surviving cohabitant's entitlement is to be a proportion of the estate to which he or she would have been entitled had he or she been married to, or in civil partnership with, the deceased.<sup>14</sup>

1.10 The second issue is whether to treat a surviving spouse or civil partner differently depending on whether or not he or she is the parent of the deceased's surviving children.<sup>15</sup> Reconstituted families are becoming more common. This may mean that a parent's wealth might not devolve on his or her children since it might pass, on the parent's death, to a subsequent spouse or civil partner (ie a step-parent). If the latter were to die intestate, the children whose parent had died would not be entitled to a share of the intestate estate as he or she would not be amongst the step-parent's heirs. We see no straightforward way to address this possibility in the intestacy rules. The introduction of special provisions would introduce complexity without any guarantee of producing a fair solution in all cases. We have preferred to keep the rules simple and have recommended that no distinction should be made between first and subsequent spouses or civil partners. If a parent is concerned for his or her child, the parent should make a will if the intestacy rules might not give effect to his or her wishes.

1.11 In the fourth and final type of situation, where there is no surviving spouse, civil partner or issue, we recommend that the current order of succession be retained. However, we recommend that the legal distinction between half-blood and full-blood collaterals be removed.

1.12 In considering intestate succession we have given particular thought to the family home. This deserves attention for at least two reasons. First, the deceased's right in his or her house is often one of the most valuable assets in the estate. Secondly, if he or she dies leaving a spouse or civil partner, the rules governing the division of the estate should take account of the need to protect the survivor against having to sell the home in order to meet other beneficiaries' claims on the estate.

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<sup>11</sup> See generally paras 2.7-2.16. We recommend that Scottish Ministers should have a duty to review the figure annually and to alter it as appropriate.

<sup>12</sup> See proposal 2(1) in para 2.57. Help the Aged suggested that "the fixed sum be increased to at least £400,000 to minimise any reduction in current entitlement and to take account of escalating house prices". The significant changes in the housing market following our consultation period (in the second half of 2007) will have gone some way to addressing this concern.

<sup>13</sup> See Part 3.

<sup>14</sup> See Part 4.

<sup>15</sup> See paras 2.26-2.30.

1.13 We proposed in the discussion paper that a surviving spouse or civil partner should, in certain circumstances, have the right to acquire the couple's home and furniture.<sup>16</sup> Although the majority of those who responded were in favour of this we have decided not to make a recommendation to this effect. This is because we consider that, as a matter of principle, succession rights should not be property-specific. Our recommendation that the surviving spouse or civil partner should take the whole intestate estate, or the threshold sum of £300,000 plus half of any excess, should be sufficient to allow the survivor to obtain the deceased's share of the couple's home and furniture in all but very exceptional cases.

1.14 A separate issue arises when a surviving spouse or civil partner takes the deceased's right in the couple's dwelling house by way of survivorship destination. We understand that it is still relatively common for a couple to hold title to their home in this way. On the first death, the deceased's right in the property passes directly to the survivor;<sup>17</sup> it does not form part of the deceased's estate. We consider that this may be overly generous to the spouse or civil partner at the expense of the deceased's issue. We therefore recommend that, where a survivor takes the deceased's share of the couple's home by way of survivorship destination, the value of the property should be taken into account when calculating the survivor's entitlement to the estate. In our view, this is likely to be a sufficiently frequent occurrence, and the effect to be sufficiently pronounced when it occurs, for specific provision to be included.<sup>18</sup>

### *Part 3 – protection from disinheritance*

1.15 Under the current law legal rights may be claimed by a surviving spouse or civil partner and legitim by a child of the deceased (or by his or her issue where the child has predeceased). A surviving spouse or civil partner is entitled to a proportion – one third if the deceased also left issue and otherwise one half – of the moveable estate.<sup>19</sup> Similarly, the children are entitled to share one third of any remaining moveable estate if the deceased is survived by a spouse or civil partner and otherwise to share one half of it. The value of legal rights or legitim will therefore depend on the composition of the estate, ie the value of the moveable property. One effect of our recommendations is that a right to legal share (which is what we recommend will replace legal rights and may replace legitim) will be calculated by reference to the value of the *whole* estate.

1.16 Part 3 falls into two sections: one dealing with the rights of a deceased's spouse or civil partner and the other dealing with the rights of the deceased's children.

1.17 In relation to the deceased's spouse or civil partner we recommend that legal share should be calculated in accordance with a rule rather than left to the discretion of the court: and that legal share should be 25% of the estate to which the person would have been entitled if the deceased had died intestate. There was strong support on our proposals to this effect in the discussion paper.<sup>20</sup>

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<sup>16</sup> See para 2.56 and proposal 2(3) of the discussion paper.

<sup>17</sup> This is a matter of property law rather than succession law.

<sup>18</sup> This will only be relevant where the deceased is also survived by issue. See recommendations 4 and 5.

<sup>19</sup> On an intestacy this will be the balance of the moveable estate remaining after satisfaction of the spouse's or civil partner's prior rights.

<sup>20</sup> See proposals 9 and 10.

1.18 In relation to rights for children we have found matters much more difficult. The current law is that the deceased's children are entitled to legitim, with the issue of any predeceasing child having an entitlement by way of representation. In the discussion paper we sought views on two options, both involving the abolition of the current law: the introduction of a scheme which would provide financial support for dependent children or a fixed legal share for all children.<sup>21</sup> Those who responded were sharply divided, as was our Advisory Group. There was no clear consensus of opinion, other than that we were correct to reject a discretionary scheme for all children. In these circumstances we feel that we cannot make a recommendation in favour of one option over the other but instead we set out how both options would operate. They would each involve the abolition of the current rules on legitim. In our view, the final choice is a matter for the Scottish Parliament, as representative of the views of the nation.

1.19 We therefore present two sets of recommendations for consideration, each with draft provisions.<sup>22</sup> The first set would give the deceased's issue an entitlement to legal share. This is similar to the current law. The value of the legal share would be 25% of the estate to which the person would have been entitled had the deceased died intestate.<sup>23</sup> Under the second set of recommendations a dependent child of the deceased would have the right to a capital sum payment which would be calculated to provide reasonable financial support for the child.<sup>24</sup> It would apply on testacy and on intestacy, but would not be payable out of any part of the estate which is inherited by a person who owes the dependent child an obligation of aliment. So, for example, if a man leaves his whole estate to his partner, who is not the mother of his son but who has accepted him as a child of the family, the son will have no claim as the partner owes him an obligation of aliment. However, if she had not accepted him as a child of the family, he could claim a capital sum payment, which would be payable out of the partner's legacy.

1.20 One topic which we included in the discussion paper is that of anti-avoidance, or "clawback".<sup>25</sup> We asked whether there should be new legislative provisions designed to protect close relatives against the possibility that the deceased might give away, or sell at undervalue, assets during his or her lifetime in circumstances where this reduces the estate at death and hence the value of the relatives' claims.<sup>26</sup> There was almost unanimous opposition to this idea. As many respondents pointed out, any anti-avoidance scheme would create numerous practical difficulties and would be likely to be complex. And, from a principled perspective, it would disrupt or frustrate otherwise legitimate and intentional acts on the part of the deceased before death. In addition, those who were well advised would be able to take steps to organise their affairs in the light of whatever anti-avoidance measures may be in place, but those who were not in that position, which generally would be people with more modest estates, would be liable to be unduly and unjustifiably affected. In view of all of these factors, we have decided to make no recommendation in this regard.

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<sup>21</sup> See paras 3.80-3.110. Our thinking on how best to provide for dependent children has developed since we published the discussion paper, as we explain in Part 3.

<sup>22</sup> See Parts 2 and 3 of the draft Bill, which are alternatives to each other. Part 2 provides for legal share for the deceased's issue and Part 3 provides for a capital sum payment for dependent children.

<sup>23</sup> See paras 3.36-3.39. If this option is adopted, we recommend that the rules of collation should be abolished.

<sup>24</sup> See paras 3.65ff. We recommend that the right be characterised as a right of succession rather than a right of aliment, which has an effect on its treatment under private international law: see para 5.7 for details.

<sup>25</sup> See paras 4.3-4.24 of the discussion paper.

<sup>26</sup> Question 39 in para 4.16 of the discussion paper.

## Part 4 – cohabitation

1.21 Under the current law a cohabitant can apply, on the death of the other party to the relationship, for payment of a sum out of the estate.<sup>27</sup> However, this is limited to intestate estates. The court has discretion as to the quantum of any payment. The present law has been subject to a good deal of criticism, one being that the court is not given a clear aim or purpose for the exercise of its discretion. The lack of reported cases has not assisted.<sup>28</sup> We consider that the current law is unsatisfactory and should be replaced.

1.22 Whilst it is not a universally held view, there has been consistent public support in favour of giving succession rights to cohabitants, both on intestacy and in testate cases.<sup>29</sup> There is also support for a discretionary scheme (as the current one is) rather than one based on fixed rules. We agree that a discretionary scheme is appropriate. Though recognising that it may be controversial we accept that the current rights of cohabitants, which apply only on intestacy, should be extended so that cohabitants have the right to protection in testate cases.

1.23 We recommend that the surviving cohabitant should have the right to apply to court for a determination of his or her entitlement (but, in practice, matters may often be resolved without going to court). An application must be made within a year of the death, unless the court determines that a longer period is reasonable in the particular circumstances.<sup>30</sup> The process will operate as follows. The first question is whether the survivor is a cohabitant for the purposes of the succession legislation. We set out the factors which we consider to be relevant to this issue.<sup>31</sup> They are largely based on existing criteria used in social security law. A necessary factor is that the survivor was cohabiting with the deceased immediately before the death. Thus there is no protection for those whose relationship broke down at some time before the death of the other party.<sup>32</sup> The next step is to determine the "appropriate percentage". This is designed to express the extent to which the cohabitant should be treated, for the purposes of succession, as if he or she had been married to, or in civil partnership with, the deceased. We recommend that the appropriate percentage should be fixed by reference to only three factors: (i) the length of the period of cohabitation, (ii) the interdependence, financial or otherwise, of the parties during cohabitation, and (iii) what the survivor contributed to their life together, whether financial or otherwise (for example in running the household, or caring for the deceased and their children). This means that the court will not be able to take account of, for example, the size of the estate or who the other beneficiaries are.

1.24 Once the appropriate percentage has been fixed the cohabitant's entitlement can be calculated. If the deceased died intestate the cohabitant is entitled to the appropriate

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<sup>27</sup> See s 29 of the Family Law (Scotland) Act 2006. This was modelled on the recommendation we made in para 16.37 of the *Family Law Report*.

<sup>28</sup> We are aware of only two decisions, both from the sheriff court: *Savage v Purches* 2009 GWD 9-157 and *Chebotareva v Khandro* 2009 Fam LR 66; 2008 GWD 12-231. In the former no award was made to the survivor and the latter failed on jurisdictional grounds..

<sup>29</sup> See para 4.1.

<sup>30</sup> At present there is a 6 month time limit: see s 29(6) of the Family Law (Scotland) Act 2006. This has been widely criticised as being too short.

<sup>31</sup> See recommendation 38(2).

<sup>32</sup> However, it is not necessary that the cohabitants were physically living together at the point of death. If, for instance, one party is serving overseas in the armed forces or has been taken into hospital the period of cohabitation will not be treated as having ended simply for that reason.

percentage of the estate to which a spouse or civil partner would have been entitled. If on the other hand the deceased left a will, the cohabitant is entitled to the appropriate percentage of the legal share to which a spouse or civil partner would have been entitled.<sup>33</sup> As the appropriate percentage cannot exceed 100% a cohabitant can never be entitled to more than what her entitlement would have been if married to, or in civil partnership with, the deceased.

1.25 It is possible that the deceased was survived by both a cohabitant and a spouse or civil partner. In this situation both the cohabitant and the spouse or civil partner will have succession rights.<sup>34</sup> Where the deceased died intestate we recommend that the amount which the spouse or civil partner would otherwise receive should be shared with the cohabitant. The amount due to the latter will depend on the 'appropriate percentage', but can never be more than what the spouse or civil partner receives. And where the deceased died testate the cohabitant's claim will be the appropriate percentage of the legal share to which the spouse or civil partner is entitled.<sup>35</sup> Thus, in this situation too, the cohabitant's entitlement can never exceed that of the spouse or civil partner.

#### *Part 5 – private international law*

1.26 Our main recommendations in the area of private international law relate to two areas: choice of law rules and rules of jurisdiction applicable to our new schemes of succession. We also endorse two unimplemented recommendations from the 1990 Report dealing with testamentary capacity and the construction of titles to property situated outwith Scotland.

1.27 Scots private international law adopts the scission principle. Succession to moveable property is governed by the law of the deceased's domicile regardless of where the property is situated at the time of death; succession to immoveable property is governed by the *lex situs* whatever the deceased's domicile at death. Thus where the deceased died domiciled in Scotland, Scots succession law is applied to all of the moveable estate and to the immoveable estate in Scotland. And where the deceased died with a foreign domicile Scots succession law applies only to the deceased's immoveable property situated in Scotland. We recommend that the new schemes for intestate succession and legal share and for cohabitants' and dependent children's rights should operate in accordance with this principle. This means that the estate against which the relevant rights may be exercised would be the estate whose succession is governed by Scots law.

1.28 In relation to jurisdiction we recommend that the rules in relation to each of the various rights of succession should, as far as possible, be unified. The effect of our recommendation is that the Court of Session and the sheriff court would both have jurisdiction in most cases. The Court of Session is to have jurisdiction where the deceased was domiciled in Scotland at death or died owning immoveable property in Scotland. The sheriff court jurisdiction would be based on habitual residence in a particular sheriffdom or on immoveable estate being situated there. In addition, we recommend that a gap in the

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<sup>33</sup> If the cohabitant was also left a legacy under the will he or she will have to choose between accepting it or taking the new statutory entitlement.

<sup>34</sup> We recommend that separation should have no effect on the succession rights of spouses and civil partners: see para 2.25.

<sup>35</sup> It may be that the spouse or civil partner does not elect to receive legal share, perhaps because he or she is left a legacy under the will. If so, this will not affect the cohabitant's entitlement.

current law be closed by providing that, where an executor is confirmed in Scotland, he or she may be sued in relation to his or her functions as an executor in either the Court of Session or in a court in the sheriffdom where confirmation was granted.

#### *Part 6 – testamentary writings and special destinations*

1.29 The majority of the topics covered in Part 6 are ones which we examined in the 1990 Report. In the main, our recommendations are the same as before, subject to some minor modifications. Accordingly we recommend reforms in the following areas: the rectification of wills; the effect of divorce, dissolution or annulment on testamentary provisions; the two *conditiones*; the revival of a revoked will; the survivorship rules; and the treatment of special destinations.<sup>36</sup> However, unlike the position in the 1990 Report, we make no recommendation in respect of the validation of wills. This is because changes in the law since 1990 regarding the subscription of documents have simplified the formalities of execution for a valid will.

#### *Part 7 – miscellaneous matters*

1.30 As with Part 6, most of the topics addressed in Part 7 also formed part of the 1990 Report. Again, our recommendations remain largely as they were in our earlier Report. We therefore make recommendations in respect of: the effect of adoption; mournings and other common law rights of succession; the vesting of the fee when a liferent is forfeited or renounced; the references to legal rights in existing documents; and the rules on forfeiture.

1.31 In addition we make recommendations in respect of the law of caution and the appointment process for executors-dative. Although these topics do not, strictly speaking, form part of the law of succession, but relate instead to the way in which an estate is administered, there was some enthusiasm for their inclusion.<sup>37</sup> We recommend that caution should cease to be a requirement for confirmation of a person as an executor-dative,<sup>38</sup> and that the sheriff should have the power, on cause shown, to refuse to appoint a petitioner as executor-dative. As caution will no longer be available as insurance against incorrect or wrongful distributions we consider that this power will be useful to prevent unsuitable candidates from being in a position to administer the estate. Further, we recommend that the minimum period within which a petitioner may be decerned executor-dative should be increased from 9 days to 14 days.

1.32 We have also taken the opportunity to recommend that the rules on donations *mortis causa* be abolished. The practice of making such donations is all but obsolete and we consider that the rules are archaic. Although we did not include this topic in the discussion paper we have sought the views of the members of our Advisory Group who agree with us that the rules should be abolished. It will still be possible to make conditional gifts, but the conditions must be expressly set out.

1.33 In the course of this project it has become apparent to us that it would be highly desirable to have a wide-ranging review of executry matters. These are issues which are, in

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<sup>36</sup> In the case of special destinations our recommendation is, in some respects, materially different from the corresponding ones in the 1990 Report. See paras 6.61-6.66 below for details.

<sup>37</sup> See para 1.12 of the discussion paper. Caution was examined in the 1990 Report at paras 8.32-8.39.

<sup>38</sup> We also recommend, lest there be any doubt, that courts should not have the power to order caution to be found by an executor-nominate: see para 7.11.

the main, of an administrative nature. They do not affect succession law *per se* but are closely allied with it. In our view reform is necessary in order to bring the rules of estate administration up to a standard which meets modern executry practice. There is also a need to make the law clear and more accessible. We intend to suggest that this topic be included in our Eighth Programme of Law Reform, which will run from 2010 until 2014. We are consulting on the content of the Programme during 2009. If the project is adopted it would be desirable to include within it those recommendations in the 1990 Report which deal with the administration of estates.<sup>39</sup>

1.34 Finally, in the discussion paper we sought views on the prescriptive periods applicable to succession rights.<sup>40</sup> Despite the fact that the current law is complex and uncertain we said that it was only with some hesitation that we were taking the opportunity to make changes. We proposed that certain rights – to intestate estate, to a legacy and to legal share – should prescribe under section 6 of the Prescription and Limitation (Scotland) Act 1973, ie after a period of 5 years from the date of death. We also proposed that time should not run while a person was, with reason, unaware of the existence of the right and that a written claim to the executor should interrupt prescription. Our proposals were supported by the majority of those who responded to it, though some expressed criticisms of aspects of it. We have reflected further on the issues in the course of preparing this Report and have reached the conclusion that we should not make any recommendation at this time.<sup>41</sup> We should not be understood as indicating that the law in this area is satisfactory. However, we have identified certain legal issues which we do not consider would be properly addressed by our proposal in the discussion paper and in respect of which further consultation would be necessary. Many of these issues have their roots in the structure and operation of the 1973 Act itself, and one option would be a review of the whole of the law of prescription. But even a review which was limited to the prescriptive periods applicable to succession rights would, in our opinion, involve an examination of the law of prescription as it applies to trust law – since wills are commonly drafted so as to create a trust – and, to an extent, to property law. That lies outwith the scope of the present exercise but might fall within the estates administration project which we mentioned immediately above.

#### *Part 8 – recommendations*

1.35 Part 8 lists our recommendations.

#### *Appendices*

1.36 Appendix A contains our draft Succession (Scotland) Bill which gives effect to our recommendations. We have included full explanatory notes. Appendix B lists those who sent a written response to the discussion paper and Appendix C lists the members of our Advisory Group.

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<sup>39</sup> In particular we have in mind recommendations 44 (use of will as link in title), 45 (appointment of executors-dative), 46 (repeal of s1 of the Confirmation of Executors (Scotland) Act 1823), 47 (competence to issue confirmation where no estate in Scotland) and 64 (valuation of estate).

<sup>40</sup> See paras 4.36-4.49.

<sup>41</sup> There will, though, need to be consequential changes to the Prescription and Limitation (Scotland) Act 1973: see s 54 of our draft Bill.

## **Inheritance tax**

1.37 The 1990 Report contained three recommendations for consequential amendments to the Inheritance Tax Act 1984.<sup>42</sup> We recognise that, when legislation implementing the recommendations in this Report has been passed by the Scottish Parliament, appropriate amendments to that Act will be needed in consequence of certain of our recommendations, such as those relating to legal share. In our view a suitable method of achieving this in the context of the devolution settlement would be by means of subordinate legislation made by a UK Minister under section 104 of the Scotland Act 1998,<sup>43</sup> and we anticipate that such legislation would be short. Thus we have not, on this occasion, made specific recommendations in relation to the inheritance tax legislation.

### **A note on the worked examples**

1.38 Throughout the Report we give a number of worked examples. They are designed to illustrate the effect of our recommended reforms and are therefore simplified wherever possible. Readers should note that references in the examples to "estate" are generally to net estate. We have also usually chosen to make the survivor female, in large part because women tend to live longer than men. However, our reforms are neutral as to the sex of the survivor.

### **Legislative competence**

1.39 Questions of legislative competence arise if a provision of an Act of the Scottish Parliament falls within any of the paragraphs in section 29(2) of the Scotland Act 1998. The law of succession is not a reserved matter within the terms of that Act and so the subject matter is generally within the competence of the Scottish Parliament.

1.40 We consider that our draft legislation is within competence in other respects too. In particular, we consider that the provisions are compatible with Convention rights and with Community law.

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<sup>42</sup> Recommendations 60-62.

<sup>43</sup> That section permits the making of subordinate legislation which is considered necessary or expedient in consequence of a provision of an Act of the Scottish Parliament.

# Part 2 Intestate Succession

## Introduction

2.1 The rules of intestate succession are default rules which apply when the deceased has died without a will or other testamentary disposition. Most Scots do not have a will.<sup>1</sup> Consequently the number of persons who die intestate is substantial. In 2007, the average value of all confirmed estates<sup>2</sup> - testate and intestate - was estimated at £147,822;<sup>3</sup> but the value of intestate estates is likely to be considerably less<sup>4</sup> because persons who own significant assets are far more likely to have made a will than the rest of the population.<sup>5</sup> Accordingly, the rules of intestate succession will generally be used to distribute estates which are of small to modest value although there will continue to be exceptional cases where the intestate estate is large.

2.2 In the discussion paper we criticised the current rules on account of their complexity.<sup>6</sup> They produce very different results depending on whether the deceased's estate is largely heritable or moveable and to the extent that it consists of property which is subject to the surviving spouse or civil partner's prior rights. Of these, the prior rights in relation to the deceased's right in a dwelling house<sup>7</sup> and the contents<sup>8</sup> are property-specific: they apply only to a house in which the surviving spouse or civil partner was ordinarily resident at the date of the death. This means that if the deceased's estate does not contain such property, the rights are valueless. Thus for example, if a spouse leaves her home because she has been a victim of domestic violence she will have no prior right to the deceased's right in the property as she was not ordinarily resident there at the date of the deceased's death. On the other hand, when there is such property, the prior rights may well exhaust the estate so that there is nothing available for the deceased's heirs on intestacy to inherit. The prior right to the dwelling house is currently worth a maximum of £300,000, the prior right to furniture a maximum of £24,000 and the monetary prior right a maximum of £42,000 if the deceased is also survived by issue, and £75,000 if he is not.<sup>9</sup> Depending on the size of the deceased's rights in the dwelling house and the furniture, a surviving spouse or civil partner's prior rights can therefore have a maximum value of £366,000 if the deceased has issue and £399,000 if he has not.<sup>10</sup> And so in many cases a surviving spouse or civil partner will *in fact* inherit the whole estate even although she is not technically an heir on intestacy.<sup>11</sup> While concern has

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<sup>1</sup> Research found that only 37% of Scots had made a will but that this increased to 69% of those aged 65 or over: S O'Neill *Wills and Awareness of Inheritance Rights*, Scottish Consumer Council (2006), p 5 n 40.

<sup>2</sup> Confirmed estates represent approximately half the deaths in Scotland. In the case of the other half, the value of the estate is too small to require confirmation. It is likely that these estates will be intestate.

<sup>3</sup> This figure was obtained from the Scottish Court Service by Dot Reid: see *Reid*, p 413.

<sup>4</sup> In 1986-7 the value of intestate estates were half the value of testate estates: see *Reid*, pp 413-414.

<sup>5</sup> *Ibid*, p 413.

<sup>6</sup> Para 2.8.

<sup>7</sup> Section 8(1) of the 1964 Act.

<sup>8</sup> *Ibid*, s 8(3).

<sup>9</sup> The current amounts are set by the Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252.

<sup>10</sup> In addition the surviving spouse or civil partner is entitled to legal rights from any moveable estate left after the prior rights have been satisfied.

<sup>11</sup> A surviving spouse or civil partner is an heir on intestacy if the deceased died without surviving issue or parents or siblings or the siblings' issue: s 2(1)(e) of the 1964 Act.

sometimes been expressed that the housing prior right may be of little, if any, value to her it has seldom been suggested that the current law is overgenerous to the surviving spouse or civil partner.<sup>12</sup>

2.3 While the primary purpose of any reform of the law of intestate succession should be to ensure that the estate is fairly distributed, we have taken the view that the rules should be as simple as possible in order that people will be easily aware of what will happen to their property if they die without making a will. Rights to an intestate estate should no longer be property-specific: instead they should arise in respect of the whole of the estate with no distinction being made for this purpose between heritable and moveable property. We also consider that, as a consequence of their status, a surviving spouse or civil partner should be recognised as one of the deceased's main heirs.

2.4 It also seems important to us that the surviving spouse's or civil partner's share of the intestate estate should generally be sufficient to ensure that she does not have to leave the former matrimonial or family home.

### **Spouse or civil partner but no issue**

2.5 Under the current law, where there are no issue of the deceased the surviving spouse or civil partner may, depending on the amount and nature of the intestate estate, have to share the estate with the deceased's siblings and/or parents. In the discussion paper we proposed that in this situation a surviving spouse or civil partner should succeed to the whole of the deceased's intestate estate irrespective of its size.<sup>13</sup> Such a rule not only reflects the contemporary perception of a spouse or civil partner as a key member of the deceased's family but it is also simple. There was unanimous support for this proposal from our consultees. Accordingly we recommend that:

- 1. Where a person dies intestate survived by a spouse or civil partner but not by issue the spouse or civil partner should inherit the whole of the net intestate estate.**

(Draft Bill, section 2(2))

### **Issue but no spouse or civil partner**

2.6 Under the present law, where a person dies intestate survived by issue but not by a spouse or civil partner, the issue inherit the whole estate. This is a simple and straightforward rule. There has been no suggestion that this should not continue to be the law. We therefore recommend that:

- 2. Where a person dies intestate survived by issue but not by a spouse or civil partner the issue should inherit the whole of the net intestate estate.**

(Draft Bill, section 2(4))

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<sup>12</sup> However, the current law has been criticised when the surviving spouse or civil partner is the deceased's second or subsequent spouse or civil partner: see paras 2.26-2.30.

<sup>13</sup> Paras 2.18-2.26.

## Spouse or civil partner and issue

2.7 As we have seen,<sup>14</sup> under the current law the surviving spouse or civil partner has three types of prior rights (house, furniture and a capital sum). In addition, the surviving spouse or civil partner and the deceased's issue can claim their legal rights out of any moveable property remaining in the estate. After the legal rights have been satisfied, the remainder of the estate will be inherited by the issue as the deceased's heirs on intestacy. That said, in many cases, the satisfaction of the surviving spouse or civil partner's prior rights will exhaust the whole intestate estate.<sup>15</sup>

2.8 On consultation, there was general agreement on the need for reform. There was almost unanimous support for our proposal that the surviving spouse or civil partner should be entitled to the whole estate where it was worth less than a specified amount: any excess over the specified amount should be divided equally, half to the surviving spouse or civil partner and half to the deceased's issue.<sup>16</sup> In this Report and draft Bill the specified amount is referred to as "the threshold sum" because it is the threshold above which any excess balance of the estate has to be divided equally between the surviving spouse or civil partner and the deceased's issue. This rule has the advantage that the surviving spouse or civil partner's right to inherit is no longer property-specific and does not depend on whether the deceased's estate is largely heritable or moveable. The new rule also has the merit of being simple.

2.9 The policy of the present law is to ensure that in most cases the surviving spouse or civil partner can retain the family home and furniture<sup>17</sup> and also have a capital sum. We think that this policy should be maintained. In the interests of simplicity, however, we consider that this should be achieved by providing that the surviving spouse or civil partner should have the right to the whole of the estate up to the value of the threshold sum rather than have a right to specific assets. This avoids the problems of defining a relevant dwelling house and the hard cases where the surviving spouse or civil partner becomes homeless because she was not ordinarily resident in the family home at the date of the deceased's death.<sup>18</sup>

2.10 Two thirds of Scottish households are now owner occupied. Approximately 43.5% are owned by sole proprietors<sup>19</sup> and only 42% per cent are owned in common by spouses or civil partners.<sup>20</sup> It will therefore be clear that the law still has to take account of the situation where the deceased was the sole owner of the property. In December 2008 the average house price in Scotland was £152,256.<sup>21</sup> In our view the threshold sum must reflect the average house price to ensure that in most cases the surviving spouse or civil partner will be

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<sup>14</sup> Para 2.2.

<sup>15</sup> Ibid.

<sup>16</sup> Proposal 2(1).

<sup>17</sup> Up to specified financial limits.

<sup>18</sup> See para 2.2.

<sup>19</sup> Approximately half are owned by men and half by women.

<sup>20</sup> The remainder were held in common by parties not stated to be married and with different surnames: some of these may, of course, be married or civil partners. These statistics have been acquired from Registers of Scotland based on a sampling exercise of six titles in each of 23 out of the 33 registration counties. We are grateful to the Registers for this information.

<sup>21</sup> Statistics produced by the Council of Mortgage Lenders in conjunction with the UK Department for Communities and Local Government. The figure is based on purchase prices as reported to lenders in mortgage applications and thus exclude "cash" purchases. For comparison, the corresponding figure for May 2008 was £167,126.

able to remain in the family home. In addition we think that the surviving spouse should also be assured of a capital sum payment from the estate. The current money prior right when there are issue is £42,000. Taking the average value of a house and the current money prior right, this would give a threshold sum in the region of £210,000.<sup>22</sup>

2.11 However, as we have seen<sup>23</sup> the current housing prior right is valued at £300,000. It was raised to this figure from £130,000 in 2005.<sup>24</sup> Dot Reid has explored how the Scottish Executive decided on £300,000:<sup>25</sup>

"An investigation of the background to the relevant statutory instrument reveals that the Executive originally intended the housing increase to be a modest one, from £130,000 to £160,000 plus an increase in the monetary claim from £58,000 to £70,000 if the deceased left no children. However, 'the Succession Committee of the Law Society of Scotland did not consider these increases to be substantial enough and recommended the values of £300,000 and £75,000 be used, respectively.' The reasons for the Law Society's recommended increase are not explained, but it was not objected to and on that basis, the Subordinate Legislation Committee determined that the attention of the Scottish Parliament need not be drawn to the instrument. Since the average net value of heritable property in the whole of the UK was less than £153,000, the Executive's initial figure of £160,000 would arguably have been more appropriate. Even though the housing right is rarely claimed in full, the increase to £300,000 has the potential to make a significant impact on the division of an estate and on the amount available for children. Yet this change was subject to no public consultation, no Parliamentary debate and no media scrutiny."

2.12 On the other hand, the maximum value of the housing right has traditionally been very high to ensure that few, if any, surviving spouses or civil partners have to relinquish the matrimonial or family home. When the housing prior right was introduced in 1964,<sup>26</sup> the maximum value was £15,000, almost five times the average 1964 UK house price of approximately £3,250.<sup>27</sup> If the same ratio was applied to the current average house price of approximately £150,000, this would give a maximum value of £750,000 as opposed to £300,000. Moreover, there does not appear to have been any public discontent at setting the figure at £300,000. Indeed, the only complaint that we have heard has come from some solicitors who regret that the increase was not retrospective and only applied to the estates of persons who died on or after 1 June 2005.

2.13 In the discussion paper, we were clearly influenced by the value of the surviving spouse or civil partner's prior rights under the current law: these reach a maximum of £366,000 where the deceased has surviving issue. Considering that in our proposals the surviving spouse or civil partner will also be entitled to half the value of the remainder of the estate, we took the view that the threshold sum should be £300,000. However, we

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<sup>22</sup> In England and Wales, a surviving spouse or civil partner's statutory legacy is £250,000 where the deceased left children and £450,000 where the deceased left no children: Family Provision (Intestate Succession) Order 2009 SI 2009/135. In Northern Ireland, the Department of Finance and Personnel considered that £200,000 should be the appropriate statutory legacy for a surviving spouse or civil partner where the deceased died intestate with children: *Administration of Estates: Intestacy and the Statutory Legacy* (2007) Summary Consultation Paper available at [http://www.dfpni.gov.uk/statutory\\_legacy\\_executive\\_summary-2.pdf](http://www.dfpni.gov.uk/statutory_legacy_executive_summary-2.pdf).

<sup>23</sup> Para 2.2.

<sup>24</sup> Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252.

<sup>25</sup> *Reid*, pp 411-412.

<sup>26</sup> Section 8 of the 1964 Act.

<sup>27</sup> Nationwide gives a figure of £3,139 and Halifax a figure of £3,360. Professor Meston has pointed out that the original figure of £15,000 in 1964 represented approximately three times the value of a substantial city house he purchased that year: *Meston*, p 39.

appreciate that few intestate estates trigger the maximum value of the housing right. Accordingly, provided the rest of the estate is greater than £42,000 (the maximum financial prior right), the deceased's issue will inherit at least some of it. Under our proposals, the deceased's issue will not inherit any of the estate unless the estate is worth more than £300,000. This is £50,000 more than the surviving spouse or civil partner's statutory legacy in England.<sup>28</sup>

2.14 We are strongly of the view that fixing the size of the threshold sum is a matter for political judgment at the time when the legislation is before the Scottish Parliament. The higher the threshold sum the less likely it is that there will be any balance to be shared between the surviving spouse or civil partner and the deceased's children. If the figure is set at £300,000 we have to accept Dot Reid's conclusion<sup>29</sup> "that in the vast majority of cases the surviving spouse will take the whole estate under the new proposals and only the children of the wealthiest Scots will have a claim on an intestate estate."<sup>30</sup> However, in 2007 the average confirmed estate in Scotland was worth only £147,822.<sup>31</sup> As will often be the case, much of the estate will consist of the deceased's right in the dwelling house, and so, if there is a surviving spouse or civil partner, under the current law the deceased's children will rarely inherit anything from their parent's intestate estate. For most children, therefore, our proposals will not radically change the position they de facto "enjoy" under the existing regime. In order to ensure that more children in fact receive a share of their parent's intestate estate, the threshold sum would have to be drastically reduced to say £100,000 or less. At this level, however, a surviving spouse or civil partner might have to sell the matrimonial or family home in order to satisfy the children's claims.

2.15 While we see the force of Dot Reid's arguments, it remains the case that the current levels of prior rights were set by the Scottish Executive only four years ago and until now have met with little, if any, disapproval. In these circumstances, we consider that our proposals should not leave a surviving spouse or civil partner with, potentially, substantially less than under the current law. This Report and the draft Bill therefore proceed on the basis that the threshold sum is £300,000. We do, however, recognise that the matter is one of political judgment with the final decision to be made by the Scottish Parliament when enacting our proposals.<sup>32</sup> Once the level has been set, Scottish Ministers should be under a duty to review the threshold sum and be empowered to alter it in order to maintain the value of the sum in real terms or by such other amount as they think reasonable.

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<sup>28</sup> This was increased to £250,000 by Family Provision (Intestate Succession) Order 2009, SI 2009/135. But, in addition, the surviving spouse or civil partner is entitled to all the contents of the matrimonial or family home as well as a life interest in half of the balance of the estate.

<sup>29</sup> *Reid*, p 413.

<sup>30</sup> In 2007 only 2% of confirmed intestate estates were over £300,000: *Reid*, p 414.

<sup>31</sup> *Reid*, p 413.

<sup>32</sup> One of the Commissioners, Professor Gretton, considers that this figure is too high and that the threshold sum should be £200,000.

2.16 Accordingly we recommend that:

3. (1) **Where a person dies intestate survived by a spouse or civil partner and issue the spouse or civil partner should have a right to the**

**whole estate if less than the threshold sum. Any excess over the threshold sum should be divided equally, half to the spouse or civil partner and half to the issue.**

(Draft Bill, section 2(3))

- (2) **The threshold sum should be £300,000.**

(Draft Bill, section 2(8))

- (3) **Scottish Ministers should have a duty to review the threshold sum annually and have the power to alter it from time to time by statutory instrument.**

(Draft Bill, section 9)

### **A right to buy the family home?**

2.17 In the discussion paper we noted that: "One of the undoubted benefits of the existing system of prior rights is that the surviving spouse or civil partner is entitled to the dwelling house (or a share of it) which belonged to the deceased and is therefore unlikely to be forced to move out of the family home".<sup>33</sup> We suggested that under our proposed scheme this desirable policy objective could be met by giving the survivor an entitlement to acquire the family home and its contents in satisfaction, or partial satisfaction, of his or her share of the estate. Even where the house and its contents were more than the survivor's share we thought that he or she should be entitled to acquire them on paying the balance to the estate. There was support for this proposal from a majority of our respondents.

2.18 However, on further reflection we have decided not to make such a recommendation. The threshold sum has been set at £300,000 to ensure that in all but the most exceptional cases it will more than cover the net value of the deceased's right in the family home. Indeed, it will ensure that in the vast majority of cases the surviving spouse or civil partner will inherit the whole of the estate.<sup>34</sup> There is therefore no need for a right to buy as the surviving spouse will inherit the property as part of her inheritance. The right to buy would only be necessary where the deceased was the sole owner of a house worth more than £300,000 or his one half *pro indiviso* share of the property was worth more than £300,000 ie the family home was worth £600,000 or more. Where the deceased owns property of such value, it is very unlikely that he would die intestate. In these circumstances we have taken the view that a statutory system under which a surviving spouse or civil partner can purchase the family home and its contents would be disproportionate to the mischief that it would be designed to address. Moreover, such a scheme runs counter to the principle that intestate succession rights should not be property-specific.

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<sup>33</sup> Para 2.56.

<sup>34</sup> See discussion at paras 2.7-2.16.

## Survivorship destinations

2.19 As we have seen,<sup>35</sup> approximately 42% of homes owned in Scotland are owned in common by spouses or civil partners. We understand from Registers of Scotland that in about three quarters of these the title to the property includes a survivorship destination. This means that, on his death, the deceased's *pro indiviso* share passes automatically to the survivor.<sup>36</sup> In the discussion paper<sup>37</sup> we took the view that as a general rule in the case of a partial intestacy, any testamentary disposition in favour of a surviving spouse or civil partner should not be taken into account in respect of her rights of succession to the intestate estate. But cases of partial intestacy are extremely rare. On the other hand, survivorship destinations remain quite common yet it seems artificial to treat them as exercises of testamentary intention. Consultees were divided on the question of whether the surviving spouse or civil partner's share of the intestate estate should be reduced by the value of the property which passed to them by virtue of the destination.

2.20 Consider the following examples:-

### Example 1

H and W are equal co-owners of the family home. It is valued at £400,000. There is no survivorship destination. H has other assets worth £600,000. On H's death he is survived by W and issue.

H's share of house	£200,000
Assets	£600,000
Total	£800,000

W is entitled to the threshold sum of £300,000 plus half the balance of the estate. So W's share is £550,000; issue's share is £250,000.

### Example 2

H and W are co-owners of the family home. It is valued at £400,000. There is a survivorship destination. H has other assets worth £600,000. On H's death he is survived by W and issue.

H's share of house	nil <sup>38</sup>
Assets	£600,000
Total	£600,000

W is entitled to the threshold sum of £300,000 plus half the balance of the estate. So W's share is £450,000; issue's share is £150,000.

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<sup>35</sup> Para 2.10.

<sup>36</sup> This assumes that the deceased had not evacuated the destination.

<sup>37</sup> Paras 2.81-2.86.

<sup>38</sup> H's one half *pro indiviso* share, worth £200,000, passes to W by virtue of the survivorship destination.

It will be clear that if the value of the property which passed by virtue of the destination is not taken into account, in example 2 on H's death W receives property valued at £200,000 plus £450,000 ie £650,000. She is £100,000 better off than W in example 1 where the couple were co-owners but their *pro indiviso* shares were not subject to a survivorship destination.<sup>39</sup> In consequence, the issue in example 2 are prejudiced because H's one half *pro indiviso* share is subject to a survivorship destination.

2.21 The threshold sum before the estate has to be shared with the deceased's issue has been set at £300,000 largely to ensure that the surviving spouse or civil partner should be able to remain in the matrimonial or family home. This policy is achieved when there is a survivorship destination. In these circumstances, we do not think that a surviving spouse or civil partner should be entitled to the first £300,000 of the deceased's estate without taking into account the value of the property which passed under the survivorship destination. To fail to do so would also unduly prejudice the deceased's issue. To achieve this end, the threshold sum has to be reduced by the value of the property passing to the surviving spouse or civil partner by virtue of the survivorship destination.

Thus in example 2 the threshold sum of £300,000 is reduced by £200,000 so that W is only entitled to £100,000 before the estate has to be shared with the issue. This leaves £500,000 to be divided equally between W and the issue. W's share is therefore £100,000 + £250,000 ie £350,000 and the issue's share is £250,000. Given that the property which passed under the survivorship destination is valued at £200,000, on H's death W obtains property of a total value of £550,000 ie the same as W obtains in example 1. Similarly, the issue in example 2 will now share £250,000 ie the same as the issue in example 1.

2.22 Most estates will be less than £300,000. Nevertheless, the value of the share of the dwelling house passing by a survivorship destination must be deducted from the threshold sum of £300,000 in order to determine the threshold at which the estate is to be shared with the issue. Consider the following example:

H dies intestate. He is survived by W and issue. H's right in the dwelling house passes to W under a survivorship destination: it is valued at £150,000. The estate is valued at £200,000. To determine the threshold at which the estate is to be shared with the issue, the value of property which passed by virtue of the survivorship destination, £150,000, is deducted from the threshold sum of £300,000, giving her a threshold of £150,000. The remainder of the estate, £50,000, is then divided between W and the issue. W is therefore entitled to £175,000 (£150,000 + £25,000) and the issue share £25,000.

If the estate was only worth £50,000, W would be entitled to the whole estate as its value is less than the applicable threshold sum of £150,000 ie the threshold sum of £300,000 less £150,000, the value of the property passing under the survivorship destination.

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<sup>39</sup> As will increasingly be the situation.

Accordingly we recommend that:

4. **Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination does not exceed the threshold sum of £300,000, the threshold sum should be reduced by the net value of the deceased's right.**

(Draft Bill, section 3(3))

2.23 We must also consider the exceptional situation where the net value of the deceased's right in the dwelling house which passes to a surviving spouse or civil partner under a survivorship destination exceeds the threshold sum of £300,000. In these circumstances, several solutions are possible. We could simply reduce the threshold sum to nil and allow the surviving spouse or civil partner to share the whole of the estate equally with the issue without accounting for the balance of the value of the destination property. This would give the surviving spouse or civil partner a windfall at the expense of the deceased's issue. Alternatively, the whole of the net value of the deceased's right in the dwelling house could be deducted from the estate and the remainder, if any, taken by the issue. While this has the virtue of simplicity, if the estate was large this would give the issue a windfall at the expense of the surviving spouse or civil partner.

We favour a third solution which, if more complicated, seems more principled. The difference between the value of the destination property and the threshold sum is deducted from the value of the intestate estate and the surviving spouse is entitled to half of the remainder, if any. Because the surviving spouse or civil partner cannot be compelled to renounce any part of the property she owns by virtue of the survivorship destination, this entitlement is never to be less than nil. The issue are then entitled to the net value of the intestate estate less the sum, if any, due to the surviving spouse or civil partner. Consider the following examples:-

#### Example 1

H dies intestate survived by W and issue. His one half *pro indiviso* share of the dwelling house passes to W by virtue of a survivorship destination. The one half *pro indiviso* share is valued at £500,000. He leaves other property valued at £500,000. The difference between the value of the destination property and the threshold sum is £200,000. This has to be deducted from the value of the intestate estate of £500,000 which gives £300,000. W is entitled to half this sum ie £150,000. The issue are therefore entitled to the intestate estate minus the sum obtained by W from the estate (£500,000 - £150,000) ie £350,000. Given the value of the destination property, on H's death W receives property worth a total of £650,000 and the issue's share is £350,000. This is precisely how the estate would have been divided if H had died and his one half *pro indiviso* share of the dwelling house had not been subject to a survivorship destination.<sup>40</sup>

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<sup>40</sup> W would have received £650,000 ie £300,000 and £350,000 (half of the balance of £700,000) and the issue's share would have been £350,000.

## Example 2

H dies intestate survived by W and issue. His one half *pro indiviso* share of the dwelling house passes to W by virtue of a survivorship destination. The one half *pro indiviso* share is valued at £500,000. He leaves other property valued at £100,000. The difference between the value of the destination property and the threshold sum is £200,000. This has to be deducted from the net value of the intestate estate ie £100,000 less £200,000. This would give a negative value. Because W cannot be compelled to renounce the property she owns as a result of the survivorship destination, any negative value is to be treated as nil. W is therefore entitled to nothing from the estate. But since W receives nothing from the estate the issue are entitled to the whole of the net intestate estate, ie £100,000. Given the value of the destination property, on H's death W receives property worth a total of £500,000 and the issue share £100,000. If H's one half *pro indiviso* share of the dwelling house had not been subject to a survivorship destination W would have received £450,000, ie £300,000 + £150,000 (half of the balance of £300,000) and the issue would have shared £150,000. Thus in this case W receives more and the issue share less because of the survivorship destination. But this only arises when the value of the destination property exceeds £300,000 *plus* the value of the net intestate estate, and in these circumstances our solution ensures that the children are at least entitled to the whole of the net intestate estate.

2.24 Accordingly we recommend:

5. **Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum of £300,000, any excess over this sum should be deducted from the deceased's intestate estate. The surviving spouse or civil partner should be entitled to one half of the resulting amount, if any; the rest of the estate should be shared by the issue.**

(Draft Bill, section 3(4))

## Separated spouses

2.25 There was almost unanimous support for our preliminary view that there should be no change in the existing law whereby separation (whether or not a decree of judicial separation or a separation order has been obtained) has by itself no effect on the succession rights of spouses or civil partners.<sup>41</sup>

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<sup>41</sup> Until 2006, where a wife obtained a decree of judicial separation and died intestate her husband had no right to any estate she had acquired after the date of the decree of separation: in terms of s 6 of the Conjugal Rights (Scotland) Act 1861 the property passed as if he had predeceased her. There was no equivalent rule for a husband who had obtained a decree of separation. The 1861 Act was repealed by Sch 3 to the Family Law (Scotland) Act 2006: s 6 was the only remaining operative provision. Of course where the couple are *de facto* separated, this could have important implications under the current law as the housing and furniture prior rights depend on the surviving spouse or civil partner being ordinarily resident in the dwelling house at the date of the deceased's death: see discussion at para 2.2.

We therefore recommend that:

**6. Separation by itself should continue to have no effect on the succession rights of a spouse or a civil partner.**

**Spouse or civil partner not parent of all the children**

2.26 As under the current law, it will be clear that in many cases the effect of our proposals will mean that the surviving spouse or civil partner will inherit all of the deceased's estate. Public opinion supports this result where the surviving spouse or civil partner is the parent of the deceased's children<sup>42</sup> and the deceased's children appear to accept that their own mother or father should succeed to the estate. To some extent they do so because they have an expectation that they will succeed to the estate when the surviving parent dies. The initial transfer of wealth between the spouses is perceived to be "a temporary and transitional stage" since it is expected that the wealth will eventually flow from the surviving spouse on her death to the next generation.<sup>43</sup> However, concern has been expressed that the rule could lead to injustice when the surviving spouse or civil partner is *not* the parent of the deceased's children.<sup>44</sup> Consider the following:

2.27 H and W marry. They have two children, A and B. W dies. H inherits all of W's property. H marries W2 who has a child, C, from a previous marriage. H dies and all his property is inherited by W2. When W2 dies intestate all of her property is inherited by C. A and B inherit nothing even though W2's wealth was inherited from their father, H.

2.28 For Professor Norrie, "It is not self-evident that this is a just outcome, or one acceptable to Scottish society generally, or one that is justified by any principle identified by the Law Commission - except the sterile tyranny of simplicity."<sup>45</sup>

2.29 There is no doubt that this scenario raises difficult issues. Since it is estimated that reconstituted families - stepfamilies - will be the norm in the UK by 2010,<sup>46</sup> the problems are also of practical significance. In these circumstances, Dot Reid has observed that "the complex territory of reconstituted families may require complex law"<sup>47</sup> and rejects our proposal that the same rules should apply whether or not the surviving spouse is a step-parent. Yet a large majority of our respondents agreed with us on the basis that the succession rights of the surviving spouse or civil partner arise from their *status* as the deceased's spouse or civil partner and not on whether they were the parent of the deceased's children.<sup>48</sup> As Professor Norrie explains what we have here "is not really a competition between surviving spouse or civil partner and issue but between a first family (represented by issue) and a second family (represented by the surviving spouse) and it may well be that the balance of interests in that situation needs to be struck differently from the balance in those intra-familial competitions which will presumably be the norm".<sup>49</sup> But he recognises that the range of circumstances involving reconstituted families is infinitely great so that in the absence of a discretionary judicial remedy it is impossible to have a rule which

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<sup>42</sup> *Intestate Succession and Legal Rights* (Scot Law Com CM No 69,1986) app II; *Succession Opinion Survey*.

<sup>43</sup> See generally M Munro "Housing wealth and inheritance" (1988) 17 *Journal of Social Policy* 417.

<sup>44</sup> See for example K McK Norrie "Reforming Succession Law: Intestate Succession" (2008) 12 *EdinLR* 77; *Reid*.

<sup>45</sup> *Ibid* at p 79.

<sup>46</sup> S O'Neill, *Wills and Awareness of Inheritance Rights in Scotland*, Scottish Consumer Council (2006).

<sup>47</sup> *Reid*, p 409.

<sup>48</sup> We received a similar response in 1990.

<sup>49</sup> *Op cit* at 79-80.

fairly differentiates between the claims of the first and second families. He concludes: "The Commission has been unable to identify a clear principle upon which a departure from its simple spouse-takes-virtually-everything rule might be based. And nor can I."<sup>50</sup>

2.30 We remain convinced that no distinction should be made between different types of surviving spouse or civil partner. The succession rights of the surviving spouse or civil partner arise solely from their legal relationship with the deceased. Put another way, a spouse or civil partner does not have to "earn" the right to have part of the deceased's estate: the right arises from their status. The rule that a surviving spouse or civil partner will inherit the whole estate unless it is more than the threshold sum will therefore apply regardless of whether the survivor is a second or subsequent spouse or civil partner and is not related to the deceased's issue. This is not to deny the difficulties which may arise in reconstituted families. But it must always be remembered that the rules of intestate succession are default rules. They apply only when the deceased has not left a will. No one is better qualified than the deceased to decide whether in his particular circumstances he should provide for his first as well as his second or subsequent family. If he decides to do so, he simply makes a will to that effect. The fact that the rule on what will happen if he dies intestate is simple and easily understood should help him make that decision. We therefore recommend that:

7. **A surviving spouse or civil partner should continue to be treated in the same way with regard to succession to an intestate estate whether or not the spouse or civil partner was a second or subsequent spouse or civil partner or the parent of the deceased's children.**

#### **Step-children and accepted children**

2.31 Under the current law a step-child of the deceased or a child accepted by the deceased as a child of the family has no rights on intestacy. Given the increase in the numbers of reconstituted families, there is considerable public support that those children should have rights in respect of their step-parent or acceptor's intestate estate.<sup>51</sup> There is also no doubt that the current law can produce harsh anomalies. For example:

H and W marry. They have a child, A. H dies shortly after A's birth. A year later W marries H2. H2 accepts A as a child of the family. W and H2 have two children, B and C. In terms of upbringing and emotional relationship, the three children are treated identically by W and H2. Yet only B and C will succeed to H2's estate if H2 dies intestate. H2 must make a will if he wishes A to succeed to part of his estate. The anomaly is compounded by the fact that since H2 has accepted A as a child of his family, he owes A the same obligation of aliment as he does B and C.<sup>52</sup>

2.32 On the other hand, intestate succession is traditionally a matter of blood relationships or their legal equivalents such as adoption. This brings an important degree of certainty to the law. If this concept of child was extended to include the deceased's non-biological children, some, at least, of this certainty would be lost. There is the practical difficulty of

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<sup>50</sup> Ibid.

<sup>51</sup> See para 2.72 of the discussion paper.

<sup>52</sup> Non-biological relationships are also recognised in other areas of the law. For example, an accepted child is a member of the deceased's immediate family for the purposes of damages for wrongful death under the Damages (Scotland) Act 1976.

establishing whether or not the deceased had – perhaps many years before he died – accepted the child to a sufficient degree. If acceptance was sufficient for all purposes, then in our example not only could A succeed to H2's estate but also to the intestate estate of H2's parents and other members of H2's family. Unlike adoption, acceptance does not – and should not – destroy the legal relationship between the child and the biological parent. So in our example, A would retain succession rights in H's parents' intestate estates and if acceptance was enough to create succession rights in respect of H2's family, to that extent A would be better off than if A had been adopted by H2.

2.33 Our provisional view was that the disadvantages of a change in the law outweighed the advantages particularly as the acceptor could make provision for the child by the simple expedient of making a will.<sup>53</sup> A large majority of our consultees agreed. To include step-children and accepted children would make the law over complicated, create practical uncertainties and "produce as many anomalies as it may be argued the present law has".<sup>54</sup> Professor Norrie's eloquent conclusion reflects the majority's view:

"The Commission is only slightly less convinced on the question of whether a child accepted by the deceased as a member of his or her family (typically a step-child) should be treated in the same way as a blood child. The simplifying instinct of the Commission, which makes it incline to a negative answer, is sound. The concept of the 'accepted child', though well-known in, for example, the law of aliment, is ill fitted to the absolutist traditions of intestate succession where certainty and predictability are far more important than in needs-based alimentary claims. 'Acceptance' is not determined by something as simple as a DNA test but by a minute examination of how the family organised itself and the interrelationship between its members. Perhaps an even more serious objection to giving step-children and accepted children rights on intestacy is that the class of children would then be entitled to two (or perhaps even more) inheritances: the more a family is reconstituted, the more disparate will be the claims of children depending upon their life-experiences. This would be bad social policy."<sup>55</sup>

2.34 Accordingly we recommend that:

8. **The deceased's step-child and a child accepted by the deceased as a child of the deceased's family should continue not to be treated as the deceased's child for the purposes of the law of intestate succession.**

### **Deceased survived by neither spouse or civil partner nor issue**

2.35 In the 1990 Report we took the view that where the deceased died without a surviving spouse or civil partner or issue the existing rules of division of the estate between the deceased's other relatives should continue. That remains our opinion. This means that where the deceased dies without a surviving spouse or civil partner or issue, the order of succession is as follows:

- (a) parents and siblings. Here the surviving parent or parents take one half of the estate and the surviving brothers or sisters the other half;

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<sup>53</sup> See para 2.80 of the discussion paper.

<sup>54</sup> Response from Messrs Balfour and Manson.

<sup>55</sup> *Op cit* at pp 78-79.

- (b) siblings (where there are no surviving parents);
- (c) parents (where there are no surviving siblings);
- (d) uncles and aunts;
- (e) grandparents;
- (f) siblings of any of the deceased's grandparents;
- (g) remoter ancestors, generation by generation successively: the siblings of an ancestor having priority over more remote ancestors.

2.36 We also consider that the doctrine of representation should continue as under the current law. Thus for example, the deceased's nephew or niece will represent their parent who was the deceased's brother or sister and who predeceased the deceased: and the deceased's cousins will represent their parent who was the deceased's uncle or aunt and who predeceased the deceased. The effect of representation is to prevent the succession opening to categories of relative further down the list. For example, if a person dies survived by his nephew (the son of a predeceasing sister) and an uncle, the nephew inherits the whole intestate estate since he represents his mother, the deceased's sister: because a sibling is further up the list than an uncle or aunt, the succession does not open up to the uncle.

2.37 Under the current law collaterals (siblings) of the half-blood are excluded if there are collaterals of the full-blood. Moreover, as a result of the doctrine of representation, the deceased's half-brother will be excluded by the children of a full-brother who had predeceased the deceased. In the 1990 Report we recommended that collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.<sup>56</sup> Given the even greater prevalence of reconstituted families, this remains our view. There also continues to be unanimous support for this recommendation among our respondents. Accordingly we recommend that:

- 9. **With the exception of the deceased's spouse or civil partner, the existing list of categories of relative should continue but collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.**

(Draft Bill, section 6)

**Distribution to heirs as individuals (*per capita*) and as members of a family line (*per stirpes*)**

*Where the deceased is survived by issue*

2.38 When the deceased leaves a surviving spouse or civil partner and issue, we are recommending that the surviving spouse or civil partner should inherit the whole estate unless it is more than the threshold sum: then the surviving spouse or civil partner should

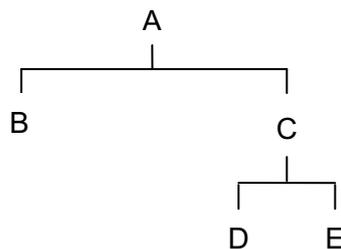
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<sup>56</sup> Recommendation 4.

inherit the first £300,000 and any balance should be shared between the surviving spouse or civil partner and the deceased's issue. When the deceased dies without a surviving spouse or civil partner the whole intestate estate should be shared between the deceased's issue. Issue means the descendants of the deceased however remote but in practice the deceased's issue will be his children, grandchildren and, increasingly, great grandchildren. Where a person, A, is the issue of the deceased and A also has issue, we propose that as under the current law, A's survival of the deceased precludes A's issue's entitlement to a share of the deceased's intestate estate.

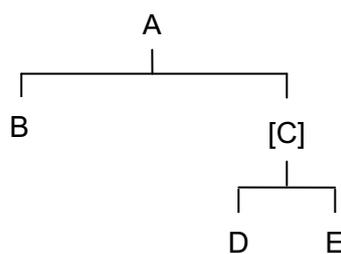
2.39 Consider the following examples:

(1)



A dies intestate. He is survived by his son B and his daughter C. B and C are A's issue. C has two children, D and E. D and E are A's grandchildren and consequently A's issue. They are also the issue of their mother C, A's daughter. Because D and E are the issue of A's issue, ie his surviving daughter C, C's survival precludes their entitlement to a share of the value of A's intestate estate. Therefore the persons entitled to share A's intestate estate are his surviving children, B and C.

(2)

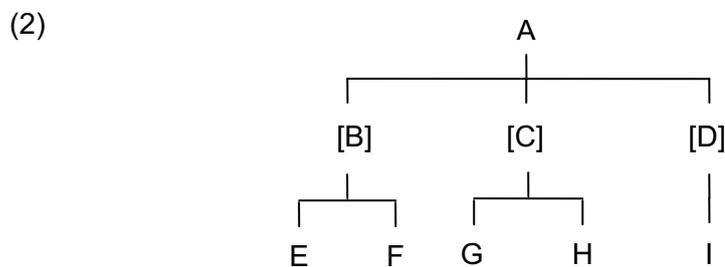


A dies intestate. He is survived by his son B and his grandchildren, D and E, whose mother C, A's daughter, predeceased A. D and E are A's grandchildren and consequently A's issue. They are also the issue of their mother C, A's daughter. Although D and E are the issue of A's issue, ie his deceased daughter C, because C has not survived A's death, D and E as A's issue are entitled to a share of the value of A's intestate estate. Therefore the persons entitled to share A's intestate estate are his surviving child, B, and his surviving grandchildren, D and E.

2.40 If in example (2), B had a son, F, while F is A's grandson and consequently A's issue, F is not entitled to share in his grandfather A's estate. F is also the issue of B, A's son. Because F is the issue of A's issue ie his surviving son B, B's survival precludes F's entitlement to a share of the value of A's intestate estate.

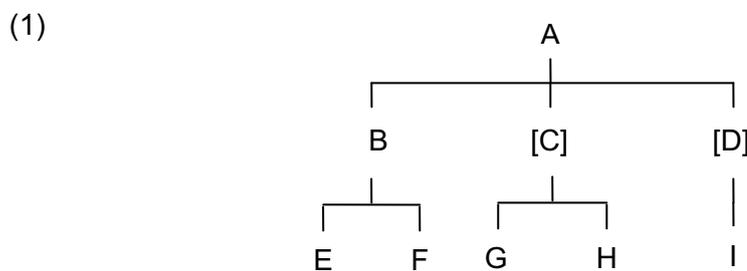
2.41 Where two or more issue are entitled to share the deceased's intestate estate, the size of their share will depend on their degree of relationship to the deceased. Where all the entitled issue are related in the same degree, we propose that as under the current law each will have an equal share (division *per capita* ). Consider the following examples:

- (1) A dies and is survived by his three children B, C and D. The three children are the entitled issue. As they are in the same degree of relationship to the deceased each is entitled to an equal share of the value of the estate. Consequently each will receive a third of the value of A's intestate estate.



A dies. His children B, C and D predeceased him. He is survived by B's children E and F, C's children, G and H, and D's child I. The five grandchildren will be the entitled issue. As they are in the same degree of relationship to the deceased, each is entitled to an equal share of the value of the estate. Consequently each grandchild will receive a fifth of the value of A's intestate estate.

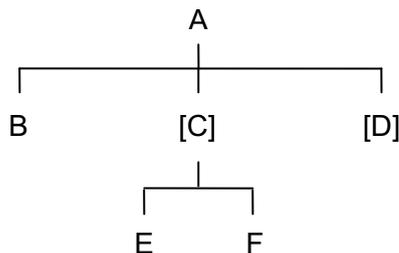
2.42 Where the entitled issue are not related in the same degree, we propose that as under the current law the distribution should be as members of a line of the family (division *per stirpes*). Consider the following examples:



A dies. He is survived by his child B. His children C and D predeceased him. He is also survived by B's children E and F, C's children G and H and D's child I. While all the grandchildren are A's issue E and F are not entitled to a share of A's intestate estate. E and F are also the issue of A's surviving child

B. Because E and F are the issue of A's issue ie his surviving son B, B's survival precludes E and F's entitlement to a share in the value of A's intestate estate. The entitled issue are therefore A's child B, his grandchildren G and H (the children of C) and I (the child of D). Because the entitled issue are in different degrees of relationship to A the division of the estate is *per stirpes*. The estate is divided into three as A is survived by a child and the issue of two predeceased children, C and D. B receives one third of the value of the estate, G and H share their deceased parent C's one third of the value of the estate and therefore each receives one sixth of the value of the estate and I receives her deceased parent D's one third of the value of the estate.

(2)



A dies. He is survived by his child B. His children C and D predeceased him. He is also survived by C's children E and F. D died without any children. The entitled issue are A's son B and his grandchildren E and F. Although E and F are also the issue of A's issue (ie A's deceased child C) they are not precluded from being entitled to share in the value of A's estate since C did not survive A's death. Because the entitled issue are in different degrees of relationship to the deceased the division is *per stirpes*. The estate is divided into two as A is survived by a child and the issue of one predeceased child, C. B receives one half of the value of the estate and E and F share their deceased parent B's one half of the value of the estate and therefore each receives a quarter of the value of the estate.

2.43 As we have indicated, these rules reflect the position under the existing law. A large majority of our respondents did not see any reason why the current law should be changed.

2.44 Therefore we recommend that:

10. (1) **Where a person who is the deceased's issue survives the deceased, that person's survival should preclude any of that person's issue from being entitled to share in the value of the deceased's estate.**

(Draft Bill, section 2(5))

- (2) **Where two or more entitled issue are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.**

(Draft Bill, section 7)

*Where the deceased is not survived by issue*

2.45 Where the deceased is survived by a spouse or civil partner and no issue, we have proposed that the surviving spouse or civil partner should inherit the whole value of the deceased's intestate estate.<sup>57</sup>

2.46 Where there is no surviving spouse or civil partner, we have taken the view that the current order of succession and distribution should continue.<sup>58</sup> Accordingly, the estate will be divided between the deceased's parents and siblings. The parents will take one half of the estate and the surviving brothers and sisters the other half. Where there are no surviving siblings or their issue, the parents will be entitled to the value of the whole estate. Where there are no surviving parents,<sup>59</sup> the siblings will share the value of the whole estate. Because of the doctrine of representation, the deceased's nephews and nieces may be entitled to share in the estate.

2.47 In the absence of parents or siblings, the succession opens to the deceased's aunts and uncles: again because of the doctrine of representation, the deceased's cousins may be entitled to share in the estate. Failing aunts and uncles, the estate opens to grandparents and remoter ascendants.<sup>60</sup> For example:

A dies. He is survived by his nephews, C and D, who are the children of his deceased brother B. He is also survived by his uncle, E. As a result of the doctrine of representation C and D are entitled relatives. Because they represent their father B (who was A's brother) the succession does not open to E as uncles are lower on the list than siblings. Since C and D are in the same degree of relationship to the deceased, the estate is to be divided equally between them and therefore each receives half the value of the estate.

2.48 Where there are two or more entitled relatives, the estate will be shared equally between them when they are in the same degree of relationship to the deceased: when they are not in the same degree of relationship to the deceased, the estate is to be divided between them *per stirpes*. Consider the following examples:

- (1) A dies. He is survived by his mother and father. He is also survived by his brother B and C who is his mother's daughter from a previous marriage. The entitled relatives are A's mother and father, B and C since under our proposals half-blood collaterals are to be treated in the same way as full-blood. A's parents therefore share half the value of the estate equally between them and B and C also share half the value of the estate equally between them as they are in the same degree of relationship to the deceased.
- (2) A dies. He is survived by his brother B and sister C but not by his parents. He is also survived by his nephews, E and F, the children of A's deceased sister D. The entitled relatives are B, C and, as a result of the doctrine of

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<sup>57</sup> The doctrine of representation does not apply in respect of a spouse or civil partner.

<sup>58</sup> Paras 2.35-2.37.

<sup>59</sup> The doctrine of representation does not apply in respect of a parent.

<sup>60</sup> See para 2.35. The doctrine of representation does not apply in respect of grandparents or remoter lineal ancestors.

representation, E and F. Because the entitled relatives are not in the same degree of relationship to the deceased, the division of the estate is *per stirpes*. The estate is divided into three since A was survived by two siblings and the issue of a deceased sibling. Thus B and C each receive one third of the value of the estate. E and F are each entitled to half their deceased mother D's share and therefore each receive one sixth of the value of the estate.

As we have indicated, these rules reflect the position under the existing law. A large majority of our respondents did not see any reason why the current law should be changed.

2.49 Therefore we recommend that:

11. (1) **The current rules on distribution between parents and siblings and remoter relatives should continue to apply.**

(Draft Bill, section 4(3))

- (2) **The current doctrine of representation should continue to apply.**

(Draft Bill, section 5)

- (3) **Where two or more entitled relatives are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.**

(Draft Bill, section 7)

## Renunciation

2.50 It seems to us to be axiomatic that either before or after the death of the deceased, a person should be able to renounce his or her entitlement to the deceased's estate. Thus for example, a surviving spouse or civil partner could renounce her right to inherit the estate. The effect of a renunciation should be to treat the spouse or civil partner as not having survived the deceased. This would mean that in our example the deceased's issue would share the whole estate.

2.51 Because a person who renounces is to be treated as not having survived the deceased, the effect of renunciation may be that his issue become entitled to share the estate. This may defeat the purpose of the renunciation. Consider the following example:

A dies. He is survived by his brother B and a sister, C, who is handicapped. Before A died, B renounced his entitlement to a share of A's estate. B does so in order that C should inherit the whole estate. B has a son, D. The effect of the renunciation is that B is treated as not having survived A. But because of the doctrine of representation D is entitled to B's share. This defeats the purpose of the renunciation.

2.52 In these circumstances we have taken the view that in a renunciation, a person should also be able to renounce the entitlement of their issue to the estate.<sup>61</sup> The renunciation must be express and its effect is that the issue will be treated as not having survived the deceased.

2.53 Where a person renounces, this either increases the share of the existing heirs or opens the succession to the next set of entitled relatives. Unlike the current law, the provisions in the Bill have been drafted to ensure that the renounced estate does not fall immediately to the Crown.

2.54 Accordingly we recommend that:

**12. (1) Before or after the deceased's death a person should be able to renounce any entitlement to the deceased's intestate estate and should be treated as if he or she had not survived the deceased.**

**(2) A person should be able expressly to renounce the entitlement of that person's issue to the deceased's intestate estate and that person's issue should be treated as if they had not survived the deceased.**

(Draft Bill, section 8)

2.55 At present the Crown has the right to claim any intestate estate to which no surviving relatives of the deceased can be found to succeed.<sup>62</sup> We received no representations for any change. Accordingly we recommend that:

**13. The Crown should continue to have the right to claim any intestate estate to which no surviving relatives of the deceased can be found to succeed.**

(Draft Bill, section 10)

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<sup>61</sup> We take the view that the renunciation must be in respect of all the issue. For example, A has two children, B and C. A can renounce both his right to succeed to his father's intestate estate and the rights of B and C to succeed to their grandfather's intestate estate as their grandfather's issue. But A cannot renounce B's right to succeed while enabling C to continue to succeed as issue of the grandfather.

<sup>62</sup> Section 7 of the 1964 Act.

# Part 3            Protection from Disinheritance

## Introduction

3.1     As we pointed out in the discussion paper,<sup>1</sup> in one sense persons cannot be disinherited as no-one has an indefeasible right to succeed to another person's estate. However, when a person dies intestate the law identifies the members of the deceased's family who are his heirs and who are entitled to succeed to the estate. These are, of course, default rules and are displaced if the deceased has made a will when the estate will be distributed to the beneficiaries whom the deceased has chosen in his will. To the extent that the beneficiaries are different from those who would have succeeded if he had died intestate, the latter could be said to have been disinherited. Further, it is argued by some that certain relatives of the deceased, for example a spouse or a civil partner or children, have a moral right to inherit at least a share of the deceased's estate. If the deceased fails to make provision for them in his will, such persons may feel that they have been disinherited. While neither rationale is entirely compelling, nevertheless the idea of disinheritance is one in general use. The public attitude surveys in 1979, 1986 and 2005 have consistently shown strong support for providing some protection from disinheritance. Until his death, the deceased owed his surviving spouse or civil partner an obligation of aliment. At the very least, it would be surprising if he were free to leave her destitute by bequeathing all his property to a third party. Conversely, where the deceased leaves the whole of the estate to a surviving spouse or civil partner, a substantial proportion of those responding still thought that any children of the deceased should be entitled to claim a share.<sup>2</sup> Again we think that few would argue with this, at least where the deceased owed the child an obligation of aliment at the date when he died. For these reasons we think that complete freedom to test ie to dispose of one's estate by will is not a viable option for the basis of reform.

## Surviving spouse or civil partner

3.2     Under the current law, the protection of a spouse or civil partner from disinheritance takes the form of legal rights. The surviving spouse or civil partner's legal rights is the right to a sum of money equal to one third of the value of the deceased's net moveable estate if the deceased is survived by issue or to one half of its value if there are no surviving issue. By restricting the deceased's freedom to test in this way, the law attempts to ensure that the surviving spouse or civil partner will not be destitute if the deceased had decided not to make provision for the survivor in the will. Where a testamentary disposition contains a provision in favour of a spouse or civil partner, it is deemed to be in satisfaction of their legal rights.<sup>3</sup> The beneficiary must elect to take the testamentary provision or claim legal rights. Legal rights can also be claimed out of an intestate estate but only after satisfaction of the surviving spouse or civil partner's prior rights.

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<sup>1</sup> At paras 3.1-3.3.

<sup>2</sup> 1986 40%; 2005 53%.

<sup>3</sup> Unless the will contains an express provision to the contrary: s 13 of the 1964 Act and s 131(4) of the Civil Partnership Act 2004.

3.3 It is generally accepted that this system is flawed. First, legal rights are only exigible from the net moveable estate. There is very little, if any, protection when the estate consists largely of heritage as the deceased is free to test on heritable property without restriction. On the other hand if the estate is largely moveable, the deceased's freedom to test is restricted to half of his moveable property if there are no issue and only a third where there are. Second, both assets and obligations have to be classified as either heritable or moveable: heritable debts are then in the first place set against heritable property and likewise moveable debts against moveable property. This complicates the administration of the estate. Third, legal rights are rigid. They do not take into account the recipient's needs, resources or conduct and the claims of the recipient cannot be balanced against those of the testamentary beneficiaries. Fourth, legal rights vest in the spouse or civil partner on the date the deceased died: this is also true of any testamentary provisions in their favour. In this situation a choice has to be made between legal rights and the testamentary provisions. But the right to choose is only brought to an end by the long negative prescription ie 20 years after the date of death of the deceased. This can result in long delays in winding up estates. Finally, it appears that legal rights are rarely claimed. In research for her article, Dot Reid found that out of 73 law firms which responded to her questionnaire, 68% of the experienced executry practitioners had not encountered a testate estate in which legal rights had been claimed and a further 28% had only encountered this situation once or twice.<sup>4</sup>

3.4 Nevertheless, on consultation there remained very strong support for the proposal that a surviving spouse or civil partner should continue to be protected from disinheritance. While legal rights would provide capital for an indigent surviving spouse or civil partner, a majority of respondents considered that they were inherent in her legal relationship with the deceased ie they were an attribute of the survivor's status as the deceased's spouse or civil partner rather than her needs. Moreover, a large majority was adamant that this protection should take the form of a fixed share of the deceased's estate: it should be rule based and not involve the intervention — and discretion — of the courts. In other words, respondents were prepared to accept a degree of rigidity in the protection rather than have a court-based scheme. The Society of Trust and Estate Practitioners, for example, considered that "a fixed share system is fundamental for the purposes of clarity and ease of application without recourse to court."<sup>5</sup>

3.5 We agree that a surviving spouse or civil partner's protection should continue to take the form of a fixed share of the value of the deceased's estate. While this could mean that in some cases an indigent survivor may still have insufficient funds for her needs or that a very wealthy survivor will receive a gratuitous windfall at the expense of more deserving testamentary beneficiaries, there is an overwhelming consensus among our consultees that a court-based discretionary system must be avoided. A degree of rigidity has to be accepted if the protection is to take the form of a clear and simple rule.

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<sup>4</sup> Reid, p 399 fn 57.

<sup>5</sup> For a discussion of the possible merits of a court-based discretionary system see H Hiram, "Reforming Succession Law: Legal Rights" (2008) 12 EdinLR 81.

Accordingly we recommend that:

- 14. The protection of a surviving spouse or civil partner from disinheritance should take the form of a right to a fixed share of the value of the deceased's estate.**

(Draft Bill, sections 11 and 15)

3.6 All our respondents agreed that a surviving spouse or civil partner should be entitled to a fixed share of the value of the whole of the deceased's estate. Unlike the current system of legal rights, the new fixed share would include heritable as well as moveable property. Not only does this simplify the law but given the value of heritable property the right will often be greatly enhanced. Conversely, where the deceased's estate largely consists of heritable property, the deceased's freedom to test is substantially reduced. It is therefore important that the size of the fixed share should attempt to reflect both the interests of the survivor and the deceased's freedom to test on his own property. In the discussion paper we thought that this would be achieved if the survivor's fixed share amounted to 25% of what she would have obtained if the deceased had died intestate.<sup>6</sup> A large majority of our consultees agreed that to link the survivor's fixed share to her rights on intestacy was a welcome simplification of the law. Moreover, they also agreed that 25% was a reasonable proportion to provide the survivor with some protection while at the same time recognising the importance of the deceased's freedom to test. With one exception, all our respondents were content that the survivor's fixed share should be called a legal share. Therefore we recommend that:

- 15. A surviving spouse or civil partner's fixed share should be called a legal share and amount to 25% of what he or she would have inherited if the deceased had died intestate.**

(Draft Bill, sections 11 and 15)

3.7 The following examples show how the new system would work:

(1) H dies leaving a house worth £300,000 and moveable property worth £100,000. In his will he leaves all his property to a charity. H is survived by W. There are no children. W's legal share is 25% of what she would have inherited if H had died intestate. Since H has died without issue, W would have inherited the whole estate, £400,000, if H had died intestate. Therefore her legal share is £100,000.

(2) H dies leaving a house worth £200,000 and moveable property worth £50,000. In his will he leaves all his property to his only son, A. H is survived by A and W, A's step-mother. W's legal share is 25% of what she would have inherited if H had died intestate. Since the estate is less than the threshold sum of £300,000 W would have inherited the whole estate, £250,000. Therefore her legal share is £62,500.

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<sup>6</sup> Para 3.46.

(3) H dies leaving a farm valued at £3,500,000. In his will he leaves the farm to his eldest son, A. H is survived by A, his daughter B, and his wife, W. W's legal share is 25% of what she would have inherited if H had died intestate. Since the estate is worth more than the threshold sum of £300,000 W would have inherited the first £300,000 and half the remainder ie £1,600,000 giving a total of £1,900,000. Therefore her legal share is £475,000.

### *Renunciation*

3.8 As example 3 in the preceding paragraph illustrates, the existence of a legal share which is exigible out of heritable as well as moveable property, may seriously undermine the deceased's testamentary intentions. These may have been done for legitimate business reasons as in the case of agricultural land and, indeed, other business property. We have taken the view that it is axiomatic that a spouse or civil partner can renounce her right to legal share either before or after the deceased's death. In this way, the testator will be able to ensure that his testamentary intentions will not be frustrated. We also considered that such a renunciation should not enlarge the legal share of the deceased's issue. The majority of our consultees agreed. Accordingly we recommend that:

- 16. A spouse or civil partner should be able to renounce, either before or after the deceased's death, the right to a legal share and such a renunciation should not enlarge the legal share of the deceased's issue.**

(Draft Bill, sections 14(1) and 17)

### *Effect of election to receive legal share*

3.9 Like existing legal rights, the right to a legal share from the deceased's estate would vest in a surviving spouse or civil partner when the deceased died. It is not a right which is personal to the survivor and should she die before she has received her legal share, the right will transmit to her executor. The surviving spouse or civil partner would, as now, have to elect between testamentary provisions and legal share. In the discussion paper we proposed that in the absence of a provision to the contrary in the will, payment of the legal share would disentitle the surviving spouse or civil partner from any other succession rights: for example rights under the deceased's will or rights to any intestate estate.<sup>7</sup> We thought that this disentitlement could best be achieved by deeming a surviving spouse or civil partner who received payment of the legal share to have predeceased the deceased in relation to all other rights of succession to the deceased's estate. This does not include survival for the purposes of a special destination which is a matter of property law rather than the law of succession. A large majority of our respondents agreed. Therefore we recommend that:

- 17. A surviving spouse or civil partner who elects to receive legal share should be treated as not having survived the deceased for all other purposes of succession to the deceased's estate.**

(Draft Bill, sections 13(2) and 16(2))

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<sup>7</sup> Paras 3.49-3.52.

3.10 We have taken the view that legal share applies to the whole of the deceased's estate, both heritable and moveable. It also applies when the deceased's estate is both testate and partially intestate. Since legal share is calculated as a proportion of what the survivor would have received if the deceased had died intestate, the value of the deceased's right in the dwelling house which passes by survivorship destination to the survivor will automatically have been taken into account.<sup>8</sup> Consider the following examples:

- (1) A dies. He leaves property worth £500,000. In his will he leaves W a legacy of £100,000 and the residue to a charity. There are no children. If A had died intestate she would have been entitled to the whole estate. Therefore W's legal share is £125,000. If she claims legal share she is treated as not having survived for the purpose of the legacy. Therefore she would obtain legal share valued at £125,000 but forfeit the legacy. On the other hand, if the legacy was £200,000, W would be advised to accept the legacy as her legal share is worth only £125,000.
- (2) A dies. He leaves property worth £1,000,000. He leaves his wife a legacy of £100,000 and the residue to his lover, L. A is survived by W, his son B, and L. If A had died intestate, W would have received the threshold sum of £300,000 and half the balance of £700,000 ie £650,000. Therefore her legal share is £162,500. It would be in W's financial interest to claim legal share albeit forfeiting the £100,000 legacy. On the other hand, if L predeceased A and the £900,000 residuary legacy fell into intestacy, W could claim the threshold sum of £300,000 and half the balance ie £600,000. She would also be entitled to the legacy as she has not claimed legal share.
- (3) A dies. He leaves property worth £1,000,000. He leaves legacies of £100,000 to his wife W, £890,000 to his lover, L and £10,000 to L's mother, M. There is no residuary legatee. M predeceases A and the £10,000 falls into intestacy. A is survived by W, his son, B, and L. As in (2) above, W's legal share is £162,500. It would therefore be in W's financial interest to claim legal share albeit forfeiting the legacy of £100,000 and the £10,000 which has fallen into intestacy. Because she will be treated as not having survived A when she receives legal share, prima facie the £10,000 intestate estate will be inherited by A's issue, ie his son, B.
- (4) A dies leaving moveable property worth £100,000. His one half *pro indiviso* share of the dwelling house he co-owns with W is valued at £300,000 and is subject to a survivorship destination in favour of W. A is survived by his wife, W, and his son, H. In his will he leaves all of his moveable property to his son and nothing to W. If A had died intestate, W would have been entitled to £50,000 as the effect of the special destination is to reduce the threshold sum to zero. Accordingly her legal share is £12,500. Her claim for legal share does not affect her right to A's one half *pro indiviso* share which was subject to the survivorship destination in her favour.

#### *Payment of legal share*

3.11 Legal share is the right to the payment of a sum of money out of the deceased's estate equal to 25% of the amount the surviving spouse or civil partner would obtain if the deceased had died intestate. A majority of respondents agreed with us that the survivor

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<sup>8</sup> Discussed at paras 2.19ff.

should have no right to acquire the former matrimonial or family home and its contents. However, we can see that when a large proportion of the estate consists of a business, such as a farm, it may be difficult for assets to be realised immediately in order to pay the legal share to the survivor. In these circumstances, we think that the executor should be able to apply to court for an order stipulating when the legal share should be paid, including provision for payment by instalments. Consequently we recommend that:

- 18. An executor should be entitled to apply to the court for an order providing when legal share should be paid to a surviving spouse or civil partner: this may include provision for payment by instalments.**

(Draft Bill, sections 13(3) and 16(3))

#### *Incidence of payment of legal share*

3.12 How should the liability for payment of legal share be borne by the beneficiaries? We take the view that the rule of incidence should be the same as that presently used for the payment of legal rights. The order of liability would therefore be: intestate estate first, then residue, then general legacies and finally special legacies. Within each category the burden would be borne *pro rata*. The following example illustrates the recommended rules:

A man dies survived by his civil partner. He leaves his car worth £25,000 to his brother, a legacy of £5,000 to charity A and a legacy of £15,000 to charity B. The residue of £5,000 is left to his former wife. The surviving civil partner's legal share is £12,500 ie 25% of the whole estate as he would have inherited the whole estate if the deceased had died intestate. The £12,500 would be payable as follows: former wife, £5,000 (residuary legatee); charity A £1,875 and charity B £5,625 (general legatees *pro rata*).

3.13 Accordingly we recommend that:

- 19. Legal share should be met from the estate in the following order:**

**intestate estate;**

**residue;**

**general legacies;**

**special legacies.**

**Within each category liability should be *pro rata*.**

(Draft Bill, sections 13(1) and 16(1))

## **Children and issue of the deceased**

### *Introduction*

3.14 Under the current law, the deceased's children (or issue of predeceasing children) have legal rights or legitim in relation to the deceased's estate. This is the right to a sum of money calculated on the basis of the value of the deceased's net moveable estate,

irrespective of the provisions of the deceased's will. Where the deceased is survived by a spouse or civil partner, legitim consists of a sum equal to one third of the value of the deceased's net moveable estate: but if there is no surviving spouse or civil partner the sum increases to one half of the value of the deceased's net moveable estate. The legitim fund is then shared between the children (or the issue of predeceasing children).

3.15 This scheme suffers many of the same defects as the current system of legal rights for surviving spouses and civil partners.<sup>9</sup> In brief these are:

- Where the estate largely consists of heritable property, legitim will offer little if any protection as the deceased is free to test on heritage. For example, a deceased can leave all his land to his eldest son while his other children receive nothing. On the other hand, when the estate largely consists of moveable property the deceased's freedom to test is seriously curtailed. And so for example, a widow cannot leave all her money to the daughter who cared for her without the risk that her other children will claim legitim out of half of her moveable estate. Moreover, when the deceased dies survived by dependent children, in the absence of another person who owes them an obligation of aliment, the amount of legitim may be quite inadequate to maintain the children.
- The law is complex given that both the assets and obligations have to be classified as either heritable or moveable.
- Legitim is rigid. Children are entitled to share in the legitim fund regardless of their needs, resources or conduct towards the deceased.
- The right to elect between legitim and a testamentary provision is only brought to an end by the long negative prescription ie 20 years after the death of the deceased.

3.16 As in the case of the surviving spouse or civil partner's legal rights, it appears that children do not often claim legitim.<sup>10</sup> There is little incentive to do so when the legatee is their own parent: they are more likely to do so where the legatee is not the children's parent, for example their step-parent or their father's cohabitant. Of course, children will often be reluctant to upset the deceased's testamentary provisions particularly at a time when they and the deceased's beneficiaries are distressed; later they may decide not to claim legitim in order to avoid potential family disputes. Indeed, it may be that people simply do not know that they are entitled to legitim from their parent's estate although executry practitioners usually ask for a discharge of legitim from the deceased's children who are not beneficiaries under the will. In these circumstances we took the view in the discussion paper that the status quo was not an option.

#### *Options for reform*

3.17 In the discussion paper, we put forward the radical option that legitim should be abolished and not replaced by a system under which the deceased's children would have a

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<sup>9</sup> Para 3.3.

<sup>10</sup> Ibid.

right to a fixed sum to be paid from the deceased's estate.<sup>11</sup> Instead, there would be a scheme under which the deceased's dependent children would be entitled to a capital sum out of the deceased's estate<sup>12</sup> where the deceased's intestate heir<sup>13</sup> or testamentary beneficiary did not owe them an obligation of aliment. The capital sum would be calculated on the basis of what was required to maintain the child until he or she ceased to be dependent. Capital sum payments under this scheme could be substantial if the children were young and/or likely to be engaged in higher education or training. However, it would mean that after a child had reached the age of 25,<sup>14</sup> the child would no longer be dependent and would no longer have a right to be protected from disinheritance. In this Report such a child is described as an adult child. This proposal has proved to be very controversial and our respondents were almost evenly divided for and against it.

#### *The arguments for retention of a fixed legal share*

3.18 The arguments of consultees who were in favour of retaining children's rights (irrespective of their age) to a fixed share of their parent's estate as protection against disinheritance fall into the following categories:<sup>15</sup>

##### *(i) legal tradition*

3.19 A number of consultees simply argued that to abolish legitim would be to change a fundamental principle of Scots law which has existed for centuries. As Dot Reid observes:

"Stair affirms that 'the first rule of succession in equity, is the express will of the owner' but this rule is immediately qualified by natural obligations which exist between husbands and wives and between parents and children, for the man who does not provide for his own family is 'worse than an infidel'. The modified rule is therefore that 'the first member of succession in equity must be those of the defunct's family, and not those of his institution or choice'. Thus it was not possible to test at all on heritable property until 1868 and, from ancient times, a married man with a surviving spouse and children could only test on one third of his moveable property. This rule is preserved in modern Scots law, for children and spouses can still claim legal rights up to two thirds of the deceased's moveable property."<sup>16</sup>

3.20 Nevertheless, it should be remembered that until it was abolished by the Family Law (Scotland) Act 1985,<sup>17</sup> children were under a *legal* duty to aliment their parents if they became indigent. In these circumstances it could perhaps be argued that legitim was the counterpart of that legal obligation which, of course, no longer exists.

3.21 In restricting the deceased's freedom to test in this way consultees pointed out that Scots law resembles western civilian legal systems which have forced heirship. It was argued that to abolish legitim would place Scotland firmly in the Anglo-American legal systems with their emphasis on the deceased's complete freedom to test, albeit that this is often tempered by a court-based discretionary system to alleviate any consequent cases of

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<sup>11</sup> Paras 3.78ff.

<sup>12</sup> This scheme is discussed in detail at paras 3.65-3.99.

<sup>13</sup> For example the deceased's spouse or civil partner who had not accepted the child as a child of the family.

<sup>14</sup> The child would have ceased to be dependent at 18 if the child was not going to be engaged in higher education or training: see discussion at paras 3.67-3.70.

<sup>15</sup> For an excellent analysis of reasons for retaining a fixed share see *Reid*, pp 397-405.

<sup>16</sup> *Reid*, pp 398-9 (with footnotes omitted).

<sup>17</sup> Section 1(3).

hardship among the deceased's family and dependents. However, while legal tradition is a factor which is important in considering the options for reform, it cannot in itself be decisive.

*(ii) keeping wealth in the family*

3.22 Some respondents argued that legitim was necessary to ensure that children and their issue became entitled to a portion of the wealth built up by their parents and remoter ancestors over several generations. In short, succeeding generations have a claim to the assets built up by their antecedents and so have a legitimate expectation to succeed to some portion of their parent's estate. There is particular force in this argument when the deceased desires to transfer assets out of the family. But, in some cases the deceased may wish to keep specific property *within* the family and in order to do so desires to leave the property to only one of his children. In these circumstances, legitim may actually hinder a testator from keeping specific property of value, for example an art collection, within the family.

*(iii) moral duty to leave property to children*

3.23 Some of our respondents argued that parents have a moral duty to leave their property to their children. While the legal obligation to aliment children might finally end when they reached the age of 25, parents continue to owe a moral obligation to help and support them. This should extend to making testamentary provision for their children. For many people being a "good" parent involves passing something on to the next generation:<sup>18</sup> children are therefore entitled to a fixed portion of their parent's estate if the parent has been a "bad" parent by failing to do so.

3.24 Parents may well have a moral duty to help their adult children financially and there is no doubt that many parents make – and will continue to make – testamentary provisions for them. Nevertheless it can be asked why such a moral duty should become legally enforceable through legitim after the parent is dead, when it was not legally enforceable while the parent was alive.

3.25 If adult children no longer had legal rights, there is no doubt that this would increase the individual's freedom to dispose of assets as he or she wished: and to that extent it would favour the deceased's individualism over the claims of kinship. In an important passage Dot Reid argues that this "impetus towards greater individualism in family relationships may be anachronistic. It is certainly at odds with the tone of current political dialogue with its emphasis on family and community obligations as the foundations of civic responsibility and its call for increased intergenerational support."<sup>19</sup> She explains how current political rhetoric encourages the aged to be cared for by their families rather than by the state:

"The change has impacted most on women. It is estimated that informal care of the elderly by (usually female) family members is the largest care sector. Figures suggest that as much as 80% of elderly care in the UK comes from family members, and even in reconstituted families the 'dominant care relationship' is that of 'blood-related daughter for mother.'"<sup>20</sup>

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<sup>18</sup> J Finch and J Mason *Passing On; Kinship and Inheritance in England* (2000), p 41.

<sup>19</sup> Reid, p 399.

<sup>20</sup> Reid, p 403.

3.26 Dot Reid maintains that to strengthen the deceased's individualism by abolishing legitim would run counter to this political rhetoric which encourages children to assume their family responsibilities and look after their parents on a shared - often implicit - understanding that the children will inherit at least some of the family property in due course. This argument has considerable force when all the members of the family assume responsibility for the care of aged parents. But as she herself indicates often they do not. Instead the burden is taken up by the spouse or cohabitant of the deceased or one or two female children. If all adult children continue to have a right to a fixed sum from their parent's estate, there remains a risk that the deceased's testamentary intentions will be undermined where the deceased chooses to leave all of his estate to those members of the family who have in fact assumed their responsibilities and looked after him.

*(iv) public opinion*

3.27 There is a lot of public support for some protection for children against disinheritance. In the 1986 survey<sup>21</sup> 85% thought that children should receive an inheritance when everything was left to charity: 80% thought that a child should receive an inheritance when everything was left to another child: but only 40% supported claims by children where everything had been left to a surviving spouse. The ages of the children were not specified. In the 2005 survey,<sup>22</sup> 87% thought that a young child should have a claim on his parent's estate if left out of his will: 70% thought that adult children should have a claim and this rose to 77% if the adult child was excluded in favour of another child. Where everything was left to a surviving spouse, 54% thought that children should be entitled to a portion of the estate.

3.28 Executry practitioners have also told us that most parents accept that they are unable to disinherit their children completely and do not view this as unreasonable. If determined to disinherit their children, these practitioners can advise parents to manage their property in such a way during their lifetime that there is no moveable property upon which the children can claim legitim when they die.

3.29 In short, there remains strong support for children continuing to be entitled to a fixed share of their parent's estate although this substantially decreases when the beneficiary is the deceased's surviving spouse or civil partner. This is a most important argument for the retention of a fixed share for children. However at the time of the surveys the scheme under which dependent children could be entitled to a capital sum payment from the deceased's estate had not been developed. As we shall see<sup>23</sup> such payments could far exceed what children would receive by way of a fixed share of the estate. The existence of such a scheme might now temper support for a fixed share. Moreover, whatever the results of our surveys, there is some evidence of dissatisfaction with the principle that adult children should have an indefeasible right to a portion of their parents' estate.<sup>24</sup>

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<sup>21</sup> *Intestate Succession and Legal Rights* (Scot Law Com CM No 69,1986), app II.

<sup>22</sup> *Succession Opinion Survey*.

<sup>23</sup> At paras 3.78-3.86.

<sup>24</sup> Recently there have been two petitions to the Scottish Parliament calling for the abolition of legitim for adult children.

### *The arguments for the abolition of a fixed legal share*

3.30 In the discussion paper we put forward the following arguments for the abolition of a fixed legal share for children:<sup>25</sup>

- A parent's obligation to aliment a child ceases when the child reaches the age of 18, or 25 if engaged in appropriate training or education:<sup>26</sup> a child no longer has a legal obligation to aliment an indigent parent. Parents should fulfil their obligation of aliment. Dependent children should therefore be entitled to a capital sum from their parent's estate if the beneficiary or intestate heir<sup>27</sup> does not owe the child an obligation of aliment.<sup>28</sup> The capital sum would be calculated on what was required to maintain the child until he or she ceased to be dependent. Even if a parent has a moral duty to support an adult child, the child should not be able to make a claim on his parent's estate which the child could not have made during the parent's lifetime.
- Most people have not inherited substantial assets. The property they have acquired during their lifetime has been a result of their own efforts. In that sense, it is not family property. Therefore a person should be free to dispose of his or her property as he or she wishes. This is, of course, subject to a surviving spouse or civil partner's legal share or the claim of a surviving cohabitant.
- Children now tend to be middle aged when their parents die and therefore do not require substantial assets to set them up in life: legitim may promote the interests of children who may be very comfortably off over beneficiaries, for example charities, chosen by the deceased.
- The obligation to relieve the needs of adult children rests on the state, not on the parent. In spite of the current "family" rhetoric, it remains the state's obligation to relieve the needs of aged parents.
- Legal rights are seldom claimed by children. While Dot Reid suggests that this is because legitim may be "the best kept secret in Scots Law",<sup>29</sup> it could easily be because most parents *in fact* leave property to their children.
- The prospective entitlement of a spouse or civil partner can be terminated before death by divorce or dissolution. Adoption apart, there is no legal machinery available for parents to dissolve the parent-child relationship so as to prevent their children's claims, although children may agree during the parent's lifetime to discharge their legal rights.

3.31 For these reasons, we took the preliminary view that children should cease to be entitled to a fixed share of their parents' estates. Dependent children would have the right to

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<sup>25</sup> Para 3.95.

<sup>26</sup> Family Law (Scotland) Act 1985, s 1(1) and (5).

<sup>27</sup> This would arise when the deceased's surviving spouse or civil partner was not the child's parent and did not owe the child an obligation of aliment because they had not accepted the child as a child of their family.

<sup>28</sup> See paras 3.71-3.76.

<sup>29</sup> Reid, p 396.

a capital sum from the estate where the beneficiary or intestate heir did not owe them an obligation of aliment. This would be calculated on the basis of what was required for the children's maintenance. Depending on the circumstances, the children could receive a sum which would be far greater than a fixed share.

3.32 In her paper, Dot Reid describes these arguments as representing "a statement of possessive individualism, firmly in the liberal tradition".<sup>30</sup> She goes on:

"From this foundation emerges a new version of inheritance law which prioritises the freedom (and rights) of the individual - as spouse and as property owner - over the claims of kinship. It could conceivably be characterised as extending the market principles which govern property transactions into family relationships: the prioritisation of freedom and the empowerment of the owner to choose how to dispose of assets, limited only by pre-existing legal obligations and the need to provide for young dependent children. Automatic provision for the current spouse fits with this theory in that a voluntarily assumed relationship can be deemed to represent the choice the deceased would have made for the disposal of his or her assets."<sup>31</sup>

3.33 If adult children were no longer entitled to a fixed share, there is no doubt that this would represent such a shift and would enhance the testator's freedom to dispose of his or her property. But this freedom could be used to enhance the interests of the family. For example, a person would be able to leave his business to the child who has been working with him: this would be particularly important in relation to agricultural businesses. Parents would be able to "generation skip" if a child was likely to dissipate his inheritance and leave the property to their grandchildren. If one of the children was handicapped, the parents could leave their estate to that child whose needs were greater than those of the other adult siblings. A daughter who had looked after her parents assiduously for many years could be left the entire estate without claims by other adult children who had not assumed any responsibility for the care of the deceased when they were alive. All these are perfectly sensible family transactions. If adult children did not have the right to a fixed share, none of these transactions would be challengeable.

3.34 It is true that this would also mean that being a child of the deceased was no longer sufficient to be entitled to a fixed share of the deceased's estate when the deceased had determined that the child was not to be a legatee or had died intestate knowing that all the estate would be inherited by his surviving spouse or civil partner. It would mean that the deceased could favour one child at the expense of another. And adult children would no longer have any protection from the whims of a capricious parent testator.

### *Conclusion*

3.35 As many of our respondents said, whether or not to abolish a fixed share for children is a question of social policy. Given the support for legitim among the public, the abolition of a fixed share for adult children might appear to be too radical a reform. But we recognise that there are strong arguments in favour of both options. In addition, our respondents were deeply divided. In these circumstances, this Commission does not feel that it can recommend one option above the other. This is ultimately a political question for the

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<sup>30</sup> Reid, p 396.

<sup>31</sup> Reid, pp 396-7.

Scottish Parliament. Accordingly, we have decided that this Report and draft Bill will provide two options. First, on the basis that children should be entitled to a fixed share of the deceased's estate. Second, on the basis that a fixed legal share for adult children should be abolished and dependent children should have the right to a capital sum payment from their parents' estate where the beneficiaries or intestate heir do not owe them an obligation of aliment: the capital sum is to be calculated on what is required to maintain the child until the child is no longer dependent.<sup>32</sup>

### **OPTION ONE: FIXED LEGAL SHARE FOR CHILDREN**

3.36 On the hypothesis that all children, adult or dependent, should be protected from disinheritance, all the respondents agreed that it should take the form of a fixed share out of their parent's estate: there was no support for a court-based discretionary scheme.<sup>33</sup> Moreover, it was agreed that the fixed share – to be known as legal share – should come from the whole of the deceased's estate and should no longer be restricted to the deceased's moveable property as is currently the case with legitim. Given that the legal share would be exigible out of heritable as well as moveable property, there was also general agreement that a balance had to be struck between protection for the family and the deceased's freedom to test. A large majority of consultees thought that our preliminary proposal that a child's legal share should amount to 25% of what he or she would have obtained if the deceased had died intestate struck a suitable balance.

3.37 Under the current law, by virtue of the doctrine of representation,<sup>34</sup> the issue of a predeceasing child of the deceased are entitled to the predeceased child's share of the legitim fund. We think that this policy should continue. As a child's legal share is to be 25% of what he would have obtained if the deceased had died intestate, the provisions of Part 1 of the draft Bill have to be used to calculate the child's entitlement. Under sections 2(3), (4) and (5), the deceased's heirs are his surviving issue and include the surviving issue of any child who predeceased the deceased.<sup>35</sup> Therefore if we provide that the deceased's issue – as opposed to children – are entitled to legal share, this will include not only the deceased's surviving children but also the surviving issue of any of the deceased's children who predeceased the deceased. In other words, Part 1 of the draft Bill is used to identify the deceased's entitled issue and to calculate the amount which each of the entitled issue would receive if the deceased died intestate: the legal share is simply 25% of that amount. There is no need to have recourse to the doctrine of representation. Consider the following examples:

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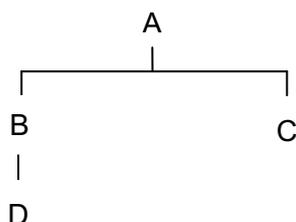
<sup>32</sup> Part 2 of the draft Bill in Appendix A contains provisions relevant to this option (and Part 3 of the Bill reflects option 2, which is discussed at paras 3.65ff).

<sup>33</sup> But see H Hiram "Reforming Succession Law: Legal Rights" (2008) 12 EdinLR 81.

<sup>34</sup> Section 11 of the 1964 Act.

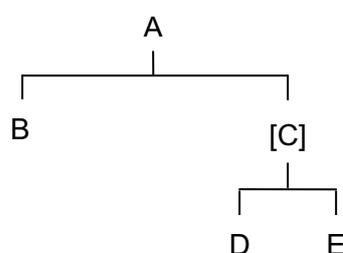
<sup>35</sup> See para 2.38 ff.

(1)



A, a widow, dies. She is survived by her daughters, B and C. B and C are A's issue. B has a son, D. D is A's grandson and consequently A's issue. In her will, A leaves all her estate to a charity. The estate is valued at £500,000. If A had died intestate, because D is the issue of A's issue, ie A's surviving daughter, B, B's survival precludes D's entitlement to a share of the value of A's estate:<sup>36</sup> therefore the entitled issue would be A's daughters, B and C. As they are in the same degree of relationship to the deceased each is entitled to an equal share of the whole value of the estate.<sup>37</sup> Consequently, if A had died intestate, B and C would each receive £250,000. Therefore each has a legal share of £62,500. Thus B and C would each receive £62,500 and the charity £375,000.

(2)



A, a widow, dies. She is survived by her daughter, B, and her grandchildren, D and E, who are the children of A's daughter, C, who predeceased A. B is A's issue. D and E, A's grandchildren, are also A's issue. In her will, A leaves all her estate to a charity. The estate is valued at £500,000. If A had died intestate, although D and E are the issue of A's issue, ie her deceased daughter C, because C has not survived A's death, D and E as A's issue remain entitled to a share of the value of A's intestate estate.<sup>38</sup> Therefore the entitled issue are A's child, B, and her grandchildren, D and E. As the entitled issue are in different degrees of relationship to the deceased, the estate would be divided into two as A is survived by a child and the issue of one predeceased child.<sup>39</sup> B would receive one half of the estate and D and E share their deceased parent B's one half of the value of the estate and therefore each receives a quarter. Consequently, if A had died intestate, B would receive £250,000 and D and E would receive £125,000 each. Therefore B's legal share is £62,500 and D and E's legal share is £31,250 each. Therefore B would receive £62,500, D and E would each receive £31,250 and the charity £375,000.

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<sup>36</sup> See recommendation 10(1).

<sup>37</sup> See recommendation 10(2).

<sup>38</sup> See recommendation 2.

<sup>39</sup> See recommendation 10(2).

3.38 As in the case of legal share for a surviving spouse or civil partner, an executor should be able to apply to court to allow payment to be deferred for a specified period or to be paid by instalments.

3.39 Therefore we recommend that:

**20. (1) The deceased's issue should be entitled to a fixed legal share of the deceased's estate.**

**(2) The fixed legal share should be a sum equal to 25% of the amount that the issue would have inherited if the deceased had died intestate.**

(Draft Bill, section 12)

**(3) An executor should be entitled to apply to the court for an order providing when legal share should be paid to the deceased's surviving issue: this may include provision for payment by instalments.**

(Draft Bill, section 13(3))

#### **Deceased survived by spouse or civil partner and issue**

3.40 Where the deceased is survived by a spouse or civil partner, we have recommended that on an intestacy the surviving spouse or civil partner will inherit the threshold sum of £300,000 and only then will the deceased's issue become entitled to share half of any excess.<sup>40</sup> Because the issue's legal share is 25% of the amount to which they would have been entitled if the deceased had died intestate, it follows that their legal share is nil where the estate is less than the threshold sum of £300,000 and the deceased is survived by a spouse or civil partner. Since 80% of married men and 70% of married women leave their estates to their surviving spouse,<sup>41</sup> it means that unless the estate is worth more than the threshold sum of £300,000 the deceased's children's legal share will in fact be of little, if any, value where the deceased is survived by a spouse or civil partner. Nevertheless, this result is consonant with our policy to provide a surviving spouse or civil partner with a large portion of the deceased's estate when the deceased died intestate. We think that when the deceased has left her the whole of his estate in his will, the surviving spouse or civil partner should inherit at least as much as she would have inherited if the deceased had died intestate. Under these proposals, when a surviving spouse or civil partner is the deceased's sole legatee, she will always succeed to the same or more than she would have inherited if the deceased had died intestate: this is because the children's legal share is only 25% of the amount they would have inherited if the deceased had died intestate and is only triggered when the estate is worth more than the threshold sum of £300,000. For example:

H dies. He is survived by W and two children, B and C. H's estate is worth £600,000. In his will he leaves the whole of his estate to W. If he had died intestate, W would have received £450,000 (the threshold sum of £300,000 + £150,000 ie half

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<sup>40</sup> Recommendation 3(1).

<sup>41</sup> See <http://www.hmrc.gov.uk/stats/inheritance-tax/table12-9.pdf>; M Munro, "Housing wealth and inheritance" (1988) 17 *Journal of Social Policy* 417; H E Jones *Succession Law*, Scottish Office Central Research Unit Papers (1990) 27.

of the excess) and B and C would have received £75,000 each. B and C's legal share is 25% of what they would have received if H had died intestate ie £18,750 each. Therefore W will receive £562,500 and the children £18,750 each.

3.41 This result is in stark contrast to the current law. If the deceased dies leaving a will in which he leaves all his property to his surviving spouse or civil partner, his children have the right to share a sum equal to one third of his moveable property as legitim. The surviving spouse will receive less than she would have done if the deceased had died intestate if her prior rights would have exhausted the estate before the children could claim legitim.<sup>42</sup> The new rules will prevent this anomaly arising.

3.42 Moreover, in our 2005 survey,<sup>43</sup> public support for protection of children from disinheritance fell away when the deceased's legatee was his surviving spouse or civil partner. While 54% considered that children should still be entitled to at least some portion of the estate, 40% thought that children should have no protection at all in these circumstances. We think that our proposals provide an acceptable compromise between the two positions. A large majority of our respondents agreed.

### **Accepted children**

3.43 There was general agreement among our respondents that children whom the deceased had accepted as children of the family should not be entitled to a legal share of his estate. For the reasons discussed above,<sup>44</sup> we have recommended that an accepted child is not to be treated as the deceased's issue for the purpose of being entitled to share the deceased's intestate estate. Given that a child's legal share should be 25% of what the child would have received if the deceased had died intestate, it logically follows that an accepted child cannot have a legal share in the estate of a person who has merely accepted the child as a child of the deceased's family. This furthers our policy decision that unlike adoption, acceptance is not *per se* sufficient to create succession rights in relation to the child's reconstituted family as it does not sever the child's rights of succession in relation to the child's biological family.

### **Effect of election to receive legal share**

3.44 The right to legal share should vest in the child when the parent dies. It is not a right which is personal to the child and should the child die before electing to receive legal share the right can be enforced by the child's executor. The child would, as now, have to elect between testamentary provisions and legal share. Accordingly, where a child elects to receive legal share, all the child's rights in the deceased's estate under the law of intestate succession and all testamentary provisions should be forfeited unless the will stipulates otherwise. We think that this disentitlement could best be achieved by deeming the child who has received payment of the legal share not to have survived the deceased in relation to all other rights of succession to the deceased's estate.<sup>45</sup> However, we do not think that the child's deemed non-survival should have the effect of enabling the child's issue to take

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<sup>42</sup> Where the spouse is entitled to the whole estate or is the residuary beneficiary she may be able to render the estate intestate by renouncing her legacy: see *Kerr, Petr* 1968 SLT (Sh Ct) 61.

<sup>43</sup> *Succession Opinion Survey*.

<sup>44</sup> Para 2.31-2.34. The same policy considerations also apply here.

<sup>45</sup> This does not include survival for the purposes of a special destination which is a matter of property law rather than the law of succession.

the forfeited provisions in the child's place by virtue of being the deceased's heirs on intestacy, conditional institutes under the deceased's will or deemed conditional institutes.<sup>46</sup> In the unlikely event that the deceased wished the child's issue to succeed to the testamentary provisions even if the child elected to receive legal share, the testator can provide expressly for this to happen in his or her will.

3.45 We therefore recommend that:

**21. Unless there is express provision to the contrary in the deceased's will, if a person elects to receive legal share:**

**(a) any other right of succession which that person has to the deceased's estate should be extinguished;**

**(b) that person should be treated, in relation to such other right, as not having survived the deceased;**

**(c) that person's deemed non-survival should not have the effect of enabling that person's issue to take the forfeited provisions in that person's place by virtue of the law of intestate succession, or as a conditional institute under the deceased's will or as a deemed conditional institute.**

(Draft Bill, section 13(2))

## **Renunciation**

3.46 Because the right to legal share can undermine the deceased's testamentary intentions which may reflect sound business or other reasons, it seems axiomatic that a child should be able to renounce the right to legal share.<sup>47</sup> Accordingly, it was our preliminary view in the discussion paper, that legal share could be renounced by a child before or after the parent's death and that this should not enlarge the legal share of any other potential claimant, for example the deceased's surviving spouse or civil partner.<sup>48</sup> All our respondents agreed. However, unlike the case where a person renounces her right to succeed on an intestacy, we take the view that the purpose of renunciation of legal share would be undermined if the renouncer's issue could claim legal share should she predecease the deceased. Accordingly we think that, on renunciation, the rights of the renouncer's issue to claim legal share to the deceased's estate should also be extinguished. Therefore we recommend that:

**22. (1) Before or after the deceased's death a person should be able to renounce the right to legal share.**

(Draft Bill, section 14(1))

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<sup>46</sup> See s 13(2) of the draft Bill in Appendix A.

<sup>47</sup> Once the child has reached the age of legal capacity.

<sup>48</sup> Para 3.110.

**(2) The effect of such a renunciation should be to exclude the right of that person's issue to legal share from the deceased's estate.**

(Draft Bill, section 14(2))

**(3) Such renunciations should not enlarge the legal share of any other person.**

(Draft Bill, section 12(3)(b))

### **Incidence of payment of legal share**

3.47 As we have recommended in relation to the payment of legal share to a surviving spouse or civil partner,<sup>49</sup> we think that the rules of incidence of payment of legal share to the deceased's issue should be the same as those currently used for the payment of legitim. The order of liability would therefore be: intestate estate first, then residue, then general legacies and finally special legacies. Within each category the burden would be borne *pro rata*.

3.48 We recommend that:

**23. A person's legal share should be met from the estate in the following order:**

**intestate estate;**

**residue;**

**general legacies;**

**special legacies.**

**Within each category liability should be *pro rata*.**

(Draft Bill, section 13(1))

### **Collation**

3.49 Collation arises where a parent has transferred money to a child as an advancement of the money which the child would obtain when the parent dies as the child's share of the legitim fund. The doctrine requires children who are claiming legitim to collate such advances in order to make a nominal enlargement of the legitim fund which is to be divided between them. Its purpose is to provide an element of fairness when distributing the legitim fund between the *children* who are claiming: if only one child claims, she is not obliged to collate any advances made to her during the parent's lifetime.<sup>50</sup>

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<sup>49</sup> Paras 3.12-3.13.

<sup>50</sup> *Coats's Trs v Coats* 1914 SC 744.

3.50 In *Coats's Trustees v Coats*, the Lord President (Strathclyde) famously attempted to explain the theoretical basis of the doctrine.<sup>51</sup>

"*Collatio bonorum inter liberos* is an obligation incumbent, by the law of Scotland, on children...who are actually claiming their share of the legitim fund, to compel other children who are also claiming on the fund to bring into the computation advances which they have received from their father during his lifetime. It is an equitable doctrine introduced for the purpose of securing equality in the distribution of the legitim fund among the children who are actual claimants on the fund. It has no place among others than children. Its basis is a double fiction. It assumes that the father has paid a part or the whole of his indebtedness at a time when no relationship of debtor and creditor existed between the father and the child. It further assumes that the payment is made out of the legitim fund although confessedly the legitim fund is at the time non-existent. Now it is apparent that a doctrine which rests on a foundation so narrow and so purely artificial is not susceptible of what is called logical extension."

3.51 The whole basis of the doctrine therefore rests on the theory that on a parent's death a child has a *right* to a share of the legitim fund. If a parent performs part or the whole of this obligation during his lifetime by making an advance to one of his children from what is assumed to be the legitim fund, then fairness to the children to whom he has not made such a payment demands that the advance is collated should the recipient elect to claim legitim. But this is unnecessary if all the other children elect to discharge their right to claim legitim after their parent dies. Conversely, if the recipient does not elect to claim legitim, the other children cannot compel him or her to do so and accordingly the advance the child has received cannot be collated to increase the value of the legitim fund. Since the obligation to collate arises when a child claims legitim it applies in relation to intestate as well as testate estates.<sup>52</sup>

3.52 Our proposed legal share is a child's right to a sum equal to 25% of the sum the child would have inherited if his or her parent had died intestate. It is not analysed as a right to share a fund which is part of the estate and which is discharged as if it were a debt the parent owed his or her child. It is not envisaged that a parent would be able to discharge the child's right to legal share by advancing property to the child during the parent's lifetime. We reject the concept of a fictional *inter vivos* discharge by the testator of his or her child's right as a consequence of the transfer of property to the child from a notional fund within the parent's patrimony.<sup>53</sup> In short, the two assumptions on which collation is based do not arise and the doctrine is therefore not applicable. Accordingly, there is no place for the existing doctrine of collation in the proposed system of legal share and it will fall when legitim is abolished.

3.53 The question arises whether we should have a doctrine which is an "equivalent" of collation in that any child who claims legal share should have to account for the value of any gratuitous transfers of property which the child had received from the deceased parent during the parent's lifetime. In our discussion paper we asked whether a new reformed scheme of collation should be introduced or whether collation should be abolished without any replacement.<sup>54</sup> The scheme we had in mind would have created a notional "children's

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<sup>51</sup> Ibid at 748-9.

<sup>52</sup> *Meston*, pp 61-64. Collation does not apply to the division of the free estate amongst children.

<sup>53</sup> Express lifetime discharges of the right to claim legal share would be competent: see para 3.46.

<sup>54</sup> Proposal 44, para 4.35.

fund" consisting of a combination of the children's intestate shares and lifetime transfers which would be divided equally among the children but any child taking a share on intestacy would have to impute his or her lifetime transfers. As legal share is based on a proportion of the intestate share the scheme would also have applied to legal share claims by children against a testate estate. As explained in paragraph 3.58 we favour abolition of collation without replacement, but if a "collation type" scheme were to be introduced it should be simpler and apply only to legal share claims by children against a testate estate. Each claimant would have to deduct any lifetime gifts from his or her legal share and so be entitled from the estate to only the balance. The rationale would be to protect the parent's testamentary intentions by making it not worthwhile for those who had got substantial lifetime gifts to claim legal share as well. We do not see the need to adjust intestate shares to take account of lifetime gifts.

3.54 The following examples show how the simpler possible replacement scheme would work:

(a) W, a widow, dies leaving 3 children, X, Y and Z. She leaves her estate of £120,000 to X. During her lifetime she had given £3,000 to Y and £12,000 to Z. Y and Z's legal share is 25% of what they would get if W had died intestate. Thus their legal share is £10,000 each. Since Y has already received £3,000 Y's legal share will be reduced to £7,000. Z has already received £12,000: as this is in excess of Z's legal share, Z will not claim it. X will receive £113,000.

(b) W, a widow, dies leaving 3 children, X, Y and Z. Her estate is £120,000. She leaves £90,000 to her neighbour, N, and the residue to X. During her lifetime she had given Y £3,000 and Z £12,000 but had not given anything to X. The children's legal share is £10,000 each. X takes the legacy. Y's legal share is £7,000 and Z will not claim. The legal share is paid out of residue. Consequently X receives the residue worth £23,000 and N receives the legacy of £90,000.

(c) During his lifetime T transfers £500,000 to his daughter D. T dies leaving his estate of £500,000 to his son, S, so as to treat the two children equally. He is survived by D and S. Without collation D can claim legal share of £62,500 as well as keeping her lifetime gifts. As D's gifts are greater than her legal share she will not claim it. The son, S, therefore takes the whole estate.

(d) During his lifetime T transfers £500,000 to his daughter D, his favourite child. T dies leaving his estate of £500,000 to D. He is survived by D and his son, S. The children's legal share is £62,500 each. S receives £62,500. As D's legacy is greater than her legal share she will not claim. She will receive £437,500 and retain the £500,000 given to her during T's lifetime.

(e) During his lifetime T transfers £100,000 to his only child, S. He tells S that he will receive nothing when he dies. T dies leaving his estate of £100,000 to a charity. S's legal share is £25,000. Since the legal share is less than the £100,000 inter vivos gift, S will not claim and the charity will receive the whole of the legacy of £100,000.

3.55 As these examples show, taking account of inter vivos transfers when making a claim for legal share can help to uphold the testator's intentions and protect the chosen beneficiaries. But the system does not necessarily create equality between the deceased's

children: it simply prevents those who have received lifetime gifts from being able to ignore them if they claim legal share. And as example (d) illustrates, apparently unfair treatment will continue since a child cannot be compelled to claim legal share. Indeed the greater the unfairness, the less likely it is to be redressed through some form of "collation".

3.56 There are also difficult practical issues that would have to be resolved to arrive at a workable scheme. Limiting the new scheme to gifts made within a specified period before the deceased's death would be arbitrary. What should the period be? And gifts made shortly before the period began would escape, however large they were. But without any time limit, records of gifts made decades ago would have to be kept for possible use by the executors should a legal share claim be made. Delays in administration would occur while executors sought evidence of gifts having been made to claimants and then arranging for them to be valued. What sort of gifts should be included? Birthday, Christmas and conventional gifts of a reasonable amount should probably be exempted,<sup>55</sup> but what would be reasonable for succession purposes? While payments made in fulfilment of the deceased's obligation of aliment should also be exempted, what of an allowance paid to a child aged 25 or over when he was embarking on his career? Would payment of the cost of a wedding or a holiday count? Assuming that the property is to be valued at the date of transfer,<sup>56</sup> further unfairness may arise depending on whether or not its value increased or decreased between that date and the date of death. At present where a grandchild claims legitim he or she must collate not only gifts made to him or her but also an appropriate proportion of any gifts made to his or her parent, the deceased's predeceasing child.<sup>57</sup> Would this rule have a place in the new scheme? All these issues could be solved by further detailed provisions but in our view these would make the scheme disproportionately complex to the mischief it is intended to resolve.

3.57 Moreover, there are reasons of principle why such a system should not be introduced. If the policy of the law is to respect the deceased's testamentary intentions, that is an argument for not extending legal share to children. However, assuming that children are to have a right to legal share, where a parent intends to disinherit a child as a *quid pro quo* for an *inter vivos* transfer of property (as in examples (c) and (d) in paragraph 3.54), a more direct solution is for the parent to insist on a discharge from the child of his right to claim legal share before transferring the property to him.<sup>58</sup>

3.58 The majority of those responding to our question in the discussion paper were in favour of the abolition of collation without replacement. Our Advisory Group was also of this view as few, if any of them, had encountered collation in practice. In their view it was almost obsolete law. In the 1990 Report this Commission recommended that there should be no requirement to "collate" when claiming legal share.<sup>59</sup> It considered that the purpose of the law of succession was to distribute what remains of the patrimony of deceased persons after their death and not to attempt to remedy any injustices which might be thought to have occurred during their lifetimes. It is recognised that a new system of "collation" could operate better to preserve the testator's intentions and the interests of the chosen

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<sup>55</sup> Such gifts are exempted from challenge on subsequent bankruptcy of the donor: Bankruptcy (Scotland) Act 1985, s 34.

<sup>56</sup> Valuing the gift at the date of the donor's death could lead to complex tracing provisions.

<sup>57</sup> Section 11(3) of the 1964 Act.

<sup>58</sup> We recommend that lifetime discharges are competent and do not enlarge the amount claimable by other children: see para 3.46.

<sup>59</sup> Para 3.37, recommendation 11.

beneficiaries. But the justice achieved is at best rough and productive of arbitrary results. As a method of achieving fairness in the financial treatment by the deceased of his children, it is of limited effect and given the complexities envisaged in operating such a system its introduction would seem disproportionate to the mischief it is intended to resolve. In these circumstances we have decided to continue with the policy in the 1990 Report and recommend that:

**24. There should be no requirement to collate advances and other benefits as a condition of claiming legal share.**

**Legal share for spouse, civil partner and issue**

*Interest on legal share*

3.59 At present interest is payable on the legal rights of a spouse, civil partner or issue for the period from the date of the deceased's death until payment.<sup>60</sup> There is no fixed rate; the rate the court will award is based on the rate the estate earned on the assumption that it had been managed prudently,<sup>61</sup> but other factors are taken into consideration.<sup>62</sup> In the 1990 Report this Commission recommended use of a specified rate for legal share as that would be more convenient for executors and claimants. The specified rate was to be capable of being varied by the Secretary of State.<sup>63</sup> We no longer consider this to be appropriate. The assets which make up an estate will vary widely. Some will typically earn relatively high rates of return (such as a holiday flat) but others may earn no interest at all (for instance, the deceased's books or car). We therefore favour retaining the common law rule which allows for the particular mix of assets in an estate to be taken into consideration in determining an appropriate rate of interest. In our view a fixed rate would, on occasion, require payment of interest at a rate which is substantially out of line with the rate earned by a prudently managed estate. Also, any fixed rate would require to be kept under periodic review, especially during periods when, as now, interest rates in the wider economy are changing relatively rapidly. The need for frequent orders to revise the fixed rate would weigh against the undoubted simplicity and convenience of such a system. We therefore favour the retention of the current common law rules, which will be applied to legal share in the same way as they apply at present to legitim and legal rights. Further, in Part 4 below we recommend that a cohabitant's entitlement in respect of a testate estate is the appropriate percentage of a spouse's legal share. The interest provisions for legal share would therefore apply to the cohabitant's award.<sup>64</sup>

3.60 We recommend that:

**25. Interest should be payable on legal share as it is currently payable on legal rights and legitim from the date of the deceased's death until payment.**

(Draft Bill, section 50(2))

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<sup>60</sup> Delay on the part of the claimant may result in no interest being awarded: *Wick v Wick* (1898) 1F 199.

<sup>61</sup> *Kearon v Thomson's Trs* 1949 SC 287.

<sup>62</sup> See *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 25, para 795.

<sup>63</sup> Para 3.28 and recommendation 8(d) at para 3.29.

<sup>64</sup> See para 3.87 for interest in relation to a dependent child's entitlement to a capital sum payment.

### *The exclusion of certain kinds of property from legal share*

3.61 It is a fundamental tenet of our proposals that legal share for both the deceased's surviving spouse or civil partner and the deceased's issue should be exigible from the whole of the deceased's estate, heritable as well as moveable property. This has been done not only to simplify the law but also to reflect the increase in value of heritable property so that in many cases it is by far the most valuable part of the deceased's estate.

3.62 These proposals have caused concern particularly among the farming community and owners of rural estates. Because legal rights and legitim are only exigible from moveable property, the deceased is free to test on his heritable property. A farmer is therefore able to leave his farm to the child who has worked and is happy to continue to work the farm without fear that this arrangement will be undermined by claims by his surviving wife and the other children for payment of legal rights and legitim respectively. Such settlements, it is argued, would no longer be possible if the right to legal share was extended to include heritable property. Not only is there the danger of fragmentation of the land but because farmers are often asset rich but cash poor it is contended that payment of legal share would cause serious financial difficulties for estates and agricultural businesses.

3.63 In these circumstances it was not surprising that respondents<sup>65</sup> who represented agricultural interests argued strongly that agricultural land, landed estates and agricultural businesses should be excluded from the deceased's estate for the purpose of legal share. On the other hand, all the other respondents who considered the issue took the view that there was no reason in principle why an exception should be made for business property in general and agricultural property in particular. For example, no exception exists for the purpose of financial provision on divorce or dissolution of a civil partnership. It was also pointed out that farms and other agricultural businesses are often held as companies or partnerships. The deceased's interest in such undertakings will therefore take the form of shares or a partnership account. Since shares and the partnership account constitute moveable property they are therefore subject to claims for legal rights and legitim under the current law. Yet this does not appear to have given rise to any significant problems. In these circumstances, it is difficult to see why such problems would arise if legal share was introduced.

3.64 There is no doubt that our proposals have given rise to concern among the agricultural community. On reflection we feel that the concern is largely misplaced. First, a child can renounce the right to legal share at any time before or after the deceased's death. Second, while a spouse or civil partner will be entitled to legal share, most farmers' wives are aware of and support the farm being inherited by one of their children: we envisage that in these circumstances it will become standard practice for them to renounce their right to legal share on marriage or shortly thereafter. Even if a spouse, civil partner or child elects to receive payment of legal share, we have provided that an application can be made to court by the deceased's executor for the sum to be paid in instalments thereby reducing the financial difficulties which may arise in order to pay the sum due.<sup>66</sup> The fact that the deceased's interest in an agricultural business often takes the form of moveable property

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<sup>65</sup> These included NFU Scotland, the Scottish Rural and Property and Business Association Ltd, the Scottish Estates Business Group and Messrs Turcan Connell. We also received comments from individual farmers and farmers' wives.

<sup>66</sup> See recommendations 18 and 20(3).

and is subject to legal rights and legitim claims under the current law confirms our view that our proposals will not, in practice, have any serious detrimental effect on the farming and landed estates sector. Therefore we recommend that:

**26. Businesses, including agricultural farms and estates, should not be excluded from claims for legal share.**

**OPTION TWO: THE RIGHT OF A DEPENDENT CHILD TO A CAPITAL SUM PAYMENT FROM THE DECEASED'S ESTATE**

3.65 In the discussion paper we outlined a scheme whereby dependent children would be entitled to a capital sum payment from those parts of their deceased parent's estate that were not inherited by those owing an obligation of aliment to the children.<sup>67</sup> This entitlement was to replace legitim (and its associated rules, such as the doctrine of collation *inter liberos*) and aliment *jure representationis*). Opinion on consultation was divided and those responding also criticised the scheme on points of detail and gaps in provision. The scheme we now put forward takes account of those comments.<sup>68</sup>

3.66 Our proposal is not a true alimentary scheme because, in the interests of finality for the liable beneficiaries or heirs on intestacy, any award would take the form of a capital sum which would be incapable of variation later should the child's circumstances change. Also, unlike aliment, the needs and resources of the liable beneficiary or heir on intestacy would not generally be taken into account,<sup>69</sup> and the period for which it would be awarded would run from the date of the parent's death until the determination of the claim. It is therefore best regarded as a right of succession based on, or quantified according to, reasonable maintenance for the child. A proposal to this effect in the private international law context was made in our discussion paper which was agreed by all but one of those responding.<sup>70</sup> Characterisation as a right of succession means that under current Scots private international law rules a claim may be made against immovable property in Scotland (whatever the domicile of the deceased) and moveable property (wherever situated) where the deceased died domiciled in Scotland.<sup>71</sup>

**Dependent children**

3.67 Children entitled to claim from their deceased parent's estate under our scheme should be limited to those to whom the parent owed an obligation of aliment immediately before death. This follows from the underlying rationale of the scheme which is to ensure that children continue to receive the support from the deceased that they had previously enjoyed. In terms of the Family Law (Scotland) Act 1985 an obligation of aliment is owed by parents to their children<sup>72</sup> and by individuals to children whom they have accepted as children of their family.<sup>73</sup> In both cases the obligation of aliment lasts until the child is 18 but

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<sup>67</sup> Paras 3.80-3.91.

<sup>68</sup> Part 3 of the draft Bill in Appendix A contains provisions relevant to this option (and Part 2 of the Bill reflects option 1, which is discussed at paras 3.36-3.64).

<sup>69</sup> See recommendation 30(2).

<sup>70</sup> Proposal 52.

<sup>71</sup> These existing Scots (and English and Northern Irish) private international law rules would be changed if the UK decided to opt into the proposed EU regulation on Wills and Succession.

<sup>72</sup> Including adopted children and children where a parental order has been granted under s 30 of the Human Fertilisation and Embryology Act 1990 or s 54 of the Human Fertilisation and Embryology Act 2008.

<sup>73</sup> Section 1(1)(c) and (d) respectively.

will continue thereafter (but no later than the child's 25<sup>th</sup> birthday) as long as the child is reasonably and appropriately undergoing further education or training.<sup>74</sup>

3.68 A child may be owed an obligation equivalent to aliment under foreign law. Suppose for example a Scottish couple separate, with the father remaining here and the mother going to France with the children. She obtains a decree against the father for their support from a French court.<sup>75</sup> If the father died without making provision for the children we think our scheme should be available to ensure continuation of the children's support from his estate.

3.69 It was suggested on consultation that the test of eligibility should be one of actual dependency of the child on the parent immediately before the latter's death. Thus a 40 year-old disabled child who was unable to earn a living and had been supported by the deceased parent should be eligible to claim under the scheme. We would reject this because parents while alive are not under a legal obligation to aliment a dependent child irrespective of the child's age. It would be odd to impose such an obligation on the parent's estate after the parent dies. We acknowledge that most parents do support their adult disabled children to the best of their ability and also make provision for them in their wills. But that is a matter of choice, not legal obligation. Moreover, dependency would not be easy to define in legislation and it would be hard for a court to assess in practice whether or not the child in question was dependent. This would lead to more investigation of the pre-death situation and more litigation. In our discussion paper we raised the issue of protecting those dependent on the deceased more generally and asked whether protection should be extended beyond spouse and children to others, including dependants.<sup>76</sup> No commentator was in favour of extension.

3.70 We recommend that:

- 27. Children to whom the deceased owed an obligation of aliment (or an equivalent obligation under foreign law) immediately before death should be entitled to a capital sum payment from the deceased's estate.**

(Draft Bill, section 18(1)-(3))

In the rest of this section such children are referred to as dependent children.

### **Estate liable**

3.71 Under our proposed scheme the deceased's whole estate, heritable and moveable, testate and intestate, would be potentially available to meet claims of dependent children. For this purpose the estate should include property passing from the deceased to another person by virtue of a special destination in the title to the property.<sup>77</sup> But, and this is the key feature of our scheme, any estate passing to a person who owes the child an obligation of aliment (or an equivalent obligation under foreign law) would be exempt. The reason is that the deceased's obligation of aliment is being continued in a different way. Should the person

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<sup>74</sup> Section 1(5).

<sup>75</sup> In terms of Brussels I a maintenance action can be brought in the courts of the member state in which the child is habitually resident.

<sup>76</sup> Proposal 34.

<sup>77</sup> A dwelling house passing to the deceased's spouse or civil partner by way of a survivorship destination is taken into account for the purposes of legal share and cohabitants' claims as they are ultimately tied to a proportion of intestate shares: see paras 2.19-2.24.

who owes the child an obligation of aliment not meet it, any award would be based on the obligor's resources.<sup>78</sup> These would be his or her own means plus what had been inherited from the deceased's estate. The following examples illustrate this feature.

(1) A man dies survived by his wife and their two young children. He leaves his whole estate, valued at £150,000 to her. The children, although dependent, would have no claim on their father's estate, as the beneficiary, their mother, owes them an obligation of aliment.

(2) A man dies survived by his wife and their two young children. He dies intestate with an estate of £150,000. In terms of our recommended rules of intestacy the widow would succeed to the whole estate. The children, although dependent, would have no claim on their father's estate, as the heir, their mother, owes them an obligation of aliment.

(3) A woman dies survived by her second husband and her two young children (aged 8 and 10) from her first marriage. She leaves her whole estate, valued at £150,000 to her second husband who had accepted her children as children of his family on marriage some five years ago. The children, although dependent, would have no claim on their mother's estate, as the beneficiary, their stepfather, owes them an obligation of aliment as he had accepted them as children of his family.<sup>79</sup>

(4) A woman dies survived by her second husband and her two teen-aged children (aged 16 and 18 who are in full-time education at a boarding school) from her first marriage. She dies intestate with an estate of £150,000 which passes to her second husband. He had not accepted the children as children of his family. The children would have a claim on their mother's estate since the beneficiary, their stepfather, does not owe the children an obligation of aliment as he has not accepted them as children of his family.<sup>80</sup>

3.72 For this reason, we think that claims by dependent children will be rare. Most married parents with dependent children will leave their whole estate to their spouse who is the other parent or a person who has accepted them as children of the family. They trust them to use the estate, together with the surviving spouse's own resources, to aliment the survivor and their children and for the survivor to bequeath the parental wealth to the children. In the vast majority of cases such trust is not misplaced. Moreover, it is most unusual for a second spouse not to accept the other's children as children of the family if they are young and living in family with the natural parent.

3.73 One of the criticisms made on consultation was that the exemption for estate passing to an alimentary obligor, such as the children's other parent, failed to protect the children if the obligor later became bankrupt. The estate would be taken by the obligor's creditors instead of being available to aliment the children. Legal rights and legal share, it was argued, offered better protection in that the children would get a sum of money of their own. We accept that our scheme offers less protection in cases of bankruptcy. However,

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<sup>78</sup> Family Law (Scotland) Act 1985, s 4.

<sup>79</sup> The same result would occur if the woman had died intestate.

<sup>80</sup> On a much larger intestate estate, the children might succeed as heirs to half the balance of the estate over the threshold sum of £300,000. They would have to choose whether to accept their intestate shares or claim under the scheme.

personal bankruptcy is still relatively uncommon. Moreover, where the deceased is survived by a spouse and young children the estate would have to be over the threshold sum of £300,000 before the children got anything by way of legal share and quite substantial before it amounted to very much. Even with an estate of £500,000 the children's legal share is only £25,000 to be divided amongst them. If there were two children each would receive £12,500, equivalent to about 2-3 years' aliment.<sup>81</sup> By contrast, our scheme would entitle the children to a substantial capital sum sufficient to provide aliment throughout the period of their dependency. We think that the above disadvantage is more than outweighed by the generally superior protection under our scheme for children when the deceased's estate (or the bulk of it) is left to persons not obliged to aliment them.

3.74 Another similar objection was that the surviving parent or other obligor might take the estate and then refuse to fulfil his or her existing obligation to aliment the children. Legal share or legal rights, being money payable to the children themselves, avoided this problem. We think that the existing law provides sufficient procedures for assessing the child's later claim for aliment and enforcing payment of any court decree.

3.75 One suggestion put forward by the Faculty of Advocates was that the children's capital sum award should be treated like legal rights so that it would be assessed by reference to, and paid out of, the net estate but having priority over the testamentary beneficiaries or the intestate heirs.<sup>82</sup> We are grateful for this suggestion and adopt it. We discuss at paragraph 3.88 below the allocation of the child's capital sum payment amongst the liable beneficiaries.

3.76 We recommend that:

- 28. No right to a capital sum payment to a dependent child should exist in relation to any part of the deceased's estate (including property passing by way of special destination) which passes to an individual who at the date of the deceased's death was under an obligation to aliment the child (or an equivalent obligation under foreign law).**

(Draft Bill, sections 18(1) and 21)

### **Nature of a child's right**

3.77 We consider that a child's right to a capital sum payment should be a personal right. Thus if the child died before the amount due had been settled by negotiation or before an award was made by the court, the child's executors could not claim in respect of the period from the parent's death to the child's death. And clearly there can be no capital sum payment due in respect of any period after the child's death. These results follow the rule for aliment that a court will only award aliment for the present and future.<sup>83</sup> It will not award

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<sup>81</sup> With estates of this size and larger, children may be left substantial legacies in order to take full advantage of the inheritance tax nil rate band. If the children are left legacies, they would have to choose whether to accept them or claim under the scheme.

<sup>82</sup> This is the position for aliment *jure representationis*.

<sup>83</sup> *Alexander v Alexander* (1849) 12D 117; *Bruce v Bruce* 1945 SC 353. These cases deal with spousal aliment but the principle applies generally.

aliment in respect of past periods unless a right to that aliment has been established by a previous court decree or voluntary agreement.<sup>84</sup> We recommend that:

**29. A child's right to a capital sum payment should fall if the child dies before the payment has been agreed or awarded by the court.**

(Draft Bill, section 19(5))

**Quantifying the child's right**

3.78 The capital sum payment would be assessed by reference to the annual rate of aliment needed by the child and the likely period for which it was required. The rate of aliment should, like aliment due by a living obligor,<sup>85</sup> be what is reasonable in all the circumstances. One of the most important factors would be the needs and resources of the child. Needs would depend on the level to which the child had been alimented in the past and the family's position and lifestyle. The capital sum payment due to a dependent child under our scheme would be calculated by reference to the period from the parent's date of death to the date when the obligation would cease had the parent still been alive. Because aliment can continue beyond the child's 18<sup>th</sup> birthday if the child is reasonably and appropriately undergoing further education or training, the likelihood of this occurring would have to be brought into the calculation. Where a dependent child was owed an obligation under a law other than that of Scotland, support should be deemed to cease for the purposes of our scheme when the child attains the age limit set by the applicable foreign law or the 1985 Act, whichever comes first. This avoids the parent's estate being liable to adult children or for lifelong support under a more generous foreign obligation.

3.79 The child's resources would include any existing personal wealth and in the case of an older child, his or her actual or potential earnings. Suppose a widow dies intestate leaving three sons aged 29, 26 and 20. Her estate of £120,000 is divided equally amongst her sons so that they receive £40,000 each. Even though the 20 year old still had two more years at university the court is unlikely to award him a capital sum payment out of his brothers' shares. He has adequate resources, his inheritance of £40,000. Apart from the items mentioned above, the main resource of dependent children would be obligations of aliment owed to the child by others. There would be no hierarchy of alimentary liability. The court would take the existence of other obligors (and the probability of getting aliment from them) into account when deciding what was due from the estate. For example, a boy claims a capital sum payment from the estate of his mother who left all her estate to her second husband, the boy's stepfather, who had not accepted him as a child of his family. If the boy's natural father was alive, rich and willing to provide aliment (or the aliment could be easily enforced) then the court might decide that only a part of the child's requirements (or perhaps no part at all) should come from the mother's estate.

3.80 In deciding what amount of aliment is due by a living obligor, that person's needs resources and earning capacity are taken into account.<sup>86</sup> We think that these factors should in general be irrelevant in fixing the capital sum payment due to a dependent child by a

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<sup>84</sup> There is a limited statutory power in awarding future aliment to backdate the award on special cause shown to cover aliment for a period before the action was raised: Family Law (Scotland) Act, 1985, s 3. This could not apply where the child has died as an action for future aliment could not be raised.

<sup>85</sup> Family Law (Scotland) Act 1985, s 1(2).

<sup>86</sup> *Ibid*, s 4(1).

beneficiary of the parent's estate. A beneficiary who inherits part of the estate should thereby become liable for the child's capital sum payment only from that part of the estate; he or she should never be required to provide for the child out of his or her own personal wealth. The beneficiary's resources are therefore irrelevant. To this general rule we would make one exception, where the liable beneficiary or heir on intestacy is the deceased's surviving spouse or civil partner.<sup>87</sup> Surviving spouses or civil partners have a strong moral claim based on sharing wealth accumulated during the marriage or partnership and the financial and non-financial contributions they made to their life together. Moreover while he was alive, the deceased was under an obligation to aliment his spouse or civil partner.

3.81 In the discussion paper we proposed that there should be no percentage cap put on the sum that could be awarded to a child from the estate.<sup>88</sup> As we remarked, responsible parents should ensure that their dependent children will continue to be supported after their death, by leaving their estate to persons obliged to aliment the children or making some other arrangement, such as a trust, for the children. On consultation there was general agreement with this proposal. As far as beneficiaries of an estate are concerned, their legacies are pure bounty and should be available, in full if necessary, to meet the stronger moral claims of dependent children.

3.82 The liable beneficiaries or heir on intestacy of an estate should not be entitled to defeat or minimise a child's claim for a capital sum payment by offering to aliment the child in their own homes. This defence is available to a living obligor when the child is over 16,<sup>89</sup> but we do not think it should be extended to beneficiaries or heir on intestacy with whom the child may well have had no previous connection or relationship.

3.83 In general each child is entitled to an equal share of the legitim fund<sup>90</sup> and our new legal share would also treat all children equally. Our proposed scheme was criticised as allowing different amounts to be awarded to each child of the deceased. We regard the potential for differentiating between children as one of the advantages of our scheme. Suppose, for example, a woman left two sons aged 14 and 21. The younger son would very probably be entitled to a larger capital sum payment than his older brother. A drawback of legitim and legal share is that they are inflexible and do not take account of an individual child's needs.

3.84 In cases of aliment between living individuals the parties' conduct is not to be taken into account unless it would be manifestly inequitable to ignore it.<sup>91</sup> We think this rule should be extended to claims by children for a capital sum payment out of their deceased parents' estates under our scheme.

3.85 Concern was expressed on consultation that quantification of the child's lump sum would require complex calculations involving projected future needs and resources, rates of inflation and discounting for immediate payment. This, it was said, would lead to much effort and expense by the executors, the child and their respective legal advisers. We agree that

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<sup>87</sup> These would not have accepted the child as a child of their family: if they had, our scheme would not, of course, apply to any estate inherited by them: see para 3.71.

<sup>88</sup> Proposal 26(d) and para 3.87.

<sup>89</sup> Family Law (Scotland) Act 1985, s 2(8).

<sup>90</sup> At present children claiming legal rights may have to collate pre-death advances to them by their deceased parent which would make the amounts they received from the estate unequal: see paras 3.49-3.58.

<sup>91</sup> Family Law (Scotland) Act 1985, s 4(3)(b).

fixing an annual rate<sup>92</sup> for a child's future needs on which to base a capital sum payment will not be a simple task. But it would not be unfamiliar, because courts already have to perform a similar task in relation to damages for personal injury<sup>93</sup> and sums due by one living cohabitant to another in respect of sharing the future child care burden following on the termination of their relationship.<sup>94</sup> Once the rate has been fixed the lump sum required to provide this for the necessary number of years can be calculated actuarially, taking into account current inflation and interest rates. Moreover, the burden would not be great as our scheme should not result in a large number of claims and we would envisage that many of these would be settled by negotiation. We provide two examples as illustrations:

#### Example 1

A widower dies bequeathing his estate of £125,000 to a number of charities and leaving nothing to his recently estranged 16 year old daughter who is living with her aunt. The girl is currently at school and is likely to leave at 18 and do a four year degree course at university. The court might assess the annual rate for the two school years at £3,500 and for the four university years at £5,000, producing a total of £27,000. A capital sum payment of £24,000 might be awarded to reflect discounting of future payment.

#### Example 2

A man dies and leaves his whole estate (house £200,000 and investments of £100,000) to his second wife. The first marriage ended in divorce and his two children from that marriage have since then lived with their mother (the deceased's first wife) who is in poor health and on state benefits. The children are aged 5 and 7 and the deceased was paying a total of £9,000 a year in child maintenance for them. The court might calculate the capital sum payment based on an annual rate of £5,000 per child and its termination at age 20 to cater for a 50% chance of them going on to tertiary education. This produces a capital sum payment of £140,000 after any allowance for inflation and discounting for immediate payment. If the second wife had no means of her own, the court would scale down the award, as it can take account of her needs and resources, as otherwise she would have to realise the investments and sell the house to meet the award. In that case an appropriate award might be in the region of £80,000. On the other hand if she was rich the whole £140,000 might be awarded as a capital sum payment.

3.86 We recommend that:

- 30. (1) The capital sum payment award should represent the sum required to produce the total aliment due from the deceased's date of death to the date when the child's dependency is likely to terminate (taking into account the likelihood of the child undergoing further education or training after 18). The award should be what is reasonable for the liable portion of the estate to provide having regard only to:**

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<sup>92</sup> Two or more rates might have to be set if there was very likely to be a change in circumstances, such as leaving school and going away to university.

<sup>93</sup> See McEwan and Paton, *Damages for Personal Injury in Scotland* (2<sup>nd</sup> edn), ch 7; *Wells v Wells* [1999] 1 AC 345.

<sup>94</sup> Family Law (Scotland) Act 2006, s 28(2)(b); *M v S* 2008 SLT 871.

- (a) the needs, resources and earning capacity of the child;
  - (b) the existence of any other person owing the child an obligation of aliment and the needs, resources and earning capacity of that obligor; and
  - (c) if the liable beneficiary is the deceased's spouse or civil partner, his or her needs, resources and earning capacity; and
- (2) Regard may be had to conduct of the child or of any other person if it would be manifestly inequitable not to do so.

(Draft Bill, section 18(4)-(6))

### Form of award

3.87 As already mentioned the child's award from the court<sup>95</sup> should take the form of a capital sum which in the interests of finality should be incapable of later variation. However, by analogy with the court's powers on financial provision on divorce, we think that the court should be able to defer payment of the capital sum to some specified date or allow it to be paid by instalments. Applications should be competent for deferral or instalments after an immediate capital sum award has been made and the court should also be able to vary or recall any provisions for deferral or instalments.<sup>96</sup> In addition, the court should be able to determine whether, and if so what, interest is to be payable while any sum due is outstanding. We recommend that:

31. (1) The capital sum payment awarded to a dependent child should be payable immediately unless the court allows payment to be deferred or the sum to be paid by instalments.
- (2) The deferral and instalment provisions should be capable of being made later and of being subsequently varied or recalled.
- (3) The court should be able to determine what interest (if any) is payable while a capital amount remains outstanding.

(Draft Bill, section 19(4), (7))

### Incidence of award

3.88 How should the liability for the capital sum payment be borne by the liable beneficiaries? We consider that the rules of incidence should be the same as those presently used for legal rights and which we have adopted for legal share. There seems no reason to have different rules for dependent children. The order of liability would therefore be: intestate estate first, then residue, then general legacies and finally special legacies.<sup>97</sup> Within each category the burden would be borne *pro rata*. The following example illustrates the recommended rules.

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<sup>95</sup> The executors and the child could agree to any form of award.

<sup>96</sup> Family Law (Scotland) Act 1985, s 12.

<sup>97</sup> Property passing by special destination would be regarded as a special legacy.

A man dies survived by a 16 year old daughter. He leaves his car worth £20,000 to his brother, a legacy of £5,000 to charity A and a legacy of £15,000 to charity B. The residue of £20,000 is left equally between his sister and his ex-wife, the mother of the daughter. A suitable capital sum payment for the daughter is considered to be £14,000 from the estate other than the half share of the residue left to the girl's mother (as she owes the daughter an obligation of aliment). The £14,000 would be payable as follows: sister, £10,000 (residuary legatee); charity A £1,000 and charity B £3,000 (general legatees *pro rata*).

3.89 We recommend that:

**32. A dependent child's capital sum payment should be met from the liable portions of the estate in the following order:**

**intestate estate;**

**residue;**

**general legacies;**

**special legacies and property passing under special destinations.**

**Within each category liability should be *pro rata*.**

(Draft Bill, section 20(1))

### **Time limit for claiming**

3.90 In the discussion paper we envisaged that children would be entitled to claim under the scheme as long as they were still dependent.<sup>98</sup> Beneficiaries might therefore be faced with a claim long after the parent's death, as could happen if the child's other parent became unable to provide further aliment for the child due to financial embarrassment. On consultation several respondents expressed concerns about this long-term potential liability. We now think that in the interests of finality claims should in general have to be made within a short period from the parent's death. We consider that a period of one year would allow sufficient time for children (or those representing them) to consider their position and submit a claim. This should not hold up the administration of estates to any great extent as many are not finalised within the first year. Moreover, the executors would not be under a duty to delay distribution (provided they were unaware that a claim was in the offing) as the child's claim would then be against the liable beneficiaries. However, a rigid cut-off period of one year could produce injustice. We therefore think that the courts should have power to extend the time limit and entertain late applications on cause shown. Late applications might be made, for example, by children who only became aware of their parent's death a year afterwards and by children who had to have a legal representative appointed to raise the action on their behalf.

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<sup>98</sup> Para 3.84.

3.91 We recommend that:

- 33. An application to the court by a child for a capital sum payment should have to be made within one year from the date of the deceased's death, but the court should be empowered to allow an application made after the expiry of this period on cause shown.**

(Draft Bill, section 19(1))

### **Claims by or on behalf of children**

3.92 Concerns were raised on consultation about who would claim on behalf of a child and possible conflicts of interest between the child's legal representative qua representative and qua individual. These problems already arise under the present law of legitim and claims by a cohabitant on an intestate estate. In legitim claims by young children the surviving spouse is usually the major beneficiary and the legal representative of the children, while a cohabitant is often claiming against his or her own children who are the deceased's heirs on intestacy, and of whom he or she is the legal representative. The problems should arise substantially less frequently under our scheme since only rarely will the children have a claim against the surviving spouse. And it would be very unusual for a surviving spouse who had not accepted the children to be their legal representative. We consider the resolution of these problems to be outwith the scope of a report on the substantive law of succession.

### **Effect of claiming**

3.93 A dependent child who elects to receive a capital sum payment under our scheme should forfeit all other rights of succession to the deceased's estate, unless (and this would be most unusual) the will provided otherwise. Thus the child would forfeit any testamentary provision or share on intestacy. Benefits accruing to the child outwith the estate, such as support from the deceased's pension scheme or a policy for the child on the deceased's life, would not be forfeited, although they would be taken into account as part of the child's resources in calculating the size of any capital sum payment.

3.94 Forfeiture by the child would propel the forfeited provisions to other beneficiaries or heirs. The simplest way of achieving this is for the child who elects to receive a capital sum payment to be regarded for all other purposes of succession to the deceased's estate as having failed to survive the deceased.

3.95 We recommend that:

- 34. A child who elects to receive a capital sum payment under the scheme should be regarded for the purposes of other rights of succession to the deceased's estate as having failed to survive the deceased, unless the deceased's will provides otherwise.**

(Draft Bill, section 20(2))

### **Renunciation**

3.96 It should be competent for a child to renounce the right to a capital sum payment under our scheme, either before or after the parent's death. The child would, of course,

have to have capacity under the Age of Legal Capacity (Scotland) Act 1991 in order for the renunciation to be valid. Thus the child would have to be over 16,<sup>99</sup> but a renunciation by a 16 or 17 year old would be capable of being challenged by the child at any time up to his or her 21<sup>st</sup> birthday on the ground that it was a prejudicial transaction. As the child's claim is personal we do not think that it should be capable of being renounced by a legal representative of the child, even if there was no conflict of interest.

3.97 We therefore recommend that:

- 35. It should be competent for a child with capacity to renounce, whether before or after the deceased's death, the right to a capital sum payment from the deceased's estate.**

(Draft Bill, section 20(3))

### **Protection of payments made for young children**

3.98 If the child was over 16 then the executors could safely pay the amount of the negotiated settlement or court award to the child or some person nominated by the child. For children under 16, payment should be made to the child's legal representative, ie a parent, guardian or someone specially appointed as legal representative. Where the award is made by the court then in terms of section 13 of the Children (Scotland) Act 1995 the court can make protective orders. These include ordering the money to be paid to the Accountant of Court to administer on the child's behalf. Where the claim is settled by negotiation and the agreed sum is over £20,000 the executors would be obliged to seek directions from the Accountant of Court before handing it over to the child's legal representative.<sup>100</sup> If the sum was over £5,000 but below £20,000 the executors may, but would not be obliged to, seek directions from the Accountant of Court. We do not think that any further protective measures are necessary.

### **Interim awards**

3.99 The deceased's dependent children may be left without any means of support in the period immediately after death. It will take some time before their claim is determined by the court or agreed by the executors. We would adopt the power of the court in alimentary actions under the Family Law (Scotland) Act 1985 to award interim aliment as soon as the action is raised.<sup>101</sup> An interim lump sum payment could therefore be made pending the disposal of the child's action for a capital sum payment award. The interim award should be treated as a payment to account and so it would be deducted from the final capital sum payment awarded or repaid in the unlikely event of no final capital sum payment being awarded. We recommend that:

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<sup>99</sup> The exception in s 2(1) would not apply to a gratuitous renunciation as the terms would be unreasonable. Likewise, a proposed renunciation by a 16 or 17 year-old would not be ratified by the court under s 4.

<sup>100</sup> Children (Scotland) Act 1995, s 9(2).

<sup>101</sup> Section 6.

- 36. It should be competent for a court dealing with an application by a child for a capital sum payment to order payment of a lump sum interim award pending the determination of the application. The sum or sums so paid should be deducted from any award ultimately made.**

(Draft Bill, section 19(2), (3) and (6))

# Part 4 Cohabitation

## Introduction

4.1 In this Part we consider the succession rights of cohabitants ie persons who were living together as if they were husband and wife or civil partners. Under the current law, a surviving cohabitant does not have prior rights in her deceased cohabitant's intestate estate and does not have legal rights to protect her from disinheritance. In short, a surviving cohabitant has no right to inherit any part of the deceased's estate unless there are testamentary provisions in her favour. Yet there is strong public support for cohabitants to have some protection against disinheritance. In 1981, 73% of respondents in a survey of Scottish public opinion supported the idea of giving a surviving cohabitant a right to some part of the deceased's estate when she had not been included in the deceased's will.<sup>1</sup> In the 2005 Succession Opinion Survey,<sup>2</sup> this had risen to 80%.

4.2 In our 1992 Report on Family Law<sup>3</sup> we rejected giving a surviving cohabitant an automatic share of the deceased cohabitant's intestate estate or the right to claim a fixed share out of his testate estate. Instead we recommended a more flexible scheme whereby the surviving cohabitant would have to apply to the court for an award out of the deceased cohabitant's estate whether testate or intestate.<sup>4</sup> The provisions of section 29 of the Family Law (Scotland) Act 2006 are modelled on the discretionary court-award scheme we recommended in our Family Law Report.<sup>5</sup>

## The current regime – section 29 of the Family Law (Scotland) Act 2006

4.3 Section 29 of the Family Law (Scotland) Act 2006 applies when the deceased has died intestate leaving a surviving cohabitant. It does not provide any protection for a surviving cohabitant when the deceased has died testate without having made any provision for her in his will. Under section 29, a surviving cohabitant is not made an heir on intestacy and therefore does not have an automatic right to succeed to any part of the deceased's intestate estate: instead the surviving cohabitant has the right to apply to the court for an award out of the deceased's intestate estate. The court has to be satisfied that immediately

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<sup>1</sup> A J Manners and I Rauta, *Family Property in Scotland* (OPCS), Table 4.8 at para 4.2.

<sup>2</sup> *Succession Opinion Survey*, pp 16-17.

<sup>3</sup> Scot Law Com No 135.

<sup>4</sup> *Ibid*, paras 16.24-16.37.

<sup>5</sup> Lord Drummond Young and Professor Gretton are opposed to the general policy of extending succession rights to cohabitants; they are of the opinion that the law should leave parties to such relationships free to make such arrangements as they see fit regarding the disposal of their property. Nevertheless, they recognise that, in s 29 of the Family Law (Scotland) Act 2006, Parliament has adopted a policy that cohabitants should be awarded succession rights, and they consider that the Commission must respect that policy. For that reason they accept the recommendations contained in this Part of the Report. In relation to the proposal to extend cohabitants' rights to cases of testate succession, they attach some importance to the relatively limited scale of the rights in question, and also to recommendation 41, which permits cohabitants to renounce succession rights in each other's estates.

before the deceased's death the applicant was cohabiting with the deceased.<sup>6</sup> In deciding whether the applicant was a cohabitant for this purpose the court is to have regard to the length of the period they had been living together, the nature of their relationship during that period and the nature and extent of any financial arrangements subsisting between them during that period.<sup>7</sup> If the applicant was not the deceased's cohabitant immediately before his death the claim will fail. In deciding what award, if any, to make the court has to have regard to the following factors: the size and nature of the deceased's intestate estate, any non-estate benefit received by the applicant as a result of the death, for example life insurance or rights under a pension scheme,<sup>8</sup> other rights to or claims on the estate, for example the rights of the deceased's children as heirs on intestacy, and any other matter the court considers appropriate.<sup>9</sup> However, the court is given no guidance on the purpose of the award: is it to provide for the applicant's future needs or is it to be in recognition of the financial and non-financial contributions that the applicant made for the benefit of the deceased and their family during the relationship? The only express guidance is that the award cannot be greater than the amount the applicant would have received if she had been the deceased's surviving spouse or civil partner rather than cohabitant.<sup>10</sup>

4.4 Section 29 has given rise to much concern. First, it is strange that the factors in section 25(2) of the 2006 Act such as the length and nature of the relationship are relevant to whether or not the applicant is a cohabitant rather than to be taken into consideration when exercising the discretion to make an award under section 29. However, in *Savage v Purches*,<sup>11</sup> the sheriff held that these factors could be considered under section 29(3)(d) viz "any other matter the court considers appropriate". Second, when exercising its discretion, the court is overwhelmed by the number of potentially relevant factors so that in the absence of expressly articulated aims it is very difficult if not impossible to focus on those which are significant in the particular case. The point was well made by the Senators of the College of Justice in their response to the discussion paper:

"Listing factors to be 'taken into account' is of little or no assistance, since the list is open-ended and the desired weight to be attached to such factors is left to conjecture. What is missing is any indication of the basis on which a cohabitant should, or should not, be deserving of benefit in competition with family claims. How far should an award reflect the period of cohabitation, or the happiness or otherwise of the relationship, or the effect of the relationship on children and other close family members? How far should the cohabitant's financial position or marital status affect the level of any claim? At present these and similar questions remain unanswered, and there is no clear focus for the exercise of the court's discretion."

4.5 Third, there is a dearth of reported case law.<sup>12</sup> Consequently there has been no judicial guidance on what are the most important factors which should be taken into account. In these circumstances, it is difficult to advise a party on whether to proceed with her

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<sup>6</sup> Family Law (Scotland) Act 2006, s 29(1)(b)(ii). This could cause difficulties where for example the deceased had been hospitalised for a time before his death and the applicant was therefore not *in fact* living with the deceased immediately before he died.

<sup>7</sup> *Ibid*, s 25(2).

<sup>8</sup> *Savage v Purches* 2009 GWD 9-157 (Falkirk Sheriff Court, 19<sup>th</sup> December 2008; opinion available at [www.scotcourts.gov.uk/opinions/SAVAGE](http://www.scotcourts.gov.uk/opinions/SAVAGE)).

<sup>9</sup> Family Law (Scotland) Act 2006, s 29(3).

<sup>10</sup> *Ibid*, s 29(4).

<sup>11</sup> See footnote 8 above.

<sup>12</sup> But see now *Savage v Purches*, above.

section 29 application and there has been an understandable tendency for parties to settle without resort to litigation.

4.6 One issue that has been of great concern for practitioners is the conflict of interest between the applicant and the deceased's children. Consider the following:<sup>13</sup>

A dies intestate. He is survived by his cohabitant, B, and their two young children, C and D. The estate consists of the house in which he was living with B and the children. It is valued at £60,000. B is the children's legal representative and as such applies to be confirmed as executor-dative. She then makes an application under section 29. There is a conflict of interest between B and the children. As a cohabitant, she has no prior rights. Consequently as A's heirs on intestacy, C and D are each prima facie entitled to half of the estate. The court makes an order that B will receive £20,000 while the balance of the estate will be held on trust for C and D until their majority. To achieve this result the house has to be sold even although B needs a home for herself and her – and the deceased's – children. This seems a strange result. To ensure their inheritance, the children and their mother are rendered homeless! Yet if B had been married to A, her housing prior right would have exhausted the estate and the children's rights as intestate heirs would be valueless. But the family would have been left with their home and that would surely have been in the best interests of the children – a factor not expressly listed in section 29.

4.7 There is no doubt that there is genuine concern about section 29. Almost all our consultees expressed reservations about the current provisions and in particular the almost unfettered extent of the court's discretion. We also think that section 29 in its current form is unsatisfactory. There is no express aim or purpose for the exercise of the court's discretion. Put another way, the court is not told what it should be trying to achieve by making an award. In addition, the factors to be considered are potentially infinite. The court is being asked to do the impossible: to balance conflicting family interests without any guidance on the relative weight to be given to the needs and interests of each party. This is then to be given effect in an order for a capital sum payment or a property transfer order. In these circumstances the court will undoubtedly be influenced by the size of the deceased's estate. And this may in turn affect how the court will balance the applicant's interests and those of the deceased's family.<sup>14</sup> For these reasons, we think that section 29 should be repealed and replaced with a simpler provision which will greatly reduce the extent of the court's discretion. This will make the outcome of litigation easier to predict and therefore encourage parties to negotiate a settlement without resort to court.

4.8 Given the dissatisfaction with section 29 in its current form it is perhaps not surprising that a substantial minority of our respondents were reluctant that section 29 should be extended to testate as well as intestate estates. It was, however, accepted that the reason why the Scottish Executive decided that section 29 should be restricted to intestate estates was because we were engaged on this review and would consider the issue: there was no point of principle involved. Under our proposals the court's discretion will be much narrower and a cohabitant is to be awarded a proportion (expressed as a percentage) of what she would have inherited if she had been the deceased's spouse or civil partner. In the context

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<sup>13</sup> This example is based on a case which settled and is therefore not reported.

<sup>14</sup> This was an important issue for the sheriff in *Savage v Purches*, above.

of a testate estate, this would be a proportion of a spouse or civil partner's legal share. Even if a cohabitant was awarded a 100% proportion,<sup>15</sup> all she would therefore receive from the estate would be 25% of what a spouse or civil partner would have received if the deceased had died intestate. Given the strong public support for cohabitants to have some protection from disinheritance<sup>16</sup> and the limited nature of the protection envisaged, we think that the statutory regime which should replace section 29 should apply to testate as well as intestate estates.

4.9 Therefore we recommend that:

**37. (1) Section 29 of the Family Law (Scotland) Act 2006 should be repealed and replaced by a new statutory regime providing succession rights for cohabitants.**

**(2) The new statutory regime should apply to testate as well as intestate estates.**

(Draft Bill, sections 22-26 and schedule 2)

4.10 The first issue to be addressed is what should be the nature of the rights of surviving cohabitant. It is clear that public opinion strongly supports some protection from disinheritance.<sup>17</sup> As we have argued<sup>18</sup> a spouse or civil partner should have succession rights simply by virtue of their status as the surviving spouse or civil partner of the deceased: the length and the quality of the parties' relationship are irrelevant to the survivor's succession rights. But we do not think that similar rights should vest in a cohabitant from the simple fact that she and the deceased had been living together as husband and wife or civil partners. Instead, a cohabitant's rights of succession should reflect the quality of the relationship which the couple had. Put another way, unlike a spouse or civil partner, a cohabitant has to "earn" her right to a share of an intestate estate or to be protected from disinheritance. To that extent the distinction between marriage and civil partnership and cohabitation should be maintained. This means that as with section 29 proceedings, an element of judicial discretion will be involved. This will arise at two stages.

### **Recognition as the deceased's cohabitant**

4.11 The court has to be satisfied that the applicant was the deceased's cohabitant immediately before the deceased's death. This means that immediately before the deceased's death, the applicant and the deceased were living together as husband and wife or as civil partners. In determining whether they were living together in this way we think that it would be useful to direct the court to the most important relevant factors.<sup>19</sup> These are:

- (a) whether the parties were members of the same household,
- (b) the stability of the relationship,

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<sup>15</sup> The maximum percentage that can be awarded: in practice it will usually be less.

<sup>16</sup> See para 4.1.

<sup>17</sup> Ibid.

<sup>18</sup> See para 2.30.

<sup>19</sup> These are the factors which were described as "admirable signposts" for the existence of such a relationship in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, a social security law case.

- (c) whether the parties had a sexual relationship,
- (d) whether the parties had children together or have accepted children as children of the family, and
- (e) whether the parties appear to family, friends and members of the public to be a married couple, civil partners or cohabitants. This will cover two situations. First, when a couple pretend to be married or in a civil partnership but are not; and secondly, couples who state openly that they are not married or have not registered a civil partnership but nevertheless live together.

4.12 Like section 29, we think that the right should arise only when the survivor was the deceased's cohabitant immediately before the deceased's death: it should not arise when the couple had terminated their relationship before the deceased died. In these circumstances we think that it is important to stress that it is the continuation of the relationship that is important and not that the couple were physically living together immediately before the date of death. For example, if A and B were living together as if they were husband and wife that relationship does not necessarily come to an end merely because A has to go into a hospital or nursing home: provided they have not otherwise terminated their relationship, B should continue to be A's cohabitant for succession purposes even although she was not in fact living with him when he died in the hospital or nursing home. To put the matter beyond doubt there should be an express provision that a person does not cease to be a cohabitant of another person by reason only that they are separated by hospitalisation, imprisonment, service overseas and other similar reasons.

4.13 Accordingly we recommend that:

- 38. (1) Where the deceased is survived by a person who immediately before the deceased's death was living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners, that person, the deceased's cohabitant, should have the right to apply for a proportion of the deceased's estate.**
- (2) In determining whether the couple were living together in such a relationship, the court should have regard to:**
- (a) whether they were members of the same household;**
  - (b) the stability of the relationship;**
  - (c) whether the parties had a sexual relationship;**
  - (d) whether they had children together, or had accepted children as children of the family; and**
  - (e) whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.**

**(3) A person should not be regarded as having ceased to be the cohabitant of another person by reason only of circumstances such as hospitalisation, imprisonment or service overseas in the armed forces.**

(Draft Bill, section 22)

### **Fixing the appropriate percentage**

4.14 Once it is established that the applicant was the deceased's cohabitant immediately before his death, the court then turns to the second stage. Here we propose that the court should determine the extent to which the applicant should be treated as a spouse or civil partner of the deceased for the purpose of the rules of succession: this is to be expressed as a percentage. When doing so, in marked contrast to section 29, we take the view that the court should only be allowed to consider three matters. These are:

- (a) the length of the period of cohabitation;
- (b) the interdependence, financial or otherwise, between the cohabitant and the deceased during the period of cohabitation; and
- (c) what the cohabitant contributed to the life together of the cohabitant and the deceased (whether such contributions were financial or otherwise) as for example running the household, caring for the deceased and their children or any children accepted by them as children of the family.

4.15 At one extreme, the percentage would be high. For example: A (aged 70) and B (aged 65) cohabited for forty years. During that period, B worked and her earnings were used for household expenses. The couple had four children who were looked after by B. When A was diagnosed with a terminal illness, he was nursed by B. Because of the length of the relationship and the financial and non-financial contributions made by B to A and their family, we would think that the percentage might approach 100%.

4.16 At the other extreme, the percentage would be low. For example: A (aged 28) and B (aged 26) cohabited for 5 years. During that period A and B both worked. They shared joint household expenses but were otherwise financially independent. There were no children. They spent all of their spare time together. A died suddenly from a heart attack. Here the relationship was relatively short, there were no children and the degree of financial interdependence was limited. B's case simply rests on her contributions to their life together. In these circumstances we think that the percentage might not exceed 25%.

4.17 Many cases would fall within these extremes. For example: A (aged 75) and B (aged 70) cohabited for five years. At the beginning of their relationship B sold her house and used the proceeds to make improvements to A's house where they lived. B ran the household but A paid the expenses. They spent all their spare time together. When A was diagnosed with a terminal illness, B nursed A. Although the relationship was relatively short and there were no children, B made financial and non-financial contributions to their life together including nursing B. Here we think that the percentage might be around 50%.

4.18 The maximum percentage is 100% so that a cohabitant cannot be awarded a greater sum than she would have obtained if she had been the deceased's surviving spouse or civil partner.

4.19 It is important to note that the court's discretion is solely focused on the nature and quality of the parties' relationship. The court has to decide to what extent the surviving cohabitant *deserves* to be treated as the deceased's spouse or civil partner for the purposes of the rules of succession. Other factors such as the interests of the deceased's children or other relatives are irrelevant. In particular, the court has no knowledge of the value of the deceased's estate or whether the surviving cohabitant has received any benefits such as a pension in consequence of the deceased's death. This "veil of ignorance" is deliberate. In deciding the appropriate percentage, it is our view that the court should *not* be influenced by the size of the estate or the interests of other members of the deceased's family: the nature and quality of the parties' relationship should be the only relevant criteria. Under these proposals the court's discretion is much more focused than under section 29.

4.20 Once the court has fixed the appropriate percentage, it will issue a declarator to that effect. The cohabitant is then entitled to claim from the deceased's executor a sum which represents the appropriate percentage of the estate which she would have obtained if she had been the deceased's spouse or civil partner. In other words the sum due to the cohabitant is calculated by simply applying the ordinary rules of succession and the appropriate percentage. Consider the following examples:

- (a) A dies intestate. He is survived by his cohabitant, B, and his two grown up children. His estate is worth £200,000. The appropriate percentage is declared to be 25%. Under our proposals, if she had been married to A, she would have received the whole estate as it is less than the threshold sum of £300,000, viz £200,000. As the appropriate percentage is 25%, B will therefore receive £50,000. A's children will share the rest of the estate equally between them.
- (b) A dies testate. He is survived by his cohabitant, B, and two children. His estate is worth £200,000. In his will he leaves his estate to his two children. The appropriate percentage is declared to be 20%. Under our proposals, if she had been married to A, she would have been entitled to legal share of 25% of what she would have inherited if A had died intestate, ie £50,000. As the appropriate percentage is 20%, B will therefore receive £10,000. The children will inherit the rest of the estate.
- (c) A dies intestate. He is survived by his cohabitant, B, and his mother and brother. His estate is worth £200,000. The appropriate percentage is declared to be 50%. Under our proposals, if she had been married to A, B would have inherited the whole estate, ie £200,000. As the appropriate percentage is 50%, B will therefore receive £100,000. A's mother and brother will share the rest of the estate equally between them.
- (d) A dies testate. He is survived by his cohabitant, B, and his mother and brother. His estate is worth £200,000. In his will he leaves all his property to a charity. The appropriate percentage is declared to be 50%. Under our proposals, if she had been married to A, B would have been entitled to legal

share of 25% of what she would have inherited if A had died intestate ie £50,000. As the appropriate percentage is 50%, B will therefore receive £25,000. The charity will inherit the rest of the estate.

- (e) A dies intestate. He is survived by his cohabitant, B, and two children. Title to the house is in the names of A and B and the survivor. The value of A's right in the dwelling house which passes to B under the survivorship destination is £150,000. The estate is worth £200,000. The appropriate percentage is declared to be 50%. Under our proposals, if she had been married to A, B would have inherited £175,000.<sup>20</sup> As the appropriate percentage is 50%, B is entitled to £87,500. from the estate: the children will share the rest of the estate, £112,500, equally between them.

As these examples illustrate, once the appropriate percentage has been fixed, no further judicial discretion is involved. The ordinary rules of intestate succession and legal share are applied and the cohabitant is then entitled to the appropriate percentage of the sum which would have been due to her if she had been the deceased's spouse or civil partner.<sup>21</sup>

4.21 Therefore we recommend that:

**39. (1) If the court declares the applicant to have been the deceased's cohabitant immediately before the death, the court should then fix the appropriate percentage of the entitlement to the estate which the deceased's spouse or civil partner would have received under the rules of intestate succession or legal share.**

**(2) In fixing the appropriate percentage the court should only have regard to:**

- (a) the length of the period of cohabitation;**
- (b) the interdependence, financial or otherwise, between the couple during the period of their cohabitation; and**
- (c) the surviving cohabitant's contribution to their life together (whether such contributions were financial or otherwise) as for example, running the household, caring for the deceased and caring for their children or children accepted by them as children of the family.**

(Draft Bill, section 23(1) and (2))

### **Effect of claiming the appropriate percentage**

4.22 Where the deceased has died testate, unless there is a provision to the contrary in the will, we think that a cohabitant should have to elect between accepting any legacy in her

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<sup>20</sup> The value of the property which passes by virtue of the survivorship destination, £150,000, is deducted from the threshold sum of £300,000 to give £150,000, and the balance of £50,000 is shared equally with the children to give £25,000: the total to which W would have been entitled is therefore £175,000.

<sup>21</sup> See para 3.59 for the rules regarding interest.

favour or accepting a sum calculated by reference to her appropriate percentage. Consider the following example:

A dies testate. He is survived by his cohabitant, B, and two children. In his will he leaves B a legacy of £50,000. The estate is worth £500,000. If B was married to A she would have a legal share of 25% of what she would have inherited if A had died intestate, ie £100,000.

If the appropriate percentage is fixed at less than 50%, B is better off taking the legacy: if it is fixed at more than 50% B is better off claiming the appropriate percentage but would forfeit the legacy if she elected to do so. Accordingly, we think that if she elects to receive the appropriate percentage, the cohabitant and her issue should be treated as not having survived the deceased in relation to any other right of succession which she had to the deceased's estate. Therefore we recommend that:

- 40. Unless express provision to the contrary is made in the deceased's will, election to receive the appropriate percentage of the deceased's estate should extinguish any other right of succession which the cohabitant has to the deceased's estate and the cohabitant and his or her issue should be treated in relation to any other such right as not having survived the deceased.**

(Draft Bill, section 25(1))

#### **Renunciation of cohabitant's entitlement**

4.23 When a couple decide to cohabit, we think that it is important that they should be free to regulate the legal consequences of their relationship. This will often be done under a pre-cohabitation agreement. Accordingly we think that at any time before or after the death a person should be able to renounce her statutory right to apply for an appropriate percentage of another person's estate. In these circumstances we recommend that:

- 41. A person may, whether before or after the death of another person, renounce any entitlement to apply for an appropriate percentage of that person's estate.**

(Draft Bill, section 26)

#### **Where the deceased is survived by a cohabitant and a spouse or civil partner**

4.24 Under section 29, where the deceased is survived by both a spouse or civil partner and a cohabitant, the surviving spouse or civil partner's prior and legal rights are deducted from the deceased's intestate estate<sup>22</sup> before an award can be made to the cohabitant.<sup>23</sup> Any award to the cohabitant can only be made out of the balance, if any, of the intestate estate remaining after the prior and legal rights of the surviving spouse or civil partner have been deducted. In this way, the law prioritises the interests of the surviving spouse or civil partner.

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<sup>22</sup> Section 29 only applies where the deceased dies intestate.

<sup>23</sup> Family Law (Scotland) Act 2006, s 29(10).

4.25 Under our recommendations, where the deceased dies intestate survived by a spouse or civil partner but no issue, the surviving spouse or civil partner is to inherit the whole estate.<sup>24</sup> If we applied the existing policy, this would mean that in these circumstances, there would be no estate upon which the surviving cohabitant could have a claim. Even where the deceased also left issue, the estate would have to be over the threshold sum of £300,000 before it could become the subject of a claim by the surviving cohabitant. In the discussion paper we thought that these results were too harsh.<sup>25</sup> It was our preliminary view that in this situation, in intestate – as well as testate – estates, the net estate which would be available for the cohabitant's claim should be the deceased's estate after deduction of the surviving spouse or civil partner's legal share as opposed to their rights on intestacy. A large majority of our respondents agreed.

4.26 Nevertheless, on reflection we now favour another solution. Where the deceased dies intestate, we take the view that the value of the estate to which the surviving spouse or civil partner is entitled (the relevant amount) should be divided between the spouse or civil partner and the cohabitant. The cohabitant would be entitled to the appropriate percentage of half the relevant amount and the spouse or civil partner would be entitled to the balance of the relevant amount. Consider the following:

- (a) A dies intestate. He is survived by his civil partner, B, and his cohabitant, C. There are no children. The estate is worth £500,000. Under our proposals B is entitled to the whole estate. The relevant amount is therefore £500,000. The surviving cohabitant, C, is entitled to the appropriate percentage of half the relevant amount ie £250,000. The appropriate percentage is 25% and C is therefore entitled to £62,500. B is entitled to the balance of the relevant amount, ie £437,500.
- (b) A dies intestate. He is survived by his wife, B, and his cohabitant, C. There are two children. The estate is worth £500,000. Under our proposals B is entitled to £400,000 and the children share £100,000 equally between them. The relevant amount is therefore £400,000. The surviving cohabitant, C, is entitled to the appropriate percentage of half the relevant amount, ie £200,000. The appropriate percentage is 25% and C is therefore entitled to £50,000. B is entitled to the balance of the relevant amount, ie £350,000.

4.27 As the appropriate percentage increases, C's share of the relevant amount will also increase but the surviving spouse or civil partner will still receive more than C. It is only when C is entitled to a 100% proportion, that the surviving spouse or civil partner receives exactly the same amount as C: the surviving spouse or civil partner can never receive less than C. Moreover, it should also be noticed that the succession rights of the deceased's issue are never affected. It is our view that this formula better reflects the policy of prioritising the succession rights of a surviving spouse or civil partner than our preliminary proposal in the discussion paper.

4.28 Where the deceased died testate, the cohabitant's claim which can never be more than a spouse or civil partner's legal share is simply to be treated as additional to a surviving spouse or civil partner's claim for legal share. Consider the following:

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<sup>24</sup> See para 2.5.

<sup>25</sup> Paras 3.71ff.

A dies testate. He is survived by his wife, B, and his cohabitant, C. There are no children. In his will he leaves his whole estate to charity. The estate is valued at £300,000. B's legal share is 25% of what she would have inherited if A had died intestate. As she would have inherited the whole estate, her legal share is £75,000. C is entitled to the appropriate percentage of the amount to which she would have been entitled if she had been his spouse. The appropriate percentage is 50% and C is therefore entitled to £37,500. The charity is entitled to the remainder of the estate, ie £187,500.

If A had left all his estate to his wife, B, C is still entitled to the appropriate percentage of the legal share she would have had if she had been married to C. This remains £37,500. B will inherit the remainder of the estate, ie £262,500.

4.29 Where a cohabitant is entitled to a 100% proportion, her claim and that of the surviving spouse or civil partner can never total more than half the value of the estate.

4.30 This approach has been discussed with our Advisory Group who considered that it was a sensible solution to a difficult issue. Accordingly, we recommend that:

**42. (1) Where the deceased dies intestate survived by a spouse or civil partner and a cohabitant, the value of the estate which the spouse or civil partner would inherit (to be known as the relevant amount) should be shared between the cohabitant and the spouse or civil partner: the cohabitant should be entitled to the appropriate percentage of half the relevant amount and the spouse or civil partner should be entitled to the balance of the relevant amount.**

**(2) Where the deceased dies testate, the cohabitant's entitlement to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner.**

(Draft Bill, section 24)

## **Time limits**

4.31 A claim under section 29 has to be made within six months from the date the deceased died.<sup>26</sup> A large number of practitioners who responded to the discussion paper told us that six months is too short a period in which to make a claim. Difficulties have been experienced in relation to the appointment of executors-dative and the identification of potential heirs which make it impracticable to make the claim within six months. In these circumstances, we have taken the view that a cohabitant should have a year from the date of the deceased's death to bring an application under our proposed regime. This would also give more time for the executor and the heirs or beneficiaries to reach a settlement with the cohabitant. We have also been informed of at least one case where a cohabitant has been time-barred through no fault of her own. Here the deceased had made a will under which his cohabitant was the major beneficiary. The validity of the will was challenged by the deceased's relatives. Their action was successful and the will was reduced. While the

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<sup>26</sup> Family Law (Scotland) Act 2006, s 29(6).

estate was rendered intestate, the surviving cohabitant could not bring a claim under section 29 because the six months period had expired. To accommodate these exceptional cases we think that the court should have the power on cause shown to allow applications outwith the period of a year from the date of the deceased's death.

4.32 Accordingly we recommend that:

- 43. Unless on cause shown the court otherwise permits, any application for a proportion of the deceased's estate should be made within the period of 1 year commencing on the date of the deceased's death.**

(Draft Bill, section 23(3))

## Part 5 Private international law

### General

5.1 Along with the other parts of the United Kingdom and many other jurisdictions, Scots law adopts a scission principle in terms of which the private international law rules are that succession to moveable property is governed by the law of the deceased's domicile irrespective of where the property is situated, whereas succession to immoveable property is governed by the *lex situs* regardless of the deceased's domicile at the date of death.<sup>1</sup> Classification of property as moveable or immoveable is performed by the *lex situs* and may differ from the classification used by that system for internal purposes.<sup>2</sup> As a consequence of these rules, the estate of a Scottish domiciliary to which the Scots law of succession applies consists of the moveables wherever situated and immoveables situated in Scotland. No account is taken of immoveables situated outwith Scotland. Conversely, the Scots private international rules state that the Scots law of succession applies to immoveables situated in Scotland owned by a deceased foreign domiciliary.

5.2 It is widely acknowledged that the scission principle leads to wide variations in the distribution of the estate depending on the location and character of the assets.<sup>3</sup> The 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons provided for a person's whole estate, moveable and immoveable, wherever situated, to devolve according to the law of a single state. The Convention has attracted little support and has not entered into force. The United Kingdom has not acceded to it and currently has no plans to do so.

5.3 The private international law of succession is currently the subject matter of a European Union legislative initiative to harmonise the laws of Member States in this area. The European Commission produced a Green Paper on *Wills and Succession* in 2005 which opened a broad-based consultation process on the form that harmonised private international law rules of succession should take.<sup>4</sup> Negotiations are now taking place between the Member States on the content of a European Union regulation but the United Kingdom has the option of deciding whether or not to be bound by any eventual regulation. The scope of any future European legislation or the specific impact it might have on Scots law is therefore unclear. In the discussion paper we suggested that a review of the scission principle within the United Kingdom should be carried out along with the Law Commission for England and Wales and the Northern Ireland Law Commission unless the regulation led to

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<sup>1</sup> *Anton with Beaumont*, p 676. Many European countries operate a unitary approach whereby the whole estate is governed by one law, the law of the deceased's habitual residence or nationality at death.

<sup>2</sup> *Meston*, pp 132-133; *Macdonald v Macdonald* 1932 SC (HL) 79.

<sup>3</sup> *Meston*, p 133, and J H C Morris, "Intestate Succession to Land in the Conflict of Laws" (1969) 85 LQR 339. For judicial criticism of the scission principle see dicta of Browne-Wilkinson VC in the English case of *Re Collens* [1986] 2 WLR 919 at 923 and 925.

<sup>4</sup> "Green Paper on Wills and Succession" COM (2005) 65 Final, published 1 March 2005. The deadline for responses was 30 September 2006.

the enactment of similar uniform private international law rules for internal purposes within the United Kingdom.<sup>5</sup> That remains our view.

5.4 Nevertheless, we put forward in the discussion paper some proposals which clarified the current law, considered the private international law aspects of our substantive proposals on intestacy and protection from disinheritance and addressed gaps in the rules of jurisdiction. We carry these forward into this Report together with two recommendations from the 1990 Report on Succession.

## A: CHOICE OF LAW

### **Intestacy**

5.5 The proposals in the discussion paper were stated as applying to the intestate estate which was governed by Scots law.<sup>6</sup> There was no adverse comment made by those responding and we adopt that approach in this Report. For example, we have recommended that where a person dies intestate survived by issue and by a spouse or civil partner, the spouse or civil partner should be entitled to the whole intestate estate if it is less than the threshold sum of £300,000: any excess over £300,000 should be divided equally between the spouse or civil partner and the issue. The scission principle means that where the deceased died domiciled in Scotland the entitlement would be exigible from all the moveables wherever situated and immoveable property situated in Scotland. Any immoveable property situated in another jurisdiction would devolve in accordance with the *lex situs*. Conversely, where the deceased did not die domiciled in Scotland, the entitlement would be exigible only from immoveable property in Scotland.

### **Legal share**

5.6 At present legal rights are only exigible out of the moveable estate of the deceased and consequently are available only where the deceased died domiciled in Scotland. We have recommended in Part 3 that spouses and civil partners, and on one option children also, should be entitled to claim legal share which would be calculated on the deceased's whole estate. We think that the existing restriction to cases where the deceased died domiciled in Scotland should not be carried forward to the new legal share regime as the latter is to apply to the whole estate. Legal share is to be 25% of what the claimant would receive had the deceased's whole estate been intestate. It would be confusing if the private international law rules on a deemed intestacy were different from those applicable to an actual intestacy. Moreover, before their abolition by the 1964 Act, the legal rights of *terce* and *courtesy* existed in relation to Scottish heritage, and the scission principle meant that they could be claimed by the surviving spouse out of immoveables situated in Scotland whatever the last domicile of the deceased.<sup>7</sup>

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<sup>5</sup> Para 4.77.

<sup>6</sup> Para 4.84.

<sup>7</sup> *Anton with Beaumont*, p 671.

## Support for dependent children

5.7 Our alternative scheme for protecting children from disinheritance would take the form of a capital sum from the deceased parent's estate calculated by reference to the child's needs and resources over the period from the date of the claim to the age when the child would no longer be able to claim aliment from his or her parent if still alive. The sum would be due only from those parts of the deceased parent's estate that were not inherited by those owing an obligation of aliment to the child. Thus no sum would be due if the estate was left to the child's other parent. In the discussion paper we proposed that the scheme should be characterised as one of succession rather than alimentary provision and thus subject to the normal private international law rules of succession.<sup>8</sup> On consultation this was almost unanimously approved. The only dissent came from a body that wished to retain the existing system of legal rights and aliment *jure representationis*; the latter being seen as an alimentary right rather than a succession right. We would adhere to our proposal so that the recommended new scheme for dependent children would apply to immoveable estate situated in Scotland whatever the domicile of the deceased parent and to moveable estate wherever situated if the parent died domiciled in Scotland.

## Cohabitants

5.8 Under section 29 of the Family Law (Scotland) Act 2006 a surviving cohabitant of a person dying domiciled in Scotland is entitled to apply to the court for a discretionary award out of the deceased cohabitant's net intestate estate devolving according to Scots law. However, the court can have regard to "any other matter the court considers appropriate"<sup>9</sup> and so could take into account immoveables situated outwith Scotland by making a larger award out of the estate devolving according to Scots law than it might otherwise have done. But any award made could never exceed the value of that "Scottish" estate. No claim can be made under section 29 out of the deceased's intestate estate, even immoveable property situated in Scotland, if the deceased died domiciled outwith Scotland.

5.9 In the discussion paper we proposed extending this scheme to the deceased's whole estate but retaining the requirement that the deceased had died domiciled in Scotland and the existing private international law rules.<sup>10</sup> The scheme we now recommend involves the court fixing the extent (expressed as a percentage) to which a cohabitant should be regarded as the deceased's spouse or civil partner for the purposes of succession. The cohabitant would then be entitled to that percentage of the estate which a spouse or civil partner would have received on intestacy or by way of legal share. We therefore think that the same rules should apply for claims by cohabitants as apply to spouses or civil partners on intestacy or claiming legal share. Thus the normal scission principle rules should apply. We see no reason to impose a further restriction of the deceased having to have died domiciled in Scotland. The absence of a restriction would assist cohabitants of foreign domiciliaries who died owning immoveable property in Scotland where the surviving

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<sup>8</sup> Proposal 52, para 4.99.

<sup>9</sup> Section 29(3)(d).

<sup>10</sup> Proposal 17, para 3.75.

cohabitant had no remedy under the law of the deceased's domicile or any award was limited to property subject to that law.<sup>11</sup>

5.10 Summing up this section we therefore recommend that:

- 44. The new schemes for intestacy, legal share, dependent children and cohabitants recommended in Parts 2 to 4 should apply to the whole of the deceased's estate the devolution of which is governed by Scots law.**

The draft Bill affects the law of Scotland. Therefore the new schemes for intestacy, legal share, dependent children and cohabitants will apply to such estate as is governed by Scots law.

### **Testamentary capacity**

5.11 A child aged 12 has capacity to make a will in respect of both heritable and moveable property.<sup>12</sup> The present Scottish private international law rules are thought to be that testamentary capacity in relation to moveables is governed by the *lex domicilii* of the testator at the time, while capacity in relation to immoveables depends on the *lex situs*.<sup>13</sup> In the 1990 Succession Report the Commission recommended that this distinction between moveables and immoveables should be removed and that capacity should be governed by the *lex domicilii* of the testator at the time of making or revoking the will. We endorse this recommendation and note that testamentary capacity is outwith the scope of the European Wills and Succession Regulation currently under negotiation. Accordingly we recommend that:

- 45. Capacity to make or revoke a will should, in the case of a will or revocation executed after commencement, be determined (whether the will disposes of moveables or immoveables) by the law of the testator's domicile at the time of making or revoking the will.**

(Draft Bill, section 52(1))

### **Foreign joint property**

5.12 In the case of *Connell's Trustees v Connell's Trustees*<sup>14</sup> the deceased, a domiciled Scot, had bought shares in English companies that had been registered in the joint names of himself and his wife. It was held that his half of the shares passed to her on his death as ownership of shares by two persons under English law contained an implied survivorship destination. Under Scots law the deceased's half of the shares would have passed to his estate. *Connell's Trustees* was distinguished in *Cunningham's Trustees v Cunningham*<sup>15</sup> on the basis that Government stock was involved and the transaction by a domiciled Scot was with the United Kingdom Government: but the former case has not been overruled. The 1990 Report recommended, following general support on consultation, that the law of the

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<sup>11</sup> In *Chebotereva v King's Executor* 2008 GWD 12-231, Ms Chebotereva's claim was dismissed because, although it was accepted she was the late Mr King's cohabitant, he had died domiciled in England. Under our recommendations an award could have been made as he had owned a flat in Stirling.

<sup>12</sup> Age of Legal Capacity (Scotland) Act 1991, s 2(2) replacing s 28 of the 1964 Act.

<sup>13</sup> *Anton with Beaumont*, p 681. Testamentary capacity is necessary both to make and revoke a will.

<sup>14</sup> (1886) 13R 1175.

<sup>15</sup> 1924 SC 581.

deceased owner's domicile should govern whether the terms of the title in the deceased's moveable property passed it to another person on death.<sup>16</sup> People investing in foreign shares or bonds or opening bank accounts in joint names will often be unaware of the effect of this under the foreign law and cannot be taken to have intended that this (rather than Scots law) should be applied to their estate. The recommendation was not extended to foreign immoveables as it was considered that they would be bought with the assistance of a local lawyer so that the purchaser would be advised as to the effect of joint ownership or any destination in the title. We agree with this recommendation and its limitation to moveable property. We therefore recommend that:

- 46. The question whether the terms of the title to moveable property belonging to a deceased person operate to pass that property to anyone else on the deceased's death should be determined by the law of the deceased's domicile at death.**

(Draft Bill, section 52(2))

5.13 A closely allied topic is our recommendation in Part 6 below that a special destination involving spouses or civil partners in a title to property should be evacuated by their subsequent divorce or annulment of marriage or the dissolution or annulment of their civil partnership.<sup>17</sup> This automatic evacuation should apply to all property the devolution of which is governed by Scots law, ie moveables wherever situated if the deceased died domiciled in Scotland and immoveables situated in Scotland whatever the domicile of the deceased. We therefore recommend that:

- 47. Recommendation 61 dealing with the effect of subsequent divorce or annulment of a marriage or the dissolution or annulment of a civil partnership on a special destination in the title to the deceased's property should apply to property the devolution of which is governed by Scots law.**

5.14 The proposed European Union Regulation would not affect these recommendations as property rights created or transferred otherwise than by succession are intended to be excluded from its scope.

## **Miscellaneous**

5.15 In Part 6 below we make recommendations relating to the rectification of wills<sup>18</sup> and the effect of a subsequent divorce or annulment of a marriage or a dissolution or annulment of a civil partnership on testamentary provisions by one spouse or civil partner in favour of the other.<sup>19</sup> These should apply only where the deceased died domiciled in Scotland. We therefore recommend that:

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<sup>16</sup> Recommendation 68, para 10.8.

<sup>17</sup> Recommendation 61.

<sup>18</sup> See para 6.7.

<sup>19</sup> See para 6.17.

**48. Recommendations 51 and 52 should apply only where the deceased died domiciled in Scotland.**

(Draft Bill, sections 27(1) and 28(1)(c))

5.16 The new rules of survivance which we recommend in Part 6 would replace the existing rules in section 31 of the 1964 Act. The existing rules apply to estates or parts of estates the devolution of which is governed by Scots law and we think the new rules should have the same scope. The same is, and should remain, the position where forfeiture has been incurred through the unlawful killing of the deceased.<sup>20</sup> We therefore make no recommendation for change in these areas.

**B: JURISDICTION**

5.17 As a matter of principle the Scottish courts should have jurisdiction whenever Scots law is the applicable law to the succession issue in question. In the discussion paper we identified a jurisdictional gap where the deceased's executor is not domiciled in Scotland. Unless the will creates an express trust it may be that none of the provisions in Schedule 8 to the Civil Jurisdiction and Judgements Act 1982 which deals with the jurisdiction of Scottish courts will apply. This means that those raising actions against executors in connection with their administration of a Scottish estate may have to do so in the courts of the country in which the executors are domiciled. We proposed that confirmation of the executor in Scotland should be an additional ground of jurisdiction for the Scottish courts in issues relating to the confirmed estate. All those who responded agreed and we now recommend that:

**49. Where a person has been confirmed as an executor in Scotland that person may be sued in the Court of Session or in the sheriff courts for the sheriffdom in which confirmation was granted in proceedings relating to his or her powers and duties as an executor in relation to the confirmed estate.**

(Draft Bill, schedule 1, paragraph 3)

5.18 The new ground of jurisdiction based on confirmation would be appropriate in most cases for proceedings arising out of this Report: disputes relating to intestacy or legal share, claims by dependent children for a capital sum payment and claims by cohabitants. Where the deceased died domiciled in Scotland and had a usual residence there confirmation is granted by the sheriff court which deals with commissary business within whose area that residence is situated.<sup>21</sup> The sheriff at Edinburgh grants confirmation (a) where the deceased died domiciled in Scotland but without a known residence in any particular part, and (b) where the deceased died domiciled abroad with property, usually heritable property, in Scotland. However, jurisdiction based on confirmation would not deal with the situation where the deceased died domiciled in England and Wales or Northern Ireland since probate or letters of administration granted there authorise executors or administrators to act as executors of the Scottish property without confirmation. It would also fail to deal with claims

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<sup>20</sup> What estate was governed by Scots law would change if the proposed EU Regulation were to apply to the UK.

<sup>21</sup> Commissary proceedings are excluded from the Sch 8 jurisdictional rules: Sch 9, para 7. Not all sheriff courts deal with commissary business: see Act of Sederunt (Commissary Business) 1975, SI 1975/539 as amended.

in relation to estates that were administered without an executor being confirmed.<sup>22</sup> We therefore recommend two additional grounds of jurisdiction; one based on the deceased's domicile in Scotland and the other based on the situation of immoveable property in Scotland where the deceased died domiciled outwith Scotland. Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 confers jurisdiction on Scottish courts (in addition to other grounds) where the proceedings have as their object rights *in rem* in immoveable property in Scotland, or where the defender is not domiciled in the United Kingdom and has a beneficial interest in such immoveable property.<sup>23</sup> The first of these is not apposite to proceedings arising out of this Report as their object is payment of money calculated by reference to the net estate; the second fails to deal with defenders domiciled in the United Kingdom owning Scottish heritage. The two recommended additional grounds, domicile and situation of heritage in Scotland, should also apply to allocate jurisdiction to the sheriff courts of a particular sheriffdom. But the sheriff at Edinburgh would have jurisdiction where the deceased died domiciled in Scotland but without a fixed or known residence in any particular sheriffdom. We therefore recommend that:

**50. (1) The Court of Session should also have jurisdiction in relation to relevant proceedings in this Report:**

**(a) where the deceased died domiciled in Scotland;**

**(b) where the deceased died domiciled outwith Scotland and the estate includes immoveable property situated in Scotland.**

**(2) The sheriff courts of a sheriffdom should also have jurisdiction in relation to relevant proceedings in this Report:**

**(a) where the deceased died domiciled in Scotland and was habitually resident in that sheriffdom;**

**(b) where the deceased died domiciled outwith Scotland and the estate includes immoveable property situated in that sheriffdom.**

**(3) The sheriff at Edinburgh should also have jurisdiction in relation to relevant proceedings in this Report where the deceased died domiciled in Scotland but without any fixed or known habitual residence in any particular sheriffdom.**

(Draft Bill, sections 13(6), 16(6), 19(8) and (9), 23(4) and (5), 27(9) and (10))

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<sup>22</sup> A number of investment bodies such as building or friendly societies and National Savings Investments have statutory power to pay sums up to a specified limit without confirmation. Confirmation would also be unnecessary if, for example, a deceased foreigner's Scottish estate consisted of only immoveable property in Scotland which passed by a survivorship destination.

<sup>23</sup> Arts 5(1)(a) and 2(h) respectively.

## Part 6 Testamentary documents and special destinations

### Rectification of wills

6.1 In the 1990 Report this Commission recommended that the Court of Session or the sheriff courts should have the power to rectify a will prepared by someone other than the testator where the court was satisfied that the will failed to give effect to the testator's instructions.<sup>1</sup>

6.2 The following four examples, which were given in that Report, demonstrate the type of situation in which the rectification of such a will may be appropriate:<sup>2</sup>

- (i) A typist, in copying a will from an approved draft, erroneously misses out some words. The effect is to deprive a residuary legatee of all benefit.<sup>3</sup>
- (ii) Instead of leaving legacies of £10,000 each to the testator's daughters, G and F, as instructed by the testator, the will, because of a clerical error, leaves two legacies of £10,000 to G and fails to mention F. The will is sent to the testator for signature along with a summary of its provisions. The testator reads the summary, which mentions legacies to G and F but does not read the whole will. He signs it without noticing the error.<sup>4</sup>
- (iii) An insurance agent, asked to prepare a will relating only to an insurance policy, erroneously includes a clause revoking prior wills. He believes, in good faith, and assures the testatrix, that this has effect only in relation to the insurance money. In fact it has general effect and contrary to the testatrix's intentions and instructions, revokes her prior will entirely.<sup>5</sup>
- (iv) A solicitor, instructed by a testatrix to revoke clause 7(iv) of a will, mistakenly and carelessly revokes the whole of clause 7.<sup>6</sup>

6.3 It was also recommended that in deciding whether or not to make an order for rectification of a will a court should be able to look at extrinsic evidence, such as oral or written instructions. It was thought that a time limit of six months from confirmation for making an application for rectification gave a reasonable balance between allowing sufficient

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<sup>1</sup> See paras 4.21-4.28 of the 1990 Report.

<sup>2</sup> See para 4.21.

<sup>3</sup> Cf *In re Reynette-James* [1976] 1 WLR 161.

<sup>4</sup> Cf *In the Goods of Sir J E Boehm* [1891] P 247.

<sup>5</sup> Cf *Collins v Elstone* [1893] P 1.

<sup>6</sup> Cf *Re Morris, decd* [1971] P 62.

time for an application and preventing stale claims but that there might be special circumstances where it would be reasonable for a late application to be permitted.<sup>7</sup>

6.4 We were also of the view that a trustee or executor who had acted in good faith in distributing property on the basis of an unrectified will should not be held personally liable where that will is later rectified. Finally, it was recommended that an order of the court rectifying the will should be registrable in the Books of Council and Session.

6.5 Looking at these matters afresh, we consider that the arguments in favour of these reforms are equally convincing now and accordingly we recommend adhering to them.

6.6 There is one further matter. What should happen when the testator prepares his or her own will rather than instructing a third party to do so? In 1990, opinion was divided among consultees on the issue.<sup>8</sup> However, the Commission was persuaded by the argument that it would be very difficult to obtain sufficient evidence to satisfy a court of the need to rectify a home-made will. Accordingly, we recommended that the power to rectify a will should be confined to cases where the will had been prepared by someone other than the testator where a comparison could be made between the testator's instructions and the will itself. We continue to hold this view and therefore we wish to confine a power of rectification to cases where the will has been prepared by someone other than the testator.

6.7 Accordingly we recommend:

51. (1) **Provision should be made for the judicial rectification of a will prepared by someone other than the testator where the court is satisfied that the will is so expressed that it fails to give effect to the testator's intentions.**
- (2) **The power to rectify should be exercisable by the Court of Session or by the sheriff court.**
- (3) **An application for rectification should be competent only within 6 months from the date of confirmation of an executor or, where there is no confirmation, from the date of death: but the court should have power, on cause shown, to allow a later application.**
- (4) **A court dealing with an application for rectification should be expressly empowered to consider extrinsic evidence.**
- (5) **A trustee or executor should not be personally liable for distributing any property in good faith in accordance with a will which is later rectified.**

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<sup>7</sup> For example, the late discovery of documents which could not reasonably have been discovered earlier.

<sup>8</sup> See para 4.24 of the 1990 Report.

**(6) Provision should be made for a court order rectifying a will to be registrable in the Books of Council and Session or sheriff court books if the will is already registered there or if it is being registered there at the same time.**

(Draft Bill, section 27)

### **Effect of marriage or civil partnership**

6.8 In the 1990 Report this Commission considered whether the present rule that marriage has no effect on a will should continue to apply.<sup>9</sup> The main argument which was advanced in favour of a rule of revocation by subsequent marriage is that for the purposes of succession the importance of marriage as an event makes it likely to destroy the basis upon which any prior will was made. Furthermore, most married testators would wish their estates to devolve in accordance with the rules on intestacy rather than under the terms of a will made before a marriage which they had, inadvertently, omitted to amend. In this regard it was also recognised that the spouse's legal share would be much less valuable than his or her rights on intestacy.

6.9 However, we were more persuaded by the arguments against the creation of a rule of revocation by marriage. It was felt that to allow the revocation of a will by marriage could frustrate the intentions of a testator who might reasonably assume that the will stood until revoked by him or her. Furthermore, the marriage of the testator would have the effect of revoking his or her entire will, which we considered was a disproportionate response to the mischief that such a rule would be designed to address. The common occurrence of second marriages also pointed against introducing a rule of revocation due to the fact that testators would not necessarily wish a second marriage to have any effect upon provisions of a will which favoured any children of the previous marriage.

6.10 In 1990, therefore, having considered the case for and against revocation by marriage and the consultees' responses we did not recommend that a will should be revoked by the testator's marriage. The arguments made in 1990 continue to apply and we are therefore content to make no recommendation for change.

6.11 We consider that the same rule should apply to civil partnership on the basis of the principle that those who have registered a civil partnership should be treated, for succession purposes, in the same way as those who are married. Civil partnerships would probably be treated in the same manner as marriage under the common law, a view which we endorse.

### **Effect of divorce, dissolution or annulment**

6.12 Under the existing law, testamentary provisions in favour of a spouse are not revoked unless it is clear from their terms that they are made on the condition that the legatee remains a spouse.<sup>10</sup> This rule stands in contrast to the provisions in a number of other

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<sup>9</sup> See paras 4.29-4.33. In contrast to the rule in Scotland, in England and Wales a testator's marriage results in the revocation of the will, unless it appears from the will that it was made in contemplation of that marriage (Wills Act 1837, s 18, as substituted by the Administration of Justice Act 1982, s 18(1)). The English rule is followed in most Commonwealth jurisdictions, though it has been questioned.

<sup>10</sup> See *Henderson's JF v Henderson* 1930 SLT 743; *Pirie's Trs v Pirie* 1962 SC 43; *Couper's JF v Valentine* 1976 SLT 83.

jurisdictions where a divorce effectively revokes provisions in favour of former spouses, unless otherwise provided by the will.<sup>11</sup>

6.13 The issue was examined in the 1990 Report.<sup>12</sup> The considerations which apply in this case are not the same as those applying to revocation of a will by marriage or civil partnership, as unlike the latter, only the provisions in favour of a former spouse or civil partner (rather than the whole will) would be revoked. Moreover, it can usually be assumed that a testator would not wish a former spouse or civil partner to inherit, especially as the latter will have received financial provision on divorce or dissolution. Therefore a rule revoking testamentary provisions in favour of a former spouse or civil partner is likely to give effect to a testator's wishes.

6.14 In the light of this, and the very strong support among consultees in 1990, this Commission recommended a rule to the effect that testamentary provisions in favour of a spouse were to be revoked automatically by later divorce or annulment, unless the will otherwise provided, and that the surviving spouse was to be treated as having failed to survive the testator. This included testamentary provisions appointing spouses as executors, curators, tutors or donees under a power of appointment.

6.15 We are of the view that the rule recommended in 1990 should be carried forward to the new Bill, subject to being extended to civil partnerships. Account should also be taken of the fact that curators and tutors no longer exist as a result of the Age of Legal Capacity (Scotland) Act 1991 and the Children (Scotland) Act 1995.

6.16 In order to provide an appropriate link with Scotland, the rule should apply where the testator dies domiciled in Scotland, regardless of where the divorce, dissolution or annulment is obtained, provided it is recognised in Scotland.

6.17 We therefore recommend:

**52. (1) Divorce, dissolution or annulment of a marriage or civil partnership should, unless the will provides otherwise, have the effect of revoking:**

**(a) any testamentary provision by one of the spouses or civil partners conferring a benefit or power of appointment on the other;**

**(b) any testamentary appointment by one spouse or civil partner of the other spouse or civil partner as a trustee, executor or guardian.**

**(2) The effect of such a revocation should be that, for the purposes of the will, the surviving spouse or civil partner is deemed to have failed to survive the testator.**

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<sup>11</sup> See for example the Uniform Probate Code, Section 2-508 and, in England and Wales, s 18A of the Wills Act 1937 (inserted by the Administration of Justice Act 1982, s 18(2)). See also *Re Sinclair, decd* [1985] 2 WLR 795.

<sup>12</sup> At paras 4.34-4.45.

**(3) These rules should apply where the testator dies domiciled in Scotland and the divorce, dissolution or annulment is recognised in Scotland.**

(Draft Bill, section 28)

**Effect of birth of child: *conditio si testator sine liberis decesserit***

6.18 Scots law currently provides that a will may be challenged by a child of the deceased who is born after the will was executed, if the will makes no provision for the child.<sup>13</sup> The child could apply to court for the will to be treated as revoked under the rule of law known as the *conditio si testator sine liberis decesserit*. In the 1990 Report, after taking into account consultees' responses, we recommended that this rule be abolished.

6.19 As we stated in the 1990 Report, this rule of law appears to have been introduced into Scots law in the eighteenth century.<sup>14</sup> A similar rule in English law was abolished by the Wills Act 1837. We are not aware of any corresponding rule in the continental European jurisdictions. There is a provision in the Uniform Probate Code giving an "after-born or after-adopted child", if not provided for in the will, an entitlement to what he or she would have received on intestacy.<sup>15</sup> This is subject to exceptions: it does not apply where, from the terms of the will, the omission was intentional; nor does it apply where the testator made provision for the child by means other than the will.<sup>16</sup> It should be noted that the Uniform Probate Code does not make provision for legal share or discretionary family provision for children.

6.20 In the 1990 Report we explained that the application of the *conditio* may, on occasion, produce unfortunate results. We cited the example of a man who left his whole estate to his long term (but unmarried) partner. If a child were subsequently born to the couple, and the father were to die, the effect of the *conditio* would result in the estate being treated as intestate and the child inheriting everything. This, it could be assumed, would not be in accordance with the testator's wishes. Even under our current recommendations, which would allow the surviving cohabitant the right to claim in succession, the result could still be very different from the testator's intention. And if the testator had left an earlier will which did not breach the *conditio* then it may take effect.<sup>17</sup>

6.21 We see no reason to depart from the recommendation in the 1990 Report and we therefore recommend that:

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<sup>13</sup> Until *Greenan v Courtney* 2007 SLT 355 the last reported case was from the early 20<sup>th</sup> century.

<sup>14</sup> See *Yule v Yule* (1758) Mor 6400; *Watt v Jervie* (1760) Mor 6401.

<sup>15</sup> Section 2-302, "omitted children".

<sup>16</sup> There is a further exception in the case where, at the date of execution of the will, the testator was childless and where the will leaves all, or substantially all, of the estate to the after-born or after-adopted child's parent who survives and takes.

<sup>17</sup> As in *Nicolson v Nicolson's Tutrix* 1922 SC 649, where an earlier will which made provision for unborn children was held to regulate the deceased's succession in view of the revocation, by the *conditio*, of a later will which left his entire estate to the deceased's widow. The later will was universal in its terms and did not expressly revoke the earlier will. Contrast that with the decision in *Elder's Trs v Elder* (1895) 22 R 505, where an earlier universal testament which provided for future children did not have effect, as it had been expressly revoked by a subsequent will. We discuss the rules on the revival of revoked wills at paras 6.31-6.36.

53. The rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) should be abolished.

(Draft Bill, section 30)

**Legatee who predeceases leaving issue: *conditio si institutus sine liberis decesserit***

6.22 In certain circumstances, a legatee who dies before the legacy vests can be represented by his or her issue. In other words, the issue take what would otherwise have fallen to their deceased parent (or ancestor). The class of legatees to whom this rule applies is restricted to the testator's direct descendants, and to nephews or nieces if the testator treated them, in the will, as a parent would treat a child. In such cases, the legacy is, in effect, to be read as if it included wording such as "whom failing his, or her, issue". The rule is known as the *conditio si institutus sine liberis decesserit*.<sup>18</sup> It applies unless there is an express or clearly implied indication to the contrary.<sup>19</sup> A similar – but not necessarily identical – rule applies in many other jurisdictions.<sup>20</sup>

6.23 In the 1990 Report this Commission recognised that there are arguments for and against retaining the rule. An argument in favour is that it is likely to give effect to the testator's wishes. In leaving a legacy to a child, a parent may simply not contemplate that the child will predecease and may therefore not expressly state that, where this occurs, the child's issue is to take in his or her place. On the other hand, the rule involves reading into a will words which do not appear yet which may readily have been inserted. It can also be difficult to determine whether the rule is to apply, and this is particularly so where it involves a nephew or niece.<sup>21</sup>

6.24 In our consultative memorandum we favoured a modest extension of the scope of the rule. But in the 1990 Report we recommended that, on balance, the rule should be retained though with some slight restrictions.<sup>22</sup> In coming to that conclusion, consideration was given to extending the scope of the rule by applying it to those other than direct descendants and nephews and nieces – for example, to collaterals, step-children, parents, grandparents and spouses of legatees.<sup>23</sup> However,

"although there was support from consultees for some extension, we have come to the conclusion, after reconsideration, that it is very difficult to justify drawing a line at any point beyond the testator's own descendants. The special position of descendants of the deceased, and the issue of predeceasing descendants, is recognised for the purposes of legal rights (and we are recommending that this should continue in relation to legal shares) and it seems reasonable to read into a will a conditional institution of the issue of descendants. It is not so reasonable, and

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<sup>18</sup> See D R MacDonald, "Lapse of Legacies in Scots Law" in *Modern Studies in Property Law* (ed. E Cooke, vol I), 275ff.

<sup>19</sup> See *Hall v Hall* (1888) 18 R 690; *Knox's Ex v Knox* 1941 SC 532. This topic is discussed generally in some detail in paras 4.50-4.66 of the 1990 Report.

<sup>20</sup> For instance, in English law the rule applies to direct descendants only: see the Wills Act 1837, s 33 (as amended by the Administration of Justice Act 1982, s 19). In South African law the equivalent rule applies only where the legatee is a child of the testator but not a more remote descendant: see the General Law Amendment Act 1952, s 24. In the Uniform Probate Code, the rule applies to legacies to a grandparent or a lineal descendant of a grandparent of the testator: see Section 2-605.

<sup>21</sup> See *Knox's Ex v Knox* 1941 SC 532.

<sup>22</sup> See the recommendations in para 4.65.

<sup>23</sup> See in particular paras 4.57-4.60.

indeed is probably not justifiable, to read such a conditional institution into bequests to grand-parents, parents, uncles, aunts, nephews, nieces or cousins. A woman who leaves a bequest to her mother would not usually intend to benefit her brother should her mother have predeceased her."<sup>24</sup>

6.25 Consideration was also given to a number of other aspects of the rule or possible modifications of it.

6.26 Should the rule apply when the legatee was already dead at the time the will was executed?<sup>25</sup> This does not form part of the *conditio* in Scots law, but in some jurisdictions an equivalent rule applies when the legatee was dead but the testator was not aware of this fact.<sup>26</sup> We did not recommend an extension of the rule in this direction, for the reason that in most cases a testator could be expected to know whether, at the time of executing the will, the legatee was alive or not (and could make appropriate provision for issue to take, were there any doubt as to whether the legatee was still alive).

6.27 What is sufficient to show that the testator did not intend a legatee's issue to take in the event of the legatee's predecease? Should the rule be displaced if the bequest contains a survivorship clause or a provision that another person is to take the legacy if the specified legatee does not survive?<sup>27</sup> There was support amongst consultees for applying the rule unless it was expressly disapplied. However, we took the view that this might lead to results which the testator, and particularly a testator who did not have professional legal advice, did not intend. Our recommendation was that a clear implication (but not necessarily an express statement) that the rule was not to apply was to be sufficient to displace it.<sup>28</sup> We also recommended that the rule should not apply to a bequest which contains an express survivorship clause or destination over.<sup>29</sup>

6.28 At present, the rule entitles the issue of a predeceasing legatee to take only the legatee's original share (and not what would have been taken if he or she had survived to the date of vesting). We gave an illustration of this in the 1990 Report:

"A testator leaves his estate to his three sons A, B and C. There is no express survivorship clause. A predeceases the testator leaving a daughter. B predeceases without issue. C survives. If A had survived he would have shared the estate equally with C, the other surviving child. However, the rule mentioned in the text means that A's daughter does not take the half share he would have received on survival but only the one third share originally left to him in the will."<sup>30</sup>

Consultees agreed with our suggestion that this result is difficult to justify. There was a strong preference for the predeceasing legatee's issue taking what the legatee would have taken on survival. It is possible that more than one legatee may predecease, leaving issue, and so we recommended that the division should be on the basis that all predeceasing legatees who left surviving issue should be presumed to have survived. In other words, if B

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<sup>24</sup> Extract from para 4.57 of the 1990 Report.

<sup>25</sup> See para 4.61 of the 1990 Report.

<sup>26</sup> Eg see the Uniform Probate Code Section 2-605. Contrast this with the position in Scots law: *Barr v Campbell* 1925 SC 317.

<sup>27</sup> See para 4.62 of the 1990 Report. It is perhaps surprising that it has been held that the rule can apply even in such cases: see *Dixon v Dixon* (1841) 11 Rob App 1; *Devlin's Trs v Breen* 1945 SC(HL) 27.

<sup>28</sup> See recommendation 19(a).

<sup>29</sup> See recommendation 19(c).

<sup>30</sup> Para 4.64.

had predeceased the testator in the example above, and had left issue, the estate would have been divided into three, with one part taken by C and one part each by A and B's issue.

6.29 We still adhere to our recommendations set out in the 1990 Report, for the reasons given in it and summarised above. We therefore recommend:

54. (1) **There should continue to be a rule whereby, if a legatee within a certain class dies after the date of the will but before the date of vesting, his or her issue take the legacy unless the will expressly, or by clear implication, provides otherwise.**
- (2) **The class should be confined to direct descendants of the testator.**
- (3) **The will should be regarded as providing otherwise if the bequest contains an express survivorship clause or destination-over.**
- (4) **Where the rule applies, the issue of the predeceasing beneficiary should take the share that the beneficiary would have taken if he or she (and any other predeceasing beneficiary whose issue take by virtue of this rule) had survived the date of vesting.**

(Draft Bill, section 33)

6.30 In line with the approach taken in the draft Bill appended to the 1990 Report,<sup>31</sup> we propose to abolish the *conditio si institutus sine liberis decesserit* and to replace it with new statutory rules. The reason for this is to make it clear that cases on the current *conditio* are irrelevant to the interpretation of the new statutory rules.

### **Revival of revoked wills**

6.31 Scots law currently provides that, where a will which revokes a previous will is itself revoked, the previous will revives.<sup>32</sup> This is subject to a possible exception where it can be proved by extrinsic evidence that the testator did not intend the earlier will to have any continuing effect as a potential testamentary document.<sup>33</sup>

6.32 In the 1990 Report this Commission concluded that the law on this point is not satisfactory.<sup>34</sup> Indeed, it is quite likely to produce effects which would not have been intended by the testator. Two examples from decided cases were cited:

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<sup>31</sup> Clause 17.

<sup>32</sup> *Bruce's JF v Lord Advocate* 1969 SC 296; *Scott's JF v Johnston* 1971 SLT (Notes) 41. As the 1990 Report noted, at para 4.69, one strand in the argument is the assumption that a will only "speaks from death": see, in particular, the dicta in *Bruce's JF v Lord Advocate* at 305 and 307. But there is authority to the effect that a valid and express revocation of an earlier settlement takes immediate effect, and stands even if other parts of the document containing it are revoked or successfully challenged: eg see *Leith v Leith* (1863) 1 M 949 at 955.

<sup>33</sup> *Ferguson v Russell's Trs* 1919 SC 80 per Lord Sands at 84. Lord Sands gave the examples of a testator who had given his solicitor instructions to destroy the old will (which instructions had not been carried out) or a testator who had given the old will "to an autograph-hunting friend because some great celebrity was one of the instrumentary witnesses".

<sup>34</sup> See generally the discussion at paras 4.67-4.76. There is a brief discussion of comparative law in paras 4.70-4.73.

"1. In *Bruce's Judicial Factor v Lord Advocate*<sup>35</sup> the testator executed a will in 1945. In 1949 he executed a new will which contained a clause revoking all previous testamentary writings. He did not expressly instruct his solicitors to destroy the 1945 will and they retained it. The 1949 will was proved to have been in the testator's custody from 1955 and was not proved to have left his custody. When the testator died in 1961 the 1949 will could not be found and was therefore presumed to have been destroyed by him with the intention of revoking it.<sup>36</sup> In these circumstances it was held that the 1945 will took effect.

2. In *Scott's Judicial Factor v Johnston*<sup>37</sup> the testatrix executed a testamentary writing in 1963 ("the 1963 will"). In 1964 she executed another ("the 1964 will") which expressly revoked all previous testamentary writings. Her solicitor, however, retained the 1963 will. On her death there was found a subsequent signed holograph writing which said: "I, Marion A Scott cancel completely the will drawn up by Mr Gilruth and signed by me." It was agreed that this revoked the 1964 will and it was held that the result was that the 1963 will regulated the succession."<sup>38</sup>

6.33 The consultative memorandum proposed that there should be either a rule of non-revival, or alternatively a presumption of non-revival, in all cases where a will was expressly revoked. Most consultees favoured a rule rather than a presumption, in the interests of certainty. We agreed, but also considered that there should be an exception in two cases: an earlier will which has been expressly revoked should be treated as effective if the testator either re-executes it or executes another document which expressly revives it.<sup>39</sup>

6.34 In the course of preparing for the 1990 Report, we also consulted on a second matter – does a will, which is *impliedly* revoked by a later will (typically, a will with provisions which are inconsistent with those in the earlier will), revive if the later will is revoked? "Logically," the 1990 Report stated,<sup>40</sup> "this is a different situation. The first will is merely displaced to the extent of any inconsistency and, as a matter of principle, ought to receive effect once the inconsistency is removed by the revocation of the second will."<sup>41</sup> There can be a difficulty in this type of situation in knowing with clarity whether the subsequent will is intended to revoke the earlier one. It is arguable that the two wills are to be read together and the later one allowed to prevail insofar as there is inconsistency.<sup>42</sup> However, most of the consultees thought that the same rule should apply to implied and express revocations. We disagreed, considering "that it would be safer and more in accordance with principle to confine a rule of non-revival to cases where the first will had been expressly revoked".<sup>43</sup>

6.35 However, on further consideration, we now take the opposite view. We consider that the rule ought to apply, subject to the exceptions mentioned in paragraph 6.33 above, where the later will has expressly or impliedly revoked the earlier will. It will be a matter of fact and

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<sup>35</sup> 1969 SC 296.

<sup>36</sup> See *Clyde v Clyde* 1958 SC 343.

<sup>37</sup> 1971 SLT (Notes) 41.

<sup>38</sup> Extract from para 4.68 of the 1990 Report.

<sup>39</sup> This Commission accepted that, in both of these cases, a court might hold that there was a new will but it seemed preferable to remove any doubt: see para 4.75 of the 1990 Report.

<sup>40</sup> Extract from para 4.76.

<sup>41</sup> See *Leith v Leith* (1863) 1 M 949 *per* LJC Inglis at 955; *Kirkpatrick's Trs V Kirkpatrick* (1874) 1 R (HL) 37 at 44 and 48; *Nicolson v Nicolson's Trs* 1922 SLT 473.

<sup>42</sup> See *Kirkpatrick's Trs v Kirkpatrick* (1874) 1 R (HL) 37 at 44 and 48.

<sup>43</sup> Extract from para 4.76 of the 1990 Report.

law whether, in any particular case, there has been an implied revocation.<sup>44</sup> This reform has the virtue of consistency in that the testator's intentions are central, regardless of whether they are express or implied. It also has the support of our Advisory Group and will mean that there will be no need for testators to direct their solicitor to destroy an earlier will when they execute a subsequent one.<sup>45</sup>

6.36 Accordingly we recommend that:

- 55. A will, or any part of a will, which has been revoked, either expressly or impliedly, by a subsequent will should not revive unless the testator re-executes it or executes another document which expressly revives it.**

(Draft Bill, section 32)

### Validation of Wills

6.37 In the 1990 Report, this Commission considered whether the Scottish courts should have the power to declare as formally valid a writing which purports to be a will, an alteration to a will, or a revocation of a will, notwithstanding a failure to comply with the requirements for formal validity, if it is satisfied that the testator intended it to be a testamentary writing.<sup>46</sup> In light of an examination of the arguments for and against the introduction of such a power, and also a comparative study of similar powers in a number of foreign jurisdictions, we recommended that the Scottish courts should have this power. It was considered to be necessary because it would provide a remedy in a situation where a document obviously intended as a will could not take effect because of technical defects in its execution.

6.38 We also considered that the power to validate should extend to documents which purport to be testamentary writings, even if they had not been signed by the testator:

"A dispensing power limited to signed documents would not cover all the cases where such a power would be useful. It would not cover the type of case, where because of mistake, oversight or interruption, a testator omits to sign even though the circumstances leave no room for doubt as to his or her intention that the document should take effect as his or her will. It would not meet the case where a husband and wife mistakenly sign each other's wills. Nor would it meet the type of case where an unsigned will is contained in a signed and sealed envelope and where the present law cannot be stretched far enough to allow the signature on the envelope to be regarded as the subscription of a will. Yet another type of case was brought to our attention during discussions with a representative of the Law Society of Scotland on this question. This is the case where a purported notarial execution is carried out on behalf of a person who is unable to write by a person who is not qualified to act as a notary. The will, let us suppose, is written out on the testator's instructions, read over to him or her by the 'notary' in the presence of two reputable witnesses, and subscribed by the 'notary' on behalf of, and with the authority of, the testator. Everything is honest and open. The will is reasonable in its terms and confers no

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<sup>44</sup> Implied revocation will typically occur where a testamentary writing is followed, in time, by another testamentary writing which is valid and necessarily inconsistent with the earlier one. The revocation will be limited to the extent of the inconsistency: see *Stoddart v Grant* (1852) 1 Macq 163.

<sup>45</sup> The decision in each of the cases cited in para 6.32 would have been different had the testator instructed the destruction of the earlier will. It is hardly likely that the typical testator who instructs a second will would think of expressly instructing the destruction of the first.

<sup>46</sup> Paras 4.1-4.20 of the 1990 Report.

benefit on the 'notary' or the witnesses. There is no doubt as to the testator's testamentary intentions. Yet the will is not signed by the testator."<sup>47</sup>

6.39 Since the submission of the 1990 Report, the Requirements of Writing (Scotland) Act 1995 has been enacted with the effect of reducing substantially the requirements for formal validity of testamentary writings. Unlike the formalities required for wills made before 1 August 1995, all that is now required for formal validity is subscription at the end of the last page of the document.<sup>48</sup> There is no longer any need for witnessing or for the writing to be holograph or adopted as holograph or for signature on all pages.<sup>49</sup> In short, many of the difficulties created by the formal requirements for wills made prior to 1 August 1995 no longer exist for wills made after that date.<sup>50</sup>

6.40 Although the 1990 Report states that a power to validate would be useful even if the requirements for formal validity were reduced to subscription alone,<sup>51</sup> we now take a different view. Subscription is a minimal, very simple requirement. It is not at all confusing to apply, even for a lay person. We do not think it is unreasonable or onerous to require a signature at the end of a will for formal validity. People are generally aware that a will must be signed before it is legally effective. If unsigned documents could be validated by a court as a will it is likely that there will be a number of difficult and potentially hopeless litigations, as well as increased prospects of fraud. Furthermore, in some cases, the task of the executor will be substantially more difficult because all writings left by the deceased will require to be checked for testamentary instructions, whether they are signed or not. For these reasons, we now feel that the case for a validation power is much weaker. We are therefore not recommending that the courts be given a power to grant testamentary effect to formally invalid wills.

6.41 There is a further question which arises, which is how to treat alterations to, or revocations of, a will where the alteration or revocation is not in itself formally valid. As we have seen, in the 1990 Report we recommended that a power of validation should extend to alterations and revocations of wills which did not comply with the requirements for formal validity.<sup>52</sup> If this had been acted upon, an unsubscribed alteration to, or revocation of, a will could be declared formally valid if there was enough evidence to satisfy the court that the proposed alteration or revocation was intended by the testator to take effect as part of his or her will.

6.42 Once again, the Requirements of Writing (Scotland) Act 1995 has changed the law in this area. It makes provision for the alteration of documents, including testamentary writings.<sup>53</sup> Under that Act, if an alteration is made to a document before it is subscribed by

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<sup>47</sup> Extract from para 4.15 (with footnote references omitted).

<sup>48</sup> Requirements of Writing (Scotland) Act 1995, s 2. The signature should be the full name or surname and forename or initials or another name, description, initial, or mark which is the testator's usual method of signing documents of that type and is intended as his or her signature (s 7(2)).

<sup>49</sup> Section 3 of the 1995 Act, however, requires both attestation and signature by the testator on all pages for the will to be self-proving.

<sup>50</sup> The singular requirement of subscription has itself been interpreted fairly liberally by the courts. In *Davidson v Convy* 2003 SC 420 it was held that an unsigned paper which was left in a signed envelope bearing the words 'My Will' constituted a valid testamentary writing.

<sup>51</sup> Para 4.7 of the 1990 Report.

<sup>52</sup> Para 4.20 of the 1990 Report.

<sup>53</sup> "Alteration" includes interlineation, marginal addition, deletion, substitution, erasure or anything written on erasure (s 12(1)).

the testator, the alteration will take effect as part of the document so subscribed.<sup>54</sup> Alterations made after the document has been subscribed, however, must themselves be signed or initialled by the granter in order to take effect as formally valid alterations.<sup>55</sup>

6.43 In light of these changes, and in line with our decision that the courts should not have power to validate formally invalid writings which purport to be wills, we are of the view that the same rule should apply to purported alterations and revocations of wills. If an alteration or revocation is not executed in accordance with section 5(1) of the 1995 Act then it should not be possible for it to be later validated by the court given the simplicity of the requirements for formal validity which the 1995 Act has introduced. For these reasons, and for those given above, we now make no recommendation that the courts be given the power to grant testamentary effect to formally invalid alterations to, or revocations of, testamentary writings.

### **Vesting of fee on forfeiture or renunciation of liferent**

6.44 In the case of a simple bequest such as "to A in liferent and B in fee" the fee will normally vest in B on the death of the testator.<sup>56</sup> But where there is a destination over or survivorship clause (eg "to A in liferent and B whom failing C in fee") the vesting of the fee will usually be postponed until A's death.<sup>57</sup> This can cause problems when A renounces the liferent or it otherwise terminates early. For instance, there is a question mark over what to do with the income which arises during the life of the liferenter after the point of renunciation or termination. A liferent in this situation has been described as a "shadow" liferent.<sup>58</sup>

6.45 In the 1990 Report this Commission argued as follows. Since a claim for legal share is to result in the claimant being treated as having predeceased the deceased, the intended effect of such a claim by a person who is otherwise entitled to a liferent interest in all or part of the deceased's estate is that the vesting of the fee should be accelerated and should not await the claimant's death.<sup>59</sup> It was considered that this effect might not result without express statutory provision, and so a recommendation to that end was made. It reverses the rule of the present law that early termination of a liferent by renunciation or forfeiture does not accelerate vesting in the fee unless the document in question so provides. "It is hard to believe that any sane testator would wish to create a situation in which there was a liferent but no liferenter. The net result [of the recommendation being implemented] should be the avoidance of a good deal of difficulty, expense and litigation."<sup>60</sup>

6.46 We continue to take the same view. We note, though, that under our recommendations there will be a deemed renunciation not only when a claim for legal share is made, but also when a surviving cohabitant makes a claim against the deceased's

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<sup>54</sup> Section 5(1)(a).

<sup>55</sup> Section 5(1)(b). It should be noted that the requirements of s 5(1) are without prejudice to any rule of law enabling any provision in a testamentary document to be revoked by deletion or erasure without authentication of the deletion or erasure by the testator (s 5(2)(a)). This rule in itself was doubted by Lord McLaren in the leading case of *Pattison's Trs v University of Edinburgh* (1888) 16 R 73 in which it was held that a deletion would not take effect unless the substituting words were themselves authenticated. In such a case the court would revert to the original wording, despite the possibility that this may not represent the last wishes of the testator.

<sup>56</sup> See *Carleton v Thomson* (1867) 5M (HL) 151.

<sup>57</sup> See *Muirhead v Muirhead* (1890) 17R (HL) 45.

<sup>58</sup> See G L Gretton, "Vesting, Equitable Compensation and the Mysteries of the Shadow Liferent" 1988 SLT (News) 149.

<sup>59</sup> See para 9.17 and recommendation 59.

<sup>60</sup> Extract from the end of para 9.17 of the 1990 Report.

estate.<sup>61</sup> However, that merely increases the number of situations in which renunciation of a liferent may arise, but does not affect the desired effect of the renunciation in any way.

6.47 We therefore recommend that:

- 56. Where property has been left to one person in liferent and to another person in fee and the liferent is renounced or forfeited by the liferenter or otherwise terminates before the liferenter's death then the fee should, unless the document creating the liferent expressly provides otherwise, vest in the fiar at the time when it would have vested if the liferenter had died on the date of the renunciation, forfeiture or termination.**

(Draft Bill, section 34)

### Miscellaneous testate succession matters

6.48 There are a number of topics relating to testate succession which were examined in the 1990 Report on which we are content to follow the recommendations of that Report but to which we have not devoted any significant time on this occasion:

#### *Making a will for an incapax*

6.49 This Commission consulted on whether the lack of power to make a will for a person who does not have testamentary capacity should be changed. We recognised that there were arguments on both sides and expected opinion to be fairly divided. In the event, there was overwhelming support for keeping the law as it was. The 1990 Report contained no recommendation for the introduction of power to make a will for an *incapax*.<sup>62</sup>

6.50 We have not re-examined this issue. However, we note that since 1990 there have been legislative changes in this area, notably with the passage of the Adults with Incapacity (Scotland) Act 2000. Part 6 of this Act provides for "intervention orders", which allow a court to make an order relating to an incapable person's property, financial affairs or personal welfare. These have, on occasion, been made for succession purposes.<sup>63</sup>

#### *Meaning of "heirs" in private documents*

6.51 There was discussion in the 1990 Report of whether it was desirable to provide a statutory rule as to the meaning of "heir" in private documents.<sup>64</sup> The reason for the question was that this term might be understood differently at the time of execution of the document and at the time the testator's succession opened. Which interpretation was to be used? We consulted on the issue but decided not to make a recommendation. The main reasons were that the lack of any such statutory provision has hitherto not given rise to insuperable problems, that setting out a rule might distort what the testator intended, and that "heir" is

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<sup>61</sup> See para 4.22.

<sup>62</sup> See paras 4.78-4.80 of the 1990 Report.

<sup>63</sup> In *T, Applicant* 2005 SLT (Sh Ct) 97 the court granted an intervention order which authorised the applicant's mother's solicitor to execute a codicil to her will. A similar type of effect (renunciation of an incapable person's *jus relictii* in his deceased wife's estate) was achieved by the intervention order granted in *M, Applicant* 2007 SLT (Sh Ct) 24.

<sup>64</sup> At paras 4.81-4.83.

only one of a number of terms which might be used in a private deed and so a rule about its interpretation might only achieve partial success.

6.52 We have not considered it necessary to re-examine this issue.

### *Mutual wills*

6.53 The 1990 Report contains a brief discussion of mutual wills.<sup>65</sup> No recommendation was made. We have not considered it necessary to re-examine this issue.

### **Survivorship**

6.54 In order to succeed to the estate of a deceased person, the beneficiary or heir on intestacy has to survive the deceased. The merest instant will suffice unless the will specifies a longer period. The onus of proof of survivorship lies on the successor and the standard of proof is the normal civil standard - the balance of probabilities.

6.55 Section 31 of the 1964 Act sets out rules of survivorship in two different situations. The first is where the evidence indicates that the people concerned died simultaneously; the second is where there is uncertainty as to the order of death due to a lack of evidence. In each case the general rule is that the younger is deemed to have survived the elder.<sup>66</sup> Thus for all purposes of succession to the estate of the elder, the younger is deemed to have survived and for all purposes of succession to the estate of the younger, the elder is deemed to have failed to survive. There are two exceptions to this general rule. A husband and wife or two civil partners are deemed to have failed to survive each other;<sup>67</sup> and where the elder left a bequest to the younger whom failing a third party and the younger died intestate, for the purposes of the bequest the younger is deemed to have predeceased the elder so that the bequest passes to the third party instead of the intestate heirs of the younger.<sup>68</sup>

6.56 In the 1990 Report, this Commission criticised the general rule as it could lead to unfair and unexpected results.<sup>69</sup> For example, two cohabitants who had lived together for some time might leave their estates to each other whom failing their own relatives. Under the present rules of survivorship, the relatives of the younger could succeed to the combined estates, whereas the intention would have been that each cohabitant's estate passed to his or her own relatives if the other did not take. We recommended as a new general rule that where two persons die simultaneously or in circumstances where it is uncertain who survived whom, then for the purpose of succession to the estate of each of them, neither is to be treated as having survived the other. Thus in the example of the two cohabitants this produces the intended result. With this new general rule there is no need for the two exceptions noted above. The rule is the same as that which presently applies for married couples and civil partners and the third party will succeed instead of the younger's intestate heirs. We are not aware of any circumstances since 1990 which suggest a reconsideration of the recommended rule and it was endorsed by our Advisory Group.

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<sup>65</sup> At para 4.84.

<sup>66</sup> Section 31(1)(b).

<sup>67</sup> Section 31(1)(a).

<sup>68</sup> Section 31(2).

<sup>69</sup> It is also possible that, when the rule is applied to the simultaneous deaths of three (or more) people, the results are contradictory: see G L Gretton and A M Steven, *Property, Trusts and Succession*, para 25.22.

6.57 We therefore recommend that:

- 57. Section 31 of the Succession (Scotland) Act 1964 should be replaced by a provision that, where two persons die simultaneously or in circumstances such that their order of death is uncertain, the estate of each should be distributed as if the other had failed to survive.**

(Draft Bill, section 35)

6.58 It should continue to be competent for people to specify in their wills a period that a successor has to survive in order to take the testamentary provisions. It is common practice to provide for a survivance period of around a month where married couples or civil partners are providing for each other.<sup>70</sup> In this case the question will be did the spouse or civil partner survive the deceased for the specified period? If this cannot be established due to a lack of evidence then we think that the spouse or civil partner should be deemed to have failed so to survive. This prevents the spouse or civil partner from taking the provision and will enable it to pass to another person in terms of the will or the law. We therefore recommend that:

- 58. Where one person makes a testamentary provision for another and specifies in the will a period that the other must survive in order to take and it is uncertain whether the other survived for that period then for the purposes of that provision he or she should be treated as having failed so to survive.**

(Draft Bill, section 37)

6.59 In the 1990 Report, this Commission recommended a five day period of survivance for all rights of succession (intestacy, testamentary provisions, legal share and special destinations) unless the deceased had provided for a different period. It was thought that people would not want their estates to go to those who survived for only a day or so. Requiring a period of survivance also cuts down the number of cases where lack of evidence of survivance brings into play the new general rule which we have recommended above.<sup>71</sup> In accidents it often happens that the order of death of the victims is uncertain, but if there are survivors the issue of survivance for five clear days is less likely to arise. Nevertheless, we now think that this is an unnecessary addition to the general rule. Our Advisory Group thought that the practice of setting a period of about one month for couples would continue and in many other situations mere survivance would be preferred to five days. A five day provision loses much of its attractiveness if it applies only as a default provision in a minority of cases.

6.60 We also made a recommendation in the 1990 Report to deal with the situation where property is to pass to a person depending on the order of death and the property does not form part of the estate of any of the persons involved. For example, the proceeds of a life policy may be payable to the estate of the first to die or to the survivor of two or more people; and the fee of an inter vivos trust estate may be destined to two children equally between them or wholly to the survivor. The present law provides no solution where the two people

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<sup>70</sup> A R Barr, J M H Biggar, A M C Dalgleish and H J Stevens, *Drafting Wills in Scotland*, (2<sup>nd</sup> edn, 2009) para 5.15.

<sup>71</sup> Recommendation 57.

die simultaneously or their order of death is uncertain. The recommendation was that the property should be divided equally amongst the potential successors. We would support this equitable solution and recommend that:

- 59. Where property is to be transferred to one of two or more persons, depending on the order of their deaths, and does not form part of the estate of either or any of those persons before his or her death then if those persons have died simultaneously or their order of death is uncertain the property or its value should, in the absence of provisions to the contrary in the relevant document, be divided equally between or among the estates of those persons.**

(Draft Bill, section 36)

### **Special destinations**

6.61 A special destination is a destination in a document of title to property which passes the property, or the deceased's share of the property, from the deceased to a specified person or class of persons on the deceased's death. The most common special destination is the survivorship destination. In its simplest form the title is "to A and B equally between them and wholly to the survivor". While A and B are alive they are co-owners, but when one dies his or her share passes automatically to the survivor who ends up owning the whole property. This is often inserted in the titles of dwelling houses owned by married and other couples. Special destinations are not confined to heritable property; they are also met in share or bond certificates.

6.62 In the 1990 Report, this Commission took the view that special destinations, other than survivorship destinations, in future documents should cease to have effect in passing property on death.<sup>72</sup> Other special destinations, such as "to A whom failing B" and "to A and B in conjunct fee and liferent" are seldom used and it was considered that any advantages in having them were outweighed by the dangers that the owners of property and their executors were ignorant of their legal effects and the likelihood of conflicting provisions in the owners' wills. We now think that there is no need for legislative intervention. People should be free to use whatever destination they wish and should have to accept the risk that it may fail to give effect to their intentions. Although we have not carried out a recent survey, anecdotal evidence is that special destinations other than survivorship destinations are rarely used in current practice so that the scale of the mischief does not warrant statutory abolition. Finally, it has been pointed out that the survivorship destination "to A and B equally between them and wholly to the survivor" is in fact a half share to A whom failing B and a half share to B whom failing A, so that it makes no sense to allow survivorship destinations but ban destinations of the type "to A whom failing B". We also see no need to define a special destination and are content to leave this to the existing law and its development by the courts.

6.63 In *Barclays Bank Ltd v McGreish*<sup>73</sup> it was held that property passing by virtue of a special destination passed free from the deceased's debts. In the 1990 Report, we recommended that a person receiving property by virtue of a special destination should be

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<sup>72</sup> Paras 6.2-6.6 for property and paras 6.23-6.26 for leases.

<sup>73</sup> 1983 SLT 344.

liable for the deceased's debts up to the value of the property received.<sup>74</sup> This has now been implemented by the decision in *Fleming's Trustee v Fleming*<sup>75</sup> which overruled *Barclays Bank* so that legislative intervention is unnecessary.

6.64 The rules relating to the evacuation of a special destination by a later will are complex. In survivorship destinations there is usually an implied contract between the co-owning couple arising out of their contributions to the price that prevents either of them from evacuating the destination by bequeathing their share of the property to anyone apart from other.<sup>76</sup> And where one of them receives their share by gift he or she cannot evacuate the destination as regards that share.<sup>77</sup> There are very probably no restrictions on lifetime disposals by co-owners, but the law is not absolutely clear.<sup>78</sup> In the 1990 Report we recommended that there should be no restrictions on an owner's power of disposal of property subject to a special destination during lifetime or on death.<sup>79</sup> This was done to achieve certainty and simplify the law. Since 1990 there has been a change of practice regarding survivorship destinations. They are no longer inserted almost as a matter of course in titles involving married and other couples. A survivorship destination will generally be inserted now only on the express instructions of the couple after its effects, advantages and disadvantages have been explained. This would be even more true of the more unusual types of destinations. There is therefore a greater expectation now that where the couple agreed to have the succession to their share governed by a survivorship destination it will not be evacuated by either of them by will. We therefore no longer recommend any change in the present law on evacuation.

6.65 Destinations may also occur in wills or trusts. One that causes difficulties at present is where a legacy is given "to A whom failing B". If A predeceases the testator then B will take. But if A and B both survive the testator then B can be either a conditional institute so that once A takes the legacy B has no further right, or B can be a substitute – a successive legatee – so that A takes but if A dies still owning the property it will pass to B by virtue of the destination. Where the subject matter of the legacy is moveable or a mixture of heritable and moveable property (such as the residue) then conditional institution is presumed. However, if the subject matter of the legacy is heritable then substitution is presumed and the executor should dispose the property "to A whom failing B". The presumption for substitution in bequests of heritable property is not widely known, often ignored, and has become a trap for testators and executors. In the 1990 Report, we recommended that this rule for heritable property should be abolished so that once A takes B would never have any further right in the property, whatever its nature. But that recommendation was made in the context of special destinations in titles to property in the form of "to A whom failing B" being ineffective to pass title to B on A's death. As explained in the previous paragraph, we now take the view that such destinations should remain effective so that a better response is to provide that conditional institution is to be presumed, whether the legacy is heritable, moveable or mixed in nature. It would remain open for a testator to provide for substitution but the will or trust deed would have to make this intention clear. We recommend that:

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<sup>74</sup> Recommendation 29 for property and recommendation 33 for leases.

<sup>75</sup> 2000 SC 206.

<sup>76</sup> *Perrett's Trs v Perrett* 1909 SC 522.

<sup>77</sup> *Renouf's Trs v Haining* 1919 SC 497.

<sup>78</sup> There are restrictions in destinations to issue in marriage contracts and in clauses of return where A gifts property to B and provides for its return in the title on B's death. Neither of these is common today.

<sup>79</sup> Recommendation 30 for property and recommendation 32 for leases.

- 60. Where a will, other testamentary document or trust deed contains a destination of property to a beneficiary whom failing another person, conditional institution should be presumed whatever the nature of the property.**

(Draft Bill, section 31)

6.66 In the 1990 Report, this Commission recommended that where one spouse left a legacy to the other their subsequent divorce should disentitle the surviving spouse from taking the legacy; he or she would be deemed to have failed to survive the deceased.<sup>80</sup> A similar recommendation was made for property passing from one spouse to the other by way of special destination.<sup>81</sup> The second recommendation was implemented by section 19 of the Family Law (Scotland) Act 2006 and extended to civil partners by section 124A of the Civil Partnership Act 2004. In order to have both provisions in the same place we recommend that:

- 61. Section 19 of the Family Law (Scotland) Act 2006 and section 124A of the Civil Partnership Act 2004 should be repealed and re-enacted.**

(Draft Bill, section 29 and schedule 2)

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<sup>80</sup> Recommendation 17(a)(i), para 4.45. Compare recommendation 52 in this Report.

<sup>81</sup> Recommendation 17(a)(iv), para 4.45.

## Part 7            Miscellaneous matters

### Forfeiture

7.1     A person who is otherwise entitled to succeed may forfeit any rights of succession to the estate of an individual that he or she had unlawfully killed. The Parricide Act 1594 disinherits anyone convicted of slaying a parent or grandparent and the succession passes to those who would have inherited had the killer and the killer's issue failed to survive the deceased. There is also a common law rule that a person who has unlawfully killed another cannot take any benefit from the estate.<sup>1</sup> This is an aspect of the wider rule that the law will not permit people to profit from their crimes. It is often, but inaccurately, described as "forfeiture". However, the Forfeiture Act 1982 allows a civil court, on application by the killer, to grant relief from forfeiture, except in cases of murder.

7.2     In the 1990 Report this Commission recommended that the Parricide Act 1594 should be repealed and that the common law of forfeiture should be put on a statutory basis as far as persons convicted of murder or culpable homicide (or their equivalents in other jurisdictions) were concerned. The common law would continue to deal with unconvicted killers and rights not based on succession to the victim's estate, such as those under a life policy or an inter vivos trust. We would adhere to the recommendation to repeal the Parricide Act 1594. It deals with a limited class of victims, disinherits the killer's issue, probably applies only to the victim's heritable property and was ignored in the one recent case of parricide.<sup>2</sup> However, we are now not in favour of having new statutory provisions for convicted killers. There seems little benefit in legislating only part of the law of forfeiture. Cases of forfeiture are uncommon and the common law has not given rise to any difficulties in practice, except for one minor matter which we address in the next paragraph. We therefore recommend that:

**62.     The Parricide Act 1594 should be repealed.**

(Draft Bill, schedule 2)

7.3     In *Hunter's Executors, Petitioners*<sup>3</sup> a man murdered his second wife. Her will provided for her estate to go to her husband and if he predeceased her and there was no issue of the second marriage it was to be divided between his son by his first wife and her own sister. The man clearly forfeited any benefit under his wife's will but it was held that he should not be treated as having predeceased her so the estate fell into intestacy and passed to the wife's sister and parents. The court rejected the Commission's conjecture in the 1990 Report that the existing law provided that a killer was deemed to have predeceased the victim. We also made a recommendation to that effect.<sup>4</sup> The court decided that there was no public policy consideration that demanded this wider effect to the forfeiture rule.

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<sup>1</sup> *Smith, Petr* 1979 SLT (Sh Ct) 35; *Burns v Secretary of State for Social Services* 1985 SLT 351.

<sup>2</sup> *Cross, Petr* 1987 SLT 384.

<sup>3</sup> 1992 SC 474.

<sup>4</sup> Recommendation 35.

However, we remain of the opinion that the clearest and simplest way of disinheriting the killer and giving proper effect to the will or rules of intestacy once the killer has been cut out of the succession, is for the killer to be deemed to have predeceased the victim. We note that the Law Commission of England and Wales has made a similar recommendation in its *Report on The Forfeiture Rule and the Law of Succession*.<sup>5</sup> Thus a legacy to the killer would pass to the destinee-over or lapse into residue, a bequest of residue to the killer would pass to the destinee-over or lapse into intestacy. The killer could not claim legal share and the killer's entitlement on intestacy would pass to the next heir. Because the deemed predecease would apply only to the distribution of the victim's estate, the killer's right in property held on a survivorship destination would not pass to the victim's estate. We therefore recommend that:

- 63. An unlawful killer who incurs forfeiture should be treated for the purposes of succession to the deceased victim's estate and any destination of trust property as having failed to survive the deceased.**

(Draft Bill, section 38(2))

7.4 In the case of *Cross, Petitioner*<sup>6</sup> the Forfeiture Act 1982 has been held to allow the court to grant only partial relief from forfeiture. Nevertheless, in that case relief was granted in respect of all the heritable property and 99% of the moveable property. As relief is entirely at the discretion of the court total relief should be available in the rare case where it is appropriate. Accordingly we support the recommendation to this effect in the 1990 Report and recommend that:

- 64. It should be competent for a court in Scotland to grant total relief under the Forfeiture Act 1982.**

(Draft Bill, section 39)

7.5 In terms of section 2(3) of the Forfeiture Act 1982, an application for relief from forfeiture must be made within three months of the killer's conviction. In the 1990 Report, we recommended that the period be extended to six months with any appeal period not counting towards this new time limit. We continue to support this as it seems to strike the right balance between allowing the killer sufficient time to make an application while not holding up unduly the administration of the victim's estate. We therefore recommend that:

- 65. An application for relief from forfeiture, in a case where the killer has been convicted, should have to be made within 6 months from the date of conviction. Any period during which the conviction may be or is under appeal should not count towards the 6 month period.**

(Draft Bill, section 39(c)(ii)-(iii))

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<sup>5</sup> Law Com No 295, 2005.

<sup>6</sup> 1987 SLT 384.

## Executors and Bonds of Caution

### *Bonds of caution*

7.6 Where a person dies intestate, an executor-dative is appointed by the court to administer the estate.<sup>7</sup> Before being confirmed by the court an executor-dative is required to obtain a bond of caution from a third party to indemnify any creditor or beneficiary of the estate against loss caused by maladministration, negligence or fraud on the part of the executor.<sup>8</sup> Generally, there is no requirement on an executor-nominate to obtain a bond of caution before being confirmed as executor.<sup>9</sup>

7.7 In the discussion paper we asked whether the rule that a prospective executor-dative is required to find caution before he or she may be confirmed should be abolished.<sup>10</sup> The principal argument in favour of retaining caution is that it can provide an effective remedy where an executor-dative has acted negligently or fraudulently in administering the estate. In such cases the cautioner will settle the claim and carry the risk that there will be little or no prospect of recovery from the executor. A further argument in favour of retaining the requirement for caution is that it can provide added protection for beneficiaries below the age of legal capacity. It should be noted, however, that section 9 of the Children (Scotland) Act 1995 provides protection for such beneficiaries and so this argument is not as convincing today as it was previously.<sup>11</sup>

7.8 The main argument against retaining the requirement to find caution relates to the expense involved in obtaining the bond. In most cases, the obligation to provide caution is undertaken by an insurance company, and a premium based on the size and complexity of the estate to be distributed is charged. The estate will bear the cost of the premium. The view among at least some members of the legal profession is that the premiums charged are excessive in relation to the benefit provided, and it appears that the relatives of the deceased sometimes have difficulty in understanding the requirements for a bond and object to the premium charged. Claims under bonds of caution are rare. In practice most intestate estates are administered by solicitors on behalf of the executor. If the solicitor is negligent, his or her professional insurance can be called upon to make good the loss.

7.9 In the current market, it appears that only two companies offer bonds of caution in executry cases, something which has resulted in a *de facto* duopoly.<sup>12</sup> We have been made aware of delays of several months in the issuing of some bonds which, of course, holds up confirmation and hence the administration of the estate. Outright refusals to issue a bond of

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<sup>7</sup> For a list of the circumstances where it is necessary or desirable to appoint an executor-dative to testate estates see *Currie and Scobbie*, para 6.14.

<sup>8</sup> The Confirmation of Executors (Scotland) Act 1823, s 2, as amended by s 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, provides an exception for a surviving spouse if he or she will inherit the whole estate in the satisfaction of his or her prior rights. This exception has not been extended to civil partners, and if our recommendation 66 is not accepted then we consider that the law should be changed to take account of civil partners in this situation.

<sup>9</sup> There are, however, some exceptional situations where a bond of caution has been held to be required by an executor-nominate: see *Currie and Scobbie*, paras 9.03-9.04.

<sup>10</sup> Question 55. Consideration of caution should, in our view, properly form part of a wider consideration of the law on executries and the administration of estates. However, we decided to include caution as part of the current project due to an overwhelming demand that the topic be examined. In our view, the law on executries merits proper consideration, and may form part of our Eighth Programme of Law Reform.

<sup>11</sup> Section 9 makes provision for safeguarding children's property. A fuller exposition of the arguments for and against caution can be found in the discussion paper at paras 4.116-4.117.

<sup>12</sup> Zurich SGS and Royal & Sun Alliance.

caution are rare, although at least one practitioner has reported difficulties in obtaining a bond for a very sizeable intestate estate.

7.10 In addition to the financial burden put on the estate by the requirement to obtain caution there is also an administrative burden. In normal cases the identities and whereabouts of all of the beneficiaries require to be disclosed. This can give rise to delay in the preparation of the application, especially if the whereabouts of some of the beneficiaries are unknown. It also creates practical difficulties in that there are no funds available from the estate to finance the work, as executors must obtain confirmation (which they are unable to do without caution) in order to access estate funds. That said, however, nearly all of this work would have to be done anyway in order to distribute the estate correctly and at least one of the insurance company cautioners will generally issue a bond subject to conditions rather than wait until all the difficulties are resolved.

7.11 A number of consultees responded to the question of whether we should abolish the requirement upon executors-dative to obtain caution before confirmation, and the overwhelming response was supportive of this. We therefore recommend that:

**66. The general requirement upon an executor-dative to obtain caution before he or she may be confirmed as executor should be abolished.**

(Draft Bill, section 40)

In addition, we consider that the opportunity should be taken to remove the power of the court to order caution in the limited and exceptional circumstances in which a bond of caution is required of an executor-nominate. We accordingly recommend that:

**67. The court should no longer have power to order caution to be found by an executor-nominate.**

(Draft Bill, section 40(1))

*Should caution be retained for some cases only?*

7.12 On the assumption that mandatory caution was to be abolished, the discussion paper asked whether courts should nevertheless be given a discretionary power to order bonds of caution to be obtained by executors-dative where it was thought appropriate. Furthermore, it was asked whether, if consultees favoured the introduction of a discretionary power to order caution, that power should extend to executors-nominate.<sup>13</sup> Although the majority of consultees were in favour of the introduction of such a power we are more persuaded by the comments of those who disagreed. To make caution discretionary as opposed to mandatory would be likely to have the effect of collapsing the current market, thereby rendering occasional bonds very expensive to obtain.<sup>14</sup> It is, in our view, preferable that the requirement for caution is abolished in its entirety. Furthermore, we consider that giving courts a discretionary power to require caution to be found will introduce judicial elements

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<sup>13</sup> See questions 56 and 59.

<sup>14</sup> One of our consultees, Messrs Balfour & Manson, developed this point in a way we find convincing: "While the idea in retaining caution in exceptional cases is intellectually attractive it is extremely unlikely that caution will be available at any reasonable cost. In effect by requiring caution to be found a Court would be flagging up to the insurers a bad risk."

into what is better seen as an administrative process. We are therefore content to make no recommendation to the effect that courts should be granted a discretionary power to order bonds of caution to be obtained in particular cases. We recommend that:

**68. The court should not be given a discretionary power to order caution to be obtained by an executor.**

*Power to refuse to appoint or confirm executors*

7.13 Under the current law the court has no power to refuse to appoint a person as executor-dative, except where a person who ranks above the petitioner in terms of the order of preference competes for appointment. In light of this we proposed that sheriffs should have a new power to refuse to appoint as executor-dative a petitioner who appears to be unsuited to the office and, further, asked whether consultees considered that such power should be extended to executors-nominate.<sup>15</sup> While most consultees agreed with the proposal in respect of executors-dative, opinion was divided on an extension to executors-nominate. The main argument against such an extension related to the right of a testator to nominate his or her own executor. Allowing the court to refuse to confirm as executor a person who has been chosen by the deceased to administer his or her estate is contrary to the principle of testamentary freedom which the law of succession aims to protect.

7.14 We consider that in abolishing mandatory caution it would be advisable for the courts to have the power to refuse to appoint to the office of executor-dative persons who appear unsuited to the post. We consider that this new power should be exercisable on cause shown. It would therefore be up to any interested party to make his or her objections known to the court. We recognise that there may be practical problems with this, as objections may only be made by a person who is, at the very least, aware of an application for appointment as executor-dative. In the discussion paper we mentioned the option of interested parties lodging a caveat, which will trigger intimation of a relevant application.<sup>16</sup> In addition, the extension of the minimum time which must elapse before a petitioner may be appointed executor-dative, as recommended below, will be of some assistance in this regard.

7.15 In relation to the confirmation of executors-nominate, we recognise the force of the arguments set out above against introducing a discretionary power for the sheriff to refuse to confirm a particular person as executor, on cause shown. However, we can see possible merit too. For example, a testator may execute a will appointing an individual as executor and then become incapable. If the named individual is shown to be unfit for office, but this only becomes clear once the testator is incapable, the introduction of a discretionary power would be valuable in preventing that person from being confirmed as executor-nominate. We have no reason to suppose that the power would be used more than very occasionally but we favour its introduction for the situations when it may be of value.

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<sup>15</sup> Proposal 61 and question 62.

<sup>16</sup> See para 4.120.

7.16 We therefore recommend:

- 69. The sheriff should have a discretionary power to refuse to appoint a petitioner who, on cause shown, appears to be unsuited to the office of executor-dative, and should also have a power to refuse to confirm an executor-nominate.**

(Draft Bill, section 41(1)(d) and (2))

#### *Time limits*

7.17 As the law currently stands, the interval between intimation of a petition by an individual to become executor-dative and appointment<sup>17</sup> of that individual as executor is to be a minimum of nine days.<sup>18</sup> In the discussion paper we proposed that this time limit should be extended to fourteen days in order to be consistent with current practice in the sheriff courts where time limits tend to be based on multiples of seven.<sup>19</sup> Consultees were generally in favour of the extension of the time limit between intimation and decerniture and accordingly we make such a recommendation. In addition, as noted in paragraph 7.14 above, this will allow more time for any representations to be made to the court regarding the fitness of the petitioner. Accordingly we recommend that:

- 70. The sheriff should have power to appoint an executor-dative fourteen days after the sheriff clerk has certified intimation of the petition.**

(Draft Bill, section 41(1)(a))

#### *Protection of trustees and executors*

7.18 Section 24(2) of the 1964 Act offers some protection to executors and trustees who distribute estate in ignorance of the existence of an adoption order which would affect the proper distribution of the estate.<sup>20</sup> We discussed this provision in the 1990 Report and recommended that it form part of a new provision to be inserted into the Trusts (Scotland) Act 1921.<sup>21</sup> There is a similar immunity from liability, but in respect of the existence of children of persons who are not or have not been married to each other, in section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.<sup>22</sup> Our recommendation was that these two provisions be replaced by a new provision expressed in a general fashion. We recommended that, in order to benefit from immunity from liability based on ignorance of the existence or non-existence of persons or their relationship or lack of relationship with a relevant person, an executor or trustee must have acted in good faith and have made such enquiries as a reasonable and prudent executor or trustee would make in those circumstances. We suggested no change to the current law whereby a person has the right

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<sup>17</sup> Appointment is the same as decerniture.

<sup>18</sup> Confirmation of Executors (Scotland) Act 1858, s 6.

<sup>19</sup> Proposal 58.

<sup>20</sup> We discuss the succession rights arising from adoption at paras 7.29-7.35.

<sup>21</sup> See recommendation 42 and the discussion at paras 8.15-8.18. We also noted, in para 8.16, that s 24(2) has a minor defect in that it offers no protection when estate is distributed in ignorance of an adoption order by which the adopted person ceases to be entitled to a distribution of property.

<sup>22</sup> As amended by the Law Reform (Parent and Child) (Scotland) Act 1986, Sch 1 para 10 and Sch 2, and by the Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006, SSI 2006/384, art 3(a)-(c)(iii).

to recover property forming part of the estate from persons to whom it had been distributed in error.

7.19 We take the same view now and accordingly we recommend that:

**71. A trustee or executor, in making a distribution from the estate vested in him or her, should not be personally liable for any error in distribution based on ignorance of the existence or non-existence of persons or their relationship or lack of relationship with a relevant person (including relationships by adoption or marriage) provided that he or she acted in good faith and made such enquiries as a reasonable and prudent trustee or executor would make in such circumstances.**

(Draft Bill, section 43)

*Protection of acquirers of executry assets*

7.20 Section 17 of the 1964 Act protects persons purchasing heritable property which is or was vested in the deceased's executors by virtue of confirmation. It provides:

"Where any person has in good faith and for value acquired title to any interest in or security over heritable property which has vested in an executor as aforesaid directly or indirectly from—

(a) the executor, or

(b) a person deriving title directly from the executor,

the title so acquired shall not be challengeable on the ground that the confirmation was reducible or has in fact been reduced, or, in a case falling under paragraph (b) above, that the title should not have been transferred to the person mentioned in that paragraph."

Protection as regards corporeal moveables is provided by section 23 of the Sale of Goods Act 1979 thus:

"When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

7.21 In the 1990 Report this Commission considered that these provisions were deficient in two respects: first, that purchasers of items other than heritage or goods, such as shares or book debts were not protected, and second that onerous acquirers of goods otherwise than by purchase (for example by exchange with another beneficiary or foregoing a claim) were not protected.<sup>23</sup> We now take the view that the existing common law protects a person who acquires in good faith and for value from someone whose title is voidable, regardless of the type of property.<sup>24</sup> But section 17 may cover cases that would be outwith the scope of the rule just mentioned and accordingly we think that that section should be repealed and re-

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<sup>23</sup> See paras 8.19-8.20 of the 1990 Report.

<sup>24</sup> See K G C Reid, *Law of Property in Scotland* (1996), para 692.

enacted, in our draft Bill, in wider terms to provide more complete statutory protection. We therefore recommend that:

- 72. Section 17 of the Succession (Scotland) Act 1964, which protects persons purchasing heritable property which is or was vested in the deceased's executors by virtue of confirmation, should be extended to cover all onerous acquirers of any kind of property.**

(Draft Bill, section 42)

### **Definition of "estate" and related terms**

7.22 The rules of succession, including the rules on legal share, are concerned with the devolution of property belonging to the deceased at the time of his or her death. So once the different treatment of heritable and moveable property has been eliminated, the definition of estate for the purposes of these rules ought, as a matter of principle, simply to be the property belonging to the deceased at the time of death.<sup>25</sup>

7.23 There is one exception which we consider ought to be made to this general rule: property held by the deceased subject to a special destination is not to form part of the estate.<sup>26</sup> Such property will pass on death directly to the special donee and so there is no need to provide in succession law for its devolution.<sup>27</sup> This is in line with the current definition of estate in section 36(2) of the 1964 Act. However, we have found it necessary to take account of special destination property owned by the deceased in two situations. First, our recommendations in respect of dependent children incorporate a definition of estate as *including* any property owned by the deceased which passed on his or her death to another person by way of special destination.<sup>28</sup> Secondly, we recommend that where a surviving spouse or civil partner receives the deceased's share of their dwelling house by way of a survivorship destination, the net value of that share can affect the value of the survivor's succession rights.<sup>29</sup>

7.24 The estate which we have been considering so far is gross estate. Certain deductions must be made from it in order to reach the net estate. Debts owed by the deceased at the time of death clearly fall to be deducted. Traditionally, funeral expenses have also been deducted, even though they will only arise after death. We recommend that this tradition continue. In addition, the estate will be assessed for liability to inheritance tax, and where it is payable the gross estate will, of course, be reduced. However, we have decided that, for the purposes of dividing the estate between those entitled to share it, any liability to inheritance tax should not be taken into account in calculating the net estate. If we do otherwise there is a potential circularity which would render it impossible to calculate the net estate. For example, the amount of inheritance tax which is payable may depend on how much the surviving spouse or civil partner receives.<sup>30</sup> It is impossible to provide that the value of the net estate depends on the amount of the inheritance tax when this in turn

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<sup>25</sup> See Part 5 for a discussion of the relevant private international law rules.

<sup>26</sup> It may, however, form part of the estate for administration purposes.

<sup>27</sup> We took a different view in the 1990 Report: see para 9.23.

<sup>28</sup> See para 3.71 in particular, and s 21(1) of the draft Bill.

<sup>29</sup> See paras 2.19-2.24. Where a surviving cohabitant receives the deceased's right in their dwelling house by way of survivorship destination this will need to be taken into account in the same way.

<sup>30</sup> Section 18 of the Inheritance Tax Act 1984, as amended by reg 7 of the Tax and Civil Partnership Regulations 2005, SI 2005/3229.

depends on the value of the net estate. However, our recommendation in this regard has no effect whatsoever on the liability for inheritance tax, and it is confined to the definition of net (testate or intestate)<sup>31</sup> estate for the purposes of our draft Bill.

7.25 It is necessary to determine whether the expenses of realising and administering the estate should be deducted before or after the calculation of the sums due to those entitled to a share of the estate. The decision can have a practical effect on its division. Consider the following example:

A man dies intestate leaving a widow and a daughter. His net estate, after deduction of debts and funeral expenses, is £306,000. The expenses of realising and administering the estate come to £10,000.

If the entitlements of the survivors are calculated on the net estate before the expenses are deducted, then the widow will take £303,000 and the daughter £3,000. From these entitlements, the expenses will be deducted rateably, meaning that the daughter will bear about 1%, or £100, of them.

If, however, the expenses are deducted before the entitlements are calculated, then the net intestate estate falls to £296,000 and this is taken entirely by the widow.

7.26 Similar effects will be felt by a legal share claimant or a cohabitant, since their entitlements are calculated by reference to what the claimant would have received on an intestacy. It seems to us preferable to determine the share of the estate *before* deduction of the expenses of realisation and administration. As a matter of principle we do not consider that expenses should affect the way in which the estate falls to be divided. Also, the expenses will often not be known until some time, and perhaps a considerable time, after the death. As a matter of practice, our recommended approach will mean that those entitled to a share of the estate will know, as soon as possible after death, the approximate value of that entitlement. Of course, nothing in this will remove the executor's right to payment for the expenses of realising and administering the estate.

7.27 A general rule that the expenses of administration are to be deducted after the division of the net estate needs a particular refinement. At present, legal rights are not treated as legacies for the purpose of deciding from which parts of the estate the expenses are to be paid. Rather, they are treated in a special way, being liable for a share of the expenses of obtaining title to and realising the estate but not for general expenses of administration.<sup>32</sup> This appears to be based on the special character of legal rights as debts in competition with heirs. We considered this in the 1990 Report and could see no reason for continuing this treatment; instead we suggested that an amount payable by way of legal share should be treated, for the purposes of the expenses of realising and administering the estate, as if it had been a general legacy of the same amount.<sup>33</sup> We make the same recommendation now, and consider that it should also apply to awards to dependent children and to cohabitants.

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<sup>31</sup> Where the deceased dies partially intestate, ie where there is both testate and intestate estate, the deductions from the gross estate are to be made as follows: first, debts secured over a specific asset are to be allocated to that asset (up to the value of the asset), and then any other debts are to be allocated proportionately between the testate and intestate estate. See s 46(2) of the draft Bill.

<sup>32</sup> See *Henderson v Henderson's Trs* 1916 2 SLT 292; *Russel v Attorney General* 1917 SC 28.

<sup>33</sup> See para 9.25 and recommendation 63(c).

7.28 We therefore recommend that:

**73. (1) For the purposes of the new succession rules the net estate (whether testate or intestate) should be the estate belonging to the deceased at the date of his or her death (but excluding, except as provided below, any property passing on death from the deceased to any other person by way of a special destination) less:**

- (a) the debts for which his or her estate is liable as at the date of death; and**
- (b) any funeral expenses.**

(Draft Bill, sections 45-46)

**(2) For the purpose of a dependent child's entitlement, the deceased's estate should include any property passing on death from the deceased to any other person by way of special destination.**

(Draft Bill, section 21(1))

**(3) Inheritance tax and expenses of administration should not be deducted before the division of the net estate is made but this should not carry any implication that the estate is not liable for inheritance tax and expenses of administration or that the amounts due to beneficiaries in accordance with the rules of division applying to the net estate will not ultimately have to bear a share of that tax or those expenses.**

(Draft Bill, section 46(1)(c))

**(4) For the purposes of allocating expenses of administration to different parts of the estate any amount payable by way of legal share, cohabitant's entitlement or dependent child's entitlement to a capital sum should be treated as if it had been a general legacy of the same amount.**

(Draft Bill, section 44)

## **Adoption**

7.29 The current law on the succession rights of adopted persons is contained in Part IV of the 1964 Act.<sup>34</sup> In essence, a person who has been adopted is to be treated as the child of the adopter and not of the natural parent.<sup>35</sup> This applies both to the succession to a testate or intestate estate and to the disposal of property by virtue of any *inter vivos* deed. The same general statement about the status of adopted persons is also contained in the

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<sup>34</sup> Part IV comprises ss 23-24.

<sup>35</sup> In cases of assisted reproduction there is statutory provision as to who the parents of a child are: ss 27-28 of the Human Fertilisation and Embryology Act 1990 (and Part 2 of the Human Fertilisation and Embryology Act 2008, though it is not yet in force). There is equivalent provision for surrogacies: s 30 of the 1990 Act and s 54 of the 2008 Act, which provide for parental orders. If a child to whom any of these provisions applies is subsequently adopted it is the adoption legislation which will govern the child's status for our purposes.

two statutes which deal in particular with adoption and adopted persons: the Adoption (Scotland) Act 1978 and the Adoption and Children (Scotland) Act 2007 (which we refer to, respectively, as "the 1978 Act" and "the 2007 Act").<sup>36</sup> Each of them contains a section entitled "status conferred by adoption", by virtue of which the adopted person is to be treated in law as if he or she had been born as the child of the adopter and of no-one else.<sup>37</sup> Each statute also expressly states that it does not affect the law relating to adopted persons in respect of succession.<sup>38</sup>

7.30 We see no reason why the status of adopted persons as respects everything other than succession is contained in the adoption statutes but their status in respect of succession rights is set out in a succession statute. We consider that it would be preferable for the adoption legislation to contain the relevant rules.

7.31 This also applies to the transitional measure contained in section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. It provides succession rights for adopted persons whose adoptive parents had died before the commencement of the 1964 Act and who had a natural parent who was still alive at the commencement of the section.<sup>39</sup> But for this provision, a person in this situation would have no succession rights in respect of any parent.<sup>40</sup> Although more than four decades have passed since the provision was enacted it may still be necessary. For instance, those who adopted a child in the late 1950s may have died before 1964 but a natural parent of the child may still survive. Alternatively, if the adopters died before 1964 and a natural parent died after 1966, the latter may have left a trust whose beneficiaries include their children. Unless the trust terms expressly exclude the child who was adopted, he or she would be included within the category of children under the trust.<sup>41</sup>

7.32 We turn now to the substantive law of succession in relation to adopted persons. Section 23 of the 1964 Act contains four rules on succession rights as they apply to an adopted person. The first, in subsection (1), is the general rule, which has already been mentioned, by which an adopted person is to be treated, for the purposes of succession and of the disposal of property by *inter vivos* deed, as the child of the adopter and of no-one else. Subsection (2) contains a particular provision on the construction of deeds by which property is conveyed or under which a succession arises. The rule is that, where such a deed is executed after an adopter has adopted a child, any reference in it to a child of the adopter is to be read as including a reference to that adopted child unless the contrary intention appears. Subsection (3) is a rule dealing with the narrow topic of deeds regulating the

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<sup>36</sup> The 2007 Act, so far as relevant for present purposes, has not yet been brought into force.

<sup>37</sup> See s 39 of the 1978 Act and s 40 of the 2007 Act.

<sup>38</sup> See s 44 of each Act. Neither the succession to the estate of a deceased person, whether testate or intestate, nor the disposal of property by virtue of an *inter vivos* deed is covered by the adoption statutes.

<sup>39</sup> The commencement dates are 10 September 1964 and 3 August 1966 respectively.

<sup>40</sup> This is because, prior to the 1964 Act, an adopted person retained his or her succession rights in respect of a natural parent and did not acquire such rights in respect of an adopter.

<sup>41</sup> A provision equivalent to s 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 is to be inserted into s 39 of the 1978 Act (by s 48(2) of our draft Bill).

devolution of property along with a title, honour or dignity.<sup>42</sup> Subsection (4) provides that a deed executed before the commencement of the 1964 Act is not to be affected by the Act.<sup>43</sup>

7.33 In our view it would be preferable for effect to be given to these rules by the 1978 and 2007 Acts.<sup>44</sup> However, we do not consider that the rule in section 23(2) of the 1964 Act need be re-enacted. If an adopted person is to be given the status as the child of the adopter and of no-one else, as we recommend, then it follows that any references in a deed executed by the adopter to his or her children must be read as including the adopted person, unless the deed states otherwise. This is true whether the adoption takes place before or after the deed is executed. The only exception is in relation to deeds executed before the 1964 Act came into force, for which special provision is made as mentioned in the paragraph above.

7.34 Section 24 of the 1964 Act contains supplementary provisions. Subsection (1) makes provision for cases where the adopted person is to be treated, within the adoptive family, as either a half blood or a whole blood sibling. As a consequence of an earlier recommendation,<sup>45</sup> there will be no difference for succession purposes between persons related by whole or half blood. This provision is therefore unnecessary and we do not consider it should be re-enacted. Subsection (1A) provides that, in determining the seniority within a class of people which contains an adopted person, that person is to be treated as having been born on the date of the adoption order. We criticised this provision in the 1990 Report on the ground of its artificiality and recommended its repeal.<sup>46</sup> This is a view we continue to hold, and it should not be re-enacted. The age of an adopted person should always be taken to be their actual age. In relation to subsection (2) we have already recommended that it be repealed and re-enacted as part of a more general provision on the protection of trustees.<sup>47</sup> Finally, subsection (3) states that a person in respect of whom there has been more than one adoption is to be treated only as the child of the most recent adopter. We consider that this is the correct policy, but that it will follow naturally from the provisions of our draft Bill. It is, therefore, superfluous and there is no need to re-enact it.

7.35 Accordingly, in order that the status of adopted persons be set out in a clearer and more self-contained manner, we recommend that:

**74. The statutory provisions relating to the status of adopted persons in respect of succession rights should be grouped together and placed in the Adoption (Scotland) Act 1978 and the Adoption and Children (Scotland) Act 2007.**

(Draft Bill, section 48)

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<sup>42</sup> The provision equivalent to subs (3) is to be s 44A(2) of the 1978 Act and s 44A(2) of the 2007 Act, as inserted by s 48 of the draft Bill. The new s 44A in each Act will also contain a provision equivalent to s 37(1)(a) of the 1964 Act, which deals with another aspect of the law on the succession to titles, etc.

<sup>43</sup> It also provides that the devolution of property following the death of a person who died before commencement is to be unaffected. Given that this refers to deaths before 10 September 1964 there is no need to re-enact it in our draft Bill.

<sup>44</sup> We note, in relation to s 23(4) of the 1964 Act and its equivalent, under our recommendation, in the 1978 and 2007 Acts, that there may be human rights issues which arise: see, for example, *Pla v Andorra* (2006) 42 EHRR 25. However, we consider that our recommended provisions are compatible with Convention rights.

<sup>45</sup> Recommendation 9.

<sup>46</sup> See para 9.2 of the 1990 Report.

<sup>47</sup> See paras 7.18-7.19 and recommendation 71.

## **Mournings; aliment *jure representationis*; temporary aliment**

7.36 In the 1990 Report this Commission recommended the abolition of certain common law rights of succession.<sup>48</sup> The rights of a widow and family to claim an allowance for mournings, along with the rights to aliment *ex jure representationis* and temporary aliment were considered by the then Commission to be both anachronistic and out of place in the context of the modern law of succession.

7.37 We consider that these reforms are sensible and justified.<sup>49</sup> We therefore recommend:

**75. Any right at common law to claim the expense of mournings, aliment *jure representationis* or temporary aliment should be abolished.**

(Draft Bill, section 50)

## **Donations *mortis causa***

7.38 A donation *mortis causa* is an *inter vivos* gift by an individual that is made in contemplation of death, although not necessarily under apprehension of imminent death.<sup>50</sup> In such a gift two resolutive conditions are implied. The donee obtains an immediate right of ownership in the property gifted but the gift is defeasible if (a) the donor revokes the donation during his or her own lifetime or (b) the donee predeceases the donor.<sup>51</sup>

7.39 Donations *mortis causa* fall between outright gifts and legacies in that they share some features of each. Like an *inter vivos* gift, a donation *mortis causa* has effect at once and can be made by the same juridical act as a gift.<sup>52</sup> But like a legacy, a donation *mortis causa* can be revoked by the donor while alive, does not defeat legal rights and will be liable for the deceased donor's debts should his or her ordinary estate be insufficient.<sup>53</sup>

7.40 The Commission's 1990 Report on Succession dealt briefly with donations *mortis causa*. It recommended that they should not be treated as part of the donor's estate for the purpose of calculating legal share and should not be forfeited if the donee claimed legal share. Another recommendation was that a donation *mortis causa* should be forfeited if the donee unlawfully killed the donor or failed to survive the donor for the specified period.<sup>54</sup> We have been informed by the Advisory Group that donations *mortis causa* are unknown in current practice. *Inter vivos* gifts now almost invariably take the form of outright gifts. This may be because gifts with reservation of benefit to the donor remain part of his or her patrimony and are therefore ineffective for inheritance tax planning.<sup>55</sup> If conditions were

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<sup>48</sup> Recommendations 54-56.

<sup>49</sup> The 1990 Report contained a recommendation (number 57) on deathbed, which was included in order to remove any possible doubt about the extent of the Victorian repeal of this rule of law. However, we now consider that deathbed has ceased to exist and no longer forms part of Scots law. So we see no practical purpose to be served in taking forward that recommendation.

<sup>50</sup> *Lord Advocate v Galloway* (1884) 11R 674.

<sup>51</sup> *Morris v Riddick* (1867) 5M 1036.

<sup>52</sup> Eg a gift of heritage will require writing, but a gift of incorporeal moveables can be made without writing or being evidenced by writing. A gift of corporeal moveables can be made merely by delivery: *Morris v Riddick*, above. For a review of the deposit receipt cases see *Graham's Trs v Gillies* 1956 SC 437.

<sup>53</sup> *Morris v Riddick*, above.

<sup>54</sup> Recommendation 58, para 9.16. The period would have been 5 days unless the deceased had specified another period.

<sup>55</sup> Finance Act 1986, s 102 as amended by Finance Act 2003, s 185.

sought to be attached to gifts the Group advised that a trust would be used. This we think justifies a more radical approach, that of abolition. Although donation *mortis causa* would be abolished as a distinct legal entity, people would continue to be able to make gifts on such express conditions as they wished to impose and which the donees were prepared to accept. The consequences for succession law of making a conditional gift would depend upon the conditions in question. We imagine there would be few if any such gifts made in the future so that these consequences could be left to the courts to develop without unduly burdening them.

7.41 We recommend that:

- 76. A gift made in contemplation of death, called a donation *mortis causa*, should be presumed to be an outright gift unless the donor clearly stipulates otherwise.**

(Draft Bill, section 51)

### References to legal rights in existing documents

7.42 Documents executed under the existing law may refer to legal rights (as the term is used in succession law). There may, for instance, be a renunciation of legal rights by a child in exchange for provisions under a trust, or by a farmer's wife in order to facilitate the passing of the farm to one of her children. Once legal shares have replaced legal rights, any reference to legal rights should be construed as a reference to legal share or – if children are not given an entitlement to legal share – the right of a child to claim a capital sum payment. We therefore recommend that:

- 77. In relation to the estate of a person who dies after the commencement of implementing legislation, any reference in any document executed before such commencement to legal rights (in the succession law sense) should be construed as a reference to the right to legal share or, as appropriate, the right of a dependent child to a capital sum payment under the new legislation.**

(Draft Bill, section 53)

### Transitional provisions

7.43 In general the new succession rules recommended in this Report should only apply to deaths occurring on or after the date on which implementing legislation is commenced.<sup>56</sup>

7.44 It may be uncertain whether a person died before or after commencement. We recommend that, for the purposes of the succession to his or her estate, a person in this situation is presumed to have died after commencement.<sup>57</sup>

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<sup>56</sup> We discuss commencement at para 7.48. The 1964 Act also applies only to deaths on or after its date of commencement: see s 37(1)(d).

<sup>57</sup> There may be situations in which this uncertainty is resolved by the courts (in which case the deeming provision will not operate). For instance, declarator may be sought under the Presumption of Death (Scotland) Act 1977, s 2 of which requires a court, if satisfied, to make a finding as to the date of death.

7.45 Where a person dies on or after the commencement of the new legislation but leaves a will or other testamentary writing which fails to give effect to his or her instructions, we consider that an application to have the will or writing rectified should be competent, regardless of the date of its execution.<sup>58</sup> This result is achieved in the draft Bill simply by not providing any exception for documents which are executed before commencement. Equally, we consider that the rule on the revival of revoked wills should apply to documents executed either before or after commencement.<sup>59</sup> Again, this is achieved simply by not providing any exception for documents executed before commencement.

7.46 There are, though, certain situations in which we consider that acts which have taken place before commencement of the new legislation should not be affected:

(i) We have recommended that destinations of property in favour of one person whom failing another person should be presumed to operate as conditional institutions rather than as substitutions.<sup>60</sup> As we do not intend to disturb the interpretation of existing deeds, we recommend that the new rule should not apply to any document executed before the commencement of the new legislation (nor to documents executed after that time if they are implementing a provision in such a document).

(ii) Our recommendation on the question of whether a bequest to a descendant of the testator should go to the issue of that descendant if he or she predeceases the testator leaving issue would affect the construction of existing documents if it were to apply regardless of the date of execution.<sup>61</sup> It would be wrong, in our view, to alter the meaning of documents drawn up and executed under the current law even if the testator died after the commencement of the new legislation. So our recommendation only applies to documents executed after the commencement of the new legislation.

(iii) Our recommendation concerning the termination of a liferent other than on the death of the liferenter should, in our view, only apply where the event that would now result in termination, occurs on or after the commencement of new legislation.<sup>62</sup>

(iv) Our recommendation as to the protection to be afforded to trustees for certain errors in distributing estate should apply only to distributions taking place on or after the commencement of new legislation. This is achieved by section 43 of our draft Bill, which inserts a new section 29A into the Trusts (Scotland) Act 1921. New section 29A(3)(b) provides that the new provision is restricted to distributions which take place on or after the commencement of the draft Bill.

(v) Finally, we consider that our recommendation as to the protection of persons acquiring title should apply only to acquisitions on or after the date of commencement of the new legislation.<sup>63</sup> However, the provision in the draft Bill which gives effect to this will come into force at the same time as the current provision, section 17 of the

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<sup>58</sup> This would be done under s 27 of the draft Bill.

<sup>59</sup> See s 32 of the draft Bill.

<sup>60</sup> See paras 6.61-6.65.

<sup>61</sup> See paras 6.22-6.30 and s 33 of the draft Bill.

<sup>62</sup> See paras 6.44-6.47 and s 34 of the draft Bill.

<sup>63</sup> See paras 7.20-7.21 and s 42 of the draft Bill.

1964 Act, is repealed.<sup>64</sup> As the new provision restates the current law with improved protection for third parties, they will not lose any protections afforded to them by the current law.

7.47 We therefore recommend that:

**78. (1) In general the new rules of succession law recommended in this Report should only apply in relation to deaths occurring on or after the date on which the implementing legislation is commenced.**

**(2) Where it is uncertain whether a person died before or after commencement he or she should be deemed to have died after commencement.**

**(3) Where a person dies on or after commencement leaving a will, or an alteration to a will, which fails to give effect to his or her instructions it should be competent to rectify the will, or the alteration, under section 27 of the draft Bill even if it was executed before commencement.**

**(4) The following recommended new rules should not apply to documents executed before commencement:**

- (a) the rule on destinations in wills and certain trusts;**
- (b) the rule on whether a bequest to a descendant of the testator should go to the issue of that descendant if he or she predeceases the testator leaving issue;**
- (c) the rule on the termination of a liferent other than on the death of the liferenter;**
- (d) the rule on the protection to be afforded to trustees for certain errors in distributing estate; and**
- (e) the rule on the protection of persons acquiring title.**

(Draft Bill, section 55)

## **Commencement**

7.48 The draft Bill annexed to this report forms a package which cannot sensibly be broken down into smaller parts for commencement at different times. Each part of the Bill is dependent for its operation on the others. It would be completely unworkable if, for example,

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<sup>64</sup> Section 17 of the 1964 Act will be repealed by sch 2 to the draft Bill.

intestate succession were to be governed by the Bill while testate succession remains subject to the rules in the 1964 Act. We therefore recommend that:

- 79. The Scottish Ministers should appoint, by statutory instrument, a single day for the commencement of the new legislation.**

(Draft Bill, section 57(2))

## Part 8 List of recommendations

1. Where a person dies intestate survived by a spouse or civil partner but not by issue the spouse or civil partner should inherit the whole of the net intestate estate.

(Paragraph 2.5; draft Bill, section 2(2))
2. Where a person dies intestate survived by issue but not by a spouse or civil partner the issue should inherit the whole of the net intestate estate.

(Paragraph 2.6; draft Bill, section 2(4))
3. (1) Where a person dies intestate survived by a spouse or civil partner and issue the spouse or civil partner should have a right to the whole estate if less than the threshold sum. Any excess over the threshold sum should be divided equally, half to the spouse or civil partner and half to the issue.

(Paragraph 2.16; draft Bill, section 2(3))

(2) The threshold sum should be £300,000.

(Paragraph 2.16; draft Bill, section 2(8))

(3) Scottish Ministers should have a duty to review the threshold sum annually and have the power to alter it from time to time by statutory instrument.

(Paragraph 2.16; draft Bill, section 9)
4. Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination does not exceed the threshold sum of £300,000, the threshold sum should be reduced by the net value of the deceased's right.

(Paragraph 2.22; draft Bill, section 3(3))
5. Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum of £300,000, any excess over this sum should be deducted from the deceased's intestate estate. The surviving spouse or civil partner should be entitled to one half of the resulting amount, if any; the rest of the estate should be shared by the issue.

(Paragraph 2.24; draft Bill, section 3(4))

6. Separation by itself should continue to have no effect on the succession rights of a spouse or a civil partner.

(Paragraph 2.25)

7. A surviving spouse or civil partner should continue to be treated in the same way with regard to succession to an intestate estate whether or not the spouse or civil partner was a second or subsequent spouse or civil partner or the parent of the deceased's children.

(Paragraph 2.30)

8. The deceased's step-child and a child accepted by the deceased as a child of the deceased's family should continue not to be treated as the deceased's child for the purposes of the law of intestate succession.

(Paragraph 2.34)

9. With the exception of the deceased's spouse or civil partner, the existing list of categories of relative should continue but collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.

(Paragraph 2.37; draft Bill, section 6)

10. (1) Where a person who is the deceased's issue survives the deceased, that person's survival should preclude any of that person's issue from being entitled to share in the value of the deceased's estate.

(Paragraph 2.44; draft Bill, section 2(5))

- (2) Where two or more entitled issue are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.

(Paragraph 2.44; draft Bill, section 7)

11. (1) The current rules on distribution between parents and siblings and remoter relatives should continue to apply.

(Paragraph 2.49; draft Bill, section 4(3))

- (2) The current doctrine of representation should continue to apply.

(Paragraph 2.49; draft Bill, section 5)

- (3) Where two or more entitled relatives are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.

(Paragraph 2.49; draft Bill, section 7)

12. (1) Before or after the deceased's death a person should be able to renounce any entitlement to the deceased's intestate estate and should be treated as if he or she had not survived the deceased;

(2) A person should be able expressly to renounce the entitlement of that person's issue to the deceased's intestate estate and that person's issue should be treated as if they had not survived the deceased.

(Paragraph 2.54; draft Bill, section 8)

13. The Crown should continue to have the right to claim any intestate estate to which no surviving relatives of the deceased can be found to succeed.

(Paragraph 2.55; draft Bill, section 10)

14. The protection of a surviving spouse or civil partner from disinheritance should take the form of a right to a fixed share of the value of the deceased's estate.

(Paragraph 3.5; draft Bill, sections 11 and 15)

15. A surviving spouse or civil partner's fixed share should be called a legal share and amount to 25% of what he or she would have inherited if the deceased had died intestate.

(Paragraph 3.6; draft Bill, sections 11 and 15)

16. A spouse or civil partner should be able to renounce, either before or after the deceased's death, the right to a legal share and such a renunciation should not enlarge the legal share of the deceased's issue.

(Paragraph 3.8; draft Bill, sections 14(1) and 17)

17. A surviving spouse or civil partner who elects to receive legal share should be treated as not having survived the deceased for all other purposes of succession to the deceased's estate.

(Paragraph 3.9; draft Bill, sections 13(2) and 16(2))

18. An executor should be entitled to apply to the court for an order providing when legal share should be paid to a surviving spouse or civil partner: this may include provision for payment by instalments.

(Paragraph 3.11; draft Bill, sections 13(3) and 16(3))

19. Legal share should be met from the estate in the following order:

intestate estate;

residue;

general legacies;

special legacies.

Within each category liability should be *pro rata*.

(Paragraph 3.13; draft Bill, sections 13(1) and 16(1))

20. (1) The deceased's issue should be entitled to a fixed legal share of the deceased's estate.
- (2) The fixed legal share should be a sum equal to 25% of the amount that the issue would have inherited if the deceased had died intestate.

(Paragraph 3.39; draft Bill, section 12)

(3) An executor should be entitled to apply to the court for an order providing when legal share should be paid to the deceased's surviving issue: this may include provision for payment by instalments.

(Paragraph 3.39; draft Bill, section 13(3))

21. Unless there is express provision to the contrary in the deceased's will, if a person elects to receive legal share:

(a) any other right of succession which that person has to the deceased's estate should be extinguished;

(b) that person should be treated, in relation to such other right, as not having survived the deceased;

(c) that person's deemed non-survival should not have the effect of enabling that person's issue to take the forfeited provisions in that person's place by virtue of the law of intestate succession, or as a conditional institute under the deceased's will or as a deemed conditional institute.

(Paragraph 3.45; draft Bill, section 13(2))

22. (1) Before or after the deceased's death a person should be able to renounce the right to legal share.

(Paragraph 3.46; draft Bill, section 14(1))

(2) The effect of such a renunciation should be to exclude the right of that person's issue to legal share from the deceased's estate.

(Paragraph 3.46; draft Bill, section 14(2))

(3) Such renunciations should not enlarge the legal share of any other person.

(Paragraph 3.46; draft Bill, section 12(3)(b))

23. A person's legal share should be met from the estate in the following order:

intestate estate;

residue;

general legacies;

special legacies.

Within each category liability should be *pro rata*.

(Paragraph 3.48; draft Bill, section 13(1))

24. There should be no requirement to collate advances and other benefits as a condition of claiming legal share.

(Paragraph 3.58)

25. Interest should be payable on legal share as it is currently payable on legal rights and legitim from the date of the deceased's death until payment.

(Paragraph 3.60; draft Bill, section 50(2))

26. Businesses, including agricultural farms and estates, should not be excluded from claims for legal share.

(Paragraph 3.64)

27. Children to whom the deceased owed an obligation of aliment (or an equivalent obligation under foreign law) immediately before death should be entitled to a capital sum payment from the deceased's estate.

(Paragraph 3.70; draft Bill, section 18(1)-(3))

28. No right to a capital sum payment to a dependent child should exist in relation to any part of the deceased's estate (including property passing by way of special destination) which passes to an individual who at the date of the deceased's death was under an obligation to aliment the child (or an equivalent obligation under foreign law).

(Paragraph 3.76; draft Bill, sections 18(1) and 21)

29. A child's right to a capital sum payment should fall if the child dies before the payment has been agreed or awarded by the court.

(Paragraph 3.77; draft Bill, section 19(5))

30. (1) The capital sum payment award should represent the sum required to produce the total aliment due from the deceased's date of death to the date when the child's dependency is likely to terminate (taking into account the likelihood of the child undergoing further education or training after 18). The award should be what is reasonable in all the circumstances for the liable portion of the estate to provide having regard only to:
- (a) the needs, resources and earning capacity of the child; and
  - (b) the existence of any other person owing the child an obligation of aliment and the needs, resources and earning capacity of that obligor;
  - (c) if the liable beneficiary is the deceased's spouse or civil partner, his or her needs, resources and earning capacity and;
- (2) Regard may be had to conduct of the child or of any other person if it would be manifestly inequitable not to do so.

(Paragraph 3.86; draft Bill, section 18(4)-(6))

31. (1) The capital sum payment awarded to a dependent child should be payable immediately unless the court allows payment to be deferred or the sum to be paid by instalments.
- (2) The deferral and instalment provisions should be capable of being made later and of being subsequently varied or recalled.
- (3) The court should be able to determine what interest (if any) is payable while a capital amount remains outstanding.

(Paragraph 3.87; draft Bill, section 19(4), (7))

32. A dependent child's capital sum payment should be met from the liable portions of the estate in the following order:
- intestate estate;
  - residue;
  - general legacies;
  - special legacies and property passing under special destinations.

Within each category liability should be *pro rata*.

(Paragraph 3.89; draft Bill, section 20(1))

33. An application to the court by a child for a capital sum payment should have to be made within one year from the date of the deceased's death, but the court should be empowered to allow an application made after the expiry of this period on cause shown.

(Paragraph 3.91; draft Bill, section 19(1))

34. A child who elects to receive a capital sum payment under the scheme should be regarded for the purposes of other rights of succession to the deceased's estate as having failed to survive the deceased, unless the deceased's will provides otherwise.

(Paragraph 3.95; draft Bill, section 20(2))

35. It should be competent for a child with capacity to renounce, whether before or after the deceased's death, the right to a capital sum payment from the deceased's estate

(Paragraph 3.97; draft Bill, section 20(3))

36. It should be competent for a court dealing with an application by a child for a capital sum payment to order payment of a lump sum interim award pending the determination of the application. The sum or sums so paid should be deducted from any award ultimately made.

(Paragraph 3.99; draft Bill, section 19(2), (3) and (6))

37. (1) Section 29 of the Family Law (Scotland) Act 2006 should be repealed and replaced by a new statutory regime providing succession rights for cohabitants.

(2) The new statutory regime should apply to testate as well as intestate estates.

(Paragraph 4.9; draft Bill, sections 22-26 and schedule 2)

38. (1) Where the deceased is survived by a person who immediately before the deceased's death was living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners, that person, the deceased's cohabitant, should have the right to apply for a proportion of the deceased's estate.

(2) In determining whether the couple were living together in such a relationship, the court should have regard to:

- (a) whether they were members of the same household;
- (b) the stability of the relationship;
- (c) whether the parties had a sexual relationship;
- (d) whether they had children together, or had accepted children as children of the family; and

- (e) whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.

(3) A person should not be regarded as having ceased to be the cohabitant of another person by reason only of circumstances such as hospitalisation, imprisonment or service overseas in the armed forces.

(Paragraph 4.13; draft Bill, section 22)

39. (1) If the court declares the applicant to have been the deceased's cohabitant immediately before the death, the court should then fix the appropriate percentage of the entitlement to the estate which the deceased's spouse or civil partner would have received under the rules of intestate succession or legal share.

(2) In fixing the appropriate percentage the court should only have regard to:

- (a) the length of the period of cohabitation;
- (b) the interdependence, financial or otherwise, between the couple during the period of their cohabitation; and
- (c) the surviving cohabitant's contribution to their life together (whether such contributions were financial or otherwise) as for example, running the household, caring for the deceased and caring for their children or children accepted by them as children of the family.

(Paragraph 4.21; draft Bill, section 23(1) and (2))

40. Unless express provision to the contrary is made in the deceased's will, election to receive the appropriate percentage of the deceased's estate should extinguish any other right of succession which the cohabitant has to the deceased's estate and the cohabitant and his or her issue should be treated in relation to any other such right as not having survived the deceased.

(Paragraph 4.22; draft Bill, section 25(1))

41. A person may, whether before or after the death of another person, renounce any entitlement to apply for an appropriate percentage of that person's estate.

(Paragraph 4.23; draft Bill, section 26)

42. (1) Where the deceased dies intestate survived by a spouse or civil partner and a cohabitant, the value of the estate which the spouse or civil partner would inherit (to be known as the relevant amount) should be shared between the cohabitant and the spouse or civil partner: the cohabitant should be entitled to the appropriate percentage of half the relevant amount and the spouse or civil partner should be entitled to the balance of the relevant amount.

(2) Where the deceased dies testate, the cohabitant's entitlement to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner.

(Paragraph 4.30; draft Bill, section 24)

43. Unless on cause shown the court otherwise permits, any application for a proportion of the deceased's estate should be made within the period of 1 year commencing on the date of the deceased's death.

(Paragraph 4.32; draft Bill, section 23(3))

44. The new schemes for intestacy, legal share, dependent children and cohabitants recommended in Parts 2 to 4 should apply to the whole of the deceased's estate the devolution of which is governed by Scots law.

(Paragraph 5.10)

45. Capacity to make or revoke a will should, in the case of a will or revocation executed after commencement, be determined (whether the will disposes of moveables or immoveables) by the law of the testator's domicile at the time of making or revoking the will.

(Paragraph 5.11; draft Bill, section 52(1))

46. The question whether the terms of the title to moveable property belonging to a deceased person operate to pass that property to anyone else on the deceased's death should be determined by the law of the deceased's domicile at death.

(Paragraph 5.12; draft Bill, section 52(2))

47. Recommendation 61 dealing with the effect of subsequent divorce or annulment of a marriage or the dissolution or annulment of a civil partnership on a special destination in the title to the deceased's property should apply to property the devolution of which is governed by Scots law.

(Paragraph 5.13)

48. Recommendations 51 and 52 should apply only where the deceased died domiciled in Scotland.

(Paragraph 5.15; draft Bill, sections 27(1) and 28(1)(c))

49. Where a person has been confirmed as an executor in Scotland that person may be sued in the Court of Session or in the sheriff courts for the sheriffdom in which confirmation was granted in proceedings relating to his or her powers and duties as an executor in relation to the confirmed estate.

(Paragraph 5.17; draft Bill, schedule 1, paragraph 3)

50. (1) The Court of Session should also have jurisdiction in relation to relevant proceedings in this Report:

- (a) where the deceased died domiciled in Scotland;
- (b) where the deceased died domiciled outwith Scotland and the estate includes immoveable property situated in Scotland.

(2) The sheriff courts of a sheriffdom should also have jurisdiction in relation to relevant proceedings in this Report:

- (a) where the deceased died domiciled in Scotland and was habitually resident in that sheriffdom;
- (b) where the deceased died domiciled outwith Scotland and the estate includes immoveable property situated in that sheriffdom.

(3) The sheriff at Edinburgh should also have jurisdiction in relation to relevant proceedings in this Report where the deceased died domiciled in Scotland but without any fixed or known habitual residence in any particular sheriffdom.

(Paragraph 5.19; draft Bill, sections 13(6), 16(6), 19(8), (9), 23(4), (5), 27(9), (10))

51. (1) Provision should be made for the judicial rectification of a will prepared by someone other than the testator where the court is satisfied that the will is so expressed that it fails to give effect to the testator's intentions.
- (2) The power to rectify should be exercisable by the Court of Session or by the sheriff court.
- (3) An application for rectification should be competent only within 6 months from the date of confirmation of an executor, or, where there is no confirmation, from the date of death: but the court should have power, on cause shown, to allow a later application.
- (4) A court dealing with an application for rectification should be expressly empowered to consider extrinsic evidence.
- (5) A trustee or executor should not be personally liable for distributing any property in good faith in accordance with a will which is later rectified.
- (6) Provision should be made for a court order rectifying a will to be registrable in the Books of Council and Session or sheriff court books if the will is already registered there or if it is being registered there at the same time.

(Paragraph 6.7; draft Bill, section 27)

52. (1) Divorce, dissolution or annulment of a marriage or civil partnership, should, unless the will provides otherwise, have the effect of revoking:
- (a) any testamentary provision by one of the spouses or civil partners conferring a benefit or power of appointment on the other;
  - (b) any testamentary appointment by one spouse or civil partner of the other spouse or civil partner as a trustee, executor or guardian.

(2) The effect of such a revocation should be that, for the purposes of the will, the surviving spouse or civil partner is deemed to have failed to survive the testator.

(3) These rules should apply where the testator dies domiciled in Scotland and the divorce, dissolution or annulment is recognised in Scotland.

(Paragraph 6.17; draft Bill, section 28)

53. The rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) should be abolished.

(Paragraph 6.21; draft Bill, section 30)

54. (1) There should continue to be a rule whereby, if a legatee within a certain class dies after the date of the will but before the date of vesting, his or her issue take the legacy unless the will expressly, or by clear implication, provides otherwise.

(2) The class should be confined to direct descendants of the testator.

(3) The will should be regarded as providing otherwise if the bequest contains an express survivorship clause or destination-over.

(4) Where the rule applies, the issue of the predeceasing beneficiary should take the share that the beneficiary would have taken if he or she (and any other predeceasing beneficiary whose issue take by virtue of this rule) had survived the date of vesting.

(Paragraph 6.29; draft Bill, section 33)

55. A will, or any part of a will, which has been revoked, either expressly or impliedly, by a subsequent will should not revive unless the testator re-executes it or executes another document which expressly revives it.

(Paragraph 6.36; draft Bill, section 32)

56. Where property has been left to one person in liferent and to another person in fee and the liferent is renounced or forfeited by the liferenter or otherwise terminates before the liferenter's death then the fee should, unless the document creating the liferent expressly provides otherwise, vest in the fiar at the time when it would have vested if the liferenter had died on the date of the renunciation, forfeiture or termination.

(Paragraph 6.47; draft Bill, section 34)

57. Section 31 of the Succession (Scotland) Act 1964 should be replaced by a provision that, where two persons die simultaneously or in circumstances such that their order of death is uncertain, the estate of each should be distributed as if the other had failed to survive.

(Paragraph 6.57; draft Bill, section 35)

58. Where one person makes a testamentary provision for another and specifies in the will a period that the other must survive in order to take and it is uncertain whether the other survived for that period then for the purposes of that provision he or she should be treated as having failed so to survive.

(Paragraph 6.58; draft Bill, section 37)

59. Where property is to be transferred to one of two or more persons, depending on the order of their deaths, and does not form part of the estate of either or any of those persons before his or her death then if those persons have died simultaneously or their order of death is uncertain the property or its value should, in the absence of provisions to the contrary in the relevant document, be divided equally between or among the estates of those persons.

(Paragraph 6.60; draft Bill, section 36)

60. Where a will, other testamentary document or trust deed contains a destination of property to a beneficiary whom failing another person, conditional institution should be presumed whatever the nature of the property.

(Paragraph 6.65; draft Bill, section 31)

61. Section 19 of the Family Law (Scotland) Act 2006 and section 124A of the Civil Partnership Act 2004 should be repealed and re-enacted.

(Paragraph 6.66; draft Bill, section 29 and schedule 2)

62. The Parricide Act 1594 should be repealed.

(Paragraph 7.2; draft Bill, schedule 2)

63. An unlawful killer who incurs forfeiture should be treated for the purposes of succession to the deceased victim's estate and any destination of trust property as having failed to survive the deceased.

(Paragraph 7.3; draft Bill, section 38(2))

64. It should be competent for a court in Scotland to grant total relief under the Forfeiture Act 1982.

(Paragraph 7.4; draft Bill, section 39)

65. An application for relief from forfeiture, in a case where the killer has been convicted, should have to be made within 6 months from the date of conviction. Any period during which the conviction may be or is under appeal should not count towards the 6 month period.

(Paragraph 7.5; draft Bill, section 39(c)(ii)-(iii))

66. The general requirement upon an executor-dative to obtain caution before he or she may be confirmed as executor should be abolished.
- (Paragraph 7.11; draft Bill, section 40)
67. The court should no longer have power to order caution to be found by an executor-nominate.
- (Paragraph 7.11; draft Bill, section 40(1))
68. The court should not be given a discretionary power to order caution to be obtained by an executor.
- (Paragraph 7.12)
69. The sheriff should have a discretionary power to refuse to appoint a petitioner who, on cause shown, appears to be unsuited to the office of executor-dative, and should also have a power to refuse to confirm an executor-nominate.
- (Paragraph 7.16; draft Bill, section 41(1)(d) and (2))
70. The sheriff should have power to appoint an executor-dative fourteen days after the sheriff clerk has certified intimation of the petition.
- (Paragraph 7.17; draft Bill, section 41(1)(a))
71. A trustee or executor, in making a distribution from the estate vested in him or her, should not be personally liable for any error in distribution based on ignorance of the existence or non-existence of persons or their relationship or lack of relationship with a relevant person (including relationships by adoption or marriage) provided that he or she acted in good faith and made such enquiries as a reasonable and prudent trustee or executor would make in such circumstances.
- (Paragraph 7.19; draft Bill, section 43)
72. Section 17 of the Succession (Scotland) Act 1964 which protects persons purchasing heritable property which is or was vested in the deceased's executors by virtue of confirmation should be extended to cover all onerous acquirers of any kind of property.
- (Paragraph 7.21; draft Bill, section 42)
73. (1) For the purposes of the new succession rules the net estate (whether testate or intestate) should be the estate belonging to the deceased at the date of his or her death (but excluding, except as provided below, any property passing on death from the deceased to any other person by way of a special destination) less:

- (a) the debts for which his or her estate is liable as at the date of death; and
- (b) any funeral expenses.

(Paragraph 7.28; draft Bill, sections 45-46)

(2) For the purpose of a dependent child's entitlement, the deceased's estate should include any property passing on death from the deceased to any other person by way of a special destination.

(Paragraph 7.28; draft Bill, section 21(1))

(3) Inheritance tax and expenses of administration should not be deducted before the division of the net estate is made but this should not carry any implication that the estate is not liable for inheritance tax and expenses of administration or that the amounts due to beneficiaries in accordance with the rules of division applying to the net estate will not ultimately have to bear a share of that tax or those expenses.

(Paragraph 7.28; draft Bill, section 46(1)(c))

(4) For the purposes of allocating expenses of administration to different parts of the estate any amount payable by way of legal share, cohabitant's entitlement or dependent child's entitlement to a capital sum should be treated as if it had been a general legacy of the same amount.

(Paragraph 7.28; draft Bill, section 44)

74. The statutory provisions relating to the status of adopted persons in respect of succession rights should be grouped together and placed in the Adoption (Scotland) Act 1978 and the Adoption and Children (Scotland) Act 2007.

(Paragraph 7.35; draft Bill, section 48)

75. Any right at common law to claim the expense of mournings, aliment *jure representationis* or temporary aliment should be abolished.

(Paragraph 7.37; draft Bill, section 50)

76. A gift made in contemplation of death, called a donation *mortis causa*, should be presumed to be an outright gift unless the donor clearly stipulates otherwise.

(Paragraph 7.41; draft Bill, section 51)

77. In relation to the estate of a person who dies after the commencement of implementing legislation, any reference in any document executed before such commencement to legal rights (in the succession law sense) should be construed as a reference to the right to legal share or, as appropriate, the right of a dependent child to a capital sum payment under the new legislation.

(Paragraph 7.42; draft Bill, section 53)

78. (1) In general the new rules of succession law recommended in this Report should only apply in relation to deaths occurring on or after the date on which the implementing legislation is commenced.
- (2) Where it is uncertain whether a person died before or after commencement he or she should be deemed to have died after commencement.
- (3) Where a person dies on or after commencement leaving a will, or an alteration to a will, which fails to give effect to his or her instructions it should be competent to rectify the will, or the alteration, under section 27 of the draft Bill even if it was executed before commencement.
- (4) The following recommended new rules should not apply to documents executed before commencement:
- (a) the rule on destinations in wills and certain trusts;
  - (b) the rule on whether a bequest to a descendant of the testator should go to the issue of that descendant if he or she predeceases the testator leaving issue;
  - (c) the rule on the termination of a liferent other than on the death of the liferenter;
  - (d) the rule on the protection to be afforded to trustees for certain errors in distributing estate; and
  - (e) the rule on the protection of persons acquiring title.

(Paragraph 7.47; draft Bill, section 55)

79. The Scottish Ministers should appoint, by statutory instrument, a single day for the commencement of the new legislation.

(Paragraph 7.48; draft Bill, section 57(2))

# Appendix A

## Succession (Scotland) Bill

DRAFT

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# Succession (Scotland) Bill

## DRAFT

An Act of the Scottish Parliament to make new provision as regards succession; to amend the Trusts (Scotland) Act 1921; and for connected purposes.

### PART 1

#### INTESTATE SUCCESSION

##### **1 General application**

The net intestate estate of a deceased person is to be divided in accordance with the provisions of this Part.

#### NOTE

Section 1 provides that, where a person dies intestate, that is without leaving a will disposing of the whole estate, his or her estate is to be divided in accordance with the rules set out in Part 1. These replace the current rules in Part 1 of the Succession (Scotland) Act 1964. The new rules apply to deaths occurring on or after the date on which the draft Bill comes into force: section 55(1).

##### **2 Spouse or civil partner and issue**

- (1) This section applies where a deceased person is survived by (either or both)—
  - (a) a spouse or civil partner,
  - (b) issue.
- (2) A spouse or civil partner is entitled to the whole of the net intestate estate except where—
  - (a) the deceased is also survived by issue, and
  - (b) the value of the net intestate estate exceeds the threshold sum.
- (3) Where the deceased is survived by a spouse or civil partner and by issue and the value of the net intestate estate exceeds the threshold sum—
  - (a) the spouse or civil partner is entitled to—
    - (i) the threshold sum, and
    - (ii) a sum equal to half of the remaining value of the net intestate estate, and
  - (b) the issue is entitled to such sum as is mentioned in paragraph (a)(ii).
- (4) Where the deceased is survived by issue but is not survived by a spouse or civil partner the issue is entitled to the whole of the net intestate estate.

- (5) Where a surviving issue (“A”) has issue, A’s survival precludes A’s issue from any entitlement to the net intestate estate under this section (except where section 8(2) applies).
- (6) Where there are two or more surviving issue who are entitled to the whole (or part) of the net intestate estate, the value of the net intestate estate (or the part) is to be divided between or among them in accordance with section 7.
- (7) Subsections (2) and (3) are subject to section 3.
- (8) In this section and in section 3 (before any reduction under that section), “the threshold sum” is £300,000.

#### NOTE

Where a person who dies intestate is survived by a spouse, civil partner or issue, section 2 applies. Otherwise, succession to the estate is regulated by section 4. "Issue" is defined, in section 47(1), as meaning "issue however remote". Issue therefore includes children, grandchildren, great grandchildren and so on.

Subsection (2) provides for the situation in which the deceased is survived by a spouse or civil partner. If there are no surviving issue, the spouse or civil partner is entitled to the whole net intestate estate. This implements recommendation 1. Where the deceased also left issue, the spouse or civil partner is entitled to the whole net intestate estate where it is worth less than "the threshold sum" (which is set, by subsection (8), at £300,000). This is in implementation of recommendation 3 (1).

Subsection (3) provides for the situation in which the deceased is survived by both a spouse or civil partner and issue and where the net intestate estate is worth more than the threshold sum. This sum is the threshold beyond which the issue are entitled to share in the estate. Subsection (3) provides that the estate is to be shared between the spouse or civil partner and the issue, with the spouse or civil partner being entitled to the threshold sum plus half of the balance and the issue being entitled to the remaining half of the balance. This is in implementation of recommendation 3 (1).

Subsection (4) provides that, where the deceased is survived by issue but not by a spouse or civil partner, the issue are entitled to the whole of the net intestate estate. This implements recommendation 2.

Subsection (5) regulates the entitlement of the deceased's issue under this section. As issue is defined as issue however remote it will embrace, for instance, the deceased's granddaughter as well as the deceased's daughter. The deceased's daughter and granddaughter are both issue of the deceased and so they both have a *prima facie* entitlement. The effect of subsection (5) is that, if the granddaughter's mother survives, the granddaughter has no entitlement under this section. The only exception would be where the granddaughter's mother has renounced her entitlement (under section 8).

Subsection (6) provides that, where there are two or more surviving issue entitled to a share, the net intestate estate is to be divided in accordance with the rules in section 7.

Subsection (7) indicates that the various entitlements under subsections (2) and (3) are subject to section 3. That section deals with the particular case in which a surviving spouse or civil partner takes the deceased's share of the family home by way of special destination.

Subsection (8) sets the threshold sum at £300,000, in implementation of recommendation 3 (2). This sum is subject to annual review by the Scottish Ministers by virtue of section 9. Various factors have been relevant to the choice of the initial figure. We wished to take account of the maximum value of a spouse or civil partner's prior rights: currently £366,000 where the deceased also leaves issue. We also wished to try to ensure that, in the vast majority of cases, the spouse or civil partner's entitlement will continue to be sufficient to allow him or her to remain in the matrimonial or family home. However, we acknowledge

that the decision as to what the appropriate level of the threshold sum should be is a political one and is for the Scottish Parliament.

### **3 Survivorship destination in favour of spouse or civil partner**

- (1) This section applies where—
  - (a) by way of a survivorship destination, the right of a deceased person (“A”) in a dwelling house in which A and A’s spouse or civil partner (“B”) have lived together passes to B on A’s death (in this section the property so passing being referred to as the “destination property”), and
  - (b) A is survived by issue.
- (2) The entitlements of A’s issue and B under section 2 are modified in accordance with—
  - (a) in a case where the net value of the destination property is less than or equal to the threshold sum, subsection (3), or
  - (b) in a case where the net value of the destination property exceeds the threshold sum, subsection (4).
- (3) The threshold sum is to be reduced by the net value of the destination property.
- (4) The amount by which the net value of the destination property exceeds the threshold sum is to be deducted from the value of the net intestate estate and—
  - (a) if the resultant amount is greater than zero—
    - (i) B’s entitlement becomes a sum equal to half the resultant amount, and
    - (ii) the entitlement of A’s issue becomes a sum equal to the whole of the value of the remaining net intestate estate after deduction of B’s entitlement under sub-paragraph (i), or
  - (b) if the resultant amount is less than or equal to zero—
    - (i) B is to have no entitlement to any part of the net intestate estate, and
    - (ii) the entitlement of A’s issue becomes the whole of the net intestate estate.
- (5) In this section, a reference to the net value of the destination property is a reference to its value after deduction of (either or both)—
  - (a) where (immediately before death) A was solely liable for a debt secured over the property, the amount of the debt,
  - (b) where (immediately before death) A was jointly and severally liable with B for a debt secured over the property, the amount of the debt which is proportionate to the share of A’s ownership that passes to B as a result of the destination.

#### **NOTE**

Section 3 applies where the deceased is survived both by issue and also by a spouse or civil partner who receives, by way of a survivorship destination, the deceased's share of a dwelling house in which the couple lived. That share is called the "destination property". Such property does not form part of the deceased's estate: see section 45(2). Whilst not disturbing this rule, section 3 ensures that account is taken of the net value of the destination property. If such property were ignored for succession purposes the balance which is achieved by section 2 between the spouse or civil partner's entitlement and that of the deceased's issue would become unfairly weighted against the issue. Section 3 implements recommendations 4 and 5.

Where the net value of the destination property passing to the spouse or civil partner is less than or equal to the threshold sum, subsection (3) provides that the threshold sum is to be reduced by that value. This means that, in calculating the entitlement of the spouse or civil partner and issue under section 2, the threshold sum is not £300,000 but a lesser sum.

Where the net value of the destination property exceeds the threshold sum (ie is over £300,000), subsection (4) provides that the amount by which it exceeds that sum is to be deducted from the value of the net intestate estate. If the resulting amount is greater than zero the spouse or civil partner is entitled to half of that amount. The issue are entitled to the whole estate minus the spouse or civil partner's entitlement. If, however, the resulting amount is zero or less, the issue are entitled to the whole estate. In all cases the spouse or civil partner keeps the destination property and, as it does not form part of the estate, the issue can never become entitled to a share of it.

Subsection (5) defines the net value of the destination property. It is the gross value of that property less the amount of any debts which are secured over it for which the donee becomes responsible as a result of the operation of the survivorship destination.

#### **4 Other surviving relatives**

- (1) This section applies where a deceased person is not survived by a spouse, civil partner or issue.
- (2) The entitlement to the net intestate estate is to be determined by reference to the ranking of the surviving relatives in accordance with the categories of relative listed in section 6(1).
- (3) Where the surviving relatives are those specified in section 6(1)(a)—
  - (a) the parents are entitled to share a sum equal to one half of the value of the net intestate estate, and
  - (b) the siblings are entitled to share a sum equal to that mentioned in paragraph (a).
- (4) In any other case, the surviving relatives in the highest ranked category in section 6(1) in which there is a surviving relative are entitled to share the whole of the net intestate estate.
- (5) Where there are two or more surviving relatives who are entitled to the whole (or part) of the net intestate estate, the value of the net intestate estate (or the part) is to be divided between or among them in accordance with section 7.
- (6) This section is subject to section 5.

#### **NOTE**

Section 4 provides for the succession to the net intestate estate of a person who is not survived by a spouse, civil partner or issue. (Otherwise, section 2 applies.)

Subsection (2) provides that the relatives who are entitled to the estate are determined by reference to the list of categories of relative in section 6(1).

Where the deceased is survived by at least one parent and one sibling subsection (3) provides that the parent(s) are entitled to one half of the value of the net intestate estate and the sibling(s) are entitled to the other half. This implements recommendation 11 (1), and preserves the current law. By section 5, the issue of a predeceasing sibling are entitled to represent that sibling.

Subsection (4) provides that where the deceased is not survived by parents or siblings the surviving relatives in the highest ranked category in section 6(1) are entitled to share the whole of the net intestate

estate. Subsection (5) provides that the division of the estate amongst the relatives is governed by the rules in section 7.

Subsection (6) states that the doctrine of representation, under section 5, applies. This determines who qualifies as a relative in the highest ranking category.

## **5 Representation**

- (1) This section applies where a person (“A”)—
  - (a) would, but for not surviving a deceased person, have been entitled to all or part of the net intestate estate of the deceased, and
  - (b) left issue surviving the deceased.
- (2) For the purposes of section 4, A’s issue is to be treated as being the surviving relative (in place of A) in the applicable category listed in section 6(1).
- (3) But where A’s surviving issue (“B”) also has issue, B’s survival precludes B’s issue from being treated as the surviving relative under subsection (2) (except where section 8(2) applies).
- (4) This section does not apply where A was the deceased’s—
  - (a) issue,
  - (b) parent, grandparent or remoter lineal ancestor, or
  - (c) spouse or civil partner.

### **NOTE**

Section 5 preserves the current doctrine of representation whereby a person who would, but for his or her predecease, have been entitled to a share in an estate is represented by his or her issue, and they in turn become entitled. Equally, a person who renounces his or her intestate succession rights under section 8(2) may be represented by his or her issue. Section 5 implements recommendation 11 (2).

Subsection (2) provides that, in determining who falls within the highest ranked category in section 6(1), the doctrine of representation is to apply.

Subsection (3) provides that, where a predeceasing relative is represented by his or her issue, not all of the issue will necessarily become entitled to a share of the estate. This subsection implements recommendation 9 (1). The provision is similar to section 2(5): see its note for an explanation of how this provision operates.

Subsection (4) provides that the doctrine of representation does not operate when the predeceasing relative was the deceased's issue, parent (or grandparent or remoter lineal ancestor) or spouse or civil partner. This preserves the effect of the current law.

## **6 Categories of relatives**

- (1) For the purpose of section 4(2) the categories of relatives are—
  - (a) parents together with siblings,
  - (b) siblings (where there are no surviving parents),
  - (c) parents (where there are no surviving siblings),
  - (d) uncles and aunts,

- (e) grandparents,
  - (f) siblings of any of the deceased's grandparents,
  - (g) remoter ancestors, generation by generation successively.
- (2) The categories of relatives in subsection (1) rank in descending order from paragraph (a) to paragraph (g).
  - (3) In the application of this section, no distinction is to be made between relatives of the full-blood and relatives of the half-blood.
  - (4) For the purposes of subsection (1)(g), the siblings of an ancestor have priority over more remote ancestors.

NOTE

Section 6 implements recommendation 9. It preserves the current rules as to entitled relatives, except that the deceased's spouse or civil partner is omitted from the list (and provided for under section 2) and the distinction between half- and full-blood is removed.

Subsection (1) lists the categories of relatives who are entitled to inherit the net intestate estate in the event that a person dies without leaving a spouse, civil partner or issue. Subsection (2) states that the categories are to be read in descending order.

Subsection (3) provides that no distinction is to be made between relatives of the full-blood and relatives of the half-blood. All are equally entitled.

**7 Division among several entitled relatives**

- (1) This section applies where a deceased person is survived by two or more relatives who are entitled to share the whole (or part) of the net intestate estate.
- (2) If all the surviving relatives are of the same degree of relationship to the deceased, the value of the net intestate estate (or the part) is to be divided among them equally.
- (3) In any other case, the value of the net intestate estate (or the part) is to be divided equally into the same number of portions as the aggregate number of—
  - (a) those surviving relatives (“the nearest surviving relatives”) who are nearest in degree of relationship to the deceased, and
  - (b) any other relatives (“the nearest predeceasing relatives”) who—
    - (i) were related to the deceased in that degree,
    - (ii) did not survive the deceased, and
    - (iii) left issue surviving the deceased.
- (4) Those portions are to be taken—
  - (a) one by each of the nearest surviving relatives, and
  - (b) one, *per stirpes*, by the issue of each of the nearest predeceasing relatives.

NOTE

Section 7 applies where the deceased is survived by two or more entitled relatives and the distribution is not regulated by earlier provisions in the draft Bill. The net intestate estate is to be divided in accordance with subsections (2)-(4). It implements recommendations 10 (2) and 11 (3).

Subsection (2) provides that if all of the surviving relatives are of the same degree of relationship to the deceased (eg are all children, or are all siblings of the deceased) the estate is to be distributed equally between them.

Otherwise, subsection (3) applies. It requires the estate to be divided into a number of portions, some of which will be taken by relatives who are representing an ancestor who has predeceased or who has renounced his or her intestate succession rights. The number of portions is obtained by adding the number of relatives who are nearest in degree of relationship to the deceased to the number of those who would, but for predecease or renunciation, have been in that category and who are being represented by their issue. So, for instance, if a woman dies, with no surviving husband, civil partner or parents, but with two siblings and three nephews by a predeceased sibling, her estate will be divided into  $2+1=3$  portions.

Subsection (4) provides for the distribution of the portions. One will be taken by each of the relatives who are closest in degree of relationship to the deceased. Any portion which would have been taken by a relative who has predeceased or renounced his or her rights will be shared, *per stirpes*, by his or her issue. So, in the example above, the two siblings will take one portion (one third) each, and the remaining portion will be shared equally between the nephews.

## **8 Renunciation of rights**

- (1) This section applies where a person (“A”) renounces any entitlement to the net intestate estate of a deceased person (whether before or after the death of the deceased).
- (2) For the application of this Part to the renounced entitlement, A is to be treated as not having survived the deceased.
- (3) In the renunciation, A may expressly exclude any entitlement of A’s issue to the net intestate estate arising by virtue of section 2 or 5.
- (4) Where there is such an express exclusion, A’s issue is also to be treated as not having survived the deceased.
- (5) Such an express exclusion of issue has the effect of excluding all of A’s issue (even if it only purports to exclude certain of A’s issue).

### NOTE

Section 8 deals with renunciation of an entitlement to intestate estate and implements recommendation 12. No-one is obliged to accept an entitlement under Part 1 and may renounce it, either before or after the death of the intestate.

Subsection (2) provides that a person who renounces his or her entitlement in the net intestate estate of the deceased is to be treated, for the purposes of Part 1 of the draft Bill, as not having survived the deceased.

Subsection (3) provides that a person may renounce not only his or her own entitlement but also that of his or her issue (who would otherwise represent the renouncer). Unless this is done expressly a person will be treated as only having renounced his or her own entitlement and not that of the issue. By subsection (4), where an express exclusion has been made in respect of A's issue, both A and A's issue are to be treated, for the purposes of Part 1 of the draft Bill, as not having survived the deceased. Subsection (5) states that it is not competent to exclude the entitlement of only some of the issue. A partial exclusion will be treated as a total exclusion.

## **9 Duty of Scottish Ministers to review the threshold sum**

- (1) The Scottish Ministers are to review annually the sum specified for the time being in section 2(8) (that is to say, the threshold sum) and may by order made by statutory instrument alter the sum—
  - (a) by such amount as will maintain the value of the sum in real terms, or
  - (b) by such other amount as they consider reasonable.
- (2) For the purpose of this section, the Scottish Ministers may have regard to any price index.
- (3) An order under subsection (1) is not made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

### NOTE

Section 9 implements recommendation 3 (3) and imposes a duty on the Scottish Ministers to keep the threshold sum specified in section 2(8) under annual review. It also provides a power to change that sum. In deciding what alterations to make to the threshold sum the Scottish Ministers may, by subsection (2), have regard to any price index which they consider to be appropriate. By subsection (3) an order made under subsection (1) does not become law unless it is approved by a resolution of the Scottish Parliament.

## **10 Preservation of Crown's rights**

This Part does not affect any right of the Crown to any estate to which no surviving issue or other relative of the deceased can be found to succeed.

### NOTE

Section 10 preserves the existing right of the Crown to claim property to which no surviving relative can be found to succeed.

## **PART 2**

### PROTECTION FROM DISINHERITANCE [ALTERNATIVE TO PART 3]

This Part is an alternative to Part 3. As explained in paragraph 3.35 of the Report, the draft Bill contains provisions for two alternative options for protection against disinheritance. Under each option, the deceased's spouse or civil partner has the right to legal share. The difference is in respect of the rights of the deceased's issue. The first option, reflected in Part 2, gives the deceased's issue the right to legal share. Under the second option, reflected in Part 3, the dependent children of the deceased (ie those aged under 18 or, in some cases, 25) have the right to a capital sum payment, but the issue of the deceased have no right to legal share. The two options are discussed, respectively, in paragraphs 3.36-3.64 and 3.65-3.99 of the Report.

## **11 Legal share of spouse or civil partner**

- (1) Where a deceased person (“A”), survived by a person (“B”) who is A’s spouse or civil partner, leaves a will which disposes of—
  - (a) the whole of A’s estate, or
  - (b) part only of A’s estate,

B is entitled to a legal share in A's estate (that right vesting in B on A's death).

- (2) B's entitlement under subsection (1) is to 25% of what B would have been entitled to had A died wholly intestate leaving net intestate estate of the same value as—
  - (a) the net testate estate, or
  - (b) in a case mentioned in paragraph (b) of subsection (1), the aggregate of the net testate estate and net intestate estate,which A did leave.

#### NOTE

Section 11 provides a surviving spouse or civil partner with the right to legal share in the deceased's estate. By subsection (1), which implements recommendation 14, this right arises where the deceased left a will (whether or not it disposes of the whole estate). The right to legal share vests on the deceased's death, as is the case for legal rights under the current law. It may, therefore, be claimed by the surviving spouse or civil partner's executor if he or she dies without having elected to take legal share.

Subsection (2) implements recommendation 15. The value of legal share is to be determined by a rule rather than in a discretionary way. Its value is 25% of the sum to which the person would have been entitled if the deceased had died wholly intestate. (Paragraph (b) of subsection (2) deals with the case where the deceased was partially intestate.) Part 1 of the draft Bill sets out the entitlements on intestacy; in particular, subsections (2) and (3) of section 2 regulate the entitlement of a surviving spouse or civil partner. The rules on intestate succession therefore require to be followed in calculating the value of legal share. By contrast with the current position for legal rights, which are calculated as a percentage of the value of the deceased's moveable estate only, legal share will be calculated by reference to the value of the whole estate, both heritable and moveable.

## 12 Legal share of issue

- (1) Where a deceased person ("A"), survived by issue ("B"), leaves a will which disposes of—
  - (a) the whole of A's estate, or
  - (b) part only of A's estate,B is entitled to a legal share in A's estate (that right vesting in B on A's death).
- (2) Where B has issue, B's survival precludes B's issue from having an entitlement under subsection (1).
- (3) B's entitlement under subsection (1) is to 25% of what B would have been entitled to—
  - (a) had A died wholly intestate leaving net intestate estate of the same value as—
    - (i) the net testate estate, or
    - (ii) in the case mentioned in paragraph (b) of subsection (1), the aggregate of the net testate and net intestate estate,which A did leave, and
  - (b) in a case where—
    - (i) A's spouse or civil partner, or
    - (ii) some other issue of A,

has renounced any entitlement to a legal share in A's estate or any entitlement arising by virtue of subsection (2), (3), or (4) of section 2, had there been no such renunciation.

#### NOTE

Section 12 provides the deceased's surviving issue with the right to legal share in the deceased's estate. (See the note above to Part 2.)

By subsection (1), which implements recommendation 20 (1), the right to legal share arises where the deceased left a will (whether or not it disposes of the whole estate). The right to legal share vests on the deceased's death, as is the case for legitim under the current law. It may therefore be claimed by the issue's executor if the issue dies without having elected to take legal share.

Subsection (2) limits the class of issue who are entitled to legal share. The draft Bill defines issue as "issue however remote" (in section 47(1)), which means that children, grandchildren, great grandchildren and so on will be issue. The effect of subsection (2) is that a person is only entitled to legal share in a deceased's estate if he or she does not have a surviving ancestor (parent, grandparent, etc) who has a right to legal share in that estate. So, if a person is survived by a son and the son's child, the son (but not his child) would be entitled to legal share.

Subsection (3) implements recommendation 20 (2). The value of legal share is to be determined by a rule rather than in a discretionary way. Its value is 25% of the sum to which the person would have been entitled if the deceased had died wholly intestate. (Paragraph (b) of subsection (2) deals with the case where the deceased was partially intestate.) Part 1 of the draft Bill sets out the entitlements on intestacy; in particular, subsections (3) and (4) of section 2 regulate the entitlement of the surviving issue. The rules on intestate succession therefore require to be followed in calculating the value of legal share. By contrast with the current position for legitim, which is calculated as a percentage of the value of the deceased's moveable estate only, legal share will be calculated by reference to the value of the whole estate, both heritable and moveable. However, subsection (3)(b) requires that, in doing so, any other person's renunciation of a right to legal share or to intestate estate is to be disregarded. Thus the value of a person's legal share is not affected if other members of the deceased's family decide not to take their legal share or intestate succession rights.

### **13 Provisions supplementary to sections 11 and 12**

- (1) Any legal share out of an estate is to be met—
  - (a) out of so much, if any, of that estate as is intestate estate (shares in the division of the intestate estate under Part 1 being abated *pro rata*),
  - (b) in so far as not met under paragraph (a), out of the residue of the estate,
  - (c) in so far as not met under paragraphs (a) and (b), out of general legacies (the general legacies being abated *pro rata*), and
  - (d) in so far as not met under paragraphs (a) to (c), out of special legacies (the special legacies being abated *pro rata*).
- (2) Except in so far as provision to the contrary is made in the will, if B elects to receive a sum by virtue of section 11 or 12, then, in relation to any other right of succession which B has to A's estate both—
  - (a) B, and
  - (b) B's issue,are to be treated as not having survived A.

- (3) A's executor may apply to a relevant sheriff for an order (either or both)—
  - (a) deferring payment of an amount claimed by virtue of section 11 or 12 either until a date specified in the application or until some occurrence so specified,
  - (b) providing for payment of any such amount by instalments.
- (4) For the purposes of subsection (3), a relevant sheriff is—
  - (a) if A died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which A was habitually resident,
  - (b) if A died domiciled in Scotland but as at the date of death either A was not habitually resident in a particular part of Scotland or in which part of Scotland A was habitually resident is not known or is uncertain, the sheriff at Edinburgh,
  - (c) if A died domiciled outwith Scotland but as at the date of death owned immoveable property situated in Scotland, the sheriff of the sheriffdom in which the immoveable property is situated, or
  - (d) the sheriff of the sheriffdom in which A's executor obtains confirmation.

NOTE

This section contains some supplementary rules governing the payment of legal share and the consequences of electing to receive it.

Subsection (1) stipulates the order in which various parts of the estate are liable for meeting legal share. It implements recommendations 19 and 23.

Subsection (2) sets out the consequences of electing to receive legal share. A person who is entitled to legal share is not obliged to take it: section 14 expressly allows for the right to be renounced. If a person elects to receive legal share then (unless the will provides otherwise) he or she is treated as not having survived the deceased for the purpose of any other right of succession which that person had to the deceased's estate. This means that any other right of succession which he or she has to the estate (such as a legacy under the will) is forfeited. In addition, that person's issue are prevented from taking the forfeited rights in his or her stead. So, for example, if a father leaves his daughter a legacy in his will but she decides to take legal share, not only does she lose the right to the legacy but her children are also prevented from standing in her place to take it. (The children do not, of course, lose any succession rights which they may have in their own right.) This implements recommendations 17 and 21 (3).

Subsection (3) entitles the deceased's executor to seek a court order regulating when and how legal share may be paid. This implements recommendations 18 and 20 (3). Legal share might be payable out of an estate which comprises assets which are not readily realisable or whose value will be disproportionately affected if a part is sold off at short notice, as might be the case where the deceased's main asset is a right in a farm or other business. (Such assets are not to be excluded: see recommendation 26.) In order not to diminish unduly the value of the remaining estate, the executor may not wish to make immediate payment in full. This subsection permits a sheriff to order payment of legal share by instalments and (in addition, or separately) to order that no payment be made until a specified time or event in the future. It should be noted, however, that this does not allow the sheriff to alter the total sum payable by way of legal share. Interest may be awarded: see the note to section 50.

Subsection (4) specifies which sheriff may make an order. It implements recommendations 50 (2) and (3).

#### **14 Renunciation of entitlement to legal share**

- (1) A person may (whether before or after the death of another person) renounce any entitlement, under section 11 or as the case may be section 12, to a legal share in the estate of that other person.
- (2) Where a person renounces any entitlement under section 12 to a legal share in the estate of another person (such renunciation being before the death of the other person), the renouncer's issue have no entitlement under that section to a legal share in the estate.

#### NOTE

Subsection (1) states that a person who is entitled to legal share may renounce that entitlement. This may be done either before the deceased's death or afterwards. This implements recommendations 16 and 22 (1) and (3). A renunciation will not affect the amount to which any other person is entitled by way of legal share.

Subsection (2) applies where the right to legal share is renounced by the deceased's issue. It provides that the issue of the person who makes the renunciation are not to be entitled to claim legal share. This implements recommendation 22 (2). If, for example, a man has a daughter, who is handicapped and needs expensive care, and a son, he may decide to leave the bulk of the estate to the daughter. In order to rule out the possibility of a claim after death which would reduce his sister's legacy, the son may agree, during his father's lifetime, to renounce his right to legal share. However, if he were then to die before his father, his own children would be entitled to legal share in their grandparent's estate. This could lead to the daughter's legacy being diminished. Subsection (2) prevents such an entitlement arising.

It is only necessary for the subsection to apply to renunciations made before the deceased's death as the right to legal share vests on death. Thus if it is renounced after that time it does not transmit to any other person.

### **PART 3**

#### PROTECTION FROM DISINHERITANCE AND DEPENDENT CHILD'S ENTITLEMENT TO CAPITAL SUM PAYMENT [ALTERNATIVE TO PART 2]

##### *Protection from disinheritance*

This Part is an alternative to Part 2. See the note to Part 2 above for an explanation of the two options.

#### **15 Legal share of spouse or civil partner**

- (1) Where a deceased person ("A"), survived by a person ("B") who is A's spouse or civil partner, leaves a will which disposes of—
  - (a) the whole of A's estate, or
  - (b) part only of A's estate,

B is entitled to a legal share in A's estate (that right vesting in B on A's death).

- (2) B's entitlement under subsection (1) is to 25% of what B would have been entitled to had A died wholly intestate leaving net intestate estate of the same value as—
  - (a) the net testate estate, or
  - (b) in a case mentioned in paragraph (b) of subsection (1), the aggregate of the net testate estate and net intestate estate,

which A did leave.

NOTE

This provision is identical to section 11, and implements recommendations 14 and 15. See the note to that section for an explanation.

**16 Provisions supplementary to section 15**

- (1) Any legal share out of an estate is to be met—
  - (a) out of so much, if any, of that estate as is intestate estate (shares in the division of the intestate estate under Part 1 being abated *pro rata*),
  - (b) in so far as not met under paragraph (a), out of the residue of the estate,
  - (c) in so far as not met under paragraphs (a) and (b), out of general legacies (the general legacies being abated *pro rata*), and
  - (d) in so far as not met under paragraphs (a) to (c), out of special legacies (the special legacies being abated *pro rata*).
- (2) Except in so far as provision to the contrary is made in the will, if B elects to receive a sum by virtue of section 15, then, in relation to any other right of succession which B has to A's estate both—
  - (a) B, and
  - (b) B's issue,are to be treated as not having survived A.
- (3) A's executor may apply to a relevant sheriff for an order (either or both)—
  - (a) deferring payment of an amount claimed by virtue of section 15 until a date specified in the application or until some occurrence so specified,
  - (b) providing for payment of any such amount by instalments.
- (4) For the purposes of subsection (3), a relevant sheriff is—
  - (a) if A died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which A was habitually resident,
  - (b) if A died domiciled in Scotland but as at the date of death either A was not habitually resident in a particular part of Scotland or in which part of Scotland A was habitually resident is not known or is uncertain, the sheriff at Edinburgh,
  - (c) if A died domiciled outwith Scotland but as at the date of death owned immoveable property situated in Scotland, the sheriff of the sheriffdom in which the immoveable property is situated, or
  - (d) the sheriff of the sheriffdom in which A's executor obtains confirmation.

NOTE

This provision is very similar to section 13, and implements recommendations 17-19 and 50 (2) and (3). See the note to section 13 for an explanation.

## **17 Renunciation of entitlement to legal share**

A person may (whether before or after the death of another person) renounce any entitlement, under section 15, to a legal share in the estate of that other person.

### NOTE

By section 17 a spouse or civil partner may renounce, either before the deceased's death or afterwards, his or her entitlement to legal share. This implements recommendation 16.

### *Dependent child's entitlement to capital sum payment*

## **18 Dependent child's entitlement to capital sum payment**

- (1) A person ("B") who is the dependent child of a deceased person ("A") is entitled to a capital sum payment out of such part of A's estate as will devolve, or has devolved, (whether or not in fee) on a person ("C") who does not owe B—
  - (a) an obligation of aliment under section 1 of the Family Law (Scotland) Act 1985 (c.37) (in this section referred to as "the 1985 Act"), or
  - (b) any like obligation under a system of law other than Scots law.
- (2) B is the "dependent child" of A if, immediately before A's date of death, A owed B—
  - (a) an obligation of aliment under section 1(1)(c) or (d) of the 1985 Act, or
  - (b) any like obligation under a system of law other than Scots law.
- (3) Except that—
  - (a) B is not, by virtue of paragraph (b) of subsection (2), the dependent child of A if immediately before A's date of death B is not a child as defined by section 1(5) of the 1985 Act, and
  - (b) for the purposes of this section, an obligation mentioned in that paragraph is to be taken to cease to subsist (if it has not earlier ceased to subsist) when B ceases to be a child as so defined.
- (4) The capital sum payment to which a dependent child is entitled under subsection (1) is such (if any) as it is reasonable to pay out of the part in question in respect of the period from A's date of death until, were A still alive, the obligation mentioned in subsection (2) would have ceased to subsist.
- (5) In determining what is reasonable for the purposes of subsection (4), regard is to be had only to the following matters—
  - (a) the needs, resources and earning capacity of B,
  - (b) if C is A's surviving spouse or civil partner, the needs, resources and earning capacity of C,
  - (c) the needs, resources and earning capacity of any person who owes B an obligation such as is mentioned in subsection (1)(a) or (b),
  - (d) the likelihood of B, after attaining the age of 18 years, undergoing reasonable and appropriate—
    - (i) instruction at an educational establishment, or
    - (ii) training for employment or for a trade, profession or vocation, and

- (e) the likely duration of any such instruction or training.
- (6) Except that, in so determining, regard may be had to any conduct of B, or of another person, to which it would be manifestly inequitable not to have regard.

#### NOTE

Subsection (1) creates a new right of succession for a dependent child. It states that the child has the right to a capital sum payment from the deceased's estate. This applies whether the deceased died testate or intestate. However, it is only payable out of any part of the estate which falls to a person who does not owe the child an obligation of aliment. This would arise, for example, in an intestacy where the deceased's heir is a surviving spouse or civil partner who has not accepted the child as a child of the family and does not therefore owe an obligation of aliment to the child. If estate falls to a person who is obliged to aliment the child then, by the law of aliment, that person will continue to be obliged to use his or her own resources to provide aliment for the child. These resources will, of course, include the inheritance. This implements recommendations 27 and 28.

Subsection (2) defines "dependent child" as a person whom, immediately before death, the deceased was obliged to aliment, either under provisions of section 1 of the Family Law (Scotland) Act 1985 or under a similar obligation under a foreign legal system. In most cases the deceased will be the child's parent, either natural or adoptive, but the right will also exist where the child was accepted by the deceased as a child of the family. Section 1(5) of the Family Law (Scotland) Act 1985 provides that a "child" is a person under the age of 18 and also a person aged 18 or over but under 25 who is undertaking appropriate and reasonable education or training.

Subsection (3) applies where a child is owed an obligation of aliment under a foreign system of law. It seeks to limit the effect of a system which offers more generous alimentary provisions than those available under Scots law. Paragraph (a) states that no-one is entitled to a capital sum payment unless, at the time of the deceased's death, he or she is a "child" within the meaning of section 1(5) of the Family Law (Scotland) Act 1985, ie is under 18 or under 25 and in appropriate education or training. The effect of paragraph (b) is that, regardless of a more generous entitlement under a foreign legal system, the capital sum payment will be based on the period between the date of the deceased's death and the child's 18<sup>th</sup> birthday (unless, when aged over 18 but under 25, he or she is in appropriate education or training).

Subsections (4) and (5) explain how the right is to be quantified. They implement recommendation 30. Subsection (4) sets out the basic method for determining the value of the capital sum payment. Looking at the length of time during which, but for dying, the deceased would have been obliged to aliment the child, a reasonable capital sum payment is calculated by considering the factors listed in subsection (5). This list is exhaustive. No other factors can be taken into account. The capital sum payment cannot, of course, exceed the value of the deceased's estate which was inherited by the people who do not owe an obligation of aliment to the child.

#### **19 Action for payment of capital sum by virtue of section 18(1)**

- (1) Unless on cause shown the court otherwise permits, any action for payment of a capital sum by virtue of section 18(1) must be brought within the period of 1 year commencing on A's date of death.
- (2) Where an action has been brought under subsection (1) the court may, pending determination of the claim, make an interim award.
- (3) An amount awarded by virtue of subsection (1) (whether or not an interim award) is to be awarded as a lump sum.
- (4) But any such award may include such provision as the court thinks fit as to when payment is to be made (including provision as to payment by instalments) and as to what interest (if any) is to be payable while an amount remains outstanding.

- (5) It is not competent to make any such award if B has died.
- (6) An amount paid by virtue of subsection (2) is to be—
  - (a) deducted from any lump sum awarded (other than as an interim award) by virtue of subsection (1), and
  - (b) repaid if no lump sum is so awarded.
- (7) Provision made under subsection (4) (or under this subsection) may, if circumstances change materially, be varied or recalled by an order of the court.
- (8) In this section “the court” means—
  - (a) the Court of Session—
    - (i) where the court has jurisdiction by virtue of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 (c.27) (rules as to jurisdiction in Scotland),
    - (ii) where A died domiciled in Scotland,
    - (iii) where A died domiciled outwith Scotland but as at the date of death owned immovable property situated in Scotland, or
    - (iv) where A’s executor is confirmed in Scotland, or
  - (b) a relevant sheriff.
- (9) For the purposes of subsection (8)(b), a relevant sheriff is—
  - (a) if A died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which A was habitually resident,
  - (b) if A died domiciled in Scotland but as at the date of death either A was not habitually resident in a particular part of Scotland or in which part of Scotland A was habitually resident is not known or is uncertain, the sheriff at Edinburgh,
  - (c) if A died domiciled outwith Scotland but as at the date of death owned immovable property situated in Scotland, the sheriff of the sheriffdom in which the immovable property is situated, or
  - (d) the sheriff of the sheriffdom in which A’s executor obtains confirmation.

NOTE

If agreement as to the appropriate level of capital sum payment cannot be reached, a dependent child may raise an action. Subsections (8) and (9) specify which courts have competence and they implement recommendations 49 and 50. Subsection (1) states that the action must be raised within a year of the deceased's death, though on cause shown the court has discretion to allow an action outside that period. This implements recommendation 33.

By subsection (3) any award must be in the form of a lump sum, but the court may make an interim award, by subsection (2). Subsection (6) states that any interim award is to be deducted from the final award and is repayable if no award is made. This implements recommendation 36.

Subsection (4) provides that any award, whether final or interim, may be ordered to be paid subject to such conditions as the court thinks fit, for example as to instalments or interest. By subsection (7) such an order may be varied or recalled if circumstances change to a material degree. This implements recommendation 31. Nothing, however, entitles a court to review or alter the total value of the lump sum once it has been awarded.

Subsection (5) provides that no award may be made unless the dependent child is alive at the time of the award. This implements recommendation 29. The right to seek a capital sum payment is therefore personal to the child and does not transmit to his or her executor on death. However, if the child dies after the award has been made but before the capital sum has been paid, in part or in whole, the outstanding balance becomes a debt owed to the child's estate.

## **20 Provisions supplementary to sections 18 and 19**

- (1) Any payment obtained by virtue of section 18(1) from an estate is to be met—
  - (a) out of so much, if any, of that estate as is intestate estate (shares in the division of the intestate estate under Part 1 being abated *pro rata*),
  - (b) in so far as not met under paragraph (a), out of the residue of the estate,
  - (c) in so far as not met under paragraphs (a) and (b), out of general legacies (the general legacies being abated *pro rata*), and
  - (d) in so far as not met under paragraphs (a) to (c), out of special legacies and special destinations (the special legacies and special destinations being abated *pro rata*).
- (2) Except in so far as provision to the contrary is made in A's will, if B elects to receive a payment by virtue of section 18(1) from A's estate then, in relation to any other right of succession which B has to that estate both—
  - (a) B, and
  - (b) B's issue,are to be treated as not having survived A.
- (3) Whether before or after the death of A, B may (subject to the provisions of the Age of Legal Capacity (Scotland) Act 1991 (c.50)) renounce any entitlement to receive a payment by virtue of section 18(1) from A's estate.

### **NOTE**

Subsection (1) specifies the order in which various parts of the deceased's estate are to be used to meet a capital sum payment. It implements recommendation 32.

Subsection (2), which implements recommendation 34, sets out the consequences of an election for a capital sum payment. If a child elects to receive a capital sum payment, then unless the deceased has left a will which otherwise provides, the child (and his or her issue) is treated as not having survived the deceased for the purpose of any other right of succession which he or she had in the deceased's estate.

Subsection (3) allows a child to renounce his or her right to a capital sum payment. It implements recommendation 35. In order for it to be valid, the renunciation must be made at a time when the child has legal capacity to do so.

## **21 Interpretation of sections 18 to 20**

- (1) In sections 18 to 20, "estate" includes the net value of property passing on A's death to another person ("B") by virtue of a special destination.
- (2) In subsection (1), the reference to the net value of the property so passing is a reference to its value after deduction of (either or both)—
  - (a) where (immediately before death) A was solely liable for a debt secured over the property, the amount of the debt,

- (b) where (immediately before death) A was jointly and severally liable with B (or B and some other person) for a debt secured over the property, the amount of the debt which is proportionate to the share of A's ownership that passes to B (or to B and that other person) as a result of the destination.

#### NOTE

Section 21 modifies the definition of "estate" by including within it the net value of any property which passes from the deceased on his or her death to another person by way of special destination. It implements, in part, recommendation 28. The general rule, in section 45(2), is that such property does not fall within the definition of estate for the purposes of the draft Bill. The effect of section 21 is, therefore, to create a wider definition of estate, potentially enlarging the value of the assets in respect of which a capital sum may be awarded to a dependent child. However, if the recipient of the special destination property owes the child an obligation of aliment then, as explained in the note to section 18(1) above, no part of the estate to which that recipient is entitled may be used to meet a capital sum payment.

### PART 4

#### COHABITANTS

#### 22 Cohabitant's entitlement

- (1) This section applies where a deceased person is survived by a person who, not being the deceased's spouse or civil partner, was immediately before the deceased's death living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners (that is to say, the two persons were cohabitants).
- (2) The survivor is entitled to a sum equal to a percentage of the sum to which a spouse or civil partner would be entitled from the deceased's estate under (as the case may be)—
  - (a) section 2 (intestacy), or
  - (b) section 11 or 15 (legal share),(that entitlement vesting in the survivor on the deceased's death).
- (3) The percentage referred to in subsection (2) ("the appropriate percentage")—
  - (a) represents the extent to which the survivor is to be treated, for the purposes of that subsection, as a spouse or civil partner, and
  - (b) is not to exceed 100%.
- (4) In determining whether the two persons were living together as mentioned in subsection (1), regard is to be had to—
  - (a) whether they were members of the same household,
  - (b) the stability of their relationship,
  - (c) whether their relationship was sexual,
  - (d) whether they had children together, or had accepted children as children of the family, and
  - (e) whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.

- (5) For the purposes of this section, a person is not to be regarded as having ceased to be the cohabitant of another person by reason only of such circumstances as hospitalisation, imprisonment or service overseas in the armed forces.
- (6) This section is subject to section 24.

#### NOTE

Section 22 creates a new entitlement for cohabitants. The existing entitlement in section 29 of the Family Law (Scotland) Act 2006 is repealed by schedule 2 to the draft Bill. This implements recommendation 37 (1).

By virtue of subsection (1), this section applies where a deceased person is survived by a cohabitant. Subsection (1) defines a cohabitant as a person who was living with the deceased immediately before the death in a relationship which had the characteristics of the relationship between spouses or civil partners. A person whose relationship of cohabitation had ended at some time before the death of the other party is excluded. A person who was married to, or in civil partnership with, the deceased is expressly disqualified from being a cohabitant.

Subsection (2) entitles the surviving cohabitant to a sum from the deceased's estate. It implements recommendation 38 (1). The sum is a percentage of the amount to which a spouse or civil partner of the deceased would be entitled from the estate. This applies whether the estate is testate or intestate, in implementation of recommendation 37 (2). The current succession rights for cohabitants only apply on intestacy.

The surviving cohabitant's entitlement to the sum vests on the death of the deceased, by subsection (2). One consequence of this is that, if the survivor dies without having elected to receive the entitlement, the right transmits to the survivor's executor. (This is subject to the one year time limit for exercising the right: see section 23(3).)

By subsection (2) the surviving cohabitant is entitled to a percentage of the amount to which a surviving spouse or civil partner would have been entitled: subsection (3) gives further information about this percentage. First, it is to be known as the "appropriate percentage". Secondly, it cannot exceed 100%, meaning that a surviving cohabitant can never be entitled to more than what his or her entitlement would have been if married to, or in civil partnership with, the deceased. Lastly, it is to represent the extent to which the cohabitant is to be treated, for succession purposes, as if he or she had been the deceased's spouse or civil partner. (This is further explained in the note to section 23(2).)

Subsection (4) sets out the factors which are relevant in determining whether two people were living together in a relationship which had the characteristics of the relationship between husband and wife or civil partners. This test must be met before any entitlement to a sum from the estate arises. The factors are already used by the courts and have been termed "admirable signposts" for the existence of a relationship of cohabitation for the purposes of social security law in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498. The list is not exhaustive, so it is competent to take account also of any additional factor if it is thought relevant in a particular case. None of the factors is to be read as more important than any of the others. This subsection implements recommendation 38 (2).

Subsection (5) makes it clear that, where the survivor of a couple whose relationship is one of cohabitation within the meaning of this section was not in fact living with the other cohabitant immediately before death, as required by subsection (1), he or she may still qualify. So, for instance, if one cohabitant had spent the last months of life in residential care accommodation or was working overseas on a contract but the relationship otherwise met the test in section 22, the survivor would still be entitled to a sum from the deceased's estate. This implements recommendation 38 (3).

## **23 Recognition of cohabitant and fixing of appropriate percentage**

- (1) If a person (“B”) wishes, for the purposes of section 22(2), to be recognised as having been the cohabitant of a person who has died (“A”), the court is, on B’s application, to make an order—
  - (a) declaring that B was (or was not) a cohabitant of A for the purposes of that section, and
  - (b) if it declares that B was such a cohabitant, fixing the appropriate percentage.
- (2) In fixing the appropriate percentage, the court is only to have regard to—
  - (a) the length of the period of cohabitation,
  - (b) the interdependence, financial or otherwise, between A and B during the period of their cohabitation,
  - (c) what B contributed to their life together (whether such contributions were financial or otherwise) as for example—
    - (i) running the household,
    - (ii) caring for A,
    - (iii) caring for any children that A and B had together or had accepted as children of the family.
- (3) Unless on cause shown the court otherwise permits, any application under this section must be made within the period of 1 year commencing on A’s date of death.
- (4) In this section “the court” means—
  - (a) the Court of Session—
    - (i) where the court has jurisdiction by virtue of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 (c.27) (rules as to jurisdiction in Scotland),
    - (ii) where A died domiciled in Scotland,
    - (iii) where A died domiciled outwith Scotland but as at the date of death owned immoveable property situated in Scotland, or
    - (iv) where A’s executor is confirmed in Scotland, or
  - (b) a relevant sheriff.
- (5) For the purposes of subsection (4)(b), a relevant sheriff is—
  - (a) if A died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which A was habitually resident,
  - (b) if A died domiciled in Scotland but as at the date of death either A was not habitually resident in a particular part of Scotland or in which part of Scotland A was habitually resident is not known or is uncertain, the sheriff at Edinburgh,
  - (c) if A died domiciled outwith Scotland but as at the date of death owned immoveable property situated in Scotland, the sheriff of the sheriffdom in which the immoveable property is situated, or
  - (d) the sheriff of the sheriffdom in which A’s executor obtains confirmation.

## NOTE

This section sets out the approach to be taken by a person who wishes to exercise the right to a share of the deceased's estate. There are two questions to be answered. Is the survivor a "cohabitant" within the meaning of section 22? And, if so, what is the appropriate percentage? It may, on occasion, not be possible for the interested parties to agree the answers amongst themselves, in which case the survivor may apply to court for orders under subsection (1). Where an application has been made, the court is to answer the two questions set out above. This implements recommendation 38 (1). (Subsections (4) and (5) explain which court has jurisdiction, and implement recommendations 49 and 50.)

Subsection (2) is at the centre of the reforms of the law in relation to cohabitants. It sets out the matters to which regard may be had in determining the appropriate percentage in any given case. Importantly (and in contrast to the list of factors in section 22(4)), no other considerations, such as the size of the estate or the identity of other people who may be entitled to a share of the estate, may be taken into account. Broadly speaking, the listed factors aim to evaluate the quality of the relationship which the survivor and the deceased had. This implements recommendation 39 (2).

Subsection (3) stipulates that any action must be raised within a year of death, though the court has a discretion, on cause shown, to allow an action outside that period. This implements recommendation 43.

## **24 Survival both by cohabitant and by spouse or civil partner**

(1) If the circumstances are that a deceased person dies survived both—

- (a) by a cohabitant, and
- (b) by a spouse or civil partner,

then, in a case where the deceased dies leaving a will, section 22 applies irrespective of those circumstances; but subsections (2) and (3) (of this section) apply where the deceased dies intestate.

(2) The value of the net intestate estate to which the spouse or civil partner would (but for this section) be entitled under section 2 (the "relevant amount") is to be shared between the cohabitant and the spouse or civil partner.

(3) In that case—

- (a) the cohabitant is entitled to a sum equal to the appropriate percentage of half the value of the relevant amount, and
- (b) the spouse or civil partner is entitled to a sum equal to the remaining value of the relevant amount.

## NOTE

If the deceased is survived both by a cohabitant and also by a spouse or civil partner, this section provides the necessary modification to the succession rights of both of these parties. Modification is needed in order to maintain a proper balance between their respective rights but, by subsection (1), this only arises when the deceased died intestate (where subsections (2) and (3) apply). If, on the other hand, the deceased left a will the entitlement of the spouse or civil partner to legal share and that of the cohabitant to a sum under section 22 (assuming that the parties wish to take up these entitlements) can both be met in full from the estate. The spouse or civil partner's entitlement is valued at 25% of what he or she would have been entitled to on intestacy and the cohabitant's entitlement will be the same sum multiplied by the "appropriate percentage". Thus the total amount payable to the survivors can never exceed 50% of the sum to which the spouse or civil partner would have been entitled on intestacy, and so will always be less than the value of the estate. This implements recommendation 42 (2).

Subsections (2) and (3) regulate the distribution of the estate where the deceased died intestate. Ordinarily, the spouse or civil partner would be entitled to the whole estate or, where its value exceeds the threshold sum and the deceased left issue, to the threshold sum plus half of the balance: see section 2. In addition, the cohabitant is entitled to the "appropriate percentage" of this sum. As the value of these two rights will often exceed the value of the whole estate, a modification is needed. The amount to which the spouse or civil partner would otherwise be entitled, which is termed the "relevant amount", is divided into half and the cohabitant is entitled to the appropriate percentage of one half. The spouse or civil partner is entitled to the balance of the relevant amount. In this way, he or she will never be entitled to a smaller sum than that to which the cohabitant is entitled. This implements recommendation 42 (1).

## **25 Supplementary provisions with regard to cohabitants**

- (1) Except in so far as provision to the contrary is made in the will (if any), if a person ("A") elects to receive a sum under section 22, then, in relation to any other right of succession which A has to the deceased's estate both—
  - (a) A, and
  - (b) A's issue,are to be treated as not having survived the deceased.
- (2) Where a deceased dies leaving a will, a cohabitant's entitlement out of the deceased's estate by virtue of this Part is to be met—
  - (a) out of so much, if any, of the estate as is intestate estate (shares in the division of the intestate estate under Part 1 being abated *pro rata*),
  - (b) in so far as not met under paragraph (a), out of the residue of the estate,
  - (c) in so far as not met under paragraphs (a) and (b), out of general legacies (the general legacies being abated *pro rata*), and
  - (d) in so far as not met under paragraphs (a) to (c), out of special legacies (the special legacies being abated *pro rata*).

### **NOTE**

Subsection (1) specifies the consequence of a cohabitant electing to receive a sum to which he or she is entitled under section 22. In essence, it states that this will result in the cohabitant losing any other right of succession to the deceased's estate which he or she would otherwise have had (unless the deceased's will provides otherwise). So, for example, if the cohabitant is left a legacy in the deceased's will but he or she nevertheless elects to receive the entitlement under section 22 (perhaps because it is of greater value than the legacy) then the right to the legacy lapses. In addition, the cohabitant's issue are not permitted to take up the right (though this does not affect any entitlement to a share of the estate which they may have in their own right). This implements recommendation 40.

Subsection (2) stipulates the order in which various parts of the estate are liable for meeting the cohabitant's entitlement.

## **26 Renunciation of cohabitant's entitlement**

A person may (whether before or after the death of another person) renounce any entitlement under section 22 in the estate of that other person.

## NOTE

This section provides that a cohabitant may renounce, either before the deceased's death or afterwards, his or her entitlement to a share of the estate under section 22. This will often be done where there is a pre-cohabitation agreement. It implements recommendation 41.

## PART 5

### TESTAMENTARY DOCUMENTS AND SPECIAL DESTINATIONS

#### 27 Rectification of will

- (1) This section applies where a testator dies domiciled in Scotland and an application is made to the court, after the date of death, in relation to a will prepared by another person on the instructions of the testator.
- (2) If the court is satisfied that the will fails to express accurately what was instructed, it may order that the will be rectified, in such manner as it may specify, so as to give effect to the instructions.
- (3) For the purpose of subsection (2) regard may be had to evidence extrinsic to the will.
- (4) Subject to subsection (5) and to section 42, a will rectified by virtue of this section has effect as if so rectified when executed.
- (5) A trustee or executor is not personally liable for having distributed property in good faith in accordance with a will which, by virtue of this section, was rectified after the distribution.
- (6) Unless on cause shown the court otherwise permits, any application under this section must be made within the period of 6 months commencing—
  - (a) in a case where confirmation is obtained in respect of the estate, on the date of its being granted, or
  - (b) in any other case, on the date of death.
- (7) An order under subsection (2) may be registered in—
  - (a) the Books of Council and Session, or
  - (b) sheriff court books,if the will to which the order relates is registered (either before or when the order is registered) in the books in question.
- (8) On cause shown, the court may—
  - (a) dispense with execution by any person of a document needed to give effect to the rectified will, and
  - (b) authorise and direct a clerk of session, or as the case may be the sheriff clerk, to execute the document.
- (9) In this section “the court” means—
  - (a) the Court of Session—
    - (i) where the court has jurisdiction by virtue of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 (c.27) (rules as to jurisdiction in Scotland),

- (ii) where the testator died domiciled in Scotland, or
  - (iii) where the testator’s executor is confirmed in Scotland, or
  - (b) a relevant sheriff.
- (10) For the purposes of subsection (9)(b), a relevant sheriff is—
- (a) if the testator died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which the testator was habitually resident,
  - (b) if the testator died domiciled in Scotland but as at the date of death either A was not habitually resident in a particular part of Scotland or in which part of Scotland the testator was habitually resident is not known or is uncertain, the sheriff at Edinburgh, or
  - (c) the sheriff of the sheriffdom in which the testator’s executor obtains confirmation.

NOTE

Section 27 allows a will to be rectified. It implements recommendation 51. As the provisions of the draft Bill do not apply to deaths occurring before the date on which it comes into force, rectification may only be sought if the testator died on or after that date: but rectification is competent regardless of when the will was executed.

Subsection (1) confines rectification to situations in which a person other than the testator prepared the will on the testator's instructions. It is therefore inapplicable where the testator prepared the will him or herself. The remedy only applies where the testator died domiciled in Scotland (regardless of where he or she was domiciled at the time of instructing the will). This is in implementation of recommendation 48.

By subsection (2), rectification is only competent where there are instructions with which to compare the executed will. Those instructions need not necessarily be in writing.

By subsection (4) rectification has retrospective effect. A beneficiary under the will as executed is therefore obliged under the law of unjustified enrichment to restore any bequest (or the value of the bequest) to the executor if he or she is not a beneficiary under the will as rectified. However, where a beneficiary has sold property conveyed to him or her by the deceased's executor under the unrectified will, subsequent rectification will not prejudice the title of whoever acquired the property in good faith and for value. Title is also protected if acquired directly from the executor. This is the effect of section 42 of the draft Bill. In addition, by subsection (5) a trustee or executor will not be personally liable for having distributed estate in good faith under a will which is subsequently rectified.

Subsection (8) permits the court, on cause shown, to take action to give effect to the will as rectified. The Court of Session has power at common law to authorise a clerk to sign documents on behalf of people who refuse to sign when under a legal obligation to do so (eg *Boag* 1967 SC 322), though this requires a petition to the *nobile officium*. The sheriff court has a similar, but more limited, power under section 5A of the Sheriff Courts (Scotland) Act 1907. We considered that it would be valuable for the procedure to be made more generally available.

**28 Effect of divorce, dissolution or annulment on a will**

- (1) Subsection (2) applies where—
  - (a) a person (“A”) by a will—
    - (i) confers a benefit or power of appointment on a person (“B”) who is (or who goes on to become) A’s spouse or civil partner, or

- (ii) appoints B as a trustee, executor or guardian,
  - (b) the marriage is terminated by divorce or annulment, or as the case may be the civil partnership is terminated by dissolution or annulment, and
  - (c) A dies domiciled in Scotland.
- (2) B is, for the purposes of the will, to be treated as not having survived A (unless the will includes provision to the effect that B is to have that benefit or power of appointment, or as the case may be to be so appointed, even in the event of such termination having come about).
- (3) In this section references to “divorce”, “annulment” and “dissolution” are to divorce, annulment or dissolution—
- (a) obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man, or
  - (b) if not so obtained, the validity of which is recognised in the United Kingdom.

#### NOTE

Where a testator's marriage or civil partnership is brought to an end by divorce, dissolution or annulment and the testator dies domiciled in Scotland, the effect on his or her will is that any provision in favour of the former spouse or civil partner is revoked, unless the will indicates that that person is to remain a beneficiary notwithstanding the divorce, annulment or dissolution. The ex-spouse or ex-civil partner's appointment as trustee, executor or guardian is also terminated. The way in which this effect comes about is by treating the ex-spouse or ex-civil partner as not having survived the testator. Section 28 implements recommendation 52 and, in part, recommendation 48.

### **29 Special destinations: revocation on divorce, dissolution or annulment**

- (1) Subsections (2) and (3) apply where—
- (a) property is held in the name of—
    - (i) a person (“A”) and a person (“B”) who is A’s spouse or civil partner and the survivor of them,
    - (ii) A, B and another person and the survivor of them, or
    - (iii) A with a special destination, on A’s death, in favour of B,
  - (b) the marriage is terminated by divorce or annulment, or as the case may be the civil partnership is terminated by dissolution or annulment, and
  - (c) after the termination A dies.
- (2) In relation to the succession to A’s property, B is to be treated as not having survived A (unless the destination includes provision to the effect that B is to take under the destination even in the event of such termination having come about).
- (3) If a person has in good faith and for value (whether by purchase or otherwise) acquired title to the property, the title so acquired is not challengeable on the ground that, by virtue of subsection (2), the property falls to the estate of A.
- (4) Subsection (3) of section 28 applies in relation to this section as it applies in relation to that section.

## NOTE

Section 29 re-enacts section 19 of the Family Law (Scotland) Act 2006 and section 124A of the Civil Partnership Act 2004 (which are repealed by schedule 2 to the draft Bill). We considered that there is merit in having both of these provisions in a single section within the draft Bill. This section implements recommendation 61.

### **30 The *conditio si testator sine liberis decesserit***

The *conditio si testator sine liberis decesserit* (that is to say the rule of law by which, in certain circumstances, a will may be treated as revoked if a child is born to the testator after the will is executed) ceases to have effect.

## NOTE

Section 30 implements recommendation 53. This *conditio* is rarely invoked in current practice and its application can lead to unfortunate results. Under our recommendations a child of the testator for whom no provision is made in the will may have an entitlement to a share of the estate, either for legal share under section 12 or as a dependent child under section 18.

### **31 Destinations in wills and certain trusts**

- (1) This section applies where—
  - (a) a will, or
  - (b) a trust taking effect during the lifetime of the truster,contains a destination of property in favour of a person (“A”) whom failing another person (“B”).
- (2) If the property vests in A, then it is to be presumed that B loses all rights to take under the destination.

## NOTE

Property, whether heritable or moveable, may be subject to a destination, either in a will or a trust taking effect during the truster's lifetime, by which it is to be transferred to person A whom failing person B. Under the present law destinations of this type are presumed to be substitutions if the property is heritable but are presumed to be conditional institutions where the property is moveable or a mixture of moveable and heritable. Under section 31 if the property in fact vests in A there is a presumption that B loses all rights to take the property under the destination in the will or trust. In other words there is a presumption that B is a conditional institute and not a substitute. If the terms of the will or trust make clear that a different result is intended then that result will prevail. This implements recommendation 30.

### **32 Revival of revoked will**

If a will, or part of a will, is revoked (whether expressly or impliedly and whether before or after the day appointed under section 57(2)) the will or part does not revive unless and until—

- (a) the will is executed again, or
- (b) a document expressly reviving the will or part is executed.

## NOTE

Under the current law a will which is revoked by a subsequent will revives if the subsequent will is itself revoked. Section 32 reverses that rule and the earlier will, once revoked, does not revive unless it is re-executed or a document expressly reviving it is executed. This applies where the will is expressly revoked or where it is revoked by implication, which typically occurs where there is a subsequent will which is necessarily inconsistent with it. The rule also applies where only part of a will is revoked. Section 32 implements recommendation 55.

### **33 Death before legacy vests: entitlement of issue**

- (1) This section applies where a person (“A”) named in a will as a beneficiary—
  - (a) is a direct descendant of the testator, and
  - (b) dies after the will is executed but does not survive the date of vesting of the bequest.
- (2) Any issue of A alive on that date is entitled to receive the legacy unless it is clear from the terms of the will that the testator intended otherwise.
- (3) Without prejudice to the generality of subsection (2), the testator is to be regarded as having intended otherwise if those terms provide expressly that the legacy is bequeathed—
  - (a) to A and another person (or other persons) and to the survivor (or survivors) of them, or
  - (b) to A, whom failing to another person (or other persons).
- (4) Where the legacy is bequeathed to more than one direct descendant, the share of it which A’s issue is entitled to receive is the share which A would have been entitled to receive had A survived the date of vesting of the bequest.
- (5) Any distribution made by virtue of this section between or among two or more of A’s issue is to be made in the same way as if it were a distribution between or among them of the whole or part of an intestate estate.
- (6) The *conditio si institutus sine liberis decesserit* (that is to say the rule of law by which the issue of a close relative of a deceased may be entitled to a bequest which the relative would have been entitled to but for not surviving the date of vesting of that bequest) ceases to have effect.

## NOTE

Section 33 abolishes and restates, with considerable modification, the rule of common law known as the *conditio si institutus sine liberis decesserit*, by which the issue of a predeceasing beneficiary are, in certain circumstances, entitled to take the legacy which the beneficiary would have taken had he or she survived the testator or the date of vesting. Section 33 sets out a new statutory rule. It states that, where a testator leaves a bequest to a direct descendant who dies after the will was executed but before the bequest vests (which is normally on the testator's own death), the descendant's issue are entitled to share the bequest. This new rule will be displaced by any clear provision in the will which has a contrary effect. Section 33 implements recommendation 54.

By subsection (1) the class of beneficiaries to whom the new rule applies is limited to direct descendants of the testator. At present, the common law *conditio* can also apply to nephews and nieces of the testator. The subsection applies to bequests in wills and other testamentary writings but not to benefits conferred by *inter vivos* documents. The date of vesting, to which the subsection refers, is usually the date of the testator's death but it may be a later date if vesting is postponed.

Subsection (2) provides that the new rule is subject to any clear provision to the contrary in the will. Subsection (3) sets out two particular types of situation in which the will is to be read as providing to the contrary: where the legacy is subject to a survivorship clause or a destination over.

Under the current common law rule the issue of a predeceasing beneficiary take only the share that the beneficiary would have taken had he or she survived the testator (or the date of vesting) *and all other beneficiaries had so survived*. Subsection (4) allows the issue to benefit from any accretion which will result if other beneficiaries predecease without leaving issue.

Subsection (5) provides for the situation in which more than one person is entitled to a share of the deceased's estate under this section. It does so by reference to the rules of division applicable to shares of intestate estate under Part 1 of the draft Bill.

Subsection (6) abolishes the *conditio*. The replacement rules are in statutory form, in subsections (1)-(5), because to modify the existing *conditio* would have involved numerous amendments. The resulting law would not have been clear and accessible.

### **34 Vesting on termination of liferent other than by death**

Where a liferent terminates other than on the death of the liferenter then, unless the document creating the liferent expressly provides otherwise, the fee vests in the fiar on the day on which it would have so vested had the liferenter died on the day of termination.

#### NOTE

Most liferents will terminate on the liferenter's death but, at present, there can be difficulties where early termination occurs: for instance because the liferent is renounced or forfeited. This is sometimes described as a "shadow" liferent. One such difficulty is what to do with the income generated between the date of termination and the date when the fee vests on the liferenter's death. In order to prevent the problems which arise with unvested fees, section 34 provides that, so far as the vesting of the fee is concerned, the liferenter is deemed to have died on the date of the termination, unless the document creating the liferent expressly provides otherwise. This section applies to liferents created by *inter vivos* or testamentary documents. Section 34 implements recommendation 56.

## **PART 6**

### **SURVIVORSHIP**

#### **35 Uncertainty of survivorship**

- (1) Subsection (2) applies where two persons die simultaneously or in circumstances where it is uncertain who survived whom.
- (2) For the purposes of—
  - (a) succession to the estate of each of them, and
  - (b) the passing of property between them by virtue of a special destination, neither is to be treated as having survived the other.
- (3) In this section, "property" means property of whatever kind.

## NOTE

Section 35 deals with the situation in which the order of death of two persons cannot be determined with certainty. It replaces the current rules of survivorship in section 31 of the Succession (Scotland) Act 1964. (That section is repealed by schedule 2 to the draft Bill.) Section 35 provides that, where it is uncertain which of two people died before the other, neither is to be treated as having survived the other. This applies on intestacy and testacy, and covers succession to the respective estates of the two people and also the passing of property between them by way of a special destination. The onus is on a beneficiary or heir, or his or her executor, to establish that one individual survived the other. Section 35 implements recommendation 57.

### **36 Succession to property where order of death is uncertain**

- (1) Subsection (2) applies where—
  - (a) property is to pass to one of two or more persons by reference to the order of their deaths and does not form part of the estate of either or any of those persons before death,
  - (b) there is uncertainty as to the order of their deaths, and
  - (c) any document regulating the passing of the property does not make provision to deal with such circumstances.
- (2) The property is to be divided equally between or among their estates.
- (3) In this section, “property” means property of whatever kind.

## NOTE

Section 36 implements recommendation 59. Where property is to pass to one of two or more people by reference to the order in which they die and it happens that there was uncertainty as to the order of death, section 36 provides that the property is to be divided equally among their estates. For example, if there is a liferent to two people with the fee to the survivor of them, the fee will be divided equally between the two estates if it is uncertain which person survived. Or a life assurance policy on the joint lives of a married couple payable to the estate of the first person to die will benefit the two estates equally if it is uncertain which death was first. The document regulating the devolution of the property may, of course, provide for a different rule of division and this will override the statutory equal division rule in this subsection.

### **37 Testamentary requirement of survival**

Where—

- (a) a provision in a will requires that a person survive the testator for a specified period in order to receive a benefit under the will, and
  - (b) the person survives the testator but it is uncertain whether the person survived for that period,
- the person is to be treated as not having survived the testator for that period.

## NOTE

A testator may provide that a bequest is only to be taken if the beneficiary survives for a specified period; this is common practice for married couples and civil partners, with the period usually being around a month. Section 37 provides that, where the beneficiary survives the testator but it is uncertain whether he or she survived for the specified period, the person is to be treated as not having survived for that period.

As a result, his or her estate will not be entitled to the benefit under the will. Section 37 implements recommendation 58.

## PART 7

### FORFEITURE

#### 38 Forfeiture

- (1) This section applies where, under the forfeiture rule (that is to say, the rule of public policy which, in certain circumstances, precludes a person from acquiring a benefit in consequence of a criminal act which results in the death of another person), a person (“A”) has forfeited—
  - (a) any rights of succession to the estate of a person (“B”) who has died as a result of A’s actions,
  - (b) any beneficial interest in property which (but for A’s forfeiture) A would have acquired in consequence of the death of B, being property which, before the death, was held in trust for any person,
  - (c) any title to property which (but for A’s forfeiture) A would have acquired in consequence of the death of B by virtue of a special destination in A’s favour.
- (2) A is to be treated as not having survived B in respect of the forfeited rights, beneficial interests or title to property (as the case may be).
- (3) Where any person has in good faith and for value, whether by purchase or otherwise, acquired title to property or any interest in property, the title so acquired is not to be challengeable on the ground that it was acquired (directly or indirectly) from a person who in relation to that property has incurred forfeiture.
- (4) If on application a relevant sheriff is satisfied that a person has failed to execute any document which may reasonably be necessary to give effect to a forfeiture, the relevant sheriff may authorise the sheriff clerk to execute the document.
- (5) A document executed by the sheriff clerk under subsection (4) is to have like force and effect as if the document had been executed by the person.
- (6) In this section, “property” means property of whatever kind.
- (7) For the purposes of this section, a relevant sheriff is—
  - (a) if B died domiciled in Scotland and was as at the date of death habitually resident in a particular part of Scotland, the sheriff of the sheriffdom in which B was habitually resident,
  - (b) if B died domiciled in Scotland but as at the date of death either B was not habitually resident in a particular part of Scotland or in which part of Scotland B was habitually resident is not known or is uncertain, the sheriff at Edinburgh,
  - (c) if B died domiciled outwith Scotland but as at the date of death owned immoveable property situated in Scotland, the sheriff of the sheriffdom in which the immoveable property is situated, or
  - (d) the sheriff of the sheriffdom in which B’s executor obtains confirmation.

## NOTE

Subsection (1) refers to, but does not alter, the common law rule known as the forfeiture rule. Strictly speaking, it is not a rule of forfeiture, since that implies that the unlawful killer has rights which he or she is required to forfeit; rather it is a rule by which the killer does not acquire rights which, but for the unlawful killing, he or she would have enjoyed.

Subsection (2) implements recommendation 63. A person to whom the forfeiture rule applies is to be treated, for certain purposes, as having failed to survive the deceased victim.

Subsection (3) protects the title of a person who acquires property in good faith and for value whose title would otherwise be affected by the killer's forfeiture.

Subsection (4) provides certain powers for a "relevant sheriff", as defined by subsection (7). When forfeiture occurs after property from the deceased's estate has been distributed, those in possession of the property (other than those who acquire in good faith and for value who are protected under subsection (3) above) will be under a duty to hand it back if they are no longer entitled to it. This subsection provides for the situation where a person under that duty refuses to sign the necessary documents. By subsection (5) a document executed by the sheriff clerk under authority from a relevant sheriff is to have effect as if the person who was under a duty to execute it had done so.

### **39 Relief from forfeiture**

In the Forfeiture Act 1982 (c.34), in section 2 (power to modify the rule)—

- (a) in subsection (1), after the word "modifying" there is inserted "or excluding",
- (b) in subsection (2)—
  - (i) after the word "modifying" there is inserted "or excluding", and
  - (ii) after the word "modified" there is inserted "or excluded",
- (c) in subsection (3)—
  - (i) after the word "modifying" there is inserted "or excluding",
  - (ii) for the word "three" there is substituted "6", and
  - (iii) for the words "his conviction" there is substituted "the date on which the conviction ceases to be appealable or (if appealed) subject to appeal",
- (d) in subsection (5)—
  - (i) after the word "modify" there is inserted "or exclude", and
  - (ii) in paragraph (b) after the words "respect of" there is inserted "all or any", and
- (e) in subsection (6), after the words "an order" there is inserted "modifying the forfeiture rule".

## NOTE

Section 39 implements recommendations 64 and 65. The first of these is to the effect that courts are to have the power to grant total relief under section 2 of the Forfeiture Act 1982. This reverses the decision in *Cross, Petr* 1987 SLT 384 which decided that the court may only grant partial relief.

The other change to the law is that the time limit within which proceedings for relief may be brought is to be extended from 3 to 6 months after conviction. In addition, any time during which an appeal against conviction is competent is not to count.

## PART 8

### ESTATE ADMINISTRATION

#### **40 Confirmation of executor: no requirement to find caution**

- (1) A person decerned executor of a deceased person is not required to find caution (nor is an executor-nominate).
- (2) Section 2 of the Confirmation of Executors (Scotland) Act 1823 (c.98) (court to regulate caution to be found) is repealed.

#### NOTE

Section 40 implements recommendations 66 and 67. Currently an executor-dative is required, by section 2 of the Confirmation of Executors (Scotland) Act 1823, to obtain a bond of caution before he or she may be confirmed as executor. Subsection (2) repeals that section. Caution is not, in practice, required to be found by executors-nominate but section 40 makes it incompetent for a court to do so.

#### **41 Further provision as to confirmation of executor**

- (1) In section 6 of the Confirmation of Executors (Scotland) Act 1858 (c.56) (procedure on petition)—
  - (a) for the word “nine” there is substituted “fourteen”,
  - (b) the provisos are repealed,
  - (c) the existing provisions as amended by paragraphs (a) and (b) become subsection (1) of the section, and
  - (d) after that subsection there is added—
    - “(2) In the case of a petitioner desirous of being decerned executor-dative, if on cause shown it appears to the court that the petitioner is not a fit person to be so decerned the court is to decline to pronounce decree.”.
- (2) After section 10 of that Act there is inserted—

##### **“10A Executor-nominate: refusal of confirmation**

If on cause shown it appears to the sheriff that an executor-nominate desirous of expediting confirmation is not a fit person to act in the office of executor, the sheriff is to refuse confirmation.”.

#### NOTE

Subsection (1)(a) implements recommendation 70. Once a person has presented a petition to be executor-dative the commissary clerk will intimate it and it will be published. The clerk will then certify that this has been done. Under the current law a minimum of 9 days need to elapse from the date of that certification before the petitioner may be appointed as executor-dative. Subsection (1)(a) extends that period to 14 days.

Subsection (1)(b) repeals the provisos to section 6 of the Confirmation of Executors (Scotland) Act 1858. These relate to the requirement to find caution. The repeal is in consequence of section 40 of the draft Bill.

Subsections (1)(d) and (2) implement recommendation 69. Under the current law the court has no power to refuse to appoint a person as executor-dative; the only ground for refusal is where another person who ranks above the petitioner in terms of the order of preference competes for appointment. Subsection (1)(d)

provides the sheriff with such a power. If, on cause shown, a petitioner appears to the court to be unfit for the office of executor-dative the sheriff must refuse to appoint him or her as executor. Subsection (2) introduces a similar power in relation to executors-nominate. Although a person is appointed as executor-nominate by the testator in his or her will, if it appears to the court that the person is not fit for office the sheriff must refuse to confirm him or her.

#### **42 Protection of persons acquiring title**

- (1) This section applies where a person (“A”), in good faith and for value—
  - (a) acquires property which has vested, by virtue of confirmation, in an executor (“E”), and
  - (b) acquires title to that property directly or indirectly—
    - (i) from E, or
    - (ii) from a person (“B”) who derived it directly from E.
- (2) It is not a ground of challenge to the title—
  - (a) that the confirmation is reducible or has been reduced, or
  - (b) where the title was acquired from B, that it should not have been transferred to B.
- (3) In this section, “property” means property of whatever kind.

#### **NOTE**

Section 42 implements recommendation 72. Currently, section 17 of the Succession (Scotland) Act 1964 protects those who purchase heritable property which is or was vested in the deceased's executor by virtue of confirmation. We considered that there is merit in re-enacting it in wider terms to provide more complete statutory protection. Accordingly, section 17 of the 1964 Act is repealed by schedule 2 of the draft Bill and section 42 provides protection to those who acquire property in good faith and for value directly or indirectly from the executor or a person (eg a legatee) who derived it directly from the executor.

#### **43 Error in distribution of property or of income of property: circumstances in which trustee not personally liable**

In the Trusts (Scotland) Act 1921 (c.58), after section 29 there is inserted—

##### **“29A Distribution of property or of income of property: limit on personal liability of trustee**

- (1) A trustee (“T”) is not personally liable for any error in the distribution of any property, or of the income of property, vested in T as trustee if—
  - (a) the error was caused by T not knowing (either or both)—
    - (i) of the existence (or non-existence) of some person,
    - (ii) of some person’s relationship (or lack of relationship) to another person, and
  - (b) the distribution takes place either—
    - (i) in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case, or
    - (ii) in accordance with an order of the court.

- (2) Where a claim by virtue of section 18(1) or 22(2) of the Succession (Scotland) Act 2009 (asp 00) cannot be satisfied because property, or the income of property, vested in T as trustee is distributed before the claim is made, T is not personally responsible if the distribution takes place either—
  - (a) in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case, or
  - (b) in accordance with an order of the court.
- (3) Subsections (1) and (2) above—
  - (a) do not affect any right which a person entitled to the property or income concerned has to recover it from another person, and
  - (b) do not apply as respects a distribution which has taken place before the day appointed under section 57(2) of the Succession (Scotland) Act 2009 (asp 00).
- (4) Subsection (3)(a) above is without prejudice to section 42 of that Act.”.

NOTE

Under the current law trustees and executors are protected where they distribute estate in ignorance of certain facts which would affect the proper distribution of the estate. In essence this applies where the executor, acting in good faith and after making reasonable enquiries, makes a distribution in ignorance of the existence either of an adoption order or of a child who parents are not, or have not been married to each other. We considered that such protections should be gathered together, with minor modifications, and inserted as a new section in the Trusts (Scotland) Act 1921. Section 43 gives effect to this. Schedule 2 to the draft Bill repeals the current law as contained in section 24(2) of the Succession (Scotland) Act 1964 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. This does not affect the right of a person under the law of unjustified enrichment to seek restitution in respect of property forming part of the estate from persons to whom it has been distributed in error. Section 43 implements recommendation 71.

**44 Legal share: allocation of expenses of administration**

In allocating expenses of administration—

- (a) a legal share,
  - (b) a capital sum payable, by virtue of section 18, to a dependent child, or
  - (c) a capital sum payable, by virtue of section 22 or 24, to a cohabitant,
- out of an estate is to be treated as if a legacy out of the estate.

NOTE

Section 44 implements recommendation 73 (4). In general the expenses of administration of the estate are to be deducted after the division of the net estate. (Section 46(1)(c) specifies the deductions which are to be made in arriving at the net estate.) Section 44 provides that payments in satisfaction of legal share, the entitlement of a dependent child to a capital sum payment and a cohabitant's entitlement are to be treated, for the purposes of allocating expenses of administration, as if they were legacies of the same amount.

## PART 9

### GENERAL AND MISCELLANEOUS

#### *Interpretation*

#### **45 Meaning of estate**

- (1) In this Act (unless the context requires otherwise) a reference to the “estate” of a deceased person (“A”) is a reference to the whole estate belonging to A at the time of death.
- (2) But (unless the context requires otherwise) such a reference does not include property passing on A’s death to another person by virtue of a special destination.

#### NOTE

Section 45 implements, in part, recommendation 73 (1). Property belonging to a deceased person immediately before his or her death which passes, on death, to another person by virtue of a special destination only forms part of the deceased's estate, for the purposes of the draft Bill, where a dependent child of the deceased is entitled to a share of the estate under section 18. See the note to section 21. In addition, such property is to be taken into account when determining the division of the estate between the spouse or civil partner and the deceased's issue on intestacy (or where it is necessary to determine how an estate would have been divided if the deceased had died intestate, eg in calculating legal share): see the note to section 3.

If at the time of death the deceased owned property outwith Scotland the rules of private international law apply in determining whether the property falls within the estate for the purposes of the draft Bill. Under Scots private international law succession to moveable property is governed by the law of the deceased's domicile irrespective of where the property is situated and succession to immoveable property is governed by the *lex situs*.

#### **46 Reckoning of the intestate and testate estate**

- (1) In this Act (unless the context requires otherwise)—
  - (a) a reference to the “intestate estate” of a deceased person is a reference to any estate, or any part of such estate, which is not disposed of by will,
  - (b) a reference to the “testate estate” of a deceased person is a reference to any estate, or any part of such estate, which is disposed of by will, and
  - (c) a reference to the “net intestate estate” or the “net testate estate” of a deceased person is a reference to the value of the intestate estate or (as the case may be) the value of the testate estate after deduction of—
    - (i) the debts (other than inheritance tax) for which the deceased’s estate is liable as at the date of death, and
    - (ii) any funeral expenses.
- (2) Where a deceased dies partially intestate, the deductions provided for in subsection (1)(c) are—
  - (a) in the case of a debt secured over a specific asset, to be allocated to that asset (up to the value of that asset), and
  - (b) in any other case, to be allocated proportionately between the intestate estate and the testate estate.

## NOTE

Section 46 implements, in part, recommendation 73 (1). Subsection (1)(c) specifies the deductions which are to be made from the gross estate in order to arrive at the net estate, whether it be testate or intestate. Sums due by way of inheritance tax are to be left out of account for these purposes in order to avoid a circularity whereby the value of the net estate depends on how much inheritance tax is due which, in turn, depends on how the estate is divided.

Subsection (2) provides for the allocation of deductions in the rare cases of partial intestacy.

### **47 Further provision as to interpretation**

- (1) In this Act “issue” means issue however remote.
- (2) In this Act (unless the context requires otherwise) a “will” means any document of a testamentary nature and includes a reference to—
  - (a) a testamentary trust disposition and settlement,
  - (b) a codicil, and
  - (c) a nomination of a deceased in accordance with the provisions of an enactment.
- (3) A reference to a will being executed includes, in relation to a nomination mentioned in subsection (2)(c), a reference to the nomination being made.

## NOTE

Section 47 provides definitions of "issue" and "will" for the purposes of the draft Bill. The former is identical to the definition in section 36(1) of the Succession (Scotland) Act 1964. However, that Act also uses "children". The draft Bill uses issue to refer to children as well as remoter descendants.

## *Adoption*

### **48 Adoption**

- (1) In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c.19), section 5 (adopted person to be treated as child of natural parents for the purposes of succession in certain circumstances) is repealed.
- (2) In the Adoption (Scotland) Act 1978 (c.28)—
  - (a) in section 39 (status conferred by adoption)—
    - (i) after subsection (1) there is inserted—

“(1A) Except that, where—

      - (a) the adopter died before 10 September 1964, or
      - (b) in the case of a child adopted jointly by spouses, both spouses died before that date,

the child is to be treated, for the purposes of succession to the estate of a natural parent, as the child of that parent.”,
    - (ii) subsection (5) is repealed, and
    - (iii) at the end there is added—

“(5A) Nothing in this section affects the construction of any deed executed before 10 September 1964.”,

(b) section 44 (effect of section 39 of that Act of 1978 on succession and *inter vivos* deed) is repealed, and

(c) at the end of Part 4 there is added—

**“44A Titles, coats of arms etc.**

(1) Nothing in this Act applies to, affects the succession to, or affects the devolution of, any title, coat of arms, honour or dignity transmissible on the death of the holder.

(2) Where the terms of a deed provide that any property, or any interest in property, is to devolve along with a title, honour or dignity, nothing in this Act prevents that property or interest from so devolving.”.

(3) In the Adoption and Children (Scotland) Act 2007 (asp 4)—

(a) in section 40 (status conferred by adoption), at the end there is added—

“(11) Nothing in this section affects the construction of any deed executed before 10 September 1964.”,

(b) section 44 (succession and *inter vivos* deeds) is repealed, and

(c) at the end of Chapter 3 of Part 1 there is added—

**“44A Titles, coats of arms etc.**

(1) Nothing in this Act applies to, affects the succession to, or affects the devolution of, any title, coat of arms, honour or dignity transmissible on the death of the holder.

(2) Where the terms of a deed provide that any property, or any interest in property, is to devolve along with a title, honour or dignity, nothing in this Act prevents that property or interest from so devolving.”.

NOTE

Section 48 implements recommendation 74. It repeals the current provisions in the Succession (Scotland) Act 1964 which regulate the succession rights of adopted persons and, with minor changes, relocates them in the legislation which governs adoption. The principle that an adopted person is to be treated, for succession purposes, as being the child of the adoptive parent(s) and of no-one else is unchanged. Section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, is also repealed and re-enacted. That section provides succession rights for adopted persons whose adoptive parents died before the 1964 Act came into force (on 10 September 1964) and who had a natural parent who died on or after 3 August 1966.

*Titles, coats of arms etc.*

**49 Titles, coats of arms etc.**

(1) Nothing in this Act applies to, affects the succession to, or affects the devolution of, any title, coat of arms, honour or dignity transmissible on the death of the holder.

(2) Where the terms of a deed provide that any property, or any interest in property, is to devolve along with a title, honour or dignity, nothing in this Act prevents that property or interest from so devolving.

## NOTE

Section 49 preserves the current law whereby succession law does not affect either the transmission of titles, coats of arms, honours or dignities nor the passing of property along with a title, honour or dignity. Subsection (1) restates section 37(1)(a) of the Succession (Scotland) Act 1964 and subsection (2) restates section 23(3) of that Act.

### *Abolition of certain rights at common law etc.*

#### **50 Abolition of certain rights at common law**

- (1) Any right at common law to claim *jus relictæ*, legitim, aliment *jure representationis*, temporary aliment or the expense of mournings is abolished as are any ancillary rights or obligations.
- (2) Except that rights and obligations at common law relating to the payment of interest as respects *jus relictæ* and legitim—
  - (a) are unaffected by subsection (1), and
  - (b) are to apply as respects—
    - (i) any legal share under this Act, and
    - (ii) any sum payable by virtue of section 22(2)(b).

## NOTE

Subsection (1) abolishes the common law right to claim the expense of mournings, aliment *jure representationis*, and temporary aliment. This implements recommendation 75. It also abolishes *jus relictæ* and legitim, in consequence of the introduction in the draft Bill of the right to legal share for the deceased's surviving spouse or civil partner and (where appropriate) the right of the deceased's issue to legal share and the right of a dependent child to a capital sum payment. (The statutory rights of *jus relictæ*, in section 6 of the Married Women's Property (Scotland) Act 1881, and of civil partners to legal rights, in section 131 of the Civil Partnership Act 2004, are repealed by schedule 2 to the draft Bill.) Any ancillary rights or obligations, such as the rules of collation in respect of legitim, are also abolished. By section 55(1) the abolition only takes effect in relation to a death occurring after the draft Bill comes into force.

Subsection (2) implements recommendation 25. The current common law rules on interest in respect of *jus relictæ* and legitim are preserved and continue to apply in relation to the entitlement to legal share and to the right of a dependent child to a capital sum payment. This means that the court continues to have discretion to set an appropriate rate of interest.

#### **51 Donations *mortis causa***

- (1) The customary mode of making a conditional gift known as making a donation *mortis causa* is abolished.
- (2) Subsection (1) does not prevent the making of a conditional gift other than as a donation *mortis causa*.

## NOTE

A donation *mortis causa* is a conditional gift made in contemplation of death which gives the donee an immediate right of ownership in the property gifted but which is defeasible if the donor revokes the gift during his or her lifetime and if the donee predeceases the donor. Section 51(1) abolishes the customary mode of making such a gift.

Subsection (2) states that the abolition of the rules governing donations *mortis causa* does not affect a person's power to make such conditional gifts as they wish. Suitable evidence as to the conditional nature of the gift will need to be provided by a person wishing to rely on the existence of any condition. Section 51 implements recommendation 76.

*Private international law*

**52 Capacity to make or revoke a will and construction of certain documents other than wills**

- (1) Capacity to make or revoke a will, whether in relation to moveable or to immoveable property, is to be determined in accordance with the law of the testator's domicile as at the time the will is made or as the case may be revoked.
- (2) The construction of a document other than a will, in so far as the document regulates a right in moveable property which forms part of a deceased's estate, is to be determined in accordance with the law of the deceased's domicile as at the time immediately before death.

NOTE

At present it is thought that, under the rules of Scots private international law, testamentary capacity in relation to moveables is governed by the *lex domicilii* of the testator at the time whereas capacity in relation to immoveables depends on the *lex situs*. Section 52(1) provides that testamentary capacity in relation to both moveable and immoveable property is to be determined by the testator's *lex domicilii* at the relevant time. Subsection (1) implements recommendation 45.

Subsection (2) overrules *Connell's Trs v Connell's Trs* (1886) 13R 1175 in which it was held that the destination in a title to shares in English companies acquired by a domiciled Scot were to be construed according to English law. By subsection (2) Scottish rules of construction are to be applied to the title where the property is moveable and the deceased owner is domiciled in Scotland at death. Where two co-owners have different domiciles each of their shares will devolve according to the law of their respective domiciles. For heritable property, the document of title will continue to be construed according to the law of the country in which the property is situated. Subsection (2) implements recommendation 46.

*Further provision as regards the construction of documents*

**53 Construction of existing documents**

- (1) This section applies (in relation to the succession to the estate of a deceased person who died after the coming into force of this section) to any document executed before this section comes into force.
- (2) Any reference (however expressed) in the document to legal rights in relation to the succession to the estate of a deceased person is to be construed as a reference to—
  - (a) the legal share of—
    - (i) a spouse or civil partner under section 11 or 15, or
    - (ii) (as the case may be) a person who is a child of the deceased under section 12,
  - (b) a dependent child's entitlement, under section 18, to a capital sum payment.

## NOTE

Section 53 implements recommendation 77. Its effect is that any reference to legal rights in a document executed before the date on which the draft Bill comes into force is to be construed, where the deceased died after that date, as a reference to the legal share to which the deceased's spouse, civil partner or, where appropriate, issue is entitled under the draft Bill. It is also to be construed, where appropriate, as a reference to the entitlement of a dependent child of the deceased under section 18 of the draft Bill.

### *Prescription*

#### **54 Prescription**

In paragraph 2 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (a paragraph which lists obligations not affected by prescriptive periods of five years under section 6 of that Act), for sub-paragraph (f) there is substituted—

“(f) to any obligation to satisfy an entitlement—

- (i) to legitim, *jus relict* or *jus relict*ae,
- (ii) of a surviving spouse or surviving civil partner, under section 8 or 9 of the Succession (Scotland) Act 1964 (c.41),
- (iii) of a surviving spouse or surviving civil partner, under section 2 of the Succession (Scotland) Act 2009 (asp 00), or
- (iv) under that Act of 2009, to a legal share in a deceased's estate;”.

## NOTE

Section 54 amends the Prescription and Limitation (Scotland) Act 1973 so as to preserve the current law of prescription in respect of legal rights. We made no substantive recommendations in this area of the law but recognise that it is in need of reform, ideally as part of a future project to be undertaken by the Commission. This is discussed at paragraph 1.34 of the Report.

### *General*

#### **55 Saving and transitional provisions etc.**

- (1) The provisions of this Act (except this subsection) do not apply in relation to the estate of any person who dies before the day appointed under section 57(2).
- (2) If it is uncertain whether a person died before that day the person is, for the purposes of this Act, to be taken to have died on or after that day.
- (3) Section 31 does not apply as respects—
  - (a) a document executed before that day, or
  - (b) a special destination in a title to property contained in a document which implements a provision in a document so executed.
- (4) Section 33 does not apply as respects a document executed before that day.
- (5) Section 34 does not apply as respects a termination which has taken place before that day.
- (6) Section 42 does not apply as respects an acquisition which has taken place before that day.

- (7) Section 51 has no effect in relation to a donation *mortis causa* constituted before that day.
- (8) Section 52 has no effect in relation to a will, or a document revoking a will, executed before that day.
- (9) The Scottish Ministers may, by order made by statutory instrument, make such further incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of—
  - (a) this Act, or
  - (b) any order made under section 9.
- (10) Subject to subsection (12), a statutory instrument containing an order under subsection (9) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (11) An order under subsection (9) may make different provision for different cases or different classes of case.
- (12) An order under subsection (9), if it includes provision amending or repealing an enactment contained in an Act, is not made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

#### NOTE

Subsection (1) implements recommendation 78 (1). It provides that the changes made by the draft Bill will only affect the distribution of the estate of a person who dies after the date on which the draft Bill enters into force.

Subsection (2) implements recommendation 78 (2). There may be cases where it is uncertain when a person died. If the uncertainty extends to not being certain whether the death occurred before or after the draft Bill came into force the person is to be treated as having died afterwards and so the draft Bill will regulate the distribution of the estate.

Subsections (3)-(8) set out the exceptions to the rule in subsection (1) under which the draft Bill applies to the estate of a person who dies on or after the date of commencement. In general, the reason for the exceptions is to preserve the effect of deeds or acts which have already been executed or done before the draft Bill is commenced and whose effect would be altered, possibly prejudicially, if the rules in the draft Bill were to apply. So, where certain classes of documents were executed before commencement, against the background of the law at the time, and certain types of acts occurred before that time, again in the context of the prevailing law, subsections (3)-(8) aim to preserve their legal effect.

## **56 Minor and consequential amendments and repeals**

- (1) Schedule 1 makes provision for the modification of enactments.
- (2) The enactments mentioned in schedule 2 to this Act are repealed to the extent mentioned in the second column of that schedule.

#### NOTE

Section 56 introduces schedules 1 and 2 which, respectively, amend and repeal existing enactments. Notes are provided where appropriate to schedules 1 and 2.

**57 Short title and commencement**

- (1) This Act may be cited as the Succession (Scotland) Act 2009.
- (2) The provisions of this Act, except this section, come into force on a day that the Scottish Ministers by order made by statutory instrument appoint.

NOTE

By subsection (2) the Scottish Ministers are to appoint a single day on which the whole of the draft Bill is to come into force. (The only exception is section 57 itself which comes into force on the date of royal assent.)

SCHEDULE 1  
*(introduced by section 56)*

MODIFICATION OF ENACTMENTS

*Sheriff Courts (Scotland) Act 1907 (c.51)*

1 In section 6 of the Sheriff Courts (Scotland) Act 1907 (action competent in sheriff court), after paragraph (d) there is inserted—

“(da) Where the defender is an executor who has obtained confirmation within the jurisdiction and the action relates to the discharge of the defender’s duties as executor:”.

*Land Registration (Scotland) Act 1979 (c.33)*

2 In section 12(3) of the Land Registration (Scotland) Act 1979 (indemnity in respect of loss)—

(a) in paragraph (p), at the end there is added “or section 27 of the Succession (Scotland) Act 2009 (asp 00).”.

(b) for paragraphs (r) (as inserted by the Family Law (Scotland) Act 2006 and not as inserted by the Housing (Scotland) Act 2006) and (s) there is substituted—

“(ra) the loss is suffered by the estate of a deceased former spouse, or deceased former civil partner, in respect of heritable property falling to the estate, where the title to the property or to any interest in the property has been acquired by another person and is unchallengeable by virtue of section 29 of the Succession (Scotland) Act 2009 (asp 00), or

(rb) the loss arises by reason of forfeiture of—

(i) rights of succession in respect of property,

(ii) a beneficial interest in property, or

(iii) a title to property, which would have been acquired by virtue of a special destination,

under the forfeiture rule (as described in section 38 of that Act) and the title to that property is unchallengeable by virtue of subsection (3) of that section.”.

*Civil Jurisdiction and Judgments Act 1982 (c.27)*

3 In rule 2 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 (rules as to jurisdiction in Scotland: special jurisdiction), after paragraph (g) there is inserted—

“(ga) in his capacity as executor (provided he has obtained confirmation in Scotland), in the Court of Session or before the sheriff of the sheriffdom in which it was obtained;”.

*Forfeiture Act 1982 (c.34)*

- 4 In section 2 of the Forfeiture Act 1982 (power to modify the forfeiture rule), in paragraph (a) of subsection (4)—
- (a) in sub-paragraph (i), the words “or by way of ius relictii, ius relictiae or legitim” are repealed,
  - (b) after that sub-paragraph there is inserted—
    - “(ia) by virtue of section 11, 12 or 15 (legal share), 18 (dependant child’s entitlement to a capital sum) or 22 (entitlement of cohabitant) of the Succession (Scotland) Act 2009 (asp 00),”.

*Family Law (Scotland) Act 2006 (asp 2)*

- 5 In section 25 of the Family Law (Scotland) Act 2006 (interpretation), in subsections (1) and (2) for the words “29” there is substituted “28”.

NOTE TO SCHEDULE 1

Paragraphs 1 and 3 implement recommendation 49. The effect is to extend Scottish courts' jurisdiction in succession matters. This will be particularly useful when the deceased's executor is not domiciled in Scotland. But for the amendments made by these paragraphs, a person wishing to raise an action in respect of the administration of a Scottish estate by an executor who is not domiciled in Scotland may have to raise it in the courts of the country where the executor is domiciled. The amendments will allow the action to be raised in the Scottish courts if the executor obtained confirmation in Scotland.

Paragraph 2 amends section 12(3) of the Land Registration (Scotland) Act 1979. That section lists the situations in which a person has no entitlement to indemnity from the Keeper for certain losses.

The amendment to paragraph (p) excludes the Keeper's liability following the rectification of a will under section 27 of the draft Bill.

The repeal of paragraphs (r) and (s) and the insertion of new paragraph (ra) is consequential on section 29 of the draft Bill.

The insertion of new paragraph (rb) is to exclude the Keeper's liability to provide indemnity where a title has been registered after having been acquired, in good faith and for value, either directly or indirectly from an unlawful killer to whom the forfeiture rule applies. But for this paragraph the Keeper would be obliged to indemnify the deceased victim's estate (or his or her trustees) because of their failure to recover the property from the person who acquired it in good faith and for value. The loss falls on the estate (or the trust), although the executors (or trustees) will generally have a right of recovery at common law against the unlawful killer.

Paragraph 4 amends section 2 of the Forfeiture Act 1982 so that the current reference to legal rights is replaced by a reference to the relevant succession rights created under the draft Bill.

Paragraph 5 amends section 25 of the Family Law (Scotland) Act 2006 in consequence of the repeal, by schedule 2 to the draft Bill, of section 29 of that Act.

SCHEDULE 2  
(introduced by section 56)

REPEALS

Parricide Act 1594 (c.30)	The whole Act.
Married Women's Property (Scotland) Act 1881 (c.21)	The whole Act.
Succession (Scotland) Act 1964 (c.41)	Part I. Part II. Section 17. Part IV. Section 30. Section 31.  In section 37(1), the words "or (as respects paragraph (a) of this subsection) in the Children Act 1975 or the Adoption (Scotland) Act 1978 or in the Adoption and Children (Scotland) Act 2007 (asp 4)".
Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c.70)	Section 7.
Succession (Scotland) Act 1973 (c.25)	The whole Act.
Civil Partnership Act 2004 (c.33)	Sections 124A and 131.
Family Law (Scotland) Act 2006 (asp 2)	Sections 19 and 29.
Adoption and Children (Scotland) Act 2007 (asp 2)	In schedule 2, paragraph 1.

NOTE TO SCHEDULE 2

Schedule 2 repeals various statutes or provisions of statutes.

Paricide Act 1594 This implements recommendation 62. Part 7 of the draft Bill contains provisions on unlawful killing.

Married Women's Property (Scotland) Act 1881 The only operative sections of the Act which remain in force deal with *jus relictii* and legitim, both of which are replaced by provisions in Parts 2 and 3 of the draft Bill.

Succession (Scotland) Act 1964 The repealed provisions of the Act have either been replaced by new statutory provisions in the draft Bill or have been re-enacted.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 Section 7 has been replaced by a more general provision to be inserted into the Trusts (Scotland) Act 1921 by section 43 of the draft Bill.

Succession (Scotland) Act 1973 This Act empowers the Secretary of State to alter the prescribed sums in relation to prior rights in sections 8 and 9 of the Succession (Scotland) Act 1964. The repeal is consequential on the repeal of those sections.

Civil Partnership Act 2004 The repeal of section 124A implements, in part, recommendation 61. That section is re-enacted in section 29 of the draft Bill. Section 131 given civil partners legal rights, which are replaced by the right to legal share under Parts 2 and 3 of the draft Bill.

Family Law (Scotland) Act 2006 The repeal of section 19 implements, in part, recommendation 61. That section is re-enacted in section 29 of the draft Bill. Section 29 of the 2006 Act provides succession rights for cohabitants. These are now set out in Part 4 of the draft Bill.

Adoption and Children (Scotland) Act 2007 Paragraph 1 of schedule 2 will, when it comes into force, amend provisions of the Succession (Scotland) Act 1964 which are being repealed by schedule 2 to the draft Bill. The paragraph is therefore repealed in consequence of the repeals to the 1964 Act.

# Appendix B

## List of consultees who submitted written comments on Discussion Paper No 136

Messrs Balfour and Manson

Professor Paul Beaumont and Professor Roderick Paisley, University of Aberdeen

Messrs Bird Semple

Mr Paul Black

Mr David Brand, Solicitor, Dundee

The Committee of Scottish Clearing Bankers

Professor Elizabeth Crawford, University of Glasgow

Mr Stephen Cumming, Solicitor, Blairgowrie

Sheriff Douglas J Cusine

Enable Scotland

Faculty of Advocates

Mr Richard Frimston, Solicitor, London

Ms Nora Fry

Ms Erika Hay

Help the Aged

Historic Houses Association of Scotland

Ms Carole Hope, Solicitor, Edinburgh

Mr John Kerrigan, Solicitor, Glasgow

The Law Society of Scotland

Mrs G E Lawson

Messrs Lindsays WS

Mr Douglas Maule, Napier University

Mr Keith Napier, Solicitor, Aberdeen

NFU Scotland

Professor Kenneth Norrie, University of Strathclyde

Queen's and Lord Treasurer's Remembrancer

Registers of Scotland

Mr Donald Reid, Solicitor, Edinburgh

Professor Kenneth Reid, University of Edinburgh

Mr Paul Roper, Solicitor, Galashiels

Scottish Rural Property and Business Association Ltd and Scottish Estates Business Group (joint)

Senators of the College of Justice

Messrs Shepherd and Wedderburn LLP, Private Client Services Group

Society of Trust and Estate Practitioners, Scotland Branch

Mr Thomas Trodden

Trustbar

Messrs Turcan Connell

United Kingdom Men's Movement

Professor Prue Vines, University of New South Wales

Mr Adrian Ward, Solicitor, Barrhead

Zurich GSG Limited

## Appendix C      Advisory Group on Succession

Mr Alan Barr	University of Edinburgh; Solicitor, Edinburgh
Mr John Kerrigan	Solicitor, Glasgow
Mr Ross MacDonald	University of Dundee
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