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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

NOT FOR PUBLICATION OR BROADCAST

BEFORE 1100 HOURS Thursday 16 August 2007

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Introduction

Scots law of succession determines the devolution of a deceased person's estate. The discussion paper focuses on two main areas: the position of surviving spouses, civil partners and cohabitants on intestacy; and the protection of close relatives from disinheritance by the deceased.

Scottish society and the family and other relationships in which people live have changed in the 40 or so years since the last major piece of legislation, the Succession (Scotland) Act 1964. Civil partnership, a legal status open to same-sex couples who register their relationship, was introduced by the Civil Partnership Act 2004, and surviving civil partners have the same succession rights as surviving spouses. The increase in the number of divorces and subsequent repartnering means that steprelationships are now more important. It is estimated that about one in every eight children now experience life in a stepfamily. Many more couples are living together as unmarried cohabitants in same-sex or opposite-sex relationships. The Family Law (Scotland) Act 2006 introduced limited rights for cohabitants whose partners die without a will but there is no protection for those whose partners die leaving a will which fails to provide for them.

Intestacy

The existing rules of intestacy where the deceased leaves a spouse or civil partner are very complex and require consideration of five different rights with the estate being divided into its heritable and moveable components. Sometimes they also fail to provide a fair result.

Surviving spouse or civil partner– no children. At present, if the deceased leaves a large or mainly heritable estate and is survived by a surviving spouse or civil partner, but no children, the surviving spouse or civil partner will be the major beneficiary but a substantial proportion may go to the deceased's parents, siblings and even issue of predeceasing siblings. We propose that in this situation the surviving spouse or civil partner should be entitled to the whole estate.

Surviving spouse or civil partner and children. Where the deceased is survived by a spouse or civil partner and children we continue the policy of the existing law by giving a measure of priority to the deceased's spouse or civil partner but their share under our proposal is calculated in a much simpler way – the whole estate up to £300,000 and then half of any excess.

Separated and second spouses or civil partners. The question of whether a spouse or civil partner who was separated from the deceased or a spouse or civil partner who is not the parent of all the deceased's children should be entitled to a lesser share is considered. We conclude that the range of possible circumstances for each of these categories is so large that there is no simple rule that would produce a substantially fairer result than the existing law which treats all spouses or civil partners identically.

Stepchildren and adopted children. Stepchildren do not inherit on intestacy from their step-parents. We conclude that this should continue to be the position as otherwise a stepchild would be entitled to inherit from the step-parent as well as the natural parents. Adopted children inherit from their adoptive parents but lose the entitlement to inherit from their natural parents, but we do not think that the formation of a steprelationship should have this effect.

Protection from disinheritance

Under Scots law, a testator is able to "disinherit" any member of his or her close family by leaving all his estate to other non-family members. There is strong and consistent public support for some protection for spouses, civil partners and issue and dissatisfaction with the existing regime of legal rights applicable to them

At present, legal rights (the system of protection for spouses, civil partners and children) are exigible only out of the deceased's moveable estate. We think that any rules for protection from disinheritance should apply to the whole estate, including land and buildings. However, we recognise that a special regime may be needed for owners of landed estates and farms in order to avoid forced sales to meet close relatives' claims.

Surviving spouses and civil partners. We propose that the surviving spouse or civil partner should be entitled to 25% of what he or she would have received had the deceased died intestate under our new intestacy proposals.

Cohabiting partners. Where the deceased died intestate, cohabiting partners are entitled to apply to court for a share of the deceased's estate under section 29 of the Family Law (Scotland) Act 2006. We propose extending section 29 to testate estates.

Children. We propose that dependent children to whom the deceased owed an obligation of alimenterie should be able to apply to court for maintenance from their deceased parent's estate. Where the deceased's estate is not inherited by a person who is under an obligation to alimenterie the deceased's child (eg the other natural parent or a stepparent who has accepted the child as a child of the family) that child should be entitled to an award from the estate. The award would be based on the child's need for alimenterie but would take the form of a lump sum.

Whether adult children should also be protected, and if so by what scheme, is a difficult issue. We tend to think there should be no protection. If they are to be protected, then we propose that they should be entitled to 25% of what they would have received on intestacy.

Miscellaneous

Anti-avoidance provisions. Under Scots law, there is nothing to prevent a person evading the existing or proposed protections against disinheritance by giving property away during life

instead of leaving it by will. We ask whether new legislative provisions should be introduced to protect claims by close relatives against the estate from being defeated by the deceased giving away his property during life.

Time limits. The current law relating to the prescription of succession rights is unclear and complex. We therefore ask whether the law should be clarified and simplified so that, in most cases, inheritance claims should prescribe five years from the date of death.

Private international law. We also consider which system of law should apply to estates with a non-Scottish element and on what grounds the Scottish courts should have jurisdiction. We put forward several proposals to fill gaps and accommodate our new substantive proposals.

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

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Drummond Young, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Colin J Tyre QC. The Chief Executive is Michael Lugton.
2. **A News Conference will be held on 16 August 2007 at 1100 hours** at the Commission's office, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk). You are invited to be represented. Media copies of the paper will be available at the News Conference or can be collected from the Commission's office. The paper may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.
3. Further information can be obtained by contacting Dr David Nichols, at the above address.