



**Law  
Commission**  
Reforming the law

## Intestacy and Family Provision Claims on Death



# **The Law Commission**

(LAW COM No 331)

## **INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH**

*Presented to Parliament pursuant to section 3(2) of the Law  
Commissions Act 1965*

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# THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Munby, *Chairman*  
Professor Elizabeth Cooke  
Mr David Hertzell  
Professor David Ormerod  
Miss Frances Patterson QC

The Acting Chief Executive of the Law Commission is Mr John Saunders.

The Law Commission is located at Steel House, 11 Tothill Street, London SW1H 9LJ.

The terms of this report were agreed on 17 November 2011.

**The text of this report is available on the Intestacy and Family Provision Claims on Death project page of the Law Commission's website at [www.lawcom.gov.uk](http://www.lawcom.gov.uk).**

**THE LAW COMMISSION**  
**INTESTACY AND FAMILY PROVISION**  
**CLAIMS ON DEATH**

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# GLOSSARY

“**1975 Act**”: the Inheritance (Provision for Family and Dependants) Act 1975.

“**1989 Report**”: the Law Commission report Family Law: Distribution on Intestacy (1989) Law Com No 187.

“**Cohabitation Report**”: the Law Commission report Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

“**Consultation Paper**”: this refers to Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191.

“**Descendants**”: we use this word (instead of the legal term “issue”) to mean a person’s direct descendants only (children, grandchildren and so on).

“**Estate**”: we use this term to refer to a deceased person’s assets, generally after payment of funeral expenses, any debts, administration costs and any gifts in a will. This is sometimes called the “net” or “residuary” estate or “residue”. The “net estate” for family provision claims is defined in section 25(1) of the 1975 Act.

“**Family provision**”: the system under the 1975 Act that enables certain family members and dependants to apply for reasonable financial provision from a deceased person’s estate.

“**Full siblings**” and “**half siblings**”: the intestacy rules distinguish between siblings “of the whole blood”, who share both parents, and siblings “of the half blood”, who share just one parent. We prefer “full sibling” and “half sibling”.

“**Intestate**”: we use this term to refer to someone who has died without leaving a will that effectively disposes of property (as in “she died intestate”), and to refer to an estate or part of an estate not disposed of in a will (“an intestate estate” or “the intestate part of an estate”). In legislation, the term is often used as a noun to refer to such a person (“the date of the intestate’s death”).

“**NatCen focus groups**”: research published in National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009).

“**Nuffield survey**”: research published in National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010).

“**Personal chattels**”: items owned by the deceased for his or her personal use (the legal definition is in the Administration of Estates Act 1925, section 55(1)(x)).

“**Spouse**”: we use this term to refer to a husband, wife or civil partner.

“**Statutory legacy**”: this is the sum to which a surviving spouse is entitled from an intestate estate before any other beneficiaries are paid. It is referred to in legislation as “the fixed net sum”.

“**Succession**”: this term is sometimes used in a legal context to refer to the transfer of property on death. The law of succession regulates inheritance.

# THE LAW COMMISSION

## INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH

*To the Right Honourable Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice*

### PART 1 INTRODUCTION

#### BACKGROUND

- 1.1 We all have to die, and we cannot take anything with us. The law makes provision for what is to happen to the property that we leave behind, be it large or small; this area of the law is known as the law of succession, and it can be divided into three topics.
- 1.2 First, the law relating to wills enables us to choose who takes our property; the Wills Act 1837 is the starting point, and there is a considerable body of case law governing the validity and interpretation of wills.
- 1.3 The law of intestacy determines what is to happen to property that is not disposed of by will. Section 46 of the Administration of Estates Act 1925 sets out the “intestacy rules”, which list the family members to whom property is to pass. The list is a hierarchy; preference is given to closer relatives, and more distant ones become entitled only if there are no more immediate relatives to take the property. The intestacy rules have an impact on a large part of the population; between a half and two thirds of adults in England and Wales have not made a will.<sup>1</sup> Many of them will do so before they die. Nevertheless, over the most recent five year period for which figures are available there were more than 300,000 applications for a grant of representation to administer an intestate estate.<sup>2</sup> Even this is likely to underestimate the problem; more than half of all estates are administered without a formal grant and most of those are likely to be intestate.<sup>3</sup>
- 1.4 The law of family provision, contained in the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) supplements the law of wills and the law of intestacy, by enabling a limited range of potential applicants to apply to the court for an order that they receive something, or something more than their current entitlement, from the estate of someone who has died. This can be done on the basis that either the will or the rules of intestacy did not make reasonable

<sup>1</sup> National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 3; K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005) p 71.

<sup>2</sup> Ministry of Justice, *Judicial and court statistics 2010 – full report* (2011) table 2.12.

<sup>3</sup> Intestate estates generally are of a lower value than estates where there is a will (see Appendix D, table 4) and it is reasonable to assume that a grant of representation is more likely to be obtained where there are significant assets in the estate which can only be properly administered by those who have obtained a grant of representation.

provision for the applicant. The circumstances in which the court will make an order are restricted by the terms of the 1975 Act. We estimate that in the past three years, more than 1,000 1975 Act claims have been formally commenced.<sup>4</sup>

- 1.5 For the most part this Report is not concerned with the law relating to wills; instead, it focuses on the two other parts of the law of succession, namely intestacy and family provision. Both of those areas of the law are concerned with what the law – which reflects, or at least is intended to reflect, the views and values of our society – deems “ought” to happen to the property of someone who has died. Nothing in either topic overrides the importance of making a will. The intestacy rules cannot be a substitute for putting careful thought into making a will that is right for a particular family,<sup>5</sup> and the law of family provision is framed so as to make only limited inroads into an individual’s freedom to make a will in the terms he or she chooses. If this Report has one over-arching message to the public, it is this: make a will and keep it under review.
- 1.6 In 2008 the Law Commission started work on a review of the law relating to intestacy and family provision, and this Report sets out and explains the recommendations that we make at the conclusion of that project, as well as presenting two draft Bills that would enable those recommendations to be implemented. In this introductory Part we begin by explaining the background to the Law Commission’s work in this area of the law. We then explain how we conducted this project, in terms both of practical methodology and of principle. We outline the law of intestacy and of family provision, and we then summarise the recommendations that we make in each of the following Parts. Finally, we acknowledge the help that we have received in the course of the project.

### **EARLIER LAW COMMISSION WORK AND THE ORIGINS OF THIS PROJECT**

- 1.7 The Law Commission has had an active interest in this area of the law from its very early years. The 1975 Act itself is the product of the Commission’s work.<sup>6</sup> In 1989 the Law Commission published a report (“the 1989 Report”)<sup>7</sup> that made two principal recommendations: first, that a surviving spouse of a person who died intestate should in all cases receive the whole estate and, second, that cohabitants should be able to apply under the 1975 Act for family provision without having to show that they were dependent on the deceased.<sup>8</sup>
- 1.8 The recommendation relating to cohabitants was enacted in the Law Reform (Succession) Act 1995. The recommendation about the surviving spouse,

<sup>4</sup> There were 271 applications issued in the Chancery Division in London between 2008 and 2010: see Ministry of Justice, *Judicial and court statistics 2010 – full report* (2011) table 5.3. In the absence of relevant data, we have assumed that the same number of claims were issued in the Family Division and that the number issued in all county courts is the same as in both Divisions of the High Court combined: see the intestacy and family provision claims on death impact assessment, para 1.108 below.

<sup>5</sup> Though disputes may arise even in well planned estates. See, for example, “Wealthy prone to inheritance disputes”, *Financial Times*, 15 November 2011.

<sup>6</sup> Family Law: Family Property Law (1971) Law Commission Working Paper No 42; Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

<sup>7</sup> Family Law: Distribution on Intestacy (1989) Law Com No 187.

<sup>8</sup> That is, those who lived in the same household as the deceased and as if they were the deceased’s husband or wife (or, now, civil partner) for at least two years before the death.

however, was not accepted. It had been subject to criticism that it might prejudice any children of the deceased, particularly those from a relationship other than the marriage to the surviving spouse. The entitlement of the surviving spouse has been an important focus of this project, and we have given careful consideration to the claims of spouses vis-à-vis those of other relatives, particularly children.

- 1.9 Cohabitants have no entitlement under the intestacy rules, but are able to apply for family provision by virtue of the cohabiting relationship. In 2007 the Law Commission published its report on the financial consequences of the breakdown of cohabiting relationships (“the Cohabitation Report”).<sup>9</sup> It did not recommend any changes to a cohabitant’s position on intestacy, taking the view that any such development should only take place within the context of a broader review.
- 1.10 In 2005 the Department for Constitutional Affairs (now the Ministry of Justice) published a consultation paper proposing significant increases in the statutory legacy – that is, the amount that a surviving spouse is entitled to receive from an intestate estate before any other beneficiary receives anything.<sup>10</sup> As a result of that consultation, the levels of the statutory legacy increased significantly for deaths from 1 February 2009. Responses to that consultation revealed enthusiasm for a wider review of the intestacy rules.<sup>11</sup> Almost all consultees agreed that such a review was necessary; support came from a wide range of individuals and groups, including academics, practitioners, professional organisations and members of the public.
- 1.11 The Ministry of Justice asked the Law Commission to consider a project to review the law of intestacy and family provision, and the Better Regulation Executive of the Cabinet Office supported that proposal. The Association of Contentious Trust and Probate Specialists independently proposed a review of this area of the law.<sup>12</sup> The project was therefore included in the Law Commission’s Tenth Programme of Law Reform,<sup>13</sup> which was approved by the Lord Chancellor and laid before Parliament in June 2008. Work on the project commenced later that year, and our Consultation Paper was published in October 2009.<sup>14</sup>

## **METHODOLOGY AND PRINCIPLES**

- 1.12 In this section of this Part we summarise the sources of information and the ideas that have informed our project. We comment in turn upon the legal research we have done and the legal context in which we have worked, the responses to our consultation, and the empirical data upon which we have drawn.

<sup>9</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

<sup>10</sup> See para 1.45 below. Where the context permits, we use the term “spouse” to mean a person’s husband, wife or civil partner; see para 1.38 below.

<sup>11</sup> Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) p 3.

<sup>12</sup> The Association of Contentious Trust and Probate Specialists (ACTAPS) was established in 1997 as a forum for practitioners specialising in contentious trust and probate work.

<sup>13</sup> Tenth Programme of Law Reform (2007) Law Com No 311, paras 2.9 to 2.13.

<sup>14</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, referred to in this Report as “the Consultation Paper”.

## The legal context

- 1.13 The Law Commission's work is grounded in wide-ranging legal research, looking to other jurisdictions as well as our own where that is relevant, and informed by consultation. Our Consultation Paper set out in some detail the historical background to the current law.<sup>15</sup> It also drew upon the law, and on recent recommendations for law reform, in a number of Commonwealth countries whose legal background and experience is similar to our own. That experience was very valuable when we considered some difficult issues, in particular the balance to be struck between a surviving spouse and children on intestacy,<sup>16</sup> and the possibility of an entitlement for cohabitants on intestacy,<sup>17</sup> but we have also been mindful of the need to anchor our recommendations firmly within the legal and social context and public opinion in England and Wales.
- 1.14 We say more about the social context, and public opinion, when we look at the empirical evidence below. As to the legal context, we have regarded it as very important not to undermine the conceptual foundation of the law of intestacy and family provision. The current law combines rules with a limited discretion. The intestacy rules, and the law of wills, recognise the value of certainty and the freedom we each have to make whatever provision we wish by will. The discretion is limited so that it cuts across the rules only where there is a failure to make reasonable provision for close family and dependants.
- 1.15 It is important to maintain that balance of rules and discretion. The intestacy rules provide solutions that are designed to be generally acceptable, and to work in most families. Intestate estates are managed by administrators; generally, they are the beneficiary or beneficiaries of the estate.<sup>18</sup> Intestate estates tend to be smaller than average,<sup>19</sup> and administrators may choose not to engage legal help; but even where lawyers are involved it is important that the intestacy rules function as *rules*. Any departure from that principle will make for additional work, expense, complexity and stress in the administration of estates.
- 1.16 The law of family provision supplements the law of intestacy by enabling the rules to be challenged where it is felt that they have operated inappropriately. So the rules are not the last word and there is room for discretion and for the consideration of individual circumstances. However, the 1975 Act does not make family provision available to all, but only to a number of groups of potential applicants: spouses and former spouses, cohabitants, children of the deceased, those whom the deceased has treated as a child of his or her family in relation to a marriage or civil partnership, and any other people whom the deceased has maintained.<sup>20</sup> A parent, for example, cannot apply unless he or she can show that he or she was being maintained by the deceased.

<sup>15</sup> Consultation Paper, paras 2.2 to 2.10.

<sup>16</sup> See paras 2.27 to 2.95 below.

<sup>17</sup> See Part 8 below.

<sup>18</sup> See paras 1.81 to 1.83 below.

<sup>19</sup> See Appendix D, table 4.

<sup>20</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1.

1.17 Moreover, the basis on which an order can be made under the 1975 Act is not open-ended. It is not a matter of the court making an order that is, in some general sense, fair in the circumstances; nor can the court respond to what an individual deserves, nor to what the deceased ought to have or might be supposed to have intended to have done. As Oliver J put it in *Re Coventry*:

The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position.<sup>21</sup>

1.18 The statute is very specific about the basis of provision. The court can make an order only:

... if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant ...<sup>22</sup>

1.19 We say more, below, about the meaning of "reasonable financial provision".<sup>23</sup> For now, it is important to note that for all applicants except a surviving spouse this is a relatively restricted standard, extending only to provision that it would be reasonable for the applicant to receive for his or her maintenance (though for a cohabitant of the deceased the actual award may represent a significant proportion of the estate). The 1975 Act responds primarily to need, rather than to fairness or desert. It will not confer an investment or lift the applicant into a different wealth bracket. Equally, it will not take an entitlement away from the beneficiary of a will or intestacy on the basis that he or she was *undeserving*. For example, a parent who takes half of the deceased's estate under the intestacy rules cannot be deprived of that entitlement pursuant to the 1975 Act on the basis that he or she was wholly estranged from the deceased.<sup>24</sup>

1.20 There are two important reasons for this restriction upon the basis of provision. The first is practical; an open-ended discretion to do what seemed fair to the court in an individual case would make for unpredictability, inconsistency (itself a form of unfairness) and consequent expense and stress. It is important that administrators and beneficiaries know what to expect and are able to negotiate within the parameters of a predictable and objective jurisdiction.

1.21 The other is principled, namely the need to ensure that testamentary freedom is not interfered with more than is really necessary. The law of England and Wales, in common with many other Commonwealth countries and others whose law derives in part from ours, differs from that of our European neighbours. English law lacks the concept often referred to as "forced heirship": the principle that certain relatives are entitled to inherit on the basis of kinship alone, regardless of

<sup>21</sup> [1980] Ch 461, 475.

<sup>22</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 2(1).

<sup>23</sup> See paras 1.66 to 1.68 below.

<sup>24</sup> See para 3.14 below.

the deceased's wishes.<sup>25</sup> That concept is alien to our legal tradition, and we note that responses to our consultation did not support any move closer to forced heirship. Testamentary freedom is restricted by the provisions of the 1975 Act, but only to a limited extent. Freedom is restricted so as to ensure proper provision to spouses – and by “proper” we mean something commensurate with their status. Beyond that, freedom is restricted only so as to make reasonable provision for maintenance for a small group of family members and dependants. An adult child, for example, who does not need provision for maintenance, has no claim for family provision, however deserving he or she may be.

1.22 These restrictions upon both the classes of persons who may claim and on what may be claimed can seem very harsh in individual cases. Close relatives may be left feeling aggrieved or even disinherited; and we have heard from some consultees who have had that experience. We do not underestimate the distress and sense of injustice that they have felt. But we regard it as centrally important not to disturb the principles upon which family provision rests. To extend the jurisdiction beyond those principles is to introduce uncertainty and subjectivity, and also to undermine the important freedom – which public opinion regards as very important<sup>26</sup> – to dispose of our property by will as we choose.

1.23 It would be possible, of course, to have different standards of family provision for testate and intestate estates, on the basis that if there is no will, an award of family provision does not override the deceased's wishes. However, if intestate estates were liable to be re-allocated on the basis of “fairness”, this would undermine the choices made by the intestacy rules, especially the priority given to the surviving spouse. It would also undermine the choices of individuals who have made an informed decision not to make a will on the basis that the intestacy rules will achieve the provision that they themselves would have made. A change in the basis of the 1975 Act for intestate estates only could also give rise to odd results in cases of partial intestacy, where the deceased has left a will which applies to part of the estate, and the intestacy rules govern the rest.<sup>27</sup>

1.24 So our recommendations are set in the context of the current balance of rules and restricted discretion. Within that context, of course, it is important that the intestacy rules are framed so as to achieve what they are supposed to achieve, namely a general level of acceptability for most families. If the rules are out of step with contemporary family life, where public opinion and prevailing lifestyles have changed but the law has not done so, then the intestacy rules need to be brought up to date, and we have been mindful of that need when considering in particular the position of cohabitants. And if the law of family provision is failing to recognise claims by certain deserving family members and dependants or is

<sup>25</sup> See C Castelein, R Foqué and A Verbeke (eds), *Imperative Inheritance Law in a Late-Modern Society: Five Perspectives* (2009) pp 30 to 31.

<sup>26</sup> See, for example National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009) pp 9 to 11, available at <http://www.justice.gov.uk/lawcommission/areas/intestacy-and-family-provision-claims-on-death.htm>.

<sup>27</sup> It is important to note that a change in the basis of family provision for intestate estates only would not solve the very difficult issue surrounding children, particularly adult children, whose parent has died leaving a surviving spouse who is unlikely to pass the parent's estate ultimately to the child. That issue is as likely to arise in testate as in intestate estates. See the discussion at para 6.19 and following below.

limiting access to certain property in the estate on unduly technical grounds, then it should be updated. But we have not recommended fundamental changes to the conceptual foundations on which this area of the law is based.

### **Consultation responses**

- 1.25 The response to our Consultation Paper gave us a rich source both of views and of expertise. We received 124 formal responses, of which 35 were from members of the public; of the rest, most were lawyers, and some of them were organisations representing significant numbers of experts in the field (notably the Association of Contentious Trust and Probate Specialists, the Association of Her Majesty's District Judges, the Association of Muslim Lawyers, the Association of Pension Lawyers, the Centre for Child and Family Law Reform, the Chancery Bar Association, the City of Westminster and Holborn Law Society, the Family Law Bar Association, the Institute of Professional Willwriters, the Judges of the Chancery Division and of the Family Division of the High Court, the Law Reform Committee of the Bar Council, the Law Society, the Money and Property Committee of the Family Justice Council, Resolution, the Society of Trust and Estate Practitioners and the Trust Law Committee). We were also able to hear a range of opinion at a number of events that we organised throughout the consultation period, in particular a public lecture at the Institute of Advanced Legal Studies, a seminar hosted by the Chancery Bar Association, and a number of presentations given to solicitors' firms and other audiences.<sup>28</sup> The consultation also prompted comment in professional journals.<sup>29</sup>
- 1.26 The value of a Law Commission consultation is that it is open and accessible to so many different consultees; we therefore benefit from the expertise of legal specialists whose knowledge of the technical complexity of the subject is unrivalled, and also from members of the public who have shared with us their own stories and, in many cases, the hardship and heartache that their experience has brought them. In this project, we have been examining an area of the law that impacts upon people's lives at a time when they are also undergoing the pain and stress of bereavement. Some of our consultees have told us about the most painful time in their lives. We are grateful to them.
- 1.27 One of the points emerging from the response to the Consultation Paper was that we needed to consider extending the scope of one of our proposals for reform. We had asked for consultees' views about the possibility of amendments to sections 31 and 32 of the Trustee Act 1925 for trusts established on intestacy, to reform the way in which income and capital may be used by trustees for beneficiaries who are under the age of 18. The reform we proposed was supported, but many consultees felt that it should be extended to all trusts, not just those arising on intestacy.

<sup>28</sup> See para 1.112 below.

<sup>29</sup> For example: J Herring, "Heaven sent" (2009) 159 *New Law Journal* 1607; S Ross, "Inheritance Act Claims by Dependents" [2010] *Family Law* 490; D Catchpole and L Parker, "A time for change" (2010) 115(Apr) *Trusts and Estates Law & Tax Journal* 20; B Rich, "'Habitual residence' in English succession law" (2011) 17 *Trusts & Trustees* 316; H Stewart, "Evolution or Revolution?" (2011) 16 *Private Client Adviser* 24; L Morgan, "Sensible streamlining" (2011) 116(Oct) *Trusts and Estates Law & Tax Journal* 4.

- 1.28 In order to give proper consideration to that possibility, and consider further reforms, on 26 May 2011 we published on our website a Supplementary Consultation Paper. Consultation on the four questions posed in that paper closed on 22 July 2011, and the outcome of that additional consultation is discussed in Part 4 of this Report.
- 1.29 A full list of the respondents to the Consultation Paper and Supplementary Consultation Paper can be found at Appendix F.

### **Empirical data**

- 1.30 We have also had access to empirical data: information generated by research, rather than consultation, into the impact the law has in this context, and into the economic and other circumstances likely to be relevant to the way that the law operates. Some of these data have been produced by others, in some cases with a view specifically to assisting us with this project, and some we have helped to generate.
- 1.31 In 2008 we commissioned a study from the National Centre for Social Research (“NatCen”), using a number of focus groups (“the NatCen focus groups”). Four focus groups were undertaken, each with around 10 participants. Participants were chosen from those whose points of view might be lost, or picked up only in a very general way, in a large-scale survey, including people who have married more than once, people who have children from more than one relationship, step-parents, cohabitants and those in same-sex relationships. Discussion in the groups ranged widely over the areas examined in the Consultation Paper, including the importance of testamentary freedom, the relative entitlements of spouses and children, the rights of cohabitants on the death of a partner and the significance of the family home. We have made the final report available on our website and we refer to it in this Report where the information generated informed our conclusions.<sup>30</sup>
- 1.32 When we started our work in 2008 there was no up-to-date, statistically significant evidence of public opinion about intestacy or family provision.<sup>31</sup> “Statistically significant” evidence is data that is drawn from a sample sufficiently large and properly randomised that it enables us to generalise: that is, to reach conclusions about the views of the population at large. A consultation exercise cannot generate statistically significant data because the sample of public opinion that it elicits is too small, and is self-selecting (which means that we are likely to hear from members of the public about unusual experiences and particularly strong views, which are important but do not tell us how the law impacts on people in general). The NatCen focus groups are not designed to give statistically significant data, but fulfil the different and important function of giving a sample of views, and exploring in some depth the reasons for them, without giving any

<sup>30</sup> National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009), available at <http://www.justice.gov.uk/lawcommission/areas/intestacy-and-family-provision-claims-on-death.htm>.

<sup>31</sup> But see C Williams, G Potter and G Douglas, “Cohabitation and intestacy: public opinion and law reform” [2008] *Child and Family Law Quarterly* 499. This reports the findings obtained by requiring students to find a small number of respondents each. While not a randomly generated sample, this methodology is a good way of generating sufficient responses to give a reasonably representative view of public opinion.

information about how many people hold them; such a study is said to be qualitative rather than quantitative.

- 1.33 We were therefore delighted that the Nuffield Foundation funded a large-scale research project under the leadership of Professor Gillian Douglas of Cardiff University and Alun Humphrey of NatCen. The research was carried out in two phases (collectively referred to as “the Nuffield survey”); it was unfinished at the date of our Consultation Paper but has now been completed and published. The first phase was a large-scale quantitative survey making use of NatCen’s own omnibus survey to determine the views of the general population on a variety of questions relating to intestacy. The second was qualitative, exploring through in-depth interviews the individual experiences and thought processes people go through in forming opinions about the issues involved. The quantitative component took place between August and November 2009 with the follow-up qualitative interviews running through until December 2009. The final report of the Nuffield survey is published by NatCen.<sup>32</sup>
- 1.34 We have attached great importance to the empirical data about public opinion, using it to supplement and to set in context what we have learnt from consultation responses. However, even in those cases where we have evidence of majority public opinion – and that is not the case on all the issues addressed in the course of this project – we have not invariably regarded it as determinative of policy. Public opinion is not always based upon full information about the topic; the empirical data is limited by the form and content of the questions asked and by the impossibility, in the context of a very large-scale survey, of prefacing a question by an explanation. So it will be seen throughout this Report that we have given careful consideration to the empirical data, and have found it a valuable source of information, but have used it with care and with an awareness of its inevitable limitations.
- 1.35 One further source of data was generated for this project in conjunction with the Probate Service and HM Revenue & Customs. Every week the Probate Service sends HM Revenue & Customs an electronic dataset containing details of grants of representation issued in the previous week.<sup>33</sup> The data include, among other things, the net value of the estate and the type of grant obtained. In most cases, the type of grant obtained indicates whether the deceased left a will or died intestate. Those few grants which do not clearly indicate this were excluded from the analysis. HM Revenue & Customs statisticians have analysed the data to produce findings which have previously not been available, including the average size of estates, the proportion of estates within each of a range of estate sizes and the average age at death of those in respect of whom a grant is obtained. Significantly for the present project, we have for the first time been able to compare the figures for those who left a will and those who did not. The findings of this research were published in the Consultation Paper and are reproduced at Appendix D below.

<sup>32</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010), available at <http://www.natcen.ac.uk/study/inheritance-and-the-family> (last visited 23 November 2011). See also A Humphrey, L Mills, G Morrell, G Douglas and H Woodward, “Enduring Love? Attitudes to Family and Inheritance law in England and Wales” (2011) 38 *Journal of Law and Society* 245.

<sup>33</sup> See paras 1.81 to 1.83 below.

## THE CURRENT LAW OF INTESTACY AND FAMILY PROVISION

- 1.36 Here we summarise the intestacy rules and the basic principles of the law of family provision, and outline the way that estates are administered; more detail on the law is given in the later parts of this Report where relevant.<sup>34</sup>
- 1.37 Inevitably any discussion of this area of the law involves the use of some technical terms, and the glossary facing page 1 will be of assistance. We say more here about the term “spouse”, and the group of terms “issue”, “child” and “minor”.
- 1.38 The legal treatment of husbands, wives and civil partners is identical in the law of intestacy and family provision claims, and for brevity we use the term “spouse” in this Report to refer to all three.<sup>35</sup> However, in the draft Bills, the term “spouse” is used to refer to a husband or wife only, and civil partners are referred to as such, in order to maintain consistency with existing legislation.
- 1.39 The intestacy rules also use the word “issue”, meaning direct descendants (children, grandchildren, great-grandchildren and so on).<sup>36</sup> We refer in this Report to a “child” or “children”, meaning only immediate offspring of any age, and to “other descendants” to include grandchildren, great-grandchildren and so on. We note here that references to a person’s child are intended in all cases to include a child adopted by that person, who from the date of the adoption order is legally the child of the adopters and ceases to be the child of his or her birth parents.<sup>37</sup> A child who is being fostered, however, is not legally the child of the foster “parents”. Where appropriate, we also use the term “child” to refer to a person under 18 (a “minor” in legal terminology).
- 1.40 Two technical points should be noted. First, references in the intestacy rules and in this Report to a child or other descendant living at the death of any person include a child or other descendant who has been conceived but is unborn at that date.<sup>38</sup> Second, in the law of intestacy as it applies to deaths after 4 April 1988, a person is treated as the child or descendant of another regardless of whether his or her parents were married to one another (or, since 2004, civil partners);<sup>39</sup> similar rules apply to the interpretation of a gift in a will to the testator’s child or remoter descendant.<sup>40</sup>

<sup>34</sup> See also the Consultation Paper, Part 2.

<sup>35</sup> One consultee (the Family Education Trust) objected to this approach, expressing concern that it failed to sufficiently distinguish marriage from civil partnership; we disagree, because the law does not treat these relationships differently in this context.

<sup>36</sup> For the meaning of “issue” generally see C Sherrin, R Barlow and R Wallington, *Williams on Wills* (9th ed 2008) vol 1, ch 76.

<sup>37</sup> Adoption and Children Act 2002, s 67; Adoption Act 1976, s 39.

<sup>38</sup> Referred to in the statute as a child *en ventre sa mere* (in the mother’s womb): Administration of Estates Act 1925, s 55(2).

<sup>39</sup> Family Law Reform Act 1987, s 1.

<sup>40</sup> Wills Act 1837, s 33(4)(a), as substituted by the Administration of Justice Act 1982, s 19, in respect of testators who died after 1982.

## **Intestacy**

### ***The general scheme of the intestacy rules***

- 1.41 The intestacy rules apply when a person dies without leaving a valid will that effectively disposes of all of his or her property.<sup>41</sup>
- 1.42 Intestacy can be total or partial. Total intestacy occurs if the deceased did not make a will, or made one that was invalid for some reason (for example, if it was not executed correctly<sup>42</sup>) or was revoked, deliberately or otherwise (for example, by marriage or the formation of a civil partnership).<sup>43</sup> Total intestacy also occurs if there was a valid will that did not dispose of any of the assets in the estate (for example, if it left everything to someone who had already died).<sup>44</sup> There is a partial intestacy if there is a will which governs how some of the deceased's assets are distributed, but not all of them.
- 1.43 The intestacy rules determine the distribution of the deceased's estate after any debts and liabilities, funeral expenses and costs of the administration of the estate have been paid. If the intestacy is partial, the distributions under the will take priority; once those distributions have been made the intestacy rules take effect, without regard to whether any of the beneficiaries under those rules have already received anything under the will.<sup>45</sup>
- 1.44 The modern law of intestacy dates from the enactment of the Administration of Estates Act 1925, which established for the first time intestacy rules that were neutral both as to the nature of the property (the earlier law had distinguished between land and other property) and as to the gender of the recipient (before 1925, widows and widowers had a different entitlement).<sup>46</sup> Those rules determine the entitlement of surviving relatives of the deceased; they are summarised in the diagram overleaf. As we noted above, they take the form of a hierarchy, with different classes becoming entitled in turn if no member of the prior class survives. If there is more than one member of any of these categories, they share equally.<sup>47</sup> The diagram overleaf summarises the way in which an estate is distributed under the intestacy rules among the surviving family members of a person who has died intestate.

<sup>41</sup> Some property will not pass under a will or the intestacy rules; see para 1.58 below.

<sup>42</sup> In order to be recognised as a valid will, the document must be signed and witnessed correctly: Wills Act 1837, s 9. A will may also be invalidated if, for example, the testator was not mentally capable of making a will or did not know and approve of its contents or was subject to the undue influence of a third party.

<sup>43</sup> Unless the will stated expressly that it was made in contemplation of that particular marriage or civil partnership: Wills Act 1837, ss 18 and 18B.

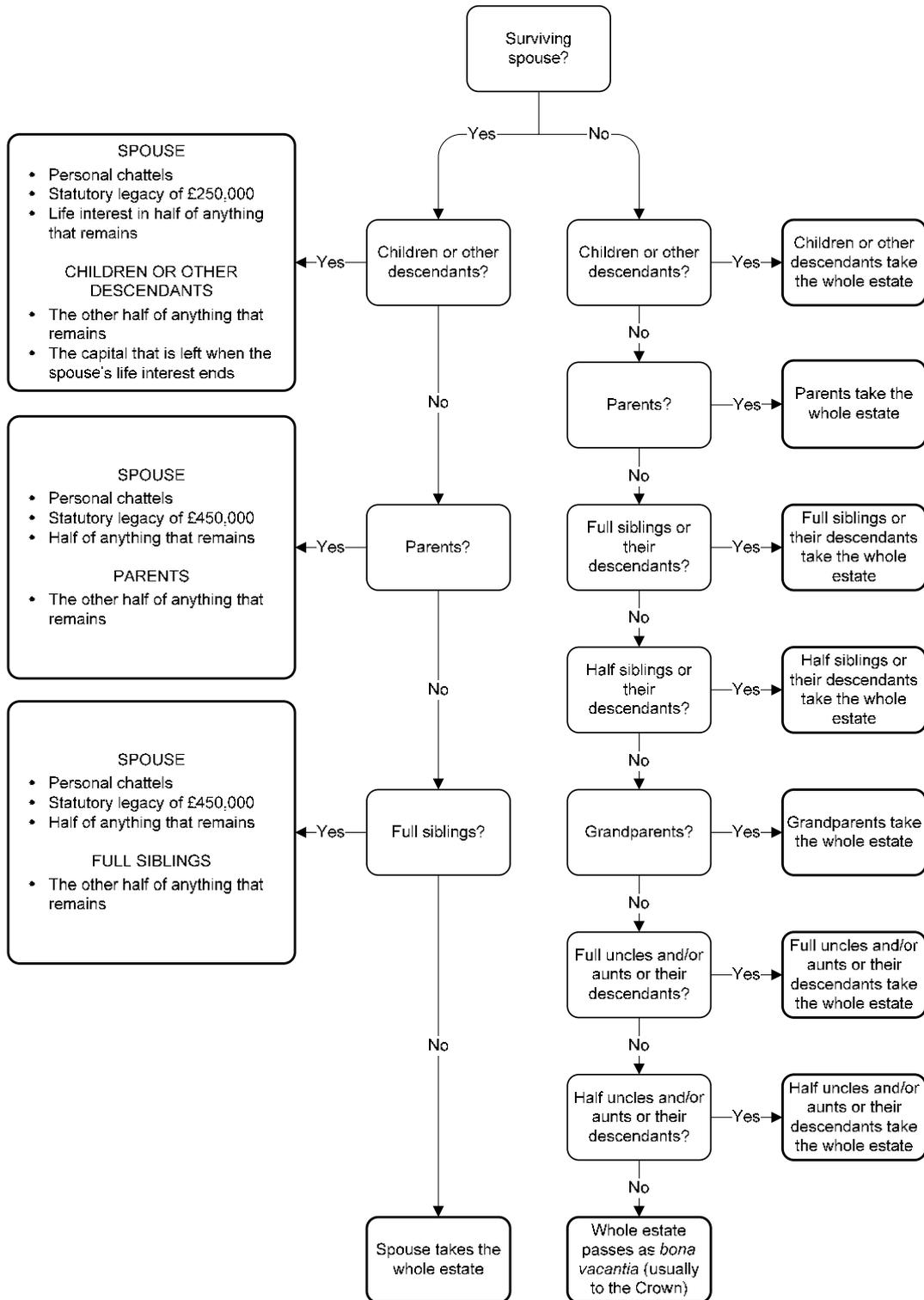
<sup>44</sup> In some cases a child or other descendant may be substituted for the original beneficiary: Wills Act 1837, s 33.

<sup>45</sup> There is no longer any provision requiring gifts under the will to be brought into account: the rules previously set out at section 49 of the Administration of Estates Act 1925 were repealed by sections 1(2)(b), 5 and the schedule to the Law Reform (Succession) Act 1995, following recommendations by the Law Commission: Family Law: Distribution on Intestacy (1989) Law Com No 187, para 55.

<sup>46</sup> We gave an account of the history of this area of the law in Part 2 of the Consultation Paper.

<sup>47</sup> Administration of Estates Act 1925, ss 46(1)(ii) to (v) and 47; see further paras 1.52 to 1.53 below.

## DIAGRAM SUMMARISING DISTRIBUTION UNDER THE INTESTACY RULES



- 1.45 However, the hierarchy is a little more complex if there is a surviving spouse. Under the intestacy rules, a surviving spouse takes the whole estate unless the deceased was also survived by children or other descendants, full siblings or parents. Where such relatives do survive, the spouse receives all of the deceased's personal chattels and the rest of the estate up to a "fixed net sum", commonly referred to as the statutory legacy. Only if the estate exceeds the statutory legacy is it then shared with the deceased's children or other descendants, if any, and if none then with his or her parents, if still living, or full siblings, if not.

***If the deceased is survived by a spouse and children***

- 1.46 If the deceased is survived by a spouse and children,<sup>48</sup> the spouse is entitled to:

- (1) all of the deceased's personal chattels;
- (2) a statutory legacy of £250,000; and
- (3) a life interest in half of the remainder of the estate.<sup>49</sup>

- 1.47 "Personal chattels" encompass the deceased's personal belongings, such as cars, jewellery, china, clothes, furniture, pictures, and so on, but do not include anything used for business purposes, or money.<sup>50</sup>

- 1.48 The spouse may use the property that is subject to the life interest and receives any income it generates (such as rent or interest) during his or her life, but may not sell the assets or diminish their capital value. The spouse also has the right to "capitalise" the life interest within 12 months of a grant of representation.<sup>51</sup> This means that the fund is divided so that the spouse receives the capital value of the life interest and the remainder passes to the deceased's children.

- 1.49 The surviving children are entitled to:

- (1) half of what is left after payment of the statutory legacy; and
- (2) eventually, the other half of the estate when the surviving spouse's life interest comes to an end.

These interests are held on the "statutory trusts", which we discuss below.<sup>52</sup>

***If the deceased is survived by a spouse but no children***

- 1.50 If the deceased is survived by a spouse but no children or other descendants, the entitlement of the surviving spouse depends on the existence of other relatives. If there are no parents or full siblings (or children or other descendants of a full

<sup>48</sup> Or by any descendants of a child who has already died who are entitled to take that child's share by substitution; see further para 1.55 below.

<sup>49</sup> Administration of Estates Act 1925, s 46(1)(i)(2).

<sup>50</sup> Above, s 55(1)(x); see further paras 2.96 to 2.113 below.

<sup>51</sup> Above, s 47A; see further paras 1.81 to 1.82 below.

<sup>52</sup> See paras 1.54 to 1.55 below.

sibling) the spouse takes the whole estate absolutely.<sup>53</sup> Otherwise, the surviving spouse is entitled to:

- (1) all of the deceased's personal chattels;
- (2) a statutory legacy of £450,000; and
- (3) half of the rest of the estate absolutely.<sup>54</sup>

1.51 The other half of the estate passes to the deceased's parents in equal shares, or to one parent if only one is still alive. If neither parent survives, then any full siblings take the remaining half, in equal shares if two or more survive. If a full sibling has already died leaving surviving descendants, the share which he or she would have received is taken by those descendants, as explained below.<sup>55</sup>

***If the deceased is not survived by a spouse***

1.52 If the deceased is not survived by a spouse then the whole estate will be inherited by other relatives, in the following order of priority:

- (1) children (and other descendants);
- (2) parents;
- (3) full siblings (and their descendants);
- (4) half siblings (and their descendants);
- (5) grandparents;
- (6) full siblings of parents of the deceased – uncles and aunts (and their descendants, the first cousins of the deceased);
- (7) half siblings of parents of the deceased – half uncles and half aunts (and their descendants).

Where a category can include descendants, they only benefit under the intestacy rules if their parent would have been entitled, but has already died; the share their parent would have taken is divided between them under the statutory trusts, explained below. Otherwise, if there is more than one surviving member of any of these categories, they share equally.<sup>56</sup>

1.53 Because the list is a hierarchy, so that only if there are no members of a particular class does the next class become relevant, the estate cannot be split between two different classes of relatives. It can, however, be divided between different generations within a class which includes descendants, by the operation of the statutory trusts.

<sup>53</sup> Administration of Estates Act 1925, s 46(1)(i)(1).

<sup>54</sup> Above, s 46(1)(i)(3).

<sup>55</sup> See para 1.55 below.

<sup>56</sup> Administration of Estates Act 1925, ss 46(1)(ii) to (v) and 47.

### ***The statutory trusts***

- 1.54 The statutory trusts take effect in all cases except where the estate passes only to the deceased's spouse, parents or grandparents. So, where the effect of the intestacy rules is that the estate passes, for example, to two children and two grandchildren of the deceased (the grandchildren being entitled because their parent has died), the estate will be held for them on the statutory trusts.
- 1.55 Under the statutory trusts, the beneficiaries in any given class (the deceased's children, siblings or parents' siblings) are entitled to the estate in equal shares on reaching the age of 18 (or marrying or forming a civil partnership under that age). However, if any of them have already died leaving surviving children, then the share which the deceased beneficiary would have received will pass instead to those children in equal shares. This process is repeated if any of those children have themselves predeceased leaving surviving children, and so on; no descendant can benefit if his or her parent is still alive. The statutory trusts are discussed in more detail in Part 4.<sup>57</sup>

### ***Bona vacantia***

- 1.56 If the deceased leaves none of the relatives listed in the intestacy rules (see the diagram on page 12) then the estate passes as *bona vacantia* (a Latin term roughly translated as "ownerless goods"). This usually means that the Crown becomes entitled to the estate, though these assets are now collected by the Treasury Solicitor and are used for general public spending.<sup>58</sup> However, if the deceased died resident within the County Palatine of Lancaster,<sup>59</sup> or in Cornwall, the estate passes to the Duchy of Lancaster or the Duke of Cornwall.<sup>60</sup>
- 1.57 The Administration of Estates Act 1925 gives all three bodies the discretion to make grants from the estate for dependants of the deceased and "other persons for whom the intestate might reasonably have been expected to make provision".<sup>61</sup> These might include, for example, unmarried partners, friends or neighbours, or relatives by marriage or civil partnership. The Treasury Solicitor's Department publishes guidelines as to the way in which this discretion will be exercised.<sup>62</sup> We discuss *bona vacantia* in Part 3.<sup>63</sup>

### ***Assets inherited outside the will and the intestacy rules***

- 1.58 Some assets pass to others on death separately from the intestacy rules, just as they pass without reference to the terms of any will which has been made. Generally they are not distributed by the personal representatives. The main

<sup>57</sup> For further discussion see Consultation Paper, paras 5.36 to 5.53.

<sup>58</sup> The Treasury Solicitor is head of the Government Legal Service and is responsible, among other things, for collecting *bona vacantia* on behalf of the Crown.

<sup>59</sup> The County Palatine of Lancaster covers Lancashire, Greater Manchester, Merseyside and the Furness area of Cumbria.

<sup>60</sup> Administration of Estates Act 1925, s 46(1)(vi).

<sup>61</sup> Above, s 46(1)(vi).

<sup>62</sup> <http://www.bonavacantia.gov.uk/output/Discretionary-Grants-in-Estates-Cases.aspx> (last visited 23 November 2011).

<sup>63</sup> See paras 3.28 to 3.45 below.

instances are certain types of jointly owned property, assets held in trust, and pension funds (which may generate benefits to others following the pensioner's death). We say more about some of these assets in Part 7.<sup>64</sup>

## Family provision

### *The development of the current law*

- 1.59 The introduction, in the 1930s, and the subsequent development of the law of family provision is a fascinating reflection of the change in family forms and in public opinion during the twentieth century.<sup>65</sup> Previously, it was not possible to claim further provision from an estate. A will could be challenged only on very limited grounds relating to the circumstances in which it was made,<sup>66</sup> and distribution under the intestacy rules could not be challenged at all. The Inheritance (Family Provision) Act 1938 allowed claims only where the deceased had died leaving a will, and by only three categories of applicant: the surviving spouse; an unmarried or disabled daughter; and a son who was under 21 or disabled.<sup>67</sup> The Intestates' Estates Act 1952 extended the 1938 Act to cover intestate estates.<sup>68</sup>
- 1.60 The law of family provision was substantially revised by the 1975 Act, which replaced the earlier legislation and implemented recommendations made by the Law Commission.<sup>69</sup> Significant reforms included enabling the court to make a wider range of orders and take into account certain assets to which the will or the intestacy rules would not apply.
- 1.61 However, the most notable change was the expansion of the categories of applicant to include all children (including adult children), people treated as though they were children of the deceased's marriage, and dependants of the deceased. A further category of applicant was added in 1995, again on the recommendation of the Law Commission: an unmarried partner who had lived in the same household with the deceased "as husband or wife" for at least two years before the death.<sup>70</sup> Further amendments have placed civil partners in the same position as husbands and wives, and expressly included same-sex partners who have not entered a civil partnership but have been living as civil partners.<sup>71</sup>

<sup>64</sup> See paras 7.71 to 7.120 below.

<sup>65</sup> S Cretney, *Family Law in the Twentieth Century: a History* (2005) pp 485 to 511.

<sup>66</sup> For example, that the testator was not mentally capable of making a will, did not know and approve of its contents or was subject to the undue influence of a third party.

<sup>67</sup> A child of the deceased and the surviving spouse could not claim at all if at least two-thirds of the income of the estate had been left to the surviving spouse; this restriction was finally removed by section 1 of the Family Provision Act 1966.

<sup>68</sup> However, it was not until the Family Provision Act 1966 that the restriction on awarding lump sums instead of periodical payments was completely removed.

<sup>69</sup> Second Report on Family Property: Family Provision on Death (1974) Law Com No 61; see para 1.7 above. Appendix E reproduces the text of the 1975 Act in full.

<sup>70</sup> Law Reform (Succession) Act 1995, s 2, with effect for deaths on or after 1 January 1996.

<sup>71</sup> Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1)(a), 1(1)(b) and 1(1B), amended by section 71 and schedule 4 paragraph 15 of the Civil Partnership Act 2004.

### ***The modern basis for family provision***

- 1.62 The only ground for a claim for family provision is that the way in which the deceased person's estate is to be distributed, either under the will or the intestacy rules, does not make reasonable financial provision for the applicant. As we discussed above, the family provision legislation cannot be used to redistribute the estate on the basis of fairness, desert, or what the deceased is supposed to have wanted.
- 1.63 A claim can only be made if the deceased died domiciled in England and Wales.<sup>72</sup> It must be made within six months of the grant of representation, although the court may extend this time period.<sup>73</sup> If the applicant is successful, the court can make orders for various types of financial provision from the estate, including periodical payments, lump sum payments, the transfer of particular property in the estate (such as a house) or the purchase of property for the applicant.<sup>74</sup>

### ***Who can apply***

- 1.64 Those who can apply for family provision are:
- (1) the spouse of the deceased;
  - (2) the former spouse of the deceased (provided that he or she has not remarried or entered into a new civil partnership);
  - (3) a person who lived in the same household as the deceased, as if he or she were the spouse of the deceased, for a period of two years ending immediately before the date when the deceased died;<sup>75</sup>
  - (4) a child of the deceased;
  - (5) any person treated by the deceased as a child of the family in relation to a marriage or civil partnership; and
  - (6) any other person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.

### ***The decisions to be made***

- 1.65 If the applicant qualifies under one of the above categories, then the court will decide:
- (1) whether the way in which the estate is set to be distributed under the will, or the intestacy rules, fails to make reasonable financial provision for the applicant; and

<sup>72</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(1).

<sup>73</sup> Above, s 4; see paras 1.81 to 1.82 below.

<sup>74</sup> Above, s 2.

<sup>75</sup> Often referred to as a cohabitant. Elsewhere in this Report, in particular in Part 8, we also use the term cohabitants in a less technical sense to refer to couples who live together in an intimate relationship.

- (2) if reasonable financial provision has not been made, whether any, and if so what, provision should be made for the applicant.<sup>76</sup>
- 1.66 The term “reasonable financial provision” carries two alternative meanings, depending on whether the applicant is a surviving spouse of the deceased or one of the other classes of applicant entitled to apply under the Act. A surviving spouse is entitled to seek such financial provision as it would be reasonable in all the circumstances of the case for a spouse to receive, *whether or not* that provision is required for maintenance.<sup>77</sup> The measure of provision for all other applicants is reasonable provision for the applicant’s maintenance.<sup>78</sup>
- 1.67 For those other applicants, what is maintenance? In *Re Dennis* it was explained that maintenance “connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him”.<sup>79</sup> In *Re Coventry*, it was said that:
- On the one hand ... one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by; on the other hand, it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare.<sup>80</sup>
- 1.68 Maintenance includes the day-to-day costs of living, which may be supplied by way of income payments or, more usually, by a lump sum.<sup>81</sup> Awards often include a flat or house from the estate, or provision for the applicant to buy one, to fulfil his or her accommodation requirements.<sup>82</sup> In the same way, a claim for a sum to enable repayment of debts can be consistent with maintenance if that will enable the applicant to obtain an income.<sup>83</sup>

***The factors to be taken into account***

- 1.69 The following factors must be taken into account in every case:
- (1) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (2) the financial resources and financial needs which any other applicant for an order has or is likely to have in the foreseeable future;

<sup>76</sup> Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1), 2(1) and 3(1).

<sup>77</sup> Above, ss 1(2)(a) and 1(2)(aa).

<sup>78</sup> Above, s 1(2)(b).

<sup>79</sup> [1981] 2 All ER 140, 145, by Browne-Wilkinson J.

<sup>80</sup> [1980] Ch 461, 485, by Goff LJ.

<sup>81</sup> For a case in which periodical payments were considered appropriate, see *Re Hancock* [1998] 2 FLR 346. In *Negus v Bahouse* [2008] EWCA Civ 1002, for example, the lump sum award had been calculated by reference to the income required (£38,000 per year) (at [9]).

<sup>82</sup> See, for example, *Re Watson* [1999] 1 FLR 878, and *Graham v Murphy* [1997] 1 FLR 860.

<sup>83</sup> See Lewison J in *Baynes v Hedger* [2008] EWHC 1587 (Ch), [2008] 2 FLR 1805 at [147], quoted in agreement on appeal at [2009] EWCA Civ 374, [2009] 2 FCR 183 at [45]. In *Re Dennis* [1981] 2 All ER 140 no award was made in respect of debts because this would not have helped towards the applicant’s future maintenance; contrast the finding in *Espinosa v Bourke* [1999] 1 FLR 747 that paying off debts would enable the applicant to derive an income from her business in the future.

- (3) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
  - (4) any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary of the estate of the deceased;
  - (5) the size and nature of the net estate of the deceased;
  - (6) any physical or mental disability of any applicant or beneficiary; and
  - (7) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.<sup>84</sup>
- 1.70 Those other matters can include, for example, a will which was prepared before the death but was left in draft, or not properly executed.<sup>85</sup> On the other hand, a statement of the deceased's reasons for the level of provision that he or she made may not be effective to prevent a claim. It may indicate that the deceased thought that the financial provision made needed special justification. Instead, the reasons given may point to factors falling under other headings, in particular the deceased's obligations and responsibilities (legal or moral) to the applicant and other beneficiaries. In the same way, a promise to leave property to the applicant can be relevant in assessing the moral obligations owed by the deceased.
- 1.71 A will may contain a clause to the effect that a beneficiary will only receive what is given by the will if he or she does not make a claim under the 1975 Act. Such a clause may force the beneficiary to choose between the two, but does not prevent the beneficiary from bringing a claim, or the court from making an award – indeed it may support the applicant's claim by indicating that the deceased thought it reasonable to make some provision.<sup>86</sup>
- 1.72 The behaviour of the applicant is unlikely in most cases to form an independent factor for consideration unless it is particularly abhorrent.<sup>87</sup> However, it can form part of the assessment of the deceased's obligations and responsibilities.<sup>88</sup> Delay, or other conduct during the proceedings, may be relevant under this heading.<sup>89</sup>
- 1.73 Where the applicant is a surviving spouse, the court is also directed to consider:
- (1) the age of the applicant and the duration of the marriage or civil partnership;

<sup>84</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 3(1).

<sup>85</sup> *Rees v Newbery and the Institute of Cancer Research* [1998] 1 FLR 1041. A wish expressed in a will may also be relevant: see *Re Hancock* [1998] 2 FLR 346, 352.

<sup>86</sup> *Nathan v Leonard* [2002] EWHC 1701 (Ch), [2003] 1 WLR 827.

<sup>87</sup> See *Re Snoek* [1983] *Family Law* 18, in which a modest award was made despite the wife's violent behaviour in the later years of the marriage.

<sup>88</sup> See, for example, consideration of the son's conduct in *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373.

<sup>89</sup> See *Re Hancock* [1998] 2 FLR 346.

- (2) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and
  - (3) the provision which would have been awarded if, instead of death, the marriage or civil partnership had been ended by divorce or order of dissolution.<sup>90</sup>
- 1.74 In the case of a cohabitant, in addition to the factors always taken into account, the court is to have regard to:
- (1) the age of the applicant and the length of the period during which he or she lived as the spouse of the deceased and in the same household as the deceased; and
  - (2) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.<sup>91</sup>
- 1.75 There are additional factors to be considered where the applicant is a child of the deceased, was treated by the deceased as a child of the family, or was a dependant of the deceased.<sup>92</sup>

***Eligibility and provision for the different categories of applicant***

- 1.76 It will be apparent from what has been said so far that the success of an application for family provision will depend on:
- (1) the applicant’s eligibility to apply within one of the statutory categories;
  - (2) the meaning of “reasonable financial provision” for that category of applicant; and
  - (3) the effect of the factors set out above both on the decision as to whether or not reasonable financial provision has been made, and the decision as to the order, if any, that is to be made.
- 1.77 Analysis of decisions in family provision cases can therefore be quite complex. We look at the particular considerations relevant to different applicants later in this Report in the context of particular reform proposals.

***The deceased’s assets and orders which can be made***

- 1.78 When a family provision claim is made, the court takes into account all of the deceased’s assets. This is not limited to assets held in the deceased’s own name and passing according to the will or the intestacy rules. The court may also take into account and make orders in relation to the deceased’s interest in jointly owned property, even if it passed automatically to the surviving co-owner or co-

<sup>90</sup> Inheritance (Provision for Family and Dependants) Act 1975, 3(2).

<sup>91</sup> Above, s 3(2A).

<sup>92</sup> Above, ss 3(3) and 3(4), and see para 6.43 and following below.

owners.<sup>93</sup> Similarly, property subject to a statutory nomination is taken into account.<sup>94</sup>

- 1.79 The court can also take into account gifts, including gifts made into trusts, which the deceased made within six years of the death with the intention of defeating an application under the 1975 Act.<sup>95</sup> The person to whom the gift was made can be ordered to return its value to fund provision for the applicant.
- 1.80 Otherwise, interests under trusts do not generally form part of the estate within the meaning of the 1975 Act.<sup>96</sup> The same applies to payments from pension schemes or under life insurance policies, which also cannot usually be the subject of an order.<sup>97</sup>

### **The administration of estates**

- 1.81 When someone dies, his or her estate must be “administered”; this is the term used for the process of paying debts and legacies and distributing the rest of the estate. Sometimes this can be done informally, for example where the assets are of low value and comprise only cash or personal effects. Where the estate is more valuable or comprises assets, such as land, that cannot be transferred informally, a grant of representation is required. A grant of representation is a formal authorisation to deal with the estate. There are two kinds of grant: a grant of probate and a grant of letters of administration.
- 1.82 If the deceased left a will appointing an executor or executors, those named may (if willing to act) apply for a grant of probate. Otherwise, an application for a grant of letters of administration will be made (usually by the deceased’s relatives), according to a prescribed order of priority.<sup>98</sup> Those to whom letters of administration are granted are known as the administrators. Once the grant of representation has been made, the executors or administrators – collectively known as the personal representatives – will be able to manage and distribute the estate, using the grant of representation to prove their entitlement to do so where necessary.
- 1.83 An important part of the background to our recommendations is consideration of the part played by personal representatives and the need to ensure that they are not subjected to undue burdens, whether in terms of cost or of complexity.

<sup>93</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 9 (subject to a strict six-month time limit); see further para 7.74 below.

<sup>94</sup> Above, s 8.

<sup>95</sup> Above, ss 10 and 13. A gift vitiated on the ground of undue influence (or similar) will also be repaid into the estate: see *Gorjat v Gorjat* [2010] EWHC 1537 (Ch), 13 ITEL 312.

<sup>96</sup> The exceptions are ante-nuptial and post-nuptial settlements; above, ss 2(1)(f) and (g). See paras 7.114 to 7.116 below.

<sup>97</sup> See para 7.99 and following below.

<sup>98</sup> Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22. Where a will has been made but does not name executors, or where named executors are unable or unwilling to act, a grant of letters of administration may be made with the will annexed. The estate will then be administered according to the other terms of the will: Senior Courts Act 1981, s 119; Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 20.

## THE STRUCTURE OF THIS REPORT AND OUR RECOMMENDATIONS

1.84 The structure of the rest of this Report is as follows.

### **Part 2: the surviving spouse**

1.85 In Part 2 we look at the position of the surviving spouse in the intestacy rules and the law of family provision. Our principal recommendations relate to the entitlement of a surviving spouse on intestacy. We recommend that where the deceased leaves a spouse but no children, the spouse should take the entire estate. The impact of that reform would be small, because fewer than 2% of intestate estates exceed the value of the higher level of statutory legacy.<sup>99</sup> But the current law, in those cases, runs counter to expectations; the reform we recommend was widely supported by consultees.

1.86 More complex is the issue of whether there should be reform of a surviving spouse's entitlement where there are also surviving children. We do not recommend that the surviving spouse should take the entire estate in that case; but we do recommend that he or she should take the statutory legacy and then half of the balance of the estate (if any). That would simplify the law and eliminate the expense and complication of the life interest structure imposed by the law at present.

1.87 We make a recommendation that would modernise and improve the definition of the deceased's personal chattels, which a surviving spouse takes on intestacy in any event. We also recommend a mechanism for the regular updating of the statutory legacy, and provision for determining the rate of interest payable on it from the date of death until the point when it is paid to the surviving spouse.

1.88 Finally, we turn to family provision for the surviving spouse, and we make a recommendation that would clarify the requirement that the court "have regard to" the provision that the applicant might reasonably have expected to receive if the marriage or civil partnership had been terminated by divorce or dissolution instead of by death. Our recommended reform would make it clear that this requirement is not intended as any kind of limit upon the surviving spouse's entitlement to family provision.

### **Part 3: intestacy: other relatives**

1.89 In Part 3 we look at the law of intestacy as it relates to relatives other than the surviving spouse and children of the deceased. We consider the questions we asked in the Consultation Paper about the preference for parents over siblings in the intestacy rules, the distinction made between full and half siblings, and the range of relatives entitled on intestacy. In each case we reach the conclusion that no reform is necessary.

1.90 In Part 3 we also look at *bona vacantia*;<sup>100</sup> we conclude, again, that the law should not change.

<sup>99</sup> Appendix D, table 3.

<sup>100</sup> See paras 1.56 to 1.57 above.

#### **Part 4: the statutory trusts**

- 1.91 Part 4 begins with an examination of the statutory trusts which, as noted above,<sup>101</sup> determine how intestate estates are shared between a class of beneficiaries and the terms of ongoing trusts for those under 18. We go on to recommend reform so that a child who is adopted after his or her parent's death would not, because of that adoption, lose an entitlement under a trust to share in that parent's estate. Finally we recommend reforms to trustees' powers to pay out capital and income for the benefit of beneficiaries before they become entitled to the trust fund outright.

#### **Part 5: intestacy: the administration of estates**

- 1.92 Part 5 looks at a group of issues relevant to the administration of intestate estates. The first is about the cost of tracing relatives generally, and we recommend no change to the rule that the cost of tracing should be a liability of the estate rather than being imposed solely upon beneficiaries whom the personal representatives have had to trace. We then look at the rules surrounding the identification of the deceased's father, where he was not married to the deceased's mother, and recommend a change to modify a legal presumption.
- 1.93 Next we consider the small payments regime, whereby under the current law certain estates can be administered without a grant of letters of administration or indeed of probate where there is a will. There is clearly some dissatisfaction with this regime, but it is apparent from consultation responses that such a reform raises issues beyond the scope of this project; so we have made no recommendation for reform, but have recommended that the situation be examined further by Government.
- 1.94 We then examine the rules on appropriation and self-dealing and conclude that it would be inappropriate to recommend any change to these rules as they apply to administrators of intestate estates. Finally we look at the rules of survivorship, and the rules about accounting for earlier benefits; we make no recommendations for reform of either.

#### **Part 6: family provision: other applicants**

- 1.95 We then turn to the law of family provision, examining the position of applicants other than the surviving spouse. We begin with children, and the question whether an order for the benefit of a child of the deceased might cease to be limited by the "maintenance" standard of provision. We conclude that it should not, after careful consideration of the difficult issues that arise when a will, or the intestacy rules, have the effect of diverting assets away from a child of the deceased.
- 1.96 We go on to examine the concept of the "child of the family", and we recommend that the eligibility of that class of applicant should no longer be limited to situations where the deceased was married or in a civil partnership. We also consider the current restrictions on making a family provision application as a

<sup>101</sup> See paras 1.54 to 1.55 above.

dependant.<sup>102</sup> The statute refers to the deceased having assumed responsibility for the maintenance of the applicant; we recommend that an assumption of responsibility by the deceased, distinct from the fact of maintenance, should not be required in order for an applicant to qualify as a dependant. We also conclude that it should no longer be necessary for such an applicant to prove that the deceased contributed more to the relationship, in terms of financial value, than did the applicant; that opens the door for claims in cases of interdependence. Finally, we ask whether the class of potential applicants for family provision should be widened, and conclude that it should not.

### **Part 7: family provision: general**

- 1.97 In Part 7 we look at some more general points about claims for family provision and the orders that can be made.
- 1.98 We examine first the “domicile precondition”: the rule that an order for family provision can only be made if the deceased died domiciled in England and Wales, and we recommend reform of that precondition. We then consider two related points about grants of representation, recommending that it should not be necessary for there to be a grant before a family provision claim is made, and also a clarification as to which grants of representation set time running for the purpose of the time limit for bringing a family provision claim. Next we turn to two different types of property and some issues about whether and how they may form part of the net estate. We first consider property held on a joint tenancy and make recommendations for reform; we then discuss pension funds and conclude that there should be no change to their treatment. Finally we look briefly at points of detail about the orders that the court can make and make recommendations for reform to give the court greater flexibility.

### **Part 8: cohabitants**

- 1.99 Part 8 relates to the entitlement of cohabitants. Our main recommendation is that in certain circumstances a person who lived in the same household as the deceased and as his or her spouse up until the date of death should have the same entitlement as a spouse under the intestacy rules, provided that the deceased was not married or in a civil partnership at the date of death. In order to qualify for that entitlement on intestacy, the cohabitation must have lasted either for five years, or – if the couple had a child together who was living in the same household at the date of death – for two years. We also recommend reform to permit a claim for family provision by the survivor of a shorter cohabiting relationship who had a child with the deceased.
- 1.100 We have kept this discussion of cohabitants separate because our recommendations are embodied in a separate draft Inheritance (Cohabitants) Bill. That Bill pre-supposes the reforms already recommended in Parts 2 to 7, which would be given effect by the draft Inheritance and Trustees’ Powers Bill. The provisions of the Inheritance and Trustees’ Powers Bill would constitute a self-contained package which we think might well be suitable for introduction to Parliament by means of the Special Public Bill procedure for Law Commission

<sup>102</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(e).

Bills.<sup>103</sup> Our recommendations in relation to cohabitants are kept separate because their implementation raises three different issues which do not apply to the draft Inheritance and Trustees' Powers Bill.

- 1.101 The first is a matter of value judgement. Our recommendations are firmly grounded in consultation responses and in the available evidence of public opinion; but public recognition of cohabiting relationships is a matter of some political debate to the extent that our other recommendations are not. We think that to keep the discussion and the draft Inheritance (Cohabitants) Bill separate will facilitate that debate, whilst ensuring that decisions on the recommendations embodied in the draft Inheritance and Trustees' Powers Bill are not coloured by that debate.
- 1.102 Secondly, implementation of our recommendations for cohabitants may turn out to have a link, in practical terms, with the reform of the law relating to remedies for cohabitants on separation during lifetime. We remain convinced that the introduction of such remedies is right, as we said in the Cohabitation Report.<sup>104</sup> We also think that it is inevitable, given the increasing prevalence of cohabitation,<sup>105</sup> that public support for reform will strengthen further over time. Other jurisdictions that have introduced an intestacy entitlement for cohabitants as well as financial remedies on separation during lifetime have done so at different times and in different orders. So the two reforms are not necessarily linked, but it seems useful to set out the reform of the law of succession for cohabitants in a separate Bill so that the two issues can be considered together if that is found to be useful in due course.
- 1.103 Indeed, there may be some practical virtue in linking the two reforms. One of the arguments against reform of the intestacy rules in favour of cohabitants is the expectations of the public. Many members of the public think that cohabitants do already have an entitlement on intestacy, which may be one of the reasons why we have heard so many stories of cohabitants left in a situation of hardship because their partners did not make a will. There is a myth that cohabitants are "common law spouses".<sup>106</sup>
- 1.104 In other words, the public is not entirely well-informed about the legal status of cohabitants. We believe that that status should change in two respects, first in

<sup>103</sup> This procedure was recommended by the House of Lords Procedure Committee in February 2008, initially on a trial basis: Law Commission Bills, First Report of the Procedure Committee of the House of Lords (2007-8) HL 63. The Committee subsequently recommended that the procedure be made permanent: Law Commission Bills, Second Report of the Procedure Committee of the House of Lords (2010-11) HL 30; this has been approved by the whole House: *Hansard* (HL), 7 October 2010, vol 721, col 224.

<sup>104</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307. The Government has stated that it does not intend to take forward these recommendations in the current Parliamentary term: see Written Statement, *Hansard* (HL), 6 September 2011, vol 730, cols WS18 to WS19.

<sup>105</sup> See para 8.5 below.

<sup>106</sup> The British Social Attitudes survey in 2006 found that 51% of respondents believed that an unmarried couple who live together for some time "definitely" or "probably" have a "common law marriage" which gives them the same legal rights as married couples: see A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media", in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (2008) pp 40 to 42.

terms of remedies on lifetime separation and second in terms of the intestacy entitlement. If both changes happened together, there might well be less confusion in the minds of the public, less chance of misinformation and fewer wrong choices being made as a result.

- 1.105 Thirdly, there is an issue of timing and impact. Certain other changes will have to take place when the law is reformed to give cohabitants an entitlement on intestacy. The most obvious one is the changes required to the Non-Contentions Probate Rules.<sup>107</sup> Such changes do generate cost, particularly in the short term and we consider that the importance of change in this area justifies such cost. Realistically, we recognise that the financial constraints upon public services at present may mean that it is impracticable to implement immediately the reforms we recommend for cohabitants.

### **Appendices**

- 1.106 Appendix A contains the draft Inheritance and Trustees' Powers Bill, which would put into effect our recommendations in Parts 2 to 7. There then follows Appendix B, with the draft Inheritance (Cohabitants) Bill, which would put into effect our recommendations in Part 8. Both draft Bills are presented with explanatory notes.
- 1.107 Appendix C sets out the membership of our advisory group.<sup>108</sup> For ease of reference, we include HM Revenue & Customs' analysis of net estates reported for probate at Appendix D,<sup>109</sup> and the current text of the 1975 Act at Appendix E. Finally, Appendix F lists the respondents to the Consultation Paper and Supplementary Consultation Paper.

### **Analysis of responses and impact assessments**

- 1.108 Reference is made throughout this Report to the views expressed by consultees and other stakeholders with whom we have met. We have also produced a detailed analysis of all of the responses we received to the Consultation Paper and Supplementary Consultation Paper. Separate impact assessments have been produced for each of the draft Bills. All of these additional documents can be downloaded from the Law Commission website.<sup>110</sup>

### **ACKNOWLEDGEMENTS**

- 1.109 We would like to thank all of those who responded to the Consultation Paper for their detailed and thoughtful contributions, which have informed the final recommendations set out in this Report.
- 1.110 A number of individuals and organisations have given us particular assistance during the project and we would like to record our appreciation here.

<sup>107</sup> See para 8.131 and following below.

<sup>108</sup> See para 1.111 below.

<sup>109</sup> See para 1.35 above.

<sup>110</sup> <http://www.justice.gov.uk/lawcommission/areas/intestacy-and-family-provision-claims-on-death.htm>.

- 1.111 Throughout the project we have had the benefit of an expert advisory group, comprised of academics and practitioners with specialist knowledge of these areas of the law. We thank them for the time and expertise they have contributed to the project.
- 1.112 During the consultation period we held a number of events to explain our provisional proposals and publicise the consultation. We would like to thank Blake Laphorn solicitors, the Chancery Bar Association, the Institute of Advanced Legal Studies, and the Lesbian and Gay Lawyers Association for hosting seminars. We would also like to thank those who invited us to speak to them about the project: the District Probate Registrars annual meeting; Farrer & Co; Henmans LLP; Irwin Mitchell LLP; the Law Society's Wills and Equity Committee; Mishcon de Reya; the Money and Property Committee of the Family Justice Council; Taylor Wessing LLP; and Wedlake Bell LLP.
- 1.113 The project has benefitted from access to new empirical data, discussed above.<sup>111</sup> We would like to thank Professor Gillian Douglas and Hilary Woodward of the University of Cardiff, and Alun Humphrey, Matthew Barnard and Gareth Morrell from NatCen for undertaking the Nuffield Survey, and the Trustees of the Nuffield Foundation for funding the project. We thank Sharon Witherspoon of the Nuffield Foundation for all her help. We would also like to thank NatCen for the focus group research undertaken on our behalf; and John Haskey (Visiting Senior Research Fellow, Department of Social Policy and Intervention, University of Oxford) for undertaking demographic research to assist the project and advising us generally on demographic issues.
- 1.114 We must also record our appreciation to the many who gave up their time to meet with us to discuss specific aspects of the project both in their personal capacity and as representatives of their organisations. They include:
- (1) members of the judiciary: Sir Mark Potter (when he was President of the Family Division of the High Court); Mr Justice Henderson (in his role as Chairman of the Civil Procedure Rules Committee); Chief Chancery Master Jonathan Winegarten and Masters Bowles, Teverson and Moncaster; and Senior District Judge of the Family Division Phillip Waller;
  - (2) academics: Professor Anne Barlow of the University of Exeter; Jo Miles of Trinity College, Cambridge; Dr Mike Murphy of the London School of Economics; and Dr Debora Price of King's College London;
  - (3) organisations: the Association of Muslim Lawyers (Nazia Rashid and Hajj Ahmad Thomson), who met us together with His Honour Judge Abbas Mithani QC and Taha M Dharsi; the Association of Pensions Lawyers (Jonathan Moody of Mayer Brown solicitors and James Clifford of Maitland Chambers); the Bank of England (John Heath, Antony Beaves and Ed Dew); the British Association for Adoption and Fostering (Alexandra Conroy Harris and Julia Feast); and the Trust Law Committee (John Dilger);

<sup>111</sup> See para 1.30 and following above.

- (4) legal practitioners and other professionals: Georgia Bedworth, Toby Boutle, Richard Dew, Gregory Hill, Richard Wallington and Michael Waterworth of Ten Old Square, Lincoln's Inn; Darelle Borthwick of Jackson McDonald solicitors in Perth, Western Australia; Gilead Cooper of 3 Stone Buildings, Lincoln's Inn; Andrew Francis of Serle Court chambers; Tim Elkins, James Furber and Simon Pring of Farrer & Co; Giles Harrap of 3 Pump Court, Middle Temple; Chris Jarman of 13 Old Square, Lincoln's Inn; Michelle Johnson of the Society of Trust and Estate Practitioners branch in Sydney, New South Wales; Maggie Rae of Clintons solicitors; Richard Roberts of Gedye & Sons solicitors; Sidney Ross of 11 Stone Buildings, Lincoln's Inn; and Paul Saunders of Barclays Wealth; and
  
- (5) officials at: the Bona Vacantia Division of the Treasury Solicitor's Department; the Cabinet Office; the Department for Children, Schools and Families (now the Department for Education); the Government Actuary's Department; HM Courts Service; HM Revenue & Customs; HM Treasury; the Legal Services Commission; the Ministry of Justice; the Office of the Official Solicitor; and the Probate Service.

## **PART 2**

# **THE SURVIVING SPOUSE**

### **INTRODUCTION**

- 2.1 Part 3 of the Consultation Paper reviewed the position of a surviving spouse of a person who dies intestate, and also raised some issues about family provision for a surviving spouse.<sup>1</sup>
- 2.2 In this Part of this Report we set out the background to a spouse's entitlement on intestacy. We then review our provisional proposals and make recommendations for reform of the law in cases where the deceased is survived by a spouse and no children, and where there are children who also survive. We look at the definition of "personal chattels" under the intestacy rules and recommend reform. We also consider how the statutory legacy might be updated in the future, as well as the rate of interest payable when a statutory legacy remains unpaid. Finally we look at issues that may arise from the wording of the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act") in the context of a family provision claim by a spouse.

### **BACKGROUND**

- 2.3 If a person who dies intestate was married or in a civil partnership at the date of death, his or her widow or widower will usually take an entitlement under the intestacy rules as a surviving spouse.<sup>2</sup> If a decree absolute of divorce, or a final dissolution order in relation to a civil partnership, has been made, the ex-spouse does not qualify for entitlement as a spouse under the intestacy rules.<sup>3</sup> The same result is reached if a decree of judicial separation has been made and the separation is continuing at the date of death, or if both spouses die within 28 days of one another; in both cases, the survivor is deemed by statute not to have survived for the purposes of the intestacy rules.<sup>4</sup>
- 2.4 As we noted in Part 1, the surviving spouse takes priority to all other relatives under the intestacy rules. In all cases, the surviving spouse takes all of the deceased's "personal chattels", but he or she may have to share the rest of the estate with the deceased's children or other descendants, parents or full siblings. Where the estate is shared, the spouse's priority is ensured by the payment of the statutory legacy; if the value of the estate does not exceed the applicable level of the statutory legacy, then the spouse takes the whole estate.
- 2.5 When first introduced in 1925 the statutory legacy was set at £1,000, which at that time was sufficient to ensure that most estates passed in their entirety to a

<sup>1</sup> We use that term to mean husbands, wives and civil partners.

<sup>2</sup> If the marriage or civil partnership was void, the person will not qualify as a surviving spouse or civil partner. However, if it was voidable, and not annulled during the deceased's lifetime, then he or she will qualify, because a voidable marriage or civil partnership is valid unless annulled.

<sup>3</sup> If the deceased died before a decree nisi was made absolute, or a conditional order made final, then the survivor will still qualify as a surviving spouse since the marriage or civil partnership ended by death and not by divorce or dissolution: *Re Seaford* [1968] P 53.

<sup>4</sup> Matrimonial Causes Act 1973, s 18(2) and Civil Partnership Act 2004, s 57.

surviving spouse. Over time, inflation eroded the level of the statutory legacy and changing patterns of property ownership meant that more married couples lived in a home owned by one or both of them. This led to concerns that insufficient provision might be made for surviving spouses, most often widows and particularly where the family home had been solely owned by the husband.<sup>5</sup> To address these concerns, the levels of statutory legacy have been increased periodically, albeit at irregular intervals.

- 2.6 There are now two levels of statutory legacy: a lower level of £250,000 which applies where the deceased also left children or other descendants, and a higher level of £450,000 which applies where the deceased left no children or descendants but is survived by at least one parent or full sibling.<sup>6</sup> These figures are the result of the most recent increase in the levels of statutory legacy which came into effect for deaths from 1 February 2009. The levels are now such that at least 90% of surviving spouses will in fact inherit the whole estate where the lower level applies (and at least 98% where the higher level applies). These figures emerged from our work with HM Revenue & Customs and have been very helpful in clarifying the impact of the current law.<sup>7</sup>
- 2.7 The position of a surviving spouse is most precarious where he or she has little or no beneficial interest in the family home, typically because it was owned by the other spouse. If the surviving spouse's entitlement under the intestacy rules is insufficient to purchase the deceased's interest in the family home, he or she may be forced to move. In the Consultation Paper we explained that it is not possible to produce a reliable figure for the number of such cases that may arise each year beyond estimating that it is likely to be very few following the most recent increases in the levels of the statutory legacy.<sup>8</sup>
- 2.8 Balanced against the concern for surviving spouses is a countervailing concern for the children of the deceased. In the common situation where the family home is owned by a couple as beneficial joint tenants (though as consultees have pointed out, this may be less common among elderly married couples), the whole property and other jointly owned assets, such as the proceeds of a joint bank account, pass to the surviving spouse automatically by operation of the doctrine of survivorship. The value of the assets subject to the intestacy rules is unlikely significantly to exceed the statutory legacy. A surviving spouse will therefore inherit most or all of the deceased's assets, leaving little or nothing for any children or other descendants. Some regard this as providing too much for a surviving spouse at the expense of the deceased's children (who may or may not also be the children of the surviving spouse). This conundrum was summed up neatly by Boodle Hatfield in their response to the Consultation Paper:

It is very difficult to set the spouse's entitlement at the "right" level. If it is too high, children will effectively be excluded from most estates

<sup>5</sup> S Cretney, "Intestacy Reforms – The Way Things Were, 1952" [1994] *Denning Law Journal* 35, 36 to 37.

<sup>6</sup> Family Provision (Intestate Succession) Order 2009, SI 2009 No 135, art 2.

<sup>7</sup> See Appendix D.

<sup>8</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 ("Consultation Paper"), paras 3.23 and 3.24.

anyway but too low and spouses may still not be adequately provided for.

- 2.9 When the Law Commission last reviewed this area of the law it recommended that a surviving spouse should be entitled to the entire estate in all cases.<sup>9</sup> Concerns were raised in Parliament that children would be “disinherited” and this recommendation was not accepted by Government.<sup>10</sup> But the statutory legacy was then much lower than it is now, even accounting for inflation. We also now have the benefit of clear evidence of the proportion of estates that are likely to fall below the level of the statutory legacy and therefore pass in their entirety to the surviving spouse under the current law.
- 2.10 Against this background, we provisionally proposed that a surviving spouse of a person who dies intestate should inherit the entire estate where there are no surviving children or other descendants. Where the deceased left children or other descendants as well as a spouse, we made no provisional proposals. Instead, we set out a series of options for reform and asked for consultees’ views. Those options were:
- (1) the current law, which gives the surviving spouse a statutory legacy and then a life interest in half of the balance (if any);
  - (2) a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any); or
  - (3) a regime that focuses on the family home, either by providing that the surviving spouse inherits the deceased’s share in the family home in any event (possibly up to a value limit), or by raising the statutory legacy but requiring the surviving spouse to account, against that legacy, for any share of the family home passing by survivorship.<sup>11</sup>
- 2.11 Some consultees expressed a preference for one or more of the options we set out and others suggested different approaches or variations on our models.
- 2.12 For a significant minority of consultees, the needs of a surviving spouse should always trump those of any other potential beneficiary. There should therefore be no question of sharing the estate, whatever its size and whatever mechanism is adopted. At the other end of the spectrum are those who believe that the interests of surviving spouses have been allowed to dominate the debate over reform of the intestacy rules.
- 2.13 These represent the extremes. The middle ground is occupied by those who believe that the law should continue to give precedence to the needs of a surviving spouse but that the deceased’s children and other descendants should receive something where the estate is of a sufficient size to permit some sharing without reducing the surviving spouse’s standard of living.

<sup>9</sup> Family Law: Distribution on Intestacy (1989) Law Com No 187, para 62.

<sup>10</sup> *Hansard* (HL), 16 June 1992, vol 538, cols 170 to 178; *Hansard* (HL), 13 February 1995, vol 561, col 503.

<sup>11</sup> Consultation Paper, para 3.96.

- 2.14 We consider below each of the three principal options set out above, as well as one that we discussed in the Consultation Paper but decided not to include as one of the main options: whether the rules should distinguish cases where the surviving spouse is not the parent of all of the deceased's children. This is discussed under the heading "children of other relationships". We also consider other suggestions made by consultees.

#### **INTESTACY: SPOUSAL ENTITLEMENT WHERE THERE ARE NO CHILDREN**

- 2.15 We provisionally proposed that where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the surviving spouse, whether or not there are other family members surviving.<sup>12</sup>

#### **Consultation responses**

- 2.16 This provisional proposal was strongly supported by most of the 41 consultees who responded to this question.<sup>13</sup> Several noted that many people would be surprised to know that in such circumstances the surviving spouse has to share the estate with the deceased's parents or siblings.
- 2.17 A number of consultees noted that few wills provide for any part of the estate to pass to relatives other than children where there is a surviving spouse (except in substitution, in the event that the spouse is no longer alive). The Chancery Bar Association and the Association of Her Majesty's District Judges both argued that this reform would have the advantage of reducing the number of applications for family provision by spouses.
- 2.18 There was some concern this might give too much to a spouse in a short marriage or civil partnership, but recognition that the intestacy rules cannot hope to reflect the length and nature of a marriage in a particular case. It was also noted that a parent or sibling who had been dependent on the deceased would be able to bring an application for family provision against the estate.
- 2.19 Some consultees noted that very few estates will be affected by this reform. In the Consultation Paper we drew attention to the research undertaken on our behalf by HM Revenue & Customs, which suggests that no more than 2% of intestate estates are above the £450,000 higher level of statutory legacy.<sup>14</sup> But this was generally cited as a reason to pursue reform to ensure that all surviving spouses in a similar position are treated in the same way.
- 2.20 Of the few voices raised against this proposal, only two set out their reasons. Sheila Campbell argued that assets that the deceased inherited from his or her family, in particular farms, should pass back to the family. She was also concerned that an elderly parent who is vulnerable but not actually dependent on the deceased would not have standing to apply for family provision.<sup>15</sup> Chris Jarman said that, although the provisional proposal "seems deceptively attractive

<sup>12</sup> Consultation Paper, para 3.36.

<sup>13</sup> Analysis of Responses, para 3.1 to 3.16.

<sup>14</sup> Consultation Paper, para 3.31; Appendix D, table 3.

<sup>15</sup> See para 6.81 and following below.

at first sight”, he would like to hear a convincing reason of principle for disinheriting parents or full siblings in these cases.

## Discussion

- 2.21 The principled reason for pursuing this reform, as we noted in the Consultation Paper and as a number of consultees confirmed, is that the effect of the current law runs counter to public expectations. The belief that spouses should inherit the whole of each other’s estates is particularly strong where there are no children to consider.
- 2.22 We now have a measure of public attitudes on this point from the Nuffield survey. In a hypothetical scenario, where a married woman dies intestate and is survived by her husband and mother, respondents expressed the following preferences.
- (1) All to husband: 63%.
  - (2) Priority to husband: 21%.
  - (3) Shared equally: 14%.
  - (4) Either priority to mother, all to mother or other: 3%.<sup>16</sup>
- 2.23 We also now have some indication of the numbers of spouses who might be affected by this reform. Demographic research undertaken on our behalf suggests that there may be around 40,000 people aged over 65 who are married and have a living parent or sibling but no children or grandchildren. This contrasts with an estimated 4.4 million married people in this age group who have a living child or grandchild.<sup>17</sup> When account is taken of the small proportion (around 2%) of intestate estates that exceed the current £450,000 higher level of statutory legacy, we can see that the numbers affected by this reform are likely to be very small.
- 2.24 In the light of these findings, coupled with the strong positive response on consultation, we consider that the proposed reform should be taken forward. In those relatively rare cases where the deceased leaves one or more dependent parents or full siblings (and does not make reasonable provision for them in a will), the law recognises their ongoing need for maintenance by giving them standing to make an application for family provision.<sup>18</sup>
- 2.25 **We recommend that where a person dies intestate and is survived by a spouse but no children or other descendants the whole estate should pass to the surviving spouse.**
- 2.26 Clause 1(2) of the draft Inheritance and Trustees’ Powers Bill puts this recommendation into effect by amending the table at section 46(1) of the Administration of Estates Act 1925.

<sup>16</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 38 and 120.

<sup>17</sup> J Haskey, “Intestacy and surviving kin: Law Commission research” [2010] *Family Law* 964, unpublished data.

<sup>18</sup> See paras 6.43 to 6.46 and 6.84 to 6.88 below; Consultation Paper, paras 6.32 to 6.36.

## **INTESTACY: SPOUSAL ENTITLEMENT WHERE THERE ARE CHILDREN**

2.27 The Consultation Paper considered separately the situation where a person dies intestate and is survived by a spouse and also by children or other descendants. We anticipated that views as to the appropriate distribution of the estate would vary far more widely than in the case where a spouse is “competing” only with the deceased’s parents or siblings. We therefore made no provisional proposals but instead set out options for reform.<sup>19</sup>

### **All to spouse in every case**

2.28 We first asked whether the intestacy rules should be reformed so as to provide that the whole estate passes to a surviving spouse in every case, whether or not the deceased also leaves children or other descendants.

2.29 There was significant minority support for this option;<sup>20</sup> three main reasons were given. First, a number of consultees said that “all to spouse” reflected their experience of will drafting: one firm said that between 85% and 95% of married clients want their surviving spouse to inherit outright and nearly all the remainder want the surviving spouse to be given a life interest over the whole estate. But other respondents with practical experience of will drafting indicated that many testators take care not to exclude their children, particularly children from a previous relationship.

2.30 Secondly, others favoured this option on the basis that it is most likely to meet the needs of the surviving spouse and family, particularly where there are minor children. Helen Whitby said that she would support any reform that gave more to a spouse than at present: “There may be a need to retain a statutory legacy but in my opinion this should be only where there are minor children of the intestate who are not in the care of the spouse.”

2.31 Thirdly, Jo Miles questioned on principle the basis for providing any automatic entitlement for children on intestacy, noting that there is nothing in English law akin to “forced heirship” to prevent a testator disinheriting his or her children. She also noted that changing the law in this way would essentially just bring the law into line with the way that it operates in practice already in the vast majority of estates which fall below the level of the statutory legacy.<sup>21</sup>

2.32 The voices in favour of this option were, however, significantly outnumbered by those against.<sup>22</sup> Many consultees, including organisations representing large numbers of legal professionals, were firmly opposed. The nature of the opposition was put succinctly by the Society of Legal Scholars working group:

It was felt that there was something inherently and intuitively unfair in an intestacy law that ignored the child of the family and allowed the entire estate (whatever its value) to devolve absolutely to the surviving spouse.

<sup>19</sup> Consultation Paper, para 3.96.

<sup>20</sup> Analysis of Responses, para 3.19 and following.

<sup>21</sup> See para 2.6 above.

<sup>22</sup> Analysis of Responses, para 3.23 and following.

- 2.33 As noted above, “all to spouse in every case” was the only one of the four recommendations that the Law Commission made in the 1989 Report that was not accepted by Government.<sup>23</sup> It still has many merits. On a practical level, there would be no need to retain and periodically update any statutory legacy; and in those estates where the deceased leaves both a surviving spouse and children, administration would be greatly simplified and there would be no further automatic creation of life interest trusts or statutory trusts for minor beneficiaries.
- 2.34 Nevertheless, we accept the points made by the many consultees who opposed this option. The current rules give primacy to the needs of a surviving spouse. Nothing we have heard has persuaded us to change that, but in a significant number of estates there is more than enough to ensure that the surviving spouse is well provided for. We therefore agree that there should be some mechanism under the intestacy rules for sharing the rest of the estate with the deceased’s children.
- 2.35 We also now have a measure of public attitudes from the Nuffield survey. In a hypothetical scenario, where a married man dies intestate survived by his wife and two children aged over 18:
- (1) 51% of participants favoured “all to wife”;
  - (2) 29% favoured “priority to wife”;
  - (3) 16% opted for “shared equally”; and
  - (4) 5% chose either “priority to children”, “all to children” or “other”.<sup>24</sup>
- 2.36 The equivalent figures for the same scenario but with two young children instead of two children over 18 were very similar (50%, 26%, 17% and 7% respectively).<sup>25</sup>
- 2.37 These results on their own appear to show a bare majority in favour of “all to spouse”. However, three further scenarios explored attitudes towards the position of a surviving second wife, where the husband had been married before and had children from that earlier marriage. The results will be set out in more detail below when we consider the position of “children of other relationships” but it is worth noting that support for the “all to spouse” option varied between 11% and 16%.
- 2.38 It is clear therefore that a recommendation that a spouse should take everything in every case would not accord with public attitudes and would run counter to the views of most consultees (despite persuasive voices in favour of this approach). We therefore make no such recommendation. What is apparent, however, from consultation responses and the public attitude survey, is the strong support for maintaining the priority that is accorded to a surviving spouse under the current intestacy rules. Although we have rejected the “all to spouse in every case”

<sup>23</sup> See para 2.9 above.

<sup>24</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 39 and 120.

<sup>25</sup> Above, pp 39 to 40 and 120.

approach, we are conscious that any reform that we do recommend should not reduce the current entitlement of a surviving spouse.

### **Retaining the current law**

- 2.39 Having accepted that larger estates should be shared between a surviving spouse and the deceased's children, the question is how that sharing should be done. One option is to retain the current law, under which a surviving spouse receives the deceased's personal chattels, a statutory legacy at the prevailing rate, and a life interest in half of anything that is left.
- 2.40 The Consultation Paper outlined the major practical concern with the current law, which is the automatic creation of a life interest in larger estates (which a spouse can choose to capitalise if certain conditions are met).<sup>26</sup> England and Wales appears to be the only common law jurisdiction where the law generates a life interest on intestacy.
- 2.41 Consultees expressed considerable criticism of the current law.<sup>27</sup> Sidney Ross echoed the views of many when he said that: "The present system is unwieldy and outdated. To put it colloquially, it is more trouble than it is worth." It was noted that family provision claims by spouses often include objections to the imposition of a life interest trust. Abolishing them could therefore reduce litigation.
- 2.42 The range of arguments made by consultees in favour of reforming the current automatic creation of life interests can be broadly summarised as follows:
- (1) a clean break is preferable, especially where there are tensions between the surviving spouse and other members of the deceased's family;
  - (2) a trust structure limits the ability of the surviving spouse to deal freely with assets subject to the life interest;
  - (3) proper trust administration is expensive, disproportionately so where the life interest is in a small fund;
  - (4) the provisions which allow a surviving spouse to capitalise the life interest are complicated and little used; and
  - (5) in the current economic climate, any returns are likely to be modest.
- 2.43 Of those consultees who supported retention of the current law, few gave reasons. A number of other consultees put forward alternative suggestions to those canvassed in the Consultation Paper, which in some cases included a life interest as part of the surviving spouse's entitlement.
- 2.44 Overall, however, responses strongly confirmed our initial view expressed in the Consultation Paper that the automatic creation of life interest trusts is a cumbersome and inappropriate mechanism for the distribution of an intestate estate. We therefore recommend below reform that would end the automatic

<sup>26</sup> Consultation Paper, paras 3.66 to 3.74.

<sup>27</sup> Analysis of Responses, para 3.31 and following.

creation of a life interest on intestacy. This would not, of course, prevent families from agreeing their own arrangements, subject to all relevant parties being of full age and capacity, which may well include the creation of one or more trusts. But in our view the law should not impose a trust in these circumstances.

### **Options that focus on the family home**

- 2.45 In many cases a married couple will own their family home as beneficial joint tenants. This means that on the death of one spouse, the home will pass automatically to the survivor. This is a form of inheritance that is unaffected by the intestacy rules or the terms of any will. In other cases, the family home may be in the deceased's sole name, or owned as beneficial tenants in common, which means that the deceased's share does fall into his or her estate. Under the current law, a surviving spouse has the right in such circumstances to require that the family home is transferred to him or her. If the home, or the deceased's share in it, is worth more than the amount which the spouse is entitled to receive from the estate, then the spouse can pay the difference to the estate (this is sometimes referred to as "equality money").<sup>28</sup> We intend to retain that right under any reforms to the intestacy rules.
- 2.46 Another approach canvassed in the Consultation Paper for sharing an intestate estate in these circumstances was to focus on the family home. We set out two rather different options:
- (1) reform to ensure that a surviving spouse always inherits the deceased's share of their family home (perhaps up to some value limit and perhaps in addition to a smaller statutory legacy than at present); or
  - (2) reform to require a surviving spouse to account (perhaps in the context of a larger statutory legacy), for any share of the family home which passed automatically by survivorship.<sup>29</sup>
- 2.47 However, there was little support for either of these options.<sup>30</sup> A number of consultees emphasised the potential complexity: the Chancery Bar Association said any such system would be "unwieldy in its application", and the Law Society considered that "it would introduce unwelcome complexity and discrepancies".
- 2.48 Consultees also questioned whether the impact on a surviving spouse of having to move home is sufficiently serious to justify special treatment of the family home. A further concern was that any reform which elevated the status of real property over other assets in an intestate estate could produce unfortunate results in some cases; for example, where a couple sold their home and invested the proceeds to pay for residential care shortly before one of them died. The Norwich and Norfolk Law Society expressed this concern very clearly:

... regardless of the sentimental value that a home can have, it was not appropriate to treat assets which were held in bricks and mortar differently to assets held in other forms, such as savings and

<sup>28</sup> Intestates' Estates Act 1952, s 5 and sch 2.

<sup>29</sup> Consultation Paper, para 3.96.

<sup>30</sup> Analysis of Responses, para 3.55 and following.

investments. We felt that this could cause significant unfairness in a number of cases; an individual beneficiary should not be better off because their spouse kept property as opposed to stocks and shares.

2.49 The Family Law Bar Association noted that, because of significant differences in house price across England and Wales, reform along these lines would have a very different outcome in regions other than the South East of England. For others, however, this was one advantage of these proposals; a statutory legacy that is fixed at the same level for everyone has much less “buying power” in areas of the country where house prices are high. Paul Saunders suggested that a surviving spouse should be given the option of receiving either the family home or a statutory legacy.

2.50 We share many of the concerns raised by consultees about the complexity and potential for unfairness generated by any reform that treats the family home in a different way to other assets in the estate. The weight of opposition from consultees has confirmed our view that this is not an approach that should be taken forward as the basis for reform of the law in this area.

#### **A statutory legacy and fixed share of any balance**

2.51 The third option canvassed in the Consultation Paper was to provide that a surviving spouse receives a statutory legacy and a fixed share of any balance of the estate (instead of a life interest in half of the remainder).

2.52 This would mean that no life interests would be created as a result of the intestacy rules. Testators would remain free to provide for life interests in wills and the beneficiaries of an intestate estate could, subject to agreement or the consent of the court, create one by a deed of variation.

2.53 This was the option most widely supported by consultees.<sup>31</sup> The arguments against the current law, summarised above,<sup>32</sup> are all arguments in favour of a change to a statutory legacy with a fixed share of the balance. The creation of life interests under the current law is generally disliked; it was felt by many consultees that the change to a fixed share is a straightforward and effective way to provide properly for the surviving spouse.

2.54 A number of consultees saw an advantage in the fact that there would be no need for an ongoing financial relationship between the surviving spouse and the children of the deceased once the estate had been distributed. This could be particularly beneficial where family relations are strained, for example, where the deceased had remarried and has children from an earlier marriage. Some consultees drew an analogy with the approach taken by the courts in ancillary relief proceedings on divorce or dissolution of a civil partnership, where a “clean break” between the former spouses is considered desirable if that can be achieved. They argued that our provisional proposal would achieve a similar outcome in the context of an intestacy.

<sup>31</sup> Analysis of Responses, para 3.40 and following.

<sup>32</sup> See para 2.42 above.

- 2.55 However, the prospect of this reform raises the question of the share of the estate that a surviving spouse should receive. The two options canvassed in the Consultation Paper were a third or a half of any balance of the estate after payment of the statutory legacy. These are the only fixed shares that apply in those jurisdictions that operate such a system and no consultee suggested any other fraction, though not all consultees who supported the fixed share approach addressed this subsidiary question.
- 2.56 The Government Actuary's Department maintains tables which set out the multiplier to be used when calculating the capital value of a life interest created under the intestacy rules. The capitalised value of a life interest depends on the size of the estate and the gender and age of the surviving spouse: the older the surviving spouse, the less his or her life interest would be worth. By contrast, a fixed share of the remainder of the estate after payment of the statutory legacy would always be the same for any given size of estate, no matter what the age and gender of the surviving spouse. Therefore, a move from life interests to fixed shares would change the entitlement of some beneficiaries.
- 2.57 A fixed share of a third of the remainder of the estate after payment of the statutory legacy would produce results that are in many cases close to the outcome of the current law. The Association of Her Majesty's District Judges noted that this "achieves approximately the same result as under the present law, but without the complication of a life interest". The position of older surviving spouses (those aged around 60 when widowed) would be improved, whereas younger spouses would receive less than they would under the current law. In the Consultation Paper we commented that this may be an appropriate result, as older spouses are more likely to be in financial need and with less earning power.<sup>33</sup> One consultee, however, disagreed strongly with this analysis.<sup>34</sup>
- 2.58 A half share is attractive for a number of reasons. Most significantly, there is no case in which a surviving spouse of a person who dies intestate would do less well under this reform than under the current law; an absolute interest is always worth more than a life interest. However, the corollary is that, where the estate exceeds the level of the statutory legacy, the children of the deceased will receive less. They will inherit immediately the same amount as under the current law but will lose the expectation of the capital subject to the surviving spouse's life interest on his or her subsequent death.
- 2.59 We are persuaded that it is more important to ensure that no surviving spouse would receive less under our reforms than under the current law. As we noted above, consultation responses and the Nuffield survey revealed very strong support for maintaining the priority that is accorded to a surviving spouse under the current intestacy rules.<sup>35</sup> A half share of the balance is also a very simple rule to explain and operate. Once the personal chattels have been dealt with and the statutory legacy has been paid, it is a relatively simple matter to halve anything that is left.

<sup>33</sup> Consultation Paper, para 3.80.

<sup>34</sup> Analysis of Responses, para 3.47.

<sup>35</sup> See paras 2.33 to 2.38 above.

- 2.60 We also note that this reform would leave the inheritance tax position on such deaths unchanged. The inheritance tax legislation treats the life interest under the current intestacy rules as though the spouse were beneficially entitled to the underlying assets; the spouse exemption applies to both the statutory legacy and the half share in the balance subject to the spouse's life interest.<sup>36</sup> That treatment would be the same if the spouse were beneficially entitled to that half share.
- 2.61 Two consultees suggested that we follow the approach adopted in Northern Ireland and a number of other common law jurisdictions,<sup>37</sup> where the surviving spouse is entitled to a statutory legacy and a fixed share of the balance of the estate which varies depending on how many children the deceased left (half if there is one child, a third if there are two or more children). We are not attracted to this idea. It would, in our view, introduce into English law a novel and unwelcome distinction in the treatment of spouses based on the number of children that the deceased had (who may not all be the children of the surviving spouse). It would also detract from the simplicity of the fixed share approach.
- 2.62 **We recommend that where a person dies intestate and is survived by a spouse and children or other descendants, the surviving spouse should receive, in addition to the deceased's personal chattels and a statutory legacy, half of any balance of the estate.**
- 2.63 Clause 1(2) of the draft Inheritance and Trustees' Powers Bill puts this recommendation into effect by amending the table at section 46(1) of the Administration of Estates Act 1925.
- 2.64 Where the value of the estate exceeds the statutory legacy, the children and other descendants of the deceased would share the half of the balance that the spouse did not take.
- 2.65 As noted above, the principal benefit of this reform is that life interest trusts would no longer be created by operation of the intestacy rules. This has one consequence for the administration of estates which we have had to consider, namely the requirement under the current law that, where a life interest arises, representation must be granted to a trust corporation or at least two individuals (unless it appears to the court to be expedient in all the circumstances to appoint an individual as sole administrator).<sup>38</sup> The same rule applies where any beneficiary is a child under 18, so in many cases at least two administrators will be appointed even where there is no life interest. But under our reforms there will be cases where the estate is sufficiently large to be shared between the surviving spouse and the deceased's children but the requirement for two administrators does not apply because there is no minor beneficiary and no life interest. It will be possible for a sole administrator to be appointed and this is likely to be the surviving spouse, who has priority to take a grant of representation.<sup>39</sup>

<sup>36</sup> Inheritance Tax Act 1984, ss 18, 49 and 49A.

<sup>37</sup> Consultation Paper, paras 3.81 and 3.82.

<sup>38</sup> Senior Courts Act 1981, s 114(2).

<sup>39</sup> Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

2.66 We have considered whether to require the appointment of a second administrator in any case where the value of the estate exceeds the prevailing level of statutory legacy. We have decided, however, that this might unnecessarily complicate the administration of those estates where no particular complication or contentiousness arises. In other cases, it is open to a party who has an interest in the estate to apply to be a co-administrator if there are reasonable concerns about the issue of a grant to a sole administrator.<sup>40</sup> This procedure could be used by the deceased's children if they had concerns about administration of the estate by the surviving spouse. The spouse could also nominate any children or other relatives entitled to share the estate to join as co-administrator.<sup>41</sup>

### **Children of other relationships**

2.67 In the Consultation Paper we discussed whether the intestacy rules should take account of the fact that, in some cases, the deceased's children will not also be the children of the surviving spouse. The central premise of "conduit theory", articulated by an American legal academic, is that a surviving spouse in these circumstances cannot be relied upon as a "conduit" to pass inherited wealth down to the deceased's children on his or her own death.<sup>42</sup>

2.68 For the reasons set out in the Consultation Paper,<sup>43</sup> we did not propose reform of the intestacy rules to reflect the concerns of conduit theory. To summarise:

- (1) in many cases there will be no "surplus" for the surviving spouse to pass on to anyone on his or her death, so conduit theory is irrelevant;
- (2) conduit theory paints too simplistic a picture of family relationships: a surviving spouse who is the parent of the deceased's children will not always be a reliable conduit and a step-parent will not always be an unreliable one;
- (3) it is wrong in principle for the entitlement of one spouse to differ from that of another because of the presence of children from other relationships; and
- (4) even if the surviving spouse is the parent of the deceased's children, he or she may remarry or cohabit or simply fall out with the children, potentially diverting some or all of the deceased's wealth to a new partner or other beneficiary (for example, a charity) on his or her death.

<sup>40</sup> Such applications, if disputed, may be required to be made by summons to a district judge or registrar in chambers, or to a High Court judge: see the Non-Contentious Probate Rules 1987, rr 25(2) and 61(1). See also R D'Costa, J Winegarten and T Synak, *Tristram and Cootes's Probate Practice* (30th ed 2006 with 3rd supplement February 2010) paras 7.17 to 7.18.

<sup>41</sup> Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 25.

<sup>42</sup> L Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1990-1991) 76 *Iowa Law Review* 223, 232 to 233.

<sup>43</sup> Consultation Paper, paras 3.98 to 3.111.

2.69 A number of consultees commented on this. In many cases, this was in the context of opposition to any reform which passed the whole estate to a surviving spouse in every case. For example, the Family Law Bar Association responded:

In those now frequently found circumstances where there are second or even third families, the children of the earlier relationships would be unlikely to receive any benefit from their deceased parent's estate, and any surviving parent may not have sufficient funds to make proper provision.

2.70 Jo Miles questioned our assertion in the Consultation Paper that it would be unfair to treat a second spouse less favourably where the deceased has children from other relationships as, in most cases, that spouse will know that he or she is marrying someone with children from a previous relationship.

2.71 The Association of Contentious Trust and Probate Specialists suggested that, when making wills, testators go to considerable lengths to ensure that there is a fair division of family wealth as between children from a first marriage and the spouse and children from a second marriage. But others argued that people who have complicated arrangements and estates in excess of the statutory legacy need to make wills which are tailored to their particular circumstances.

2.72 Two consultees devised alternative reform options to protect the interests of children who are not the children of the surviving spouse. Professor Roger Kerridge said that if the deceased leaves children and also leaves a surviving spouse who is not the parent of any of the children, he would give the surviving spouse no more than a life interest. In other cases he would be prepared "without enthusiasm" to let the surviving spouse have the whole estate. Farrer & Co proposed that the statutory legacy be increased to £1 million where all of the deceased's children are the children of the surviving spouse and to £500,000 in other cases.

2.73 However, there was also clear opposition to any attempt to reflect "conduit theory" in the intestacy rules. Giles Harrap said:

Schemes that reduce the spouse's share if there are children from a former relationship all seem too complex to me and risk creating injustice in the quite common situation where the widow is caring for small children of the deceased's relatively recent marriage to her and the husband had other grown up and wholly independent children from previous relationships.

2.74 And Christopher Jarman noted that conduit theory is not always honoured by a surviving spouse who is the parent of all of the deceased's children:

... even if the other parent was in all cases the surviving spouse, it cannot be assumed that this will mean that the property inherited by her from the deceased will eventually pass to his descendants (so far as remaining at the surviving spouse's death): she may equally well have children from other relationships (born before or after the death of the deceased), or may have remarried. Especially in the latter case, it is far from impossible that her estate would pass to her new spouse, whether or not she leaves a will.

2.75 The fact that so many consultees raised this issue caused us to reconsider the position set out in the Consultation Paper. There are at least two ways in which conduit theory could be expressed in the intestacy rules:

- (1) give the whole estate to a surviving spouse except where there are living children or other descendants from another relationship (in which case some sort of sharing mechanism would be adopted); or
- (2) share any part of the estate that is left after payment of the statutory legacy between a surviving spouse and any children of the deceased, but give a greater share of the estate to the children where some or all of them are not also the children of the surviving spouse.

2.76 Of these two approaches, (1) is the most coherent way of reflecting conduit theory: if a surviving spouse can be relied upon to pass wealth down to his or her own children, there is no need for sharing on the death of the first parent unless there are also children alive who are not the children of the surviving spouse. As we have seen, however, there was considerable opposition to any reform of the intestacy rules that “disinherits” the children and other descendants of the deceased where the estate is large enough to support some sharing with the surviving spouse. Approach (2) is less vulnerable to that criticism. It strikes us, however, that the benefits of reform along these lines would be rather meagre. It would introduce a relatively minor difference in the entitlement of those children whose parent is not the surviving spouse. Where the estate exceeds the statutory legacy by a relatively small amount or there are several children, the actual amount that each child receives will not differ greatly.

2.77 Aside from this practical consideration, there are more fundamental concerns about any attempt to reflect conduit theory in the intestacy rules. It seems inappropriate for a spouse’s entitlement to be determined on the basis of whether the deceased had children from another relationship; it might well be felt that that spouse was being penalised for circumstances beyond his or her control. This might be especially hard where the second spouse was unaware of the existence of children from another relationship, for example where the deceased fathered a child in the course of an extra-marital affair.

2.78 We also question whether any system can adequately reflect the many different factors that may intervene to divert wealth away from the deceased’s children. There is nothing to prevent the surviving spouse from entering into a subsequent relationship which changes the distribution of his or her estate, diverting some or all of the wealth inherited from the deceased away from the deceased’s children. It is possible to design ever-more complex rules to try to reflect these factors; the Uniform Probate Code, which has been adopted at least in part by 18 US states, gives a surviving spouse a reduced entitlement if he or she has a child who is not also the child of the deceased.<sup>44</sup> The complexity that this would introduce into the law would in our view unjustifiably add to the burden on administrators and increase the risk of estates being incorrectly administered.

<sup>44</sup> Uniform Probate Code 2005, s 2-102(3), available at <http://www.law.cornell.edu/uniform/probate.html> (last visited 23 November 2011).

2.79 We also now have the results of the Nuffield survey which shed some light on public attitudes to this issue. The survey presented three hypothetical scenarios in which a man who had been married twice dies intestate leaving:

- (1) a second wife and grown-up children from his first marriage;
- (2) a second wife plus children under the age of 10 from his first marriage;
- (3) a second wife plus children over 18 from both marriages.

2.80 The options presented to participants were:

- (1) all to second wife;
- (2) priority to second wife;
- (3) shared equally between second wife and children;
- (4) priority to children (not an option in the third scenario);
- (5) all to children;
- (6) other.<sup>45</sup>

2.81 The results can be set out as follows:

	Adult children from first marriage	Children under 10 from first marriage	Children from both marriages
All to second wife	15%	11%	16%
Priority to second wife	31%	27%	45%
Shared with second wife and children	35%	34%	19%
Priority to children	13%	21%	NA
All to children	5%	5%	19%
Other	1%	2%	1%

2.82 A number of conclusions can be drawn from these results. We note here that where there are children from both marriages, a far higher proportion of respondents favoured either giving the whole estate to the second wife or giving priority to the second wife (61% in total). It is only where there are no children from the second marriage that support for prioritising the second spouse falls below 50%. It would be possible to devise intestacy rules to reflect these preferences. However, for the reasons set out above, any potential benefits are

<sup>45</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 48 to 50 and 122 to 123.

significantly outweighed by the disadvantages. We therefore remain of the view that the intestacy rules should not make different provision for the children of the deceased who are not also the children of the surviving spouse.

### **Other suggestions**

- 2.83 In addition to commenting on the reform options set out in the Consultation Paper, a number of consultees suggested alternative approaches. For the reasons set out in the discussion below, we do not intend to take forward any of these alternative approaches as recommendations for reform of the law.

### ***Capitalising the value of a life interest***

- 2.84 Two consultees suggested that a surviving spouse should receive the capitalised value of a life interest in half of the remainder of the estate after payment of the statutory legacy (one suggested that the spouse should then have the option to receive the income instead, as under the current law).
- 2.85 Under the current law, a surviving spouse may elect to capitalise the life interest.<sup>46</sup> It appears that this right is rarely exercised and it has been suggested to us that some professional advisers may be unaware that this option is available. We have also been told by the Government Actuary's Department (GAD), which maintains tables which set out the multiplier to be used when calculating the capital value of a life interest created under the intestacy rules, that these are something of a blunt instrument, since they cannot take into account any of the individual's characteristics beyond age and gender. So it seems that the option to capitalise is unpopular at present, and would require a better system of information about capital values if it were to be adopted as a default system. Such a system would be much more complex than a system that gave a fixed share to the surviving spouse. And it would enable the spouse to opt for a life interest, whereas (for the reasons set out above) we do not favour any reform which requires the creation and management of life interest trusts, even in these more limited circumstances.

### ***Rights in the family home***

- 2.86 Some consultees suggested that a surviving spouse should receive a life interest in the home that he or she shared with the deceased.
- 2.87 Life interests in the family home can be easier to manage than life interests in other assets, but problems may still arise, especially in those cases where the spouse wants to move home, or where capital is needed to maintain the property. The suggestion is also vulnerable to the same criticisms that were directed at the "family home" options presented in the Consultation Paper, in particular that it arbitrarily distinguishes between estates that are comprised largely of real property and those where the assets are in some other form.
- 2.88 Sheila Campbell suggested that a surviving spouse should be permitted to stay in the family home for a year after the death. There is precedent under the personal insolvency regime for permitting the spouse of a person who is bankrupt a period

<sup>46</sup> Within 12 months of a grant of representation: Administration of Estates Act 1925, s 47A.

of grace before the home is sold.<sup>47</sup> This sort of reform would nevertheless require the creation of significant new legal machinery, which in our view would be a disproportionate response to the scale of the problem encountered in practice.

- 2.89 A surviving spouse has a statutory right to appropriate the family home. Richard Wallington suggested that appropriating the matrimonial home against the spouse's interest should be made as easy as possible. This statutory right permits a surviving spouse, acting with at least one other administrator, to appropriate the family home in circumstances that might otherwise breach what is known as the rule against self-dealing. We consider this further in Part 5 but, for the reasons set out there, do not recommend any further statutory reform to permit self-dealing by surviving spouses or personal representatives more generally.

#### ***A fixed share of the estate with no statutory legacy***

- 2.90 Some members of the Society of Legal Scholars working group suggested that all intestate estates should simply be divided between the surviving spouse and any children of the deceased. It was suggested that this would ensure that inheritance by children is not confined to larger estates, as small amounts of money may be of disproportionate importance to those on lower incomes. Some members of the City of Westminster and Holborn Law Society also favoured reform that would abolish the statutory legacy. Instead, the estate would be divided in two, with the surviving spouse receiving one half immediately and a life interest in the other half.
- 2.91 This would represent a significant change to the current entitlement of a surviving spouse. As explained above, the purpose of the statutory legacy is to ensure that a surviving spouse only has to share an intestate estate with other beneficiaries where it is sufficiently large to allow sharing without impacting on his or her standard of living (insofar as that is possible, given the size of the estate). Reform along these lines would significantly reduce the entitlement of many surviving spouses and we have therefore not pursued it.

#### ***Defunct marriages***

- 2.92 Cripps Harries Hall LLP suggested that a spouse should not inherit under the intestacy rules if he or she had not been living with the deceased for two or more years before the date of death.
- 2.93 A reform along these lines would be intended to address the situation where a marriage has effectively ended, although the parties have not divorced. Similar suggestions were made by consultees in response to our provisional proposal that a cohabitant should have no automatic entitlement on intestacy where the deceased was still married at the date of death.<sup>48</sup> We made that proposal for the practical reason that administrators should not be required to make a judgement

<sup>47</sup> See the Insolvency Act 1986, ss 335A and 336, the effect of which in practice is that a trustee in bankruptcy will generally delay for a year an application for an order for the sale of the property, or to terminate a spouse's occupation rights: N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007) pp 193 to 196.

<sup>48</sup> See para 8.65 below.

about the quality of the marriage with the deceased. We remain of that view and would not endorse any such approach to a surviving spouse's entitlement on intestacy.

### ***Setting a child's entitlement with a view to inheritance tax***

- 2.94 The Royal Bank of Scotland Trust & Estate Group suggested that where there is an estate large enough to justify sharing between a surviving spouse and any surviving children or other descendants of the deceased, the entitlement of the children or other descendants should be set at the same level as the inheritance tax threshold in force at the time. This would, they reasoned, preserve the non-taxable nature of the estate.
- 2.95 We are mindful of the potential for our provisional proposals to impact on the tax position of beneficiaries. However, the factors relevant to the setting of the inheritance tax threshold are very different from those that have a bearing on the point at which it is appropriate to divide an intestate estate between a surviving spouse and children or other descendants. We therefore do not feel that it would be right to make this sort of link between them. None of our recommendations for reform are motivated by a desire to either save tax or to increase tax revenue; beneficiaries are free to take steps to mitigate their own tax position.<sup>49</sup>

### **PERSONAL CHATTELS**

- 2.96 We have recommended that a surviving spouse should only share the estate under the intestacy rules where there are also surviving children or other descendants; in those circumstances the spouse would take the deceased's personal chattels, a statutory legacy and half of any balance. We now turn to the definition of "personal chattels" for these purposes, which is currently stated in section 55(1)(x) of the Administration of Estates Act 1925:

"Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.

- 2.97 The definition lists both specific classes of article (such as "motor cars") and the rather broader category of "articles of household or personal use or ornament". The authorities indicate that items or collections of items falling within one of the specific classes are always considered to be personal chattels, irrespective of the purpose for which they were acquired and kept and the location of the item during the life of the deceased and at his or her death. But where the item is not specifically listed, the purpose of the acquisition and the manner in which the item

<sup>49</sup> See also the Consultation Paper, para 1.31.

was used and its location will have a bearing on the question of whether it is an “article of household or personal use or ornament”.<sup>50</sup>

- 2.98 This is too complex, and the whole definition has an anachronistic flavour. We provisionally proposed that a revised and simplified statutory definition of personal chattels be provided. We also suggested that only items used by the deceased exclusively or principally for business purposes at the date of his or her death should be excluded from the definition, to ensure that items which had only incidental business use should pass to the surviving spouse as of right.<sup>51</sup>

### **Consultation responses**

- 2.99 Almost all consultees who expressed a view agreed that the current definition of personal chattels is antiquated and should be revised and simplified.<sup>52</sup> It was even suggested that the word chattels is itself outdated and that the statute should refer instead to “personal possessions”. Many consultees also noted that disputes over the deceased’s personal chattels have the potential to become very intense and out of all proportion to the value of the items in dispute.
- 2.100 There was also general support for a clarification of the current exemption of items used for business purposes, especially as more people now work from home. There was concern, however, that administrators should be able to take possession of items which may have been used only partly for business purposes but which are nevertheless important for the continuation of the deceased’s business (for example, a home computer with business files saved on it).
- 2.101 Other voices, however, cautioned against change for change’s sake, noting that the courts have liberally interpreted the current statute and thereby avoided many of the problems that might otherwise be caused by the archaic wording.
- 2.102 There was little enthusiasm for the possibility of limiting in some way the value of individual items that could be treated as personal chattels. One consultee saw merit in setting some limit on the proportion of the value of an estate that could pass to a surviving spouse as personal chattels; another argued that aircraft, large boats and caravans should be specifically excluded. It was also suggested that a spouse should receive either the family home and its contents or a statutory legacy with which to purchase any chattels.

### **Discussion**

- 2.103 Consultation responses have reinforced our view that the definition of personal chattels under the current law should be simplified and modernised.
- 2.104 However, it would not be practicable to remove the list of specific items from the current definition of personal chattels, leaving only “articles of household or

<sup>50</sup> So a collection of clocks purchased and maintained purely as an investment would pass to the surviving spouse because (it was held) clocks are furniture; whereas a collection of watches would probably not do so because it is not among the items specifically listed and therefore the use to which it was put would become relevant (*Re Crispin’s Will Trusts* [1975] Ch 245, 251). See also C H Sherrin and R C Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 11-011.

<sup>51</sup> Consultation Paper, para 3.132.

<sup>52</sup> Analysis of Responses, paras 3.89 to 3.99.

personal use or ornament”. That would not fully capture the nature of the property that should continue to pass to a surviving spouse as a matter of course. Nor are we attracted to the idea of updating the list to reflect more modern items. One of the chief criticisms of the current definition is that it lists specific items which may have been commonplace in 1925 but now appear anachronistic; any modern list of items risks the same fate in future. So a more fundamental re-casting of the statutory definition is required.

- 2.105 Historically, the term personal chattel was used to refer to property that is tangible and movable. It therefore excluded any land or interest in land (whether legal or equitable, freehold or leasehold) and also intangible assets such as patents, copyrights and “choses in action” (a debt owed to the deceased, for example). The current statutory definition of personal chattels includes only items that are tangible and movable. The specific exclusion for money and securities for money, which in most but not all cases are likely to be intangible anyway, puts beyond doubt that they are not to be treated as personal chattels.
- 2.106 These concepts provide a suitable basis for a revised statutory definition of personal chattels for the purposes of the intestacy rules.<sup>53</sup> Re-casting the definition in terms of “tangible movable property” (and retaining the exclusion of money and securities for money)<sup>54</sup> would not significantly widen or narrow the scope of the definition in practice, but should make the statute less obscure and easier to apply to items that may be found in a modern estate that may not have been anticipated by the drafters of the 1925 Act (a smartphone, for example).
- 2.107 We take the view that the current position requires two further reforms. First, the exception for business property should apply only if the primary use to which the item was being put at the date of death was business use. That meets consultees’ concerns about home working and business use.
- 2.108 Secondly, we favour introducing a further exception: property held by the deceased at the date of death solely as an investment. This is intended as a narrow exception to exclude chattels which cannot properly be described as personal because they were only held in the expectation that they would increase in value (or possibly to hold their value or not decrease in value as much as other assets). Where that is the case, the chattel is functionally no different to cash or shares held by the deceased and in our view should form part of the residuary estate rather than passing to the surviving spouse along with items which had genuine personal use.
- 2.109 We would stress, however, that this recommendation is intended to exclude chattels held solely for investment purposes. Chattels may be purchased and kept both as an investment and to be enjoyed; a ring that the deceased bought to wear, or a painting to hang on the wall of the family home, may also have been purchased in the hope that it would represent a good investment. This investment potential may even have been the primary motivation for the purchase. We take the view that such items should only fall outside the definition of personal chattels

<sup>53</sup> There is recent statutory precedent for this approach: the Finance Act 2004, sch 15, para 1, defines “personal chattels” as any tangible, movable property other than money.

<sup>54</sup> Many securities for money are excluded because they are not tangible but specific provision has to be made to exclude tangible securities, such as items pledged for cash.

if, at the date of the deceased's death, they were owned solely for investment purposes. Any personal use should be sufficient to ensure that it passes to the surviving spouse. In particular, we think that any test that was based on the intention of the deceased towards the chattel (for example, whether the primary purpose for which the deceased purchased the item was as an investment) would encourage difficult and often disproportionately expensive litigation.

2.110 We do not propose to adopt the suggestion that certain items such as aeroplanes or yachts should be expressly excluded from the definition of personal chattels. First, these are items that are unlikely to feature in very many estates. Secondly, for the reasons set out above, we doubt the wisdom of referring to specific items in the statute. We are also not attracted by the suggestion that a spouse should be forced to choose between receiving personal chattels along with the family home or a statutory legacy with which to purchase them. This would not fit with the broader reform we recommend for spouses.

2.111 **We recommend that a surviving spouse should receive all of the deceased's tangible movable property other than such property which:**

- (1) **consists of money or securities for money;**
- (2) **was used at the death of the deceased solely or mainly for business purposes; or**
- (3) **was held at the death of the deceased solely as an investment.**

2.112 Clause 3 of the draft Inheritance and Trustees' Powers Bill puts this recommendation into effect by substituting a new section 55(1)(x) of the Administration of Estates Act 1925 in place of the current provision.

2.113 Many pre-existing wills refer to personal chattels, often by reference to section 55(1)(x) of the Administration of Estates Act 1925. The Society of Trust and Estate Practitioners suggested that a revised definition of personal chattels should apply to pre-existing wills. We are concerned that this may contradict the express intention of the testator in some cases. Clause 3(2) of the draft Inheritance and Trustees' Powers Bill therefore provides that any reference to personal chattels within the meaning of section 55(1)(x) in a will or codicil executed before commencement of this reform should continue to be interpreted as a reference to the current wording.

## **REVIEWING THE STATUTORY LEGACY**

2.114 Under the current law there are two levels of statutory legacy: a higher level (currently £450,000) that is payable when the deceased survived by a spouse and one or more parents or full siblings but no children or other descendants; and a lower level (currently £250,000) that is payable where the deceased was survived by a spouse and one or more children or other descendants.<sup>55</sup> Under our recommendation that a surviving spouse should receive the whole estate unless the deceased was also survived by one or more children or other descendants, the higher level of statutory legacy would no longer be relevant.

<sup>55</sup> Family Provision (Intestate Succession) Order 2009, SI 2009 No 135, art 2.

- 2.115 The current levels of statutory legacy were implemented following a lengthy process which included public consultation by the Ministry of Justice.<sup>56</sup> Because this process was undertaken so recently, we did not ask consultees for their views on what the levels of statutory legacy should be. Our provisional proposals focused instead on the way in which those levels are reviewed.
- 2.116 The Lord Chancellor has power to fix the level of statutory legacy from time to time.<sup>57</sup> There is, however, no requirement for this power to be exercised at any particular intervals. Nor is the Lord Chancellor required to take into account any particular factors when determining the appropriate levels of statutory legacy.
- 2.117 We provisionally proposed that the level of the statutory legacy should be reviewed at least every five years.<sup>58</sup> We also provisionally proposed that the statutory legacy, if it is retained and if it is still required to be linked to house prices, should be raised in line with the average rate of increase, if any, of house prices across England and Wales on each occasion.<sup>59</sup>

### **Consultation responses**

- 2.118 There was general consensus among consultees that the level of statutory legacy should be regularly reviewed.<sup>60</sup> A number of consultees expressed concern that the most recent increase, which took effect for deaths from 1 February 2009, was the first for 16 years. The Office of the Official Solicitor noted that many problematic cases in the past were related to the low level of statutory legacy but these increases should mean that there are fewer problems in future.
- 2.119 Views as to the appropriate interval between reviews differed. Many consultees agreed with the provisional proposal of a review “at least every five years”, some noting that this should mean a review during every Parliament. Some consultees thought that five years was too short an interval, suggesting reviews every 10 or even 20 years. However, others favoured more frequent reviews, perhaps annually or every two years.
- 2.120 Consultees’ views differed also on whether the level of statutory legacy should be linked to any particular measure of economic growth and, if so, which one. Some felt that a link to house prices would be appropriate because the retention of the family home may be a central concern of those who have been bereaved. Others noted that this may cause discrepancies where there is no real property in the estate, as house prices have tended to rise more steeply than other prices. It was noted that house prices vary widely across the country, though there was acceptance that the level of statutory legacy could not be set on a regional basis. A number of consultees said that house prices should not be the only factor influencing the review. The Society of Trust and Estate Practitioners suggested that the goal of each review should be to set the level of statutory legacy so that

<sup>56</sup> Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005); Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008).

<sup>57</sup> Family Provision Act 1966, s 1.

<sup>58</sup> Consultation Paper, para 3.143.

<sup>59</sup> Consultation Paper, para 3.144.

<sup>60</sup> Analysis of Responses, para 3.100 and following.

90% of intestate estates pass entirely to the surviving spouse and only larger estates are shared with the deceased's children.

- 2.121 In addition to commenting on the reform options set out in the Consultation Paper, a number of consultees made additional suggestions. Two consultees (the Chancery Bar Association and Christopher Jarman) suggested that reviews might be undertaken on an “upward only” basis so that the level of statutory legacy can never be reduced. Others, however, stated that those reviewing the statutory legacy should have the option of recommending no change or even a reduction in the level, if economic circumstances at the time warranted such a conclusion. Christopher Jarman also suggested that “the legislation should aim for a process which is as nearly automatic as can be achieved, so as to avoid the potential for either a waste of time and resources on frequent consultation or criticism for failure to consult.”

### **Discussion**

- 2.122 In the Consultation Paper we suggested that the statutory legacy might be raised in line with the average rate of increase, if any, of house prices across England and Wales. We remain of the view that one function of the statutory legacy is to enable a surviving spouse to remain in the family home (insofar as that is possible without giving the whole estate to the spouse in every case). Therefore, any mechanism to routinely update the statutory legacy should take some account of house price inflation.
- 2.123 We have, however, been persuaded that the statutory legacy should not be linked exclusively to house price inflation. As noted in the Consultation Paper, it is not possible to determine with any precision how many spouses risk being forced to move from their family home because the statutory legacy is insufficient, but we estimate that the actual number is very small, especially since the statutory legacy levels were significantly increased in 2009.<sup>61</sup> We also take the point made by some consultees that many estates do not include real property, such as those where the family home was rented or was owned but passed to the spouse by survivorship and therefore did not form part of the estate. A statutory legacy exclusively linked to house prices would therefore be inappropriate in many cases. As the Ministry of Justice review noted, house price inflation varies so widely between the different regions of England and Wales that a national measure would not reflect the reality in many areas.<sup>62</sup>
- 2.124 Further discussions with those in Government responsible for maintaining the levels of statutory legacy, together with our analysis of the consultation responses to these questions, have led us to the view that the best approach going forward would be to introduce a statutory indexation mechanism. The level of statutory legacy would be updated periodically by reference to the retail prices index (RPI). The RPI is a widely used measure of inflation which is published on a monthly basis by the Office for National Statistics.<sup>63</sup> It includes certain housing costs (council tax, mortgage interest repayments, house depreciation, buildings

<sup>61</sup> Consultation Paper, paras 3.22 to 3.24.

<sup>62</sup> Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy* (2005), para 58.

<sup>63</sup> <http://www.ons.gov.uk> (last visited 23 November 2011).

insurance, ground rent and estate agents' and conveyancing fees) not included in the consumer prices index (CPI). Using RPI means that future increases in the statutory legacy will reflect house price inflation to some extent but also reflect inflation in the rest of the economy and across the country as a whole. For practical purposes, any figure arrived at by the simple application of a measure of inflation should be rounded up to the nearest £1,000.

2.125 We have decided against annual updates. The actual increase would be relatively small on each occasion and therefore of limited effect. Updating every year would also be a potential source of confusion and error in the administration of estates. Instead, we recommend that these index-linked updates should take place at least every five years. In other words, the interval between any two updates should not be longer than five years but it may be shorter.

2.126 These index-linked updates are intended to be “upwards only”. The level of statutory legacy can only increase or stay the same as a result of the automatic update process. Should there be deflation between updates, for example, it will be for the Lord Chancellor to decide whether to reduce the level of statutory legacy.

2.127 We also consider that the Lord Chancellor should be given discretion to substitute a different measure of inflation in place of the RPI but should explain his reasons for any exercise of this power in a statement to Parliament. This will give sufficient flexibility to choose a measure of inflation that is considered to be most appropriate or to cater for the possibility that the RPI is no longer published. The coalition programme commits the present Government to working with the Bank of England to investigate how the process of including housing costs in the CPI measure of inflation can be accelerated.<sup>64</sup> It may therefore be that in future the CPI becomes a more appropriate measure of inflation for these purposes and should be used instead of RPI.

2.128 **We recommend that:**

- (1) **the Lord Chancellor must, at intervals of not more than five years, specify by statutory instrument the amount of the fixed net sum payable under the intestacy rules;**
- (2) **unless the Lord Chancellor otherwise determines, the amount of the fixed net sum must be index-linked by reference to the increase in the retail prices index since the previous amount was fixed (rounded to the nearest £1,000 above the figure produced by this index-linking);**
- (3) **if the Lord Chancellor otherwise determines, a report must be laid before Parliament stating the reason for the determination; and**
- (4) **the Lord Chancellor may by statutory instrument substitute for the retail prices index some other measure of inflation.**

<sup>64</sup> HM Government, *The Coalition: our programme for government* (2010) p 9.

- 2.129 Clause 2 and schedule 1 of the draft Inheritance and Trustees' Powers Bill give effect to these recommendations by adding a new schedule 1A to the Administration of Estates Act 1925.
- 2.130 This system for updating the level of statutory legacy is intended to replace that currently found in the Family Provision Act 1966 and to enable that Act to be repealed. The levels of statutory legacy applicable to estates where the death occurred before the new system comes into force will be left unchanged.

## **INTEREST ON THE STATUTORY LEGACY**

### **Setting the interest rate**

- 2.131 Under the current law, a surviving spouse of a person who dies intestate is entitled to interest on the statutory legacy for the period from the death until payment "at such rate as the Lord Chancellor may specify by order". The current rate of 6% per annum has not changed since 1983.<sup>65</sup> We agree with Richard Wallington's comment that this rate of interest is now far out of line with commercial rates and should be reviewed. It is now so high that it appears punitive and risks unfairness to other beneficiaries. This echoes comments we have heard from legal practitioners outside the formal consultation process. A related complaint is that it can be difficult to locate information on the rate.
- 2.132 We have concluded that the rate of interest payable on the statutory legacy should be aligned with the Bank of England official bank rate. This has the advantage of being well publicised and easy to find for any given date.<sup>66</sup>
- 2.133 This does present one potential disadvantage. The rate is set by the Bank of England's Monetary Policy Committee and reconsidered at the Committee's monthly meetings. Although the rate has remained unchanged for some time, it can potentially fluctuate on a monthly basis (or indeed more frequently than that, as the Bank of England has power to change the rate at any time).<sup>67</sup> Any changes between the date of death and the date on which the statutory legacy is paid might complicate the administration of the estate, as administrators would be required to undertake potentially difficult calculations to apply the correct interest rate to different periods during which the statutory legacy was unpaid.
- 2.134 One way to avoid this is to fix the rate of interest as that prevailing at the date of death of the deceased. Because any changes in the rate are generally announced and take effect from midday, it would be necessary to make clear that the relevant rate is the rate prevailing at the end of the day on which the deceased died. The Lord Chancellor should retain power to set a different interest rate, for example if changes in the official bank rate mean that it no longer represents an appropriate rate of interest for these purposes.

<sup>65</sup> Intestate Succession (Interest and Capitalisation) Order 1977 (Amendment) Order 1983, SI 1983 No 1374, art 2.

<sup>66</sup> <http://www.bankofengland.co.uk> (last visited 23 November 2011).

<sup>67</sup> Bank of England Act 1998, part 2.

2.135 **We recommend that, unless the Lord Chancellor decides otherwise, interest on the fixed net sum payable under the intestacy rules should be at the Bank of England official bank rate that had effect at the end of the day on which the deceased died.**

2.136 Clauses 1(3) and 1(4) of the draft Inheritance and Trustees' Powers Bill put this recommendation into effect by substituting a new subsection (1A) of section 46 of the Administration of Estates Act 1925 in place of the existing subsection and inserting new subsections (5) to (9).

#### **Simple not compound interest**

2.137 During the course of our consultation we have become aware that there is debate among practitioners over whether interest on the statutory legacy should be calculated on a simple or compound basis. It seems to be the general practice to use the simple basis of calculation. One reason appears to be a feeling that, if compound interest were intended, it would be expressly provided for in the statute. There are, however, examples of simple interest being expressly provided for in statute.<sup>68</sup>

2.138 We take the view that it is more appropriate for interest to be calculated on a simple rather than a compound basis and consider that it would be helpful to make this clear in the statute so that administrators and their legal advisers no longer have any cause for doubt.

2.139 **We recommend that interest on the statutory legacy should be calculated on a simple basis.**

2.140 Clause 1(2) of the draft Inheritance and Trustees' Powers Bill puts this recommendation into effect by adding the word "simple" before the word "interest" in the table at section 46(1) of the Administration of Estates Act 1925.

#### **FAMILY PROVISION FOR SPOUSES AND THE COMPARISON WITH DIVORCE**

2.141 When hearing an application for family provision by a surviving spouse, the court is required to have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce (or dissolution of a civil partnership).<sup>69</sup> This has become known as the "deemed divorce" test or analogy. We noted in the Consultation Paper that two issues had been raised with us in connection with this provision:<sup>70</sup>

(1) the direction to the court to "have regard to" what the spouse might have received on divorce or dissolution of a civil partnership may be being wrongly applied as setting a ceiling or cap on the amount of family provision that a surviving spouse may be awarded; and

(2) the analogy may be upsetting to recently bereaved spouses.

<sup>68</sup> See, for example, section 35A(1) of the Senior Courts Act 1981.

<sup>69</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 3(2).

<sup>70</sup> Consultation Paper, paras 3.145 to 3.150.

- 2.142 No consultation questions were asked about either of these issues and there were no formal consultation responses to the discussion in the Consultation Paper. However, when we met with the Chancery Masters (including Chief Chancery Master Jonathan Winegarten) during the consultation period, they considered that it may be helpful to clarify that the divorce analogy does not set a “ceiling” on the level of family provision that a spouse may receive.
- 2.143 As discussed in the Consultation Paper, the deemed divorce analogy has its genesis in Law Commission work, which concluded that:
- So far as is practicable in the differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on divorce.<sup>71</sup>
- 2.144 The draft Bill produced by the Law Commission used the “have regard to” formulation which was carried through into the 1975 Act.<sup>72</sup> It is clear that this notional ancillary relief award was never intended to set a ceiling or cap on the family provision award. We do not think that this is a widespread misconception but if it is the case that awards are being made on that erroneous basis then there is a risk that spouses may be prejudiced by not receiving as much as they might if the legislation were correctly applied.
- 2.145 We do not, however, take the view that the provision that a spouse might expect to receive on divorce or dissolution of a civil partnership must in all cases represent the minimum amount of family provision to which he or she is entitled. Although the divorce analogy does not set a “ceiling” on the award it will not in all cases be the “floor” and we do not want to fetter judges’ freedom to make appropriate orders in those cases. We are also concerned that any such reform would encourage parties to attempt the sort of “slavish and wholly artificial comprehensive enactment of the ancillary relief process” that has been rejected by the courts as a wasteful exercise.<sup>73</sup> Courts should continue to have regard to the divorce analogy but should not, in our view, be unduly constrained by it.
- 2.146 **We recommend that, when hearing an application for family provision by a surviving spouse under the Inheritance (Provision for Family and Dependants) Act 1975, the court is to have regard to the provision the applicant might have expected to receive on divorce or dissolution of a civil partnership but is not required to treat such provision as setting an upper or lower limit on the provision which may be ordered.**
- 2.147 Paragraph 6(2) of schedule 2 to the draft Inheritance and Trustees’ Powers Bill puts this recommendation into effect by amending section 3(2) of the 1975 Act.
- 2.148 We are aware of the distress that can be caused by the statutory reference to divorce or dissolution of a civil partnership. But it would in our view be difficult to

<sup>71</sup> Family Law: Second Report on Family Property, Family Provision on Death (1974) Law Com No 61, para 2(b).

<sup>72</sup> Above, Appendix 1.

<sup>73</sup> *P v G* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431 at [67], by Black J.

frame a provision in terms that have identical effect to the current statute while omitting the reference to divorce or dissolution of a civil partnership, without inadvertently changing the substantive law (or at least opening the door to litigation over whether the substantive law has changed). We are therefore not minded to recommend statutory reform.

- 2.149 We do however consider that there is scope for a change of practice in this area. During the course of our project we have been made aware that some practitioners use forms designed for use in ancillary relief proceedings (following a divorce or dissolution of a civil partnership) when advising clients who are seeking family provision after the death of a spouse. These forms are used to obtain from the bereaved spouse information about his or her financial assets and needs, and are carefully designed to cover different kinds of assets and possibilities; but the language of divorce and dissolution is inappropriate in the context of bereavement and can cause unnecessary distress to clients.<sup>74</sup> Some practitioners adapt the forms to avoid this language; used in this way, these forms can be extremely helpful in eliciting detailed financial information about the needs and financial resources of the parties that is necessary for the court and legal advisers to make a clear assessment of the merits of the application.
- 2.150 We would urge practitioners to ensure that the paperwork they ask their clients to supply does not cause distress in this way, by adapting the forms for use in these circumstances. We have discussed our views with the Wills and Equity Committee of the Law Society, who have expressed agreement with us.
- 2.151 We did not ask any other consultation questions about the law of family provision as it relates specifically to a surviving spouse. One consultee, however, asked us to consider the setting aside of gifts or other dispositions at an undervalue made with the intention of defeating a claim. He noted that the courts have broader powers to do so in relation to a claim for ancillary relief on divorce or dissolution of a civil partnership than they do in the context of a family provision claim. He suggested that the two regimes should be more closely aligned to avoid unfair results if one spouse dies while proceedings for ancillary relief are ongoing.<sup>75</sup>
- 2.152 The Law Commission has previously considered this question as part of the project which led to the enactment of the 1975 Act.<sup>76</sup> A working paper published in 1971 provisionally proposed that the anti-avoidance provisions of the new family provision statute should be modelled on those then available to the court in ancillary relief proceedings.<sup>77</sup> These included the ability to challenge transactions made at any time, including prospective transactions, and a rebuttable presumption that a “reviewable disposition” made within three years of a petition

<sup>74</sup> For example, parties are referred to as “petitioner/respondent in the divorce/dissolution suit” and are asked to state the date of their separation and divorce petition and whether they have remarried or formed a new civil partnership: Form E, available at [http://hmctsfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=1125](http://hmctsfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=1125) (last visited 23 November 2011).

<sup>75</sup> Analysis of Responses, para 3.123.

<sup>76</sup> Family Law: Family Property Law (1971) Law Commission Working Paper No 42; Second Report on Family Law: Family Provision on Death (1974) Law Com No 61.

<sup>77</sup> Family Law: Family Property Law (1971) Law Commission Working Paper No 42, paras 3.69 to 3.75.

for divorce or dissolution was made with an intention to defeat the ancillary relief claim.<sup>78</sup> Following consultation, however, the Law Commission concluded that it would not be appropriate to replicate these provisions in the new family provision legislation.<sup>79</sup> In particular, it was recognised that it might be difficult for those defending a family provision claim to discharge the burden of rebutting a presumption as to the intentions of a person who has died. The Law Commission therefore recommended specific anti-avoidance provisions for family provision claims, limited to dispositions made within six years before death and requiring the necessary intention to be established in all cases on a balance of probabilities.<sup>80</sup>

- 2.153 We are not persuaded that it would be appropriate to reopen that decision now, especially as this was not a question on which we consulted as part of this project. We are concerned that any attempt to replicate in the family provision context the broader anti-avoidance provisions available to a court considering a claim for ancillary relief might complicate the administration of estates. For example, if the law were changed to allow dispositions made more than six years before the death to be challenged, this might raise considerable evidential difficulties. The current law may seem unfair where one spouse dies during ancillary relief proceedings (though such cases will be rare and it will be rarer still that the spouse who died has sought to dispose of assets at an undervalue to frustrate those proceedings). But we remain of the view that there are fundamental differences between a claim for family provision and a claim for ancillary relief, and that it would not be appropriate to try to align the two regimes any more closely than they are at present.

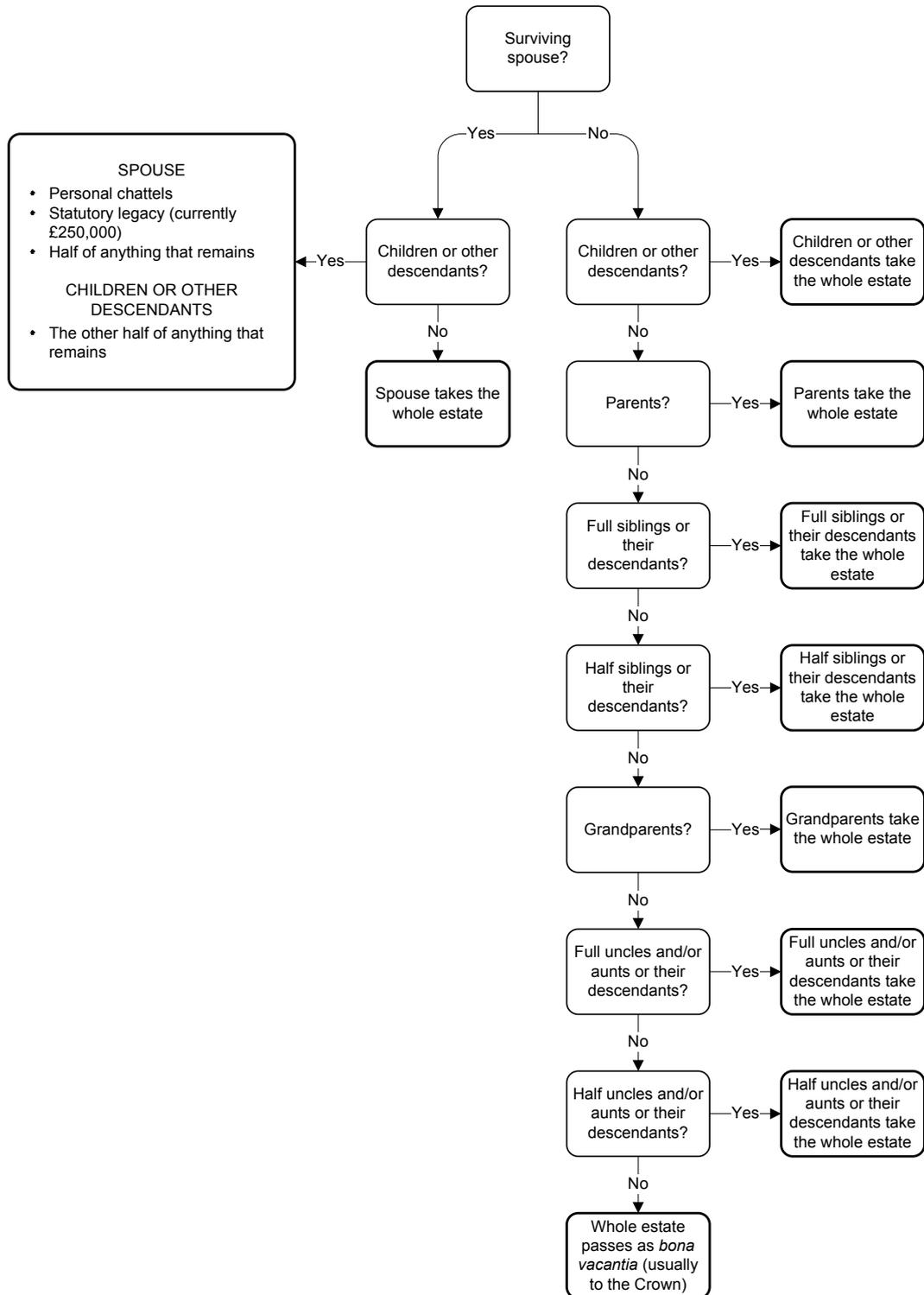
<sup>78</sup> Matrimonial Proceedings and Property Act 1970, s 16. By the time of publication of the Second Report, these provisions had been repealed and re-enacted in section 37 of the Matrimonial Causes Act 1973.

<sup>79</sup> Second Report on Family Law: Family Provision on Death (1974) Law Com No 61, paras 190 to 197.

<sup>80</sup> Above, paras 199 to 205 and 211; Inheritance (Provision for Family and Dependents) Act 1975, ss 10 and 12(1).

## SUMMARY OF REFORMS

2.154 Below we set out a diagram which summarises the way in which an estate would be distributed among the surviving relatives of a person who has died intestate under the reforms recommended in this Part.



# **PART 3**

## **INTESTACY: OTHER RELATIVES**

### **INTRODUCTION**

- 3.1 In Part 2 we considered the entitlement of spouses when one party to a marriage or civil partnership dies intestate. Where there is no surviving spouse, the children and (depending on the circumstances) other descendants of the deceased form the first category of relatives entitled to the estate. We do not recommend any change to this order of entitlement, though we discuss in Part 4 some more technical issues about the way in which estates are distributed between the different generations.
- 3.2 We now turn to entitlements on intestacy for other family members. As we noted in Part 1, the intestacy rules operate on the basis of a hierarchy, with each class of family members becoming entitled only if there is no one in the preceding class (save in the relatively rare cases where the surviving spouse shares the estate with those next entitled). So a sibling of the deceased will take the estate only if the deceased's parents did not survive him or her, and so on. The diagram in Part 1, on page 12, sets out the full range of possible beneficiaries on intestacy.
- 3.3 In this Part we discuss the intestacy entitlements of parents and siblings, and we also discuss what the legislation calls relationships “of the full blood” and “of the half blood”. We also look at what happens to the estate where the deceased left no family within the categories identified by the intestacy rules. We ask whether the categories should be widened to include more remote relatives, and whether the system of *bona vacantia*<sup>1</sup> should be reformed.
- 3.4 In Part 8 we recommend an extension of the categories of persons entitled on intestacy; we recommend that cohabitants who meet certain qualifying criteria should have an entitlement. If that recommendation is accepted, then qualifying cohabitants would be entitled only if there were no surviving spouse, but would take in priority to children and other descendants of the deceased, and the relatives discussed in this Part. However, as discussed in Part 1,<sup>2</sup> we take the view that the reforms we recommend for cohabitants are best regarded as a separate package; consistent with that, we discuss other relatives here before we address the reform that would give cohabitants priority to them.

### **PARENTS AND SIBLINGS**

- 3.5 We have recommended that if a person dies intestate leaving a spouse and no children or other descendants, the spouse should take the whole estate.<sup>3</sup> That would mean that the parents or siblings of someone who has died intestate would only inherit if the deceased left no surviving spouse or children; the estate would no longer be divided between the deceased's surviving spouse and his or her parents or siblings.

<sup>1</sup> See para 1.56 above.

<sup>2</sup> See para 1.99 and following above.

<sup>3</sup> See para 2.25 above.

- 3.6 As the intestacy rules currently stand, where there is no surviving spouse or children or other descendants the whole estate will pass to any surviving parent or parents of the deceased. If neither parent survives, it will be inherited by any surviving siblings. The children or other descendants of a sibling who has already died can inherit in their parent's place,<sup>4</sup> and references to siblings in this Part should be taken as including their children and other descendants where appropriate.<sup>5</sup>
- 3.7 In the Consultation Paper we considered whether the intestacy rules should be reformed on this point. We put forward two alternatives. The order could be reversed, so that siblings would inherit in preference to parents and the deceased's parents would only be able to inherit if the deceased was not survived by any siblings. Alternatively, provision could be made for parents and siblings to share the estate. We did not make a provisional proposal, but asked consultees whether the current preference in the intestacy rules for parents over siblings should be retained.<sup>6</sup>

### **Consultation responses**

- 3.8 Consultees generally favoured retaining the current law.<sup>7</sup> It was noted that parents, being older than siblings of the deceased, are more likely to be in financial need; and to have incurred expense in supporting and bringing up the deceased. Consultees also envisaged that to the extent that the parents did not need the money, they might well pass it on to the surviving siblings, either by lifetime gifts or on death. While some drew our attention to the inheritance tax benefits of leaving money direct to the siblings, the majority noted that in appropriate circumstances a deed of variation of the intestate estate could be used to mitigate inheritance tax.
- 3.9 We noted in the Consultation Paper that no clear consensus of opinion emerged from the empirical research then available to us,<sup>8</sup> although preference for parents over siblings was expressed by participants in the NatCen focus groups.<sup>9</sup> The Nuffield survey included a hypothetical scenario concerning a woman who dies and is survived by her mother and a sibling – specified as a brother for half of the survey sample, and a sister for the other half.<sup>10</sup>

<sup>4</sup> See paras 1.54 and 1.55 above.

<sup>5</sup> Here we use the term "siblings" to mean both full siblings and half siblings. As explained at paras 3.16 to 3.17 below, full siblings and their descendants have priority over half siblings and their descendants.

<sup>6</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 ("Consultation Paper"), para 6.46.

<sup>7</sup> Analysis of Responses, paras 6.61 to 6.75.

<sup>8</sup> Consultation Paper, para 6.41.

<sup>9</sup> National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009) pp 17 to 18.

<sup>10</sup> To avoid a gender bias: National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 63 to 65 and 123.

The results can be set out as follows:

	Woman dies, survived by her mother and brother	Woman dies, survived by her mother and sister
All to her mother	21%	17%
Priority to her mother	20%	22%
Shared equally	51%	54%
Priority to brother/sister	6%	4%
All to brother/sister	1%	2%
Other	1%	1%

- 3.10 The most popular single option was equal sharing between the mother and brother or sister; but the options giving all or most of the estate to the mother were far more popular than those giving all or most of the estate to the brother or sister.

### Discussion

- 3.11 One of the challenges that we have had to address in analysing the results of the Nuffield survey is the approach that we should take in cases where most respondents favoured a solution that involved sharing between two classes of beneficiary. There were a number of such cases; and this is perhaps unsurprising, because a sharing option can appear to resolve a difficulty without refusing an entitlement to anyone. But there are disadvantages to such a solution in practice. Because most intestate estates are of relatively low value, in many cases any division between classes of beneficiary will mean that each individual receives very little. Sharing is also more complicated for administrators, particularly where the estate comprises property that would need to be sold so that its value could be shared. So we hesitate to adopt sharing solutions in general.
- 3.12 In this particular case, we considered the sharing option in the light of demographic factors. Our work with HM Revenue & Customs indicated that the average person dying intestate dies at age 73,<sup>11</sup> and data from the Nuffield survey suggest that only around 6% of people aged 65 to 74 have at least one surviving parent.<sup>12</sup> So the practical disadvantages of introducing a shared entitlement for parents and siblings would not be outweighed by a great deal of benefit. Parents will not inherit under the intestacy rules in any case where the deceased was survived by a spouse, children or other descendants, and it will therefore only be in a very few cases that parents stand to inherit on intestacy at

<sup>11</sup> Appendix D, table 6.

<sup>12</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010), unpublished data.

all. In these cases, parents are likely to be elderly and more in need of financial assistance than siblings.<sup>13</sup>

- 3.13 In the light of these points, and of consultees' responses and the Nuffield survey results, we have concluded that the current law should remain as it stands. Although sharing has an instinctive appeal, because it seems to address both parents' probable needs and the benefits of making gifts direct to siblings, we think that a preference for parents over siblings strikes the right balance. Accordingly we make no recommendation for change to the current preference for parents over siblings in the intestacy rules.

### **Estranged parents**

- 3.14 One consultee favoured sharing an intestate estate between parents and siblings, as a response to the difficulty that arises when the deceased was estranged from one of his or her parents.<sup>14</sup> In such a case the parent stands to benefit even if he or she played little or no part in the deceased's life, simply because of the legal relationship between them. Under the current law there is no way to take the inheritance away from the estranged parent. We explained in Part 1 why it is not appropriate to re-fashion the basis of the intestacy rules to enable distribution to be varied on a discretionary basis in cases where a beneficiary is, or appears to be, undeserving.<sup>15</sup> And to introduce a shared entitlement for parents and siblings would diminish but would not take away the entitlement of an estranged parent, and might well be unacceptable where siblings were estranged.
- 3.15 Clearly, there are families where the intestacy rules produce inappropriate and distressing results. We are not persuaded that such situations would become any less frequent if the order of priority between parents and siblings were changed.

### **FULL SIBLINGS AND HALF SIBLINGS**

- 3.16 If the deceased leaves no parents, the intestate estate passes to his or her siblings, if any. The current law makes a distinction between full siblings and half siblings – those who share both parents with the deceased, and those who share only one.<sup>16</sup>
- 3.17 Full siblings take precedence over half siblings in the intestacy rules; so a half sibling does not inherit if any full sibling (or a child or other descendant of a full sibling) survives the deceased.<sup>17</sup> If no parent, sibling or half sibling survives, and the deceased also leaves no surviving grandparent, then full siblings of the deceased's parents (that is, the deceased's aunts and uncles) are entitled in priority to half siblings of the deceased's parents.

<sup>13</sup> That may not be so where, for example, there is a disabled sibling; but in such a case the family might well decide that a deed of variation was appropriate.

<sup>14</sup> Analysis of Responses, para 6.67.

<sup>15</sup> See paras 1.19 to 1.22 above.

<sup>16</sup> They are referred to in the intestacy rules as "brothers and sisters of the whole blood" and "brothers and sisters of the half blood": Administration of Estates Act 1925, s 46(1).

<sup>17</sup> Administration of Estates Act 1925, s 46(1).

- 3.18 In the Consultation Paper we asked whether consultees would favour reform to the intestacy rules so that no distinction is drawn between full and half siblings. Our question was prompted partly by the fact that many other common law jurisdictions either do not distinguish between full and half siblings in this way or have pending recommendations from their law reform bodies to remove the distinction. More importantly, however, we were concerned that the distinction might, in the context of modern families, have fallen out of step with public expectations.<sup>18</sup> We noted that if there were reform to that effect, it would have to be carried through to the Non-Contentious Probate Rules 1987, so that full and half siblings would not only share equally in an intestate estate, but would also have the same entitlement to take out a grant of representation.<sup>19</sup>

### **Consultation responses**

- 3.19 Consultees' responses were mixed, and there was no strong majority opinion.<sup>20</sup> Several of those in support of reform noted that nowadays it is more common for full and half siblings to be brought up in close contact with one another, so that, as the Society of Trust and Estate Practitioners observed, they "tend to think of themselves as just 'siblings'". That suggests that siblings should be regarded as one class of beneficiary; and indeed the City of Westminster and Holborn Law Society noted that the distinction is no longer observed in other legal contexts.<sup>21</sup>
- 3.20 Whichever view they took, consultees recognised that half siblings may be very close, or hardly know each other, depending on the family context. The reform envisaged in our question to consultees would apply not only in a family where all siblings are in close contact, but also in one where the deceased and his or her half siblings had little or nothing to do with each other (for example, if the deceased's parents broke up and one moved away to start another family). The intestacy rules must distribute the estate on the basis of the blood relationship between the beneficiary and the deceased, not the emotional connection. This led the Law Reform Committee of the Bar Council to argue that:

It is not easy to see how one rule can cover both. ... There is some sense in the presumption that you are closer to your full siblings, than your half siblings.

- 3.21 Consultees opposed to reform expressed concern that it would complicate estate administration. Half siblings might be difficult to trace; half uncles and aunts perhaps more so. Furthermore, the Probate Service considered that reform might have implications for its work. Since half and full siblings would have equal

<sup>18</sup> Consultation Paper, paras 6.50 to 6.52.

<sup>19</sup> Consultation Paper, para 6.54. The rules governing entitlement to a grant of representation generally reflect the order of priority in the intestacy rules: Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

<sup>20</sup> Analysis of Responses, paras 6.76 to 6.89.

<sup>21</sup> The strongest example is that, in a will, references to siblings are usually taken to include half siblings as well as full siblings: see Consultation Paper, para 6.52.

entitlement to a grant, competing applications might increase, as might use of the caveat procedure.<sup>22</sup>

3.22 Such arguments must be set in context; the reform would not change the distribution in a large number of estates. The number of people dying who leave no spouse, descendant or parent, but both full and half siblings (or their descendants) is likely to be fairly low; estates where uncles and aunts, or their descendants, are in line to inherit will be still more uncommon. The Law Society considered, therefore, that reform would not cause significant problems.

3.23 Consultees agreed with us that particular weight should be put on public opinion on this point. The Nuffield survey included the following question:

Suppose that a man dies without making a will. He is survived only by a brother and a half sister. What do you think should happen to his property?<sup>23</sup>

3.24 45% of respondents felt that the brother and half sister should share the estate equally. A further 18% considered that all of the property should pass to the brother, and 35% of respondents opted to give priority to the brother. So a bare majority of respondents (53%) favoured the full sibling, but neither of those options taken singly attracted as much support as equal sharing between the full sibling and the half sibling.

3.25 We have considered the results of the Nuffield survey carefully. We note that while the Consultation Paper envisaged either keeping the current law or moving to a system of equal sharing, the Nuffield survey gave the third option of sharing with priority to the brother. We do not think that it would be appropriate for us to recommend reform which would share estates unequally between full and half siblings, despite suggestions from a couple of consultees that a half sibling should take one half of the amount inherited by a full sibling.<sup>24</sup> This would maintain a distinction between full and half siblings, while also being subject to the disadvantages of more complex estate administration which are attendant on any option involving sharing.

3.26 We cannot know what choices the respondents to the Nuffield survey would have made had that option not been available. Would they have opted for everything to pass to the full sibling, or for equal sharing between the full sibling and the half sibling? As matters stand, we are concerned that reform – particularly in the light

<sup>22</sup> A procedure whereby an interested party can be made aware of any attempt to obtain a grant of representation to an estate and thereby have an opportunity to liaise with the person applying for the grant or to make representations to the Court about the matter. See further <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/probate/caveats.htm> (last visited 23 November 2011).

<sup>23</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 64 to 65 and 124. The scenario did not describe how close the deceased was to his half sister.

<sup>24</sup> So, in the scenario envisaged in the Nuffield survey, the brother would receive two thirds of the estate and the half sister one third. The consultees who favoured unequal sharing felt that a reduced share for the half sibling would recognise his or her expectations of inheriting from another parent who has no relation to the deceased. We are not convinced that this would always reflect the realities of the situation.

of the potential practical disadvantages of equal sharing highlighted on consultation – is not justified by the strength of public opinion.

- 3.27 Accordingly we make no recommendation for change to the distinction currently drawn in the intestacy rules between full siblings and half siblings.

#### **OTHER RELATIVES AND *BONA VACANTIA***

- 3.28 At present, the intestacy rules do not recognise any relatives more remote than the deceased's uncles and aunts and their descendants.<sup>25</sup> Those descendants are the deceased's first cousins, or first half cousins where they are descendants of half siblings of the deceased's parents.<sup>26</sup>

- 3.29 When someone dies intestate and leaves no entitled relatives, the estate passes as *bona vacantia*, roughly translated as "ownerless goods". Depending on the deceased's place of residence, it will pass to the Crown (and to the administrative responsibility of the Treasury Solicitor), or to the Duchy of Lancaster or the Duke of Cornwall. But as we noted in Part 1, that is not always the end of the story, since the Crown and the Duchies may make discretionary payments out of the estate to people for whom the deceased might have been expected to provide, such as a cohabitant.<sup>27</sup>

#### **Should more relatives be included in the intestacy rules?**

- 3.30 In the Consultation Paper we noted that in some jurisdictions, such as Scotland and some other civil law systems, more distant relatives are included in the order of priority on intestacy.<sup>28</sup> We also considered public attitude surveys indicating that people feel that intestate estates should be inherited by family members, even if only distantly related, rather than passing to the state; a similar preference was expressed in the NatCen focus groups, although in some cases on the basis of a misunderstanding of the law.<sup>29</sup>

- 3.31 However, we did not feel that reform to add additional categories to the intestacy rules would be beneficial. In particular, we were concerned about the costs of tracing more remote relatives. We also felt that public opposition to *bona vacantia* might be less strong if the discretionary payments system operated by the Crown and the Duchies, under statutory authority, were more generally known. And other than that general opposition, we were not at that stage aware of any particular pressure (from the public or professionals) to create a specific additional class of beneficiaries on intestacy.<sup>30</sup>

- 3.32 It was, however, suggested to us following publication of the Consultation Paper that second cousins of the deceased should be added after first cousins in the

<sup>25</sup> Administration of Estates Act 1925, s 46(1).

<sup>26</sup> A child of an uncle or aunt would be the deceased's first cousin, a grandchild would be a first cousin once removed, and so on.

<sup>27</sup> See para 1.57 above.

<sup>28</sup> Consultation Paper, para 6.57.

<sup>29</sup> Consultation Paper, para 6.78.

<sup>30</sup> Consultation Paper, para 6.58.

intestacy rules. Two people are second cousins if they both have the same great-grandparent.<sup>31</sup>

- 3.33 Situations in which a person's closest relations are his or her second cousins are more common than might be expected. In particular, this is the case for an only child whose parents were also only children, but whose grandparents did have siblings. Those siblings' grandchildren, if any, would then be the deceased's closest relatives of the same generation. They may well expect to inherit on intestacy, and be disappointed when their claims are not recognised because the intestacy rules have set the limit in a particular place.
- 3.34 We have considered these arguments carefully, together with the responses from consultees who commented on our discussion of the issue in the Consultation Paper (although we did not ask a specific question). Some consultees suggested that second cousins should be included, but others argued that the list should remain unchanged, or even be reduced.<sup>32</sup>
- 3.35 We see practical reasons not to extend entitlement to second cousins. First, there are problems of definition. Strictly, one's second cousin is the great-grandchild of a common great-grandparent. It would be rather arbitrary to include only these specific relatives. To be consistent with the way in which relatives are currently treated, a reform intended to bring in second cousins would have to include the great-grandparents of the deceased and any of their descendants.<sup>33</sup> This is the position in Scotland. This may bring into consideration a vast number of relatives: an example given in the 2007 New South Wales Law Reform Commission Report on intestacy is of a man who left his estate to all the surviving descendants of his grandparents (first cousins, first cousins once removed and so on), which, when all were found, gave rise to 1,675 beneficiaries.<sup>34</sup> We referred in the Consultation Paper to the difficulty and expense faced by administrators seeking to trace distant relations with whom the deceased had little or no connection;<sup>35</sup> any reform to widen the classes of relatives entitled on intestacy would make this problem far more likely to arise.
- 3.36 Reform could even have the unintended consequence of reducing the amount received by a second cousin who was in fact close to the deceased. At present, if there are no closer relations, a second cousin who was close to the deceased has the opportunity to apply to the Treasury Solicitor (or the solicitors for the Duchies, as appropriate) for a discretionary payment from the estate. If all second cousins were to receive an automatic entitlement, the amount received by a

<sup>31</sup> Strictly, two people who share just one common great-grandparent are half second cousins. It was not clear from their responses if those who advocated this reform would include such relatives. Following the approach currently taken to cousins in the intestacy rules, half second cousins would be included but full second cousins would take priority.

<sup>32</sup> A point also raised in the Consultation Paper, para 6.63. See Analysis of Responses, paras 6.112 to 6.114.

<sup>33</sup> The great-grandparents, great-uncles and great-aunts of the deceased would in fact take in preference to a second cousin of the same generation as the deceased, being genealogically closer.

<sup>34</sup> New South Wales Law Reform Commission, Uniform Succession Laws: Intestacy (2007) Report 116, para 9.43.

<sup>35</sup> Consultation Paper, paras 6.59 to 6.61.

second cousin who was actually close to the deceased could be much reduced. This might also impact on others, such as cohabitants, unpaid carers and close friends of the deceased, who might be considered for a discretionary payment if the estate were *bona vacantia*; this possibility would no longer be available if the estate passed instead to relatives descended from a common great-grandparent.

- 3.37 We have concluded that we should not recommend any change to the classes of relatives entitled on intestacy.

### ***Bona vacantia***

- 3.38 In the absence of any relative entitled under the intestacy rules, an intestate estate passes to the Crown or the Duchy of Cornwall or Lancaster; we explained the operation and administration of *bona vacantia* in detail in the Consultation Paper,<sup>36</sup> and we noted that the Treasury Solicitor and the Duchies advertise for entitled relatives, and also make discretionary payments to others, such as carers and cohabitants. The statutory basis for this practice refers to “persons for whom the intestate might reasonably have been expected to make provision”.<sup>37</sup> The guidelines followed by the Treasury Solicitor’s Bona Vacantia Division in making discretionary payments can be found on the Division’s website.<sup>38</sup> The Duchies follow substantially the same procedures.<sup>39</sup>
- 3.39 There is evidence that people are not attracted to the idea that property should pass to the state; distant relatives, friends and charities are also often suggested as appropriate alternatives to the Crown or Duchies. In the Consultation Paper we said that we thought that the current system, whereby the Crown and Duchies are able to make discretionary payments out of their *bona vacantia* income to those who the deceased might have wanted to benefit, worked well. We therefore made no provisional proposals for reform.<sup>40</sup>
- 3.40 Of those consultees who commented on *bona vacantia*, many supported our view that reform was not necessary, mostly for the same reasons we gave in the Consultation Paper.
- 3.41 Those in favour of reform generally felt that the system for dealing with *bona vacantia* is anachronistic. They would prefer such estates to pass to charity. Suggestions included the establishment of a new body or making use of existing organisations such as the Charity Commission, the Charities Aid Foundation or the Big Lottery Fund to distribute to good causes estates that would currently pass as *bona vacantia*.
- 3.42 It was suggested that a gift to charity is more likely to accord with what the deceased would have wanted and with public opinion. However, in the Consultation Paper, we emphasised the difficulties inherent in attempting to design intestacy rules based on the presumed wishes of the deceased. People

<sup>36</sup> Consultation Paper, paras 2.31 to 2.32.

<sup>37</sup> Administration of Estates Act 1925, s 46(1)(vi).

<sup>38</sup> <http://www.bonavacantia.gov.uk/output/estates.aspx> (last visited 23 November 2011).

<sup>39</sup> More details can be found on the Duchies’ websites: see <http://www.duchyoflancaster.com> and <http://www.duchyofcornwall.org> (last visited 23 November 2011).

<sup>40</sup> Consultation Paper, para 6.83.

who die intestate have by definition failed to express a binding testamentary preference and, given the diverse range of charities, the deceased might have actively opposed distribution to a particular organisation or type of charity.

- 3.43 It is also notable that two of the three charities who commented on *bona vacantia* actively opposed any such reform. They feared it could be a disincentive to people who would no longer feel the need to make a will to benefit charities. They were also concerned that smaller charities may miss out on any *bona vacantia* distributions to charity through a centralised distribution system. Charities would also be unable to make discretionary payments to those who might receive such payments from the Crown or Duchies under the current law, because a charity's duty is to safeguard assets for their particular charitable purpose.<sup>41</sup>
- 3.44 Nor is it clear that any of the existing bodies would be suitable vehicles for distributing *bona vacantia* monies. Although the Charity Commission does have a role in applying trust property where a charity has ceased to exist, the legal basis for its doing so requires the property to be allocated for charitable purposes close to the purpose of the original trust.<sup>42</sup> Applying *bona vacantia* funds to charity generally would require a much wider jurisdiction. Deciding which charities should benefit from the roughly £10 million worth of intestate estates that pass as *bona vacantia* each year would be a difficult task. Although the Big Lottery Fund has expertise in distributing a large amount of funds to charitable causes, we foresee opposition to involving any element of the National Lottery in the administration or distribution of intestate estates.
- 3.45 We take the view that a reform giving *bona vacantia* estates to charity would be undesirable. However, we note that the net proceeds of *bona vacantia* in the County Palatine of Lancaster and in Cornwall do in fact pass to charities chosen by the Duchies.

<sup>41</sup> H Picarda, *The Law and Practice Relating to Charities* (4th ed 2010) p 625.

<sup>42</sup> The *cy-près* doctrine: A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed 2008) para 11-120.

# **PART 4**

## **THE STATUTORY TRUSTS AND WIDER TRUST REFORMS**

### **INTRODUCTION**

- 4.1 This Part deals with the statutory trusts in the intestacy rules, and with wider trust reforms on which we consulted in our Supplementary Consultation Paper.<sup>1</sup>
- 4.2 The statutory trusts have two main functions. First, they contain the rules on sharing an intestate estate within a class of beneficiaries which can include more than one generation. This occurs where the primary beneficiaries under the intestacy rules are the deceased's children, siblings or parents' siblings. If at least one of the primary beneficiaries has died before the deceased leaving children – and perhaps other descendants – the statutory trusts determine how to share the estate within that class of beneficiaries. This may mean sharing between two or more generations.
- 4.3 Secondly, the statutory trusts determine the provisions applicable to any share which is held on trust for a beneficiary who is under 18 and not married or civil partnered: notably, the conditions for that beneficiary to become absolutely entitled to that share, and the use of capital and income while the share is held in trust. Implementation of the reforms set out in Part 2 would mean that these are the only ongoing trusts which arise on intestacy; we have recommended that a surviving spouse should no longer take a life interest in an intestate estate where the deceased also left children.<sup>2</sup>
- 4.4 In this Part we consider first the way in which an intestate estate is shared within a class of beneficiaries which includes the descendants of those who would have been entitled if they had survived the deceased. We then look at ongoing trusts on intestacy for beneficiaries who are under 18 and not married or civil partnered, and consider the conditions for absolute entitlement.
- 4.5 Moving beyond the statutory trusts, we then consider the effects of adoption on a child's contingent interest in the estate of a parent, and recommend reform to the adoption legislation to apply whether the parent died intestate or had made a will. Finally, we discuss in the context of all trusts – established on intestacy, by will or during lifetime – reforms to the rules governing the use of capital and income in advance of a beneficiary becoming absolutely entitled.

### **THE STATUTORY TRUSTS: DISTRIBUTION BETWEEN GENERATIONS**

- 4.6 If A dies leaving no spouse, children or parents, but is survived by all five of his sisters, each sister takes a fifth of the estate. However, the situation may be more complex. Perhaps one or more of the sisters has already died, leaving surviving children, who are A's nephews and nieces. More complexity is added if there

<sup>1</sup> Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925 (2011) Law Commission Consultation Paper No 191 (Supplementary) ("Supplementary Consultation Paper"); see paras 1.27 to 1.28 above.

<sup>2</sup> See para 2.62 above.

were also other nephews and nieces who have already died leaving surviving children of their own. The distribution of A's estate in these scenarios is controlled by the statutory trusts, as discussed above.

- 4.7 Where only one member of a particular generation has predeceased leaving children or other descendants, the effect of the statutory trusts is relatively uncontroversial.<sup>3</sup> If one of A's sisters had already died, having had two sons, and one of those sons had also predeceased leaving a surviving daughter, the class of beneficiaries would comprise A's four surviving sisters, his surviving nephew and his great-niece. The sisters would take a fifth of the estate each and the other fifth would be divided equally between the nephew and great-niece (in the place of the nephew who has predeceased).
- 4.8 However, two or more members of a generation may have predeceased leaving children or other descendants, and in that event the distribution becomes a little more complex. In the Consultation Paper we discussed the different ways in which other jurisdictions choose to distribute the estate in such cases.<sup>4</sup>
- 4.9 Suppose that B, a widower, dies without making a will. He had two daughters C and D, who have both already died, and a son E who is still alive. C left four sons and D left two sons. E has three daughters.
- 4.10 The intestacy rules currently share the estate between beneficiaries by a method known as "distribution *per stirpes*", "stirpital distribution" or "inheritance by representation".<sup>5</sup> An equal division is made between all primary beneficiaries who either survived the deceased or have already died leaving at least one surviving child or other descendant. The children of a primary beneficiary who did not survive the deceased then share equally in what their parent would have received, and so on down the generations until living beneficiaries are found. Anyone whose parent did survive the deceased is excluded from taking under the statutory trusts.
- 4.11 In the example, C, D and E are the primary beneficiaries, entitled to a third of the estate each. Therefore under *per stirpes* distribution E takes his third, C's third is divided between her sons (a twelfth each), and D's third between her sons (a sixth each).
- 4.12 Some other jurisdictions adopt *per capita* distribution; there are two main forms. One form adopts the *per stirpes* approach as a general rule, except where *all* members of the preceding generation have predeceased, in which case an equal division is made between the members of the following generation.<sup>6</sup> This is the system which currently operates in Scotland.<sup>7</sup> This system would not change the

<sup>3</sup> See paras 1.54 to 1.55 above.

<sup>4</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 ("Consultation Paper"), paras 5.22 to 5.30.

<sup>5</sup> Administration of Estates Act 1925, s 47. *Per stirpes* means "by stock" or "by family".

<sup>6</sup> One equal share is allocated to each surviving member of that following generation and to each member who predeceased leaving one or more descendants, being divided among those descendants in accordance with *per stirpes* distribution.

<sup>7</sup> Succession (Scotland) Act 1964, ss 5 and 6. The Scottish Law Commission has recommended no change: Report on Succession (2009) Scot Law Com No 215, para 2.44.

result in the example above, because E is a surviving primary beneficiary. But if E had also predeceased B then under the Scottish system the estate would have been divided equally between all of the grandchildren. Assuming that E left no children or other descendants, D and C's children would therefore have taken a ninth of the estate each.

- 4.13 The second is distribution *per capita* at each generation. This system involves identifying the first generation with living beneficiaries, and making a notional equal division of the estate between the members of that generation. If two or more members of that generation have predeceased then the shares those members would have taken are added together and the process is repeated with the first generation of descendants from those beneficiaries with living members. So, in the example, E would still take a third of the estate, but C and D's six sons would take a ninth each.
- 4.14 In the Consultation Paper we asked whether consultees would favour any change to the present method of *per stirpes* distribution of intestate estates, and in particular the introduction of *per capita* distribution at each generation.<sup>8</sup>

#### **Research and consultation**

- 4.15 In reviewing this point, we have had the benefit of both the data from the Nuffield survey and the responses from consultees. The Nuffield survey included the following scenario:

Suppose that a woman dies without making a will. She had one son and one daughter, both of whom have died. She is survived by her son's two children and her daughter's four children. What do you think should happen to her property?<sup>9</sup>

- 4.16 The results showed that 92% of respondents were in favour of equal distribution between the six grandchildren, that is, a sixth each. This indicates public support for a form of *per capita* distribution.
- 4.17 Consultees, on the other hand, strongly favoured retaining the current system.<sup>10</sup> Only four consultees supported reform. Twenty-nine argued expressly for no change; of those, two said that they were prepared to accept the Scottish system of distribution. A further three gave no definite answer but still appeared to prefer distribution *per stirpes*.
- 4.18 Several consultees argued that changing a system which is well-established and familiar to practitioners would risk confusion and would carry costs not justified by the limited effect. It is not usual for children to die before their parent, leaving grandchildren to inherit directly. Although it may be more usual to find that a sibling or a parent's sibling has already died, those relatives will only rarely be in line to inherit under the intestacy rules.

<sup>8</sup> Consultation Paper, para 5.35.

<sup>9</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 61 and 124.

<sup>10</sup> Analysis of Responses, paras 5.16 to 5.31.

- 4.19 In the Consultation Paper we suggested that *per capita* distribution could cause additional difficulties where some beneficiaries of the estate are missing.<sup>11</sup> The uncertainty as to whether one beneficiary had survived, and how many children they had had, would affect the shares of others in other family branches. However, it was suggested on consultation that administrators usually do not distribute at all until they know, for the estate as a whole, who is entitled and in what shares; and that means solving the problem of missing beneficiaries, whatever the system of distribution.<sup>12</sup>
- 4.20 But in solving that problem, where enquiries have been inconclusive, the last resort for personal representatives is missing beneficiary indemnity insurance. This enables the personal representatives to distribute the estate on the assumption that the beneficiary does not exist, with the protection of resort to the insurers if that proves incorrect later on. Title Research argued that a move to a *per capita* system could result in such insurance becoming more difficult and expensive to obtain because it would be more difficult to quantify risk. Any difficulty in tracing one line of the family (particularly siblings or parents' siblings) through more than one generation would have an impact on the underwriter's ability to quantify risk, potentially making them unwilling to insure.
- 4.21 A few consultees also observed that the current system on intestacy is consistent with provision for *per stirpes* distribution in the context of wills. Section 33 of the Wills Act 1837 provides for this system of representation, in the absence of contrary provision, where a child has predeceased a testator leaving descendants. These consultees felt that reform would have to cover both in order to be coherent.<sup>13</sup>
- 4.22 Consultees also argued that representation should follow the branches of a family, reflecting a concept of inheritance passing from parent or child. The *per stirpes* system achieves the same result for, say, D's sons whether or not C survives B. If distribution were *per capita* at each generation, the fact that C predeceases B (even by one day) would result in D's sons receiving a ninth each, not a sixth. It was considered that the entitlement of grandchildren in one branch should not be reduced on the basis that there were more grandchildren in another family branch.
- 4.23 It is difficult to assess such arguments from principle, since they are rooted in a personal preference for viewing inheritance in terms of family branches or as a benefit for individual members of a generation. A *per capita* system simply disregards family branches and divides the estate so that those equally related to the deceased take in equal shares. Consultees who favoured legislative change considered that to be fairer and clearer.

### **Conclusion**

- 4.24 We have given the options for reform careful consideration. It appears that the gains of changing the current system would be limited, because in practice the actual distribution of estates would often be the same. We note consultees'

<sup>11</sup> Consultation Paper, para 5.33.

<sup>12</sup> As the costs of tracing are an expense of the whole estate: see paras 5.3 to 5.13 below.

<sup>13</sup> See Consultation Paper, para 5.32.

suggestions that it would be difficult to justify the costs of implementing a change. And we are concerned about the possibility of complicating estate administration, in particular by increased costs and uncertainty in obtaining insurance to deal with missing beneficiaries.<sup>14</sup>

- 4.25 The Nuffield survey indicated significant public support for a *per capita* system. However, it is not clear – due to the limitations of the scenario given in the Nuffield survey – which form of *per capita* distribution was supported. The scenario stated that all the primary beneficiaries (the woman’s two children) had already died, and in such a case both the Scottish system and distribution *per capita* at each generation reach the same result: division equally between the surviving secondary beneficiaries.
- 4.26 The question therefore did not focus on distribution *per capita* at each generation; the researchers have commented that, with the benefit of hindsight, the question should not have been asked in that form.<sup>15</sup> We do not know what the public response would have been if participants had been presented with a scenario including a third child who was still living and would take a third of the estate in any event.<sup>16</sup>
- 4.27 To add to this, we have evidence from professional consultees as to the approach taken by members of the public when they have the opportunity to think through the alternatives and are required to make a real decision affecting their families. Several of them – solicitors, will writers, legal executives and barristers – recounted their experience that clients, when they are drawing up wills, rarely opt for *per stirpes* distribution after an explanation. We also note the lack of evidence that the current law is perceived to be unsatisfactory in practice; indeed, one consultee stated that in 30 years he had not heard any complaint about the current law from a client or opposing litigant.<sup>17</sup>
- 4.28 This material on clients’ choices in will-making is not conclusive. We bear in mind the disadvantages of relying on testators’ choices as models for the intestacy rules. We also note that the anecdotal evidence we have received from these professionals relates to their own clients, who may not be typical of those with lower-value estates to which the intestacy rules generally apply. Nevertheless, it does suggest that the survey results should be viewed with caution.
- 4.29 After considering the other difficulties foreseen by consultees, we have therefore decided to make no recommendation for change on this point.

<sup>14</sup> Depending on the framing of the provision, disclaimer by a beneficiary might also cause difficulties, since (subject to any contrary provision if there is a will) such a beneficiary is treated as having died before the deceased: Administration of Estates Act 1925, s 46A; Wills Act 1837, s 33A (these provisions, inserted by the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, are due to come into force on 1 February 2012). Indeed it would need to deal with the possibility of a beneficiary wishing to disclaim in order to secure a greater share of the estate to his or her children.

<sup>15</sup> See National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) p 61.

<sup>16</sup> One consultee argued that *all* beneficiaries should take equal shares; in this scenario the surviving child and the grandchildren of those who had predeceased would all receive the same amount. This would be a very significant departure from the current system.

<sup>17</sup> Analysis of Responses, para 5.18.

## **THE STATUTORY TRUSTS: CONDITIONS FOR ABSOLUTE ENTITLEMENT**

- 4.30 Under the statutory trusts which arise on intestacy, the share of any beneficiary who is under 18 and not married or civil partnered is held on trust; the initial trustees are the administrators.
- 4.31 If a beneficiary of an intestate estate dies under 18 without having married or formed a civil partnership, he or she is treated as having died before the deceased. If that beneficiary had any children who were living when the deceased died intestate, they will take the beneficiary's share, also on the statutory trusts.<sup>18</sup> If not, the share will pass to those next entitled under the intestacy rules as they applied when the deceased died.
- 4.32 In the Consultation Paper we discussed the current conditions for a beneficiary to take his or her share from the trust absolutely: attaining the age of 18 or marrying or forming a civil partnership under that age. We concluded that the current law is appropriate and did not favour either increasing the age of inheritance or removing the prior marriage or civil partnership condition. Only two consultees commented on this point, both of whom were prepared to support our conclusion. They agreed that it would not be acceptable to distinguish between surviving spouses depending on whether the marriage or civil partnership took place before or after the age of majority.<sup>19</sup>

## **ADOPTION: PRESERVATION OF CERTAIN CONTINGENT INTERESTS**

- 4.33 Adoption breaks the legal relationship between a child and his or her biological parents; the child's only legal parents are the adopters.<sup>20</sup> A biological parent's subsequent death intestate has no legal relevance to the adopted child, who cannot inherit from him or her. We do not contemplate any change to that position.
- 4.34 What happens when a child is adopted at a time when he or she has already inherited property that is then held on trust? Statute currently provides for trust beneficiaries to retain after adoption "qualifying interests" – those which are already vested in possession before the adoption.<sup>21</sup> Therefore, if a beneficiary under a trust has a right to the income as of right, even if not to the capital, that interest would be retained despite adoption. The same would apply if the beneficiary is entitled to income and capital without needing to satisfy any contingencies, even if for administrative reasons the fund is still held by the trustees (sometimes known as an interest under a bare trust).
- 4.35 However, in some circumstances the effect of adoption is to take away an inheritance, because where the beneficiary's interest is subject to a contingency,

<sup>18</sup> Administration of Estates Act 1925, s 47(4B) to (4D) (these provisions, inserted by the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, are due to come into force on 1 February 2012).

<sup>19</sup> Analysis of Responses, paras 5.51 to 5.53. These consultees also considered the current law on the ability of beneficiaries who are under 18 and married or civil partnered to give trustees valid receipts for payments of income and capital: Analysis of Responses, paras 5.54 and 5.55. Opinions on this point differed, and we have not made any recommendation for change.

<sup>20</sup> Adoption and Children Act 2002, s 67(3).

<sup>21</sup> Above, s 69(4), saving such interests from the effect of section 67(3).

the legislative saving just described does not apply. That will be the case for all entitlements taken under the intestacy rules by children who are under 18. Suppose that F (whose wife has already died) has a daughter, G, aged two. F dies intestate and his entire estate passes to G, contingent on her reaching 18 or marrying or forming a civil partnership under that age. F's sister H offers to adopt G; the adoption takes place a year or so later. On G's adoption her contingent interest in F's estate fails, on the basis that she is not "a child of the intestate, living at the death of the intestate".<sup>22</sup> The trust fund therefore passes to the next relatives entitled on F's intestacy. If his parents are no longer living, the fund will pass to his siblings, including H – creating an uncomfortable conflict of interest as well as depriving G.

4.36 In the Consultation Paper we argued that this is unacceptable, and that the child's interest should not be affected by the adoption. It is counterintuitive that new care arrangements necessitated by the death should deprive a child of an inheritance to which he or she has already become contingently entitled. Therefore it is easy in practice to overlook the point. Even if adoption professionals are aware of the entitlement, they may not appreciate that it will be lost by the adoption. We took the view that the child's entitlement should not depend on the point being spotted and a court application, with attendant costs and delay, being made to vary the statutory trusts so as to save the contingent interest.<sup>23</sup>

4.37 Therefore we provisionally proposed that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.<sup>24</sup>

### **Consultation responses**

4.38 Many consultees endorsed this proposal, including the Law Society, the Family Law Bar Association, the Judges of the Chancery Division and of the Family Division of the High Court and the Law Reform Committee of the Bar Council.<sup>25</sup> The Society for Trust and Estate Practitioners commented that "this is a nasty trap and would never be what a parent would have expected or intended".

4.39 John Dilger expressed the view that the current law is "clearly not in the interest" of a bereaved child. The Chancery Bar Association confirmed, as we had suggested in the Consultation Paper, that "this is a point which family lawyers and courts often overlook". Similarly, the Norwich and Norfolk Law Society said "we were unaware of this consequence".

4.40 The Association of Contentious Trust and Probate Specialists, while supporting the proposal, mentioned that these adoptions occur "comparatively rarely". Even

<sup>22</sup> Administration of Estates Act 1925, s 47(1)(i); *S v T* [2006] WTLR 1461 (decided before the Adoption and Children Act 2002 came into force, and therefore on the equivalent provisions in the Adoption Act 1976).

<sup>23</sup> As happened in *S v T* [2006] WTLR 1461; the variation gave the child an absolute entitlement under a bare trust. We considered and rejected the option of making this an automatic consequence of such adoptions: see the Consultation Paper, para 5.63.

<sup>24</sup> Consultation Paper, para 5.66.

<sup>25</sup> Analysis of Responses, paras 5.56 to 5.68.

on that basis, we think that the effect of the current law is unjustifiably severe whenever the point is missed. Boodle Hatfield commented in their response that they had seen the point in practice; and we were contacted after publication of the Consultation Paper by a member of the public whose child's inheritance had been lost in these circumstances.

- 4.41 A few consultees opposed the proposal. Some had misunderstood our proposal; we did not suggest retaining the inheritance link where the adoption occurred *before* the death. Others thought that preserving the contingent entitlement might generate problems within the adoptive family; adopted children would be differentiated from their new siblings because of their expectations, in particular on becoming entitled to the payment of a lump sum at 18. These consultees valued the consistent approach of the current law in severing all links on adoption.
- 4.42 Consultees also raised concerns about practical difficulties in dealing with a later accretion to the estate: this would require the original personal representatives to transfer the new assets into the trust, even though adoption has broken the legal link with the birth family. The trusteeship of the fund would not be changed by the adoption itself, and the trustees would need to keep in touch with the beneficiary in the adoptive family; a few consultees felt that such contact might not be compatible with the adoption. They also felt there would be an opportunity for fraud by the adopters, in particular by becoming the trustees of the fund.

### **Discussion**

- 4.43 We do not think that the concerns raised by consultees should stand in the way of reform. Adopters are advised that the child should know that he or she was adopted and given information as appropriate.<sup>26</sup> If all family members know of the adopted child's origins, we think that there should be few difficulties arising from the child's financial expectations.<sup>27</sup> The cases affected by our reform will be very few and will generally be those where the adoption has taken place because the child has been orphaned. Under the current law, the child's contingent interest in the deceased's parent's estate can be saved if the situation is noticed and an application made to the court, as it was in *S v T*;<sup>28</sup> in that situation, again, the child will have an entitlement that his or her adoptive siblings do not share. The answer is not to compound the child's bereavement by depriving him or her of the inheritance; any potential unfairness can be addressed by the adoptive parents making wills as appropriate.
- 4.44 We also take the view that there will be no insurmountable practical difficulties. The unusual cases where this reform will take effect are the ones more likely to

<sup>26</sup> See, for example, the advice from the British Association for Adoption and Fostering at <http://www.baaf.org.uk/info/adoption#tell> (last visited 23 November 2011).

<sup>27</sup> Indeed the current law could be said to exacerbate such problems; the solution at present is to obtain a court order under the Variation of Trusts Act 1958 to give the child an immediate beneficial interest under a bare trust (see *S v T* [2006] WTLR 1461).

<sup>28</sup> [2006] WTLR 1461.

be “open”<sup>29</sup> because the child has been adopted by relatives, and so contact by the personal representatives of the parent’s estate will not give rise to difficulties. Even where the adoption is “closed”, subsequent contact can be facilitated if necessary by the adoption agency. And if problems do arise with the trusteeship which cannot be resolved privately, an application can be made to the court.<sup>30</sup> No special provision has been made in relation to trusteeship for qualifying interests which are already saved on adoption by section 69(4) of the Adoption and Children Act 2002, and we are not aware that this has been criticised. Nor does it appear to have caused problems in *S v T*,<sup>31</sup> where although the trust was varied to give the prospective adoptee an absolute interest, the resulting bare trust still required trustees.

- 4.45 We do not think that there is a substantial risk that fraud by adopters would be facilitated as part of this reform. We have also been told by the British Association for Adoption and Fostering that financially-motivated adopters are rare and would be unlikely to pass the adoption process.

### **The extent of reform**

- 4.46 Consultees queried whether our proposal would operate only in relation to the deceased’s children, or include other relatives such as siblings, nieces and nephews, and grandchildren. We have considered this carefully. The problem of losing an already vested entitlement is common to all beneficiaries who are subsequently adopted. On the other hand, the issue is particularly acute in relation to children adopted after the death of their parent, not only because of the strong expectations of inheritance carried by the close blood relationship but also because the adoption is in such cases usually a direct consequence of the death, not incidental to it. Therefore we are restricting our recommendation to the entitlement of children of the deceased.
- 4.47 We were also asked whether the reform would extend to wills creating contingent interests; the proposal in the Consultation Paper specified contingent interests in intestate estates. It might be said that those who make wills should be taken to mean what they say in them. This assumes, however, that will drafters are aware of the issue; the response on consultation suggests that even professionals do not contemplate this eventuality. In any case, the existence or extent of a testator’s ability in a will to override the operation of the relevant statutory

<sup>29</sup> The “openness” of an adoption refers to the degree of the birth family’s involvement. In a “closed” adoption all contact is severed and there is no sharing of details between birth and adoptive families. Nowadays adoptions are more commonly open to some degree, for example by providing information on the child, or facilitating communication between the child and the birth family, after the adoption. See S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (2nd ed 2011) p 945. Where a child is adopted by family members after the death of his or her parents – commonly an uncle and aunt, or grandparents – there is no reason for the adoption to be other than wholly open.

<sup>30</sup> For example, if independent trustees are required but have not been appointed: Trustee Act 1925, ss 36, 41 and s 58(1); for the inherent jurisdiction of the court to remove a trustee, see generally J Mowbray, L Tucker, N Le Poidevin, E Simpson and J Brightwell, *Lewin on Trusts* (18th ed 2008) paras 13-47 to 13-57. It was suggested on consultation that all such matters should be submitted to a judge for the appointment of an independent trustee; we are not persuaded that a court application is always necessary.

<sup>31</sup> [2006] WTLR 1461.

provisions is unclear.<sup>32</sup> We therefore recommend a consistent reform across both testate and intestate estates.

- 4.48 A testator can by will create a variety of trust arrangements in favour of his or her children. These may be similar to those arising on intestacy, though the testator has a greater choice of conditions on which the entitlement is contingent; for example, leaving money to children in equal shares on reaching 25. But will trusts may also create contingent interests that are in remainder to some other beneficiary's interest; for example, a will might leave money to A for life, with remainder to the testator's child B, if B reaches 25. We made a recommendation in Part 2 that life interests for surviving spouses should no longer be created under the intestacy rules.<sup>33</sup>
- 4.49 We do not consider that contingent interests in remainder should be within the scope of our recommendation.<sup>34</sup> Section 69 of the Adoption and Children Act 2002 saves interests that are "vested in possession", and therefore does not extend to interests which are in remainder even if there is no contingency. We take the view that our recommendation should likewise be restricted to exclude interests in remainder.<sup>35</sup>
- 4.50 Our recommendation therefore extends only to the interest of an adopted child in the estate of his or her deceased parent, and does not apply to contingent interests in remainder. It is important to stress that our recommendation has no application to cases where the death of the adopted child's birth parent occurred after the date of adoption.
- 4.51 **We recommend that if immediately before adoption a child has in the estate of his or her deceased parent any contingent interest, other than a contingent interest in remainder, that interest shall not be affected by the adoption.**
- 4.52 Clause 4 of the draft Inheritance and Trustees' Powers Bill achieves this by adding a new category of interest to section 69(4) of the Adoption and Children Act 2002.

#### **Adoption and family provision claims**

- 4.53 In the Consultation Paper we also discussed the effect of adoption in preventing a family provision claim by the child against the estate of his or her biological parent.<sup>36</sup> We provisionally rejected any reform of this position on the basis that there is usually enough time before the adoption for a claim to be made, noting

<sup>32</sup> We have not been able to find any precedent dealing with the point.

<sup>33</sup> See para 2.62 above.

<sup>34</sup> Assuming that they are in remainder at the date of the adoption; if, in the above example, A had died before B's adoption then B's interest would be preserved under our new provision.

<sup>35</sup> A will may include a direction for the accumulation of income, either expressly or pursuant to section 31(2) of the Trustee Act 1925 (see para 4.57 below). Such a direction postpones the right to income and requires it to be added to the capital to which the child is contingently entitled; it is not a separate interest from which the child's interest is in remainder.

<sup>36</sup> Consultation Paper, paras 5.67 to 5.69.

also the local authorities' statutory duty to provide for the financial needs of an adopted child if the adopter or adopters cannot do so.<sup>37</sup>

- 4.54 Most consultees did not respond on this point, and only one opposed our conclusion. Giles Harrap felt that young children should not be disadvantaged if no one happened to take action on the point for them in time. However, we still feel that – given the existing safeguards for such children, and the lack of evidence that the current position causes injustice in practice – it is not desirable to enable such litigation between the child and his or her biological relatives after the adoption. We therefore make no recommendation on this point.

#### **ALL TRUSTS: SECTIONS 31 AND 32 OF THE TRUSTEE ACT 1925**

- 4.55 Sections 31 and 32 of the Trustee Act 1925 are about the capital and income of a trust fund. The courts have used the metaphor of a tree and its fruit to explain the concepts of capital and income. The “tree” is the capital (such as an office block) and the “fruit” is the income (such as the rent received from renting out the offices). Sections 31 and 32 apply to all trusts, whether established under the intestacy rules, by will or by an arrangement in lifetime, to the extent that the terms of the trust do not override them; a settlor or testator may choose to modify or exclude them for a particular trust.<sup>38</sup>
- 4.56 Their effect can be illustrated by an example.<sup>39</sup> V has established a trust for her sons W and X, who will take the capital in equal shares at 25, and are currently aged 19 and 10; the terms of the trust do not exclude or modify sections 31 and 32.
- 4.57 Section 31 concerns the income of the trust fund, and can be considered in three parts.
- (1) The trustees must pay all the income of W's share to W, because he has reached 18 and is entitled to the capital of that share contingently on reaching 25.
  - (2) The trustees may, at their discretion, pay for X's maintenance, education or benefit<sup>40</sup> so much of the income of X's share as is reasonable in all the circumstances. This is because X is under 18 and will become entitled to that share outright if he satisfies the contingency of reaching 25. If the trustees are aware that the income of another trust can be applied for X's maintenance, education or benefit, they may be restricted as to how much they can pay out; this is explained further below.<sup>41</sup>

<sup>37</sup> Adoption and Children Act 2002, part 1 ch 2; Adoption Support Services Regulations 2005, SI 2005 No 691, part 3.

<sup>38</sup> Trustee Act 1925, s 69(2); *Re Turner's Will Trusts* [1937] Ch 15.

<sup>39</sup> A summary of the current law on sections 31 and 32 of the Trustee Act 1925 was given in the Supplementary Consultation Paper, Part 2.

<sup>40</sup> This is a wide phrase; the trustees may use the income not only for day to day expenses but also for, say, one-off investments such as buying a house in which the beneficiary can live: G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010) para 14.13.

<sup>41</sup> See paras 4.82 and 4.88 to 4.91 below.

- (3) While X is under 18, the trustees must accumulate the rest of the income of X's share, adding it to capital; and the accumulated income can be paid out in a subsequent year as though it were current income. Otherwise, the accumulated income will go to X if he reaches 25, with the capital of the fund.
- 4.58 Where an ongoing trust is established on intestacy, only (2) and (3) are relevant, since the beneficiaries will be entitled to the fund as of right on reaching 18 or marrying or forming a civil partnership at a younger age. However, all three can be relevant to a trust which is established by a will or a lifetime arrangement, depending on its terms.
- 4.59 Section 32 concerns the capital of the trust fund, and provides that the trustees may pay or apply up to one-half of the capital of W's share for his advancement or benefit<sup>42</sup> before the age of 25; the same applies in relation to X and the capital of his share. This is because W and X are not yet entitled to the capital as of right, but are contingently entitled on reaching 25. The same applies for a beneficiary under the statutory trusts who is under 18.<sup>43</sup>
- 4.60 In the Consultation Paper we considered the provisions of section 31, and made a provisional proposal for an amendment to section 32. We proposed that trustees' power to pay capital to a beneficiary pursuant to section 32 should be extended, for the purposes only of the statutory trusts on intestacy, to the whole rather than one-half of that beneficiary's share.<sup>44</sup> This provisional proposal attracted strong support on consultation. However, several consultees argued that it should not be limited to trusts established on intestacy, but should be extended to trusts created by will or by an arrangement made in lifetime.
- 4.61 Accordingly, we put forward a revised provisional proposal in our Supplementary Consultation Paper, in which we also asked questions on possible reform to the power to pay income under section 31.

### **Section 32: the restriction to one-half of a beneficiary's share**

- 4.62 In the Supplementary Consultation Paper we provisionally proposed that the power in section 32 should be extended to the whole of the beneficiary's share in the trust fund, for the purposes of all trusts however established rather than only those arising on intestacy.<sup>45</sup>

<sup>42</sup> The concept of "advancement" centres on setting a beneficiary up in life; typically, with a view to giving him or her some permanent advantage. "Benefit" is discussed above; it is a wider term which includes a range of possible payments from capital. For example, it can even extend to making (though within limits) charitable donations which the beneficiary feels morally obliged to make. See Supplementary Consultation Paper, paras 2.23 to 2.25.

<sup>43</sup> If there is a beneficiary with a prior interest, usually an entitlement to the income of the share, his or her consent is required. This will no longer be the case for the statutory trusts under the reforms we recommend for the spousal entitlement: see paras 2.62 and 2.65 above.

<sup>44</sup> Consultation Paper, para 5.52; see paras 5.50 to 5.51 for discussion.

<sup>45</sup> Supplementary Consultation Paper, para 3.26.

- 4.63 Our original proposal was well supported on consultation, and the revised proposal attracted almost unanimous approval from consultees.<sup>46</sup> Consultees pointed out that section 32 is extended as a matter of course when wills and lifetime trusts are prepared, and considered that the statutory provision should reflect this widespread practice. It was suggested that trustees may not be aware of the restriction where it does apply, and that inadvertent breaches of trust therefore occur.<sup>47</sup>
- 4.64 Consultees also noted the advantages of the increased flexibility granted by the removal of the one-half limit. It enables trustees to use capital at an early stage in the beneficiary's life when it may be most needed, because he or she is not yet able to be self-supporting. It may even be appropriate for the whole of a beneficiary's share to be paid out, and for the trust to be wound up, particularly where it is of small value, thus saving administrative costs. At present a court application may be required in order to override the limit, which can be costly.
- 4.65 That flexibility may be particularly relevant to statutory trusts arising on intestacy, because intestate estates are typically of relatively modest value.<sup>48</sup> If a beneficiary's prospective share under the statutory trusts is small, the trustees may have particularly good reasons to use more than half – or perhaps all – of it for the beneficiary before he or she reaches 18. However, consultees agreed that it was right to revise the scope of the proposal. They felt that partial reform would risk confusion, and that section 32 should reflect the modification commonly made in wills and express trusts and apply consistently across all trusts.
- 4.66 A concern expressed by a minority who responded to the original proposal, and by one respondent to the Supplementary Consultation Paper, was that extending the scope of the section 32 power could facilitate abuse or fraud. That argument has most weight in relation to trusts arising on intestacy, when the deceased has not taken the opportunity to select trustees for their honesty.
- 4.67 However, other consultees responding to the revised proposal queried whether the one-half limitation is, in any case, a strong disincentive to fraud. The Law Reform Committee of the Bar Council, for example, commented that “in our experience, financial abuse occurs because of the character of the trustee, not the legal limits on his/her powers”. Therefore, these consultees agreed with us that this risk is outweighed by the advantages of more flexibility.<sup>49</sup>
- 4.68 Consultees stressed the existing requirement for trustees to consider not only the interests of the beneficiary who would benefit from the advancement, but also the rights of others who have or may have an interest in the capital.<sup>50</sup> For example, trustees in considering an advancement to A, whose entitlement is contingent on reaching 25, must consider the interests of B, who will take the fund if A dies aged under 25. The Society for Trust and Estate Practitioners gave the example

<sup>46</sup> Analysis of Responses, paras 5.32 to 5.55 and 8.2 to 8.28.

<sup>47</sup> Although another consultee felt that trustees would usually obtain legal advice before making an advancement and would therefore be informed about the restriction.

<sup>48</sup> See Appendix D, table 4.

<sup>49</sup> Supplementary Consultation Paper, paras 3.4 to 3.8 and 3.25.

<sup>50</sup> Considered in the Supplementary Consultation Paper, paras 3.5 to 3.7; see also *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303.

of a gift to all the children of X who attain 25, in equal shares; spending all the capital now to benefit the children currently living would exclude future children of X from taking any benefit. However, the Society considered that the current requirement to take into account all circumstances, including the possibility of the class increasing, is a sufficient safeguard.

- 4.69 We agree with consultees that section 32 should be updated, for all trusts, to reflect current drafting practice in removing the one-half limit. This would give trustees flexibility to make the most appropriate decisions for beneficiaries within the parameters established by the general law on trustee decision-making.
- 4.70 Two consultees drew our attention to the potential for the removal of the one-half limit in section 32 to have a wider impact on the treatment of trusts for tax purposes.<sup>51</sup> There are various references to section 32 in tax legislation, in relation to trustees' liability to inheritance tax, income tax and capital gains tax.<sup>52</sup>
- 4.71 Some of these provisions apply in the same way whether or not the one-half limit in section 32 as currently worded applies to the trust in question. But for others, the restriction to one-half may be of importance for tax policy, so that the effect of such references could be changed by the removal of that restriction. We have discussed these issues with HM Revenue & Customs, who agree that those provisions in the taxing statutes will need to be reviewed on implementation of this recommendation. This would involve removing references to section 32 where they are superfluous; if in particular circumstances the one-half limit previously imposed by section 32 is considered important, a standalone limitation on advancement could be introduced.
- 4.72 **We recommend that the power contained in section 32 of the Trustee Act 1925 to pay or apply capital to or for the benefit of a trust beneficiary should be extended to the whole, rather than one-half, of the beneficiary's share in the trust fund.**
- 4.73 This is given effect by clause 9 of the draft Inheritance and Trustees' Powers Bill. The transitional provisions for this reform are discussed below.<sup>53</sup>
- 4.74 In responding to the Supplementary Consultation Paper, two consultees raised an additional point: the wording of section 32 focuses on the advancement of "any capital money".<sup>54</sup> The trust fund may be made up of a range of other assets, and the trustees may wish to transfer assets other than cash to or for the benefit of a beneficiary. There is authority that the trustees may make such a transfer on the basis that it avoids the need to put in place a more elaborate arrangement

<sup>51</sup> Analysis of Responses, paras 8.22 and 8.23. Consultees referred to *Barclays Bank Trust Co Ltd v Commissioners for HM Revenue & Customs* [2011] EWCA Civ 810, [2011] WTLR 1489.

<sup>52</sup> Inheritance Tax Act 1984, ss 71A, 71D and 89; Taxation of Chargeable Gains Act 1992, s 169D, sch 1, para 1 and sch 4ZA, para 9; Finance Act 2005, ss 34 and 35.

<sup>53</sup> See para 4.97 below.

<sup>54</sup> Analysis of Responses, paras 8.24 and 8.25.

whereby the trustees advance cash, and the beneficiary then buys the asset from the trust.<sup>55</sup>

4.75 We consider that it is appropriate in this Bill to make it clear on the face of the statute that such a transfer can be made straightforwardly, using the power in section 32.

4.76 **We recommend that section 32 of the Trustee Act 1925 be amended so that the trustees have power to transfer or apply other property subject to the trust on the same basis as the power to pay or apply capital money to or for the advancement or benefit of a beneficiary.**

4.77 This reform is given effect by clause 9 of the draft Inheritance and Trustees' Powers Bill. It is to apply to all trust arrangements.

**Section 31: the conditions on the power to pay income for a beneficiary's maintenance, education or benefit**

4.78 Section 31 of the Trustee Act 1925 concerns the income of the trust fund. Where it applies and is not modified by the terms of the trust, it includes not only the power to pay that income at the trustees' discretion, but also a duty to pay it out to a beneficiary, or to accumulate it, as explained above.<sup>56</sup> In the Supplementary Consultation Paper we considered those duties, but felt that reform would not be appropriate.<sup>57</sup> Our questions to consultees concerned possible reforms to the power to pay income for the maintenance, education or advancement of a beneficiary who is under 18. This power is set out as follows:

(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property –

- (i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is –
  - (a) any other fund applicable to the same purpose; or
  - (b) any person bound by law to provide for his maintenance or education; and
- (ii) if such person on attaining the age of eighteen years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

<sup>55</sup> *Re Collard's Will Trusts* [1961] Ch 293.

<sup>56</sup> See para 4.57 above.

<sup>57</sup> See Supplementary Consultation Paper, paras 2.13 to 2.21 and 3.41 to 3.43. Consultees made suggestions for other amendments to section 31, which are discussed at para 8.68 and following in the Analysis of Responses.

- 4.79 We considered three requirements for the exercise of the trustees' discretion which are set out in the provision as currently drafted.
- 4.80 First, section 31(1)(i) states that the trustees may pay "the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable". We drew attention to commentary suggesting that this is perceived as imposing an additional requirement that the exercise of the trustees' discretion must be objectively reasonable, and to standard precedents which substitute a reference simply to the trustees' absolute discretion.<sup>58</sup> We asked consultees whether this part of the provision should be redrafted to substitute an unfettered discretion.<sup>59</sup>
- 4.81 Secondly, the first part of the proviso to section 31(1) states that the trustees must "have regard to the age of the infant<sup>60</sup> and his requirements and generally to the circumstances of the case".
- 4.82 Thirdly, the second part of the proviso goes on specifically to restrict the trustees to paying out a proportionate amount of the income where they have notice that the income of another fund is also applicable for the beneficiary's maintenance, education or benefit.
- 4.83 We considered the second part of the proviso to be unnecessarily restrictive, and a potentially costly administrative burden, noting that it is frequently disapplied in practice. We provisionally proposed that it should be removed.<sup>61</sup> We also considered whether there is a need for the first part of the proviso, noting that it can be seen as guidance for the trustees but is superfluous, since trustees would in any case need to consider such issues; it has no equivalent in section 32. Again, it is often disapplied in standard precedents for trusts and wills.<sup>62</sup> We therefore asked consultees whether it should also be deleted; that is, whether the whole of the proviso should be removed.<sup>63</sup>

***So much of the income "as may, in all the circumstances, be reasonable"***

- 4.84 A majority of consultees supported redrafting section 31(1)(i) to express the trustees' discretion without a criterion of reasonableness.<sup>64</sup> In particular, they noted that this would bring section 31 into line with both section 32 and with what they described as routine professional practice in wills and trust documents.<sup>65</sup>

<sup>58</sup> Supplementary Consultation Paper, paras 3.29 and 3.36 to 3.38.

<sup>59</sup> Supplementary Consultation Paper, para 3.40(2).

<sup>60</sup> Section 31 refers to a person who is under 18 as an "infant" and to the period from birth to his or her 18th birthday as the beneficiary's "infancy" or "minority".

<sup>61</sup> Supplementary Consultation Paper, paras 3.32 to 3.34.

<sup>62</sup> Supplementary Consultation Paper, paras 3.27 to 3.29.

<sup>63</sup> Supplementary Consultation Paper, para 3.40(1).

<sup>64</sup> Analysis of Responses, paras 8.54 to 8.67.

<sup>65</sup> We noted in the Supplementary Consultation Paper that the amendment is not made in the current edition of the Society for Trust and Estate Practitioners' Standard Conditions: para 3.38. In their consultation response the Society acknowledged this fact but still considered that an unfettered discretion should be substituted in the legislation.

- 4.85 Consultees also expressed concern that the current criterion may fetter trustees in the exercise of their discretion, and encourage what the Trust Law Committee described as “somewhat fruitless disputes”. They argued that there is a risk that the current wording no longer simply expresses the trustees’ general duty but is perceived as setting a further restriction; and that a redraft would make the position clearer and simpler.
- 4.86 It was noted that the reform would not give the trustees the freedom – or the encouragement – to act unreasonably. The Society of Trust and Estate Practitioners noted that “trustees will still be exercising a fiduciary power and beneficiaries will have redress if the power is exercised improperly”.
- 4.87 Only two consultees opposed reform.<sup>66</sup> Farrer & Co considered that a stricter requirement of objective reasonableness is desirable where a settlor or testator has not taken professional advice in drawing up a trust or will, or where the trust arises on intestacy.<sup>67</sup> However, we agree with other consultees that it is more desirable that there should be consistency on this point between trusts however they arise. The Law Reform Committee of the Bar Council expressed concern that removing the express requirement of reasonableness would imply that acting unreasonably is permitted. We do not think that the reform would carry that implication; the general law on the exercise of trustees’ discretion will apply.<sup>68</sup>

***The proviso to section 31(1)***

- 4.88 No consultees opposed our proposal to remove the second part of the proviso to section 31(1). There was more disagreement as to whether the first part should be removed, but still a clear majority in favour of doing so.<sup>69</sup>
- 4.89 The second part of the proviso restricts trustees to paying only a proportionate amount of the income where there is more than one fund available for the beneficiary’s maintenance, education or benefit. Many consultees considered that this requirement is too rigid, and an impractical and potentially costly administrative burden which is out of step with modern practices and requirements. It was noted that settlors or testators will retain the option to introduce such restrictions expressly if they wish, usually after taking advice; but several consultees confirmed that it is “very common practice” (Society for Trust and Estate Practitioners) for professional drafters to exclude it.
- 4.90 Consultees pointed to the trustees’ existing duty to act in the best interests of the beneficiaries and take all circumstances into account; they must therefore consider the information they have about other sources of income in any case. Even if the income of another fund is potentially applicable to that beneficiary’s maintenance, there may be reasons (such as investment strategy or the

<sup>66</sup> The Institute of Professional Willwriters supported it as an alternative to their preferred option, which was to remove section 31 altogether. This very significant change to the current law was not suggested by other consultees and we did not feel that it would be appropriate to pursue it as part of this project.

<sup>67</sup> Or otherwise by operation of law.

<sup>68</sup> See, for example, A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed 2008) paras 6-074 to 6-115.

<sup>69</sup> See paras 4.81 and 4.82 above; Analysis of Responses, paras 8.41 to 8.53.

structuring of provision for beneficiaries with special requirements) why it is not appropriate to spend that income now.

- 4.91 Given consultees' strong views on this point we have decided that it would be appropriate to remove the restriction which limits the trustees to paying only a proportionate amount of the income where there are two or more funds applicable for the beneficiary's maintenance, education or benefit. This leaves the first part of the proviso, which requires the trustees to have regard to: the beneficiary's age and requirements; the circumstances of the case generally; and in particular what other income (if any) is applicable for the beneficiary's maintenance, education or advancement.
- 4.92 Five consultees expressly disagreed with the idea of deleting this part of the proviso, although one of them considered that the final requirement to have regard to other sources of income should properly be removed together with the restriction to which we have referred as the second part of the proviso. They considered that the rest of the proviso does no harm, and may indeed provide useful guidance to trustees. The Trust Law Committee argued that "in a statutory power it [is] appropriate ... to expressly indicate factors to which trustees should have regard".
- 4.93 Others, however, considered that it is not appropriate to list factors to which trustees should have regard. Edward Nugee QC noted that modern trusts do not include such "signposts" to trustees about how to exercise their discretion. The Society of Trust and Estate Practitioners commented that "the words are unlikely to be of any great assistance to trustees", considering that "the circumstances specified ... would in any case be in the mind of a trustee who was considering exercising the power". Indeed it was suggested that the proviso could actually be confusing, since it does not list all possible factors.
- 4.94 We find these arguments convincing. Having considered the responses, we take the view that after the deletion of the second part of the proviso, the first part serves no substantive purpose; it duplicates the existing law and is unlikely in practical terms to assist trustees in their decision-making. The drafting up to "the circumstances of the case" exists as the setting for the specific requirement – not found in the general law – to restrict the payment of income to a proportionate amount; and therefore is properly removed with it.
- 4.95 **We recommend that section 31(1) of the Trustee Act 1925 be amended to:**
- (1) **remove the words "as may, in all the circumstances, be reasonable" and substitute "as the trustees think fit"; and**
  - (2) **delete the whole of the proviso to the subsection.**
- 4.96 This reform is given effect by clause 8 of the draft Inheritance and Trustees' Powers Bill.
- 4.97 In the Supplementary Consultation Paper we made a provisional proposal<sup>70</sup> as to transitional arrangements applicable to these reforms and to our recommendation

<sup>70</sup> Supplementary Consultation Paper, para 3.68.

on the extension of the power in section 32.<sup>71</sup> Our provisional proposal was strongly supported on consultation.<sup>72</sup> Therefore, these reforms are to apply to all trusts established on intestacy, or by a will or codicil, where the death occurs after the provisions have come into force; and to new trusts created after that time by settlors with their own assets. They are also to apply to all new trusts, and interests under trusts, which come into effect by the exercise of powers associated with existing trusts (whether established before or after the new provisions come into force). Such powers may be general powers of appointment, special powers of appointment or powers of advancement.<sup>73</sup> The transitional effect of the reforms is governed by clause 10 of the draft Inheritance and Trustees' Powers Bill.

<sup>71</sup> See para 4.72 above.

<sup>72</sup> Analysis of Responses, paras 8.79 to 8.100, which includes discussion of the minority views on transitional provisions.

<sup>73</sup> Including the power conferred by section 32 of the Trustee Act 1925 itself. See Supplementary Consultation Paper, paras 3.54 to 3.67.

# **PART 5**

## **INTESTACY: THE ADMINISTRATION OF ESTATES**

### **INTRODUCTION**

- 5.1 In this Part we look at some administrative aspects of the law of intestacy. By that we mean questions that relate for the most part not to who takes the estate, but to how the administrators manage and distribute it. In looking at these questions we have to bear closely in mind the fact that administrators are unlikely to be lawyers; those who can take out letters of administration of an intestate estate are essentially those entitled to the property.<sup>1</sup> They will therefore be family members; few will be lawyers, and many will not take legal advice. Intestate estates tend to be of relatively low value,<sup>2</sup> and there is much to be said for keeping administrative procedures as simple as possible in order to avoid unnecessary cost and worry.
- 5.2 We address six issues in this Part. The first two relate to the procedures that administrators have to follow in order to ascertain who is entitled to the estate; one is about tracing relatives generally, and the other is about the identification of the deceased's father, in the cases where he was not married to the deceased's mother. Then we look at the small payments regime, whereby under the current law certain assets can be distributed without a grant of letters of administration or indeed of probate where there is a will. Next we turn to the rules on appropriation and self-dealing. Finally we look at the rules of survivorship, and the rules about accounting for earlier benefits.

### **TRACING MISSING BENEFICIARIES**

- 5.3 The intestacy rules mean that in some cases rather remote relatives may be entitled to inherit. They may be remote in terms of relationship (the most distant relatives entitled are the descendants of a half sibling of a parent of the deceased), or geographically, or hard to find because they were not in touch with the deceased. The administrators of the estate may encounter difficulties in identifying and locating all of the potential beneficiaries.<sup>3</sup>
- 5.4 The administrators of an intestate estate may incur personal liability if they fail to distribute the estate correctly. Where they have difficulty in tracing beneficiaries, there are a number of options open to them. They may advertise, to avoid liability for failing to distribute to beneficiaries of whose existence they are unaware.<sup>4</sup> But if they know the identity, but not the whereabouts, of a beneficiary, advertisement will not assist them. They may employ professional genealogists – sometimes called “heir hunters” – and they may insure against the possibility of a missing

<sup>1</sup> See paras 1.81 to 1.83 above.

<sup>2</sup> See Appendix D, table 3.

<sup>3</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 (“Consultation Paper”), paras 6.59 to 6.61.

<sup>4</sup> Trustee Act 1925, s 27; see *Evans v Westcombe* [1999] 2 All ER 777 and *AON Pension Trustees Ltd v MCP Pension Trustees Ltd* [2010] EWCA Civ 377, [2011] 3 WLR 455.

beneficiary coming forward. An insurer will require evidence that efforts have been made to trace the missing person, in particular using genealogists. Costs incurred in tracing missing beneficiaries are generally treated as an expense in the administration, reducing the amount that is available for division between the beneficiaries.

- 5.5 Ultimately the administrators may apply to the court for directions – either to administer the estate on the basis that the missing beneficiary has died,<sup>5</sup> or to distribute the estate while reserving the share of the missing beneficiary, so that the costs of further tracing fall on that beneficiary alone.
- 5.6 We invited consultees' views as to whether there should be a presumption that administrators may distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.<sup>6</sup> That would mean that the cost of tracing a particular beneficiary would be taken from that beneficiary's share in the estate. Our suggestion would not, of course, assist administrators in a case where the total number of beneficiaries (or at least the number of branches in the family) was unknown, but would be relevant where all potential beneficiaries have been identified but some remain to be located.
- 5.7 Of the 43 consultees who responded to this invitation, 17 consultees agreed with the proposal, while 14 disagreed and 12 gave qualified support, alternative suggestions or provided comments without expressly agreeing or disagreeing.<sup>7</sup>
- 5.8 A number of concerns were expressed. Some consultees made reference to the availability of missing beneficiary insurance. Where the personal representatives have not done enough to satisfy an insurance company that the risks of a beneficiary being found are negligible, then it is not clear that it is appropriate for them to distribute the rest of the estate. Indeed, the probate genealogy firms who responded suggested that genealogical probate research is now so effective, thanks in part to the availability of online records, that in 95% of cases it should be possible to find a "missing" beneficiary. These firms agreed (with one exception) that reform is not needed; they took the view that the problem we identified is not sufficiently serious to warrant reform and can be dealt with by existing measures.
- 5.9 One of the most compelling arguments against reform is that it might reduce the incentive for family members to assist in the search for their "missing" kin.<sup>8</sup> Many consultees agreed that this would be a problem in practice; it was even suggested that reform might actively increase dishonesty. A related concern is that the cost of searching for beneficiaries is a legitimate expense of the administration and should be treated as any other administration expense, which are not generally attributed to a particular beneficiary. As the Society of Trust and Estate Practitioners noted, missing beneficiaries do not know they are missing until they are found and it is not necessarily their fault that they are hard to find.

<sup>5</sup> *Re Benjamin* [1902] 1 Ch 723.

<sup>6</sup> Consultation Paper, para 6.62.

<sup>7</sup> Analysis of Responses, paras 6.90 to 6.114.

<sup>8</sup> Consultation Paper, para 6.61.

- 5.10 Some of our charity consultees suggested that reform would benefit charities. Our provisional proposal was directed at intestate estates, and would therefore only increase the amount passing to charity in a case of partial intestacy, where part of the estate passed to charity under a will. The issue of whether reform should apply equally to testate and intestate estates was not directly addressed in the Consultation Paper or by consultees. If it did not, reform could make the duties of administrators of intestate estates less onerous than those of the executors of testate estates. This might be justifiable on the basis that the intestacy rules impose on administrators a duty to identify and locate distant relatives who are much less likely to be named in a will; but it could be seen as a new and undesirable distinction in their legal obligations.
- 5.11 Even among those consultees who supported reform, many argued for safeguards to ensure that administrators had in fact taken all reasonable steps to locate the beneficiaries who might be prejudiced by a distribution of the rest of the estate, including a suitable advertising procedure. These are the sort of steps that would need to be taken at present before applying to court for directions.
- 5.12 Recent changes to Part 64 of the Civil Procedure Rules mean that it is much easier to make an application for adjudication without an oral hearing. We accept that even an uncontested application on the papers will involve some costs that may be disproportionate where the estate is small. Nevertheless, reform allowing the distribution of an estate in circumstances where that would not have been sanctioned by the court risks diluting the fundamental duty of a personal representative to identify and locate all beneficiaries.
- 5.13 In the light of all this we make no recommendation for change to the rule that the cost of tracing missing beneficiaries is borne by the whole estate.

#### **UNMARRIED FATHERS**

- 5.14 In the Consultation Paper we highlighted a little-known rule that operates where a person whose parents were not married to one another dies intestate.<sup>9</sup> The administrators of that person's estate may proceed on the basis that the deceased was not survived by his or her father or anyone related through his or her father, "unless the contrary is shown".<sup>10</sup> In other words, when someone dies intestate there is a presumption that his or her unmarried father has already died, but that presumption can be rebutted.
- 5.15 The presumption was first introduced in 1969, alongside reforms which provided for a child whose parents were not married to one another to inherit on his or her

<sup>9</sup> Consultation Paper, paras 6.64 to 6.67. See Family Law Reform Act 1987, s 18(2), which refers to "a person whose father and mother were not married to each other at the time of his or her birth". The rule does not apply to those whose parents later married or whose birth would otherwise be regarded in law as legitimate or legitimated: see Family Law Reform Act 1987, s 1; Legitimacy Act 1976, ss 2, 2A, 3, 4 and 10.

<sup>10</sup> In the case of a person who has a female parent other than his or her mother by virtue of section 43 of the Human Fertilisation and Embryology Act 2008, the administrators may proceed on the basis that the deceased was not survived by the second female parent or any person related only through the second female parent: Family Law Reform Act 1987, s 18(2A). For simplicity, references to a person's "father" in the text below are intended to include references to a person's second female parent where that is relevant.

father's intestacy, and, equally, for the father to inherit on the child's intestacy.<sup>11</sup> There was a concern that, in many cases, the identity of the father would be unknown, and so the presumption was introduced as a rule of convenience.<sup>12</sup>

- 5.16 The rule was reconsidered by the Law Commission in a 1979 working paper and in reports in 1982 and 1986.<sup>13</sup> The 1982 Report recommended that the right of a father to inherit on the intestacy of his non-marital child should be extended to any relative claiming through the father.<sup>14</sup> But the Commission was concerned that a conscientious personal representative might feel obliged to make extensive enquiries about the existence of such relatives.<sup>15</sup> It was therefore decided to extend the existing presumption to anyone related through the father. This was enacted as section 18(2) of the Family Law Reform Act 1987.
- 5.17 It was suggested to us before the publication of the Consultation Paper that this provision is discriminatory and unfair and might fail a challenge under the Human Rights Act 1998. We therefore asked to hear the views of consultees, in particular those involved in the administration of estates, as to any practical problems which might arise as a result of a reform of section 18(2) of the Family Law Reform Act 1987.<sup>16</sup>
- 5.18 Some consultees were concerned that if administrators were no longer entitled to rely on the presumption they would be required to make more onerous enquiries and might be exposed to liability if they failed to trace a father who was in fact alive. There was, however, some support for reform. Several consultees argued that the presumption is discriminatory and may not be compatible with the European Convention on Human Rights.<sup>17</sup>

### **Discussion**

- 5.19 This is not an issue that affects a great number of estates. The presumption is only relevant where a person whose mother and father were not married to one another:
- (1) dies intestate;
  - (2) leaves no children or other descendants; and

<sup>11</sup> Family Law Reform Act 1969, s 14(4) (repealed by the Family Law Reform Act 1987, s 33(4) and sch 4).

<sup>12</sup> Report of the Committee on the Law of Succession in Relation to Illegitimate Persons (1966) Cmnd 3051, para 47.

<sup>13</sup> Family Law: Illegitimacy (1979) Law Commission Working Paper No 74; Family Law: Illegitimacy (1982) Law Com No 118; Family Law: Illegitimacy (Second Report) (1986) Law Com No 157.

<sup>14</sup> The Law Commission used the term "non-marital" in preference to "illegitimate".

<sup>15</sup> Family Law: Illegitimacy (1982) Law Com No 118, para 8.32.

<sup>16</sup> Consultation Paper, para 6.68; Analysis of Responses, paras 6.115 to 6.126.

<sup>17</sup> We commented on this in the Consultation Paper, para 6.66.

- (3) is survived by his or her father, and either leaves no spouse or leaves a spouse and has an estate valued at more than £450,000 (excluding personal chattels).<sup>18</sup>
- 5.20 It also seems likely that many administrators may be unaware of the presumption and in practice take the same steps to identify and locate the father as they would any other relative. Nevertheless, the provision is not merely of theoretical interest; a number of practitioners have told us that they have relied on the presumption in practice, albeit rarely.
- 5.21 In considering this question further, we have devised a solution which reduces the risk that the law is incompatible with the European Convention on Human Rights, while acknowledging the fact that the presumption serves an important practical purpose in avoiding the need for administrators to make unnecessary enquiries. We suggest that the starting point is to distinguish two related but separate problems that may be faced by administrators in these circumstances:
- (1) establishing the identity of the father; and
  - (2) establishing whether the father is still alive and locating him.
- 5.22 The first port of call when establishing a father's identity would usually be to check whether he is named on the official record of the deceased's birth.<sup>19</sup> The mother and father of a baby are under a statutory duty to register the birth,<sup>20</sup> but there is no duty on the father if he was not married to the mother at the time of the birth. Indeed, under the current law a registrar will not enter in the register the name of any person as father except at the joint request of the mother and the person stating himself to be the father of the child.<sup>21</sup> It is therefore possible for a child of unmarried parents to be registered either:
- (1) solely by the mother (a sole registration); or
  - (2) jointly by the mother and father (joint registration).
- 5.23 In the mid-1960s, more than 60% of births outside marriage were sole registrations. In 2003, this figure was 17%. Over a similar timeframe, the proportion of births to unmarried parents has risen from around 10% of all births in the mid-1970s to more than 40% in 2003.<sup>22</sup> So when the Family Law Reform

<sup>18</sup> The size of the estate will be irrelevant if our recommendation that the whole estate should pass to the surviving spouse where the deceased is not survived by any children or other descendants is accepted. See para 2.25 above.

<sup>19</sup> In most cases this will be in a register of births kept, or having effect as if kept, under the Births and Deaths Registration Act 1953. But some records, for example registers of births on ships or aircraft or births of British citizens overseas are included in indexes kept under the Act. In either case, the records can be searched for a modest fee: see the General Registry Office website at <https://www.gro.gov.uk/gro/content/certificates/default.asp> (last visited 23 November 2011).

<sup>20</sup> Births and Deaths Registration Act 1953, s 2. There are provisions for situations where the mother or father is dead.

<sup>21</sup> Births and Deaths Registration Act 1953, s 10.

<sup>22</sup> S Smallwood, "Characteristics of sole registered births and the mothers who register them" (2004) 117 *Population Trends* 20, 21.

Act 1969 was enacted, there were far fewer births to unmarried parents than today and in most of those cases the father's name was not registered. It is now relatively unusual for a birth to be registered in the sole name of the mother (only around 7% of all births). Amendments to the Births and Deaths Registration Act 1953 that have been enacted but are not yet in force will require an unmarried mother to provide information about the baby's father when registering the birth alone. This is intended to enable the registrar to contact the father with the aim of entering his details on the register. These reforms will also make it easier for a father to apply to be registered without the mother's consent.<sup>23</sup>

- 5.24 Where a birth is registered in the sole name of the mother, we agree that it would be unreasonable to require an administrator to attempt to discover the identity of the father. Although there will be cases where the administrator does in fact know or suspect the identity of the father,<sup>24</sup> in other cases the presumption that the father has already died provides an important safeguard against the need to make onerous and potentially sensitive enquiries that may well prove fruitless.
- 5.25 The decline in sole registered births means that the number of cases where the father is not named on the register will reduce over time. However, those dying in old age today were born at a time when sole registration of births to unmarried parents was far more common. The presumption will therefore still serve a useful purpose for some time to come.
- 5.26 But where a father is named on the official record of the child's birth, the case for retaining a presumption that he has predeceased his child is much less strong. An entry in a register of births is evidence of the facts stated in the entry,<sup>25</sup> and the administrators may safely proceed on the basis that the person named is the father, unless the contrary is shown.
- 5.27 There may be difficulties in establishing whether the person recorded as the child's father is still alive and then locating him. Further problems may arise if the father has died; the search may then extend to relatives claiming only through him (though only if the deceased has no living mother or full sibling, who would take the estate in priority to any relative of the father). But these are problems that may arise in locating any beneficiary; there is no reason to suppose that it is inherently more difficult to locate a father whose identity is known than it is to locate any other "missing kin".
- 5.28 Concerns that the current law is not compatible with the European Convention on Human Rights should be addressed by this reform. It is more proportionate to apply the presumption only where a father is not named on the official record of the child's birth than to retain a blanket presumption which applies in every case, even where there is an obvious means of identifying the father.

<sup>23</sup> Welfare Reform Act 2009, s 56 and sch 6. For academic criticism see S Sheldon, "From 'absent objects of blame' to 'fathers who want to take responsibility': reforming birth registration law" (2009) 31(4) *Journal of Social Welfare and Family Law* 373.

<sup>24</sup> Research found that for 23% of all sole registered births the mother described the father as being closely involved in the child's upbringing and the mother was cohabiting with the father in 8% of all sole registered births: S Smallwood, "Characteristics of sole registered births and the mothers who register them" (2004) 117 *Population Trends* 20, 21.

<sup>25</sup> *Brierley v Brierley and Williams* [1918] P 257, 260; *Jackson v Jackson and Pavan* [1961] 2 WLR 58.

- 5.29 **We recommend that section 18(2) of the Family Law Reform Act 1987 shall not apply if a person is recorded as the deceased's father (or as a parent, other than the mother) on the official record of the deceased's birth under the Births and Deaths Registration Act 1953.**
- 5.30 This recommendation is put into effect by clause 5 of the draft Inheritance and Trustees' Powers Bill.

### **SMALL PAYMENTS**

- 5.31 The "small payments" rules are a collection of statutory provisions which enable some assets of lower value to be released after the death of the person entitled to them without the need to produce a grant of representation.<sup>26</sup> It does not matter whether the estate is testate or intestate. The rules apply to a miscellany of assets, including National Savings certificates, Government stock, building society funds, trade union, industrial, provident or friendly society funds, and certain pension and other payments to some public sector workers.
- 5.32 The rules generally apply to assets valued individually at less than £5,000, although occasionally there is an additional requirement, such as that the overall holding does not exceed a certain limit.<sup>27</sup> In the Consultation Paper we noted that the £5,000 limit is somewhat out of date, having been set in 1984; we calculated that it would be equivalent to about £11,000.<sup>28</sup>
- 5.33 We therefore provisionally proposed that the value of assets that can be administered without the need for a grant of representation be reviewed with a view to its being raised.<sup>29</sup>

### **Consultation responses**

- 5.34 Several consultees endorsed this proposal. They noted that a review is long overdue, and cited the inconvenience and cost of obtaining a grant of representation. However, many others were cautious about focusing solely on raising the limit. They indicated various other factors which would need to be taken into account in reviewing the small payments rules.<sup>30</sup>
- 5.35 A range of consultees were concerned about an increased risk of fraud; that is, that one of a class of beneficiaries would apply for the assets to be released and

<sup>26</sup> The schedules to the Administration of Estates (Small Payments) Act 1965 set out most of the enactments. For a full treatment, see J Ross Martyn and N Caddick (eds), *Williams, Mortimer and Sunnucks: Executors, Administration and Probate* (19th ed 2008) paras 9-07 to 9-16.

<sup>27</sup> For example, if the value of holdings of Government stock, National Savings Bank deposits and savings certificates, premium savings bonds and certified contractual savings schemes exceeds £50,000, the release of Government stock or National Savings Bank deposits or savings certificates requires confirmation from HM Revenue & Customs that inheritance tax is either not due or has been paid: National Savings Stock Register Regulations 1976, SI 1976 No 2012, reg 42; National Savings Bank Regulations 1972, SI 1972 No 674, reg 41; Savings Certificate Regulations 1991, SI 1991 No 1031, reg 17.

<sup>28</sup> Consultation Paper, para 7.7. The current limit was set by the Administration of Estates (Small Payments) (Increase of Limits) Order 1984, SI 1984 No 539.

<sup>29</sup> Consultation Paper, para 7.8.

<sup>30</sup> Analysis of Responses, paras 7.1 to 7.21.

then fail to account to the others, in whole or in part. This was a particular concern for consultees from the charity sector. Charities often rely on the Smee & Ford legacy notification service, which disseminates information from wills admitted to probate.<sup>31</sup> If no grant of probate is required then a charitable legacy can be concealed from the intended recipient.

- 5.36 Some consultees stressed that a grant of representation is important because it makes administration of the estate a matter of public record: anyone can see who has taken on responsibility for administering the estate, and on what basis – intestacy, or the terms of a will. The date of the grant establishes when time starts running for claims against the estate,<sup>32</sup> and enables third parties to address their claims to the personal representatives. Other stakeholders have noted that a grant of representation may have other benefits; the Chancery Masters pointed out that a grant of representation will be very useful in the event of a later accretion to the estate. This may indicate that those who are entitled to a grant should be encouraged to obtain one.
- 5.37 Several consultees noted other discrepancies in the small payments regime. The range of assets to which it applies is miscellaneous and has not been updated for some time. The legislation does not apply to funds in bank accounts; and yet banks and building societies often release funds substantially in excess of £5,000.<sup>33</sup> Some consultees considered that banks did not make sufficient enquiries before funds were paid over, thereby increasing the risk of fraud.

## Discussion

- 5.38 We appreciate the concerns of consultees about an increase in the threshold. We also note that the difficulty of obtaining a grant of representation may be overstated. The cost is currently £105 for a personal application in relation to an estate valued at more than £5,000, and nil for a smaller estate.<sup>34</sup> Personal applications for grants of representation fall within the scope of the review being undertaken by the Non-Contentious Probate Rules working group.<sup>35</sup> Some of our consultees suggested options such as a “simplified” procedure for small estates.
- 5.39 Any revision of the current rules would need to work satisfactorily with other procedures, such as the collection of inheritance tax. At present, an inheritance tax account (in a shortened form, if the estate is small) is required before a grant can be issued; although removing the requirement for a grant would not affect the amount of inheritance tax payable, it could reduce HM Revenue & Customs’ opportunities to collect it.
- 5.40 In summary, our consultation has revealed considerable dissatisfaction with the current law but also considerable disagreement as to any potential reform. While

<sup>31</sup> See <http://www.smeeandford.co.uk> (last visited 23 November 2011).

<sup>32</sup> Including claims under the Inheritance (Provision for Family and Dependents) Act 1975.

<sup>33</sup> As much as £20,000: Consultation Paper, para 7.5.

<sup>34</sup> Non-Contentious Probate Rules Fees Order 2004, SI 2004 No 3120, sch 1 (£45 is charged for an application for a grant, plus £60 for a personal application).

<sup>35</sup> This is an ad-hoc advisory committee whose function is to undertake a revision of the Non-Contentious Probate Rules 1987 (NCPR). See further: <http://www.judiciary.gov.uk/media/media-releases/2009/news-release-2109> (last visited 23 November 2011).

some consultees would like to see the current £5,000 limit raised and applied to a wider range of assets, other stakeholders would prefer to limit the current opportunities for administering an estate without a grant of representation. It is therefore clear that any review would need to address a far broader range of issues than simply whether the current £5,000 limit should be raised. Matters that would need to be addressed include the range of assets to which the rules should apply, the protection afforded to asset holders, and the formalities that should be followed when applying for assets to be released. These are matters that are beyond the scope and resources of our current project.

- 5.41 In particular, any review would need to consider the way in which many financial institutions release assets without the need for a grant outside the small payments regime. These institutions would need to be consulted as part of any review, as would organisations in the charity sector which have concerns about the impact of these practices.
- 5.42 HM Treasury is the Government department with responsibility for setting and maintaining the small payments limit. We have held initial discussions with HM Treasury and also with HM Revenue & Customs, the Ministry of Justice and the Probate Service. There was general agreement that this area of law would benefit from a more fundamental review than we have been able to undertake as part of this project.
- 5.43 **We recommend that the Government should commission a review of the small payments regime. This review should consider, among other things, whether the current £5,000 limit should be raised, the range of assets to which the rules should apply, the protection afforded to asset holders, the formalities that should be followed when applying for assets to be released and any other issues that arise from the review.**

#### **APPROPRIATION AND SELF-DEALING**

- 5.44 When distributing the estate of a deceased person, the personal representatives may wish to transfer a specific item of property to a beneficiary as part of that beneficiary's entitlement.<sup>36</sup> This is known as an appropriation. It may be more efficient to appropriate an item than to sell it and distribute the proceeds. Appropriation is also likely to be more suitable for property with special significance such as personal items, shares in a private company (which may be difficult to sell in any case) or, in particular, the deceased's family home.
- 5.45 We explained in the Consultation Paper that a problem may arise where a beneficiary is also a personal representative. This is often the case, particularly on an intestacy where those who are entitled to benefit from the estate are also entitled to take a grant of representation in the same order of priority.<sup>37</sup> A surviving spouse will often be the sole administrator of the intestate estate of his or her deceased spouse.<sup>38</sup>

<sup>36</sup> Administration of Estates Act 1925, s 41.

<sup>37</sup> Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

<sup>38</sup> Above, r 22(1).

- 5.46 Where a personal representative appropriates property as part of his or her own entitlement to the estate without the authorisation of other beneficiaries or the consent of the court, the appropriation may breach what is known as the rule against self-dealing. This rule renders the transaction voidable (that is, the transaction can be overturned) if any other beneficiary so requires.<sup>39</sup> This means that, even if the notional value which the personal representative ascribed to the asset was fair in the circumstances, other beneficiaries are entitled to a court order setting aside the transaction (subject to equitable defences, such as undue delay in seeking the order).
- 5.47 The rule against self-dealing stems from the “obligation of loyalty” owed by anyone in a fiduciary position.<sup>40</sup> The fiduciary must not, unless authorised, make profits from the fiduciary position or act where there is a conflict between his or her personal position and the duty owed as fiduciary. The precise scope of the rule is somewhat unclear. It certainly applies to personal representatives who purchase property from the estate (as it does to any trustee who purchases trust assets). But the application of the rule to appropriations in satisfaction of a personal representative’s own entitlement is less clear. There are cases which suggest that the full rigour of the rule applies only to appropriations in satisfaction of a pecuniary legacy, rather than a share in the residuary estate.<sup>41</sup>
- 5.48 It is clear, however, from the decision of Sir Richard Scott V-C in *Kane v Radley-Kane*,<sup>42</sup> that the rule against self-dealing does apply where the surviving spouse who is administering an intestate estate appropriates assets in satisfaction of the statutory legacy to which he or she is entitled under the intestacy rules. In that case, the deceased’s assets included shares in a private company which had been valued for probate purposes at £50,000. Mrs Radley-Kane appropriated the shares to herself in part satisfaction of her statutory legacy of £125,000. About 18 months later, she sold the private company shares for just over £1.1 million. Her stepsons brought a claim to avoid the appropriation and, since the estate would then exceed the statutory legacy, to obtain their own shares in the residue. Because the appropriation was found to have breached the rule against self-dealing, the claimants obtained a declaration from the court that it was invalid.
- 5.49 The application of the self-dealing rule in these circumstances has been criticised. The surviving spouse is often the person best placed to administer the estate, having most knowledge about the deceased’s financial affairs and property, yet the decision in *Kane v Radley-Kane* suggests that a surviving spouse might be well advised not to act as an administrator. This has been described as “a profoundly unsatisfactory state of affairs”.<sup>43</sup>
- 5.50 However, as we noted in the Consultation Paper, the rule against self-dealing is a well established and important principle of fiduciary relationships which applies in a wide variety of circumstances. To create an exception in the context of

<sup>39</sup> *Tito v Waddell (No. 2)* [1977] Ch 106, 241

<sup>40</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1, 18, by Millett LJ.

<sup>41</sup> *Elliott v Kemp* (1840) 7 M & W 306, 151 ER 783, *Barclay v Owen* (1889) 60 LT 220 and *Re Richardson* [1896] 1 Ch 512.

<sup>42</sup> [1999] Ch 274.

<sup>43</sup> S Cretney, “Re Radley-Kane (Deceased)” [1998] *Family Law* 525, 526.

intestacy may be inappropriate. The present rule may operate harshly on occasion but it has the benefit of clarity and discourages behaviour by personal representatives that may prejudice other beneficiaries.

- 5.51 We therefore did not make any provisional proposal but invited consultees' views as to whether the application of the self-dealing rule to administrators of intestate estates should be modified so that an appropriation should not be voidable by reason of the rule if it was at a fair value.<sup>44</sup>
- 5.52 We also invited comments on the suggestion that problems may be caused where a surviving spouse is not aware of the need to appropriate the family home until many years after the death of the deceased. If the property has increased in value it may exceed the level of statutory legacy in force at the death.<sup>45</sup>

### **Consultation responses**

- 5.53 Of the 32 consultees who responded to this invitation, 19 favoured some modification of the self-dealing rule in these circumstances. They included law firms, the Chancery Bar Association and the Law Reform Committee of the Bar Council. Ten consultees opposed change, including the Society of Trust and Estate Practitioners, the Family Law Bar Association and the Law Society.<sup>46</sup>
- 5.54 Many consultees who favoured reform agreed with our concern set out in the Consultation Paper that the rule may present a trap for non-professional administrators who are unlikely to be aware of it. The City of Westminster and Holborn Law Society argued that applying the self-dealing rule in these circumstances "is legalistic, unfair and absurd". The Chancery Bar Association said that beneficiaries who are appointed to administer the estate would inevitably be placed in a position where their personal interests and duties to others conflict.
- 5.55 These responses in favour of reform were not unequivocal. Some consultees were in favour of reform only if it was subject to conditions, such as the appointment of a second administrator. The Chancery Bar Association suggested that it should apply only to appropriations by an administrator and not to purchases from an estate. Others supported reform in principle but doubted whether it would bring any practical benefit.
- 5.56 Those who opposed reform were most concerned to safeguard the position of other beneficiaries in tackling maladministration by personal representatives. The Family Law Bar Association argued that many family members feel "powerless" to control those who are administering a relative's estate. For these consultees, the self-dealing rule provides a clear, well established and effective way to discourage personal representatives from unfairly appropriating assets in a way that may prejudice other beneficiaries.

<sup>44</sup> Consultation Paper, para 7.19.

<sup>45</sup> The statutory legacy received by the spouse is fixed at the level in force on the date of the death, and we do not propose to change that rule, which has the merit of simplicity and certainty.

<sup>46</sup> Analysis of Responses, 7.22 to 7.51.

- 5.57 Many of these consultees felt that the disadvantages identified in the Consultation Paper could be addressed without reform of the underlying law, for example by providing more information when non-professional personal representatives obtain a grant. Others emphasised the possibility of obtaining consent from the beneficiaries, or from the court if that is not possible. The Trust Law Committee drew our attention to the report of a working group set up by them to examine conflicts of interest in trusts.<sup>47</sup> This inspired a new court procedure to enable certain applications by trustees, including personal representatives, to be dealt with on paper without the need for a hearing.<sup>48</sup>
- 5.58 Some consultees, including those who favoured reform in principle, felt that the advantages of retaining the rule in its current form could outweigh the difficulties that might be caused by reform. One consultee said that reform might complicate litigation. Another reasoned that it would not be logical to modify the rule in cases of intestacy but not for other trusts, including those created under wills.

### Discussion

- 5.59 The self-dealing rule applies in a wide range of circumstances of which the appropriation by a surviving spouse on intestacy is just one. The rule itself is a manifestation of fundamental equitable principles. We therefore need to approach any proposals for reform of the rule with care.
- 5.60 That said, it must be recognised that statute has already intervened to modify the rule in certain circumstances. A surviving spouse has the statutory right to appropriate the deceased's interest in the family home as part of his or her share of the estate; in that case the self-dealing rule does not apply, provided that the spouse acted with at least one other administrator.<sup>49</sup> Some consultees suggested that this approach should be extended to permit appropriation of other assets in satisfaction of an administrator's own entitlement if there is at least one other co-administrator in place. We accept that this requirement can be a helpful safeguard against maladministration and it appears to work well in the context of appropriation of the family home; our consultation did not reveal any dissatisfaction with the current law.<sup>50</sup> But the law only requires the appointment of two or more administrators where a life interest arises or any beneficiary is under 18.<sup>51</sup> In other cases, the effectiveness of reform along these lines depends on a sole administrator being sufficiently aware of the law to seek the appointment of a co-administrator. We doubt whether this is realistic where the surviving spouse is entitled to the entire estate on intestacy; and there is little incentive for others to

<sup>47</sup> Trust Law Committee Working Party on Conflicts of Interest in Trusts paper, available at <http://www.kcl.ac.uk/law/research/centres/trustlawcommittee/otherpapersandreports.aspx> (last visited 23 November 2011).

<sup>48</sup> See Civil Procedure Rules, Practice Direction 64A, para 1A.

<sup>49</sup> Intestates' Estates Act 1952, s 5 and sch 2; see in particular paragraph 5, which disapplies the self-dealing rule and enables the spouse to pay "equality money" where the value of the family home exceeds his or her interest in the estate.

<sup>50</sup> There was no response to the suggestion mooted in the Consultation Paper that particular problems may be caused where a surviving spouse is not aware of the need to appropriate the family home: see Consultation Paper, para 7.20, and para 5.52 above.

<sup>51</sup> Senior Courts Act 1981, s 114(2).

volunteer to act as a co-administrator if there is no prospect of any benefit from the estate.

- 5.61 Reform would therefore make little difference in our view unless it permitted a sole administrator to appropriate property in satisfaction of his or her own entitlement, as was the case in *Kane v Radley-Kane*. For a number of our consultees, however, the facts of that case illustrate why the rule against self-dealing is so important and should be retained. Shares in private companies are notoriously difficult to value but on any view the original valuation of £50,000 appears to have been very low compared with the price of more than £1 million at which the shares were sold. Because the rule against self-dealing was held to apply, the deceased's children who stood to benefit if the transaction were set aside were entitled to that declaration as of right. There was no need for a lengthy consideration of the actions of the spouse and the value of the shares at different dates.
- 5.62 The case therefore appears to be criticised more for the principle it establishes than the actual outcome. It seems harsh that an appropriation can be set aside with no consideration of the state of mind of the personal representative. But in practice it may be unlikely that litigation would be commenced where the appropriation was in fact made at a fair value; there would be little to be gained by the other beneficiaries in such cases.
- 5.63 And we take on board the concern that a "fair value" rule may complicate litigation. It could even lead to more litigation, as it will be less easy to predict the outcome in advance. Some consultees queried how the administrator would show that the appropriation was at a fair value, either procedurally or substantively (assuming that the burden of demonstrating fair value was placed on the administrator and not the beneficiaries). In *Kane v Radley-Kane*, Sir Richard Scott V-C suggested that the self-dealing rule does not apply "if the assets appropriated were equivalent, to all intents and purposes, to cash", such as "government stock, or quoted securities".<sup>52</sup> The rule would therefore appear to be relevant only to assets that are likely to be more difficult to value; finding an objective "fair value" in those circumstances may be elusive.
- 5.64 There is also a good argument that the self-dealing rule does not apply at all to appropriations in satisfaction of shares in residue, but only to those in relation to the statutory legacy. As Sir Richard Scott V-C acknowledged in *Kane v Radley-Kane*, there are a number of authorities holding that an appropriation in satisfaction of a personal representative's share in residue is valid, if fairly made.<sup>53</sup> In addition, there is authority in relation to wills and trusts that the self-dealing rule does not apply where the conflict is brought about by the position in which the trustee is placed by the settlor or the terms of the trust, not by the

<sup>52</sup> [1999] Ch 274, 285.

<sup>53</sup> *Kane v Radley-Kane* [1999] Ch 274, 282 to 284, referring to *Elliott v Kemp* (1840) 7 M & W 306, 151 ER 783, *Barclay v Owen* (1889) 60 LT 220 and *Re Richardson* [1896] 1 Ch 512. In *Re Bythway* (1911) 80 LJ Ch 246 those cases were distinguished in relation to an appropriation in satisfaction of a pecuniary legacy. See also J Mowbray, L Tucker, N Le Poidevin, E Simpson and J Brightwell, *Lewin on Trusts* (18th ed 2008), para 20-72.

trustee.<sup>54</sup> The intestacy rules similarly appoint beneficiaries as administrators when it is obvious that they will have a conflict of interest. We agree with the Chancery Bar Association that it is illogical for the law then to object to that conflict by ruling that all appropriations in the administrator's own favour are automatically invalid unless further steps are taken. But we note that, where problems do arise, the new court procedures referred to above have made it more straightforward and less expensive to obtain the court's approval of transactions which would otherwise breach the rule against self-dealing.<sup>55</sup>

- 5.65 The Chancery Bar Association suggested that reform of the law should apply to appropriations only and not to purchases from the estate by an administrator. We are not convinced that such an approach would resolve the problem. In *Kane v Radley-Kane* the appropriation was analysed in terms of a purchase by the surviving spouse and therefore found to breach the rule against self-dealing. And there may be cases where the asset which is appropriated exceeds the personal representative's entitlement. In these cases the normal practice would be to pay "equality money", but this would not be permitted if purchases remain unlawful.
- 5.66 These uncertainties over the precise scope of the rule against self-dealing make it very difficult to recommend reform and be sure that reform will not have unintended consequences. The circumstances in which any reform might apply are not fixed but depend on case law that remains subject to change. It might also be regarded as inconsistent to modify in the context of intestacy a rule which may cause similar problems where a beneficiary is appointed as an executor under a will (or, for that matter, where a trustee stands to benefit under a lifetime trust). Some consultees argued that wills can be distinguished because it is open to a testator to disapply or modify the rule against self-dealing. But if a will is prepared without the benefit of legal advice it is less likely that the testator will be aware of that possibility. Reform limited to intestacy may also lead to odd results in cases of partial intestacy, where the distribution of some but not all of the deceased's assets is determined by the terms of a will.
- 5.67 Taken together, we think that the risks of reform in this area outweigh the possible advantages. This has not been an easy decision. Those consultees who supported reform presented compelling reasons for changing the law. However, in many cases the additional safeguards which these consultees suggested (the appointment of at least two administrators; or the retention of the rule for purchases from the estate) would negate many of the potential benefits of reform. There may be a case for general reform of the rule against self-dealing, as it applies to lifetime trusts, wills and other fiduciary situations as well as those which arise under the intestacy rules. But reform of these areas lies well beyond the scope of this project and would require significant re-consultation. We therefore do not recommend any reform at this stage.

<sup>54</sup> *Hordern v Hordern* [1910] AC 465, 475, by Lord Shaw. See also J Mowbray, L Tucker, N Le Poidevin, E Simpson and J Brightwell, *Lewin on Trusts* (18th ed 2008), para 20-96.

<sup>55</sup> See para 5.57 above.

## **SURVIVORSHIP PROVISIONS IN THE INTESTACY RULES**

- 5.68 In order for a spouse to inherit under the intestacy rules, he or she must survive the deceased for a period of 28 days.<sup>56</sup> Accordingly, if A was in a civil partnership and died intestate on 1 January, but his civil partner B died 10 days later, B would not take a spousal entitlement under the intestacy rules. Instead, A's estate would pass to whoever was next entitled – his children, if any, and their descendants, and if none then his parents and so on. B's estate would be passed on separately in accordance with his will, if any, or the intestacy rules.
- 5.69 The survivorship rule confers different benefits in different family circumstances. Children born to both the spouses will be the next entitled beneficiaries under the intestacy rules for both estates; so the survivorship provision is likely to mean that the estates pass to the same ultimate beneficiaries without the estate of the first to die having to be administered as part of the estate of the second to die. Where the spouses do not have common children, the rule responds to a sense that it would be unfair or inappropriate, in the example above, for all of A's property to pass to B's family when B had survived A for only a few days.
- 5.70 There is no such survivorship period for other beneficiaries under the intestacy rules. The only condition for them to inherit is that they survive the deceased, even by a very short interval. If the order of deaths cannot be ascertained, it is presumed that the younger of the deceased and the beneficiary was the survivor.<sup>57</sup> In the Consultation Paper, we proposed that inheritance on intestacy for all beneficiaries, not just spouses, should be subject to a 28-day survivorship period; but we also made a second proposal, that where this would result in the estate passing as *bona vacantia*,<sup>58</sup> the survivorship rule should take effect.<sup>59</sup>
- 5.71 These proposals were supported on consultation.<sup>60</sup> Twenty-four consultees – including the Chancery Bar Association, the Law Society and the Law Reform Committee of the Bar Council – endorsed our first proposal. Four consultees opposed it, and one advocated removing the survivorship provision for spouses but imposing it for other beneficiaries. The second proposal attracted slightly more support, on the assumption that the first was implemented.
- 5.72 One of our reasons for putting forward the first proposal was the avoidance of what we called the “channelling effect”: funds from the estate of the deceased being channelled, through the estate of a beneficiary who did not survive long enough to enjoy them, to those who are entitled under that beneficiary's will or intestacy.<sup>61</sup>
- 5.73 However, we note that “channelling” may not always be inappropriate. In considering again, following consultation, our proposal to widen the survivorship rule, we note that it would prevent assets from an intestate estate from passing

<sup>56</sup> Administration of Estates Act 1925, s 46(2A).

<sup>57</sup> Law of Property Act 1925, s 184.

<sup>58</sup> See Consultation Paper, paras 7.27 and 7.29 for information on similar provisions and recommendations for reform in Canada, Australia and the US.

<sup>59</sup> Consultation Paper, paras 7.30 and 7.31.

<sup>60</sup> Analysis of Responses, paras 7.52 to 7.65.

<sup>61</sup> Consultation Paper, paras 7.24 to 7.26.

via a deceased beneficiary to others who are part of the deceased's family, but not blood relatives. This means in particular that no benefit would accrue to a spouse of the beneficiary – even though he or she would be prioritised under the intestacy rules if the beneficiary had not made a will. This does not generally appear to have concerned consultees; and at the time of drafting the Consultation Paper, we did not see it as a problem. However, we have now reconsidered that view.

- 5.74 Suppose that E, F and G are sisters whose parents have died. None of them have any children, and E is single, but F and G are both married. E dies on 1 February and F then dies on 15 February, while G survives into March. In different families there would be different opinions as to whether it is appropriate for F's husband to inherit anything from E's estate (via F's), or for everything to pass to G. Without evidence of public opinion on this question it is difficult to know what the majority of people affected by the intestacy rules would prefer. It may be that it is right, in many cases, for assets to be "channelled" rather than concentrated in the hands of longer-surviving beneficiaries.
- 5.75 The issue is thrown into even sharper relief when considering the implications of the second proposal. If G also dies, on 25 February, and the alternative for E's estate is *bona vacantia*, then the survivorship provisions are not to apply. The question then is which of the sisters' estates should benefit: the logical choice, following the sequence of events, would be G's, as the last alternative to *bona vacantia*. But that denies any benefit to F's estate, and therefore presumably her husband, even though F and G would have been entitled equally had they not both died within the 28-day period.
- 5.76 The situation seems different where the deceased and the beneficiary are spouses. Since spouses are not blood relatives survivorship usually produces a result which we think most people would want. If they have children together, it ensures that each spouse's assets pass to the children without double administration or the need to investigate a common accident. If they do not, then each spouse's assets pass to his or her own blood relatives, rather than favouring the relatives of the spouse who happens to survive for a brief period (or be deemed to survive). The same goes for cohabiting couples. We recommend, in Part 8, that certain cohabitants would automatically take a spousal entitlement on intestacy. We consider that, as part of those reforms, the 28-day survivorship period should apply to cohabitants as it does to spouses.<sup>62</sup>
- 5.77 In view of the fact that the "channelling" effect cannot be seen as obviously and universally a disadvantage where the two deceased are not spouses,<sup>63</sup> we take the view that reform should not be recommended.

<sup>62</sup> See Part 8, below. Some consultees urged us to consider removing the survivorship period for spouses, for tax reasons; see Analysis of Responses, para 7.59. Our recommendations cannot be shaped by taxation considerations; and in any event it would be technically complex to reproduce, for intestate estates, the taxation effect for which consultees argued. That effect is generally achieved through wills drafted in "mirror" form, so that the property will be split in the same way whichever survives, and that is not the case under the intestacy rules.

<sup>63</sup> Or, as noted above, qualifying cohabitants following our recommendations in Part 8.

- 5.78 We have considered whether it would be right to pursue a limited version of the second provisional proposal: that is, to recommend that the survivorship rule for spouses – and cohabitants, under the reforms discussed in Part 8 – should be disapplied where the alternative is *bona vacantia*. Our conclusion is that this would not be worthwhile since the present rule does not appear to be causing difficulties and the exception would only operate in very few cases.

### **ACCOUNTING FOR OTHER BENEFITS**

- 5.79 In the context of inheritance, a “hotchpot” rule is one which requires beneficiaries to bring into account, when an estate is being shared, other benefits which they have received from the deceased as lifetime gifts or on death. Suppose that C is a widow who has three children, D, E and F; C dies intestate leaving an estate worth £150,000. At first sight we would suppose that the three children take £50,000 each. But three years before her death, C gave F £15,000 to help him out of some financial difficulties. A hotchpot rule would require the administrators to treat that £15,000 as part of C’s estate, but already received by F. That would mean that D and E would now take £55,000 each and F would take the remaining £40,000.
- 5.80 In the Consultation Paper we discussed the statutory rules of hotchpot on intestacy, which were repealed in 1995 on the Law Commission’s recommendation.<sup>64</sup> These required children to bring into account against their entitlement to an intestate estate lifetime advancements made by the deceased (as in the example just given), and any benefit received under a will on a partial intestacy. They also required spouses to bring into account against the statutory legacy any benefit received under the will on a partial intestacy. In the Consultation Paper we also outlined arguments for and against a new requirement to bring into account benefits received in a foreign jurisdiction against an intestacy entitlement here.<sup>65</sup>
- 5.81 We explained in the Consultation Paper that we felt that it would be wrong to reintroduce the statutory rules of hotchpot, or create a new rule for cross-border estates. In particular, we were concerned about complicating the administration of estates. We noted that although the recommendations that led to the repeal of the statutory rules of hotchpot in 1995 complemented the main recommendation made in that report (that a surviving spouse should in all cases be entitled to the entire intestate estate), the 1989 Report also set out a number of other reasons in favour of repealing the rules of hotchpot which still apply today. Therefore we made no provisional proposals.
- 5.82 Only three consultees referred to this section of the Consultation Paper. Sidney Ross endorsed our position. Christopher Jarman supported only the reintroduction of the spousal hotchpot rule on partial intestacy, simplified so as to apply only to absolute benefits under the will; he argued that it is illogical to provide the spouse with both the benefits under the will and his or her full

<sup>64</sup> Consultation Paper, paras 7.32 to 7.35; Administration of Estates Act 1925, ss 47(1)(iii), 49(1)(a) and 49(1)(aa), repealed by Law Reform (Succession) Act 1995, s 1(2) and sch 1, para 1. See Family Law: Distribution on Intestacy (1989) Law Com No 187, para 62.

<sup>65</sup> Consultation Paper, paras 7.36 to 7.39.

entitlement under the intestacy rules. Professor Roger Kerridge generally favoured hotchpot requirements and noted that such rules do still apply to wills.

- 5.83 We do not think that these reasons outweigh the considerations we noted in the Consultation Paper against resurrecting the hotchpot rules. On partial intestacy, requiring the spouse to account may be appropriate in one case, and not in another; it cannot be definitively said that one rule is better or more logical than the other. Accordingly we make no recommendation about requirements to account for other benefits.

# PART 6

## FAMILY PROVISION: OTHER APPLICANTS

### INTRODUCTION

- 6.1 So far, we have focused largely on intestacy. In this Part we turn to the law of family provision. In Part 2 we considered some issues in relation to the treatment of a surviving spouse under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”), and in Part 8 we will consider family provision for cohabitants. Here we look at other potential applicants under the 1975 Act.<sup>1</sup> As we noted in Part 1, only certain people can claim: a spouse, a former spouse, a cohabitant, a child of the deceased, a person treated as a child of the deceased’s family, or a dependant.<sup>2</sup> We consider now the basis of entitlement of adult children, “children of the family”, and dependants. We then ask whether a wider range of people should be eligible to apply for family provision.

### ADULT CHILDREN

- 6.2 A child of the deceased is entitled to apply for family provision, and provided that the deceased was the legal parent of the applicant,<sup>3</sup> a claim may be made regardless of the applicant’s age. Step-children do not qualify under this heading, although they may be eligible as “children of the family” (discussed below). The measure of provision for children is reasonable provision for the applicant’s maintenance.<sup>4</sup> We looked at the meaning of this expression in Part 1; it is the measure of provision for all applicants other than a surviving spouse.<sup>5</sup>
- 6.3 Where the applicant is a child of the deceased, in addition to the factors set out in section 3(1) the court is required to have regard to “the manner in which the applicant was being or in which he might expect to be educated or trained”.<sup>6</sup> This may involve considering for how long, and to what extent, the estate is to provide support until the child becomes self-supporting, and that may depend on whether the child is to be state or privately educated, and whether provision is to be made for university education, professional training and so on.<sup>7</sup> That factor is of course especially pertinent to minor children and to young adults.
- 6.4 It is worth pausing to consider the different situations in which a child may be applying for family provision. Where the deceased was intestate, a child who is making a family provision claim will usually be in competition with a surviving spouse, since in the absence of a spouse the intestacy rules will ensure that any

<sup>1</sup> Appendix E reproduces the text of the 1975 Act in full.

<sup>2</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 1(1); see para 1.64 above.

<sup>3</sup> This includes adoptive parents, and parents by virtue of the Human Fertilisation and Embryology Act 1990, s 30, and the Human Fertilisation and Embryology Act 2008, ss 33 to 48, and 57(2).

<sup>4</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).

<sup>5</sup> See paras 1.66 to 1.68 above.

<sup>6</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 3(3).

<sup>7</sup> A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 8[9].

children of the deceased inherit the whole estate.<sup>8</sup> An application may be needed if the child is a minor and the surviving spouse is not in fact caring for the child. An adult child, on the other hand, may want to apply for family provision because the surviving spouse is felt to be unlikely to pass any of the deceased's property ultimately to the child – as may be the case in particular where the surviving spouse is not the child's parent.

6.5 If the deceased made a will leaving everything to a spouse, then the same situation may arise. However, the picture may be quite different; a testator may leave the estate to any beneficiary, whether or not a relative – perhaps to a friend, or a charity. In those circumstances an adult child may feel strongly that property should have passed to him or her rather than being diverted out of the family. So, again, he or she may seek a remedy under the family provision legislation – regardless of need.

6.6 But whether the claim arises in the context of an intestacy, or in response to the provisions of a will, the limitation of family provision to the “maintenance” level sets an important practical limit on an adult's claim, because most adults will be supporting themselves. The 1975 Act has been framed so as to be consistent with testamentary freedom; there is no obligation to leave property to a child in one's will, and no principle that a child must inherit solely because of a blood relationship. Testamentary freedom is restricted, so far as one's children are concerned, only where necessary to meet need or some unusual circumstance. As the Court of Appeal put it in *Re Hancock*:

If ... the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation.<sup>9</sup>

6.7 In *Ilott v Mitson*<sup>10</sup> the Court of Appeal had the opportunity to “conduct a thorough review of the approach to be taken in adult children's claims under the 1975 Act”.<sup>11</sup> The case concerned the estate of a Mrs Jackson, who had died at the age of 70, leaving her estate (worth £486,000) to the Blue Cross Animal Welfare Society, the Royal Society for the Protection of Birds and the Royal Society for the Prevention of Cruelty to Animals. She left nothing to her daughter, the applicant, who was aged 50, had five children, and lived in very modest circumstances. The applicant's husband was not in full-time work and around three-quarters of the family's income was made up of welfare benefits and tax credits. The District Judge, at first instance, had concluded that Mrs Jackson's will did not make reasonable provision for her daughter, and awarded a sum of £50,000 out of the estate, by way of capitalised maintenance.

<sup>8</sup> Where there is no surviving spouse and more than one child, then a family provision claim might be made where one child has particular needs that the other siblings do not have.

<sup>9</sup> [1998] 2 FLR 346, 351, by Butler-Sloss LJ; note that the case made it clear that a moral obligation, or “special circumstances” is not a pre-requisite to every claim, as had been thought following *Re Coventry* [1980] Ch 461 and other cases. See also *Garland v Morris* [2007] EWHC 2 (Ch), [2007] 2 FLR 528 and *Robinson v Fernsby* [2003] EWCA Civ 1820, [2003] All ER (D) 414, both cases in which it was held not to be unreasonable that the parent's will made no provision for the adult child

<sup>10</sup> [2011] EWCA Civ 346, [2011] 2 FCR 1.

<sup>11</sup> Above at [9], by Sir Nicholas Wall P.

- 6.8 The applicant appealed on the basis that the award was too small, and the charities cross-appealed. Eleanor King J in the High Court found in favour of the charities, but the Court of Appeal allowed the applicant's further appeal, finding that the District Judge had approached the decision correctly.
- 6.9 In reviewing the authorities, the three members of the Court of Appeal stressed again the need to follow closely the words of the statute. There is no question of a "moral obligation" being a condition for an award, although such an obligation and any other special circumstances will be among the factors that the court is to take into consideration. Nor is there any scope for the court to look at what the testator "ought" to have done or at what the applicant deserved or might have thought proper. The court is initially required to make a value judgement as to whether the provision made for the applicant was reasonable; if not, the court is to exercise a discretion as to whether to make an order and, if so, what to order.
- 6.10 The case therefore reinforces the principle that no additional words are to be read into the statute, and casts no doubt on the pre-existing case law. It remains the case, therefore, that the expectations of an adult child under the 1975 Act must be quite limited.
- 6.11 We discussed in the Consultation Paper the difficulties that would attend any change in the current law so as to increase the chances of success for adult child applicants.<sup>12</sup> If the "maintenance" limitation were removed, how would the courts assess what a particular child, or children in general, ought to receive? And how could an alternative principle be framed, consistent with testamentary freedom?<sup>13</sup>
- 6.12 We made no provisional proposal for reform, therefore, in the Consultation Paper; but we asked consultees whether the 1975 Act should be amended to give a greater chance of success to adult children.<sup>14</sup>

### **Consultation responses**

- 6.13 The response on consultation strongly favoured our provisional view that reform was not appropriate.<sup>15</sup> Only five consultees advocated reform. Thirty-one opposed legislative change, including the Chancery Bar Association, the Family Law Bar Association, the Law Society, the Association of Her Majesty's District Judges and the Judges of the Chancery Division and of the Family Division of the High Court.
- 6.14 Consultees noted that strengthening the claims of adult children would represent a fundamental change to the 1975 Act. The minority of consultees in favour of

<sup>12</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 ("Consultation Paper"), paras 5.12 to 5.18.

<sup>13</sup> We took note of the New Zealand experience, where statutory reform in 1990 put an end to family provision awards for children on the basis purely of blood relationship and substituted a principle based on the provision of "proper maintenance and support". See N Peart and A Borkowski, "Provision for adult children on death – the lesson from New Zealand" [2000] *Child and Family Law Quarterly* 333, where the authors note the reluctance of common law systems to move towards automatic sharing of a parent's estate, in contrast to the civil law approach.

<sup>14</sup> Consultation Paper, para 5.19.

<sup>15</sup> Analysis of Responses, paras 5.1 to 5.15.

reform generally considered that it would be “fairer” for children to be able to claim substantial provision from their parents’ estates. But others expressed dislike for a move towards “forced heirship” and away from testamentary freedom.<sup>16</sup> Consultees reflected our unease at an entitlement for children based on blood relationship alone. They recognised that parents can choose to disinherit their children, and felt that this is right; the Money and Property Committee of the Family Justice Council commented that “the ability of a parent to cut out a child goes to the root of basic English law”.

- 6.15 Jo Miles reasoned that the concern about overriding a testator’s wishes does not exist where there is no will. However, we take the view that there should not be different family provision rules for wills and on intestacy.<sup>17</sup> The Law Reform Committee of the Bar Council suggested that reform would enable cases currently fought on the basis of a defect in the will, or on the basis of constructive trust or estoppel, to be argued (and settled) more straightforwardly under the 1975 Act. This may be true; but a change would increase uncertainty and generate considerable cost for many other estates.
- 6.16 Consultation responses also reinforced our view that removing the restriction to maintenance would leave the courts with the problem of determining the standard of “reasonable provision for a child”. As there is no consensus as to what that standard should be, it is difficult to suggest any criteria.
- 6.17 A related concern expressed by a number of consultees was an increase in litigation and difficulty in giving advice on outcomes. Giles Harrap said:

The obvious remedy (to enable the highly meritorious Claimant who does not need maintenance to apply) would be to remove the “maintenance” restraint. But unleashing claims from the “maintenance” restraint would cause very significant increased litigation – every child has parents that die and most in their 50s and 60s have parents who they think ought to leave them something when they die in their 70s, 80s and 90s!

- 6.18 Charity consultees pointed out that charities are often the beneficiaries of wills made by parents who do not wish to leave money to their children, and argued that the burden of increased litigation would therefore fall disproportionately on charities; and they were anxious about a reduction in legacy income. The Battersea Dogs and Cats Home stated that legacies account for “in excess of 85%” of its income.

## **Discussion**

- 6.19 The balance of opinion on consultation confirms the provisional view we gave in the Consultation Paper, that there should be no change to the law on this point.
- 6.20 We note that perhaps the strongest case for a change to the basis of family provision for children arises when the parent’s estate passes, by will or on intestacy, to a surviving spouse who is not the parent of the surviving child or

<sup>16</sup> See para 1.21 above.

<sup>17</sup> See para 1.23 above.

children. Those children may feel aggrieved that their parent's estate has passed to a beneficiary who they believe or know will not ultimately pass it to them.<sup>18</sup>

- 6.21 This is the same issue that we considered in Part 2, under the heading "children of other relationships".<sup>19</sup> A child of the deceased may feel "disinherited"<sup>20</sup> because the deceased's spouse who is not the child's parent is not seen as a reliable "conduit" for wealth from the deceased parent to that child. It is easy to construct an example: A dies intestate leaving a son, B, from his first marriage and a second wife, C. His first wife, D, died some years ago and the whole of D's estate passed to A under her will, which was drafted in the usual terms so that had A not survived her, her property would have passed to B. A's estate is just within the lower level of statutory legacy, and so passes in its entirety to C. B is convinced that his parents' property will never pass to him; he does not think that C will give or bequeath any of it to him, and he will take nothing if she dies intestate. He was not dependent upon A and is comfortably off, and there are no special circumstances that could form the basis of a successful claim for family provision.
- 6.22 That situation feels unacceptable to B, and likewise to many people. In Part 2 we discussed the possibility of amending the intestacy rules so as to take account of the presence of children who are not the children of the surviving spouse.<sup>21</sup> We did not recommend such reform; in any event such a reform would not assist someone in B's position since this estate does not exceed the amount of the statutory legacy which must pass to the surviving spouse under the intestacy rules in any event. Here we look at a different possible solution: whether the basis on which adult children can claim family provision should be extended, so that their entitlement is no longer constrained by the "maintenance" level.<sup>22</sup>
- 6.23 We have given very careful thought to this suggestion, but remain convinced that it is not a satisfactory solution. On the contrary, it raises difficult questions. There would remain the issue of the standard of provision to be applied, and we have heard no acceptable suggestions for that. And would such a change be applicable to all estates or only to intestate ones? If A left his property by will to his second wife C the problem – from his son B's point of view – might well still be the same; and so the reform would have to apply to testate estates as well and so must undermine testamentary freedom. Would a change in the basis of entitlement apply only to children who had a step-parent? That would surely not be possible, and it would therefore give rise to litigation by children against their own parent.
- 6.24 There is also a real practical problem. If the law were to change so as to enable B to claim family provision, at what point should he do so? He may have no wish to disturb C's entitlement now – and indeed he may have no prospect of doing so if

<sup>18</sup> The issue will also arise in connection with surviving cohabitants if our recommendations in Part 8 of this Report are implemented.

<sup>19</sup> See para 2.67 and following above.

<sup>20</sup> The term is misleading because it seems to imply a right to inherit; but there is none.

<sup>21</sup> See para 2.75 and following above.

<sup>22</sup> S Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77, 89 to 91, 95 to 98.

she needs the property (particularly the family home). Rather, his wish is for an entitlement on C's death. But how is that to be adjudicated, perhaps many years later? How would A's – and indeed his first wife D's – property be identified at that stage? It might have been spent. Money might have been realised and reinvested. C might have married again and mingled her inheritance from A with the assets of her new husband.

- 6.25 The complications in a situation of that nature are so difficult that we think that such reform is impracticable. We recognise that the current law produces hard cases, and will continue to do so. Many consultees who opposed reform recognised that children who care for their parents “deserve” an inheritance, and indeed may have been promised one, but accepted that this is something for which the intestacy rules cannot cater.<sup>23</sup> Where the circumstances of a family, or of an individual's lifestyle or conduct, make it appropriate or important that someone receive an inheritance, generally only a will can achieve that.
- 6.26 We therefore make no recommendation for change in the basis for the award of family provision to children.

#### **CHILDREN OF THE FAMILY**

- 6.27 The 1975 Act introduced a new category of potential applicant for family provision:

... any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership ...<sup>24</sup>

- 6.28 This reform was the result of Law Commission recommendations.<sup>25</sup> It made possible claims by a step-child, who previously had no standing to apply for family provision by virtue of his or her relationship to the deceased. But the provision does not mention step-parenthood and is potentially applicable to a wide range of situations.
- 6.29 There is nothing in the Law Commission's 1971 Working Paper<sup>26</sup> or 1974 Report<sup>27</sup> to explain why the subsection was drafted to refer only to those treated as children in relation to a marriage (the reference to civil partnerships was of course added later).<sup>28</sup> The reason was no doubt that the concept of “child of the family” was taken from the matrimonial context,<sup>29</sup> reflecting the fact that the courts had recently acquired jurisdiction to order that financial provision be made for a “child of the family” on divorce.

<sup>23</sup> We say more about carers at paras 6.89 to 6.94 below.

<sup>24</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(d), as amended by the Civil Partnership Act 2004.

<sup>25</sup> Consultation Paper, para 6.3.

<sup>26</sup> Family Law: Family Property Law (1971) Law Commission Working Paper No 42.

<sup>27</sup> Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

<sup>28</sup> Civil Partnership Act 2004, sch 4, para 15.

<sup>29</sup> Matrimonial Proceedings and Property Act 1970, ss 3 and 27(1); Matrimonial Causes Act 1973, ss 23 and 52(1).

- 6.30 The requirement that the relationship must be referable to a marriage or civil partnership excludes claims by those who were treated as a child by the deceased alone or in the context of a cohabitation. This appeared to us and to many critics as an anomaly which should be addressed.<sup>30</sup> We considered that the provision should be extended to the assumption of a parental role not only in relation to a cohabitation but also where the deceased was single. What matters is the parenting given, not the fact that the person who acted as a parent was also a member of a couple.
- 6.31 We therefore provisionally proposed that a person who was treated by the deceased as his or her child should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party.<sup>31</sup>

### **Consultation responses**

- 6.32 This proposal was broadly supported by consultees,<sup>32</sup> including the Law Society and the Chancery Bar Association, who commented that:

This proposal is a clear improvement on the current law and removes the present anomaly, which, whilst uncommon, can be hard to explain to possible claimants when encountered.

- 6.33 The Judges of the Chancery Division and of the Family Division of the High Court said that we had made out “a compelling case for reform”. The Society of Legal Scholars working group suggested that the current law might not be compatible with the European Convention on Human Rights and should be reformed.
- 6.34 Some consultees supported the general thrust of our provisional proposal but expressed concern that reform of this well established section might create uncertainty, causing additional delay and expense in litigating as a preliminary point whether an applicant is in fact a “child of the family”. We are reassured that the Association of Her Majesty’s District Judges did not share this concern; they agreed with the provisional proposal and noted that “child of the family” is a concept well understood by the courts. The Norwich and Norfolk Law Society noted that the reform would harmonise the treatment of “children of the family” under the 1975 Act, schedule 1 to the Children Act 1989 and ancillary relief proceedings on divorce.
- 6.35 Wilsons Solicitors LLP suggested that applicants who are excluded by the wording of section 1(1)(d) may be able to apply for family provision as a dependant of the deceased under section 1(1)(e). Some charities also opposed reform but this appeared to be based in some cases on a mistaken belief that “children of the family” do not currently have any standing to apply for family provision (though no doubt their opposition would apply with equal force to our more modest proposal to reform the definition).

<sup>30</sup> Consultation Paper, paras 6.2 to 6.8; and see S Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77, 89 to 90.

<sup>31</sup> Consultation Paper, para 6.9.

<sup>32</sup> Analysis of Responses, paras 6.1 to 6.18.

- 6.36 There was concern among some consultees that permitting a claim by a person who was treated as a child by the deceased alone (and not in the context of a relationship, whether married, civil partnered or cohabiting) might be problematic.
- 6.37 The Society of Trust and Estate Practitioners described that aspect of our provisional proposal as a “potential minefield” and expressed concern that people might be deterred from undertaking voluntary work in youth clubs or sponsoring a child in the developing world by the fear of a claim against their estate. The Family Law Bar Association had similar concerns, stating that “assisting an elderly neighbour ... should not of itself justify an application under the 1975 Act”. Both suggested that the law should be reformed but only to widen section 1(1)(d) to include those treated as a child in relation to a cohabitation.

### **Discussion**

- 6.38 We think that these concerns are more hypothetical than real. A court would not find that a child who was simply sponsored by the deceased or with whom the deceased undertook voluntary work was treated as a child of the family, unless the quality and intensity of that help could be characterised as parental. Nor would simply helping an elderly neighbour, without much more, merit such a description. We note that case law suggests that the courts are more receptive to claims where it can be shown that the applicant also treated the deceased as his or her parent.<sup>33</sup> It is equally fanciful to suppose that many people will be deterred from undertaking such activities because of the fear of a claim being made against their estate. There may be a risk of speculative, ill-judged litigation to test the boundaries of this new category but this is no reason not to cure what appears to us and many commentators as an undesirable anomaly in the law.
- 6.39 Christopher Jarman suggested that there be an additional requirement that the applicant had lived in the same household as the deceased. We are not attracted to this suggestion; it would restrict the range of applicants who are currently entitled to apply and would be rather anomalous, given that there is no requirement for a legal child of the deceased to have been living at home.
- 6.40 Nothing has emerged from consultation which alters our preliminary view that section 1(1)(d) is outdated and may operate in an arbitrary and unfair manner. Applicants with the same quality of relationship with the deceased may be treated quite differently from one another depending on whether the deceased was married or in a civil partnership, cohabiting, or single. It is, in our view, no answer to say that some children of the family excluded because of the wording of section 1(1)(d) may have standing to apply for family provision as dependants under section 1(1)(e). That subsection imposes a quite different set of threshold requirements and sets a much higher hurdle.
- 6.41 **We recommend that a person who was treated by the deceased as a child of the family should be able to make an application for family provision in that capacity under the Inheritance (Provision for Family and Dependants) Act 1975 whether or not that treatment was referable to the deceased’s marriage or civil partnership.**

<sup>33</sup> See *Re Leach* [1986] Ch 226.

- 6.42 Paragraph 3 of schedule 2 to the draft Inheritance and Trustees' Powers Bill puts this recommendation into effect. It amends section 1(1)(d) of the 1975 Act to widen the category of applicants: the treatment as a child of the family may relate either to a marriage or civil partnership to which the deceased was party, or to a family in which the deceased stood in the role of a parent. Paragraph 3 inserts a new subsection (2A) to make it clear that a family for these purposes may be a "single parent family" composed only of the deceased and the applicant.

## **DEPENDANTS**

### **The statutory provisions**

- 6.43 Section 1(1)(e) of the 1975 Act enables a claim for family provision by a class generally referred to as "dependants", described as:

... any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased ... .

- 6.44 Subsection (3) of section 1 expands on this:

For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.<sup>34</sup>

- 6.45 In the event of an application by a dependant, the court must decide whether the deceased's will, or the intestacy rules, failed to make reasonable financial provision for the applicant's maintenance.<sup>35</sup> If so, the court may in its discretion make an order in favour of the applicant. In making both of these decisions the court is to have regard to the factors common to all applications, set out at section 3(1), and an additional factor given by section 3(4); the court must:

... have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and to the length of time for which the deceased discharged that responsibility.

- 6.46 Until 1995, the "dependant" category was the only basis for a claim by a cohabitant.<sup>36</sup> Since then, the provision remains relevant to cohabitants of less than two years' standing, but also for a potentially wide range of relatives, friends and other connections to whom the deceased gave financial support. In the

<sup>34</sup> Section 1(3) was interpreted as expanding on, rather than providing an alternative to, the concept of "being maintained" in subsection (1)(e) by Megarry V-C in *Re Beaumont* [1980] Ch 444. We return to this point at para 6.66.

<sup>35</sup> Inheritance (Provision for Family and Dependants) Act, s 1(2)(b).

<sup>36</sup> Law Reform (Succession) Act 1995, s 2, with effect for deaths on or after 1 January 1996.

Consultation Paper we examined two restrictions on dependants' applications which have arisen from the courts' interpretation of the relevant provisions.<sup>37</sup>

### **Assumption of responsibility**

- 6.47 Section 3(4) of the 1975 Act, set out above, does not say what "assumption of responsibility" means, nor indeed whether it is in fact a separate concept from maintenance itself. The simple fact of maintaining another can be seen as inevitably involving, to some extent, an assumption of responsibility for maintenance (arguably, even if the donor had insisted that he or she was under no obligation to do so). It would be possible to read the provision as using "assumption of responsibility for maintenance" as a single concept – a way of describing what is happening whenever one person is, on the facts, maintained by another – and giving "assumption of responsibility" no further, separate, meaning. But assumption of responsibility can also be seen as a separate matter, which can go beyond accompanying the provision of maintenance. For example, it may be found in an undertaking on the part of the deceased to provide that maintenance in the future. And if assumption of responsibility is understood in that sense, there can be cases where although maintenance was actually provided, there was no assumption of responsibility – for example, if there was an express disavowal by the deceased of ongoing obligation to the dependant.
- 6.48 Whatever the intentions of the legislature, the courts have taken "assumption of responsibility" as a separate concept from maintenance itself. Even though section 3(4) is expressed in terms of matters to which the court is to have regard in assessing the claim which has been made, it has been interpreted as making an assumption of responsibility by the deceased a necessary condition of any claim as a dependant, which is additional to the fact of maintenance.<sup>38</sup> That interpretation has been criticised by academics, and by judges who are nevertheless bound to follow it.<sup>39</sup> In order to avoid requiring the applicant to demonstrate the requisite assumption of responsibility in every case, the courts have adopted a workaround: it will usually be presumed from the fact that the deceased maintained the applicant.<sup>40</sup> That presumption is rebuttable by evidence that the deceased did not intend to assume such responsibility.<sup>41</sup>
- 6.49 In the Consultation Paper we criticised that workaround as complex and unsatisfactory.<sup>42</sup> We highlighted *Bouette v Rose*,<sup>43</sup> in which the applicant was claiming against the estate of her daughter, for whom she had been a full-time carer. The deceased had not been capable of actually assuming responsibility for anyone; she was only 14 when she died and suffered from severe mental

<sup>37</sup> Consultation Paper, paras 6.10 to 6.31.

<sup>38</sup> *Re Beaumont* [1980] Ch 444; *Jelley v Iliffe* [1981] Fam 128.

<sup>39</sup> For example: S Naresh, "Dependants' Applications Under the Inheritance (Provision for Family and Dependants) Act 1975" (1980) 96 *Law Quarterly Review* 534, 548 to 554; S Coldham, "Dependants' Provision on Death" (1982) 45 *Modern Law Review* 100, 102 to 103; S Bridge, "For love or money? Dependent carers and family provision" (2000) 59 *Cambridge Law Journal* 248; *Bouette v Rose* [2000] 1 FLR 363, 371, by Robert Walker LJ.

<sup>40</sup> *Jelley v Iliffe* [1981] Fam 128.

<sup>41</sup> *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183.

<sup>42</sup> Consultation Paper, paras 6.13 to 6.17.

<sup>43</sup> [2000] 1 FLR 363.

disability. However, the court found that the assumption of responsibility could be presumed from the mother's reliance on funds held for the daughter by the Court of Protection and the daughter's 75% interest in the home they shared.

- 6.50 We provisionally proposed that the question of how far the deceased assumed responsibility for the dependant should not be a threshold condition for the making of a claim under section 1(1)(e). Instead, it should simply be one among the other relevant factors set out in section 3 to which the court has regard in assessing whether to make an order, and if so the size and nature of the award.<sup>44</sup>

### **Consultation responses**

- 6.51 This proposal attracted substantial support on consultation, being endorsed by 25 consultees including the Chancery Bar Association, the Family Law Bar Association, the Law Reform Committee of the Bar Council and the Society of Trust and Estate Practitioners.<sup>45</sup>

- 6.52 Several consultees expressly agreed with our criticisms of the current law. Giles Harrap said:

This proposal ... not only overcomes the unnecessary injustice of the *Bouette* type of case at first instance but avoids the complicated reasoning required by the Court of Appeal to remedy that injustice. It is also what Parliament intended.

- 6.53 Five consultees opposed reform. There was concern that it would increase litigation, and deter lifetime generosity for fear of post-death claims.<sup>46</sup> We think that this overstates the scope of the reform; we did not suggest that assumption of responsibility should be irrelevant, but that it should be a factor rather than a threshold. If the deceased expressly disavowed responsibility, or paid debts as a one-off to give the applicant a fresh start, an assertion that reasonable provision was not made is, in most cases, unlikely to impress the court. The claim must also be weighed against, for example, the deceased's obligations and responsibilities to others.<sup>47</sup>
- 6.54 Some consultees discussed whether legislative reform is necessary. Sidney Ross argued that assumption of responsibility cannot, so far as the terms of the statute itself are concerned, be a threshold condition,<sup>48</sup> and opposed the provisional proposal on the basis that:

<sup>44</sup> Consultation Paper, para 6.18.

<sup>45</sup> Analysis of Responses, paras 6.19 to 6.29.

<sup>46</sup> Jonathan Larmour raised a related concern about respect for the deceased's intentions. However, the primary purpose of the family provision legislation is to respond to failure to make reasonable provision, not to the deceased's probable intentions.

<sup>47</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 3(1)(d). *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183, for example, would be unlikely to have a different outcome.

<sup>48</sup> See also S Ross, "Inheritance Act Claims by Dependents" [2010] *Family Law* 490, arguing that it is not in fact a threshold requirement on a proper understanding of the cases.

All that is required is for judges and lawyers to cease using the phrase “threshold requirements” or any equivalent phrase in relation to any provision of the 1975 Act other than the provisions of s 1.

- 6.55 Others accepted that it might be open to the appellate courts to take a different view in a future case. But the lower courts are bound by case law to treat assumption of responsibility as a threshold condition for applications under the 1975 Act. They therefore thought that statutory reform would be preferable. For instance, the Judges of the Chancery Division and of the Family Division of the High Court considered that, given the state of the authorities, “their reconciliation by amendment of the Act is wise”.

### **Discussion**

- 6.56 It is clear that consultees agreed with us that the assumption of responsibility should not be regarded as a threshold requirement to establishing a claim as a dependant pursuant to section 1(1)(e) of the 1975 Act. As matters stand, the courts have set up an additional requirement, and then found a way to circumvent it by presuming assumption of responsibility from the fact of maintenance. This is “tortuous” reasoning;<sup>49</sup> in particular, it may give rise to problems if in the circumstances there is evidence that there was in fact no assumption of responsibility, so that the courts’ presumption can be rebutted. It generates uncertainty and complexity which may discourage potentially meritorious applicants from bringing family provision claims.
- 6.57 We are sympathetic to the view that the statute itself does not create such a threshold requirement. It is arguable that the Court of Appeal could provide a judicial re-reading of the statute and a departure from the established case law on its interpretation in this context. But it may well be that a Supreme Court decision would be required; in either event, it is unlikely to be quickly achieved.<sup>50</sup>
- 6.58 We have therefore decided that legislative reform is appropriate: an amendment to section 3(4) to separate and clarify the various considerations which are contained within it. These are all factors to which the court must have regard in considering whether there was a failure to make reasonable provision for the applicant, and if so, whether an order should be made and in what terms. Each factor is to be given the weight appropriate in each case when the court considers the exercise of its discretion.

- 6.59 **We recommend that:**

- (1) **a person who was being maintained by the deceased immediately before the death should be eligible to apply for family provision as a dependant under the Inheritance (Provision for Family and Dependants) Act 1975 whether or not, beyond the fact of providing maintenance, the deceased assumed responsibility for that person’s maintenance; and**

<sup>49</sup> S Coldham, “Dependants’ Provision on Death” (1982) 45 *Modern Law Review* 100, 102; Consultation Paper, para 6.17.

<sup>50</sup> It would be necessary to depart not only from the first instance decision in *Re Beaumont* [1980] Ch 444 but also from the Court of Appeal decisions in *Jelley v Illiffe* [1981] Fam 128 and *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183.

- (2) **the question of whether or not there was such an assumption of responsibility, and its extent, should be taken into account as a factor in assessing whether there was a failure to make reasonable provision for the applicant and considering the exercise of the court's powers.**

- 6.60 This is achieved by paragraph 6(4) of schedule 2 to the Inheritance and Trustees' Powers Bill, which amends section 3(4) of the 1975 Act. The amended provision directs the court to consider, first, the duration and basis of the maintenance provided, and how much the deceased contributed – in order to qualify under section 1(1)(e), the applicant must have been maintained by the deceased, so here the court is to assess the factual maintenance provided.
- 6.61 Secondly, it requires the court to consider whether and if so to what extent there was an assumption of responsibility by the deceased for the applicant's maintenance. Even if the facts do not show that there was any assumption of responsibility over and above the fact of maintenance having been provided, the court may still make an order in favour of an applicant who qualifies under section 1(1)(e) as having been maintained by the deceased immediately before the death.
- 6.62 Indeed, assumption of responsibility beyond the fact of maintenance itself may often not be a significant additional factor in an applicant's claim. To an extent, that reflects the effect of the current law; the courts are prepared to presume from the fact of maintenance that there was an assumption of responsibility. In most cases where it does feature, it is perhaps most likely to be a factor relevant to the assessment of the amount which it is appropriate for the applicant to be awarded; if the deceased undertook responsibility to pay the applicant's university fees, for example, it may be appropriate to make a commensurate award.

***Factors relevant to an applicant who is a child of the family***

- 6.63 Section 3(3) of the 1975 Act concerns the particular factors relevant to the assessment of a claim by someone who qualifies as a child of the family in relation to the deceased, under section 1(1)(d).<sup>51</sup> Section 3(3)(a) requires the court to have regard:

... to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility ... .

- 6.64 Since the concept of assumption of responsibility for maintenance also appears in this provision, it must also be amended to reflect the new approach adopted in section 3(4). There would otherwise be a risk that the explicit separation of the two concepts made in that provision would cause uncertainty as to the interpretation of section 3(3).
- 6.65 Paragraph 6(3) of schedule 2 to the draft Inheritance and Trustees' Powers Bill makes the appropriate amendments. These are not in exactly the same terms as

<sup>51</sup> See para 6.27 and following above.

the changes to section 3(4). There is no necessity for a child of the family to have been maintained by the deceased in order to hold that status.<sup>52</sup> The amendments to section 3(3) therefore make it clear that the court is to consider whether any maintenance was provided, and only if that was the case will it be relevant to look at the duration of that maintenance, the basis on which the deceased maintained the applicant and the extent of the contribution made by way of maintenance. Any assumption of responsibility for the applicant's maintenance, over and above what is shown by the actual provision of maintenance if that occurred, is also to be considered.

### **Balancing contributions: dependency and mutual dependency**

- 6.66 As outlined above, the initial definition of a person entitled to apply as a "dependant" asks whether the person was being "maintained, either wholly or partly, by the deceased".<sup>53</sup> Satisfaction of this condition depends on whether "the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs" of the applicant.<sup>54</sup>
- 6.67 The courts have interpreted this as requiring a "balance sheet test": their approach is to weigh up on one side the contribution made by the deceased, and on the other any benefits provided to the deceased by the applicant. The claim can only succeed if this shows a net gain by the applicant.<sup>55</sup> They have stressed the need to apply this test with "common sense".<sup>56</sup> Nevertheless, as we argued in the Consultation Paper, it is unrealistic and too restrictive.<sup>57</sup>
- 6.68 The test is counterintuitive, preferring those whose dependency is entirely one-way and working against those who also gave something back to the deceased, such as by providing care or helping with housework. It encourages devaluation of such domestic services to get the claim over the threshold at all.<sup>58</sup> In particular, the test fails to recognise "interdependency" – two people who can sustain a comfortable lifestyle together, which they could not manage separately, are in a real sense dependent on the continuance of their relationship. They may perhaps be friends, siblings, parent and child, or partners in the early stages of their relationship.
- 6.69 In the Consultation Paper we proposed to remove the "balance sheet test" so that it would no longer be a prerequisite to the success of a claim brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the applicant; that would enable the courts to evaluate the

<sup>52</sup> *Re Callaghan* [1985] Fam 1.

<sup>53</sup> See para 6.43 above; Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

<sup>54</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 1(3).

<sup>55</sup> Some authorities require a "substantial" balance in the applicant's favour: *Jelley v Iliffe* [1981] Fam 128, 138.

<sup>56</sup> *Jelley v Iliffe* [1981] Fam 128, 141, by Griffiths LJ; *Bishop v Plumley* [1991] 1 All ER 236, 242, by Butler-Sloss LJ.

<sup>57</sup> Consultation Paper, paras 6.21 to 6.24.

<sup>58</sup> *Re Wilkinson* [1978] Fam 22.

position of the applicant after the deceased's death, rather than focusing on the balance of contributions during his or her lifetime.<sup>59</sup>

### **Consultation responses**

- 6.70 Twenty-seven consultees supported this proposal, with only four against.<sup>60</sup> Sidney Ross supported the substance of the proposal, but objected to its wording, because it assumed a current requirement that the deceased “contributed *substantially* more”<sup>61</sup> than the applicant. Although some judges have suggested this, it has not been consistently held.<sup>62</sup> We agree that it would have been better to refer to a prerequisite that the deceased “contributed more” than the applicant. However, this does not appear to have affected other consultees’ responses, since the text of the relevant section made it clear that we proposed removing the balance sheet test altogether.
- 6.71 Consultees agreed with our view that “mutual dependency” is as deserving of relief as what one might call “one-way dependency”. Richard Dew said: “The existing provisions work very badly in cases of ‘mutual dependency’ despite the fact that the survivor is often left much worse off as a result of the death”. The Society of Trust and Estate Practitioners observed that mutual dependency is now common “just to make ends meet and enjoy a reasonable standard of living”.
- 6.72 Consultees also agreed that applicants who have actively given something back to the deceased should not be disadvantaged by it – the Society of Trust and Estate Practitioners gave the example of looking after an aged parent or other person in need of support.
- 6.73 The Family Law Bar Association recognised that uncertainty was being caused by “excessively strained constructions” to avoid disappointing meritorious applicants. That uncertainty, and the difficulty of the current law, was said by the Association of Her Majesty’s District Judges to be causing “extra expense in proceedings”. Similarly, the Chancery Bar Association characterised the current law as often requiring “a difficult, emotionally draining and cost-wasting task”.
- 6.74 The Chancery Bar Association felt that the reform we proposed would be unlikely to let in unmeritorious claims, since these would be prevented by the other requirements of the Act. We agree, despite concerns from two consultees who opposed the proposal. We do not intend this proposal to open the floodgates, but to resolve uncertainties in the law and enable those who were in fact dependent on the deceased to bring claims where they are merited. We take seriously the warnings of consultees that the central tenet of the 1975 Act, to meet needs rather than to reward service, must be respected.

### **Discussion**

- 6.75 Consultation responses have confirmed our views that the “balance sheet test” can work injustice and should be removed.

<sup>59</sup> Consultation Paper, para 6.31.

<sup>60</sup> Analysis of Responses, paras 6.30 to 6.42.

<sup>61</sup> Emphasis added.

<sup>62</sup> See Consultation Paper, para 6.30, fn 40 and the cases there cited.

6.76 **We recommend that it should not be necessary for a person claiming family provision as a dependant under the Inheritance (Provision for Family and Dependents) Act 1975 to show that the deceased contributed more to the parties' relationship than did the applicant.**

6.77 In order to assess how that reform should be framed, we have to look again at the terms of the statute. Section 1(3) amplifies the description of dependent applicants at section 1(1)(e) as follows:

For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

6.78 The words "otherwise than for full valuable consideration" have been interpreted in two different ways. They have been the foundation of the "balance sheet test";<sup>63</sup> but they also play an important role in eliminating applicants who are not dependants because their relationship with the deceased was wholly commercial or professional. It is these words that remove the possibility of a claim by a lodger paying a market rent, or a paid carer.<sup>64</sup>

6.79 So the simple removal of those words opens the gate too wide. Instead, paragraph 4 of schedule 2 to the draft Inheritance and Trustees' Powers Bill limits them so that they are applicable only in a commercial situation. Accordingly, the lodger paying a market rent is still unable to claim. The lodger paying half a market rent, through the kindness of the landlord – perhaps a relative or godparent – is not ruled out, because the relationship is commercial but full consideration was not given; a claim can be made, but its success would depend upon the court's assessment of whether reasonable provision for the applicant's maintenance had in fact been made. Equally, the door is open for applicants in a situation that had begun on a professional basis but later changed to one of dependency so that, over time, full consideration had not been paid.<sup>65</sup>

6.80 But outside the context of the commercial relationship, an absence of full valuable consideration is no longer required, and accordingly the balance sheet is removed.

### **OTHER APPLICANTS**

6.81 In the Consultation Paper we noted that there were arguments in favour of including parents (and perhaps siblings) in the list of those who may apply for family provision. However, ultimately we said that we were not convinced that this reform would be workable. Nevertheless, we invited consultees' views as to whether the categories of applicant for family provision should be widened further to include other relatives.<sup>66</sup>

<sup>63</sup> *Re Beaumont* [1980] Ch 444; see Consultation Paper, para 6.19 and following.

<sup>64</sup> *Bouette v Rose* [2000] 1 FLR 363, 369.

<sup>65</sup> Consultation Paper, para 6.26.

<sup>66</sup> Consultation Paper, para 6.36.

### **Consultation responses**

- 6.82 Most consultees opposed any widening of the categories of applicant.<sup>67</sup> There was concern that adding to the categories could lead to a proliferation of claims under the 1975 Act. As the Law Society remarked: “Any widening to the categories of applicant for family provision is likely to increase litigation and thus cause delay and additional expenditure to administer the estate”.
- 6.83 Particular concern was voiced by the charities that responded to this question. The Battersea Dogs and Cats Home feared “an avalanche of 1975 Act claims in instances where legacies have been left to charities”. Other consultees noted that any significant widening of the class of persons entitled to family provision on the basis simply of their relationship with the deceased would not fit easily within the conceptual basis and policy of the 1975 Act.<sup>68</sup> It was suggested that the fundamental purpose of the family provision jurisdiction is (except in the case of spouses) to provide a safety net for close family members and dependants whose circumstances are such that it would be inequitable for the deceased not to make reasonable testamentary provision for their maintenance. As the Chancery Bar Association noted in their consultation response, section 1(1)(e) of the 1975 Act enables a person who was being maintained by the deceased to apply for family provision. A meritorious claim by a person outside the deceased’s immediate family should therefore succeed under the current law.
- 6.84 A significant minority of consultees, however, felt that parents should be added as a separate class of applicant in their own right. In contrast to other relatives, parents will (usually) have maintained their child at some point, and it is more likely that a parent will become dependent on their child in their later years than other, more remote, relatives. Including parents as potential applicants for family provision in their own right would therefore give some recognition to that possibility, and indeed to the fact that parents generally have supported their children financially. Many of the reasons given by consultees for preferring the addition of parents mirrored those given by consultees who favoured retention of the preference for parents over siblings in the intestacy rules.<sup>69</sup>

### **Discussion**

- 6.85 We appreciate these arguments in favour of allowing parents to apply for family provision in their own right. We are also conscious that our recommendation that a surviving spouse should inherit the whole estate where the deceased leaves no children or other descendants will, in a small number of cases, reduce the number of parents inheriting on intestacy (though such cases are already rare, as the estate must exceed £450,000).<sup>70</sup>
- 6.86 However, the overwhelming response on consultation was not to widen the range of persons entitled to apply for family provision to parents or any other class of

<sup>67</sup> Analysis of Responses, paras 6.43 to 6.60.

<sup>68</sup> See also para 6.2 and following above where we discuss whether the Inheritance (Provision for Family and Dependants) Act 1975 might be amended to give a greater chance of success to adult children who are not in particular need.

<sup>69</sup> See para 3.5 and following above. As we explain there, we are not minded to recommend any change to that current preference.

<sup>70</sup> See para 2.25 above.

relative. The Association of Her Majesty's District Judges expressly opposed permitting parents to apply in their own right, noting that a parent who was being financially supported by the deceased would be able to bring a claim as a dependant under the current law.

- 6.87 We also remain concerned that any addition to the categories of applicant would represent a step away from the conceptual basis of the 1975 Act.<sup>71</sup> It could also lead to an increase in costly litigation for little benefit: even if non-dependent parents were given standing to apply for family provision it is unclear how many would actually succeed in their applications. In a society where there is no general expectation that children will financially support their elderly parents it is likely that the courts would encounter difficulty in determining whether a deceased child had failed to make reasonable testamentary provision for the maintenance of a non-dependent parent.
- 6.88 The position overseas does not argue strongly in favour of including parents. Although a number of jurisdictions do include parents as a specific category in their family provision statutes, there are often additional provisions that require parents to have been maintained by the deceased before they are eligible to claim.<sup>72</sup> So we are not convinced that parents should be included as an additional class of applicants.
- 6.89 We take the same view of another special, and in many cases very deserving, group, namely carers.
- 6.90 The view has been expressed that those who have cared for the deceased, other than those whose caring is part of their employment, should have an entitlement to inherit, in recognition of their services.<sup>73</sup> We have also had correspondence from a member of the public, since the close of consultation, who had been very involved in caring for his elderly mother, and was aggrieved by the operation of the intestacy rules on her death, whereby her estate was shared equally with his siblings. He felt that his special contribution meant that he had a greater entitlement to the property, and that his mother would have wanted all or most of it to pass to him.
- 6.91 There is clearly no case for inclusion of carers in the intestacy rules. Those rules have to be able to operate just as rules, without any evaluation by the administrators of desert or contribution by beneficiaries. So any entitlement for carers would have to be introduced through family provision.
- 6.92 The difficulty in doing that would be in identifying precisely who was to benefit and why. What level of care would bring an entitlement, and to how much? Would it matter if another family member or friend had wanted to do the caring and had been prevented from doing so by the applicant? In cases of intestacy, how would the courts know what the deceased "would have wanted"? How would the courts

<sup>71</sup> See paras 1.16 to 1.22 above.

<sup>72</sup> We are grateful to Sidney Ross for the detailed information he provided on foreign family provision legislation in his consultation response.

<sup>73</sup> M Oldham, "Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France" (2001) 60 *Cambridge Law Journal* 128.

assess cases whether the carer had given up work to look after their elderly parent, for example, and had had free housing? The latter case of course introduces an element of dependency; such a carer has clearly been maintained by the deceased – and the reform we have recommended would mean that the element of mutual dependency would not jeopardise the claim.<sup>74</sup> Any wider entitlement for carers would introduce great uncertainty and would give the courts a well-nigh impossible task.

6.93 One of the clearest messages that we seek to convey in this Report is the desirability of making a will.<sup>75</sup> A conspicuous example of the need for testamentary disposition is the situation where there is a carer. Such situations cry out for discussion and planning before it is too late; neither the intestacy rules nor the law of family provision can be any substitute for that.

6.94 In the light of consultees' comments generally, and of the issues more specific to parents and carers, we conclude that we should not recommend the introduction of further categories of potential applicants for family provision.

<sup>74</sup> See para 6.76 above.

<sup>75</sup> See para 1.5 above.

# **PART 7**

## **FAMILY PROVISION: GENERAL**

### **INTRODUCTION**

- 7.1 In this Part we remain with the topic of family provision, but we turn from the entitlement of different applicants to look at some general points about the bringing of claims and the orders that can be made.
- 7.2 The first of the law reform issues considered in this Part is the “domicile precondition”: the rule that an order for family provision can only be made if the deceased died domiciled in England and Wales. We then consider two related points about grants of representation and the conditions necessary for an application to be made. First, as the law stands, it appears that an application for family provision cannot be made unless a grant of representation has been taken out; we consider whether it should be possible to make an application before that point is reached.<sup>1</sup> Secondly, an application for family provision must be made within six months after the grant is taken out, unless the court gives permission for a late application. We make recommendations that would clarify which types of grant will set time running for these purposes.
- 7.3 Next we turn to two different types of property and issues about whether and when they may form part of the net estate. One is property held on joint tenancy. In what circumstances can it be regarded as part of the net estate, and at what date should it be valued? Another type of property is pensions, and the benefits that may be payable on death. Finally in this Part we consider two technical points about the orders that the court can make: the power to vary a trust arising on intestacy or under a will, and to deal with changes to the net estate by reason of the order itself.
- 7.4 In order to examine those general issues properly we have to expand, first, on what we said in Part 1 about the property that forms part of the net estate of the deceased for the purposes of family provision.<sup>2</sup>

### **BACKGROUND: THE NET ESTATE FOR THE PURPOSES OF FAMILY PROVISION**

- 7.5 A court hearing a claim for family provision must consider “the size and nature of the net estate of the deceased”.<sup>3</sup> If it is satisfied that reasonable financial provision has not been made for the applicant, it can make various orders in relation to the net estate. For example, the court may order that a lump sum is to be paid from the net estate to the applicant, or that property comprised in the net estate is to be transferred to him or her.<sup>4</sup>
- 7.6 The “net estate” is defined at section 25(1) of the 1975 Act. It is represented by the assets specified in the Act, less debts and liabilities payable from the estate

<sup>1</sup> See paras 1.81 to 1.82 above.

<sup>2</sup> See para 1.78 above.

<sup>3</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 3(1)(e).

<sup>4</sup> Above, s 2(1).

(including inheritance tax), the costs of administering the estate and so on. As a general rule, property that is not governed by the provisions of the deceased's will, or by the rules of intestacy, is not part of the net estate.<sup>5</sup> For example, a dependant's pension, payable out of the deceased's pension fund after his or her death, does not pass in accordance with the will or the intestacy rules, and so is not part of the net estate. However, that is a general rule, and other assets may be treated as part of the net estate.

- 7.7 One category of assets frequently added to that basic definition is property owned jointly by the deceased and one or more others as joint tenants, so that, on the death, the deceased's interest passes automatically to the survivor or survivors without reference to any will or the intestacy rules.<sup>6</sup> Despite that automatic taking by survivorship, the court can make an order that the deceased's interest should be treated as part of the net estate.<sup>7</sup>
- 7.8 The net estate also includes property which the deceased, when contemplating death, arranged to give away on the basis that the gift would take effect if he or she were to die.<sup>8</sup> In addition, it includes money which passes by reason of a statutory nomination made by the deceased during his or her lifetime to take effect on death: for example, it is possible for members of certain friendly societies to nominate in this way funds of up to £5,000 to pass to selected beneficiaries.<sup>9</sup>
- 7.9 Furthermore, if the deceased made a gift (or any transfer at an undervalue) less than six years before the death with the intention of defeating an application under the 1975 Act, the court can treat that money or property as part of the net estate and order the recipient to pay money or transfer property to the applicant.<sup>10</sup> Gifts into trusts, as well as to individuals, can be caught by that provision.
- 7.10 Finally, property that is the subject of a contract to leave property by will may be brought into the net estate, if the contract was for less than full value.<sup>11</sup>

## **DOMICILE**

- 7.11 An application for family provision can only be made against the estate of a person who died domiciled in England and Wales.<sup>12</sup> Domicile is a highly technical

<sup>5</sup> Although assets in relation to which the deceased had a general power of appointment only exercisable in lifetime are included if the power had not been exercised before death.

<sup>6</sup> Whether this occurs depends on the way in which the joint ownership is structured; see further para 7.70 below.

<sup>7</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 9.

<sup>8</sup> Above, s 8. This is sometimes called a "deathbed gift" or *donatio mortis causa*. It is a lifetime gift, but because the gift is conditional on death, it is in effect similar to a will. See further A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed 2008) paras 5-047 to 5-054.

<sup>9</sup> Friendly Societies Act 1974, s 66. See also, for example, Industrial and Provident Societies Act 1965, s 23.

<sup>10</sup> Above, s 10.

<sup>11</sup> Above, s 11.

<sup>12</sup> Above, s 1(1).

concept; it is possible to retain a foreign domicile even if one has spent many years living in this jurisdiction and has family and dependants here.<sup>13</sup> This typically occurs where someone who was originally domiciled abroad lives here, even for a number of years, without forming the intention to reside here permanently or indefinitely.<sup>14</sup>

- 7.12 The effect of the “domicile precondition” is that those family members and dependants may be left without any means of challenging the distribution of the estate in a will or under the intestacy rules. This rule has been the subject of criticism since it was first introduced in 1938.<sup>15</sup> In the Consultation Paper we noted *Cyganik v Agulian*,<sup>16</sup> where it was held that the partner of a man who died domiciled in Cyprus could not claim family provision under the 1975 Act, although the deceased had assets of around £6.5 million in England and an English will admitted to probate.
- 7.13 We also note that changing patterns of property ownership since 1974 may justify reconsideration of the domicile precondition. More than five million European Union citizens live in a state other than the state of their nationality and many more people own property in more than one country.<sup>17</sup> Between 1999 and 2004, for example, the number of UK households that owned foreign property increased by almost 50% to approximately 256,000.<sup>18</sup>
- 7.14 The effects of the domicile precondition may be entirely unforeseen but, equally, it is possible for it to be used deliberately as a means of preventing an application for family provision.

### **Removing the domicile precondition**

- 7.15 We therefore provisionally proposed that the availability of family provision should no longer be dependent upon the deceased having died domiciled in England and Wales.<sup>19</sup>
- 7.16 Most consultees agreed with our proposal, including the Law Society, the Society of Trust and Estate Practitioners, the Chancery Bar Association, the Family Law Bar Association, the Judges of the Chancery Division and of the Family Division

<sup>13</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 (“Consultation Paper”), para 7.40.

<sup>14</sup> See generally L Collins and others, *Dicey, Morris and Collins: the Conflict of Laws* (14th ed 2006 with 4th supplement 2010) ch 6.

<sup>15</sup> And indeed before it was enacted: W Breslauer, “The Bill and Private International Law” (1937) 2 *Modern Law Review* 306. The criticism has continued: see R Frimston, “EU nearer to abolishing domicile?” (2005) 45 *Probate Section Journal of the Law Society* 13.

<sup>16</sup> [2006] EWCA Civ 129, [2006] 1 FCR 406.

<sup>17</sup> Deutsches Notarinstitut (German Notary Institute), *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l'Union Européenne (Comparative study of conflict of law of succession in member states of the European Union)* (2002) pp 11 to 12. An executive summary in English is available online at [http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm) (last visited 23 November 2011).

<sup>18</sup> D Aspden, “Methodological improvements to UK foreign property investment statistics” (2005) 619 *Economic Trends* 54, 55.

<sup>19</sup> Consultation Paper, para 7.53.

of the High Court and a number of individual practitioners and academics.<sup>20</sup> Consultees drew our attention to the expense of litigating domicile as a preliminary point, and described the injustice caused where family members and dependants with otherwise meritorious claims are barred from pursuing an action because of the domicile precondition. The Chancery Bar Association said that it was inappropriate for a matter as elusive as the English concept of domicile to be a complete defence to an otherwise perfectly reasonable claim.

7.17 **We recommend that it should no longer be the sole precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died domiciled in England and Wales.**

7.18 The question then arises whether any precondition or filter is needed to prevent claims from proceeding where the deceased did not have sufficient connection with this jurisdiction and, if so, whether that should be something other than domicile or whether one or more other possibilities should be added to the domicile precondition.

### **The options for reform**

7.19 We addressed that question by asking consultees whether it should be a precondition to an application for family provision that the deceased died habitually resident in England and Wales, or whether such an application should be possible in any case where there is property comprised in the estate that is governed by English succession law. We also invited views on whether there should be any other requirement limiting the circumstances in which an application for family provision may be made.<sup>21</sup>

### ***Habitual residence***

7.20 Habitual residence has to be regarded as a serious candidate as an alternative to the domicile pre-condition, not least because of the European Commission's proposed Regulation on the private international law of succession, published in October 2009.<sup>22</sup>

7.21 "Private international law" is the body of rules that governs the conflict of laws, that is, the situation that arises when a choice has to be made between the domestic laws of more than one country. For example, when a person domiciled in Spain and habitually resident in France, owning a holiday home in England, dies intestate, the rules of private international law determine which country's courts have jurisdiction to hear disputes about the estate and which country's law is applicable.

7.22 Private international law is complicated by the fact that different countries operate different rules. So in the example just given, English private international law

<sup>20</sup> Analysis of Responses, paras 7.66 to 7.80.

<sup>21</sup> Consultation Paper, para 7.54.

<sup>22</sup> Proposed regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM (2009) 0154 final. It was discussed at Council Meeting 3096 (Justice and Home Affairs), 9 to 10 June 2011, and at the time of publication was awaiting its first reading in the European Parliament.

states that the land owned in England is governed by English law and that the English courts have jurisdiction to make orders relating to it. However, if a dispute about that estate is brought to the courts of a different state, the answers given – as to which courts have jurisdiction and which law they will apply – may well be different from those generated by the English rules of private international law.

- 7.23 It is to avoid situations such as that (and they may be complex with a number of different states involved) that the European Commission wishes to unify the conflict of law rules relating to succession. The objective is that the same rules as to jurisdiction and choice of law should be applied throughout the European Union. Under the draft Regulation, succession to estates – whatever property they comprised – would be governed by the laws of the member state in which the deceased was habitually resident at the time of his or her death, unless the deceased chose a different governing law (within certain parameters). The regulation would govern only private international law and not domestic law.
- 7.24 The UK's response to the proposed regulation has always been cautious because it would require the courts in England and Wales to operate foreign succession law; there has been particular concern about the reception here of rules about forced heirship<sup>23</sup> and the possibility of "clawback" (that is, where an asset given away during the deceased's lifetime can be reclaimed by his or her heirs).<sup>24</sup> The Government announced in December 2009 its intention not to opt in to the proposed Regulation.<sup>25</sup> But the Regulation will take effect for other member States and will have an influence throughout Europe.
- 7.25 There was little enthusiasm among consultees for the suggestion that the domicile precondition could simply be replaced with a precondition that the deceased had been habitually resident in England and Wales at the date of death.<sup>26</sup> As we noted in the Consultation Paper, using a single test of habitual residence could produce just as many hard cases where the deceased had a significant connection with England and Wales but was not habitually resident here at death.<sup>27</sup> It would mean that an application for family provision could also be made against the estate of a person who was neither domiciled nor owned property in England and Wales.<sup>28</sup> The concept of habitual residence is also not currently used in domestic succession law,<sup>29</sup> and so introducing it as the precondition to make a 1975 Act claim would make it necessary to decide a point which does not need to be settled in order for the administration of the estate to

<sup>23</sup> See para 1.21 above.

<sup>24</sup> The EU's Regulation on Succession, Report of the House of Lords European Union Committee (2009-2010) HL 75, paras 86 to 98.

<sup>25</sup> Written Statement, *Hansard* (HL), 16 December 2009, vol 715, col WS274.

<sup>26</sup> Analysis of Responses, paras 7.81 to 7.104.

<sup>27</sup> Consultation Paper, para 7.46.

<sup>28</sup> We explained in the Consultation Paper, para 7.45, that habitual residence was rejected as a precondition for family provision applications in 1987 when the Law Commission undertook a general review of private international law, because it was felt that it did not provide a sufficiently strong link between a person and a country. See *Private International Law: The Law of Domicile* (1987) Law Com No 168.

<sup>29</sup> It is used in other domestic legal contexts; practitioners have pointed out that it is not always consistently defined.

proceed. It could be said still to encourage expensive litigation over a preliminary issue that has little to do with the real issue: whether reasonable provision was made for the applicant.

### ***Alternatives suggested by consultees***

- 7.26 A number of consultees suggested alternative preconditions. The idea of using a “deemed domicile” test, as in the inheritance tax legislation, was supported by two consultees and several practitioners have referred us to it. For inheritance tax purposes, a person is currently deemed to be UK-domiciled at a particular time if he or she was domiciled here within the preceding three-year period, or has been UK-resident in at least 17 out of the last 20 tax years.<sup>30</sup> This combines the concepts of domicile and residence with the addition of a requirement that the residence should have continued for a particular period of time.
- 7.27 Two other consultees favoured using domicile and residence as alternative bases of jurisdiction; and another suggested that the leave of the court might be required for some cases so as to exclude cases with “no substantial connection” with this country.
- 7.28 While we can see that these suggestions for alternative preconditions might mean that fewer meritorious claims are precluded than at present, we remain concerned that introducing the concept of habitual residence at this time could over-complicate our law of succession and reduce certainty.

### ***English succession law***

- 7.29 English succession law applies to immovable assets (essentially, land) situated within this jurisdiction and the movable property of a person who was domiciled here.<sup>31</sup> English succession law will also apply in some situations where, although the English conflicts rules require the English courts to decide the matter as a foreign court would have done, the foreign court would in fact have applied English law.<sup>32</sup>
- 7.30 The suggestion in the Consultation Paper that the applicability of English succession law to part of the estate should be the sole criterion for jurisdiction under the 1975 Act was well supported by consultees, including the Society of Trust and Estate Practitioners, the Law Society, the Institute of Professional Willwriters and the Association of Her Majesty’s District Judges.<sup>33</sup>
- 7.31 The City of Westminster and Holborn Law Society neatly summarised the principal argument in favour of this approach by stating that: “English succession

<sup>30</sup> Inheritance Tax Act 1984, s 267(1); a person who has been UK-resident for more than 16 calendar years may, depending on the exact dates, be deemed domiciled in the UK. The question of residence is determined as for the purposes of income tax: s 267(4).

<sup>31</sup> Consultation Paper, para 7.48. See also L Collins and others (eds), *Dicey, Morris and Collins: the Conflict of Laws* (14th ed 2006 with 4th supplement 2010) para 27R-010 rule 140, and para 27R-015 rule 141.

<sup>32</sup> For detail on the principles of *renvoi* and double *renvoi*, see L Collins and others (eds), *Dicey, Morris and Collins: the Conflict of Laws* (14th ed 2006 with 4th supplement 2010) ch 4.

<sup>33</sup> Analysis of Responses, para 7.84 and following.

law is properly regarded as the rules of testate and intestate succession as adjusted by the discretionary rules of family provision". They considered that it would be appropriate to permit a family provision claim under this approach even where the deceased was neither domiciled nor habitually resident here, noting that the deceased may nevertheless have left a dependant here. Indeed, the result in *Cyganik v Agulian*<sup>34</sup> would have been different under this test; English succession law would have been applicable to the deceased's immovable property in England, and so his partner could have made a claim.

7.32 Some consultees were concerned that this approach might permit claims against estates where the deceased's only connection with this jurisdiction was the ownership of real property here (a holiday home in Cornwall, for example). We do not find this objectionable: if the 1975 Act is part of English succession law, then it should be possible to challenge under the Act the distribution of any property that falls to be dealt with under English succession law.

7.33 Another concern was that the ownership of real property in England and Wales might make the whole estate vulnerable to redistribution under the 1975 Act, wherever the deceased and the bulk of his or her other property were based. Some consultees suggested an express limitation that only property within the jurisdiction of the court could be affected by an order. However, we take the view that an express limitation is not needed. The courts will not make an order which would be ineffective because it would not be recognised in the state in which the property was situated,<sup>35</sup> and so it would be disproportionate to introduce a condition restricting the courts' ability to make orders in all cases.<sup>36</sup> We therefore do not think that an approach based on the applicability of English succession law would open the floodgates to claims with only a tenuous connection to this jurisdiction.<sup>37</sup>

7.34 Although some consultees felt that removing the domicile precondition might leave too many estates vulnerable to a claim, others were concerned that it would still be possible to engineer one's affairs to avoid a claim. It would be possible, for example, for someone domiciled abroad to own English real property via a company (since the shares would be movable property and then subject to the law of the deceased's domicile). The Chancery Bar Association and the Family Law Bar Association both suggested an approach that would permit a claim

<sup>34</sup> [2006] EWCA Civ 129, [2006] 1 FCR 406.

<sup>35</sup> Consultation Paper, para 7.51. Note that, however, a person within the jurisdiction can be compelled by an order of the court to deal with property abroad: *Bheekhun v Williams* [1999] 2 FLR 229. The court will take into account the value of foreign property held by parties to a 1975 Act claim in assessing their needs and whether reasonable provision has been made for them.

<sup>36</sup> We explain below that the domicile condition will be retained as an alternative to the application of English succession law, to avoid narrowing the current law; a general limitation to property in this jurisdiction could have the opposite effect.

<sup>37</sup> The Office of the Official Solicitor suggested a limitation according to the value of assets in the estate. We are not attracted to this approach either. It seems to us that the disproportionate costs of pursuing a claim against a small estate should provide a sufficient practical disincentive. It would also be difficult to set (and periodically update) an appropriate value limit. And it must be open to question whether this sort of restriction on access to the courts would be compatible with Article 6 of the European Convention on Human Rights.

either where the deceased had property in this jurisdiction or where the deceased had been habitually resident here.

7.35 For the reasons set out above, we are not convinced that it would be appropriate at this time to introduce a test based even in the alternative on habitual residence. We acknowledge that the consequence of this is that some – though far fewer – deserving cases may fall outside the reformed precondition. But we think that, in the interests of consistency with English succession law as it currently stands, we should not attempt to introduce such a novel concept.

7.36 On the other hand, a test based solely on the applicability of English succession law may be too narrow. Retaining the domicile condition as an alternative sufficient condition deals with the possibility that the deceased might have been domiciled in England and Wales but owned only immovable property, all of which was situated abroad. That is a very unlikely circumstance, and we are aware that retaining the domicile condition means that in some cases, a question of domicile which does not need to be determined in order to administer the estate may arise as a preliminary issue in a family provision claim. However, in the interests of avoiding an unintended narrowing of the circumstances in which an application can be made, particularly given the issues discussed below relating to property which is brought into the net estate,<sup>38</sup> we think it is worthwhile.

7.37 **We recommend that an application for family provision under the Inheritance (Provision for Family and Dependants) Act 1975 should be possible in any case where either the deceased was domiciled in England and Wales, or English domestic succession law applies to any part of the estate.**

7.38 Taken together, these alternative conditions mean that an applicant would be able to make a family provision claim in any case where at least one of the following statements is true:

- (1) the deceased was domiciled here;
- (2) the deceased owned immovable property situated here;
- (3) the deceased was domiciled in another jurisdiction, and English domestic succession law applies to part of the estate because our choice of law rules recognise a reference to English domestic succession law by the choice of law rules of another jurisdiction.

7.39 Where the deceased was not domiciled here, had only movable property here, and the estate was not governed by a legal system that applies English succession law, then an application for family provision would not be possible.

7.40 Paragraph 2 of schedule 2 to the draft Inheritance and Trustees' Powers Bill puts this policy into effect. It also makes some further provisions relevant to the second condition identified in our recommendation above, namely the applicability of English succession law to any part of the estate, and we go on now to say more about that.

<sup>38</sup> See paras 7.41 to 7.46 below.

### **Assets brought into the net estate**

- 7.41 We noted above that family provision orders may be made in relation to the deceased's "net estate",<sup>39</sup> and that the court has power under sections 8 to 11 of the 1975 Act to make orders in respect of certain assets that are not governed by the provisions of the deceased's will, if any, or by the law of intestacy.<sup>40</sup> In particular, sections 8 to 10 of the 1975 Act enable the court to treat as part of the net estate or to make orders in respect of a *donatio mortis causa* ("deathbed gift"), a statutory nomination, the deceased's severable share of property that passed by survivorship to a joint owner, and property that was transferred at an undervalue during the six years before death with the intention of defeating a family provision claim.
- 7.42 Where sections 8 to 10 are brought into operation, the types of property to which they apply are not necessarily subject to English succession law. If the deceased, not domiciled here, nevertheless owned property which falls into one of these four categories, the recommendation set out above might therefore not enable his English dependants to bring a claim for family provision. And whilst that might seem a relatively unusual scenario, we take the view that some provision should be made for it – recalling that the potential for deliberate evasion is a major reason for recommending reform to the domicile pre-condition. Without a further recommendation, the reform we have recommended would be easily evaded by, for example, the making of a lifetime gift (perhaps shortly before death).
- 7.43 **We recommend that an application for family provision should be possible where assets within the scope of sections 8, 9 and 10 of the Inheritance (Provision for Family and Dependants) Act 1975 were held by the deceased.**
- 7.44 That recommendation would open the door to an application in certain cases. For example, A dies domiciled abroad having given away her house in London by a valid *donatio mortis causa* shortly before her death. If the house had not passed in that way, it would have been subject to English succession law on her death, and would therefore have founded jurisdiction under the 1975 Act. The same would apply if A owned the London house with her husband as beneficial joint tenants. An applicant would still be able to make a family provision claim against the estate on the basis that if the house had not passed by survivorship, it would have devolved according to English succession law.<sup>41</sup> It would not be necessary for the court, in determining whether a family provision application is possible, also to assess whether it would in fact make an order with respect to the joint property, as section 9 empowers it to do. It would simply have to determine whether or not the English succession law condition was fulfilled; the same is the case for section 10.<sup>42</sup>

<sup>39</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 25(1).

<sup>40</sup> See paras 7.6 to 7.10 above.

<sup>41</sup> Just as he or she would have been able to do if the house had been held as tenants in common, either from the beginning or because the joint tenancy had been severed before A's death.

<sup>42</sup> A similar example can be constructed where A died domiciled abroad, having given her London house to her daughter a few months before her death in order to defeat a potential claim for family provision by her son.

- 7.45 Paragraph 2 of schedule 2 to the draft Inheritance and Trustees' Powers Bill puts that recommendation into effect at new subsections (4)(c), (d) and (e) of section 1 of the 1975 Act.
- 7.46 Section 11 of the 1975 Act gives the court power to make an order in respect of property that was the subject of a contract to leave property by will, for less than full valuable consideration, again with the intention of defeating a family provision claim. The above recommendation does not encompass property covered by section 11. The status of such property within the deceased's estate is uncertain; it seems most likely that, where section 11 applies, the property is part of the estate albeit subject to an obligation created by the contract, rather than removed from the estate altogether.<sup>43</sup> Such provision would, in any case, be relevant only in a case where the deceased died domiciled abroad, but had property covered by English succession law, all of which was the subject of a contract within the scope of section 11. We think this so unlikely that it would be disproportionate to make provision for it.

### **APPLICATIONS BEFORE GRANT OF REPRESENTATION**

- 7.47 It is generally accepted that under the current law an application for family provision cannot be commenced until a grant of representation has been obtained.<sup>44</sup> This may be problematic where an applicant needs prompt relief. We asked consultees whether reform to enable an application for family provision to be issued in the absence of a grant is necessary or desirable.<sup>45</sup>
- 7.48 Consultees were in general agreement that there are circumstances where an applicant for family provision may be prejudiced by the inactivity of those who are entitled to a grant.<sup>46</sup> That inactivity may be due to inertia; but it may be that the deceased's only significant assets pass outside the estate (an interest in jointly owned property, for example, or benefits under a pension scheme) so that there is little need or incentive to obtain a grant of representation. Problems can also arise in the common situation where the person who intends to make a claim against the estate is also the person with priority to take a grant. The Association of Her Majesty's District Judges noted that "others involved may, for their own motives and self-interest, deliberately delay in applying for a grant."
- 7.49 The proposition that an application for family provision cannot be commenced in the absence of a grant is based on a single authority coupled with the Civil Procedure Rules and is not free from doubt. This uncertainty was reflected in the consultation responses. Consultees reported that in some cases the courts had permitted cases to be commenced and even concluded without a grant being

<sup>43</sup> The alternative view is that the property becomes in some circumstances subject to a constructive trust: A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed 2008) paras 10-320 to 10-332.

<sup>44</sup> *Re McBroom* [1992] 2 FLR 49; Civil Procedure Rules, r 57.16(3)(a) states that the written evidence filed with the claim must include "the grant of probate or letters of administration in respect of the deceased's estate". See also A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) paras 3[34] to 3[47].

<sup>45</sup> Consultation Paper, para 7.70.

<sup>46</sup> Analysis of Responses, paras 7.140 to 7.162.

issued. Consultees also noted, as we did in the Consultation Paper,<sup>47</sup> that there are steps that an applicant can take under the current law. The citation procedure can be used to require any person with a prior right to a grant either to obtain one or to renounce their right to do so.<sup>48</sup> The High Court also has power to appoint alternative personal representatives or to issue a limited grant that will permit a family provision claim to be commenced.<sup>49</sup> Some consultees argued that reform was not needed because applicants can pursue one of these available legal strategies. Others, however, felt that the law should not be so obscure that only a well-advised applicant with specialist advice should have access to a remedy.

7.50 The law on this point should be clear, so that the courts can take a consistent approach. Consultation responses have confirmed our view that there are circumstances where applicants will want to apply for family provision against an estate before a grant of representation has been obtained and it is appropriate that they should be able to do so.

7.51 **We recommend that the Inheritance (Provision for Family and Dependants) Act 1975 should make clear that nothing prevents the making of an application before a grant of representation with respect to the estate of the deceased is first taken out.**

7.52 Paragraph 7 of schedule 2 to the draft Inheritance and Trustees' Powers Bill gives effect to this recommendation by amending section 4 of the 1975 Act.

7.53 However, consultees also agreed that cases should not be permitted to proceed very far without a grant being obtained.<sup>50</sup> We agree that it would be difficult to proceed to a substantive hearing of the claim until the assets and liabilities of the estate are reasonably clear. In most cases, this will not be possible without the appointment of personal representatives.

7.54 This is not a matter for primary legislation. Rather, we anticipate that consequential changes to the Civil Procedure Rules and Practice Directions would be needed to ensure that, in those cases where proceedings are commenced before a grant has been obtained, appropriate directions are given for a grant to be taken out as soon as is practicable. We have been in discussion with the Chairman of the Civil Procedure Rules Committee; the Committee is prepared to consider what consequential changes may be necessary and carry out their own consultation accordingly.

#### **WHICH GRANTS START TIME RUNNING?**

7.55 The 1975 Act has its own limitation period: an application for an order under the Act cannot be made more than six months after the date on which the personal representatives for the estate obtain a grant of representation. After this deadline,

<sup>47</sup> Consultation Paper, para 7.68.

<sup>48</sup> For more on the citation procedure, see R D'Costa, J Winegarten and T Synak, *Tristram and Coote's Probate Practice* (30th ed 2006 with 3rd supplement February 2010) ch 24.

<sup>49</sup> Senior Courts Act 1981, ss 116 and 117.

<sup>50</sup> The Office of the Official Solicitor had particular concerns about this: see Analysis of Responses, para 7.153.

an application can only be made with the permission of the court.<sup>51</sup> It is therefore important to know when the six-month period starts running, and when it will expire.<sup>52</sup> For most estates, only one grant of representation will be obtained, and it will trigger the six-month limitation period. But there are different types of grant, and some of these do not start time running.

7.56 One consultee noted that it is not clear whether foreign grants of representation start time running under the 1975 Act. There is also some uncertainty as to the effect of certain grants issued in England and Wales which give the personal representatives only limited powers to administer the estate. The Family Law Bar Association suggested that we should take the opportunity to clarify the status of these grants for these purposes. We have therefore considered whether the current law is sufficiently clear.

### **Limited grants**

7.57 Section 23 of the 1975 Act lists those grants which are not to be taken into account in determining the date on which representation with respect to the estate of the deceased was first taken out. The effect of the section is that the following grants will not start time running:

- (1) grants limited to settled land;
- (2) grants limited to trust property;
- (3) grants limited to real estate where there is no previous or contemporaneous grant limited to the remainder of the estate; and
- (4) grants limited to personal estate where there is no previous or contemporaneous grant limited to the remainder of the estate.

7.58 These are all grants which are limited as to the type of property which can be distributed. However, there are other types of grant which are limited for particular purposes and do not enable the administrator to distribute any of the estate, at least without the leave of the court. These include grants *ad colligenda bona* (roughly translated as a grant “to collect the goods”), which authorises the person named to get in the assets of the estate and preserve them until a full grant can be made, and grants *pendente lite* (pending suit) or *ad litem* (for the suit), which appoint personal representatives pending determination of a probate claim or to represent the estate in legal proceedings.

7.59 These grants are not listed in section 23 and therefore, on a literal reading of the statute, representation with respect to the estate has been taken out even though the administrators have only restricted powers to administer the estate for the limited purposes specified in the grant. On one view this is unproblematic; the court has sufficient powers on the conclusion of the family provision proceedings

<sup>51</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 4.

<sup>52</sup> At present, the consequences of applying outside this period are particularly serious as the court cannot then bring into account the deceased’s share of jointly owned property; but see paras 7.74 to 7.83 below.

to make appropriate orders enabling the personal representatives to collect and distribute the assets in the estate.<sup>53</sup>

- 7.60 Others, however, take the view that these limited grants should be left out of account for the same reason that other grants listed in section 23 (and the equivalent section in the 1938 Act) are disregarded.<sup>54</sup> There is some judicial authority for this proposition, at least as regards grants *ad litem*. In the briefly reported case of *Re Johnson*<sup>55</sup> a grant *ad litem* was made to solicitors so that they could begin proceedings in negligence on behalf of the deceased's estate, arising from the circumstances in which he died. A full grant of probate was then made four years later. It was held that the limited grant was not "the first taking out of representation" required for time to begin to run under section 4; it merely enabled a particular thing to be done in relation to the estate and did not enable distribution of the estate.
- 7.61 Although these types of grant are made relatively infrequently,<sup>56</sup> it is clear that there is a lack of clarity over this question. The Law Commission was criticised for not taking the opportunity to clarify these matters when we last recommended reform of the family provision legislation.<sup>57</sup> We would therefore like to provide clarification as part of this project.

### Foreign grants

- 7.62 A foreign grant is generally not effective to permit the distribution of property situated in England and Wales.<sup>58</sup> A grant issued in Northern Ireland or Scotland is recognised as if it had been made in England and Wales and is therefore not treated as a foreign grant.<sup>59</sup> If the deceased was domiciled in one of the countries to which the Colonial Probates Acts 1892 and 1927 apply, a grant which has already been obtained in that country will be recognised once it has been "resealed" in England and Wales ("a colonial reseal"). Where the foreign grant is not automatically recognised and cannot be resealed, rule 30 of the Non-Contentious Probate Rules 1987 regulates the persons to whom a grant may be made to enable dealings with property situated here.
- 7.63 Section 4 of the 1975 Act refers to the date on which representation with respect to the estate of the deceased is first taken out. This suggests that a foreign grant could start time running, even if a grant in England and Wales is later obtained (either a colonial reseal or a grant under rule 30 of the Non-Contentious Probate Rules 1987). This is problematic: the foreign grant does not enable the

<sup>53</sup> A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 3[42].

<sup>54</sup> R Andrae, "Maintenance Claim and Grant of Representation" (1970) 120 *The New Law Journal* 293.

<sup>55</sup> [1987] CLY 3882.

<sup>56</sup> Between November 2007 and October 2008, for example, there were 166 grants *ad colligenda bona* and 12 grants pending suit: Appendix D, Annex A.

<sup>57</sup> R Oughton and E Tyler, *Tyler's Family Provision* (2nd ed 1984) p 240.

<sup>58</sup> Though see the apparent exception when personal representatives in England and Wales may pay over to a foreign administrator: M Waterworth and G Bedworth, *Rossdale: Probate and Administration of Estates* (4th ed 2008) para 4-15.

<sup>59</sup> Administration of Estates Act 1971, ss 1(1) to 1(2) and 1(4).

distribution of the English estate and in many cases it may be difficult for those who may have a claim for family provision to know if a foreign grant has been made.

- 7.64 Up to now, this problem has been more theoretical than real. Under current law, the deceased must have been domiciled in England and Wales for his or her estate to be liable to a claim under the 1975 Act.<sup>60</sup> We have recommended that, in certain circumstances, a claim could be made against the estate of a person who died domiciled abroad.<sup>61</sup> This increases the chances of applications being made where the first grant of representation in respect of the estate is a foreign grant.

#### **Our recommendation**

- 7.65 We did not raise this question in our Consultation Paper and it did not elicit significant comment on consultation. We are therefore cautious in recommending reform. In particular, where the statute is clear that certain grants are to be left out of account, we do not want to risk casting any doubt on what appears to be a settled and well-understood provision.
- 7.66 There is an inconsistency, however, in that certain grants which limit the type of property which can be distributed are left out of account, while grants which are limited to special purposes and do not enable the administrator to distribute any property appear to start time running for these purposes. We consider that a grant which does not permit any property to be distributed should therefore be left out of account for the purposes of section 4 of the 1975 Act.
- 7.67 It should also be put beyond doubt that a foreign grant does not start time running for these purposes. This is particularly important in light of our recommendation to amend the “domicile precondition”. As with the limited grants discussed above, the personal representatives (or their equivalent in the jurisdiction where the grant was obtained) will not be in a position to distribute that part of the estate that is governed by English succession law. It may also not be obvious to a potential family provision applicant when a foreign grant has been made.
- 7.68 **We recommend that, for the purposes of section 4 of the Inheritance (Provision for Family and Dependents) Act 1975, the following should be left out of account when considering when representation with respect to the estate of the deceased was first taken out:**

- (1) **those grants currently left out of account under section 23;**
- (2) **any other grant which does not permit distribution of at least some of the estate; and**
- (3) **a grant, or its equivalent, made outside the United Kingdom, with the exception of a grant sealed under section 2 of the Colonial Probates Act 1892 (but only from the date of sealing).**

<sup>60</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 1(1).

<sup>61</sup> See para 7.37 above.

- 7.69 Paragraph 2 of schedule 3 to the draft Inheritance and Trustees' Powers Bill puts this recommendation into effect by substituting a new section 23 of the 1975 Act in place of the current provision.
- 7.70 The question of when a grant was "first taken out" also arises in sections 9 and 20 of the 1975 Act and in a number of other statutes, including the Administration of Estates Act 1925, the Matrimonial Causes Act 1973, the Administration of Justice Act 1982, the Children Act 1989 and the Civil Partnership Act 2004. For consistency, these statutes should also be amended to make clear that foreign grants and grants which do not permit distribution of any property are to be left out of account. This is given effect by paragraphs 1, 3, 4 and 5 of schedule 3 to the draft Inheritance and Trustees' Powers Bill.

### **THE NET ESTATE: PROPERTY HELD AS JOINT TENANTS**

- 7.71 In the Consultation Paper we considered the court's power to treat as part of the net estate the deceased's interest in jointly-owned property, where that interest has passed automatically to the surviving co-owner or co-owners. That power is contained in section 9 of the 1975 Act. We made provisional proposals in relation to two issues: the time limit applying to this power, and the valuation of the deceased's interest.
- 7.72 Co-owners of property may hold it as tenants in common or as joint tenants.<sup>62</sup> This issue most often arises in relation to a house or flat co-owned by two or more people. If the deceased and another person owned a house, say, as tenants in common, then the deceased's share will form part of his or her estate. It will be inherited according to the deceased's will or the intestacy rules, and will be available along with the rest of the net estate for the purposes of a family provision order. However, if they co-owned the house as joint tenants, the surviving co-owner will take the deceased's share automatically by survivorship, without reference to any will or the intestacy rules.
- 7.73 Even though this property passes to the surviving co-owner or co-owners automatically, section 9 empowers the court to make an order that the deceased's share is to be treated as part of the net estate for the purposes of making a family provision order.

#### **The six-month time limit**

- 7.74 This power can, however, only be exercised if the family provision application was made within six months of the date when the grant of representation in relation to the estate was taken out. There is no power to extend the time limit. This contrasts with the general rule determining whether a 1975 Act claim may be brought at all: under section 4 of the 1975 Act, although claims must usually be brought within six months of the grant of representation, a claim brought after that time may proceed with the permission of the court. That contrast means that, even if a late application is permitted, the court in dealing with that application will not be able to exercise its power under section 9 and so the deceased's share in property held as joint tenants cannot be brought into the net estate.

<sup>62</sup> W Swadling, "Property: General Principles" in A Burrows (ed), *English Private Law* (2nd ed 2007) para 4.354.

- 7.75 In the Consultation Paper we considered the reasoning of the Law Commission in recommending this strict time limit in 1974; the concern was that the other joint tenant or joint tenants should know within a set period how their rights in property acquired by survivorship might be affected by a family provision application. However, we felt that it would be right to reassess the rule in the light of criticism, in particular that the strict time limit acts as a trap for the unwary and may prevent meritorious applicants from accessing a major asset of the estate.<sup>63</sup>
- 7.76 We therefore asked consultees whether the court should have discretion in an appropriate case to exercise its powers under section 9 of the 1975 Act even where the application for family provision was brought more than six months after the grant of representation.<sup>64</sup>
- 7.77 This proposal was well supported on consultation.<sup>65</sup> Many argued that the rule should be reformed to give the court more flexibility to have recourse to joint property in appropriate cases, thus avoiding inequitable results.<sup>66</sup> The Society of Trust and Estate Practitioners, for instance, commented that “it is not sensible to include arbitrary traps within our law”. Generally, such consultees considered either that the strict time limit does not in practice benefit surviving joint tenants, or that the benefit is outweighed by the problems it causes. It was suggested that the rule may waste costs and court time by forcing applicants to issue claims within the six-month deadline when they might otherwise have negotiated a pre-action settlement.
- 7.78 The principal concern of those consultees who opposed reform was that our provisional proposal might prolong the uncertainty over property rights taken by survivorship, which would be detrimental to the position of the surviving joint tenant or joint tenants. These comments echo the Law Commission’s original position in 1974. On balance, however, we agree with the large number of consultees who took the view that reform is worthwhile in order to ameliorate the injustice caused by the current inflexible rule.
- 7.79 As consultees emphasised, section 9 is discretionary: the court *may* order that the deceased’s severable share of jointly owned property be brought into account “to such extent as appears to the court to be just in all the circumstances of the case”. The courts do at present take into account the impact of any order on third parties who have benefited from the deceased’s estate (whether as beneficiaries or surviving joint tenants).<sup>67</sup>
- 7.80 In any event, the protection afforded to joint tenants under section 9 as it currently stands is perhaps more illusory than real. Time runs from the grant of

<sup>63</sup> Consultation Paper, paras 7.57 to 7.59.

<sup>64</sup> Consultation Paper, para 7.60.

<sup>65</sup> Analysis of Responses, paras 7.105 to 7.123.

<sup>66</sup> A few consultees appear to have responded on the basis of a misunderstanding of the current law, or of the question; for example, it was suggested that the court *does* currently have power to extend the time limit under section 9.

<sup>67</sup> *Re Salmon* [1981] Ch 167, 176, by Sir Robert Megarry V-C; recognising that there is “a real psychological change” for beneficiaries when distribution actually occurs, which applies with even greater force if beneficiaries have also changed their position in reliance on the receipt.

representation, which may not be obtained for some years after the death.<sup>68</sup> If the strict time limit was intended to avoid prolonged uncertainty for surviving joint tenants then it has not achieved that aim. One consultee suggested that this could be overcome by a new time limit which would be longer – between 12 and 18 months – but run from the date of death, not the date when the grant of representation is taken out. The applicant would need to put the surviving joint tenant or joint tenants on notice of a potential family provision claim during that period.<sup>69</sup> We recognise that this would increase certainty for those who inherit by survivorship, by ignoring (as generally irrelevant to them) the date on which the grant of representation is obtained; but we are concerned that it could simply replace one arbitrary and potentially unfair time limit with another.<sup>70</sup> We also note that it would be necessary to devise rules for putting the surviving joint tenant or tenants on notice of a family provision claim, short of actually issuing the claim. As noted above, the court will be mindful that any order it makes could affect third parties. We therefore do not consider that further reform is necessary to ensure that such claims are brought within a specific timeframe.

- 7.81 The Judges of the Chancery Division and of the Family Division of the High Court suggested that the court should be given power to extend the section 9 time limit but only at the same time as hearing the application to permit the claim to proceed out of time. We are not convinced that this should be necessary; it might operate harshly on an applicant who does not know at the time of making the application whether the deceased owned property jointly.
- 7.82 It seems to us that the most appropriate reform is simply to remove the restriction, so that the court may exercise its section 9 powers even where the applicant has been given leave to proceed with a claim brought more than six months from the date when the grant of representation was issued.
- 7.83 **We recommend that the court should have discretion to exercise its powers under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.**
- 7.84 Accordingly, paragraph 8(a) of schedule 2 to the draft Inheritance and Trustees' Powers Bill removes from section 9(1) of the 1975 Act the words "before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out".
- 7.85 We appreciate that as a result of this reform there could be an increase in the number of orders made under section 9. The Royal Bank of Scotland Trust & Estate Group drew our attention to the position of asset-holders such as banks and other financial institutions. The bank at which the deceased and his or her spouse held a joint savings account, for example, may have paid out the whole amount to the survivor. However, we note that section 9(3) of the 1975 Act provides that no one is to be liable for anything done before an order under

<sup>68</sup> In *Dingmar v Dingmar* [2006] EWCA Civ 942, [2007] Ch 109, considered at para 7.86 and following below, it was seven years.

<sup>69</sup> Analysis of Responses, para 7.123.

<sup>70</sup> For the same reason we have not adopted the suggestion that the time limit should remain absolute but with the substitution of a longer period.

section 9(1) is made. We take the view that this provides adequate protection for asset-holders.

### **Valuation**

- 7.86 The deceased's share of property held as joint tenants may have changed in value between the date of death and the date of judgment on a family provision claim. In giving the court power to order that the deceased's share is to be treated as part of the net estate, section 9(1) uses the words "at the value thereof immediately before [the] death" in relation to the share.
- 7.87 In *Dingmar v Dingmar* it was not until seven years after the death that the deceased's widow issued a family provision claim.<sup>71</sup> The deceased's only asset was his interest in the family home, which had passed by survivorship to his son, and in the intervening years its value had risen substantially. The case turned on the interpretation of the words "at the value thereof immediately before his death": whether the court was limited to calculating the deceased's 50% share on the value of the property at the date of death, or was not prevented by those words from taking instead the higher valuation as at the date of the hearing. The trial judge took the first view, but the Court of Appeal, by a majority, took the second.
- 7.88 In the Consultation Paper we expressed agreement with the result in *Dingmar*: while the moment immediately before death is the last point at which the share could have been severed, this does not control the point at which it is valued in subsequent family provision proceedings.<sup>72</sup> We considered that the wording of section 9 should be reviewed so as to make this clear on the face of the statute, noting the dissatisfaction expressed by all three of the Court of Appeal judges about the wording of the section. We suggested that this should apply both to section 9 and to the similar wording in section 8, which concerns statutory nominations and gifts made in contemplation of death.<sup>73</sup>
- 7.89 We provisionally proposed that the value of assets for the purposes of sections 8 and 9 of the 1975 Act should be their value at the date of the application, not at the date of death.<sup>74</sup>

### **Valuation of the deceased's severable share: section 9**

- 7.90 Most responses to this question focused on the proposed amendment to section 9, which was generally supported by consultees.<sup>75</sup> In particular, consultees pointed to the general principle of the 1975 Act that the court should "take into account the facts as known to the court at the date of the hearing", and considered that this should be applied unless there is a particular reason not to

<sup>71</sup> [2006] EWCA Civ 942, [2007] Ch 109.

<sup>72</sup> Hence the difference in terminology between this provision and section 8, which refers to the value *at* the date of death rather than immediately before. The moment immediately before death is the last opportunity for a beneficial joint tenant to sever the joint tenancy, and therefore the last point at which, strictly speaking, a severable share existed: *Powell v Osbourne* [1993] 1 FLR 1001, 1006, by Simon Brown LJ. No such consideration arises under section 8, so the value taken there is the value at the date of death.

<sup>73</sup> Consultation Paper, 7.61 to 7.64.

<sup>74</sup> Consultation Paper, para 7.65.

<sup>75</sup> Analysis of Responses, paras 7.124 to 7.139.

do so.<sup>76</sup> As one consultee pointed out, additional costs may be incurred in revaluing property, but we do not think that this outweighs the advantages of that general principle.

- 7.91 We therefore remain of the view that the wording of the statute should make it clear that there is no restriction to the value of the deceased's interest in jointly owned property at the date of death. The facts of *Dingmar v Dingmar*<sup>77</sup> show that such a limit could arbitrarily prejudice a family provision claim where the deceased's only significant asset was his or her share of the family home.
- 7.92 The Society of Trust and Estate Practitioners agreed with the provisional proposal but noted that it may not be appropriate in all cases for the court simply to take the later valuation, pointing out that the increase in value might be due to improvements made since the death by the surviving co-owner or co-owners. We note, however, that the court has discretion under section 9 not only as to whether the deceased's share of the property should be brought into account as part of the net estate, but also as to the extent to which this is done. Therefore, in that example the court might decide that it would be "just in all the circumstances of the case" for only a proportion of the deceased's share to be brought into the net estate.<sup>78</sup>
- 7.93 On the other hand, there may be cases where it would also be inappropriate to limit the court to that later valuation. For instance, where the property had fallen in value since the death (perhaps because of neglect by the other co-owners), the court should be free to take an earlier valuation of the property.
- 7.94 We have therefore concluded that it would not be right simply to change the relevant date for valuation to the date of the application (or the date of the hearing, as some consultees suggested). Instead, the court should have discretion to adopt whichever valuation date is appropriate in the circumstances, taking account of whether the property has increased or decreased in value since the date of death and the reasons why that has happened.
- 7.95 The Chancery Bar Association suggested that it should be mandatory for the court to deduct any inheritance tax payable by the surviving joint tenant to reach a net amount which can be treated as part of the net estate.<sup>79</sup> We consider that the current requirement for the court to have regard to the inheritance tax position is sufficient, and are not aware that this has caused problems in practice.
- 7.96 **We recommend that when an order is made under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 treating as part of the net estate the deceased's share of property held as joint tenants immediately before death, the share should be valued at such date as appears to the court to be appropriate.**

<sup>76</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 3(5).

<sup>77</sup> [2006] EWCA Civ 942, [2007] Ch 109.

<sup>78</sup> For an example of a case in which the order made did not extend to the full value of the deceased's severable share see *Jessop v Jessop* [1992] 1 FLR 591.

<sup>79</sup> This would reflect the current position in relation to section 8, discussed at para 7.98 below.

- 7.97 Paragraph 8(b) of schedule 2 to the draft Inheritance and Trustees' Powers Bill therefore replaces the words "at the value thereof immediately before his death" in section 9(1) of the 1975 Act with the words "valued at such date as appears to the court to be appropriate".

***Valuation of property to which section 8 applies***

- 7.98 Our original provisional proposal applied not only to section 9, but also to section 8 of the 1975 Act. That provision applies to a sum of money or other property which the deceased arranged during his or her lifetime to pass to a particular recipient, either by a statutory nomination or by a gift made in contemplation of death. In the case of a sum of money, the amount to be treated as part of the net estate is that sum; other assets must be treated as part of the net estate "to the extent of the value thereof at the date of the death of the deceased". Most of the consultees who commented on our proposal addressed only section 9; but a few observed that section 8 should not be treated in the same way, and we agree.<sup>80</sup> A change to the basis of valuation of gifts to which section 8 applies would contradict the position under section 10, which applies to gifts and other transactions at an undervalue where the deceased is shown to have had an intention to defeat an application for family provision. In view of that potential anomaly, and since we are not aware that there is general dissatisfaction with the current law as regards section 8, we have decided to make no recommendation on this point.

**PENSIONS**

- 7.99 Pension funds may be among the most important assets of an individual or indeed a family. A pension itself generally comes to an end with the death of the recipient – either it ceases to be payable, or it will never become payable. But we have to consider here the benefits that may become payable to others from someone's pension fund after his or her death. We refer to them as "pension benefits"; broadly they may comprise either a lump sum payment or a dependant's pension.<sup>81</sup>
- 7.100 As pension funds are held on trust by pension trustees, pension benefits will usually be paid through a discretionary trust mechanism in the pension trust deeds. The pension holder will usually have been given the opportunity to sign a letter of wishes, nominating an individual to receive any lump sum payments that may be payable. That nomination is not binding on the pension trustees, who retain a discretion (subject to the terms of the pension trust) as to who receives the payment.<sup>82</sup> A dependant's pension may be paid to a spouse, civil partner, cohabitant, child or other dependant of the deceased.<sup>83</sup>

<sup>80</sup> Analysis of Responses, para 7.133.

<sup>81</sup> The form that they can take is prescribed by the Finance Act 2004, ss 167 and 168.

<sup>82</sup> Alternatively, the scheme may state who will receive the benefits in all cases, or may enable the pension holder to make a binding nomination, which the trustees must then follow. The discretionary arrangement is generally preferred, partly for inheritance tax reasons.

<sup>83</sup> Finance Act 2004, s 167 and sch 28, para 15.

- 7.101 Pension benefits are not available for distribution for the purposes of the intestacy rules,<sup>84</sup> and they usually (subject to some exceptions that we discuss below) fall outside the net estate for the purposes of family provision claims, although the court does have a duty to take into account the distribution of any pension benefits when considering and making an order for family provision.<sup>85</sup>
- 7.102 In the Consultation Paper we rejected the idea that pension benefits should be accounted for within the intestacy rules, because that would make the administrators' task too difficult. That view was not challenged by the responses we received to our consultation.
- 7.103 However, we did ask whether the 1975 Act should be reformed so as to make pension benefits available for distribution in response to a claim for family provision. We noted that pension funds might be substantial and that the introduction of pension sharing on divorce had led to a significant difference between family provision and ancillary relief on divorce or dissolution of a civil partnership.<sup>86</sup> This seemed especially anomalous in view of the requirement that the court, in making an order in favour of a spouse, must have regard to the provision the applicant "might reasonably have expected to receive" if the marriage or civil partnership had been ended by divorce or dissolution.<sup>87</sup> That said, we considered that, if there were to be reform, recourse to pension funds should only be available as a last resort, where the assets in the net estate would otherwise be insufficient to make reasonable financial provision for the applicant.
- 7.104 In the Consultation Paper we asked whether consultees would favour reform of the 1975 Act so as to make pension benefits available on this basis, and we asked what might be the legal or practical difficulties arising from that reform.<sup>88</sup>

### **Consultation responses**

- 7.105 Of the consultees who addressed these questions, just over half favoured reform, a quarter were opposed and the rest expressed no overall opinion.<sup>89</sup> Those in favour of reform included the Chancery Bar Association and the Family Law Bar Association, the Law Society and the Society of Trust and Estate Practitioners. The main reasons given for favouring reform to bring pensions within the scope of the 1975 Act mirrored those we presented in the Consultation Paper and centred on the concern that reasonable provision for applicants may only be possible if the net estate is augmented by the pension benefits. A few consultees expressed a concern that pension trustees exercised their discretion too speedily

<sup>84</sup> Unless they are payable to the estate (under the terms of the pension scheme or in accordance with a nomination made by the deceased), which is unusual.

<sup>85</sup> Section 3(1) of the Inheritance (Provision for Family and Dependants) Act 1975 requires the court to consider the "financial resources and financial needs" of any applicant or beneficiary, which will include the destination of any pension benefit. See, for instance, *P v G (Family Provision: Relevance of Divorce Provision)* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431 where the court formulated an award which took account of the fact that the applicant had already received benefits from the deceased's pension.

<sup>86</sup> Consultation Paper, paras 7.75 to 7.79.

<sup>87</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 3(2), discussed further at para 2.141 and following above.

<sup>88</sup> Consultation Paper, paras 7.82 and 7.83.

<sup>89</sup> Analysis of Responses, paras 7.163 to 7.193.

after death and consequently ran the risk of paying out to the “wrong” beneficiary who, although named in a letter of wishes, might not be the most needy or deserving potential beneficiary.

- 7.106 Most notable amongst those opposing reform were the Association of Pension Lawyers and the Investment and Life Assurance Group, both of whom submitted detailed responses and who represent a substantial section of the pensions industry. A number of reasons were given for opposing reform. In particular, consultees doubted whether the scale of the problem would justify reform.
- 7.107 Some consultees argued that pension benefits would usually be distributed fairly in any event, on the basis that the pension trustees themselves take their responsibilities seriously and exercise their discretion carefully. They thought that little would be gained by subjecting the exercise of the trustees’ discretion to the supervision of the courts in family provision proceedings. It was also suggested that it is rare for a pension-holder to deprive a spouse or other close family member by nominating someone else as the recipient of his or her pension.
- 7.108 The modest size of most pension funds was also noted; consultees commented that in most cases a claim would not be worthwhile. We met with Dr Debora Price, Senior Lecturer in Social Policy at King’s College London, who pointed out that only 50% of the over 65 population have a pension, and most of these pensions are worth less than £20,000. Such pensions would not normally be worth the expense of litigation under the 1975 Act.
- 7.109 Consultees therefore felt that the complexity added to the administration by reform in respect of pension benefits would not be warranted. In particular, they were concerned that the payment of pension benefits would be delayed. The payment of pension benefits does not usually require a grant of representation, and the speed with which they can be paid after the death is therefore regarded as particularly useful for a bereaved family.
- 7.110 Finally, there was criticism of introducing reform with the aim of reflecting the availability of pension sharing on divorce. Although some consultees saw that regime as a useful precedent, the Association of Pension Lawyers disagreed. They considered that pension sharing on divorce reflects the “sensible policy” that “the former spouse should not lose the benefit of something that was previously available to provide support for him or her as part of the joint finances of a marriage”. But discretionary payments available for distribution under a pension scheme are potentially payable to a much wider range of beneficiaries. As a result, it was said to be appropriate that the trustees have the power to consider a range of factors without making them subject to court supervision, especially where the trustees might have better knowledge of the deceased.

### **Discussion**

- 7.111 The concerns expressed by consultees have persuaded us that we should not recommend reform of the 1975 Act to make pension benefits available for distribution in family provision claims. In particular, we take the view that although the present law can cause hardship in individual cases, the evidence we have as to the scale of the problem does not justify enabling the court directly to redistribute pension benefits under the 1975 Act. Reform could detrimentally

affect a larger number of straightforward cases, were the trustees to delay exercising their discretion to guard against possible family provision proceedings.

- 7.112 Reform would also be expensive to implement, probably requiring substantial re-training of pension advisors and re-advising of pension holders, and might well be of limited utility if only a minority of pension funds are of a high enough value to be worth litigation. We initially took the view that the legislative mechanism of the pension sharing provisions within the Matrimonial Causes Act 1973 could be adapted for use in the family provision context.<sup>90</sup> After considering the arguments of consultees noted above, and meeting with representatives of the pensions industry, we have been persuaded that this is not realistic. The ancillary relief method of sharing a pension that has not (usually) entered payment (that is to say that the pensioner is not yet in receipt of a pension) is very different from altering the destination of a payment that has already been made by permitting the court to override the discretion vested in pension trustees.

***Pension benefits in family provision under the current law***

- 7.113 In claims for family provision the court may also be able to access pension funds directly, in two limited instances. First, where the payment has been nominated by the deceased and the pension scheme rules are statutory, or were made in accordance with a statute, the payment may be caught by section 8 of the 1975 Act.<sup>91</sup>
- 7.114 Secondly, it is possible for a pension scheme to fall within the definition of an ante-nuptial or post-nuptial settlement, and therefore to be subject to the court's power to vary such a settlement under sections 2(1)(f) and (g) of the 1975 Act. The court's powers under these sections mirror those under section 24(1)(c) of the Matrimonial Causes Act 1973.
- 7.115 Where sections 2(1)(f) or (g) do apply, a variation to the settlement may only be made in favour of the surviving spouse, any child of both spouses, or a person treated as a child of the family in relation to the marriage or civil partnership. A pension will be an ante-nuptial or post-nuptial settlement for these purposes where it provides "some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children", but is not a "disposition which confers an immediate, absolute interest in an item of property".<sup>92</sup> It was suggested to us by Giles Harrap that this position was unsatisfactory and perhaps discriminatory as section 2(1)(f) is confined to settlements between married couples and civil partners.<sup>93</sup> Pensions that cannot be defined as such settlements are inaccessible.

<sup>90</sup> Consultation Paper, para 7.79.

<sup>91</sup> See *Re Cairnes* (1983) 4 FLR 225, 231 to 232, by Anthony Lincoln J. Our research indicates that this principle may currently apply to certain public sector pension schemes.

<sup>92</sup> *Brooks v Brooks* [1996] AC 375, 391. *Brooks* was concerned with section 24(1)(c) of the Matrimonial Causes Act 1973, but the courts' interpretation of this section has been read across to section 2(1)(f) of the Inheritance (Provision for Family and Dependants) Act 1975: *P v G (Family Provision: Relevance of Divorce Provision)* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431 at [209] and [248]; A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 13[6](c).

<sup>93</sup> Section 2(1)(g) is the equivalent provision for civil partners.

7.116 We do not agree that the section is discriminatory. Sections 2(1)(f) and (g) represent a special approach in relation to marriages and civil partnerships and we do not see a need either to repeal sections 2(1)(f) and (g) or to expand them to include other pensions. The defining characteristic of an arrangement that comes within these provisions is that it is a “nuptial settlement”, not that it is a pension, and consequently there will be settlements that are *not* pensions that are also covered. Nor do we see sections 2(1)(f) and (g) as providing a model for a more general reform. It has been said that “this power has only been invoked on rare occasions in respect of a 1975 Act claim”,<sup>94</sup> and we are aware of only one reported case that considers the use of section 2(1)(f) of the 1975 Act.<sup>95</sup> One commentator has noted that an order under section 2(1)(f) has never been made in respect of a personal pension scheme;<sup>96</sup> the only reported case, *P v G*, concerned a “small self-administered pension scheme, set up ... by the deceased”.<sup>97</sup> We do not consider that these provisions form a solid basis for any reform.

### ***Pension trustees and the exercise of their discretion***

7.117 The understandable desire of pension trustees to pay out speedily after death, however well intentioned, may create potential for a more deserving beneficiary to be overlooked in the distribution. Some consultees criticised the way pension trustees operate, while others argued that such trustees take their responsibilities seriously and undertake essentially the same exercise that a court would in a claim for family provision. We note that the exercise of trustees’ discretion is already subject to a limited form of review by the court, although this review extends only to ensuring that the trustees ask the correct questions, direct themselves correctly in law, take into account only relevant factors, and do not arrive at a perverse decision.<sup>98</sup>

7.118 In the case of pension trustees, the Pensions Ombudsman also has the power to investigate and determine certain matters referred to him, including complaints over the distribution of lump sum death benefits.<sup>99</sup> However, as with the court’s

<sup>94</sup> A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 13[6](b), which contrasts this with the “recent spate of decisions” under section 24(1)(c) of the Matrimonial Causes Act 1973.

<sup>95</sup> *P v G (Family Provision: Relevance of Divorce Provision)* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431, where Black J remarked (at [209]) that she “would be prepared” to make an order under section 2(1)(f), but did not do so. *Dixit v Dixit* (23 June 1988) CA (unreported) is given as an example of an order under section 2(1)(f) by A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 13[6](b). However, it has been noted elsewhere that the order made in *Dixit* was overturned on appeal for unconnected reasons and that consequently “it was not decided whether the order ... was one that could be made under section 2(1)(f)”: S Ross, *Inheritance Act Claims: Law and Practice* (3rd ed 2011) para 5-021.

<sup>96</sup> S Ross, *Inheritance Act Claims: Law and Practice* (3rd ed 2011) para 5-021.

<sup>97</sup> *P v G (Family Provision: Relevance of Divorce Provision)* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431 at [130].

<sup>98</sup> *Wild v Pensions Ombudsman* [1996] 2 FLR 680, 688, quoting *Harris v Lord Shuttleworth* [1994] ICR 991, 999.

<sup>99</sup> Pension Schemes Act 1993, s 146. For examples of recent determinations by the Pensions Ombudsman in the field of pension benefits, see *Blundell v AEGON Scottish Equitable* (2010) ref 78553/1; *McGurk v Royal Mail Pension Trustees Limited* (2009) ref 74946/2; and *Winterstein v London Borough of Camden* (2009) ref 76288/1.

jurisdiction to supervise trustees, the role of the Pensions Ombudsman is limited.<sup>100</sup>

- 7.119 The role of the Pensions Ombudsman in this context, and of the court more generally, is therefore more limited than that of the court in claims for family provision. We are, however, concerned that subjecting pension trustees' discretion to the much wider redistributive powers the court possesses under the 1975 Act could have unintended adverse consequences.
- 7.120 There is, of course, a difficult balance for pension trustees to strike. Payment is often relied upon as a source of funds early on after the pensioner's death; but it is important for pension trustees, when they come to exercise their discretion, to ensure that they have made sufficient enquiries, and have allowed sufficient time to receive representations from possible beneficiaries. We note the importance of the role that pension trustees fill here, and the difficulties that it involves, and we make no formal recommendation.

### **POWERS OF THE COURT TO MAKE ORDERS**

- 7.121 If the court is satisfied that the disposition of the deceased's estate under a will or the intestacy rules does not make reasonable provision for the applicant, section 2 of the 1975 Act provides the court with powers to make a wide range of orders.
- 7.122 Section 2(1) lists the orders that the court can make for the benefit of the applicant, including orders for payment of a lump sum or periodical payments out of the net estate or orders for the transfer to the applicant of specified property. The court can also order the settlement, for the benefit of the applicant, of property comprised in the net estate. But Richard Wallington raised with us a concern that the court lacks the power to vary – for the benefit of the applicant – trusts which have arisen under the deceased's will or by operation of the intestacy rules.
- 7.123 The court does have power to vary these trusts for the purpose of giving effect to an order or for the purpose of securing that any such order operates fairly as between one beneficiary of the estate and another. However, this power is only ancillary to the powers in section 2(1) and cannot be used under that subsection to satisfy the applicant's claim.<sup>101</sup>
- 7.124 The desired result may be achieved by re-settling on new trusts property that is held on existing trusts, which the court has power to do under the current law.<sup>102</sup> But this may be a disproportionate and unwieldy approach that could be avoided if it were possible simply to vary an existing trust.
- 7.125 Having considered this suggestion and undertaken informal consultation with members of our advisory group and others we are satisfied that this power should be available in all cases and its availability should be clear on the face of the Act.

<sup>100</sup> *Curran v IBC Pension Trustees Limited* (2009) ref 74746/1, [18] and [19].

<sup>101</sup> A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 13[5].

<sup>102</sup> Inheritance (Provision for Family and Dependents) Act 1975, s 2(1)(d).

- 7.126 **We recommend that the court in making an order under the Inheritance (Provision for Family and Dependants) Act 1975 should have power to make an order varying for the applicant's benefit the trusts on which the deceased's estate is held.**
- 7.127 We are also aware that there is a question as to whether, when the court makes an order under the 1975 Act, the net estate can be assessed in the light of the way in which that order itself will affect the liabilities payable, and whether the order can extend to any consequent increase in the net estate.
- 7.128 When a family provision order is made, it is taken to have effect as though the will or intestacy of the deceased had operated subject to the terms of the order from the date of death.<sup>103</sup> This may mean that the net estate would have been increased, because an amount that was deductible from the net estate as it was originally distributed is no longer payable. In particular, if inheritance tax was originally payable on the estate, the amount due may be less by reason of the order; a common example is a successful family provision claim by a spouse, where the amount which passes to him or her attracts exemption from inheritance tax.<sup>104</sup> It has been suggested that although the 1975 Act definition of the "net estate" takes into account debts and liabilities, including inheritance tax payable on the estate, a repayment due by reason of the order itself may come too late for the court to make provision out of it in that order.<sup>105</sup>
- 7.129 We consider that it is appropriate to clarify this point on the face of the statute. Practitioners will, of course, be mindful of the need to calculate carefully the amount of any repayment which is anticipated, taking account of matters such as revised tax calculations, and to make clear to the court making the order that the repayment is dependent on such calculations and has not yet been received.
- 7.130 **We recommend that the court in making an order under the Inheritance (Provision for Family and Dependants) Act 1975 should have power to treat the net estate as already including a repayment of inheritance tax, or a payment of any other amount, which would become payable as a result of the order.**
- 7.131 These recommendations are given effect by paragraph 5 of schedule 2 to the draft Inheritance and Trustees' Powers Bill, which inserts the appropriate provisions in section 2 of the 1975 Act.

<sup>103</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 19(1).

<sup>104</sup> Inheritance Tax Act 1984, s 18.

<sup>105</sup> Inheritance (Provision for Family and Dependants) Act 1975, s 25(1); A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (15th update March 2011) para 14[14] n 2.

# PART 8

## COHABITANTS

### INTRODUCTION

- 8.1 Under the current law, a cohabitant can inherit the estate of his or her partner on intestacy, but only through an application to court for family provision. The courts' approach to such applications is to make an award that reflects the cohabitant's lifestyle with the deceased and provides a measure of long-term security.<sup>1</sup> Awards may be at a level very close to what would have been ordered in favour of a surviving spouse; in some cases the cohabitant may take the whole estate. So cohabitants have a well-established position within the system of inheritance on intestacy. But generally they must launch a court action in order to inherit anything.<sup>2</sup> In this final Part we consider whether the intestacy rules should be reformed so that, where one member of a cohabiting couple dies intestate, the surviving partner can inherit automatically under the intestacy rules without having to make a family provision claim.
- 8.2 We use the terms "cohabitation" and "cohabitants" to describe couples who live together in an intimate relationship but are not married or in a civil partnership. We do not intend to include those people who live together but are not couples in that sense; for example, those who share a home as friends, or just for convenience, but not as a couple, or those whose relationship is primarily commercial, as landlord and tenant or lodger.
- 8.3 This Part is structured as follows:
- (1) the background to these issues;
  - (2) an examination of the general question asked in the Consultation Paper, whether there should be any circumstances in which a surviving cohabitant might be entitled on intestacy;
  - (3) the definition of a cohabiting relationship for these purposes;
  - (4) what further conditions for entitlement should be imposed;
  - (5) what the survivor's entitlement should be;
  - (6) a cohabitant's entitlement to personal chattels; and
  - (7) consequential issues, including amendments to the family provision legislation to ensure consistency with our recommendations for reform of the intestacy rules.

<sup>1</sup> See para 8.160 below.

<sup>2</sup> In many cases, of course, the matter will be settled by negotiation with the deceased's relatives; but it may be necessary for the cohabitant to threaten litigation in order for such negotiations to progress. A cohabitant may, alternatively, be awarded a discretionary payment if the estate passed as *bona vacantia* because the deceased died intestate leaving no relatives within the intestacy rules; see paras 1.56 to 1.57, and 3.38 and following, above.

- 8.4 We explained in Part 1 that reform of the intestacy rules in favour of cohabitants is rather different from the rest of our recommendations. It is more contentious and is likely to be subjected to a more intense level of debate. For the reasons set out in Part 1 and discussed further below, the recommendations we make in this Part are embodied in a separate draft Inheritance (Cohabitants) Bill, which can be found at Appendix B. The Inheritance (Cohabitants) Bill is drafted on the assumption that the Inheritance and Trustees' Powers Bill, which would enact the other recommendations in the preceding Parts of this Report, is already in force.

## **BACKGROUND**

- 8.5 The prevalence of cohabitation has increased enormously since the Law Commission last reviewed the law of intestacy more than 20 years ago.<sup>3</sup> In 2006, of those aged under 60 and unmarried, 24% of men and 25% of women were cohabiting in Great Britain. These were approximately double the rates found 20 years earlier.<sup>4</sup> By 2010, around 7.5 million people were living in cohabiting families, representing more than 15% of all families.<sup>5</sup> According to the Office for National Statistics, the number of cohabiting couples in England and Wales will increase from 2.3 million in 2008 to 3.8 million in 2033.<sup>6</sup> Cohabitation is therefore widespread and seems likely to become more so.
- 8.6 Research suggests that cohabitants are among the people least likely to have a will. One study found that only 17% of cohabitants had made one.<sup>7</sup> This figure must be treated with caution as cohabitation is more common among young people, who are less likely to have a will because of their age, whatever type of relationship they are in.<sup>8</sup> Nevertheless, the potential impact of the current law is already significant and is set to increase.

## **The Law Commission's previous work**

- 8.7 In Part 4 of the Consultation Paper we noted the Law Commission's previous work in this area. In our 1989 Report we rejected reform of the intestacy rules to take account of cohabitants.<sup>9</sup> However, we recommended their inclusion as a separate category of applicant under the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"). Cohabitants had previously been able to apply for family provision only as dependants, which limited their chances of success. This recommendation was enacted in 1995 and took effect from 1

<sup>3</sup> Distribution on Intestacy (1988) Law Commission Working Paper No 108; Family Law: Distribution on Intestacy (1989) Law Com No 187.

<sup>4</sup> Office for National Statistics (2008) 38 *Social Trends* 15 and 19, reporting that in 1986 the figures were (again for the unmarried under-60 population) 11% of men and 13% of women. See also Office for National Statistics (2009) 39 *Social Trends* 21 to 22.

<sup>5</sup> Office for National Statistics (2011) 41 *Social Trends (Households and families)* 7 to 8.

<sup>6</sup> Office for National Statistics, *Marital Status population projections, 2008-based*, Statistical Bulletin (24 June 2010) p 4.

<sup>7</sup> National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

<sup>8</sup> C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499, 501.

<sup>9</sup> Family Law: Distribution on Intestacy (1989) Law Com No 187.

January 1996.<sup>10</sup> Since that date, a person who was living in the same household as the deceased and as the husband or wife of the deceased for a continuous period of two years before the death has been entitled to make a claim for family provision from the estate. That right has since been extended to same-sex couples.<sup>11</sup>

- 8.8 This means that a cohabitant can claim family provision from the estate of a deceased partner by virtue of his or her status as a cohabitant, without having to demonstrate dependency. Entitlement is limited to provision for the applicant's maintenance, rather than the more generous basis on which awards are made to spouses. But the courts' approach to family provision applications by cohabitants can result in significant awards that make long-term provision for the cohabitant, recognising the lifestyle that the couple had enjoyed together.<sup>12</sup>
- 8.9 Yet despite this legal recognition of the claims of cohabitants on death, cohabitants still have no place in the intestacy rules and their only route to a share of a deceased partner's estate on intestacy is through litigation, or at least the threat of it. This can create significant hardship. Faced with a choice between litigation and simply moving out of the family home, the surviving cohabitant may choose to go quietly rather than to assert a claim. In other cases, the cohabitant may not even be aware of the right to claim. Where the cohabitant is looking after children from his or her relationship with the deceased, any claim will be against those children's entitlement under the intestacy rules. Litigation is therefore likely to involve the added expense and emotional turmoil of having the children involved and separately represented in proceedings that are essentially aimed at re-organising the estate to make the family finances workable.
- 8.10 The Law Commission considered this question as part of its 2007 review of the financial consequences of relationship breakdown, concluding that any change in the intestacy rules in favour of cohabitants should wait for a comprehensive review of the law of intestacy.<sup>13</sup>
- 8.11 We therefore examined the position of bereaved cohabitants in Part 4 of the Consultation Paper and made a number of provisional proposals for reform of both the intestacy rules and family provision legislation. We consider below consultees' responses to our provisional proposals and set out our final recommendations. But first we need to mention some important empirical evidence of public attitudes that was not available when the Consultation Paper was published.

### **The Nuffield survey**

- 8.12 In formulating our provisional proposals we took account of the empirical data available at that date. However, those data did not include a statistically

<sup>10</sup> Law Reform (Succession) Act 1995, s 2.

<sup>11</sup> Civil Partnership Act 2004, sch 4, para 15.

<sup>12</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 ("Consultation Paper"), paras 2.74 to 2.75. See *Negus v Bahouse* [2008] EWCA Civ 1002.

<sup>13</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 6.9.

significant and up to date sample of public opinion.<sup>14</sup> The NatCen focus groups informed our provisional proposals but were not statistically significant; they can only tell us what some people think. Research from the Universities of Sheffield and Cardiff, to which we referred in the Consultation Paper,<sup>15</sup> involved more respondents, but did not give a randomised sample.<sup>16</sup>

- 8.13 Hence the value to us of the Nuffield survey (the background to which is explained in Part 1),<sup>17</sup> because only a study on that scale and with proper randomisation can give us data from which we can generalise. The Nuffield survey asked a number of questions involving cohabitants, with varying lengths of cohabitation, with and without children, and with different competing potential beneficiaries. Questions were asked to elicit responses as to whether the deceased's whole estate, or most of it, or half of it should go to the surviving cohabitant, given a range of lengths of cohabitation, with or without children. We will refer below to these findings where they are relevant.

### **ENTITLEMENT ON INTESTACY**

- 8.14 It is worth looking again at the reasons why cohabitants can already inherit on their partner's intestacy, by means of a family provision claim.
- 8.15 That ability to inherit rests on two important characteristics of the cohabiting relationship: commitment and financial interdependence. These are features that are shared with marriage and civil partnership. In particular, a family unit composed of cohabitants who are bringing up children together is functionally very similar to a married couple, or civil partners, doing the same. In *Ghaidan v Godin-Mendoza*,<sup>18</sup> the House of Lords, in considering whether an unmarried cohabiting couple could be described as living "as husband and wife", held that "What matters most is the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial interdependence."<sup>19</sup>
- 8.16 Commitment is, of course, a moot point. Some commentators have claimed that a failure to formalise a relationship by marriage or civil partnership inevitably demonstrates a lack of commitment, and that only the formal step of marriage or civil partnership reliably denotes a commitment to "share worldly goods" with a spouse, justifying a significant entitlement on intestacy.<sup>20</sup> We disagree.

<sup>14</sup> By which we mean a sample that enables us to draw conclusions about what the population as a whole thinks; see para 1.32 above.

<sup>15</sup> Consultation Paper, paras 4.20, 4.73 and 4.82.

<sup>16</sup> The 3,123 respondents were people to whom students happen to have access – generally their family and friends: C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499, 506.

<sup>17</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010), available at <http://www.natcen.ac.uk/study/inheritance-and-the-family> (last visited 23 November 2011); see para 1.33 above.

<sup>18</sup> [2004] UKHL 30, [2004] 2 AC 557. The main issue in the case was whether the words "living as his or her wife or husband" could be interpreted as including same-sex cohabitants, in the light of the Human Rights Act 1998; following the enactment of the Civil Partnership Act 2004 and consequential amendments, such questions no longer arise.

<sup>19</sup> [2004] UKHL 30, [2004] 2 AC 557 at [139], by Baroness Hale.

<sup>20</sup> R Kerridge, "Reform of the law of succession: a view from England" [2010] *Edinburgh Law Review* 323, 325.

Commitment within cohabiting relationships varies, as it does among marriages. Some couples live together without having taken the formal step of marriage or civil partnership, but with the same emotional and practical commitment as those who have. Others do not. Many cohabitations are long-lasting,<sup>21</sup> and end, not in separation, but in marriage or civil partnership.<sup>22</sup> Research into cohabitation indicates that there are a variety of reasons why such couples do not formalise their relationship.<sup>23</sup> Sometimes the reason is financial, because of the pressure to have a big family wedding;<sup>24</sup> but many cohabiting couples simply have not seen a reason to get married or civil partnered.

- 8.17 Research indicates that cohabitants may be unaware of the legal status of their relationship (or, rather, its lack of legal status). Information campaigns are not particularly effective in addressing that ignorance. And even where information is received and understood, action – such as making a will, or getting married or civil partnered – is often not actually taken.<sup>25</sup> Other cohabitants are intending to marry or form a civil partnership but have not yet done so at the point when one of them dies; the fact that a relationship has been cut short by bereavement makes it impossible to judge commitment at that point. Others cannot marry or form a civil partnership with their partner, because their partner is unwilling to do so. It takes two to marry and we do not accept that the answer to one partner's unwillingness to marry is for the other partner to leave. It is not clear to us that a partner who continues the relationship in these circumstances is lacking in commitment.
- 8.18 Commitment is a quality of the relationship. So is financial interdependency, but it has practical implications for a cohabitant's future after bereavement. The sharing of a household inevitably brings with it a financial relationship; the longer cohabitation continues, the greater that interdependence becomes. Perhaps the most reliable indicator of financial connection is the presence and joint upbringing of children. When that interdependence is terminated by death, hardship results. When the family includes children, hardship impacts upon them.
- 8.19 These considerations are implicit in the cohabitant's ability to inherit by making a family provision claim when a partner dies intestate.
- 8.20 But on what basis might the law be reformed to give some cohabitants an automatic entitlement through the intestacy rules instead of having to litigate? Such a move changes the position from an opt-in (a cohabitant who wants his or her partner to inherit without litigation can make a will to that effect) to an opt-out

<sup>21</sup> Contrast the very different position in America: A Cherlin, *The American Way of Marriage: Are There Lessons for the United Kingdom?* The Edith Dominican Memorial Lecture 2011, Johns Hopkins University, London, 30 June 2011.

<sup>22</sup> See A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) p 17, reporting that 59% of past cohabitants in 2000 went on to marry.

<sup>23</sup> Above, pp 67 to 74.

<sup>24</sup> Research has shown that many couples do not marry simply because they cannot afford the expense of a "proper" wedding: J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, 11; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 70 to 72.

<sup>25</sup> See, for example, A Barlow, C Burgoyne and J Smithson, *The Living Together Campaign – An Investigation of its impact on legally aware cohabitants* (2007) Ministry of Justice Research Series 5/07.

(a cohabitant who does not want that result can make a will leaving property elsewhere).

- 8.21 Cohabitation is no longer an insignificant minority choice, nor a socially unacceptable lifestyle. The number of people in cohabiting relationships is projected to rise from around 4.7 million in 2008 to just under 7.6 million by 2033.<sup>26</sup> A considerable proportion of those cohabitants will die intestate – no matter what efforts are put into publicising the need to make a will – and it is neither practicable nor desirable for so many partners to have to make (or threaten to make) a family provision claim.
- 8.22 The available evidence of public opinion at the time when the Consultation Paper was written indicated that there was strong support for cohabitants to have some entitlement on intestacy – although it was less easy to find agreement on what that entitlement should be.<sup>27</sup> The NatCen focus groups were particularly helpful in unpacking the reasons for that view, which included the prevalence of cohabitation, the wish not to discriminate against informal relationships and the difficulties some people face in formalising their partnership.<sup>28</sup> But views were also expressed that not all cohabitants should qualify for an entitlement, and that other indicators of commitment, such as the duration of the relationship or shared parental responsibility, were essential.
- 8.23 Several other common law jurisdictions give cohabitants an automatic entitlement to share in a partner's estate on death.<sup>29</sup> We are not aware of evidence that this has led to any significant difficulties. The definition of those eligible to take under these provisions, and the requirements which must be satisfied, vary between jurisdictions. Most (but not all) specify a minimum period of cohabitation (generally two or three years) or, alternatively, the presence of a child of both parties. Some require a minimum duration even if there is a child. These provisions are in many cases well-established; for example, New South Wales has included cohabitants in its intestacy rules since 1985.<sup>30</sup>
- 8.24 However, while there are strong arguments for reform, there are counter-arguments. One is choice; the argument encountered frequently in our Cohabitation project was that cohabitants have chosen an informal relationship without the legal consequences of marriage or civil partnership. Moreover, when we think of cohabitants, we are likely to have in mind a youngish couple, possibly

<sup>26</sup> Office for National Statistics, *Statistical Bulletin: Marital status population projections, 2008-based* (24 June 2010) table 3.

<sup>27</sup> See Scottish Executive Social Research, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (2005); C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499; and National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009). We summarised the findings of these reports in our Consultation Paper, paras 4.18 to 4.25.

<sup>28</sup> See Consultation Paper, paras 4.21 to 4.22.

<sup>29</sup> Examples of jurisdictions which give a cohabitant equal treatment with a surviving spouse include: The Australian Capital Territory, New South Wales, The Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia, Alberta, British Columbia, Manitoba, the Northwest Territories, Saskatchewan and New Zealand.

<sup>30</sup> On the commencement of the Wills, Probate, and Administration (De Facto Relationships) Amendment Act 1984 (New South Wales).

with young children, so that if one were to die intestate the result might well be financial disaster for the other. But generally people are older than this when they die. An elderly cohabiting couple is unlikely to still have dependent children and may have deliberately decided not to marry or form a civil partnership; among the reasons may be the wish to preserve an inheritance for their own children from an earlier relationship, or not to take on financial responsibility for each other.

- 8.25 However, we noted above that it is not clear that choice is really being exercised in many situations of intestacy, because of the many reasons – not always rational ones – why people do not either formalise their relationship or make a will. The levels of ignorance about the nature of “common law marriage” are well documented; many cohabitants mistakenly believe that they have acquired the legal rights and responsibilities of spouses because of the length of time they have lived together. It is also worth reiterating that intestacy law is always optional – anyone can opt out by making a will.
- 8.26 In the Consultation Paper we made a provisional proposal in general terms that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions, in order to capture the views of consultees on the issue in principle before we turned to the detail of possible reform.<sup>31</sup>

### **Consultation responses**

- 8.27 Seventy-nine consultees responded to this question.<sup>32</sup> Of those, 40 clearly opposed reform, while 33 supported it and six were ambivalent. Why, then, do we recommend reform?
- 8.28 It is necessary to unpack those figures. Many of the respondents to the Consultation Paper were professional groups, representing a significant number of members. Most of these groups were in favour of the introduction of intestacy rights for cohabitants. These included Resolution, which represents most family law solicitors, the Chancery Bar Association, the Association of Her Majesty’s District Judges, the Society of Trust and Estate Practitioners, the Law Society, the Family Law Bar Association, the Money and Property Committee of the Family Justice Council, and the Office of the Official Solicitor. The Association of Contentious Trust and Probate Specialists supported reform, but only if it was brought in at the same time as financial remedies for cohabitants on the breakdown of their relationship.
- 8.29 Some professional groups opposed reform, including the Judges of the Family Division and of the Chancery Division of the High Court and the City of Westminster Law Society; but many of those who opposed reform were individual members of the public; 19 such consultees were against and six were in favour of reform in principle. Most of those were expressed to be responses to press coverage of the launch of the Consultation Paper, rather than to the paper itself. It was also clear that many consultees were under the impression that cohabitants at present have no rights on the death of a partner; they appeared to be unaware that the option of applying for family provision from the estate has been available for many years. The responses that we had from members of the

<sup>31</sup> Consultation Paper, para 4.59.

<sup>32</sup> Analysis of Responses, paras 4.1 to 4.65.

public cannot be relied upon as an indication of public opinion in general, being a very small and self-selecting group; for statistically significant evidence of public opinion we have the data from the Nuffield survey, which we discuss below.

- 8.30 A number of arguments were raised by those consultees who disagreed with the proposal. Some consultees felt that the family provision regime provides the most appropriate way for a cohabitant to benefit from the estate of a deceased partner, as the merits of each case can be determined by the court. And of course it does provide that individual scrutiny; but against that is the expense and stress that that scrutiny costs.
- 8.31 For some, it was important that those who choose to cohabit may not want their partner to inherit, and that cohabitants already have a means of securing a benefit for one another on death by marrying or making wills. But as we noted above, many cohabitants are ignorant of the legal position, or have chosen not to act upon it not because they approve of it but because they “have not got round to it”. The low rate of will making across the country indicates that this is a step that people are – for whatever reason – reluctant to take. Yet the hardship for cohabitants as a result of intestacy remains a reality.
- 8.32 Others were concerned that the introduction of an intestacy entitlement might bring a risk of increased litigation, primarily over the issue of whether a person claiming to have been cohabiting with the deceased was in fact doing so. Some were concerned that there is a potential for fraud here that might not even reach the courts. We acknowledge that these are risks; but we have noted that other jurisdictions have not seen those risks as outweighing the real reasons in favour of reform, and have not found that the risks have materialised to any great extent.
- 8.33 A number of consultees suggested that public awareness of the legal advantages of marriage over cohabitation and the importance of making a will could be raised by public education campaigns; but as we noted above it is clear that that is not a strategy that is likely to be very effective. One member of the public suggested that, for those who want to give their relationship legal status without marrying, the opportunity to enter into a civil partnership could be extended to partners of different sexes. Another argued that it should be mandatory to make a will once a relationship has lasted for five years. Neither argument commends itself to us; it is unlikely that many cohabiting couples who – for so many reasons – do not marry would form any other registered relationship, and it is impracticable to make it compulsory to make a will. How would such a duty be enforced?
- 8.34 Those in favour of reform echoed many of the arguments that we made in support of our provisional proposal in the Consultation Paper, in particular the importance of commitment and interdependence, and the hardship that can result from intestacy. Although they acknowledged that cohabitants can litigate to obtain an entitlement on the death of a partner, they stressed the uncertainties of litigation under the 1975 Act.
- 8.35 We also now have the findings of the Nuffield survey. Respondents were not asked an abstract question about the principle of giving cohabitants an entitlement on intestacy. Instead they were asked for their views on the appropriate division of the estate in a number of factual scenarios, some of which included a surviving cohabitant. Support for giving priority to the surviving

cohabitant – either all of the estate or priority over other beneficiaries – ranged from 38% to 74%, depending on the length of the relationship and which other relatives were “competing” with the cohabitant for a share of the estate in each scenario. In each case, around 20% of those participating in the survey preferred the option which shared the estate equally between the cohabitant and other relatives. Relatively few respondents would have denied the cohabitant any inheritance at all (figures ranged from 3% to 14%, depending on the scenario). The results for individual scenarios helped to inform the detail of our reform recommendations and will be examined in more detail below.

## Conclusions

- 8.36 There is no overwhelming consensus in favour of reform, and that is perhaps to be expected. For some people, the granting of legal rights to the survivor of an unmarried couple is simply unacceptable, notwithstanding that many cohabitants already inherit when a partner dies intestate, through a claim for family provision. For many who take this view, the concern is that greater legal equivalence between marriages and civil partnerships on the one hand, and cohabiting relationships on the other, risks undermining the institution of marriage. We appreciate those concerns but do not share them. The problem we are seeking to address is caused to a large extent by ignorance of the law – the widespread but mistaken belief that cohabitants acquire the status of “common law spouses” after a certain period of time. Real hardship is caused to those who only discover on the death of a partner that this is not the case. We therefore doubt that changing the law in the way that we provisionally propose will either encourage cohabitation or discourage marriage.<sup>33</sup>
- 8.37 Most of the organisations representing legal practitioners were persuaded by the case we put for the principle of reform, although views differed over the detail.
- 8.38 The Association of Her Majesty’s District Judges supported the principle of an entitlement for cohabitants. The Judges of the Chancery Division and of the Family Division of the High Court, by contrast, felt that the discretionary regime of the 1975 Act was appropriate and that the choice made by those who have not married or entered into a civil partnership should be respected. But this opposition was also motivated in part by a belief that the proposal represents “a fundamental shift in social policy which ought not to occur in the guise of reforming the law of succession” and that “what is required is a comprehensive review of the property rights of cohabitants to produce a coherent scheme that applies during life and upon death”. The answer to this is that the Law Commission has already made recommendations in the Cohabitation Report for a scheme that applies to cohabitants whose relationship ends by separation;<sup>34</sup> the current project addresses the needs of those whose relationship is ended by death.
- 8.39 A number of consultees suggested that there would be advantages in implementing both sets of reform recommendations at the same time, and of

<sup>33</sup> There is no evidence that conferring rights on cohabitants has had this effect elsewhere: see K Kiernan, A Barlow and R Merlo, “Cohabitation law reform and its impact on marriage” (2006) 36(Dec) *Family Law* 1074.

<sup>34</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

course we would be in favour of implementing both sets of recommendations at an early date. However, the connection with the Cohabitation Report has to be made with caution. The two sets of recommendations can operate independently; and other jurisdictions have implemented the two reforms separately.<sup>35</sup>

- 8.40 The findings of the Nuffield survey show that there is a very significant level of support for cohabitants receiving something from the estate of a deceased partner. The strength of that support is influenced by factors such as whether the couple had children and the duration of the relationship. This is not unexpected; indeed, we have reflected the significance of these factors in setting conditions for entitlement.
- 8.41 In the light of consultation responses and the findings of the Nuffield survey, we continue to take the view that there should be an entitlement on intestacy for certain cohabitants. We use the term “qualifying cohabitant” to refer to a person who meets the definition of a cohabitant adopted for these purposes and the additional conditions for entitlement which are considered below.
- 8.42 **We recommend that a qualifying cohabitant should be entitled to benefit from the estate of a deceased partner under the intestacy rules.**
- 8.43 What has clearly been demonstrated to us is that this issue has the potential to be divisive and contentious. Press reports of the launch of our consultation focused almost exclusively on the questions we posed about cohabitants, while our other provisional proposals received far less attention. If the recommendations we make in respect of cohabitants were to form a single package with our other recommendations, there is a risk that our recommendations as a whole may become the subject of controversy. We do not want those who oppose the stance we have taken on cohabitants’ rights to feel unable to express support for those other recommendations.
- 8.44 We have therefore decided to present our recommendations for cohabitants in a separate draft Bill, the Inheritance (Cohabitants) Bill. That Bill has been drafted on the assumption that the recommendations in the Inheritance and Trustees’ Powers Bill will be implemented earlier or at the same time.
- 8.45 It may be, when the time comes to enact these two sets of recommendations, that different Parliamentary procedures are adopted. The special procedure for Law Commission Bills introduced in the House of Lords may be appropriate for a Bill that implements largely uncontroversial and technical law reform recommendations but may not be appropriate for a more socially and politically contentious Bill conferring greater legal rights on cohabitants. But that is a matter for the Government and Parliament to decide in due course.
- 8.46 We turn now to the detail of reform. How should cohabitants be defined? And in what circumstances should a cohabitant qualify for an entitlement on intestacy? Those are major issues that we explore in detail before going on to look at what the entitlement should be.

<sup>35</sup> For example, in Queensland and South Australia, reform of the intestacy rules to include cohabitants preceded the introduction of a statutory scheme for financial remedies on the separation of cohabiting couples. Elsewhere, lifetime remedies came before intestacy reform or reform of both areas of the law was enacted at the same time.

## DEFINING COHABITATION

8.47 A number of existing statutes, most significantly for present purposes the 1975 Act, provide for orders to be made in favour of a class of persons who are generally referred to as cohabitants. Those statutes do not use the term “cohabitants”; instead they give an entitlement to those who were, for a continuous period of time ending immediately before the death:

- (1) living in the same household as the deceased; and
- (2) as the husband or wife or civil partner of the deceased.<sup>36</sup>

8.48 In the Consultation Paper we said that we would prefer not to define cohabitants by analogy with marriage or civil partnership.<sup>37</sup> This echoed the discussion in the Cohabitation Report and the argument made there that such an analogy might be inappropriate for those who have decided not to formalise their relationship by marrying or entering a civil partnership. We also took the view that it might perpetuate myths about “common law marriage”.<sup>38</sup>

8.49 The Cohabitation Report recommended that cohabitants be defined, for the purpose of financial remedies on separation, by reference to the fact of living together as a couple in a joint household.<sup>39</sup> We adopted that approach in the Consultation Paper, provisionally proposing that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased:

- (1) was living with the deceased as a couple in a joint household; and
- (2) was neither married to nor a civil partner of the deceased.<sup>40</sup>

8.50 We also noted that the definition should expressly exclude couples between whom sexual activity would constitute a criminal offence, on the basis of the age of either of the parties or that fact that they are related to one another.<sup>41</sup> We did not propose that there should be a statutory checklist of factors to be taken into account when determining the question of whether a couple were cohabiting within the definition. To avoid inconsistency, the Intestacy and Family Provision Claims on Death Consultation Paper also proposed that the 1975 Act should be

<sup>36</sup> Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1A) and 1(1B). See also Fatal Accidents Act 1976, s 1; Family Law Act 1996, s 62(1); Family Law (Scotland) Act 2006, s 25 (which uses the form “as if they were” husband and wife or civil partners); section 23(7) of the Disability Discrimination Act 1995 (repealed); paragraph 3(6) of schedule 5 to the Equality Act 2010; ground 2A in part 1 of schedule 2 to the Housing Act 1985; and the definition of “couple” in section 35(1) of the Jobseekers Act 1995.

<sup>37</sup> Consultation Paper, paras 4.47 to 4.61.

<sup>38</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179, paras 9.29 to 9.32.

<sup>39</sup> Above, paras 3.4 to 3.13.

<sup>40</sup> Consultation Paper, para 4.60.

<sup>41</sup> Consultation Paper, para 4.57; Cohabitation: The Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 3.67.

amended to match whatever statutory definition of cohabitants is adopted for reform of the intestacy rules.<sup>42</sup>

### **Consultation responses**

- 8.51 Many consultees approved of our proposed definition.<sup>43</sup> Some also noted with approval that it reflects the definition recommended in the Cohabitation Report and would create consistency in both sets of reforms.
- 8.52 Others, however, noted that the existing 1975 Act definition is well-known and appears to work well in practice. Two consultees expressly urged us not to adopt a new definition. Others, while supportive of our proposed definition, suggested that we should incorporate within it elements of the 1975 Act definition with which the courts and legal practitioners are familiar. Concerns were also raised that the use of the word “couple” in our provisional proposal was too broad and ambiguous a term and might not be sufficiently precise to exclude (as we intended) those who share a home but do not have an intimate relationship.
- 8.53 A specific concern raised by several consultees (including the Masters of the Chancery Division of the High Court) was that those couples who would otherwise qualify should not lose out because of a period of what might be termed involuntary absence from the joint household immediately before the death or during any qualifying period of cohabitation. For example, if one partner has to go into a hospice or care home, or work abroad, or leave the home because of the other’s domestic violence, would this bring the cohabitation to an end, at least for these legal purposes?
- 8.54 There was no consensus among consultees as to whether it would be helpful to have a statutory checklist of factors for administrators or the court to take into account when identifying a cohabiting relationship.

### **Discussion**

- 8.55 In the light of consultation responses and further thinking we have reconsidered our objection to defining cohabiting relationships by analogy with marriage and civil partnership.
- 8.56 We were particularly troubled by the difficulties in ensuring consistency of treatment of cohabitants under the intestacy rules and the 1975 Act. To avoid inconsistency, we provisionally proposed that whatever statutory definition of cohabitants is adopted for the intestacy rules should be transplanted into the 1975 Act to replace the current wording. That approach carries the risk of raising questions as to the scope of the new definition, and therefore of excluding from the scope of the family provision regime applicants who are clearly entitled to apply under the established law. For example, there could be uncertainty as to the application of a new definition in the context of the concerns raised above, where one partner was absent from the household in circumstances that do not change the couple’s relationship.

<sup>42</sup> Consultation Paper, para 4.112.

<sup>43</sup> Analysis of Responses, paras 4.66 to 4.82.

- 8.57 The alternative – introducing a new definition of cohabitants for the purposes of entitlement on intestacy but retaining the existing definition of cohabitants as a class of applicants under the 1975 Act – is equally problematic; some people who are entitled on intestacy may not qualify as applicants for family provision and *vice versa*.
- 8.58 So we have chosen to adopt, for reform of the intestacy rules, the established statutory definition of cohabitation that is used to determine eligibility to apply for family provision, to claim damages following bereavement as a result of a fatal accident and in other statutory contexts. The relationship of the intestacy rules with the 1975 Act means that the advantages of retaining that definition outweigh the principled objections to defining eligibility by analogy with marriage or civil partnership.
- 8.59 We can see other practical benefits. There is case law under the 1975 Act and other legislation that considers the questions raised by consultees about involuntary absence from the shared household immediately before the death or during the two-year qualifying period for cohabitant applicants.<sup>44</sup> This will provide valuable precedent to assist administrators and the courts when they are faced with similar cases that fall to be decided under the intestacy rules. Moreover, if the established definition is used there is no need to exclude expressly from the statutory definition those who are too young to marry or enter into a civil partnership or could not do so because they are related within the prohibited degrees for marriage or civil partnership. This is implicit in the idea of living “as” another person’s husband, wife or civil partner.
- 8.60 We note that in other common law jurisdictions which have attempted a statutory definition of cohabitation, some have used a “marriage analogy” and some have not.<sup>45</sup> Some have adopted expressions that are unfamiliar here, such as a “de facto relationship”<sup>46</sup> or describing couples as living together on a “genuine domestic basis”.<sup>47</sup>
- 8.61 **We recommend that the survivor of a cohabiting relationship should have no entitlement under the intestacy rules unless he or she was, immediately before the death of the deceased, living:**
- (1) **in the same household as the deceased; and**
  - (2) **as the deceased’s spouse.**
- 8.62 For the reasons set out in the Consultation Paper, we do not want to elaborate on this definition by introducing a statutory checklist of factors to be taken into account when determining whether a person is a cohabitant for these purposes.

<sup>44</sup> *Re Watson* [1999] 1 FLR 878; *Gully v Dix* [2004] EWCA Civ 139; *Santos v Santos* [1972] Fam 247 (in the context of “living apart” as a ground for divorce).

<sup>45</sup> For a recent example, see the Irish Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172.

<sup>46</sup> New Zealand: see Consultation Paper, para 4.50.

<sup>47</sup> Some Australian states: see Consultation Paper, para 4.50.

The need to have regard to a checklist could lead to a “box-ticking mentality” and confusion about the status and importance of the factors listed.<sup>48</sup>

- 8.63 If and when our recommendations for remedies for cohabitants on lifetime separation are implemented, the question of how cohabitants should be defined in statute will need to be addressed. We remain of the view that in the context of relationship breakdown the analogy with marriage and civil partnership is inappropriate, as we said in the Cohabitation Report.<sup>49</sup> But the issue we have to determine in this Report is how to reform the intestacy rules and we have chosen to retain the existing statutory definition for the present and in this specific context.

#### **No entitlement if there is a surviving spouse**

- 8.64 In the Consultation Paper we provisionally proposed that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse.<sup>50</sup>
- 8.65 This divided opinion among consultees.<sup>51</sup> Some saw our proposal as unfair and contrary to the tenor of our proposals generally. Many consultees described the phenomenon of a “fossil marriage” which has effectively ended but has not been formally terminated. One consultee suggested that this approach might have implications for the cohabitant’s human rights, though these potential implications were not spelled out. These consultees felt that in these circumstances, it would not be right for a cohabitant of many years’ standing to find that he or she had no automatic entitlement. Alternatives suggested included splitting the estate between the cohabitant and the spouse or providing for a cohabitant to take priority where the deceased had not been cohabiting with the spouse for a specified number of years before his or her death.
- 8.66 Others, however, while acknowledging that the results would be harsh in some cases, accepted the logic in our adopting a bright line rule that would be easy for administrators to follow. These included Resolution, the Chancery Bar Association, the Society of Trust and Estate Practitioners, the Law Society, and the Money and Property Committee of the Family Justice Council, and the Judges of the Chancery Division and of the Family Division of the High Court. Christine Riley suggested that a surviving cohabitant should not qualify if he or she was married to or cohabiting with someone else at the date of death.
- 8.67 We accept the concerns of consultees around “fossil marriages” but agree with Resolution that the intestacy rules should not be an exception to the general rule about the legal consequences of a marriage or civil partnership not ended by divorce or dissolution. We do not agree with the suggestion that this approach may be incompatible with the human rights of the cohabitant; the 1975 Act provides the opportunity to obtain a remedy in appropriate circumstances while retaining the special position accorded to spouses under the intestacy rules. We

<sup>48</sup> Consultation Paper, para 4.55.

<sup>49</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 3.4 to 3.10.

<sup>50</sup> Consultation Paper, para 4.107.

<sup>51</sup> Analysis of Responses, paras 4.182 to 4.202.

therefore remain of the view that it would not be appropriate to deny a surviving spouse primacy over other beneficiaries. It would place administrators in an invidious position – indeed it would be unclear who is entitled to administer the estate, as the entitlement to a grant of representation on intestacy generally follows the beneficial entitlement to the estate.

8.68 **We recommend that a person can be a qualifying cohabitant in relation to a person who died intestate only if the deceased was not married or in a civil partnership immediately before his or her death.**

8.69 Clause 1 of the draft Inheritance (Cohabitants) Bill puts this recommendation into effect by amending section 46 of the Administration of Estates Act 1925.

8.70 This is not intended to suggest that a person who is the spouse of one person cannot at the same time be living “as the husband, wife or civil partner” of another. There is authority for the proposition that this is possible (though the claim was ultimately unsuccessful on other grounds).<sup>52</sup> We do not want to do anything to disturb that position but we doubt whether many such claims would be successful.

8.71 We have not adopted the suggestion that a surviving cohabitant should also be excluded from automatic entitlement if he or she was married or civil partnered to a third party. The definition we are recommending focuses on the quality of the relationship between the cohabitant and the deceased. The existence of another such relationship may make it more difficult to show that there was a real cohabitation with the deceased, but not impossible; for example, where the survivor was still party to a marriage that had broken down. No issue arises here of administrators having to adjudicate between competing claims to the estate; a surviving cohabitant’s spouse will have no such claim.

#### **More than one cohabitant**

8.72 The Consultation Paper also invited consultees’ views as to the approach to be taken where more than one cohabitant satisfied our proposed eligibility conditions under the intestacy rules.

8.73 Comments on this question ranged widely. A number of consultees said that, in this rare situation, they should all share equally that part of the estate that would in ordinary circumstances pass to the sole surviving cohabitant. But others took a different view. A common position was that competing cohabitants should be required to bring a claim for family provision, so that the circumstances of their claim can be considered by the court. The City of Westminster and Holborn Law Society said that no provision needed to be made for this situation.

8.74 The definition we have adopted may on occasions be satisfied by more than one person who had a relationship with the deceased. Sharing is generally allowed within any class of beneficiary; it is even possible within the spouse category, where the deceased was party to a bigamous marriage or a series of polygamous marriages validly contracted overseas.<sup>53</sup> But it will be very rare indeed that more

<sup>52</sup> *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 3 FCR 744.

<sup>53</sup> *Official Solicitor to the Senior Courts v Yemoh* [2010] EWHC 3727 (Ch), [2011] 3 FCR 386.

than one person can qualify under the definition, which requires living together in the same household and as one another's spouse.<sup>54</sup> In those rare cases where two or more partners of the deceased each claim to be a "qualifying cohabitant" within the meaning of the reforms we recommend, it is likely that their competing claims will need to be settled by agreement, failing which the administrators must seek directions from the court. This is no different to the situation that would arise under the current law where two or more applicants claim family provision under section 1(1)(ba) of the 1975 Act.

## **FURTHER CONDITIONS FOR ENTITLEMENT**

- 8.75 Under the current law, entitlement to apply as a cohabitant for family provision accrues after two years' continuous cohabitation ending immediately before the date of death.<sup>55</sup>
- 8.76 In the Consultation Paper we discussed whether there should be a similar duration condition before a cohabitant qualifies under reformed intestacy rules to inherit from the estate of a deceased partner. We also discussed an alternative condition based on the fact that the couple had children together (including adopting children together).

### **A duration requirement**

- 8.77 The duration of a cohabiting relationship is clearly an important matter to consider among the potential additional conditions for entitlement. Length of time clearly weighs heavily in people's views about the seriousness and commitment of cohabitation,<sup>56</sup> and the longer cohabitation continues, the more financial interdependence is likely to develop. Accordingly, in the Consultation Paper we provisionally proposed that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should have an entitlement under the intestacy rules if the cohabitation had continued for at least five years before the death.<sup>57</sup>
- 8.78 In arriving at the period of five years, we had in mind the Cohabitation Report, in which we recommended that cohabitants who have children together should have an entitlement to financial remedies on separation, and that there be a minimum duration requirement of between two and five years for eligibility for those who do not have children. So our proposal for a duration requirement of five years was the outside figure in the range we proposed in the Cohabitation Report. We noted that a number of common law jurisdictions give cohabitants a spousal entitlement after two or three years; so five years was a conservative figure taking into account our legal and political culture.

<sup>54</sup> See Department for Work and Pensions, *Decision Makers' Guide* (July 2011) para 11033, available at <http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide> (last visited 23 November 2011).

<sup>55</sup> Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1A) and 1(1B). See also Fatal Accidents Act 1976, s1(3)(b).

<sup>56</sup> As indicated by the views expressed in the NatCen focus groups: Consultation Paper, paras 4.73 to 4.74. See also C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499.

<sup>57</sup> Consultation Paper, para 4.80.

8.79 We also provisionally proposed that the duration requirement should be able to be fulfilled only by a continuous period of cohabitation.<sup>58</sup> This is consistent with the 1975 Act, which requires cohabitant applicants to have been living with the deceased as a spouse “for the whole of the period of two years ending immediately before the date when the deceased died”. We discuss below the approach the courts have adopted to this requirement, so that a period during which one of the couple was physically absent from the shared household because of illness or work commitments does not necessarily mean that this requirement was not fulfilled.<sup>59</sup>

### ***Consultation responses and the Nuffield survey***

8.80 Of those consultees who addressed these questions directly, all supported some duration requirement before entitlement on intestacy for cohabitants without children.<sup>60</sup>

8.81 Many, including stakeholders representing significant numbers of family and succession law experts (such as the Chancery Bar Association, the Society of Trust and Estate Practitioners, the Law Society, the Family Law Bar Association, and the Money and Property Committee of the Family Justice Council) agreed with us that five years was an appropriate period. Others suggested a shorter period of either two years or three years (the Association of Her Majesty’s District Judges suggested three years). Two consultees said that the qualifying period should be 10 years.

8.82 We also now have the findings of the Nuffield survey, which presented a scenario involving a childless cohabitation. Participants were asked to consider who should receive the whole estate or have priority when the estate is distributed: the partner of the deceased or the parents of the deceased (who would receive the whole estate under the current law).

(1) If the partners had cohabited for two years, 33% said that the partner should take the whole estate and a further 17% said that the partner should have priority over other beneficiaries (50% therefore favoured the cohabitant over other beneficiaries).

(2) If the partnership had lasted for five years, 43% favoured giving all of the estate to the partner and a further 21% would give the partner priority (64% therefore favoured the cohabitant over other beneficiaries).

(3) After 10 years, 53% of survey participants agreed that the partner should get everything and a further 21% would give the partner priority (74% therefore favoured the cohabitant over other beneficiaries).<sup>61</sup>

8.83 Turning to consultation responses, there was almost unanimous support for a duration requirement among those who addressed the question. However,

<sup>58</sup> Consultation Paper, para 4.79.

<sup>59</sup> See para 8.86 below.

<sup>60</sup> Analysis of Responses, paras 4.104 to 4.134.

<sup>61</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 44 to 45 and 121 to 122.

several raised concerns that periods of separation for good reasons – such as hospital stays, living in a care home, working abroad, looking after a relative, having to leave home because of domestic abuse – should not count against the surviving cohabitant.

### ***Discussion***

- 8.84 Consultation and the findings of the Nuffield survey have reinforced our view that the duration of the relationship is a significant factor to bear in mind when formulating policy in this area. It is of course only a proxy measure of commitment and interdependence; some unmarried couples may remain financially independent throughout their relationship (just as some married couples do). But our definition of a qualifying cohabitant – which requires the applicant to have been living in the same household and as the spouse of the deceased – will exclude those couples who live truly separate lives.
- 8.85 We also remain satisfied that five years is the appropriate duration requirement. A period shorter than this carries too high a risk of its catching some elderly cohabitants unawares by overriding, too soon in the relationship, a deliberate choice to remain unmarried and thereby not incur legal responsibilities. A longer period would exclude too many of those whom we hope to assist with these reforms.
- 8.86 We can thus adopt the approach taken under the current law – requiring a period of continuous cohabitation ending only with the death of one of the partners. As noted above, the courts deal sensitively with involuntary absences from the shared household, in particular periods of time spent in hospital or a hospice at the end of the deceased’s life.<sup>62</sup> However, there will be cases where the courts will not artificially prolong legal cohabitation where it no longer truly applies to the real situation. If one partner moves into a care home on an extended and settled basis, even if the other partner continues to live in the formerly shared home and pay visits, it may be wrong to consider them as continuing to live as spouses in a joint household.<sup>63</sup> Another example would be the cohabitant who has left home because of domestic violence. To try to incorporate that sort of situation into a definition of “living together” for the purposes of intestacy would be inappropriate, since the true problem in that instance is the absence of a statutory scheme for financial remedies on separation.
- 8.87 **We recommend that, where the deceased died intestate, a person who was, during the whole of the period of five years ending immediately before the deceased’s death, living:**

- (1) **in the same household as the deceased; and**
- (2) **as the deceased’s spouse**

**should be a qualifying cohabitant in relation to the deceased.**

<sup>62</sup> See para 8.59 above.

<sup>63</sup> *Shaw v Foley* (21 January 2004) Ch (unreported).

- 8.88 Clause 1 of the draft Inheritance (Cohabitants) Bill puts this recommendation into effect by amending section 46 of the Administration of Estates Act 1925. This condition is set out in a new subsection (6).

### **Cohabitants who have children together**

- 8.89 In the Consultation Paper we focused not only on the duration of the cohabiting relationship but also on the presence of children, because a couple with children are almost inevitably interdependent financially as well as emotionally. The presence of children when living together can also be regarded as a measure – albeit not always reliable – of a couple’s commitment to one another. We provisionally proposed that a cohabitant should have an entitlement on intestacy if the deceased and the surviving cohabitant were by law the parents of a child born before, during or following their cohabitation, without any minimum duration requirement for the couple’s relationship.<sup>64</sup>

### **Consultation responses**

- 8.90 This question divided opinion among consultees – even those who agreed in principle with automatic entitlement for cohabitants on intestacy.<sup>65</sup> While there was a narrow majority in favour, including Resolution, the Association of Her Majesty’s District Judges, the Law Society, and the Money and Property Committee of the Family Justice Council, there were some strong voices against. The Judges of the Chancery Division and of the Family Division of the High Court, for example, said:

The notion that the birth of a child to the deceased should of itself postpone (or eliminate) the succession rights of that child in favour of newly created succession rights for the surviving parent is not easy to grasp. The surviving parent may move on to another relationship. But the child will always be the child of the deceased. The deceased and the cohabitant are in that position out of choice. The child is not.

- 8.91 The common concern of those who opposed this proposal, or had doubts about it, was that while in some (perhaps most) cases the birth of a child to cohabitants will indicate a committed and marriage-like relationship, that will not always be so. The risk is that where the cohabitant does not take responsibility for the child after the death of the other parent, the deceased’s assets would in fact be diverted away from the child, who would have to make a family provision application against the former cohabitant.

- 8.92 We also now have the findings of the Nuffield Survey on this point, which can be summarised as follows.

- (1) In a scenario where there was a cohabitation of 25 years which had produced children – now adults – 32% of respondents felt that the cohabitant should be the sole beneficiary and a further 15% agreed that

<sup>64</sup> Consultation Paper, para 4.68.

<sup>65</sup> Analysis of Responses, paras 4.83 to 4.103.

the partner should have priority over other beneficiaries (47% therefore favoured the cohabitant over other beneficiaries).<sup>66</sup>

- (2) Where the scenario involved a couple who had cohabited for less than two years and had a baby together, 25% of the survey participants considered that the whole estate should go to the cohabitant (and a further 13% favoured giving priority to the cohabitant). 14% agreed that the whole estate should go to the baby, as it does under the current law. But a further 23% would give priority to the baby over the cohabitant, and almost a quarter (24%) would share the estate equally. 60% of respondents would therefore share the estate in some way.<sup>67</sup>

### **Discussion**

- 8.93 Consultation responses were more or less evenly split on this question. The empirical data on public attitudes are also finely balanced and – because participants were given the option of sharing the estate between different classes of beneficiary – the results are more difficult to analyse. For the reasons discussed elsewhere in this Report, in most cases where there is a surviving spouse or cohabitant, it is not practical to share the estate with other beneficiaries.<sup>68</sup> These findings could not, therefore, of themselves form the basis of practical law reform. They are, however, a helpful indication of public opinion, and they sound a further note of caution about the provisional proposal to grant an intestacy entitlement to surviving cohabitants solely on the basis that they had children with the deceased.
- 8.94 The inclusion of cohabitants with children as a separate class within the intestacy rules would recognise the functional similarities between family units represented by cohabitants with children on the one hand, and spouses with children on the other. There are very few objective measures of commitment and interdependence available in this situation; living together and bringing up a child together is likely to indicate financial interdependence, as well as seriousness and commitment. And we must keep in mind that the relationships we are considering here have all been ended by the death of one of the partners rather than relationship breakdown. In many cases the families would, but for that death, have stayed together for a much longer period. In some, the parents would have gone on to formalise their relationship.
- 8.95 A major practical reason to accelerate the entitlement of a cohabitant who has children with the deceased would be to provide – insofar as the size of the estate allows it – some measure of financial security for ongoing care of the children by the cohabitant. Where a cohabitant is left alone after the death of a partner, with responsibility to bring up the couple's child or children, the lack of an entitlement on intestacy is likely to cause, at best, severe inconvenience and stress, and at worst, long-term hardship. The parent caring for the children may be left with no long-term housing despite taking on all the responsibilities of a single parent. Expensive and emotionally draining family provision litigation may be required to

<sup>66</sup> National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010) pp 43 and 121.

<sup>67</sup> Above, pp 43 to 44 and 121.

<sup>68</sup> See paras 2.90 to 2.91 above and, more generally, para 3.11 above.

get the estate into a manageable form. Arguably, a cohabitant left with young children of the deceased to care for has a stronger case for entitlement under the intestacy rules than most others.

- 8.96 Set against that is the view that a cohabitant may pick up an undeserved or inappropriate entitlement simply by having a child, and that the potential for this might encourage “gold-digging”. Although we think that that view is a distortion of the realities of life in most families, we accept that where the cohabitation is very short, the fact that the cohabiting relationship has produced children may be an unreliable indicator of a committed and interdependent relationship. There may be cases where the cohabitant does not in fact take responsibility for the child after the death of the other parent, and we understand why some consultees were concerned that our provisional proposal might divert the assets of the deceased parent away from the child in those cases.
- 8.97 We remain of the view that it is inappropriate for cohabitants who have had children with their partner to have to demonstrate the same period of living together as childless couples in order to qualify for an entitlement on their partner’s intestacy. But we accept, in the light of consultation responses and the Nuffield Survey results, that our provisional proposal placed too much weight on the fact of having children together, and that that alone should not provide a basis for an absolute entitlement under the intestacy rules. We think that a more appropriate balance can be struck by modifying both the intestacy rules and the family provision legislation to create a coherent scheme of legal remedies, balancing protection for the survivor of a cohabiting relationship who is left to bring up the deceased’s child with the interests of the children and other beneficiaries.
- 8.98 We take the view that the intestacy rules should require a surviving cohabitant to demonstrate, in addition to the fact of having a child with the deceased, an established relationship of a prescribed minimum duration. This will prevent cohabitants who have had a child together in the context of a very short cohabitation from qualifying.
- 8.99 We have concluded that the minimum duration for these purposes should be two years. Our aim is to put in place an additional threshold condition to establish a level of commitment between the partners beyond the fact of conceiving a child together; no particular duration can precisely correspond to that. We have settled on two years’ cohabitation as the most appropriate minimum requirement as it demonstrates a relationship of some permanence. That, combined with the fact of having children together, is in our view sufficient to justify an entitlement on intestacy. Two years is the minimum period of living together that we suggested in the Consultation Paper could provide a basis for an intestacy entitlement on the grounds of cohabitation.<sup>69</sup> It is the period established in the current law for claims under the 1975 Act and the Fatal Accidents Act 1976. Neither of those Acts provides an exact analogy as in both cases two years is the minimum period of cohabitation after which a surviving partner can make a claim, rather than a basis for an entitlement. But these statutes have established two years’ cohabitation as a sufficient basis for legal rights for surviving partners, and there is acceptance of and familiarity with those threshold requirements.

<sup>69</sup> Consultation Paper, para 4.85.

- 8.100 We recognise that the two-year cohabitation requirement has the potential to give rise to hardship for some deserving cohabitants. These cases are likely to be rare: the number of cohabitants dying after less than two years' cohabitation having had children with their partner will be very small. But such cases will involve the single parent of a young child suffering the emotional and practical consequences of an unexpected bereavement. It is essential that if the law is not to give all cohabitants who have had children with the deceased an automatic intestacy entitlement, it is able to provide for them by other means.
- 8.101 We therefore make a recommendation that if the survivor was cohabiting with the deceased at the date of death, and had had a child with the deceased, he or she should be able to apply under the 1975 Act.<sup>70</sup> That reform would take away for such cohabitants the current two-year duration requirement, and responds to cases where the presence of a child does not qualify a surviving cohabitant for an entitlement on intestacy under the rules recommended above. In such a case the survivor's claim to share in the estate should be considered by the court in the context of a 1975 Act claim. The court is in a position to take account of all of the circumstances of the case, including the needs of the surviving cohabitant but also the position of other beneficiaries (including the child or children). In many cases the claim will be a strong one and can be settled by the administrators. But the court is able to filter unmeritorious claims in a way that an automatic entitlement on intestacy cannot.
- 8.102 **We recommend that, where the deceased died intestate, a person who was, during the whole of the period of two years ending immediately before the deceased's death, living:**
- (1) **in the same household as the deceased; and**
  - (2) **as the deceased's spouse**
- should be a qualifying cohabitant in relation to the deceased if that person is also:**
- (1) **the father or mother of a child of the deceased born on or before the date of the deceased's death; and**
  - (2) **living with the child in the same household as the deceased at the date of the deceased's death.**
- 8.103 Clause 1 of the draft Inheritance (Cohabitants) Bill puts this recommendation into effect by amending section 46 of the Administration of Estates Act 1925. This condition is set out in a new subsection (7).
- 8.104 In addition to requiring at least two years' cohabitation, this recommendation only qualifies a surviving cohabitant for an intestacy entitlement if the child he or she had with the deceased was born alive and was living with the couple at the date of death. That condition cannot be satisfied by the fact that a surviving cohabitant is pregnant with the deceased's child at the date of death, or that the couple had a child together who had already died or was no longer living with them. Our

<sup>70</sup> See para 8.153 below.

Consultation Paper's provisional proposal would have included them; and we recognise that in many of these circumstances the fact that the child is no longer within the family unit does not lessen the strength and commitment of the cohabiting relationship. The additional restriction has the potential to exclude deserving cases; the surviving cohabitant may have lost a child and a partner in quick succession.

- 8.105 But other cases are more complicated; for example, where the surviving cohabitant decided to terminate the pregnancy after her partner's death. Difficult issues also arise where a couple had a child together and continue to cohabit but did not raise the child themselves; for example, because the child was looked after by other relatives, or taken into care. In these cases the inheritance that the child might expect to receive following the loss of one parent might disappear if the surviving parent were entitled to the deceased's estate on intestacy and chose not to support the child financially. The child – or in reality those with responsibility for the child – could make an application for family provision, but not all would be aware of this option or find it practical to do so.
- 8.106 We have concluded that it would be unsafe for reform to confer an automatic entitlement upon the survivor of a short cohabitation, with no ongoing childcare requirements, in preference to other relatives. Such cases are better dealt with under a discretionary regime which can consider the individual merits rather than by an automatic entitlement. Our recommended reform of the 1975 Act would enable a surviving cohabitant who had had a child with the deceased to make a family provision claim even if that child had subsequently died or was living apart from the couple, and would also be satisfied by a pregnancy which was ongoing at the date of death.

### **Summary**

- 8.107 Most cohabitants, whether or not they have had children together, will die when they are old, and the question of whether the couple had lived together for two or five years will not arise. But in the rare cases where it does, our recommendations present a clear structure of entitlement, which balances the need for discretion (offered by the 1975 Act) and the certainty of entitlement under the intestacy rules.
- 8.108 Where the cohabitants lived together for less than two years and did not have children together, the survivor has no entitlement under the intestacy rules and does not qualify to apply for family provision as a cohabitant.<sup>71</sup> If, although the relationship was of less than two years' duration, the cohabitants had had a child together (or a pregnancy was ongoing), the survivor qualifies to claim as a cohabitant under the 1975 Act. The survivor of a childless relationship of between two and five years also qualifies as a cohabitant for 1975 Act purposes. A surviving cohabitant who lived with the deceased for between two and five years before the death, and has had a child with the deceased who is living in the same household at the date of death, qualifies for an entitlement on intestacy. That also applies where the cohabitation continued for five years before death, whether or not the survivor and the deceased had children together.

<sup>71</sup> The survivor may qualify to make a family provision application under section 1(1)(e) of the Inheritance (Provision for Family and Dependents) Act, as a dependant of the deceased; see paras 6.43 to 6.46 above.

## THE ENTITLEMENT OF A QUALIFYING COHABITANT

- 8.109 Having posed the fundamental question of whether there should be any circumstances in which a cohabitant can inherit on the intestate death of a partner, and discussed the definition of cohabitation for these purposes and what further conditions for qualification might be imposed, we now consider what the entitlement of a qualifying cohabitant should be.
- 8.110 The rationale for giving the survivor of a long cohabiting relationship (or one with children) an entitlement on the intestate death of his or her partner is to recognise the marriage-like intimacy and commitment, and financial interdependence, of such relationships. We therefore provisionally proposed that a qualifying cohabitant should have the same entitlement as a spouse on intestacy.<sup>72</sup>
- 8.111 In the Consultation Paper we also considered whether there should be any entitlement for a cohabitant who did not meet either of the conditions discussed above. We explored the idea of a graduated approach, with entitlement accruing over time (for example, 20% of the spousal entitlement accruing for each year of cohabitation) but concluded that this would be too complex.<sup>73</sup>
- 8.112 We then discussed a simpler form of graduated entitlement, accruing after two years' cohabitation but amounting to less than either a spouse or cohabitant of five years' standing would receive. Two years is already significant, being the duration requirement for eligibility to claim family provision as a cohabitant (rather than as a dependant) or to make a claim under the Fatal Accidents Act 1976. We suggested that this might represent an answer to those who have misgivings about the appropriateness of a full spousal entitlement after a cohabitation of less than five years, while recognising that, where there is no will, considerable hardship can be caused to those in shorter relationships. So we provisionally proposed that if the cohabitation had continued for between two and five years before the death and the couple had not had a child together the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.<sup>74</sup>
- 8.113 We noted two further points. One was that if a cohabitant's taking half the deceased's estate would leave the other half as *bona vacantia* ("ownerless goods", taken by the Crown of the Duchy of Lancaster or Cornwall, depending on where the deceased lived), then the cohabitant should take the entire estate. We also made clear that we did not consider it appropriate for the survivor of a short cohabitation to receive a fixed share of the estate as a statutory legacy.<sup>75</sup> Even a statutory legacy of £125,000 (half of the current lower level for spouses of £250,000) would exceed the value of more than 70% of intestate estates.<sup>76</sup>

<sup>72</sup> Consultation Paper, paras 4.68 and 4.80.

<sup>73</sup> Consultation Paper, paras 4.82 to 4.84.

<sup>74</sup> Consultation Paper, paras 4.85.

<sup>75</sup> Consultation Paper, para 4.88.

<sup>76</sup> More than 70% of intestate estates are worth less than £125,000, according to the statistics derived from our work with the Probate Service and HM Revenue & Customs: Appendix D, table 3.

### **Consultation responses**

- 8.114 Many consultees responded to our provisional proposals for cohabitants who had a child with the deceased or had lived with the deceased for five years before the death without commenting directly on the proposal that they should receive a spousal entitlement.
- 8.115 Those who did address this question directly made a number of helpful points. Resolution agreed that the entitlement of a qualifying cohabitant should be the same as a spouse would receive. They noted that this matched the approach taken in a number of other common law jurisdictions. Others, however, suggested some lesser entitlement: for example, 75% of a spouse's entitlement so as to give "some primacy to marriage"; or limited a cohabitant to the "maintenance standard" applied to family provision claims.
- 8.116 As regards cohabitations of less than five years, the Law Society suggested that the estate should be divided equally between the cohabitant and any children of the deceased. This would in fact be the effect of our final recommendations on anything left in the estate after payment of the statutory legacy.<sup>77</sup>
- 8.117 Few other consultees, however, were enthused by the idea of a graduated entitlement for the survivor of a short, childless, cohabitation. Even among those consultees who were supportive of our proposals in principle, this was generally seen as being too complex and unnecessary (given that such cohabitants have standing to apply for family provision). Resolution, for example, argued that this "adds another layer of complexity for what will, in most cases, be a small estate". The Judges of the Family Division and of the Chancery Division of the High Court opposed what they saw as a "second prize" for a childless cohabitation lasting less than five years.

### **Discussion**

- 8.118 We see no sound basis for giving a qualifying cohabitant any lesser entitlement than a spouse would have received in the same circumstances. We can also see a very sound practical reason not to try to devise some lesser entitlement; if that entitlement was not sufficient for the cohabitant's ongoing maintenance, he or she would have strong grounds for a family provision claim. That would negate one of the key benefits hoped for from this reform, which is an anticipated reduction in litigation by cohabitants.
- 8.119 **We recommend that a qualifying cohabitant should have the same entitlement under the intestacy rules as a spouse.**
- 8.120 By "qualifying cohabitant" we mean a person within the basic definition set out above,<sup>78</sup> who also meets one of the further conditions for entitlement (cohabitation for at least five years before the death or two years if the survivor is a parent of a child of the deceased). Clause 1 of the draft Inheritance (Cohabitants) Bill achieves this by amending the intestacy rules so that the administrators of an intestate estate are directed to distribute the estate in the same manner to the deceased's surviving spouse or – if the deceased was not

<sup>77</sup> See para 8.119 below.

<sup>78</sup> See para 8.61 above.

married or in a civil partnership at the date of death – to any surviving qualifying cohabitant. These amendments include the survivorship provisions at section 46(2A) of the Administration of Estates Act 1925; which means that a qualifying cohabitant who dies within 28 days of his or her partner will be treated for these purposes as not having survived and will not inherit under the intestacy rules.

### **Chattels**

- 8.121 In the Consultation Paper we made provisional proposals about the entitlement of cohabitants to the deceased's personal chattels. These are part of the spousal entitlement, but merit separate discussion.
- 8.122 Chattels are rather different from other assets because they may have an emotional value out of all proportion to their monetary value. If chattels include, say, photograph albums dating back many years, it is not obvious that a cohabitant should take them in preference to the deceased's children by a previous relationship or to the deceased's parents.
- 8.123 We concluded, however, that where the cohabitation had lasted for five years or more or had produced children it would not be appropriate to try to pick and choose which chattels the cohabitant receives. Many chattels (for example, furniture) will be intrinsic to the household and lifestyle that the couple shared and in many cases it would not be possible to determine easily who in fact owned each item.
- 8.124 We therefore provisionally proposed that if the deceased and a surviving cohabitant were by law the parents of a child born before, during or following their cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.<sup>79</sup>
- 8.125 We also made a provisional proposal for shorter cohabitations. We felt that in such cases it was not right completely to override a cohabitant's claim to items from what was – given the definition of cohabitation – the couple's home. So we provisionally proposed that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.<sup>80</sup> That went along with our provisional proposal that such cohabitants should be entitled to 50% of the spousal entitlement to the rest of the estate.<sup>81</sup> The other 50%, including any chattels that the cohabitant did not appropriate, would pass to the family members next entitled (subject to our point above about *bona vacantia*).<sup>82</sup>

<sup>79</sup> Consultation Paper, para 4.95.

<sup>80</sup> Consultation Paper, para 4.96. That is, the right to select personal chattels to be allocated in satisfaction of some or all of that entitlement. See further paras 8.129 to 8.130 below.

<sup>81</sup> See para 8.112 above.

<sup>82</sup> See para 8.113 above.

### ***Consultation responses***

- 8.126 Most consultees who supported reform in principle favoured a single qualifying duration period after which a cohabitant receives the same entitlement as a spouse, including all of the deceased's personal chattels.<sup>83</sup>
- 8.127 There was opposition to the survivor of a potentially short cohabitation that had produced children receiving all of the personal chattels. There was also a suggestion that chattels which the deceased had inherited should pass to his or her children, with only assets acquired during the cohabitation passing to the surviving cohabitant. One consultee suggested that a cohabitant's entitlement be limited to furniture, household contents and gifts he or she gave to the deceased.
- 8.128 Just as few consultees liked the general proposition that the survivor of a short, childless relationship should receive half of a spouse's entitlement, few favoured the idea of the surviving cohabitant being able to choose which of the deceased's chattels he or she wanted to appropriate.

### ***Discussion***

- 8.129 We remain of the view that a cohabitant of five years' standing or where the couple had children together should receive a spouse's entitlement, including all of the deceased's personal chattels. Any other scheme is too complicated and open to the risk of disputes that are disproportionate to the value of the items.
- 8.130 For the reasons explained above, we are not pursuing the idea of an automatic entitlement for the survivor of a cohabitation shorter than five years, unless the couple had a child together. We therefore do not recommend that a cohabitant in these circumstances be able to appropriate any chattels. This will not prevent a cohabitant who has standing to apply for family provision from seeking the transfer of certain items as part of his or her claim.

### **ENTITLEMENT TO A GRANT OF REPRESENTATION**

- 8.131 In the Consultation Paper we noted that when a person dies it is necessary to administer the estate by paying any debts and legacies and distributing the rest to those who are entitled either under a will or the intestacy rules. Certain assets may be owned in such a way that they pass automatically to the other co-owners; other assets may be administered informally as "small payments".<sup>84</sup> But it is often necessary for those who want to administer the estate to obtain a grant of representation, which gives them formal authorisation to deal with the estate.
- 8.132 Where a grant of representation is required, the Non-Contentious Probate Rules 1987 set out the procedure for obtaining a grant. Where there is a will, the executors named in the will have priority to obtain a grant, even if the will does not cover all of the deceased's property and that part of the estate falls to be administered under the intestacy rules. In the case of a wholly intestate estate, it is only those people who will benefit from the estate under the intestacy rules who are entitled to apply for a grant. Where there is a surviving spouse and the value of the estate is below the prevailing level of statutory legacy, the surviving

<sup>83</sup> Analysis of Responses, paras 4.155 to 4.181.

<sup>84</sup> See para 5.31 and following above.

spouse is the only person entitled to a grant.<sup>85</sup> In larger estates, or where the surviving spouse refuses or fails to obtain a grant, the deceased's children or other beneficially entitled relatives or creditors of the deceased may apply for a grant in addition to or instead of the surviving spouse.

- 8.133 We have recommended that, where the deceased was not married or in a civil partnership but left a qualifying cohabitant, the qualifying cohabitant should receive the same entitlement as a spouse.<sup>86</sup> This raises the question of whether the qualifying cohabitant should also be entitled to obtain a grant of representation in preference to other relatives or creditors of the deceased.
- 8.134 This was not a question we asked directly in our Consultation Paper but it was an issue that several consultees addressed in their responses. A number of these asked how a cohabitant would prove qualification for these purposes. Some suggested that there might be potential for fraudulent applications, particularly where the deceased was old and had few surviving relatives who might contradict the person asserting a claim as a cohabitant.
- 8.135 One option would be to leave the Non-Contentious Probate Rules as they are. The cohabitant would therefore not be able to administer the estate. A child of the deceased or some other relative would have to take out a grant and administer the estate for the principal benefit of the cohabitant.<sup>87</sup> Realistically, such an arrangement is likely to produce at best inefficiency, and at worst disputes or a situation where no-one will take out the grant to an estate from which they will not benefit.
- 8.136 So we think that reform of the intestacy rules in favour of cohabitants almost certainly has to involve a qualifying cohabitant being entitled to take out a grant in priority to other surviving relatives of the deceased. Most of those consultees who commented on this issue came to the same conclusion.
- 8.137 This has the potential to impact on the Probate Service, which administers the work of the Probate Registrars, and District Judges of the Principal Registry of the Family Division who issue grants in the vast bulk of "non-contentious" cases. Around 70% of applications for grants are made by solicitors on behalf of clients; the rest are "personal applications" which often require a face-to-face interview.
- 8.138 There is also the potential for disputes over whether a person claiming to be a qualifying cohabitant does in fact satisfy the statutory criteria. This raises questions over the forum for resolving such disputes. Under the current court procedure rules, "contentious" probate business is largely dealt with in the

<sup>85</sup> R D'Costa, J Winegarten and T Synak, *Tristram and Coote's Probate Practice* (30th ed 2006 with 3rd supplement February 2010) para 6.93; R Kerridge, *Parry and Kerridge: The Law of Succession* (12th ed 2009) para 17.42.

<sup>86</sup> See para 8.119 above.

<sup>87</sup> The administrator would not be a surviving spouse as we recommend that it should not be possible for a cohabitant to benefit under the intestacy rules where there is a surviving spouse.

Chancery Division of the High Court,<sup>88</sup> although county courts also have jurisdiction where the value of the estate is relatively modest.<sup>89</sup>

- 8.139 During the course of the project we have held extremely helpful meetings with the Probate Service and others, including the Masters of the Chancery Division of the High Court, to discuss the potential impact of our recommendations.
- 8.140 We anticipate that, if the intestacy rules are amended to give certain cohabitants a beneficial entitlement to the estate of a deceased partner, it will be necessary to make consequential amendments to the Non-Contentious Probate Rules. The Lord Chancellor already has power to amend the rules; it is therefore not necessary to make any provision for this in our draft Bill. Nor do we think it is necessary now to make detailed recommendations for the content of any amendments at this stage. That is a matter for consideration once it is clear how the Government intends to take forward our recommendations.
- 8.141 It has been suggested that a cohabitant who intends to apply for a grant of representation to the estate of a deceased partner may benefit from legal advice to determine if he or she does in fact meet the statutory criteria and to consider any supporting evidence. It may be that such applications are therefore best dealt with by a solicitor or other qualified person and are unsuitable as personal applications. We can certainly see the benefit of having a professional validation of the cohabitant's application. It would be important to ensure that this did not restrict access to the courts, but in practice the costs of such advice are likely to come from the estate.<sup>90</sup>
- 8.142 We are mindful of the experience elsewhere in the common law world, where the introduction of intestacy rights for cohabitants does not appear to have led either to undue trouble or expense for the (local equivalent of the) Probate Service or to an increase in the known incidence of fraud. We made enquiries with the relevant overseas branches of the Society of Trust and Estate Practitioners about their members' experience. Some difficult situations were described but it would appear that, in the general run of cases, practitioners and the courts take a robust attitude towards deciding whether the conditions for entitlement are fulfilled or not. The risk of fraud appears to have been reduced by the requirement to provide evidence and the risk of penalties for falsification.
- 8.143 In a similar vein, we discussed in the Consultation Paper the implications for administrators who might be exposed to more risk if cohabitants were to be entitled on intestacy, because of the possibility of distribution made in error. As discussed above, in many cases the cohabitant will be the administrator and the principal beneficiary. In other cases, we are satisfied that the current law will

<sup>88</sup> Senior Courts Act 1981, sch 1, para 1(h).

<sup>89</sup> County Courts Act 1984, s 32. The "county court limit" for the purposes of contentious probate proceedings is currently £30,000: County Courts Jurisdiction Order 1981, SI 1981 No 1123, art 2.

<sup>90</sup> It is not clear whether the requirement for legal representation in order to take out a grant would engage Article 6 of the European Convention on Human Rights. But if it did, we take the view that the applicant's rights under that article would not be breached unless he or she could not afford to instruct a solicitor. See for example *Aerts v Belgium* (2000) 29 EHRR 50. A grant is unlikely to be sought unless there are funds in the estate and so the practical reality is that representation will in most cases be affordable.

achieve the right result, in particular through the court's discretion to relieve trustees and personal representatives from liability for what might be colloquially termed "honest mistakes" under section 61 of the Trustee Act 1925.

## **FAMILY PROVISION**

- 8.144 Under current law, a person who cohabited with the deceased for a continuous period of two years ending immediately before the death of the deceased is entitled to apply for family provision, whether or not they had children together. Most cohabitants – except those of relatively short standing – can therefore already make a claim for family provision. Our provisional proposals for reform of the family provision legislation were therefore much more limited than our provisional proposals for reform of the intestacy rules and primarily intended to ensure consistency between these two important elements of succession law.
- 8.145 We focused on two issues:
- (1) eligibility to apply for family provision as a cohabitant; and
  - (2) the measure of family provision for a cohabitant.

### **Eligibility to apply for family provision as a cohabitant**

- 8.146 The 1975 Act gives standing to apply for family provision to a person who was, during the whole of the period of two years ending immediately before the date when the deceased died, living in the same household as the deceased, and as the husband, wife or civil partner of the deceased.
- 8.147 Our provisional proposals for reform of the intestacy rules took a different approach. We provisionally proposed that entitlement should accrue to a person who was living as a couple in a joint household with the deceased immediately before the death (and had done so for at least five years or was the parent of a child of the deceased). We then sought to avoid inconsistency between these two regimes, as it would be undesirable for a cohabitant who was entitled under the intestacy rules without a duration requirement, because of the presence of children, to be unable to apply for family provision. So we provisionally proposed that, if the surviving cohabitant and the deceased are by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of the 1975 Act, provided that the cohabitation was continuing at the date of death.<sup>91</sup>
- 8.148 We also proposed that the definition of cohabitation used in the intestacy rules under our proposals should be incorporated into the 1975 Act, again for consistency.<sup>92</sup> Consultees largely agreed with this provisional proposal.<sup>93</sup>
- 8.149 For the reasons set out above, we have now decided that in defining qualifying cohabitants for the purposes of the intestacy rules, we should reflect the familiar

<sup>91</sup> Consultation Paper, para 4.122.

<sup>92</sup> Consultation Paper, para 4.124.

<sup>93</sup> Analysis of Responses, paras 4.242 to 4.250.

wording of the 1975 Act.<sup>94</sup> The need to amend the 1975 Act as provisionally proposed therefore falls away.

8.150 Our provisional proposal that there should be no duration requirement for cohabitants with children under the 1975 Act was also well-received by most consultees, although there was concern about the consequences for other beneficiaries.<sup>95</sup> Again, we have modified our approach to reform of the intestacy rules: we now recommend that cohabitants who have children together should qualify for an entitlement on intestacy only if they had cohabited for at least two years before the death. The child must also be living in the same household as his or her parents at the date of death.<sup>96</sup>

8.151 But the case for reforming the 1975 Act, so that all cohabitants with children have standing to apply, remains strong. Indeed, it may be stronger if it is more difficult than we had originally envisaged for a cohabitant to qualify for entitlement on intestacy as the parent of the deceased's child. It should be borne in mind that the right to apply for family provision does not mean that in every case the applicant will be successful. The court will consider all of the circumstances of the case and the requirements of the statute in deciding what order (if any) to make.

8.152 So we would not impose a two-year duration requirement for cohabitants with children, for family provision purposes, in the way that we recommend for entitlement under the intestacy rules. There may be cases where the survivor of a short cohabitation who is pregnant with the deceased's child is able to make out a strong case for family provision. Similarly, there may be deserving cases where the child has already died or was not living in the same household at the date of the deceased's death. We think that it would be unnecessary to deny the surviving parent the opportunity to at least apply for family provision, because the circumstances may well justify an award.

8.153 **We recommend that a person who:**

(1) **was the father or mother of a child of a deceased person (including a child *en ventre sa mere* or a child who was born alive but predeceased both parents); and**

(2) **at the date of the deceased's death was:**

(a) **living in the same household as the deceased; and**

(b) **as the deceased's spouse**

**should be entitled to apply under the Inheritance (Provision for Family and Dependents) Act 1975 for family provision from the deceased's estate.**

8.154 Clause 3 of the draft Inheritance (Cohabitants) Bill puts this recommendation into effect by amending section 1 of the Inheritance (Provision for Family and Dependents) Act 1975.

<sup>94</sup> See para 8.55 and following above.

<sup>95</sup> Analysis of Responses, paras 4.220 to 4.232.

<sup>96</sup> See para 8.102 above.

- 8.155 We also invited consultees' views as to whether, where the couple had not had a child together, the current two-year qualifying period for the survivor to be entitled to apply for family provision should be retained.<sup>97</sup>
- 8.156 While most consultees agreed with the proposal to remove the two-year threshold for cohabitants with children, a large majority opposed the removal of the duration requirement for all cohabitants. Those in favour of removing the duration requirement, including the Chancery Bar Association, the Society of Trust and Estate Practitioners, and the Association of Her Majesty's District Judges, noted that the proposal would only give standing to apply for family provision; if the claim was unmeritorious the court would not make any award. But for those opposed to the proposal, the need for the court to assess the claim was part of the problem. The Office of the Official Solicitor expressed the views of many that such a change would "inevitably lead to a proliferation of claims that would have little prospect of success and involve disproportionate costs".
- 8.157 It is important to bear in mind that the survivor of a cohabitation of less than two years can already apply for family provision if he or she was dependent on the deceased. The courts are currently bound by an interpretation of the statute which causes problems for those couples who were dependent on one another; the survivor can struggle to show that he or she was being maintained by the deceased. Recommendations we make elsewhere in this Report would deal with this problem by confining the "balance sheet test" to commercial relationships and allowing "interdependence" between partners to be recognised.<sup>98</sup>
- 8.158 It is therefore hard to see a compelling case for changing the law to assist a cohabitant of less than two years' standing who was not dependent on the deceased and does not have ongoing responsibility for a child of the deceased. We have therefore decided not to recommend any such reform.

#### **The "maintenance standard" of provision for cohabitants**

- 8.159 The measure of family provision for a cohabitant, as for all applicants other than a surviving spouse, is "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance". This contrasts with the standard applicable to a spouse (where the marriage or civil partnership was continuing and not subject to a decree of judicial separation or separation order), which is "such financial provision as it would be reasonable for a spouse to receive, whether or not required for maintenance."
- 8.160 In the Consultation Paper we noted that the courts, in determining what the surviving cohabitant needs for his or her maintenance, take account of the lifestyle the applicant shared with the deceased. This leads to awards that can appear more generous than those made to other non-spouse applicants, even though the award is restricted to what is needed for the applicant's maintenance.<sup>99</sup>

<sup>97</sup> Consultation Paper, para 4.123.

<sup>98</sup> See para 6.76 above.

<sup>99</sup> Consultation Paper, para 4.129.

- 8.161 We said that we thought that this was the correct approach and is more consistent with the decision to include cohabitants in the 1975 Act as a class of applicant distinct from dependants. We suggested that the statute should be amended to match the approach of the courts and explicitly recognise that a cohabitant's claim is based on something more than dependency.
- 8.162 We therefore provisionally proposed that the 1975 Act be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.<sup>100</sup>
- 8.163 A number of consultees (including the Chancery Bar Association, the Association of Her Majesty's District Judges, the Law Society, and the Money and Property Committee of the Family Justice Council) supported this proposal.<sup>101</sup> It was argued that the current law places the courts in an "uncomfortable straitjacket" and that the proposal reflects the "holistic" approach that is already taken by the courts in many cases of applications by cohabitants.
- 8.164 However, there was concern that there is no objective way of determining what is reasonable for a cohabitant to receive without some link to what the cohabitant needs for his or her maintenance. When assessing a spouse's claim, it is possible – in fact mandatory – to consider what the result would have been had the couple's relationship ended in divorce or dissolution of their civil partnership. If and when the recommendations made in the Cohabitation Report are implemented, the financial relief which would have been awarded on a lifetime separation could be taken into account in a similar way.<sup>102</sup> But currently, there is no equivalent for cohabitants which can be used to calibrate a family provision award.
- 8.165 We are also persuaded that the current approach of the courts to applications by cohabitants is sufficiently generous to achieve a fair result in most cases. We therefore do not make a recommendation in the terms of our provisional proposal; but we note that this should be reviewed on the introduction of financial remedies for cohabitants on lifetime separation.

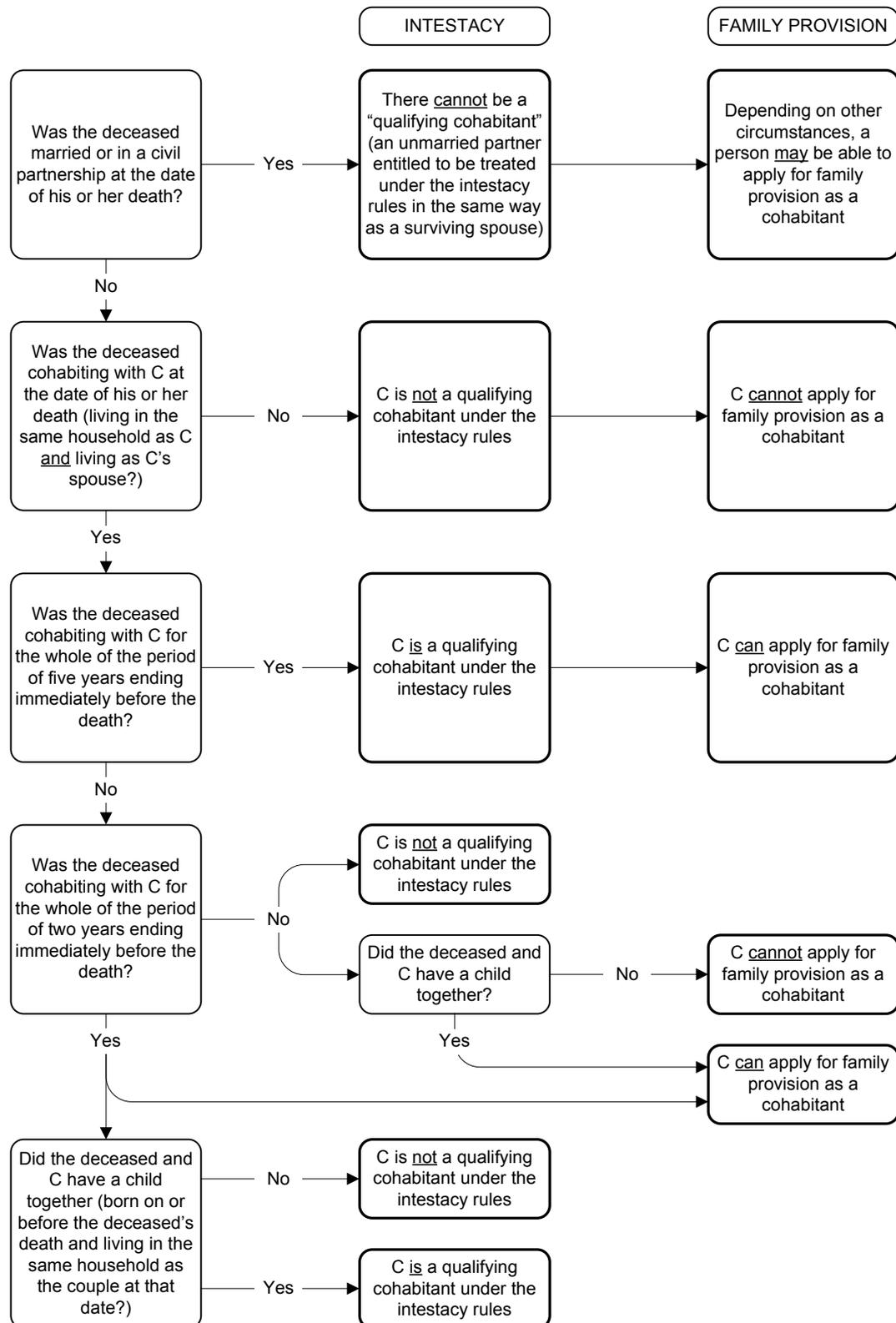
<sup>100</sup> Consultation Paper, para 4.134.

<sup>101</sup> Analysis of Responses, paras 4.251 to 4.264.

<sup>102</sup> Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 6.32 to 6.43; see also paras 6.44 and 6.49, recommending that it should be possible for an order for financial relief on separation to include a bar on subsequent applications under the 1975 Act. Similarly, it would be necessary to consider whether cohabitants should be able to contract out of the 1975 Act; see Marital Property Agreements (2011) Law Commission Consultation Paper No 198, paras 7.77 to 7.89.

## SUMMARY OF REFORMS

8.166 Below we set out a diagram which summarises the circumstances in which the cohabitant (“C”) of a person who has died would qualify for entitlement on intestacy or be able to claim family provision under the reforms recommended in this Part.



# **PART 9**

## **SUMMARY OF RECOMMENDATIONS**

### **PART 2: THE SURVIVING SPOUSE**

- 9.1 We recommend that where a person dies intestate and is survived by a spouse but no children or other descendants the whole estate should pass to the surviving spouse.

**[paragraph 2.25]**

- 9.2 We recommend that where a person dies intestate and is survived by a spouse and children or other descendants, the surviving spouse should receive, in addition to the deceased's personal chattels and a statutory legacy, half of any balance of the estate.

**[paragraph 2.62]**

- 9.3 We recommend that a surviving spouse should receive all of the deceased's tangible movable property other than such property which:

- (1) consists of money or securities for money;
- (2) was used at the death of the deceased solely or mainly for business purposes; or
- (3) was held at the death of the deceased solely as an investment.

**[paragraph 2.111]**

- 9.4 We recommend that:

- (1) the Lord Chancellor must, at intervals of not more than five years, specify by statutory instrument the amount of the fixed net sum payable under the intestacy rules;
- (2) unless the Lord Chancellor otherwise determines, the amount of the fixed net sum must be index-linked by reference to the increase in the retail prices index since the previous amount was fixed (rounded to the nearest £1,000 above the figure produced by this index-linking);
- (3) if the Lord Chancellor otherwise determines, a report must be laid before Parliament stating the reason for the determination; and
- (4) the Lord Chancellor may by statutory instrument substitute for the retail prices index some other measure of inflation.

**[paragraph 2.128]**

- 9.5 We recommend that, unless the Lord Chancellor decides otherwise, interest on the fixed net sum payable under the intestacy rules should be at the Bank of England official bank rate that had effect at the end of the day on which the deceased died.

**[paragraph 2.135]**

- 9.6 We recommend that interest on the statutory legacy should be calculated on a simple basis.

**[paragraph 2.139]**

- 9.7 We recommend that, when hearing an application for family provision by a surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975, the court is to have regard to the provision the applicant might have expected to receive on divorce or dissolution of a civil partnership but is not required to treat such provision as setting an upper or lower limit on the provision which may be ordered.

**[paragraph 2.146]**

#### **PART 4: THE STATUTORY TRUSTS AND WIDER TRUST REFORMS**

- 9.8 We recommend that if immediately before adoption a child has in the estate of his or her deceased parent any contingent interest, other than a contingent interest in remainder, that interest shall not be affected by the adoption.

**[paragraph 4.51]**

- 9.9 We recommend that the power contained in section 32 of the Trustee Act 1925 to pay or apply capital to or for the benefit of a trust beneficiary should be extended to the whole, rather than one-half, of the beneficiary's share in the trust fund.

**[paragraph 4.72]**

- 9.10 We recommend that section 32 of the Trustee Act 1925 be amended so that the trustees have power to transfer or apply other property subject to the trust on the same basis as the power to pay or apply capital money to or for the advancement or benefit of a beneficiary.

**[paragraph 4.76]**

- 9.11 We recommend that section 31(1) of the Trustee Act 1925 be amended to:

- (1) remove the words "as may, in all the circumstances, be reasonable" and substitute "as the trustees think fit"; and
- (2) delete the whole of the proviso to the subsection.

**[paragraph 4.95]**

## **PART 5: INTESTACY: THE ADMINISTRATION OF ESTATES**

- 9.12 We recommend that section 18(2) of the Family Law Reform Act 1987 shall not apply if a person is recorded as the deceased's father (or as a parent, other than the mother) on the official record of the deceased's birth under the Births and Deaths Registration Act 1953.

**[paragraph 5.29]**

- 9.13 We recommend that the Government should commission a review of the small payments regime. This review should consider, among other things, whether the current £5,000 limit should be raised, the range of assets to which the rules should apply, the protection afforded to asset holders, the formalities that should be followed when applying for assets to be released and any other issues that arise from the review.

**[paragraph 5.43]**

## **PART 6: FAMILY PROVISION: OTHER APPLICANTS**

- 9.14 We recommend that a person who was treated by the deceased as a child of the family should be able to make an application for family provision in that capacity under the Inheritance (Provision for Family and Dependants) Act 1975 whether or not that treatment was referable to the deceased's marriage or civil partnership.

**[paragraph 6.41]**

- 9.15 We recommend that:

- (1) a person who was being maintained by the deceased immediately before the death should be eligible to apply for family provision as a dependant under the Inheritance (Provision for Family and Dependants) Act 1975 whether or not, beyond the fact of providing maintenance, the deceased assumed responsibility for that person's maintenance; and
- (2) the question of whether or not there was such an assumption of responsibility, and its extent, should be taken into account as a factor in assessing whether there was a failure to make reasonable provision for the applicant and considering the exercise of the court's powers.

**[paragraph 6.59]**

- 9.16 We recommend that it should not be necessary for a person claiming family provision as a dependant under the Inheritance (Provision for Family and Dependants) Act 1975 to show that the deceased contributed more to the parties' relationship than did the applicant.

**[paragraph 6.76]**

## **PART 7: FAMILY PROVISION: GENERAL**

- 9.17 We recommend that it should no longer be the sole precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died domiciled in England and Wales.

**[paragraph 7.17]**

- 9.18 We recommend that an application for family provision under the Inheritance (Provision for Family and Dependants) Act 1975 should be possible in any case where either the deceased was domiciled in England and Wales, or English domestic succession law applies to any part of the estate.

**[paragraph 7.37]**

- 9.19 We recommend that an application for family provision should be possible where assets within the scope of sections 8, 9 and 10 of the Inheritance (Provision for Family and Dependants) Act 1975 were held by the deceased.

**[paragraph 7.43]**

- 9.20 We recommend that the Inheritance (Provision for Family and Dependants) Act 1975 should make clear that nothing prevents the making of an application before a grant of representation with respect to the estate of the deceased is first taken out.

**[paragraph 7.51]**

- 9.21 We recommend that, for the purposes of section 4 of the Inheritance (Provision for Family and Dependants) Act 1975, the following should be left out of account when considering when representation with respect to the estate of the deceased was first taken out:

- (1) those grants currently left out of account under section 23;
- (2) any other grant which does not permit distribution of at least some of the estate; and
- (3) a grant, or its equivalent, made outside the United Kingdom, with the exception of a grant sealed under section 2 of the Colonial Probates Act 1892 (but only from the date of sealing).

**[paragraph 7.68]**

- 9.22 We recommend that the court should have discretion to exercise its powers under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.

**[paragraph 7.83]**

9.23 We recommend that when an order is made under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 treating as part of the net estate the deceased's share of property held as joint tenants immediately before death, the share should be valued at such date as appears to the court to be appropriate.

**[paragraph 7.96]**

9.24 We recommend that the court in making an order under the Inheritance (Provision for Family and Dependants) Act 1975 should have power to make an order varying for the applicant's benefit the trusts on which the deceased's estate is held.

**[paragraph 7.126]**

9.25 We recommend that the court in making an order under the Inheritance (Provision for Family and Dependants) Act 1975 should have power to treat the net estate as already including a repayment of inheritance tax, or a payment of any other amount, which would become payable as a result of the order.

**[paragraph 7.130]**

#### **PART 8: COHABITANTS**

9.26 We recommend that a qualifying cohabitant should be entitled to benefit from the estate of a deceased partner under the intestacy rules.

**[paragraph 8.42]**

9.27 We recommend that the survivor of a cohabiting relationship should have no entitlement under the intestacy rules unless he or she was, immediately before the death of the deceased, living:

- (1) in the same household as the deceased; and
- (2) as the deceased's spouse.

**[paragraph 8.61]**

9.28 We recommend that a person can be a qualifying cohabitant in relation to a person who died intestate only if the deceased was not married or in a civil partnership immediately before his or her death.

**[paragraph 8.68]**

9.29 We recommend that, where the deceased died intestate, a person who was, during the whole of the period of five years ending immediately before the deceased's death, living:

- (1) in the same household as the deceased; and
- (2) as the deceased's spouse

should be a qualifying cohabitant in relation to the deceased.

**[paragraph 8.87]**

9.30 We recommend that, where the deceased died intestate, a person who was, during the whole of the period of two years ending immediately before the deceased's death, living:

- (1) in the same household as the deceased; and
- (2) as the deceased's spouse

should be a qualifying cohabitant in relation to the deceased if that person is also:

- (1) the father or mother of a child of the deceased born on or before the date of the deceased's death; and
- (2) living with the child in the same household as the deceased at the date of the deceased's death.

**[paragraph 8.102]**

9.31 We recommend that a qualifying cohabitant should have the same entitlement under the intestacy rules as a spouse.

**[paragraph 8.119]**

9.32 We recommend that a person who:

- (1) was the father or mother of a child of a deceased person (including a child *en ventre sa mere* or a child who was born alive but predeceased both parents); and
- (2) at the date of the deceased's death was:
  - (a) living in the same household as the deceased; and
  - (b) as the deceased's spouse

should be entitled to apply under the Inheritance (Provision for Family and Dependents) Act 1975 for family provision from the deceased's estate.

**[paragraph 8.153]**

(Signed) JAMES MUNBY, *Chairman*  
ELIZABETH COOKE  
DAVID HERTZELL  
DAVID ORMEROD  
FRANCES PATTERSON

JOHN SAUNDERS, *Acting Chief Executive*  
17 November 2011

# **APPENDIX A DRAFT INHERITANCE AND TRUSTEES' POWERS BILL AND EXPLANATORY NOTES**

The draft Bill begins on the following page. Turn to page 209 for the Explanatory Notes.

# Inheritance and Trustees' Powers Bill

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- 6 Amendments of Inheritance (Provision for Family and Dependents) Act 1975
- 7 Date when representation is first taken out
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- 9 Power of advancement
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- 12 Short title, commencement, application and extent

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- Schedule 1 – Determination of the fixed net sum
  - Schedule 2 – Amendments of Inheritance (Provision for Family and Dependents) Act 1975
  - Schedule 3 – Determination of date when representation is first taken out
  - Schedule 4 – Minor and consequential amendments

DRAFT  
OF A  
**B I L L**

TO

Make further provision about the distribution of estates of deceased persons; to amend the law relating to the powers of trustees; and for connected purposes.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 Intestacy: surviving spouse or civil partner**

- (1) Section 46 of the Administration of Estates Act 1925 (succession to real and personal estate on intestacy) is amended as follows.
- (2) For the Table in paragraph (i) of subsection (1) substitute—

“TABLE

(1) If the intestate leaves no issue:	the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely.
(2) If the intestate leaves issue:	(A) the surviving spouse or civil partner shall take the personal chattels absolutely;

(B) the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a fixed net sum, free of death duties and costs, to the surviving spouse or civil partner, together with simple interest on it from the date of the death at the rate provided for by subsection (1A) until paid or appropriated; and

(C) subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held –

(a) as to one half, in trust for the surviving spouse or civil partner absolutely, and

(b) as to the other half, on the statutory trusts for the issue of the intestate.

The amount of the fixed net sum referred to in paragraph (B) of case (2) of this Table is to be determined in accordance with Schedule 1A.”

(3) For subsection (1A) substitute –

“(1A) The interest rate referred to in paragraph (B) of case (2) of the Table in subsection (1)(i) is the Bank of England rate that had effect at the end of the day on which the intestate died.”

(4) After subsection (4) insert –

“(5) In subsection (1A) “Bank of England rate” means –

(a) the rate announced by the Monetary Policy Committee of the Bank of England as the official bank rate, or

(b) where an order under section 19 of the Bank of England Act 1998 (reserve powers) is in force, any equivalent rate determined by the Treasury under that section.

(6) The Lord Chancellor may by order made by statutory instrument amend the definition of “Bank of England rate” in subsection (5) (but this subsection does not affect the generality of subsection (7)(b)).

(7) The Lord Chancellor may by order made by statutory instrument –

(a) amend subsection (1A) so as to substitute a different interest rate (however specified or identified) for the interest rate for the time being provided for by that subsection;

(b) make any amendments of, or repeals in, this section that may be consequential on or incidental to any amendment made by virtue of paragraph (a).

- (8) A statutory instrument containing an order under subsection (6) is subject to annulment pursuant to a resolution of either House of Parliament.
- (9) A statutory instrument containing an order under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

## **2 The fixed net sum**

- (1) In the Administration of Estates Act 1925, after the First Schedule insert the Schedule set out in Schedule 1 to this Act (which provides for the determination of the fixed net sum).
- (2) The Family Provision Act 1966 is repealed.

## **3 Definition of “personal chattels”**

- (1) For paragraph (x) of section 55(1) of the Administration of Estates Act 1925 (definitions) substitute –
  - “(x) “Personal chattels” means tangible movable property, other than any such property which –
    - consists of money or securities for money, or
    - was used at the death of the intestate solely or mainly for business purposes, or
    - was held at the death of the intestate solely as an investment:”.
- (2) Unless the contrary intention appears, subsection (1) does not affect a reference (in any form) to personal chattels within the meaning of section 55(1)(x) of the Administration of Estates Act 1925 in a will or codicil executed (while containing the reference) before the coming into force of subsection (1).

## **4 Adoption and contingent interests**

- (1) In section 69 of the Adoption and Children Act 2002 (rules of interpretation for instruments concerning property), in subsection (4) –
  - (a) omit “or” after paragraph (a), and
  - (b) after paragraph (b) insert “, or
  - (c) any contingent interest (other than a contingent interest in remainder) which the adopted person has immediately before the adoption in the estate of a deceased parent, whether testate or intestate.”
- (2) The amendments made by subsection (1) have effect only in relation to adoptions whose date is the day this section comes into force or later.

## **5 Presumption of prior death**

In section 18 of the Family Law Reform Act 1987 (succession on intestacy), after subsection (2) insert –

- “(2ZA) Subsection (2) does not apply if a person is recorded as the intestate’s father, or as a parent (other than the mother) of the intestate –

- (a) in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or
- (b) in a record of a birth included in an index kept under section 30(1) of that Act (indexes relating to certain other registers etc)."

## **6 Amendments of Inheritance (Provision for Family and Dependants) Act 1975**

Schedule 2 amends the Inheritance (Provision for Family and Dependants) Act 1975.

## **7 Date when representation is first taken out**

Schedule 3 amends enactments relating to the determination, for various purposes, of the date on which representation with respect to the estate of a deceased person is first taken out.

## **8 Power to apply income for maintenance**

- (1) Section 31 of the Trustee Act 1925 (power to apply income for maintenance and to accumulate surplus income during a minority) is amended as follows.
- (2) In subsection (1)(i) for "as may, in all the circumstances, be reasonable," substitute "as the trustees may think fit,".
- (3) Omit the words from "Provided that" to the end.

## **9 Power of advancement**

- (1) Section 32 of the Trustee Act 1925 (power of advancement) is amended as follows.
- (2) In subsection (1), in the words before the proviso—
  - (a) for the words from "Trustees" to "a trust," substitute "Trustees of a trust may at any time or times pay or apply any capital money, or transfer or apply any other property, subject to the trust," and
  - (b) after "payment" insert ", transfer".
- (3) In paragraph (a) of the proviso in subsection (1)—
  - (a) for the words from the beginning to "amount" substitute "the total amount so paid, transferred or applied for the advancement or benefit of any person shall not exceed the amount of", and
  - (b) omit "one-half of".
- (4) In paragraph (b) of that proviso for "the money so paid or applied" substitute "any money so paid or applied, and any other property so transferred or applied,".
- (5) In paragraph (c) of that proviso—
  - (a) after "payment" (in both places) insert ", transfer", and
  - (b) for "paid" substitute "or other property paid, transferred".
- (6) After subsection (1) insert—
 

"(1A) For the purposes of subsection (1), the total amount paid, transferred or applied by trustees for the advancement or benefit of any person is found by adding—

- (a) the total amount of any money paid or applied by the trustees for the advancement or benefit of the person, to
- (b) the amount representing the total value of any other property transferred or applied by the trustees for the advancement or benefit of the person.”

## **10 Application of sections 8 and 9**

- (1) Section 8 applies in accordance with subsections (4) and (5).
- (2) Section 9, apart from subsection (3)(b), applies in relation to trusts whenever created or arising.
- (3) Section 9(3)(b) applies in accordance with subsections (4) and (5).
- (4) Subject to subsection (5), the provisions mentioned in subsections (1) and (3) apply only in relation to trusts created or arising after the coming into force of those provisions.
- (5) Those provisions also apply in relation to an interest under a trust (not falling within subsection (4)) if the interest is created or arises as a result of the exercise, after the coming into force of those provisions, of any power.

## **11 Minor and consequential amendments**

Schedule 4 makes minor and consequential amendments.

## **12 Short title, commencement, application and extent**

- (1) This Act may be cited as the Inheritance and Trustees' Powers Act 2011.
- (2) This section comes into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may appoint different days for different purposes.
- (4) The provisions of this Act, except sections 4 and 8 to 10, apply only in relation to deaths occurring after the coming into force of the provision concerned.
- (5) Subject to subsection (6), this Act extends to England and Wales only.
- (6) The repeals made by paragraph 4 of Schedule 4 extend to the United Kingdom.

## SCHEDULES

### SCHEDULE 1

Section 2

#### DETERMINATION OF THE FIXED NET SUM

The following is the Schedule inserted after the First Schedule to the Administration of Estates Act 1925—

#### “SCHEDULE 1A

#### DETERMINATION OF THE FIXED NET SUM

- 1 This Schedule has effect for determining the fixed net sum referred to in paragraph (B) of case (2) of the Table in section 46(1)(i).
- 2 On the coming into force of this Schedule, the amount of the fixed net sum is the amount fixed by order under section 1(1)(a) of the Family Provision Act 1966 immediately before the coming into force of this Schedule.
- 3 (1) The Lord Chancellor may from time to time by order made by statutory instrument specify the amount of the fixed net sum.
  - (2) An order under sub-paragraph (1) relates only to deaths occurring after the coming into force of the order.
  - (3) The first order under sub-paragraph (1) supersedes paragraph 2 of this Schedule.
  - (4) A statutory instrument containing an order under sub-paragraph (1) is subject to annulment pursuant to a resolution of either House of Parliament.
  - (5) Sub-paragraph (4) does not apply in the case mentioned in paragraph 5(3), or in the case of an instrument which also contains provision made by virtue of paragraph 7.
- 4 The Lord Chancellor may make an order under paragraph 3(1) at any time, but must make one—
  - (a) before the end of the period of 5 years beginning with the date this Schedule comes into force, and then
  - (b) before the end of the period of 5 years since the date on which the last order under paragraph 3(1) was made, and so on.
- 5 (1) Unless the Lord Chancellor otherwise determines, an order under paragraph 3(1) must specify the amount given by paragraph 6(2) or (as the case requires) 6(3).

- (2) If the Lord Chancellor does otherwise determine—
    - (a) an order under paragraph 3(1) may provide for the fixed net sum to be of any amount (including an amount equal to or lower than the previous amount), and
    - (b) the Lord Chancellor must prepare a report stating the reason for the determination.
  - (3) A statutory instrument containing an order under paragraph 3(1) that specifies an amount other than that mentioned in subparagraph (1) of this paragraph may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
  - (4) The Lord Chancellor must lay the report before Parliament no later than the date on which the draft of the instrument containing the order is laid before Parliament.
- 6
- (1) The amount mentioned in paragraph 5(1) is found as follows.
  - (2) If the retail prices index for the current month is higher than that for the base month, the amount to be specified in the order is found by—
    - (a) increasing the amount of the previous fixed net sum by the same percentage as the percentage increase in the retail prices index between those months, and
    - (b) if the resulting figure is not a multiple of £1,000, rounding it up to the nearest multiple of £1,000.
  - (3) If the retail prices index for the current month is the same as, or lower than, that for the base month, the amount specified in the order is to be the same as the amount of the previous fixed net sum.
  - (4) In this paragraph—

“the base month” means—

    - (a) in the case of the first order under paragraph 3(1), the month in which this Schedule came into force, and
    - (b) in the case of each subsequent order, the month which was the current month in relation to the previous order;

“the current month” means the most recent month for which a figure for the retail prices index is available when the Lord Chancellor makes the instrument;

“retail prices index” means—

    - (a) the general index of retail prices (for all items) published by the Statistics Board, or
    - (b) if that index is not published for a relevant month, any substituted index or index figures published by that Board.
- 7
- (1) The Lord Chancellor may by order made by statutory instrument amend paragraph 6 so as to—
    - (a) substitute for references to the retail prices index references to another index, and

- (b) make amendments in that paragraph consequential on that substitution.
- (2) A statutory instrument containing an order under sub-paragraph (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

## SCHEDULE 2

Section 6

### AMENDMENTS OF INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- 1 The Inheritance (Provision for Family and Dependants) Act 1975 is amended as follows.

#### *Jurisdiction*

- 2 (1) Section 1 (application for financial provision from deceased's estate) is amended as follows.
- (2) In subsection (1), for “a person dies domiciled in England and Wales” substitute “a person falling within subsection (4) dies”.
- (3) After subsection (3) insert—
- “(4) The following fall within this subsection—
- (a) a person who dies domiciled in England and Wales;
  - (b) a person whose estate includes property which satisfies the applicable law condition;
  - (c) a person whose net estate is treated by virtue of section 8(1) or (2) of this Act as including money or other property which satisfies the applicable law condition;
  - (d) a person who was immediately before death beneficially entitled to a joint tenancy of any property which satisfies the applicable law condition;
  - (e) a person in relation to whom the court is satisfied of the matters mentioned in paragraphs (a) and (b) of section 10(2) of this Act, read with section 12(1), if the property subject to the disposition mentioned there satisfies the applicable law condition.
- (5) The applicable law condition is that a court in England and Wales (after applying any relevant rules of private international law) would find that succession to the property is governed by the domestic law of England and Wales (or, in the case of property referred to in subsection (4)(c), (d) or (e), would have been so governed if it had been included in the deceased's estate).”

#### *Children of the family*

- 3 In section 1 (application for financial provision from deceased's estate)—
- (a) in subsection (1)(d), for the words from “who” to the end substitute “who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any

family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family;”

(b) after subsection (2) insert –

“(2A) The reference in subsection (1)(d) above to a family in which the deceased stood in the role of a parent includes a family of which the deceased was the only member (apart from the applicant).”

#### *Maintenance*

4 In section 1 (application for financial provision from deceased’s estate), for subsection (3) substitute –

“(3) For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money’s worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.”

#### *Powers of court*

5 (1) Section 2 (powers of court to make orders) is amended as follows.

(2) In subsection (1), at the end insert –

“(h) an order varying for the applicant’s benefit the trusts on which the deceased’s estate is held (whether arising under the will, or the law relating to intestacy, or both).”

(3) After subsection (3) insert –

“(3A) In assessing for the purposes of an order under this section the extent (if any) to which the net estate is reduced by any debts or liabilities (including any inheritance tax paid or payable out of the estate), the court may assume that the order has already been made.”

#### *Matters to which court is to have regard*

6 (1) Section 3 (matters to which court is to have regard when exercising powers under section 2) is amended as follows.

(2) In subsection (2), at the end of each of the final two sentences insert “; but nothing requires the court to treat such provision as setting an upper or lower limit on the provision which may be made by an order under section 2.”

(3) In subsection (3) –

(a) for paragraph (a) substitute –

“(a) to whether the deceased maintained the applicant and, if so, to the length of time for which and basis on which the deceased did so, and to the extent of the contribution made by way of maintenance;

(aa) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant;”

- (b) in paragraph (b) for “assuming and discharging that responsibility” substitute “maintaining or assuming responsibility for maintaining the applicant”.
- (4) In subsection (4), for the words from “regard” to the end substitute “regard –
- (a) to the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;
  - (b) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.”

*Time limit for applications*

- 7 In section 4 (time-limit for applications), at the end insert “(but nothing prevents the making of an application before such representation is first taken out)”.

*Joint tenancies*

- 8 In section 9 (property held on joint tenancy), in subsection (1) –
- (a) omit the words from “, before the end” to “first taken out,”;
  - (b) for “at the value thereof immediately before his death,” substitute “valued at such date as appears to the court to be appropriate,”.

SCHEDULE 3

Section 6

DETERMINATION OF DATE WHEN REPRESENTATION IS FIRST TAKEN OUT

- 1 In section 31 of the Matrimonial Causes Act 1973 (variation, discharge, etc, of certain orders for financial relief), for subsection (9) substitute –
- “(9) The following are to be left out of account when considering for the purposes of subsection (6) above when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (9A) below).
- (9A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (9) above, but is to be taken as dated on the date of sealing.”
- 2 For section 23 of the Inheritance (Provision for Family and Dependants) Act 1975 (determination of date on which representation was first taken out)

substitute –

**“23 Determination of date on which representation was first taken out**

- (1) The following are to be left out of account when considering for the purposes of this Act when representation with respect to the estate of a deceased person was first taken out –
  - (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (2) below).
- (2) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of this section, but is to be taken as dated on the date of sealing.”

3 In section 20 of the Administration of Justice Act 1982 (rectification of wills), for subsection (4) substitute –

- “(4) The following are to be left out of account when considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out –
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (5)).
- (5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (4), but is to be taken as dated on the date of sealing.”

4 (1) Schedule 1 to the Children Act 1989 (financial provision for children) is amended as follows.

(2) In paragraph 7 (variation of orders for secured periodical payments after death of parent), for sub-paragraph (6) substitute –

- “(6) The following are to be left out of account when considering for the purposes of sub-paragraph (2) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (6A)).

- (6A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (6), but is to be taken as dated on the date of sealing.”
- (3) In paragraph 11 (alteration of maintenance agreements after death of one of the parties), for sub-paragraph (4) substitute –
- “(4) The following are to be left out of account when considering for the purposes of sub-paragraph (3) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (4A)).
- (4A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (4), but is to be taken as dated on the date of sealing.”
- 5 In Schedule 5 to the Civil Partnership Act 2004, in paragraph 60 (variation of secured periodical payments order where person liable has died), for sub-paragraph (6) substitute –
- “(6) The following are to be left out of account when considering for the purposes of sub-paragraph (3) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (7)).
- (7) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (6), but is to be taken as dated on the date of sealing.”

#### SCHEDULE 4

Section 11(1)

#### MINOR AND CONSEQUENTIAL AMENDMENTS

##### *Administration of Estates Act 1925*

- 1 (1) The Administration of Estates Act 1925 is amended as follows.
- (2) Omit section 46(3) (which relates to deaths in circumstances where it is uncertain which of two people survived the other).

- (3) Omit section 47A (right of surviving spouse to have own life interest redeemed).
- (4) In section 48 (powers of personal representative in respect of interests of surviving spouse), in subsection (2), omit the following—
  - (a) paragraph (b), and the word “and” after paragraph (a), and
  - (b) the words “in either case”.
- (5) In section 49 (application of Part 4 of Act to partial intestacies), omit subsection (4).

*Intestates' Estates Act 1952*

- 2 (1) Schedule 2 to the Intestates' Estates Act 1952 (rights of surviving spouse or civil partner as respects home) is amended as follows.
  - (2) Omit paragraph 1(4).
  - (3) In paragraph 3, for sub-paragraph (3) substitute—
    - “(3) The court may extend the period of 12 months referred to in sub-paragraph (1)(a) if the surviving spouse or civil partner applies for it to be extended and satisfies the court that a period limited to 12 months would operate unfairly—
      - (a) in consequence of the representation first taken out being probate of a will subsequently revoked on the ground that the will was invalid, or
      - (b) in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out, or
      - (c) in consequence of some other circumstances affecting the administration or distribution of the estate.
    - (4) For the purposes of the construction of the references in this paragraph to the first taking out of representation, there shall be left out of account—
      - (a) a grant limited to settled land or to trust property,
      - (b) any other grant that does not permit any of the estate to be distributed,
      - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
      - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (5)).
    - (5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (4), but is to be taken as dated on the date of sealing.”

*Administration of Justice Act 1977*

- 3 In section 28 of the Administration of Justice Act 1977, omit subsection (1).

*Inheritance Tax Act 1984*

- 4        **In the Inheritance Tax Act 1984 –**
- (a)    in section 17 (changes in distribution of deceased's estate, etc.), omit paragraph (c);
  - (b)    omit section 145 (redemption of surviving spouse's or civil partner's life interest).

# DRAFT INHERITANCE AND TRUSTEES' POWERS BILL

## EXPLANATORY NOTES

### INTRODUCTION

- A.1 The draft Inheritance and Trustees' Powers Bill implements the recommendations made by the Law Commission in Parts 2 to 7 of its Report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331 published in December 2011.
- A.2 The recommendations in Part 8 of the Report would be put into effect by the draft Inheritance (Cohabitants) Bill for which separate explanatory notes have been prepared. These can be found at Appendix B of the Report.
- A.3 The Law Commission's work was concerned with two areas of the law: the intestacy rules and the family provision legislation. In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191. Following responses to this consultation, the Law Commission considered some aspects of trustees' powers more widely and a Supplementary Consultation Paper was published in May 2011.

### Intestacy

- A.4 The intestacy rules determine the distribution on a person's death of any of his or her property that is not governed by a valid will. They are largely contained in the Administration of Estates Act 1925 and the Intestates' Estates Act 1952. Priority is given to any surviving spouse or civil partner of the deceased, followed by blood relatives (children and other descendants, parents, siblings and their descendants, grandparents, aunts and uncles and their descendants).
- A.5 The Law Commission's review considered all aspects of the intestacy rules, including the circumstances in which a surviving spouse or civil partner is required to share the deceased's property with other relatives, the order of priority between the different classes of relative and the way in which property is divided between the different generations within each class.

### Family provision

- A.6 The Inheritance (Provision for Family and Dependents) Act 1975 permits certain family members and dependants to apply to the court to vary the distribution of a deceased's person's property, whether that is under the intestacy rules or the terms of a valid will. An application under the 1975 Act is often referred to as a claim for family provision.
- A.7 The Law Commission's review considered the whole of the 1975 Act, including the categories of persons who are entitled to apply for an order under the Act, the factors the court must take into account when considering the application, the powers of the court to make orders and property that the court is able to take into account when making orders.

### **Trustees' powers**

- A.8 The intestacy rules require the creation of statutory trusts where beneficiaries are under 18 or property is to be shared between beneficiaries. The trustees of assets held under these trusts are usually (but not always) the personal representatives responsible for administering the estate.
- A.9 The general law gives certain powers to trustees and imposes on them certain obligations. The Law Commission's project considered the powers and obligations under sections 31 and 32 of the Trustee Act 1925, which give trustees powers to distribute capital or income from the trust fund to a beneficiary who is under the age of 18, subject to certain restrictions.

### **THE DRAFT INHERITANCE AND TRUSTEES' POWERS BILL**

- A.10 The draft Inheritance and Trustees' Powers Bill implements the Law Commission's recommendations by amending existing legislation, principally the Administration of Estates Act 1925, the Trustee Act 1925 and the Inheritance (Provision for Family and Dependants) Act 1975.
- A.11 The Law Commission Consultation Paper and Report use the term "spouse" to refer to a person's husband, wife or civil partner. The draft Bill uses the term "spouse" to refer to a person's husband or wife. These explanatory notes follow the approach taken by the draft Bill.

### **COMMENTARY ON CLAUSES**

#### **Clause 1: intestacy: surviving spouse or civil partner**

- A.12 Clause 1 of the draft Bill amends the entitlement of a surviving spouse or civil partner of a person who has died intestate in two situations. First, where the deceased was also survived by "issue", meaning a direct descendant (a child, grandchild, great-grandchild and so on). Secondly, where the deceased was not survived by any issue but was survived by at least one parent or at least one full sibling (or the issue of a full sibling).
- A.13 The property of a person who has died, after payment of all debts and administrative expenses, is known as the residuary estate. The distribution of the residuary estate of a person who has died intestate is governed by section 46 of the Administration of Estates Act 1925. Section 46(1)(i) sets out in a table what is to happen if the intestate leaves a spouse or civil partner who survives for more than 28 days after the intestate's death (see section 46(2A)).
- A.14 In all cases, the surviving spouse or civil partner is entitled to all of the deceased's "personal chattels" that are not disposed of by will. The draft Bill does not change that position but clause 3 changes the statutory definition of personal chattels. That is explained in more detail in the commentary on clause 3, below.
- A.15 Clause 1(2) substitutes a new table at section 46(1)(i) of the Administration of Estates Act 1925 in place of the current table.
- A.16 Paragraph (1) of the new table provides that, where the intestate leaves no issue, the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely. This means that, in all cases where the deceased died intestate and

was survived by a spouse or civil partner, that spouse or civil partner is the only beneficiary except where the deceased was also survived by issue. This changes the current law, under which a surviving parent or full sibling (or the issue of a full sibling) is entitled to share the estate after the surviving spouse or civil partner has received the deceased's personal chattels and the first £450,000 of the residuary estate (this is referred to in section 46 as the "fixed net sum" and commonly known as a "statutory legacy").

- A.17 Paragraph (2) of the new table provides that, where the intestate leaves issue, the surviving spouse or civil partner is entitled to the deceased's personal chattels and a statutory legacy (currently £250,000). Under current law, a surviving spouse or civil partner would be entitled to a life interest in half of anything that is left in the estate. This means that he or she may use the property and is entitled to the income from it until his or her own death, at which point the property itself passes to the deceased's issue (who share it under the "statutory trusts" set out in section 47 of the Administration of Estates Act 1925). Paragraph (2) changes this: instead of a life interest in half of the rest of the estate, the surviving spouse or civil partner will take that half of the rest of the estate absolutely, as his or her own. The other half of the balance of the estate will be held on the statutory trusts for the issue of the deceased, as under the current law.
- A.18 Paragraph (2)(B) of the new table clarifies a point of uncertainty under the current law by providing that the statutory legacy accrues interest from the date of death calculated on a simple basis as opposed to a compound basis.
- A.19 The text below the new table provides for the amount of the statutory legacy to be determined in future by a new schedule 1A to the Administration of Estates Act 1925, which is explained in the commentary on clause 2 of and schedule 1 to the draft Bill below.
- A.20 Clause 1(3) substitutes a new section 46(1A) of the Administration of Estates Act 1925. This provides that the rate of interest which accrues from the date of death of the intestate on the statutory legacy (see paragraph B of case (2) of the new table at section 46(1)(i) of the Act) is the Bank of England rate that had effect at the end of the day on which the intestate died.
- A.21 Clause 1(4) inserts new subsections (5) to (9) after subsection (4) of section 46 of the 1925 Act. The new subsection (5) defines the Bank of England rate as being either the rate announced by the Monetary Policy Committee of the Bank of England as the official bank rate, or any equivalent rate determined by the Treasury in the exercise of its emergency powers under section 19 of the Bank of England Act 1998 to give the Bank directions with respect to monetary policy. The new subsection (6) gives the Lord Chancellor power to amend the definition of bank of England rate, for example if the Bank of England ceases to publish a rate using the term "official bank rate". The new subsection (8) provides that a statutory instrument containing an order made under this power is subject to annulment by either House of Parliament. This negative resolution procedure means that the new definition passes into law unless there is a resolution in either the House of Commons or House of Lords annulling it.

- A.22 The new subsection (7) contains a broader power for the Lord Chancellor to amend section 46(1A) of the 1925 Act by substituting a different interest rate for the prevailing rate and to make any consequential changes to the section. The new subsection (9) provides that a statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

**Clause 2: the fixed net sum**

- A.23 Clause 2(1) inserts a new schedule 1A into the Administration of Estates Act 1925. This new schedule is set out at schedule 1 to the draft Bill. It makes provision for determining the fixed net sum (often referred to as a “statutory legacy”) to which a surviving spouse or civil partner is entitled before any part of the estate is shared with any other beneficiary (under the amendments made by clause 1, only issue will be entitled to share the estate with the intestate’s spouse under the intestacy rules). The detailed provisions are explained in the commentary on schedule 1 below.
- A.24 Clause 2(2) repeals section 1 of the Family Provision Act 1966. (This is done by repealing the whole of the 1966 Act; all substantive provisions apart from section 1 had already been repealed by other legislation.) Section 1 contained the Lord Chancellor’s power to set the fixed net sum. On the coming into force of schedule 1 to the draft Bill that power will be superseded by the powers in the new schedule 1A to the Administration of Estates Act 1925.

**Clause 3: definition of “personal chattels”**

- A.25 The table at section 46(1)(i) of the Administration of Estates Act 1925 provides that the surviving spouse or civil partner of a person who has died intestate is entitled to all of that person’s “personal chattels”. These are defined at section 55(1)(x).
- A.26 Clause 3(1) substitutes for the current wording of section 55(1)(x) a new definition of personal chattels as “tangible movable property” with three defined exceptions. The first exception is money and securities for money, which is an exception that is found in the current statutory definition. The second exception is for property used at the death of the intestate solely or mainly for business purposes. The current statutory definition of personal chattels also excludes any chattels used at the death of the intestate for business purposes but the new clause adds the words “solely or mainly” to make clear that it is only where a chattel was used primarily for business purposes that it should be excluded under this exception and not pass to the surviving spouse or civil partner. The third exception, for property held at the death of the intestate solely as an investment, is wholly new. This is intended as a narrow exception for property held *solely* as an investment which had no personal use at the date of the deceased’s death. Property which had some personal use but which the deceased also hoped might maintain or increase its value, for example precious jewellery worn only occasionally, will not fall within this exception (and so will pass to the surviving spouse) even if it is held outside the home, for example in a bank for security reasons.

**Clause 4: adoption and contingent interests**

- A.27 Clause 4 concerns the rights of an adopted child to the estate of a parent who had died before the adoption. The general rule, set out in section 67(3) of the

Adoption and Children Act 2002, is that after adoption the child is regarded for all purposes as the legal child of the adopter or adopters, and has no other legal parents. This can have consequences for the child's interests in property, where those interests depend on the legal relationship between the child and the former legal parent or parents.

- A.28 Section 69(4) of the Adoption and Children Act 2002 contains exceptions to this rule. In particular, interests which are already vested in possession in the adopted child are not affected by adoption: for example, an inheritance by will which was left in such a way as to give the child an unconditional entitlement. Subsection (1) of clause 4 adds a further category of interest which is not affected by adoption, by adding a new paragraph (c) to section 69(4). It applies where that adoption occurs on or after the date on which the section comes into force (subsection (2)).
- A.29 New paragraph (c) applies where, immediately before adoption, the child's then legal parent has already died and some or all of that parent's estate is held on trusts – whether created by will or arising on intestacy – by which the child has a contingent interest which is not in remainder. Its effect is that the child's interest in that parent's estate is not affected by the change in the child's legal parentage on adoption.
- A.30 A contingency is a condition which must be fulfilled before the beneficiary has an absolute entitlement. For example, if a child's parent died intestate with no other surviving family members, under the intestacy rules the whole estate would pass to the child contingent on reaching the age of 18. Such an interest is preserved by new paragraph (c) despite the adoption. Paragraph (c) does not apply if the contingent interest is in remainder to another beneficiary's interest. Contingent interests in remainder no longer arise under the intestacy rules, but may be created by will. For example, a parent makes a will leaving his or her estate in trust so that X has a right to the income for life and subject to that the child will take the estate if he or she reaches 25. The child's interest is contingent, but (if X is living at the date of the adoption) it is in remainder to X's interest and therefore not preserved by new paragraph (c).

#### **Clause 5: presumption of prior death**

- A.31 Section 18(2) of the Family Law Reform Act 1987 operates where a person dies intestate and his or her parents were not married to each other at the time of his or her birth. The rule does not apply to those whose parents later married or whose birth would otherwise be regarded in law as legitimate or legitimated (see Family Law Reform Act 1987, s 1; Legitimacy Act 1976, ss 2, 2A, 3, 4 and 10). In such cases, the administrators may presume that the intestate was predeceased by his or her father and also by any other person to whom the intestate was related only through his or her father. In the case of a person who has a female parent other than his or her mother by virtue of section 43 of the Human Fertilisation and Embryology Act 2008, the administrators may proceed on the basis that the deceased was not survived by the second female parent or any person related only through the second female parent (see the Family Law Reform Act 1987, s 18(2A)). The presumption operates "unless the contrary is shown".

- A.32 Clause 5 amends section 18 of the 1987 Act by adding a new subsection (2ZA), which disapplies section 18(2) in certain circumstances. Those circumstances are that a person is recorded as the intestate's father, or as a parent (other than the mother) of the intestate in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or in a record of births included in an index kept under section 30(1) of that Act. The reference to "a parent (other than the mother)" addresses the possibility of registration as a second female parent of a child in the circumstances set out in section 43 of the Human Fertilisation and Embryology Act 2008. The reference to indexes kept under section 30(1) of the 1953 Act is to cater for the fact that births may be recorded in registers which are not kept under the 1953 Act but are included in a searchable index kept under the Act. Examples include the marine register, the air register book of births and deaths, the hovercraft register book of births and deaths, and the service departments registers.

**Clause 6: amendments of Inheritance (Provision for Family and Dependents) Act 1975**

- A.33 Clause 6 and schedule 2 make amendments to the Inheritance (Provision for Family and Dependents) Act 1975. These are explained in the commentary on schedule 2 below.

**Clause 7: date when representation is first taken out**

- A.34 A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases. Clause 7 and schedule 3 amend section 23 of the 1975 Act and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a deceased person was first taken out. These amendments are explained in the commentary on schedule 3 below.

**Clause 8: power to apply income for maintenance**

- A.35 Clause 8 amends the statutory power of trustees to use the income of trust funds for the maintenance, education or benefit of a beneficiary who is under 18 and has an interest in those funds. For example, if a trust fund invested in shares is held for the benefit of such of W's young children X, Y and Z as reach the age of 18, in equal shares, the trustees may use the power under section 31 to pay a maximum of one-third of the income (the dividends on the shares) for the maintenance, education or benefit of each child.
- A.36 Subsection (2) concerns the assessment of the amount of income to be used under the power. Section 31(1)(i) of the Trustee Act 1925 states that the power is exercisable in respect of the trust property in which the beneficiary in question has an interest, and that it extends to "the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable". Subsection (1) amends that condition to make it clear that the amount of the income used is a matter for the trustees' discretion, and is not limited by an objective standard of reasonableness. The general law on trustees' decision-making applies; the decision must be taken in good faith after due consideration of the circumstances.

A.37 Subsection (3) removes the proviso to section 31(1) of the Trustee Act 1925. This proviso lists factors to which the trustees are to have regard in exercising their discretion – the beneficiary’s age and requirements, and the circumstances generally – and imposes a specific restriction on the amount of income which may be paid out. That restriction applies where the trustees have notice that the income of one or more other trust funds is also applicable for the maintenance, education or benefit of the beneficiary in question, and limits the payments to a proportionate part of the income, so far as practicable (unless the whole of the income is paid out, or the court directs otherwise). The removal of this proviso leaves trustees free to pay out as much of the income as they think fit; the requirement of the general law to consider all relevant factors before exercising their discretion is unaffected.

A.38 These amendments apply in accordance with clause 10.

**Clause 9: power of advancement**

A.39 Clause 9 amends section 32 of the Trustee Act 1925, which confers on trustees the power to make payments of capital for the advancement or benefit of a beneficiary who has a requisite type of entitlement to the capital of the trust fund. This is known as the statutory power of advancement. For instance, the trustees of the trust described at paragraph A.35 above could use this power to make payments of capital for the benefit of X, Y and Z. Each of those beneficiaries is contingently entitled to one-third of the capital of the trust fund on reaching the age of 18 (see paragraph A.30 above). The trustees could sell some of the shares which represent the capital of the trust fund and use this statutory power to make payments from the proceeds for the benefit of X, Y and Z; for example, to pay for an educational trip.

A.40 The terms of section 32 limit this power of advancement to a maximum of one-half of the beneficiary’s prospective share. Subsection (3)(b) of clause 9 removes that one-half limit, so that the power enables trustees in the exercise of their discretion to pay out up to the whole of the capital of a beneficiary’s prospective share for his or her advancement or benefit.

A.41 Subsection (2) amends the statutory power of advancement to make it clear that the trustees are able not only to pay out cash in the exercise of the statutory power of advancement but also to transfer or apply property. For example, the trustees might wish to create another trust in favour of one of the beneficiaries and his or her family; they could transfer the shares direct to the trustees of the new trust. This clarifies and extends the effect of existing case law (*Re Collard’s Will Trusts* [1961] Ch 293).

A.42 Subsection (3)(a) amends section 32(1)(a) of the Trustee Act 1925 to make it clear that advancements under the power, whether in money or other property, may not exceed the beneficiary’s prospective share of the capital of the trust fund. Subsection (6) inserts new section 32(1A), which sets out the requirement to add together all cash and non-cash advancements to find the total amount advanced for this purpose.

A.43 Subsection (4) carries this reform through to section 32(1)(b) of the Trustee Act 1925 to require that any non-cash assets advanced under the power are brought into account, in the same way as a cash payment, as part of the beneficiary’s

share if and when he or she becomes absolutely entitled to it. Paragraph (c), which makes the exercise of the power of advancement subject to the consent of other trust beneficiaries in certain circumstances, is also amended to apply equally to cash and non-cash advancements: subsection (5).

A.44 These amendments apply in accordance with clause 10.

**Clause 10: applications of sections 8 and 9**

A.45 Clause 10 sets out the circumstances in which clauses 8 and 9 apply to trusts.

A.46 Subsection (2) concerns the amendments made by clause 9 to include within the statutory power of advancement under section 32 of the Trustee Act 1925 the ability to transfer or apply property other than money. These amendments apply to all trusts whenever established. For example, these reforms to the power would apply in relation to a trust which arose on the intestacy of a person who died before clause 9 came into force.

A.47 Under subsections (1) and (3), the removal of the one-half restriction on the statutory power of advancement pursuant to subsection (3)(b) of clause 9, and the reforms to the power in section 31 of the Trustee Act 1925 made by clause 8, apply as set out in subsections (4) and (5).

A.48 Under subsection (4), those reforms apply in relation to all interests under trusts established after the coming into force of these provisions. For example, if a trust arises under the intestacy rules on a death which occurs after the provisions have come into force, these statutory powers will apply as reformed to all interests under the trust. The same applies if the trust is created by will in these circumstances (regardless of when the will was executed), subject to amendment or exclusion of the power by the terms of the will (section 69(2) of the Trustee Act 1925). Similarly, and again subject to contrary intention expressed in the trust instrument, all interests under a trust created in lifetime after the provisions come into force will have the benefit of the powers as reformed.

A.49 Subsection (5) extends the application of the reforms to trust interests established by the exercise, after the reforms come into force, of any power held in relation to a trust, whether that power was conferred by the terms of the trust or by statute. This is relevant where the trust in question is already in existence before the reforms. For example, the trustees of such an existing trust may hold a power of appointment, enabling them to create new interests in favour of one or more of a class of beneficiaries. If that power is exercised after these provisions come into force to create new trust interests (without establishing a separate settlement, in which case subsection (4) would apply), the interests so created have the benefit of the statutory powers as amended. For example, suppose that the trustees exercised the power of appointment so as to give A an entitlement to a tenth of the trust fund contingent on reaching 25. They would then be able to use the statutory power of advancement in section 32 of the Trustee Act 1925 as amended by clause 9(3)(b) to apply anything up to the whole of that one-tenth share for A's advancement or benefit, by virtue of that contingent interest.

### **Clause 11: minor and consequential amendments**

- A.50 Clause 11 and schedule 4 make minor and consequential amendments. These are explained in the commentary on schedule 4 below.

### **Schedule 1: determination of the fixed net sum**

- A.51 Clause 2 of and schedule 1 to the draft Bill make provision for determining the fixed net sum (often referred to as a “statutory legacy”) to which a surviving spouse or civil partner is entitled under section 46 of the Administration of Estates Act 1925. Under current law, the Lord Chancellor has power to set the level of statutory legacy but is under no obligation to do so or to keep the level under review (see section 1 of the Family Provision Act 1966). Clause 2 inserts a new schedule 1A into the Administration of Estates Act 1925. The text of that new schedule is set out at schedule 1 to the draft Bill. References to paragraph numbers below are to the paragraph numbers of the new schedule 1A.
- A.52 Paragraph 2 provides that the amount of the fixed net sum after the coming into force of the schedule is to be the same as it was immediately before.
- A.53 Paragraph 3(1) retains the Lord Chancellor’s power to set the level of the fixed net sum by order. Paragraph 3(2) provides that any such order relates only to deaths occurring after the coming into force of the order. Paragraph 3(3) provides that the current level of the fixed net sum (see paragraph 2) will be superseded once the first order is made under the power in paragraph 3(1).
- A.54 Paragraph 3(4) provides that a statutory instrument containing an order made under paragraph 3(1) is subject to annulment by either House of Parliament. This means that the new amount of the fixed net sum passes into law unless there is a resolution in either the House of Commons or House of Lords annulling it. Paragraph 3(5) disapplies this negative resolution procedure in the case where the Lord Chancellor determines the amount of the fixed net sum without using the index-linking mechanism set out in paragraph 6 of the new schedule, or amends paragraph 6 under the powers set out in paragraph 7. In those cases, each House of Parliament must positively approve the statutory instrument containing the order (see paragraph 5(3)).
- A.55 Paragraph 4 requires the Lord Chancellor to make an order setting the fixed net sum at least every five years. The first such order must be made within five years of the date on which the new schedule comes into force. Subsequent orders must be made within five years of the previous order.
- A.56 Paragraph 5 provides that, unless the Lord Chancellor otherwise determines, the fixed net sum specified in each order should be the amount given by following the procedure set out in paragraph 6. That procedure “index-links” the fixed net sum by increasing it by an amount that reflects any increase in the retail prices index measure of economic inflation. The procedure operates on an “upwards only” basis; if there has been no inflation or there has been deflation in the economy, the amount of the fixed net sum does not change under the paragraph 6 procedure.
- A.57 Paragraphs 5(2) to 5(4) apply where the Lord Chancellor does decide to set the fixed net sum without using the index-linking mechanism at paragraph 6.

- A.58 Paragraph 5(2)(a) provides that the Lord Chancellor may set the fixed net sum at any amount, including an amount equal to or lower than the pre-existing figure.
- A.59 Paragraph 5(2)(b) requires the Lord Chancellor to prepare a report stating the reason why it has been decided to set the fixed net sum without using the index-linking mechanism at paragraph 6. This report must be laid before Parliament before or at the same time as the instrument containing the draft order is laid before Parliament (paragraph 5(4)).
- A.60 Paragraph 5(3) requires any order setting the fixed net sum at a level other than that obtained by the index-linking procedure to be positively approved by a resolution in each House of Parliament (see paragraph 3(5)).
- A.61 Paragraph 6 sets out the procedure to be used to determine the amount of the fixed net sum in any case covered by paragraph 5(1) (that is, in every case except where the Lord Chancellor has decided otherwise). This involves ascertaining the retail prices index for the current month (that is, the most recent month for which a figure is available when the Lord Chancellor makes the statutory instrument setting the new level of the fixed net sum: see paragraph 6(4)). This figure is compared with the equivalent figure for the base month (that is, the month that was the “current month” for the previous order or, in the case of the first order made under the schedule, the month in which the schedule came into force: see paragraph 6(4)).
- A.62 If the retail prices index for the current month is higher than that for the base month, then the new amount of the fixed net sum is calculated by increasing the existing figure by the same percentage as the percentage increase in the two retail prices index figures (paragraph 6(1)), and then rounding the resulting figure up to the next multiple of £1,000 (paragraph 6(2)).
- A.63 If the retail prices index for the current month is the same or lower than that for the base month, then the amount specified in the order is the same as the existing amount (unless the Lord Chancellor otherwise determines). The fixed net sum therefore remains the same.
- A.64 Paragraph 6(4) defines the terms “base month”, “current month” and “retail prices index” for the purposes of paragraph 6.
- A.65 Paragraph 7 gives the Lord Chancellor power to amend paragraph 6 by specifying an index other than the retail prices index and to make any other amendments to paragraph 6 that are required as a result of that change. This power is intended to recognise that the retail prices index may cease to be the most appropriate index to use (for example, it may no longer be published, or the Government may decide that the consumer prices index or some other index is a more appropriate measure of inflation for these purposes). Paragraph 7 enables paragraph 6 to be amended by order without the need for further primary legislation. A statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

## **Schedule 2: amendments of Inheritance (Provision for Family and Dependants) Act 1975**

- A.66 Clause 6 and schedule 2 make amendments to the Inheritance (Provision for Family and Dependants) Act 1975.
- A.67 Under the current law, a family provision claim cannot be made unless the deceased died domiciled in England and Wales. Paragraph 2 widens this precondition so that an application can alternatively be made if the deceased's estate includes, or is treated as including, certain property to which the domestic succession law of England and Wales applies.
- A.68 Paragraph 2 replaces the current reference in section 1(1) of the 1975 Act with new subsection (4). The existing condition that the deceased died domiciled in England and Wales is reproduced at paragraph (a). Paragraphs (b) to (e) refer to the new applicable law condition.
- A.69 The applicable law condition is set out at new subsection (5). This condition is satisfied, in relation to a particular asset, if a court in England and Wales would find that the domestic succession law of England and Wales applies to that asset. For example, if the deceased was not domiciled in this jurisdiction but owned land here, the applicable law condition is satisfied: land in this jurisdiction is governed by the domestic succession law of this country. In some cases, the domestic succession law of England and Wales applies not because the deceased was domiciled or owned land in this jurisdiction but because the rules of private international law lead to its application. For example, if the rules of private international law applied by the English court indicate that the law of another country applies, but a court in that country would apply the domestic succession law of England and Wales, then the applicable law condition is satisfied.
- A.70 Paragraphs (b) to (e) of subsection (4) all concern the applicable law condition; if it is satisfied in relation to the money or other property specified in one of these paragraphs, then an application for financial provision under the 1975 Act may be made. The court's power to make an order in relation to such an application is not limited to that money or other property. Paragraph (b) concerns assets included in the deceased's estate; for example, land owned in his or her sole name. Paragraph (c) relates to assets caught by section 8 of the 1975 Act: sums of money which are the subject of a nomination made by the deceased in accordance with an enactment in favour of a person, and money or other property comprised in a *donatio mortis causa* ("deathbed gift") made by the deceased. For example, if X, knowing that her death is imminent, makes a gift of land in England on the basis that it will only take effect on her death, the applicable law condition is satisfied in relation to X's estate.
- A.71 Paragraph (d) concerns property which was co-owned by the deceased and one or more others as joint tenants: where property is jointly owned in this way, on the death of one co-owner the property passes automatically to the surviving co-owner or co-owners. Despite this inheritance by survivorship, if the property itself satisfies the applicable law condition, paragraph (d) applies.
- A.72 Paragraph (e) refers to cases within section 10(2)(a) and (b) of the 1975 Act, where the court is satisfied that a gift, or a transfer at an undervalue, was made by the deceased within six years of the death with the intention to defeat an

application for financial provision under the 1975 Act. Whether the deceased had such an intention is assessed in accordance with section 12(1) of the 1975 Act; the question is whether the court is satisfied that, on the balance of probabilities, the intention of the deceased in making the gift or transfer was to prevent an order from being made or reduce the amount of provision which could be ordered. If such a gift or transfer was made, and the property subject to it satisfies the applicable law condition, then paragraph (e) applies to the deceased's estate and an application under the 1975 Act can be made. This does not affect the court's decision as to whether any order should in fact be made under section 10 of the 1975 Act, requiring the person to whom the gift or transfer was made to provide money or property from which financial provision can be made.

- A.73 Paragraph 3 of schedule 2 amends section 1(1) of the 1975 Act, which sets out the categories of relatives and dependants who can apply under the Act. These categories include, at section 1(1)(d), any person who was treated by the deceased as a "child of the family" in relation to a marriage or civil partnership to which the deceased was at any time a party. Paragraph 3 extends that category of applicant by amending section 1(1)(d) to include any person who was treated by the deceased as a child of the family, not in relation to a marriage or civil partnership, but in relation to any other family in which the deceased had a parental role (sub-paragraph (a)). The requirement that the deceased stood in a parental role in that family clarifies that the relationship between the deceased and the applicant needs to have been akin to that between a parent and a child. Other family members who form part of the deceased's family, but in relation to whom the deceased did not stand in a parental role, are not brought within the scope of the category.
- A.74 Paragraph (3)(b) inserts new subsection (2A) in section 1 of the 1975 Act. This provision establishes that an applicant can be treated as a child of the family (otherwise than in relation to the deceased's marriage or civil partnership) even if that family only existed in the relationship between the deceased and the applicant. Thus, a "single parent family" is included within the scope of section 1(1)(d) as amended.
- A.75 Paragraph 4 of schedule 2 amends section 1(3) of the 1975 Act. That subsection qualifies the interpretation of section 1(1)(e), which permits a person to make an application under the Act if immediately before the death of the deceased he or she was being maintained, either wholly or partly, by the deceased. Such applicants are usually described as "dependants" and section 1(3) as currently worded provides that a person shall be treated as being maintained by the deceased if the deceased was, otherwise than for full valuable consideration, making a substantial contribution towards that person's reasonable needs.
- A.76 The words "otherwise than for full valuable consideration" have been interpreted as requiring the court to balance the contribution made by the deceased towards the needs of the applicant against any benefits flowing the other way (from the applicant to the deceased). This is the case even if the applicant and the deceased were living in an interdependent domestic relationship with no commercial aspect. If the "balance sheet" shows that the applicant contributed more to the deceased than vice versa, then the applicant cannot be said to have been maintained by the deceased and cannot apply under section 1(1)(e).

- A.77 The new wording of section 1(3) still requires the deceased to have been making a substantial contribution towards the reasonable needs of the applicant but the words “otherwise than for full valuable consideration” are omitted. Instead, there is a narrower exception for any contribution that was made for full valuable consideration pursuant to an arrangement of a commercial nature. This will mean that contributions made between people in a domestic context should not be weighed against one another for these purposes.
- A.78 Paragraph 5 of schedule 2 amends section 2 of the 1975 Act, which governs the court’s powers to make orders if it is satisfied that the deceased’s will or the intestacy rules (or a combination of both) did not make reasonable provision for the applicant.
- A.79 Paragraph 5(2) inserts a new section 2(1)(h) into the 1975 Act, giving the court an express power to vary, for the applicant’s benefit, the trusts on which the deceased’s estate is held (whether these are trusts arising on intestacy or under a will or both). This provides a more direct way of achieving a result that under the current law may require the creation of a new trust or trusts to replace the existing trust or trusts under which the estate is held.
- A.80 Paragraph 5(3) concerns the assessment of the net estate of the deceased. Under section 2 of the 1975 Act, the court may make various orders in relation to the net estate, such as the payment of a lump sum to the applicant. The net estate is defined at section 25(1) of the 1975 Act, which specifies the assets which are included and provides for the deduction of funeral, testamentary and administration expenses, debts and liabilities, including inheritance tax payable out of the estate. It is possible, under section 19(1) of the 1975 Act, for the calculation of such liabilities to be affected by the making of an order under section 2; for example, because changes in the way in which the estate is distributed affect the calculation of tax.
- A.81 Paragraph 5(3) adds a new subsection (3A) to section 2 of the 1975 Act, confirming that in making an order under section 2 the court may assess the net estate on the assumption that the order has already been made. The court may therefore make an order which extends to the whole of the net estate after the liabilities have been recalculated in accordance with that order.
- A.82 Paragraph 6 of schedule 2 amends section 3 of the 1975 Act, which sets out matters to which the court is to have regard when exercising its order-making powers under section 2 of the Act. Where the applicant was the spouse or civil partner of the deceased, one of the matters to which the court is to have regard is the award that a court would have made in proceedings for “ancillary relief” had the marriage or civil partnership ended in divorce or dissolution: section 3(2) of the 1975 Act. The words added by paragraph 6(2) make clear, so as to avoid any uncertainty, that this exercise is not to be regarded as setting either a lower limit or an upper limit on the level of any award under the 1975 Act.
- A.83 Paragraph 6(3) of schedule 2 concerns matters to which the court is to have regard where the application is made by virtue of section 1(1)(d) of the 1975 Act, on the basis that the deceased treated the applicant as a child of the family. It amends paragraphs (a) and (b) of section 3(3) of the 1975 Act to clarify the matters which are there set out, in order to avoid any uncertainty consequent on

the amendments also made to section 3(4) of the 1975 Act, discussed immediately below.

- A.84 Paragraph (a) of section 3(3), as amended, directs the court to have regard to whether the deceased maintained the applicant; and if so, to the duration of that maintenance, the basis on which it was provided, and how much maintenance the deceased contributed. New paragraph (aa) of section 3(3) requires the court also to have regard to whether the deceased assumed responsibility for the applicant's maintenance, and if so, to what extent. A necessary consequential amendment is made to paragraph (b) of section 3(3), which concerns the requirement for the court to have regard to whether – if the deceased maintained or assumed responsibility for maintaining the applicant – the deceased did so in the knowledge that the applicant was not his or her own child.
- A.85 Paragraph 6(4) of schedule 2 amends section 3(4) of the 1975 Act, which sets out matters to which the court is to have regard in relation to an application brought by a dependant: that is, on the basis that the applicant was maintained by the deceased, under section 1(1)(e) of the 1975 Act. The amendments separate two issues to which the court is to have regard. Under section 3(4)(a), the court must consider the duration of the maintenance provided, the basis on which it was provided, and the extent of the contribution thereby made by the deceased. Under section 3(4)(b), the court must also have regard to whether the deceased assumed responsibility for the applicant's maintenance (beyond the actual provision of maintenance) and if so, the extent of that assumption of responsibility. The requirement in the case law as it currently stands that such an assumption of responsibility must be present in order for an applicant to qualify under section 1(1)(e) of the 1975 Act is thereby removed. An applicant qualifies to apply under the 1975 Act as a dependant if he or she satisfies the terms of section 1(1)(e), read with section 1(3); see paragraphs A.75 to A.77 above.
- A.86 Paragraph 7 of schedule 2 amends section 4 of the 1975 Act to expressly permit an application to be made under the Act before a grant of representation has been made in respect of the estate. A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases.
- A.87 Paragraph 8 of schedule 2 amends section 9 of the 1975 Act, which governs the way in which the court treats property which the deceased co-owned with others as a beneficial joint tenant immediately before his or her death. Under this form of co-ownership, the death of any one co-owner causes that co-owner's undivided share of the property to pass automatically to the other co-owners. It does not therefore form part of the deceased co-owner's estate. Section 9 permits the court to treat the deceased's severable share of any such property as part of the deceased's net estate to such extent as appears to the court to be just in all the circumstances of the case. Once included in the net estate for these purposes, the property can be the subject of an order under section 2 of the Act.
- A.88 Paragraph 8 amends section 9 of the 1975 Act in two ways. First, it omits the words "before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out". This permits the court to exercise the section 9 power even where the application had been made more than six months after a grant of representation was first

taken out (if the court has given permission for the application to be made; see section 4 of the 1975 Act). The second amendment replaces the words “at the value thereof immediately before his death” with the words “valued at such date as appears to the court to be appropriate”. The current wording was considered by the Court of Appeal in *Dingmar v Dingmar* [2006] EWCA Civ 92 and its meaning was found to be unclear. The amendment is intended to make clear that the court has discretion to choose the most appropriate date at which to value the property in question, taking into account such factors as the increase or decrease in its value between the death of the deceased and the hearing of the claim and the reasons for any change in value, for example the effect of any improvements or neglect for which the surviving joint tenants are responsible.

### **Schedule 3: determination of date when representation is first taken out**

- A.89 Clause 7 and schedule 3 amend section 23 of the 1975 Act and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a deceased person was first taken out. These are section 31(9) of the Matrimonial Causes Act 1973, section 20(4) of the Administration of Justice Act 1982, paragraphs 7 and 11 of schedule 1 to the Children Act 1989, and paragraph 60 of schedule 5 to the Civil Partnership Act 2004.
- A.90 The significance of the determination of this date depends on the particular statutory context. An application for an order under section 2 of the 1975 Act, for example, must be made within six months of this date unless the court gives permission for a late application (see section 4 of the 1975 Act).
- A.91 Under section 23 (and the other statutory provisions amended by schedule 3) grants limited to settled land and to trust property are left out of account as are grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. There are a number of other types of grant which give the personal administrators certain powers (for example, to collect in the assets of the estate and protect them or to represent the estate in litigation) but do not permit any property in the estate to be distributed. There is uncertainty under the current law over whether the making of such a grant counts as the first taking out of representation for the purposes of section 23 (and by analogy for the various purposes in the other statutes which use the same wording). There is also uncertainty over the status for these purposes of a grant made outside the United Kingdom (that is, other than a grant made in England and Wales or in Scotland).
- A.92 Clause 7 and schedule 3 clarify this uncertainty by substituting in each case new provisions in place of the existing provisions. These maintain the current position by leaving out of account grants limited to settled land and to trust property as well as grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. A grant limited to trust property is issued where the deceased held legal title to property as trustee for others and there is no other estate for which a grant is required. A limited grant is needed to permit the personal representatives to deal with the trust property but it does not permit the distribution of any of the deceased’s own property. Similarly, succession to settled land is governed by special rules and is not available for distribution by the personal representatives

as part of the deceased's estate. The new provisions expressly exclude from consideration any other grant which also does not permit any of the estate to be distributed. The new provisions also require grants made outside the United Kingdom to be left out of account. For these purposes, a grant which is "resealed" in the United Kingdom under the Colonial Probates Act 1892 is treated as a grant made in the United Kingdom. Any such grant is taken to have been made on the date it was sealed and not the date on which the original grant was taken out.

#### **Schedule 4: minor and consequential amendments**

- A.93 Paragraph 1 of schedule 4 makes minor and consequential amendments to the Administration of Estates Act 1925.
- A.94 Paragraph 1(2) omits section 46(3) of the 1925 Act, which operates in limited circumstances where an intestate and his or her younger spouse or civil partner died in circumstances rendering it uncertain which one survived the other. Ordinarily, section 184 of the Law of Property Act 1925 would deem the younger spouse or civil partner to have survived the intestate but section 46(3) provides that section 46 is to have effect as if the younger spouse or civil partner had not survived the intestate. In other words, for these limited purposes only, section 46(3) disapplies the deemed survival under section 184 of the Law of Property Act 1925. But section 46(2A) of the Administration of Estates Act 1925 (inserted by the Law Reform (Succession) Act 1995) has rendered section 46(3) redundant. Section 46(2A) operates where the intestate's spouse or civil partner survives the intestate but dies within 28 days of the intestate's death. In those circumstances, the spouse or civil partner is deemed not to have survived. Therefore, in the circumstances contemplated by section 46(3), the younger spouse or civil partner is deemed by section 46(2A) not to have survived for the purposes of the intestacy rules. Section 46(3) therefore no longer serves a purpose and can be repealed.
- A.95 Paragraph 1(3) omits section 47A of the Administration of Estates Act 1925, which gives a surviving spouse or civil partner a right to redeem a life interest arising on intestacy. The reforms enacted under clause 1 of the draft Bill mean that no further life interests will be created under the intestacy rules. Section 47A will therefore become redundant for deaths after the coming into force of clause 1 and can be repealed.
- A.96 Paragraph 1(4) omits section 48(2)(b) of the Administration of Estates Act 1925, which gives personal representatives power to raise capital to enable the purchase or redemption of the surviving spouse or civil partner's life interest by borrowing against the security of the rest of the estate. The reforms enacted under clause 1 of the draft Bill mean that no further life interests will arise under the intestacy rules. Section 48(2)(b) will therefore become redundant for deaths after the coming into force of clause 1. Paragraph 1(4) therefore omits section 48(2)(b) and amends the rest of section 48 accordingly.
- A.97 Paragraph 1(5) omits section 49(4) of the Administration of Estates Act 1925, which clarifies the way in which the word "property" is used in section 47A and is rendered unnecessary by the repeal of section 47A.
- A.98 Paragraph 2 of schedule 4 makes minor and consequential amendments to the Intestates' Estates Act 1952, schedule 2 of which governs the operation of a

surviving spouse or civil partner's right to appropriate his or her former matrimonial or civil partnership home.

- A.99 Paragraph 2(2) omits paragraph 1(4) of schedule 2 to the 1952 Act. That paragraph deals with the treatment of a spouse or civil partner's life interest created under the intestacy rules and is rendered redundant by clause 1 of the draft Bill, which has the effect that no such interests will be created in future.
- A.100 Paragraph 2(3) substitutes new wording for paragraph 3(3) of schedule 2 to the 1952 Act to take account of the repeal of section 47A of the Administration of Estates Act 1925.
- A.101 Paragraph 3 of schedule 4 amends the Administration of Justice Act 1977 by omitting section 28(1), which inserted subsection (1A) into section 46 of the Administration of Estates Act 1925 (giving the Lord Chancellor power to set the interest rate that accrues on the fixed net sum to which a surviving spouse or civil partner is entitled). Clause 1(3) of the draft Bill substitutes a new subsection (1A) into section 46 of the 1925 Act, rendering section 28(1) of the 1977 Act redundant.
- A.102 Paragraph 4 of schedule 4 amends the Inheritance Tax Act 1984 to take account of the repeal of section 47A of the Administration of Estates Act 1925.

# **APPENDIX B DRAFT INHERITANCE (COHABITANTS) BILL AND EXPLANATORY NOTES**

The draft Bill begins on the following page. Turn to page 232 for the Explanatory Notes.

# Inheritance (Cohabitants) Bill

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- 1 Succession to estate on intestacy
- 2 Intestacy: rights as respects the home
- 3 Application for financial provision from deceased's estate
- 4 Minor and consequential amendments
- 5 Short title, commencement, application and extent

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Schedule – Minor and consequential amendments

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TO

Make provision about the property of deceased persons who are survived by a cohabitant.

**B**E IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 Succession to estate on intestacy**

- (1) Section 46 of the Administration of Estates Act 1925 (succession to real and personal estate on intestacy) is amended as follows.
- (2) In subsection (1)(i) (cases where the intestate leaves a spouse or civil partner)—
  - (a) in the words before the Table, for “or civil partner,” substitute “, civil partner or qualifying cohabitant,” and
  - (b) in the Table—
    - (i) for “the surviving spouse or civil partner”, where first occurring, substitute “the surviving spouse, civil partner or qualifying cohabitant (“the survivor”)”, and
    - (ii) for each subsequent occurrence of “the surviving spouse or civil partner” substitute “the survivor”.
- (3) In subsections (1)(ii) to (v), (2A) and (4) (which make further provision about the rights of spouses, civil partners and others on intestacy) for “or civil partner” (in each place) substitute “, civil partner or qualifying cohabitant”.
- (4) After subsection (2A) insert—

“(2B) Where an intestate and the intestate’s spouse or civil partner have died in circumstances rendering it uncertain which of them survived the other, this section has effect as if the intestate did not leave any qualifying cohabitant.”
- (5) After subsection (4) insert—

“(5) A person is a qualifying cohabitant in relation to an intestate only if—

- (a) the intestate was neither married nor in a civil partnership immediately before death, and
  - (b) the first or second condition is met in relation to the person.
- (6) The first condition is that during the whole of the period of five years ending immediately before the intestate's death the person was living as the intestate's spouse or civil partner and in the same household as the intestate.
- (7) The second condition is that –
- (a) the person is the other parent of a child of the intestate born on or before the date of the intestate's death,
  - (b) at that date the child is living in the same household as the person, and
  - (c) during the whole of the period of two years ending immediately before the intestate's death the person was living as the intestate's spouse or civil partner and in the same household as the intestate."

## **2 Intestacy: rights as respects the home**

- (1) Schedule 2 to the Intestates' Estates Act 1952 (rights of surviving spouse or civil partner as respects the matrimonial or civil partnership home) is amended as follows.
- (2) Before paragraph 1 there is inserted –
- “A1 (1) This Schedule applies where a person dies intestate and leaves a spouse, civil partner or qualifying cohabitant.
- (2) In this Schedule –
- “qualifying cohabitant” has the meaning given by section 46(5) of the principal Act;
  - “the survivor” means the surviving spouse, civil partner or qualifying cohabitant.”
- (3) In paragraphs 1 to 6, for “the surviving spouse or civil partner” (in each place) there is substituted “the survivor”.
- (4) In paragraph 6(2) for “a surviving spouse or civil partner” there is substituted “a surviving spouse, civil partner or qualifying cohabitant”.
- (5) For the title there is substituted –
- “RIGHTS OF SURVIVING SPOUSE, CIVIL PARTNER OR QUALIFYING COHABITANT AS RESPECTS THE HOME”.

## **3 Application for financial provision from deceased's estate**

In section 1 of the Inheritance (Provision for Family and Dependants) Act 1975 for subsections (1A) and (1B) (certain persons entitled to apply for provision) there is substituted –

- “(1A) This subsection applies to any person who during the whole of the period of two years ending immediately before the date when the deceased died was living –
- (a) as the deceased's husband or wife or civil partner, and

(b) in the same household as the deceased.

(1B) This subsection applies to a person who is the other parent of a child of the deceased if at the date when the deceased died the person was living—

(a) as the deceased’s husband or wife or civil partner, and

(b) in the same household as the deceased.

(1C) The reference in subsection (1B) to a child includes—

(a) a child born alive who died before the deceased, and

(b) a child en ventre sa mere at the date of the deceased’s death (whether or not the child is subsequently born alive).

(But this does not affect the generality of the definition of “child” in section 25(1)).”

#### **4 Minor and consequential amendments**

The Schedule to this Act, which makes minor amendments and amendments consequential on other provisions of this Act, has effect.

#### **5 Short title, commencement, application and extent**

- (1) This Act may be cited as the Inheritance (Cohabitants) Act 2011.
- (2) This section comes into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may appoint different days for different purposes.
- (4) This Act applies only in relation to deaths occurring after the coming into force of this Act (apart from this section).
- (5) This Act extends to England and Wales only.

## SCHEDULE

Section 4(1)

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### *Administration of Estates Act 1925*

- 1 (1) The Administration of Estates Act 1925 is amended as follows.
  - (2) In section 48(2)(a) (powers of personal representative in respect of interests of surviving spouse or civil partner) for “or civil partner” substitute “, civil partner or qualifying cohabitant”.
  - (3) In section 55(1) (definitions), after paragraph (iv) there is inserted –
    - “(iva) “Qualifying cohabitant” has the meaning given by section 46(5):”.

#### *Intestates’ Estates Act 1952*

- 2 In the Intestates’ Estates Act 1952, for section 5 (rights of surviving spouse or civil partner as respects the matrimonial home) substitute –
  - “5 Rights of surviving spouse, civil partner or qualifying cohabitant as respects the home**

The Second Schedule to this Act (rights of surviving spouse, civil partner or qualifying cohabitant as respects the home) has effect.”

#### *Law Reform (Succession) Act 1995*

- 3 In consequence of the amendment made by section 3, omit section 2(3) of the Law Reform (Succession) Act 1995.

#### *Civil Partnership Act 2004*

- 4 (1) Schedule 4 to the Civil Partnership Act 2004 is amended as follows.
  - (2) In consequence of the amendments made by section 2 and paragraph 2 of this Schedule, omit paragraph 13.
  - (3) In consequence of the amendment made by section 3, omit paragraph 15(5).

# DRAFT INHERITANCE (COHABITANTS) BILL

## EXPLANATORY NOTES

### INTRODUCTION

- B.1 The draft Inheritance (Cohabitants) Bill implements the recommendations made by the Law Commission in Part 8 of its Report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331.
- B.2 The recommendations in Parts 2 to 7 of the Report would be put into effect by the draft Inheritance and Trustees' Powers Bill, for which separate explanatory notes have been prepared. These can be found at Appendix B of the Report. The Inheritance (Cohabitants) Bill has been drafted on the basis of the law as it would be after enactment of the Inheritance and Trustees' Powers Bill.
- B.3 The Law Commission's work was concerned with two areas of the law of succession, which governs the distribution of a person's assets when that person dies: the intestacy rules and the family provision legislation. The intestacy rules determine the distribution on a person's death of any of his or her property that is not governed by a valid will. The family provision legislation permits certain family members and dependants to apply to the court to vary the distribution of a deceased's person's property, whether or not there is a will.
- B.4 In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191. Following responses to this consultation, the Law Commission considered some aspects of trustees' powers more widely and a Supplementary Consultation Paper was published in May 2011.

### THE DRAFT INHERITANCE (COHABITANTS) BILL

- B.5 The draft Inheritance (Cohabitants) Bill amends the law of succession in England and Wales to give greater legal rights to the survivors of certain cohabiting relationships when the other partner dies while the relationship is continuing.
- B.6 Under the current law, where two people live together in the same household as if they are one another's spouse or civil partner, their relationship has only limited legal recognition when one of them dies. If there is no will, the deceased's assets will be distributed according to the intestacy rules. These currently make no provision for anyone other than the spouse or civil partner of the deceased and certain blood relatives (children and other descendants, parents, grandparents, siblings and their descendants, aunts and uncles and their descendants). If the couple's relationship had continued for at least two years (ending immediately before the death), the survivor may apply to court under the Inheritance (Provision for Family and Dependents) Act 1975 for an order changing this distribution (or the distribution under the deceased's will). But the court will only make an order if the will or the application of the intestacy rules (or a combination of both) did not make reasonable financial provision for the applicant's maintenance.
- B.7 The Law Commission considered the position of cohabitants as part of its review of the law of intestacy and family provision claims on death. It recommended that

certain “qualifying cohabitants” should be included in the list of those who benefit by default under the intestacy rules when a person dies without a will and was not married or in a civil partnership at the date of death. The Law Commission also recommended that the other parent of a child of a deceased person should be able to claim family provision if that person and the deceased were cohabiting at the date of death of the deceased, without having to show that the relationship had been ongoing for two or more years.

- B.8 The draft Inheritance (Cohabitants) Bill implements the Law Commission’s recommendations by amending existing legislation, principally the Administration of Estates Act 1925 and the Inheritance (Provision for Family and Dependents) Act 1975. It also makes consequential amendments to the Intestates’ Estates Act 1952, the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2004.

## **COMMENTARY ON CLAUSES**

### **Clause 1: succession to estate on intestacy**

- B.9 The property of a person who has died, after payment of all debts and administrative expenses, is known as the residuary estate. The distribution of the residuary estate of a person who has died intestate is governed by section 46 of the Administration of Estates Act 1925.
- B.10 Clause 1 of the draft Inheritance (Cohabitants) Bill amends section 46 of the Administration of Estates Act 1925 to place a “qualifying cohabitant” in the same position as a spouse or civil partner of an intestate.
- B.11 Clause 1(2) amends the table at section 46(1)(i) of the 1925 Act (which describes what should happen if the intestate leaves a surviving spouse or civil partner) to include a qualifying cohabitant.
- B.12 Clause 1(3) makes equivalent amendments to subsections (1)(ii) to 1(v), (2A) and (4) of section 46. The amendment to section 46(2A) extends that “survivorship” provision (which currently applies to spouses and civil partners) to qualifying cohabitants. The effect is that a qualifying cohabitant who dies within 28 days of the intestate will be treated for these purposes as not having survived the intestate and will therefore not inherit under the intestacy rules.
- B.13 Clause 1(4) inserts a new subsection (2B) into section 46 of the Administration of Estates Act 1925. The new subsection applies where a person dies intestate with his or her spouse or civil partner in circumstances that make it impossible to know the order in which they died (for example, where they died together in an accident). In these relatively unusual circumstances the law applies a presumption that the younger spouse or civil partner survived the older spouse or civil partner (see section 184 of the Law of Property Act 1925). The result of applying this presumption would appear to be that the younger spouse was technically not married immediately before his or her death. This is because the deemed death of the older spouse left the younger spouse widowed, albeit for only a fictional moment before the younger spouse’s own death. It is therefore possible that a person with whom the younger spouse was cohabiting at the date of death might qualify as the younger spouse’s cohabitant (under the amendments at clause 1(5) of the draft Bill). The new section 46(2B) provides that section 46 is to apply in these circumstances as if the intestate did not leave

a qualifying cohabitant. This would eliminate the possibility of a cohabitant inheriting under the intestacy rules simply because of a legal presumption that the older spouse died first.

- B.14 Clause 1(5) adds three new subsections after subsection (4) of section 46 of the Administration of Estates Act 1925 to define the term “qualifying cohabitant”.
- B.15 The new section 46(5) states that a person is a qualifying cohabitant in relation to an intestate if the intestate was neither married nor in a civil partnership immediately before death *and* either one of two further conditions is met. The effect is that a person cannot qualify as a cohabitant for these purposes if the deceased died married or in a civil partnership. It also makes clear that the surviving spouse or civil partner of the deceased cannot also be a qualifying cohabitant.
- B.16 The new section 46(6) sets out one of two alternative conditions which must be satisfied for a person to qualify as a cohabitant for these purposes. In any particular case only one of these further conditions need be met (although both conditions may in fact be met). The condition at section 46(6) is that, during the whole of the period of five years ending immediately before the intestate’s death, the person was living as the intestate’s spouse or civil partner and in the same household as the intestate.
- B.17 The new section 46(7) sets out the alternative condition. This also requires the person to have been living as the intestate’s spouse or civil partner and in the same household as the intestate. But the required duration is the whole of the period of two years ending immediately before the intestate’s death. There are two further requirements to this condition. The person must be the other parent of a child of the intestate who was born on or before the date of the intestate’s death; and, at that date, the child must be living in the same household as that person and the intestate.

**Clause 2: intestacy: rights as respects the home**

- B.18 Clause 2 amends schedule 2 to the Intestates’ Estates Act 1952. That schedule has effect where an intestate’s estate includes an interest in the dwelling house in which the surviving spouse or civil partner was resident at the date of death, typically the couple’s family home. The schedule sets out the conditions under which the surviving spouse or civil partner can require the personal representatives (of whom the spouse or civil partner may be one) to “appropriate” any such interest in satisfaction of the surviving spouse’s entitlement. This means that, if the relevant conditions are met, the surviving spouse or civil partner can acquire the intestate’s interest in the family home by using the value of any inheritance from the estate and (if necessary) any additional funds. In practice, many couples own their homes as “joint tenants”, which means that the home passes automatically to the survivor on the death of either spouse, but schedule 2 of the 1952 Act offers some protection to the survivor where this is not the case. Clause 2 of the draft Bill makes the necessary amendments to schedule 2 to the 1952 Act so that references to a spouse or civil partner will in future include a qualifying cohabitant (within the meaning of that term given by the new section 46(5) of the Administration of Estates Act 1925).

**Clause 3: application for financial provision from deceased's estate**

- B.19 Clause 3 amends section 1 of the Inheritance (Provision for Family and Dependents) Act 1975 by substituting three new subsections (1A), (1B) and (1C) for the current subsections (1A) and (1B).
- B.20 The new subsection (1A) of section 1 brings together the existing subsections (1A) and (1B). It does not substantively change the current law: a person who was living in the same household as the deceased and as the deceased's husband or wife or civil partner for the whole of the period of two years ending immediately before the death of the deceased will continue to have standing to make an application under the 1975 Act for provision from the estate of the deceased.
- B.21 The new subsection (1B) of section 1 changes the substantive law by permitting a person who was the other parent of a child of the deceased to make a claim under the 1975 Act if, at the date of death of the deceased, he or she was living in the same household as the deceased and as the deceased's husband or wife or civil partner. The requirement for the cohabitation to have continued for at least two years ending immediately before the death is therefore removed for cohabitants who have had children together.
- B.22 The new subsection (1C) of section 1 defines the term "child" in the new subsection (1B) to include both a child *en ventre sa mere* (in the mother's womb) at the date of death of the deceased and a child who was born alive but who died before the deceased.

**Clause 4: minor and consequential amendments**

- B.23 Clause 4 and the schedule to the Bill make minor and consequential amendments and repeals to the Administration of Estates Act 1925, the Intestates' Estates Act 1952, the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2004. They do not include amendment of provisions that would be repealed by the draft Inheritance and Trustees' Powers Bill, because the Inheritance (Cohabitants) Bill has been drafted on the basis that the Inheritance and Trustees' Powers Bill is enacted first (see paragraph B.2 above).

## **APPENDIX C**

### **ADVISORY GROUP MEMBERS**

Miranda Allardice (Pump Court Chambers, Temple)

Roland D'Costa (District Probate Registry, Oxford)

Richard Frimston (Russell-Cooke LLP solicitors)

Henry Frydenson (Mishcon de Reya solicitors)

Professor Jonathan Herring (Exeter College, Oxford)

Professor Roger Kerridge (University of Bristol)

Alison Meek (Harcus Sinclair solicitors)

Trevor Milne-Day (Blake Laphorn solicitors)

Robin Paul (Withers LLP solicitors)

Penelope Reed QC (5 Stone Buildings, Lincoln's Inn)

# **APPENDIX D**

## **HM REVENUE & CUSTOMS' ANALYSIS OF NET ESTATES REPORTED FOR PROBATE**

### **INTRODUCTION**

- D.1 This Appendix sets out HM Revenue & Customs' analysis of net estates as reported for probate.

### **CALENDAR OF GRANTS DATA**

- D.2 Every week the Probate Service sends HM Revenue & Customs an electronic dataset containing details of grants issued in the previous week. The fields used for this analysis are:

- (1) date grant issued;
- (2) date of death;
- (3) indicator of duplicate grant;
- (4) net estate size;
- (5) grant type; and
- (6) date of birth (used to calculate age).

- D.3 The grant type field is used to determine whether an estate was testate or intestate. Annex A to this Appendix shows the classification rules, which were based on advice from the Law Commission who liaised with the Probate Service.

- D.4 The net estate reported for probate only includes elements of the estate for which probate is needed to transfer ownership. This means that it excludes a number of elements in the estate which need to be reported for inheritance tax purposes including:

- (1) joint property passing by survivorship;
- (2) settled property;
- (3) foreign assets; and
- (4) lifetime gifts made up to seven years before death.

### **SPECIFYING THE SET OF ESTATES FOR ANALYSIS**

- D.5 Consideration was given to what set of estates would be most appropriate to use to calculate statistical information for this project. In recent years there have been a large number of applications for grants related to claims for miners' compensation.

D.6 The miners' compensation scheme was set up in 1999 and claims in respect of miners who have died have to be supported by a grant of representation. New applications for grants for these cases tend to be for intestacies with low values for net estate, where death occurred several years ago.

D.7 The tables below show numbers of grants for testate and intestate estates since 1999, with the proportionate breakdown by time elapsed between the date of death and the date the grant was issued. They illustrate the following impacts:

- (1) grants for intestate estates increased dramatically, peaking in 2005/06 and 2006/07. It is clear that the increase comes predominantly from deaths more than five years before grant; and
- (2) little impact on testate estates, where there is likely to be a grant already.

**Table 1: Grants for intestacies, England and Wales, by period between death and grant**

Year <sup>1</sup>	Number	Lag between death and grant (years)							Total
		0-4	5-9	10-19	20-29	30-39	40-49	50-	
1999/00	52,306	96.30%	2.00%	1.21%	0.33%	0.10%	0.04%	0.03%	100.00%
2000/01	53,248	93.21%	2.61%	2.45%	1.30%	0.34%	0.04%	0.05%	100.00%
2001/02	56,121	86.67%	4.61%	5.06%	2.58%	0.92%	0.14%	0.02%	100.00%
2002/03	62,598	78.64%	6.29%	8.13%	4.51%	2.04%	0.36%	0.02%	100.00%
2003/04	65,007	72.70%	5.87%	10.36%	6.84%	3.46%	0.75%	0.02%	100.00%
2004/05	81,954	55.71%	7.84%	15.62%	11.96%	6.96%	1.89%	0.03%	100.00%
2005/06	89,595	51.43%	6.88%	15.66%	13.91%	8.97%	3.05%	0.09%	100.00%
2006/07	89,303	50.18%	6.44%	14.96%	13.98%	10.07%	4.07%	0.29%	100.00%
2007/08	64,810	65.40%	4.99%	10.34%	9.26%	6.65%	3.01%	0.35%	100.00%
2008/09 <sup>2</sup>	32,249	86.24%	2.99%	4.20%	3.10%	2.31%	1.01%	0.15%	100.00%

**Table 2: Grants for testate estates, England and Wales, by period between death and grant**

Year <sup>3</sup>	Number	Lag between death and grant (years)				Total
		0-4	5-9	10-19	20-	
1999/00	209,796	99.38%	0.41%	0.18%	0.03%	100.00%
2000/01	204,802	99.33%	0.44%	0.19%	0.04%	100.00%
2001/02	205,080	99.15%	0.55%	0.26%	0.04%	100.00%
2002/03	208,381	98.83%	0.75%	0.36%	0.06%	100.00%
2003/04	209,054	98.81%	0.69%	0.42%	0.08%	100.00%
2004/05	204,026	98.13%	1.01%	0.70%	0.16%	100.00%
2005/06	212,776	97.99%	0.94%	0.84%	0.24%	100.00%
2006/07	209,111	97.98%	0.91%	0.83%	0.28%	100.00%
2007/08	211,822	98.39%	0.76%	0.63%	0.22%	100.00%
2008/09 <sup>4</sup>	143,308	98.97%	0.58%	0.35%	0.10%	100.00%

<sup>1</sup> Weekly download received 1 April to 31 March for year shown.

<sup>2</sup> April 2008 to November 2008 inclusive.

<sup>3</sup> Weekly download received 1 April to 31 March for year shown.

<sup>4</sup> April 2008 to November 2008 inclusive.

- D.8 Even in the most recent data there appear to be some miners' compensation cases. These will bring down average and median values for net estates. It would be desirable to remove such estates for the current analysis because the cases should disappear quickly in the period for which any new intestacy rules would apply.
- D.9 There is no simple way to identify the cases; for this analysis we have removed all estates where death occurred more than five years before the issue of the grant. We have also removed a small number of cases where a duplicate grant was or may have been issued or where the grant type raises some doubt over whether a will existed or not. Annex A to this Appendix shows the line taken for each grant type.
- D.10 The latest 12 month period for which we have complete data is November 2007 to October 2008.
- D.11 The set of grants analysed is therefore: all grants issued between 1 November 2007 and 31 October 2008 inclusive (271,150), but excluding:
- (1) duplicate grants and those where testate/intestate status was uncertain (3,173); and
  - (2) other grants where date of death more than 5 years before date of grant (13,607).

This gives a core set of 254,370 grants to analyse.

- D.12 Annex A to this Appendix shows a breakdown of these figures by grant type.

## RESULTS – KEY STATISTICS BROKEN DOWN BY ESTATE SIZE AND AGE

D.13 The following table shows the distribution of estate size.

<b>Table 3: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)</b>						
<u>Net estate range (£)</u>	<u>Frequency (number of estates)</u>			<u>Cumulative percentage of total</u>		
	<u>Testate</u>	<u>Intestate</u>	<u>All</u>	<u>Testate</u>	<u>Intestate</u>	<u>All</u>
0k-25k	22,105	13,499	35,604	10%	32%	14%
25k-50k	19,864	6,423	26,287	20%	47%	24%
50k-75k	13,741	3,795	17,536	26%	56%	31%
75k-100k	13,923	3,397	17,320	33%	64%	38%
100k-125k	14,699	3,068	17,767	40%	72%	45%
125k-150k	15,058	2,249	17,307	47%	77%	52%
150k-175k	15,128	1,899	17,027	54%	82%	59%
175k-200k	13,807	1,548	15,355	60%	85%	65%
200k-225k	12,098	1,227	13,325	66%	88%	70%
225k-250k	10,773	906	11,679	71%	90%	74%
250k-275k	9,777	818	10,595	76%	92%	79%
275k-300k	9,367	734	10,101	80%	94%	83%
300k-325k	5,754	370	6,124	83%	95%	85%
325k-350k	4,563	304	4,867	85%	96%	87%
350k-375k	3,884	265	4,149	87%	96%	88%
375k-400k	3,229	224	3,453	88%	97%	90%
400k-425k	2,747	157	2,904	90%	97%	91%
425k-450k	2,300	132	2,432	91%	98%	92%
450k-475k	1,961	134	2,095	92%	98%	93%
475k-500k	1,746	95	1,841	93%	98%	93%
500k-1m	11,652	634	12,286	98%	100%	98%
1m-2m	3,036	142	3,178	99%	100%	100%
2m-	1,098	40	1,138	100%	100%	100%
Total	212,310	42,060	254,370			

D.14 Medians and averages for the same group of estates are shown in the following table, broken down by age and testate/intestate status:

**Table 4: Medians and averages (£)** (excluding duplicates and grants where death more than 5 years before grant)

<u>Age Range</u>	<u>Testate</u>		<u>Intestate</u>		<u>All</u>	
	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>
Missing	116,000	189,000	48,000	109,000	95,000	167,000
0-17	*	*	5,000	104,000	*	*
18-34	99,000	157,000	36,000	76,000	46,000	89,000
35-49	128,000	240,000	54,000	95,000	80,000	153,000
50-59	145,000	246,000	59,000	104,000	100,000	186,000
60-69	146,000	236,000	59,000	106,000	118,000	200,000
70-79	156,000	224,000	66,000	112,000	141,000	205,000
80-89	166,000	228,000	55,000	108,000	156,000	215,000
90-	164,000	230,000	37,000	93,000	158,000	221,000
All	160,000	228,000	56,000	105,000	143,000	208,000

\* No figures provided because of doubt over reliability of age variable in testate cases where age under 18.

- D.15 It can be seen that average values are much higher than median values. This is because the distribution in each subgroup includes a small proportion of very large cases.
- D.16 While median values of both testate and intestate estates increase with age, the effect is much stronger for testate estates.
- D.17 For comparison, Annex B to this Appendix shows versions of Tables 3 and 4 if grants where death occurred more than five years before a grant are included.
- D.18 Table 5 (on the following page) breaks down statistics on numbers of grants and proportion with wills by age at death, and illustrates how the proportion of estates with wills increases very strongly with both age and net estate size. The distribution by age at death and median age at death is shown in Table 6 (also on the following page).<sup>5</sup>

<sup>5</sup> If grants made more than five years after death are included the median values for age at death change only slightly (all: 81, testate: 83, and intestate: 72).

<b>Table 5: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)</b>										
Breakdown by age group (age at death)										
Age group:	All	Missing	0-17	18-34	35-49	50-59	60-69	70-79	80-89	90-
<u>Cases</u>										
All	254,370	2,246	133	1,313	6,558	12,756	27,716	56,061	98,380	49,207
Testate	212,310	1,647	10	224	2,603	7,349	20,111	46,579	87,793	45,994
Intestate	42,060	599	123	1,089	3,955	5,407	7,605	9,482	10,587	3,213
<u>Proportion with wills</u>										
<u>Net estate value</u>										
All	83%	73%	#	17%	40%	58%	73%	83%	89%	93%
0k-50k	68%	65%	#	8%	23%	38%	56%	69%	76%	84%
50k-125k	81%	69%	#	22%	39%	53%	69%	81%	88%	94%
125k-250k	90%	80%	#	32%	52%	69%	81%	88%	93%	96%
250k-450k	93%	87%	#	39%	64%	78%	87%	92%	96%	98%
450k-1m	95%	84%	#	*	72%	86%	91%	94%	96%	99%
1m-	96%	87%	#	*	81%	89%	93%	96%	97%	99%

# No statistic calculated due to doubt over age field for minors with wills.

\* Too few cases to calculate a meaningful statistic.

<b>Table 6: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)</b>										
Distribution of age at death										
Cases	Cases where age known	Proportionate split by age								
		0-17	18-34	35-49	50-59	60-69	70-79	80-89	90-	Median age
All	254,370	0%	1%	3%	5%	11%	22%	39%	20%	82
Testate	212,310	0%	0%	1%	3%	10%	22%	42%	22%	83
Intestate	42,060	0%	3%	10%	13%	18%	23%	26%	8%	73

**ANNEX A: CLASSIFICATION AS TESTATE/INTESTATE**

D.19 Estates were classified as testate or intestate or for exclusion from the analysis according to grant type as shown in the following table:

<u>Grant Type</u>	<u>Classification</u>	<u>Total</u>	<u>Duplicate/ unclear</u>	<u>5+ years after death</u>	<u>Remainder analysed</u>
Ad colligenda bona	Exclude	166	166	0	0
Administration	Intestate	46,660	0	10,244	36,416
Administration (attorney)	Intestate	4,728	0	557	4,171
Administration (Duchy of Cornwall)	Intestate	4	0	1	3
Administration (Duchy of Lancaster)	Intestate	114	0	7	107
Administration (incapacity)	Intestate	393	0	186	207
Administration (minority)	Intestate	639	0	7	632
Administration (save & except settled land)	Intestate	1	0	1	0
Administration (settled land)	Exclude	10	10	0	0
Administration (Treasury Solicitor)	Intestate	429	0	18	411
Administration de bonis non	Exclude	2,122	2,122	0	0
Administration pending suit	Exclude	12	12	0	0
Administration use/benefit	Intestate	71	0	16	55
Admon / will	Testate	6,785	0	619	6,166
Admon / will (attorney)	Testate	6,925	0	158	6,767
Admon / will (Duchy of Cornwall)	Testate	0	0	0	0
Admon / will (Duchy of Lancaster)	Testate	0	0	0	0
Admon / will (incapacity)	Testate	334	0	27	307
Admon / will (minority)	Testate	23	0	1	22
Admon / will (save & except settled land)	Testate	1	0	1	0
Admon / will (Treasury Solicitor)	Testate	9	0	1	8
Admon / will de bonis non	Exclude	647	647	0	0
Admon / will use/benefit	Testate	116	0	7	109
Colonial reseal (admon / will)	Testate	38	0	6	32
Colonial reseal (admon)	Intestate	75	0	17	58
Colonial reseal (probate)	Testate	439	0	26	413
Double probate	Exclude	216	216	0	0
Probate	Testate	200,187	0	1,707	198,480
Probate (save & except settled land)	Testate	6	0	0	6
<b>Total</b>		<b>271,150</b>	<b>3,173</b>	<b>13,607</b>	<b>254,370</b>

D.20 The reason for excluding some grant types from the analysis is as follows:

Ad colligenda bona	May be obtained before will proved – testate status unclear
Administration de bonis non	Always follows a previous grant, so duplicate
Admon / will de bonis non	
Double probate	
Administration pending suit	May be a dispute over will – testate status unclear
Administration (settled land)	Excluded to ensure no duplicates of save & except grants

**ANNEX B: ANALYSIS INCLUDING GRANTS MORE THAN 5 YEARS AFTER DEATH**

D.21 Tables 3A and 4A are the equivalents of Tables 3 and 4 including the grants made more than 5 years after death.

<b>Table 3A: Grants of representation issued, England and Wales, between November 2007 and October 2008</b> (excluding duplicates and grants where death more than 5 years before grant)						
<u>Net estate range (£)</u>	<u>Frequency - number of estates</u>			<u>Cumulative percentage of total</u>		
	<u>Testate</u>	<u>Intestate</u>	<u>All</u>	<u>Testate</u>	<u>Intestate</u>	<u>All</u>
0k-25k	23,467	23,564	47,031	11%	44%	18%
25k-50k	20,129	6,769	26,898	20%	57%	28%
50k-75k	13,976	4,018	17,994	27%	65%	34%
75k-100k	14,101	3,538	17,639	33%	71%	41%
100k-125k	14,831	3,178	18,009	40%	77%	48%
125k-150k	15,143	2,314	17,457	47%	82%	54%
150k-175k	15,202	1,927	17,129	54%	85%	61%
175k-200k	13,868	1,576	15,444	61%	88%	66%
200k-225k	12,151	1,251	13,402	66%	91%	71%
225k-250k	10,793	911	11,704	72%	92%	76%
250k-275k	9,787	820	10,607	76%	94%	80%
275k-300k	9,380	736	10,116	80%	95%	83%
300k-325k	5,765	373	6,138	83%	96%	86%
325k-350k	4,567	307	4,874	85%	97%	87%
350k-375k	3,891	265	4,156	87%	97%	89%
375k-400k	3,232	226	3,458	89%	97%	90%
400k-425k	2,750	158	2,908	90%	98%	91%
425k-450k	2,306	133	2,439	91%	98%	92%
450k-475k	1,965	134	2,099	92%	98%	93%
475k-500k	1,749	96	1,845	93%	98%	94%
500k-1m	11,670	637	12,307	98%	100%	98%
1m-2m	3,040	142	3,182	99%	100%	100%
2m-	1,100	41	1,141	100%	100%	100%
Total	214,863	53,114	267,977			

**Table 4A: Medians and averages (£) (excluding duplicates and grants where death more than 5 years before grant)**

<u>Age Range</u>	<u>Testate</u>		<u>Intestate</u>		<u>All</u>	
	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>
Missing	109,000	182,000	32,000	90,000	78,000	154,000
0-17	*	*	5,000	102,000	*	*
18-34	95,000	154,000	34,000	73,000	43,000	87,000
35-49	127,000	239,000	47,000	89,000	74,000	146,000
50-59	142,000	243,000	42,000	88,000	87,000	171,000
60-69	143,000	232,000	29,000	79,000	100,000	180,000
70-79	154,000	220,000	28,000	82,000	127,000	190,000
80-89	165,000	226,000	34,000	91,000	151,000	209,000
90-	164,000	229,000	30,000	84,000	156,000	219,000
All	159,000	226,000	33,000	85,000	134,000	198,000

\* No figures provided because of doubt over reliability of age variable in testate cases where age under 18.

# APPENDIX E

## INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

An Act to make fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person; and for matters connected therewith.

### PART 1

#### 1. Application for financial provision from deceased's estate.

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons: –

- (a) the spouse or civil partner of the deceased;
- (b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;
- (ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) below applies;
- (c) a child of the deceased;
- (d) any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership;
- (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(1A) This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living –

- (a) in the same household as the deceased, and
- (b) as the husband or wife of the deceased.

(1B) This subsection applies to a person if for the whole of the period of two years ending immediately before the date when the deceased died the person was living –

- (a) in the same household as the deceased, and
- (b) as the civil partner of the deceased.

(2) In this Act “reasonable financial provision” –

- (a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(aa) in the case of an application made by virtue of subsection (1)(a) above by the civil partner of the deceased (except where, at the date of death, a separation order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 was in force in relation to the civil partnership and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a civil partner to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

## **2. Powers of court to make orders.**

(1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders: –

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;

(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;

(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;

(f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage;

(g) an order varying any settlement made –

(i) during the subsistence of a civil partnership formed by the deceased,  
or

(ii) in anticipation of the formation of a civil partnership by the deceased,

on the civil partners (including such a settlement made by will), the variation being for the benefit of the surviving civil partner, or any child of both the civil partners, or any person who was treated by the deceased as a child of the family in relation to that civil partnership.

(2) An order under subsection (1)(a) above providing for the making out of the net estate of the deceased of periodical payments may provide for –

(a) payments of such amount as may be specified in the order,

(b) payments equal to the whole of the income of the net estate or of such portion thereof as may be so specified,

(c) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section,

or may provide for the amount of the payments or any of them to be determined in any other way the court thinks fit.

(3) Where an order under subsection (1)(a) above provides for the making of payments of an amount specified in the order, the order may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those payments; but no larger part of the net estate shall be so set aside or appropriated than is sufficient, at the date of the order, to produce by the income thereof the amount required for the making of those payments.

(4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this subsection –

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;

(b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;

(c) confer on the trustees of any property which is the subject of an order under this section such powers as appear to the court to be necessary or expedient.

### **3. Matters to which court is to have regard in exercising powers under s. 2.**

(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say –

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

(2) This subsection applies, without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or (b) of this Act.

The court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the age of the applicant and the duration of the marriage or civil partnership; the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;

In the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

In the case of an application by the civil partner of the deceased, the court shall also, unless at the date of the death a separation order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the civil partnership, instead of being terminated by death, had been terminated by a dissolution order.

(2A) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(ba) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to –

- (a) the age of the applicant and the length of the period during which the applicant lived as the husband or wife or civil partner of the deceased and in the same household as the deceased;
- (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard –

- (a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;
- (b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;
- (c) to the liability of any other person to maintain the applicant.

(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility.

(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.

#### **4. Time-limit for applications.**

An application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

#### **5. Interim orders.**

(1) Where on an application for an order under section 2 of this Act it appears to the court –

- (a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and
- (b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant;

the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to the provisions of this Act, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under the said section 2 or decides not to exercise its powers under that section.

(2) Subsections (2), (3) and (4) of section 2 of this Act shall apply in relation to an order under this section as they apply in relation to an order under that section.

(3) In determining what order, if any, should be made under this section the court shall, so far as the urgency of the case admits, have regard to the same matters as those to which the court is required to have regard under section 3 of this Act.

(4) An order made under section 2 of this Act may provide that any sum paid to the applicant by virtue of this section shall be treated to such an extent and in such manner as may be provided by that order as having been paid on account of any payment provided for by that order.

#### **6. Variation, discharge etc. of orders for periodical payments.**

(1) Subject to the provisions of this Act, where the court has made an order under section 2(1)(a) of this Act (in this section referred to as “the original order”) for the making of periodical payments to any person (in this section referred to as “the original recipient”), the court, on an application under this section, shall have power by order to vary or discharge the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended.

(2) Without prejudice to the generality of subsection (1) above, an order made on an application for the variation of the original order may –

- (a) provide for the making out of any relevant property of such periodical payments and for such term as may be specified in the order to any person who has applied, or would but for section 4 of this Act be entitled to apply, for an order under section 2 of this Act (whether or not, in the case of any application, an order was made in favour of the applicant);
- (b) provide for the payment out of any relevant property of a lump sum of such amount as may be so specified to the original recipient or to any such person as is mentioned in paragraph (a) above;

(c) provide for the transfer of the relevant property, or such part thereof as may be so specified, to the original recipient or to any such person as is so mentioned.

(3) Where the original order provides that any periodical payments payable thereunder to the original recipient are to cease on the occurrence of an event specified in the order (other than the formation of a subsequent marriage or civil partnership by a former spouse or former civil partner) or on the expiration of a period so specified, then, if, before the end of the period of six months from the date of the occurrence of that event or of the expiration of that period, an application is made for an order under this section, the court shall have power to make any order which it would have had power to make if the application had been made before the date (whether in favour of the original recipient or any such person as is mentioned in subsection (2)(a) above and whether having effect from that date or from such later date as the court may specify).

(4) Any reference in this section to the original order shall include a reference to an order made under this section and any reference in this section to the original recipient shall include a reference to any person to whom periodical payments are required to be made by virtue of an order under this section.

(5) An application under this section may be made by any of the following persons, that is to say –

- (a) any person who by virtue of section 1(1) of this Act has applied, or would but for section 4 of this Act be entitled to apply, for an order under section 2 of this Act,
- (b) the personal representatives of the deceased,
- (c) the trustees of any relevant property, and
- (d) any beneficiary of the estate of the deceased.

(6) An order under this section may only affect –

- (a) property the income of which is at the date of the order applicable wholly or in part for the making of periodical payments to any person who has applied for an order under this Act, or
- (b) in the case of an application under subsection (3) above in respect of payments which have ceased to be payable on the occurrence of an event or the expiration of a period, property the income of which was so applicable immediately before the occurrence of that event or the expiration of that period, as the case may be,

and any such property as is mentioned in paragraph (a) or (b) above is in subsections (2) and (5) above referred to as “relevant property”.

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.

(8) Where the court makes an order under this section, it may give such consequential directions as it thinks necessary or expedient having regard to the provisions of the order.

(9) No such order as is mentioned in sections 2(1)(d), (e) or (f), 9, 10 or 11 of this Act shall be made on an application under this section.

(10) For the avoidance of doubt it is hereby declared that, in relation to an order which provides for the making of periodical payments which are to cease on the occurrence of an event specified in the order (other than the formation of a subsequent marriage or civil partnership by a former spouse or former civil partner) or on the expiration of a period so specified, the power to vary an order includes power to provide for the making of periodical payments after the expiration that period or the occurrence of that event.

## **7. Payment of lump sums by instalments.**

(1) An order under section 2(1)(b) or 6(2)(b) of this Act for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

(2) Where an order is made by virtue of subsection (1) above, the court shall have power, on an application made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable, to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.

## **PART 2**

### **8. Property treated as part of "net estate".**

(1) Where a deceased person has in accordance with the provisions of any enactment nominated any person to receive any sum of money or other property on his death and that nomination is in force at the time of his death, that sum of money, after deducting therefrom any inheritance tax payable in respect thereof, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any inheritance tax so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property to the person named in the nomination in accordance with the directions given in the nomination.

(2) Where any sum of money or other property is received by any person as a donatio mortis causa made by a deceased person, that sum of money, after deducting therefrom any inheritance tax payable thereon, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any inheritance tax so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that donatio mortis causa.

(3) The amount of inheritance tax to be deducted for the purposes of this section shall not exceed the amount of that tax which has been borne by the person nominated by the deceased or, as the case may be, the person who has received a sum of money or other property as a donatio mortis causa.

### **9. Property held on a joint tenancy.**

(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased.

(2) In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of an order under subsection (1) above, the court shall have regard to any inheritance tax payable in respect of that severable share.

(3) Where an order is made under subsection (1) above, the provisions of this section shall not render any person liable for anything done by him before the order was made.

(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.

## **10. Dispositions intended to defeat applications for financial provision.**

(1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below.

(2) Where on an application under subsection (1) above the court is satisfied –

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any inheritance tax borne by the donee in respect of that payment.

(4) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any inheritance tax borne by the donee in respect of the transfer of that property by the deceased.

(5) Where an application (in this subsection referred to as “the original application”) is made for an order under subsection (2) above in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 2 of this Act the court is satisfied –

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition other than the disposition which is the subject of the original application, and

(b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) above if the original application had been made in respect of that other disposition and the court had been satisfied as to the matters set out in paragraphs (a), (b) and (c) of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)(b) to the donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.

(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(7) In this section “disposition” does not include –

- (a) any provision in a will, any such nomination as is mentioned in section 8(1) of this Act or any donatio mortis causa, or
- (b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise.

(8) The provisions of this section do not apply to any disposition made before the commencement of this Act.

### **11. Contracts to leave property by will.**

(1) Where an application is made to a court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under this section.

(2) Where on an application under subsection (1) above the court is satisfied –

- (a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and
- (b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and
- (c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person, and
- (d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may make any one or more of the following orders, that is to say –

- (i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;
- (ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything in subsection (2) above, the court may exercise its powers thereunder in relation to any contract made by the deceased only to the extent that the court considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court shall have regard to the value of property at the date of the hearing.

(4) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(5) Where an order has been made under subsection (2) above in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under section 12(3) of this Act and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) The provisions of this section do not apply to a contract made before the commencement of this Act.

## **12. Provisions supplementary to ss. 10 and 11.**

(1) Where the exercise of any of the powers conferred by section 10 or 11 of this Act is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Act, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where an application is made under section 11 of this Act with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in subsection (1) above, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision under this Act.

(3) Where the court makes an order under section 10 or 11 of this Act it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

(4) Any power conferred on the court by the said section 10 or 11 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and

(a) any reference in section 10(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee, and

(b) any reference in section 10(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee;

but the court shall not have power under the said section 10 or 11 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having distributed any such property before he has notice of the making of an application under the said section 10 or 11 on the ground that he ought to have taken into account the possibility that such an application would be made.

### **13. Provisions as to trustees in relation to ss. 10 and 11.**

(1) Where an application is made for –

- (a) an order under section 10 of this Act in respect of a disposition made by the deceased to any person as a trustee, or
- (b) an order under section 11 of this Act in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under the said section 10 or 11 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 10, to any provision regarding the deduction of inheritance tax) namely, that the amount of any sum of money or the value of any property ordered to be provided –

(i) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee;

(ii) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of the transfer of property (other than a sum of money) in accordance with a contract, shall not exceed the aggregate of the value at the date of the order of so much of that property as is at that date in the hands of the trustee and the value at that date of any property which represents the first-mentioned property or is derived therefrom and is at that date in the hands of the trustee.

(2) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made.

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in the said section 10 or 11 to the donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) above to a trustee shall be construed in the same way.

### **14. Provision as to cases where no financial relief was granted in divorce proceedings etc.**

(1) Where, within twelve months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and –

- (a) an application for a financial provision order under section 23 of the Matrimonial Causes Act 1973 or a property adjustment order under section 24 of that Act has not been made by the other party to that marriage, or
- (b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,

then, if an application for an order under section 2 of this Act is made by that other party, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

**14A. Provision as to cases where no financial relief was granted in proceedings for the dissolution etc. of a civil partnership**

(1) Subsection (2) below applies where –

- (a) a dissolution order, nullity order, separation order or presumption of death order has been made under Chapter 2 of Part 2 of the Civil Partnership Act 2004 in relation to a civil partnership,
- (b) one of the civil partners dies within twelve months from the date on which the order is made, and
- (c) either –
  - (i) an application for a financial provision order under Part 1 of Schedule 5 to that Act or a property adjustment order under Part 2 of that Schedule has not been made by the other civil partner, or
  - (ii) such an application has been made but the proceedings on the application have not been determined at the time of the death of the deceased.

(2) If an application for an order under section 2 of this Act is made by the surviving civil partner, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat the surviving civil partner as if the order mentioned in subsection (1)(a) above had not been made.

(3) This section shall not apply in relation to a separation order unless at the date of the death of the deceased the separation order was in force and the separation was continuing.

**15. Restriction imposed in divorce proceedings etc. on application under this Act.**

(1) On the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act.

In this subsection “the court” means the High Court or, where a county court has jurisdiction by virtue of Part V of the Matrimonial and Family Proceedings Act 1984, a county court.

(2) In the case of a decree of divorce or nullity of marriage an order may be made under subsection (1) above before or after the decree is made absolute, but if it is made before the decree is made absolute it shall not take effect unless the decree is made absolute.

(3) Where an order made under subsection (1) above on the grant of a decree of divorce or nullity of marriage has come into force with respect to a party to a marriage, then, on the death of the other party to that marriage, the court shall not entertain any application for an order under section 2 of this Act made by the first-mentioned party.

(4) Where an order made under subsection (1) above on the grant of a decree of judicial separation has come into force with respect to any party to a marriage, then, if the other party to that marriage dies while the decree is in force and the separation is continuing, the court shall not entertain any application for an order under section 2 of this Act made by the first-mentioned party.

**15ZA. Restriction imposed in proceedings for the dissolution etc. of a civil partnership on application under this Act**

(1) On making a dissolution order, nullity order, separation order or presumption of death order under Chapter 2 of Part 2 of the Civil Partnership Act 2004, or at any time after making such an order, the court, if it considers it just to do so, may, on the application of either of the civil partners, order that the other civil partner shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act.

(2) In subsection (1) above “the court” means the High Court or, where a county court has jurisdiction by virtue of Part 5 of the Matrimonial and Family Proceedings Act 1984, a county court.

(3) In the case of a dissolution order, nullity order or presumption of death order (“the main order”) an order may be made under subsection (1) above before (as well as after) the main order is made final, but if made before the main order is made final it shall not take effect unless the main order is made final.

(4) Where an order under subsection (1) above made in connection with a dissolution order, nullity order or presumption of death order has come into force with respect to a civil partner, then, on the death of the other civil partner, the court shall not entertain any application for an order under section 2 of this Act made by the surviving civil partner.

(5) Where an order under subsection (1) above made in connection with a separation order has come into force with respect to a civil partner, then, if the other civil partner dies while the separation order is in force and the separation is continuing, the court shall not entertain any application for an order under section 2 of this Act made by the surviving civil partner.

**15A. Restriction imposed in proceedings under Matrimonial and Family Proceedings Act 1984 on application under this Act.**

(1) On making an order under section 17 of the Matrimonial and Family Proceedings Act 1984 (orders for financial provision and property adjustment following overseas divorces, etc.) the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act.

In this subsection “the court” means the High Court or, where a county court has jurisdiction by virtue of Part V of the Matrimonial and Family Proceedings Act 1984, a county court.

(2) Where an order under subsection (1) above has been made with respect to a party to a marriage which has been dissolved or annulled, then, on the death of the other party to that marriage, the court shall not entertain an application under section 2 of this Act made by the first-mentioned party.

(3) Where an order under subsection (1) above has been made with respect to a party to a marriage the parties to which have been legally separated, then, if the other party to the marriage dies while the legal separation is in force, the court shall not entertain an application under section 2 of this Act made by the first-mentioned party.

**15B. Restriction imposed in proceedings under Schedule 7 to the Civil Partnership Act 2004 on application under this Act**

(1) On making an order under paragraph 9 of Schedule 7 to the Civil Partnership Act 2004 (orders for financial provision, property adjustment and pension-sharing following overseas dissolution etc. of civil partnership) the court, if it considers it just to do so, may, on the application of either of the civil partners, order that the other civil partner shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act.

(2) In subsection (1) above “the court” means the High Court or, where a county court has jurisdiction by virtue of Part 5 of the Matrimonial and Family Proceedings Act 1984, a county court.

(3) Where an order under subsection (1) above has been made with respect to one of the civil partners in a case where a civil partnership has been dissolved or annulled, then, on the death of the other civil partner, the court shall not entertain an application under section 2 of this Act made by the surviving civil partner.

(4) Where an order under subsection (1) above has been made with respect to one of the civil partners in a case where civil partners have been legally separated, then, if the other civil partner dies while the legal separation is in force, the court shall not entertain an application under section 2 of this Act made by the surviving civil partner.

**16. Variation and discharge of secured periodical payments orders made under Matrimonial Causes Act 1973.**

(1) Where an application for an order under section 2 of this Act is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order made under the Matrimonial Causes Act 1973 or Schedule 5 to the Civil Partnership Act 2004, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or discharge that periodical payments order or to revive the operation of any provision thereof which has been suspended under section 31 of that Act of 1973 or Part 11 of that Schedule 2 .

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 2 or section 5 of this Act and any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order.

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

**17. Variation and revocation of maintenance agreements.**

(1) Where an application for an order under section 2 of this Act is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or revoke that agreement.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 2 or section 5 of this Act and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made.

(3) If a maintenance agreement is varied by the court under this section the like consequences shall ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration.

(4) In this section "maintenance agreement", in relation to a deceased person, means any agreement made, whether in writing or not and whether before or after the commencement of this Act, by the deceased with any person with whom he formed a marriage or civil partnership, being an agreement which contained provisions governing the rights and liabilities towards one another when living separately of the parties to that marriage or of the civil partners (whether or not the marriage or civil partnership has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage or civil partnership.

**18. Availability of court's powers under this Act in applications under ss. 31 and 36 of the Matrimonial Causes Act 1973.**

(1) Where –

(a) a person against whom a secured periodical payments order was made under the Matrimonial Causes Act 1973 has died and an application is made under section 31(6) of that Act for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended, or

(b) a party to a maintenance agreement within the meaning of section 34 of that Act has died, the agreement being one which provides for the continuation of payments thereunder after the death of one of the parties, and an application is made under section 36(1) of that Act for the alteration of the agreement under section 35 thereof,

the court shall have power to direct that the application made under the said section 31(6) or 36(1) shall be deemed to have been accompanied by an application for an order under section 2 of this Act.

(2) Where the court gives a direction under subsection (1) above it shall have power, in the proceedings on the application under the said section 31(6) or 36(1), to make any order which the court would have had power to make under the provisions of this Act if the application under the said section 31(6) or 36(1), as the case may be, had been made jointly with an application for an order under the said section 2; and the court shall have power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under this Act in the case of an application for an order under section 2.

(3) Where an order made under section 15(1) of this Act is in force with respect to a party to a marriage, the court shall not give a direction under subsection (1) above with respect to any application made under the said section 31(6) or 36(1) by that party on the death of the other party.

**18A. Availability of court's powers under this Act in applications under paragraphs 60 and 73 of Schedule 5 to the Civil Partnership Act 2004**

(1) Where –

(a) a person against whom a secured periodical payments order was made under Schedule 5 to the Civil Partnership Act 2004 has died and an application is made under paragraph 60 of that Schedule for the variation or discharge of that order or for the revival of the operation of any suspended provision of the order, or

(b) a party to a maintenance agreement within the meaning of Part 13 of that Schedule has died, the agreement being one which provides for the continuation of payments under the agreement after the death of one of the parties, and an application is made under paragraph 73 of that Schedule for the alteration of the agreement under paragraph 69 of that Schedule,

the court shall have power to direct that the application made under paragraph 60 or 73 of that Schedule shall be deemed to have been accompanied by an application for an order under section 2 of this Act.

(2) Where the court gives a direction under subsection (1) above it shall have power, in the proceedings on the application under paragraph 60 or 73 of that Schedule, to make any order which the court would have had power to make under the provisions of this Act if the application under that paragraph had been made jointly with an application for an order under section 2 of this Act; and the court shall have power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under this Act in the case of an application for an order under section 2.

(3) Where an order made under section 15ZA(1) of this Act is in force with respect to a civil partner, the court shall not give a direction under subsection (1) above with respect to any application made under paragraph 60 or 73 of that Schedule by that civil partner on the death of the other civil partner.

#### **19. Effect, duration and form of orders.**

(1) Where an order is made under section 2 of this Act then for all purposes, including the purposes of the enactments relating to inheritance tax, the will or the law relating to intestacy, or both the will and the law relating to intestacy, as the case may be, shall have effect and be deemed to have had effect as from the deceased's death subject to the provisions of the order.

(2) Any order made under section 2 or 5 of this Act in favour of –

(a) an applicant who was the former spouse or former civil partner of the deceased,

(b) an applicant who was the husband or wife of the deceased in a case where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing,

(c) an applicant who was the civil partner of the deceased in a case where, at the date of death, a separation order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 was in force in relation to their civil partnership and the separation was continuing,

shall, in so far as it provides for the making of periodical payments, cease to have effect on the formation by the applicant of a subsequent marriage or civil partnership, except in relation to any arrears due under the order on the date of the formation of the subsequent marriage or civil partnership.

(3) A copy of every order made under this Act other than an order made under section 15(1) or 15ZA(1) of this Act shall be sent to the principal registry of the Family Division for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate or letters of administration under which the estate is being administered.

## **20. Provisions as to personal representatives.**

(1) The provisions of this Act shall not render the personal representative of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that he ought to have taken into account the possibility –

(a) that the court might permit the making of an application for an order under section 2 of this Act after the end of that period, or

(b) that, where an order has been made under the said section 2, the court might exercise in relation thereto the powers conferred on it by section 6 of this Act,

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Act, any part of the estate so distributed.

(2) Where the personal representative of a deceased person pays any sum directed by an order under section 5 of this Act to be paid out of the deceased's net estate, he shall not be under any liability by reason of that estate not being sufficient to make the payment, unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient.

(3) Where a deceased person entered into a contract by which he agreed to leave by his will any sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, then, if the personal representative of the deceased has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision under this Act, he may, notwithstanding anything in that contract, postpone the payment of that sum of money or the transfer of that property until the expiration of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out or, if during that period an application is made for an order under section 2 of this Act, until the determination of the proceedings on that application.

## **21. [Repealed]**

## **22. [Repealed]**

## **23. Determination of date on which representation was first taken out.**

In considering for the purposes of this Act when representation with respect to the estate of a deceased person was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

## **24. Effect of this Act on s. 46(1)(vi) of Administration of Estates Act 1925.**

Section 46(1)(vi) of the Administration of Estates Act 1925, in so far as it provides for the devolution of property on the Crown, the Duchy of Lancaster or the Duke of Cornwall as bona vacantia, shall have effect subject to the provisions of this Act.

## **25. Interpretation.**

(1) In this Act –

“beneficiary”, in relation to the estate of a deceased person, means –

(a) a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate or would be so interested if an order had not been made under this Act, and

(b) a person who has received any sum of money or other property which by virtue of section 8(1) or 8(2) of this Act is treated as part of the net estate of the deceased or would have received that sum or other property if an order had not been made under this Act;

“child” includes an illegitimate child and a child en ventre sa mère at the death of the deceased;

“the court” means unless the context otherwise requires the High Court, or where a county court has jurisdiction by virtue of section 22 of this Act, a county court;

“former civil partner” means a person whose civil partnership with the deceased was during the lifetime of the deceased either –

- (a) dissolved or annulled by an order made under the law of any part of the British Islands, or
- (b) dissolved or annulled in any country or territory outside the British Islands by a dissolution or annulment which is entitled to be recognised as valid by the law of England and Wales;

“former spouse” means a person whose marriage with the deceased was during the lifetime of the deceased either –

- (a) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Islands, or
- (b) dissolved or annulled in any country or territory outside the British Islands by a divorce or annulment which is entitled to be recognised as valid by the law of England and Wales;

“net estate”, in relation to a deceased person, means: –

- (a) all property of which the deceased had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including any inheritance tax payable out of his estate on his death;
- (b) any property in respect of which the deceased held a general power of appointment (not being a power exercisable by will) which has not been exercised;
- (c) any sum of money or other property which is treated for the purposes of this Act as part of the net estate of the deceased by virtue of section 8(1) or (2) of this Act;
- (d) any property which is treated for the purposes of this Act as part of the net estate of the deceased by virtue of an order made under section 9 of the Act;
- (e) any sum of money or other property which is, by reason of a disposition or contract made by the deceased, ordered under section 10 or 11 of this Act to be provided for the purpose of the making of financial provision under this Act;

“property” includes any chose in action;

“reasonable financial provision” has the meaning assigned to it by section 1 of this Act;

“valuable consideration” does not include marriage or a promise of marriage;

“will” includes codicil.

(2) For the purposes of paragraph (a) of the definition of “net estate” in subsection (1) above a person who is not of full age and capacity shall be treated as having power to dispose by will of all property of which he would have had power to dispose by will if he had been of full age and capacity.

(3) Any reference in this Act to provision out of the net estate of a deceased person includes a reference to provision extending to the whole of that estate.

(4) For the purposes of this Act any reference to a spouse, wife or husband shall be treated as including a reference to a person who in good faith entered into a void marriage with the deceased unless either –

(a) the marriage of the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales, or

(b) that person has during the lifetime of the deceased formed a subsequent marriage or civil partnership.

(4A) For the purposes of this Act any reference to a civil partner shall be treated as including a reference to a person who in good faith formed a void civil partnership with the deceased unless either –

(a) the civil partnership between the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales, or

(b) that person has during the lifetime of the deceased formed a subsequent civil partnership or marriage.

(5) Any reference in this Act to the formation of, or to a person who has formed, a subsequent marriage or civil partnership includes (as the case may be) a reference to the formation of, or to a person who has formed, a marriage or civil partnership which is by law void or voidable.

(5A) The formation of a marriage or civil partnership shall be treated for the purposes of this Act as the formation of a subsequent marriage or civil partnership, in relation to either of the spouses or civil partners, notwithstanding that the previous marriage or civil partnership of that spouse or civil partner was void or voidable.

(6) Any reference in this Act to an order or decree made under the Matrimonial Causes Act 1973 or under any section of that Act shall be construed as including a reference to an order or decree which is deemed to have been made under that Act or under that section thereof, as the case may be.

(6A) Any reference in this Act to an order made under, or under any provision of, the Civil Partnership Act 2004 shall be construed as including a reference to anything which is deemed to be an order made (as the case may be) under that Act or provision.

(7) Any reference in this Act to any enactment is a reference to that enactment as amended by or under any subsequent enactment.

## **26. Consequential amendments, repeals and transitional provisions.**

(1) [Repealed]

(2) [Repealed]

(3) The repeal of the said enactments shall not affect their operation in relation to any application made thereunder (whether before or after the commencement of this Act) with reference to the death of any person who died before the commencement of this Act.

(4) Without prejudice to the provisions of section 38 of the Interpretation Act 1889 (which relates to the effect of repeals) nothing in any repeal made by this Act shall affect any order made or direction given under any enactment repealed by this Act, and, subject to the provisions of this Act, every such order or direction (other than an order made under section 4A of the Inheritance Family Provision Act 1938 or section 28A of the Matrimonial Causes Act 1965) shall, if it is in force at the commencement of this Act or is made by virtue of subsection (3) above, continue in force as if it had been made under section 2(1)(a) of this Act, and for the purposes of section 6(7) of this Act the court in exercising its powers under that section in relation to an order continued in force by this subsection shall be required to have regard to any change in any of the circumstances to which the court would have been required to have regard when making that order if the order had been made with reference to the death of any person who died after the commencement of this Act.

**27. Short title, commencement and extent.**

- (1) This Act may be cited as the Inheritance (Provision for Family and Dependants) Act 1975.
- (2) This Act does not extend to Scotland or Northern Ireland.
- (3) This Act shall come into force on 1st April 1976.

**SCHEDULE 1. [REPEALED]**

# **APPENDIX F RESPONDENTS TO THE CONSULTATION PAPER AND SUPPLEMENTARY CONSULTATION PAPER**

## **RESPONDENTS TO CONSULTATION PAPER NO 191**

### **Organisations**

Anglia Research (genealogists)

Association of Contentious Trust and Probate Specialists

Association of Financial Mutuals

Association of Her Majesty's District Judges

Association of Muslim Lawyers

Association of Pension Lawyers

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Cancer Research UK (charity)

Centre for Child and Family Law Reform

Chancery Bar Association

Christian Action Research and Education (charity)

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Cripps Harries Hall LLP (solicitors)

Davenport Lyons LLP (solicitors)

Family Education Trust

Family Law Bar Association

Farrer & Co (solicitors)

Finders (firm)

Hoopers (firm)

Institute of Fundraising (charity)

Institute of Legacy Management

Institute of Professional Willwriters

Investment and Life Assurance Group

Jubilee Centre

Judges of the Chancery Division and of the Family Division of the High Court

Law Reform Committee of the Bar Council

Law Society

LV= (Liverpool Victoria Friendly Society Limited)

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Mishcon de Reya (solicitors)

Money and Property Committee of the Family Justice Council

Norwich and Norfolk Law Society

Office of the Official Solicitor

People's Dispensary for Sick Animals (charity)

Probate Service

Resolution

Roy Castle Lung Cancer Foundation (charity)

Royal Bank of Scotland Trust & Estate Group

Royal National Mission to Deep Sea Fishermen (charity)

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Boodle Hatfield (solicitors)

City of Westminster and Holborn Law Society

Farrer & Co (solicitors)

Institute of Professional Willwriters

Judges of the Chancery Division of the High Court

Law Reform Committee of the Bar Council

Law Society

Royal Bank of Scotland Trust & Estate Group

Society of Trust and Estate Practitioners

Trust Law Committee

Withers LLP (solicitors)

Woodland Trust (charity)

**Individuals**

Andrew East (legal executive, Prettys)

Donald Jolly (retired solicitor)

Edward Nugee QC (barrister, Wilberforce Chambers)

Sidney Ross (barrister, 11 Stone Buildings)

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