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THE FORFEITURE RULE AND THE LAW OF SUCCESSION

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This consultation paper, completed on 30 September 2003, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION

THE FORFEITURE RULE AND THE LAW OF SUCCESSION

CONTENTS

SUMMARY

S1. There is a well-established common law rule, often referred to as the "forfeiture rule", which states that a person cannot inherit property from someone whom he or she has unlawfully killed. For example, when a person dies without making a will, leaving no spouse but an only child, the law normally provides that that child should inherit. If however the child has unlawfully killed the dead person, the forfeiture rule overrides the normal law and the child is excluded.[1]

S2. The question is what should happen to the inheritance in these circumstances. The three possibilities are that it should go:

(a) to the killer's children (the dead person's grandchildren);

(b) to other relatives, such as the dead person's brothers and sisters; or

(c) to the State.

A RECENT CASE

S3. This problem came to light as a result of a case decided by the Court of Appeal in 2000.[2] Two grandparents were murdered by their only son, who was sent to prison for life. The grandparents had not left a will and so their property had to be distributed under the intestacy rules. It was agreed that the son himself could not inherit because, as he had murdered his parents, the forfeiture rule prevented it.

S4. The question was who would receive the property. Had the son already died, the property would have gone to the grandparents' only grandchild, who was also the son's only child. However, the son was not dead, but merely disqualified from inheriting. The relevant provision of the intestacy rules (contained in the Administration of Estates Act 1925) provides that the grandchild will inherit only if the son or daughter has already died. The court accordingly decided that the law did not allow the grandson to take the property. Rather, the property would have to go to the dead grandfather's sister (or her estate).

S5. Thus, in this situation, not only is the killer disqualified from inheriting but so also are all the killer's direct descendants. The Court of Appeal seems to have regarded this as an unintended and unforeseen consequence of the present intestacy rules. The property is arbitrarily diverted away from those who would normally be next in line to receive it.

[1] There is a discretionary power to waive this rule in cases where the killing does not amount to murder.

[2] *Re DWS (deceased)* [2001] Ch 568 (CA).

PROBLEMS WITH THE CURRENT LAW

S6. The Law Commission sees three principal problems with the present rule:

(a) It has the effect of punishing innocent grandchildren by permanently cutting them out of the scheme of inheritance because of their parents' wrongdoing. This seems inherently unfair.

(b) The intestacy rules set down a specific order in which the dead person's relatives are to receive the property. In that order, grandchildren come before brothers and sisters. It seems odd that, where the deceased's son or daughter is disqualified rather than dead, the brothers and sisters should be preferred and the grandchildren excluded from the list altogether.

(c) The intestacy rules are generally designed to reflect the presumed wishes of the dead person; that is, to replicate the will that the dead person might have made for themselves. Were they told that their children would be disqualified from inheriting they would presumably expect the property to go their grandchildren in the usual way rather than to remoter relatives.

OUR PROVISIONAL PROPOSALS

S7. We provisionally propose that in situations where a potential heir is disqualified, the property should be distributed as if that person had died. This would allow the property to be distributed in the normal way and better reflect the likely wishes of the dead person. This rule would apply whether the dead person was killed by a son or daughter or by some other relative, for example a brother or sister.

S8. The Law Commission's main proposal concerns the case where the dead person has died intestate, and the potential heir is excluded because he or she has killed the dead person. However, we also suggest similar solutions for analogous cases, where a potential heir refuses a benefit to which he or she is entitled under the intestacy laws, or the killer has been left property by will.

PART I
INTRODUCTION

1.1 In July 2003 the Department of Constitutional Affairs requested 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",[1] 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 (dec'd)*[2] and should explore ways the law might be reformed to prevent apparently unfair outcomes of this sort.

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

1.2 Accordingly, this Consultation Paper sets out the Law Commission's provisional views and invites consultees' comments. The paper will set out the nature (Part II) and scope (Part III) of the problem encountered in *Re DWS (dec'd)*. It will also briefly consider comparative approaches (Part IV) and the relevant policy arguments (Part V) and, finally, suggest some possible solutions (Part VI). Our provisional proposals and the questions for consultation are set out in brief in Part VII.

THE PROBLEM

1.3 Briefly, the problem concerns the case where a person is disqualified from claiming an inheritance because he or she has killed the deceased. In this situation, it appears that an unintentional effect of the intestacy rules, as laid down in the Administration of Estates Act 1925, is to exclude all the killer's descendants from the succession. Thus, where a son or daughter has killed a parent, the grandchildren are excluded in favour of collaterals: that is, the deceased's brothers, sisters, uncles, aunts and their descendants.[3] By contrast, where a son or daughter dies before the parent, the grandchildren are generally preferred to the collaterals. The question is whether there is a valid policy reason for this difference or whether the grandchildren should not rather be allowed to inherit equally in both situations.

1.4 The conclusion of this Consultation Paper is that the grandchildren should be allowed to inherit. One reason is that they should not be punished for the sins of

[1] 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.

[2] [2001] Ch 568 (CA).

[3] Similarly, when the deceased was killed by a brother, sister, aunt or uncle the descendants of the killer are excluded in favour of remoter relatives: para 2.13 below.

their parent; another is that this is more likely to be what the deceased would have wished; a third is that the general policy of intestacy law is to prefer issue to collaterals so that to make an exception in the forfeiture case is inconsistent.

ANALOGOUS SITUATIONS

1.5 Similar problems may be found in a wider range of situations. First, the problem may arise under the terms of a will or a settlement rather than under the law of intestacy; secondly, there may be reasons for disqualification other than forfeiture.

1.6 The situation may arise under a will which leaves a legacy to A or, if A should predecease the testator, to B. If A kills the testator, B will not meet the conditions set by the will, and the legacy will fall into residue or intestacy. Analogous facts could arise under a settlement containing a gift conditional on surviving a tenant for life. The main difference between these situations and the intestacy situation is that B need not be related to A.

1.7 The main reason for disqualification other than forfeiture is disclaimer. This may occur either under a will or on intestacy. If the child or principal beneficiary disclaims the benefit, the effect will be that the grandchild or substitute beneficiary is also excluded, as their interest is conditional on the child or principal beneficiary dying before the deceased. The same thing may happen in will cases where the principal beneficiary is disqualified by having witnessed the will.

PROVISIONAL PROPOSALS

1.8 In the principal situation discussed, of the son or daughter whose interest under an intestacy is forfeited because he or she has killed the deceased, we consider that the grandchildren should be allowed to inherit. This would best be effected by a new statutory provision that, in this situation, the estate should be distributed as if the person losing the entitlement had died immediately before the deceased. The alternative possibility, that the Crown or the court should be allowed to rectify the situation through a discretionary power, is undesirable.

1.9 The Law Commission's main provisional proposal concerns the case where:

(a) the dead person has died intestate, and the potential heir is excluded because he or she has killed the dead person.

We propose a similar solution for the cases where:

(b) the dead person has died intestate, and the potential heir is excluded because he or she has disclaimed any interest in the estate; or

(c) the dead person has made a will, and the potential heir is excluded because he or she has killed the dead person.

For reasons explained below,[4] we do not consider that this solution should extend to other cases, such as where:

(d) the dead person has made a will, and the potential heir is excluded because he or she disclaimed any interest in the estate;

(e) the dead person has made a will, and the potential heir is excluded because he or she is a witness to the will; or

(f) analogous circumstances exist in connection with a lifetime settlement.

THE REVIEW PROCESS

1.10 The "forfeiture rule", as discussed in this paper, is a rule of law to the effect that a person cannot claim an interest under a will or intestacy if he or she has killed the testator or intestate person. It is an instance of a wider principle that a person should not be allowed to profit from his or her crime ("the no-profit principle"). The no-profit principle is considered in the Commission's project on illegal transactions, and it is for this reason that the present review of the forfeiture rule was allocated to that project. (The link between the present review and the project on illegal transactions is largely administrative: the present review will have its separate timetable, consultation process and conclusions.)

1.11 One possibility being considered by the Commission as part of its work on illegal transactions is that the no-profit principle should remain in existence, but in the form of a discretion to be exercised in accordance with statutory guidelines rather than of a strict exclusionary rule.[5] This corresponds to a reform already made to the forfeiture rule in cases where the killing does not amount to murder.[6] This reform does not however solve the particular problem addressed in this paper, though one possibility suggested (and rejected) below is to widen the scope of that discretion to include the position of third parties affected by the forfeiture.[7]

1.12 This Consultation Paper will be sent to a representative sample of judges, academics and practitioners interested in the law of wills and intestacy, and to selected interest groups and professional organisations. The date set for comments to reach us is 23 January 2004. Depending on the nature of the response, it is hoped to publish a Report, possibly containing a draft Bill, by the end of 2004.

1.13 The scope of this paper is restricted to England and Wales. It is thought that similar problems may arise in the laws of Scotland[8] and Northern Ireland, and the issue has already been considered by the Scottish Law Commission.[9] Since each country has its own intestacy laws, and these are devolved matters, it was decided not to conduct the review as a joint project.

4 Paras 5.38 to 5.44.

5 Illegal Transactions: The Effect of Illegality on Contracts and Trusts (1998) Consultation Paper No 154, para 7.2.

6 Para 2.3 below.

7 Paras 6.12 and 6.13 below.

8 See below, para 4.8 *et seq*.

9 1990 Report on Succession Law (Scot Law Com No 124).

PART II
FORFEITURE AND THE LAW OF INTESTACY

The forfeiture rule

2.1 It is a well-established principle of public policy that a person who has been criminally responsible for the death of another cannot take by succession on the death.[10] This rule is often referred to as the "forfeiture rule". The Forfeiture Act 1982, which significantly modifies the previous effect of the rule,[11] 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.[12] Strictly speaking, the rule is based on public policy and is not dependent on statute.

2.2 The rule clearly applies where the successor is guilty of the murder[13] or manslaughter[14] of the deceased, although the precise extent to which it applies to other crimes involving death is less certain.[15] The rule applies both to succession under wills and on intestacy.[16] Intestacy arises when a person dies without leaving a valid will disposing of his property. In this situation the property is ultimately distributed according to the scheme set out in section 46 of the Administration of Estates Act 1925.[17]

2.3 The rule is mitigated by the Forfeiture Act 1982, which provides relief from forfeiture of inheritance for persons guilty of unlawful killing.[18] The Act recognises the common law rule based on public policy (see above) and then provides in section 2(1) that, where a court determines that the forfeiture rule would preclude

[10] 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] Ch 559, 562; *Re Giles (dec'd)* [1972] Ch 544, 551; *Re Royse (dec'd)* [1985] Ch 22; *Re K (dec'd)* [1985] Ch 85.

[11] Para 2.3 below.

[12] 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)).

[13] See *Cleaver v Mutual Reserve Fund Association* [1982] 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. The rule does not apply where the verdict is "not guilty by reason of insanity".

[14] *In the Estate of Hall* [1914] P 1, 7; *Re Giles (dec'd)* [1972] Ch 544.

[15] For the effect of offences such as causing death by dangerous driving and assisting suicide, see *Dunbar v Plant* [1998] Ch 412, discussed by Stuart Bridge, "Assisting Suicide Rendered Financially Painless" [1998] CLJ 31.

[16] See *Re Sigsworth* [1935] Ch 89; *Re Giles (dec'd)* [1972] Ch 544; *Re Royse (dec'd)* [1985] Ch 22.

[17] As amended by the Intestates Estates Act 1952.

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

the offender from "acquiring any interest in the property", the court can make an order modifying the effect of that rule by either totally or partially excluding its application to the relevant property.[19] Interests in property include all benefits by way of succession.[20] The Forfeiture Act 1982 is a recognition and alleviation of the rule, not a reformulation.

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…

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

The problem considered here

2.5 This paper addresses a particular problem exemplified by the Court of Appeal's decision in *Re DWS (dec'd)*,[21] the facts of which are set out below. *Re DWS (dec'd)* concerned the operation of the forfeiture and intestacy rules. However, some of the difficulties encountered there may also apply in analogous situations which do not necessarily involve forfeiture or intestacy.

The intestacy provisions

2.6 The relevant provisions of the Administration of Estates Act 1925 are as follows, with divisions and emphases to allow for easier reading. The sections from which these are taken are set out at greater length and in the traditional layout in the Appendix to this Consultation Paper.

> **46. Succession to real and personal estate on intestacy.**
>
> (1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:--
>
> […]
>
> (ii) If the intestate leaves issue but no husband or wife,
>
> the residuary estate of the intestate shall be held on the statutory trusts for the **issue** of the intestate;
>
> […]
>
> (v) If the intestate leaves no husband or wife and no issue and no parent,
>
> then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:--

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

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

[21] [2001] Ch 568 (CA).

First, on the statutory trusts for the **brothers and sisters** of the whole blood of the intestate;

[…]

(vi) In default of any person taking an absolute interest under the foregoing provisions,

the residuary estate of the intestate shall belong to the **Crown**

or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be,

as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke **may**

[…]

out of the whole or any part of the property devolving on them respectively,

provide, in accordance with the existing practice, for

dependants, whether kindred or not, of the intestate, and

other persons for whom the intestate might reasonably have been expected to make provision.

47 Statutory trusts in favour of issue and other classes of relatives of intestate

(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the **issue** of the intestate,

the same shall be held upon the following trusts, namely:--

(i) 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,

who attain the age of eighteen years or marry under that age,

and for all or any of the **issue**

living at the death of the intestate

who attain the age of eighteen years or marry under that age

of any child of the intestate who predeceases the intestate,

such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate,

and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

[...]

(2) If the trusts in favour of the issue of the intestate **fail** by reason of **no child or other issue attaining an absolutely vested interest**--

(a) the residuary **estate** of the intestate

and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same,

shall go, devolve and be held under the provisions of this Part of this Act

as if the intestate had died without leaving issue living at the death of the intestate;

(b) references in this Part of this Act to the intestate "leaving no issue" shall be construed as "leaving no issue who attain an absolutely vested interest";

(c) references in this Part of this Act to the intestate "leaving issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested interest."

[…]

The decision in *Re DWS (dec'd)*

Facts

2.7 In *Re DWS (dec'd)* R murdered his parents, both of whom died intestate.[22] He was therefore 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.[23] In subsequent proceedings, R's son, T, claimed to be entitled to his grandparents' estates under section 47(1)(i) of the Administration of Estates Act 1925, which provided that the issue of the child of an intestate could take if that child had predeceased the intestate. T contended that the rule of public policy which had disqualified his father meant that section 47(1)(i) of the Administration of Estates Act 1925 had to be construed as if R had predeceased the grandparents.

2.8 That contention was challenged by the executors of W, the grandfather's sister. According to them, section 47(1)(i) had to be construed literally. The statutory trust for issue was *either* for a child *or* for remoter descendants whose parents had died before the deceased. T fell into neither category.

2.9 The second question was: assuming that T could not take, what should be the ultimate destination of the estate? In particular, could W's executors inherit? W's executors relied primarily on section 47(2)(a) of the Administration of Estates Act 1925. As no child or other issue of the deceased had attained an absolutely vested interest, the statutory trust for issue failed and the estate devolved as if the intestate had died without leaving issue living at his death. Accordingly section 46(1)(v) of the Administration of Estates Act 1925 applied and the estate should go in the first instance to "the brothers and sisters of the whole blood of the intestate". In response, T contended that section 47(2) of the Administration of

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

[23] This provides that "…if the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate". It was accepted by both sides that R was disqualified from benefiting from his parent's estate.

Estates Act applied only if the child had failed to obtain an absolute vested interest because he did not attain the age of 18 or marry.

The decision

2.10 Blackburne J, at first instance, held for W's executors on both points.[24] The Court of Appeal (comprising Aldous, Sedley and Simon Brown LJJ) also rejected T's claim, upholding the decision at first instance. It held that on the construction of section 47(1)(i) of the Administration of Estates Act 1925, the issue of a child of the intestate could take only if the intestate's child had actually predeceased the intestate. Such a construction gave effect to the clear intention of Parliament that a child of surviving issue could not take in preference to his parent, and a conclusion to the contrary would amount to a complete rewording of section 47(1)(i). There was nothing absurd in construing that provision so that the child of the surviving issue could not inherit his grandparents' estate even when the surviving issue was disqualified. T could not inherit his grandparents' estate since his father had survived the intestate.

2.11 All three judges agreed that T could not inherit. With regard to the ultimate destination of the property, the majority (Aldous and Simon Brown LJJ) held that the estate passed to W's executors under the combined effect of section 46(1)(v) and section 47(2)(a) of the Administration of Estates Act 1925. The words of the latter were not qualified or restricted to particular events which would prevent the child attaining an absolute vested interest, and the subsection was wide enough to cover the instant case. R had not attained an interest for the reasons set out above. Accordingly, the estate should be held as if the grandfather had died without leaving any issue.

2.12 Sedley LJ dissented on the latter point. For him, the literal wording of section 46(1)(v) of the Administration of Estates Act 1925[25] seemed to make devolution of the estate to the blood siblings of the intestate conditional on the intestate leaving no spouse, issue or parent alive at this death. It was tenable to construe the statute as meaning that, in circumstances such as these, neither the collaterals (W) nor issue (T) could succeed (the former by virtue of the literal wording of section 46(1)(v) of the Administration of Estates Act 1925 and the latter by the literal wording of section 47(1)(i) of that Act). The property would become *bona vacantia*, enabling the Crown to step in to make an equitable allocation of the estate in uncatered for circumstances.[26]

[24] [2000] 2 All ER 83.

[25] "If the intestate leaves no husband or wife and no issue and no parent, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate… First, on the statutory trusts for the brothers and sisters of the whole blood of the estate."

[26] [2001] Ch 568, 592-3 (paras 37-42). Sedley LJ hinted that the *bona vacantia* property might then be allocated to the grandson on the basis that the policy of the law is generally to prefer the less to the more remote, citing Harman J in *Re Lockwood (dec'd)* [1958] Ch 231.

Further consequences

2.13 The decision turns 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.[27] It follows that, where the deceased has been killed by a brother, sister, uncle or aunt, the descendants of the killer are excluded in favour of remoter relatives in the same way as the grandchild in *Re DWS (dec'd)*. In the remainder of this paper, the discussion will for convenience of presentation be addressed only to the case where the killer is the son or daughter of the deceased; but the same problems, and the same range of solutions, should be understood to exist equally in these other cases.

Why the current law was felt to be unsatisfactory

2.14 The result in *Re DWS (dec'd)* seems to us to be unsatisfactory for three principal reasons, which are examined in detail in Part IV below:[28]

(a) it is unjust to penalise the grandson for the crime of his parent;

(b) the result contradicts the policy of the intestacy legislation;

(c) the result contradicts the likely wishes of the deceased.

The ECHR case

2.15 There may also be an ECHR dimension to the decision in *Re DWS (dec'd)*.[29] This is significant for several reasons. First, if the UK Government is found in Strasbourg to be in breach of its obligations under the ECHR, it may be liable to T in damages. Secondly, such a finding will have consequences for domestic courts. A domestic court will be compelled under section 3 of the Human Rights Act 1998 to read the relevant sections of the Administration of Estates Act 1925 "so as far as possible" to conform with T's Convention rights. In cases where there is a conflict between the domestic provision and T's Convention rights, the court may be required to make a declaration of incompatibility under section 4 of the Human Rights Act 1998.

2.16 There are three ways in which an ECHR claim might be framed. First, T might seek to invoke his right to property under Article 1 of the First Protocol ECHR (the right to property) which provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[27] For all these provisions see the Appendix.

[28] See also R Kerridge, "Visiting the Sins of the Fathers on their Children" (2001) 117 LQR 371 and R Wallington, "Unlawful Killing, Disclaimer and the Intestacy Rules" [2001] NLJ 22 June, 919. All four judges who heard the case at first instance and in the Court of Appeal expressed sympathy with T although none felt able to grant his claim.

[29] T has filed a petition at the ECHR under the name *TGWS (Severs) v UK*, although the case has yet to be heard on its merits.

> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or the contributions or penalties.

T would need to argue that a claim under the intestacy provisions is a type of property within the meaning of the Protocol.[30] The Protocol provides that States may not effect a *de iure* or *de facto* deprivation of a person's property unless it is in the public interest. However, in defining that public interest it is well established that the national authorities have a wide margin of appreciation in implementing social and economic policies. Their judgment will be respected unless it is "manifestly without reasonable foundation".[31] In the present case, it might be difficult for T to demonstrate that the UK has exceeded its margin of appreciation. It could also be argued that T has been deprived of no more than a mere hope of succeeding: if the murder had not taken place he would have had no vested right to ensure that the property should devolve from the deceased to R and from R to himself.[32]

2.17 Secondly, T might frame his claim as a breach of Article 8 ECHR which provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

T might seek to argue that by arbitrarily diverting his grandparents' estate away from him the English legal system has imposed a regime calculated to disrupt the natural ties of kinship protected by Article 8. The intestacy rules are here conceived as concerning status and placing value on certain relationships rather than as a purely financial scheme. It is not clear whether T would succeed in this claim. It is questionable whether the intestacy rules can be accurately conceived in this way and whether these are interests which Article 8 protects.[33]

2.18 Thirdly, T might seek to argue that there has been a breach of Article 14 ECHR taken with Article 1 of the First Protocol ECHR (the right to property) or Article 8. Article 14 provides that:

[30] See *NPBS v UK* (1998) 25 EHRR 127; *Marckx v Belgium* (1979-80) 2 EHRR 330 and *Inze v Austria* (1987) 10 EHRR 394.

[31] See *James v UK* (1986) 8 EHRR 123.

[32] Para 5.4 below.

[33] The concepts of privacy and family life in Article 8 have been applied in a wide variety of contexts: see A Lester and D Pannick, *Human Rights Law and Practice* (1999) p 165. Nevertheless it is uncertain whether it would prohibit interference with ties of kinship with deceased relatives.

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The list of prohibited grounds is not exhaustive and “other status” has been extensively interpreted. T might argue that the present law discriminates against him in an arbitrary and unjust way. This is because the decision that he should not inherit was based on the fact that his father survived his grandparents, while his father’s survival was no bar to the claim of W (the collaterals). The difference in treatment had no objective or reasonable justification and penalised a wholly innocent grandchild. Nor did it have a legitimate aim since it arose as the result of legislative oversight and the arbitrary operation of the forfeiture rule. On the other hand, even if the provisions of the Administration of Estates Act 1925 are manifestly discriminatory it does not follow that they discriminate *in relation to Convention rights*. It would be necessary first to bring his claim to succession within the ambit of either Article 8 or Article 1 of the First Protocol: that is, the applicant need not demonstrate that there has been a breach of those Articles, merely that the applicant has been discriminated against with regard to the exercise of rights under them. Of the three potential claims this would seem to have the best (though still far from certain) chance of success.

PART III
DOES THE PROBLEM APPLY MORE WIDELY?

3.1 The result in *Re DWS (dec'd)*[34] is open to criticism on several grounds. An important consideration, therefore, is to what extent the problems encountered on the facts of *Re DWS (dec'd)* can apply in other situations. It seems that there are several other areas in which a similar problem might occur.

Disclaimer on intestacy

3.2 The first situation which may raise a similar problem is that which occurs when a person entitled pursuant to the intestacy rules disclaims the entitlement (disclaimer is refusal to accept an interest). It seems that it is possible to disclaim an entitlement under an intestacy. This was the assumption in *Re Scott (dec'd)*[35] (although prior to that decision there was some doubt about whether it was possible[36]). Disclaimer here will have an effect equivalent to disqualification under the forfeiture rule.[37] The situation would seem to be directly analogous to that encountered in *Re DWS (dec'd)*.

Wills with substitutionary gifts

3.3 A problem may also occur when the deceased has made a will stipulating a substitutionary gift. In such a situation the testator provides by will that A shall take but if A shall predecease the testator then B shall take. The problem considered in this paper may arise in more than one guise. If A kills the testator (forfeiture), or A disclaims the gift (disclaimer), B will not take in A's stead because the condition (that A predecease the testator) has not been met.[38]

3.4 There is a third instance where a problem may occur where a will has been made which is peculiar to wills. 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 such disposition is "utterly null and void". If, therefore, the testator provides that A shall take but if A shall predecease 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.[39]

[34] [2001] Ch 568 (CA).

[35] [1975] 1 WLR 1260.

[36] See W Goodhart, "Disclaimer of Interests on Intestacy" (1976) 40 Conv (NS) 292 and R D Oughton, "Disclaimer of Interests on Intestacy — an American Viewpoint" (1977) 41 Conv (NS) 260. However, English law, unlike New Zealand law, contains no express statutory recognition of the power to disclaim an interest on intestacy.

[37] See the judgment of Sedley LJ in *Re DWS (dec'd)*, [2001] Ch 568, 592 (para 34).

[38] There is no such problem where B's interest is vested, as in those circumstances the doctrine of acceleration will apply, see *Re Taylor* [1957] 1 WLR 1043.

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

3.5 The purposes of the rule disqualifying a witness from receiving a benefit are to avoid fraud or undue influence on the deceased by the witness and to make sure that at least two genuinely independent observers are present when the will is signed. It replaced an earlier rule of evidence to the effect that, where a witness was interested under a will, the whole will was void unless the witness disclaimed his or her benefit.[40] The limits of the rule are somewhat arbitrary. The effect of attesting a will is to invalidate a bequest, not only to the witness, but also to the witness's spouse; but a bequest to the witness's child or other connected persons remains valid.

3.6 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. 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 or the will may even provide for the eventuality of A's disclaimer or forfeiture.[41] In this case 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 does not exist or because it does not cover the property in question[42]) then the property will be distributed according to the total or partial[43] intestacy rules. By virtue of section 49 of the Administration of Estates Act 1925 the basic scheme of entitlement set out in section 46 of that Act applies to undisposed property where the deceased dies partially intestate.[44]

3.7 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. 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.

3.8 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.

[40] See D E C Yale, "Witnessing Wills and Losing Legacies" (1984) 100 LQR 453.

[41] Although the latter is highly unlikely since testators are unlikely to foresee such an eventuality.

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

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

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

Other areas

3.9 Other situations where the deceased's gift fails, such as ademption, abatement and uncertainty, have no particular consequences for the problem discussed here and do not give rise to the same difficulties. (Ademption may occur where a gift's subject-matter has ceased to exist as part of the testator's property at his death. Abatement occurs where the funds available for payment of the pecuniary legatees are insufficient: in this case the pecuniary legacies are reduced rateably. Uncertainty means that it is impossible to ascertain the subject-matter of the gift.) "Lapse" (death of an intended beneficiary) is already dealt with by statute.[45]

3.10 Another area which has already been dealt with is the effect of divorce on a testamentary gift to the testator's spouse. Section 18(2) of the Administration of Justice Act 1982 inserted a new section 18A into the Wills Act 1837: the new section provided that where a testator is divorced subsequent to execution of the will, any gift to his former spouse should "lapse". This gave rise to the problem identified in *Re Sinclair*.[46] By his will, H gave his whole estate to his wife W or, if she predeceased him, to a charity. Subsequent to the execution of the will, H and W were divorced, and then H died. The Court of Appeal held that the contingent gift to the charity failed because W had not predeceased H. In consequence of this decision, a reference was made to the Law Commission[47] and a further amendment to the Wills Act was made.[48] Section 18A now provides that where the testator is divorced subsequent to execution of his will, any property devised or bequeathed to the former spouse should pass as if the former spouse had died on the day of the decree absolute.

Summary

3.11 In summary, it seems that there are several other areas where analogous difficulties to those identified in *Re DWS (dec'd)* arise.

3.12 As far as intestacy is concerned, it arises 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 (dec'd)* itself and the situations are directly analogous. Difficulties also arise in three situations where the deceased has made a will providing for a substitutionary gift: forfeiture, disclaimer and beneficiary attestation. Analogous difficulties could arise in the case of a lifetime settlement providing for a substitutionary gift in remainder.

[45] By amendment to the Wills Act 1837, s 33.

[46] [1985] Ch 446.

[47] See Family Law: The Effect of Divorce on Wills (1993) Law Com No 217; Cmnd 2322.

[48] See Law Reform (Succession) Act 1995, s 3.

PART IV
WHAT DO OTHER COUNTRIES DO?

4.1 The fact pattern in *Re DWS (dec'd)*[49] and analogous situations is likely to occur rarely. It is therefore hard to find relevant comparative law materials. The forfeiture rule itself, or a version of it, is not uncommon in other jurisdictions.[50] It operates in largely the same way in most Common Law jurisdictions as it does in England and Wales. In Civil Law jurisdictions the way in which intestate succession operates is considerably different in detail, but analogues to the forfeiture rule exist and the problem in *Re DWS (dec'd)* may occur in a different guise.

France

4.2 The French Civil Code gives an exhaustive list of the situations (*indignités*) where a potential successor on intestacy may be disqualified from inheriting. Since 1st July 2002 the situations where the claimant is necessarily disqualified are limited to the cases where the claimant has been found guilty of the murder or attempted murder of the deceased, or has unintentionally caused the death by way of assault.[51] There is a discretion to disqualify the claimant in other cases, such as where the claimant has given false evidence against the deceased.[52]

4.3 Until 1st July 2002, the Code provided that the children of an *indigne* were not excluded for the fault of their parent, but that this only applied when their claim to inheritance was direct and not by way of representation.[53] The claim of grandchildren and remoter issue on intestacy is only by way of representation;[54] and, as in England and Wales, representation only applied where the person represented had died before the deceased.[55] A case with the facts of *Re DWS (dec'd)* would therefore have been decided the same way as in England.

4.4 From 1st July 2002, the Code provides that the children of an *indigne* are not excluded whether their claim is direct or by way of representation.[56] It also provides that they may claim by way of representation notwithstanding that the *indigne* is still alive.[57] This indicates that the type of result found in *Re DWS (dec'd)* was foreseen and considered to be unjust, and that it has been solved in much the

[49] [2001] Ch 568 (CA).

[50] See, for example, South Africa (*Casey v The Master* 1952 4 SA 505 (N); *Makhaya v Minister for Finance* [1997] 2 ASA 227 (D)), Scotland (*Smith, Petr* 1979 SLT (Sh Ct) 35) and the USA, below.

[51] French Civil Code, article 726.

[52] *Ibid*, article 727.

[53] *Ibid*, article 730 (pre-1st July 2002 text). "Representation" is the principle whereby, if a potential heir has died before the deceased, his or her presumptive share is taken by the potential heir's descendants.

[54] *Ibid*, article 745, alinéa 2 (pre-1st July 2002 text); articles 744, 752 (from 1st July 2002).

[55] *Ibid*, article 744, alinéa 1 (pre-1st July 2002 text).

[56] *Ibid*, articles 729-1 and 754 (from 1st July 2002).

[57] *Ibid*, article 755 (from 1st July 2002).

same way as that suggested below. It remains the law that a person cannot claim by way of representation of a potential successor who has disclaimed.[58]

Italy

4.5 In the Italian Civil Code there is a wide range of "indignities", including the case where the claimant has killed the decease.[59] However, the right of representation allows descendants to inherit in the place of their ancestor in all cases where the ancestor is unable or unwilling to take.[60] It is therefore not limited to cases where the ancestor has died before the testator or intestate, and the problem in *Re DWS (dec'd)* does not arise.

United States

4.6 A well-developed analysis of the issue under discussion here is provided in the US literature.[61] The specific problem was considered by Professor A W Scott, one of the authors of the *Restatement of Restitution* in 1937. Scott agreed with Professor J B Ames, who had argued previously that in all cases where a person murders someone from whom he inherits property, he should hold that property on a constructive trust.[62] Scott then went on to argue in favour of a "deemed predecease" rule in cases such as the present. Paragraph 187(2) of the *Restatement of Restitution* covers the facts of *Re DWS (dec'd)* exactly:

> Where a person is murdered by his heir or next of kin, and dies intestate, the heir or next of kin holds the property thus acquired by him upon a constructive trust for the person or persons who would have been heirs or next of kin if he had predeceased the intestate.

Whilst there was no English case directly in point prior to *Re DWS (dec'd)*, the topic is discussed both in Goff and Jones' *Law of Restitution*[63] and in Oakley's *Constructive Trusts*.[64]

(1) Goff and Jones described Scott's argument for a "deemed predecease" rule as persuasive and consistent with *Cleaver v Mutual Reserve Fund Life Association*,[65] but did not address the constructive trust approach as a way of achieving it. They acknowledged that the "deemed predecease" rule might be inconsistent with the English statute, but expressed the view that *Re DWS (dec'd)* was a harsh decision and one which Parliament could not have anticipated.

[58] *Ibid*, article 754 (from 1st July 2002).

[59] Italian Civil Code, article 463.

[60] Italian Civil Code, article 467.

[61] See R Kerridge, "Visiting the Sins of the Fathers on their Children" (2001) 117 LQR 371, 374.

[62] See J B Ames, "Can a Murderer Acquire Title by his Crime?" (1890) 4 Harv L R 394; Ames, *Lectures on Legal History* (1913), p 310.

[63] R Goff and G Jones, *The Law of Restitution* (6th ed 2002) para 38-003.

[64] A Oakley, *Constructive Trusts* (1997) pp 50-1.

[65] [1892] 1 QB 147.

(2) Oakley, writing before the decision in *Re DWS (dec'd)*, states that:

> The authorities generally state that the will or intestacy provisions are applied on the basis that the murderer is struck out. While this has been sufficient to dispose of the cases that have come before the courts, it has never been made clear whether the effect of being struck out is or is not equivalent to predeceasing the victim. However, commentators have generally taken the view that the rights of third parties should indeed be established on the basis that the criminal predeceased his victim. This question obviously awaits clarification by the courts.

Unlike Scott, he does not base the forfeiture rule as a whole on the constructive trust concept, but he does hold that if any of the property in question did in fact reach the hands of the killer (for example, as the survivor of a joint tenancy), a constructive trust would arise.

4.7 The "deemed predecease" rule appears to have been adopted as the solution in several US states. For example, in South Carolina, where it appears that the legislature had foreseen the very problem encountered in *Re DWS (dec'd)*, the legislative solution was to provide specifically that in such a situation inheritance of the estate would jump a generation and go to the grandchild.[66] Not all US states, however, have legislated in this fashion. In Oregon, for example, the state Supreme Court in their decision in *Re Norton (dec'd*)[67] (the facts of which were equivalent to those in *Re DWS (dec'd)*) reached the same result as *Re DWS (dec'd)*: the collaterals ultimately inherit.

Scotland

4.8 An analysis of the problem under consideration here has also been undertaken by the Scottish Law Commission in their 1990 Report on Succession Law[68] and in subsequent case law.

4.9 The position in Scotland is that, as under the law of England and Wales, the common law precludes someone who has unlawfully killed another from inheriting under their estate. This was confirmed in the case of *Smith, Petr*[69] and in a number of subsequent cases.[70] In *Smith* the deceased's wife was excluded from the succession because she had been convicted of his manslaughter in Northern

[66] See para 40 of *Re DWS (dec'd)*, citing *Rasor v Rasor* (1934) 175 SE 545. See also statutory provisions of Ohio, Nebraska and North Dakota (Page's Ohio General Code; Compiled Statutes of Nebraska 1929; Compiled Laws of North Dakota 1913).

[67] (1944) 156 ALR 617.

[68] Scot Law Com No 124.

[69] *Smith, Petr* 1979 SLT (Sh Ct) 35.

[70] *Burns v Secretary of State for Social Services* 1985 SLT 351; *Paterson, Petr* 1986 SLT 121; *Cross, Petr* 1987 SLT 384; *Gilchrist, Petr* 1990 SLT 494; *Hunter's Exrs, Petrs* 1992 SLT 1141.

Ireland. It should also be noted that the Forfeiture Act 1982 applies in Scotland as it does in England and Wales.[71]

4.10 The precise effect of the common law rule was uncertain until recently. The Scottish Law Commission, in its 1990 Report, conceived of the rule as having the effect of deeming the killer to have predeceased the deceased. This view was based on a reading of the English case of *Re Callaway* (see above) which made a reference to the killer being "struck out"[72] and a passage in the *Stair Memorial Encyclopedia* where the author suggested that:

> the rule to be applied is that the share which any person is precluded from taking must be distributed as if that person had died before the deceased.[73]

4.11 The Commission noted in the Report the difficulties that the operation of the forfeiture rule (without the killer being deemed to predecease the deceased) could cause in an inheritance context. For one thing, it was recognised that it was unjust to penalise the issue because of the ancestor's crime (all those responding to the Report's consultative memorandum agreed[74]). It was felt therefore that the simplest way to allow the killer's issue to inherit in these circumstances would be to enact a declaratory provision to the effect that:

> An unlawful killer who incurs forfeiture should be treated for the purposes of succession to the deceased's estate and any destination of trust property as having predeceased the deceased. Any descendants of the unlawful killer should be entitled to make the same claims on the killer's presumed predecease by virtue of forfeiture as they could have made had the killer actually predeceased without having incurred the penalty of forfeiture.[75]

However, these proposals have not been enacted and there appear to be no immediate plans to do so.

4.12 The effect of the common law rule of forfeiture on the killer's descendants was examined two years after the publication of the 1990 Report in the case of *Hunter's Exrs, Petrs.*[76] This was a case concerning testate succession[77] where the murdered deceased had made a will with a substitutionary gift which had made the killer the primary beneficiary and, in the event of his death, the claimants the next in line.

[71] Under Scottish law there is also the Parricide Act 1594, which disinherits anyone convicted of killing a parent or grandparent. However, the Act is of extremely limited scope and its practical impact is minimal. There are no reported cases of it ever having been used to disinherit anyone and the Scottish Law Commission has recommended its repeal in the 1990 Report.

[72] This was taken to imply that the killer was deemed to have predeceased the deceased.

[73] Volume 25, para 672.

[74] Some Miscellaneous Topics in the Law of Succession (1986) Consultative Memorandum No 71.

[75] Scot Law Com No 124, para 7.18.

[76] 1992 SLT 1141.

[77] It has consequences for the scope of the forfeiture rule in general, however.

There was no further default gift. The court was not persuaded by the arguments presented in the Law Commission Report that the common law forfeiture rule had the effect of deeming the killer to have predeceased his victim. Rather, it agreed with counsel for the heirs on intestacy that forfeiture was based, at least in part, on public policy and that a rule of public policy should be carried no further than was necessary to achieve its objectives. Public policy dictated that the killer should not inherit but there was no public policy consideration that dictated that he should be deemed to have predeceased the deceased when the total or partial intestacy regime was in the background. In the result, it was held that the substitutionary gift did not operate and that the estate fell into intestacy. Thus, any possibility that the common law has the effect of deeming the predecease of the killer seems to have been removed.

4.13 Despite the proposals of the Scottish Law Commission, the current law of Scotland therefore remains substantially the same as that of England and Wales in this respect. Similar difficulties will arise with relation to both the intestacy[78] and testate regimes to those arising under English law (see above), although the difficulty with regard to beneficiary attestation would appear not to arise under Scottish law since there is no equivalent of section 15 of the Wills Act 1837.

[78] Succession (Scotland) Act 1964, s 5 is the functional equivalent of Administration of Estates Act 1925, s 47(1)(i).

PART V
THE POLICY ARGUMENTS

5.1 We have noted above[79] that there are three possible arguments for regarding the decision in *Re DWS (dec'd)*[80] as unsatisfactory. This Part examines the relevant policy arguments in more detail. It divides the arguments into two sections: those concerning disqualification on intestacy and those concerning the analogous situations where the deceased has made a will with a substitutionary gift. It then briefly considers lifetime settlements.

INTESTACY

Forfeiture

Arguments for allowing the grandchild or other contingent beneficiary to inherit

VISITING THE SINS OF PARENTS ON THEIR CHILDREN

5.2 The effect of the decision is effectively to punish T (the grandson) for R's (the son's) crime.[81] T was innocent of any wrongdoing,[82] yet the effect of the intestacy rules, as applied in *Re DWS (dec'd)*, is that T cannot inherit on R's disqualification, either while R is still alive or even after R's death. Under the present law, R's disqualification diverts the line of succession away from the intestate's issue towards collateral successors. T is effectively cut out.

5.3 This seems harsh on T and there do not seem to be any countervailing justifications for the result. There may be situations on different facts where T is not as completely innocent as he was in *Re DWS (dec'd)*. Nevertheless, if T is to be either directly or *de facto* disqualified, this ought to be as the result of his own actions. The forfeiture rule governs the consequences for inheritance for someone who commits an illegal act. It seems harsh that T should be effectively disqualified even though he does not directly fall within that rule.

5.4 On the other hand it could be argued that it is not as if T were being deprived of a vested interest. The starting point of the "sins of the parents" argument is that T ought not to be worse off than if R had not been disqualified. For the comparison to work several assumptions are required: that the deceased, if allowed to survive, would not have willed the property away from R; that R would not have willed it away from T; and that neither the deceased nor R would have spent or divested themselves of the property. That is, the comparison depends on T's place among the heirs of R rather than among the heirs of the deceased. The contrary rule, allowing T to inherit in place of R, would benefit T *more* than if the forfeiture had not occurred, as T need not wait till the death of R.

[79] Para 2.14.

[80] [2001] Ch 568 (CA).

[81] See R Kerridge, "Visiting the Sins of the Fathers on their Children" (2001) 117 LQR 371.

[82] T was aged two at the time of the murders.

5.5 In the end, the strength of this argument depends on the extent to which a law of intestacy ought to admit the principle of representation. That is, any law of intestacy may be expected to provide some sort of order of preference among the relatives of the deceased existing at the time. It is not so obvious that that order need coincide with the order of devolution among those relatives, assuming them to inherit successively. The real point is that, *if* one order does coincide with the other, it should do so consistently: which takes us to the next argument.

THE RESULT CONTRADICTS THE POLICY OF THE LEGISLATION

5.6 Secondly, the result might be objected to on the ground that it contradicts the policy of the legislation (and hence Parliament's underlying intention). As Harman J said in *Re Lockwood (dec'd)*, "the object of the two statutes [the 1925 Act and the Intestates Estates Act 1952] was to distribute the estate of the intestate among [the] next of kin, and not to prefer the more to the less remote."[83] The legislation effectively provides a list which designates the priority (or remoteness) of those taking on intestacy. It provides for husbands and wives to be first in the queue; thereafter descendants take before collaterals and collaterals before the Crown. However, as Wallington has put it:[84]

> The court's solution in *Re DWS* was to apply the words of the statute literally and produce a result which… is an irrational one because it means that one member of a category lower on the list [i.e. W, the sister of the intestate] takes in preference to one higher on the list [T, the intestate's grandson].

5.7 Against this, it might be argued that to state that Parliament's policy with regard to intestacy is to prefer issue to collaterals is to state the position too broadly. Rather, Parliament's policy, as evinced by sections 46 and 47 of the Administration of Estates Act 1925, is not to prefer the remoter issue of an intestate where the intestate's child has survived the intestate, and only to prefer remoter issue where they were alive at the intestate's death.[85]

5.8 The answer to this is that, whether or not the result was intended by Parliament, it is inconsistent in principle. 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.

[83] [1958] Ch 231, 234-5.

[84] R Wallington, "Unlawful Killing, Disclaimer and the Intestacy Rules" [2001] NLJ 919.

[85] See the judgment of Blackburne J at first instance in *Re DWS (dec'd)* [2000] 2 All ER 83, 91 where he analyses an analogous argument with regard to how sections 46 and 47 of the Administration of Estates Act 1925 should be interpreted.

THE RESULT CONTRADICTS THE LIKELY WISHES OF THE DECEASED

5.9 It is generally correct to say that the present law of intestacy is designed to reflect the presumed intention of the intestate.[86] As Lord Cairns once put it, the provisions as to intestate succession should be regarded as no more than a will made by the legislature for the intestate.[87] The specific facts of *Re DWS (dec'd)* represent the kind of situation unlikely ever to be contemplated by a testator. However, there would seem to be some force in the argument that most people in the situation of the two deceased parents in the present case, if told that in such an unimagineable event their son would be disqualified from inheriting and asked what they would like to happen, would say that they would like their estate to go to their grandchild.[88] The result in *Re DWS (dec'd)* does not give effect to this intention and produces a result which is out of step with the legislation as a whole. The argument applies both where the original beneficiary is disqualified by virtue of the forfeiture rule and where he disclaims his benefit.

5.10 There are several possible objections to this argument. The first might be to question whether the deceased's intentions are always the basis of the law. As some commentators have pointed out,[89] whilst it is certainly generally true that the deceased's presumed intentions form the basis of the law of intestacy, this is not invariably so. An example might be the law's treatment of the entitlement of half brothers and sisters.[90] Where there are also full brothers and sisters, they will take to the exclusion of the half-brothers and sisters.[91] Where all of these children have been brought up in a family without differentiation, an intestate might well be surprised to realise that (in the absence of a spouse, issue or parent) only his full brothers and sisters would share in his estate.[92]

5.11 It might also be questioned whether the presumed intention of the deceased should always be the basis for the intestacy rules. In Working Paper No 108,[93] the Law Commission canvassed views on alternative principles on which the law of intestacy might be based. Amongst these were provision based according to need, provision according to desert, provision according to status and discretionary provision.

5.12 The third objection might be to question how the deceased's intention is to be ascertained. Can the deceased's intentions really be assumed in this case? Law

[86] C Sherrin & R Bonehill, *The Law and Practice of Intestate Succession* (2nd ed 1994) p 16. The Law Commission accepted in Family Law, Distribution on Intestacy (1989) Law Com No 187 that the presumed intentions of the deceased were the principal basis of the existing law.

[87] *Cooper v Cooper* (1874) LR 7 HL 53, 66, referring to the Statutes of Distribution.

[88] See the judgment of Sedley LJ in the Court of Appeal, [2001] Ch 568, 593 (para 41).

[89] See C Sherrin & R Bonehill, *The Law and Practice of Intestate Succession* (2nd ed 1994) p 16.

[90] *Ibid*, pp 19-20.

[91] See Administration of Estates Act 1925, s 46(1)(v).

[92] See, for example, *Re Groffman* [1969] 1 WLR 733. Another example might be the entitlement of grandchildren. Grandchildren do not take directly but take their deceased parent's interest by representation. This leads to inequalities where the sons and daughters of the deceased have different numbers of children.

[93] Distribution on Intestacy (1988) Working Paper No 108.

reform bodies in the past have undertaken surveys of public opinion[94] or recent wills[95] in order ascertain the deceased's likely intentions in a given case.

5.13 In response to these points, it is argued that whilst the deceased's intention may not underpin every provision in the intestacy rules, it remains the paramount justification for the intestacy rules.[96] It is also preferable to the alternative justifications. Nor does there seem to be any particular justification for departing from it in the present case. Further, whilst gathering empirical evidence of the deceased's likely intentions in *Re DWS (dec'd)* type cases might be sound in principle, it is probably unnecessary. Whilst the facts of *Re DWS (dec'd)* are unlikely to occur often, it does not seem in doubt that the deceased's preference would probably have been that the estate devolved to the grandchild.

5.14 Once more, the fundamental argument is that from consistency. There may be room for argument whether the deceased would have preferred to benefit the grandchildren or the collaterals, but it is reasonably certain that they would not have intended to benefit the grandchildren in one set of circumstances and the collaterals in the other.

Arguments against allowing the contingent beneficiary to inherit

OPEN TO THE DECEASED TO PROVIDE FOR CONSEQUENCES

5.15 One argument might be that it is, of course, open to parties to avoid the unfortunate consequences of the present law by making a will so as to avoid their estate being distributed under the intestacy rules. This might be taken as an argument for preserving the *status quo*.

5.16 We consider that it would be better for the law to be changed. There is no justification for the "default" position being an unsatisfactory one, and the law should not leave it to the parties to contract out of such an undesirable situation. This is particularly so when events such as forfeiture (and for that matter disclaimer) are rare and are unlikely to be anticipated by parties or their lawyers even if and when they do decide to make a will.

RARITY OF FORFEITURE ON INTESTACY

5.17 Forfeiture on account of the successor killing the deceased is likely to occur rarely. This might be taken as a reason for the law to be left as it is.

5.18 However, this does not seem to be a satisfactory reason. The cases are rare but they do occur.[97] The most appropriate course would be to legislate to correct this.

[94] See, for example, Law Com No 187 (above). The Scottish Law Commission has adopted a similar approach.

[95] This was the approach taken in New Zealand when the Administration Amendment Bill 1965 was introduced.

[96] See Law Com No 187 (above) para 24; also the Report of the Committee on the Law of Intestate Succession ("the Morton Report") (1951) Cmd 8310.

[97] As is shown by their occurrence in other jurisdictions: see Part IV.

INDIRECT BENEFIT TO THE OFFENDER

5.19 One argument against allowing grandchildren to inherit instead of collaterals is that they are more likely to be under the influence of the offender, and may even pass the money or property to him or her.

5.20 Another argument is that to allow the grandchildren to inherit may confer an indirect benefit on the offender, thus making the forfeiture ineffective as a deterrent. For example, if the grandchildren are still financially dependent on the offender at the time of the death, any inheritance from the deceased will remove from the offender a part of the burden of supporting them.[98]

5.21 One answer to this is that the forfeiture rule was never intended to cover indirect benefits of this kind. If the deceased had made a will directly benefiting the grandchildren, there would be no question of depriving them of this legacy in order to avoid an indirect benefit to the offender. By parity of reasoning they should not be deprived of a benefit they might otherwise be expected to take on the failure of the offender's interest.

5.22 The fear of the grandchildren passing the property to the offender is less easy to answer. If the property comes to them because of the failure of the offender's interest, rather than as a direct gift, it may be easier for the offender to persuade them that the property is "morally mine".[99] A possible answer is that, if the grandchildren are minors,[100] the property will be held by trustees; while if they are adults, they are less likely to be persuaded by the offender unless they are also convinced that the murder accusation was untrue. Another is that, while the law itself should never reward wrongdoing, it does not also have the duty to ensure that no other person is ever in a position to do so.

5.23 We therefore consider that:

(a) the existing law of intestate succession, in its application to forfeiture cases, leads to unsatisfactory results; and

(b) the most appropriate result in cases such as *Re DWS (dec'd)* is that the grandchild/contingent beneficiary should inherit.

Disclaimer

5.24 Disclaimer on intestacy is rare and, as stated above, it was doubtful until recently that it was possible. To judge from disclaimer in will cases, the usual reason for disclaimer will be either to secure beneficial tax consequences or to enable the beneficiary to avoid inheriting onerous property such as a lease with repairing covenants.

[98] The problem will not normally arise while the grandchildren are minors, as the statutory trust for issue only includes grandchildren who attain the age of eighteen years or marry under that age (Administration of Estates Act 1925, s (1)(i)).

[99] Though if the grandchild does transfer the property to the offender as a result of this kind of pressure, the gift could be undone under the law of undue influence.

[100] Though this will seldom be the case: see n 98 above.

5.25 The practical urgency of the problem discussed in this paper will therefore seldom be great in disclaimer cases. If the property is onerous enough for the son or daughter to want to disclaim it, it is unlikely that the grandchild and the siblings will be greatly exercised about who has the first chance to take it. In the case of tax planning, the usual reason will be that if the property goes straight from the deceased to the grandchild, this will only incur one lot of inheritance tax, whereas if it had gone through the son or daughter there would have been two. This is a legitimate form of tax planning, but if the disclaimer route is not available a similar result can presumably be achieved by other means (for example, a deed of variation).

5.26 The "sins of the parents" argument seems artificial when applied to the disclaimer situation. It is not really a case of the parent's sins being visited on the children, rather that the disclaimer causes unwanted consequences. Nor does the indirect benefit argument apply.

5.27 The other two arguments, from the policy of the legislation and the likely wishes of the deceased, apply to the disclaimer situation as much as they do to the forfeiture situation. The fundamental reason for reform remains the same: that it is artificial for the grandchild to take before the siblings if the son or daughter has died, but for the siblings to take before the grandchild if the son or daughter cannot take for some other reason.

5.28 The case for reform is thus equally cogent in principle in the two cases, even though the disclaimer case is of less practical importance. As with forfeiture, the rarity of disclaimer cases could even be an argument *for* reform, as it is a problem that is unlikely to be foreseen and avoided by making a will.

5.29 The disclaimer situation would not be serious enough to justify reform if it stood alone. If however there is to be legislation on the (more serious) forfeiture problem, **we consider on balance that the disclaimer situation should also be covered, though we do not regard this as of great importance**.[101]

WILLS

Forfeiture

5.30 The arguments with regard to the situation where the deceased has made a will with a substitutionary gift are slightly different from those concerned with the situation on intestacy. As noted above, the consequence of a gift failing in this situation is that, if the testator has given further indication of how the property is to be distributed, it will devolve accordingly; otherwise, it will fall under the total or partial intestacy rules.

5.31 The objection in this situation is simply that the testator's wishes may be frustrated by the effects of A's disqualification. The likely intention of the testator was that, failing A, B should benefit: the mention of A predeceasing the testator was probably there only because that is the most obvious and likely reason for A being unable to take. If an officious bystander had asked the testator "What if A is

[101] For our provisional proposals on disclaimer, see para 6.22 below.

unable to take for some other reason?" the likely answer would have been "Oh, B of course".

5.32 Unlike the two situations outlined above, it is still possible that the intended default beneficiary (B) may inherit via another route: for example he may inherit under another provision of the will or under the application of the total or partial intestacy rules. The problem is therefore a less acute one than that observed in the intestacy situation. Nevertheless, the result seems objectionable because the testator's likely original wishes are thwarted by the operation of the disqualification with no guarantee that the property will end up in its intended place.

5.33 The argument made above with respect to parents' sins being visited on their children would appear to have no application to this situation. In the situation described, B need not be the child or other potential heir of A. Thus, B is not made any worse off by A's disqualification: if A had been allowed to inherit, B would have got nothing either.

5.34 The argument with respect to the policy of the intestacy legislation being thwarted is obviously irrelevant to this situation, as it arises from the interpretation of the will and not of the intestacy legislation. The consistency argument does however apply in another form. It is an arbitrary result that B should inherit if A has died, but not if A is unable to take for another reason. That is not to say that a testator might not deliberately direct this result; but it is an unlikely intention to have and should not be inferred in the absence of an express indication.

5.35 The same counter-arguments can be made as in the intestacy case: that it was open to the testator to provide specifically for the consequences, and that the difficulties are likely to occur rarely. However, they can be met with the same answers. The argument about indirect benefit to A will only apply in those cases where B is in fact A's child, which is not a necessity of the situation described; and where it does apply it can be answered in the same way as in the intestacy situation.

5.36 It could also be argued that, while the object of intestacy rules is to replicate the likely wishes of the deceased, in the case of a will the onus of stating those wishes is on the testator. To burden the Wills Act with rules of construction overriding the literal meaning of wills in order to second-guess the likely wishes of testators may be seen as excessive paternalism.

5.37 A purist approach might therefore be to exclude wills from the scope of the reform altogether. **The other possibility, which we favour, is to hold that, while in principle wills ought not to be touched, the forfeiture case is so unlikely and unforeseeable that it is worth making an exception for it**.[102]

Disclaimer of legacy

5.38 Many of the same arguments arise here as for disclaimer on intestacy and for forfeiture on wills, with the obvious exception of the indirect benefit argument. To recapitulate:

[102] For our provisional proposals on forfeiture of interests under wills, see para 6.26 below.

(1) Most disclaimers are either for tax purposes, in which case the same results can be achieved by a deed of variation, or because the property is onerous, in which case the substitute beneficiary is unlikely to feel aggrieved by being excluded.

(2) A well-drafted will normally provides for a residual bequest, which takes effect if any of the previous gifts fail for any reason, and this will often mean that our problem does not arise. Except in the most extreme and dramatic cases (such as forfeiture), it is wrong in principle to depart from the actual words of the will in order to second-guess what the testator would have wanted.

(3) However, where a will does provide for a gift to A, and if A predeceases the testator then to B, and A disclaims, it is still arguable that the testator is more likely to have wished the property to go to B than to fall into residue or into intestacy, and that this is the more consistent result.

Given that the case is less unforeseeable, and less practically urgent, than the forfeiture case, **we consider that the normal principle of respecting the actual words of the will should prevail and that the situation arising from disclaimer of benefits under wills should be excluded from any reform**.

Attestation of will by beneficiary

5.39 The situation in which a legatee loses a legacy by witnessing the will is closely analogous to the forfeiture and disclaimer cases, and is likely to occur rather more frequently. The argument for reform is the same as in the other two cases: that a default beneficiary should not be deprived because the first-line beneficiary lost his or her benefit in an unforeseen way.

5.40 In this situation, as in the forfeiture case, it is possible to raise the indirect benefit argument. That is, it could be argued that, if the purpose of forbidding a witness to the will to take is to avoid conflicts of interest,[103] the conflict is not really resolved by allowing the witness's children to benefit instead. For example, there could be a case where the witnesses WW (husband and wife) attested the will of testatrix T (the elderly next door neighbour) which bequeathed the entire estate to WW, or if they predecease her to their children A and B. If the objection to this lies in some presumption of undue influence it could be argued that to allow the estate to go straight to A and B is scarcely less objectionable than giving it to WW.

5.41 The answer to this is twofold. First, there would have been no disqualification if the legacy had been directly to A and B in the first instance,[104] so it should make no difference that the gift happens to be substitutionary. Secondly, the effect of the present rule is to disallow a substitutionary gift not only to the witness's child but to any person whatever. For example, if a will is made in favour of W, but if W predeceases the testator, to a charity, and W attests the will, the existing law is that the charity cannot take and the estate falls into intestacy. As W and the charity

[103] See paras 3.4 and 3.5 above.

[104] Or to WW if alive at the date of death "and so far as not hereinbefore disposed of" to A and B.

may be wholly unconnected, this result cannot be justified by any consideration of conflict of interest.

5.42 Nevertheless, as with the disclaimer situation we do not consider that the anomalous result found in this situation is important enough to justify departing from the principle of respecting the words of the will. If the questions of conflict of interest and indirect benefits are to be canvassed, this should be as part of a wider review of the attestation requirement.

LIFETIME SETTLEMENTS

5.43 Precisely the same difficulties as in will cases may arise where property is held on trust under a lifetime settlement for L for life, with remainder to A, or if A should predecease L, to B. If A kills L, B will not fulfil the condition and the property will revert to the settlor under a resulting trust. This outcome may be innocuous if the settlor is still alive, as there is then the option of re-settling the property on B. If however the settlor is dead, the settlor's personal representatives may well decide to retain the property, even though the settlor would have preferred to benefit B.

5.44 There is an argument for saying that the logic in such cases is exactly the same as for trusts under a will: the settlor would have preferred B to benefit in the absence of A, and this has only not occurred because A's interest failed for an unforeseen reason. On the other side, it could be argued that a settlement is a more formal document than a will, and that it is right for the onus to be on the settlor to express his or her intentions exactly. Even more strongly than in will cases, the guiding principle should be to respect the actual words rather than to try to read the settlor's probable intentions between the lines. Also, once contingent interests under settlements are to be addressed, all sorts of other situations could be included, for which no single formula could be devised: for example, where A's interest is contingent on surviving some event other than a death. **We therefore recommend that lifetime settlements should be excluded from the scope of the reforms, even in forfeiture cases.**

CONCLUSION

5.45 There are seven possible situations. The interest may arise under the law of intestacy, a will or a lifetime settlement. In each of these cases it may be lost by forfeiture or by disclaimer (or renunciation); in the will case it may also be lost if the intended beneficiary witnesses the will. In all these cases, where the intended beneficiary loses the interest, the wording of the instrument excludes the default beneficiary because the intended beneficiary has not in fact predeceased the intestate, the testator or the tenant for life. In all these cases, it seems likely that the deceased or settlor would have preferred the default beneficiary to take.

5.46 It is arguable in all these cases that the property in question should go to the default beneficiary, both because this represents the likely wishes of the deceased or the settlor and in the interests of general consistency. In some cases there are additional factors for or against this conclusion: either that the present law appears to punish the children for the sins of their parents, or (as against that) that to allow the children to take would confer an indirect benefit on the parents.

5.47 The main argument on the other side is that in construing wills and settlements the aim should be to give effect to the actual wording without trying to second-guess what the testator or settlor would have wanted in some unforeseen event. If this

sort of speculative re-writing were to be admitted, one would also have to consider gifts conditional on surviving an event other than a death, and there would be no end to it.

5.48 On balance, we consider that the argument for reform is strongest in connection with the law of intestacy, and that this reform should extend to both the forfeiture and the disclaimer cases. It would be reasonable to extend this reform to will cases, as concerns forfeiture only, as the exceptional and dramatic nature of these facts is something for which no testator could be expected to provide. It should not extend to disclaimer and attestation in will cases, or to lifetime settlements in any circumstances.

PART VI
POSSIBLE SOLUTIONS

INTESTACY

Forfeiture

6.1 The problem of forfeiture on intestacy, as exemplified in *Re DWS (dec'd)*,[105] could be solved either by a "deemed predecease" rule, as in some of the American states, or by introducing a discretionary power. Each of these solutions could take the form of a statutory provision or could be achieved by judicial reinterpretation of the Administration of Estates Act 1925, though not below House of Lords level.

Deemed predecease rule

6.2 Our provisional proposal is that a person who survives the intestate but is disqualified from taking by the operation of the forfeiture rule should be deemed (without prejudice to the possibility of relief under the Forfeiture Act 1982) to have immediately predeceased the deceased.

6.3 This solution amounts to a generalised "deemed predecease" rule. The would-be successor, who is disqualified, is deemed by virtue of a legal fiction to have immediately predeceased the victim(s) and the estate devolves on this footing. Thus, on the facts of *Re DWS (dec'd)*, R is disqualified by virtue of the forfeiture rule and, under the rule being discussed here, would be deemed to have predeceased his victims, the grandparents. By virtue of section 46(1)(ii) of the Administration of Estates Act 1925, the estate would then devolve to T, better reflecting the policy of the statute and the deceased's likely wishes and avoiding the unfortunate situation where T's interests are deleteriously and arbitrarily affected by R's actions.

JUDICIAL REFORM

6.4 One solution would be to urge judicial reform and the "reading in" to the relevant provision of the Administration of Estates Act 1925 of a deemed predecease rule. This is in effect what was being urged by counsel for T in *Re DWS (dec'd)* where the argument was made that the effect of the rule of public policy which disbarred R from taking on intestacy was to deem R to have predeceased the grandfather.

6.5 Although this reaches the "right" result, it seems an unsatisfactory methodology. The reading in of a deemed predecease rule is a major judicial interpolation in the statute. The Court of Appeal in *Re DWS (dec'd)* felt unable to go this far and such a change would have to be achieved by the House of Lords.[106]

[105] [2001] Ch 568 (CA).

[106] This is highly unlikely. Apart from anything else, the House of Lords refused leave to appeal in *Re DWS (dec'd)*.

STATUTORY REFORM

6.6 The obvious way to introduce this "deemed predecease" rule would be by statute. We discuss below the question of whether this should take the form of a free-standing enactment or of an amendment to the Forfeiture Act 1982 or the Administration of Estates Act 1925.[107]

6.7 One criticism of the "deemed predecease" approach is that it imports a fiction into the law and, further, one that contains an internal contradiction. In the case of the forfeiture rule, by deeming that the would-be successor predeceased the victim, the fiction deems a state of affairs which excludes the fact of the killing itself.[108] As applied to the possibility of judicial "reading in" of a deemed predecease rule, this is a valid criticism. As applied to statutory reform, it is simply a drafting problem, and does not affect the utility of the desired result. The same effect could be achieved by providing that, where a survivor of the intestate is disqualified from taking by the operation of the forfeiture rule, the intestacy rules should apply in the same way as if that person had immediately predeceased the deceased. Either type of wording avoids the unfortunate consequences outlined in the previous Parts of this paper in the simplest way. It avoids the complications which can ensue on the would-be successor's disqualification and does least damage to the surrounding law. There are also precedents for adopting this approach (see discussion of section 3 of the Law Reform (Succession) Act 1995,[109] paragraph 187(2) of the *Restatement of Restitution* (1937)[110] and the work of the Scottish Law Commission[111]).[112]

Discretionary power

6.8 An alternative solution is not to reverse the existing rule but to introduce a power whereby the court, or the Crown, could in the exercise of its discretion divert the property to the grandchild or contingent beneficiary if this seemed right in the circumstances. As with the introduction of the "deemed predecease" rule this could be done either by statutory provision or by judicial law-making (the *bona vacantia* solution). A statutory provision, in turn, could take the form of an amendment expanding the scope of the existing discretion under either the Forfeiture Act 1982 or the Inheritance (Provision for Family and Dependants) Act 1975.

DISTRIBUTE PROPERTY AS *BONA VACANTIA*

6.9 One way of introducing such a discretion is by judicial law-making, following the reasoning of Sedley LJ in *Re DWS (dec'd)* so as to allow the property to go to the Crown as *bona vacantia*; the Crown would then distribute it among the relatives as

[107] Paras 6.21 and 6.25 below.

[108] *Re DWS (dec'd)*, judgment of Aldous LJ, [2001] Ch 568, 589 (para 22).

[109] Para 3.10 above.

[110] Para 4.6 above.

[111] Paras 4.8 *et seq*.

[112] Also, statutory provisions of Ohio, Nebraska and North Dakota.

it saw fit.[113] However, this approach does not seem to be the best solution in principle. Allowing any property interest to depend on discretion is always a solution of last resort, for cases where no fixed rule can be devised with satisfactory results.

6.10 Sedley LJ reasoned in *Re DWS (dec'd)* that the arguments for the collaterals inheriting and the arguments for T inheriting both involved non-literal constructions of the statute. The former necessitated reading into section 46(1)(v) of the Administration of Estates Act the qualification "capable of taking" to the requirement that the deceased leave no husband, wife, issue or parent. The latter required the court to evade the requirement in section 47(1)(i) of the Administration of Estates Act that the R predecease the intestate, by reading in a fiction that R will be *deemed* to have predeceased the intestate if R is disqualified by virtue of the forfeiture rule. However, if a literal construction (with regard to both provisions) were taken, the result would be that the property would devolve to the Crown as *bona vacantia*. This result would have the advantage that the estate could then be distributed to T at the Crown's discretion.

6.11 However, distribution as *bona vacantia* is an unsatisfactory solution on facts such as those in *Re DWS (dec'd)*. Whilst the possibility of allowing the property to be equitably distributed by the Crown provides a tempting flexibility, there are also defects in the scheme. First, such a discretion may provide flexibility but it also fails to provide any guarantees or even guidelines for predicting future cases and is undesirable from a policy perspective. Secondly, it is a clumsy solution as it involves the property passing through the hands of another owner. In particular, it seems odd to hold the property to be *bona vacantia* in circumstances where (as happened in *Re DWS*) the Treasury Solicitor took the view that the Crown had no interest and declined to take part in the proceedings. Thirdly, to hold that the property becomes *bona vacantia* seems indirectly to reverse the policy of the Forfeiture Act 1870 (and subsequent forfeiture legislation and doctrine) which abolished the "felony" rule whereby a felon forfeited his property to the Crown.[114]

AMEND THE FORFEITURE ACT 1982

6.12 Another possibility would be to amend the Forfeiture Act 1982, so as to provide that not only the offender but also any other person affected could apply for relief under the Act, and to allow that relief to take the form of such distribution of the forfeited assets as the court thinks fit. It would remain the law that the offender could not apply for relief if convicted of murder; other persons affected would be allowed to apply in murder cases as well as in all other cases of unlawful killing.

6.13 This solution has the disadvantage incidental to any discretionary power, namely lack of predictability, with the consequences of acrimony and expensive litigation. It has the further drawback of being confined to the forfeiture situation, leaving it to be considered whether some entirely separate solution should be found for other cases such as disclaimer. It would also take careful drafting to define the category

[113] Administration of Estates Act 1925, s 46(1) last paragraph, set out in para 2.6 above.

[114] Forfeiture Act 1870, s 1. See also R Kerridge, "Visiting the Sins of the Fathers on their Children" (2001) 117 LQR 371, 373.

of persons affected: at first sight T is not affected by the operation of the forfeiture rule, as he would not have inherited whether or not the forfeiture rule applied.

AMEND THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

6.14 A third possibility would be to allow those in the position of T to apply under the Inheritance (Provision for Family and Dependants) Act 1975. At present such persons have no standing under the Act, as they are not dependants or persons for whom the deceased might have been expected to provide. This too is objectionable on the grounds of unpredictability and the likelihood of family acrimony: as applications under the 1975 Act require review of all the circumstances of the deceased and the claimant, they are notoriously slow and expensive, and the cost may be prohibitive for small estates.[115]

6.15 Another problem is in defining the class of possible applicants. It would seem short-sighted to restrict it to claimants defeated by a requirement that another person predecease the intestate, as this opens the prospect of a piecemeal series of small further amendments every time another quirk of inheritance law is discovered. On the other hand, to define a general class of persons deprived by quirks in inheritance law is to undermine all fixed rules of succession and throw open every estate to claims from anyone who feels hard done by.

Conclusion on forfeiture

6.16 Of the various suggestions made about forfeiture on intestacy, we consider that the statutory amendment described in paragraph 6.2, incorporating a "deemed predecease" rule, is the most satisfactory, and that it would be preferable to introducing a discretionary power. It remains to be considered whether the same solution can apply to the other situations.

6.17 **Our provisional proposal is that, in a case where a person, by virtue of the forfeiture rule, loses any entitlement under the total or partial intestacy of another person, the intestacy rules should be applied as if the disqualified person had died immediately before the intestate. We further recommend that this rule should be introduced by statute.**

Disclaimer

6.18 The "deemed predecease" formula could be used to cover other causes of disqualification, such as disclaimer.

6.19 One possibility is that the amendment should cover all reasons for disqualification generically, rather than making separate provision for forfeiture and disclaimer, as the principle of the desired amendment is identical in both cases. Further, it may be that the category of reasons for disqualification is not closed. For example, the intended beneficiary might be disqualified by the law of a foreign country of

[115] Even where legal aid is available, the costs will eventually come out of the estate through the statutory charge. For this effect in probate and inheritance cases generally, see T Goriely and P Das Gupta, *Breaking the Code: The Impact of Legal Aid Reforms on General Civil Litigation* (Institute of Advanced Legal Studies 2001) pp 129-130.

domicile, or be simply impossible to find. The essential object is to treat all cases where a beneficiary is unable to take for a reason not foreseen by the deceased in the same way as if the beneficiary had died: the actual reason for disqualification is in a sense of secondary importance.

6.20 It should be noted that this is exactly the approach of section 47(2) of the Administration of Estates Act 1925, which provides for the case where none of the issue have attained vested interests by treating the estate as if the intestate had left no issue. The scheme of the suggested amendment would be to apply this approach to the interface between the trusts for children and the trusts for remoter descendants, just as it now applies to the interface between trusts for issue and trusts for collaterals.

6.21 The other possibility, which we favour in the interests of certainty, is to confine the reform in terms to forfeiture and disclaimer cases. The question then arises of whether this should be done by one provision or by two. The neatest solution would be an amendment to the Administration of Estates Act 1925, covering forfeiture and disclaimer in a single provision. The alternative would be to insert a suitable provision into the Forfeiture Act 1982, but that would make it harder to find a home for the disclaimer reform. This however is a drafting question that could be left to a later stage.

6.22 **Our provisional proposal is that, in a case where a person has disclaimed an entitlement under the total or partial intestacy of another person, the intestacy rules should be applied as if the disqualified person had died immediately before the intestate. We further recommend that:**

(a) this rule, and the equivalent rule relating to forfeiture, should be introduced by amendment to the Administration of Estates Act 1925; and

(b) that amendment should be confined to cases of forfeiture and disclaimer, and not cover other possible causes of disqualification.

WILLS

6.23 The most appropriate solution for this situation would also seem to be the enactment of a deemed predecease rule. As noted above,[116] the "evil" in this situation is slightly more remote than in the situation typified by the facts of *Re DWS (dec'd)*. Certain of the objections to that result do not really apply here. Rather, the only real objection is that the testator's wishes, as expressed in the will, may be frustrated by the primary beneficiary's disqualification. This result could be avoided if the beneficiary who forfeits is deemed by operation of law to have predeceased the testator. For the reasons given in Part V, we consider that any amendment should be confined to the forfeiture case and not extend to disclaimer or the attestation of the will.

[116] Paras 5.30 *et seq*.

6.24 One question is whether the rule should be wide enough to cover substitutionary gifts which depend on a person predeceasing a person other than the testator. For example, T might leave his property to A for life, with remainder to B, or in case B should predecease A, to C. In such a case, if B is disqualified by the forfeiture rule, B should be treated as predeceasing A, rather than T.[117] As with lifetime settlements, we are not disposed to pursue this route, as it would raise the question of interests contingent on surviving an event other than a death, and thus unduly widen the project.

6.25 The provision about forfeiture in wills cases should take the form of an amendment to the Wills Act 1837, and should be separate from the intestacy reforms, as it does not cover disclaimer.

6.26 Our provisional proposal is that, where a person is disqualified by the operation of the forfeiture rule from receiving a benefit under the will of another person, any gift in the will contingent upon the disqualified person dying before the testator should be given effect as if that person had in fact so died. We further recommend that this reform be effected by amendment to the Wills Act 1837. We do not recommend that a similar rule be made for cases where a person is disqualified for reasons other than the forfeiture rule.

[117] This logic applies in forfeiture cases regardless of whether B has killed A or T.

PART VII
SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION ISSUES FOR CONSIDERATION

INTESTACY

7.1 Do consultees agree with our view that:

(a) the existing law of intestate succession, in its application to forfeiture cases, leads to unsatisfactory results;

(b) the most appropriate result in cases such as *Re DWS (dec'd)*[118] is that the grandchild/contingent beneficiary should inherit (Paragraph 5.23); and

(c) the most appropriate solution is to apply the intestacy rules as if the person disqualified by operation of the forfeiture rule had died immediately before the intestate (the "deemed predecease" rule)? (Paragraph 6.17)

7.2 If not, would they recommend some other reform, such as the introduction of a discretionary power? (Paragraph 6.16)

7.3 Do consultees agree with our provisional proposal that, in a case where a person has disclaimed an entitlement under the total or partial intestacy of another person, the intestacy rules should be applied as if the disqualified person had died immediately before the intestate? (Paragraph 6.22)

7.4 Do consultees agree with our provisional proposal that the deemed predecease rule (for intestacy cases where a person has forfeited or disclaimed the entitlement):

(a) should be introduced by statute (Paragraph 6.17), and

(b) specifically, by amendment to the Administration of Estates Act 1925? (Paragraph 6.22)

7.5 Do consultees agree that the proposed amendment should be confined to cases of forfeiture and disclaimer, and not cover other possible causes of disqualification? (Paragraph 6.22)

WILLS

7.6 Do consultees agree that, where there is a will with a substitutionary gift and the primary beneficiary does not take by virtue of the forfeiture rule, the contingent beneficiary, whether or not the child of the primary beneficiary, ought to inherit?

[118] [2001] Ch 568 (CA).

7.7 Do consultees agree with our provisional proposal that, where a person is disqualified by the operation of the forfeiture rule from receiving a benefit under the will of another person, any gift in the will contingent upon the disqualified person dying before the testator should be given effect as if that person had died immediately before the testator?

7.8 If so, do they agree with our further proposals that:

(a) this reform be effected by amendment to the Wills Act 1837;

(b) that the reform be confined to the forfeiture case and not extended to cases where a person is disqualified for other reasons, such as disclaimer or attestation of the will? (Paragraph 6.26)

7.9 If consultees do not agree that the reform (so far as it relates to wills) should be confined to forfeiture cases, would they prefer the reform to extend to:

(a) disclaimer of gifts under a will (paragraph 5.38); or

(b) loss of gifts under a will by reason of being a witness to its execution? (paragraphs 5.39 to 5.42)

GENERAL

7.10 Can consultees think of any further circumstances in which a similar problem might arise, apart from forfeiture, disclaimer and beneficiary attestation? If so,

(a) should these be specifically covered; or

(b) should the proposed reform extend generally to all cases of failure to attain a vested interest for whatever reason? (Paragraph 6.19)

7.11 Should the proposed reform extend to:

(a) gifts contingent on a person dying before an event other than the death of the donor (paragraph 6.24); or

(b) contingent gifts under a lifetime settlement? (Paragraphs 5.43 and 5.44)

7.12 Do consultees think that there is any justification for maintaining the law as it is? In particular, is there substance in the concern that the grandchild/contingent beneficiary might make the property available to the primary beneficiary? (Paragraphs 5.19 to 5.22, 5.40 and 5.41)

APPENDIX: THE INTESTACY PROVISIONS

Administration of Estates Act 1925

46. Succession to real and personal estate on intestacy.

(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:--

(i) If the intestate leaves a husband or wife, then in accordance with the following table: [*omitted*]

(ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

(iii) If the intestate leaves no husband or wife and no issue but both parents, then, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

(iv) If the intestate leaves no husband or wife and no issue but one parent, then, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;

(v) If the intestate leaves no husband or wife and no issue and no parent, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:--

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts, then

Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate);

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

47 Statutory trusts in favour of issue and other classes of relatives of intestate

(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:--

(i) 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, who attain the age of eighteen years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of eighteen years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

(ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;

[...]

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest--

(a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

(b) references in this Part of this Act to the intestate “leaving no issue” shall be construed as “leaving no issue who attain an absolutely vested interest”;

(c) references in this Part of this Act to the intestate “leaving issue” or “leaving a child or other issue” shall be construed as “leaving issue who attain an absolutely vested interest.”

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

(4) References in paragraph (i) of subsection (1) of the last foregoing section to the intestate leaving, or not leaving, a member of the class consisting of brothers or sisters of the whole blood of the intestate and issue of brothers or sisters of the whole blood of the intestate shall be construed as references to the intestate leaving, or not leaving, a member of that class who attains an absolutely vested interest.