The Law Commission

(LAW COM No 295)

THE FORFEITURE RULE AND THE LAW OF SUCCESSION

Presented to the Parliament of the United Kingdom by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty
July 2005

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

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THE LAW COMMISSION

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To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

PART 1
INTRODUCTION

1.1 In *Re DWS (deceased)*[1] a person killed both his parents, neither of whom left a will. The killer was not allowed to inherit from them, under a rule of law known as the forfeiture rule. The Court of Appeal decided that not only the killer, but also his son, was excluded from inheriting. The inheritance went instead to the couple's other relatives.

1.2 It is clearly right to exclude a murderer from inheriting, but it seems unfair to exclude the murderer's children as well. This outcome appears arbitrary: it is not based on public policy, but is a by-product of the way the intestacy legislation is drafted. Similar problems may arise in other situations, such as where the killer forfeits property under a will, or where a person refuses to accept an inheritance.

1.3 In July 2003 the Department for Constitutional Affairs asked the Law Commission to review the relationship between the forfeiture rule and the law of succession. The terms of reference were as follows.

(1) In conjunction with its work on "illegal transactions",[2] the Law Commission is asked to review the relationship between the forfeiture and intestacy rules.

(2) The review should be carried out with reference to the difficulties highlighted in the case of *Re DWS (deceased)* and should explore ways the law might be reformed to prevent apparently unfair outcomes of this sort.

[1] [2001] Ch 568 (CA).

[2] Item 4 of the Sixth Programme of Law Reform (1995) Law Com No 234; item 3 of the Eighth Programme of Law Reform (2001) Law Com No 274; Ninth Programme of Law Reform (2005) Law Com No 293 paras 2.41-2.45.

(3) The review should also consider any ancillary areas of succession law that might produce analogous outcomes, for example disclaimer and attesting beneficiaries.

1.4 In October 2003 we published Consultation Paper No 172, "The Forfeiture Rule and the Law of Succession". This considered the problem raised in the case of *Re DWS (deceased)*, and discussed whether a similar problem arose in other contexts.

1.5 In this Report we discuss the responses to consultation and set out our recommendations together with a draft Bill.[3]

THE PROBLEM

1.6 A common law rule, often referred to as the "forfeiture rule", states that a person cannot inherit property from someone whom he or she has unlawfully killed. When a person dies without making a will, leaving no spouse but an only child, the law normally provides that the child should inherit. If, however, the child has unlawfully killed the deceased, the forfeiture rule overrides the normal law and the child is excluded. The Forfeiture Act 1982 gives the court a discretionary power to waive this rule, provided that the killer has not been convicted of murder.

1.7 The question is what should happen to an inheritance that has been forfeited. The three possibilities are that it should go:

(1) to the killer's children (that is, the deceased's grandchildren), in the same way as if the killer had died before the deceased;

(2) to other relatives, such as the deceased's brothers and sisters; or

(3) to the State.

1.8 The current position is possibility (2): where a person is killed by an only child, the inheritance goes to the other relatives, and all descendants of the killer are excluded.[4] This can be criticised on three grounds. First, the grandchildren should not be punished for the sins of their parent. Secondly, it is more likely that the deceased would have wished to benefit the grandchildren than the other relatives. Thirdly, the general policy of intestacy law is to prefer descendants to siblings and other relatives. To make an exception in the forfeiture case is inconsistent with that policy.

1.9 Other combinations of facts raise similar problems. For example, the killer could be a spouse or other relative rather than a child.[5] A person could lose a benefit by

[3] The draft Bill (and explanatory notes) are to be found in Appendix 1.

[4] *Re DWS (decd)* [2001] Ch 568 (CA).

[5] When the deceased was killed by a brother or sister, the descendants of the killer are excluded in favour of remoter relatives. The position where one spouse is killed by the other is discussed at para 2 of Appendix 2. In most other cases the property goes to the State.

disclaiming it (that is, refusing to take it) rather than by forfeiture. A benefit under a will could be lost, either by forfeiture or disclaimer, or by the legatee being a witness to the will. There could be similar problems in connection with a joint tenancy or a lifetime settlement. In all these cases, the question is whether it is fair to exclude the descendants of the person who has lost the benefit, or more generally those who would have been eligible to take if that person had died.

THE CONSULTATION PAPER

1.10 The Consultation Paper provisionally proposed that in cases such as *Re DWS (deceased)* there should be a "deemed predecease" solution. That is, where a person forfeits a benefit under an intestacy through having killed the deceased, the estate should be distributed as if the killer had died immediately before the deceased. We also proposed that the deemed predecease rule should apply where there is a substitutionary gift under a will, and the main gift fails because of the forfeiture rule. Finally the Consultation Paper looked at cases where a person disclaims a benefit, either under an intestacy or under a will. It proposed that the deemed predecease rule should apply where a person disclaims a benefit under an intestacy, but not where he or she disclaims an interest under a will.

1.11 We received responses to the Consultation Paper from 31 consultees, who are listed in Appendix 3. We are very grateful to all those who commented on our paper.

1.12 Most of the respondents agreed that the current law was unsatisfactory. Two thirds of them agreed that, in *Re DWS (deceased)*, the grandchild ought to have inherited, and that a "deemed predecease" rule would be the best way of effecting this. The remainder wanted either to preserve or reinterpret the existing law or to effect reform through a statutory discretion or a constructive trust.

1.13 About half of the respondents agreed that a similar solution was appropriate in disclaimer cases, and 11 respondents thought that it was appropriate in cases concerning wills. Many argued that it would be illogical for the reform to cover forfeiture on both intestacy and wills, but disclaimer only on intestacy. Some also wished to include the case of the loss of an interest under a will by a witness. One raised a new point about the position of a grandchild whose parent has died unmarried under the age of majority but after the deceased.[6]

[6] See the recommendation in 1.16(2) below, and the discussion in paras 4.30 to 4.34, below.

SUMMARY OF RECOMMENDATIONS

1.14 There is strong support for our proposals to introduce a "deemed predecease" rule. For reasons set out in Part 3 we did not find the arguments of the dissenting minority persuasive. The more difficult question was to what permutations of facts it should extend. In particular, we were persuaded by the argument that it was illogical to exclude the disclaimer of interests under wills while including both the forfeiture of interests under wills and the disclaimer of interests under intestacy.

1.15 We therefore recommend the following.[7]

(1) Where a child of an intestate is disqualified through having killed the intestate, the property should be distributed as if the child had died immediately before the intestate (the "deemed predecease" rule). That is to say, the killer's children should be allowed to inherit.

(2) A similar rule should apply when the deceased has been killed by a spouse or other relative.

1.16 We recommend that the same solution should also apply, with the necessary modifications, to the cases where:

(1) the deceased has died intestate, and the potential heir has disclaimed any interest in the estate;[8]

(2) the deceased has died intestate, leaving a minor potential heir who later dies leaving issue without having attained majority or married;[9]

(3) the deceased has made a will, and the potential heir (whether a relative or not) is excluded because he or she has killed the deceased;[10] or

(4) the deceased has made a will, and the potential heir (whether a relative or not) has disclaimed any interest in the estate.[11]

We do not consider that this solution should extend to other cases, such as where:

(5) the deceased has made a will, and the potential heir is excluded because he or she is a witness to the will;[12]

[7] Para 3.33 below.

[8] Para 4.28 below.

[9] This problem is explained in full in paras 4.30 to 4.34 below. Briefly, the surviving issue in this case are unfairly excluded because they fall between two stools. They are unable to inherit directly from the intestate, because their parent was still alive when the intestate died. On the other hand, they are unable to inherit via their parent, because the parent never attained a vested interest.

[10] Para 4.11 below.

[11] Para 4.28 below.

[12] Para 4.29 below.

(6) the deceased was killed by someone with whom he or she was a joint tenant;[13] or

(7) there are circumstances analogous to any of the above in connection with a lifetime settlement.[14]

[13] Para 4.37 below.

[14] Para 4.35 below.

PART 2
THE PRESENT LAW

FORFEITURE ON INTESTACY

The forfeiture rule

2.1 There is a well-established rule of common law that a person who has been criminally responsible for the death of another cannot take by succession on the death.[15] This rule is often referred to as the "forfeiture rule", and is a consequence of the principle of public policy that the law should not allow offenders to benefit from their own crime. The Forfeiture Act 1982, which modifies the effect of the rule,[16] refers to the forfeiture rule as meaning the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.[17]

2.2 The rule clearly applies where the successor is guilty of the murder[18] or manslaughter[19] of the deceased, although the extent to which it applies to other crimes involving death is less certain.[20] The rule applies both to succession under wills and on intestacy.[21]

2.3 The rule is mitigated by the Forfeiture Act 1982, which permits relief from forfeiture of inheritance for persons guilty of unlawful killing, except where the killer has been convicted of murder.[22] The Act provides in section 2(1) that, where a court determines that the forfeiture rule would preclude the offender from "acquiring any interest in the property", the court can make an order modifying the effect of that rule. It can do this by either totally or partially excluding the rule's

[15] See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 155; *In the Estate of Crippen* [1911] P 108, 112; *In the Estate of Hall* [1914] P 1, 5; *Re Callaway* [1956] 1 Ch 559, 562; *Re Giles (decd)* [1972] Ch 544, 551; *Re Royse (decd)* [1985] Ch 22; *Re K (decd)* [1985] Ch 85.

[16] Para 2.3 below.

[17] See Forfeiture Act 1982, s 1(1). This includes those who have unlawfully aided, abetted, counselled or procured the death of another (s 1(2)).

[18] See *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147; *In the Estate of Crippen* [1911] P 108; *Re Sigsworth* [1935] Ch 89; *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559. The successor need not have been convicted, but the fact of unlawful killing must be established on a balance of probabilities. The rule does not apply where the verdict is "not guilty by reason of insanity".

[19] *In the Estate of Hall* [1914] P1, 7; *Re Giles (decd)* [1972] Ch 544.

[20] For the effect of offences such as causing death by dangerous driving and assisting suicide, see *Dunbar v Plant* [1998] Ch 412.

[21] See *Re Sigsworth* [1935] Ch 89; *Re Giles (decd)* [1972] Ch 544; *Re Royse (decd)* [1985] Ch 22.

[22] This is without prejudice to their entitlement to apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975.

application to the relevant property.[23] Interests in property include all benefits by way of succession.[24]

2.4 The exercise of this power is discretionary. Section 2(2) of the Act provides that:

> The court shall not make an order under this section … unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified …

By virtue of section 5, the court has no power to modify the effect of the forfeiture rule if the successor has been convicted of murder.

2.5 If relief under the Act is granted,[25] it may take various forms. For example:

(1) The court may order that the forfeiture rule should not apply to any of the property, thus allowing that property to devolve as if no cause for forfeiture existed.[26]

(2) It may apply the forfeiture rule to some parts of the property and not others, by identifying either particular assets, particular interests in property or a percentage of the estate.[27]

(3) It may make other arrangements for the property; for example, when one spouse is killed by the other, the court can order the proceeds of a policy of life assurance to be put into trust for their child.[28]

The time limit for making an application is three months from the date of death, and cannot be extended.

The intestacy rules

2.6 Intestacy arises when a person dies without leaving a valid will. In this situation that person's property is distributed according to the scheme set out in sections 46 and 47 of the Administration of Estates Act 1925.[29] The scheme also applies

[23] Forfeiture Act 1982, s 2(5).

[24] *Ibid*, see s 2(4).

[25] The court can of course reject the application, leaving the forfeiture rule to apply to the whole property: *Dalton v Latham* [2003] EWHC 796 (diminished responsibility).

[26] *Re K (decd)* [1986] Ch 180; *Dunbar v Plant* [1998] Ch 412 (suicide pact); *Re H (decd)* [1990] 1 FLR 441, [1990] Fam Law 175. Contra, in Scotland, *Cross, Petitioner* 1987 SLT 384 (rule excluded as to 99%, as total exclusion not possible).

[27] *Re Forfeiture Act 1982 (Manslaughter: Forfeiture of Widow's Pension)* [1999] Pens LR 1; *Gilchrist (Mona), Petitioner* 1991 JC 160, 1990 SLT 494 (Scotland; rule excluded in relation to 80%).

[28] *Re S (decd) (Forfeiture Rule)* [1996] 1 WLR 235. It may be that this is only possible with the consent of the offender, as happened in *Re S (decd)*.

[29] As amended by the Intestates' Estates Act 1952.

to a partial intestacy.[30] This may occur either because the will fails to dispose of some of the property or because an intended beneficiary loses the right to benefit for some reason.[31]

2.7 The intestacy rules where the intestate leaves a spouse[32] are briefly as follows:[33]

(1) If the intestate leaves a spouse but no children, parents, siblings or descendants of children or siblings, the whole estate goes to the spouse.

(2) If the intestate leaves a spouse and children or descendants, the spouse receives the personal chattels and a fixed net sum,[34] plus a life interest in half the remainder. The other half, together with the reversion expectant on the life interest, is held on the statutory trusts for issue, that is, for the surviving children and the descendants of any children who have died before the intestate. An interest under a statutory trust only vests if the child or other descendant attains 18 or marries under that age.[35]

(3) If the intestate leaves a spouse and no descendants, but does leave one or both parents, the spouse receives the personal chattels and a fixed net sum,[36] plus half the remainder absolutely. The other half goes to the parent or parents absolutely.

(4) If the intestate leaves a spouse and no descendants or parents, but does leave siblings or descendants of siblings, the spouse receives the personal chattels and a fixed net sum,[37] plus half the remainder absolutely. The other half is held on the statutory trusts for the siblings and their descendants: the rules are the same as for the statutory trusts for issue.

2.8 Where the intestate does not leave a spouse, the rules are as follows:

(1) If the intestate leaves descendants, the property is held for them on the statutory trusts.

[30] Administration of Estates Act 1925, s 49.

[31] See, for example, *Re Sullivan* [1930] 1 Ch 84 (disclaimer); *Ross v Caunters* [1980] Ch 297 (beneficiary attestation).

[32] When the Civil Partnership Act 2004 comes into force, the same rules will apply when the deceased leaves a civil partner; and throughout this Report words like "spouse" and "marry" should be read as including civil partnerships.

[33] Administration of Estates Act 1925, s 46(1)(i) and table.

[34] Currently £125,000: Family Provision (Intestate Succession) Order 1993 (SI 1993/2906) art 2(a).

[35] This definition of "statutory trusts" applies with the necessary modifications to all uses of those words in this and the following paragraphs.

[36] Currently £200,000: Family Provision (Intestate Succession) Order 1993 (SI 1993/2906) art 2(b).

[37] Currently £200,000: see previous footnote.

(2) If there are no descendants, the property goes to the parents (in equal shares if both survive).

(3) If there are no descendants or parents, it goes to the intestate's brothers and sisters and their descendants, on statutory trusts analogous to those for issue. Full brothers and sisters take before half-brothers and sisters.

(4) If no siblings or descendants of siblings survive, or if none attain an absolutely vested interest, to the grandparents, in equal shares if more than one.

(5) If no grandparents survive, to uncles and aunts and their descendants, also on statutory trusts. Again, full blood uncles and aunts take before half blood uncles and aunts.

(6) Failing all these, to the Crown (or Duchy of Lancaster or Cornwall) as bona vacantia (ownerless goods). The Crown or Duchy may then use the property to provide for dependants and relatives "in accordance with the existing practice".[38]

Forfeiture by an only child of the intestate

2.9 The starting point of this project was the Court of Appeal's decision in *Re DWS (deceased)*,[39] the facts of which are set out below. *Re DWS (deceased)* concerned the operation of the forfeiture and intestacy rules. However, some of the difficulties encountered there will also apply in situations other than forfeiture or intestacy. These are discussed later in this Part.[40]

2.10 In *Re DWS (deceased)* R murdered his parents, both of whom died intestate.[41] It was accepted by all parties that he was disqualified by the forfeiture rule from taking their estates, to which he would otherwise have been entitled under section 46(1)(ii) of the Administration of Estates Act 1925. The question was whether R's father's estate should go to:

(1) R's son, T, who would have been the heir if R had died before the grandparents;

(2) the executors of W, the grandfather's sister;[42] or

(3) the Crown, as bona vacantia.[43]

[38] Administration of Estates Act 1925, s 46(1)(vi) last paragraph.

[39] [2001] Ch 568 (CA).

[40] Para 2.18 *et seq*.

[41] By the combined effect of Law of Property Act 1925, s 184 and Administration of Estates Act 1925, s 46(3) neither was treated as having survived the other for succession purposes.

[42] W died after the date of the murder but before the case was decided.

2.11 All the judges[44] agreed that T was ineligible to succeed. The definition of "statutory trusts" for issue[45] had to be construed literally, so that the issue of a child of the intestate could take only if the intestate's child had in truth predeceased the intestate. The statutory trust for issue, on the wording of the statute, was *either* for a child *or* for remoter descendants whose parents had died before the deceased. As R was disqualified, rather than dead, T fell into neither category.

2.12 On the second question, whether the estate went to W's executors or to the Crown, the judges were divided. Blackburne J, and the majority of the Court of Appeal, held that the estate went to W's executors. Sedley LJ held that it went to the Crown as bona vacantia.

2.13 The question turned on the interpretation of section 47(2) of the Administration of Estates Act 1925. This provides that, if the statutory trusts for issue fail because none of the issue attains an absolutely vested interest, the estate is to be distributed as if the deceased had died without issue.

(1) According to the majority, the subsection covers failure to attain an interest for whatever reason, including reasons external to the scheme of the Act, and was therefore wide enough to cover the instant case. Accordingly section 46(1)(v) of the Administration of Estates Act 1925 applied and the estate went to "the brothers and sisters of the whole blood of the intestate".

(2) According to Sedley LJ, the subsection only applies if the child or other issue fails to obtain an absolutely vested interest for reasons foreseen in the Act, that is, because he does not attain the age of 18 or marry. Where the trust fails for another reason, such as forfeiture, section 47(2) does not apply, and none of the gifts in section 46(1)(v) can take effect unless the deceased in truth died without issue. The estate should therefore become bona vacantia.[46]

Forfeiture in other circumstances

Forfeiture by one of several children

2.14 Had R been one of several brothers and sisters, it is unclear what the legal position would have been. The Court of Appeal pointed out that section 47(2)

[43] The same question arose concerning R's mother's estate, the choice being between T, the Crown and the mother's nephews and niece. The question of the mother's estate was not discussed in the Court of Appeal, as it was agreed that it should await the result as concerned the father's estate.

[44] Blackburne J, at first instance ([2000] 2 All ER 83), and all three members of the Court of Appeal (Aldous, Sedley and Simon Brown LJJ).

[45] Administration of Estates Act 1925, s 47(1)(i), which defines the "statutory trusts" mentioned in s 46(1)(ii).

[46] And the Crown could then make provision for the grandchild or the other relatives as it saw fit.

would not apply unless the killer was the only surviving child of the deceased. If there were several children, it may be that

(1) the whole estate would have been divided among the other siblings, or

(2) R's putative share would have remained separate and become bona vacantia.

Given the literal approach adopted in *Re DWS (deceased)*, this latter outcome seems more likely.[47]

Forfeiture by a relative other than a child

2.15 The same problem can arise where the intestate is killed by a relative other than a child. The rules are discussed in detail in Appendix 2 to this Report. Briefly:

(1) Where the killer is the only sibling of the intestate, the same problem arises as in *Re DWS (deceased)*: the killer's descendants are excluded, and the remoter relatives (if any) inherit.

(2) Where the killer is one of several siblings of the intestate, it is uncertain whether the killer's putative share goes to the other siblings or becomes bona vacantia, for the same reasons as discussed in connection with children.

(3) Where the killer is the intestate's only uncle or aunt, the killer's descendants are excluded for the reasons explained in *Re DWS (deceased)*. As the list in section 46 does not contain any remoter relatives, the estate becomes bona vacantia.

(4) Where the killer is one among several uncles or aunts of the intestate, it is unclear whether the killer's putative share goes to the other uncles and aunts or becomes bona vacantia.

(5) In most other cases, such as where the killer is a spouse, parent or grandparent of the intestate, there is no equivalent of section 47(2). The estate, instead of going to a relative further down the list, becomes bona vacantia.

2.16 In brief, a common effect of the forfeiture rule is that the forfeited interest becomes bona vacantia and does not go to the next relative in order of priority. The main exception is where the killer is the only surviving member of a class of beneficiaries under a statutory trust, or where all the other members are the killer's descendants. In these cases section 47(2) or (4) has the effect of deeming the deceased to have died without leaving any members of the relevant class. The property then does not go to the killer's descendants, but instead devolves on the next statutory class.

[47] Appendix 2 para 3.

2.17 The question in this project, so far as it relates to forfeiture and intestacy, therefore divides into two parts.

(1) Where the killer is one of several potential beneficiaries under a statutory trust, is the current law fair in (sometimes) giving the killer's presumptive share to the next statutory class, or should it rather go to the other members of the same statutory class? (For example, to the grandchildren in the *Re DWS (deceased)* situation.)

(2) In the remaining cases, such as where the killer is a spouse or a parent, is the current law fair in (sometimes) making the property bona vacantia, or should it rather go to the members of the next statutory class?

WILLS, DISCLAIMER AND OTHER SITUATIONS

2.18 So far we have considered the various forms in which the problem identified in *Re DWS (deceased)* could occur, where a person forfeits a benefit under an intestacy through having killed the deceased. Similar problems arise in other situations, such as:

(1) where the benefit is disclaimed rather than forfeited;

(2) where the benefit lost by forfeiture or disclaimer arises under a will rather than upon intestacy;

(3) where the benefit is lost in some other way, such as where a legatee under a will acts as a witness to it;

(4) in connection with joint tenancies or lifetime settlements.

We consider these in turn.

Disclaimer on intestacy

2.19 The first situation is where a person entitled to a benefit under the intestacy rules disclaims the entitlement. Disclaiming, here, means refusing to accept the inheritance. One possible reason for doing this is that the property is so expensive to maintain that owning it would be a burden rather than a benefit. Another might be for the sake of tax planning.

2.20 Where this happens, the question who receives the benefit will be answered in the same way as where the benefit was forfeited.[48] That is to say, where the person disclaiming is the only surviving child of the deceased, the benefit will by-pass the descendants of that child and go to the collaterals. The position of spouses and other relatives will also be the same as in forfeiture cases.[49]

[48] See the judgment of Sedley LJ in *Re DWS (decd)*, [2001] Ch 568, 592 (para 34).

[49] See para 2.15 above.

Wills with substitutionary gifts

2.21 A similar problem may occur when the deceased has made a will containing a substitutionary gift. For example the testator may provide by will that A shall take but if A predeceases the testator, or does not survive the testator by a given number of days, then B shall take. If A kills the testator (forfeiture), or disclaims the gift (disclaimer), B will not take in A's stead because the condition (that A predecease the testator) has not been met.

2.22 Another example comes closer to the intestacy situation. The testator may make a will in favour of his or her child, or of descendants generally, without any default gift. If a child dies before the testator, leaving issue, statute provides for that child's share to be divided among the issue.[50] Here too, if a child kills the testator or disclaims the gift, that child's children and remoter descendants are excluded because the child did not die before the testator.

2.23 Apart from forfeiture and disclaimer, there is a third way in which this problem can arise, in connection with wills but not with intestacy. This arises because of the rule that an attesting witness shall not take a benefit under a will. Under section 15 of the Wills Act 1837 any disposition to a witness is "utterly null and void". If, therefore, the testator provides that A shall take but if A predeceases the testator then B shall take – and A attests the will and loses the gift – B cannot take as the condition (predecease) has not been met.[51]

2.24 The consequences of the gift's failure in the case of a will with a substitutionary gift may be different from those of the failure of statutory trusts where the deceased has not made any will.

(1) While the basic problem is the same in will cases as in intestacy cases, the relations between the parties may be different. In intestacy cases, the problem mostly concerns the position of descendants of the person forfeiting or disclaiming the benefit. In will cases, the default beneficiary (B) may be anyone: A's spouse, a descendant or someone totally unrelated.

(2) Will cases also differ from intestacy gifts in that there may be a further default gift. In the case of a will it is clear that, as with intestacy, B cannot take under the original substitutionary gift. However, the property may be subject to a "residuary" clause in the will. The will may even include a provision covering eventualities such as A's disclaimer or forfeiture.[52] If so the property will be distributed under this provision: depending on the wording of the clause, this may or may not mean that B inherits. If the property is not covered by such a clause (either because such a clause

[50] Wills Act 1837, s 33. The rules are very similar to those in Administration of Estates Act 1925, s 47(1).

[51] See, for example, *Ross v Caunters* [1980] Ch 297.

[52] That is not to say that any will should, or is likely to, contain a specific provision for the event of the legatee killing the testator. It may however provide generally for what happens if the primary gift fails for any reason.

does not exist or because it does not cover the property in question[53]) it will be distributed according to the total or partial[54] intestacy rules.

2.25 The problem does not exist in the same form where B's interest is successive rather than substitutionary. For example, if the will gave property to A for life with remainder to B, and A killed the testator or disclaimed the gift, B would succeed to the property under the doctrine of acceleration.[55] There might however be a situation where both interests are in remainder but one is in substitution for the other. For example, the will could give property to L for life, with remainder to A, but in case A does not survive L, to B. In this case, if A disclaims the gift, or kills either the testator or L, B does not fulfil the condition and the property falls into residue or intestacy.

2.26 The same situation could occur in the case of a lifetime settlement, with the likely effect that the property will revert to the settlor under a resulting trust. Similarly, a will or settlement may provide for B to take in place of A if A dies before some specified time or event, which need not be the death of a person.

Joint tenancies

2.27 Where one joint tenant kills another, the killer cannot take the deceased's interest by survivorship: it appears that the deceased's share is severed from the rest, and devolves on the deceased's personal representatives.[56]

2.28 One respondent to the Consultation Paper expressed some concern that this system would be disturbed by the introduction of a "deemed predecease" fiction. That is, the killer would be deemed to have died before the victim. Therefore, if they were the only joint tenants, the entire property would vest in the victim's personal representatives, without any severance; if there were other joint tenants, the property would vest in them (jointly, if more than one), excluding both the killer and the victim.

2.29 Whatever the merits of this result, it would not be the effect of our proposals. The proposals are confined to the construction of the intestacy legislation and of wills, and do not amount to a presumption of predecease for all purposes.[57] Survivorship in joint tenancies is an incident of the law of property and does not form part of the scheme of either testate or intestate succession.

[53] See, for example, *Re Plowman* [1943] Ch 269.

[54] Depending on whether the failed gift constitutes the whole or a part of the deceased's estate.

[55] *Re Taylor* [1957] 1 WLR 1043.

[56] Megarry and Wade, *The Law of Real Property* (6th ed, 2000) para 9-049. (This passage also mentions an alternative possibility, based on constructive trusts, as possibly applying in some Commonwealth countries: but as argued below at para 3.21 *et seq*, the constructive trust analysis of forfeiture does not seem consistent with the position accepted in England.)

[57] As pointed out in CP para 6.7, such a fiction would be nonsense, as it contradicts the fact of the killing.

Summary

2.30 In summary, it seems that there are several other areas where difficulties analogous to those identified in *Re DWS (deceased)* may arise.

2.31 As far as intestacy is concerned, these difficulties arise where a person entitled on intestacy disclaims the gift. Disclaimer in this case plays an equivalent role to that played by the forfeiture rule in *Re DWS (deceased)*. Difficulties also arise in three situations where the deceased has made a will providing for a substitutionary gift, or section 33 of the Wills Act 1837 applies: forfeiture, disclaimer and beneficiary attestation. Analogous difficulties could arise in the case of a lifetime settlement providing for a substitutionary gift in remainder.

PART 3
FORFEITURE ON INTESTACY

SUMMARY OF THE ISSUES

3.1 The main questions raised by the Consultation Paper are these:

(1) Should there be a statute introducing a "deemed predecease" rule in the forfeiture/intestacy case?

(2) Should the same treatment be extended to other situations, such as those concerning disclaimer, wills, attestation or settlements?

We discuss question (1) in this Part and question (2) in Part 4.

CRITICISMS OF THE EXISTING LAW

3.2 The Consultation Paper identifies three possible criticisms of the present rule as found in *Re DWS (deceased)*. These are:

(1) The present rule appears to punish children for the crimes of their parents.

(2) The present rule is inconsistent, in that there is an arbitrary distinction between the case where the child of the deceased dies and the case where that child becomes ineligible to inherit for another reason.

(3) The present rule is unlikely to represent what the deceased would have wanted.

Punishing children for the crimes of the parents

3.3 The immediate intuitive response to the result of *Re DWS (deceased)* is that it is unfair on the grandchildren, who have been permanently deprived of their prospects of inheritance through no fault of their own. There are however two counter-arguments.

3.4 First, the grandchildren have not been deprived of any vested interest. Forfeiture is in any case a sort of punishment. Whenever an offender has been fined or had property confiscated as a punishment, this has an indirect effect on any potential heirs because the offender's estate is that much less valuable, but no one regards this as unfair.[58]

3.5 Secondly, neither the law as it stands nor the proposed "deemed predecease" rule really puts the grandchildren in the same position as if the offence had not been committed. The deemed predecease rule is based, not on the grandchildren's position among the heirs of the killer, but on their position among

[58] However, the same result follows in disclaimer cases, and here this counter-argument is not available, as there is no flavour of punishing anyone.

the relatives of the deceased intestate. Under such a rule, they benefit more than if the offence had not been committed, as they need not wait till the death of the killer. They are also protected from the risk that the deceased or the killer would have disposed of the property or made a will leaving it to someone else.

3.6 We therefore prefer not to place too much emphasis on this reason for objecting to the existing law. The more fundamental reason is that of consistency, as discussed in the next few paragraphs.

Consistency

3.7 The most important objection is that the current rule is inconsistent and arbitrary. The scheme of the intestacy legislation is to arrange the relatives of the deceased in order of priority, so that if there is no relative in a given category, the inheritance goes to the relatives in the following category. It would make sense for the same rule to apply where a relative in the given category is unable to inherit for a reason other than death.

Forfeiture by an only child

3.8 To take the *Re DWS (deceased)* situation, the legislature clearly considered a grandchild to be a more deserving relative than a sibling: where the child of the deceased dies, the grandchild inherits, as coming before the sibling in the list. It is odd that the same approach is not followed when the child is not dead but disqualified. As we put it in the Consultation Paper:[59]

> There is room for argument whether, in the abstract, an intestacy regime ought (in the absence of eligible children) to prefer grandchildren to siblings or vice versa. Once however the choice is made, it should be consistently carried out regardless of the reason for the absence of eligible children. There is no real justification for preferring grandchildren to siblings where the son or daughter is dead, but siblings to grandchildren where the son or daughter is unable to take for some other reason.

3.9 Under a deemed predecease rule, this inconsistency would be removed. Once the child is removed from the equation, whether by death or by forfeiture, the grandchild would be next in line to inherit, followed by parents, siblings, grandparents, uncles and aunts in order.

Forfeiture by a spouse

3.10 The current position where one spouse kills the other is set out in Appendix 2.[60] If our proposed reforms were implemented the position would be as follows. The killer would be deemed to have predeceased the intestate, and the rules about cases where the deceased does not leave a husband or wife[61] would apply. That

[59] Para 5.8.

[60] Para 2. Briefly, the statutory legacy and life interest merge into residue, and the spouse's whole or half share of the estate becomes bona vacantia.

[61] As set out in Administration of Estates Act 1925, s 46(1)(ii) to (vi): see para 2.8 above.

is, the entire estate would go to the issue, parents, siblings or other relatives in the normal order, on the statutory trusts where appropriate. For the same reasons as those set out above in relation to children, this seems to be a more logical outcome.

Forfeiture by other relatives

3.11 The same argument applies in the other cases discussed in Part 2.

(1) In the statutory trust cases, the inheritance goes one rung down the scale when the primary beneficiary dies, but two rungs down when he or she is disqualified. For example, if the deceased's only sister dies before the deceased, the property goes to the sister's son (the deceased's nephew). If the sister kills the deceased, the nephew is excluded and the property goes to the deceased's grandparents, uncles, aunts or cousins.

(2) In the other cases, such as that of a parent, the inheritance goes one rung down in the case of death (say to the deceased's siblings), but right to the bottom in the case of disqualification: the estate skips over all the other relatives and becomes bona vacantia.

It would be simpler and more reasonable for the inheritance to descend one rung in every case.

3.12 The deemed predecease proposal removes two inconsistencies. The first is the inconsistency between what happens on death and what happens on forfeiture. The second is the inconsistency between the case where the killer is a child or sibling of the deceased and the case where the killer is a spouse, parent or other relative of the deceased.

What the deceased would have wanted

3.13 The third argument against the current law, and in favour of a "deemed predecease" rule, is that this is more likely to be what the deceased would have wanted. One of the objects of any law of intestacy must be to reproduce, however approximately, the likely wishes of a typical person for the distribution of their estate.[62] On this reasoning, the present legislation supposes that in general people prefer to benefit their grandchildren than their siblings. This may or may not be correct; but it is a reasonably safe assumption that the deceased would not have wanted a split regime, in which the grandchildren benefit if the child dies, but the siblings benefit if the child loses the estate for another reason. The argument turns out to be another form of the consistency point.

REACTIONS TO THE PROPOSED RULE

3.14 Out of the 31 organisations and individuals responding to our paper, 22 were in favour of our proposed reform. This included most of the judges consulted. Of the respondents who disagreed, one thought our proposals savoured of an alien concept of "family property". Another did not think our proposals corresponded

[62] CP paras 5.9 to 5.14.

with the likely wishes of the deceased and was concerned that they allowed the possibility of benefit to the offender, reducing the deterrent effect of the rule. Others agreed with the result we proposed but thought either that there was no need to change the law because *Re DWS (deceased)* was wrongly decided, or that the same solution could be reached by way of a constructive trust. Yet others favoured a statutory discretion or forfeiture to the State. We address these arguments in turn.

Arguments for no change

The family property point

3.15 The Society of Legal Scholars commented that the Consultation Paper seemed to contain an expectation akin to the concept of family property found in Continental Europe; that of a fixed chain of successive descents which should not be compromised by the vagaries of any individual link. On a more individualistic concept of property, as found in English law, there is no injustice in the bare fact of the grandchildren not inheriting from the grandparent because of the crime of their parent, as they had no pre-existing right to inherit. It is the same sort of consequence as their not inheriting because the parent received and then lost the property in some other way.[63]

3.16 We consider that this argument is based on a misunderstanding of the reason for our proposal. The proposal does not attempt to duplicate what would have happened if the parent had inherited and then died leaving the property to the grandchildren. The reasoning is quite different: it is that once the parent is eliminated from the equation, there is no reason why the grandchildren should not take their normal place in the order of succession from the grandparent. In other words, grandchildren should be treated as relatives in their own right, rather than as mere stand-ins for their parents.

The wishes of the deceased

3.17 We argue above[64] that, in most situations, the deceased would prefer to benefit grandchildren than siblings, whether the child dies or is disqualified for some technical reason. The question arises whether the forfeiture situation is an exception to this generalisation. Chief Master Winegarten argued that, if asked specifically about what should happen in the event of their murder by a family member, most people would want to exclude the killer's family as well as the killer from any benefit. This kind of question cannot be taken much further by reasoned analysis, being largely a question of public opinion. Our proposals received some

[63] See para 3.4 above. It should be noted that the Society does not use this argument to defend the existing rule: it argues that the logical answer is forfeiture to the State, though it does not suggest this as a practical reform.

[64] Para 3.13 above.

press coverage but generated little in the way of comment.[65] We do not think there is any widespread feeling that our proposed solution is wrong in principle.

Benefit to the offender

3.18 A related point is the possibility of benefit to the offender. This might occur in two forms. First, the grandchildren, if allowed to inherit, might be prevailed upon to pass the property or some of it to the killer. Secondly, even if this does not happen, the killer might benefit indirectly through not having to pay so much for the grandchildren's maintenance.

3.19 Chief Master Winegarten argued that allowing the killer's children to inherit, far from being a deterrent, might even be an incentive. We do not agree with this formulation, which seems to suppose that the killer contemplates being caught, but understand the argument that the proposed rule is less of a deterrent than the existing rule. Nevertheless, on balance we consider that any extra deterrent effect of the current rule does not justify excluding the killer's innocent descendants.

3.20 As to the possibility of indirect benefit to the offender, we consider that the answer in the Consultation Paper is sufficient. The same would happen if the money had been left to the grandchildren directly, in which case there would be no question of depriving them for this reason.[66] Special arrangements, for example by way of trust, could exist where the grandchildren are minors, to prevent benefit to the offender: these are considered further below.[67]

No need for reform

3.21 A further argument against our proposals is that there is no need for statutory reform to reach the desired result, as *Re DWS (deceased)* was wrongly decided: on a correct view of the law there is already a "deemed predecease" rule. On this view, rather than burden the statute book with a detailed provision to reverse the result of *Re DWS (deceased)*, we should urge the House of Lords to overrule it if and when it has the opportunity.

3.22 Professor Roger Kerridge advanced a detailed argument to this effect.[68] On this argument the traditional, and intellectually preferable, explanation of the forfeiture rule is that:

(1) the statute operates to vest the property in the designated intestate successor, namely the killer, but

[65] *Guardian*, Clare Dyer 16 October 2003; BBC Law in Action 16 October 2003 (http://news.bbc.co.uk/1/hi/uk/3197018.stm). We received one letter concerning a case where the killer's child was a minor.

[66] CP para 5.21.

[67] Para 3.34 below.

[68] (2001) 117 LQR 371, and in his response to consultation.

(2) the successor then holds it on constructive trust for the person who would have been the successor if the killer had predeceased the victim.[69]

3.23 After considerable thought we concluded that this was not the answer, for three reasons.

(1) The process of administration of estates in England and Wales does not normally admit of a constructive trust arising, as no legal title can vest in the killer unless the property has been distributed in ignorance of the facts and the killing is discovered at a later stage.

(2) Even if forfeiture does operate by way of constructive trust, it is not clear why this should imply a deemed predecease (or any other) rule. Where property is distributed to the wrong beneficiary, a constructive trust arises in favour of the right beneficiary; but the constructive trust is not in itself the reason for a given person being the right or wrong beneficiary.

(3) Whatever the theoretical force of the argument, there can be no reasonable certainty that a suitable case will reach the House of Lords or that, if it does so, the House of Lords will adopt the constructive trust analysis in the desired form.

3.24 Peter Smith, of Reading University, suggested a statutory solution based on the concept of a constructive trust.[70] This trust would normally be in favour of the person identified by the "deemed predecease" rule, but there would be flexibility for special cases. As with Professor Kerridge's argument, we are not convinced that the fact of a constructive trust would either imply a "deemed predecease" rule or contain that flexibility (even if flexibility is desired: see the next few paragraphs).

Discretion to depart from the deemed predecease rule

3.25 The Consultation Paper raised the possibility of a statutory discretion, possibly on the lines of the Inheritance (Provision for Family and Dependants) Act 1975. However, it advised against pursuing this option, for three main reasons:[71]

(1) A discretionary power is liable to generate litigation, causing delay and expense.

(2) In the present context, it is hard to envisage guidelines for the exercise of the discretion, so the results will be unpredictable.

[69] This explanation has been widely accepted in Commonwealth and US jurisdictions, and had some academic support in England before the cases of *Re Jones decd* [1998] 1 FLR 246 and *Re DWS decd*. For more detail, see Professor Kerridge's argument in the article cited in the previous footnote.

[70] "The equitable maxim of the common law" (2004) 18 Trust Law International 194, and in his response to consultation.

[71] CP paras 6.8 to 6.15.

(3) In almost all cases several relatives will consider they are in with a chance, and any decision taken is likely to cause family acrimony.

Most respondents agreed with these reasons.

3.26 The Law Reform Advisory Committee for Northern Ireland agreed that the normal rule in the *Re DWS (deceased)* situation should be that the grandchildren inherit, but suggested that there should be a discretion to disapply this rule when the justice of the case demands it. An example might be where the deceased had a closer relationship with the siblings than with the grandchildren. The Committee recommends that the presumption should be in favour of the grandchildren, and that there should be a list of factors to take into account in exercising the discretion. In our view, even this limited discretion would have the same potentiality for expense and acrimony as the wider discretion discussed in the preceding paragraph.

Forfeiture to the State

3.27 One possibility canvassed in the Consultation Paper was that, in a situation such as *Re DWS (deceased)*, the property should go neither to the grandchildren nor to the collaterals but to the Crown as bona vacantia. In the dissenting judgment in *Re DWS (deceased)* itself, Sedley LJ held that this was the effect of the existing law. We advised against this solution,[72] on the ground that it was clumsy and that it was beset by the same problems of uncertainty and acrimony as any other solution based on discretion.

3.28 The arguments for this solution are as follows:

(1) It would permit the Crown to distribute the property in whatever way seems fair. This allows the benefits of a discretionary system, while avoiding the expense and delay of court proceedings.

(2) The bona vacantia solution is superior to the existing position in consistency. As we saw in Part 2,[73] the effect of the forfeiture rule, even on the current law, is that the forfeited property becomes bona vacantia in most types of case: the bona vacantia solution simply alters "most" to "all".

(3) The forfeiture rule is intended to be punitive. Other criminal property (such as profits from drug dealing) may be confiscated by the State. Family inheritances obtained by crime should be treated in the same way.

3.29 The respondents to the Consultation Paper were overwhelmingly against this solution, though some considered that it was the second best option after the deemed predecease rule.[74] The Society of Legal Scholars thought it the most

[72] CP para 6.9 *et seq*.

[73] And Appendix 2.

[74] James Sunnucks QC suggested a variant of this solution, in which the property would be held by the Crown for the lifetime of the killer, and then go to the grandchildren.

satisfactory solution intellectually, but did not attempt to argue for it on the grounds of practical benefit. The bona vacantia section at the Treasury Solicitor's office, and the solicitors representing the Duchies of Lancaster and Cornwall, were strongly against any extension of their responsibilities.

3.30 While this solution avoids the delay and expense of a court-based discretion, the other two objections to a discretionary system, namely uncertainty and acrimony, remain. The existing intestacy legislation states that, when the Crown receives property as bona vacantia, it may provide "in accordance with the existing practice" for the dependants of the deceased and other persons for whom he might have been expected to provide.[75] If a new category of bona vacantia were introduced by statute, there would by definition be no "existing practice" to follow. Both the grandchildren and the collaterals might equally consider that they had the preferable moral claim, and feel aggrieved if the exercise of the Crown's discretion went against them.

3.31 We do not think the profits from drug dealing provide an analogy. The profits from drug dealing have no legitimate owner. By contrast, an inheritance was the property of the deceased until the moment of their death. It should, as far as possible, be distributed in accordance with the deceased's wishes (or such approximation to their wishes as is provided for in the normal hierarchy laid down in the intestacy legislation). Intestacy law presumes that in normal circumstances most people would prefer their estate to pass to their relatives than to the State. The same should apply here. The responses to consultation did not suggest that there was any professional or public feeling that the existing law of forfeiture was not punitive enough and would be improved by extending the excluded class to cover the entire body of relatives.

CONCLUSION

Deemed predecease rule

3.32 In conclusion, we consider that the "statutory deemed predecease" solution, as proposed by the Consultation Paper, is the way forward, and most of the responses support it.

3.33 We recommend that there should be a statutory rule that, where a person forfeits the right to inherit from an intestate through having killed that intestate, the rules of intestate succession, as laid down in sections 46 and 47 of the Administration of Estates Act 1925 (as amended), should be applied as if the killer had died immediately before the intestate.

Special arrangements for minors

3.34 As mentioned above, there is some concern that our reforms in forfeiture cases will lead to property being held for minor children of the killer, and that this may indirectly benefit the killer.[76] Professor Jill Martin, in her response to consultation,

[75] Administration of Estates Act 1925, s 46(1)(vi) second paragraph.

[76] Para 3.18 above.

mentioned an analogous problem in cases where children receive awards from the Criminal Injuries Compensation Authority for injuries inflicted by their parents. These are generally made subject to trusts so as to ensure that the parents do not inherit these sums if the child dies intestate. On that analogy, there should be a provision that, when property is held for under-age grandchildren in the *Re DWS (deceased)* situation under our reforms, it should always be held by the Public Trustee.[77] He or she should then have the duty of administering the property with a view to avoiding indirect benefit to the offender.[78]

3.35 We agree with this argument, but consider that it would be preferable for the court to have a discretionary power to appoint the Public Trustee to hold the assets, rather than for the assets to vest automatically. One reason for this is that in some cases the risk of benefit to the offender may be too remote to make it necessary for the Public Trustee to act. Another is that in some cases, such as where there are several beneficiaries and the property is not readily divisible, the minor beneficiary's share may not be represented by identifiable assets so as to allow automatic vesting to occur. A discretionary power of this kind is included in the draft Bill in Appendix 1 to this Report. This provision applies regardless of the relationship of the offender to the deceased, but is limited to cases where the minor beneficiary is descended from the offender.[79]

3.36 The question also arises whether there should be special trust arrangements to ensure that the offender does not inherit from the minor children, as in the Criminal Injuries Compensation Authority cases. On reflection we decided that this was unnecessary.

(1) If the children die when they are still minors, their interests never vest. The estate therefore goes to the collaterals as direct heirs of the original deceased, and the prospect of the offender inheriting it from the children does not arise.

(2) If the children attain majority, the onus is on them to make a will. It is true that if they do not, the offender may inherit; but this is equally the case under the present law, in that a sibling of the offender may also die intestate and without issue, in which case the offender also inherits. It is sufficient for the forfeiture rule to prevent the offender inheriting as a direct heir of the deceased: the deceased's estate cannot be ring-fenced in perpetuity to prevent the offender from acquiring an interest through any route whatever.

[77] The same problem can of course arise when the offender is a relative other than a child of the deceased, and a corresponding solution is appropriate.

[78] Without this provision, the property would normally be held by the administrators, who would have powers of maintenance, accumulation and advancement. The point is not so much that the administrators are more easily influenced (though they may be) but that one can be confident that the Public Trustee will abide by any statutory duty to ensure that the killer does not benefit.

[79] For example it does not apply if the deceased was killed by one son and the property goes to the killer's younger brother.

3.37 We recommend that where a person forfeits a benefit under an intestacy through having killed the deceased, but as a result of our reforms property devolves on or is held for a minor descendant of the killer, the court should have power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer.

PART 4
WILLS, DISCLAIMER AND OTHER SITUATIONS

4.1 The Consultation Paper recommended that the reform should extend to forfeiture on intestacy, forfeiture of an interest under a will and disclaimer on intestacy, but not to disclaimer of an interest under a will, loss of such an interest by attestation or any other situation. Many respondents argued that this result seems arbitrary and lopsided. Below we start by looking at how forfeiture should affect substitutionary gifts under wills. We then look at the effects of disclaimer on both intestacy and wills.

FORFEITURE AND WILLS

4.2 Part 2 explains that the problem in *Re DWS (deceased)* can also occur in will cases.[80] Either the will may explicitly contain a default gift dependent on the primary beneficiary dying before the testator, or the same effect may result from section 33 of the Wills Act 1837. In these cases, if the primary beneficiary kills the testator the default gift cannot take effect, because the primary beneficiary did not in fact die before the testator. The Consultation Paper proposed that, in forfeiture cases, this should be remedied by a "deemed predecease rule" in the same way as in the intestacy situation. That is, the will should be interpreted as if the offender had died immediately before the testator, and the default gift should take effect on that assumption.

4.3 This proposal gives rise to three questions.

(1) If there is a problem, does it arise from a defect in the law or merely from defective drafting of wills?

(2) How far does the introduction of a "deemed predecease" rule risks indirect benefit to the killer?

(3) Is a "deemed predecease" rule likely to represent the wishes of the testator?

Defective law or defective drafting?

4.4 The first argument against including will cases in the scope of the reform is that the original problem springs from the wording of sections 46 and 47 of the Administration of Estates Act 1925, and should be remedied by amending those sections. The fact that similar problems arise under the wording of some wills merely means that those wills are badly drafted, and not that the law of wills is defective.[81]

[80] Above, para 2.21 *et seq*.

[81] The Society of Legal Scholars argued that a properly drafted will ought to provide for failure of the gift for reasons other than death of the donee, and that the remedy is therefore an action for negligence against the person who drafted the will.

4.5 This is a purist view. The counter-argument is that, if a particular kind of bad drafting is common, it makes sense to enact statutory implied terms to counteract the problem. For example, the Law of Property Act 1925 is full of implied terms to be read into conveyances, though there too one could argue that all the Act is doing is saving conveyancers the trouble of making their intentions clear. Compared with conveyances, a far higher proportion of wills are home-made, so the case for statutory intervention is greater.

4.6 Further, the argument that the problem arises from the defective drafting of wills is only valid where the will contains an explicit default gift, such as "to A, or if A should die before me, to B". In fact the problem is wider than that. As mentioned above,[82] when a will contains a gift for a child of the testator, or for the testator's descendants generally, without any default gift, statute provides that, if a child dies before the testator, the property goes to the child's descendants.[83] Exactly the same problem arises here as in the intestacy case: the special provision only applies if the child dies, and not if the child forfeits or disclaims the gift. In these cases the problem does arise from the wording of a statute rather than the drafting of wills (except in the indirect sense that the will could have been drafted in such a way as to exclude the provisions of the statute). In this case at least, the argument for reforming the law of wills is as strong as that for reforming the law of intestacy.

Indirect benefit to the offender

4.7 The Consultation Paper argues that in the will situation, unlike the intestacy situation, the default beneficiary need not be related to the primary beneficiary, so the concern about indirect benefit to the killer need not arise.[87] As against this, Professor Martin suggested that probably the commonest case is where the default beneficiary is the primary beneficiary's spouse, so that the prospect of benefit to the killer is greater than in the case of a child.

4.8 The answer to the argument about the default gift to the spouse is the same as in other indirect benefit cases. The prospect of benefit would have been just as great if the legacy had been to the spouse in the first instance, and no one seeks to block such a legacy for this reason.

The testator's wishes

4.9 It could be argued that the sheer variety of situations in which our problem arises is such that one cannot be sure that, in all of them, the testator would wish the

[82] Para 2.22 above.

[83] Wills Act 1837, s 33.

[84] The Society of Legal Scholars argued that a properly drafted will ought to provide for failure of the gift for reasons other than death of the donee, and that the remedy is therefore an action for negligence against the person who drafted the will.

[85] Para 2.22 above.

[86] Wills Act 1837, s 33.

[87] CP para 5.35 last sentence.

default beneficiary to benefit as if the primary beneficiary had died. Some variables are as follows.

(1) The will may or may not contain a further default provision such as a residuary gift. If a will says "To A, or if A predeceases me to B" and stops there, it is a fair supposition that the testator would have wished B to take if A were excluded for a reason other than death. If the will says "To A, or if A predeceases me to B, and subject to this gift, to C", one cannot be sure whether in the circumstances the testator would have preferred to benefit B or C.

(2) B may be the spouse of A, a relative of A or unrelated. The less the degree of association between A and B, the less likely it is that the testator would wish to penalise B, or be worried about the possibility of benefit to A.

(3) The gift to A or B, and the gift over to C if there is one, may relate to particular assets or to the whole estate. The probability that the testator wished the gift to C to take effect seems higher where that gift is specifically predicated on the failure of the gift to A or B than where it is a general gift of residue.

4.10 It is true that the likelihood that the testator intended B to benefit if the gift to A failed for whatever reason is stronger in some permutations of facts than in others. However, in all of them it seems more likely than not that the testator favours B over C, and does not wish to make a distinction so that B benefits if A dies but C benefits if A becomes ineligible for another reason. We conclude that there should be a "deemed predecease" rule for wills, on the same lines as that proposed for intestacy. The testator could of course exclude this rule by making specific provision for the case where the legatee becomes ineligible for a reason other than death.

4.11 We recommend that where a person forfeits a benefit under a will through having killed the testator, the will should be applied as if the killer had died immediately before the testator, unless the will contains a provision to the contrary.

Special arrangements for minors

4.12 The introduction of a deemed predecease rule may result in forfeited property being held on trust for children of the killer. This can happen either if the will contains a default gift for those children or if the special provision in the Wills Act 1837 applies.[85] The same danger of benefit to the killer arises as in intestacy cases, and a corresponding solution is appropriate.

4.13 We recommend that where a person forfeits a benefit under a will through having killed the deceased, but as a result of our reforms property devolves on or is held for a minor descendant of the killer, the court should have

[85] Wills Act 1837, s 33; see para 2.22 above.

power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer.

DISCLAIMER

4.14 The other issue is that of disclaimer. As we have said, this may be relevant both in intestacy cases and in will cases. The main argument for including disclaimer cases, advanced by several respondents, is that the issues are the same as in forfeiture cases and that the same rule of succession should apply whether the primary beneficiary dies or is unable to take for any other reason. The main argument against is that disclaimer is a deliberate act, and that any undesirable consequences of the existing rule can be easily avoided by taking a different route.

On intestacy

4.15 For convenience, we first discuss the case under an intestacy, where it is the child of the intestate who proposes to disclaim, and the choice is whether the grandchildren of the intestate or the collaterals should be next in line to inherit. The question in this case is whether the existing rule, or for that matter the proposed replacement rule:

(a) restricts the freedom of the primary beneficiary (the person disclaiming), or fails to reflect his or her likely intentions;

(b) is unfair to the grandchildren; or

(c) is likely to frustrate the wishes of the deceased.

The primary beneficiary

4.16 One argument against including disclaimer cases in the reform is that the decision to disclaim can be taken at leisure and after full legal advice. If disclaimer would lead to undesired results, the primary beneficiary can decide not to disclaim. This would be as true following our suggested reform as it is now: whether the result of disclaimer is to benefit issue or collaterals, it is open to the primary beneficiary to bring about the opposite result by means of a deed of variation. We conclude that, from the point of view of freedom and flexibility, the proposals are neutral.

The grandchildren

4.17 In one sense, the present rule is not unfair to the grandchildren, in that they are not deprived of a vested interest: the result is the same as if the primary beneficiary had accepted the inheritance and given it to someone else. However, the rule is counter-intuitive: the disclaiming beneficiary would naturally expect to benefit the grandchildren, and would be surprised to learn that the effect of the disclaimer is to cut them out. We therefore consider that the grandchildren should be second in line after the disclaimer by the child, and that this should be the default position if the child does not take steps to avoid it.

The deceased

4.18 It seems likely that the deceased would wish to benefit the grandchildren rather than the collaterals if the child disclaimed. Unlike in the forfeiture case, the primary beneficiary has not (from the deceased's point of view) done anything wrong, and it is unlikely that the deceased would either wish to penalise the whole family or be concerned about the possibility of indirect benefit to the disclaiming beneficiary. So far as the argument from the presumed wishes of the deceased is concerned, the case for reform is stronger than in the forfeiture case.

4.19 The main argument is that of consistency. The intestacy legislation creates an order of priority among relatives, and it makes sense that if one person steps out of the line the next should take. For this purpose it should not matter whether the stepping out of line takes the form of death, forfeiture or disclaimer.

Relatives other than children

4.20 The same reasoning applies to the other statutory trusts, whether it is a sibling, aunt or uncle who disclaims.

4.21 In the remaining cases, such as disclaimer by a parent, and (probably) by one among several siblings, the effect under current law is to make the property bona vacantia. This is most unlikely to be the intention of either the deceased or the person disclaiming. The argument for reform in these cases is therefore stronger than in the statutory trust cases, where the choice is only between one relative and another.[86]

4.22 This also means that the argument for reform in disclaimer cases is in one respect stronger than that in forfeiture cases. It would be possible to defend the present rule in forfeiture cases (especially on Sedley LJ's interpretation) by explaining forfeiture as a mechanism for the confiscation of a benefit obtained by a crime. By contrast, there is no policy reason for confiscating property which a member of the deceased's family does not happen to want.

Under wills

4.23 The Consultation Paper recommended that there should not be a deemed predecease rule for the case where a person disclaims a benefit under a will. The reasoning was that the disclaimer situation is less unforeseeable and less practically urgent than the forfeiture case. There is therefore less reason to depart from the normal principle that one should respect the actual wording of a will rather than trying to second-guess the testator.[87]

4.24 On considering the responses to consultation, we are persuaded that the resulting pattern would be illogical. The argument about not departing from the

[86] A possible exception is where the property is so onerous that none of the relatives is likely to want it, in which case ownership by the Crown may be the best solution. Even here, it is better for the relatives further down the line to be given the chance to accept the property or decline it, rather than that it should compulsorily pass over all their heads.

[87] CP para 5.38.

wording of wills should apply to all will cases or none. Although disclaimer is somewhat easier to foresee than forfeiture, it would be rare for a will to read "to A, or if A should predecease me or disclaim the gift, then to B". It would be more usual to speak of A dying or failing to attain a vested interest for whatever reason; which would look after the forfeiture case as well. It makes more sense to include both types of will case than to distinguish between forfeiture and disclaimer.

4.25 It is true that the consistency argument does not apply to wills in quite the same form as in intestacy cases, as we are not trying to interpret a statute imposing a fixed order of succession. It does however apply in the same way as in will cases involving forfeiture. It is conceivable that a testator might wish explicitly to make a gift to A, with a default gift to B if A dies, but to C if A disclaims. But it is hard to discern any motive for such a distinction (harder than in forfeiture cases), and this intention should not be inferred in a will if not made absolutely explicit.

4.26 In the end, the choice is the same as in forfeiture cases. There might be a case for excluding will cases altogether, whether the cause of disqualification is forfeiture or disclaimer. But once the decision is taken to include wills in principle, as discussed in connection with forfeiture, the same logic should apply to cases where a beneficiary disclaims a benefit under a will.

Conclusion on wills and disclaimer

4.27 We agree with the majority of respondents that it would be illogical for the reform to extend to three out of four permutations, as recommended in the Consultation Paper. Logically the reform could cover either intestacy cases but not will cases, or forfeiture cases but not disclaimer cases, or all four permutations. For the reasons explained above, we prefer the four-permutation solution.

4.28 We recommend that where a person disclaims an inheritance, either under a will or under the law of intestacy, the inheritance should devolve as if the person disclaiming had died immediately before the deceased.

OTHER ISSUES

Attestation of wills

4.29 We consider that it would be inappropriate to provide for the case of witness attestation without a more general review of the justification for the attestation requirement. It would also seem dangerous to make an open-ended provision for failure to attain a vested interest for whatever reason. We therefore consider that, subject to the next point, the reform should be limited to the four permutations: wills and intestacy, forfeiture and disclaimer.

Death during minority

4.30 An interesting variation of our problem has been raised by the Chancery Bar Association. When an intestate dies leaving minor children, those children attain a vested interest on reaching the age of majority or on marrying before that age. Suppose that a child dies after the intestate while still a minor and unmarried,

leaving one or more children. Since 1991, illegitimacy is not a bar to intestate inheritance and these children qualify as grandchildren of the intestate.[88] However, the intestate's property does not reach them through their parent, as the parent never attained a vested interest. Nor can the grandchildren inherit direct from the intestate, as the parent did not predecease the intestate as required by the intestacy laws.[89] The property will therefore devolve on the other relatives. As this problem would not arise if the child were married, the law of intestate succession still in effect discriminates against illegitimate grandchildren.

4.31 We agree that this is an anomaly, and that it is sufficiently closely related to the *Re DWS (deceased)* problem to justify addressing in the same reform. There are three possible solutions.

(1) The Chancery Bar Association, in its original response, suggested that, after every mention of "or marry under that age" in the intestacy legislation, there should be inserted "or die under that age leaving surviving issue". The problem with that approach is that the parents would then acquire and lose a vested interest at the same moment (that of their death), requiring the succession rules to be applied twice, with undesirable inheritance tax consequences. This solution is radically different from that suggested for the forfeiture and disclaimer cases, in that it depends on the grandchildren's position among the heirs of their parents rather than of the intestate.[90]

(2) Another possibility would be to provide that the children of the intestate acquire a vested interest on the birth of any issue. This is a reform of the law of inheritance that goes well beyond the solution of the problem under discussion.

(3) A third is to make specific provision that children who fail to attain a vested interest because they die before majority or marriage should be deemed to have predeceased the intestate. This would raise the question whether an analogous provision should be made for wills containing a gift for a person conditional on that person attaining a given age or marrying under that age.

On consideration we favour the third option, which is now endorsed by the Chancery Bar Association. A provision to this effect is contained in the draft Bill. We do not recommend an analogous provision for wills, as it is likely that where there is a conditional gift of this kind there will be a default gift to the grandchildren.

4.32 This problem is not confined to cases where the minor was a child of the deceased. It can also arise where the minor was a grandchild, sibling, uncle or

[88] Family Law Reform Act 1987, s 18.

[89] Administration of Estates Act 1925, s 47(1)(i) *in fine*.

[90] This may not make much practical difference, as a minor (other than one on active military service) cannot make a will: Wills Act 1837, s 7.

aunt, or a descendant of any of these. The solution should therefore extend to every beneficiary under any of the statutory trusts, the common factor being that they are all liable to the failure of their interests if they outlive the intestate but die as unmarried minors, thus cutting out their descendants.

4.33 In conclusion, where a person loses a benefit under intestacy by dying unmarried and a minor, that person's descendants (if any) should not be debarred from inheriting by the fact that their parent outlived the intestate but did not attain a vested interest.

4.34 We recommend that, where a person loses a benefit under intestacy by dying unmarried and a minor, but leaves children or remoter issue, the property should devolve as if that person had died immediately before the intestate.

Lifetime settlements

4.35 In the Consultation Paper we raised the question whether the reform should extend to successive interests under lifetime settlements.[91] For reasons there explained, we recommended that it should not, and those of the respondents to the Consultation Paper who mentioned the issue at all agreed. We therefore do not propose to pursue this possibility.

Miscellaneous

4.36 Some respondents raised further issues, namely:

(1) whether a similar reform should apply to joint tenancies and joint debts;

(2) how far similar problems arise with pensions, in particular whether, in cases where the value of a member's pension benefits is attached to compensate for the member's fraud against the employer, this should affect derivative benefits such as spouse's pensions;

(3) how the reform would interact with relief under the Forfeiture Act 1982 and whether the time limit for such relief should be increased;

(4) whether the same principle should apply to the descent of hereditary peerages.

4.37 The position where one joint tenant kills another, both in current law and under a deemed predecease rule, are set out in Part 2.[92] We do not consider that the position resulting from a deemed predecease rule is superior to the existing rule. Under the existing rule, the share of the victim is severed and safeguarded, and remains the same whether or not there are other joint tenants. Under a deemed predecease rule, the victim's share would be doubled if there are no other joint tenants, and disappear altogether if there are. Further, there was no support in

[91] CP para 5.43 and 5.44.

[92] Paras 2.27 to 2.29 above.

the responses for extending the deemed predecease rule to joint tenancies: the one consultee to raise the question was mainly concerned to ensure that our proposed reform did not extend to this situation unintentionally.[93] It would also be illogical to separate the issue of joint tenancies from the wider issue of lifetime settlements. We therefore do not recommend including joint tenancies in the scope of the reform.

4.38 We considered in some detail the possibility of reforming the law of joint mortgages and joint debts. However, we were unable to devise any solution that would not either cause more complications than it would solve or prejudice the position of creditors.

4.39 The existing position on pensions is that derivative benefits fall with the principal benefits to the scheme member if these are forfeited or lost for any reason. We do not regard this as an unjust result: our proposals should therefore remain confined to the sphere of inheritance and not be extended by analogy to pensions.

4.40 We agree that it is important to draft any new provision in such a way as not to prejudice the power to grant relief under the Forfeiture Act 1982, and this is specifically provided for in our draft Bill. The question of the time limit, however, is outside the scope of the project.

4.41 The question about hereditary peerages concerns the impact of Government proposals to make peerages removable in the case of imprisonment for certain offences, rather than the effect of the present law. This is not a matter for the Law Commission.

[93] Para 2.28 above.

PART 5
LIST OF RECOMMENDATIONS

5.1 There should be a statutory rule that, where a person forfeits the right to inherit from an intestate through having killed that intestate, the rules of intestate succession, as laid down in sections 46 and 47 of the Administration of Estates Act 1925 (as amended), should be applied as if the killer had died immediately before the intestate. (Paragraph 3.33.)

5.2 Where a person forfeits a benefit under an intestacy through having killed the deceased, but as a result of our reforms property devolves on or is held for a minor descendant of the killer, the court should have power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer. (Paragraph 3.37.)

5.3 Where a person forfeits a benefit under a will through having killed the testator, the will should be applied as if the killer had died immediately before the testator, unless the will contains a provision to the contrary. (Paragraph 4.11.)

5.4 Where a person forfeits a benefit under a will through having killed the deceased, but as a result of our reforms property devolves on or is held for a minor descendant of the killer, the court should have power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer. (Paragraph 4.13.)

5.5 Where a person disclaims an inheritance, either under a will or under the law of intestacy, the inheritance should devolve as if the person disclaiming had died immediately before the deceased. (Paragraph 4.28.)

5.6 Where a person loses a benefit under intestacy by dying unmarried and a minor, but leaves children or remoter issue, the property should devolve as if that person had died immediately before the intestate. (Paragraph 4.34.)

(*Signed)* ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
JEREMY HORDER
MARTIN PARTINGTON

STEVE HUMPHREYS, *Chief Executive*
4 July 2005

APPENDIX 1
DRAFT LAW REFORM (SUCCESSION) BILL

The draft Bill begins on the following page. The clauses are printed on left-hand pages and Explanatory Notes on Clauses are printed on the corresponding right-hand pages.

DRAFT

OF A

B I L L

TO

Amend the law relating to the distribution of the estates of deceased persons.

BE 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 Disclaimer or forfeiture on intestacy

(1) Part 4 of the Administration of Estates Act 1925 (c. 23) (distribution of residuary estate) is amended as follows.

(2) After section 46 insert—

"46A Disclaimer or forfeiture on intestacy

(1) This section applies where a person—

(a) is, in accordance with section 46, entitled to an interest in the residuary estate of an intestate but disclaims it, or

(b) would have been so entitled had he not been precluded by the forfeiture rule from acquiring it.

(2) He is to be treated for the purposes of this Part as having died immediately before the intestate.

(3) But subsection (2) does not affect the power of a court, in a case within subsection (1)(b), to make an order under section 2 of the Forfeiture Act 1982 (power to modify effect of forfeiture rule).

(4) In this section and section 46B, "forfeiture rule" has the same meaning as in that Act.".

(3) After section 46A insert—

"46B Safeguarding minor's share following forfeiture

(1) This section applies where—

EXPLANATORY NOTES

CLAUSE 1

This clause inserts two new sections after section 46 of the Administration of Estates Act 1925, and makes two consequential amendments to section 47 of that Act.

New section 46A

This section modifies the order of intestate succession in two cases where the person first in line to inherit an estate or part of it is unable or unwilling to do so. The first case is where the person disclaims the inheritance. The second case is where the person loses the inheritance through the common law "forfeiture rule": that is to say, where he or she has killed the intestate, and is not allowed to inherit for this reason.

The question is who inherits instead of the person disclaiming or forfeiting. The current position is that not only that person but also all that person's descendants are excluded from inheriting. In some cases, such as where the disqualified person is the child of the intestate, the inheritance goes to other relatives such as siblings. In other cases, such as where the disqualified person is a parent or spouse, the inheritance goes to the Crown as bona vacantia. The problem came to light in the case of *Re DWS (deceased)*,[1] where R murdered both his parents and his son T claimed the inheritance. The Court of Appeal decided that T could not inherit and that the property went to the estate of W, the dead man's sister.

This result is widely perceived as unfair. The new section provides that, in all such situations, the property should be treated in the same way as if the person disclaiming or forfeiting had died immediately before the intestate. The effect is that the inheritance will go to the next person listed in order of priority in section 46: on facts such as *Re DWS (deceased)*, to the grandchildren.

Subsection (3) ensures that the new rule will not limit the court's power under section 2 of the Forfeiture Act 1982. Under that section, where a person has killed the deceased but the killer has not been convicted of murder, the court has the power to modify the effect of the forfeiture rule, for example by allowing the killer to inherit all or part of the estate. Accordingly, the rule introduced by the new section gives way to any order made using the power under the Forfeiture Act.

New section 46B

This section exists to prevent a killer from benefiting indirectly from a child's inheritance.

[1] [2001] Ch 568 (CA).

(a) a person ("the offender") would have been entitled to an interest in the residuary estate of an intestate had he not been precluded by the forfeiture rule from acquiring it, and

(b) as a result of section 46A(2), an infant who is a child or remoter descendant of the offender becomes entitled to an interest in the estate.

(2) The Court may (whether or not on its own initiative)—

(a) appoint the Public Trustee to hold, during the infant's minority, any property to which his interest relates on such trusts as the Court may specify, and

(b) make such further orders or give such directions as it thinks necessary or expedient for giving effect to an appointment under paragraph (a).

(3) In deciding whether to exercise its powers under this section, the Court must have regard to the need to ensure that the offender does not benefit as a result of the infant's entitlement to an interest in the estate.

(4) When acting as trustee of a trust under this section, the Public Trustee must, so far as reasonably practicable, ensure that the offender does not benefit from the trust.

(5) Section 2(3) of the Public Trustee Act 1906 (which enables the Public Trustee to decline to accept a trust) does not apply.

(6) "Benefit" means benefit whether directly or indirectly.".

(4) Section 47 (statutory trusts on intestacy) is amended as follows.

(5) In subsection (1)(i) (provision that no issue with a parent alive at the intestate's death may inherit), after "and so that", insert "(subject to section 46A)".

(6) After subsection (4) insert—

"(4A) Subsections (2) and (4) are subject to section 46A.".

2 Disclaimer or forfeiture of a legacy under a will

(1) The Wills Act 1837 (c. 26) is amended as follows.

(2) After section 33 insert—

"33A Disclaimer or forfeiture of legacy

(1) This section applies where a will contains a devise or bequest of an interest in real or personal estate to a person who—

(a) disclaims it, or

(b) has been precluded by the forfeiture rule from acquiring it.

(2) He is to be treated for the purposes of this Act as having died immediately before the testator.

(3) But subsection (2) does not affect the power of a court, in a case within subsection (1)(b), to make an order under section 2 of the Forfeiture Act 1982 (power to modify effect of forfeiture rule).

(4) Subsection (2) is subject to any provision in the will about how the devise or bequest is to take effect in circumstances which would

New section 46B (continued)

The rule introduced by new section 46A allows a person's children and other descendants to inherit in place of that person, when he or she is disqualified by the forfeiture rule. This inheritance takes the form of "statutory trusts", which are defined in the existing section 47. Briefly, any child or descendant acquires a vested interest on attaining 18 or marrying (or, once the Civil Partnership Act 2004 is in force, forming a civil partnership). Until then, the property is held on trust, with the usual powers of maintenance, advancement and accumulation.

New section 46B provides that, in this situation, the court may appoint the Public Trustee to hold the property for the minor beneficiaries: the Public Trustee may not decline the trust. The purpose is to avoid benefit to the disqualified person. Accordingly the Public Trustee must so far as reasonably practicable administer the trust so as to avoid such benefit.

The Public Trustee continues to hold the property until the beneficiary attains the age of 18. There is no specific provision for the trust to terminate if the beneficiary marries or becomes party to a civil partnership before that age.

Subsection (5)

This is a consequential provision. At present, section 47(1) of the Administration of Estates Act 1925, which defines the statutory trusts for descendants, provides that no grandchild or remoter descendant may inherit if their parent was still alive when the intestate died. The effect of section 46A is to treat the offender as having died, so as to allow the offender's descendants to inherit. Subsection (5) inserts the words "subject to section 46A" into section 47(1), to ensure consistency with the new rule.

Subsection (6)

This is another consequential provision, and inserts a new subsection after section 47(4) of the Administration of Estates Act 1925, stating that subsections (2) and (4) are subject to the new section 46A.

Section 47(2) provides that, where no descendant of the intestate attains a vested interest, the estate is to be distributed as if the intestate had died without issue. Section 47(4) applies a similar rule to the statutory trusts for siblings or uncles and aunts, which are defined by section 47(3). These two rules cover some of the same ground as the new section 46A, and the new subsection exists to avoid duplication.

CLAUSE 2

This clause inserts two new sections after section 33 of the Wills Act 1837, and makes one consequential amendment to that section.

New section 33A

This corresponds to new section 46A of the Administration of Estates Act 1925.

It applies when a person either disclaims an interest under a will or is precluded from taking it by the forfeiture rule because he or she has killed the testator. In both these situations, the will is to be interpreted as if the person disclaiming or forfeiting had died immediately before the testator.

This makes a practical difference where the will contains wording such as "to A, but if A dies before me, to B". Under the current rule, if A disclaims, or kills the testator, the gift to B will fail because B did not in fact die before the testator. Under the new rule, B will inherit.

include those where the intended beneficiary comes within subsection (1)(a) or (b).

(5) In this section and section 33B, "forfeiture rule" has the same meaning as in the Forfeiture Act 1982.".

(3) After section 33A insert—

"33B Safeguarding minor's share following forfeiture

(1) This section applies where—

(a) a person ("the offender") has been precluded by the forfeiture rule from acquiring an interest in real or personal estate under a will, and

(b) as a result of section 33A(2), an infant who is a child or remoter descendant of the offender becomes entitled to an interest in real or personal estate under the will.

(2) The Court may (whether or not on its own initiative)—

(a) appoint the Public Trustee to hold, during the infant's minority, any property to which his interest relates on such trusts as the Court may specify, and

(b) make such further orders or give such directions as it thinks necessary or expedient for giving effect to an appointment under paragraph (a).

(3) In deciding whether to exercise its powers under this section, the Court must have regard to the need to ensure that the offender does not benefit as a result of the infant's entitlement to an interest in real or personal estate under the will.

(4) When acting as trustee of a trust under this section, the Public Trustee must, so far as reasonably practicable, ensure that the offender does not benefit from the trust.

(5) Section 2(3) of the Public Trustee Act 1906 (which enables the Public Trustee to decline to accept a trust) does not apply.

(6) In this section—

"benefit" means benefit whether directly or indirectly, and

"the Court" has the same meaning as in the Administration of Estates Act 1925.".

(4) In section 33(3) (provision that no issue with a parent alive at the testator's death may inherit), after "and so that", insert "(subject to section 33A)".

3 Death of a single parent under 18

At the end of section 47 of the Administration of Estates Act 1925 (c. 23) (statutory trusts on intestacy), add—

"(4B) Subsections (4C) and (4D) apply if a beneficiary under the statutory trusts—

(a) fails to attain an absolutely vested interest because he dies without having reached 18 and without having married or formed a civil partnership, and

(b) dies leaving issue.

New section 33A (continued)

A similar situation can arise under section 33 of the Wills Act 1837. Where a will contains a gift to a child, and that child dies before the testator, the gift is (unless the will states otherwise) to go to that child's descendants, but that no grandchild or remoter descendant may inherit if their parent was still alive when the testator died. The same problem can arise here as in the intestacy case, and the rule introduced by new section 33A solves it in the same way. Where the child disclaims or forfeits the gift, he or she is treated as having died before the testator, and the grandchildren can inherit.

Subsection (3) of the new section provides that, as in the intestacy situation, this new rule gives way to any order the court may make under the Forfeiture Act 1982. Subsection (4) confirms that the new rule gives way to any specific provision in the will about what happens to the gift in circumstances such as forfeiture and disclaimer.

New section 33B

This corresponds to new section 46B of the Administration of Estates Act 1925. Where an interest under a will is forfeited, and the new rule in section 33A results in an interest being taken by a person under 18, the court may appoint the Public Trustee to be the trustee of the relevant property for that person. The court, and the Public Trustee, are charged with ensuring that the offender does not benefit from the trust.

Subsection (4)

This makes a consequential amendment to section 33(3) of the Wills Act 1837, and corresponds to subsection (5) of clause 1 in the intestacy situation.

As explained above, section 33(3) excludes a grandchild or remoter descendant of the testator whose parent was still alive at the testator's death. Subsection (4) inserts the words "subject to section 33A", to avoid inconsistency with the rule introduced by that section.

CLAUSE 3

This inserts new subsections (4B), (4C) and (4D) after the new section 47(4A) of the Administration of Estates Act 1925.

The inserted subsections concern a special situation, in which a child of an intestate dies unmarried, but leaving children. The problem arises if the child dies after the intestate, but before attaining the age of 18. In this situation, the grandchildren are effectively disinherited. They cannot inherit directly from the intestate grandparent, because their parent was still alive at the grandparent's death (section 47(1)). Nor can they inherit via the parent, because the parent never attained a vested interest in the grandparent's estate. The same problem can arise where the person who dies under the age of 18 is a grandchild, sibling, uncle or aunt of the intestate, or a descendant of any of these.

(4C) The beneficiary is to be treated for the purposes of this Part as having died immediately before the intestate.

(4D) The residuary estate (together with the income from it and any statutory accumulations of income from it) or so much of it as has not been paid or applied under any power affecting it is to devolve accordingly.".

4 Commencement, extent and short title

(1) This Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(2) But the order may not provide for this Act to come into force before the end of three months beginning on the date on which it is passed.

(3) This Act extends to England and Wales only.

(4) This Act may be cited as the Law Reform (Succession) Act 2005.

EXPLANATORY NOTES

CLAUSE 3 (continued)

The inserted subsections address this problem by providing that, in any of these situations, the estate is to be distributed as if the child or relative had died immediately before the intestate. Income remaining from the period between the death of the testator and the death of the child or relative is dealt with in the same way.

CLAUSE 4

This provides for the Act to come into force on an appointed day, which must be at least three months after Royal Assent. It also provides for citation and extent.

APPENDIX 2
INTESTACY: FORFEITURE BY A RELATIVE OTHER THAN AN ONLY CHILD

1. In this Appendix we explain how we believe the intestacy rules currently operate where the intestate is killed by a potential beneficiary other than an only child. We then consider how this position would be affected by our recommendations.

Forfeiture by spouse

2. It is not altogether certain how the intestacy rules apply when one spouse has killed the other. The strict words of the statute[1] suggest the following:

   (1) It would seem that where the intestate leaves a spouse, but does not leave children, parents, siblings or descendants of children or siblings, the estate becomes bona vacantia. This is because the statutory gifts to grandparents, uncles, aunts etc. are all explicitly limited to the case where the deceased does not leave a spouse.

   (2) Where the intestate leaves children, parents, siblings or descendants of children or siblings, it would seem that the personal chattels also become bona vacantia, as the remaining statutory gifts all relate to the "residuary estate (other than the personal chattels)".

   (3) The spouse's entitlement to a fixed money sum (£125,000 or £200,000) would seem to disappear altogether, as the legislation expresses it as a charge on the statutory gifts of residue. Thus there is no question of this amount being kept separate and becoming bona vacantia.

   (4) The same is true of the spouse's life interest where there are children or other issue, as the gift in remainder is expressed as "subject to such life interest, on the statutory trusts for the issue of the intestate". In other words the interests of the children take immediate effect in accordance with the doctrine of acceleration.

   (5) The spouse's absolute interest in half the residue, as provided where the deceased leaves parents or siblings but no children, becomes bona vacantia for the same reasons as the whole estate in case (1).

Forfeiture by one of several children

3. On the facts of *Re DWS (deceased)*, section 47(2) applied because the killer was the only surviving child of the deceased. Had R been one of several brothers and sisters, it is unclear what would have happened. Certainly section 47(2) would not have had the effect of deeming R to be non-existent, as it only applies where there are no descendants who attain a vested interest. It is uncertain, however, whether the phrase "in trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate", should be read as meaning "equally among all the children capable of attaining an interest". If so, the entire estate is divided among the children other than R, so that in effect the share that R would have taken goes to swell the others. If not, R's putative

[1] Administration of Estates Act 1925 ss 46 and 47.

share remains separate and becomes bona vacantia. Given the literal approach used in *Re DWS (deceased)*, this latter outcome seems more likely.

Forfeiture by a sibling, uncle or aunt

4. The decision in *Re DWS (deceased)* turned on the definition of the "statutory trusts" for issue in section 47(1) of the Administration of Estates Act 1925. Under section 47(3) of that Act, the same definition is applied with the necessary changes to the statutory trusts for siblings, aunts and uncles. It follows that, where the deceased has been killed by a brother, sister, uncle or aunt, the descendants of the killer are excluded in the same way as the grandchild in *Re DWS (deceased)*.

5. Section 47(4) applies where no person attains a vested interest under statutory trusts for a given group of siblings, uncles or aunts. In forfeiture cases, this arises where the killer is the only remaining member of the relevant class, that is:

   (1) the only surviving sibling of the whole blood (or where there are no surviving siblings of the whole blood, the only surviving descendant of any sibling of the whole blood);

   (2) where there are no surviving siblings of the whole blood, the only surviving sibling of the half blood (or descendant, as before);

   (3) the only surviving uncle or aunt of the whole blood (or descendant);

   (4) where there are no surviving uncles or aunts of the whole blood, the only surviving uncle or aunt of the half blood (or descendant).

   Following *Re DWS (deceased)*, it appears that section 47(4) also applies where the killer is not the only surviving member of the relevant class, but all the others are the killer's descendants.

6. Where section 47(4) applies, the intestate is deemed to have died leaving no member of the relevant class. The property will therefore go to the next person or class in the list: half-blood siblings, grandparents, full-blood uncles and aunts, half-blood uncles and aunts or the Crown. (This is also implicit in the wording of section 46(1)(v), even without section 47(4).)

7. Where the killer is one of several siblings, uncles or aunts, section 47(4) does not apply. Nor is the condition "but if no person takes an absolutely vested interest under such trusts"[2] fulfilled. There is therefore no question of the forfeited share going to the next statutory class, as it might if the killer had been a sole sibling. It is uncertain whether the forfeited share goes to swell the shares of the other members of the class (apart from the killer's own descendants) or becomes bona vacantia, but we believe that the latter is more likely.

Forfeiture by a parent or grandparent

8. The interest of a parent under an intestacy is not held on a "statutory trust", and section 47(2) does not apply. Nor does section 46(1)(iii) or (iv) or the initial condition of (v) contain any wording about failing to attain an absolutely vested interest. All the interests under section 46(1)(v) are conditional on the deceased leaving no parent, to be understood literally. Accordingly, if the deceased was killed by his only surviving parent, none of these interests takes effect and the estate becomes bona vacantia. If both parents are alive, it would appear that the

[2] Section 46(1)(v), end of the first, second and fourth sub-paragraphs.

killer's share becomes bona vacantia rather than going to the other parent, as the gift to the surviving parent in section 46(1)(iv) is conditional on the deceased leaving only one parent.

9. The same would seem to apply where the deceased was killed by a grandparent. The gift to uncles and aunts (even those not descended from the killer) does not take effect, as it only applies if "there is no member of this class", that is, grandparents.

The view of Sedley LJ

10. Throughout this Report we have assumed that the majority view in *Re DWS (deceased)* is correct. On the minority view, as expressed by Sedley LJ, the position would be simpler and more consistent. Every mention of a person failing to attain a vested interest, whether in section 47(2) and (4) or in the conditions in section 46(1), would mean that the person failed to attain such an interest by dying without having attained majority, married or formed a civil partnership. Accordingly, with the possible exception of the spouse's statutory legacy and life interest, all forfeited property would become bona vacantia. In effect, the objective of not allowing potential heirs to profit from their own crime would be achieved by confiscation.

Summary

11. In brief:

    (1) The normal effect of the forfeiture rule is that the forfeited interest becomes bona vacantia and does not go to the next relative in order of priority.

    (2) The main exception is where the killer is the only surviving member of a class of beneficiaries under a statutory trust, or where all the other members are the killer's descendants. In these cases section 47(2) or (4) has the effect of deeming the deceased to have died without leaving any members of the relevant class, and the property devolves on the next statutory class.

    (3) Where the killer is one of several beneficiaries under a statutory trust, some of whom are not his descendants, the position is uncertain but we believe that the killer's putative share becomes bona vacantia.

Effect of our recommendations

12. Under our proposed reforms, the property will devolve in exactly the same way as if the killer had predeceased the victim. The order would be the same as that set out in paragraphs 2.7 and 2.8 of the Report. In other words:

    (1) Where the killer is a spouse, the property would devolve to the victim's children and grandchildren, followed by their parents.

    (2) Where the killer is a parent, the killer's share would pass to the other parent – followed by a sibling, grandparent, aunt or uncle.

    (3) Where the killer is a sibling, the sibling's children would take the sibling's share. If the killer has no children, it would be divided equally among the victim's other siblings.

(4) If the killer is a grandparent, their share would be divided between the other surviving grandparents. If there are no other surviving grandparents, the property would pass to any uncles or aunts and their descendants.

(5) If the killer is an uncle or aunt, the killer's share would pass to their children (the victim's cousins). If the killer did not have children, the property would be divided between the victim's other uncles or aunts.

(6) If the killer is a cousin, the killer's share would be divided between the victim's other uncles, aunts and cousins. Only if there are no remaining uncles, aunts or cousins would the property become bona vacantia.

APPENDIX 3
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