

The Law Commission
Consultation Paper No 191

**INTESTACY AND FAMILY PROVISION
CLAIMS ON DEATH**

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission for England and Wales was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell and Professor Jeremy Horder. Kenneth Parker QC was a Law Commissioner when the text of this paper was finalised, on 30 September 2009.

The Chief Executive is Mr Mark Ormerod CB.

Topic of this consultation: This Consultation Paper reviews the intestacy rules and the law of family provision claims on death. The intestacy rules, contained in the Administration of Estates Act 1925, apply when a person dies without disposing of all his or her property by will, and they determine how that person's property is to be inherited. Whether or not the person who died left a valid will, certain family members and dependants may make a claim against the estate for reasonable financial provision. These claims are made under the Inheritance (Provision for Family and Dependants) Act 1975.

We discuss the current law and set out a number of provisional proposals and options for reform on which we invite consultees' views.

Scope of this consultation: The purpose of this consultation is to generate responses to our discussion, provisional proposals and questions with a view to making recommendations for reform to Parliament. Our proposals and questions are listed in Part 8.

Geographical scope: This Consultation Paper refers to the law of England and Wales.

Impact assessment: The impact of the current law and potential reforms is considered throughout this Consultation Paper and consultees are invited to give their views on social and other impacts generally. Appendix C focuses on quantification of the impacts of the current law and options for reform, and requests information and comments from consultees.

Duration of the consultation: from 29 October 2009 to 28 February 2010.

How to respond

Please send your responses either –

By email to: propertyandtrust@lawcommission.gsi.gov.uk or

By post to: Jack Connah, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0296 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide our final recommendations and present them to Parliament. We hope to publish our final report in Autumn 2011. It will be for Parliament to decide whether to make any change to the law.

Code of Practice: We are a signatory to the Government's Code of Practice on Consultation and follow the Code criteria, set out on the next page.

Freedom of information: We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response.

PLEASE NOTE: We will disregard automatic confidentiality statements generated by an IT system.

Availability of this Consultation Paper: You can view or download the paper free of charge on our website at: www.lawcom.gov.uk/docs/cp191.pdf.

CODE OF PRACTICE ON CONSULTATION

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Correna Callender.

You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.

Contact:

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Email: correna.callender@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the Department for Business, Innovation and Skills website at: www.berr.gov.uk/files/file47158.pdf.

THE LAW COMMISSION
INTESTACY AND FAMILY PROVISION
CLAIMS ON DEATH

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GLOSSARY

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

“**1988 Working Paper**”: this refers to Distribution on Intestacy (1988) Law Commission Working Paper No 108.

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

“**Chattels**”: these are items that were owned by the deceased for his or her own personal use (the legal definition of chattels for these purposes is found in section 55(1)(x) of the Administration of Estates Act 1925).

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

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

“**Estate**”: we use this term to refer to what is left of a deceased person’s assets after payment of funeral expenses, any debts, the costs of administration and any gifts in a will. This is sometimes called the “net” or “residuary” estate or “residue”.

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

“**Intestate**”: we use this term in two ways: to refer to someone who has died without leaving a will that effectively disposes of property (as in “she died intestate”), and to refer to an estate or to part of an estate not disposed of in a will (“an intestate estate” or “the intestate part of an estate”).

“**NatCen focus groups**”: this refers to the focus groups that the National Centre for Social Research (“NatCen”) ran for this project.

“**Nuffield survey**”: this refers to the large scale public attitude survey being run by Professor Gillian Douglas and Hilary Woodward of Cardiff University, and Alun Humphrey from NatCen with funding from the Nuffield Foundation.

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

“**Statutory legacy**”: this is the sum to which a surviving spouse is entitled from an intestate estate before any other beneficiaries are paid.

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

PART 1

INTRODUCTION

- 1.1 Inheritance is a difficult subject. It is difficult not least because it goes along with bereavement; the disposition of property belonging to someone who has died has generally to be managed by those who are closely affected by the death. The process of grieving, and of adjustment to change, can be made far worse by uncertainty and anxiety about money or belongings. In an ideal world we would all make a will. The law of England and Wales allows us to determine, by making a will, what should happen to our property after we die, subject to some restrictions; and in an ideal world the will would meet the needs and wishes of all of our family and friends.
- 1.2 In the real world, not everyone makes a will, and not everyone is content with the wills that are made. Accordingly, the law makes provision for what is to happen to the property of those who die without a will; those provisions are known as the intestacy rules, and they are largely contained in the Administration of Estates Act 1925. The law also offers a procedure for challenging a will, or the effect of the intestacy rules in a particular case, where family members or dependants feel that reasonable provision has not been made for them. They can do so by applying to the court for what is commonly known as “family provision”. The court has power under the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) to make a range of orders that have the effect of modifying the distribution of an estate.¹ Family provision legislation therefore represents a limited but significant exception to the principle that we can dispose of our property as we wish by will.
- 1.3 This Consultation Paper seeks views on possible reform of the law governing intestacy and the operation of the 1975 Act. It does not address the law that is specific to wills, and so does not look at issues such as their validity or effect.

THE SIGNIFICANCE OF THIS AREA OF THE LAW

- 1.4 A great many people die in England and Wales without having made a will. Studies suggest that between a half and two thirds of the adult population have not made one.² In other cases, a will is made but turns out to be invalid because, for example, the strict formality requirements of the Wills Act 1837 were not complied with, or the testator was not mentally capable of making a will or was under the undue influence of someone else. Or a valid will may be revoked by marriage or by the formation of a civil partnership. In all these cases the estate has to be distributed according to the intestacy rules.

¹ We have provided a glossary on the facing page to explain the term “estate” and other technical terms.

² National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 3; K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005) p 71.

- 1.5 This does not necessarily mean that most of the population dies intestate. Research suggests that people are more likely to make a will as they get older.³ They are also more likely to make a will if they have significant assets to dispose of; intestate estates therefore tend to be smaller than estates where there was a will.⁴
- 1.6 It is, however, difficult to obtain accurate figures. The best source of statistics is the number of grants of representation obtained. A grant of representation is the formal document that authorises the distribution of an estate. We know that around 280,000 grants are taken out each year in England and Wales, around a third of which are in respect of intestate estates. However, each year there are around 500,000 deaths. The discrepancy between the number of grants and the number of deaths arises because no grant is needed for very small estates or property that passes automatically to another person. So the total number of grants issued for intestate estates does not tell us the total number of intestacies; and it seems likely that many of those estates where there is no grant will be intestate.
- 1.7 In just a few cases it may be that the deceased was aware of the effect of the intestacy rules on the distribution of his or her estate, and made an informed choice not to make a will. In most cases, however, it would appear that the intestacy is unintentional; inertia, superstition and misunderstanding of the law all play a part in the widespread failure to make a valid will.⁵ One study of lawyers' experiences found that:
- Clients often harbour what one observer calls 'the illusion of continued life. The minds of many simply do not avert to the possibility of untimely death and there exists the belief that there is no pressing need to attend to the matter.' Along with procrastination often comes superstition: for centuries now, would-be testators have harboured the fear that if they executed their wills, the documents would become relevant in short order.⁶
- 1.8 In many cases, the application of the intestacy rules is likely to be unproblematic; the estate will be distributed to close relatives in a way that does not cause any surprise or disappointment. In other cases, however, the distribution may not accord with the expectations of those who might have expected to benefit. In one study, nearly a quarter of those aged 55 to 64 said they had personal experience of the human and economic costs associated with intestacy.⁷ For example, a

³ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 3.

⁴ This is one of the findings of our work with HM Revenue & Customs, discussed further at paras 1.46 to 1.47 below and set out in detail at Appendix C.

⁵ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) pp 5 to 6; K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005) pp 69 to 76.

⁶ A Hirsch, "Default Rules in Inheritance Law: A Problem in Search of its Context" (2004-2005) 73 *Fordham Law Review* 1031, 1047 to 1048, quoting W Page, *Page on the Law of Wills* (revised ed 2003) vol 1, p 31.

⁷ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) pp 11 to 12.

long-term cohabitant may believe, wrongly, that her relationship with the deceased was a “common law marriage”, with the same entitlement to her partner’s estate as a spouse would have.

- 1.9 The 1975 Act may be available to change the outcome of cases in which the intestacy rules are perceived to operate unfairly; it may also enable a challenge to the provisions of a valid will. However, it has proved surprisingly difficult to obtain accurate information about the number of applications made each year under the Act. Figures are available for the number of applications issued in the Chancery Division of the High Court but not for the Family Division or for the county courts. In 2007 the Chancery Division is recorded as dealing with only 43 applications (compared with 476 in 1980, the highest number recorded).⁸ Even if accurate figures were available for the number of claims issued in all tribunals, they would not disclose the number of cases that are settled before an application is formally made.⁹
- 1.10 Whatever the precise figure, it is clear that the number of family provision claims is small compared with the number of estates administered each year. What is not known is whether the relatively low number of applications reflects general satisfaction with the current law or indicates that there are problems with the family provision legislation which prevent or deter deserving applicants from pursuing a claim.

BACKGROUND TO THE PRESENT PROJECT

- 1.11 In 2005 the Department for Constitutional Affairs (now the Ministry of Justice) published a consultation paper proposing significant increases in the statutory legacy – that is, the sum paid to a surviving spouse as his or her basic entitlement from an intestate estate. As a result of that consultation, the levels of the statutory legacy increased for deaths from 1 February 2009. Responses to that consultation revealed enthusiasm for a wider review of the intestacy rules.¹⁰ Almost all consultees agreed that such a review was necessary; support came from a wide range of individuals and groups, including academics, practitioners, professional organisations and members of the public.
- 1.12 A number of factors have led to the conclusion that the law of intestacy and family provision is ripe for review. For one thing, it is 20 years since the intestacy rules were reviewed, and considerably longer since the family provision legislation was reviewed by the Law Commission. For another, press reports and television programmes have provided anecdotal evidence of hardship caused by

⁸ Ministry of Justice, *Judicial and Court Statistics* (2007) Cm 7467, p 37; Lord Chancellor’s Department, *Judicial Statistics: England, Wales and Northern Ireland* (1980) Cmnd 8436, p 42.

⁹ Another indicator of the number of disputes in which a 1975 Act application is considered are figures provided by the Legal Services Commission for the number of applications for public funding for legal assistance. These show that between April 2007 and March 2008 there were 166 applications for public funding (of which 136 were successful). These figures, of course, do not include those cases funded privately by the parties.

¹⁰ Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) p 3.

the present rules and public support for reform,¹¹ and there have been calls for reform from practitioners and academics.¹²

- 1.13 The Ministry of Justice asked the Law Commission to consider a project to review the law of intestacy and family provision, and the Better Regulation Executive of the Cabinet Office supported that proposal. The Association of Contentious Trust and Probate Specialists independently proposed a review of this area of the law.¹³
- 1.14 The project was therefore included in the Law Commission's Tenth Programme of Law Reform,¹⁴ which was approved by the Lord Chancellor and laid before Parliament in June 2008. Work on the project commenced in October 2008, and we plan to publish a Report and draft Bill in late 2011.

PREVIOUS LAW COMMISSION WORK

- 1.15 The law of intestacy and family provision has been reviewed by the Law Commission before; and a number of other Law Commission projects have touched on these areas. We summarise the background here.

Distribution on intestacy

- 1.16 In 1989 the Law Commission published a report outlining recommendations for the reform of the law of intestacy ("the 1989 Report").¹⁵ The 1989 Report made four main recommendations:¹⁶

- (1) a surviving spouse of a person who died intestate should in all cases receive the whole estate;
- (2) the statutory rules of "hotchpot" should be repealed;¹⁷
- (3) a spouse should only inherit on intestacy if he or she survived the deceased for 14 days; and
- (4) cohabitants should be able to apply under the 1975 Act for family provision without having to show that they were dependent on the deceased.¹⁸

¹¹ See, for example, "The dangers of failing to write your will", *Daily Telegraph*, 5 May 2009; Tonight: Will Wars, *ITV1*, 26 September 2008.

¹² See, for example, R Kerridge, "Reform of the law of succession: the need for change, not piecemeal tinkering" (2007) 71 *Conveyancer and Property Lawyer* 47, 64 to 69; and S Cretney "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77.

¹³ The Association of Contentious Trust and Probate Specialists (ACTAPS) was established in 1997 as a forum for practitioners specialising in contentious trust and probate work.

¹⁴ Tenth Programme of Law Reform (2007) Law Com No 311, paras 2.9 to 2.13.

¹⁵ Family Law: Distribution on Intestacy (1989) Law Com No 187. This followed Distribution on Intestacy (1988) Law Commission Working Paper No 108.

¹⁶ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 62.

¹⁷ This term refers to the former rules that required someone who had already received a substantial benefit from the deceased to bring that into account in the calculation of their entitlement on intestacy. These are considered in more detail at paras 7.32 to 7.35 below.

- 1.17 The last three of these recommendations were accepted by the Government and enacted in the Law Reform (Succession) Act 1995.¹⁹ The first recommendation, however, was not accepted. It had been subject to criticism that it might prejudice any children of the deceased, particularly those from a relationship other than the marriage to the surviving spouse.

Family provision

- 1.18 The 1975 Act was the product of Law Commission work.²⁰ It has not been subject to a fundamental review since it was enacted, though it was amended in 1995 to allow cohabitants to make an application for financial provision from the estate of a deceased partner.²¹ Further amendments were made in 2004 to include within the scope of the 1975 Act civil partners and same-sex cohabitants.²²

The forfeiture rule

- 1.19 In 2005 the Law Commission produced a report on the forfeiture rule, which operates to disqualify a person who unlawfully kills someone from benefiting from the victim's estate. The principal problem with the current law is that the children and other descendants of the disqualified beneficiary are also excluded, even where they are entirely blameless. Similar problems can occur where a beneficiary refuses to accept an inheritance under a will or the intestacy rules (known as disclaimer). The report recommended reforms to improve the position of children and other descendants in both situations and these were included in a draft Bill.²³
- 1.20 Our recommendations have been accepted by Government and are awaiting implementation. We therefore do not intend to revisit in this Consultation Paper any of the issues raised in that report.

Cohabitation

- 1.21 The Law Commission published its final report on the financial consequences of the breakdown of cohabiting relationships in 2007.²⁴ We refer to that report in this paper as the "Cohabitation Report"; in it we made recommendations for a scheme for financial relief following separation. Its relevance to this project is that it also made some proposals about family provision. It did not recommend any changes to a cohabitant's entitlement on intestacy, taking the view that any such

¹⁸ That is, those who lived in the same household as the deceased's husband, wife or civil partner for at least two years before the death.

¹⁹ With a 28-day survivorship period enacted instead of the recommended 14-day period: Law Reform (Succession Act) 1995, s 1(1).

²⁰ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

²¹ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1A), inserted by the Law Reform (Succession) Act 1995, s 2, following the Law Commission's recommendation made in Family Law: Distribution on Intestacy (1989) Law Com No 187.

²² Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1)(a), 1(1)(b) and 1(1B), amended by the Civil Partnership Act 2004, s 71 and sch 4.

²³ The Forfeiture Rule and the Law of Succession (2005) Law Com No 295.

²⁴ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

development should only take place within the context of a broader review. The Government has not yet given a final response to the recommendations in the Cohabitation Report.

AN INTRODUCTION TO THIS PROJECT

- 1.22 This project is concerned with two complementary areas of the law. On the one hand, the intestacy rules have to cater for the general run of estates, prescribing broadly acceptable distributions that work well in most cases. They are rules; the idea is that the administrators of an estate can look them up and apply them. There is no scope for discretion in their application.
- 1.23 However, the intestacy rules are not able to respond to the needs or obligations of particular individuals. The first family provision legislation did not provide for the possibility of an application being made in respect of an intestate estate; it was considered a contradiction to suggest that the intestacy rules might not result in reasonable provision being made. Since 1952, however, it has been accepted that the circumstances of a particular case might make such an application necessary. To take a simple example: the intestacy rules provide that where surviving children are entitled to a share of an estate they share equally. There might be circumstances where that is not appropriate. Accordingly, where the intestacy rules do fail to make reasonable financial provision, the court has discretion under the 1975 Act to make orders which have the effect of modifying the results of the strict application of the intestacy rules.
- 1.24 This system of fixed rules supplemented by the court's discretion can be seen as a great strength of the law in this area, and it has not been suggested that that balance of certainty and flexibility should be disturbed. We do not contemplate changing that dual system. It should also be stressed that the intestacy rules are voluntary, in the sense that anyone can opt out of them before death by making a will; they are therefore default rules rather than mandatory rules.²⁵
- 1.25 In reviewing the law of intestacy and family provision we bear in mind the changes within society that make review in this area timely. Probably the most important factor that motivates reform is the change in family structures and values within society since these areas were last reviewed. We have in mind the introduction of civil partnership,²⁶ the increased acceptance of cohabitation,²⁷ and the prevalence of divorce and of subsequent marriages, civil partnerships and cohabitations. These changes mean that law which most people found to be an appropriate response, 100 or even 20 years ago, to the problems of intestacy and the dilemmas that arise over family provision, may today be unacceptable. It may

²⁵ See A Hirsch, "Default Rules in Inheritance Law: A Problem in Search of its Context" (2004-2005) 73 *Fordham Law Review* 1031, 1032.

²⁶ Civil Partnership Act 2004.

²⁷ See paras 4.18 to 4.23 below.

fail, in some respects, to provide for a disposition of property that reflects either what the deceased would have wanted or what the survivors find reasonable.²⁸

- 1.26 So one of our objectives is to bring the law up to date with modern expectations and preferences. In doing so, we bear in mind a number of other factors. One is the wish to minimise litigation. Recourse to the courts is not a desirable option. It is emotionally and financially costly, wasting the estate that is in dispute and exacerbating stress and conflict at a difficult time. The intestacy rules should make reasonable provision in the vast majority of cases for those who might expect to benefit from an estate, so that family provision applications – which already appear to be at very modest levels – should remain a last resort.
- 1.27 Another objective is simplicity, and indeed this is one of the statutory objectives of the Law Commission.²⁹ But simplicity is not a simple pursuit. It may at times be too great a price to pay for fairness; sometimes a more complex solution may be needed to respond to the complexity and variety of families and relationships. For example, one of the major concerns in this project is the appropriate entitlement of the surviving spouse of someone who dies intestate. Should he or she receive the entire estate? That would be a very simple solution; but we have to ask whether it is better to retain a more complicated entitlement so as to make room for the proper recognition of children and perhaps even of other family members.
- 1.28 Another very important consideration is testamentary freedom, by which we mean the freedom that the law gives us to make a will in whatever terms we wish. Any discussion of succession³⁰ in England and Wales must be placed in the context of a deeply rooted belief in testamentary freedom. Focus group research commissioned for this project suggests that this feeling is still very strong. There is no equivalent in this country to the rules in the civil law countries of Europe, often described as “forced heirship”, that give a fixed entitlement to certain relatives.³¹ The closest our law comes to that is the family provision legislation. We therefore have to bear in mind that that legislation has to respond not only to intestacy but also to the provisions of wills; the orders that the court can make in family provision have to be justifiable not only on intestacy but also in the face of the deceased’s expressed wishes in a will.³²
- 1.29 We also have to bear in mind the likely size of an intestate estate. We have worked with the Probate Service and HM Revenue & Customs (“HMRC”), to

²⁸ This is not, however, a new debate; the seventeenth century jurists and philosophers Hugo Grotius and Samuel von Pufendorf both commented on the proper basis of intestacy law. See R Scalise, “Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents” [2006] *Seton Hall Law Review* 171, 172 to 173.

²⁹ Law Commissions Act 1965, s 3.

³⁰ We use the term “succession” to refer to the transfer of property on death. The law of succession regulates inheritance. See R Kerridge, *Parry and Kerridge, The Law of Succession* (12th ed 2009) para 1-01 and following.

³¹ Civil law jurisdictions, which comprise most of Europe, derive their legal systems more directly from Roman law than do common law jurisdictions, which inherit their legal systems from England and Wales and are spread throughout the Commonwealth.

³² It has been noted that complete testamentary freedom only existed in England between 1891 and 1938: S Cretney “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77, 83 to 84, and n 50, citing M Albery, *The Inheritance (Family Provision Act) 1938* (1950) pp 1 to 2.

reveal characteristics of intestate estates that were previously assumed but could not be verified.³³ One such characteristic is the markedly lower average size of intestate estates compared with estates where there is a will. The median value of an intestate estate is £56,000, compared with £160,000 where there is a will, and almost a third of intestate estates are valued at less than £25,000.³⁴ These figures provide an important context for our review. Reported cases and the concerns of legal practitioners tend to focus on those high value estates where there is the motivation for parties to litigate and the resources to do so.

- 1.30 This can tend to obscure the reality that most intestate estates are relatively modest. This must be kept at the forefront of our minds when considering the various possible options for reform. In particular, when considering rules that govern the distribution of estates, it is tempting to see some sort of sharing among those with competing claims as the fairest solution. Yet in most cases, there is very little to share. If the intestacy rules are about deciding how to slice the cake, we must be conscious of the fact that in many cases the cake is very small. Any reform that gives one class of beneficiaries a greater share of the estate will inevitably reduce what is available for other potential beneficiaries.
- 1.31 One final point to emphasise concerns tax. In 1989 we proceeded on the basis that “taxation considerations should not be taken into account in formulating the intestacy rules”.³⁵ We take a similar approach in this paper: any reform proposals that we make for the intestacy rules should be tax neutral. By that we mean that while we would avoid suggesting changes that would automatically increase tax liability, our proposals are not motivated by a desire to reduce it. To do otherwise would be futile, since it is not possible to predict future changes in tax legislation. Individuals who are concerned about the incidence of tax on their death are free to take advice and make a will that attempts to minimise that liability.

INFORMATION AND RESOURCES

- 1.32 In the course of this review we have, inevitably, started with the current law and its strengths and weaknesses, and have considered the criticisms of the law that have been voiced in professional and academic writing. We are also keen to hear from members of the public, and we hope that many will respond to this consultation, whether in full or just with their views on aspects of the law that they have experienced.
- 1.33 We have also looked at the solutions that have been found to similar legal problems in other jurisdictions, while bearing in mind that those solutions operate in a different social and legal context. A number of common law jurisdictions have inherited the same basic law of succession as England and Wales but in many cases the law has developed in a different way. We have focused on common law jurisdictions; the law of succession in civil law jurisdictions is fundamentally different, in particular the prevalence of “forced heirship” provisions which are alien to those jurisdictions where testators are afforded a significant degree of testamentary freedom.

³³ See paras 1.46 to 1.47 below. Detailed findings of our work with HM Revenue & Customs are set out at Appendix C.

³⁴ See para 3.11 below.

³⁵ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 38.

1.34 We are also fortunate that several other law reform bodies have recently reviewed the laws of intestacy in their jurisdictions. Their publications include:

- (1) the Scottish Law Commission's recent Report and Discussion Paper on Succession;³⁶
- (2) the Report and Issues Paper on Intestate Succession published by the New South Wales Law Reform Commission, and the work of the Queensland Law Reform Commission on family provision, both representing the Australian National Committee on Uniform Succession Laws;³⁷ and
- (3) the Alberta Law Reform Institute's Report and Discussion Paper on their Intestate Succession Act.³⁸

1.35 We have gratefully drawn on the research and conclusions reached in these publications, and in others, and make appropriate reference to them throughout this Consultation Paper.

1.36 We have also drawn on the rich variety of existing empirical research dealing with issues relating to succession.³⁹ In addition, we have commissioned a small study using focus groups; and we plan to make extensive use of a large-scale study currently in progress. Empirical research into public attitudes may be qualitative, working with a small sample of respondents and exploring their views and the reasons for them. Alternatively, it may be quantitative, which means that it is based upon a sample large enough to have statistical significance, so that we can draw from it conclusions that can be generalised and can tell us what, by and large, members of the public as a whole think.

1.37 The empirical studies discussed below, both existing work and forthcoming studies, are particularly important to us. None can be said to have the last word. Some studies tell us something of what would match the wishes of most people who die intestate; some can give us information about what people would like to receive. They can all help us to build up a picture.

Will studies

1.38 Reform of the law of intestacy has traditionally relied heavily on will studies. As the Law Commission noted in 1989, the present intestacy rules were designed

³⁶ Discussion Paper on Succession (2007) Scottish Law Commission Discussion Paper No 136; Report on Succession (2009) Scot Law Com No 215.

³⁷ New South Wales Law Reform Commission, Uniform succession laws: family provision (2005) Report 110; Uniform succession laws: intestacy (2005) Issues Paper 26; Uniform succession laws: intestacy (2007) Report 116; and Queensland Law Reform Commission, Report to the Standing Committee of Attorneys General on Family Provision (1997) Miscellaneous Paper 29; Family Provision: Supplementary Report to the Standing Committee of Attorneys General (2004) Report 58.

³⁸ Alberta Law Reform Institute, Reform of the Intestate Succession Act (1996) Report for Discussion No 16; Reform of the Intestate Succession Act (1999) Report No 78.

³⁹ Empirical research bases its findings on observation or experience; in this context it includes analysis of statistical data as well as research into public attitudes.

around the “presumed wishes” of the deceased.⁴⁰ It has been said that the intestacy rules are an attempt by the legislature to write a will for the intestate.⁴¹

- 1.39 Historically, therefore, the formulation and reform of the intestacy rules has relied heavily on what testators choose to put in their wills. This has been discerned either through the study of wills or more informally by asking practitioners what, in their experience, clients choose to do. Such studies often provide inadequate information as to the wishes of testators. A will may indicate those whom the testator intended to benefit but not identify those who have been excluded from the will. Moreover, it may not be up-to-date; one’s wishes at the time of death may be very different from one’s views and priorities many years earlier when a will was made. Preferences expressed in a will may also be influenced by tax planning.
- 1.40 More fundamentally, as the Law Commission noted in 1988, “it seems odd to allow the half of the population who make wills to dictate what should happen to the property of the other half who do not”.⁴² One study has concluded that there are “important demographic differences between those who had wills and those who did not”.⁴³ Those dying intestate are on average younger than those who have made a will. Our work with HMRC has shown that the median age at death of those who die without having made a will is 73, compared with 83 for those who die with a valid will. Those dying intestate are likely to be less affluent and from lower socio-economic backgrounds than those with wills. They are less likely to be married or have children and are more likely to be from a minority ethnic background.⁴⁴
- 1.41 There are therefore drawbacks to reliance on the evidence drawn from wills, and although we have had regard to a number of will studies as a source of empirical information we have had these drawbacks in mind.⁴⁵ As one team of researchers has concluded, neither a will study nor a public attitude survey is sufficient on its own to determine the wishes of those who die intestate.⁴⁶

⁴⁰ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 24.

⁴¹ C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 1-024, citing *Cooper v Cooper* (1874) LR 7 HL 53, 56, by Lord Cairns.

⁴² Distribution on Intestacy (1988) Law Commission Working Paper No 108, para 4.2.

⁴³ M Johnson and J Robbennolt, “Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners” (1998) 22(5) *Law and Human Behaviour* 479, 497.

⁴⁴ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) pp 3 to 5.

⁴⁵ Examples include: M Fellows, R Simon and W Rau, “Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States” [1978] *American Bar Foundation Research Journal* 319; J Dekker and M Howard, “I give, devise and bequeath: an empirical study of testators’ choice of beneficiaries” (2006) New South Wales Law Reform Commission Research Report 13; and the survey of wills undertaken by the Department for Constitutional Affairs for their consultation into updating the value of the statutory legacy (summarised in Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) paras 111 to 114).

⁴⁶ M Fellows, R Simon and W Rau, “Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States” [1978] *American Bar Foundation Research Journal* 319, 326.

Public attitude surveys

- 1.42 More recent attempts at reform of the law in this area have tended to draw upon public opinion, ascertained through research, sometimes specially commissioned for a particular law reform project.
- 1.43 In some cases, the focus of the research is on the public understanding of the present law. An alternative approach is to seek to ascertain public attitudes about what the law should be. In some cases, both of these approaches are combined. We have drawn on published research, in particular the public attitude survey that was commissioned for the 1989 Report and the more recent set of questions that the Scottish Law Commission included in the April 2005 round of an “omnibus survey” run by MRUK Research. An omnibus survey is a large-scale study using a random sample of the population, involving numbers large enough to be statistically significant and therefore generating conclusions that can be generalised. The views of the public in Scotland have to be seen against the background of Scottish law. Scotland is a civil law jurisdiction and very different from ours in some areas, including inheritance. That very different legal background is known (to a greater or lesser extent) to the respondents to the omnibus survey. No similar up-to-date quantitative research into public attitudes in England and Wales was available at the start of our project.
- 1.44 We are therefore delighted that the Nuffield Foundation has funded a research project under the leadership of Professor Gillian Douglas of Cardiff University and Alun Humphrey of the National Centre for Social Research (“NatCen”). This research will consist of two parts (collectively referred to as “the Nuffield survey”). The first will be a large-scale quantitative survey making use of NatCen’s own omnibus survey to determine the views of the general population on a variety of questions relating to intestacy. The second stage will be qualitative, and through in-depth interviews will explore the individual experiences and thought processes people go through in forming opinions about the issues involved. The quantitative component will take place between August and November 2009 with the follow-up qualitative interviews running through until December 2009. We expect to have the final results from this research in June 2010.
- 1.45 We have also been fortunate in having been able to commission NatCen to conduct on our behalf a number of focus groups (“the NatCen focus groups”). Four focus groups were undertaken in 2008, each with around 10 participants. Participants were chosen from those whose points of view might be lost, or picked up only in a very general way, in large-scale quantitative research, including people who have married more than once, people who have children from more than one relationship, step-parents, cohabitants and those in same-sex relationships. Discussion in the groups ranged widely over the areas examined in this Consultation Paper, including the importance of testamentary freedom, the relative entitlements of spouses and children, the rights of cohabitants on the death of a partner and the significance of the family home. We have made the final report available on our website.⁴⁷

⁴⁷ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) (available at www.lawcom.gov.uk/intestacy.htm).

Work with the Probate Service and HM Revenue & Customs

- 1.46 We referred above to our work with the Probate Service and HMRC, which has helped us to ascertain more information about the size and composition of intestate estates. Every week the Probate Service sends HMRC an electronic dataset containing details of grants of representation issued in the previous week. The data include, among other things, the net value of the estate and the type of grant obtained. In most cases, the type of grant obtained indicates whether the deceased left a will or died intestate. Those few grants which do not clearly indicate this were excluded from the analysis.⁴⁸
- 1.47 HMRC statisticians have analysed the data to produce findings which have previously not been available, including the average size of estates, the proportion of estates within each of a range of estate sizes and the average age at death of those in respect of whom a grant is obtained. Significantly for the present project, we have for the first time been able to compare the figures for those who left a will and those who did not.⁴⁹

THE STRUCTURE OF THIS CONSULTATION PAPER

- 1.48 We have organised this Consultation Paper principally by relationships. So, after providing an outline of the current law in Part 2, we look in detail at the position of the surviving spouse under the intestacy rules and the family provision legislation in Part 3 and then turn to cohabitants in Part 4. In Part 5 we examine how this area of the law impacts on children, and in Part 6 we consider other relatives, and also what happens to intestate estates when there are no relatives entitled under the rules. Part 7 looks at some more technical questions relating to the administration of estates. Part 8 lists our provisional proposals and consultation questions. Appendix A contains a discussion on quantifying the impact of the current law and the reforms considered in this Consultation Paper. Appendix B contains tables and graphs to illustrate the entitlement of a surviving spouse under some of the options we discuss in Part 3. Appendix C provides the detailed findings of our work with HMRC.
- 1.49 Broadly, we can group the issues explored in this Consultation Paper into three. First, there are major areas where we take the view that reform is called for. These are the entitlement of the surviving spouse, the position of cohabitants, and the range of relationships covered by the family provision legislation. Developments in society and in the law indicate that these areas are ripe for reform, and we would like to be able to make recommendations that bring them closer into line with public expectations. Secondly, there are some less pervasive issues where we identify a problem in the law and propose a solution. Some of these are relatively minor points that will make the administration of estates easier; but many will be of great importance to the individuals concerned.
- 1.50 Finally, there are areas where it appears that there may be a problem in the law, and we seek to explore the extent of the problem and to ask whether, if so, it is practicable to solve it. An example is the distinction that the law makes between

⁴⁸ To avoid producing a misleading picture of the value of intestate estates today, cases where the grant was obtained more than five years after the date of death were also excluded from the analysis. This is explained at Appendix C, paras C.5 to C.9, below.

⁴⁹ The detailed findings are set out at Appendix C below.

full siblings and half siblings: we set out the issue in this paper and ask for consultees' views; and at the same time a question is being asked in the Nuffield survey, the answer to which will give us a statistically reliable measure of public opinion.⁵⁰ Another example, of a more technical nature, is the exclusion of pensions from the property that can be accessed through the family provision legislation. We explore this in Part 7 and ask some technical questions about the practical implications of changing the law on this point.

- 1.51 We have attempted where possible to avoid the use of technical legal terms that would not be familiar to a non-lawyer. For example, the word "issue" is used in statutes to refer to a person's children or other direct descendants (grandchildren, great-grandchildren and so on). We have avoided this term where possible, preferring to refer directly to children or other descendants, but we have retained it when quoting directly from statutes, case reports and other literature. We also use the term "spouse" to refer to a husband, wife or civil partner. This avoids cumbersome alternatives such as "spouse or civil partner" and reflects the fact that civil partners have the same rights as married people in this area of the law.
- 1.52 Inevitably, however, there are some terms which are encountered so frequently in the law that they cannot be avoided. We have provided a glossary of these terms on the page facing the start of this Part.

IMPACT ASSESSMENT

- 1.53 Throughout this Consultation Paper we consider the impact of the current law on those families and individuals who are directly affected by intestacy and family provision disputes as well as the wider implications for those who administer estates and offer legal advice and representation in this area. We also discuss the potential effects of the various reforms that we consider. In one sense, therefore, the whole Consultation Paper is an exercise in impact assessment. We intend to publish with our final report a formal impact assessment that will endeavour to quantify the financial impacts of reform where that is possible (although we recognise that that is not always the most significant impact that the law in this area may have). Accordingly, we have prepared a separate Appendix on the quantification of the financial aspects of impact, in which we describe the areas that might need to be explored in order to derive some figures. We would welcome consultees' views on this, in particular any potential impacts that we have not identified and any means of obtaining data that may assist us.
- 1.54 At Appendix A we invite consultees' views on the potential financial and social impacts of the current law and of the provisional proposals and approaches to reform set out in this Consultation Paper.

HUMAN RIGHTS

- 1.55 In preparing this Consultation Paper we have been alert to possible human rights implications both of the current law of intestacy and family provision, and of possible reforms. We have taken particular note of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, which confers the

⁵⁰ See paras 6.48 to 6.54 below. Similar issues are the method by which estates are distributed among multiple descendants (see paras 5.20 to 5.35 below) and the preference given in the intestacy rules to parents over siblings (see paras 6.37 to 6.47 below).

right to respect for private and family life, home and correspondence. We have also considered Article 1 of the First Protocol to that Convention, which confers the right to the peaceful enjoyment of possessions.

- 1.56 We are satisfied that our provisional proposals have no adverse human rights implications. We have been aware, in particular, of the situation where it is possible for an individual to lose their home as a result of the operation of the intestacy rules or of the family provision legislation. That possibility exists under the current law, although it is a remote one, and we believe that our proposals for cohabitants will go some way towards making that risk even less likely to materialise. Even where property does have to be disposed of following an intestacy, this is generally the result of the size of the estate rather than of the intestacy rules.
- 1.57 **We invite consultees' views on the human rights implications of the provisional proposals made, and the issues discussed, in this Consultation Paper.**

ACKNOWLEDGMENTS

- 1.58 We would like to record our thanks to a number of individuals who have given us invaluable assistance in our work on this project to date.
- 1.59 In particular, we have had the benefit of an expert advisory group, comprised of academics and practitioners with specialist knowledge of this area. They are: Miranda Allardice of Pump Court Chambers, Temple; David Bunn of Blake Laphorn solicitors; Roland D'Costa of the District Probate Registry, Oxford; Richard Frimston of Russell-Cooke LLP solicitors; Henry Frydenson of Mishcon de Reya solicitors; Jonathan Herring of Exeter College, the University of Oxford; Roger Kerridge of the University of Bristol; Alison Meek of Harcus Sinclair solicitors; Trevor Milne-Day of Blake Laphorn solicitors; Robin Paul of Withers LLP solicitors; and Penelope Reed QC of 5 Stone Buildings, Lincoln's Inn.
- 1.60 We are also grateful to NatCen, which undertook focus group research on our behalf; the Probate Service (Helen Smith and John Lauder) and HMRC (Jon Aldous, John Marchant and Paul Huggins) for their work in producing invaluable new data on the size and composition of estates; and the Legal Services Commission (Terence Davies) for providing us with detailed figures on Legal Aid awards for proceedings under the 1975 Act.
- 1.61 We would like to thank: the Bona Vacantia Division of the Treasury Solicitor's Department (Angela Manchee and Ben Allen); the British Association for Adoption and Fostering (Alexandra Conroy Harris and Julia Feast); the Government Actuary's Department (Martin Lunnion and Adrian Gallop); the Trust Law Committee (John Dilger); Farrer & Co (solicitors for the affairs of the Duchy of Cornwall and the Duchy of Lancaster); Georgia Bedworth, Andrew Francis, Giles Harrap, Sidney Ross and Michael Waterworth (barristers); Linda Courtney (solicitor); and John Haskey (statistician).
- 1.62 We would also like to thank Professor Gillian Douglas of the University of Cardiff, Alun Humphrey from NatCen, and their collaborators, for involving us in the design of their questions for the Nuffield survey.

PART 2

CURRENT LAW

INTRODUCTION

- 2.1 In this Part we sketch a little of the historical development of the law of intestacy and family provision, and then explain the current law.¹

HISTORICAL CONTEXT

- 2.2 Until the Administration of Estates Act 1925 was enacted, there were two different sets of intestacy rules: one for real property (mainly freehold land) and one for personal property (everything else).² Real property passed to the heir, usually the eldest son. A surviving widower was entitled to the income of that property for life, while a surviving widow would take one third of that income. A widower would take all the personal property outright, but a widow only one-third if the deceased left children or other descendants, who would take the balance. If there were no descendants, then the widow would take one half of the personal property, with the balance passing to other relatives. The Intestates' Estates Act 1890 improved the position of a widow: it provided for her to receive £500 from the estate if her husband died intestate, though only if he left no descendants.
- 2.3 The Administration of Estates Act 1925 revolutionised this area of law, putting real and personal property on the same footing. Continuing the theme introduced by the Intestates' Estates Act 1890, the 1925 Act preferred the rights of the surviving spouse over all other relatives except when the estate was very large. The "statutory legacy" paid outright to a surviving widow or widower, before making any other distribution, was set at £1,000. This was sufficient to enable the surviving spouse to inherit the whole estate in most cases.
- 2.4 At that time it was not possible to claim further provision from an estate. A validly executed will could not be challenged on the ground that it did not make reasonable provision for a relative or dependant but only on very limited grounds relating to the circumstances in which it was made.³ Distribution under the intestacy rules could not be challenged at all.
- 2.5 After a long public campaign and parliamentary consideration of various draft Bills, the Inheritance (Family Provision) Act 1938 was enacted. This Act allowed claims only where the deceased had died leaving a will, and by only three categories of applicant: the surviving spouse; an unmarried or disabled daughter; and a son who was under 21 or disabled.⁴ Provision could only be made for the applicant's maintenance and (unless the estate amounted to less than £2,000)

¹ For a comprehensive account of the history, see S Cretney, *Family Law in the Twentieth Century: A History* (2005) ch 12.

² See C Harpum, S Bridge and M Dixon, *Megarry and Wade, The Law of Real Property* (7th ed 2008) paras 1-011 and 1-013.

³ For example, that the testator was not mentally capable to make a will, did not know and approve of its contents or was subject to the undue influence of a third party.

⁴ A child of the deceased and the surviving spouse could not claim at all if at least two-thirds of the income of the estate had been left to the surviving spouse; this restriction was finally removed by section 1 of the Family Provision Act 1966.

only by periodical payments, ceasing when the dependency ended. In addition, the court could only reallocate the income from up to two-thirds of the estate.

- 2.6 The Morton Committee was set up in 1950 to consider a spouse's rights on intestacy.⁵ There were concerns that, because of inflation, the £1,000 statutory legacy did not make sufficient provision for a spouse; in particular, the matrimonial home might well have to be sold. The Committee recommended increasing the statutory legacy to £5,000 where there were surviving children or other descendants, and introducing a new level of £20,000 where there were no descendants, but at least one parent or full sibling survived. In the latter case, the spouse would also take half of the rest of the estate, the other half passing to the deceased's parents, or if none then to any full siblings but not to other relatives.
- 2.7 Because these increases could affect other family members – there was particular concern about the deceased's children from previous relationships, for whom the surviving spouse might not provide – the law of family provision was also reviewed. The Committee recommended that the 1938 Act should be extended to cover intestate estates. These recommendations were implemented by the Intestates' Estates Act 1952, which (among other things) enabled the court to make awards extending to the whole of the income of the estate.⁶
- 2.8 This basic structure is still seen in the intestacy rules today, although some details have changed. The definition of children has been updated,⁷ and civil partners have been placed on the same footing as husbands and wives.⁸ The statutory legacy, having been raised on six further occasions, was most recently set at £250,000 for the lower level (where there are also surviving children or other descendants) and £450,000 for the higher level (no surviving children or other descendants, but the deceased left a parent or full sibling).⁹
- 2.9 The law of family provision was substantially revised by the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"), which replaced the earlier legislation and implemented recommendations made by the Law Commission.¹⁰ Significant reforms included enabling the court to make a wider range of orders and take into account certain assets to which the will or the intestacy rules would not apply.
- 2.10 However, the most notable change was the expansion of the categories of applicant to include all children (including adult children), people treated as though they were children of the deceased's marriage, and dependants of the deceased. A further category of applicant was added in 1995, again on the

⁵ Formally known as the Committee on the Law of Intestate Succession but commonly referred to as the Morton Committee after its chairman Lord Morton of Henryton.

⁶ However, it was not until the Family Provision Act 1966 that the restriction on awarding lump sums instead of periodical payments was completely removed.

⁷ The older law restricted entitlement to legitimate children; the concept of legitimacy is no longer used: Family Law Reform Act 1969, s 14.

⁸ Civil Partnership Act 2004, s 71 and sch 4.

⁹ Family Provision (Intestate Succession) Order 2009, SI 2009 No 135, for deaths on or after 1 February 2009.

¹⁰ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61; see para 1.18 above.

recommendation of the Law Commission: an unmarried partner who had lived with the deceased “as husband or wife” for at least two years before the death.¹¹ Further amendments have placed civil partners in the same position as husbands and wives, and expressly included same-sex unmarried partners who have been living as civil partners.¹²

ADMINISTRATION

- 2.11 When a person dies, his or her estate must be “administered”; this is the term used for the process of paying debts and legacies and distributing the rest of the estate. Sometimes this can be done informally, for example where the assets are of low value and comprise only cash or personal effects. Where the estate is more valuable or comprises assets, such as land, that cannot be transferred informally, a grant of representation is required. A grant of representation is a formal authorisation to deal with the estate. There are two kinds of grant: a grant of probate and a grant of letters of administration.
- 2.12 If the deceased left a will appointing an executor or executors, those named may (if willing to act) apply for a grant of probate. Otherwise, an application for a grant of letters of administration will be made (usually by the deceased’s relatives), according to a prescribed order of priority.¹³ Those to whom letters of administration are granted are known as the administrators. Once the grant of representation has been made, the executors or administrators – collectively known as the personal representatives – will be able to manage and distribute the estate, using the grant of representation to prove their entitlement to do so where necessary.

THE INTESTACY RULES

- 2.13 The intestacy rules apply when a person dies without leaving a valid will that effectively disposes of all his or her property.¹⁴

Total or partial intestacy

- 2.14 Intestacy can be total or partial. Total intestacy occurs if:
- (1) a person has not made a will;
 - (2) the will has been revoked, either deliberately or automatically (for example, by marriage or the formation of a civil partnership);¹⁵

¹¹ Law Reform (Succession) Act 1995, s 2, with effect for deaths on or after 1 January 1996.

¹² Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1)(a), 1(1)(b) and 1(1B), amended by section 71 and schedule 4 of the Civil Partnership Act 2004.

¹³ Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22. Where a will has been made but does not name executors, or where named executors are unable or unwilling to act, a grant of letters of administration may be made with the will annexed. The estate will then be administered according to the other terms of the will: Supreme Court Act 1981, s 119; Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 20.

¹⁴ Some property will not pass under a will or the intestacy rules; see paras 2.33 to 2.40 below.

¹⁵ Unless the will stated expressly that it was made in contemplation of that particular marriage or civil partnership: Wills Act 1837, ss 18 and 18B.

- (3) the will was invalid for some reason (for example if it was not executed correctly or because of the circumstances in which it was made),¹⁶ or
 - (4) the will did not dispose of any of the assets in the estate (for example, if the person who would have taken the whole estate had died).¹⁷
- 2.15 A person dies partially intestate if there is a will which governs how some of his or her assets are distributed, but not all of them. This could happen if the will does not cover all of the deceased's assets, or if a beneficiary had already died or was not able to take under the will for some other reason.¹⁸
- 2.16 We now look at the way the intestacy rules distribute the estate to various categories of relatives; we discuss what happens to the estate if there are no surviving relatives entitled under the rules. Finally, we go through a number of categories of property that do not fall within the intestacy rules, their destination being determined by other factors; of those assets, jointly owned property and pension funds are particularly significant.

How the intestacy rules distribute the estate

- 2.17 The intestacy rules determine the distribution of the deceased's estate after any debts and liabilities, funeral expenses and costs of the administration of the estate, have been paid. If the intestacy is partial, the distributions under the will take priority, without reducing a person's entitlement under the intestacy rules.¹⁹ Those rules determine the entitlement of surviving relatives of the deceased; they are summarised in the diagram at the end of this Part. Here we look at the entitlement of each category of relatives in turn, and also introduce the concept of the "statutory trusts".

¹⁶ In order to be recognised as a valid will, the document must be signed by or at the direction of the testator in the presence of two adult witnesses both present at the same time, who must each then sign or acknowledge their signatures in the testator's presence: Wills Act 1837, s 9. A will may also be invalidated if, for example, the testator was not mentally capable to make a will or did not know and approve of its contents or was subject to the undue influence of a third party.

¹⁷ In some cases a child or other descendant may be substituted for the original beneficiary: Wills Act 1837, s 33.

¹⁸ Someone who witnessed the will, or is married or in a civil partnership with a witness, cannot take any benefit under the will: Wills Act 1837, s 15. Equally, a person who unlawfully killed the testator will forfeit any rights under a will (and under the intestacy rules), subject to relief by the court under the Forfeiture Act 1982, s 2. Similar consequences follow where the killing of another beneficiary has the effect of increasing or accelerating the killer's share of the estate.

¹⁹ There is no longer any provision requiring them to be brought into account: the rules previously set out at section 49 of the Administration of Estates Act 1925 were repealed by sections 1(2)(b), 5 and the schedule to the Law Reform (Succession) Act 1995, following recommendations by the Law Commission: Family Law: Distribution on Intestacy (1989) Law Com No 187, para 55.

Surviving spouse

- 2.18 A person will only be treated as a spouse under the intestacy rules if the marriage or civil partnership was continuing at the time of the death.²⁰ Therefore if a decree absolute of divorce, or a final dissolution order in relation to a civil partnership, has been made, the ex-spouse does not qualify under the intestacy rules.²¹ The same result is reached if a decree of judicial separation, or a separation order, has been made.²² In order to qualify as a surviving spouse, the spouse must still be alive 28 days after the deceased's death.²³
- 2.19 In all cases, a surviving spouse has the right to require that the family home is transferred to him or her. If the home, or the deceased's share in it, is worth more than the amount which the spouse is entitled to receive from the estate, then the spouse can pay the difference to the estate (this is sometimes referred to as "equality money").²⁴

If the deceased is survived by a spouse and children

- 2.20 If the deceased is survived by a spouse and children or other descendants, the spouse is entitled to:
- (1) all of the deceased's personal chattels;
 - (2) a statutory legacy of £250,000; and
 - (3) a life interest in half of the remainder of the estate.²⁵
- 2.21 "Personal chattels" encompass the deceased's personal belongings, such as cars, jewellery, china, clothes, furniture, pictures, and so on, but do not include anything used for business purposes.²⁶
- 2.22 The spouse may use the property that is subject to the life interest and may retain or spend any income it generates (such as rent or interest) during his or her life, but may not sell the assets or diminish their capital value. The spouse also has the right to "capitalise" the life interest within 12 months of a grant of representation.²⁷ This means that the fund is divided so that the spouse receives the capital value of the life interest and the remainder passes to the deceased's children and other descendants.

²⁰ If the marriage or civil partnership was void, the person will not qualify as a surviving spouse or civil partner. However, if it was voidable, and not annulled during the deceased's lifetime, then he or she will qualify, because a voidable marriage or civil partnership is valid unless annulled.

²¹ However, if the deceased died before a decree nisi was made absolute, or a conditional order made final, then the surviving spouse or civil partner will still qualify as such since the marriage ended by death and not by divorce or dissolution: *Re Seaford* [1968] P 53.

²² The intestacy rules operate as though the ex-spouse had already died: Matrimonial Causes Act 1973, s 18(2) and Civil Partnership Act 2004, s 57.

²³ Administration of Estates Act 1925, s 46(2A).

²⁴ Intestates' Estates Act 1952, s 5 and sch 2.

²⁵ Administration of Estates Act 1925, s 46(1)(i)(2).

²⁶ Above, s 55(1)(x); see further paras 3.124 to 3.133 below.

²⁷ Above, s 47A; see further paras 3.73 and 3.74 below.

2.23 The surviving children or other descendants are entitled to:

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

These interests are held on the "statutory trusts", which we discuss below.²⁸

If the deceased is survived by a spouse but no children

2.24 If the deceased is survived by a spouse but no children or other descendants, the entitlement of the surviving spouse depends on the existence of other relatives.

2.25 If the deceased was not survived by any parents or full siblings (or children or other descendants of a full sibling) the spouse takes the whole estate absolutely. Otherwise, the surviving spouse is entitled to:

- (1) all of the deceased's personal chattels;
- (2) a statutory legacy of £450,000; and
- (3) half of the rest of the estate absolutely.²⁹

2.26 The other half of the estate passes to the deceased's parents in equal shares, or to one parent if only one is still alive. If neither parent survives, then the full siblings take the remaining half, in equal shares if there are more than one of them. The children of a full sibling who has already died stand in their parent's place and share in the amount which that sibling would have received.³⁰

If the deceased is not survived by a spouse

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

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

²⁸ See paras 2.29 to 2.30 below.

²⁹ Administration of Estates Act 1925, s 46(1)(i)(3).

³⁰ On the statutory trusts.

If there is more than one member of any of these categories, they share equally.³¹

- 2.28 The list is a hierarchy; only if there are no members of a particular category does the next category become relevant. The estate will, therefore, not be split between two different categories of relatives. It can, however, be divided between different generations within a class which includes descendants, by the operation of the “statutory trusts”.

The statutory trusts

- 2.29 The statutory trusts take effect in all cases except where the estate passes only to the deceased’s spouse, parents or grandparents. So, where the effect of the intestacy rules is that the estate passes, for example, to two children and two grandchildren of the deceased (the grandchildren being entitled because their parent has died), the estate will be held for them on the statutory trusts.
- 2.30 Under the statutory trusts, the beneficiaries in any given class (the deceased’s children, siblings or parents’ siblings) are entitled to the estate in equal shares on reaching the age of 18 (or marrying or forming a civil partnership under that age). However, if any of them have already died leaving surviving children or other descendants, then the share which the deceased beneficiary would have received will pass instead to those descendants in equal shares. This means that no one can benefit if his or her parent is still alive. The statutory trusts are discussed in more detail at Part 5.³²

Bona vacantia

- 2.31 If the deceased leaves none of the above relatives then the estate passes as *bona vacantia* (a Latin term roughly translated as “ownerless goods”). This usually means that the Crown becomes entitled to the estate, though these assets are now collected by the Treasury Solicitor and are used for general public spending.³³ However, if the deceased died resident within the County Palatine of Lancaster,³⁴ or within the county of Cornwall, the estate passes to the Duchy of Lancaster or the Duke of Cornwall.³⁵
- 2.32 The Administration of Estates Act 1925 gives all three bodies the discretion to make grants from the estate for dependants of the deceased and “other persons for whom the intestate might reasonably have been expected to make provision”.³⁶ These might include, for example, unmarried partners, friends or neighbours, or relatives by marriage or civil partnership. The Treasury Solicitor’s

³¹ Administration of Estates Act 1925, ss 46(1)(ii) to (v).

³² See paras 5.20 to 5.53 below.

³³ The Treasury Solicitor is head of the Government Legal Service and is responsible, among other things, for collecting *bona vacantia* on behalf of the Crown.

³⁴ The County Palatine of Lancaster covers Lancashire, Greater Manchester, Merseyside and the Furness area of Cumbria.

³⁵ Administration of Estates Act 1925, s 46(1)(vi).

³⁶ Above, s 46(1)(vi).

Department publishes guidelines as to the way in which this discretion will be exercised.³⁷ We discuss *bona vacantia* in Part 6.³⁸

Assets inherited outside the will and the intestacy rules

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

Assets held as joint tenants

- 2.34 Some jointly owned property will pass to the other co-owner or co-owners automatically. There are two types of co-ownership: “joint tenancy” and “tenancy in common”.³⁹ The defining feature of a joint tenancy is that, on the death of any one co-owner, that person’s interest in the property passes to the surviving co-owner or co-owners automatically and is not distributed under any will, or according to the intestacy rules. Where the co-owners hold as tenants in common, on the other hand, each co-owner’s share forms part of his or her estate, and on death it will pass according to any will, or the intestacy rules. The distinction between these forms of joint ownership is usually made clear in relation to land. When a house, for example, is bought in joint names, the joint owners must declare to Land Registry whether they hold it as beneficial joint tenants or tenants in common.
- 2.35 Personal items can similarly be co-owned as joint tenants or as tenants in common, with the same results. Joint bank accounts will usually pass automatically to the survivor.

Statutory nominations

- 2.36 There are a few instances in which money can be made subject to a “nomination”, with the effect that it will pass according to the nomination rather than under the intestacy rules or a will. Nowadays this is not very significant – nominations cannot now be made in respect of deposits in the National Savings Bank or National Savings Certificates.⁴⁰ They can still be made by members of certain registered friendly societies, industrial and provident societies and trade unions, but only for sums less than £5,000.⁴¹

³⁷ www.bonavacantia.gov.uk.

³⁸ See paras 6.69 to 6.83 below.

³⁹ The word “tenancy” does not refer to a lease; it comes from the Latin *tenere*, “to hold”. Technically, land can only be held as joint tenants at law, but it may be held as either joint tenants or tenants in common in equity; that means that the registered title to the land will always pass to the survivor of a pair of joint owners. In the discussion that follows we are referring to “equitable” or “beneficial” ownership: in other words, the entitlement to the value of the property, which may be different from what the register or the deeds reveal.

⁴⁰ National Savings Bank Act 1971, s 8(2); Savings Certificates Regulations 1991, SI 1991 No 1031, reg 37 and sch 2. Only nominations made before 1 May 1981 are valid.

⁴¹ Friendly Societies Act 1974, s 66(2); Industrial and Provident Societies Act 1965, ss 23 and 24; Trade Union and Labour Relations (Consolidation) Act 1992, ss 17 to 19. See also the Administration of Estates (Small Payments) Act 1965 and the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984 No 539.

Gifts made in contemplation of and conditional on death

- 2.37 It is also possible for someone to make a gift which is conditional on death. The giver must specifically contemplate death in the near future.⁴² Such gifts are rare but are another instance of property passing on the death (in the sense that the gift can no longer be revoked, and becomes absolute), but not by the will or intestacy rules.

Assets held in trust

- 2.38 Assets held in trust are governed only by the terms of the trust; on the death of a trustee they are not affected by the intestacy rules or the trustee's will.⁴³ If the deceased was a beneficiary of a trust, the relevant assets will pass according to the terms of the trust, not the beneficiary's will or the intestacy rules (although the terms of the trust may enable a beneficiary to determine by will the way in which the fund is to pass under the trust).⁴⁴

Life insurance policies

- 2.39 The terms of a life insurance policy may be such that its proceeds fall into the policyholder's estate and are dealt with under the intestacy rules, or a will. It is common, however, for the proceeds to pass outside the estate, either under the terms of the policy itself, or because it has been "written in trust" so that the proceeds become subject to a separate trust.⁴⁵

Pension schemes

- 2.40 Death benefits payable under pension schemes may be inherited according to the intestacy rules, or any will, if under the terms of the pension scheme they are payable as of right to the deceased's estate. This is not, however, inevitable. The terms of the scheme may instead provide for the death benefit to be paid to others, such as family members, or that it can be appointed within a range of possible beneficiaries. In the latter case, the member may have the right to make a nomination determining the way in which the distribution is to be made.⁴⁶ More commonly, the trustees are given full discretion but the member may submit a

⁴² These gifts are traditionally known as *donationes mortis causa*: the Latin phrase means "gifts given because of death". For a full account see A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed 2008) paras 5-047 to 5-054.

⁴³ If the deceased was the sole trustee, the trust property may pass to the personal representatives; they will succeed to the trusteeship but will usually appoint new trustees, unless it is appropriate for them to continue as trustees themselves.

⁴⁴ The power to make such a determination is known as a power of appointment. Alternatively, the trust may provide that the property shall pass as though the intestacy rules or the will applied to it, thus achieving the same effect.

⁴⁵ A trust may also be created by statute: under section 11 of the Married Women's Property Act 1882, a policy of assurance effected by a spouse on his or her own life for the benefit of the other spouse and/or the children is held upon trust for them and will not pass under the intestacy rules or any will.

⁴⁶ If the member has an absolute beneficial interest in his share of the fund (which, in this jurisdiction, would be unusual), the nomination itself must comply with the formality rules applying to wills in order to be valid: *Re MacInnes* [1935] DLR 401.

statement of wishes to guide them in its exercise. We discuss pension schemes further below.⁴⁷

APPLICATIONS FOR FAMILY PROVISION

- 2.41 We now turn to family provision; as we explained in Part 1, this is the term used to describe the law that enables relatives and others to challenge the distribution of an estate under a will, or under the intestacy rules, by applying to court for a share, or an increased share, in the estate. If the claim is successful then the way in which the estate is distributed will be changed.
- 2.42 The only ground for a claim is that the way in which the deceased person's estate is to be distributed, either under the will or the intestacy rules, does not make reasonable financial provision for the applicant. The family provision legislation is not to be used to redistribute the estate "to accord with what the court itself might have thought would be sensible if it had been in the deceased's position";⁴⁸ it is not enough to show that it would have been reasonable for the deceased to make provision, or further provision, for the applicant.
- 2.43 A claim can only be made if the deceased died domiciled in England and Wales.⁴⁹ It must be made within six months of the grant of representation, although the court may extend this time period.⁵⁰ If the applicant is successful, the court can make orders for various types of financial provision from the estate, including periodical payments, lump sum payments, the transfer of particular property in the estate (such as a house) or the purchase of property for the applicant.
- 2.44 We begin by giving a general explanation of the operation of the 1975 Act. Then we set out some of the detail of the law relating to each category of applicant, looking first at eligibility to apply and then at the sort of provision that has been made for each category. Finally, we explain what property can be taken into account and redistributed by the court following a successful application, since the range of property involved is slightly different from that covered by the intestacy rules.

Overview

Who can apply

- 2.45 Only certain people, specifically identified by the 1975 Act, can apply for an order:
- (1) the spouse of the deceased;
 - (2) the former spouse of the deceased (provided that he or she has not remarried or entered into a new civil partnership);
 - (3) a person who lived in the same household as the deceased, as if he or she were the spouse of the deceased, for a period of two years ending

⁴⁷ See paras 7.71 to 7.83 below.

⁴⁸ *Re Coventry* [1980] Ch 461, 475, by Oliver J.

⁴⁹ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1).

⁵⁰ Above, s 4.

immediately before the date when the deceased died (referred to in this Part as a “cohabitant”),⁵¹

- (4) a child of the deceased;
- (5) any person treated by the deceased as a child of the family in relation to a marriage or civil partnership (but not a cohabitation); and
- (6) any other person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased (referred to in this Part as a “dependant”).

The decisions to be made

2.46 If the applicant qualifies under one of the above categories, then the court will decide:

- (1) whether the way in which the estate is set to be distributed under the will, or the intestacy rules, fails to make reasonable financial provision for the applicant;
- (2) if reasonable financial provision has not been made, whether any, and if so what, provision should be made for the applicant.⁵²

2.47 The term “reasonable financial provision” carries two alternative meanings, depending on whether the applicant is a surviving spouse of the deceased or one of the other classes of applicant entitled to apply under the Act. A surviving spouse is entitled to seek such financial provision as it would be reasonable in all the circumstances of the case for a spouse to receive, *whether or not* that provision is required for maintenance.⁵³ The measure of provision for all other applicants is reasonable provision for the applicant’s maintenance.⁵⁴

2.48 For those other applicants, what is maintenance? In *Re Dennis* it was explained that maintenance “connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him”.⁵⁵ In *Re Coventry*, it was said that:

On the one hand ... one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by; on the other hand, it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare.⁵⁶

⁵¹ Elsewhere in this Consultation Paper, in particular in Part 4, we also use the term cohabitants in a less technical sense to refer to couples who live together in an intimate relationship.

⁵² Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1), 2(1) and 3(1).

⁵³ Above, ss 1(2)(a) and (aa).

⁵⁴ Above, s 1(2)(b). See below, paras 2.61 to 2.62, as regards claims by former spouses.

⁵⁵ [1981] 2 All ER 140, 145, by Browne-Wilkinson J.

⁵⁶ [1980] Ch 461, 485, by Goff LJ.

2.49 Maintenance includes the day-to-day costs of living, which may be supplied by way of income payments or, more usually, by a lump sum.⁵⁷ Awards often include a flat or house from the estate, or provision for the applicant to buy one, to fulfil his or her accommodation requirements.⁵⁸ In the same way, a claim for a sum to enable repayment of debts can be consistent with maintenance if that will enable the applicant to obtain an income.⁵⁹

The factors to be taken into account

2.50 The following factors must be taken into account in every case:

- (1) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (2) the financial resources and financial needs which any other applicant for an order has or is likely to have in the foreseeable future;
- (3) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (4) any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary of the estate of the deceased;
- (5) the size and nature of the net estate of the deceased;
- (6) any physical or mental disability of any applicant or beneficiary; and
- (7) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.⁶⁰

2.51 Those other matters can include, for example, a will which was prepared before the death but was left in draft, or not properly executed.⁶¹ On the other hand, a statement of the deceased's reasons for the level of provision that he or she made may not be effective to prevent a claim. It may indicate that the deceased thought that the financial provision made needed special justification. Instead, the

⁵⁷ For a case in which periodical payments were considered appropriate, see *Re Hancock* [1998] 2 FLR 346. In *Negus v Bahouse* [2008] EWCA Civ 1002, for example, the lump sum award had been calculated by reference to the income required (£38,000 per year) (at [9]).

⁵⁸ See, for example, *Re Watson* [1999] 1 FLR 878: the award covered the purchase of a suitable flat or house, fitting out and moving costs (taking into account the applicant's own resources). See also *Graham v Murphy* [1997] 1 FLR 860.

⁵⁹ See Lewison J in *Baynes v Hedger* [2008] EWHC 1587 Ch, [2008] 2 FLR 1805 at [147], quoted in agreement on appeal at [2009] EWCA Civ 374, [2009] 2 FCR 183 at [45]. In *Re Dennis* [1981] 2 All ER 140 no award was made in respect of debts because this would not have helped towards the applicant's future maintenance; contrast the finding in *Espinosa v Bourke* [1999] 1 FLR 747 that paying off debts would enable the applicant to derive an income from her business in the future.

⁶⁰ Inheritance (Provision for Family and Dependants) Act 1975, s 3(1).

⁶¹ For example, in *Rees v Newbery and the Institute of Cancer Research* [1998] 1 FLR 1041 the deceased had given instructions for a new will giving the applicant the right to continue living in the flat and paying a substantially reduced rent for his lifetime. A wish expressed in a will may also be relevant: see *Re Hancock* [1998] 2 FLR 346, 352.

reasons given may point to factors falling under other headings, in particular the deceased's obligations and responsibilities (legal or moral) to the applicant and other beneficiaries. In the same way, a promise to leave property to the applicant can be relevant in assessing the moral obligations owed by the deceased.

- 2.52 A will may contain a clause to the effect that a beneficiary will only receive what is given by the will if he or she does not make a claim under the 1975 Act. Such a clause may force the beneficiary to choose between the two, but does not prevent the beneficiary from bringing a claim, or the court from making an award – indeed it may support the applicant's claim by indicating that the deceased thought it reasonable to make some provision.⁶²
- 2.53 The behaviour of the applicant is unlikely in most cases to form an independent factor for consideration unless it is particularly abhorrent.⁶³ However, it can form part of the assessment of the deceased's obligations and responsibilities.⁶⁴ Delay, or other conduct during the proceedings, may be relevant under this heading.⁶⁵
- 2.54 Where the applicant is a surviving spouse, the court is also directed to consider:
- (1) the age of the applicant and the duration of the marriage or civil partnership;
 - (2) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and
 - (3) the provision which would have been awarded if, instead of death, the marriage or civil partnership had been ended by divorce or order of dissolution (often referred to as the "notional divorce" factor or test).⁶⁶
- 2.55 In the case of a cohabitant, in addition to the factors always taken into account, the court is to have regard to:
- (1) the age of the applicant and the length of the period during which he or she lived as the spouse of the deceased and in the same household as the deceased;

⁶² *Nathan v Leonard* [2003] 1 WLR 827. Such clauses can take various forms; the condition will not, however, take effect at all if it is incompatible with the nature of the gift.

⁶³ See *Re Snoek* [1983] *Family Law* 18 in which a modest award was made despite the wife's violent behaviour in the later years of the marriage.

⁶⁴ See, for example, consideration of the son's conduct in *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373.

⁶⁵ See *Re Hancock* [1998] 2 FLR 346.

⁶⁶ This does not apply if a decree of judicial separation or a separation order was in force and the separation was continuing at the date of death: Inheritance (Provision for Family and Dependents) Act 1975, s 3(2). However, if the conditions of sections 14 or 14A are met, the court may exercise a discretion to treat the case as though the decree or order had not been made.

- (2) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.⁶⁷
- 2.56 If the applicant is a child of the deceased, the court is required in addition to have regard to “the manner in which the applicant was being or in which he might expect to be educated or trained”.⁶⁸
- 2.57 If the applicant was treated by the deceased as a child of the family,⁶⁹ the additional factors are:
- (1) whether the deceased had assumed any responsibility for the applicant’s maintenance and, if so, the extent to which and the basis upon which the deceased assumed that responsibility and the length of time for which he or she discharged it;
 - (2) whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his or her own child; and
 - (3) the liability of any other person to maintain the applicant.⁷⁰
- 2.58 As to dependants, the court must additionally have regard to the extent to which, and the basis upon which, the deceased assumed responsibility for the maintenance of the applicant and the length of time for which he or she discharged that responsibility.⁷¹

Eligibility and provision for the different categories of applicant

- 2.59 It will be apparent from what has been said so far that the success of an application for family provision will depend on:
- (1) the applicant’s eligibility to apply within one of the statutory categories;
 - (2) the meaning of “reasonable financial provision” for that category of applicant; and
 - (3) the effect of the factors set out above both on the decision as to whether or not reasonable financial provision has been made, and the decision as to the order, if any, that is to be made.
- 2.60 Analysis of decisions in family provision cases can therefore be quite complex; what follows is a summary, for the different categories, of some of the most important issues.

⁶⁷ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2A).

⁶⁸ Above, s 3(3).

⁶⁹ See paragraph 2.45(5) above.

⁷⁰ Inheritance (Provision for Family and Dependants) Act 1975, s 3(3).

⁷¹ Above, s 3(4).

Surviving spouses and former spouses

- 2.61 A surviving spouse can claim as such if the marriage or civil partnership was continuing at the date of death, and had not been terminated by a decree absolute of divorce or final dissolution order.⁷² If the parties had already divorced or their civil partnership had been dissolved then the survivor will be able to claim as a former spouse.⁷³ The court may exercise a discretion to treat the survivor as though the divorce or dissolution had not occurred, provided that any application for ancillary relief⁷⁴ has not been determined by the date of death.⁷⁵ The survivor cannot, however, make a claim if a court order has previously been made in the ancillary relief proceedings precluding such an application.⁷⁶
- 2.62 The difference lies in the measure of provision applicable to each category of applicant. For a surviving spouse, the standard of provision is not restricted to maintenance, but is such financial provision as it would be reasonable in the circumstances for a spouse to receive.⁷⁷ The “notional divorce” factor,⁷⁸ together with the requirements to consider the length of the marriage or civil partnership and the applicant’s contribution to it, all assist in determining what is reasonable provision for a spouse. Substantial awards have been made, even where it would diminish the amount available to any children, and often involve the outright transfer of the family home.⁷⁹
- 2.63 The “notional divorce” factor requires some explanation. Its origin was the need to ensure that a spouse would not be put in a position where he or she would receive less on a family provision application than would have been awarded on divorce, in an era where provision for applicants (usually wives) on divorce was

⁷² A decree nisi of divorce or conditional dissolution order does not affect eligibility.

⁷³ Provided that he or she has not since remarried or formed another civil partnership: Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(b). The same applies if a decree of nullity was made: s 25(1). In addition, where a decree of judicial separation or a separation order has been made and the separation is continuing, the survivor is treated as a former spouse: ss 1(2)(a) and (aa).

⁷⁴ Ancillary relief is the financial provision that can be ordered by the court on divorce or on dissolution of a civil partnership. The relevant statutory provisions are section 25 of the Matrimonial Causes Act 1973, and section 72 and schedule 5 of the Civil Partnership Act 2004.

⁷⁵ Inheritance (Provision for Family and Dependants) Act 1975, ss 14 and 14A. This treatment applies only for the purposes of the family provision application; it does not, for example, apply to bring any award within the “spouse exemption” from inheritance tax under Inheritance Tax Act 1984, s 18.

⁷⁶ Inheritance (Provision for Family and Dependants) Act 1975, ss 15 to 15B.

⁷⁷ Above, ss 1(2)(a) and (aa).

⁷⁸ See para 2.54(3) above.

⁷⁹ *Adams v Lewis* [2001] WTLR 493; *Singer v Isaac* [2001] WTLR 1045; *Baker v Baker* [2008] EWHC 977 (Ch), [2008] 2 FLR 1956. Provision for income is also important; see, for example, *McNulty v McNulty* [2002] EWHC 123 (Ch), [2002] WTLR 737.

restricted to that spouse's "reasonable needs".⁸⁰ The landscape of ancillary relief was changed radically in 2001 by the House of Lords' decision in *White v White*.⁸¹ In that case the House of Lords introduced the idea that financial provision should be checked against the "yardstick of equality", so as to avoid discrimination between the spouses, particularly on the ground of financial and non-financial contributions. The effect of the decision in *White* in ancillary relief cases has been dramatic, particularly in high-value cases.⁸² This impact has also been seen in family provision cases.⁸³

- 2.64 However, the courts have stressed that the "notional divorce" factor is only one of the factors to which a judge should have regard. In *Re Krubert*⁸⁴ the Court of Appeal approved the observation made in *Re Besterman* that:

The figure resulting from the [notional divorce] exercise is merely one of the factors to which the court is to 'have regard' and the overriding consideration is what is 'reasonable' in all the circumstances. It is, however, obviously a very important consideration and one which the statute goes out of its way to bring to the court's attention.⁸⁵

- 2.65 It was noted that correspondence between the entitlement on divorce or dissolution and on death can never be exact, most obviously because in the context of a 1975 Act application there is only one living spouse for whom provision needs to be made.⁸⁶

- 2.66 In *Cunliffe v Fielden*⁸⁷ the Court of Appeal noted the modern approach to claims for ancillary relief, following *White*. Again, caution was urged:

Divorce involves two living spouses, to each of whom the [ancillary relief provisions] apply. In cases under the 1975 Act a deceased spouse who leaves a widow is entitled to bequeath his estate to

⁸⁰ This was the approach developed by the courts in the 1970s onwards, seen in cases such as *O'D v O'D* [1976] Fam 83 and *Gojkovic v Gojkovic* [1990] 1 FLR 140. The "reasonable needs" limitation had little significance in most cases, since the division of assets on divorce normally yields barely enough to meet the needs of all the parties and the children, if any. But in a very high value estate, it effectively imposed a ceiling on awards. The wife of a multi-millionaire would never receive more than around £15 million, however vast the husband's wealth: *Dart v Dart* [1996] 2 FLR 286.

⁸¹ [2001] 1 AC 596.

⁸² N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007) pp 1018 to 1020.

⁸³ See G Miller, "Provision for a surviving spouse" [2007] *Private Client Business* 144; A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) paras 8[5A] to 8[5D]; S Ross, "The Implications of *White v White* for Inheritance Act Claims, Part 1" [2001] *Family Law* 547, and "The Implications of *White v White* for Inheritance Act Claims, Part 2" [2001] *Family Law* 619.

⁸⁴ [1997] Ch 97; see also *Capocci v Cooke* (2 February 1996) (unreported).

⁸⁵ [1984] Ch 458, 469, by Oliver LJ. Where the parties are already separated, however, the "notional divorce" factor may hold a greater significance: see *Aston v Aston* [2007] WTLR 1349 and *Parish v Sharman* [2001] WTLR 593.

⁸⁶ See, for example, *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373, in which the judge pointed out some of the most significant differences. The alternative approach was associated with *Moody v Stevenson* [1992] Ch 486.

⁸⁷ [2005] EWCA Civ 1508, [2006] Ch 361.

whomsoever he pleases: his only statutory obligation is to make reasonable financial provision for his widow. In such a case, depending on the value of the estate, the concept of equality may bear little relation to such provision.⁸⁸

- 2.67 The significance of the “notional divorce” factor is seen most clearly in claims against substantial estates. In *P v G*⁸⁹ the net estate was approximately £5 million. Under the will, the applicant was permitted to live in the family home until her death or remarriage, and might also receive further capital at the executors’ discretion. The deceased had also arranged for her to receive a pension of £140,000 per year, separately from the estate; this was capitalised at £3.8 million. The deceased had three children, two with his first wife and one with the applicant. Taking the “notional divorce” factor into account, the applicant was awarded £2 million, to include the former matrimonial home, outright (in addition to the pension).
- 2.68 As noted above, the “notional divorce” is only one of the factors to be taken into account. In *Baker v Baker*,⁹⁰ for example, the court was required to assess various factors, in particular the fact that the estate included a business, in which the deceased’s sons had worked for some years. The award made for the wife took into account the fact that it was right, in the circumstances, for the business to pass to the sons. Where the children are relatively well off, their needs will not weigh heavily against those of the surviving spouse.⁹¹ In other cases, the needs of other beneficiaries and obligations owed by the deceased to them may require more consideration.⁹²

Cohabitants

- 2.69 A person can claim as a cohabitant of the deceased if, “during the whole of the period of two years ending immediately before the date when the deceased died”, he or she was living “in the same household as the deceased” as the spouse or civil partner of the deceased.⁹³
- 2.70 The requirement that the applicant should have been living “as” the spouse or civil partner of the deceased has been the subject of analysis by the courts. In *Re Watson*, it was said that the test is:

whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife; but, when considering that question, one should not ignore the multifarious nature of marital relationships.⁹⁴

⁸⁸ [2006] Ch 361 at [21].

⁸⁹ [2004] EWHC 2944 (Fam), [2006] 1 FLR 431 (also reported as *P v E* [2007] WTLR 691).

⁹⁰ [2008] EWHC 977 (Ch), [2008] 2 FLR 1956.

⁹¹ See, for example, *Adams v Lewis* [2001] WTLR 493.

⁹² *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373.

⁹³ Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1A) and (1B).

⁹⁴ [1999] 1 FLR 878, 883, by Lord Neuberger of Abbotsbury.

2.71 Accordingly, it was not determinative in that case that Mr Watson and Miss Griffiths had not continued a sexual relationship during the period when they were living together, nor that they had informally agreed to share outgoings, nor that Miss Griffiths had rejected Mr Watson's marriage proposal. On the whole of the evidence the judge reached the conclusion that Miss Griffiths had been living "as the wife" of Mr Watson.

2.72 The couple must have been living in the same household, which means that it does not matter if the parties each have a separate home, provided that they have formed one joint household. It has been said that this seems:

To have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources.⁹⁵

2.73 The requirement that these conditions must be satisfied during the whole period of two years before the death has been interpreted to mean that a short absence immediately before the death, which is not inconsistent with the settled state of affairs during the relationship (such as a stay in hospital), will not prevent a claim.⁹⁶

2.74 Cohabitants stand outside the category of "spouses" and therefore the meaning of "reasonable financial provision" is limited, for cohabitants, to what is required for maintenance. However, this has been generously interpreted. In *Negus v Bahouse*, a case in which the applicant and the deceased had cohabited for eight years and enjoyed a lavish lifestyle together, Lord Justice Mummery commented that:

Regard [may] be had in awards under the 1975 Act to the fact that some people have a much more expensive or extravagant way of life than others. Having regard to what standard of living is appropriate to him means that one does not apply some objective standard of what is reasonable for everybody; it is a standard which has to be flexible to suit the circumstances of the case. It is what is appropriate to that case, and that means looking at what style of life the claimant was accustomed to live with the deceased during his lifetime.⁹⁷

2.75 The cohabitant was awarded a total of £540,000 out of an estate worth £2.2 million.⁹⁸ The argument of the original beneficiary that the trial judge had failed to

⁹⁵ *Churchill v Roach* [2002] EWHC 3230, [2004] 3 FCR 744, 761. See also *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, a case on similar wording in section 1(3)(b) of the Fatal Accidents Act 1976, where the Court of Appeal held at [59] that it was correct to distinguish between "wanting and intending to live in the same household, planning to do so, and actually doing so".

⁹⁶ *Re Watson* [1999] 1 FLR 878. See also *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399.

⁹⁷ [2008] EWCA Civ 1002 at [12].

⁹⁸ The award included the flat in which she had lived with the deceased. She had also received property worth at least £110,000 under a Spanish will and £495,000 from a pension policy.

differentiate between the standards of financial provision applicable to spouses and to cohabitants was rejected. This seems to indicate a more generous attitude to maintenance, at least for cohabitants, who will typically have shared a lifestyle with the deceased as described above. The courts have made awards that have enabled cohabitants to buy a home,⁹⁹ or to stay in the deceased's home for their lifetime.¹⁰⁰

Children

- 2.76 If the deceased was the legal parent of the applicant at the date of death,¹⁰¹ a claim may be made regardless of the applicant's age. Step-children do not qualify under this heading, although they may be eligible as children of the family.
- 2.77 For younger children who are still in education or training, it is easier to apply the special factor of having regard to the manner in which they are being, or might expect to be, educated or trained. This may involve looking at the period for which, and the extent to which, the estate is to provide support until the child becomes self-supporting – for example, whether the child is to be state or privately educated, and whether provision is to be made for university education, professional training and so on.¹⁰²
- 2.78 The needs of minor children will be especially important in the consideration of claims by adults. Thus where a surviving spouse applies for family provision, minor children will usually be parties to the action and will have to be separately represented in the proceedings so that their interests can be properly taken into account. The court may well take the view that their interests are best served by making provision for the spouse, if he or she is caring for them.
- 2.79 It was formerly thought that a claim by an adult child would be subject to an additional threshold of “special circumstances” or a “moral claim”.¹⁰³ In *Re Hancock*, the Court of Appeal held that this was incorrect, although it may be difficult for a child who is able to earn their own living to show that reasonable financial provision has not been made for them “without some special circumstance such as a moral obligation”.¹⁰⁴

⁹⁹ *Re Watson* [1999] 1 FLR 878.

¹⁰⁰ *Re Baker* [2008] EWHC 937 (Ch), [2008] 2 FLR 767.

¹⁰¹ This includes adoptive parents, and parents by virtue of the Human Fertilisation and Embryology Act 1990, s 30, and the Human Fertilisation and Embryology Act 2008, ss 33 to 48, and 57(2).

¹⁰² A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) para 8[9].

¹⁰³ The previous view was largely based on *Re Coventry* [1980] Ch 461 and following cases.

¹⁰⁴ [1998] 2 FLR 346, 351, by Butler-Sloss LJ.

- 2.80 It has subsequently been held that the word “moral” is intended only to emphasise that the obligations and responsibilities to which the court must have regard under section 3(1)(d) of the 1975 Act need not be purely legal.¹⁰⁵

Children of the family

- 2.81 As noted above, this category includes a person who was not the deceased’s child but was treated as such in relation to a marriage or civil partnership.¹⁰⁶ Significantly, this excludes someone whom the deceased treated as his or her own child in the context of a cohabitation. How does the law identify a child of the family? In *Re Leach*, the Court of Appeal said that the question is whether the deceased has, in a manner referable to the marriage or civil partnership, assumed the position of a parent towards the applicant.¹⁰⁷ This goes much further than affection or kindness. The status of “child of the family” may begin during adulthood.¹⁰⁸
- 2.82 In *Re Leach*, the applicant step-daughter was awarded £14,000 from an estate of £34,000 which was set to pass to the step-mother’s three siblings under the intestacy rules. It was particularly noted that the step-mother had previously inherited from her husband, the applicant’s father, and that she had told the applicant of her intention to leave half of the house to her on her death. Similarly, in *Re Callaghan*¹⁰⁹ the step-father had previously inherited under the intestacy rules on his wife’s death. He had relied on his step-son to deal with his property and financial affairs and to care for him in his last illness. It was held that he owed to his step-son obligations and responsibilities much greater than those he owed to his sisters, who would inherit from him under the intestacy rules. The step-son was awarded £15,000 – nearly half the estate.

Dependants

- 2.83 The category of applicants commonly referred to as “dependants” encompasses any other person “who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased”.¹¹⁰ The 1975 Act requires the applicant to show that “the deceased, otherwise than for full valuable

¹⁰⁵ *Espinosa v Bourke* [1999] 1 FLR 747. See in particular Aldous LJ at 760, who commented that “use of the word ‘moral’ has tended to increase debate and to mislead ... [it] adds nothing to the words in this section and should be avoided.” See also *Garland v Morris* [2007] EWHC 2 (Ch), [2007] 2 FLR 528 and *Robinson v Fernsby* [2003] EWCA Civ 1820, both cases in which it was held not to be unreasonable that the parent’s will made no provision for the adult child.

¹⁰⁶ See paragraph 2.45(5) above.

¹⁰⁷ [1986] Ch 226.

¹⁰⁸ *Re Callaghan* [1985] Fam 1.

¹⁰⁹ [1985] Fam 1.

¹¹⁰ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e). The courts’ approach to “immediately before the death” is comparable to that taken in relation to the similar wording in sections 1(1A) and (1B) (see paras 2.69 and 2.73 above); *Re Beaumont* [1980] Ch 444, *Jelley v Iliffe* [1981] Fam 128. See also *Kourkgy v Lusher* (1983) 4 FLR 65, in which the arrangement came to an end before the death. Several of the past cases brought under the “dependant” category would now fit into the new “cohabitant” category, which has only applied since 1 January 1996.

consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person".¹¹¹

- 2.84 "Valuable consideration" means some contribution to the benefit of the deceased – this might be in money or by services, such as housekeeping or caring.¹¹² If the applicant gave some valuable consideration, this will only block the claim if it can be described as "full". For example, the applicant might have made some payment for accommodation, but not as much as the market rent.¹¹³ The requirement for the deceased's contribution to have been made "in money or money's worth" carries a similar meaning. The non-material benefits flowing from the relationship itself (such as the emotional benefits of mutual affection) are not relevant.
- 2.85 The requirement that the contribution should be "otherwise than for full valuable consideration" has been interpreted to require a balancing of all contributions made by the applicant and the deceased, whether or not under a contract.¹¹⁴ If the deceased contributed more, on balance, then the applicant qualifies as a dependant. Over the years the courts have emphasised the need to use common sense in applying this test, particularly where the applicant has been performing housekeeping or similar services and the deceased provided accommodation, the larger share of the household bills, and the like.¹¹⁵ However, this approach does mean that where there is interdependence, in the sense that roughly equal contributions were made (for example, to a shared household), no account can be taken of the fact that the ending of the interdependence may generate a substantial loss for the survivor.
- 2.86 "Reasonable needs" are assessed in the context of the applicant's standard of living during the deceased's lifetime and the deceased's contribution to it, and interpreted as "reasonable requirements".¹¹⁶ So the phrase is not as narrow as it may at first seem. An applicant who can already provide for his or her own reasonable requirements, however, will not qualify as a dependant.¹¹⁷
- 2.87 As described above, in assessing a dependant's claim the court considers the deceased's assumption of responsibility for the applicant's maintenance.¹¹⁸ This

¹¹¹ Inheritance (Provision for Family and Dependents) Act 1975, s 1(3), stating the circumstances in which a person is to be treated as "being maintained, either wholly or partly, by the deceased" for the purposes of s 1(1)(e). For example, in *Jelley v Iliffe* [1981] Fam 128 the Court of Appeal noted that in the circumstances of that case the provision of rent-free accommodation was a significant contribution to the applicant's reasonable needs.

¹¹² Marriage, or a promise of marriage, cannot constitute valuable consideration: Inheritance (Provision for Family and Dependents) Act 1975, s 25(1).

¹¹³ *Rees v Newbery and the Institute of Cancer Research* [1998] 1 FLR 1041; the applicant had been paying rent at 57.4% below market levels.

¹¹⁴ *Re Beaumont* [1980] Ch 444, affirmed on these points by *Jelley v Iliffe* [1981] Fam 128. See also *Re Wilkinson* [1978] Fam 22.

¹¹⁵ *Bishop v Plumley* [1991] 1 All ER 236; *Churchill v Roach* [2004] 2 FLR 989; see also the judgment of Griffiths LJ in *Jelley v Iliffe* [1981] Fam 128.

¹¹⁶ *Harrington v Gill* [1983] 4 FLR 265.

¹¹⁷ As suggested in *Re Watson* [1999] 1 FLR 878.

¹¹⁸ See paragraph 2.58 above.

has been interpreted as indicating that an assumption of responsibility must be shown for an applicant to qualify as a dependant at all. Generally, however, the fact that maintenance was provided will lead to the conclusion that there was an assumption of responsibility unless the opposite is shown.¹¹⁹

The deceased's assets and orders which can be made

- 2.88 When a family provision claim is made, the court takes into account all of the deceased's assets. This is not limited to assets held in the deceased's own name and passing according to the will or the intestacy rules. The court may also take into account and make orders in relation to the deceased's interest in jointly owned property, even if it passed automatically to the surviving co-owner.¹²⁰ Similarly, property subject to a statutory nomination is taken into account.¹²¹
- 2.89 The court can also take into account gifts, including gifts made into trusts, which the deceased made within six years of the death with the intention of defeating an application under the 1975 Act.¹²² The person to whom the gift was made can be ordered to return its value to fund provision for the applicant.
- 2.90 Otherwise, interests under trusts do not generally form part of the estate within the meaning of the 1975 Act. There are, however, some trusts which can be varied by an order under the 1975 Act: ante-nuptial and post-nuptial settlements. Broadly speaking, these are settlements which have a special connection with a marriage or civil partnership and set up for the benefit of the parties to the marriage or civil partnership. These settlements can be varied, but only for the benefit of the surviving spouse, any child of the marriage or civil partnership, or anyone treated as a child of the family in relation to the marriage or civil partnership.¹²³ Payments from pension schemes or under life insurance policies do not count as part of the estate and cannot usually be the subject of an order,¹²⁴ unless they can be regarded as ante-nuptial or post-nuptial settlements or they fall into the estate for some other reason.¹²⁵

¹¹⁹ *Re Beaumont* [1980] Ch 444, *Jelley v Iliffe* [1981] Fam 128; see also *Bouette v Rose* [2000] 1 FLR 363 and, for a case in which responsibility was found on the facts not to have been assumed, *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183.

¹²⁰ Inheritance (Provision for Family and Dependants) Act 1975, s 9 (subject to a strict six-month time limit); see further paras 7.57 to 7.65 below).

¹²¹ Above, s 8, which also covers *donationes mortis causa*.

¹²² Above, s 10. The provision applies to any "disposition" by the deceased for less than "full valuable consideration". It therefore applies to any transfers which have an element of gift; in other words, transfers at an undervalue.

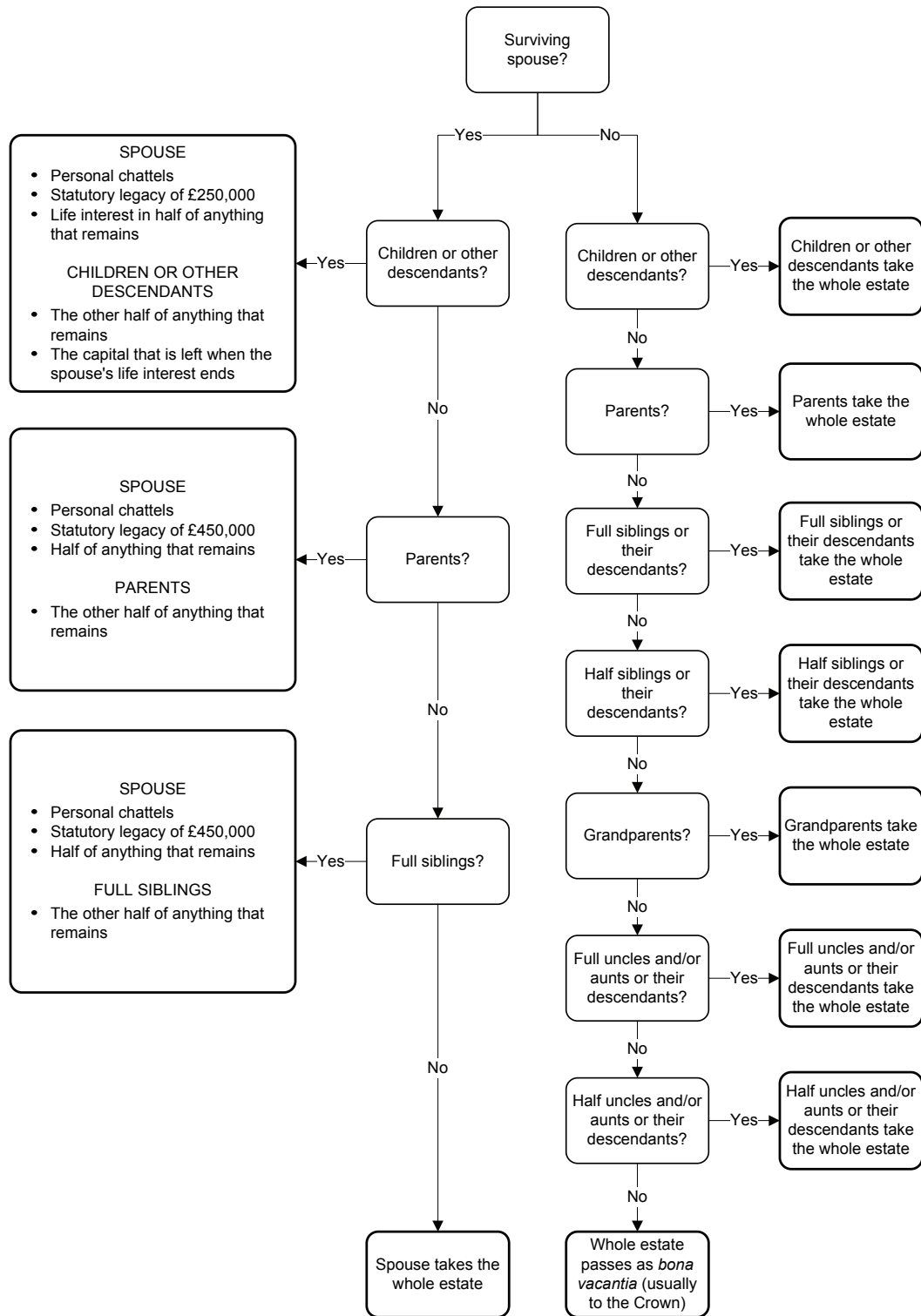
¹²³ Above, ss 2(1)(f) and (g).

¹²⁴ Note that if payments from a pension scheme or life assurance policy are received by an applicant or by another beneficiary of the estate, they may be taken into account indirectly because the court is directed to have regard to "the financial resources and financial needs" of all applicants and any beneficiary of the estate: Inheritance (Provision for Family and Dependants) Act 1975, ss 3(1)(a) to (c). A post-death payment made pursuant to a nomination by the deceased from a statutory pension scheme may fall within section 8(1) of the same Act.

¹²⁵ A pension scheme can be a post-nuptial settlement, if certain conditions are satisfied: *Brooks v Brooks* [1996] 1 AC 375.

DIAGRAM SUMMARISING THE INTESTACY RULES

2.91 Below we set out a diagram which summarises the way in which an estate is distributed under the intestacy rules among the surviving relatives of a person who has died intestate.



PART 3

THE SURVIVING SPOUSE

INTRODUCTION

- 3.1 In Part 2 we explained the current law of intestacy and family provision insofar as it relates to the surviving spouse of someone who dies intestate.¹ In this Part we look at possible reform; in doing so we are largely concerned with the intestacy rules, but we also discuss family provision.
- 3.2 We begin this Part by setting out some of the key issues that are relevant to the impact of the current law of intestacy on a surviving spouse:
- (1) the statutory legacy;
 - (2) estate size;
 - (3) patterns of home ownership; and
 - (4) the family home.
- 3.3 We then consider the position of a surviving spouse where the person who died intestate did not leave children or other descendants.² For the reasons set out below, we provisionally propose that in these circumstances the spouse should be entitled to the entire estate and should not have to share with the deceased's parents or siblings.
- 3.4 The bulk of this Part is then given over to a discussion of the position where a person dies intestate leaving a spouse and children. We consider four alternative ways in which the intestacy rules could deal with this situation. We also discuss whether the intestacy rules could be structured so as to provide a different result where the deceased has left either a surviving spouse and children who are not the product of that marriage or civil partnership or a surviving spouse who has children from another relationship. We conclude that it would not be appropriate or practicable to do so.
- 3.5 This Part also considers two further issues that have a bearing on the entitlement of a surviving spouse: a surviving spouse's entitlement to the deceased's personal chattels; and updating the statutory legacy. Finally we look at the family provision legislation and consider the "notional divorce test".

IMPACT OF THE CURRENT LAW

The statutory legacy

- 3.6 It has been argued that the introduction of the intestacy rules in 1925 was intended to ensure the whole of all but the largest of estates passed to a

¹ References in this Part to a spouse are intended to refer to a husband, wife or civil partner. The position of cohabitants is considered in Part 4.

² Generally in this Part we refer just to children, although of course we mean "children or other descendants". The descendants of any child who has predeceased the intestate take that child's share. This is considered further at paras 5.20 to 5.35 below.

surviving spouse.³ This was achieved by providing that a surviving spouse would receive the deceased's personal chattels and a "fixed net sum" of £1,000 paid from the remainder of the estate before the interest of any other beneficiary. This became known as the statutory legacy.⁴ Those promoting the legislation in Parliament stated that 98% of estates were valued at less than this sum.⁵ In the overwhelming majority of cases, therefore, a surviving spouse would inherit the entire estate.

- 3.7 As originally enacted, the Administration of Estates Act 1925 contained no means of periodically uprating the statutory legacy. Over time, inflation (particularly house price inflation) eroded its value in real terms so that, by the late 1940s, there was concern that the sum was insufficient in many cases to enable a surviving spouse to remain in the family home.⁶ Following the report of a parliamentary committee,⁷ the Intestates' Estates Act 1952 raised the statutory legacy to £5,000 (and gave a surviving spouse the right to use the legacy or other funds to purchase the family home outright). That legislation also introduced a new statutory legacy of £20,000 payable where the deceased was survived by a spouse and either a parent or full sibling (or their descendants) but no descendants of his or her own. Since then it has therefore been necessary to distinguish between this "higher level" of statutory legacy and the "lower level" applicable where a spouse and children survive.
- 3.8 In 1966, the Lord Chancellor was given the power to alter the amount of the statutory legacy by statutory instrument.⁸ This power was first exercised in 1967 and has since been used a further six times, most recently in respect of deaths from 1 February 2009.⁹ The lower level of statutory legacy is currently £250,000 and the higher level is £450,000.¹⁰
- 3.9 We consider below how the level of the statutory legacy affects the entitlement of a surviving spouse and others. It is clear, however, that an important factor in setting the amount of the legacy has been the surviving spouse's ability to purchase the deceased's interest in the family home. Attempting to fix a level of statutory legacy that applies across England and Wales can therefore be problematic; property prices have traditionally been much higher (and have risen at a faster rate) in some areas, compared to others.
- 3.10 Compelling evidence of this was provided by the Department for Constitutional Affairs in a 2005 consultation paper. To keep pace with house price inflation between 1993 and 2004 in Greater London, the lower level of statutory legacy

³ S Cretney, "Intestacy Reforms - The Way Things Were, 1952" [1994] *Denning Law Journal* 35, 36.

⁴ Administration of Estates Act 1925, s 46(1)(i).

⁵ *Hansard* (HC), 15 May 1922, vol 154, col 99.

⁶ S Cretney, "Intestacy Reforms - The Way Things Were, 1952" [1994] *Denning Law Journal* 35, 36.

⁷ Report of the Committee on the Law of Intestate Succession (1951) Cmd 8310, commonly referred to as the "Morton Committee" after its chairman Lord Morton of Henryton.

⁸ Family Provision Act 1966, s 1, amending Administration of Estates Act 1925, s 46(1)(i).

⁹ In 1972, 1977, 1981, 1987, 1993 and 2009.

¹⁰ Family Provision (Intestate Succession) Order 2009, SI 2009 No 135, art 2.

would have had to rise to just under £400,000. The equivalent exercise, using property prices in Yorkshire and Humberside, produces a figure of £270,000.¹¹ The result is that the statutory legacy may provide either more or less than the surviving spouse needs to purchase the deceased's interest in the house, sometimes significantly so.

Estate size

3.11 Where the value of an intestate estate is less than the applicable level of statutory legacy, the practical consequence is that the whole of that estate passes to a surviving spouse, irrespective of whether the deceased left children or other relatives. It is therefore important to have some idea of the average size of estates to determine the impact of any given level of statutory legacy. In preparing this Consultation Paper we have worked with HM Revenue & Customs and the Probate Service to understand more about the size and composition of estates in relation to which a grant of representation has been issued.¹² The research found that, for estates where a grant of representation was issued between November 2007 and October 2008:

- (1) the median size of an intestate estate was £56,000 (whereas the median size of a testate estate was £160,000);¹³
- (2) 90% of intestate estates were valued at less than £250,000 (compared with 71% of testate estates); and
- (3) 98% of intestate estates were valued at less than £450,000 (compared with 91% of testate estates).

The net estate figures used in this study do not include the deceased's interest in jointly owned property which passes on death to the other joint owners outside the terms of any will or the intestacy rules. The significance of jointly owned property is considered below.¹⁴

3.12 These figures show that a very large proportion of estates for which a grant of representation is obtained fall within the current levels of statutory legacy.¹⁵ And they must be put in context. We know that there are typically around twice as many deaths each year as there are grants of representation.¹⁶ In a great many cases, the deceased's estate is administered informally, without a grant of representation. Most often this will be because the individual assets which

¹¹ Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005) para 58.

¹² See paras 1.46 to 1.47 above. Detailed findings of our work with HMRC are set out at Appendix C.

¹³ The figures for the average (in the everyday sense of the mean) were £105,000 and £228,000, respectively; we note that the average figures may be distorted by a few very small or very large estates. The median (the middle value when the values are in order of size) is therefore preferred in this instance.

¹⁴ See paras 3.14 to 3.21 below.

¹⁵ At the time of the deaths represented by these statistics, a lower statutory legacy was in force; some 72% of intestate estates were valued at less than the lower level of statutory legacy in force at the time of the relevant death.

¹⁶ See para 1.6 above.

comprise the estate are of relatively low value (less than £5,000) and of a type which can be dealt with informally.¹⁷ Research based on grants of representation inevitably excludes these informally administered estates; accordingly, the median value of an intestate estate produced by such research will be higher than a median value taken across all intestate estates. It follows that the percentage of estates falling below a given value will be correspondingly higher than suggested by our research.

- 3.13 The effect of the current intestacy rules is therefore to pass the entire estate to a surviving spouse in most cases, to the exclusion of other relatives. This fact should be borne in mind throughout the discussion that follows. Although there appears from anecdotal evidence and our focus group research to be a strong feeling that children should not be “disinherited”,¹⁸ that is what in fact happens at present in the overwhelming majority of cases.

Changing patterns of home ownership

- 3.14 As suggested above, the importance of fixing a surviving spouse’s entitlement under the intestacy rules so that he or she is able to remain in the family home has been recognised since at least the early 1950s. Changing patterns of home ownership, however, arguably make this consideration less pressing today.
- 3.15 When the intestacy rules were first introduced, levels of owner-occupation were much lower than they are today. In 1900, just 10% of households were owner-occupied.¹⁹ For many surviving spouses, therefore, there was no question of their inheriting the family home (though the statutory legacy would assist with the cost of future housing needs).
- 3.16 Rates of owner-occupation rose throughout the twentieth century, but even by 1953, when the recommendations from the first major review of the intestacy rules came into force,²⁰ only 31% of households were owner-occupied.²¹ In 1989, when the Law Commission’s earlier review of the law of intestacy was published, 67% of dwellings were owner-occupied.²² In 2007, the most recent year for which figures are available, 69% of dwellings were owner-occupied.²³

¹⁷ Administration of Estates (Small Payments) Act 1965. A grant is, however, required to deal with certain property interests of any value, for example legal interests in registered land.

¹⁸ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) pp 16 to 17 (available at www.lawcom.gov.uk/intestacy.htm).

¹⁹ Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005) para 54.

²⁰ The recommendations contained in the Report of the Committee on the Law of Intestate Succession (1951) Cmd 8310 were enacted in the Intestates’ Estates Act 1952, which entered into force on 1 January 1953.

²¹ Department for Communities and Local Government, *Survey of English Housing*, Live Tables, Table S101 – Trends in Tenure.

²² Central Statistical Office, (1991) 21 *Social Trends* 135, 137 to 138. Strictly, dwellings and households are distinct concepts, but they are sufficiently similar to permit valid comparison.

²³ Office for National Statistics, (2009) 39 *Social Trends* 143, 146, and the data underlying Figure 10.4.

3.17 Most family homes that were owner-occupied when the intestacy rules were first enacted were solely owned by a husband. A 1971 study by the Social Survey Division of the Office of Population Censuses and Surveys shows that only 20% of married couples who acquired their family home in the 1930s or earlier owned that home jointly at the time of the survey; the rest were solely owned by one of the spouses.²⁴ For houses acquired in the 1970s, 74% of married owner-occupiers owned their home jointly. The survey also showed that a husband was far more likely than a wife to be the sole owner.²⁵ As late as 1952, it was stated in the Court of Appeal that:

It is, I think, common knowledge that a building society will in any case be more inclined, to say no more, to have the husband as mortgagor than the wife.²⁶

3.18 Today it is still more common for men than women to be homeowners,²⁷ yet far more family homes are co-owned by both spouses. However, as we explained in Part 2, a couple may co-own their family home as joint tenants or as tenants in common.²⁸ Where they own as joint tenants, the survivor takes the whole property automatically. By contrast, on the death of a co-owner who is a tenant in common, that co-owner's interest in the property forms part of his or her estate and therefore falls to be distributed under the terms of a will or the intestacy rules.

3.19 The Department for Constitutional Affairs estimated that around nine out of ten married couples who co-own their homes do so as joint tenants.²⁹ This was based on the number of properties registered in joint names where the owners share the same surname and there was no restriction on the register indicating a tenancy in common. It therefore may include some properties co-owned by close relatives (for example, parents and children or siblings) and exclude some homes co-owned by married couples or civil partners who have chosen not to take the same surname. But we think that it is likely to be broadly correct; the results accord with the practical experience of practitioners with whom we have spoken.

3.20 In the minority of cases where a married couple co-own their home as tenants in common, this will often be the result of a conscious decision to "sever" what was previously a beneficial joint tenancy. This is often done as part of a tax-planning scheme that also involves the making of wills, although this may be less popular following recent changes to tax law.³⁰ In such cases neither spouse will die

²⁴ J Todd and L Jones, *Matrimonial Property* (1972). This study was commissioned to inform the Law Commission's report *Family Law – First Report on Family Property: A New Approach* (1974) Law Com No 52.

²⁵ J Todd and L Jones, *Matrimonial Property* (1972) pp 9 to 10, and 76.

²⁶ *Rimmer v Rimmer* [1953] 1 QB 63, 68, by Evershed MR.

²⁷ Office for National Statistics, *Housing: More men than women are homeowners*, News Release (26 September 2008).

²⁸ See paras 2.34 to 2.35 above.

²⁹ Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005) para 65.

³⁰ Finance Act 2008, s 10 and sch 4, introduced a "transferable nil-rate band" under which any inheritance tax-free allowance that was not used on the death of the first spouse may be used on the death of the survivor.

intestate and the intestacy rules will not determine how their property is distributed.

- 3.21 A final point to make about patterns of home ownership is that in the vast majority of estates where the deceased owned the family home, or a share in it, the house will be free of mortgage after his or her death. This is because either the mortgage has been paid off (particularly in the older age groups) or it will have been protected by life assurance which will pay off the debt as a consequence of the death.

The risk of a surviving spouse losing the family home

- 3.22 The fact that so many spouses co-own their family homes as beneficial joint tenants means that in a high proportion of cases the surviving spouse will acquire the family home outright on the death of the co-owner. He or she will therefore not need to use any other assets, whether inherited from the deceased or from his or her own resources, to purchase the deceased's interest in the home.
- 3.23 Clearly, this will not always be the case. Some spouses will be at risk of losing the family home as a result of bereavement because the statutory legacy is insufficient to enable them to buy out the deceased's share. Estimating how many spouses might be at risk of losing the matrimonial home under the current rules is not straightforward. The Ministry of Justice estimated a relatively small number of cases where the spouse was at risk of losing the home, fewer than 1,200 per year.³¹
- 3.24 Using the same method of calculation adopted by the Ministry of Justice, we estimate that the recent increase in both the upper and lower levels of statutory legacy has reduced this figure dramatically to no more than a few hundred. It is only where the deceased's interest in the family home was valued at more than £250,000 that this problem arises, and only then if there are also surviving children or other descendants. We are aware, however, that the assumptions on which these calculations are based may be open to criticism. On any view, the actual number of spouses who may be placed in this position is very small, but it is not possible to calculate the precise numbers involved.
- 3.25 It should be borne in mind that surviving spouses who are at risk of losing their family homes because of the inadequacy of their entitlement under the intestacy rules have standing to make an application for family provision. On the face of it, and subject to the individual facts of the case, a surviving spouse in these circumstances would have a very strong case. However, many recently bereaved spouses may be reluctant to launch legal proceedings, particularly as those proceedings are likely to involve their children or step-children.
- 3.26 So, although having to leave the family home is extremely undesirable, it is a very rare outcome arising only from unusual circumstances. It would happen only where there was a high value estate solely owned by the deceased spouse, and

³¹ Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) p 23. The higher figure presented in the Department for Constitutional Affairs' 2005 consultation paper was revised in light of calculations provided by Professor Roger Kerridge: see Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) Annex B.

perhaps also where there were other unusual factors such as the absence of life assurance where there was a mortgage. Spouses in such cases are in any event unlikely to end up homeless. They would be able to apply for family provision which, although not a pleasant experience, is designed to cater for unusual cases. Even if the spouse had to move out of the family home, he or she would have inherited assets worth at least £250,000 and a life interest in half of the remainder of the estate. We are nevertheless keen to hear the views of consultees, in particular those who may have practical experience of this.

- 3.27 We are therefore faced with a choice: one option is to ensure that no surviving spouse is ever at risk of having to move out of the family home as a result of the operation of the intestacy rules (whatever the size of the property and the other remedies available to avoid that outcome). This could be achieved by providing that a surviving spouse should inherit the whole estate in any case. Alternatively, we could develop specific proposals for the family home. Both approaches are considered in more detail below.
- 3.28 The other option is to continue to make provision for the children of those who die with reasonably large intestate estates to share in that wealth. The price to pay may be that a small number of surviving spouses are placed at risk of having to move out of the home they shared with the deceased. The Morton Committee, reporting in 1952, considered that a person who died intestate survived by a spouse and children would wish “to make provision for his children even if this is to be to the detriment of the spouse”.³² We seek consultees’ views on whether this is the case today. We do so by presenting a number of options for the reform of the law where there is a surviving spouse and children. Before we do that, however, we present the more straightforward case where there is a surviving spouse but no children.

SURVIVING SPOUSE BUT NO CHILDREN

- 3.29 Under the current law, where a person dying intestate is survived by a spouse but not by any children, nor by a parent or a full sibling (or the descendants of a full sibling), the surviving spouse is entitled to the whole estate.³³ Subject to the possibility of another party making a successful application for family provision, the surviving spouse does not have to share the estate with anyone.
- 3.30 Where, however, a person dies intestate and is survived by a spouse and either a parent or a full sibling (or the descendants of a full sibling) the position is different. In addition to the deceased’s personal chattels, the surviving spouse receives a statutory legacy and half of the remainder of the estate absolutely. The other half is taken by any surviving parent (in equal shares if more than one). If neither parent survives, the remaining half of the estate passes to the full siblings or their descendants (again, in equal shares if more than one).³⁴ The reasoning behind the law was explained by the Morton Committee in 1952. It considered that parents and full siblings were “sufficiently closely related to the deceased to

³² Report of the Committee on the Law of Intestate Succession (1951) Cmd 8310, para 33.

³³ Administration of Estates Act 1925, s 46(1)(i)(1).

³⁴ Above, s 46(1)(i)(3).

deserve a share of a large estate” but that “the intestate would have wished to make quite certain that the position of the surviving spouse is secure”.³⁵

- 3.31 The current higher level of statutory legacy (£450,000) was introduced for deaths from 1 February 2009.³⁶ As discussed above, this is likely to exclude all but the wealthiest minority of estates: no more than 2% of estates, on the basis of the figures we have.³⁷ It is, therefore, unusual for parents or siblings to receive anything in practice under the present intestacy rules if a spouse also survives.
- 3.32 Research commissioned to inform the 1989 Report found that, in a hypothetical scenario where the deceased is survived by a spouse and siblings, 87% of respondents favoured the entire estate passing to the spouse.³⁸
- 3.33 The 1989 Report recommended that a surviving spouse should inherit the entire estate in every case. There was no separate consideration of the position of a surviving spouse if the deceased did not leave children or other descendants.³⁹ Objections to this recommendation were all focused on disadvantage to children.⁴⁰ We have reviewed responses to the 1988 Working Paper and reaction to the 1989 Report and found no dissatisfaction with this recommendation on the ground that it would prejudice parents or siblings. Indeed, some opponents of the recommendation stated that it would be unobjectionable where there are no surviving children or other descendants.
- 3.34 More recently, the Ministry of Justice reported that respondents to the Department for Constitutional Affairs’ consultation “generally considered that the surviving spouse should receive the whole estate where the deceased did not leave children”.⁴¹ Similar views were expressed by participants in the NatCen focus groups: where the deceased left no surviving children or other dependants the view was expressed that a spouse should be entitled to the entire estate on the basis that he or she had entered into an equal partnership with the deceased and should therefore retain what was seen to be property that had been acquired during that enterprise.⁴² A similar question is being asked in the Nuffield survey, so before we make any recommendations we shall have an up-to-date measure of public opinion on this point.
- 3.35 In a number of other common law jurisdictions, a surviving spouse is entitled to the entire estate unless there are also surviving children or other descendants,

³⁵ Report of the Committee on the Law of Intestate Succession (1951) Cmd 8310, para 33 and following.

³⁶ Family Provision (Intestate Succession) Order 2009, SI 2009 No 135, art 2(b).

³⁷ See para 3.11 above.

³⁸ Family Law: Distribution on Intestacy (1989) Law Com No 187, Appendix C, para 2.18 and Table 9.

³⁹ Above, paras 28 to 47.

⁴⁰ Written Answer, *Hansard* (HL), 1 July 1993, vol 547, col WA38. See two debates in the House of Lords: *Hansard* (HL), 16 June 1992, vol 538, cols 170 to 178, and *Hansard* (HL), 13 February 1995, vol 561, cols 503 to 509.

⁴¹ Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) para 48.

⁴² National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) p 13.

and the New South Wales Law Reform Commission has recommended a uniform set of intestacy rules across Australia that would have this effect.⁴³ There are, however, other jurisdictions where a parent or sibling may in some circumstances share the estate with a surviving spouse. These include Hong Kong, New Zealand, Northern Ireland and two Australian states.⁴⁴ The Uniform Probate Code (which has been adopted by a number of US states, though often in modified form) also requires a surviving spouse and parents or siblings of a person who dies intestate to share the estate in some circumstances.⁴⁵

- 3.36 **We provisionally propose that, where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the spouse, whether or not there are other family members surviving.**

SURVIVING SPOUSE AND CHILDREN

- 3.37 Under current law, where a person dies intestate leaving a spouse and descendants, the spouse is entitled to the personal chattels and a statutory legacy (currently £250,000). Where the value of the estate exceeds this figure, the surviving spouse is entitled to a life interest in half of the remainder, and the other half is shared by the children or other descendants.⁴⁶
- 3.38 We have to ask now whether this should remain the law. Should a surviving spouse ever have to share the estate with children or other descendants?
- 3.39 Answering “no” leads to the same conclusion that was reached by the Law Commission in 1989; that the entire estate should pass to the surviving spouse in any event. Below, we review the arguments for and against this idea in the light of developments in the intervening years.
- 3.40 Answering “yes” leads to further and more complicated questions. In what circumstances should a surviving spouse be required to share the estate with the children of the deceased? And how would a fair method of sharing operate? In addressing these questions, and considering options for reform, there are a limitless number of possible approaches. At this stage, we hope to strike a balance between narrowing down these approaches to a manageable number without closing down potentially fruitful debate.
- 3.41 We therefore do not make specific provisional proposals for reform of the intestacy rules where the deceased is survived by a spouse and children. Rather, we set out a series of broad options for reform, and ask consultees to tell us their views. The options we look at are:

⁴³ New South Wales Law Reform Commission, *Uniform succession laws: intestacy* (2007) Report 116, paras 3.2 to 3.18.

⁴⁴ *Intestates' Estates Ordinance*, s 4(4) (Hong Kong); *Administration Act 1969*, s 77(3) (New Zealand); *Administration of Estates Act (Northern Ireland) 1955*, s 7(4); *Administration and Probate Act sch 6, Item 3(1)(b)* (Northern Territory); *Administration Act 1903*, s 14(1), Table (3)(b)(i) and (ii) (Western Australia).

⁴⁵ *Uniform Probate Code 2005*, s 2-102(2). For more information on those States that have adopted the code, see www.law.cornell.edu/uniform/probate.html (last accessed 30 September 2009).

⁴⁶ *Administration of Estates Act 1925*, s 46(1)(i)(2).

- (1) reform of the law so that a surviving spouse inherits the entire estate in every case;
 - (2) retention of the current law;
 - (3) reform based on a fixed share for the surviving spouse; and
 - (4) reform that recognises the significance of the family home.
- 3.42 In the discussion that follows we regard it as important to ensure that any reform should not increase the chances of a surviving spouse losing the family home as a result of intestacy.

All to spouse in every case

- 3.43 The 1989 Report recommended that a surviving spouse should receive the entire estate in any case. This recommendation was not accepted by Government. We understand the concerns that led to the rejection of this recommendation in 1993. We now have to ask the question again of our consultees in this paper, and also to assess the outcome of the Nuffield survey of public attitudes on this point.
- 3.44 As the Law Commission noted in 1989, the administration of intestate estates would be greatly simplified by a reform that gave the whole estate to a surviving spouse. There would, for example, be no need to create and administer life interest trusts or statutory trusts for beneficiaries under 18, which we consider in more detail below.⁴⁷ The intestacy rules themselves would also be much simpler; there would be no need to retain (and periodically update) the statutory legacy or the machinery which entitles a surviving spouse to capitalise a life interest or appropriate the family home.⁴⁸
- 3.45 There have been a number of arguments for and against this reform over the years. The strongest support comes from those who would probably regard it as a non-issue. There is evidence from existing research into public attitudes to inheritance that many people view the passing of property from a deceased individual to his or her surviving spouse in a different light to the inheritance of property by any other party. One study concluded that:

What our inheritance data underline is just how widespread and how strong is the assumption that spouses have an automatic right to each other's property. Transmission to a surviving spouse is so much taken for granted that most of our interviewees do not think to mention it and do not count it as inheritance.⁴⁹

- 3.46 Anecdotal evidence from a number of practising solicitors who responded to the 1988 Working Paper suggested that there is a perception among many members of the public that, should one spouse die intestate, the survivor will be entitled to all of the property of the deceased.

⁴⁷ See paras 3.66 to 3.76 below.

⁴⁸ Family Law: Distribution on Intestacy (1989) Law Com No 187, paras 31 to 36.

⁴⁹ J Finch and J Mason, *Passing on: Kinship and inheritance in England* (2000) p 71.

- 3.47 While this does not accurately represent the current law, it is not an unreasonable misapprehension. This is in fact what happens in the overwhelming number of cases;⁵⁰ it is only in relatively large estates that a surviving spouse will have to share the estate with anyone else. In addition, as considered above,⁵¹ most family homes are co-owned in such a way that the surviving spouse will be entitled to the whole property. Since the family home is for most owner-occupying couples their most significant asset, the surviving spouse will acquire the bulk of the estate. The fact that this is by operation of the doctrine of survivorship rather than by operation of the intestacy rules is likely to be immaterial to most people.
- 3.48 Given that there is a widespread belief that a surviving spouse does in fact inherit the entire estate, a number of respondents to the 1988 Working Paper argued that the law should reflect what they felt was a reasonable expectation. One pithy response said: "The widow should get the lot". The public attitudes survey which informed the recommendations of the 1989 Report also showed a significant majority in favour of the "all to spouse" option even if the deceased had children (and whether those children were still dependent or not).⁵²
- 3.49 It has also been noted that in many families, significant transfers of wealth from parents to children now take place before death: parents invest in a child's education or help an adult child to get a foot on the property ladder. It has been suggested that many parents therefore feel less inhibited about spending whatever is left to provide for their own old age, often in the form of investments which provide a lifetime income but have no capital value that can be transferred on death.⁵³ Under this pattern of wealth transfer, children do not expect a significant inheritance, at least not while one parent is still alive.
- 3.50 Balanced against these arguments, the strong feelings of "disinheritance" expressed by the opponents of the 1989 Report's principal recommendation cannot be ignored. Opposition on this ground was expressed by, among others, the organisation Justice, the law reform committees of the Bar and the Law Society and several members of the House of Lords.⁵⁴ There appears to be a strong attachment to the idea that property should pass down the "bloodline" to children and grandchildren and so on.
- 3.51 While some respondents to the Department for Constitutional Affairs' 2005 consultation on the level of the statutory legacy supported the view that the whole estate should pass to a surviving spouse, it is fair to say that this did not represent the majority view. Most respondents agreed with the suggestion that the interests of a surviving spouse should be the most important consideration when setting the level of statutory legacy. However, many added a caveat that the interests of a surviving spouse should only be paramount where the

⁵⁰ See para 3.11 above.

⁵¹ See paras 3.18 to 3.19 above.

⁵² Family Law: Distribution on Intestacy (1989) Law Com No 187, Appendix C, paras 2.7 to 2.12 and Table 4: 72% of respondents to the survey wanted the entire estate to pass to the spouse where there were independent adult children.

⁵³ J Langbein, "The inheritance revolution" [1991] *The Public Interest* 15. The article discusses the North American experience but has relevance to England and Wales.

⁵⁴ *Hansard* (HL), 16 June 1992, vol 538, cols 170 to 178 and *Hansard* (HL), 13 February 1995, vol 561, cols 503 to 509.

deceased did not leave any children or did not leave children from another relationship. Around a quarter of consultees argued that the spouse and children should be accorded equal importance in setting the level of statutory legacy.⁵⁵ Some people in the NatCen focus groups thought that an estate, however small, should be divided equally between a surviving spouse and any children; the view that children should always inherit was expressed forcefully by some participants.

- 3.52 As we have observed, the risk of a surviving spouse losing his or her home as a result of the operation of the intestacy rules (rather than as a result of the small size of the estate) is currently very slim and is only going to materialise, if ever, in estates that are sufficiently substantial to exceed the value of the statutory legacy. Where it does happen, the surviving spouse is likely to succeed in a family provision application. Some would argue that changing the intestacy rules so that the whole estate always passes to a surviving spouse is too dramatic a reform to cater for such a small risk.
- 3.53 We have considered but rejected the idea that any potential unfairness to children flowing from the introduction of an “all to spouse” rule could be ameliorated through changes to the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”). As we explained in Part 2, it is difficult (though not impossible) for an adult child who was not dependent on the deceased to make out a successful claim for family provision.⁵⁶ Such an applicant will have difficulty in showing that the intestacy rules did not make adequate provision for his or her maintenance, although there are signs that the courts are now more receptive to such applications.⁵⁷
- 3.54 We examine in Part 5 the current law on family provision applications for adult children, and question whether the current criteria should be relaxed so as to make success more likely. We conclude that this is not a realistic option.⁵⁸ The family provision legislation has to operate not only in the context of the intestacy rules, but also in the face of choices expressed in wills. We think that to restrict testamentary freedom further by bolstering an adult child’s entitlement to family provision would be unacceptable.
- 3.55 The most serious concerns expressed about our “all to spouse” proposal in 1989 focused on the potential for children of another relationship to be disinherited. The fear was that, where the whole of an intestate estate passes to a surviving spouse in circumstances where the deceased had children from another relationship, those children might then lose property that they feel ought to be their inheritance. The surviving spouse is free to dispose of the property as he or she wishes during life or by will. If the surviving spouse later dies intestate, the property will pass to that spouse’s family, and the children of the deceased will have no entitlement to it.

⁵⁵ Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) para 66.

⁵⁶ See paras 2.76 to 2.80 above.

⁵⁷ See *Re Hancock* [1998] 2 FLR 346, *Re Pearce* [1998] 2 FLR 705 and *Espinosa v Bourke* [1999] 1 FLR 747.

⁵⁸ See paras 5.3 to 5.19 below.

- 3.56 Would it be possible to address this specific concern through an amendment to the family provision legislation so that, where there is a risk of “disinheritance” because property is passing to a step-parent, the deceased’s children might be able to access the property through a provision in the 1975 Act, tailor-made for this situation?⁵⁹ This could operate either on the death of the parent or on the death of the step-parent.
- 3.57 Having such a provision operate on the death of a parent is problematic. Any award made to the child would diminish the funds available to the step-parent during his or her lifetime; it would place step-parents in a different and more precarious position than other surviving spouses. We do not think that this is acceptable. It also runs the risk of provoking litigation where there might not be a need for any. Until the step-parent dies, it is not possible to determine how his or her estate will be distributed; it may be that assets which originated with the parent will in fact be passed on to the children.
- 3.58 If such a provision were to operate on the death of the step-parent it would create considerable difficulties in determining which assets originated with the applicant’s own parent. It would be necessary to follow and trace property which had passed to a step-parent, and might have been spent, sold or given away. We have concluded that any such system would be unworkable and interfere to an unacceptable extent with a surviving spouse’s ability to deal with his or her property. We note, however, that in appropriate circumstances a court considering a 1975 Act claim by a step-child may take into account that assets passed to a step-parent on the death of the applicant’s own parent.⁶⁰
- 3.59 Our provisional conclusion is that any attempt to modify the 1975 Act to enable the children of the deceased to claim against either the estate of their parent or step-parent would be impracticable. We therefore do not make any specific proposals along these lines. We would, nevertheless, be interested in consultees’ views. If we are right in that conclusion, it means that the “all to spouse” option has to be regarded as leaving open the risk of disinheriting children, and particularly the children of another relationship. The question is whether this risk is more acceptable than the risk that, in a very few cases, a surviving spouse will lose his or her home as a result of having to share the estate with the deceased’s children.
- 3.60 We ask consultees now to consider the arguments we go on to present for various ways in which the intestacy rules could structure that sharing, and to express a view on the available options.

Sharing options

- 3.61 The alternative to intestacy rules that provide for the entire estate to pass to a surviving spouse in all circumstances is for those rules to prescribe a way for the estate to be shared between a surviving spouse and surviving children or other descendants. In the text that follows, we examine a number of different structures

⁵⁹ Rather than an extended entitlement for *all* children, as discussed above.

⁶⁰ *Re Leach* [1986] Ch 226; *Re Callaghan* [1985] Fam 1. These cases are considered more fully at paras 2.81 to 2.82 above.

for sharing; we consider separately the question of the deceased's personal chattels.⁶¹

- 3.62 We would be reluctant to recommend any reform that did not, in most cases, provide for a surviving spouse at least as well as does the current law. When we come to consider the possible options for sharing the estate, that concern translates into a need to retain the statutory legacy in some form, so as to impose a threshold value below which sharing is not required.
- 3.63 Abolishing the statutory legacy would dramatically diminish the current entitlement of an enormous number of surviving spouses. We do not think that this would be acceptable. It would also represent a significant departure from the principle that the intestacy rules should give primacy to the interests of a surviving spouse, at least where the deceased left a relatively modest estate. Despite the passage of time, we do not see grounds to disturb this principle. Indeed, given increases in life expectancy, many more surviving spouses are likely to be elderly and in particular need of financial support than was the case when the statutory legacy was first created.
- 3.64 Accordingly, if the law were reformed so as to continue to provide a mechanism for sharing the estate between a surviving spouse and children, we take the view that a surviving spouse should continue to receive a statutory legacy. We invite consultees' views as to what the level of statutory legacy should be but our provisional view is that the present level should be maintained; this was recently updated, following a full consultation process and we see no reason to interfere with that outcome unless the model of reform that we ultimately recommend makes fundamental changes to the way in which intestate estates are distributed.

Sharing option 1: the current law

- 3.65 One option is to make no substantive change to this aspect of the current law. The present system has the advantage of being well-established. The treatment of a surviving spouse under the intestacy rules, at least where there are also surviving children or other descendants, has changed little since 1926. The system is, therefore, well-understood by practitioners. The extent to which it is understood by non-lawyers is less clear. Arguably, however, if the present system achieves a satisfactory result in the majority of cases, what is needed is not substantive reform of the law but perhaps clearer guidance for administrators.
- 3.66 The main disadvantage of the present system is, in our view, the creation of a life interest where the value of the estate exceeds the level of the statutory legacy. This aspect of the intestacy rules may reflect the historical origins of the current rules; when the Administration of Estates Act 1925 was passed, it was more common for wills to create life interests. Testators do occasionally still choose to achieve this by way of life interest trusts, but such trusts would usually be more flexible than those arising automatically on intestacy.⁶² In view of this, and the absence of the policy considerations underlying the statutory legacy, it would be

⁶¹ See paras 3.112 to 3.133 below.

⁶² Note also the generally much lower value of intestate estates, compared with those where there is a will; the use of a life interest is far more appropriate in cases where the testator has a higher value estate and makes such an arrangement having taken legal advice.

unusual to find the provisions of the intestacy rules replicated in a will. So far as we are aware, a life interest is not used in any other common law jurisdiction as a means of sharing the estate between a surviving spouse and children or other descendants.⁶³

- 3.67 The life interest applies only to half of the estate, excluding personal chattels and after payment of the £250,000 statutory legacy. The value subject to the trust may, therefore, be relatively modest and the imposition of a trust may seem disproportionate. The trustees will be the administrators, at least in the first instance, and we bear in mind that they are likely to be relatives of the deceased who will often not have professional assistance.
- 3.68 The trust may be straightforward to administer, particularly if the trust property is the family home, or a part of it, and no income is being generated (usually because the surviving spouse is still living there). However, there is potential for the administration to be more complicated, particularly if the trust is receiving income – perhaps if the trustees decide to sell the family home and invest in a less expensive property for the spouse to live in.⁶⁴ This could well increase costs.
- 3.69 The duties of a trustee can be burdensome. For example, a trustee has a duty to maintain a balance between investment return for the spouse, who is entitled to income, and the children (or other descendants) who are entitled to the capital on the spouse's death.⁶⁵ We have received anecdotal evidence that in practice many life interests are administered in a very informal way; inadvertent breaches of trust are possible, even likely, although it is difficult to know how often they occur. Trustees may find these duties particularly difficult if relations between the beneficiaries are strained (especially if the surviving spouse is also a trustee, which will often be the case). Equally, the cost of employing an accountant or a solicitor to help with the administration is an expense that will eat into the trust fund.
- 3.70 The fact that a surviving spouse is entitled to the income and the children or other descendants are entitled to the capital only on the death of the spouse may in itself create or aggravate such tension. This could most obviously happen if the surviving spouse is not related by blood to some or all of the descendants. Indeed, in that case the surviving spouse could also be some years younger than the deceased, so that adult children may feel that they are being “kept out of their inheritance” for too long. In these circumstances, it may be preferable to try to achieve a “clean break” by distributing all of the trust property among the beneficiaries.
- 3.71 A clean break may also favour the spouse, by awarding a lump sum which may be used as he or she wishes. There is, at present, no power for trustees to

⁶³ A number of civil law jurisdictions employ the “usufruct” (which is functionally similar to a life interest) to give a surviving spouse use of property during his or her lifetime.

⁶⁴ For example, the trustees will need to ensure compliance with the tax legislation, and also to ensure that receipts and expenses are correctly classified as capital or income. Note that a trust arising on intestacy will not include the wide range of powers which might be expressly included in a will.

⁶⁵ As well as the selection of appropriate investments, this also involves applying the rules of apportionment (see *Capital and Income in Trusts: Classification and Apportionment* (2009) Law Com No 315, Part 3).

advance capital to a spouse while the trust is continuing and so the spouse is limited to the use of property and receipt of income, without having independent control over the investments made.⁶⁶ This may significantly affect the spouse's autonomy. Equally, it will often be in the interests of children to receive a sum of money outright rather than having to wait for a life interest to come to an end before being able to access capital; an earlier outright entitlement may well assist with university fees or with access to the housing market.

- 3.72 A clean break, however, is not necessarily easy to achieve under the current law, since the trustees have no power to divide all of the trust capital between the beneficiaries and terminate the trust. Unless the beneficiaries are all adult and their consent can be obtained to vary the trust,⁶⁷ it may be necessary to obtain a court order, further increasing the costs of administering the trust.
- 3.73 The present rules do allow a surviving spouse to require the administrators to pay over the capital value of the life interest.⁶⁸ The effect of such a "capitalisation" is that the surviving spouse and the deceased's children receive lump sums immediately and free of the trust. To this extent, capitalisation offers an opportunity for a clean break from the relationship imposed by the ownership of successive interests in the same property. There are significant limits to this right; in particular, it must be exercised within a year of the grant of representation (unless this would operate unfairly).⁶⁹ It is not clear to us how common it is in practice for a surviving spouse to capitalise their life interest. There is anecdotal evidence that it is used very rarely. We would welcome comments from consultees, particularly from practitioners, as to whether this accords with their experiences.
- 3.74 There are a number of reasons why capitalisation may not be the preferred option. A surviving spouse who is sole administrator may not capitalise without notifying the High Court.⁷⁰ In addition, in some circumstances it may preclude other, more tax efficient arrangements. It may, of course, be that a surviving spouse, particularly an elderly surviving spouse who is retired, would prefer an income. If the asset is the family home, it will be preferable to have use of the property; to realise the capital value of the life interest would require selling the property.
- 3.75 We have considered whether the default position should be reversed, so that a surviving spouse receives a capital sum representing the value of a life interest in half of the remainder of the estate. A spouse who would prefer to receive an

⁶⁶ The spouse has the right to be consulted about decisions relating to land held on trust under the Trusts of Land and Appointment of Trustees Act 1996, but this does not amount to giving the spouse full control over a decisions such as downsizing to a smaller property.

⁶⁷ *Saunders v Vautier* (1841) 4 Beav 115.

⁶⁸ Administration of Estates Act 1925, s 47A.

⁶⁹ The capital value of the life interest is determined by reference to actuarial tables contained in secondary legislation, which we refer to for convenience as the "capitalisation tables". These tables were recently updated for the first time since 1977: Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008, SI 2008 No 3162. The new tables apply in respect of deaths from 1 February 2009.

⁷⁰ Administration of Estates Act 1925, s 47A(7). See also Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 56(1).

income for life could elect to do so. Imposing this as the default position in all cases may not be widely welcomed if, as appears to be the case, the option to capitalise is rarely exercised. There may be also be negative tax consequences that a surviving spouse would have to take action to avoid.

- 3.76 If the current law were to be retained, allowing for the creation of new life interests, we would propose the retention of the right to capitalise. We would also propose that the capitalisation tables be reviewed at regular intervals, ideally as part of the process of reviewing the level of statutory legacy.⁷¹

Sharing option 2: the fixed share

- 3.77 An alternative approach that we would like consultees to consider would provide a surviving spouse with a statutory legacy and a fixed proportion of the remainder of the estate (if any). The rest would be shared among the children.⁷²
- 3.78 This would represent a simple but significant reform of the current law. The main advantage is that no life interest would be created, thereby removing the expense and other disadvantages involved in administering a life interest. It would also ensure that all beneficiaries received their entire entitlement immediately.
- 3.79 What proportion of the estate should a surviving spouse receive, beyond the statutory legacy? Different options can be compared if we translate the current law, which involves life interests, into capital values: a life interest can be represented as a capital sum by the use of actuarial tables. This of course is quite complex, because the value of a life interest in a given fund varies with both the age and the gender of the recipient. We have set out at Appendix B a number of tables illustrating the value of a surviving spouse's life interest under the current law and how his or her entitlement would differ under some possible reform options.
- 3.80 An obvious and simple reform option would be to give a surviving spouse an immediate entitlement to half of the remainder of the estate, instead of a life interest. As the tables at Appendix B demonstrate, this would increase the entitlement of a surviving spouse at the expense of the children or other descendants. A model which entitled a surviving spouse to the present statutory legacy and an immediate absolute interest in a third of the remainder of the estate would produce results that are closer to those produced under the current rules. The entitlement would, however, not be exactly the same as at present. Because the value of a life interest in a given fund decreases with age but the value of a fixed interest remains constant, older spouses stand to gain under this approach while younger spouses will do less well than at present. This may well be an entirely appropriate result, given the increased needs that many of us experience in old age, and the fact that a younger surviving spouse has greater earning capacity than an older spouse and is more likely to re-partner.
- 3.81 The fixed share model is the most commonly adopted method of distribution of intestate estates found in other common law jurisdictions, although there are a

⁷¹ See paras 3.134 to 3.144 below.

⁷² On the statutory trusts; see paras 2.29 to 2.30 above.

number of variations. The most common arrangement is that, where there are children, a spouse is entitled to a statutory legacy,⁷³ and:

- (1) half of the estate absolutely, if the deceased is survived by one child (or the descendants of one child); or
- (2) a third of the estate absolutely, if the deceased is survived by more than one child (or the descendants of more than one child).

3.82 This system is adopted in Northern Ireland, three Australian states (the Australian Capital Territory, the Northern Territory and Queensland) and seven Canadian provinces (Alberta, British Columbia, the Northwest Territories, Nova Scotia, Ontario, Saskatchewan and the Yukon).⁷⁴

3.83 Other variations include:

- (1) a statutory legacy and half of the remainder of the estate absolutely, irrespective of the number of surviving children (Hong Kong, New South Wales and South Australia);⁷⁵ and
- (2) a statutory legacy and a third of the remainder of the estate absolutely, irrespective of the number of surviving children (Tasmania, Victoria, Western Australia and New Zealand).⁷⁶

3.84 There are some jurisdictions where the estate is divided between a surviving spouse and children with no provision for a statutory legacy. These include the Republic of Ireland, Newfoundland and Quebec.⁷⁷ As discussed above, we do not intend to make any provisional proposal that would have the effect of abolishing the statutory legacy, though we invite consultees' views on the appropriate level of statutory legacy and how it might be periodically reviewed and updated.⁷⁸

⁷³ The level of statutory legacy varies greatly between these jurisdictions but in all cases is presently lower than that in England and Wales. This may reflect lower property prices.

⁷⁴ See Administration of Estates Act (Northern Ireland) 1955, s 7(2); Administration and Probate Act 1929, sch 6, part 6.1, item 2(2) (Australian Capital Territory); Administration and Probate Act, sch 6, item 2(1) (Northern Territory); Succession Act 1981, sch 2, part 1(2)(1) (Queensland); Intestate Succession Act 2000, s 3 (Alberta); Estate Administration Act 1996, s 85 (British Columbia); Intestate Succession Act 1988, s 3 (Northwest Territories); Intestate Succession Act 1989, ss 4(2) and (5) (Nova Scotia); Succession Law Reform Act 1990, s 45 (Ontario); Intestate Succession Act 1996, s 6(3) (Saskatchewan); Estate Administration Act 2002, s 82 (Yukon).

⁷⁵ Intestates' Estates Ordinance, s 4(3) (Hong Kong); Probate and Administration Act 1898, s 61B(3) (New South Wales); Administration and Probate Act 1919, s 72G(b)(i) (South Australia).

⁷⁶ Administration and Probate Act 1935, s 44(3) (Tasmania); Administration and Probate Act 1958, s 51(2) (Victoria); Administration Act 1903, s 14(1), Table (2) (Western Australia); Administration Act 1969, s 77(2) (New Zealand).

⁷⁷ Succession Act 1965, s 67(1) (Republic of Ireland); Intestate Succession Act 1990, s 4 (Newfoundland); Civil Code, s 666 (Quebec).

⁷⁸ See para 3.62 above, and paras 3.134 to 3.144 below.

Sharing option 3: focus on the family home

- 3.85 As we explained above, changing patterns of property ownership since 1925 mean that, in the majority of cases, spouses own the family home together as joint tenants and the whole property passes to the surviving spouse by operation of the doctrine of survivorship. What is left will usually not exceed the statutory legacy limit and the spouse will therefore take the entire estate. Conversely, where the deceased's interest in the family home does not pass automatically to the surviving spouse, the level of statutory legacy may be insufficient to enable him or her to purchase it.
- 3.86 The family home is significant to the framing of intestacy rules in two different senses. First, it can be seen primarily as the centre of the spouse's life with the deceased, which suggests that the surviving spouse should have the right specifically to acquire the family home. Secondly, it is generally the most financially significant asset in which the deceased had an interest during his or her lifetime, and therefore the single most valuable asset passing on death. We have considered two different ways in which the intestacy rules might recognise the significance of the family home.
- 3.87 The first would entitle a surviving spouse to inherit the deceased's interest in the family home (where that did not automatically pass by survivorship). In cases where the family home formed the bulk of the estate, this would substantially reduce the entitlement of any surviving children. That outcome could be mitigated by making any such right subject to a maximum value. In addition, where a surviving spouse inherited the family home in this way, it might be justifiable to reduce significantly the size of the statutory legacy, since it would no longer be needed to meet the spouse's housing needs.
- 3.88 This approach has parallels with the present law in Scotland, where a surviving spouse inherits the deceased's interest in any dwelling house in which he or she was "ordinarily resident at the date of death" up to a value of £300,000.⁷⁹ A surviving spouse is also entitled to a statutory legacy of either £42,000 or £75,000, depending on whether the deceased was survived by children or other descendants.⁸⁰
- 3.89 One advantage of this approach is that the statutory legacy would no longer be required to keep pace with house price inflation. It could be pegged to some measure of inflation that is not subject to such wide variations in different parts of the country. However, any maximum value for the property interests passing in this way would need to be periodically updated.
- 3.90 The main disadvantage of this approach is that a surviving spouse's entitlement would vary significantly depending on the composition of the estate of his or her deceased partner.⁸¹ Where the estate did not include an interest in the family

⁷⁹ Succession (Scotland) Act 1964, s 8. The Scottish Law Commission's recent Succession Report has recommended abolishing this element of a surviving spouse's entitlement. See Report on Succession (2009) Scot Law Com No 215, para 2.9.

⁸⁰ Succession (Scotland) Act 1964, s 9.

⁸¹ See Discussion Paper on Succession (2007) Scottish Law Commission Discussion Paper No 136, paras 2.8 to 2.12, and the recommendations in Report on Succession (2009) Scot Law Com No 215, Part 2.

home, for example if the spouses were living in rented accommodation or in property owned through a company or partnership, a surviving spouse would have to provide for housing needs from his or her share of the estate or own resources.

- 3.91 A second possible approach, which we call the “accounting model”, would take a different starting point, namely the potential unfairness to the children of the deceased where a surviving spouse acquires the deceased’s interest in the family home by survivorship and the rest of the estate under the intestacy rules.⁸² This approach would reduce a surviving spouse’s entitlement under the intestacy rules by an amount equal to the value of any interest in the family home acquired by survivorship.⁸³ As with the approach considered above, this might need to be subject to a maximum limit, so that spouses were not left with outright ownership of the family home but no cash with which to maintain the property (or themselves) in future years. Alternatively, it might be necessary to increase the current level of statutory legacy to ensure that it was sufficiently large to allow some surplus after the accounting process, at least in most typical cases.
- 3.92 The accounting model responds to the sense that, where a surviving spouse acquires the deceased’s interest in the family home by survivorship as well as receiving a statutory legacy, over-provision has been made at the expense of other potential beneficiaries. There are, however, disadvantages; it might produce injustice in those cases where a surviving spouse provided more than half of the purchase price of the jointly held property. In these circumstances, a surviving spouse’s statutory legacy would be reduced in order to account for a benefit he or she had in fact paid for. Nor does this approach resolve the problems inherent in updating the statutory legacy. Indeed, it could exacerbate them; the statutory legacy would need to be maintained at a sufficient level to ensure that it was sufficient to provide at least some surplus in most cases.
- 3.93 Although we are open to suggestions as to how such a model of reform might work in practice, we take the view that there should be no further diminution of the spouse’s entitlement in the event that the deceased’s interest in the family home is worth more than the statutory legacy. We also do not favour extending this approach to other assets which pass by survivorship, such as cash in joint bank accounts. We are not aware of significant concerns about the way in which such assets pass on death, whereas it is a frequent complaint that the acquisition of the family home by a surviving spouse outside the intestacy rules leaves little or nothing for the children of the deceased to inherit.⁸⁴
- 3.94 In addition, such a change in the law could affect couples who have arranged their affairs on the basis that the family home will pass to the survivor in addition

⁸² This approach is based on an idea proposed by Professor Roger Kerridge: R Kerridge, “Reform of the law of succession: the need for change, not piecemeal tinkering” (2007) 71 *Conveyancer and Property Lawyer* 47. Professor Kerridge describes this as a form of “hotchpot”, a doctrine applicable to intestate estates before 1996 (see further paras 7.32 to 7.35 below).

⁸³ See the proposals of the Scottish Law Commission: Report on Succession (2009) Scot Law Com No 215, paras 2.1 to 2.24.

⁸⁴ See, for example, S Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77, 92; Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008) para 102.

to the spousal entitlement under the intestacy rules. If the law were to change in this manner it would be important to publicise the change so as to enable them to make alternative arrangements.

Questions

- 3.95 We draw together this discussion of the available options for reform of the intestacy rules where the deceased leaves a surviving spouse and children by asking a number of questions.
- 3.96 **Do consultees think that the intestacy rules should be reformed so as to provide that an entire intestate estate should pass to the surviving spouse, whether or not the deceased also leaves children or other descendants?**

If not, which of the following models do consultees prefer:

- (1) **the current law, which gives the surviving spouse a statutory legacy and then a life interest in the balance (if any);**
 - (2) **a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any) and, if so, what share; or**
 - (3) **a sharing structure that gives priority to the family home, either by providing that the surviving spouse inherit the deceased's share in the family home in any event, or by raising the statutory legacy but requiring the surviving spouse to account, against that legacy, for any share of the family home passing by survivorship?**
- 3.97 Note that we consider separately, below, the surviving spouse's entitlement to personal chattels.

CHILDREN FROM OTHER RELATIONSHIPS

- 3.98 As discussed above, the recommendation made by the Law Commission in 1989 that a surviving spouse should receive the entire estate in every case provoked strong opposition from those who believed that this would prevent the children of the deceased from benefiting from larger estates. Of particular concern was the position of children of the deceased who were not also the children of the surviving spouse. If, as recommended, the entire estate passed to the surviving spouse in these circumstances, it was feared that the children of the deceased would be less likely to receive anything on the later death of their parent's spouse.
- 3.99 If that surviving spouse were also to die intestate his or her step-children would have no automatic entitlement to any part of the estate (though they might, depending on the circumstances, have a claim for family provision). Where the surviving spouse made a will, some consultees worried that it would not make provision for the step-children, or would make less generous provision than they might expect from a biological parent. Either way, the result would be that the children of the deceased's previous relationships may feel "disinherited".
- 3.100 This concern echoes the central premise of "conduit theory", which suggests that a surviving spouse of a person who dies intestate is likely, on his or her death, to pass the unconsumed part of the estate to any children he or she had with the

deceased.⁸⁵ The surviving spouse is therefore only a reliable “conduit” for the deceased’s wealth, ensuring that any surplus wealth is ultimately passed down to the next generation, if he or she is also the parent of those children. Conversely, a step-parent is seen as a less reliable conduit.

- 3.101 There has been precedent in English law for treating children differently if they are not also the children of the surviving spouse. Under the Inheritance (Family Provision) Act 1938, an application for family provision could not be made in respect of an estate where the testator had left at least two thirds of the estate to his or her surviving spouse and the only other dependants were children of the surviving spouse.⁸⁶ Children of a testator who were not also children of the surviving spouse were able to bring a claim irrespective of the size of the bequest to the surviving spouse. The current legislation contains no distinction between the deceased’s children from different relationships.⁸⁷
- 3.102 A number of jurisdictions have introduced intestacy rules which reflect conduit theory. Under the US Uniform Probate Code,⁸⁸ the surviving spouse of a person who dies intestate receives the entire estate where all of the deceased’s children were the product of that relationship and the surviving spouse does not have any other children.⁸⁹ Where, however, the deceased leaves children of another relationship or the surviving spouse has children from another relationship, the surviving spouse receives a statutory legacy and half of the remainder of the estate. The deceased’s descendants share the rest.
- 3.103 A similar regime operates in Manitoba, and law reform bodies in Australia and Alberta have recently recommended that a similar approach be adopted in those jurisdictions.⁹⁰ The law in France also distinguishes between a surviving spouse who is the parent of all of the deceased’s children, and one who is not.⁹¹ However, legislation enacted in Ontario in 1970, that denied a surviving spouse any statutory legacy where the deceased left surviving children of another relationship, was repealed in 1990.⁹²
- 3.104 This issue has previously been recognised by the Law Commission. The 1989 Report acknowledged the risk that “children of former marriages could end up

⁸⁵ L Waggoner, “The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code” (1990-1991) 76 *Iowa Law Review* 223, 232 to 233.

⁸⁶ Inheritance (Family Provision) Act 1938, s 1(1). As originally enacted, the 1938 Act applied only to testate estates, however, it was amended by section 7 of the Intestates’ Estates Act 1952 to apply also to intestate estates.

⁸⁷ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c).

⁸⁸ The most recent version of the Uniform Probate Code was published in 2005. Nineteen states have adopted a version of the code, however, such adoption has sometimes been with significant modifications to the published text.

⁸⁹ Uniform Probate Code 2005, ss 2-102(1) and 2-102(4).

⁹⁰ Intestate Succession Act CCSM c 185 s 2(3) (Manitoba); New South Wales Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, p 76; Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, pp 80 to 88.

⁹¹ Code Civil, art 757 (France).

⁹² Devolution of Estates Act 1970, s 13 (Ontario). This was repealed (following criticism by the Ontario Law Reform Commission) by the Succession Law Reform Act 1990 (Ontario).

inheriting none of what was originally their parent's property".⁹³ Nevertheless, the 1989 Report concluded that this was not sufficient reason to make special provision for the children of other relationships. The reasons given were:

- (1) giving a share to children of another relationship could deny the spouse adequate provision;
- (2) children of previous relationships will often be middle-aged and less likely to need financial provision;
- (3) children of other relationships who were still young (and thus in need of maintenance) may have been living with the deceased and the surviving spouse. If they continued to live with the surviving spouse, provision for him or her should cover the children's needs – and a surviving spouse who failed to provide for such children could be ordered to make child maintenance payments as the child would be a "child of the family";
- (4) if the deceased had been maintaining children from another relationship, a 1975 Act claim by such children would be likely to succeed;
- (5) there was a perceived administrative difficulty in identifying all of the deceased's children from other relationships; and
- (6) the circumstances of relationships varied so much that "only discretionary provision would be able to take into account all the relevant factors".⁹⁴

3.105 Although this discussion was in the context of the principal recommendation that a surviving spouse receive the entire estate in every case, the reasons given are equally relevant to the specific situation where there are children of another relationship.

3.106 It is doubtful whether conduit theory is relevant to the majority of estates. It is based on the idea that a surviving spouse will pass on to his or her children any surplus wealth from the inheritance. Yet there will often be no surplus. As noted above, the median value of an intestate estate is £56,000,⁹⁵ which is likely to be consumed within a few years, particularly where the survivor is elderly and needs to pay for care. In many cases, therefore, there is limited likelihood of much wealth being left to pass on. Even in those estates where there is something for a surviving spouse to pass on, we are not convinced that conduit theory provides a sound basis for reform. Conduit theory describes the proposition that step-parents will generally feel less obligation towards their step-children than their biological children; yet we are not persuaded that this is necessarily the case.

3.107 Conduit theory paints an overly simplistic picture of family relationships. It may well accord with the experiences of many people, but for many others it will not. Our focus group research demonstrated the wide range of views on this issue. Some participants said that they had gone to great lengths to ensure that their step-children were treated no differently to their own children. Such people would

⁹³ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 41.

⁹⁴ Above, paras 41 and 45.

⁹⁵ See para 3.11 above.

no doubt be surprised and perhaps offended that their own entitlement on intestacy would be reduced because they happened to have step-children.

- 3.108 Practical problems may arise in the relatively common situation where a person dies intestate leaving children from different relationships. The approach taken in the jurisdictions surveyed above is to reduce the entitlement of the surviving spouse in order to provide a share for the children from any other relationship. As a result, for example, a surviving spouse raising three of the deceased's children might, if the deceased also had children from another relationship, receive less than a surviving spouse with just one child.
- 3.109 Under the US Uniform Probate Code, a surviving spouse's entitlement is also reduced if he or she has children from another relationship.⁹⁶ The rationale is that there will ultimately be "more mouths to feed" when distributing the surviving spouse's estate and the deceased's own children may therefore receive less than they would otherwise. We do not think that we should base reform proposals on such assumptions.
- 3.110 One final point is that, where the surviving spouse of someone who died intestate remarries or forms a new civil partnership, similar issues of "disinheritance" may arise. If we are seeking to avoid all such issues, we would, logically, also have to provide for this eventuality, since on a subsequent intestacy the new spouse would be entitled to the bulk of the estate to the exclusion of any children.
- 3.111 We therefore make no provisional proposals that would diminish the entitlement of a surviving spouse where the person who died intestate (or the surviving spouse) has children or other descendants from another relationship. We nevertheless invite consultees' views on this issue.

PERSONAL CHATTELS

- 3.112 Under the current law, a surviving spouse is entitled to the deceased's "personal chattels" outright.⁹⁷
- 3.113 A number of justifications have been advanced for giving a surviving spouse an absolute entitlement to the deceased's personal chattels. It has been recognised as minimising disruption following bereavement and producing a "continuity of lifestyle for the surviving spouse".⁹⁸ It may also reflect shared enterprise and interests. The absolute entitlement also spares a surviving spouse from the need to lay claim to specific individually owned chattels and, where necessary, from having to prove that chattels were jointly owned, and then to value them and purchase the deceased's interest.⁹⁹
- 3.114 It has also been suggested that the surviving spouse's entitlement to the personal chattels of the deceased conformed to the practice of the majority of testators in

⁹⁶ Uniform Probate Code 2005, ss 2-102(1) and (3).

⁹⁷ Administration of Estates Act 1925, s 46(1)(i).

⁹⁸ New South Wales Law Reform Commission, Uniform succession laws: intestacy (2005) Issues Paper 26, para 3.36.

⁹⁹ However, an investigation into the ownership of the deceased's chattels may be required for the purposes of inheritance tax.

the early twentieth century.¹⁰⁰ Anecdotal evidence is that this is still the position today.¹⁰¹

- 3.115 Most common law jurisdictions adopt a similar approach.¹⁰² Others, however, make no provision for the personal chattels to be treated differently from the rest of estate.¹⁰³ In some jurisdictions a surviving spouse may *elect* to receive the personal chattels in satisfaction of any other entitlement.¹⁰⁴ In Scotland, for example, a surviving spouse is entitled to the deceased's "furniture and plenishings" up to a certain value.¹⁰⁵ However, the Scottish Law Commission has recommended that this entitlement should cease.¹⁰⁶

A value limit?

- 3.116 We have not found any evidence of dissatisfaction with the principle that a surviving spouse should receive the personal chattels of the deceased. We have, nevertheless, considered whether there is a case for introducing a limit on the value of items which pass to a surviving spouse in this way. This could be achieved either by limiting the value of any single item which can pass as a personal chattel or setting a ceiling on the total value of the personal chattels to which a surviving spouse is entitled absolutely.

¹⁰⁰ New South Wales Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, para 4.3.

¹⁰¹ A will may, however, contain further provisions as to how the chattels are to pass if the spouse does not survive. If both spouses make wills those provisions may be mirrored, so that they take effect on the second death unless the survivor makes a new will.

¹⁰² See: Administration and Probate Act 1929, s 49A (Australian Capital Territory); Administration Act 1903, s 14(1) (Western Australia); Administration and Probate Act 1958, s 51(2) (Victoria); Administration and Probate Act 1919, s 72H(1) (South Australia); Succession Act 1981, sch 2, part 1 (Queensland); Administration and Probate Act 1979, s 67(2) (Northern Territory); Administration and Probate Act 1898, s 61B(3) (New South Wales); Estate Administration Act 1996, s 96(2)(b) (British Columbia); Estate Administration Act 2002, s 92(2)(b) (Yukon); Intestates' Estates Ordinance 1971, s 4(3) (Hong Kong); Administration Act 1969, s 77 (New Zealand); and Administration of Estates (Northern Ireland) Act 1955, s 7(1).

¹⁰³ Intestate Succession Act 2000 (Alberta); Intestate Succession Act 1996 (Saskatchewan); Intestate Succession Act 1990 (Manitoba); Civil Code (Quebec); Succession Law Reform Act 1990 (Ontario); Probate Act (Prince Edward Island); and Administration and Probate Act 1935 (Tasmania).

¹⁰⁴ As is the case in the Republic of Ireland: Succession Act 1965, s 56(2). This right is sometimes combined with a right to appropriate the home: Intestate Succession Act 1989, s 4 (Nova Scotia); Intestate Succession Act 1988, s 2 (Northwest Territories); and Intestate Succession Act 1988, s 2 (Nunavut).

¹⁰⁵ Defined to include "garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, articles of household use and consumable stores; but does not include any article or animal used at the date of death of the intestate for business purposes, or money or securities for money, or any heirloom": Succession (Scotland) Act 1964, s 8(6)(b).

¹⁰⁶ Two reasons are given: succession rights should not be property-specific and so should not give a beneficiary a specific right to any individual item of property; and the recommendation to give the surviving spouse a "threshold sum" (equivalent to the statutory legacy) of £300,000 plus one half of the residuary estate, will be sufficient to allow the survivor to obtain the deceased's share of the couple's home and furniture in all but very exceptional cases: Report on Succession (2009) Scot Law Com No 215, para 1.13.

- 3.117 At present, there is no limit on the value of a single personal chattel or the total value of the chattels that pass to a surviving spouse automatically under the intestacy rules. The Court of Appeal has held that the value of an item is “wholly irrelevant” to the question of whether it is a personal chattel.¹⁰⁷ Arguably, the present rule prejudices the children and other relatives of a person who dies intestate leaving an estate which is large but principally comprises valuable chattels rather than land or cash or shares that would otherwise be distributed between a surviving spouse and children or other relatives. This may be an unlikely scenario but the injustice felt by the children and other close relatives may be great, particularly where the items are regarded as family “heirlooms”.¹⁰⁸
- 3.118 Of those jurisdictions where a surviving spouse has some entitlement to the deceased's personal chattels, only two limit the total value of those chattels.
- (1) In Scotland there is a limit of £24,000 on the total value of furniture and plenishings passing automatically to the spouse.¹⁰⁹ However, as noted above, the Scottish Law Commission has recommended the abolition of this entitlement.
 - (2) The US Uniform Probate Code provides the spouse with a \$10,000 “exempt property” allowance. This includes “household furniture, automobiles, furnishings, appliances, and personal effects”.¹¹⁰ This allowance takes precedence over the provisions of any will as well as operating in the context of intestacy.
- 3.119 If this approach were adopted here, setting the value would be a difficult exercise. It would introduce into the law another fixed sum that would require periodic updating. It would also be likely to fuel disputes over items of sentimental value, placing administrators in a difficult position. A further issue arises: whether a surviving spouse should, if he or she is not entitled to the chattels automatically, be entitled to purchase them from the estate in preference to other family members.
- 3.120 On balance we consider that introducing such a limit would create more problems than it would solve. We are not convinced that the theoretical injustice in a small number of cases is sufficient to warrant a significant departure from the current law that would raise daunting practical considerations. We therefore make no provisional proposal to this effect but invite consultees' views.

Heirlooms

- 3.121 Historically, an heirloom was an article which, through its notional attachment to land, passed directly to the deceased's heir.¹¹¹ The term is nowadays used to refer to items that have been passed down a family line from one generation to

¹⁰⁷ *Re Crispin's Will Trusts* [1975] Ch 245, 252.

¹⁰⁸ See paras 3.121 to 3.123 below.

¹⁰⁹ Succession (Scotland) Act 1964, s 8(3).

¹¹⁰ Uniform Probate Code 2005, s 2-403.

¹¹¹ *Halsbury's Law of England*, vol 39(2) (4th ed reissue) para 89.

the next.¹¹² The 1988 Working Paper noted that the statutory definition of personal chattels did not provide a method for other members of the deceased's family to claim that chattels going to the spouse should instead be retained in their branch of the family.¹¹³ No mention was made of personal chattels in the 1989 Report, primarily because the recommendation that a surviving spouse should inherit the entire estate rendered consideration of specific items unnecessary.

- 3.122 Scottish legislation specifically excludes heirlooms from a surviving spouse's entitlement to the deceased's "furniture and furnishings".¹¹⁴ The Scottish Law Commission's recent recommendations would end this entitlement and therefore render the heirloom exclusion redundant.¹¹⁵
- 3.123 We have concluded that requiring administrators to distinguish between family heirlooms and the deceased's other personal chattels would not be a practical reform. Our greatest concern is that it would encourage family disputes, often over items that have sentimental meaning to family members but are of relatively low financial value. Such a proposal may therefore exacerbate the emotional trauma of bereavement and invite disputes where the potential costs of litigation are out of all proportion to the financial value of the item in question. We therefore make no provisional proposal in this regard.

The definition of personal chattels

- 3.124 The current law defines personal chattels as:

Carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.¹¹⁶

- 3.125 The statutory definition has been criticised judicially as "a curious collocation of terms" that is "neither happy nor clear".¹¹⁷ The courts have, therefore, tended to

¹¹² "Heirlooms" are defined as "any piece of personal property that has been in a family for several generations" or "anything inherited from a line of ancestors, or handed down from generation to generation", in the Oxford English Dictionary (2nd ed 1989).

¹¹³ Family Law: Distribution on Intestacy (1988) Law Com Working Paper No 108, para 3.10.

¹¹⁴ Succession (Scotland) Act 1964, s 8(6)(b). Section 8(6)(c) defines heirlooms as "... any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate".

¹¹⁵ Report on Succession (2009) Scot Law Com No 215, para 1.13.

¹¹⁶ Administration of Estates Act 1925, s 55(1)(x).

¹¹⁷ *Re Reynold's Will Trusts* [1966] 1 WLR 19; *Re Chaplin* [1950] Ch 507.

adopt a broad approach to interpretation, which “greatly assists in solving some of the problems presented by the out of date wording of the provision”.¹¹⁸

- 3.126 Law reformers in New South Wales recommended a modernised provision that entitled a surviving spouse to “all of the tangible personal property” of the deceased.¹¹⁹ Their recommendation also excluded property used exclusively for business purposes, money (unless part of a collection), security interests, property invested as a hedge against inflation or adverse currency movements (for example, gold), and any interest in land.
- 3.127 We take the view that there is a case for revising the statutory definition of personal chattels so as to bring it up to date, whilst ensuring that those items that would have been chattels under the current definition should be treated as such under any new definition. In considering such a revision, however, we have also looked at one small area of substantive change, as follows.
- 3.128 The 1988 Working Paper considered that the exclusion of articles used for business purposes “rests upon the assumption that the survivor is unlikely to have any connection with the business chattels”.¹²⁰ It may also be a very practical provision that ensures that tangible business property continues to be available for use in the business.
- 3.129 The concluding words of the statutory definition exclude chattels used for business purposes at the date of death. There is a potential ambiguity caused by the fact that the phrase “not used for business purposes” also follows two specifically enumerated chattels in the list without explicitly referring to use at the date of death.¹²¹ But it seems to us that the relevant date for determining the extent of the business use of a chattel should be the date of death and that this should be made clear in any reformed statutory definition.
- 3.130 A more substantive issue is that the exclusion of chattels used for business purposes is framed in absolute terms and therefore may have the effect of depriving a surviving spouse of items which the deceased used only minimally for business. It has been argued that this is “a serious limitation on the spouse’s entitlement”.¹²² We are happy to adopt the suggestion that the statutory definition should be modified so as to make clear that only articles used exclusively or principally for business purposes should lose the status of personal chattels.

¹¹⁸ C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 11-009, citing a number of judicial authorities.

¹¹⁹ New South Wales Law Reform Commission, *Uniform succession laws: intestacy* (2007) Report 116, Recommendation 5.

¹²⁰ Family Law: Distribution on Intestacy (1988) Law Com Working Paper No 108, para 3.11. The Law Reform Commission of Tasmania considered that articles used for business purposes “do not fall within the commonly held view of what the surviving spouse should be entitled to”: Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (1993) Report 42, p 40.

¹²¹ This does not appear to cause any problems in practice: C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 11-009.

¹²² C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 11-012.

- 3.131 This would mirror the approach taken in New Zealand and Hong Kong.¹²³ An alternative approach is to list those items that cannot pass as personal chattels, such as aeroplanes.¹²⁴ We are not attracted to this, as any such list risks becoming as outdated and anachronistic as the 1925 definition appears today.
- 3.132 **We provisionally propose that a revised and simplified statutory definition of personal chattels be provided, and that it should exclude items used by the deceased exclusively or principally for business purposes at the date of his or her death.**
- 3.133 We note that, where a will refers to “personal chattels”, the courts have (subject to evidence of a contrary intention), interpreted that as a reference to the statutory definition. Any reform of the definition will need to be accompanied by appropriate transitional provisions to ensure that its effect is prospective only and does not change the effect of wills made before the commencement of the new provision.

UPDATING THE STATUTORY LEGACY

- 3.134 We have set out above a number of possible approaches to reform of the entitlement on intestacy of a surviving spouse. For the reasons set out above, we take the view that – unless reforms lead to a surviving spouse receiving the entire estate in every case – the device of a statutory legacy should be retained in some form.¹²⁵ This prompts the question of how to set an appropriate level of statutory legacy and keep the level under review.
- 3.135 The Lord Chancellor has power to raise the level of statutory legacy by statutory instrument.¹²⁶ There is, however, no established procedure to determine when to review the level of statutory legacy or, when such a review is undertaken, to determine what increase (or possibly decrease) should be implemented, or even what factors should be taken into account. As a consequence, there have often been long intervals between reviews of the level of statutory legacy and increases have tended to be quite significant, to account for the effects of inflation in the intervening years. The most recent increase doubled the previous £125,000 lower level of statutory legacy and more than doubled the previous higher level of £200,000 to £450,000.
- 3.136 We would therefore favour regular reviews of the level of statutory legacy, with fixed intervals between reviews. We consider that annual reviews would be unnecessarily burdensome for the Lord Chancellor and his officials but that an interval of no longer than five years would be appropriate.

¹²³ Administration Act 1969, s 2(1) (New Zealand). The equivalent Hong Kong ordinance excludes chattels “used exclusively or principally for business or *professional* purposes” (emphasis added): Intestates’ Estates Ordinance 1971, s 1.

¹²⁴ As is done by Probate and Administration Act 1898, s 61A(2) (New South Wales) and Succession Act 1981, s 34A(2) (Queensland).

¹²⁵ Our provisional proposal that a surviving spouse should receive the entire estate if there are no surviving children or other descendants (see para 3.36 above) would make it unnecessary to have two different levels of statutory legacy.

¹²⁶ Family Provision Act 1966, s 1; see para 3.8 above.

- 3.137 The most recent increase in the levels of statutory legacy followed a thorough consultation process, the results of which led to the initiation of the present project. Earlier reviews have not always followed this approach.¹²⁷ We consider that, if there are to be periodic reviews at fixed intervals, it would be helpful to set down guidance to ensure consistency of approach.
- 3.138 We have said that the level of statutory legacy has fallen out of line with inflation. Yet there are a number of different measures of inflation. The Department for Constitutional Affairs' 2005 consultation paper demonstrated how pegging the increase in statutory legacy to different measures of inflation can lead to dramatically different results.¹²⁸ If the purpose of the statutory legacy is to enable a surviving spouse to purchase the family home (or the deceased's interest in the family home where that does not pass by survivorship), then it must reflect property prices in some way. This is problematic for a number of reasons:
- (1) property prices have risen more sharply during certain periods than general prices;
 - (2) property prices rise more quickly in some parts of the country than others (from base levels that are already very different); and
 - (3) where an estate does not include a house, flat or other land, provision for a statutory legacy fixed by reference to house prices may seem inappropriate.
- 3.139 If, however, a method of distribution is adopted which takes account of the significance of the family home, then there is less need for the statutory legacy itself to serve this function. It could be pegged to some measure of general inflation which is not affected by changing property prices. It is therefore clear that this question cannot be addressed in isolation from the approach that is taken to distribution of an intestate estate to a surviving spouse.
- 3.140 If a statutory legacy is to be retained, we would like to devise a method that would enable the statutory legacy to be reviewed regularly, with an opportunity for consultation where that is thought desirable but without the need for a full consultation (and therefore delay) on every occasion.
- 3.141 Most of the options we have discussed for sharing the estate between a surviving spouse and children would require the retention of a statutory legacy linked to house prices. This is the safety net that seeks to ensure that a surviving spouse does not lose his or her home. Only if the surviving spouse were given an absolute entitlement to the family home in all cases, regardless of value, would there be no need to retain a link with house prices.
- 3.142 If recommendations are made that require the retention of a statutory legacy that is linked in some way to house prices, we think that that link should be determined by a house prices index across England and Wales.¹²⁹ House prices

¹²⁷ S Cretney, *Family Law in the Twentieth Century: A History* (2005) p 512.

¹²⁸ Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005) paras 101 to 107, and Table 2.

¹²⁹ For example, Land Registry's House Price Index: see www.landregistry.gov.uk.

do differ across the country; but we have at present a newly-determined statutory legacy that is regarded by those consulted as fulfilling the function of covering the value of the deceased's share in the family home in at least the majority of cases. We think that periodic review of the legacy, by reference to the average rate of increase of house prices across the country would be useful.

3.143 **We provisionally propose that the level of the statutory legacy (if it is retained) should be reviewed at least every five years.**

3.144 **We provisionally propose that the statutory legacy, if it is retained and if it is still required to be linked to house prices, should be raised in line with the average rate of increase, if any, of house prices across England and Wales on each occasion.**

THE NOTIONAL DIVORCE TEST

3.145 We make no provisional proposals to reform the law of family provision as it relates to the surviving spouse. We are aware of no widespread dissatisfaction with its provisions. However, we do raise two points. These arise from the fact that, in considering an application by a surviving spouse for family provision, the court must have regard to the provision which the applicant might reasonably have expected to receive if the marriage or civil partnership had been terminated by divorce or dissolution rather than death.¹³⁰

3.146 The reference to divorce in the family provision legislation is intended to ensure, so far as possible, that a bereaved spouse receives at least as much as he or she would have received had the marriage or civil partnership been terminated by divorce or dissolution rather than death.¹³¹ It has been suggested that the reference to divorce may be distressing, requiring a bereaved spouse to undergo an "imaginary divorce" in circumstances that are already emotionally fraught.¹³²

3.147 Ideally, the language of the law should be sensitive to the feelings of those who are affected by its operation. We can also understand why, at first sight and without the benefit of legal advice, some bereaved spouses may feel that the present statutory provision raises an inappropriate equivalence between termination of a relationship by death and termination of the same relationship by divorce. However, in the light of the importance of the provision and the need to ensure that the interests of a surviving spouse are properly safeguarded, we think that there is no alternative to having a reference to divorce or dissolution in the statute.

3.148 A more difficult issue is whether the requirement that the court should "have regard to" the provision that the applicant might reasonably have expected to receive on divorce or dissolution of a civil partnership provides sufficiently clear guidance. There has been debate as to whether this indicates the minimum that a

¹³⁰ Inheritance (Provision for Family and Dependents) Act 1975, s 3(2), unless a decree of judicial separation or separation order was in force at the time.

¹³¹ See Family Law: First Report on Family Property, A New Approach (1973) Law Com No 52, para 61(b); Family Law: Second Report on Family Property, Family Provision on Death (1974) Law Com No 62, para 2(b).

¹³² "I've got to sue my children", *The Daily Telegraph*, 27 May 2009, p 21.

surviving spouse should receive under the 1975 Act or the maximum potential award (referred to in one case as being either a “floor” or a “ceiling”).¹³³

- 3.149 We note that the wording mirrors that of the Law Commission’s draft Bill, which was designed to give effect to a recommendation that “so far as is practicable in the differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse”.¹³⁴ Clearly the intention was that the provision should in general operate as a floor rather than as a ceiling and should not be regarded as placing a limit upon the provision available for a surviving spouse.
- 3.150 We therefore make no provisional proposals about the “notional divorce” provision in the 1975 Act, but we invite consultees’ views as to whether it requires amendment or clarification.

¹³³ See *P v G* [2004] EWHC 2944 (Fam); [2006] 1 FLR 431 at [228] and following, by Black J.

¹³⁴ Family Law: Second Report on Family Property, Family Provision on Death (1974) Law Com No 61, para 2(b).

PART 4

COHABITANTS

INTRODUCTION

- 4.1 In this Part we look at the position of cohabitants. We use that term to describe couples who live together but are not married or in a civil partnership.¹ It does not include people who live together but are not couples in an intimate relationship – for example, blood relatives, flatmates, or as landlord and tenant or lodger.
- 4.2 Cohabitation is both widespread and increasingly frequent, and seems likely to become more so in the immediate future. In 2006, 24% of men aged under 60, and 25% of women aged under 60, were cohabiting in Great Britain; the rate of cohabitation among this part of the population had approximately doubled over the previous 20 years.² Recent population projections for England and Wales gave the number of cohabiting couples in 2007 as 2.25 million and projected that it would rise to 3.7 million in 2031.³
- 4.3 Recent research suggests that cohabitants are among the people least likely to have a will; only 17% of cohabitants were found to have made one.⁴ It has been pointed out that “cohabitation is more prevalent among the young”, and that given the low rate of death in the peak age for cohabitation, “how often a cohabitant is affected by the intestacy rules may not be as high as might first appear”.⁵ Nevertheless, the potential impact of the current law is already significant and is set to increase.

PREVIOUS WORK IN THIS AREA

- 4.4 The Law Commission has previously considered the place of cohabitants in the intestacy rules and as applicants for family provision in two Reports.⁶ These are

¹ We also use it to refer to people entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependents) Act 1975, having lived in the same household as the deceased as his or her spouse.

² Office for National Statistics, (2008) 38 *Social Trends* 15, 19, reporting that in 1986 the figures were (again for the under-60 population) 11% of men and 13% of women. In all cases, the figures are for unmarried people; see also Office for National Statistics, (2009) 39 *Social Trends* 21 to 22.

³ Office for National Statistics, *Number of cohabiting couples projected to rise in England & Wales*, News Release (31 March 2009). The results for cohabitation cover only opposite-sex cohabitation, stated to be due to the difficulties in estimating same-sex cohabitation for reliable results on the current methodology (see Background Note 6 to the News Release). See also B Wilson, “Estimating the cohabiting population” (2009) 136 *Population Trends* 21, 23.

⁴ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

⁵ C Williams, G Potter and G Douglas, “Cohabitation and intestacy: public opinion and law reform” [2008] *Child and Family Law Quarterly* 499, 501.

⁶ Cohabitants were also mentioned in the Report leading to the Inheritance (Provision for Family and Dependents) Act 1975: Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, para 90.

the 1989 Report⁷ and “Cohabitation: The Financial Consequences of Relationship Breakdown” in 2007 (the “Cohabitation Report”).⁸ Each of these was preceded by a Working Paper or Consultation Paper seeking the views of interested parties.⁹

The 1989 Report

- 4.5 A public opinion survey was carried out in advance of the 1989 Report. It included a question assessing public views on the law applicable to cohabitants, asking what should happen if a woman died intestate survived by a man with whom she had been living for more than 10 years, and a sibling. 83% of the respondents considered that the cohabitant should have a share in the estate.¹⁰ The Report also noted that a few of those responding to the Working Paper had argued that cohabitants should be included in the intestacy rules.
- 4.6 However, the 1989 Report recommended that no such change should be made. It was considered that doing so would sacrifice the simplicity and clarity of the intestacy rules, require complex provisions to determine how to divide property between a cohabitant and others,¹¹ and potentially increase costs and delay the administration of estates due to disputes about the identification of a cohabitant.¹²
- 4.7 When the 1989 Report was produced, neither the intestacy rules nor the law on family provision included specific provisions for cohabitants as such. Cohabitants could claim under the Inheritance (Provision for Family and Dependants) Act 1975 (the “1975 Act”) only if they also qualified as dependants. This was problematic: the courts took the view that an applicant could only claim to have been dependent on the deceased if, when all contributions made by the deceased and the applicant (whether or not under a contract) had been balanced, the deceased’s contributions were greater. This would prevent a claim if the cohabiting relationship had involved equal contributions and mutual dependency.¹³
- 4.8 Although it rejected reform of the intestacy rules to take account of cohabitants, the 1989 Report did recommend that cohabitants should be included as a separate category of applicant under the 1975 Act without the need to show dependence; this recommendation was implemented by the Law Reform (Succession) Act 1995. In 1989 it would have been difficult to propose including

⁷ Family Law: Distribution on Intestacy (1989) Law Com No 187. Despite its title, the Report also made recommendations in relation to the family provision legislation.

⁸ Cohabitation: The Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

⁹ Distribution on Intestacy (1988) Law Commission Working Paper No 108; Cohabitation: The Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179.

¹⁰ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 58, n 92 and Appendix C, Table 13. 49% of respondents considered that the cohabitant should inherit everything, 26% that the cohabitant should receive a fixed share, and 8% a fixed amount (with the balance in each case passing to the sibling). Of the 26% who preferred a fixed share, 44% nominated 50%, and 48% nominated 75%; of the 8% who would have awarded the cohabitant a fixed amount, 94% agreed with a figure of £75,000.

¹¹ In particular, a surviving spouse.

¹² Family Law: Distribution on Intestacy (1989) Law Com No 187, para 58.

¹³ See paragraph 2.85 above.

cohabitants, in their own right, not only in the family provision legislation but also in the intestacy rules. Twenty years later, the legal landscape has changed.

The Cohabitation Report

- 4.9 The Cohabitation Report was produced in the context of a project examining “the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death”.¹⁴ The focus of that project was on financial relief between cohabiting couples on separation, due to the lack of any legal rules specifically designed for those circumstances.
- 4.10 The Cohabitation Report recommended a new scheme for financial relief for separating cohabitants. This would enable an eligible cohabitant to apply for relief following separation on the basis that the respondent had retained a benefit, or the applicant had suffered an economic disadvantage, as a result of qualifying contributions made by the applicant.¹⁵ In addition, the Cohabitation Report recommended limited amendments to the family provision legislation, which were consequential on the proposals for financial relief on separation.¹⁶
- 4.11 The Cohabitation Report also considered whether the intestacy rules should be reformed to include cohabitants. The Report, and the Consultation Paper which preceded it, acknowledged various factors in favour of this change.¹⁷ Surveys continued to show considerable public support for such reform, and there was concern that the widespread assumption that cohabitants inherit as a matter of course on their partner’s death might cause many to fail to make a will in favour of their cohabitant. It was also considered that an automatic right of inheritance under the intestacy rules would reflect the likely wishes of the deceased.
- 4.12 Without an entitlement under the intestacy rules, a cohabitant may have no option but to rely on the 1975 Act. The Cohabitation Report noted the significant emotional and financial costs that can result from a family provision application (particularly because any children would have to be separately represented) even if the matter is eventually settled.
- 4.13 However, the Cohabitation Report did not recommend any change to the intestacy rules, taking the view that any such development should only take place within the context of a wider review of the law in this area. It concluded that:

¹⁴ Ninth Programme of Law Reform (2005) Law Com No 293, para 3.6.

¹⁵ See Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 4.32 to 4.42, and generally Parts 3 and 4; see also para 2.94, recommending that the scheme should be of general application but subject to the parties’ ability to disapply the statutory scheme by an opt-out agreement.

¹⁶ Above, paras 6.11 to 6.49.

¹⁷ See Cohabitation: The Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179, paras 8.5 to 8.9, and Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 6.5.

Any change in favour of cohabitants would require an appreciation of the overall effect on the intestacy rules as they affect other members of the deceased's family. We consider that any such assessment should be made in the context of a comprehensive review of intestacy.¹⁸

The present project offers that opportunity for reconsideration.

THE INTESTACY RULES

The case for reform

- 4.14 A number of factors point to the need to reconsider the reform of the intestacy rules to include cohabitants.

Effect of the current law on interdependent cohabiting relationships

- 4.15 The current rules are creating too many hard cases, and the number is set to rise as cohabitation becomes more prevalent. At present, if a cohabitant dies intestate then a surviving partner receives nothing unless an award is made following an application under the 1975 Act. This usually involves family members and even the cohabitant's own children, who may need to be separately represented. The financial costs are likely to be heavy, but the emotional costs may be equally significant, if not more so.
- 4.16 Many cohabitations are characterised by the same hallmarks as marriage or civil partnership, although not formally registered. In *Ghaidan v Godin-Mendoza*,¹⁹ such a cohabiting relationship was described in terms of an "inter-dependent couple relationship ... the sense of belonging to one another which is the essence of being a couple ... the stability and permanence which go with sharing a home and a life together, with or without ... children".²⁰ This was summarised as "the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial inter-dependence".²¹ In particular, a family unit composed of cohabitants who are bringing up children together is functionally very similar to a married couple, or civil partners, bringing up children together. Many of the reasons for the intestacy rules to make provision for a surviving spouse also apply to those cohabiting relationships which are similar to marriages and civil partnerships – having in common with them qualities such as commitment, permanence, interdependence and sharing.
- 4.17 The argument is sometimes made that the formal step of marriage or civil partnership reliably denotes a commitment to "share worldly goods" with a spouse, justifying a significant award on intestacy. However, in the context of a durable cohabiting relationship, the fact that the couple have not taken this step –

¹⁸ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 6.9.

¹⁹ [2004] UKHL 30, [2004] 2 AC 557. The main issue in the case was whether the words "living as his or her wife or husband" could be interpreted as including same-sex cohabitants, in the light of the Human Rights Act 1998; following the enactment of the Civil Partnership Act 2004 and consequential amendments, such questions no longer arise.

²⁰ Above at [142], by Baroness Hale.

²¹ Above at [139], by Baroness Hale.

which may be for many different reasons – cannot necessarily be taken as showing the absence of such a commitment.²² A considerable proportion of cohabitants do go on to express their commitment in marriage or civil partnership; the fact that a relationship has been cut short by bereavement makes it impossible to judge commitment at that point.

Public opinion

- 4.18 Empirical research continues to demonstrate that the general public favour automatic rights for cohabitants on intestacy. As noted above,²³ strong support was shown at the time of the 1989 Report for a long-term cohabitant to take some of the estate as against the deceased's sibling. Public attitude surveys over the following 20 years have continued to show this support.
- 4.19 In 2000 the British Social Attitudes Survey found that 93% of respondents supported the proposition that, where a cohabiting relationship (without children) had continued for 10 years and the family home was in the name of the deceased, the surviving cohabitant should have the same rights to remain in the family home as a surviving spouse would have had.²⁴ In 2006 the British Social Attitudes Survey contained a similar question, save that the period of cohabitation was reduced to two years and the house was said to have been bought in the deceased's name before the relationship began. Despite those differences, 66% of respondents still agreed that the surviving cohabitant "should have the same financial rights regarding his property as she would if she had been married to the man".²⁵
- 4.20 A survey carried out at the Universities of Sheffield and Cardiff in 2007 found significant support for the view that a surviving cohabitant should automatically take a share of his or her partner's estate.²⁶ Even where the cohabitation was childless and of only two years' duration, 65% of respondents considered that the

²² Research has shown that many couples do not marry simply because they cannot afford the expense of a "proper" wedding: J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, 11; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 70 to 72.

²³ See para 4.5 above.

²⁴ A Barlow, S Duncan, G James and A Park, "Just a piece of paper? Marriage and cohabitation" in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties: The 18th Report* (2001) pp 48 to 50.

²⁵ A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media" in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: The 24th Report* (2008) p 46.

²⁶ C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499. The survey used a total sample of 3,123 respondents, obtained by requiring students to find a small number of respondents each. While not a randomly generated sample, this methodology is a good way of generating enough responses to give a reasonably representative view of public opinion.

survivor should inherit something from the estate, and of those 70% felt that the share should be at least one half.²⁷

- 4.21 In the NatCen focus groups, a number of reasons were discussed as to why unmarried partners, in the right circumstances, should be treated equally in cases of intestacy. One argument was that the intestacy rules had to reflect the fact that fewer people are getting married than used to be the case and fewer were staying married. Another argument was that for some people it was not possible to enter into the formal legal commitment of marriage or civil partnership if, for example, they were in a relationship with somebody their parents did not approve of. In contrast to these more pragmatic arguments, it was also argued that an unmarried partner should be treated equally because relationships do not need or should not need a formal or legal commitment. Members of the groups felt that where couples do not see the need to “sign a piece of paper” or viewed marriage as “only for religious people”, they should not be discriminated against under the intestacy rules.
- 4.22 Despite the range of arguments in favour of treating unmarried partners in the same way as spouses, there was general agreement among focus group participants that an unmarried relationship would have to satisfy certain conditions in order to be considered serious. Some of the participants, including people who were themselves cohabiting, saw cohabitation itself as the most crucial indicator of commitment to a relationship and something equal to or greater than the commitment represented by entering into a marriage or civil partnership. Living together was, however, considered a necessary but not always a sufficient condition for unmarried partners to be treated in the same way as married couples or civil partners. An additional indicator was shared parental responsibility, which was also significant because it made it reasonable to assume that the surviving spouse would also share the deceased’s wishes and obligations towards the children and therefore be willing to fulfil them.²⁸
- 4.23 The continuing strong public support for a cohabitant to receive a share of the deceased’s estate therefore indicates that the current law is failing to reflect generally held views as to how estates should be distributed on intestacy.
- 4.24 Responses to previous Law Commission consultations on this issue, in 1988 and 2006, have revealed some concerns as to whether it is right to give cohabitants the same rights as, or rights similar to those of, married couples.²⁹ Would such a change “undermine marriage”? We think not; rather it would reflect public

²⁷ C Williams, G Potter and G Douglas, “Cohabitation and intestacy: public opinion and law reform” [2008] *Child and Family Law Quarterly* 499, 509 to 512. Note also the recent quantitative survey carried out in Scotland (though in the different context of Scottish law): Scottish Executive Social Research, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (2005). 81% of respondents agreed that a surviving cohabitant should be entitled to claim a share of an estate where the deceased had left a will leaving everything to charity or a spouse. Three-quarters of those agreeing felt in each case that the entitlement should be to a fixed share.

²⁸ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) pp 15 to 16 (available at www.lawcom.gov.uk/intestacy.htm).

²⁹ This issue was discussed in detail in *Cohabitation: the Financial Consequences of Relationship Breakdown* (2007) Law Com No 307, paras 2.36 to 2.58, in the different context of lifetime separation.

acceptance of cohabitation.³⁰ The idea that provision for cohabitants within the intestacy rules might deter any couples from marrying or from forming a civil partnership is implausible. Nor would it be likely to trigger lifetime separation, since anyone unhappy with the result reached on intestacy would have the option of making a will.³¹

- 4.25 The absence of automatic provision under the intestacy rules seems harsh, particularly given that it affects a surviving cohabitant who, ultimately, had no way to ensure that the deceased would make a will in his or her favour. It is not appropriate to penalise the cohabitant for, at most, failing to take advantage of opportunities to persuade the deceased to do so. Even if those opportunities were available, which depends on access to information, the failure to make a will may be due to any of a number of reasons. These include inertia, not wanting to contemplate death, other spending priorities, or perceiving the will-making process as complex and difficult.³²

Public expectations and current behaviour

- 4.26 Although steps have been taken to inform the public about the current law – in particular the LivingTogether Campaign – there are still significant numbers of people who think that cohabitants are, in fact, automatically entitled to inherit on their partner's death.³³ The law can therefore be seen to be out of step with public expectations.
- 4.27 Even where information is received, action may not be taken. A research study was undertaken to assess the impact of the information communicated by the campaign website on the behaviour of those who had accessed it. It was found that, although a significant number of participants intended to take some action

³⁰ See Cohabitation: The Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179, paras 2.46 and 2.47, and Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 1.11 to 1.13.

³¹ Note also that, once a cohabiting relationship has lasted for two years, the Inheritance (Provision for Family and Dependants) Act 1975 already makes possible a claim on the estate. See also K Kiernan, A Barlow and R Merlo, "Cohabitation Law Reform and its Impact on Marriage: Evidence from Australia and Europe" [2007] *International Family Law Journal* 71, suggesting that the introduction of legislation in other jurisdictions giving cohabitants rights to financial provision on relationship breakdown in lifetime has not significantly accelerated the decline in marriage.

³² See, for example, A Barlow, C Burgoyne, J Smithson, *The Living Together Campaign – An Investigation of its impact on legally aware cohabitants* (2007) Ministry of Justice Research Series 5/07, pp 33 to 36. See generally para 1.7 above.

³³ The governmental campaign, intended to raise awareness of the fact that cohabitants do not have the legal rights of married couples, was launched in the summer of 2004. Research has, however, indicated that in 2006 half of the population still believed the "common law marriage myth", and that the proportion of those aware that common law marriage does not exist (38%) was almost exactly the same as it was in 2000, before the campaign took place: A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media" in *British Social Attitudes: The 24th Report* (2008) pp 40 to 42.

on the basis of what they had learned (29% of whom intended to make a will), few actually did.³⁴

- 4.28 Would reform generate a different mismatch with expectations, namely an undermining of the freedom of cohabitants? Cohabitation under the current law is essentially an unregulated relationship; no formalities need to be satisfied and no specific legal regime of rights and obligations attaches to cohabiting relationships as such.³⁵ Concern has been expressed that any legal regime which affects cohabitants without their making a definite decision to “opt in” would adversely affect their autonomy, particularly since they could already decide to make provision for a surviving partner on death by making a will.³⁶
- 4.29 Research has shown that most cohabitants have failed to make or change wills in response to their cohabitation. The 2006 British Social Attitudes Survey found that only 12% of cohabitants had done so.³⁷ Again, the problem (apart from the other reasons we noted above as to why people fail to make wills) may be the “common law marriage myth”. In other words, many cohabitants believe that they have no need to make a will to reach their preferred result of providing for the survivor (without the need for a special claim). It has been suggested that this belief in cohabitants’ rights “may be because, in the absence of knowledge of the actual legal position, [the public] assume this is what the situation logically should be, given the social acceptance of cohabitation”.³⁸ Others have argued that there is a “general inclination to trust in the law to provide fair and appropriate remedies for all family situations”.³⁹ It seems to us unlikely that many cohabitants deliberately fail to make wills because they do not wish their partner to inherit anything.
- 4.30 If the intestacy rules were reformed to give surviving cohabitants an entitlement, the ability to make a will would equally be a satisfactory way of avoiding such a result.⁴⁰ The question is therefore where the balance should be struck: whether

³⁴ A Barlow, C Burgoyne, J Smithson, *The Living Together Campaign – An Investigation of its impact on legally aware cohabitants* (2007) Ministry of Justice Research Series 5/07, pp 20 to 21.

³⁵ Legal rights and obligations may, of course, arise between cohabitants under the general law; for example, a claim to a share in the family home under a constructive trust, or by way of proprietary estoppel.

³⁶ The ability of the surviving cohabitant to make an application under the Inheritance (Provision for Family and Dependents) Act 1975 for provision from the estate already, however, affects that autonomy.

³⁷ A Barlow, C Burgoyne, E Clery and J Smithson, “Cohabitation and the law: myths, money and the media” in *British Social Attitudes: The 24th Report* (2008) p 43. This is a very small increase from the 2000 survey which found that only 10% had done so: A Barlow, S Duncan, G James and A Park, “Just a piece of paper? Marriage and cohabitation” in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties: The 18th Report* (2001) p 45.

³⁸ A Barlow, C Burgoyne, E Clery and J Smithson, “Cohabitation and the law: myths, money and the media” in *British Social Attitudes: The 24th Report* (2008) p 44.

³⁹ A Barlow, S Duncan, G James and A Park, “Just a piece of paper? Marriage and cohabitation” in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) p 46.

⁴⁰ To the extent possible, given the ability of surviving cohabitants to seek financial provision under the Inheritance (Provision for Family and Dependents) Act 1975.

cohabitants should have to make wills in order to make provision for one another, or should be obliged to do so if they do not wish automatic provision to be made (or wish to vary the amount). In view of what we have said about the impact of the current law upon cohabitants who have been in an interdependent relationship with the deceased, we think that the latter is preferable; individuals can opt out by making wills.

Experience in other common law jurisdictions

- 4.31 Several other common law jurisdictions give cohabitants an automatic entitlement to share in a partner's estate on death.⁴¹ We are not aware of any evidence that doing so has led to any significant difficulties. The definition of those eligible to take under these provisions, and the requirements which must be satisfied, vary between jurisdictions. For example, several require that the relationship should have been in existence for at least two (in some cases three) years. These provisions are in many cases well-established; for example, New South Wales has included cohabitants in its intestacy rules since 1985.⁴²

Other relationships

- 4.32 As we have explained, we focus in this Part on cohabitants in the sense of couples who live together. We have discussed the inclusion of such cohabitants in the intestacy rules in the light both of the intimate nature of their relationship and of their sharing a home. But what about other relationships that lack one or other of those factors?
- 4.33 An important category of non-cohabitant couples is those who "live apart together" (commonly referred to as "LATs"). While living arrangements differ widely between these couples, the group is united by the fact that the couples do not share a single residence to the extent necessary to be considered cohabitants.
- 4.34 Such couples may be very close and may consider their relationship to be as stable and committed as that of couples who share one home. Some may in fact spend as much time together as do some spouses or cohabitants, and may be, to a greater or lesser degree, financially interdependent. Many no doubt provide for each other by will. Those that have not done so may be disappointed to find that the survivor has no entitlement under the intestacy rules.⁴³
- 4.35 However, couples who "live apart together" are a very diverse group, even more so than cohabitants. This diversity would make it difficult to find an adequate way

⁴¹ Examples of jurisdictions which give a cohabitant equal treatment with a surviving spouse include: the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Western Australia, Victoria, The Northern Territory, Alberta, British Columbia, Manitoba, Northwest Territory, Saskatchewan and New Zealand.

⁴² On the commencement of the Wills, Probate, and Administration (De Facto Relationships) Amendment Act 1984 (New South Wales).

⁴³ The survivors of such couples cannot currently apply for family provision under section 1(1)(ba) of the Inheritance (Provision for Family and Dependents) Act 1975: see, for example, *Churchill v Roach* [2002] EWHC 3230, [2004] 2 FLR 989 and (on similar wording in the Fatal Accidents Act 1976, s 1(3)(b)) *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517. Both cases involved a "drift towards cohabitation": C Bridge [2005] *Family Law* 535.

of including them in the intestacy rules. It would be difficult to define couples who “live apart together”. The law would have to focus either on the existence of an intimate relationship, or on the proportion of time that the couple spent together, and neither is satisfactory. Whatever the definition, administrators would often face serious practical difficulties in identifying such partners, complicating the administration of many estates.

- 4.36 Aside from the practical problems, the diversity of couples who “live apart together” also makes it difficult to apply to them one of the key justifications for the inclusion of cohabitants in the intestacy rules. In the absence of a shared household we cannot say that, as a group, couples who “live apart together” are likely to be financially interdependent. This undermines the case for including all such relationships within the intestacy rules. Where there is sufficient financial dependency, the survivor of such a couple is already able to bring a claim under the 1975 Act, as a dependant;⁴⁴ and we are making provisional proposals that would make the interpretation of “dependency” rather more generous than it is at present.⁴⁵
- 4.37 We therefore make no proposals for the inclusion of couples who “live apart together” in the intestacy rules. We do not think that the absence of provision for such couples in the intestacy rules is causing significant problems, and we have no evidence of public support for their inclusion. To provide an entitlement on intestacy would cause far greater difficulties than it might solve.
- 4.38 Another group who might be considered in this context are those who share a home but are not, in the usual sense of the word, a couple; for example siblings or friends. We excluded at the outset of this Part blood relatives and flatmates as well as those who are living in a commercial relationship such as a landlord and tenant.
- 4.39 Again, such relationships take a wide variety of forms, and we do not think that they should be included within the intestacy rules. The reasons why friends and family might choose to live together range from love to convenience to accident. The intestacy rules already recognise that in some circumstances blood relatives should inherit from one another. For example, where elderly sisters who have not married or had children live together, each will take at least a share of the other’s estate under the current intestacy rules (the proportion depending upon how many other siblings there may be). In such a case, therefore, the intestacy rules are already likely to provide a satisfactory outcome. The law will not reach that result in all cases: whether or not that is appropriate depends on the nature of the relationship of the home-sharers. It would usually be inappropriate for, say, two young professional people living together for convenience to be entitled on each other’s intestacy, displacing other family members, however close friends they were. Cases are so dependent on their individual facts that it would not be possible to design a default intestacy rule capable of adequately differentiating between them.
- 4.40 We consider that the key justification for provision on intestacy for home-sharers who are not cohabitants, in the sense in which we use that word, is dependency.

⁴⁴ As in *Churchill v Roach* [2002] EWHC 3230, [2004] 2 FLR 989.

⁴⁵ See paras 6.19 to 6.31 below.

The law responds already, in the family provision legislation, to cases of financial dependency. Just as we noted for those who “live apart together”, we can say that the majority of cases that are likely to be considered deserving will be picked up in this category. To try to extend the intestacy rules to include a wider range of home-sharers would cause far more problems than it would potentially solve.

Implementing reform for cohabitants

- 4.41 Although the case for reform may be recognised in principle, it is important to establish that it would be practicable to implement it. It has been suggested that including cohabitants in the intestacy rules would cause various difficulties in practice.

Administration of estates

- 4.42 The 1989 Report expressed the view that including cohabitants in the default intestacy rules would “increase the costs and cause delays in the administration of estates because disputes could easily arise as to whether a particular individual was a cohabitant”.⁴⁶ Personal representatives can apply the existing intestacy rules with certainty: whether a certain person is, or is not, within a given category of relatives can be proved by looking at birth, death and marriage or civil partnership certificates. Termination of a marriage or civil partnership by divorce or dissolution can also be proved by official records. Cohabitation, however, cannot be proved by producing a certificate. In order to assess whether a given person is a cohabitant it is necessary to apply a test which in some way relates to the quality of the relationship.
- 4.43 Including cohabitants in the intestacy rules might therefore increase the burden on some administrators, because they would need to determine whether anyone met the statutory test for a cohabitant in relation to the deceased. If the administrators were to distribute the estate without regard to an eligible cohabitant, they could be personally liable to the cohabitant for the incorrect distribution. They might seek to recover property from those who had in fact received the estate, but would not necessarily succeed in doing so.
- 4.44 We do not, of course, want to impose onerous duties on administrators, the majority of whom are not likely to have legal expertise. However, potential difficulties in the administration of estates caused by including cohabitants in the intestacy rules can be overstated. In most cases, it will be quite clear to the administrators – usually family members – whether or not the deceased was living with a cohabitant, provided that the definition of a cohabitant is sensibly framed. Indeed this may be much clearer than the existence of someone already within the rules, such as an estranged child or a remote relative. Such relatives may be traced (often by specialists, and at a cost) but if the administrators are not aware of the need to do so, the estate may be incorrectly distributed.
- 4.45 Cohabitants of two years’ standing can already apply under the 1975 Act, and accordingly where the deceased left a cohabitant personal representatives already have to take into account the possibility of a claim. They may have to negotiate with a cohabitant, and they may have to delay the administration of an estate pending the resolution of a family provision claim (bearing in mind the time

⁴⁶ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 58.

limit) and perhaps even a claim to part-ownership of the family home on the basis of a constructive trust or proprietary estoppel. So it is not straightforward even under the current law to finalise the administration of an estate if the deceased had been in a cohabiting relationship, or a relationship where there is uncertainty as to whether the requirements for cohabitation under the 1975 Act were satisfied.

- 4.46 Risks to administrators can be minimised if proper account is taken of them when formulating an eligibility test for cohabitants. For example, if it is a requirement that the cohabitation should have been continuing up to the death, the administrators are less likely to be unaware of the cohabitant's existence. There are already provisions which protect personal representatives against a claim from a beneficiary under the intestacy rules whose existence was not known to them. In particular, they may distribute the estate without regard to the claims of which they have no notice, provided that they have first placed newspaper advertisements as prescribed by statute.⁴⁷ A beneficiary who has been overlooked would then be able to recover from those who have received distributions from the estate, but not from the personal representatives in their own capacity. If there are concerns about the position of administrators, those concerns should be met by devising further protections for them rather than by refusing to give cohabitants any entitlement under the intestacy rules.

The definition of a surviving cohabitant

- 4.47 One of the major practical concerns about this proposed reform is the problem of devising a suitable test to identify entitled cohabitants, given the diverse range of relationships encompassed within the concept of cohabitation. What is needed is a test that is straightforward to apply and captures the core of the group we are seeking to include.
- 4.48 There are already a number of statutory provisions which seek to identify surviving cohabitants and apply special provisions to them. The 1975 Act is, of course, particularly relevant in this context; the Fatal Accidents Act 1976 also contains similar wording.⁴⁸ As we have already noted, the test for eligibility as a cohabitant under the 1975 Act is whether the applicant has, for the whole of the two years prior to the death, lived in the same household as the deceased, and as the spouse or civil partner of the deceased.⁴⁹ The courts have indicated that the test is whether they would be said to be living together as spouses or civil partners "in the opinion of a reasonable person with normal perceptions",⁵⁰ without allowing any particular factor (such as whether they had a sexual relationship) to predominate.

⁴⁷ Trustee Act 1925, s 27.

⁴⁸ Fatal Accidents Act 1976, s 1(3)(b), which includes within the definition of "dependant": "any person who (i) was living with the deceased in the same household immediately before the date of the death; and (ii) had been living with the deceased in the same household for at least two years before that date; and (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased".

⁴⁹ Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1A) and (1B); see paras 2.69 to 2.73 above.

⁵⁰ *Re Watson* [1999] 1 FLR 878, 883, by Neuberger J.

4.49 The 1975 Act, in common with many other statutory formulations in England and Wales, describes cohabitation in terms of marriage; a cohabiting relationship is identified as a relationship which is proceeding as if it were a marriage or civil partnership, without being registered as such. The Cohabitation Report criticised the use of the analogy with marriage or civil partnership,⁵¹ principally because such wording could contribute to the misconception that cohabitants are treated for some legal purposes as though they were married or in a civil partnership. There was concern to establish a definition readily understandable by the general public which would not be confused with the status of marriage or civil partnership. In addition, the Report recognised that it is counter-intuitive to define cohabitants, who by definition have not formalised their relationship, in terms of marriage or civil partnership.

4.50 In those common law jurisdictions which make provision for cohabitants to inherit on intestacy, various definitions are used. One of the most popular is that of living together as a couple, sometimes with the added requirement that this should be on a “genuine domestic basis”. In New Zealand, a “*de facto* relationship” for the purposes of intestacy is defined as a relationship between two persons, both aged 18 or over, “who live together as a couple”, and “are not married to, or in a civil union with, one another”,⁵² there is a similar definition of “*de facto* relationship” in the New South Wales legislation.⁵³ The added “genuine domestic basis” requirement is found in, for example, the Australian Capital Territory, Victoria, and Queensland.⁵⁴ In some other jurisdictions, the definitions used rely on an analogy with marriage. For example, in Western Australia a “*de facto* partnership” is defined as existing between two people “who live together in a marriage-like relationship”.⁵⁵

4.51 The majority of these jurisdictions also provide a list of factors to be taken into account in determining whether the relationship fulfils the statutory test, in all the circumstances of the case. A typical example is the list in the New Zealand legislation, which identifies the following:

- (1) the duration of the relationship;
- (2) the nature and extent of common residence;
- (3) whether or not a sexual relationship exists;
- (4) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

⁵¹ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 3.4 to 3.13.

⁵² Property (Relationships) Act 1976, s 2D(1) (New Zealand).

⁵³ Property (Relationships) Act 1984, s 4(1) (New South Wales).

⁵⁴ Legislation Act 2001, s 169(2) (Australian Capital Territory); Administration and Probate Act 1958, s 3(1) (Victoria); Succession Act 1981, s 5AA(1) (Queensland) read with Acts Interpretation Act 1954, s 32DA(1) (Queensland).

⁵⁵ Interpretation Act 1984, s 13A(1) (Western Australia). Other examples include the Intestate Succession Act, CCSM, c 185, s 1(1) (Manitoba), referring to a “common-law partner” as “a person who, not being married to the intestate, cohabited with him or her in a conjugal relationship”; and section 2 of the Intestate Succession Act 1996 (Saskatchewan), referring to a person who “cohabited with the intestate as spouses”.

- (5) the ownership, use, and acquisition of property;
 - (6) the degree of mutual commitment to a shared life;
 - (7) the care and support of children;
 - (8) the performance of household duties; and
 - (9) the reputation and public aspects of the relationship.⁵⁶
- 4.52 The legislation specifically provides that a finding in respect of any of these matters is not to be regarded as necessary, and that “a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate in the circumstances of the case”.⁵⁷
- 4.53 Bearing these comparative examples in mind, the Cohabitation Report recommended a new test: whether the parties are “living as a couple in a joint household” and are neither married to each other nor civil partners under the law of England and Wales. We expressed the view in the Report that the definition of cohabitation in the 1975 Act should be brought into line with that formulation, for the sake of consistency and clarity and without any intention to make substantive changes to the category of those eligible to apply under the 1975 Act.⁵⁸
- 4.54 We remain of the view that such a test is more appropriate than adopting, for the purpose of the intestacy rules, a version of the test currently found in the 1975 Act, particularly in view of the problems with the “marriage analogy”.
- 4.55 The Cohabitation Report also considered whether to provide a statutory checklist of factors to be taken into account in determining whether the test was fulfilled, following jurisdictions such as New Zealand.⁵⁹ The Report concluded that, although a checklist could serve as a useful reminder of some of the issues relevant to answering the factual question posed by the definition, it should not form part of that definition itself. The courts currently identify cohabitants without the assistance of such a checklist. We also noted some consultees’ concerns that producing such a checklist could lead to a “box-ticking mentality” and confusion about the status and importance of the factors listed.
- 4.56 The definition we prefer therefore rests upon the ideas of “a couple” and “joint household”. The term “couple” is readily understood to connote an intimate relationship and to set such couples apart from flatmates, blood relatives and those in a commercial relationship. The sharing of a joint household, like the length of a relationship, is an important indication that the couple’s relationship has the quality of interdependence which we have already identified as a central concept in cohabitation. It is the subject of well-established interpretation by the courts. Even where the parties own more than one home, the courts have focused on the meaning of the word “household”, considering whether the parties

⁵⁶ Property (Relationships) Act 1976, s 2D(2) (New Zealand).

⁵⁷ Above, s 2D(3).

⁵⁸ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 3.13 and 6.15.

⁵⁹ Above, paras 3.14 to 3.22.

have set up a joint establishment or whether they have been maintaining separate domestic economies.⁶⁰ Temporary absences in hospital, or abroad, are dealt with in the context of the relationship as a whole and judges are applying a common sense approach to the issue of whether the relationship is continuing on the same basis as before.⁶¹

- 4.57 As part of the cohabitation project we also considered the age at which parties should be eligible as cohabitants, and whether they would be disqualified on the basis of relationship within the prohibited degrees. We concluded in the Cohabitation Report that couples between whom sexual activity would constitute an offence (on the basis of age or relationship) should be excluded from the scheme.⁶² We would take a similar approach to the eligibility of cohabitants under any reformed intestacy rules.

Conclusions

- 4.58 We believe that it would be possible on a practical level for cohabitants to be included in the intestacy rules, and that the definition which we have discussed above would be sufficiently clear to be applied with certainty in the majority of cases. More importantly, we have concluded that the current law causes hardship for cohabitants and is out of line with public opinion, as well as giving rise to unnecessary litigation under the 1975 Act which could be avoided if cohabitants had an entitlement on intestacy.

- 4.59 **We provisionally propose that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions to be discussed below.**

- 4.60 **We provisionally propose that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased:**

- (1) **was living with the deceased as a couple in a joint household; and**
- (2) **was neither married to nor a civil partner of the deceased.**

- 4.61 We welcome consultees' views as to whether further provision needs to be made to protect personal representatives who distribute the estate without having identified a cohabitant.

What should the cohabitant receive?

- 4.62 Any entitlement of a cohabitant on intestacy must be determined by the application of a rule; that is the case with all entitlements on intestacy. The family provision legislation is available to modify the results of a particular rule in an appropriate case. The rule proposed may work injustice in some cases, for

⁶⁰ For a recent example see *Lindop v Agus* [2009] EWHC 1795 (Ch).

⁶¹ *Re Watson* [1999] 1 FLR 878. In *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 FLR 918 the relationship was found to have been continuing even though the applicant had left the deceased three months before the death. This was however a borderline case; the court accepted that she would have gone back to the deceased as soon as he asked her to, and therefore the separation was a "transitory interruption", not an irretrievable breakdown.

⁶² Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 3.67.

example by not recognising dependency that has arisen over a very short period of cohabitation; but that can be taken into account in the exercise of the court's discretion if the cohabitant is able to apply as a dependant for financial provision from the estate.⁶³ We would not suggest introducing the idea of a discretionary entitlement on intestacy, along the lines recommended by the Scottish Law Commission.⁶⁴ That recommendation is made in a context where there is no equivalent of the 1975 Act. Here, with discretionary provision already available, the issue is different: should a cohabitant receive the same as a spouse on intestacy and, if not, what formula should determine the cohabitant's entitlement?

- 4.63 The major reason in principle for including cohabitants as beneficiaries under the intestacy rules is found in the functional equivalence of some cohabiting relationships to marriage or civil partnership. This points to the spousal entitlement as the correct starting point for that of the cohabitant. We then have to ask whether the cohabitant should in any circumstances receive the same as a spouse, or should receive less. We also have to think about what the spousal entitlement comprises – in particular, personal chattels, which raise different concerns and possible practical difficulties, and are considered separately below.⁶⁵ And we must keep in mind that, whatever entitlement is thought right for a cohabitant on intestacy, it can be reduced by a claim for family provision made by another family member or dependant.
- 4.64 The majority of other common law jurisdictions which give cohabitants rights on intestacy award them the same share as a spouse.⁶⁶ Is that the right approach for England and Wales? We consider that the essential functional similarity between marriage or civil partnership and an interdependent cohabiting relationship should be recognised in the intestacy rules. We therefore take the view that it should be possible for a cohabitant ultimately to become entitled to the same share of a partner's estate as a spouse would receive on intestacy.
- 4.65 But we use the word "ultimately". A cohabitation of a few days should not give rise to an entitlement on intestacy. If the cohabitants have also had a child together, then this is a strong indication that the quality of their relationship has fundamentally changed, and this may be sufficient in itself. If they have not, we have to ask whether there should be a time threshold before any entitlement is reached – a minimum duration requirement – and then whether there should be a graduated entitlement beyond that minimum.

⁶³ We discuss and make provisional proposals in relation to family provision claims by dependants at paras 6.10 to 6.31 below.

⁶⁴ Report on Succession (2009) Scot Law Com No 215, Part 4; Discussion Paper on Succession (2007) Scottish Law Commission Discussion Paper No 136. See paras 1.22 to 1.24 above.

⁶⁵ See paras 4.89 to 4.96 below.

⁶⁶ Indeed, several simply include cohabitants within the definition of a "spouse": for example, Queensland (Succession Act 1981, s 5AA(1)), the Northwest Territories (Intestate Succession Act 1988, s 2) and British Columbia (Estate Administration Act 1996, s 1).

Cohabitants who have had a child together

- 4.66 We think that a cohabitant should be entitled to a share of the estate under the intestacy rules if the cohabitant and the deceased had a child together.⁶⁷ This mirrors the conclusion reached in the Cohabitation Report, in the context of entitlement to remedies on lifetime separation.⁶⁸ The applicant would still need to show that at the date of death they were living as a couple in a joint household. But we consider that the cohabitant should not be required to show that a particular duration requirement was satisfied.
- 4.67 Becoming parents of a child together typically demonstrates or engenders the relationship of commitment and interdependence which we think should be recognised in the intestacy rules. The functional similarities between family units represented by cohabitants with children on the one hand, and spouses with children on the other, persuades us that a cohabitant in this situation should receive the full spousal entitlement.⁶⁹
- 4.68 **We provisionally propose that, if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation:**
- (1) **there should be no minimum duration requirement for an entitlement on intestacy for the surviving cohabitant; and**
 - (2) **the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse.**

Cohabitants who have not had a child together

A minimum duration requirement?

- 4.69 We now consider whether a minimum duration requirement should apply to a cohabitant who did not have a child with the deceased, and if so, what it should be. It may be misleading to look to the duration of a cohabitation as a guide to the quality or stability of the relationship in any context, but particularly where a relationship has been ended by death. It is impossible to know how the relationship would have proceeded; it might have ended shortly afterwards, or continued for several more years. Indeed, a cohabiting couple can be in a

⁶⁷ We mean by that cases where the cohabitants were both legally the parents of the child (including becoming parents by adoption, assisted reproduction or pursuant to a parental order following a surrogacy arrangement), and we also include cases in which the pregnancy was continuing at the time of the death.

⁶⁸ See Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 3.26 to 3.31, and Cohabitation: The Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179, paras 9.62 to 9.67.

⁶⁹ See para 4.16 above.

committed and healthy relationship with shared responsibilities after a short amount of time.⁷⁰

4.70 Nevertheless, the duration of the relationship remains instinctively one of the best ways to assess its quality and stability. It is already an important factor in current law; the 1975 Act and the Fatal Accidents Act 1976 prescribe a two-year period immediately before the death during which the couple must have been living in the same household as spouses or civil partners.

4.71 This may be because a duration test helps to assess the time after which interdependence – and not necessarily purely financial interdependence – in the relationship is typical. On an assessment of public opinion in the context of financial provision in the event of cohabitants' separation in lifetime, researchers have commented:

It could be concluded that when cohabitations become more 'marriage-like', with partners living together for a long time, having children and sharing earning and caring responsibilities between them or prioritising one partner's career, the public are much more likely to feel they should receive the same level of treatment as that given to partners separating from marriage.⁷¹

4.72 In addition, the lapse of time may be linked to an expectation that the relationship will have acquired some acceptance of its permanence in the partner's wider family, making the cohabitant no longer an "outsider".

4.73 The survey carried out at the Universities of Sheffield and Cardiff asked members of the public to comment on intestacy entitlements in three different scenarios.⁷² One scenario involved a two-year childless cohabitation, the second a 13-year cohabitation with children aged eight and six where the surviving cohabitant had received some financial disadvantage from taking on child care commitments, and the third a 30-year cohabitation with two grown-up, independent children. 65.5% of respondents thought that the survivor should receive something from the estate in the first scenario (rising to 81.5% if the couple had had a child together), 83.5% in the second scenario, and 88.2% in the third. As to the share which should be received in each scenario, in the first 27.7% of those who considered that the cohabitant should receive something thought that this should amount to the whole estate, rising to 39.6% in the second and 45.3% in the third scenario.⁷³

⁷⁰ These points were recognised by participants in the NatCen Survey: National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) pp 15 to 16. Given the potential limitations of the use of a minimum time period, other suggested indicators of commitment were sharing joint accounts or investments, buying a house and paying a mortgage together or other shared responsibilities.

⁷¹ A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media" in *British Social Attitudes: The 24th Report* (2008) p 46.

⁷² See para 4.20 above.

⁷³ C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499, 508 to 517.

- 4.74 Participants in the NatCen focus groups also raised the duration of the relationship as an important factor where a couple did not have children together. Suggestions for a suitable minimum period ranged initially from one year to ten years, though through discussion this range tended to narrow, with one year being seen as insufficient and seven to ten years excessive. There were, however, concerns that it would be difficult to settle on a particular length of time and to measure, and prove, the point at which the period began. Another concern was that any particular time period would be arbitrary and might leave people ineligible by a matter of weeks or months.⁷⁴
- 4.75 Using the length of cohabitation as a qualifying factor could potentially lead to difficulties of proof as to the period for which the survivor and the deceased actually lived as a couple in a joint household. This is, however, already an issue for claims under the 1975 Act; we have not seen indications that it is causing major difficulties. Fixing a period does have the disadvantage that it creates a “cut-off point”. The survivor of a cohabitation which fell short by a matter of weeks may feel arbitrarily excluded. Exclusion under the intestacy rules might not, however, wholly prevent a cohabitant from benefiting under the estate, in cases where he or she was eligible to apply under the 1975 Act.⁷⁵
- 4.76 Therefore, we do not favour the approach taken by some common law jurisdictions, which do not state any minimum duration but require consideration of the length of the relationship in determining whether the survivor meets the threshold requirement.⁷⁶ We prefer the certainty of a fixed period, and we note that common law jurisdictions which use a fixed period have generally set it at either two or three years.⁷⁷ We have noted that some common law jurisdictions allow that period to be satisfied by adding together more than one period of cohabitation in a defined period. We prefer, however, the established approach of the 1975 Act which requires a continuous period of cohabitation, so that if the couple stopped living together at any time and then resumed cohabitation, only the most recent period of cohabitation counts.
- 4.77 In England and Wales, two years is the period chosen for a surviving cohabitant to be eligible to apply for family provision under the 1975 Act. This only qualifies the survivor to bring the claim; in deciding whether reasonable financial provision was made and considering the making of any award, the court will again take into account the duration of the relationship.⁷⁸ The Fatal Accidents Act 1976 also sets a two-year duration requirement before a cohabitant is able to bring a claim.

⁷⁴ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) pp 15 to 16.

⁷⁵ As a cohabitant or as a dependant; for discussion and provisional proposals, see paras 4.112 to 4.124 and 6.10 to 6.31 below.

⁷⁶ For example, under the New South Wales legislation the duration of the relationship is included in the list of factors to be considered in determining whether the applicant was in a “de facto relationship” with the deceased: Property (Relationships) Act 1984, s 4(2)(a) (New South Wales).

⁷⁷ In South Australia, noted at para 3.45, n 55 of *Cohabitation: the Financial Consequences of Relationship Breakdown* (2007) Law Com No 307 as adopting a five-year requirement for entitlement on intestacy, recent reform has effected a reduction to three years: Statutes Amendment (Domestic Partners) Act 2006 (South Australia) amending the Administration and Probate Act 1919 (South Australia).

⁷⁸ Inheritance (Provision for Family and Dependents) Act 1975, s 3(2A).

However, in assessing damages, the length of the cohabitation itself is not directly relevant.⁷⁹ The only factor expressly laid down for consideration by the statute is the fact that the cohabitant “had no enforceable right to financial support by the deceased as a result of their living together”.⁸⁰

4.78 The Cohabitation Report recommended that cohabitants who did not have children together should be eligible to claim financial provision after living together for a minimum period set in a range of two to five years.⁸¹ This, again, would be a threshold requirement for a claim under the recommended discretionary scheme of financial provision and not an automatic entitlement. However, even in the context of the intestacy rules – where a duration requirement would be both necessary and sufficient to obtain a share of the estate – we do not consider that the minimum period should be set outside the range of two to five years.

4.79 **We provisionally propose that any duration requirement should be fulfilled only by a continuous period of cohabitation.**

4.80 **We provisionally propose that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse, if the cohabitation had continued for at least five years before the death.**

4.81 We now go on to consider whether a lesser share should be given after a shorter period.

A graduated entitlement?

4.82 There is a perception, demonstrated by the public attitude surveys to which we have referred, that the increasing length of a cohabitation is important. One response to that perception would be to provide for cohabitants to have no entitlement at all before five years has elapsed; and consultees may favour that approach. A different response, and an answer to any misgivings about the appropriateness of a full spousal entitlement after a period of cohabitation of less than five years, would be a graduated approach. The researchers from the Universities of Sheffield and Cardiff, for example, proposed a scheme giving the survivor different benefits according to the length of the cohabitation.⁸²

4.83 A graduated approach can be more or less sophisticated. For example, a relatively simple two-step scheme could be devised: say, for a cohabitation of at

⁷⁹ It may be indirectly relevant, perhaps as indicating how likely it is that the couple might later have separated.

⁸⁰ Fatal Accidents Act 1976, s 3(4).

⁸¹ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 3.63; for discussion see paras 3.42 to 3.45.

⁸² C Williams, G Potter and G Douglas, “Cohabitation and intestacy: public opinion and law reform” [2008] *Child and Family Law Quarterly* 499, 519 to 521. On the basis of the then current lower statutory legacy of £125,000, the researchers proposed that if the cohabitation had lasted for 2 to 5 years, the survivor would receive £50,000; 5 to 10 years, £75,000; or 10 years or more, the same as the spouse would have received. The researchers did not mention the spouse’s entitlement to share in the residuary estate or to receive personal chattels.

least two years, a proportion of the amount which a spouse would have received from the estate, with an increase to the full amount at five years. A more finely graduated system might increase the survivor's entitlement year on year, starting at a certain percentage at two years and reaching 100% at five years.

- 4.84 Any sort of graduated approach would sacrifice the simplicity of the all-or-nothing approach, and to our knowledge has not been adopted in any other common law jurisdiction.⁸³ However, we think that a two-stage approach using periods of two and five years would still be relatively simple to understand and administer. Graduating the entitlement in this way responds to the greater level of commitment and interdependence which, it is reasonable to assume, has accrued in a longer relationship. It could be argued that disputes may arise over relationships of around two years, which would not occur if there were a single five year requirement. However, such a distinction would soften potential harsh effects on survivors of relationships which fell short of the five year requirement. We take the view that a cohabitant of between two and five years should be entitled to 50% of the amount which a spouse would have received from that estate.⁸⁴
- 4.85 **We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.**
- 4.86 A wide range of considerations are potentially relevant to the amount which a cohabitant should receive under the intestacy rules, and the length of any minimum duration requirement. We will be very interested to hear consultees' views on these proposals and in particular the reasons why they agree or disagree with the periods of time and amounts which we have proposed. We also expect that the results of the statistically representative Nuffield survey will help us in formulating recommendations on this point.
- 4.87 However, there are two further points that we should address at this stage. The first concerns the situation where the deceased left a cohabitant but no other relatives. Entitling the cohabitant to half of the amount which a spouse would have received from the estate would then result in the rest of the estate being *bona vacantia*.⁸⁵ In that event, we think that the cohabitant should take the entire estate. The alternative is likely to be that the Treasury Solicitor or the Duchy is put to expense in administering the estate and will make a discretionary award in favour of the cohabitant.

⁸³ However, a similar idea is seen in Victoria, under section 51A of the Administration and Probate Act 1958, where the deceased is survived by both a spouse and a domestic partner; the distribution of the spousal entitlement then depends on the length of the cohabitation. The domestic partner's share is one-third if the cohabitation lasted for between two and four years; two-thirds if between five and six years; and the whole of the spousal entitlement if over six years.

⁸⁴ But see paras 4.89 to 4.96 below regarding entitlement to personal chattels.

⁸⁵ See paras 6.69 to 6.77 below.

4.88 The second point relates to the statutory legacy. We have made a number of suggestions about the spouse's entitlement under reformed intestacy rules, and the practical effects of this provisional proposal for cohabitants of between two and five years would depend on our conclusions for spouses. However, even if we conclude that a statutory legacy should be retained for spouses, we do not propose to introduce any equivalent minimum entitlement for such cohabitants. To do so would significantly undermine the concept of a graduated entitlement, because of the typical size of an intestate estate. If, for example, cohabitants were entitled to the first £125,000 of each estate (half the current lower level of statutory legacy for spouses) the result would be that in most cases the cohabitant would take the entire estate rather than a proportion of it: on the figures produced in our work with HM Revenue & Customs and the Probate Service,⁸⁶ more than 70% of intestate estates are worth less than £125,000.⁸⁷

Personal chattels

4.89 The spousal entitlement under the intestacy rules includes the right to receive the deceased's personal chattels outright. As noted above, these raise special considerations for the cohabitant's share on intestacy.⁸⁸

4.90 Some chattels may be particularly valuable, or hold special family significance, and enabling a cohabitant to take them as part of his or her entitlement on intestacy might therefore disappoint other relatives. On the other hand, many chattels will be intrinsic to the household and lifestyle which the cohabitant shared with the deceased, which suggests that they should pass to the cohabitant.⁸⁹ Another factor to bear in mind is that it may well be difficult to establish the legal ownership of chattels as between the cohabitant and the deceased.

4.91 We think that after five years' cohabitation it would be appropriate for the surviving cohabitant to receive the same entitlement as a spouse, and that this should include all of the deceased's personal chattels. The intermingling of the couple's lives is likely to mean that that is the simplest solution as well as the most appropriate. The same should be the case where the cohabitants have a child together.

4.92 However, we are troubled by the idea that a cohabitant should automatically receive the deceased's personal chattels after less than five years. Others, including perhaps any children from the deceased's other relationships, may feel that they should be entitled to those chattels. In view of the potential emotional significance of many items we are not convinced that those claims should be automatically overridden after a shorter cohabitation.

⁸⁶ Detailed findings of our work with HMRC are set out at Appendix C.

⁸⁷ If an entitlement to the first £125,000 applied only in the same circumstances as the spousal statutory legacy, it could also generate perverse outcomes. For example, in an estate of less than £125,000 the cohabitant would inherit the whole estate if the deceased left other relatives and the statutory legacy applied, but only half of the amount if the deceased did not. That would be counter-intuitive; we have argued that spouses should receive a greater amount where the deceased did not leave relatives.

⁸⁸ See para 4.63 above.

⁸⁹ See, in the context of the spousal entitlement to personal chattels, para 3.113 above.

- 4.93 Accordingly we take the view that where a couple have cohabited for between two and five years, and did not have children together, the survivor should be entitled to half what a surviving spouse would have received, excluding the deceased's personal chattels. However, because chattels such as furniture are in practice shared and may include, for example, the furniture in the couple's home, we think that the surviving cohabitant should be able to choose to take personal chattels up to the value of his or her entitlement.
- 4.94 We are not attracted to the idea of giving a cohabitant an entitlement to a proportion of personal chattels. The proposal we make has the advantage of giving the cohabitant the incentive to choose those chattels which really matter to him or her, and to leave to the rest of the family items more appropriate to them.⁹⁰
- 4.95 **We provisionally propose that if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.**
- 4.96 **We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.**

Cohabitants and other relationships

- 4.97 The discussion above has proceeded on the basis that the cohabitant should occupy a place similar to that of the spouse in the intestacy rules. What should happen where the deceased leaves both a spouse and a cohabitant, or more than one cohabitant?

Cohabitant and spouse

- 4.98 The fact that the deceased was still party to a subsisting marriage or civil partnership at the time of the death is likely to make it harder for a second partner to show that the deceased was also living as a couple with that partner in a joint household. However, clearly there are cases where one or both cohabitants are still party to a marriage or civil partnership with someone else, for various reasons. These instances may be reduced if the period of cohabitation required is placed at the upper end of the range of two to five years but will not be eliminated (for example because the survivor of a couple who have been together for a shorter period will be eligible if they had a child together). If a decree of judicial separation or separation order has been made in relation to that marriage or civil

⁹⁰ It does not, of course, eliminate the possibility of a spiteful appropriation, perhaps of things that are precious to the children; but such behaviour is not encouraged, and cannot be prevented, by the intestacy rules.

partnership, then the surviving spouse cannot inherit under the intestacy rules; but such orders are rare.⁹¹

- 4.99 Some jurisdictions award the spousal entitlement to a cohabitant in such circumstances only where further conditions are satisfied. In New South Wales, for example, an unmarried partner takes the spousal entitlement provided that the partner has qualified as a *de facto* spouse for two years or more.⁹² In the Northern Territory an unmarried partner will also receive the spousal entitlement to the exclusion of the spouse if the deceased is survived by children he or she had with the partner.⁹³ Other jurisdictions use a sharing mechanism. In the Australian Capital Territory, for example, the spousal entitlement is shared equally between a domestic partner and a spouse if the partnership had lasted for less than five years.⁹⁴ In New Zealand, an entitled *de facto* partner and a spouse also share the spousal entitlement equally.⁹⁵
- 4.100 The Scottish Law Commission has recommended that in this situation the spouse and cohabitant should share the spousal entitlement. The cohabitant would take a proportion (at most half) of the spousal entitlement, and the spouse would receive the remainder. The Scottish Law Commission's Report indicates that a sharing mechanism was favoured because the cohabitant would otherwise often receive nothing, the spousal entitlement having exhausted the estate.⁹⁶
- 4.101 Legislation in Queensland takes a different approach to sharing which may include a discretionary element. The spousal entitlement may be divided between the *de facto* partner and a spouse by agreement, or by a distribution order made by the court, on a discretionary basis. Otherwise, the personal representatives may assume equal sharing between the spouse and *de facto* partner (on giving three months' notice, provided that they do not have notice of a distribution order

⁹¹ If a decree of judicial separation has been made in relation to a marriage, or a separation order in relation to a civil partnership, the estate passes under the intestacy rules as if the spouse had already died, as it would if a decree absolute of divorce or final dissolution order had been obtained: Matrimonial Causes Act 1973, s 18(2), Civil Partnership Act 2004, s 180.

⁹² Probate and Administration Act 1898, s 61B(3A) (New South Wales). Tasmania has a similar provision: Administration and Probate Act 1935, s 44(3A) (Tasmania). In the Northwest Territories the cohabitant can take if the spouses had separated or the deceased's spouse was cohabiting with someone else: Intestate Succession Act 1988, ss 2(b) and 20 (Northwest Territories).

⁹³ Administration and Probate Act, sch 6, part 3 (Northern Territory).

⁹⁴ Administration and Probate Act 1929, s 45A (Australian Capital Territory); if the partnership lasted for more than five years, the domestic partner takes the full spousal entitlement. The basic duration requirement is two years, unless the cohabitants have had a child together. The rules in Western Australia are similar but with an added requirement that the spouse should not have lived with the deceased during that period (Administration Act 1903, s 15). In Victoria the entitlement is graduated according to the length of the cohabitation.

⁹⁵ Administration Act 1969, s 77C (New Zealand). There is no set duration for qualification as a *de facto* partner, although a relationship of under three years will only qualify if there is a child of the relationship or the *de facto* partner had made a substantial contribution to the relationship and the court is satisfied that otherwise serious injustice to the partner would result.

⁹⁶ Report on Succession (2009) Scot Law Com No 215, paras 4.24 to 4.30, rejecting the alternative of leaving the whole entitlement with the spouse but allowing the cohabitant to claim provision against any part of it in the court's discretion; see also para 4.7.

or a live application for such an order).⁹⁷ This solution was preferred for all Australian states by the New South Wales Law Reform Commission in 2007, because of its flexibility and potential to form a framework for negotiation.⁹⁸

- 4.102 Both the spouse and the cohabitant can claim recognition as the person closest to the deceased. Indeed, the cohabitant may seem to have the stronger claim, because the paradigm case is of a cohabitation following the breakdown of a marriage. On the other hand, it is difficult to ignore the status-based claim of the person who, although not necessarily living with the deceased at the time of death, nevertheless remained the spouse of the deceased and so, for example, would have been able to claim financial provision on divorce or dissolution.
- 4.103 A sharing mechanism seeks to recognise the claims of both parties. The difficulty is that it will usually satisfy neither and the personal representatives risk being caught in a particularly difficult situation. The remedy of the Queensland legislation is to enable the personal representatives to assume equal sharing unless informed otherwise. We are concerned, however, that it would be unduly complex to introduce the Queensland system in this jurisdiction, since the 1975 Act already enables claims to be made for an award in the court's discretion.
- 4.104 A solution which awards the whole entitlement to a cohabitant over a spouse might seem to produce an appropriate result where the evidence indicates that the marriage or civil partnership has run its course, or been supplanted by the cohabitation (either because the deceased has had a child with the cohabitant or because it is more recent).⁹⁹ However, we do not think it practicable to require administrators to make this sort of qualitative judgement. In any event, in this jurisdiction it is the general rule that the legal consequences of a marriage or civil partnership continue until that relationship is ended by divorce or dissolution or, sometimes, a decree of judicial separation or separation order. We do not think that the intestacy rules should be an exception.¹⁰⁰ A person whose marriage or civil partnership has broken down, but has not yet formally ended, can make a will excluding his or her spouse, and benefiting instead a new partner.
- 4.105 In addition, the 1975 Act provides a mechanism whereby a cohabitant who is disappointed by the distribution of the estate may apply for provision. We appreciate that this requires the cohabitant to make an application to court against the surviving spouse and that such court actions will inevitably increase the emotional strain in an already difficult situation. However, we think that there is also a value in laying down clear rules – both for those concerned in the aftermath of the death, and for the purpose of advising the living.

⁹⁷ Succession Act 1981, s 36 (Queensland).

⁹⁸ New South Wales Law Reform Commission, Report 116: Uniform succession laws: intestacy (2007), ch 6, and see para 6.29.

⁹⁹ In Alberta (Intestate Succession Act 2000, s 3.1) and Manitoba (Intestate Succession Act, CCSM, c 185, ss 3(1), (2) and (4)) the spousal entitlement is simply awarded to the party to the most recent relationship.

¹⁰⁰ A decree of dissolution of the marriage or civil partnership is required even when there are reasonable grounds to suppose (without proof) that a spouse is dead: Matrimonial Causes Act, s 19.

- 4.106 We are also concerned that the position for administrators should not be complicated. This favours a clear rule that, if the personal representatives find that the deceased was married or in a civil partnership which had not been ended by divorce or dissolution, and no decree of judicial separation or separation order had been made,¹⁰¹ only the surviving spouse is entitled to the spousal entitlement on intestacy.
- 4.107 **We provisionally propose that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse.**

More than one cohabitant

- 4.108 In the Cohabitation Report we noted that where the deceased was a party to more than one cohabiting relationship at the date of death, it may be more difficult to determine whether the deceased “was sufficiently involved in either household for one or both to amount to cohabitation at all”.¹⁰² However, cases may arise in which it can be shown that both partners are cohabitants within the definition adopted, for example where there are religious marriages which do not qualify as legal marriages. This is rather different from the conflict between a surviving spouse and cohabitant, because neither partner can claim the formal status of a spouse.
- 4.109 Other common law jurisdictions simply divide the spousal entitlement equally between the two cohabitants.¹⁰³ We consider that this is also a suitable response for this jurisdiction given that, assuming that both cohabitants satisfy the statutory test, they will both have an equal claim to recognition under the intestacy rules.
- 4.110 We can see only one viable alternative, which would be to deny either cohabitant an entitlement under the intestacy rules so that they would both need to apply under the 1975 Act in order to receive any benefit from the estate. In our view, the fact that more than one party satisfies the statutory definition of a cohabitant is not a sufficient reason to do this. We recognise, however, that an arithmetical split between the cohabitants will not always make sufficient provision for either or both of them and that therefore litigation under the 1975 Act may ensue.
- 4.111 **We invite consultees’ views as to the approach to be taken where more than one cohabitant satisfies our proposed conditions for eligibility under the intestacy rules.**

FAMILY PROVISION

Eligibility

The test for cohabitation

- 4.112 We have proposed above the introduction in the context of the intestacy rules of the test for cohabitation recommended in the Cohabitation Report, namely

¹⁰¹ See para 4.98 above.

¹⁰² Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 3.68.

¹⁰³ This is the case in, for example, Western Australia (Administration Act 1903, s 15(4)) and New Zealand (Administration Act 1969, s 77C).

whether the survivor and the deceased were living as a couple in a joint household.¹⁰⁴ We think that this test should also be used to identify who can apply for family provision as the cohabitant of the deceased. As discussed above, it is clearer and more straightforward than the current formulation in the 1975 Act, particularly because it avoids any analogy with marriage or civil partnership. We consider that our recommended test should replace that currently used in the 1975 Act, without either extending the range of the test or excluding anyone who would currently be eligible to apply.¹⁰⁵

Duration requirements

- 4.113 For the intestacy rules, we have proposed that, if cohabitants do not have children together, the survivor should only take a share of the estate if the relationship had lasted for some minimum duration.¹⁰⁶ If, however, they have had a child together, no duration requirement should be imposed.¹⁰⁷
- 4.114 It would be anomalous if a cohabitant were unable to claim under the 1975 Act, but (as we are suggesting) would automatically have qualified for a share of the estate on intestacy. Independently of those proposals, many of the reasons supporting reform in the context of the intestacy rules also favour such an amendment to the 1975 Act. In particular, the presence of a child of the relationship implies a degree of interdependence which should bring the survivor within the scope of the 1975 Act as a cohabitant, and not simply as a dependant. Therefore we think that, where cohabitants have had a child together, the survivor should be able to apply under the 1975 Act even if the relationship had lasted for less than two years.
- 4.115 Should a surviving cohabitant be entitled to apply for family provision regardless of either the duration of cohabitation or the presence of a child or children of the relationship? The period required for the 1975 Act must not be longer than that set for the intestacy rules, but could be equivalent to or shorter than that period. The Consultation Paper which preceded the Cohabitation Report asked whether the current two-year duration requirement for a claim under the 1975 Act as a cohabitant should continue to apply,¹⁰⁸ several consultees argued that it should be shortened or abolished.
- 4.116 We see the force of those arguments. Under the 1975 Act, the duration of the cohabitation is a requirement for eligibility to claim, not a guarantee of a share in the estate. The court is given discretion to assess the claim, considering whether reasonable financial provision was made, and if not, the making of any award.

¹⁰⁴ See para 4.60 above.

¹⁰⁵ As recommended in the Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307: see paras 6.15 and 6.16.

¹⁰⁶ See paras 4.80 and 4.85 above.

¹⁰⁷ See para 4.68 above.

¹⁰⁸ Cohabitation: The Financial Consequences of Relationship Breakdown (2006) Law Commission Consultation Paper No 179, paras 9.110 to 9.114.

The length of the relationship is already a factor identified by the 1975 Act to be taken into account in making that assessment.¹⁰⁹

4.117 However, at this stage we take the view that the minimum period should be retained for cohabitants without children. We are concerned that removing or reducing this duration requirement could increase the number of claims made against estates. Although such claims might have little chance of success, due to the relevance of the short duration in assessment, this could increase difficulties, costs and delay in the administration of estates. That could also happen if the court was given discretion to reduce the duration requirement, as the position would be uncertain. We also note that a cohabitant who was dependent on the deceased at the time of the death may still make a claim as a dependant. This means that a cohabitant of under two years may still apply under the 1975 Act, which should be sufficient to remedy hard cases. We discuss below the possibility of removing, in relation to applications by cohabitants, references to the standard of provision required for the applicant's maintenance.¹¹⁰ If that were implemented, then there would be a distinction in the standard applied if the application were made as a dependant, but we do not think that this would cause injustice.

Ex-cohabitants

4.118 The 1975 Act currently requires that a cohabitant is eligible only if the cohabitation was continuing immediately before the death. We have considered whether this should be relaxed to allow claims by cohabitants whose relationship ended shortly before the death.

4.119 The justification for enabling cohabitants to claim financial provision is that in the paradigm case the applicant was, at the time of the death, in a committed interdependent relationship with the deceased. We accept that this will not always have been the case, and that under the statutory language, the applicant would qualify even if the relationship had been near to having run its course. However, we think that permitting a claim by a cohabitant whose relationship had in fact ended would run counter to the basis of the jurisdiction.

4.120 Backdating the time at which the cohabitation had to be continuing to any other certain point (say, three months before the death) would still produce arbitrary results. These could only be avoided by giving judges discretion to allow a claim notwithstanding the end of the relationship, but we think that this would make the eligibility requirements too uncertain. We do not think that the current position results in hardship; an application can still be made as a dependant if that was the position.

4.121 The Cohabitation Report recommended that an ex-cohabitant should have a claim under the 1975 Act if he or she would have been entitled to make a claim for financial relief on the basis of the parties' separation.¹¹¹ This, however, was on a very different basis. Claims for financial relief on the lifetime termination of a

¹⁰⁹ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2A)(a).

¹¹⁰ See paras 4.125 to 4.134 below.

¹¹¹ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, paras 6.27 to 6.31.

cohabiting relationship, under the scheme recommended in the Cohabitation Report, would not survive against a deceased's estate – just as, under current law, claims for ancillary relief following divorce or the dissolution of a civil partnership do not survive.¹¹² Therefore the recommendation that an ex-cohabitant should have a claim under the 1975 Act was made for consistency with the scheme for claims on lifetime separation. We think that it is only appropriate in that context.

- 4.122 **We provisionally propose that if the surviving cohabitant and the deceased are by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975, provided that the cohabitation was continuing at the date of death.**
- 4.123 **We invite consultees' views as to whether, where the couple had not had a child together, the current two-year qualifying period for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975 should be retained.**
- 4.124 **We provisionally propose that, in all cases, in order to qualify for an award under the Inheritance (Provision for Family and Dependants) Act 1975 as a cohabitant the applicant must have been living as a couple in a joint household with the deceased immediately before the death.**

Reasonable financial provision and the “maintenance standard”

- 4.125 In considering whether reasonable provision has been made for a cohabitant, and the making of any award, the court has regard to specific factors, in addition to those applicable to all claims. These are: the age of the applicant; the length of the period during which the applicant lived as the spouse of the deceased and in the same household; and the contribution (including looking after the home or caring for the family) made by the applicant to the welfare of the family of the deceased.¹¹³
- 4.126 These factors are similar to the additional factors taken into account for spouses,¹¹⁴ except that there is no equivalent to the requirement to take into account the provision which would have been made had the marriage or civil partnership ended by divorce or dissolution rather than death.
- 4.127 The measure of provision for cohabitants, as for all applicants other than spouses, is “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”.¹¹⁵ This contrasts with the standard applicable to spouses (where the marriage or civil partnership was continuing and not subject to a decree of judicial separation

¹¹² Ancillary relief is the financial provision that can be ordered by the court on divorce or on dissolution of a civil partnership.

¹¹³ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2A), adding to the factors set out at section 1(3).

¹¹⁴ These are set out at section 3(2) of the Inheritance (Provision for Family and Dependants) Act 1975: see para 2.54 above.

¹¹⁵ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).

or separation order): such financial provision as it would be reasonable for a spouse to receive, whether or not required for maintenance.¹¹⁶ The 1989 Report explained the reasoning as follows:

The claim which it is recognised that cohabitants should have is to some compensation for the contribution which the deceased was making towards the common household rather than for the, perhaps greater, share in the deceased's accumulated assets which a spouse may reasonably expect when the marriage ends by death or divorce. The factors to be taken into account in the exercise of the court's discretion, however, should include, in addition to those which are relevant to all applicants, those which are relevant to spouses In our view this represents a fair balance, in recognising the contribution which each cohabitant may make to their common household and welfare, while preserving a distinction between the respective claims of married and unmarried partners.¹¹⁷

- 4.128 The special factors of age, length of cohabitation and contribution to the welfare of the family sit awkwardly with the restriction to "maintenance" which, if limited to provision for a person's basic requirements, would seem to make those special factors irrelevant.
- 4.129 However, it is clear that the courts in assessing family provision claims for cohabitants do more than merely look at basic requirements.¹¹⁸ This is consistent with the presence of the factors specific to cohabitant claimants. The case of *Negus v Bahouse*¹¹⁹ suggests that "maintenance" for a cohabitant is to be viewed differently because of the context of the joint lifestyle with the deceased. In that case the argument of the deceased's son on appeal was precisely that the first instance judge had failed properly to recognise the difference between the standard applicable to a surviving spouse and that applicable to a cohabitant. The award was upheld; it was appropriate to look at "what style of life the claimant was accustomed to live with the deceased during his lifetime".¹²⁰
- 4.130 We think that this is the correct approach, consistent with the intention behind the statute. The courts' interpretation of the standard of financial provision recognises the essence of the cohabitant's claim, which is more than simply dependency, recognition of his or her contributions to the relationship, or the duration of the relationship. It is the fact that the cohabitant and the deceased lived together in an interdependent relationship. However, this cannot be regarded as consistent with the requirement that provision for cohabitants be for maintenance, unless we take the view that the word "maintenance" means something different in the context of those who claim as cohabitants.
- 4.131 We take the view that that inconsistency should be removed, by amendment of the 1975 Act so as to give cohabitants a claim that is not limited to maintenance,

¹¹⁶ Inheritance (Provision for Family and Dependants) Act 1975, ss 1(2)(a) and (aa).

¹¹⁷ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 60.

¹¹⁸ See paras 2.74 to 2.75 above.

¹¹⁹ [2008] EWCA Civ 1002.

¹²⁰ Above at [12], by Mummery LJ.

in line with the courts' current practice. It is appropriate for the status of the surviving cohabitant to be explicitly recognised in the standard of family provision under the 1975 Act, given the increasing social acceptance of cohabitation over the 20 years since the 1989 Report was produced.

- 4.132 The Cohabitation Report concluded that "reasonable financial provision" should mean, for a claim by a cohabitant, "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance."¹²¹ This is an open-textured standard which enables the court to take into account the varying circumstances of the particular cohabiting relationship under consideration. It is consistent with the result reached by the Court of Appeal on the word "maintenance", but enables this to be attained far more straightforwardly. We think therefore that the 1975 Act should be amended along these lines.
- 4.133 We do not think that it is necessary to include in the statute a direction to the court to consider the joint lifestyle of the cohabitant and the deceased; it is apparent that the courts already take this into account. We also do not consider that it is necessary expressly to mention that the standard of provision for a cohabitant may in an appropriate case be equal to – or even exceed – that which would be made for a surviving spouse.
- 4.134 **We provisionally propose that the Inheritance (Provision for Family and Dependents) Act 1975 be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.**

Other recommendations in the Cohabitation Report

- 4.135 In the Cohabitation Report we recommended the introduction of a scheme providing for a financial remedy on the lifetime separation of cohabitants. That remedy would be assessed by seeking to adjust any benefit retained by the respondent, and share any economic disadvantage suffered by the applicant, as a result of contributions made to the parties' shared lives or the welfare of members of their families. A number of discretionary factors would be considered.
- 4.136 For spouses, the 1975 Act currently requires the court to consider the provision which might have been made had the marriage or civil partnership been terminated by divorce or dissolution, rather than death.¹²² This seeks to ensure that a surviving spouse's claim against the estate is equivalent to that which he or she would have had if the relationship had been terminated in lifetime rather than on death.
- 4.137 If the law is amended so that financial relief could be awarded to a former cohabitant in the event of lifetime separation, then that should be taken into

¹²¹ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 6.43.

¹²² Inheritance (Provision for Family and Dependents) Act 1975, s 3(2).

account in making an award on death, in order to achieve the same consistency for cohabitants. Again, the award made on death should not usually be less than that which would have been made if the parties' relationship had come to an end during their lifetimes.¹²³ This "separation analogy" was recommended in our Cohabitation Report,¹²⁴ and we continue to support its introduction together with the other recommendations which were made.

¹²³ See, in the context of spouses, the "notional divorce" test, discussed at paras 3.145 to 3.150 above.

¹²⁴ Cohabitation: the Financial Consequences of Relationship Breakdown (2007) Law Com No 307, para 6.43.

PART 5

CHILDREN

INTRODUCTION

- 5.1 So far, we have looked at the entitlement of spouses and cohabitants under the intestacy rules, and also at their position in the family provision legislation.¹ In this Part we go on to consider the entitlement of children. We do so in two senses. Primarily we are looking at the children of the deceased, who may be very young or may be adults. In referring to children in this sense we generally mean “children and other direct descendants”, except where we say otherwise. However, because that leads us into the territory of the statutory trusts,² what we have to say in this Part is relevant also to any children who become entitled under the intestacy rules. Such children might be grandchildren of the deceased; or they might be entitled through another relationship, for example as the younger siblings of the deceased.
- 5.2 We begin, then, by commenting generally on the position of the children of those who die intestate, looking both at their entitlement under the intestacy rules and at the circumstances in which they can make a successful claim for family provision. We go on to consider the rules for distribution among children, grandchildren and other descendants of the deceased and indeed of other beneficiaries. An examination of some of the provisions of the statutory trusts for children under 18 follows, and we also deal with a problem connected with adoption.

CHILDREN, INTESTACY AND FAMILY PROVISION

- 5.3 The children of someone who dies intestate and has no spouse or cohabitant are entitled to the entire estate (unless anyone else makes a successful application for family provision). We are not aware of any concerns with that position.
- 5.4 When we discussed the entitlement of spouses under the intestacy rules, we explained that the central issue was the extent to which the rules should provide for a surviving spouse to share the estate with any children. We noted the priority given in the rules to a surviving spouse, who will share the estate with any children only in the minority of cases where the estate exceeds the statutory legacy. We have asked whether consultees think that a spouse should take the entire estate, under the intestacy rules, even where there are children. We note that if the law were changed to that effect a relatively small proportion of children would lose the chance of inheriting under the intestacy rules. A parent who wanted his or her estate to be shared between a spouse and children would, of course, be able to make a will to that effect.
- 5.5 In Part 4 we provisionally proposed that cohabitants should have an entitlement under the intestacy rules.³ That proposal would affect children whose parent dies

¹ References in this Part to a spouse are intended to refer to a husband, wife or civil partner.

² The statutory trusts determine how an estate is distributed between beneficiaries and how property is to be held for those who are under 18; see paras 5.20 to 5.53 below.

³ Subject to the qualification requirements discussed in Part 4 above.

intestate and is survived by a cohabitant; currently those children take the whole estate. That reform would equalise the entitlement, under the intestacy rules, of those whose parents are married, civil partnered, or cohabiting (regardless of whether the survivor was or was not their parent).

- 5.6 The balance struck between a surviving spouse and children in the intestacy rules is, of course, only one side of the story. Any child can bring a claim for family provision against a parent's estate.⁴ The intestacy rules may have failed to make reasonable provision for the child, either due to the prior entitlement of the surviving spouse, or because of the way in which the estate is shared between children. For example, the provision for equal sharing between siblings does not respond to their individual circumstances. The same may happen where the deceased made a will: the obvious example is a will which deliberately disinherits a child. A will might also be out of date or reflect a misunderstanding about the beneficiary's circumstances; or it may be badly drafted, or operate in a way which the deceased did not intend.
- 5.7 The approach applied to claims by children under the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act") is the same in all cases: has there been a failure to make reasonable provision for the child's maintenance? Various factors are taken into account in considering whether reasonable provision was made.⁵
- 5.8 It was previously thought that, in order to succeed in an application for financial provision, an adult child would have to demonstrate that the deceased owed to him or her a "moral obligation".⁶ That view has now been rejected.⁷ The 1975 Act does require the court to take into account the obligations which the deceased owed to the applicant and to other beneficiaries, including moral as well as legal obligations. However, applicants can, and do, succeed even if they cannot show such a moral obligation.⁸ It is a question of whether, taking all the factors into account, reasonable provision has or has not been made for the applicant.⁹
- 5.9 The size of the estate may be a very material consideration. If it is large enough also to provide for the needs of other beneficiaries, then an adult child whose maintenance requirements have not been met may succeed in his or her claim. That was the case in *Myers v Myers*,¹⁰ where the estate was worth £8 million and

⁴ The only requirement is that the deceased was the applicant's legal parent.

⁵ See paras 2.50 to 2.53 and 2.56 above.

⁶ This view was associated with Oliver J's statement at first instance in *Re Coventry* [1979] 2 WLR 853, 865, despite the comments made by Goff LJ on appeal: [1980] Ch 461, 487 to 491. It appears to have had its roots in the approach taken by the courts to cases under the Inheritance (Family Provision) Act 1938, which gave much less guidance to the courts in the exercise of their discretion. See A Borkowski, "Moral Obligation and Family Provision" [1999] *Child and Family Law Quarterly* 305.

⁷ *Re Hancock* [1998] 2 FLR 346; *Espinosa v Bourke* [1999] 1 FLR 747; *Re Pearce* [1998] 2 FLR 705; and *Garland v Morris* [2007] EWHC 2 (Ch), [2007] 2 FLR 528.

⁸ For example, in *Re Hancock* [1998] 2 FLR 346, in which it was found that no moral obligation existed.

⁹ See Peter Gibson LJ in *Robinson v Fernsby* [2003] EWCA Civ 1820, [2004] WTLR 257 at [119].

¹⁰ [2004] EWHC 1944 (Fam), [2005] WTLR 851.

had been left entirely to the deceased's second wife and their children, leaving nothing to the claimant, a child of the deceased's previous marriage, who was in straitened circumstances.¹¹ The applicant's financial needs are not, however, an overriding consideration. In *Garland v Morris*,¹² for example, the claimant was in difficult financial circumstances but it was still held that the failure to make any provision was reasonable. She had already inherited the whole of her mother's estate, and her father had decided not to make further provision for her in view of their estrangement, which the applicant had made no effort to remedy.

- 5.10 So the courts' approach to a claim by an adult child should no longer be distorted by over-reliance on a "moral obligation". In principle, it is the same as the approach to a claim by a younger child. A younger child may be more easily able to show that some of the factors apply, or apply more strongly – for example, a need for education, training and ongoing support¹³ – but the balancing exercise is essentially the same. An adult child will conversely find it more difficult to show that some of the factors apply. In *Re Hancock* it was put in this way:

If the facts disclose that the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation.¹⁴

- 5.11 So an adult child who is comfortably off and set up in life cannot claim against an estate simply on the basis that he or she feels "disinherited" by the provisions of the will or of the intestacy rules. That feeling may be particularly strong if the estate has passed to a surviving spouse who is the step-parent of the deceased's children and from whom those children do not expect to inherit.
- 5.12 We have considered whether we could take any steps to respond to the understandable sense of grievance felt by many children in this position. We discussed this above, in considering whether the whole of an intestate estate should always pass to a surviving spouse (as it does in the majority of cases at present). We considered whether children from a previous relationship of the deceased might be given a special claim under the 1975 Act without restricting the children to reasonable provision for their maintenance, to enable a "fairer" distribution of the estate. We concluded that this was not a realistic option.¹⁵ We postponed to this Part a more general discussion about whether more generous provision could be made for children under the family provision legislation, so as to give adult children a better chance of success.
- 5.13 The difficulty with enhancing the position of children under the 1975 Act is that it would be difficult to find a justification for doing so that was both clear, and

¹¹ See also *Gold v Curtis* [2005] WTLR 673. In both cases, the child was estranged from the parent, but the court took the view that the parent was at least partly to blame for this.

¹² [2007] EWHC 2 (Ch), [2007] 2 FLR 528; see also *Robinson v Fernsby* [2003] EWHC 30 (Ch), [2003] WTLR 529 in which the applicant had chosen to take a large part of her inheritance during her mother's lifetime, which would have met her income needs if she had not chosen a lifestyle which was beyond her means.

¹³ See, for example, *Re C* [1995] 2 FLR 24.

¹⁴ *Re Hancock* [1998] 2 FLR 346, 351, by Butler-Sloss LJ.

¹⁵ See paras 3.55 to 3.59 above.

consistent with the rest of the law. Simply removing the maintenance requirement in the case of children would leave the courts with an impossible task: how would they determine what would be reasonable provision? One or more criteria would have to be stated. “Fairness” by itself would be of no assistance; at best it would enable the courts to reach whatever conclusion is thought, subjectively, to be fitting in a particular case without stating whether the judge is to be guided by what the deceased might have wanted, what the survivors might want, what “ought” to have happened, and so on.

- 5.14 The 1975 Act is not specific about the criterion for reasonable provision for spouses. But there is a well-established body of case law on that provision. We have also made a provisional proposal for the expansion of the criteria for cohabitants and, again, existing case law would assist. The difference in the case of children, and particularly adult children, is that there is no generally held view as to what range of provision would be appropriate.
- 5.15 The 1975 Act has to do duty both for testate and for intestate estates. In so doing it has to maintain consistency with the law’s general position on a parent’s duty towards both young and adult children. The 1975 Act matches the general position in terms of the duty to maintain and provide for one’s dependent children. Beyond that the law imposes no duty to provide for an adult child.¹⁶ We have testamentary freedom subject to the 1975 Act’s current operation; any strengthening of the criteria for claims by children in the 1975 Act would mark further departure from that principle. It would also risk undermining the intestacy rules, which are shaped so as to give priority to a surviving spouse.
- 5.16 An article by Nicola Peart and Andrew Borkowski¹⁷ has drawn our attention to the experience in New Zealand, where the Testator’s Family Maintenance Act 1900 enables children to apply for “proper maintenance and support” where this is not effected by the provisions of a will or by the intestacy rules. This is a rather wider expression than “maintenance” under the 1975 Act. The authors explain that until the 1990s the statute was interpreted liberally by the New Zealand courts, to the extent that substantial provision was justified on the basis of the blood relationship alone, without regard to need.
- 5.17 However, a report from the New Zealand Law Commission in 1997 recommended “radical change”, dramatically limiting the courts’ discretion to grant family provision awards to adult children. The Succession Adjustment Bill published with that report contains provisions that would limit provision to what is truly needed for “support”, in the sense of ongoing necessities rather than of generous capital provision. Even though that Bill has not been enacted, the courts have followed the New Zealand Law Commission’s lead, moving away from “estate engineering”.¹⁸ Claims by adult children are now far less likely to

¹⁶ The same position is seen in the provision to be made for children on divorce; financial provision must be made so as to see them housed and provided for until they are adult and have finished their education; but the courts have resisted any suggestion that financial provision on divorce should involve making long-term provision for children going beyond that obligation. See *Chamberlain v Chamberlain* [1974] All ER 33.

¹⁷ N Peart and A Borkowski, “Provision for adult children on death – the lesson from New Zealand” [2000] *Child and Family Law Quarterly* 333.

¹⁸ *Re Walker* [1998] NZFLR 726, 731.

succeed, and if successful now result in less generous provision. Peart and Borkowski conclude:

It seems that the judge or legislator from [a common law tradition] will inevitably shrink from anything which approaches an automatic sharing of parents' estates, despite such an approach being taken for granted in the civil law systems ...¹⁹

5.18 We take note of that warning. We agree with the authors that a challenge to the current law on human rights grounds would be unlikely to succeed.²⁰ Our provisional view is that no change in the position of children under the 1975 Act is called for; but we welcome consultees' views on the point.

5.19 **Do consultees think it appropriate to amend the Inheritance (Provision for Family and Dependents) Act 1975 so as to give a greater chance of success to adult children and, if so, how?**

DISTRIBUTION AMONG CHILDREN AND OTHER DESCENDANTS

5.20 The Administration of Estates Act 1925 provides for a method of distribution among children and (if relevant) other descendants, known as "distribution *per stirpes*", "stirpital distribution", or "inheritance by representation".²¹ This requires some explanation.

- (1) In a simple case, where someone dies intestate before any of his or her children, any part of the estate to which the children are entitled is shared between them equally. Nothing will pass directly to any grandchildren.
- (2) Where a person dies intestate having outlived one or more of his or her children but leaving grandchildren whose parent has already died, the position is more complicated. Those grandchildren are entitled to share that part of the estate to which their parent would have been entitled if he or she was still alive.²²

5.21 This means that members of the same generation may receive more or less than one another, depending on how many siblings they have. It may also result in a member of one generation receiving less than a member of a more remote generation. To illustrate:

H is a widower with three children: C1, C2 and C3. His estate is worth £270,000 and he does not have a will. C1 has one child, C2 has two children and C3 has three children.

If C3 dies first, followed by H (and all the grandchildren survive):

¹⁹ N Peart and A Borkowski, "Provision for adult children on death – the lesson from New Zealand" [2000] *Child and Family Law Quarterly* 333, 343.

²⁰ Above, 343.

²¹ Administration of Estates Act 1925, s 47. "*Per stirpes*" is Latin for "by stock" or "by family".

²² The same process is repeated for grandchildren, great-grandchildren and so on.

Under current law, the estate is divided into three shares: C1 and C2 each take a third (£90,000). The remaining third is divided equally among C3's three children (£30,000 each).

If H were survived by C1 (and all of his grandchildren) but outlived C2 and C3:

C1 would inherit a third of the estate (£90,000). C2's two children would each inherit half of their parent's share (£45,000 each); and C3's three children would each inherit a third of their parent's share (£30,000 each).

If H outlived all of his children, leaving six grandchildren:

C1's child would inherit a third of H's estate (£90,000); C2's two children would each inherit a sixth of H's estate (£45,000); and C3's three children would each inherit one ninth of H's estate (£30,000).

5.22 An alternative model is used in some jurisdictions to reach a different result. It is based on the principle that any distribution among members of the same generation should be in equal shares, and is known as distribution *per capita* at each generation.²³

5.23 This type of distribution also starts by dividing an estate into equal shares, one for each of the children of the deceased who are either still alive or have living children of their own. The entitlement of any living child is therefore just the same; in our example, each of H's children living at the date of his death would inherit a third of the estate. Similarly, where just one child had already died, that child's interest in the estate is divided equally among his or her children, as it would be under the present law.

5.24 Where, however, a person dies intestate having outlived two or more children who have children of their own, their shares are pooled and divided among the next generation with living members. Applying this model to the above example:

If H were survived by C1 but outlived C2 and C3:

C1 would inherit a third of the estate (£90,000) but his children would inherit nothing as C1 is still alive; and

The remaining two thirds would be divided equally between the five children of C2 and C3 (£36,000 each).

If H outlived all of his children, leaving six grandchildren, his estate would be divided equally between all six of them (£45,000 each).

5.25 This method of *per capita* distribution at each generation always provides equal shares for those equally closely related to the deceased. It also eliminates the possibility that a member of a more remote generation may receive more than a

²³ "*Per capita*" is Latin for "by head".

member of a closer generation, treating descendants as “equally near, equally dear”.²⁴

- 5.26 Distribution *per capita* at each generation would also achieve a different result to the present rules in the unusual situation where one person is related to the deceased in two different ways, sometimes described as being a relative of the “double blood”. Distribution *per stirpes* can result in such an individual taking two entitlements under the intestacy rules and thus receiving a “double portion” of the estate.
- 5.27 The recent Northern Irish case of *Re Patrick* is a case in point.²⁵ A woman died intestate leaving a number of aunts and uncles. One of her paternal uncles had married one of her maternal aunts, and the children of this relationship were therefore related to her through both of their parents. It was held that the logic of the intestacy rules compelled a conclusion that these family members were entitled to a double portion. If distribution had been *per capita*, those beneficiaries would only have been entitled to one share.²⁶
- 5.28 Research in America found that a *per capita* model of distribution on intestacy would be popular.²⁷ More recent research into wills in England and Wales found that 22% of the wills surveyed contained examples of beneficiaries in the same relationship to the deceased receiving different entitlements. The authors of that study concluded that:

The most prominent principle of division is to give equal shares or gifts to people who occupy the same genealogical position relative to the testator.²⁸

- 5.29 There is a historical precedent for this model of distribution in England and Wales. Before 1926, personal property was distributed *per capita* among members of the same generation in some circumstances.²⁹ *Per capita* is the model of distribution presently used in Scotland,³⁰ and the Scottish Law Commission has recently recommended no change to the current law.³¹ Similar

²⁴ Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, p 146.

²⁵ *In the Estate of Olive Patrick* [2000] NI 506; see also S Grattan, “Intestacy – double portions for double cousins?” [2001] *Private Client Business* 231.

²⁶ *Re Adams* (1903) 6 OLR 697; *Troop v Robinson* (1911) 45 NSR 145; *Re Cullen* [1976] 14 SASR 456.

²⁷ M Fellows, R Simon, T Snapp and W Snapp, “An Empirical Study of the Illinois Statutory Estate Plan” (1976) *University of Illinois Law Forum* 717, 740 to 741, Tables 18 and 19; M Fellows, R Simon and W Rau, “Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States” [1978] *American Bar Foundation Research Journal* 319, 384; “A Comparison of Iowans’ Dispositive Preference with Selected Provisions of the Iowa and Uniform Probate Codes” (1977-1978) 63 *Iowa Law Review* 1041, 1111 to 1112.

²⁸ J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) p 76.

²⁹ Statute of Distribution 1670, s 7; CH Sherrin & RC Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 2-015.

³⁰ Succession (Scotland) Act 1964, s 6(a).

³¹ Report on Succession (2009) Scot Law Com No 215, paras 2.38 to 2.49.

systems of distribution operate in Manitoba,³² and under the American Uniform Probate Code,³³ and this approach has been recommended for adoption in Alberta.³⁴ A review of the Manitoban approach found that the system was “working well” and “caused no difficulties for practitioners”.³⁵ In Australia, both Victoria and South Australia adopt this approach for the descendants of siblings.³⁶

- 5.30 However, there are also international precedents for the retention of distribution *per stirpes*. The New South Wales Law Reform Commission has proposed no change to that model of distribution among descendants of the deceased, on the basis that it is familiar and that change might bring little benefit.³⁷
- 5.31 Some might prefer the current system of *per stirpes* distribution on principle. Each of the children of a person who dies intestate is entitled to an equal share of their parent’s estate; if they happen to have already died, their share still passes down their family line to their children and grandchildren and so on. Under *per capita* distribution, the share that passes to a deceased child’s family can be reduced to ensure equal distribution among all living members of the same generation. Some people may feel that this would be contrary to the wishes of the deceased or the deceased child. Under a *per capita* system, the entitlement of a grandchild (A) whose parent (B) has already died is affected by what has happened in other branches of the family; A’s share will be reduced if one or more of B’s siblings (A’s uncles and aunts) also died before the grandparent, leaving more children (A’s cousins) than in A’s branch of the family (A plus his or her siblings). Under *per stirpes* distribution, in contrast, A’s share depends only on how many of his or her siblings also survived the grandparent.
- 5.32 *Per stirpes* distribution is also reflected in the provision made by the Wills Act 1837 for the descendants of a child who has died before the testator to take in that child’s place a gift made by the will.³⁸ That would not be affected by any reform of the intestacy rules.
- 5.33 The Law Commission’s 1988 Working Paper suggested a change to *per capita* distribution at each generation.³⁹ But the 1989 Report recommended no change to the current law;⁴⁰ there had been little support among consultees for any change, and there was concern that it would entail extra expense and delay in

³² Intestate Succession Act, CCSM, c 185, s 5 (Manitoba).

³³ Uniform Probate Code 2005, s 2-106(b).

³⁴ Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, pp 146 to 147.

³⁵ Above, p 147.

³⁶ The New South Wales Law Reform Commission has described this as “arbitrary” and “illogical” in not applying to all descendants of the intestate: New South Wales Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, paras 8.6 to 8.8, 8.23, and 8.30 to 8.31.

³⁷ Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, paras 8.32 to 8.34.

³⁸ Wills Act 1837, s 33.

³⁹ Distribution on Intestacy (1988) Law Commission Working Paper No 108, para 5.8.

⁴⁰ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 48.

the administration of estates. It is relatively uncommon for a child to die before his or her parent, and so reform of this area of the law is likely to have limited effect. We can also see that *per capita* distribution could complicate the administration of estates where there are large numbers of beneficiaries and it is not certain which children survived, because that uncertainty would affect the shares of beneficiaries in other family branches. But we do not know whether this would, in practice, be a significant problem, given that such uncertainty will always cause difficulties.

5.34 It may be that the current system does not now accord with public views and expectations. Before publication of our final Report we shall have the findings from the Nuffield survey which will enable us to assess what those views and expectations are, and will give us a measure of public support for a move to *per capita* distribution; we also attach great importance to consultees' views on whether such a move would involve any possible practical disadvantages.

5.35 **Would consultees favour any change to the present method of *per stirpes* distribution of intestate estates, and in particular the introduction of *per capita* distribution at each generation?**

TRUSTS FOR CHILDREN ON INTESTACY

5.36 If all of the beneficiaries of an intestate estate are adults, and therefore entitled to their shares outright, the personal representatives will simply distribute the estate to them. The shares of beneficiaries who are under 18, however, are held on trust until they turn 18 (or marry or form a civil partnership under that age).⁴¹ If a beneficiary dies before then, his or her interest passes instead as though he or she had not survived to inherit at all.⁴²

5.37 We now look at two aspects of trusts for children on intestacy: first, the conditions under which a beneficiary becomes absolutely entitled to his or her share; and secondly, trustees' powers to spend income for the beneficiaries, or to advance capital to them, while their shares are held on trust.

The conditions for absolute entitlement

5.38 We are aware of arguments that the age of 18 is too young for a child to have outright control of what may, in some cases, be a substantial inheritance. Indeed, this is often cited by solicitors as a major reason for parents to make a will rather than relying on the intestacy rules. We consider, however, that an increase to the age stated in the statutory trusts would not be appropriate. For 40 years, 18 has been the age of majority in England and Wales, having been reduced from 21.⁴³ To increase the age for the purposes of the statutory trusts at this time would run counter to that state of affairs.

⁴¹ Express consent from a parent or from someone with parental responsibility is needed for a person under 18 to marry or form a civil partnership: Marriage Act 1949, s 3; Civil Partnership Act 2004, s 4 and sch 2.

⁴² Even if the beneficiary left children of his or her own. This has been the subject of previous Law Commission work: *The Forfeiture Rule and the Law of Succession* (2005) Law Com No 295, discussed at paras 1.19 to 1.20 above.

⁴³ Family Law Reform Act 1969, s 2(1), which came into force on 1 January 1970.

- 5.39 Such an amendment would also have tax disadvantages. A trust under which the children or other descendants of the deceased will take their shares outright at 18 is a trust for bereaved minors under the inheritance tax legislation.⁴⁴ No inheritance tax is charged on the fund while it is held in trust or on its being paid out to the beneficiaries at or before 18. This would not be the case if the age were increased. Since the funds held for the minor beneficiary of an intestate estate are often relatively modest, the administrative costs of making the correct returns and calculating and paying the tax due could also be burdensome.
- 5.40 So we make no proposals to raise above 18 the age at which a beneficiary inherits outright under the statutory trusts. But what of the rule that a beneficiary of an interest held under the statutory trusts becomes entitled to that interest absolutely on marriage or the formation of a civil partnership under 18? A practitioner has suggested to us that this should cease to be the case and that all beneficiaries must wait until they are 18 to become absolutely entitled to their inheritance.
- 5.41 We are not attracted to this suggestion. The practical effect of the current law is that in most cases a young beneficiary's interest (which may well be his or her only significant asset) will pass to a surviving spouse under the intestacy rules. Any change could therefore prejudice surviving spouses. It is also arguable that marriage or civil partnership is an event on which the receipt of an inheritance might be much needed.⁴⁵
- 5.42 We note that, although there is specific provision in the intestacy rules for a beneficiary under 18 who has married or formed a civil partnership to give the trustees a valid receipt for income,⁴⁶ there is no such provision in relation to capital. The trustees may, however, obtain such a receipt from a person with parental responsibility for the beneficiary.⁴⁷ We would welcome consultees' opinions as to whether this is satisfactory.

Trustees' powers of maintenance and advancement

- 5.43 The trustees of the statutory trusts have power to distribute capital or income from the trust fund before a beneficiary reaches 18.⁴⁸ These powers are contained in sections 31 and 32 of the Trustee Act 1925.⁴⁹

⁴⁴ Inheritance Tax Act 1984, ss 71A to 71C.

⁴⁵ In any event, such a reform would be of limited relevance in practice, since the number of marriages at a young age is relatively small and appears to be falling: Office for National Statistics, "Report: Marriages in England and Wales, 2005" (2007) 127 *Population Trends* 61, 61 to 65. The data underlying this report show that in 1991 4,632 single men and 17,738 single women in the age range 16-19 married. In 2006, the latest year for which final figures are available, the figures were 1,093 and 3,826 respectively: Office for National Statistics, *Marriage, Divorce and Adoption Statistics* (2009) pp 10 and 16.

⁴⁶ Administration of Estates Act 1925, s 47(1)(ii).

⁴⁷ Children Act 1989, s 3; see M Waterworth, "Minor solutions: receipt clauses under the Children Act 1989 regime" (1997) 1 *Private Client Business* 37.

⁴⁸ Or marries or forms a civil partnership: from here on, we do not repeat that additional qualification.

⁴⁹ Applied to the statutory trusts by section 47(1)(ii) of the Administration of Estates Act 1925.

Income – the power of maintenance

5.44 Section 31 of the Trustee Act 1925 provides that:

during the infancy of [the beneficiary], if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable ...

5.45 To the extent that the income is not so applied, it must be accumulated (that is, added to capital), although it may be spent as income in subsequent years. The power conferred by section 31 is often termed “the power of maintenance”. The trustees are required to consider “the age of the infant and his requirements and generally ... the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes”.⁵⁰

5.46 The words “maintenance, education or benefit” have been described as “words of the widest import”.⁵¹ Although the income must be applied for the benefit of the beneficiary, it is permissible for there also to be some benefit to the parents or guardians of the beneficiary; for example, because the income helps to provide a suitable home for the whole family.⁵²

Capital – the power of advancement

5.47 Section 32 of the Trustee Act 1925 permits the trustees to “pay or apply” capital “for the advancement or benefit” of a beneficiary of the statutory trusts who is under 18. It does not matter that the beneficiary may die before reaching 18 and that therefore someone else might ultimately become entitled to that share. This power is often termed the “power of advancement”.

5.48 “Advancement” is difficult to define, but is associated with giving a beneficiary a permanent benefit or advantage. “Benefit” has a very wide meaning and may include paying a beneficiary’s debts, providing a house for beneficiaries to live in with their parents, and making arrangements to reduce the amount of tax payable.⁵³ It has even been used to make donations direct to charity to satisfy a moral obligation which the beneficiary felt he owed.⁵⁴ Benefit can also

⁵⁰ Trustee Act 1925, s 31(1)(ii). There is also provision for a situation in which the income of more than one fund is applicable for the beneficiary’s maintenance, in which case the income of those funds are to be applied in proportion.

⁵¹ *Re Heyworth’s Contingent Reversionary Interest* [1956] Ch 364, 370, by Upjohn J, on the same words in the Trustee Act 1925, s 53.

⁵² *Re Lofthouse* (1885) 29 ChD 921. The trustees’ primary aim must still be to benefit the beneficiary rather than the parents or guardians.

⁵³ *Lowther v Bentinck* (1874-1875) LR 19 Eq 166; *Re Lesser* [1947] WLR 366; *Re Ropner’s Settlement Trusts* [1956] 1 WLR 902.

⁵⁴ *Re Clore’s Settlement Trusts* [1966] 1 WLR 955; for a case in which the requirements for such a donation were not satisfied, see *X v A* [2005] EWHC 2706 (Ch), [2006] 1 WLR 741.

encompass the establishment of a separate trust on new terms for a beneficiary.⁵⁵

- 5.49 There are restrictions on this statutory power of advancement. In particular, the power only extends over one-half of the beneficiary's share in the trust fund. So, if there is £100,000 in the estate and two beneficiaries whose interests are held under the statutory trusts, each beneficiary's share is £50,000 but he or she can receive only £25,000 as an advancement. Even if the trust fund later increases in value, no further funds can be advanced.⁵⁶ The consent of any person with a life interest in the property must also be obtained. So, if the deceased left a surviving spouse and an advancement is to be made from that part of the estate in which the spouse holds a life interest, the spouse's consent must be obtained first. When the beneficiary to whom an advance has been made subsequently turns 18 and becomes entitled absolutely to his or her share of the estate, the advance must be brought into account, reducing the amount finally paid out.
- 5.50 We are not aware of significant concerns as to the way in which section 31 operates in relation to the statutory trusts arising on intestacy. We welcome any comments from consultees. Practitioners have, however, indicated to us that limiting the statutory power of advancement under section 32 of the Trustee Act to one-half, rather than the whole, of a beneficiary's interest is unnecessarily restrictive.
- 5.51 We note that trust and will trust precedents generally remove that restriction; a leading work on the drafting of trusts refers to this as "standard practice".⁵⁷ To do so in relation to the statutory trusts arising on intestacy would avoid the need to carry out calculations to assess whether the one-half limit has been reached. It would also increase trustees' flexibility and reduce the need for court applications to be made in order to permit advances.⁵⁸ For example, particularly where the trust fund is small, the trustees may wish to advance the fund so that it is held for the beneficiaries outright, thus simplifying the administration of the trust.⁵⁹
- 5.52 **We provisionally propose that trustees' power of advancement (pursuant to section 32 of the Trustee Act 1925) should be extended (for the purposes only of the statutory trusts on intestacy) to the whole, rather than one half,**

⁵⁵ *Pilkington v Inland Revenue Commissioners* [1964] AC 612. It would be rare for such an advancement to be justified in the context of the statutory trusts.

⁵⁶ *Re Marquess of Abergavenny's Estate Act Trusts* [1981] 1 WLR 843.

⁵⁷ J Kessler QC, *Drafting Trusts and Will Trusts: A Modern Approach* (9th ed 2008) para 11.8. See, for example, the *Standard Provisions of the Society of Trust and Estate Practitioners* (1st ed 1992) para 4; C Sherrin, R Barlow and R Wallington, *Williams on Wills* (9th ed 2008) vol 2, form B18.20; and G Ashton and others (eds) *Butterworths Wills, Probate and Administration Service* (Issue 59, 2008) form 1A.30.2.

⁵⁸ The law of wills is not within our terms of reference and the amendment we provisionally propose at para 5.52 below relates only to the trusts arising on intestacy.

⁵⁹ Such an advancement may have tax consequences, but that would also be the case under current law where an advancement is made amounting to up to one-half of the beneficiary's share. Capital gains tax is chargeable on outright advancements and certain advancements on trust under Taxation of Chargeable Gains Act 1992, s 71(1). No charge to inheritance tax will apply if the statutory trusts are for the deceased's descendants: Inheritance Tax Act 1984, s 71B(2)(c). There will be such a charge to inheritance tax under section 65 if the beneficiaries are not the deceased's descendants (at a maximum rate of 6%).

of the share of a beneficiary who is not yet absolutely entitled under the statutory trusts.

- 5.53 We do not propose to make any change to the requirement that, if the surviving spouse is entitled to a life interest in the trust fund, his or her consent must be obtained before an advancement could be made in favour of another beneficiary.

ADOPTION

- 5.54 As we explained above, the interest of a beneficiary under the statutory trusts is contingent on that beneficiary reaching 18. However, if the beneficiary is adopted, that contingent entitlement may come to an end.⁶⁰
- 5.55 Once an adoption order has been made, the adopted person is treated in law as the child of the adopter or adopters and not the child of anyone else.⁶¹ The legal connection between the adopted person and his or her biological parents is severed. It is clear, therefore, that a child who is adopted *before* the death of a biological parent is not for the purposes of the intestacy rules a child of that parent. No statutory trust can therefore arise in that child's favour; the child has no interest in any part of the estate, contingent or otherwise.
- 5.56 The position of a child who is adopted *after* the death of his or her parent is quite different, and gives rise to a problem that was considered in the case of *S v T*.⁶² S was a five-year-old child who was the sole beneficiary of his unmarried father's intestate estate. His interest was therefore held under the statutory trusts. S was the subject of adoption proceedings and it was feared that the adoption would extinguish S's contingent interest. In that event, the entire estate would pass to S's paternal grandmother, M. An application was made to the court to vary the statutory trusts so as to protect the interests of S.
- 5.57 The case was decided before the coming into force of the relevant parts of the Adoption and Children Act 2002.⁶³ The Court therefore had to consider the effect of section 39(2) of the Adoption Act 1976, which provided that an adopted child should be treated in law as if he were not the child of any person other than the adopters.⁶⁴ The Court found that there was no reported case directly concerning the interaction between the adoption legislation and the rights of an infant under the statutory trusts which arise on intestacy. It was held that:

On the face of it, the effect of section 39(2) is that once S is adopted, and if he subsequently attains the age of 18, he will not, for the purposes of [the statutory trusts], then be a "child of the intestate living at the death of the intestate". From the date of S's adoption it will be legally impossible for S to be issue of the deceased when he attains the age of 18 and so, on the face of it, section 39(2) would

⁶⁰ While it is technically possible for an adoption order to be made in respect of an unmarried person aged between 18 and 19, in almost all cases adoption will take place at an age when a beneficiary's interest is still contingent.

⁶¹ Adoption and Children Act 2002, s 67(3).

⁶² [2006] WTLR 1461.

⁶³ On 30 December 2005.

⁶⁴ See now Adoption and Children Act 2002, ss 46 and 67.

cause the vesting of the deceased's residuary estate in M absolutely on the date of S's adoption.⁶⁵

- 5.58 It was suggested that, if the effect of the adoption was that S was disinherited, the adoption might not be in his best interests and therefore might be jeopardised. The Court therefore varied the statutory trusts so that S immediately received an absolute entitlement.
- 5.59 In considering possible reform in this area we make a clear distinction between those cases where a child is adopted before the death of a biological parent and those cases where a child is adopted afterwards (and, quite possibly, as a direct consequence of the death). Children who are adopted before the death of a biological parent have no interest in that parent's estate. The result of adoption is that they cease to be the child of their birth parents; adoption does not, therefore, deny them anything to which they are already entitled.⁶⁶
- 5.60 A child who is adopted after the death of a parent is in a different position: he or she has a defined interest in that parent's estate, albeit one that is contingent on turning 18. The loss of this interest is a consequence of the adoption that in many cases will not have been anticipated by the adopters or those involved in the adoption process. It would almost certainly be contrary to the wishes of the deceased parents, and seems an unintended and unacceptable by-product of the arrangements made for the care of the child following a bereavement.⁶⁷
- 5.61 Adoption agencies are obliged to obtain information about whether a proposed adoptee has any rights to, or interest in, property which he or she stands to retain or lose if adopted.⁶⁸ In addition, the report to the court where there has been an application for an adoption order should disclose inheritance rights the child stands to retain or lose.⁶⁹ We have been advised, however, that those involved in the adoption process may not be aware of the existence of a contingent interest held under the statutory trusts that arise on intestacy and may not appreciate that adoption will destroy such an interest.
- 5.62 If the point is identified before an adoption order is made, a court hearing will be necessary to vary the statutory trusts. Even an uncontested application will involve costs and delay. Where the application is contested, for example where

⁶⁵ [2006] WTLR 1461 at [19], by Lord Justice Etherton, when he was a High Court judge.

⁶⁶ It is of course possible for the birth parent (or, indeed, a biological grandparent or other relative) to make a will in favour of a child who has been adopted; there may be issues about tracing the child following the adoption process, but the adoption agency is likely to be able to assist with this.

⁶⁷ It may also be an infringement of the child's right to have his or her property protected under Article 1 of the First Protocol to the European Convention on Human Rights. There is no authority on whether a contingent interest is within the concept of "possessions" in Article 1 of the First Protocol, and the Article does not guarantee the right to acquire property: *Kopecký v Slovakia* (2005) 41 EHRR 43, at [35]. However, it may be that a contingent interest qualifies as a "possession" by reason of it creating a "legitimate expectation" of obtaining effective enjoyment of a property right": *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45, at [61].

⁶⁸ The Adoption Agencies Regulations 2005, r 15(1), and sch 1, para 8.

⁶⁹ Family Procedure (Adoption) Rules 2005, r 29(3), as supplemented by: Practice Direction – Reports by the Adoption Agency or Local Authority, Annex A, s B(1)(i)(t).

other parties stand to gain significantly from a failure of the statutory trusts, the costs and delay may be significant and will in many cases be disproportionate to the value of the child's interest. In the case of *S v T*, S was fortunate in that his advisers were aware of the point and the estate was sufficiently large to bear the costs of litigation. This will not always be the case. We therefore favour a solution that, in the normal run of cases, does not require a court order.

- 5.63 One option would be to reform the statutory trusts so that, in the event of an adoption order being made, a beneficiary becomes entitled outright to his or her inheritance. We are concerned, however, that this would place a prospective adoptee in a better position than any other beneficiary, since he or she would obtain an absolute entitlement before the age of 18.⁷⁰ This could also have adverse tax consequences.⁷¹
- 5.64 A more targeted solution could be achieved by a provision to the effect that a contingent interest arising on intestacy is not lost as a result of adoption. The Adoption and Children Act 2002 contains provisions which allow an adopted person to retain certain interests "vested in possession" in him or her before the adoption,⁷² and a new saving provision could be made for a contingent interest under the statutory trusts.⁷³ The interest would, therefore, continue to be held by the same trustees. If that is inconvenient, it would be possible for a change of trustees to be arranged. It is more likely, where an adoption arises because of the death of one or more parents, that the trustees and the adopters will be members of the same family, and may even be the same people; so we think that this will not in general be a problem.
- 5.65 We recognise that such a reform would raise the possibility of an adopted person inheriting from one or more biological parents and also from one or more adoptive parents. However, this outcome is already possible,⁷⁴ and of course adoptive parents may make arrangements by will to avoid this outcome.
- 5.66 **We provisionally propose that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.**

⁷⁰ Although it is likely that for most minor beneficiaries the interest would be held on a bare trust until the minor beneficiary was able to give a valid receipt.

⁷¹ It would trigger a capital gains tax disposal by the trustees under section 71(1) of the Taxation of Chargeable Gains Act 1992; holdover relief under section 260 may be available, but would require a claim to be made. In addition, it would change the income tax treatment of the fund. Although the substantive effect of those changes might well be manageable, we think that it would be preferable to avoid triggering them by an adoption.

⁷² Adoption and Children Act 2002, s 73(5); see also Adoption Act 1976, s 46(4) the effect of which was considered in *Staffordshire County Council v B* [1998] 1 FLR 261. We take the view that the case does not assist a beneficiary under the statutory trusts which arise on intestacy.

⁷³ See C Harpum, S Bridge and M Dixon, *Megarry & Wade, The Law of Real Property* (7th ed 2008) para 9-001: "An interest is 'vested in possession' when it gives the right of present enjoyment. ... By contrast with a vested interest, a contingent interest is one which will give no right at all unless or until some future event happens."

⁷⁴ For example, the adopted person may inherit an absolute interest under the will of a deceased biological parent before being adopted and then inherit on the subsequent death of one or more of their adopted parents.

- 5.67 As an adopted child legally ceases to be the child of his or her biological parents once the adoption order is made, adoption also has the effect of preventing an adopted child from making an application for family provision as a child of the deceased.⁷⁵ This is unlikely to cause real injustice. The adoption process will take at least a year; there is therefore ample time to bring an application for family provision in the very few cases where that might be necessary or appropriate,⁷⁶ because an application for family provision should be brought within six months of a grant of representation.⁷⁷
- 5.68 In the very different circumstances where the child is adopted following a care order while one parent is still alive, the other having died, it would only be in very unusual circumstances that it would be appropriate for family provision proceedings to be brought against the deceased parent's estate.⁷⁸ There is a statutory duty on local authorities to ensure that the financial needs of an adopted child are met from the public purse if the adopter or adopters do not have sufficient means.⁷⁹
- 5.69 We therefore make no proposal for reform of this position.

⁷⁵ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c), considered in *Re Collins* [1990] Fam 56.

⁷⁶ Where both parents have died intestate prior to the adoption, the intestacy rules will have ensured that the child has an inheritance.

⁷⁷ Inheritance (Provision for Family and Dependants) Act 1975, s 4; the court may, however, extend this time limit.

⁷⁸ See *Re Collins* [1990] Fam 56, 61.

⁷⁹ Adoption and Children Act 2002, ch 2; Adoption Support Services Regulations 2005, SI 2005 No 691, part 3.

PART 6

OTHER RELATIVES, DEPENDANTS AND *BONA VACANTIA*

INTRODUCTION

- 6.1 In this Part we look at a range of claimants and situations. We look first at two categories of applicants for family provision: those whom the deceased has treated as “children of the family”, and dependants. We then consider whether the categories of claimant should be widened to encompass a wider range of family relationships. Then we turn to intestacy and the position of parents and siblings, and the law’s current preference for full siblings over half siblings; and we ask a question about relatives who are hard to find. Finally, we discuss what happens if the deceased had no family within the range of the intestacy rules, so that the estate becomes *bona vacantia*.

CLAIMS FOR FAMILY PROVISION

Children of the family

- 6.2 We have previously noted that a person only qualifies to claim financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”) against an estate as a child if the deceased was his or her legal parent. Others, such as stepchildren, may however qualify to claim if they were treated by the deceased as a “child of the family” in relation to the deceased’s marriage or civil partnership. We deliberately discuss such claimants here rather than in Part 5 alongside the children of the deceased, since it is important to note that the deceased was not their legal parent.
- 6.3 This category of applicants for family provision was introduced as part of the 1975 Act. The Law Commission recommended that children of the family be entitled to apply for family provision, and noted that financial provision could be ordered for such children on divorce.¹ However, the definition of the category of claimants as “children of the family of the deceased in relation to a marriage or civil partnership” rules out claims by children looked after by the deceased alone, or by the deceased together with a cohabitant.
- 6.4 The requirement that the treatment must be referable to a marriage or civil partnership has been criticised. One commentator has described it as a “significant respect” in which “children brought up by unmarried partners are treated unfavourably”:

¹ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, paras 66 and 67. See also sections 23 and 52(1) of the Matrimonial Causes Act 1973.

It follows that a child cannot claim reasonable financial provision as a child of the family out of the estate of his mother's cohabitant notwithstanding the fact that the cohabitant may have been the only father figure in the child's life.²

- 6.5 In 1975 a remarriage was then the most usual context in which such a relationship would be found. Thirty-five years later, cohabitation has become much more prevalent, and we agree that the provision is unduly restrictive in insisting that the treatment must be referable to a marriage or civil partnership.³ Cohabitation between people who have children from previous relationships is now common, and we do not think that it is right for a child to be treated differently depending on whether his or her legal parent happened to have married or formed a civil partnership with the deceased, or alternatively chosen to cohabit with him or her. The bond between the deceased and the child may be just as strong in either case.
- 6.6 This is particularly relevant in the light of our proposals that some cohabitants should be included in the intestacy rules and ultimately treated in the same way as spouses in specified circumstances. In assessing the claims of children of the family, the fact that a substantial part of the estate was inherited from the child's legal parent has often been relevant.⁴ Under our proposals for the reform of the intestacy rules that could also occur if the couple cohabited. We think that a case such as *Gora v Treasury Solicitor*,⁵ in which the applicant was in financial need and her deceased stepfather had already inherited from her mother, should be decided in the same way if the deceased had been in a cohabiting relationship rather than having married or formed a civil partnership.
- 6.7 However, we think that the law should go further than this, and that anyone whom the deceased treated as a child should be able to apply for family provision from the estate.⁶ This treatment will very often be in relation to a marriage, civil partnership or cohabitation, because the most usual reason for a child to come into someone's life is as the child of a new partner. But we do not think that this should be necessary; the only question should be whether the deceased assumed the position of a parent towards the applicant.⁷ It is strictly irrelevant to

² S Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77, 89. See also C Barton, "Stepfathers, Mothers' Cohabitants and 'Uncles'" [2009] *Family Law* 327, 332 to 333.

³ The difference in treatment is particularly marked because within that restriction the courts have interpreted the provision broadly; see, for example, *Re Callaghan* [1985] Fam 1, in which the child was independent by the time the marriage took place and never lived with the spouses.

⁴ This was the case in *Re Leach* [1986] Ch 226, *Re Callaghan* [1985] Fam 1 and *Gora v Treasury Solicitor* [2003] *Family Law* 93.

⁵ [2003] *Family Law* 93.

⁶ As is the case in Scotland: see Family Law (Scotland) Act 1985, s 1(1)(d).

⁷ See the Law Commission's comment that, on death, the concern is with the obligation of the deceased towards the child (rejecting any requirement that the deceased's spouse, as well as the deceased, should have treated the child as a child of their family): Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, para 68.

that relationship whether or not the deceased was part of a couple,⁸ although of course if such a family unit existed, that may strengthen the applicant's case.

- 6.8 We do not think that this would open the door to a large number of unmeritorious claims against estates. The courts require a person who applies as a child of the family to show, not just that the deceased was kind to him or her, but that the deceased assumed the position of a parent towards the applicant.⁹ We think that this threshold is sufficiently high.
- 6.9 **We provisionally propose that a person who was treated by the deceased as his or her child should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party.**

Dependants

- 6.10 We use the word "dependants" to describe those who do not fall into any other category of applicant and are entitled to apply for family provision on the basis that they were being maintained by the deceased immediately before his or her death.¹⁰ The new category of dependants was introduced on the recommendation of the Law Commission, which put the argument in this way:

Where a deceased person was contributing to someone's maintenance before his death his failure to make provision for that person may have been accidental or unintentional; he may have made no will; his will may be stale; or his will may have operated in a way he did not anticipate In these cases an order for family provision would be doing for the deceased what he might reasonably be assumed to have wished to do himself.¹¹

- 6.11 The current law on those entitled to apply as dependants of the deceased has raised two main concerns.

Assumption of responsibility

- 6.12 According to the case law, it is a prerequisite for a claim by a dependant that there was an "assumption of responsibility" by the deceased. This has been regarded as a threshold requirement because, in assessing the claim, the court has to have regard to "the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and to the

⁸ The Cohabitation Report noted the difficulty of defining the sort of cohabiting relationship which suffices for a claim to be made by a child of the family, given that this is strictly irrelevant to the merits of the applicant's claim: see *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007) Law Com No 307, para 6.54. See also paras 6.56 and 6.57, noting that the concept should logically be extended beyond even cohabiting relationships, and arguing that reform would be more appropriately considered in the context of a comprehensive review of the law of family provision.

⁹ *Re Leach* [1986] Ch 226, indicating that this will be most easily shown if the applicant has also treated the deceased as a parent, providing the care and support which is typically associated with that relationship.

¹⁰ Under section 1(1)(e) of the Inheritance (Provision for Family and Dependants) Act 1975.

¹¹ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, para 90.

length of time for which the deceased discharged that responsibility”.¹² That reasoning was followed in *Jelley v Iliffe*,¹³ although the Court of Appeal in that case found that the fact of maintenance will usually raise the presumption that the deceased has assumed responsibility for the applicant’s maintenance.

6.13 This additional requirement has been criticised. In *Bouette v Rose*, the Court of Appeal questioned the original reasoning, considering that in fact the special factor “is not adding a new threshold condition but is paraphrasing what is already implicit in section 1(1)(e)”.¹⁴ One commentator has argued that the current interpretation goes against the Act’s intention, since “the words ‘assumed responsibility for’ add nothing to the fact of maintenance”.¹⁵ Concerns have been expressed that requiring an assumption of responsibility “is unnecessarily restrictive and could give rise to problems if the deceased was irresponsible during her lifetime”.¹⁶

6.14 We do not think that an assumption of responsibility should be a prerequisite for a claim.¹⁷ Most successful claims on the basis of dependency will, of course, involve such an assumption of responsibility. The Law Commission in 1974 clearly envisaged that the paradigm case of dependency would relate to voluntary provision made by the deceased during his or her lifetime, which the applicant seeks to continue after the death. If that provision was made unwillingly or on the basis that it would not continue after the death, the dependant’s ability to show that reasonable provision was not made will be correspondingly weaker.¹⁸

6.15 That does not mean, however, that the assumption of responsibility should be a threshold requirement for a person to qualify to make a claim. *Bouette v Rose*¹⁹ itself is a good example of a case where requiring an assumption of responsibility was inappropriate. The deceased was only 14 when she died and her mental disability was such that she could not in fact truly have assumed responsibility for her mother’s maintenance. Her mother had been the deceased’s full-time carer, receiving regular monthly payments from funds held for the deceased by the

¹² Inheritance (Provision for Family and Dependents) Act 1975, s 3(4); *Re Beaumont* [1980] Ch 444.

¹³ [1981] Fam 128.

¹⁴ [2000] 1 FLR 363, 371. The Court of Appeal was bound by its earlier decision in *Jelley v Iliffe* [1981] Fam 128, but was able to hold that there was an inference of such an assumption of responsibility.

¹⁵ S Coldham, “Dependants’ Provision on Death” (1982) 45 *Modern Law Review* 100, 102.

¹⁶ C Hand, “Family Provision: Are the right people receiving it?” (1980) 10 *Family Law* 141, 144.

¹⁷ See S Naresh, “Dependants’ Applications Under the Inheritance (Provision for Family and Dependents) Act 1975 (1980) 96 *Law Quarterly Review* 534 for the argument that Sir Robert Megarry VC’s reliance on the Law Commission’s Second Report on Family Property: Family Provision on Death (Law Com No 61) in support of his interpretation in *Re Beaumont* [1980] Ch 444 was not justified.

¹⁸ A good example is *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183. The deceased had made it clear that she had not assumed responsibility for the maintenance of the applicant, her god-daughter, particularly not at the expense of her strong wish to leave her home and its grounds to charity. The payments she had been persuaded to make were intended to enable the applicant to pay off debts and become self-supporting.

¹⁹ [2000] 1 FLR 363.

Court of Protection, to cover living expenses and the costs of providing equipment. Their home was also owned as to 75% on behalf of the deceased.

- 6.16 The Court of Appeal held that the funds, and the share in the house, were being used to meet the mother's "financial and material needs, so as to enable [her] to look after her daughter's physical and emotional needs".²⁰ On the authority of *Jelley v Iliffe*,²¹ the fact of maintenance raised the presumption that there had been an assumption of responsibility. The claim was successful even though that responsibility could never truly have been assumed by the deceased.
- 6.17 We do not think that it is appropriate to require the courts to go through the "tortuous"²² reasoning of the *Jelley v Iliffe* presumption in order to deal with a point which should never have become part of the qualifying requirements. The basis on which responsibility was assumed – reluctantly, temporarily or conditionally – should be taken into account, but together with the other factors, and not as a threshold requirement.²³
- 6.18 **We provisionally propose that an assumption of responsibility by the deceased should not be a threshold requirement for an applicant to qualify to apply for family provision as a dependant under section 1(1)(e) of the Inheritance (Provision for Family and Dependents) Act 1975, but should be regarded on an equal footing with other factors.**

Balancing contributions: dependency and mutual dependency

- 6.19 Under section 1(3) of the 1975 Act, a person qualifies as a dependant if "the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person". In *Re Beaumont*, this was interpreted as making it necessary to:

weigh up the value of the respective contributions in money or money's worth made by [each party] towards the reasonable needs of the other, strike a balance, and then say whether the balance of contributions (if any) is substantial.²⁴

- 6.20 "Full valuable consideration" is not restricted to benefits provided under a contract. An applicant who informally provided care, housekeeping or garden work might be held to have given full valuable consideration.²⁵ Lord Justice Griffiths in *Jelley v Iliffe* emphasised that "it cannot be an exact exercise of evaluating services in pounds and pence" and that "the court must use common

²⁰ *Bouette v Rose* [2000] 1 FLR 363, 372.

²¹ [1981] Fam 128.

²² S Coldham, "Dependants' Provision on Death" (1982) 45 *Modern Law Review* 100, 102.

²³ See, for example, *Re Viner* (25 May 1990) CA (unreported); the deceased's sister, aged 71 at the death, had been widowed and left in a poor financial position. The deceased had, reluctantly, made her a small weekly allowance for about six months before he died. On her application as a dependant it was held that reasonable financial provision had not been made for her, and she was awarded £2,000 from the estate.

²⁴ [1980] Ch 444, 453, by Sir Robert Megarry VC.

²⁵ See the view taken by Stephenson LJ in *Jelley v Iliffe* [1981] Fam 128, 140.

sense”.²⁶ That “commonsense approach” was endorsed by the Court of Appeal in *Bishop v Plumley*.²⁷

- 6.21 It seems to us that the “balance sheet approach”, however broad-brush it may be, should not continue. First, it “leads to the inevitable conclusion that the more deserving the applicant, the less likely he or she is to succeed”.²⁸ An applicant who has provided services for the deceased may thereby be unable to claim under the 1975 Act, and yet he or she would naturally be regarded as a more meritorious claimant than a dependant who took from the deceased and gave nothing back. In *Re Wilkinson*²⁹ the applicant had lived with her sister as a general companion and housekeeper, in return for free board and lodging. The judge hesitantly concluded that on balance the care provided did not constitute full valuable consideration for the support the applicant had enjoyed. This may have been a generous conclusion; it has been noted that “one would be hard put ... to find a live-in housekeeper and constant companion for no more than board and lodging”.³⁰ This leads to the counterintuitive conclusion that the applicant would have been well advised “not to be assiduous in looking after her sister as she may lose her right to apply under the Act”.³¹
- 6.22 Second, it fails to recognise that an applicant may be dependent, not upon the deceased as such, but on the continuance of a relationship of mutual dependency. Consider two siblings or friends who live together. They pool their incomes, contributing equally to the rent and the household bills, and share the domestic work. By combining their incomes they are able to sustain a comfortable lifestyle together. On the death of one, the survivor is not able to meet his or her reasonable needs alone, even though there is now only one person to keep.³² Yet, even on the common sense approach associated with *Bishop v Plumley*, it must be doubtful whether the survivor can apply for financial provision from the estate, if the respective contributions were equivalent in kind and extent.
- 6.23 The failure of the current law to enable applications on the basis of mutual dependency was a reason for the Law Commission’s recommendation that cohabitants should be recognised as a separate class of applicant.³³ Yet that

²⁶ [1981] Fam 128, 141.

²⁷ [1991] 1 All ER 236, 242, by Butler-Sloss LJ. See also *Churchill v Roach* [2002] EWHC 3230, [2004] FLR 989.

²⁸ H Clark, “Deserving Mistresses Shunned?” (1978) 41 *Modern Law Review* 352, 354.

²⁹ [1978] Fam 22.

³⁰ S Naresh, “Dependants’ Applications Under the Inheritance (Provision for Family and Dependants) Act 1975” (1980) 96 *Law Quarterly Review* 534, 544.

³¹ C Hand, “Family Provision: Are the right people receiving it?” (1980) 10 *Family Law* 141, 144.

³² See also the rule of thumb (which can be displaced) for cases under the Fatal Accidents Act 1976 that there is a two-thirds dependency between spouses, on the basis that the net income is spent as to one third for the benefit of each and one third for their joint benefit, unless there are unusual features: W Norris QC and others (eds) *Kemp and Kemp on the Quantum of Damages* (release 107, May 2008) vol 1, para 29-036; *Harris v Empress Motors Ltd* [1984] 1 WLR 212, 216, by O’Connor LJ.

³³ Family Law: Distribution on Intestacy (1989) Law Com No 187, p 15, leading to the Law Reform (Succession) Act 1995.

reform has not removed the problem. These relationships are still found between other family members – notably siblings, as in *Re Wilkinson* – and friends, as well as between cohabitants who have not lived together for the two years required to make a claim in that capacity.³⁴

6.24 We think that the current law is unsatisfactory and should be reformed. Some commentators have argued that it would be appropriate to amend the “balance sheet approach” so that no account is taken of consideration given by the applicant unless it was given under a contract.³⁵ We should prefer, however, to move away from the balance sheet approach altogether, since it is fundamentally unsuited to cases of mutual dependence.

6.25 An alternative view was taken by the Court of Appeal in *Bouette v Rose*:

The words “other than for full valuable consideration” do not have the effect of imposing a wholly separate condition so much as of explaining the character of the contribution which amounts to maintenance. The care provided to an invalid by a professional nurse or nursing auxiliary may make a very substantial contribution to the invalid’s needs, but the relationship is a professional or employment relationship, not one of maintenance and dependency.³⁶

6.26 This indicates that “full valuable consideration” is to be used to draw a distinction between “commercial or professional” relationships and ones which are more in the nature of personal obligations. Could that concept be used in a reformed test of dependency? We agree that a person whose relationship with the deceased was commercial or professional will rarely be able to show that there was a failure to make reasonable provision for him or her. It will usually be reasonable for no provision to be made.³⁷ However, there are cases in which this bright line cannot easily be drawn; the relationship may have started as a commercial or professional arrangement, but have become one of dependency. We should be reluctant to say that someone who is party to a commercial or professional relationship should never be able to claim, especially in view of the difficulties in defining such terms.

6.27 Instead, we should prefer to move away from the idea of balancing the deceased and the applicant’s respective contributions in favour of a wider test. We think that the essence of the dependant’s claim does not rest on a “flow of benefits” from the deceased,³⁸ but on the fact that he or she was dependent upon the

³⁴ See *Churchill v Roach* [2002] EWHC 3230, [2004] FLR 989.

³⁵ See, for example, H Clark, “Deserving Mistresses Shunned?” (1978) 41 *Modern Law Review* 352; (1978) 94 *Law Quarterly Review* 175; contrast S Coldham, “Dependants’ Provision on Death” (1982) 45 *Modern Law Review* 100, 102.

³⁶ [2000] 1 FLR 363, 369. See also C Hand, “Family Provision: Are the right people receiving it?” (1980) 10 *Family Law* 141, 144, arguing that it would be appropriate to ignore the question of full valuable consideration where the applicant and the deceased formed a family unit.

³⁷ See, for example, the argument for the beneficiaries in *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041 that the deceased had made a commercial decision not to seek the full market rent from the applicant in order to keep a good tenant.

³⁸ *Churchill v Roach* [2002] EWHC 3230, [2004] 2 FLR 989, 1006, by His Honour Judge Norris QC.

continuance of the relationship with the deceased. In effect, the death may create the dependency, a financial need which was not there before the death.

- 6.28 Such an approach avoids any need to value the respective contributions of the parties, so that it is not necessary artificially to devalue contributions made in the form of domestic services.³⁹ It also enables proper recognition to be given to cases of true mutual dependency, in which both parties have contributed more or less equally to a relationship which provided both of them with support. The focus shifts from the balance between the applicant and the deceased to the position of the applicant after the deceased's death.
- 6.29 We recognise that this approach would potentially widen the class of dependant beyond cases of mutual dependency. For example, the deceased may have been providing social support to an elderly parent. After the death, the parent may no longer be able to manage alone, so that after the death his or her maintenance needs become greater.
- 6.30 We do not think, however, that this widening would risk a substantial increase in litigation. We would envisage retaining a requirement that the deceased's involvement in the creation of the dependency should have been more than minimal, in the same way as the 1975 Act currently requires that the deceased's contribution to the applicant's maintenance should have been substantial.⁴⁰ Such an applicant would still need to show that the failure to make any, or further, provision was not reasonable. If the applicant is able to meet his or her reasonable maintenance requirements from his or her own resources, a claim as a dependant will not be made out.⁴¹ Where the estate is not large enough comfortably to accommodate provision for the applicant as well as for the beneficiaries, taking into account the beneficiaries' resources and needs, the claim would usually fail. Even if successful, the restriction to provision for the applicant's maintenance will govern any order made.
- 6.31 **We provisionally propose that it should no longer be a prerequisite to the success of a claim under the Inheritance (Provision for Family and Dependants) Act 1975 brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the claimant.**

Other relatives

- 6.32 Practitioners have suggested to us that the 1975 Act should be widened further, so as to include applicants who qualify purely on the basis of their relationship to

³⁹ This is consistent with the court's concern in *White v White* [2000] 1 AC 596 (in the context of ancillary relief proceedings) to recognise the worth of such contributions: see para 2.63 above.

⁴⁰ In some cases, the requirement for a "substantial" contribution has been interpreted to mean that the balance of contributions must be "substantially" in the applicant's favour, thus eliminating cases which are close to mutual dependency: for example, *Jelley v Illiffe* [1981] Fam 128, 141; by Griffiths LJ; *Bishop v Plumley* [1991] 1 WLR 582, 587, by Butler-Sloss LJ. We think that it should instead be confined to describing the deceased's own contribution, to eliminate cases in which the deceased's involvement with the applicant's affairs was not significant.

⁴¹ As suggested in *Re Watson* [1999] 1 FLR 878.

the deceased, as children do at present. For example, the list might include parents, grandparents, grandchildren, brothers and sisters. A significant precedent for this view is found in the Fatal Accidents Act 1976, which includes as potential claimants a wide range of relatives.⁴² However, the Fatal Accidents Act 1976 does not include a general category of dependants in the same way as the 1975 Act.⁴³

- 6.33 The question is one of principle: whether relatives should be able to apply for family provision simply in recognition of their blood relationship with the deceased, and not because they are dependants. If children can apply purely on that ground, then why should not parents be able to do so? Most people recognise an obligation to support parents as and when they have lost their independence. If our recommendation that a spouse should take the whole estate where there are no children is accepted, some parents (or siblings) who would otherwise have inherited will be excluded. It is arguable that this requires that they should be included as applicants for family provision in order to avoid potential hard cases.⁴⁴
- 6.34 We see the force of this argument, but remain unconvinced that this reform would be workable. It would require the courts to decide what provision it is reasonable to make for a parent; this would be likely to generate increased litigation, at least in the first few years of its introduction. The statute might provide some guidance, but it is not clear to us on what principled basis such provision could be made. Enabling further relatives to apply on the basis of relationship alone might also encourage claims against estates, which would complicate administration and decrease certainty. In the light of our proposals above for the extension of the dependant category, we are also not persuaded that it is necessary.
- 6.35 We therefore make no provisional proposal on this matter, but shall be interested in consultees' views and arguments.
- 6.36 **We invite consultees' views as to whether the categories of applicant for family provision should be further widened to include other relatives, such as parents, descendants other than children, siblings, nephews and nieces, and so on.**

PARENTS AND SIBLINGS

- 6.37 Under current law, where an individual dies intestate leaving no surviving spouse or children, any surviving parent is entitled to the entire estate (if more than one parent survives, they share the estate equally). It is only if there is no surviving parent that any siblings or their descendants are entitled to inherit.

⁴² Fatal Accidents Act 1976, s 1.

⁴³ The Law Commission has recommended that such a category should be added: Claims for Wrongful Death (1999) Law Com No 263, paras 3.20 to 3.46.

⁴⁴ There is a historical parallel: in 1950 the terms of reference of the Morton Committee were extended to consider family provision because of the potential for the increase to the statutory legacy to affect other dependants, particularly children; this led to the Inheritance (Family Provision) Act 1938 being extended to intestate estates. See paras 2.6 to 2.7 above.

- 6.38 This has not always been the case. The Statute of Distribution 1685 provided that the siblings of a person who died intestate shared any personal property with the deceased's mother equally.⁴⁵ Since 1925, however, parents have been accorded priority over siblings.⁴⁶
- 6.39 We have considered whether the current law should be reformed so that either:
- (1) siblings inherit the estate in preference to parents; or
 - (2) siblings share the estate with surviving parents.
- 6.40 It has been said that the preference for parents over siblings (and also for grandparents over uncles and aunts) owes more to theoretical principles of nearness of relationship than to practical realities.⁴⁷
- 6.41 Empirical research does not indicate a clear consensus of opinion.⁴⁸ Some participants in the NatCen focus groups strongly favoured the current approach and indeed were opposed to siblings having any automatic entitlement to share in an intestate estate in any circumstances.⁴⁹ Data from will studies is inconclusive but suggests that testators sometimes provide for siblings in their wills but often treat siblings unequally.⁵⁰ In many cases, however, it will not be possible to ascertain from a will whether the testator also had a living parent when the will was made. Wills may also reflect tax planning measures.
- 6.42 In Scotland, where an intestate is survived by one or more parents and one or more siblings, the estate is shared between them; half to the parent or parents and half to the sibling or siblings.⁵¹ The Scottish Law Commission's recent report on succession recommended no change to this position.⁵²
- 6.43 The 1988 Working Paper considered a model of distribution whereby the estate would be split equally between any surviving parent or parents and any surviving sibling or siblings. For example, if one parent and two siblings survived, each would receive a third of the estate.⁵³ This proved to be a popular model of distribution among respondents to the public attitudes survey that informed the

⁴⁵ Statute of Distribution 1685, s 7.

⁴⁶ Administration of Estates Act 1925, s 46(1).

⁴⁷ C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 14-001.

⁴⁸ Public attitude surveys in the United States suggest a preference for parents and siblings to share an intestate estate where there is no surviving spouse or children. For a summary see R Scalise, "Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents" [2006] *Seton Hall Law Review* 171, 185 to 189.

⁴⁹ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families - Final Report* (2009) pp 17 to 18 (available at www.lawcom.gov.uk/intestacy.htm).

⁵⁰ See Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, pp 56 to 57.

⁵¹ Succession (Scotland) Act 1964, s 2(1)(b).

⁵² Report on Succession (2009) Scot Law Com No 215, para 2.35.

⁵³ Family Law: Distribution on Intestacy (1988) Law Com Working Paper No 108, para 5.9.

1989 Report.⁵⁴ The report concluded, however, that the case for reform was not sufficiently strong and therefore recommended that no change be made.⁵⁵

- 6.44 A sharing mechanism such as that practised in Scotland or contemplated by the Law Commission in the 1988 Working Paper would potentially complicate the administration of estates. It would be particularly difficult where assets are not in a form that can be easily divided: for example, where the bulk of the estate comprises a home in which the deceased lived with an elderly parent.⁵⁶ Any change to the current law would potentially reduce the entitlement of any surviving parent or parents of the deceased. A surviving parent will be older than any surviving siblings and will often be past retirement age; parents are therefore likely to be in greater need and have less opportunity to increase their income than a sibling who may still be of working age.
- 6.45 Clearly, for individuals making wills, the choice whether property should pass “sideways” to members of the same generation or “upwards” to the older generation may be influenced by financial as well as emotional considerations. Such a choice may also have adverse tax consequences for the deceased’s family, as there may be an inheritance tax charge on assets which pass to a parent and there may be a further charge if the same assets pass to others on that parent’s death.⁵⁷ However, as we explained in Part 1, our approach is not to make proposals motivated by a desire to reduce tax liability.⁵⁸ The effect of the tax regime will vary in different families, tax legislation may change, and individuals should take their own tax advice.
- 6.46 **We ask consultees whether the current preference in the intestacy rules for parents over siblings should be retained.**
- 6.47 A question to this effect is included in the Nuffield survey, the results of which will be available before publication of our final report. We will take account of these results along with consultation responses.

FULL SIBLINGS AND HALF SIBLINGS

- 6.48 The intestacy rules distinguish between “brothers and sisters of the whole blood” and “brothers and sisters of the half blood”.⁵⁹ In this consultation paper we refer to full siblings (who share both parents) and half siblings (who share only one parent). Under current law, full siblings are given priority over half siblings in four circumstances:

⁵⁴ Family Law: Distribution on Intestacy (1989) Law Com No 187, p 13, n 85: 63% of respondents favoured this approach compared with 25% who were in favour of parents receiving the entire estate.

⁵⁵ Above, para 51.

⁵⁶ Though this happens at present where there is more than one surviving member of a class of entitled relatives.

⁵⁷ Although the “quick succession relief” provisions at Inheritance Tax Act 1984, s 141 may apply to give full or partial relief in some cases.

⁵⁸ See para 1.31 above.

⁵⁹ Administration of Estates Act 1925, s 46(1).

- (1) if a person dies intestate survived by a spouse but no children or other descendants and no parents, and the estate is sufficiently large to satisfy the surviving spouse's statutory legacy, the remainder will be shared with any surviving full siblings (or their descendants) but not with half siblings;
- (2) if there is no spouse, child, other descendant or parent, any surviving full siblings (or their descendants) will inherit in preference to half siblings;
- (3) if there is no spouse, child, other descendant, parent or sibling, any surviving full siblings of a parent of the deceased (or their descendants) are preferred to half siblings of a parent; and
- (4) full siblings have priority over half siblings when applying for a grant of representation (and full siblings of a parent of the deceased have priority over half siblings of a parent of the deceased).⁶⁰

6.49 Historically, different rules governed succession to real property (mainly freehold land) and personal property (everything else). In the absence of a will, half siblings were prevented from inheriting real property, but full siblings and half siblings were equally entitled to personal property.⁶¹ The Inheritance Act 1833 enabled half siblings to inherit real property on intestacy for the first time.⁶² One reason for the change was that the distinction between full and half siblings was "not familiar to the public" and that "lands are therefore liable to be left to descend contrary to the intention of the owner".⁶³ The legislation nevertheless retained a preference for full siblings by providing that a half sibling could only inherit if no full sibling (or issue of a full sibling) survived.⁶⁴ It was said that there was "much less connection" between half siblings than full siblings and it would therefore be "repugnant to common feelings and notions" for any part of an estate to pass to a half sibling when there was also a living full sibling.⁶⁵

6.50 When the law of succession to real and personal property was assimilated in 1925, it was decided to retain the preference for full siblings over half siblings in the intestacy rules.⁶⁶ This preference persists today in England and Wales but is far less common elsewhere in the common law world. No distinction is made between full and half siblings in Northern Ireland.⁶⁷ The same is true in Alberta and, when the Alberta Law Reform Institute reviewed this rule, it concluded that

⁶⁰ Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

⁶¹ *Watts v Crooke* (1690) Shower 108, 1 ER 74.

⁶² Inheritance Act 1833, s 9.

⁶³ First Report made to His Majesty by the Commissioners appointed to inquire into the law of England respecting real property (20 May 1829) p 13.

⁶⁴ Inheritance Act 1833, s 9. This rule only applied if the common ancestor was male. It had been proposed that no distinction between siblings should be drawn in respect of real property acquired by an intestate as heir as opposed to by purchase or under the terms of a will: First Report made to His Majesty by the Commissioners appointed to inquire into the law of England respecting real property (20 May 1829) p 13.

⁶⁵ First Report made to His Majesty by the Commissioners appointed to inquire into the law of England respecting real property (20 May 1829) p 13.

⁶⁶ Administration of Estates Act 1925, s 46(1).

⁶⁷ Administration of Estates (Northern Ireland) Act 1955, s 14.

“nothing suggests that it causes a problem”.⁶⁸ This is also the case in New Zealand and Australia, with the exception of New South Wales, where the New South Wales Law Reform Commission has recommended that the law be changed to remove any distinction between full and half siblings.⁶⁹ In making this recommendation, the Commission reasoned that:

A distribution scheme for intestate estates should be a default mechanism that serves the majority of likely cases. Given the modern acceptance of relationship breakdown and the prevalence of melded families, it is more likely that people will have been raised with, or at least know, their half siblings.⁷⁰

- 6.51 The distinction between full and half siblings persists in Scotland,⁷¹ but the Scottish Law Commission has also recommended its abolition there, noting that a provisional proposal to this effect had received the unanimous support of consultees.⁷²
- 6.52 Our 1988 Working Paper questioned “whether the distinction between relatives of the whole blood and relatives of the half blood is acceptable today”.⁷³ But the 1989 Report did not note any consultation responses on this point and made no recommendations to change the current law. More recently, legal academics and commentators have doubted whether the continued preference for full siblings conforms to the average intentions of people dying intestate.⁷⁴ It should also be noted that references to siblings in a will are generally taken to include both full and half siblings, unless the wording or context suggests otherwise.⁷⁵ We think that the intestacy rules should also have this default position; if people do not want their estates to pass to half siblings or half uncles or aunts, they are free to make a will to that effect (subject to the possibility of a family provision claim).
- 6.53 We appreciate that a reform to end the preference for full siblings would not in practice affect very many estates. There are relatively few intestate estates where siblings (whether they are full or half siblings) inherit anything. Our provisional proposal that a surviving spouse of an intestate should inherit the entire estate where there are no surviving children would reduce even further the number of intestate estates where a sibling of the deceased stood to inherit.⁷⁶ Nevertheless, it seems to us that retaining a preference for full siblings over half

⁶⁸ Alberta Law Reform Institute, *Reform of the Intestate Succession Act (1999) Report No 78*, p 179.

⁶⁹ New South Wales Law Reform Commission, *Uniform succession laws: intestacy (2007) Report 116*, pp 151 to 154.

⁷⁰ Above, para 8.52.

⁷¹ *Succession (Scotland) Act 1964*, s 3.

⁷² *Report on Succession (2009) Scot Law Com No 215*, p 24.

⁷³ *Family Law: Distribution on Intestacy (1988) Law Com Working Paper No 108*, para 3.18.

⁷⁴ C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 1-029; see also S Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77, 87.

⁷⁵ See *Grieves v Rawley* (1852) 10 Hare 63, 68 ER 840, 841; *Dowson v Beadle* [1909] WN 245, 101 LT 671; *Miles v Wilson* [1903] 1 Ch 138; *Lynneberg v Kidahl* [1948] NZLR 207.

⁷⁶ See para 3.36 above.

siblings does not accord with the reality of modern family structures or public expectations of how property should be distributed. The Nuffield survey includes a question which will provide a reliable measure of public opinion on this point before we formulate our final recommendations.

- 6.54 **Would consultees favour reform to the intestacy rules (and consequential amendments to the Non-Contentious Probate Rules) so that no distinction is drawn between full and half siblings?**

OTHER RELATIVES

- 6.55 Under current law, the most remote relatives entitled to inherit an intestate estate are the children and other descendants of a half sibling of a parent of the deceased (that is, first half cousins, first half cousins once removed, first half cousins twice removed and so on).
- 6.56 Historically, the range of relatives entitled to an intestate estate was even wider than this. Although there were different rules for succession to real and personal property before 1926, in theory there was no limit to the remoteness of a relative entitled to inherit (though in practice they may have been impossible to trace).⁷⁷ The 1925 reforms therefore reduced the classes of relatives entitled on intestacy. Further reforms in 1952 reduced dramatically the number of occasions on which remote relatives could inherit on intestacy, by providing that a surviving spouse would never share the estate with any relative more remote than a parent or full sibling.⁷⁸
- 6.57 In some jurisdictions the list of entitled relatives is wider than in England and Wales. In Scotland, for example, the estate may pass to second, third and even more remote cousins, no matter how many generations removed they are from the deceased.⁷⁹
- 6.58 We have considered whether there would be any merit in adopting a similar approach here but have concluded that this would have little practical benefit and would be difficult to justify in principle. We are also not aware of any public or professional pressure for such a reform. The number of occasions on which an estate would pass to relatives who are more remote than presently allowed is rare but including them in the intestacy rules would exacerbate the problems which are already caused by “missing kin”.
- 6.59 The administrators of an intestate estate have a duty to distribute the estate to entitled beneficiaries. Failure to do so may amount to a breach of trust for which the administrators may be personally liable.⁸⁰ Where it is difficult to trace one or more beneficiaries, administrators are placed in a difficult position. If the administrators are unaware of the existence of a beneficiary, they may avoid personal liability for any loss caused to a beneficiary by advertising in a

⁷⁷ See W Holdsworth, *A History of English Law* (1966) vol 3, pp 171 and following; C Sherrin and R Bonehill, *The Law and Practice of Intestate Succession* (3rd ed 2004) para 2-015.

⁷⁸ Previously, a surviving spouse took the personal chattels, a statutory legacy and a life interest in the rest of the estate; other relatives were entitled in remainder.

⁷⁹ Succession (Scotland) Act 1964, ss 2(1)(h) to (i), and 5.

⁸⁰ *Re Diplock* [1948] Ch 465.

prescribed manner.⁸¹ If, however, the administrators are aware of the existence of a beneficiary but cannot locate the beneficiary, the statutory advertising procedure offers no protection.

6.60 Administrators therefore commonly turn to professional genealogists to trace missing beneficiaries.⁸² It is also possible to purchase insurance against the likelihood of missing beneficiaries later coming forward.⁸³ Insurers are, however, likely to require evidence from genealogists that tracing has been attempted before offering insurance. Ultimately, administrators may have to apply to the court for directions; for example, an order that the estate may be administered on the basis that a beneficiary who cannot be traced has died.⁸⁴ Alternatively, the court may order that known beneficiaries are entitled to their share of the estate immediately. The practical effect is that the cost of further investigations falls on those who have yet to be traced.⁸⁵ Practitioners have suggested to us that administrators should be entitled to act in this way without having to make an application to the court.

6.61 We are attracted by this idea, which appears to us to be a targeted and proportionate response to problem of tracing “missing kin”. We have some concerns, however, that it might reduce the incentive of some family members to assist the administrators to locate missing relatives. We also wonder whether it is necessary to distinguish between the costs of identifying who the beneficiaries of the estate are and the costs of locating those beneficiaries who have been identified, when both could properly be regarded as costs associated with the administration of the estate.⁸⁶ The current court procedure appears to be well established and familiar to practitioners and may be the most appropriate way to proceed when there are missing beneficiaries. In appropriate circumstances, the application may proceed “on the papers”, saving the expense of a hearing.

6.62 **We invite consultees’ views as to whether there should be a presumption that administrators may distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.**

6.63 Another way to reduce the number of “missing kin” would be to reduce the classes of potentially entitled beneficiaries (for example, by excluding relatives more remote than uncles and aunts or limiting the number of generations of descendants who can inherit). This would, however, mean that more estates fall to be treated as *bona vacantia*, which we discuss further below.⁸⁷ As we explain, there are some misconceptions about *bona vacantia*,⁸⁸ but we nevertheless believe that such a result would be unpopular. We also believe that the

⁸¹ Trustee Act 1925, s 27.

⁸² Sometimes referred to as “heir hunters”, also the title of a BBC television programme.

⁸³ There is judicial encouragement for the use of insurance, at least where the estate is modest: *Evans v Westcombe* [1999] 2 All ER 777, 785 to 786.

⁸⁴ *Re Benjamin* [1902] 1 Ch 723.

⁸⁵ Civil Procedure Rules, Practice Direction 40A, para 7.

⁸⁶ R Wilson and C Mahoney, “Personal representatives and commissions to agents tracing beneficiaries” [2005] *Private Client Business* 293, 295 to 296.

⁸⁷ See paras 6.69 to 6.83 below.

⁸⁸ See paras 6.78 to 6.79 below.

presumption discussed above is a more targeted response to the problem. We therefore make no provisional proposal to this effect.

UNMARRIED FATHERS

- 6.64 A series of reforms since 1925 has brought the legal position of children born outside marriage into line with that of children born to married parents.⁸⁹ The legal position of the parents of children born outside marriage has also changed. The Legitimacy Act 1926 entitled the mother of an unmarried child to inherit on that child's intestacy. In 1969 a similar right was extended to unmarried fathers. However, the statute also introduced a rebuttable presumption that the father of a child born outside marriage had predeceased the child. This "rule of convenience" was designed to avoid adding to the burden on administrators, who would otherwise be required to make possibly onerous enquiries to trace a child's father before distributing the estate.⁹⁰ The rule places an evidential burden on a person claiming to be the father of the deceased child to prove his paternity.
- 6.65 The Law Commission reviewed this rule in 1982.⁹¹ It was accepted then that the rule treats unmarried fathers less favourably than married fathers. We could add that it also treats them less favourably than mothers who were not married when the child was born. However, the Commission concluded that abolishing the rule would add to the costs of administration of intestate estates, and would potentially expose personal representatives to claims from unmarried fathers who refused to take steps to confirm their paternity. The Commission therefore recommended both retaining the rule and extending it to any other person related to a deceased child only through an unmarried father (who would, under reforms recommended in the same report, become entitled for the first time to inherit on such a child's intestacy).
- 6.66 The extended rule was enacted as section 18(2) of the Family Law Reform Act 1987, which remains in force today. It has been suggested to us that the provision should be amended or repealed on the basis that the difference in treatment embodied in the rule can no longer be justified. We have considered whether that difference requires reform on the grounds of incompatibility with the Human Rights Act 1998,⁹² and we take the view that this is not the case. Section 18(2) does not alter the substantive inheritance rights of unmarried fathers, and instead imposes a procedural requirement.⁹³ The practical considerations

⁸⁹ Or to parents who subsequently married one another: Legitimacy Act 1926, s 1(1). This section was subsequently repealed and replaced by section 2 of the Legitimacy Act 1976.

⁹⁰ Family Law: Illegitimacy (1979) Law Commission Working Paper No 74, paras 5.5 and 5.9.

⁹¹ Family Law: Illegitimacy (1982) Law Com No 118, paras 8.29 to 8.33.

⁹² In particular, Articles 8 (the right to respect for family and private life) and 14 (prohibition of discrimination in securing the enjoyment of Convention rights) of the European Convention on Human Rights and Fundamental Freedoms, incorporated into English law by section 1 and schedule 1 of the Human Rights Act 1998. Article 8 has been held to cover "matters of intestate succession": *Marckx v Belgium* (1979) 2 EHRR 330, at [52].

⁹³ In contrast to the Belgian succession law in issue in *Marckx v Belgium* (1979) 2 EHRR 330.

outlined below may also justify the rule.⁹⁴ Nevertheless, we have sympathy with the view that equality of treatment would be preferable.

6.67 However, strong practical considerations remain. Indeed, they may be more acute now than when the Law Commission last reviewed the law in this area. Section 17 of the Family Law Reform Act 1969 (which enabled trustees and personal representatives to distribute property without having ascertained that no person born outside marriage, or who claims through such a person, may be entitled to an interest in the property) was expressly repealed by the Family Law Reform Act 1987.⁹⁵ This is an issue which affects a relatively small number of estates (where the child of unmarried parents predeceases his or her father). We would not want to recommend any reform which increases the costs of administration of intestate estates generally, or exposes personal representatives to greater liability for the wrongful distribution of estates.

6.68 **We would like to hear the views of consultees, in particular those involved in the administration of estates, as to any practical problems which might arise as a result of a reform of section 18(2) of the Family Law Reform Act 1987.**

BONA VACANTIA

6.69 Where a person who dies intestate is not survived by any relative entitled under the intestacy rules, the estate “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*”.⁹⁶ The Crown’s right to *bona vacantia* is of ancient origin. Historically, it extended to many types of property, but now only applies in limited circumstances including intestate estates.⁹⁷

The Crown and the Duchies

6.70 The Treasury Solicitor⁹⁸ has been appointed by a succession of Royal Warrants to collect *bona vacantia* on behalf of the Crown in most of England and Wales.⁹⁹ Where a person is believed to have died without any living relatives entitled under the intestacy rules, the Treasury Solicitor is entitled to obtain a grant of representation and administer the estate.¹⁰⁰ The Bona Vacantia Division of the Treasury Solicitor’s Department administers the collection of *bona vacantia*.

⁹⁴ A provision which has an “objective and reasonable justification” may not be discriminatory under the terms of Article 14: *Marckx v Belgium* (1979) 2 EHRR 330, at [33].

⁹⁵ Family Law Reform Act 1987, s 20.

⁹⁶ Administration of Estates Act 1925, s 46(1)(vi).

⁹⁷ The other categories are the property of dissolved companies and certain property held in trust, for example, property passing on failure of a trust where an unincorporated association is dissolved and the surplus contributions to a non-charitable fund. See *Re West Sussex Constabulary’s Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1. See further *Halsbury’s Laws of England*, vol 12(1) (4th ed reissue) para 239.

⁹⁸ The Treasury Solicitor is head of the Government Legal Service and is responsible, among other things, for collecting *bona vacantia* on behalf of the Crown.

⁹⁹ The current Royal Warrant is dated 21 August 1984.

¹⁰⁰ Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

- 6.71 Where the deceased was resident within the historic County Palatine of Lancaster, which today comprises Lancashire, Greater Manchester, Merseyside and the Furness area of Cumbria, *bona vacantia* passes to the Duke of Lancaster (currently Her Majesty the Queen).¹⁰¹ In Cornwall, *bona vacantia* passes to the Duke of Cornwall, HRH The Prince of Wales.¹⁰² In 1925, the right of the relevant Duchy to estates which are *bona vacantia* was placed on a statutory footing.¹⁰³ The solicitor to the appropriate Duchy will obtain a grant of representation and administer the estate.
- 6.72 Both the Treasury Solicitor and the Duchy solicitors will, as a first step, advertise for entitled relatives.¹⁰⁴ A significant proportion of the funds administered by the Treasury Solicitor and Duchy solicitors is paid out as a result of entitled relatives being found. In the year ended 31 March 2009, for example, more than £18 million was collected from estates administered by the Treasury Solicitor but around £7 million was paid to entitled relatives. A further £2 million was paid out for the legal liabilities and debts of the estates being administered and other disbursements.¹⁰⁵

Discretionary payments

- 6.73 The Crown (or the relevant Duchy) may make discretionary or *ex gratia* payments to dependants of the deceased and “other persons for whom the intestate might reasonably have been expected to make provision”.¹⁰⁶
- 6.74 The Bona Vacantia Division of the Treasury Solicitor’s Department publishes guidance on when and how it will exercise this discretion. We understand that the Duchies follow the same guidance. Applications may be considered, for example, from someone who provided the deceased with substantial unpaid services. Occasionally, discretionary payments may also be made in accordance with the deceased’s wishes, where clear evidence of these is available, for example in a draft will. Where a person who applies for a discretionary payment may also apply for family provision (primarily, a cohabitant of the deceased) the Treasury Solicitor and the Duchy solicitors will require the applicant to make an application, except where the costs of doing so would be disproportionate to the size of the estate.

¹⁰¹ In 1377, Edward III granted certain rights and franchises to John of Gaunt. This original grant and subsequent re-grants have been held to have transferred the Crown’s right to *bona vacantia* to the Duke of Lancaster: see *Dyke v Walford* (1846) 5 Moo PCC 434.

¹⁰² The origin of the Duke’s right to *bona vacantia* is obscure but it was the established practice of the Treasury Solicitor before 1926 to offer no opposition when the solicitor for the Duchy of Cornwall applied for a grant of representation in respect of a person resident in Cornwall: *Solicitor of the Duchy of Cornwall v Canning* (1880) 5 PD 114.

¹⁰³ Administration of Estates Act 1925, s 46(1)(vi); Ing, *Bona Vacantia* (1971) pp 26 to 27.

¹⁰⁴ The Bona Vacantia Division website (www.bonavacantia.gov.uk) has a facility to search for recent advertisements.

¹⁰⁵ HM Procurator General and Treasury Solicitor, *Accounts of the Crown’s Nominee for the year ending 31 March 2009*, p 20.

¹⁰⁶ Administration of Estates Act 1925, s 46(1)(vi).

- 6.75 In the year ended 31 March 2009, discretionary grants totalling £425,000 were made by the Treasury Solicitor.¹⁰⁷ The Duchies make equivalent discretionary payments, relative to the volume of assets that they administer.

Treatment of net income

- 6.76 What happens to any remaining property or funds after the payment of entitlements and discretionary payments? Net income from estates administered by the Treasury Solicitor is transferred to the Treasury's Consolidated Fund, which is used for general Government expenditure. In the year ended 31 March 2009, total net income was around £9 million.¹⁰⁸
- 6.77 For the same period, net proceeds of *bona vacantia* in the Duchy of Lancaster were £1.352 million, which was payable to the Duchy of Lancaster charitable funds.¹⁰⁹ *Bona vacantia* in the Duchy of Cornwall is generally much lower (£34,000 in the year ended 31 March 2009, which was mostly paid out in discretionary grants and costs), but any surplus is paid to the Duke of Cornwall's Benevolent Fund (£130,000 in 2008).¹¹⁰

Is reform needed?

- 6.78 Public attitude surveys suggest that people are not attracted to the idea that ownerless property should pass to the state. Respondents consistently indicate that they would prefer intestate estates to pass to family members, however distant, rather than the state. Friends of the deceased and charities are also suggested as more worthy beneficiaries of intestate estates.¹¹¹ Similar attitudes were expressed by members of the NatCen focus groups, though these also revealed some significant misconceptions. For example, some participants wrongly believed that *all* intestate estates fall into Government funds.
- 6.79 It is also, we suspect, not generally well-known that the Treasury Solicitor and the Duchies are authorised to make discretionary payments to those whom the deceased may have wanted to benefit. To this extent, the actual wishes of the deceased may be taken into account in a way that is impossible where the distribution is to remote relatives whom the deceased may never have met.
- 6.80 Although distribution of *bona vacantia* to charity may appear superficially attractive, we do not favour this option. It would be difficult to identify a fair and cost-effective method of distribution to charities. Charities would also in most cases be unable to make discretionary payments to deserving applicants because their duty is to safeguard assets for their particular charitable

¹⁰⁷ HM Procurator General and Treasury Solicitor, *Accounts of the Crown's Nominee for the year ending 31 March 2009*, p 20.

¹⁰⁸ Above, pp 19 and 20.

¹⁰⁹ Duchy of Lancaster, *Report and accounts of the Duchy of Lancaster for the year ended 31 March 2009*, p 15.

¹¹⁰ Duchy of Cornwall, *Duchy of Cornwall Annual Report and Accounts: Year Ended 31st March 2009*, p 48.

¹¹¹ See, for example, Family Law: Distribution on Intestacy (1989) Law Com No 187, Appendix C, para 2.24 and Table 14.

purposes.¹¹² In any case, as we have seen, under the current rules the net proceeds of *bona vacantia* in the County Palatine of Lancaster and in Cornwall do now pass to charity. Elsewhere, the proceeds of *bona vacantia* contribute to general public expenditure.

- 6.81 We have also considered whether there is a need for statutory guidelines to govern the exercise of the discretionary payments system. We are not convinced, however, that this is necessary. We have not been made aware of any dissatisfaction with the way in which the discretion is exercised by the Treasury Solicitor or the Duchies. It must also be borne in mind that the amounts paid out each year are relatively modest; statutory guidelines which would have to be periodically reviewed and updated might therefore be a disproportionate response to an issue that does not appear to be problematic.
- 6.82 Nor do we think that placing the guidelines on a statutory footing would necessarily assist public awareness and understanding of the system. The present guidelines are freely available and easy to find on the Bona Vacantia Division website.¹¹³ We are told that the Duchies follow the same guidance, though we would encourage the Treasury Solicitor and the Duchies to work together to ensure that this consistency of approach is sufficiently well-publicised.
- 6.83 We therefore make no provisional proposals in respect of *bona vacantia*.¹¹⁴

¹¹² J Warburton, *Tudor on Charities* (9th ed 2003) para 6-021.

¹¹³ www.bonavacantia.gov.uk.

¹¹⁴ Though we do provisionally propose that no survivorship provision should apply where the effect would be that the estate passes as *bona vacantia*. See para 7.31 below.

PART 7

THE ADMINISTRATION OF ESTATES

INTRODUCTION

- 7.1 When writing a will, testators will often name at least one executor who is a paid professional experienced in administering estates. By contrast, those entitled to administer an intestate estate will usually be close relatives who will probably have little or no previous experience of administering an estate.¹ So it is important that the administration be as straightforward as possible, without being so simple as to create unfairness.
- 7.2 In this Part we look at a number of issues with a view to the straightforward administration of estates, and a number of points where current procedure may lead to unfairness. We make provisional proposals about the size of estates for which a grant is necessary, and about survivorship. We also discuss the “self-dealing” rule and explain why we are not making any proposals about the historic rules requiring certain benefits to be brought into account, known as “hotchpot”. We then move on to issues specific to family provision legislation, looking at the domicile rule that determines who can apply for family provision, and at some questions about the range of assets within the scope of the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”), in particular pensions.
- 7.3 However, we do not discuss the issue of costs in family provision cases. The general rule in such cases is that the unsuccessful party will be ordered to pay the costs of the successful party,² except in ancillary relief cases, where the starting point is that the court will not make an order requiring one party to pay the costs of another party.³ Lord Justice Jackson is undertaking a wide-ranging review of civil litigation costs.⁴ Following a consultation period that ran from May to July 2009, he intends to publish a final report in December 2009. In light of this ongoing review we make no provisional proposals on costs in family provision cases.

SMALL ESTATES

- 7.4 Current law permits cash sums and certain other assets which are individually valued at less than £5,000 to be paid to a person entitled under a will or intestacy without any grant of representation.⁵ Examples include pay, pensions or other allowances due to serving or retired members of the armed forces and public servants, as well as assets in particular funds, such as Government stock.

¹ Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22.

² Civil Procedure Rules 1998, r 44.3(2)(a).

³ Family Proceedings Rules 1991, r 2.71(4)(a), inserted by Family Proceedings (Amendment) Rules 2006, SI 2006 No 352, r 7. Ancillary relief is the financial provision that can be ordered by the court on divorce or on dissolution of a civil partnership.

⁴ Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), vol 1, ch 33, para 5.9.

⁵ Administration of Estates (Small Payments) Act 1965. See also *Williams, Mortimer and Sunnucks, Executors, Administrators and Probate* (19th ed 2008) paras 9-07 to 9-16.

- 7.5 It is, however, common for banks and building societies to release much greater funds from a deceased's bank account, in some cases up to £20,000. Although procedures differ, these institutions generally require an undertaking that the person seeking the withdrawal is entitled to the funds and an indemnity against any loss caused by a wrongful distribution.
- 7.6 Because these limits apply to individual accounts and other assets, it is possible for an estate with a significant total value to be administered without a grant of representation. As discussed above,⁶ around half of all estates are not formally administered. Even where a grant is obtained, around a third of intestate estates are valued at less than £25,000.⁷
- 7.7 When this question was last raised in Parliament, in 2005, the Government indicated that there were no current plans to raise the threshold.⁸ We would suggest that the figure should now be reviewed. The £5,000 limit was set in 1984,⁹ and is equivalent to around £11,000 today.¹⁰ Although our project is concerned only with intestate estates, we anticipate that any review would cover testate estates as well.
- 7.8 **We provisionally propose that the value of assets that can be administered without the need for a grant of representation be reviewed with a view to its being raised.**

APPROPRIATION AND SELF-DEALING

- 7.9 When distributing an estate, personal representatives may transfer specific property to a beneficiary as part of his or her entitlement under the intestacy rules.¹¹ This is known as appropriation and is an alternative to selling the property and distributing cash proceeds; that is often less efficient, and can be particularly unsuitable for property with special significance such as personal items, family company shares (which may be difficult to sell in any case) or, in particular, the family home.
- 7.10 A problem may arise, however, where a beneficiary is also an administrator of an estate (which is often the case). A personal representative cannot generally appropriate property as part of his or her own entitlement to the estate. This is an example of the rule against self-dealing which applies to all trustees.¹²

⁶ See para 1.6 above.

⁷ See Appendix C, Table 3, below.

⁸ Written Answer, *Hansard* (HC), 6 July 2005, vol 436, col 488WA. The limit is set by HM Treasury.

⁹ Administration of Estates (Small Payments) (Increase of Limits) Order 1984, SI 1984 No 539.

¹⁰ www.bankofengland.co.uk/education/inflation/calculator (calculated on 30 September 2009).

¹¹ Administration of Estates Act 1925, s 41.

¹² It was held to apply to personal representatives in *Kane v Radley-Kane* [1999] Ch 274.

- 7.11 This rule is specifically modified where a surviving spouse appropriates the family home as part of his or her entitlement,¹³ but only where there is at least one other administrator.¹⁴ In all other cases an administrator who appropriates property to his or her own share of the estate as beneficiary does so in breach of the self-dealing rule, even if he or she acts with another administrator.¹⁵
- 7.12 The problem affects spouses in particular, as illustrated by *Kane v Radley-Kane*.¹⁶ The deceased had died intestate survived by a widow and three sons not from that relationship. His estate was valued at £93,000, including £50,000 in shares, so it was well within the widow's statutory legacy. The widow was the sole personal representative and, by treating the shares as her own, appropriated them to herself. She later sold them for over £1.1 million. Without considering whether the appropriation had been at a fair value, the court found on principle that the appropriation breached the self-dealing rule and that the sale proceeds had to be treated as part of the estate, increasing it beyond the statutory legacy so that the sons were entitled to share in it.¹⁷
- 7.13 A surviving spouse will often be the sole administrator, being entitled to obtain a grant of representation in preference to all others.¹⁸ A second administrator is only needed if a life interest for the spouse will arise, or there will be trusts for children under 18.¹⁹
- 7.14 The application of the self-dealing rule to appropriation has been criticised. The ability to appropriate assets should make the administration of estates more efficient. The surviving spouse is often the person best placed to administer the estate, having most knowledge about the deceased's financial affairs and property. But *Kane v Radley-Kane* suggests that the surviving spouse would be well advised not to act as an administrator, because of the risk that he or she will be found liable to account to other relatives. This has been described as "a profoundly unsatisfactory state of affairs".²⁰
- 7.15 The rule against self-dealing is intended to protect beneficiaries from dishonesty on the part of a personal representative who has taken advantage of his or her

¹³ The surviving spouse has a right to require that the family home is appropriated as part of his or her entitlement: Intestates' Estates Act 1952, s 5 and sch 2. The right operates if the estate includes an interest in a dwelling-house in which the spouse was resident at the time of the death, with some exceptions.

¹⁴ Intestates' Estates Act 1952, sch 5, para 5.

¹⁵ It has been suggested that the rule does not apply if the property is "equivalent" to cash, such as government stocks: *Kane v Radley-Kane* [1999] Ch 274, 285 and 287.

¹⁶ [1999] Ch 274.

¹⁷ The value of the property in the estate at the date of death is not conclusive, so an increase in value while the estate is being administered so that it exceeds the value of the applicable statutory legacy will cause children, parents or full siblings to become entitled to a share in the estate. It may also mean appointing another administrator.

¹⁸ Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22(1).

¹⁹ Supreme Court Act 1981, s 114(2). Even then, the court may be willing to appoint the surviving spouse alone if the estate only slightly exceeds the spouse's entitlement or if the children are shortly to attain the age of 18: R D'Costa, J Winegarten and T Synak, *Tristram and Coote's Probate Practice* (13th ed 2006) para 6.92.

²⁰ S Cretney [1998] *Family Law* 525, 526.

position in making the appropriation; but because it can be circumvented, by selling the property, appropriating the cash, and then repurchasing it, the protection may be illusory. The rule can also present a trap for inexperienced administrators who honestly appropriate property to themselves as beneficiaries without being aware of the rule.²¹

- 7.16 A personal representative does have the option of seeking authorisation for the appropriation, by getting either the consent of all other beneficiaries, or a court order. However, one of the beneficiaries may be under 18, or not mentally able to give consent. The cost of applying for a court order may also be prohibitive where the estate is small. In many cases, however, a surviving spouse or other family member administering the estate will be unaware of the need to obtain consent; the self-dealing will be innocent.
- 7.17 We can therefore see good grounds in the context of the administration of an intestate estate for relaxing the rule against self-dealing so that an appropriation by a personal representative for his or her own benefit is valid if it were at a fair value. This view is supported by some commentators,²² and would encourage appropriation as a means of administering estates straightforwardly, while enabling beneficiaries to invalidate an appropriation where the administrator has gained an unfair advantage.²³ The rule has already been modified by statute to enable a surviving spouse to appropriate the family home, where at least one other personal representative has been appointed. Commonly used will and trust precedents also provide for modification of the rule.²⁴
- 7.18 However, we recognise that the rule against self-dealing is a well established and important principle of fiduciary relationships which applies in a wide variety of circumstances. To create an exception in the context of intestacy may therefore be inappropriate. Although the present rule may operate harshly on occasion, it has the benefit of clarity and discourages behaviour by personal representatives that may prejudice other beneficiaries.
- 7.19 **We invite consultees' views as to whether the application of the self-dealing rule to administrators of intestate estates should be modified so that an appropriation should not be voidable by reason of the rule if it was at a fair value.**

²¹ It may also prejudice purchasers of appropriated property who may have notice of the appropriation and might therefore not be protected by section 41(7) of the Administration of Estates Act 1925, which presumes in the purchaser's favour that the appropriation was made in accordance with the statutory requirements and with any necessary consents: C Sherrin, "Appropriation Set Aside: 'A Short Point of Law – But an Interesting One'" (1999) *Hong Kong Law Journal* 16, 28 to 30. This can only be the case where the land is unregistered.

²² C Sherrin, "Appropriation Set Aside: 'A Short Point of Law – But an Interesting One'" (1999) *Hong Kong Law Journal* 16, 25.

²³ This would be in addition to the current rule in relation to the family home which protects a spouse who appropriates in his or her own favour if there is at least one more personal representative.

²⁴ See, for example, C Sherrin, R Barlow and R Wallington, *Williams on Wills* (9th ed 2008) vol 2, paras B21.4 to B21.8, and the provisions regarding conflicts of interest in the *Standard Provisions of the Society of Trust and Estate Practitioners* (1st ed 1992) para 8, available in the *Encyclopaedia of Forms and Precedents* (2007 reissue) vol 40(1) Trusts and Settlements, para [3583].

- 7.20 Some responses to the 1988 Working Paper described cases in which a surviving spouse had not been aware of the need to appropriate the family home until many years later, when the house had appreciated in value so that it exceeded the level of statutory legacy in force at the death.²⁵ Until the statutory legacy is received by the spouse, interest is paid, currently at the rate of 6% from the date of death.²⁶ The property may have appreciated in value at a higher rate in the meantime. However, we do not know whether that is a significant problem today. We therefore make no provisional proposal about this, but we encourage consultees to comment.

SURVIVORSHIP PROVISIONS IN THE INTESTACY RULES

- 7.21 Someone who stands to benefit under the intestacy rules may also die shortly after the intestate, or in circumstances which make it difficult to know who died first: for example, because they were both involved in the same accident. The intestacy rules currently provide that unless a surviving spouse is living at the end of the period of 28 days beginning with the date of death, he or she will be treated as having died first and therefore will not benefit.²⁷
- 7.22 There is no such “survivorship” provision in relation to other beneficiaries. If it is known that the beneficiary was living at the death, then it is irrelevant that the beneficiary may have died shortly afterwards. If it is not possible to know the order of the deaths, the beneficiary is treated as having survived if he or she was the younger of the two.²⁸
- 7.23 A survivorship period avoids the need to administer the estate of the first to die and then administer the same assets in the estate of the beneficiary, which may increase costs and delay the administration. It also means that, if the order of deaths is uncertain, there is no need to obtain evidence as to who died first, a costly and upsetting task.
- 7.24 A survivorship requirement means that the estate of the first to die passes to the family members of the first to die, instead of being “channelled” through the beneficiary’s estate. This was a particular reason in favour of the change in relation to spouses who die within a short period of each other. Without a survivorship period, the property of both spouses could pass only to the relatives of the second to die. If the spouses do not have children together, or if one or both also has children from another relationship, then the intestacy rules would favour the surviving spouse’s family over the relatives of the spouse who died

²⁵ The statutory legacy received by the spouse is fixed at the level in force on the date of the death, and we do not propose to change that rule, which has the merit of simplicity and certainty.

²⁶ Administration of Estates Act 1925, s 46(1)(i); the current rate is set by the Intestate Succession (Interest and Capitalisation) Order 1977 (Amendment) Order 1983, SI 1983 No 1374.

²⁷ Administration of Estates Act 1925, s 46(2A), inserted by the Law Reform (Succession) Act 1995, with effect for deaths on or after 1 January 1996.

²⁸ Law of Property Act 1925, s 184.

first.²⁹ If the spouses died simultaneously, which family benefited would depend on which spouse happened to be younger.

- 7.25 The same reasoning would also apply to cohabitants, if our provisional proposals to include some cohabitants in the intestacy rules were accepted. On the other hand, if the beneficiary were a blood relative of the deceased, rather than a spouse or cohabitant, the property might well be channelled to people who were also related to the deceased. For example, if a person died and the estate passed to his or her son, then if the son died shortly afterwards the property would pass to the son's daughter, who would in any case have been the next entitled person on the intestacy. However, this might not always be the case, because the beneficiary's nearest relatives might not be related to the deceased at all.
- 7.26 In some of these circumstances, enabling the beneficiary's family to benefit may seem best; in others, it may not. The advantages of a survivorship period from the perspective of avoiding the channelling effect are not as clear as they are for spouses or cohabitants. But introducing the same survivorship period for all beneficiaries would avoid the practical problems in administering estates noted above, and would mean that the distribution would no longer depend on whether the deceased or the beneficiary happened to be the younger. Applying the same survivorship provision consistently to all beneficiaries under the intestacy rules would also be simpler than having a special rule only for spouses (and, perhaps, cohabitants). Therefore we consider that the same rule should also apply for all other beneficiaries.³⁰
- 7.27 We note that similar proposals have been made by the Alberta Law Reform Institute and by the New South Wales Law Reform Commission.³¹ This position is also adopted in Queensland and Manitoba, and in the Canadian Uniform Succession Act compiled by the Uniform Law Conference of Canada.³² The American Uniform Probate Code likewise provides for a survivorship period for all beneficiaries, although the five days specified is unusually short.³³
- 7.28 The length of the survivorship period must take into account the need to administer estates without undue delay – until the survivorship period has been fulfilled, there is uncertainty as to the beneficiaries of the estate. Indeed it was for this reason that in 1989 the Law Commission recommended the adoption of a

²⁹ See Family Law: Distribution on Intestacy (1989) Law Com No 187, para 57. Contrast the position where the spouses have made wills; it is common for these wills to "mirror" each other as to the ultimate gift made when both spouses have died.

³⁰ This reform would not apply outside the intestacy rules; for example, it would not affect the right of survivorship for a co-owner under a beneficial joint tenancy.

³¹ Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, pp 171 to 178 (recommending a period of 15 days); New South Wales Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, pp 189 to 196 (recommending a period of 30 days).

³² Succession Act 1981, ss 33B(1) and 35(2) (Queensland) (adopting a period of 30 days); Intestate Succession Act 1990, s 6(1) (Manitoba) (adopting a period of 15 days); Canadian Uniform Succession Act 1986, s 5(1) (adopting a period of 15 days).

³³ Uniform Probate Code 2005, s 2-104 (expressed as a period of 120 hours).

short period (14 days).³⁴ However, we are not aware that the 28-day period that was enacted has caused any problems in practice.

- 7.29 Extending the survivorship rules in that way could cause more estates to pass as *bona vacantia*. The Uniform Probate Code, the legislation in force in Manitoba, and the Canadian Uniform Intestate Succession Act all provide that the survivorship provisions are to be disapplied if they would result in the estate passing to the state.³⁵ This exception was also part of the proposals made by the Alberta Law Reform Institute, and for Australia by the National Committee for Uniform Succession Laws.³⁶ We think it reasonable that if the alternative is *bona vacantia*, the intestacy rules should prefer the estate of the beneficiary who would have qualified if he or she had survived for the prescribed period. We therefore think that the survivorship period should be disapplied.
- 7.30 **We provisionally propose that, if any beneficiary who would be entitled to take on intestacy survives the deceased but dies before the end of the period of 28 days beginning with the deceased's date of death, that beneficiary shall be treated as though he or she had not survived the deceased.**
- 7.31 **We provisionally propose that no survivorship provision should apply where the effect of treating the beneficiary as though he or she had not survived the deceased would be that the estate passes as *bona vacantia*.**

ACCOUNTING FOR OTHER BENEFITS

The rules of hotchpot

- 7.32 Until 1996, administrators of intestate estates were required, when calculating entitlements, to take into account benefits received by certain beneficiaries either during the lifetime of the deceased or under a will (in the case of a partial intestacy). These rules, collectively known as the rules of "hotchpot", were to the effect that:
- (1) property given by a parent to a child to make provision for that child in life was to be taken into account in determining distribution of that parent's intestate estate;
 - (2) on a partial intestacy, any benefits received by a child or other descendant under the will were to be taken into account when distributing the relevant part of the estate; and

³⁴ Family Law: Distribution on Intestacy (1989) Law Com No 187, paras 56 and 57.

³⁵ Uniform Probate Code 2005, s 2-104; Intestate Succession Act 1990, s 6(3) (Manitoba) Canadian Uniform Succession Act 1986, s 5(3).

³⁶ Alberta Law Reform Institute, Reform of the Intestate Succession Act (1999) Report No 78, pp 177 to 178; New South Wales Law Reform Commission, Uniform succession laws: intestacy (2007) Report 116, p 196 (see also paras 11.17 to 11.18).

- (3) on a partial intestacy, the statutory legacy payable to a surviving spouse was to be reduced by the amount of any benefit that he or she had received under the will.³⁷

7.33 So where, to take a simple example, a brother and sister were entitled to share equally in a parent's estate worth £100,000, but the brother had already been advanced £20,000 towards the deposit on his house, this would be brought into account and the brother and sister would receive £40,000 and £60,000 respectively.

7.34 In 1989 the Law Commission recommended repeal of all the statutory rules of hotchpot.³⁸ This was accepted by Government and enacted in 1995.³⁹ The recommendation must be seen in its proper context: the principal recommendation of the 1989 Report, that a surviving spouse should receive the entire estate in any event, would have rendered the "spouse hotchpot" provisions irrelevant and reduced the number of occasions on which children or other descendants inherited anything on intestacy. This was not, however, the only reason for recommending repeal of the rules of hotchpot; a number of other arguments were advanced:

- (1) the rules were complicated and difficult for administrators to apply;
- (2) repeal would greatly simplify the administration of estates;
- (3) the rules appeared to have fallen into disuse;
- (4) it was arbitrary and unfair to require a spouse and issue to account for benefits received from the deceased but not more remote relatives;⁴⁰
- (5) a parent would be unlikely to realise the possible effect of making substantial lifetime gifts to his or her children;
- (6) the hotchpot provisions applying on partial intestacy could defeat the object of the deceased making partial distributions in a will; and
- (7) it was difficult to see any coherent principle underlying the rules.⁴¹

7.35 We find these arguments compelling, in particular the argument that the rules complicated the administration of estates and fell into widespread disuse long before abolition. We are not attracted by the suggestion that the hotchpot rules that were repealed in 1996 should be re-introduced, even with improvements, and we make no recommendation for the reinstatement of the hotchpot rules.

³⁷ These rules were contained in sections 47(1)(iii), 49(1)(a) and 49(1)(aa) of the Administration of Estates Act 1925, and were repealed by section 1(2) of, and the schedule to, the Law Reform (Succession) Act 1995.

³⁸ Family Law: Distribution on Intestacy (1989) Law Com No 187, para 62.

³⁹ Law Reform (Succession) Act 1995, s 1(2).

⁴⁰ An alternative approach to abolition suggested was "retaining accounting for issue and ... introducing it for other relatives": Distribution on Intestacy (1988) Law Commission Working Paper No 108, para 5.11.

⁴¹ See Distribution on Intestacy (1988) Law Commission Working Paper No 108, paras 3.20 to 3.21 and 5.11; Family Law: Distribution on Intestacy (1989) Law Com No 187, para 55.

Benefits received in a foreign jurisdiction

- 7.36 Practitioners have brought to our attention an analogous problem which arises where someone dies with property in more than one country, so that the estate is administered according to more than one law.⁴²
- 7.37 Where a person dies with property in more than one country, issues may arise as to what law should determine the distribution of his or her estate. These questions are resolved by reference to “choice of law rules”. The rules that apply may differ depending on the type of property under consideration.⁴³ Any land or other “immovable” property situated in England and Wales is distributed according to English law, even if the deceased had no other connection with this country.⁴⁴ English law also governs the distribution of other property (referred to in this context as “movable” property) owned by a deceased person who was “domiciled” in England and Wales.⁴⁵ Domicile is a legal concept based on the idea of a “permanent home”, which may not be the same as a person’s residence or nationality. But immovable property situated abroad is generally distributed according to the law of that country.
- 7.38 The effect of the interaction of these rules is that if a person dies domiciled in England and Wales with immovable property in another country (or, alternatively, domiciled abroad with land here) the surviving spouse may benefit under more than one intestacy regime.⁴⁶
- 7.39 Reform of the choice of law rules is beyond the scope of the current project.⁴⁷ In any event, we are not persuaded that the possibility of a surviving spouse receiving benefits under the intestacy regime of more than one country is an issue that warrants reform of the law; the point will arise in a limited number of cases and may not in fact be problematic in those cases. To require the administrators of an intestate’s English estate to take into account a beneficiary’s potential entitlement in another jurisdiction would complicate and delay the administration of estates. It is also not clear what an administrator should be required to do; should one legacy be withheld and, if so, which one? We therefore make no provisional proposal.

⁴² This may arise, for example, where one jurisdiction applies its own law to moveable property but leaves land held abroad to be administered according to foreign law. This is the approach taken in England and Wales: see L Collins and others (eds), *Dicey, Morris and Collins, The Conflict of Laws* (14th ed 2006) para 27-016.

⁴³ This distinction is known as “scission”.

⁴⁴ L Collins and others (eds), *Dicey, Morris and Collins, The Conflict of Laws* (14th ed 2006) para 27R-015, rule 141.

⁴⁵ Above para 27R-010, rule 140.

⁴⁶ See *Re Rea* [1902] 1 IR 451; *Re Collens* [1986] Ch 505.

⁴⁷ The European Commission’s 2005 Green Paper on Succession and Wills may lead to the publication of a regulation aimed at unifying choice of law rules in succession throughout Europe; the United Kingdom will have a choice as to whether or not to “opt in” to that regulation.

DOMICILE

7.40 An application for family provision may only be brought against the estate of a person who was domiciled in England and Wales at the date of death.⁴⁸ As explained above, domicile is a legal concept based on the idea of a “permanent home”, which may not be the same as a person’s residence or nationality.⁴⁹ The result is that, even where the deceased was based in England and Wales for a considerable time and had family or other dependants here, no-one can challenge the financial provision made for them in the deceased’s will or as a result of the intestacy rules, if the deceased died domiciled overseas.

7.41 This “domicile precondition” was criticised as producing results that are potentially “absurd and unjust” even before the Inheritance (Family Provision) Act 1938 was enacted,⁵⁰ and has continued to attract criticism.⁵¹ A central concern today is that those who are well advised can avoid obligations to their family and dependants altogether. As one commentator explains:

It is already possible in many jurisdictions for a person who is habitually resident in England or who is a British citizen, to elect that for the purposes of their estate, English succession law should apply If however such a person is not actually domiciled in England and Wales under English law, the provisions of the 1975 Act will not be available to their dependants. The effect is that the estate of such a person escapes any obligation to make provision for dependants.⁵²

7.42 A case in point is *Cyganik v Agulian*.⁵³ The deceased was born in Cyprus but had lived in England for a more or less continuous period of 43 years prior to his death. He had assets of around £6.5 million in England and an English will that was admitted to probate here. Nevertheless, the Court of Appeal held that the deceased died domiciled in Cyprus. Because of this finding, the deceased’s partner could not bring a claim under the 1975 Act challenging the provision made for her in the will.

7.43 We also note that changing patterns of property ownership since 1974 may justify reconsideration of the domicile precondition. More than five million European Union citizens now live in a state other than the state of their nationality and

⁴⁸ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1), replicating the effect of the Inheritance (Family Provision) Act 1938, s 6.

⁴⁹ See para 7.37 above. The concept of domicile is also often used to determine an individual’s liability to tax.

⁵⁰ W Breslauer, “The Bill and Private International Law” (1937) 2 *Modern Law Review* 306.

⁵¹ J Miller, “Family provision on death – the international dimension” [1990] *International and Comparative Law Quarterly* 261, 287.

⁵² R Frimston, “EU nearer to abolishing domicile?” (2005) 45 *Probate Section Journal of the Law Society* 13, 15.

⁵³ *Cyganik v Agulian* [2006] EWCA Civ 129, [2006] WTLR 565; see also *Wilson v Jones* (8 June 2000) Ch (unreported).

many more people own property in more than one country.⁵⁴ Between 1999 and 2004, for example, the number of UK households that owned foreign property increased by almost 50% to approximately 256,000.⁵⁵

Habitual residence

- 7.44 In *Cyganik v Agulian* it was suggested that the deceased's place of "habitual residence" might be a more appropriate basis on which to permit an application for family provision. Longmore LJ said that "now that many family matters are decided by reference to habitual residence, there may, perhaps, be something to be said for reconsidering the terms of s 1(1) of [the 1975 Act]." He also described the concept of domicile as "somewhat antiquated".⁵⁶
- 7.45 The concept of "habitual residence" was considered by the Law Commission as part of a general review of the choice of law rules in 1987.⁵⁷ It was suggested that habitual residence might be easier to establish than domicile, and simpler to explain to a non-lawyer. That review concluded, however, that the concept did not involve a "sufficiently strong connection between a person and a country" to serve as a primary connecting factor in our rules of private international law.⁵⁸ The Commission also noted that such a test might sever the links between temporary expatriates and their homeland, and that a person might have more than one habitual residence or none. There was little support for habitual residence amongst those who responded to the working paper on the topic.
- 7.46 Without revisiting the arguments that were made in 1989, we note that a habitual residence precondition for 1975 Act applications might simply replace the existing gaps and anomalies in the protection for family and dependants with new ones. It would not permit applications where the deceased was habitually resident abroad, even if he or she had been domiciled in England and Wales or owned land here. Conversely, an application for family provision could be made against the estate of a person who was neither domiciled nor owned property in England and Wales.
- 7.47 The European Commission has proposed that succession to estates (whatever property they comprise) should be governed by the laws of the Member State in which the deceased was habitually resident at the time of his or her death (or, in some cases, of his or her nationality).⁵⁹ If this proposal were adopted by the UK, the case for amending the 1975 Act to replace the domicile precondition with a

⁵⁴ Deutsches Notarinstitut (German Notary Institute), *Étude de droit comparé sur les règles de conflits de juridictions (Study on Conflict of Law of Succession in the European Union)* (2002) p 12. An Executive Summary in English is available online at ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm (last accessed 30 September 2009).

⁵⁵ D Aspden, "Methodological improvements to UK foreign property investment statistics" (2005) 619 *Economic Trends* 54, 55.

⁵⁶ *Cyganik v Agulian* [2006] EWCA Civ 129, [2006] WTLR 565, 579, by Longmore LJ.

⁵⁷ Private International Law: The Law of Domicile (1987) Law Com No 168, and Private International Law: The Law of Domicile (1984) Law Commission Working Paper No 88; Scottish Law Commission Consultative Memorandum No 63.

⁵⁸ Private International Law: The Law of Domicile (1987) Law Com No 168, paras 3.5 to 3.8.

⁵⁹ Meeting of national experts, *Discussion Paper: Successions Upon Death* (30 June 2008), Arts 2.1 and 3.2.

test based on habitual residence would be strengthened. But this would still leave unresolved issues in respect of those who are habitually resident outside of those European Union member states adopting the Regulation, but who have land or other “immovables” in England and Wales.

Applicable law

- 7.48 An alternative suggestion is that it should be possible for family members and dependants to make an application for family provision against an estate whenever English succession law applies to any property comprised in that estate. Under such a rule it would be possible (as at present) to make an application for family provision where the deceased died domiciled in England and Wales with personal property here (no matter what property he or she had elsewhere). But, in a change to the current position, it would also be possible to apply for family provision against the estate of a person with a house or other “immovable” property here who was domiciled at the date of death in another country (as was the case in *Cyganik v Agulian*).⁶⁰
- 7.49 The Law Commission considered this approach when reviewing the family provision legislation in 1974 (a review which led to the enactment of the 1975 Act). However, no reform was recommended, for two principal reasons.⁶¹ First, it was felt that only the courts of a jurisdiction with which the deceased was closely connected should be able to make an order changing the distribution of that person’s estate. Domicile was considered to demonstrate a particularly strong link between a person and a jurisdiction. Secondly, it was feared that an “applicable law” test might encourage multiple proceedings: for example, where a person died domiciled in Northern Ireland but also owning a house in England, an applicant would have to bring proceedings in both jurisdictions in order to obtain family provision from all of the deceased’s assets.⁶² In these circumstances, it might also be questioned whether the family of a person whose only connection with England was a property situated here (perhaps a holiday home) should have access to the English courts to challenge the distribution of the deceased’s estate where the bulk of the estate falls to be distributed according to the law of another jurisdiction.
- 7.50 We can see force in all of these arguments. We agree that domicile often demonstrates a particular connection to a place (and even if an “applicable law” test were adopted, most 1975 Act applications will involve estates of people who were domiciled here). We note, however, that cases such as *Cyganik v Agulian* have demonstrated that an individual may appear to have a very strong connection with England and Wales and a number of dependants here but still not be domiciled here for international law purposes. We also consider that

⁶⁰ The rule of English law that succession to immovable property is governed by the law of the place where the property is situated has been criticised: see, for example, J Morris, “Intestate Succession to Land in the Conflict of Laws” (1969) 85 *Law Quarterly Review* 339.

⁶¹ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, paras 258 to 262.

⁶² The Law Commission was also concerned not to pre-empt international efforts to harmonise the choice of law rules, in particular the 1976 Hague Conference on Private International Law (which ultimately failed to produce agreement between a sufficient number of contracting states).

owning land or other immovable property in this country may itself demonstrate a strong connection to England and Wales, particularly where that property is used to house family or other dependants who live here.

- 7.51 We also doubt whether the current rules do in fact avoid the need for multiple proceedings. When making orders under the 1975 Act, the courts in England and Wales will take into account all of the assets of the deceased including immovable property in other countries.⁶³ However, the courts will generally not make an order in relation to land situated abroad where the local courts will not recognise the order. If the deceased's main assets are situated overseas, there may be insufficient property in this country with which to satisfy any order made. In such cases it will be necessary to bring additional proceedings in the jurisdiction in which the land is situated.
- 7.52 It has been argued that the family provision legislation should be seen as part of English succession law and should therefore be available when the conflicts rules apply those laws.⁶⁴ We are therefore attracted to the idea of a reform of the current law that would enable applications under the 1975 Act whenever the distribution of any property left by the deceased is governed by English succession law.⁶⁵
- 7.53 **We provisionally propose that it should not be a precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died domiciled in England and Wales.**
- 7.54 **We ask consultees whether it should be a precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died habitually resident in England and Wales, or whether an application for family provision should be possible in any case where there is property comprised in the estate that is governed by English succession law. We also invite views on whether there should be any other requirement limiting the circumstances in which an application for family provision may be made.**
- 7.55 We note that this would enable the court to consider the deceased's entire estate, whether or not governed by English succession law, although in practice orders would not be made in circumstances where they could not be enforced.

⁶³ *Bheekhun v Williams* [1999] 2 FLR 229, 242.

⁶⁴ J Morris, "The Choice of Law Clause in Statutes" (1946) 62 *Law Quarterly Review* 170, 178 to 179 (referring to the application of family provision legislation as a question of the essential or material validity of a will); J Fawcett and J Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th ed 2008) pp 1279 to 1280, and see also the discussion at page 1272.

⁶⁵ For suggested amendments to the 1975 Act see R Frimston, "Brussels 4 U" (2007) 157 *New Law Journal* 571, 572. It has also been suggested that this would be achieved by repealing the domicile precondition without replacement; see J Miller, "Family provision on death – the international dimension" [1990] *International and Comparative Law Quarterly* 261.

- 7.56 We are awaiting the outcome of international discussions on the issue of succession (in this case, among European Union member states).⁶⁶ The results of those discussions are still uncertain, but it should be emphasised that an “applicable law” test would simply mirror the prevailing choice of law rules; there would be no need subsequently to revise the 1975 Act in light of any regulations emerging as a result of the current discussions.

JOINT TENANCIES

- 7.57 In 1974, the Law Commission recommended that property held by the deceased as a joint tenant which passed on death to the surviving co-owners rather than under any will or the intestacy rules should be available for family provision.⁶⁷ This is particularly significant where the deceased’s only significant asset is, for example, an interest in the family home. The Commission was, however, concerned that the other joint tenant or joint tenants should know with certainty how their rights were going to be affected with the least possible delay. The Commission therefore recommended that the deceased’s “severable share” of jointly owned property “at the value thereof immediately before his death” could be treated as part of his or her estate for family provision purposes. But this was expressly limited to those cases where the application had been made within six months of the grant of representation; the court should have no power to extend this deadline. This was enacted as section 9 of the 1975 Act.

The six-month time limit

- 7.58 The court has discretion to hear an application for family provision made more than six months after a grant of representation but cannot in such a case exercise its powers under section 9 to bring into account the deceased’s share of jointly owned property.⁶⁸ This has been referred to by one commentator as “the section 9 trap”.⁶⁹ An unwary or poorly advised potential applicant for family provision may find that the deceased’s principal asset is put out of reach by operation of this rule.
- 7.59 Clearly there were good reasons for the Law Commission to recommend a strict time limit in 1974. It should be remembered, however, that this provision was novel and its effect could not be accurately predicted. More than two decades later it is right to review the effect of this rule.
- 7.60 **We ask consultees whether the court should have discretion in an appropriate case to exercise its powers under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.**

⁶⁶ Commission of the European Communities, Green Paper: Succession and wills, COM (2005) 65 final.

⁶⁷ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, para 140. See paras 2.34 to 2.35 above.

⁶⁸ Inheritance (Provision for Family and Dependants) Act 1975, s 9.

⁶⁹ A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) para 3[62].

Valuing the share

- 7.61 The six-month time limit runs from the date on which a grant of representation is made. In many cases a grant will be obtained soon after the death. But this is not always the case; where the deceased's only significant asset is an interest in the family home which passes by survivorship to a spouse, there is rarely a practical need to obtain a grant of representation.
- 7.62 This was the background to the case of *Dingmar v Dingmar*.⁷⁰ The deceased had died intestate in 1997. His sole asset was his interest in the family home, which he owned jointly with his son; on his death, the whole property passed by survivorship to the son. It was not until 2004 that the deceased's widow applied for a grant of representation in order to bring an application for family provision. By that time, the value of the property had more than doubled from £40,000 to £90,000. At first instance, it was held that the words "at the value thereof immediately before his death" in section 9 prevented the Court from awarding the widow any more than the value of the deceased's 50% interest in the property at the date of his death (£20,000). The widow appealed.
- 7.63 All three appeal judges expressed dissatisfaction with the wording of section 9. Lord Justice Jacob found that "there is an inherent contradiction which must be overcome somehow",⁷¹ while Lord Justice Ward held that the words were "descriptive and not prescriptive" and that a literal interpretation would produce "palpably absurd and self-evidently capricious consequences".⁷² They held that section 9 did not prevent the court from awarding the widow a 50% interest in the property, without reference to its value in 1997. In a strong dissenting judgment, Lord Justice Lloyd said that section 9 "might have achieved the Law Commission's avowed purpose more effectively if the question of value had been treated in different words."⁷³
- 7.64 In the light of these comments, we think it is right to review section 9 to ensure that the plain meaning of the section accords with the actual result reached in *Dingmar*. Similar wording appears in section 8(2), which concerns gifts made in contemplation of death.⁷⁴ Such cases are unusual but we nevertheless consider that the wording of section 8 should be consistent with any changes to section 9.
- 7.65 **We provisionally propose that the value of assets for the purposes of sections 8 and 9 of the Inheritance (Provision for Family and Dependants) Act 1975 should be their value at the date of the application, not at the date of death.**

APPLICATIONS BEFORE GRANT OF REPRESENTATION

- 7.66 It will often be desirable to make a prompt application for family provision. For example, the applicant may be in financial need and require an interim award

⁷⁰ [2006] EWCA Civ 942; [2007] Ch 109.

⁷¹ Above at [69].

⁷² Above at [88] and [99].

⁷³ Above at [43].

⁷⁴ That is, *donationes mortis causa*.

from the estate.⁷⁵ Or an urgent order may be required, for example to establish that property held by the deceased on a joint tenancy should be treated as part of the estate,⁷⁶ or to preserve property until a full hearing. However, as the law stands, it is not possible to bring an application before a grant of representation has been obtained.⁷⁷

- 7.67 Where those entitled to apply for a grant are not minded to do so (possibly because they anticipate an application for family provision), an impasse may be reached. Problems may also arise where a contentious probate action is commenced in connection with the estate, for example challenging the validity of a will. In these circumstances there may be prolonged delay before a full grant is made in respect of the estate.⁷⁸
- 7.68 Although there are practical steps that can be taken in these circumstances,⁷⁹ there is nothing in the 1975 Act to permit an application before a grant of representation has been obtained. A practitioner has suggested to us that the Act should be amended so that an application may be issued and may even proceed in the absence of a grant of representation, subject to a rule or practice direction requiring the applicant to obtain directions from the court as to the representation of the estate.
- 7.69 We can see some merit in this proposal but have concerns that it might encourage applications where it is in fact practical for a grant of representation to be obtained; we can see that there are good reasons to require a grant, which is conclusive proof as to the contents of the deceased's will or that the deceased died intestate. Until a grant has been obtained, therefore, it cannot be said what the disposition of the deceased's estate was and therefore whether it made reasonable provision for the claimant, which is the ground for a family provision claim.
- 7.70 **We invite consultees' views on whether reform to enable an application for family provision to be issued in the absence of a grant of administration is necessary or desirable.**

PENSION SHARING

- 7.71 We explained in Part 2 that some property is excluded from the scope of the intestacy rules, and that some is excluded from the scope of a 1975 Act application. One asset excluded from both is pension funds.

⁷⁵ Inheritance (Provision for Family and Dependents) Act 1975, s 5.

⁷⁶ Above, s 9.

⁷⁷ *Re McBroom* [1992] 2 FLR 49. This is not free from doubt as earlier cases where a different conclusion was reached were not cited. The civil procedure rules can be seen to reinforce this view: Civil Procedure Rules, r 57.16(3). See A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) para 3[34].

⁷⁸ Where the parties agree, however, the court may consider the merits of a 1975 Act application in the same proceedings as a contentious probate claim. See *Baker v Baker* [2008] EWHC 937 (Ch), [2008] 2 FLR 767.

⁷⁹ Full discussion of these practical approaches are set out in practitioner texts. See A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) paras 3[36] to 3[40].

- 7.72 Some pensions simply come to an end on death, but some provide a death-in-service benefit when the deceased has not yet retired, and there is often a lump sum payable on death after retirement to the deceased's family or in accordance with a letter of wishes. There may also be a widow's or widower's pension. These assets are all outside the scope of the intestacy rules; what happens to them is determined by the rules of the pension fund or, where applicable, by the pension trustees at their discretion, often in the light of a letter of wishes.
- 7.73 In response to the Department for Constitutional Affairs' 2005 consultation on updating the statutory legacy,⁸⁰ the Society of Trust and Estate Practitioners queried the current treatment of pension funds on intestacy. We take the view that it is not appropriate that pension funds should fall within the scope of the intestacy rules, since that would add a great deal of complexity to the administrators' task.
- 7.74 If there is scope for reform, it relates to the 1975 Act. Currently, pension funds are outside the ambit of the family provision legislation in that the court cannot make an order in respect of them.⁸¹ The court cannot, for example, order the pension fund trustees to pay a lump sum benefit to a surviving spouse, in cases where the deceased has indicated that it should be paid to someone else. The court can take account of benefits derived from a pension fund in assessing the resources available to claimants and to other beneficiaries of the estate. But it cannot touch the fund itself.
- 7.75 A pension fund may be very substantial indeed. It is possible for the deceased effectively to disinherit a spouse, or other close family member, by requesting that a death benefit be paid to someone else. A widow's or widower's pension is in any case inaccessible to other family members. Pension funds can therefore be said to be family provision-proof assets.
- 7.76 Not so many years ago they were also divorce-proof assets, as they fell outside the scope of ancillary relief.⁸² This was felt to be wholly inappropriate as it enabled a spouse to put out of reach of the family justice system a substantial asset that would, in happier circumstances, have been regarded as a resource for both partners. Indeed, the working spouse's pension fund is the homemaker's security for old age.
- 7.77 After years of debate on this topic in the context of ancillary relief, the Matrimonial Causes Act 1973 was amended to allow pension sharing and other orders.⁸³ Pension sharing in that context is very complex, because generally the issue is the later sharing of a pension that is not yet in payment, and the entitlement,

⁸⁰ Department for Constitutional Affairs, *Administration of Estates – Review of the Statutory Legacy* (2005).

⁸¹ Other than payments which fall within section 8(1) of the Inheritance (Provision for Family and Dependents) Act 1975 on the basis that they were nominated by the deceased in accordance with an enactment. This may be the case if the pension scheme rules are themselves a statute or have been made in accordance with a statute: *Re Cairnes* (1983) 4 FLR 225, 231 to 232, by Anthony Lincoln J.

⁸² Ancillary relief is the financial provision that can be ordered by the court on divorce or on dissolution of a civil partnership.

⁸³ Matrimonial Causes Act 1973, ss 24B to 24D, 25B to 25D; Civil Partnership Act 2004, s 72 and sch 5, parts 4 and 6.

potentially years after the litigation, of an ex-spouse to share in retirement benefits. The matter is dealt with by a direction from the court to the pension fund trustees to pay out the appropriate proportion of the fund, using a formula,⁸⁴ so that the ex-spouse can use that asset to invest in his or her own pension fund. The legislation also enables the court to direct pension fund trustees to make a capital payment.

- 7.78 The unavailability of pension funds within the scope of court orders in family provision marks a significant difference between family provision and ancillary relief. It means that it is possible for a spouse to fare markedly less well on a family provision claim than he or she would have done in ancillary relief proceedings. In considering an application by a surviving spouse for family provision, the court must have regard to the provision which the applicant might reasonably have expected to receive if the marriage or civil partnership had been terminated by divorce or dissolution rather than death.⁸⁵ But, in this important respect, the court is unable to make equivalent provision.
- 7.79 We see merit in reform to the scope of the available orders under the 1975 Act to clear up this anomaly. The legislative machinery has already been invented in the context of ancillary relief, and could be adapted to enable the court in family provision cases to make orders in relation to lump sums or to ongoing pension payments.
- 7.80 We do, however, consider that resort to pension assets should in practice be limited to those cases where there are insufficient other assets in the estate from which provision can be made for deserving applicants for family provision. Section 9 of the 1975 Act may serve as a useful precedent; the court *may* treat the deceased's severable share of property held on a joint tenancy as part of the net estate "to such extent as appears to the court to be just in all the circumstances of the case" but is not required to do so.⁸⁶
- 7.81 However, we would also like to gather some further evidence on the point. We would like to know whether consultees regard this as a serious problem that should be solved. We would also like to hear practitioners' views on the technical implications of such reform. We have not heard representations to the same effect about life insurance funds, and we would want to consider relevant similarities and differences between the two assets. We would like to consider whether special considerations arise where pension fund benefits have been placed in trust by the member during his lifetime.⁸⁷ We therefore ask:
- 7.82 **Would consultees favour reform of the Inheritance (Provision for Family and Dependents) Act 1975 to the effect that benefits from a pension fund,**

⁸⁴ This is known as the "capital equivalent transfer value" or CETV and involves valuing the pension holder's likely income from the pension as a lump sum.

⁸⁵ Inheritance (Provision for Family and Dependents) Act 1975, s 3(2), unless a decree of judicial separation or separation order was in force at the time: see paras 2.54(3) and 2.62 to 2.68 above.

⁸⁶ Inheritance (Provision for Family and Dependents) Act 1975, s 9.

⁸⁷ See, for example, *Encyclopaedia of Forms and Precedents* (2006 reissue) vol 40(3), part 9(B), Trusts and Settlements, form 54. This is done so as to take a lump sum payable on the death of the member outside the trust administered by the pension fund trustees.

whether lump sums or periodical payments, could be the subject of family provision orders made by the court?

- 7.83 Do consultees foresee that legal or practical difficulties would result if benefits from a pension fund could be the subject of family provision orders and, if so, what might they be?**

PART 8

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

- 8.1 In this Part, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this Consultation Paper. It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this Consultation Paper in which the issue was raised.

HUMAN RIGHTS

- 8.2 We invite consultees' views on the human rights implications of the provisional proposals made, and the issues discussed, in this Consultation Paper.

[paragraph 1.57]

THE SURVIVING SPOUSE

- 8.3 We provisionally propose that, where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the spouse, whether or not there are other family members surviving.

[paragraph 3.36]

- 8.4 Do consultees think that the intestacy rules should be reformed so as to provide that an entire intestate estate should pass to the surviving spouse, whether or not the deceased also leaves children or other descendants?

If not, which of the following models do consultees prefer:

- (1) the current law, which gives the surviving spouse a statutory legacy and then a life interest in the balance (if any);
- (2) a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any) and, if so, what share; or
- (3) a sharing structure that gives priority to the family home, either by providing that the surviving spouse inherit the deceased's share in the family home in any event, or by raising the statutory legacy but requiring the surviving spouse to account, against that legacy, for any share of the family home passing by survivorship?

[paragraph 3.96]

- 8.5 We provisionally propose that a revised and simplified statutory definition of personal chattels be provided, and that it should exclude items used by the deceased exclusively or principally for business purposes at the date of his or her death.

[paragraph 3.132]

- 8.6 We provisionally propose that the level of the statutory legacy (if it is retained) should be reviewed at least every five years.

[paragraph 3.143]

- 8.7 We provisionally propose that the statutory legacy, if it is retained and if it is still required to be linked to house prices, should be raised in line with the average rate of increase, if any, of house prices across England and Wales on each occasion.

[paragraph 3.144]

COHABITANTS

- 8.8 We provisionally propose that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions.

[paragraph 4.59]

- 8.9 We provisionally propose that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased:

- (1) was living with the deceased as a couple in a joint household; and
- (2) was neither married to nor a civil partner of the deceased.

[paragraph 4.60]

- 8.10 We provisionally propose that, if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation:

- (1) there should be no minimum duration requirement for an entitlement on intestacy for the surviving cohabitant; and
- (2) the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse.

[paragraph 4.68]

- 8.11 We provisionally propose that any duration requirement should be fulfilled only by a continuous period of cohabitation.

[paragraph 4.79]

8.12 We provisionally propose that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse, if the cohabitation had continued for at least five years before the death.

[paragraph 4.80]

8.13 We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.

[paragraph 4.85]

8.14 We provisionally propose that if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.

[paragraph 4.95]

8.15 We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.

[paragraph 4.96]

8.16 We provisionally propose that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse.

[paragraph 4.107]

8.17 We invite consultees' views as to the approach to be taken where more than one cohabitant satisfies our proposed conditions for eligibility under the intestacy rules.

[paragraph 4.111]

8.18 We provisionally propose that if the surviving cohabitant and the deceased are by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependents) Act 1975, provided that the cohabitation was continuing at the date of death.

[paragraph 4.122]

8.19 We invite consultees' views as to whether, where the couple had not had a child together, the current two-year qualifying period for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependents) Act 1975 should be retained.

[paragraph 4.123]

8.20 We provisionally propose that, in all cases, in order to qualify for an award under the Inheritance (Provision for Family and Dependents) Act 1975 as a cohabitant the applicant must have been living as a couple in a joint household with the deceased immediately before the death.

[paragraph 4.124]

8.21 We provisionally propose that the Inheritance (Provision for Family and Dependents) Act 1975 be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.

[paragraph 4.134]

CHILDREN

8.22 Do consultees think it appropriate to amend the Inheritance (Provision for Family and Dependents) Act 1975 so as to give a greater chance of success to adult children and, if so, how?

[paragraph 5.19]

8.23 Would consultees favour any change to the present method of *per stirpes* distribution of intestate estates, and in particular the introduction of *per capita* distribution at each generation?

[paragraph 5.35]

8.24 We provisionally propose that trustees' power of advancement (pursuant to section 32 of the Trustee Act 1925) should be extended (for the purposes only of the statutory trusts on intestacy) to the whole, rather than one half, of the share of a beneficiary who is not yet absolutely entitled under the statutory trusts.

[paragraph 5.52]

8.25 We provisionally propose that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.

[paragraph 5.66]

OTHER RELATIVES, DEPENDANTS AND BONA VACANTIA

- 8.26 We provisionally propose that a person who was treated by the deceased as his or her child should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party.

[paragraph 6.9]

- 8.27 We provisionally propose that an assumption of responsibility by the deceased should not be a threshold requirement for an applicant to qualify to apply for family provision as a dependant under section 1(1)(e) of the Inheritance (Provision for Family and Dependants) Act 1975, but should be regarded on an equal footing with other factors.

[paragraph 6.18]

- 8.28 We provisionally propose that it should no longer be a prerequisite to the success of a claim under the Inheritance (Provision for Family and Dependants) Act 1975 brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the claimant.

[paragraph 6.31]

- 8.29 We invite consultees' views as to whether the categories of applicant for family provision should be further widened to include other relatives, such as parents, descendants other than children, siblings, nephews and nieces, and so on.

[paragraph 6.36]

- 8.30 We ask consultees whether the current preference in the intestacy rules for parents over siblings should be retained.

[paragraph 6.46]

- 8.31 Would consultees favour reform to the intestacy rules (and consequential amendments to the Non-Contentious Probate Rules) so that no distinction is drawn between full and half siblings?

[paragraph 6.54]

- 8.32 We invite consultees' views as to whether there should be a presumption that administrators may distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.

[paragraph 6.62]

- 8.33 We would like to hear the views of consultees, in particular those involved in the administration of estates, as to any practical problems which might arise as a result of a reform of section 18(2) of the Family Law Reform Act 1987.

[paragraph 6.68]

THE ADMINISTRATION OF ESTATES

- 8.34 We provisionally propose that the value of assets that can be administered without the need for a grant of representation be reviewed with a view to its being raised.

[paragraph 7.8]

- 8.35 We invite consultees' views as to whether the application of the self-dealing rule to administrators of intestate estates should be modified so that an appropriation should not be voidable by reason of the rule if it was at a fair value.

[paragraph 7.19]

- 8.36 We provisionally propose that, if any beneficiary who would be entitled to take on intestacy survives the deceased but dies before the end of the period of 28 days beginning with the deceased's date of death, that beneficiary shall be treated as though he or she had not survived the deceased.

[paragraph 7.30]

- 8.37 We provisionally propose that no survivorship provision should apply where the effect of treating the beneficiary as though he or she had not survived the deceased would be that the estate passes as *bona vacantia*.

[paragraph 7.31]

- 8.38 We provisionally propose that it should not be a precondition to an application under the Inheritance (Provision for Family and Dependents) Act 1975 that the deceased died domiciled in England and Wales.

[paragraph 7.53]

- 8.39 We ask consultees whether it should be a precondition to an application under the Inheritance (Provision for Family and Dependents) Act 1975 that the deceased died habitually resident in England and Wales, or whether an application for family provision should be possible in any case where there is property comprised in the estate that is governed by English succession law. We also invite views on whether there should be any other requirement limiting the circumstances in which an application for family provision may be made.

[paragraph 7.54]

- 8.40 We ask consultees whether the court should have discretion in an appropriate case to exercise its powers under section 9 of the Inheritance (Provision for Family and Dependents) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.

[paragraph 7.60]

8.41 We provisionally propose that the value of assets for the purposes of sections 8 and 9 of the Inheritance (Provision for Family and Dependants) Act 1975 should be their value at the date of the application, not at the date of death.

[paragraph 7.65]

8.42 We invite consultees' views on whether reform to enable an application for family provision to be issued in the absence of a grant of administration is necessary or desirable.

[paragraph 7.70]

8.43 Would consultees favour reform of the Inheritance (Provision for Family and Dependants) Act 1975 to the effect that benefits from a pension fund, whether lump sums or periodical payments, could be the subject of family provision orders made by the court?

[paragraph 7.82]

8.44 Do consultees foresee that legal or practical difficulties would result if benefits from a pension fund could be the subject of family provision orders and, if so, what might they be?

[paragraph 7.83]

QUANTIFYING IMPACT

8.45 We would welcome information and comments from consultees that would help us to assess the costs of administering intestate estates and particular issues which may add to costs and delay.

[paragraph A.7]

8.46 We would welcome information and comments from consultees about the costs of administering life interests and trusts for under 18s that arise on intestacy.

[paragraph A.26]

8.47 We would welcome information and comments from consultees about the likely effect of our provisional proposals on levels of litigation under the Inheritance (Provision for Family and Dependants) Act 1975 and any potential increase in other types of claim.

[paragraph A.43]

8.48 We would welcome information and comments from consultees about the costs of litigation under the Inheritance (Provision for Family and Dependants) Act 1975.

[paragraph A.47]

8.49 We would welcome information and comments from consultees on the potential impact on practitioners and their clients of the implementation of new legislation in this area.

[paragraph A.49]

8.50 We would welcome information and comments from consultees on the impacts of intestacy on cohabitants and the potential impact of our provisional proposals on cohabitants and others.

[paragraph A.58]

8.51 We would welcome information and comments from consultees on the impacts of the current law and of our provisional proposals on particular groups. In particular, we are interested in comments on whether our provisional proposals will have any adverse or positive impact on the pursuit of equality in the areas of: age, gender, disability, race, religion or belief, sexual orientation or caring responsibilities.

[paragraph A.62]

8.52 We would welcome information and comments from consultees on any other potential impacts of reform of (or failure to reform) the law of intestacy and family provision that we have not discussed.

[paragraph A.64]

APPENDIX A

QUANTIFYING IMPACT

INTRODUCTION

A.1 Throughout the Consultation Paper we have discussed the impact of the current law of intestacy and family provision and considered the potential impact of our provisional proposals and other options for reform. In this Appendix, we look at some of these potential impacts again to consider how they might be quantified. The areas that we examine are:

- (1) the costs of administering estates;
- (2) the costs of administering and terminating trusts;
- (3) litigation costs;
- (4) the costs of implementing new legislation;
- (5) the costs of updating the statutory legacy;
- (6) particular financial impacts on cohabitants;
- (7) will-writing; and
- (8) equality.

A.2 We invite consultees' views on these and any other potential impacts. We also ask consultees to bear in mind the impact of any change in the law when responding to any of the questions in the Consultation Paper.

THE ADMINISTRATION OF ESTATES

A.3 The costs of administering an estate will, to a large extent, depend on a number of factors particular to that estate; for example, the value and type of assets that comprise the estate, the number of beneficiaries and what steps need to be taken to identify and contact the beneficiaries.

A.4 Where there is a will, its terms may impact on the costs of the administration, for example if there are ambiguities that must be resolved by an application to the court. Where an estate (or part of an estate) falls to be distributed according to the intestacy rules, the rules will always have an influence on the cost of administration. Rules which are complex and difficult to understand and apply are likely to increase costs and delay. Conversely, rules that are simple to understand and apply may help to reduce the costs of administration.

A.5 Quantifying these costs is, however, difficult. Those who have priority to apply for a grant of representation are the closest relatives of the deceased.¹ In many cases, particularly where the estate is small and/or the distribution straightforward, there is no need to engage professionals such as solicitors and

¹ Non-Contentious Probate Rules 1987, SI 1987 No 2024, rr 20 and 22.

accountants (though overly complex legal rules may mean that administrators require legal advice simply to understand the rules). We know that around a third of applications for a grant of representation are personal applications (an indication that a solicitor is less likely to have been involved in the administration)², but it can be assumed that this figure is even higher for intestate estates.

- A.6 Clearly, the time spent by an administrator in administering an intestate estate has a financial impact (in addition to the non-monetary, emotional “costs” of dealing with the administration of an estate shortly after a bereavement). The impact will vary depending on the identity of the administrator. If the administrator has to take time off work, for example, or to pay for childcare that they would not otherwise require, the cost can be clearly identified and quantified. In other cases, for example where the administrator is retired or is administering the estate alongside work or caring responsibilities, the financial impact may be less tangible.
- A.7 **We would welcome information and comments from consultees that would help us to assess the costs of administering intestate estates and particular issues which may add to costs and delay.**
- A.8 The number of intestacies varies from year to year. This can in part be explained by natural fluctuations in the number of deaths per year. There may, however, be other factors in play at a particular time. For example, between 2004 and 2008 the annual number of grants of letters of administration (the grant of representation that is issued in respect of an intestate estate) was much higher than usual, peaking at more than 100,000 in 2006.³ This is thought to be related to the fact that the families of miners who died from industrial diseases have been entitled to compensation under a Government scheme. To obtain compensation, a grant of representation in respect of the death was required. Figures for these years must therefore be treated with caution.
- A.9 Nevertheless, the average annual number of grants in respect of intestate estates since 1983 has been 63,503. In any 10 year period, therefore, more than 600,000 such grants are made. In a number of cases, more than one administrator will be appointed (this is necessary, for example, where there are beneficiaries under the age of 18 or where a surviving spouse wishes to appropriate the family home).⁴ It may therefore be the case that every decade around a million people are directly involved as administrators of intestate estates and many hundreds of thousands more family members will be involved in offering support and assistance.
- A.10 In many cases, the administrator or administrators will be the main beneficiaries of an intestate estate, but that will not always be the case. Whether or not the beneficiaries are involved in the administration of the estate, any delay in receiving an entitlement may have financial consequences for those individuals, particularly where they were previously dependent on the deceased.

² Ministry of Justice, *Judicial and Court Statistics* (2007) Cm 7467, pp 90 and 100.

³ Above, p 101.

⁴ Supreme Court Act 1981, s 114; Intestates’ Estates Act 1952, s 5 and sch 2, para 3(1)(c).

- A.11 It can be seen, therefore, that a large number of individuals are potentially affected by the intestacy rules. In one study, nearly a quarter of 55 to 64-year-olds said they had personal experience of the human and economic costs associated with intestacy.⁵
- A.12 Even if it were possible to ascertain the current cost of administering an estate, it would be difficult to determine with any precision how a particular provisional proposal would impact on these costs. We consider below some of the provisional proposals that we think may have an impact on the costs of administration of estates.

All to spouse where there are no children

- A.13 Our provisional proposal that an intestate estate should always pass to a surviving spouse where there are no children or other descendants would, we believe, ease the administrative burden in those cases where at present the estate must be shared between a surviving spouse and any surviving parents or siblings. However, for the reasons set out in the Consultation Paper, this is likely to be the case in very few estates.⁶
- A.14 We know that only around two per cent of intestate estates for which a grant of representation is obtained are valued at more than the higher level of statutory legacy (£450,000).⁷ If we assume that in around half of these cases there is no surviving spouse and in at least half of the remainder there are children or other descendants (who will take the estate to the exclusion of any surviving parent or sibling), then we can estimate that this reform may affect fewer than one in 200 intestate estates. The overall saving in administration costs is therefore minimal, although for each of the individuals who benefit the savings may be significant.

Cohabitants

- A.15 Our provisional proposal that cohabitants should be entitled under the intestacy rules to share in the estate of a deceased partner has the potential to complicate the administration of estates, thereby increasing the financial costs. Administrators will be required to assess whether the partner of the deceased qualifies as such, according to whatever definition is adopted. Although we believe that in practice there will be no ambiguity in the great majority of cases, where there is uncertainty administrators may need to spend additional time and resources to resolve it. On occasion, it may be necessary to make a court application, though for reasons set out below we believe that overall levels of litigation are likely to fall as cohabitants will no longer have to make an application under the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act") to benefit from the estate of a deceased partner. We are also not aware of any significant problems of this sort in jurisdictions where cohabitants already have an automatic entitlement on intestacy.

⁵ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) pp 11 to 12.

⁶ See para 3.11 above.

⁷ See Appendix C, Table 3, below.

- A.16 It is possible to estimate how many cohabitants die intestate each year using statistics for the number of intestate deaths each year by different age groups,⁸ and multiplying each of these by the proportion of those in each age group who cohabit.⁹ This suggests a figure of around 4,000 intestate cohabitant deaths per year. This analysis is limited by the fact that we do not have figures for deaths where no grant of representation is obtained. This method also fails to take account of projected increases in levels of cohabitation. In addition, cohabitants are more likely to die intestate,¹⁰ and this approach is therefore likely to underestimate the number actually dying intestate.

Missing beneficiaries

- A.17 In the Consultation Paper we discuss whether administrators should be permitted, subject to safeguards, to distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.¹¹ We do not believe that this would either increase or reduce the costs of the administration of estate overall but it would shift the cost from being shared among all beneficiaries (including those who do not need to be traced) to those who are more elusive.

ADMINISTERING TRUSTS

- A.18 Under current law, the application of the intestacy rules may require the creation of trusts under which assets are held until beneficiaries are fully entitled to them. Costs may be incurred in administering such trusts while they are ongoing or by taking steps to bring them to an end prematurely. Below, we consider these costs further and the likely impact of our provisional proposals.

Life interests

- A.19 Under current law, where an intestate leaves a surviving spouse and children, the surviving spouse is entitled to the first £250,000 of the estate. Any part of the estate which exceeds this sum is shared: the children take half of what remains immediately and the surviving spouse is entitled to the income from the other half until his or her death (at which point the children become entitled to the capital).¹²
- A.20 This “life interest” is a species of trust which must be administered until the death of a surviving spouse or the earlier termination of the trust. Termination can be achieved by a variation of the terms of the trust; by consent where all of the parties are over 18 and capable of consenting or, otherwise, by means of a court order. Alternatively, during a limited period the surviving spouse may choose to “capitalise” his or her interest by accepting an immediate lump sum instead of periodic payments of income. This sum is determined by reference to statutory

⁸ See Appendix C, Table 4, below.

⁹ Office for National Statistics, (2003) 33 *Social Trends* 41, 46, figure 2.9.

¹⁰ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

¹¹ See paras 6.59 to 6.62 above.

¹² See paras 2.20 to 2.23 above.

“capitalisation tables” which are periodically updated on the advice of the Government Actuary’s Department.¹³

- A.21 The cost of administering a trust will vary depending on the assets being held. In some cases, the only significant asset will be a share of the family home in which the surviving spouse is resident. The trust will then be fairly simple and inexpensive to administer; the surviving spouse will be entitled to continue living in the property but no question of income arises as the property is not being rented out. If, however, the surviving spouse wishes to move somewhere less expensive, complications can arise. The surplus proceeds of sale will need to be invested so as to produce an income for the surviving spouse but maintain the capital value to which the children will ultimately be entitled.¹⁴
- A.22 Where the assets held in trust are modest, the costs of administering the trust may be disproportionate. It may, therefore, be necessary to take steps to terminate the trust, though this may also involve some expense which will eat into the trust assets that the beneficiaries will ultimately receive. If a court application is needed to vary the trust, there will be costs of legal advice and representation. The process of capitalisation is also one on which most administrators will want to take legal advice. Using the capitalisation tables is cheaper than obtaining a “tailor made” actuarial valuation of a surviving spouse’s life interest (though such a valuation will be more accurate, as the actual circumstances of the surviving spouse can be taken into account).
- A.23 There are also costs involved in maintaining capitalisation tables. The Government Actuary’s Department believes that the tables should be kept under review to ensure that the assumptions used to formulate the tables (for example, mortality rates) are kept up to date. Ideally, a more in-depth consultation exercise should be undertaken periodically to allow interested parties to contribute their thoughts on the factors that should be taken into account and the weight given to each factor. It has estimated that the costs of its involvement in such a consultation exercise might broadly be in the order of £10,000 for a stand-alone consultation (at 2009/2010 costs). Repeat consultations would be less expensive, since it would be possible to use the previous consultation as a starting point. There is anecdotal evidence that the capitalisation of a life interest that arises on intestacy is rather infrequent. It may therefore be that the cost of maintaining the tables is disproportionate to the number of times that they are used. However, if the intestacy rules continue to provide for the creation of life interests and for life interests to be capitalised, the tables must be retained and kept up to date to avoid prejudice in those few cases where capitalisation is used.

Trusts for under 18s

- A.24 Under current law, beneficiaries of an intestate estate must wait until they turn 18 (or marry or form a civil partnership under that age) before they are fully entitled to their inheritance. Until then, the interest is held on trust. There are inevitably costs involved in administering these trusts.

¹³ See para 2.22 above.

¹⁴ See Capital and Income in Trusts: Classification and Apportionment (2009) Law Com No 315, paras 4.10 to 4.16.

- A.25 Our provisional proposal to improve the position of beneficiaries who are adopted may have the effect of slightly increasing the number of ongoing trusts for under 18s. Under current law, such interests terminate on adoption. We propose that they should continue until the adopted child turns 18 (or marries or forms a civil partnership under that age).¹⁵ There are relatively few cases where this will be relevant. Nevertheless, we believe that there is the potential for the children involved in those cases to be significantly prejudiced under the current law. The cost of administering trusts in these cases would, we believe, be outweighed by the benefit of addressing this injustice.
- A.26 **We would welcome information and comments from consultees about the costs of administering life interests and trusts for under 18s that arise on intestacy.**

LITIGATION

- A.27 One benefit of default intestacy rules which apply to every intestate estate is that, in most cases, there is no need for litigation or any other court involvement to determine the correct distribution of the estate.
- A.28 The 1975 Act provides a potential remedy for those who feel aggrieved at the distribution of an estate – whether that distribution was governed by the terms of a will or by the intestacy rules – to obtain a court order that effectively redistributes the estate. This involves litigation, or at least the threat of litigation. There are therefore likely to be financial impacts wherever our proposed reforms either encourage or discourage applications under the 1975 Act.
- A.29 On occasion, it may be necessary to apply to the court during the administration of an estate. For example, a court order may be needed to vary the terms of a trust that arises on intestacy on behalf of a beneficiary who is under 18 or otherwise not capable in law of consenting to the proposed variation. In other cases, directions may be needed to permit the estate to be distributed on the assumption that a missing beneficiary is no longer alive or on some other basis.
- A.30 We consider below the potential impact of our provisional proposals on the number of claims under the 1975 Act and other litigation.
- A.31 The 1975 Act limits the number of potential applicants in various ways:
- (1) the deceased must have died domiciled in England and Wales;
 - (2) the applicant must fall within one of a defined list of classes;
 - (3) the application must be brought within six months of the grant of representation (though the court may extend this time limit);
 - (4) the effect of the will or the intestacy rules (or a combination of both) must be that reasonable financial provision was not made for the applicant; and

¹⁵ See para 5.66 above.

- (5) the court does not have power to make orders in respect of certain property (pension entitlements being the most significant example).
- A.32 Figures on numbers of 1975 Act applications are available only for the Chancery Division of the High Court, although applications may also be made in the Family Division of the High Court and in county courts. In 2007, the Chancery Division is recorded as dealing with only 43 applications.¹⁶ If we assume, in the absence of a more reliable method of calculating the total number of applications, that a similar number of applications is made in the Family Division and that the county courts deal with the same number of applications as both of these divisions of the High Court, we arrive at a figure of fewer than 200 applications per year.
- A.33 On any view, this is a modest figure. It may, however, give a misleading picture of the scale and costs of litigation in this area. Costs may be incurred by parties seeking advice as to whether to commence a claim (or to defend an intimated claim). Many disputes will be settled before the formal issue of proceedings but with the parties having incurred costs, for example in correspondence between solicitors. One practitioner with whom we have spoken described the number of applications which proceed to any sort of court hearing as “the tip of the iceberg”.
- A.34 Certainly, not all cases that are issued result in a full trial. Indeed, the majority do not. An indication of this is provided in figures provided by the Legal Services Commission for the number of applications for public funding for legal assistance with 1975 Act applications. These show that between April 2007 and March 2008 there were 166 applications for public funding (of which 136 were successful). These figures, of course, do not include those cases funded privately by the parties. Only 19 cases were determined at a final hearing and the total cost of all legal assistance was just under £300,000; this included the profit cost, the disbursement cost and counsel’s fees.¹⁷
- A.35 Applications under the 1975 Act may increase if:
- (1) the list of entitled applicants is enlarged;
 - (2) reformed intestacy rules mean that reasonable financial provision is not made for anyone who is entitled to make an application; or
 - (3) there is less incentive to settle disputes.
- A.36 Applications may decrease if:
- (1) potential applicants receive an automatic entitlement on intestacy (or a greater entitlement than at present), though this may then encourage applications from those whose entitlement is thereby lessened; or
 - (2) applications are made more difficult.

¹⁶ Ministry of Justice, *Judicial and Court Statistics* (2007) Cm 7467, p 37, Table 2.3

¹⁷ “Disbursements” means out of pocket expenses (for example valuation fees) properly incurred by the solicitor for the client.

- A.37 A number of our provisional proposals may therefore have some impact on the range of parties who may be able to bring a 1975 Act application and choose to do so. For example, our provisional proposals in respect of cohabitants (the impact of which we consider separately below¹⁸) may have this effect. We also provisionally propose that the 1975 Act be reformed to assist those who were in an “interdependent” or mutually dependent relationship with the deceased.¹⁹
- A.38 We do not believe that any of our other proposals is likely to lead to a significant increase in the number of aggrieved relatives who choose to bring a family provision claim. We provisionally propose that a surviving spouse should inherit the entire estate where there are no children.²⁰ In some larger estates this may potentially prejudice the parents or siblings of the deceased (who at present may benefit from the estate). Neither are a class of applicant under the 1975 Act in their own right, though parents or siblings may be able to claim as dependants.
- A.39 It is conceivable that our provisional proposals that cohabitants should be entitled under the intestacy rules to inherit all or some of a deceased partner’s intestate estate may provoke challenges from relatives who would otherwise be entitled to a share (or a greater share) of the estate.
- A.40 Depending on how cohabitants are defined in any reformed law, there may be scope for factual dispute over, for example, the nature or length of the cohabitation. Alternatively, disappointed relatives may be inclined to make an application under the 1975 Act on the grounds that the intestacy rules failed to make reasonable provision for them.
- A.41 We think that these concerns can be overstated. Provided that the statutory definition of cohabitant is sufficiently clear, in the majority of cases there will be no reasonable dispute over whether the deceased was in such a relationship. Even where there is some ambiguity, it is to be hoped that most disputes would be resolved without recourse to the courts.
- A.42 In any event, the risk of such disputes must be balanced against the positive impact of our provisional proposals on levels of litigation overall. At present, a cohabitant has no choice but to apply for family provision if agreement cannot be reached with those who are entitled under the intestacy rules. Under our proposed reforms, there would be no need for such litigation unless initiated by a disappointed beneficiary or by a cohabitant where the intestacy rules failed to make reasonable provision.
- A.43 **We would welcome information and comments from consultees about the likely effect of our provisional proposals on levels of litigation under the Inheritance (Provision for Family and Dependants) Act 1975 and any potential increase in other types of claim.**

¹⁸ See paras A.54 to A.58 below.

¹⁹ See para 6.31 above.

²⁰ See para 3.36 above.

The costs of litigation

- A.44 Any change in levels of litigation will have financial impacts; increased litigation, for example, will increase the costs borne by the parties and have an impact on the wider public in delays for other court users as a result of additional pressure on court time.
- A.45 The legal costs of the parties may be considerable. Even where these costs are ordered to come from the estate (and it is something of a myth that this is routinely the case),²¹ there is less for the successful parties to inherit. Figures provided by the Legal Services Commission for parties in receipt of public funding show that in 2007/8 the maximum cost of employing a solicitor to give advice, prepare a case and, where appropriate, represent a party in a 1975 Act dispute was more than £12,000, while the average cost was just under £2,000. The same figures for employing a barrister were around £4,000 and £300 respectively. These cost figures are supported by alternative research (from 2001) into the costs of disputes (again, for publicly funded litigants) over an inheritance or a will, more than half of which involved a 1975 Act application. Costs ranged from less than £100 to almost £26,000 with 50% of cases costing between £1,452 and £5,560.²² These included cases which settled, sometimes at an early stage, as well as those which proceeded to trial. This may explain the wide range of costs. However, the rates paid to solicitors and barristers for publicly funded work tend to be considerably lower than for privately funded cases.
- A.46 The costs of litigation also include court fees, though a successful party may in some cases recover these from an unsuccessful party. The current fee to issue a 1975 Act claim in the High Court is £400 (£150 in a county court) and further fees are payable at later stages of the litigation if settlement cannot be achieved.²³
- A.47 **We would welcome information and comments from consultees about the costs of litigation under the Inheritance (Provision for Family and Dependents) Act 1975.**

THE COSTS OF NEW LEGISLATION

- A.48 Whenever the law changes there are costs borne by legal practitioners to familiarise themselves with the new legislation. Examples include the costs of training, of purchasing new textbooks and of updating internal materials such as precedents. This cost is likely to be passed on to clients where possible.
- A.49 **We would welcome information and comments from consultees on the potential impact on practitioners and their clients of the implementation of new legislation in this area.**

²¹ A Francis, *Inheritance Act Claims: Law, Practice and Procedure* (11th update March 2009) para 15[37].

²² T Goriely, P Das Gupta and R Bowles, *Breaking the Code: The Impact of Legal Aid Reforms on General Civil Litigation* (2001) p 130, see more generally pp 124 to 132.

²³ See the Civil Proceedings Fees Order 2008, SI 2008 No 1053, sch 1, para 1.5.

UPDATING THE STATUTORY LEGACY

- A.50 As we explain in the Consultation Paper, the statutory legacy is a fixed sum paid to a surviving spouse in priority to any other beneficiary.²⁴ Because this sum is fixed, inflation can erode its value in real terms. It is therefore necessary periodically to update the statutory legacy.
- A.51 The Lord Chancellor was given power to set the levels of statutory legacy in 1953. Since then, the levels have been increased in 1967, 1972, 1977, 1981, 1987, 1993 and 2009. The intervals between reviews range from four to sixteen years. We provisionally propose reviews at intervals of no more than five years.²⁵
- A.52 The most recent review, the first for 16 years, involved a significant consultation process undertaken by the Department for Constitutional Affairs. We would anticipate that more frequent reviews would mean that each review could be less detailed, addressing primarily particular concerns arising out of changes that have taken place in the interim. Our reform proposals would also provide more structured guidance as to the factors to be taken into account in any review.
- A.53 It would therefore be hoped that although the reviews would be more frequent than they have been in recent years, each review would be less costly. Regular reviews would also help to ensure that the proportion of estates that fall within the statutory legacy does not fluctuate as much as it has done in the past.

IMPACTS ON COHABITANTS

- A.54 Research suggests that only around 17% of cohabitants have made a will, in comparison with 45% of married people.²⁶ Cohabitants have no automatic entitlement under the intestacy rules to a share of a deceased's partner's estate, no matter how long the relationship had lasted. This may have a number of significant impacts. A cohabitant who was financially dependent, or perhaps mutually dependent, on the deceased will lose that support with no automatic entitlement to a share of the estate that might assist. Where a cohabitant has no access to other personal or family resources, he or she may require support from the state, which carries a cost to the taxpayer.
- A.55 Because of the common misunderstanding that cohabitants of long standing have similar rights to spouses on death and in other matters (the "common law marriage myth"), the reality that there is no automatic entitlement on intestacy can come as a shock to a bereaved cohabitant. This is in addition to the trauma of bereavement and will clearly carry an emotional cost which, although difficult to quantify, may be acute.
- A.56 A cohabitant may (if he or she meets the statutory criteria) apply for family provision. As set out above, this means embarking on litigation which in many cases will be contested by those who are entitled on intestacy. Unless an early settlement can be reached, the costs can mount considerably.

²⁴ See paras 2.3 to 2.8 above.

²⁵ See para 3.143 above.

²⁶ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

- A.57 Our provisional proposal is that a cohabitant (subject to certain threshold criteria to qualify as such) should be entitled under the intestacy rules to share in a deceased partner's estate.²⁷ This will reduce the number of occasions on which a cohabitant must bring a 1975 Act claim to ensure reasonable provision from a partner's estate. However, as discussed above,²⁸ it is conceivable that this benefit would be partially offset by litigation initiated by disappointed relatives of the deceased who would otherwise have inherited the estate.
- A.58 **We would welcome information and comments from consultees on the impacts of intestacy on cohabitants and the potential impact of our provisional proposals on cohabitants and others.**

WILL WRITING

- A.59 It is also conceivable that any reform of the intestacy rules may impact on will-writing behaviour. We do not aim to discourage will-writing (which we consider to be the best way for an individual to direct the distribution of his or her estate, insofar as that is compatible with family provision legislation). The evidence is that few people fail to write a will because they understand and are content with the default intestacy rules. Nevertheless, there is a group for whom dying intestate represents an informed choice. Should reformed rules match the actual testamentary wishes of a larger number of people, we might see more examples of this behaviour. As a result, the expense of writing and maintaining an up-to-date will would be spared for these individuals. Nevertheless, we think that this is likely to represent a rather minimal saving in financial terms.

EQUALITY

- A.60 Because of the nature of the subject matter our proposals are likely to have a particular impact on older people. We are concerned to ensure that so far as possible the risk of anyone losing their home as a result of the intestacy rules is minimised. The options we discuss for reform of the entitlement of a surviving spouse, in particular the "fixed share approach",²⁹ will have a particular benefit for older surviving spouses (those approaching and past retirement age). This could potentially alleviate the need for public funding that might otherwise be required to fund accommodation and care costs.³⁰
- A.61 We would like consultees to consider how other groups in society might be affected by the current law and by our provisional proposals. For example, we refer in the Consultation Paper to research that suggests that those from a minority ethnic background are more likely to die intestate.³¹ Any change in the intestacy rules may therefore have a more significant impact within those communities.

²⁷ See para 4.59 above.

²⁸ See paras A.35 to A.43 above.

²⁹ See paras 3.77 to 3.84 above.

³⁰ See, for example, Department of Health, *Shaping the future of care together* (2009) Cm 7673, ch 5.

³¹ See para 1.40 above.

A.62 **We would welcome information and comments from consultees on the impacts of the current law and of our provisional proposals on particular groups. In particular, we are interested in comments on whether our provisional proposals will have any adverse or positive impact on the pursuit of equality in the areas of: age, gender, disability, race, religion or belief, sexual orientation or caring responsibilities.**

OTHER IMPACTS

A.63 We are aware that there may be other impacts of the current law and of our provisional proposals for reform that we have not addressed in this Appendix.

A.64 **We would welcome information and comments from consultees on any other potential impacts of reform of (or failure to reform) the law of intestacy and family provision that we have not discussed.**

APPENDIX B

ILLUSTRATIONS FOR PART 3

INTRODUCTION

- B.1 In Part 3 we considered the entitlement under the intestacy rules of a surviving spouse where there are also surviving children or other descendants of the deceased. We asked consultees to consider a number of possible options for reform. Among these options was an approach that would provide a surviving spouse with a statutory legacy and to a fixed proportion of the remainder of the estate (if any).¹ In this Appendix we illustrate the potential effect of this approach on the entitlement of a hypothetical surviving spouse.
- B.2 We set out below tables and graphs which model the impact of intestacy rules which award a surviving spouse:
- (1) a statutory legacy of £250,000 and a life interest in half of the remainder of the estate (“Current law”);
 - (2) a statutory legacy of £250,000 and an absolute interest in half of the remainder of the estate (“Variation 1”); and
 - (3) a statutory legacy of £250,000 and an absolute interest in one third of the remainder of the estate (“Variation 2”).

METHODOLOGY

- B.3 As we explained in Part 2, a surviving spouse also has the right to choose to receive the capital value of his or her life interest instead of a right to income.² To calculate this capital value it is necessary to know:
- (1) the sex of the surviving spouse;
 - (2) the age of the surviving spouse; and
 - (3) the average gross redemption yield on medium coupon 15 year Government stocks.³
- B.4 This information is used to find a “multiplier” within the statutory capitalisation tables.⁴ The capital value is obtained by applying the multiplier to the property that is subject to the life interest.

¹ See paras 3.77 to 3.84 above.

² Administration of Estates Act 1925, s 47A.

³ As of 30 September 2009 this was 3.91%, calculated through the website of the Financial Times at markets.ft.com/ft/markets/researchArchive.asp?report=FTSEG&cat=BR, as referred to in the Explanatory Notes to the Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008, SI 2008 No 3162.

⁴ Intestate Succession (Interest and Capitalisation) Order 1977, SI 1977 No 1491 (as amended by the Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008, SI 2008 No 3162).

- B.5 For example: if a woman died intestate, leaving a surviving husband aged 72, and an estate worth £300,000, the husband would receive a statutory legacy of £250,000, and a life interest in half of the remaining £50,000. If he wished to capitalise this life interest, the multiplier applied to the £25,000 subject to the life interest would be 0.369, resulting in a capital value of £9,225.

TABLES

- B.6 For the purposes of this Appendix we have chosen to model separately the entitlement of a 70 year old widow (Table 1), and a 50 year old widower (Table 2) under the three different approaches set out at paragraph B.2 above. We also show the results in graph form below the relevant table.

Table 1: 70 year old surviving widow

B.7 The following table and graph illustrate the entitlement of a 70 year old surviving widow under the current intestacy rules, and under the two variations discussed.

Estate size	Current law	Variation 1	Difference	Variation 2	Difference
£250,000	£250,000	£250,000	£0	£250,000	£0
£300,000	£260,875	£275,000	£14,125	£266,667	£5,792
£350,000	£271,750	£300,000	£28,250	£283,333	£11,583
£400,000	£282,625	£325,000	£42,375	£300,000	£17,375
£450,000	£293,500	£350,000	£56,500	£316,667	£23,167
£500,000	£304,375	£375,000	£70,625	£333,333	£28,958
£550,000	£315,250	£400,000	£84,750	£350,000	£34,750
£600,000	£326,125	£425,000	£98,875	£366,667	£40,542
£650,000	£337,000	£450,000	£113,000	£383,333	£46,333
£700,000	£347,875	£475,000	£127,125	£400,000	£52,125
£750,000	£358,750	£500,000	£141,250	£416,667	£57,917
£800,000	£369,625	£525,000	£155,375	£433,333	£63,708
£850,000	£380,500	£550,000	£169,500	£450,000	£69,500
£900,000	£391,375	£575,000	£183,625	£466,667	£75,292
£950,000	£402,250	£600,000	£197,750	£483,333	£81,083
£1,000,000	£413,125	£625,000	£211,875	£500,000	£86,875

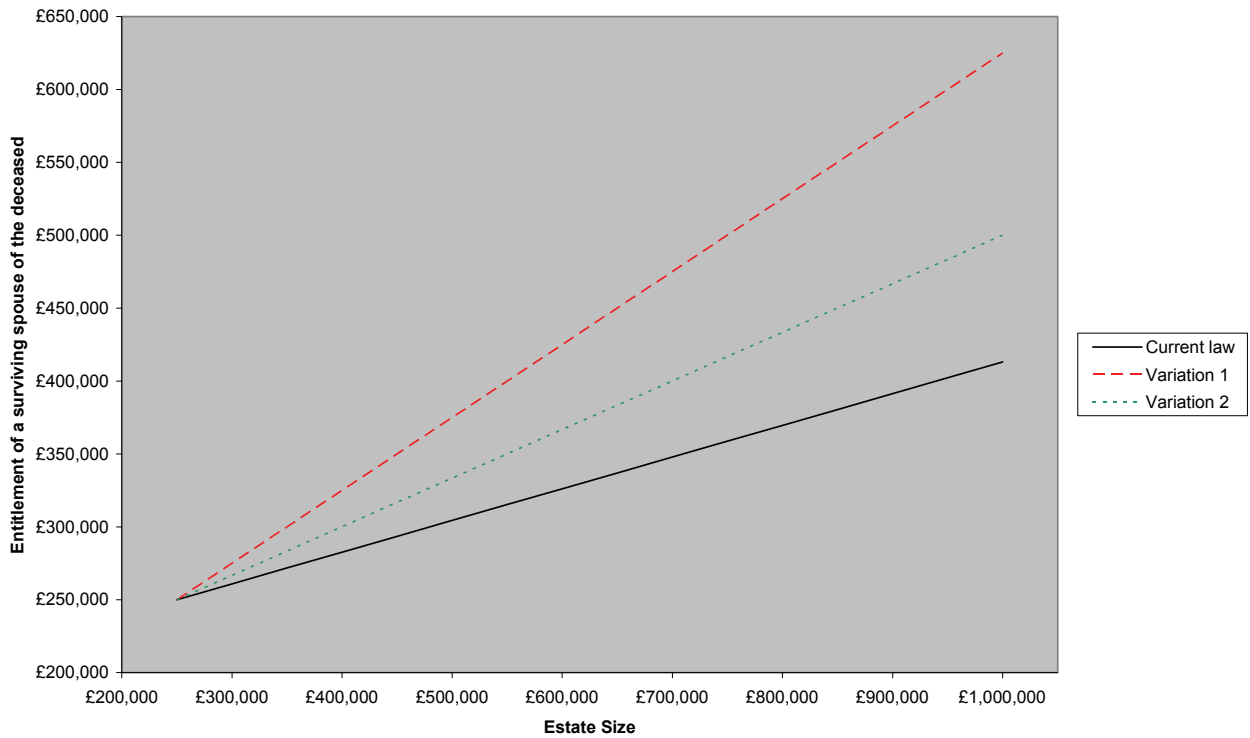
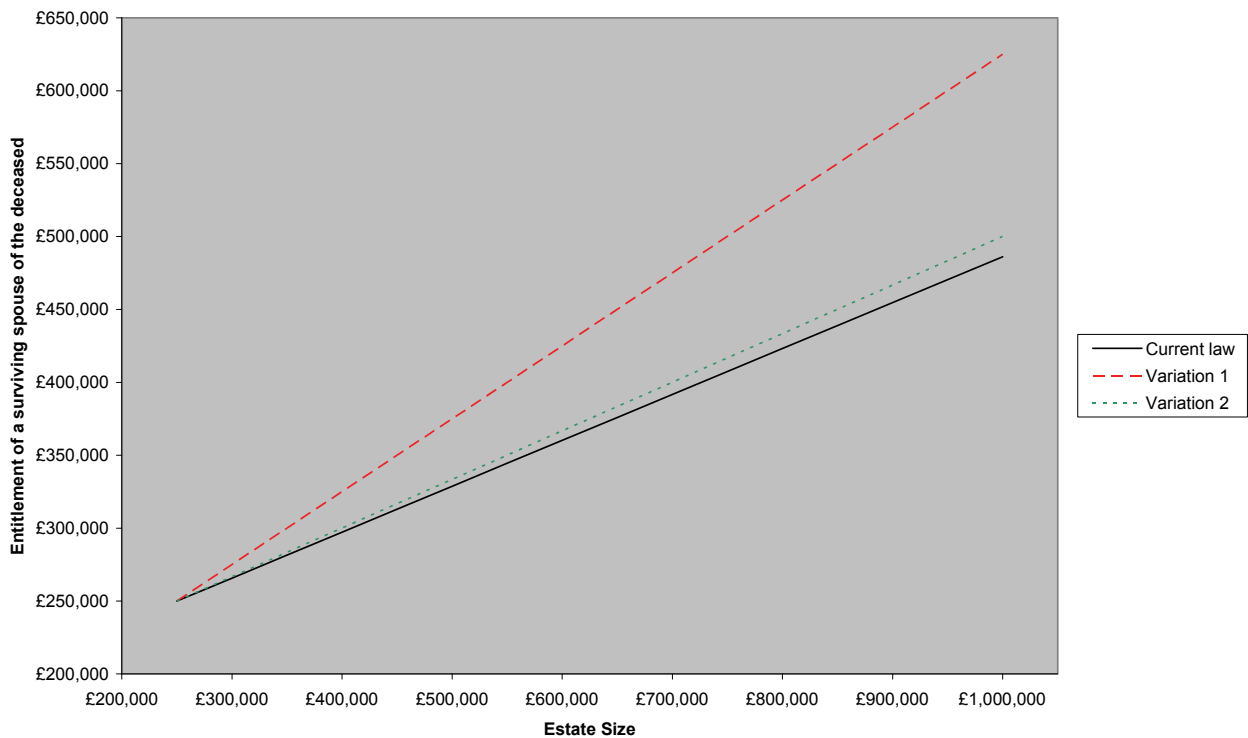


Table 2: 50 year old surviving widower

B.8 The following table and graph illustrate the entitlement of a 50 year old surviving widower under the current intestacy rules, and under the two variations discussed.

Estate size	Current law	Variation 1	Difference	Variation 2	Difference
£250,000	£250,000	£250,000	£0	£250,000	£0
£300,000	£265,750	£275,000	£9,250	£266,667	£917
£350,000	£281,500	£300,000	£18,500	£283,333	£1,833
£400,000	£297,250	£325,000	£27,750	£300,000	£2,750
£450,000	£313,000	£350,000	£37,000	£316,667	£3,667
£500,000	£328,750	£375,000	£46,250	£333,333	£4,583
£550,000	£344,500	£400,000	£55,500	£350,000	£5,500
£600,000	£360,250	£425,000	£64,750	£366,667	£6,417
£650,000	£376,000	£450,000	£74,000	£383,333	£7,333
£700,000	£391,750	£475,000	£83,250	£400,000	£8,250
£750,000	£407,500	£500,000	£92,500	£416,667	£9,167
£800,000	£423,250	£525,000	£101,750	£433,333	£10,083
£850,000	£439,000	£550,000	£111,000	£450,000	£11,000
£900,000	£454,750	£575,000	£120,250	£466,667	£11,917
£950,000	£470,500	£600,000	£129,500	£483,333	£12,833
£1,000,000	£486,250	£625,000	£138,750	£500,000	£13,750



DOWNLOADING THE SPREADSHEET

- B.9 The spreadsheet we have devised to produce this information is available to download from the Law Commission website.⁵ Consultees can select the sex and age of the hypothetical surviving spouse to see how this affects his or her resulting entitlement under the three models considered in this Appendix.
- B.10 It is also possible for users of the spreadsheet to change the fixed share of the remainder of the estate (after payment of the statutory legacy) to which a surviving spouse is entitled. We encourage consultees to make use of this spreadsheet to inform their responses to this consultation, in particular to the questions in Part 3 at paragraph 3.96.

⁵ www.lawcom.gov.uk/intestacy.htm.

APPENDIX C

HM REVENUE & CUSTOMS' ANALYSIS OF NET ESTATES REPORTED FOR PROBATE

INTRODUCTION

- C.1 This Appendix sets out HM Revenue & Customs' analysis of net estates as reported for probate.

CALENDAR OF GRANTS DATA

- C.2 Every week the Probate Service sends HM Revenue & Customs an electronic dataset containing details of grants issued in the previous week. The fields used for this analysis are:

- (1) date grant issued;
- (2) date of death;
- (3) indicator of duplicate grant;
- (4) net estate size;
- (5) grant type; and
- (6) date of birth (used to calculate age).

- C.3 The grant type field is used to determine whether an estate was testate or intestate. Annex A to this Appendix shows the classification rules, which were based on advice from the Law Commission who liaised with the Probate Service.

- C.4 The net estate reported for probate only includes elements of the estate for which probate is needed to transfer ownership. This means that it excludes a number of elements in the estate which need to be reported for inheritance tax purposes including:

- (1) joint property passing by survivorship;
- (2) settled property;
- (3) foreign assets; and
- (4) lifetime gifts made up to seven years before death.

SPECIFYING THE SET OF ESTATES FOR ANALYSIS

- C.5 Consideration was given to what set of estates would be most appropriate to use to calculate statistical information for this project. In recent years there have been a large number of applications for grants related to claims for miners' compensation.

C.6 The miners' compensation scheme was set up in 1999 and claims in respect of miners who have died have to be supported by a grant of representation. New applications for grants for these cases tend to be for intestacies with low values for net estate, where death occurred several years ago.

C.7 The tables below show numbers of grants for testate and intestate estates since 1999, with the proportionate breakdown by time elapsed between the date of death and the date the grant was issued. They illustrate the following impacts:

- (1) grants for intestate estates increased dramatically, peaking in 2005/06 and 2006/07. It is clear that the increase comes predominantly from deaths more than five years before grant; and
- (2) little impact on testate estates, where there is likely to be a grant already.

Table 1: Grants for intestacies, England and Wales, by period between death and grant

Year ¹	Number	Lag between death and grant (years)							Total
		0-4	5-9	10-19	20-29	30-39	40-49	50-	
1999/00	52,306	96.30%	2.00%	1.21%	0.33%	0.10%	0.04%	0.03%	100.00%
2000/01	53,248	93.21%	2.61%	2.45%	1.30%	0.34%	0.04%	0.05%	100.00%
2001/02	56,121	86.67%	4.61%	5.06%	2.58%	0.92%	0.14%	0.02%	100.00%
2002/03	62,598	78.64%	6.29%	8.13%	4.51%	2.04%	0.36%	0.02%	100.00%
2003/04	65,007	72.70%	5.87%	10.36%	6.84%	3.46%	0.75%	0.02%	100.00%
2004/05	81,954	55.71%	7.84%	15.62%	11.96%	6.96%	1.89%	0.03%	100.00%
2005/06	89,595	51.43%	6.88%	15.66%	13.91%	8.97%	3.05%	0.09%	100.00%
2006/07	89,303	50.18%	6.44%	14.96%	13.98%	10.07%	4.07%	0.29%	100.00%
2007/08	64,810	65.40%	4.99%	10.34%	9.26%	6.65%	3.01%	0.35%	100.00%
2008/09 ²	32,249	86.24%	2.99%	4.20%	3.10%	2.31%	1.01%	0.15%	100.00%

Table 2: Grants for testate estates, England and Wales, by period between death and grant

Year ³	Number	Lag between death and grant (years)				Total
		0-4	5-9	10-19	20-	
1999/00	209,796	99.38%	0.41%	0.18%	0.03%	100.00%
2000/01	204,802	99.33%	0.44%	0.19%	0.04%	100.00%
2001/02	205,080	99.15%	0.55%	0.26%	0.04%	100.00%
2002/03	208,381	98.83%	0.75%	0.36%	0.06%	100.00%
2003/04	209,054	98.81%	0.69%	0.42%	0.08%	100.00%
2004/05	204,026	98.13%	1.01%	0.70%	0.16%	100.00%
2005/06	212,776	97.99%	0.94%	0.84%	0.24%	100.00%
2006/07	209,111	97.98%	0.91%	0.83%	0.28%	100.00%
2007/08	211,822	98.39%	0.76%	0.63%	0.22%	100.00%
2008/09 ⁴	143,308	98.97%	0.58%	0.35%	0.10%	100.00%

¹ Weekly download received 1 April to 31 March for year shown.

² April 2008 to November 2008 inclusive.

³ Weekly download received 1 April to 31 March for year shown.

⁴ April 2008 to November 2008 inclusive.

- C.8 Even in the most recent data there appear to be some miners' compensation cases. These will bring down average and median values for net estates. It would be desirable to remove such estates for the current analysis because the cases should disappear quickly in the period for which any new intestacy rules would apply.
- C.9 There is no simple way to identify the cases; for this analysis we have removed all estates where death occurred more than five years before the issue of the grant. We have also removed a small number of cases where a duplicate grant was or may have been issued or where the grant type raises some doubt over whether a will existed or not. Annex A to this Appendix shows the line taken for each grant type.
- C.10 The latest 12 month period for which we have complete data is November 2007 to October 2008.
- C.11 The set of grants analysed is therefore: all grants issued between 1 November 2007 and 31 October 2008 inclusive (271,150), but excluding:
- (1) duplicate grants and those where testate/intestate status was uncertain (3,173); and
 - (2) other grants where date of death more than 5 years before date of grant (13,607).

This gives a core set of 254,370 grants to analyse.

- C.12 Annex A to this Appendix shows a breakdown of these figures by grant type.

RESULTS – KEY STATISTICS BROKEN DOWN BY ESTATE SIZE AND AGE

C.13 The following table shows the distribution of estate size.

Table 3: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)						
<u>Net estate range (£)</u>	<u>Frequency (number of estates)</u>			<u>Cumulative percentage of total</u>		
	<u>Testate</u>	<u>Intestate</u>	<u>All</u>	<u>Testate</u>	<u>Intestate</u>	<u>All</u>
0k-25k	22,105	13,499	35,604	10%	32%	14%
25k-50k	19,864	6,423	26,287	20%	47%	24%
50k-75k	13,741	3,795	17,536	26%	56%	31%
75k-100k	13,923	3,397	17,320	33%	64%	38%
100k-125k	14,699	3,068	17,767	40%	72%	45%
125k-150k	15,058	2,249	17,307	47%	77%	52%
150k-175k	15,128	1,899	17,027	54%	82%	59%
175k-200k	13,807	1,548	15,355	60%	85%	65%
200k-225k	12,098	1,227	13,325	66%	88%	70%
225k-250k	10,773	906	11,679	71%	90%	74%
250k-275k	9,777	818	10,595	76%	92%	79%
275k-300k	9,367	734	10,101	80%	94%	83%
300k-325k	5,754	370	6,124	83%	95%	85%
325k-350k	4,563	304	4,867	85%	96%	87%
350k-375k	3,884	265	4,149	87%	96%	88%
375k-400k	3,229	224	3,453	88%	97%	90%
400k-425k	2,747	157	2,904	90%	97%	91%
425k-450k	2,300	132	2,432	91%	98%	92%
450k-475k	1,961	134	2,095	92%	98%	93%
475k-500k	1,746	95	1,841	93%	98%	93%
500k-1m	11,652	634	12,286	98%	100%	98%
1m-2m	3,036	142	3,178	99%	100%	100%
2m-	1,098	40	1,138	100%	100%	100%
Total	212,310	42,060	254,370			

C.14 Medians and averages for the same group of estates are shown in the following table, broken down by age and testate/intestate status:

Table 4: Medians and averages (£) (excluding duplicates and grants where death more than 5 years before grant)

<u>Age Range</u>	<u>Testate</u>		<u>Intestate</u>		<u>All</u>	
	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>
Missing	116,000	189,000	48,000	109,000	95,000	167,000
0-17	*	*	5,000	104,000	*	*
18-34	99,000	157,000	36,000	76,000	46,000	89,000
35-49	128,000	240,000	54,000	95,000	80,000	153,000
50-59	145,000	246,000	59,000	104,000	100,000	186,000
60-69	146,000	236,000	59,000	106,000	118,000	200,000
70-79	156,000	224,000	66,000	112,000	141,000	205,000
80-89	166,000	228,000	55,000	108,000	156,000	215,000
90-	164,000	230,000	37,000	93,000	158,000	221,000
All	160,000	228,000	56,000	105,000	143,000	208,000

* No figures provided because of doubt over reliability of age variable in testate cases where age under 18.

- C.15 It can be seen that average values are much higher than median values. This is because the distribution in each subgroup includes a small proportion of very large cases.
- C.16 While median values of both testate and intestate estates increase with age, the effect is much stronger for testate estates.
- C.17 For comparison, Annex B to this Appendix shows versions of Tables 3 and 4 if grants where death occurred more than five years before a grant are included.
- C.18 Table 5 (on the following page) breaks down statistics on numbers of grants and proportion with wills by age at death, and illustrates how the proportion of estates with wills increases very strongly with both age and net estate size. The distribution by age at death and median age at death is shown in Table 6 (also on the following page).⁵

⁵ If grants made more than five years after death are included the median values for age at death change only slightly (all: 81, testate: 83, and intestate: 72).

Table 5: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)										
Breakdown by age group (age at death)										
Age group:	All	Missing	0-17	18-34	35-49	50-59	60-69	70-79	80-89	90-
<u>Cases</u>										
All	254,370	2,246	133	1,313	6,558	12,756	27,716	56,061	98,380	49,207
Testate	212,310	1,647	10	224	2,603	7,349	20,111	46,579	87,793	45,994
Intestate	42,060	599	123	1,089	3,955	5,407	7,605	9,482	10,587	3,213
<u>Proportion with wills</u>										
<u>Net estate value</u>										
All	83%	73%	#	17%	40%	58%	73%	83%	89%	93%
0k-50k	68%	65%	#	8%	23%	38%	56%	69%	76%	84%
50k-125k	81%	69%	#	22%	39%	53%	69%	81%	88%	94%
125k-250k	90%	80%	#	32%	52%	69%	81%	88%	93%	96%
250k-450k	93%	87%	#	39%	64%	78%	87%	92%	96%	98%
450k-1m	95%	84%	#	*	72%	86%	91%	94%	96%	99%
1m-	96%	87%	#	*	81%	89%	93%	96%	97%	99%

No statistic calculated due to doubt over age field for minors with wills.

* Too few cases to calculate a meaningful statistic.

Table 6: Grants of representation issued, England and Wales, between November 2007 and October 2008 (excluding duplicates and grants where death more than 5 years before grant)											
Distribution of age at death											
Cases	Cases where age known		Proportionate split by age								
	0-17	18-34	35-49	50-59	60-69	70-79	80-89	90-	Median age		
All	254,370	252,124	0%	1%	3%	5%	11%	22%	39%	20%	82
Testate	212,310	210,663	0%	0%	1%	3%	10%	22%	42%	22%	83
Intestate	42,060	41,461	0%	3%	10%	13%	18%	23%	26%	8%	73

ANNEX A: CLASSIFICATION AS TESTATE/INTESTATE

C.19 Estates were classified as testate or intestate or for exclusion from the analysis according to grant type as shown in the following table:

<u>Grant Type</u>	<u>Classification</u>	<u>Total</u>	<u>Duplicate/ unclear</u>	<u>5+ years after death</u>	<u>Remainder analysed</u>
Ad colligenda bona	Exclude	166	166	0	0
Administration	Intestate	46,660	0	10,244	36,416
Administration (attorney)	Intestate	4,728	0	557	4,171
Administration (Duchy of Cornwall)	Intestate	4	0	1	3
Administration (Duchy of Lancaster)	Intestate	114	0	7	107
Administration (incapacity)	Intestate	393	0	186	207
Administration (minority)	Intestate	639	0	7	632
Administration (save & except settled land)	Intestate	1	0	1	0
Administration (settled land)	Exclude	10	10	0	0
Administration (Treasury Solicitor)	Intestate	429	0	18	411
Administration de bonis non	Exclude	2,122	2,122	0	0
Administration pending suit	Exclude	12	12	0	0
Administration use/benefit	Intestate	71	0	16	55
Admon / will	Testate	6,785	0	619	6,166
Admon / will (attorney)	Testate	6,925	0	158	6,767
Admon / will (Duchy of Cornwall)	Testate	0	0	0	0
Admon / will (Duchy of Lancaster)	Testate	0	0	0	0
Admon / will (incapacity)	Testate	334	0	27	307
Admon / will (minority)	Testate	23	0	1	22
Admon / will (save & except settled land)	Testate	1	0	1	0
Admon / will (Treasury Solicitor)	Testate	9	0	1	8
Admon / will de bonis non	Exclude	647	647	0	0
Admon / will use/benefit	Testate	116	0	7	109
Colonial reseal (admon / will)	Testate	38	0	6	32
Colonial reseal (admon)	Intestate	75	0	17	58
Colonial reseal (probate)	Testate	439	0	26	413
Double probate	Exclude	216	216	0	0
Probate	Testate	200,187	0	1,707	198,480
Probate (save & except settled land)	Testate	6	0	0	6
Total		271,150	3,173	13,607	254,370

C.20 The reason for excluding some grant types from the analysis is as follows:

Ad colligenda bona	May be obtained before will proved – testate status unclear
Administration de bonis non	Always follows a previous grant, so duplicate
Admon / will de bonis non	
Double probate	
Administration pending suit	May be a dispute over will – testate status unclear
Administration (settled land)	Excluded to ensure no duplicates of save & except grants

ANNEX B: ANALYSIS INCLUDING GRANTS MORE THAN 5 YEARS AFTER DEATH

C.21 Tables 3A and 4A are the equivalents of Tables 3 and 4 including the grants made more than 5 years after death.

Net estate range (£)	Frequency - number of estates			Cumulative percentage of total		
	Testate	Intestate	All	Testate	Intestate	All
0k-25k	23,467	23,564	47,031	11%	44%	18%
25k-50k	20,129	6,769	26,898	20%	57%	28%
50k-75k	13,976	4,018	17,994	27%	65%	34%
75k-100k	14,101	3,538	17,639	33%	71%	41%
100k-125k	14,831	3,178	18,009	40%	77%	48%
125k-150k	15,143	2,314	17,457	47%	82%	54%
150k-175k	15,202	1,927	17,129	54%	85%	61%
175k-200k	13,868	1,576	15,444	61%	88%	66%
200k-225k	12,151	1,251	13,402	66%	91%	71%
225k-250k	10,793	911	11,704	72%	92%	76%
250k-275k	9,787	820	10,607	76%	94%	80%
275k-300k	9,380	736	10,116	80%	95%	83%
300k-325k	5,765	373	6,138	83%	96%	86%
325k-350k	4,567	307	4,874	85%	97%	87%
350k-375k	3,891	265	4,156	87%	97%	89%
375k-400k	3,232	226	3,458	89%	97%	90%
400k-425k	2,750	158	2,908	90%	98%	91%
425k-450k	2,306	133	2,439	91%	98%	92%
450k-475k	1,965	134	2,099	92%	98%	93%
475k-500k	1,749	96	1,845	93%	98%	94%
500k-1m	11,670	637	12,307	98%	100%	98%
1m-2m	3,040	142	3,182	99%	100%	100%
2m-	1,100	41	1,141	100%	100%	100%
Total	214,863	53,114	267,977			

Table 4A: Medians and averages (£) (excluding duplicates and grants where death more than 5 years before grant)

<u>Age Range</u>	<u>Testate</u>		<u>Intestate</u>		<u>All</u>	
	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>	<u>Median</u>	<u>Mean</u>
Missing	109,000	182,000	32,000	90,000	78,000	154,000
0-17	*	*	5,000	102,000	*	*
18-34	95,000	154,000	34,000	73,000	43,000	87,000
35-49	127,000	239,000	47,000	89,000	74,000	146,000
50-59	142,000	243,000	42,000	88,000	87,000	171,000
60-69	143,000	232,000	29,000	79,000	100,000	180,000
70-79	154,000	220,000	28,000	82,000	127,000	190,000
80-89	165,000	226,000	34,000	91,000	151,000	209,000
90-	164,000	229,000	30,000	84,000	156,000	219,000
All	159,000	226,000	33,000	85,000	134,000	198,000

* No figures provided because of doubt over reliability of age variable in testate cases where age under 18.



**Law
Commission**
Reforming the law

Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925

A Supplementary Consultation Paper

**Consultation Paper No 191 (Supplementary)
26 May 2011**

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission for England and Wales was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC.

The Chief Executive is Mr Mark Ormerod CB.

Topic of this consultation: This Supplementary Consultation Paper reviews sections 31 and 32 of the Trustee Act 1925. We discuss the current law and set out a number of provisional proposals and options for reform on which we invite consultees' views.

Scope of this consultation: The purpose of this consultation is to generate responses to our discussion, provisional proposals and questions with a view to making recommendations for reform to Parliament. In particular, we focus on an area already examined in our initial consultation (Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191) and take a broader look at the issues identified in that consultation process.

Geographical scope: This Supplementary Consultation Paper refers to the law of England and Wales.

Impact assessment: The impact of the current law and potential reforms is considered throughout this Supplementary Consultation Paper. Consultees are invited to give their views on the financial and other impacts of the current law or of reform and to suggest sources of further information.

Duration of the consultation: from 26 May 2011 to **21 July 2011**.

How to respond

Please send your responses either –

By email to: propertyandtrust@lawcommission.gsi.gov.uk or

By post to: Sarah Hansen, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0298 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you could also send them electronically.

After the consultation: In the light of the responses we receive, we will decide our final recommendations and present them to Parliament. It will be for Parliament to decide whether to make any change to the law.

Code of Practice: We are a signatory to the Government's Code of Practice on Consultation and follow the Code criteria, set out on the next page.

Freedom of information: It is important that you refer to our Freedom of Information Statement on the next page.

Availability of this Consultation Paper: You can view or download the paper free of charge on the consultation pages of our website: www.justice.gov.uk/lawcommission/consultations.htm.

CODE OF PRACTICE ON CONSULTATION

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Under Criterion 2 of the Code of Practice on Consultation, the duration of a consultation will normally be at least 12 weeks. However, as this consultation is an additional, more detailed look at a specific element of policy, this consultation will last for eight weeks in accordance with paragraph 1.5 of the Code of Practice on Consultation 2008.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Phil Hodgson.

You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.

Contact: Phil Hodgson, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the BIS website at <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>.

Freedom of Information Statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

THE LAW COMMISSION
SECTIONS 31 AND 32
OF THE TRUSTEE ACT 1925

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PART 1

INTRODUCTION

INTRODUCTION

- 1.1 This Supplementary Consultation Paper is part of our project reviewing the law of intestacy and family provision claims on death. A number of reform options and questions were put forward in our Consultation Paper, published on 29 October 2009.¹ Among the areas of law considered in the Consultation Paper, in the context of the law of intestacy, were the powers given to trustees by sections 31 and 32 of the Trustee Act 1925. This paper examines those powers in a wider context.
- 1.2 If a person dies without leaving a valid will his or her assets are inherited according to the intestacy rules.² Adult beneficiaries identified by the intestacy rules can take their shares of the inheritance outright. But beneficiaries who are under 18, and not married or civil partnered, are not entitled to take their shares outright; their shares are therefore held on trust. Those beneficiaries might be the deceased person's children, but could also be siblings, nieces or nephews, grandchildren, and so on. In this paper we refer to these continuing trusts for under-18s as the "statutory trusts".³
- 1.3 In the Consultation Paper we examined the statutory powers which enable trustees of the statutory trusts, before the beneficiary becomes entitled to take his or her share outright, to distribute income or capital from the trust fund to or for the benefit of the beneficiary.⁴ These powers are found in sections 31 and 32 of the Trustee Act 1925.⁵
- 1.4 However, sections 31 and 32 are not limited to the statutory trusts. They also apply to trusts created by a person in his or her lifetime, or by will. It is possible to exclude or modify their provisions;⁶ trusts may be established for a variety of beneficiaries and settlors have a wide range of options as to the provisions they include to determine the beneficiaries' entitlement to capital and income.

¹ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191.

² Other than assets which in any event pass irrespective of a will, in particular jointly owned property owned in such a way that it automatically passes to the survivor. For more information, see Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 2.13 to 2.40 and 2.91.

³ Administration of Estates Act 1925, s 47. Strictly speaking, the "statutory trusts" have a wider significance than this because they also determine how the intestate estate is divided between various beneficiaries; see Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 2.29 to 2.30.

⁴ The courts have used the metaphor of a tree and its fruit to explain the concepts of capital and income. The "tree" is the capital – such as an office block – and the "fruit" is the income – such as the rent received from renting out the offices. Not all receipts which become due in respect of trust property are classified as income. For example, although one would naturally think of dividends on a share portfolio as income, some distributions by way of dividend are in fact capital.

⁵ They are applied to the trusts arising on intestacy by section 47(1)(ii) of the Administration of Estates Act 1925.

⁶ Trustee Act 1925, s 69(2).

OUR PREVIOUS CONSULTATION

- 1.5 In the Consultation Paper we examined the provisions of section 31 as to how income is treated under the trust, and we made a provisional proposal for an amendment to section 32. The amendment proposed would widen the trustees' powers, in the context of intestacy only, to use the capital of a beneficiary's share before he or she becomes entitled outright:

We provisionally propose that trustees' power of advancement (pursuant to section 32 of the Trustee Act 1925) should be extended (for the purposes only of the statutory trusts on intestacy) to the whole, rather than one half, of the share of a beneficiary who is not yet absolutely entitled under the statutory trusts.⁷

- 1.6 Section 32 of the Trustee Act 1925 enables trustees to "pay or apply" capital "for the advancement or benefit" of a beneficiary who has a recognised entitlement to the capital of the trust fund but is not entitled to have it paid over outright. For example, it may be appropriate to release capital for the benefit of a young child who is a beneficiary under the statutory trusts created on a parent's intestacy. However, the scope of section 32 is limited: the trustees can use only one-half of the beneficiary's capital share in this way.
- 1.7 We proposed removing that one-half limit in relation to the statutory trusts arising on intestacy for three main reasons.⁸ First, it would bring the provisions which apply to such trusts into line with what we understand to be standard practice in drafting wills and lifetime trusts.⁹ Secondly, it would reduce administrative difficulties in calculating and keeping within the one-half limit. Thirdly, it would increase trustees' flexibility and reduce the need for court applications to be made in order to permit advances.
- 1.8 Statistics on the size of intestate estates suggest that they are often of relatively modest size compared to estates where the deceased left a will: analysis carried out by HM Revenue & Customs for the Consultation Paper shows that 64% of intestate estates have a net value of less than £100,000, half of these being less than £25,000.¹⁰ We considered that in such cases there might be particularly good reasons to advance the whole fund to the beneficiaries outright to simplify the administration of the trust or to make provision for them at a time when it may be particularly needed.
- 1.9 This provisional proposal was addressed by 34 respondents to the Consultation Paper, of whom 28 supported the proposal. Some of those consultees also argued that the amendment should apply to trusts created in the settlor's lifetime or by will, as well as to the statutory trusts on intestacy. Similarly, some of the consultees who opposed the provisional proposal did so on the basis that it

⁷ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, para 5.52.

⁸ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 5.50 to 5.51.

⁹ See paras 3.20 to 3.21 below.

¹⁰ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, Appendix C, para C.13. In comparison, only 33% of testate estates have a net value of less than £100,000, approximately one-third of those falling under £25,000.

would be disadvantageous to reform section 32 only insofar as the statutory trusts on intestacy are concerned; they felt that section 32 should be amended for all trusts, or not at all. We consider the responses to the consultation in Part 3.

NEXT STEPS: THIS SUPPLEMENTARY CONSULTATION PAPER

- 1.10 We are grateful to all consultees for their responses on this issue. Having analysed them we decided that a further consultation would be appropriate, taking a broader view of reform in two main respects.
- 1.11 First, we take seriously the concerns of consultees that reform of section 32 only for the statutory trusts arising on intestacy could create confusion and anomalies between different types of trusts. We are also encouraged by comments that there are advantages in reform across all trusts.
- 1.12 Secondly, we felt that we should consult again as to whether it would be appropriate to reform section 31, again for all trusts. Section 31 includes restrictions on the trustees' power to use income for the benefit of trust beneficiaries. In the context of a consultation on a general relaxation of the restrictions on trustees' power to make payments of capital under section 32, we think it appropriate to examine again section 31. This is supported by the fact that, as one consultee noted, it is also common to modify the effect of section 31 when drafting wills and trust documents.
- 1.13 In Part 2 we set out the relevant details of the current law, before setting out and explaining our reform proposals in Part 3. Our provisional proposals and consultation questions are summarised in Part 4.
- 1.14 We ask consultees to send responses to this consultation to us by 21 July 2011. The Law Commission is a signatory to the Government's Code of Practice on Consultation, which establishes that consultations should normally last for at least 12 weeks. In this paper we are focusing on only one of the many areas considered in the Consultation Paper, and although it is broader in scope for the reasons set out above, many of the issues raised have already been taken into account in that consultation and were considered by consultees. We therefore take the view that it is appropriate for the consultation to run for eight weeks, from 26 May 2011 to 21 July 2011.¹¹
- 1.15 Please send your responses either:

by email to: propertyandtrust@lawcommission.gsi.gov.uk; or

by post to: Sarah Hansen, Law Commission, Steel House, 11 Tothill Street,
London SW1H 9LJ

For more detailed information on how to respond and how we will deal with responses, see pages i to ii above.

¹¹ HM Government, *Code of Practice on Consultation* (2008) para 1.5. Full details of the Code are available at www.bis.gov.uk/policies/better-regulation/consultation-guidance.

PART 2

CURRENT LAW

INTRODUCTION

- 2.1 Sections 31 and 32 of the Trustee Act 1925 relate to the powers of trustees to make certain payments from trust funds. The two sections apply to all trusts, whether created by the intestacy rules, by a will or in the settlor's lifetime, but they may be (and indeed are routinely) excluded or amended by express provision.¹
- 2.2 Section 31 relates to the income of the trust fund, and one of its functions is to enable trustees to make payments from income for the maintenance, education or benefit of certain beneficiaries. Section 32 gives the trustees power to make an early release of some of the capital of a beneficiary's prospective share in the trust fund to, or for the benefit of, that beneficiary.
- 2.3 In this Part, we sketch the current law on both statutory provisions.

SECTION 31: POWERS AND DUTIES REGARDING INCOME

- 2.4 Section 31 of the Trustee Act 1925 is set out in full in the box on the next page. It concerns trustees' dealings with the income of a fund held on trust, and applies "where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent". An interest is vested if the person in question has a right to it which does not depend on a prior condition being fulfilled, such as reaching a specified age, marrying or forming a civil partnership, or on the trustees exercising a discretion. The right does not have to be permanent; for example, the trustees may be able to bring the vested interest to an end, or it may cease on the occurrence of a specified event.
- 2.5 Alternatively, the interest may be contingent; for example, in a gift "to E if she survives me and attains the age of 21", E's interest is contingent both on her surviving the person who is making the gift, and on her turning 21. Section 31 only applies to contingent interests where there is income out of which the beneficiary can be maintained. This will occur:
- (1) where the trust "carries the intermediate income of the property";² and
 - (2) in certain other circumstances where the gift was given by a legacy in a will by someone who is the parent of the beneficiary, or a person standing in the place of a parent to him or her.³

¹ Trustee Act 1925, s 69(2); *Re Turner's Will Trusts* [1937] Ch 15; see paras 3.20 to 3.21, 3.27 to 3.30 below.

² That means, roughly, that the income "belongs with" the gift, so that it is available to be used in accordance with section 31, or accumulated, or paid out to the beneficiary depending on the circumstances. A contingent interest created in a lifetime settlement will generally carry the intermediate income, subject to contrary provision. If the gift is made by will the rules are more complex; see J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) paras 31-19 to 31-23, 31-27 to 31-29.

³ Trustee Act 1925, s 31(3).

31 Power to apply income for maintenance and to accumulate surplus income during a minority

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

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

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

(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income by investing it, and any profits from so investing it from time to time in authorised investments, and shall hold those accumulations as follows –

- (i) If any such person –
 - (a) attains the age of eighteen years, or marries under that age or forms a civil partnership under that age, and his interest in such income during his infancy, or until his marriage or his formation of a civil partnership, is a vested interest; or
 - (b) on attaining the age of eighteen years or on marriage, or formation of a civil partnership, under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage or formation of a civil partnership, and though still an infant, shall be a good discharge; and

- (ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

2.6 In order to illustrate the various provisions of the section, we will consider the example of the XYZ Trust, a fund which trustees are holding on trust for the settlor's children X, Y and Z such that they will take the fund in equal shares when they reach 25. The trust was created five years ago, and X, Y and Z are now aged 10, 15 and 19 respectively. Section 31 applies to this trust because the terms of the trust – unusually – did not exclude it or modify its effect.

Power to pay or apply income for the maintenance, education or benefit of a beneficiary who is under 18

2.7 Under section 31(1)(i), the trustees of the XYZ Trust can make payments of income for or towards the maintenance, education or benefit of X or Y. This is because X and Y are both under 18.⁴ In each case they can only use the income which is properly attributable to X or Y's interest in the trust property – that is, one-third of the whole trust income respectively.

2.8 It has been said that the words “maintenance, education or benefit”:

... are generally regarded as authorising the application of trust income for routine, recurring expenses of a beneficiary; they are words “of the widest import” and, in appropriate cases, include capital investment, for example to buy a house in which the beneficiary can live or a share in a partnership, or even placing money on deposit.⁵

The meaning of “benefit” is considered further below, in connection with section 32.⁶

2.9 The income may be applied directly for X or Y's maintenance, education or benefit – for example, the trustees might decide to pay for school trips or music lessons – or it may be paid to the beneficiary's parent or guardian.

2.10 The trustees are authorised to pay out “the whole or such part, if any, of the income ... as may, in all the circumstances, be reasonable”. Section 31 expressly contemplates that there may be other sources of funds for the beneficiary's maintenance or education: another trust fund, or people – particularly parents – who are legally required to make such provision. The power may be exercisable despite such alternative sources of support.⁷

2.11 The trustees must, however, take various specified factors into account when they consider whether and to what extent to exercise the power. These include:

- (1) the age of the beneficiary;

⁴ Section 31 refers to a person who is under 18 as an “infant” and to the period from birth to his or her 18th birthday as the beneficiary's “infancy” or “minority”.

⁵ G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010), para 14.13, referring to *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364, 370, by Upjohn J, and *Allen v Coster* (1839) 1 Beav 202.

⁶ See paras 2.23 to 2.25 below.

⁷ The exercise of the power may incidentally benefit those who are not beneficiaries of the trust fund, and who are relieved of an expense by provision made pursuant to section 31, although the trustees must not set out to achieve this by the exercise of the power: *Fuller v Evans* [2000] 1 All ER 636.

- (2) the beneficiary's requirements; and
- (3) any other income applicable for the same purposes.

In addition, if the trustees of the XYZ Trust have notice that the income of another trust fund can be applied for (say) X's maintenance, education or benefit, the default rule is that only a proportionate part of the income of the XYZ Trust can be used – unless both trusts are using the whole of the relevant income.⁸

- 2.12 The trustees must take a conscious and considered decision to make payments of income in the beneficiary's best interests, taking into account all relevant circumstances as required by section 31 and by the general law on trustees' decision-making.⁹ They must not simply pay the income over to the beneficiary's parent, without giving proper thought to the issue.¹⁰

Trust to accumulate the residue of the income

- 2.13 Suppose that the share of trust income attributable to X in a particular year is £1,000. The trustees exercise their discretion to pay £750 of the income for X's maintenance, education and benefit. Under section 31(2), the remaining £250 must be accumulated. This means that it is added to capital, although even after this has occurred the trustees can at their discretion make payments of accumulated income under section 31(1) as though it were current income.¹¹
- 2.14 The obligation on the trustees to accumulate the £250 under section 31(2) is sometimes known as a "trust to accumulate"; in this context "trust" denotes a duty or obligation. It contrasts with the trustees' power to pay income under section 31(1), which is at their discretion; they may choose whether or not to exercise it, and the extent to which they do so, although this is subject to the constraints noted above and to the proper exercise of their discretion.
- 2.15 The trustees' obligation to accumulate under section 31(2) can prevent a beneficiary who would otherwise be entitled to the income from having that entitlement. It has been called an "engrafted" trust, meaning that although the beneficiary's interest may at first appear to be absolute, the provisions of section 31(2) cut down the interest.¹² The beneficiary is not entitled to the income after all; although he or she will be entitled to the accumulations of that income on attaining 18 or marrying or forming a civil partnership under that age.¹³
- 2.16 Section 31(2) can – like the rest of section 31 – be excluded by contrary provision in the trust instrument.¹⁴

⁸ Trustee Act 1925, s 31(1).

⁹ See for example J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) paras 29-117 to 29-119, 29-137 to 29-164.

¹⁰ *Wilson v Turner* (1883) 22 Ch D 521; *Turner v Turner* [1984] Ch 100.

¹¹ Trustee Act 1925, s 31(2), proviso.

¹² See for example *Stanley v IRC* [1944] KB 255, 259 by Lord Greene MR; J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 31-12.

¹³ Under section 31(2)(i)(a); see para 2.20 below.

¹⁴ Trustee Act 1925, s 69(2); *Re Turner's Will Trusts* [1937] Ch 15.

Destination of accumulated income

- 2.17 Section 31 sets out how any income which has been accumulated, and not paid out as current income, should pass. The general rule is that the accumulated income passes with the capital of the trust fund.¹⁵ For example, in the case of the XYZ Trust, the beneficiaries do not become entitled to the capital outright until they are 25, and they have no entitlement to the income until they are 18. Therefore, if X, Y and Z all die while they are under 25, the capital and any income which was accumulated in respect of them while they were under 18 will pass to whoever is entitled under the trust in that event.¹⁶
- 2.18 The legislation also specifies two particular cases in which the beneficiary to whom the income relates will take the accumulations outright on reaching 18, or marrying or forming a civil partnership under that age.¹⁷
- 2.19 The first occurs where, under the terms of the trust, the beneficiary on reaching 18 or marrying or forming a civil partnership under that age “becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest”.¹⁸ The terms “fee simple, absolute or determinable” and “entailed interest” are relevant to land,¹⁹ while the reference to the beneficiary becoming entitled “absolutely” is relevant to other property.
- 2.20 The other occurs where, under the terms of the trust, the beneficiary has a vested interest in the income of the trust fund while under 18 and not married or civil partnered. A beneficiary with a vested interest in income does not have to satisfy any contingencies or conditions in order to have a right to the income. For example, the trust document may simply state that the income is to be paid to the beneficiary for life. It has already been noted that such a provision in the trust document would be modified by the engrafted trust to accumulate in section 31(2). Section 31(2)(i)(a) provides that the accumulations made under that engrafted trust are to be held for the beneficiary if he or she attains 18 or marries or forms a civil partnership under that age. It makes the entitlement to those accumulations contingent on either of those events, rather than absolute as would be expected on the face of the trust document. That effect can be excluded by an express provision that the accumulations are to be held for the beneficiary absolutely.²⁰

¹⁵ Trustee Act 1925, s 31(2)(ii).

¹⁶ If no one is specified under the trust as being entitled to the fund in that event, the person who created the trust (or his or her estate, if he or she has already died) will become absolutely entitled to it.

¹⁷ There is a further exception for a vested annuity; accumulations made while the annuitant is under 18 are held in trust for the beneficiary absolutely: Trustee Act 1925, s 31(4).

¹⁸ Trustee Act 1925, s 31(2)(i)(b).

¹⁹ A fee simple is a freehold ownership right; an entailed interest is one that can only pass to the direct descendants of the owner.

²⁰ *Re Delamere's Settlement Trusts* [1984] 1 All ER 584. Note that a mere direction that the beneficiary is to be entitled to the income, by itself, will not be sufficient to exclude the trust to accumulate: [1984] 1 All ER 584, 589 to 590, by Slade LJ.

Trust to pay income to the beneficiary once he or she has reached 18

- 2.21 Under section 31(1)(ii), once a beneficiary has reached 18 the trustees must pay to him or her the appropriate share of the income. Therefore, in our example Z (who has reached 18) must receive one-third of the income of the XYZ Trust. This is so even though Z will not become entitled to capital until reaching 25.²¹

SECTION 32: POWER OF ADVANCEMENT

- 2.22 Section 32 of the Trustee Act 1925 is set out in full in the box below; it contains the trustees' power to use the capital of the trust fund to which a beneficiary is contingently entitled, for the beneficiary's advancement or benefit. This is commonly referred to in short form as a "power of advancement"; in this paper we will refer to "the section 32 power".

32 Power of advancement

(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that –

- (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and
 - (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and
 - (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.
- (2) This section does not apply to capital money arising under the Settled Land Act 1925.
- (3) This section does not apply to trusts constituted or created before the commencement of this Act.

"Advancement or benefit"

- 2.23 "Advancement" is difficult to define precisely. It has been said that in this context it means "establishment in life of the beneficiary ... or at any rate some step that would contribute to the furtherance of his establishment".²² In other words, the central idea is of setting the beneficiary up in life, giving him or her a permanent benefit or advantage: for example, buying a business to be owned and run by the beneficiary.

²¹ Some doubt has been expressed as to whether, on a literal reading of section 31, this trust to pay the income applies to a beneficiary who was already 18 (though not yet absolutely entitled to capital) at the time when the trust was created. We agree with commentators' arguments that the trust to pay the income does apply to such beneficiaries: see J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 31-16.

²² *Pilkington v IRC* [1964] AC 612, 634, by Viscount Radcliffe.

- 2.24 The term “benefit”, however, has a much wider meaning: it has been described as “the widest possible word one could have”.²³ Applications of capital for the “benefit” of a beneficiary have included paying a beneficiary’s debts,²⁴ providing a house for young beneficiaries to live in with their parents,²⁵ and making provision to ameliorate the beneficiary’s tax liability.²⁶ It may even include making charitable donations on behalf of a beneficiary who feels morally obliged to make them,²⁷ although there are limits on the extent to which such a moral obligation can validly be satisfied from trust assets.²⁸
- 2.25 It is also possible to exercise the section 32 power to create a new (or add to an existing) separate trust; this is sometimes termed a “settled advancement”. In the usual case, the beneficiary in question would also be a beneficiary – and probably a principal beneficiary – of that separate trust.²⁹

For whom may the power be used?

- 2.26 The section 32 power can be used in respect of a beneficiary who has some recognised entitlement to the capital of the trust fund but, for a particular reason, cannot require that it should be paid over to him or her now. Suppose that S created a trust to which section 32 applies unamended, and consider the following alternative scenarios:
- (1) The trust fund is held for S’s son B absolutely, but as he is under 18 he cannot require the trustees to pay the capital over to him. Once he reaches 18 the section 32 power will cease to be exercisable.
 - (2) S created the trust in her will; the fund is held for all S’s children so that they will take it outright in equal shares on attaining 25. If any of them die under 25, but leave children, then those children will take their parent’s share at 18. The trustees can exercise the section 32 power in B’s favour, even though he is under 25 and therefore not yet absolutely entitled to the capital. B may have children of his own who would benefit from B’s share if he were to die under 25. The trustees can exercise the section 32 power in favour of B, even though that reduces the potential entitlement of B’s children.

²³ *Re Moxon’s Will Trusts* [1958] 1 WLR 165, 168, by Danckwerts J (as he then was).

²⁴ *Lowther v Bentinck* (1874) LR 19 Eq 166.

²⁵ *Re Lesser* [1947] VLR 366.

²⁶ *Re Ropner’s Settlement Trusts* [1956] 1 WLR 902.

²⁷ *Re Clore’s Settlement Trusts* [1966] 1 WLR 955.

²⁸ *X v A* [2005] EWHC 2706 (Ch), [2006] 1 WLR 741, in which the beneficiary requested a very large payment which went beyond her own free assets, but had no intention to satisfy it from those assets if the trustees refused to do so. It was considered that a moral obligation to the extent of that advance could not be supported on the decided cases.

²⁹ *Pilkington v IRC* [1964] AC 612. There will usually also be other beneficiaries, such as the beneficiary’s children or other family members. Alternatively it appears that the beneficiary in question could be excluded from benefit under the new trusts if they were for the benefit of his or her dependants: see, for example, G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010), para 14.41; J Kessler QC and L Sartin, *Drafting Trusts and Will Trusts: A Modern Approach* (10th ed 2010) para 11.11.

- (3) S declared the trust in her lifetime in favour of all her children in equal shares at 25, and is still alive. The trustees can exercise the section 32 power in B's favour even though he is under 25 and even though S may have more children (which would reduce B's share).
- (4) The trust is for all of S's children in equal shares at 25, but the trustees have a power of appointment which if exercised can change the shares of the children or redirect one or more shares to S's nieces and nephews. Until they do so, the trustees can use the section 32 power in favour of B.
- (5) S's will created a trust by which her husband H is entitled to take the income of the fund for his lifetime, and subject to that the capital is to pass to B outright. The section 32 power can be exercised in favour of B even while H's life interest is still continuing, provided that H agrees to this. That would be the case even if the trust stated that B must reach a specified age (or survive H, or both) before he could take the capital.³⁰

2.27 On the other hand, the section 32 power will not be exercisable if the beneficiary has no entitlement to capital. For example, if S left the fund on trust:

- (1) so that B would have the right to the income for his lifetime, and the capital would pass to his children at 25 (a life interest trust); or
- (2) as to both capital and income for such of her children and grandchildren and in such shares as the trustees in their discretion determine (a discretionary trust)

then the trustees would not be able to exercise the section 32 power in B's favour. In the first example he has an entitlement to income but no entitlement to capital; in the second he has only a hope or expectation of benefiting from the trust fund if the trustees exercise their discretion in his favour. If they were to do so in such a way as to give him a requisite capital entitlement, the section 32 power might then become exercisable.³¹

Consent of beneficiaries with prior interests

2.28 Before the section 32 power can be exercised in favour of a beneficiary, it is necessary to obtain the written consent of "any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied" who would be prejudiced by the exercise of the section 32 power.³²

2.29 For example, funds might be left on trust by will to the deceased's spouse for life, and subject to that the deceased's children take the capital. In such a case the section 32 power could not be exercised in favour of any of the children without

³⁰ *Re Garrett* [1934] Ch 477.

³¹ *Re Hodgson* [1913] 1 Ch 34. There is some debate associated with more complex scenarios; see for example J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 32-24, citing *Attorney-General v Lloyds Bank* [1935] AC 382 at 394, by Lord Tomlin.

³² Trustee Act 1925, s 32(1)(c).

the spouse's consent; a payment from capital will, of course, diminish the fund which is producing income for the spouse.³³

- 2.30 It is not possible to dispense with the consent of a beneficiary with a prior interest, even if that beneficiary cannot be contacted.³⁴

How much capital may be paid out?

- 2.31 The section 32 power can only be used to pay out capital from the share of the beneficiary in question; and the maximum payment is one-half of that share.
- 2.32 Suppose that S's will settles funds on trust for her children A, B and C in equal shares at 25. One year after her death the value of the trust fund is £300,000. The trustees wish to advance capital to B; the maximum is £50,000, one-half of B's notional one-third share of the trust fund.
- 2.33 If the value of the trust fund later increases, it appears that the trustees nevertheless cannot make any further use of the section 32 power.³⁵

Bringing into account

- 2.34 If a beneficiary has received a payment under the section 32 power, that payment must be brought into account when the time comes to distribute his or her share. If B is entitled to a one-fifth share of a £500,000 trust fund on attaining 25, and has already received a payment of £25,000 as a house deposit at 21, then that payment must be brought into account (and so B would receive only £75,000, assuming no increase in the value of the fund). This is sometimes termed "bringing into hotchpot" – the idea is that the beneficiary notionally returns the payment to the common pot so that the whole amount can be divided in the appropriate shares.³⁶
- 2.35 It may be that the beneficiary never becomes entitled outright to his or her share. For example, a beneficiary whose entitlement is contingent on attaining 25 may die under that age. In that case any payments already made under the section 32 power do not need to be repaid from the beneficiary's estate.

³³ If a person with a prior interest is bankrupt, his or her trustee in bankruptcy must also agree: *Re Cooper* (1884) 27 Ch D 565. In some respects the exact boundaries of "prior interest" remain to be delineated; see for example *Re Beckett's Settlement* [1940] Ch 279, *IRC v Bernstein* [1961] Ch 399.

³⁴ *Re Forster's Settlement* [1942] 1 All ER 180.

³⁵ This follows from *Re Marquess of Abergavenny's Estate Act Trusts* [1981] 2 All ER 643. The relevant power was set out in a private Act of Parliament, but given the similar wording in section 32(1)(a) of the Trustee Act 1925, it is generally considered that the same reasoning is applicable to the section 32 power. See, for example, D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (18th ed 2010) para 63.4.

³⁶ No actual payment is required – even if the advancements made to the beneficiary turn out, on the calculation being made, to exceed his or her share of the entire fund. The amount remaining in the trust fund is valued at the date of actual distribution (rather than the date on which the distribution is due). See further J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 32-28.

PART 3 REFORM

INTRODUCTION

- 3.1 In this Part we ask consultees to comment on reforms to sections 31 and 32 of the Trustee Act 1925 and on transitional provisions for those reforms.
- 3.2 We begin by considering reform of section 32, having already made a provisional proposal on that topic in the Consultation Paper.

SECTION 32: THE RESTRICTION TO ONE-HALF OF A BENEFICIARY'S SHARE

The proposal in the Consultation Paper

- 3.3 We remain of the view we expressed in the Consultation Paper that it would be appropriate to amend the section 32 power so that it is exercisable over the whole of a beneficiary's prospective share under the statutory trusts.¹ We expressed that view only in the context of a discussion of the trusts arising on intestacy, but the arguments in favour of reform are relevant to other trusts.
- 3.4 While beneficiaries are under 18 there are many reasons why this increased flexibility would help to support them in the most appropriate way, particularly if the trust fund is small. Indeed it may be appropriate for the whole fund to be used for those purposes, in which case it can be wound up, thus saving administration expenses.
- 3.5 This reform will not affect trustees' duties to exercise the power properly. Their use of the power must be for the benefit of the particular beneficiary.² It has been said that:

This ... follows from a consideration of the fact that the parties to a settlement intend the normal trusts to take effect, and that a power of advancement be exercised only if there is some good reason for it. That good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may hereafter become interested under the trusts of the settlement.³

- 3.6 The trustees must also take reasonable steps to safeguard the application of the money for the beneficiary's benefit. They do not have to apply it to the purpose they have decided on themselves; but they cannot simply pay it over to, say, the beneficiary's parent and leave it at that. In such cases they should at least specify

¹ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 5.50 to 5.52; for the provisional proposal see para 1.5 above.

² See paras 2.23 to 2.25 above.

³ *Re Pauling's Settlement* [1964] Ch 303, 333, by Willmer LJ.

the purpose and it may well be appropriate for them to make reasonable enquiries as to how the funds have been used.⁴

- 3.7 It is already, therefore, the case that the trustees must properly consider the relevant circumstances and that the payment must be for the benefit of the beneficiary in question.⁵ All that will change is that the trustees will have the option to make payments which exceed one-half of the beneficiary's share and may extend to the whole of it.
- 3.8 The current statutory limit does define the amount of the trust fund which may properly be applied, and may therefore serve as a restraint upon careless or dishonest trustees. It is more straightforward for a wronged beneficiary to demonstrate simply that more than one-half of the fund has been paid out, than that the trustees have behaved wrongly in making the decision to do so. However, trustees' existing equitable duties should be sufficient to guard against, or allow compensation for, improper applications – of whatever share of the fund. We consider that the advantages of increased flexibility therefore outweigh the risks of increasing abuse or fraud.
- 3.9 We also acknowledge that the ability to pay out the whole of a beneficiary's presumptive share would mean that if such a beneficiary were to die before being entitled to the capital outright, the beneficiaries who would then be entitled will find that there is nothing left for them to take. We do not think, however, that this justifies a strict rule of preserving one-half of the capital for such beneficiaries. They are, by definition, not primarily in line for benefit under the trust. The primary beneficiary should be first in line for benefit and if the trustees properly consider that the primary beneficiary's interests require it they should be free to use the whole of the trust fund for that purpose. In making that decision they are already required to take into account the interests of those entitled in default.

Responses to the Consultation Paper

Support for the provisional proposal

- 3.10 The proposal that we made in the Consultation Paper was well-supported by consultees. The reasons given are outlined below, although not all consultees explained why they supported the proposal.
- 3.11 First, several consultees – both barristers and solicitors – confirmed our perception that it is standard practice to extend section 32 in wills and trust instruments to give the trustees power to advance the whole of the fund to a qualifying beneficiary. They described it as routine, so that it would be unusual not to make the amendment.
- 3.12 Other consultees referred to the benefit which would be felt by young beneficiaries, in particular because funds would be available when they might be most needed – during a period while the child is dependent on others, and before he or she has the opportunity to become self-supporting. Potential savings in the cost of administering trusts were also mentioned, as well as the advantage of giving trustees the flexibility to wind up small trusts where that was appropriate.

⁴ *Re Pauling's Settlement Trusts* [1964] Ch 303, 334, by Willmer LJ.

⁵ See para 2.24 above.

The current law was considered to cause problems in these respects due to its inflexibility.

- 3.13 It was also suggested that trustees probably already make such advancements, in breach of trust. We can see two reasons why that might happen. First, the trustees may consider that the beneficiary's present need is so compelling that it justifies a breach of trust. Secondly, the trustees may overlook the restriction in section 32; by its nature it does not appear in the trust document unless it is being amended, and by virtue of the common practice in drafting wills and trusts referred to above the one-half restriction looks increasingly counter-intuitive. A failure to observe the restriction, however, puts the trustees at the risk of a claim against them personally for breach of trust.

Opposition to the provisional proposal

- 3.14 Other than the disadvantages of reform limited to the statutory trusts on intestacy (which is examined further below), the main issue raised by consultees who opposed the provisional proposal was that it would reduce protection for young beneficiaries. Two consultees felt that the reform might lead to more trustees abusing their position and dissipating the trust fund which should be held for the young beneficiary.⁶ It was noted that in the majority of cases, the trustees of trusts created on intestacy are not expressly selected by the deceased as trustworthy, but are (at least in the first instance) the administrators of the estate.⁷ At least two administrators are required where a beneficiary of the estate is under 18,⁸ and in the usual case they will be family members.⁹
- 3.15 The risk of abuse was addressed by two consultees who supported the provisional proposal. One suggested that the involvement of an independent third party should be required in order for the power to be exercisable. The other argued that the risks of abuse were acceptable when set against the advantages of increased flexibility making the power much more useful, particularly in the context of the typically small size of statutory trusts on intestacy.

Reforming section 32 for all trusts

- 3.16 Six consultees expressly engaged with the issue of reform to section 32 for all trusts. Three supported both the provisional proposal in the Consultation Paper and a wider reform; the other three found themselves unable to support the proposal unless it formed part of such wider reform.

⁶ Similar considerations may have led to one consultee, while agreeing with the provisional proposal, to mention the possibility of imposing a capital limit on advancements.

⁷ Exceptionally, the deceased may have left a valid will which appoints executors, but which does not dispose of the whole of the estate. This means that the executors will act but that the way in which the estate (or the part not governed by the will) is inherited will be governed by the intestacy rules. In such a case the executors would be the trustees.

⁸ Senior Courts Act 1981, s 114(2).

⁹ In general, entitlement to a grant of letters of administration follows the order of entitlement on intestacy: Non-Contentious Probate Rules 1987, SI 1987 No 2024, r 22. Where a beneficiary who would otherwise be entitled to a grant is under 18, the grant will usually be taken for his or her benefit by a parent, guardian or other responsible person. In some situations this may result in the surviving spouse of the deceased, who is also the parent of the deceased's children, nominating a co-administrator. See further R D'Costa and others (eds) *Tristram and Coote's Probate Practice* (30th ed 2006) ch 7.

- 3.17 Consultees gave various reasons for favouring an extension of reform of section 32 to all trusts. It was argued that many of the reasons for supporting the reform in the context of the statutory trusts arising on intestacy also applied to other trusts. The Society of Trust and Estate Practitioners and the Institute of Professional Willwriters referred in particular to the prevalence of the amendment in wills and trust documents in support of their argument that the reform should only be made if it applied to all trusts. Consultees also noted that the settlor or testator would have the opportunity to express a contrary intention and thus disapply the default position established by the amendment.¹⁰
- 3.18 Consultees also drew attention to the advantages of consistent treatment for all trusts. In particular it was felt that to draw a dividing line between the statutory trusts arising on intestacy on the one hand, and trusts established by will or in the settlor's lifetime on the other, could create a trap for trustees and professional advisers.¹¹ As well as this risk of confusion, it was pointed out that anomalous results could follow in practice. There would be a difference in treatment between A, a beneficiary taking on intestacy, and B, a beneficiary under a will which was not professionally drafted and did not include provision to extend the scope of the power under section 32. The trustees of the statutory trusts would have more flexible powers to benefit A than the will trustees would have to benefit B.

Our revised provisional proposal

- 3.19 We think that there is merit in the arguments of consultees that this reform to section 32 should apply generally, and not only to the statutory trusts on intestacy. There are two main reasons for this.
- 3.20 First, we note the comments of consultees that it is very common to make this amendment to section 32 in any case. This is confirmed by our own research into standard precedents for will and trust drafting, which have for some years recommended such an amendment. For example, the standard provisions for inclusion in wills published by the Society for Trust and Estate Practitioners includes a provision that section 32 shall apply, but with the deletion of the words "one-half of" in section 32(1)(a).¹² Similar provisions are included in other precedent works regarding wills,¹³ and are recommended for other trusts.¹⁴

¹⁰ Trustee Act 1925, s 69(2).

¹¹ It is important not to overstate this risk in view of the fact that in so many express trusts the limit on the section 32 power is removed.

¹² Society for Trust and Estate Practitioners, *Standard Provisions* (1st ed 1992), clause 4. The same provision is included in the currently available draft of the second edition, on which the Society has consulted.

¹³ See, for example, C Sherrin and others (eds) *Williams on Wills* (9th ed 2008) vol 2, para 218.105, Form B18.20; G Ashton and others (eds) *Butterworths Wills, Probate and Administration Service Precedents* (Issue 73, 2011) para 5.196, Form 1A.30.2; Withers LLP, *Practical Will Precedents* (Release 23, 2010) eg Precedent B1a, para B1-013; M Waterworth, *Parker's Modern Wills Precedents* (6th ed 2009), para 12.23, Form 12.3.

¹⁴ See, for example, Withers LLP, *Practical Trust Precedents* (Release 29, 2010) eg Precedent A2a, para A2-023; M Waterworth, *A Practitioner's Guide to Drafting Trusts* (2nd ed 2003) eg Precedent A1.1, clause 4(2).

- 3.21 Section 32 was originally included in the Trustee Act 1925 to reflect existing practice in drafting wills and trusts.¹⁵ Now that this practice has moved on, we consider that section 32 should be updated accordingly so that it is not necessary for drafters continually to make these amendments.
- 3.22 We are aware that many precedent books also recommend wider powers to pay or apply capital for beneficiaries' advancement or benefit.¹⁶ For example, a drafter may choose to include a clause which disapplies the requirement to seek the consent of a beneficiary with a prior interest, or which enables trustees to pay capital to a beneficiary who would not qualify as an object of the power in section 32, in particular a beneficiary whose entitlement to the trust fund is restricted to income.
- 3.23 We acknowledge that it is often sensible to advise that such clauses should be included, for greater flexibility in an appropriate type of trust. However, we do not think that such provisions should be the default for all trusts, so that it would be necessary to opt out of them where they were not appropriate. We think that most settlors would assume that if they have prioritised the interests of beneficiary A over those of beneficiary B, the trustees would not be able to reverse this without A's consent. Similarly, a settlor who has provided for an income interest for one beneficiary would, we think, expect that this would not extend to capital. The purpose of providing, for example, that X is to be entitled to the income of the trust fund for life, and subject to that the capital is to pass to Y, is usually to preserve the capital for Y.
- 3.24 Secondly, we take the point made by consultees that piecemeal reform could risk confusion and that, unless there are good reasons, these provisions should apply equally to all trusts. It is difficult to know how much of a problem the distinction would create in practice, particularly given the common practice of making the same amendment expressly. But we consider that it would be more straightforward to undertake the same reform for all trusts.
- 3.25 We are not persuaded that reform will increase the risk of abuse. Dishonest trustees will not be deterred by the current limit and are unlikely to be influenced by its removal; but the removal of the limit may remove a trap for the unwary.
- 3.26 **We provisionally propose that the power contained in section 32 of the Trustee Act 1925 to pay or apply capital to or for the benefit of a trust beneficiary should be extended, for the purposes of all trusts however established, to the whole, rather than one-half, of the beneficiary's share in the trust fund.**

¹⁵ *Pilkington v IRC* [1964] AC 612, 634, by Viscount Radcliffe.

¹⁶ See, for example, J Kessler QC and L Sartin, *Drafting Trusts and Will Trusts: A Modern Approach* (10th ed 2010) para 11.8.

SECTION 31: THE SECTION 31(1) POWER

- 3.27 The above provisional proposal will leave the statutory power to pay capital from the trust fund unrestricted in scope and at the trustees' "absolute discretion". This could be seen as creating a mismatch between the statutory power to pay capital under section 32 and the statutory power to make payments of income under section 31(1). The power in section 31(1) is expressed in terms of the payment of income being at the trustees' "sole discretion", but is subject to various requirements, to which precedent books often suggest amendments.
- 3.28 One recommended amendment is to delete the whole of the proviso to section 31(1), thus removing:
- (1) the requirement on the trustees specifically to "have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes"; and
 - (2) the requirement that "so far as practicable" the trustees can only use a proportionate part of the income for the maintenance, education or benefit of the beneficiary, if they have notice that the income of another fund or funds is applicable for those purposes.

This is the approach taken by the standard provisions for inclusion in wills published by the Society for Trust and Estate Practitioners.¹⁷

- 3.29 Other precedents not only delete the proviso to section 31(1) but also amend section 31(1)(i). Section 31(1)(i) sets up the power to pay or apply income for the beneficiary's maintenance, education or benefit as extending to "the whole or such part, if any, of the income ... *as may, in all the circumstances, be reasonable*". These precedents substitute, for the words here italicised, a phrase such as "the trustees shall in their absolute discretion think fit",¹⁸ or "the trustees may think fit".¹⁹
- 3.30 Other precedents customise section 31 to a greater degree, for example by extending the power so that the trustees can use the income of the trust fund at their discretion for the maintenance of any beneficiary in the class of

¹⁷ Society for Trust and Estate Practitioners, *Standard Provisions* (1st ed 1992), clause 4. The same provision is included in the currently available draft of the second edition, on which the Society has consulted.

¹⁸ *Encyclopaedia of Forms and Precedents* (2010 reissue) vol 40(1) Trusts and Settlements, para 4815, Form 180 (sub-clauses 0.1 and 0.2), (2007 reissue) vol 42(1) Wills and Administration, para 4161, Form 306. See also, for example, Withers LLP, *Practical Will Precedents* (Release 23, 2010) eg Precedent B1a, para B1-012, amending section 31 "so that those powers shall be exercisable at the absolute discretion of the Trustees"; also found in Withers LLP, *Practical Trust Precedents* (Release 29, 2010) eg Precedent A2a, para A2-022.

¹⁹ C Sherrin and others (eds) *Williams on Wills* (9th ed 2008) vol 2, para 218.79, Form B18.11; G Ashton and others (eds) *Butterworths Wills, Probate and Administration Service Precedents* (Issue 73, 2011) para 5.196, Form 1A.30.2. See also, for example, M Waterworth, *Parker's Modern Wills Precedents* (6th ed 2009) para 12.23, Form 12.1 ("as the trustees think fit").

beneficiaries.²⁰ These more sophisticated amendments may be introduced by the drafter for good reasons in a particular trust, but they are not appropriate for all trusts.

- 3.31 Here we examine whether the default rules for all trusts – those that apply unless active steps are taken to modify or exclude them – should be changed, so as to remove either or both parts of the proviso to section 31(1), or to substitute an unfettered discretion for the requirement of reasonableness.

Using a proportionate part of the income where the trustees have notice of other trusts

- 3.32 The second part of the proviso to section 31(1) requires the trustees, where they have notice of another fund applicable for a beneficiary's maintenance, to pay only a proportionate part of the income, unless they obtain a court order to the contrary. We take the view that this is unnecessarily restrictive. It may be justified on the basis that, if the remainder beneficiaries of each trust are different, an unequal use of income would be unfair to one or the other.²¹ Yet there may be reasons why it is better to use the funds of one trust rather than the other; and there is no parallel requirement in relation to the advancement of capital, which usually makes a more significant inroad on a remainder beneficiary's entitlement. The requirement is an additional administrative burden which has the potential to increase costs, particularly where it is difficult to contact the trustees of the other fund or where it is appropriate to obtain a court order overriding it.
- 3.33 The omission of this requirement is often recommended in precedents, as noted above; and it is probably unusual to include it in express powers of maintenance. We are not aware that this practice creates injustice or difficulty in trustees' exercise of their discretion.²² It also seems unlikely that settlors would generally expect such a requirement to be imposed on their trustees, without special provision in the trust document.²³
- 3.34 **We provisionally propose that the second part of the proviso to section 31(1) (the requirement that trustees should only pay a proportionate part of the income where they have notice that the income of another fund is applicable for the same purposes) should be removed.**

Matters to which the trustees must have regard

- 3.35 The rest of the proviso to section 31(1) requires the trustees to have regard to the beneficiary's age and requirements, "and generally to the circumstances of the

²⁰ *Encyclopaedia of Forms and Precedents* (2010 reissue) vol 40(1) Trusts and Settlements, para 4813, Form 179.

²¹ C Sherrin and others (eds) *Williams on Wills* (9th ed 2008) vol 2, para 218.50, going on to acknowledge that the provision "may lead to difficulty and delay" and that, although it only applies "so far as practicable", it is "commonly excluded".

²² For consideration of the exercise of trustees' discretions in such circumstances, see for example *Smith v Cock* [1911] AC 317.

²³ See *Smith v Cock* [1911] AC 317, rejecting such a requirement and suggesting that it would defeat the intentions of settlors since it "would cause the sum payable by each estate to depend upon the joint discretion of two sets of trustees, a state of things never intended [by either settlor]" [1911] AC 317, 326, by Lord Mersey, delivering the opinion of the Privy Council.

case, and in particular to what other income, if any, is applicable for the same purposes". It could be argued that these circumstances would in any case be in the mind of a trustee who was considering the exercise of the power. The words may therefore be superfluous; but it may be helpful to have some of the most important considerations made express in the statute, as guidance for the trustees.

The requirement of reasonableness

3.36 As regards the "reasonableness" criterion, it has been said that:

Section 31(1)(i) (standing alone at any rate) gives the impression that the amount of income to be applied depends upon a standard of reasonableness, and that it cramps the discretion of the trustees ...²⁴

3.37 That impression, by itself, would not be a good reason to change the statute unless by so doing we were making a substantive change for the better in the law as applied in practice. The question is whether the reasonableness standard introduces an undesirable element of objectivity into the trustees' exercise of their discretion. In other words, is there a serious concern that even if trustees have acted honestly and in good faith, they may be open to a legal challenge to the exercise of their discretion on the basis that they have paid out more – or less – of the income than is objectively reasonable?

3.38 We note that the Society for Trust and Estate Practitioners' standard provisions for inclusion in wills, while removing the whole of the proviso to section 31(1), make no amendment to section 31(1)(i). However, a review of these provisions when they were first published in 1992 criticised them on this point, noting that:

This objective test is frequently modified to give the trustees an uncontrolled discretion which some (including this reviewer) would regard as an improvement.²⁵

As noted above, several standard precedents do advocate making such a change.

3.39 We should appreciate consultees' comments on this point and on their reasons for preferring one course of action or another.

3.40 **We ask consultees whether further changes should be made to the power to pay or apply income for a beneficiary's maintenance, education or benefit contained in section 31(1) of the Trustee Act 1925, and in particular whether it would be beneficial to make one or both of the following amendments:**

- (1) **delete the first part of the proviso to section 31(1);**

²⁴ C Sherrin and others (eds) *Williams on Wills* (9th ed 2008) vol 2, para 218.63.

²⁵ W Norris, "The Society of Trust and Estate Practitioners standard trust provisions" [1993] *Private Client Business* 232, 236. See also, for example, M Waterworth, *Parker's Modern Wills Precedents* (6th ed 2009) para 12.3, referring to the amendment as made "to widen the trustees' discretion".

- (2) **redraft section 31(1)(i) so as to remove the words “as may, in all the circumstances, be reasonable” and substitute an unfettered discretion.**

Other amendments to section 31

- 3.41 The other provisions of section 31 are also subject to amendment in express trusts. For example, a settlor may choose to delay the beneficiary’s entitlement to income under section 31(1)(ii), prolonging the trust to accumulate under section 31(2) (and the power under section 31(1)) as appropriate.²⁶ The provisions in section 31(2) as to the destination of the accumulations can also be changed; in particular, a settlor might choose to provide that the accumulations should be held on trust for the beneficiary in question outright.²⁷
- 3.42 It has been suggested that there is generally an oddity about the provisions of section 31(2)(i) in that it converts a beneficiary’s vested interest in income into a contingent interest. Such a beneficiary is not entitled outright to the accumulations of income, and they will not pass with the beneficiary’s estate if he or she dies before satisfying the contingency in section 31(2)(i)(a).²⁸ This is despite the provisions of the trust purporting to give the beneficiary the right to the income throughout. One leading textbook describes this as a “peculiar effect”.²⁹
- 3.43 There is, however, little evidence of a demand for a change to the default position, which is well-established. And we do not think that the amendments which are made expressly to some trusts are likely to be appropriate, or expected, for all trusts. It seems reasonable that settlors who require such amendments should incorporate them expressly into the trust deed or will. We therefore do not propose amendments to the remaining provisions of section 31.

TRANSITIONAL ISSUES

- 3.44 If any of the above reforms are taken forward, it will be necessary to consider the transitional provisions which should be applied, and determine the application of the legislation implementing reform to new and existing trusts.

Existing trusts

- 3.45 We consider that it is not appropriate for this reform to apply to trust interests which were already in place before its commencement date. This would change the basis of existing trust arrangements. In particular, trustees would be able to use all of the capital held for a beneficiary who has a pre-existing contingent entitlement, and therefore change the entitlement of the default beneficiaries who are entitled to the capital subject to the primary beneficiary’s interest.

²⁶ See, for example, G Ashton and others (eds) *Butterworths Wills, Probate and Administration Service Precedents* (Issue 73, 2011) para 5.208, Form 1A.30.11; Withers LLP, *Practical Will Precedents* (Release 23, 2010) Precedent F17k, para F17-351.

²⁷ C Sherrin and others (eds) *Williams on Wills* (9th ed 2008) vol 2, para 218.83, Form B18.15.

²⁸ See paras 2.13 to 2.20 above.

²⁹ G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010), para 14.17.

- 3.46 One consultee argued that the provisional proposal in the Consultation Paper should be made retrospective for the statutory trusts. He pointed out that this deprivation of the secondary beneficiaries would only be felt in the (usually unlikely) event that the primary beneficiary fails to satisfy the contingency; and only as to the one-half of the trust fund to which the section 32 power does not currently extend. He considered that this risk would be worthwhile given the advantages which could accrue from increased flexibility being given to existing statutory trusts. We appreciate this point but consider that, particularly in view of the human rights considerations relevant to deprivation of existing property rights,³⁰ it is not open to us to adopt this course.

New trusts

- 3.47 The reforms would apply to new trusts – by which we mean those created on or after the commencement date, other than trusts which are created by trustees using their powers under an existing trust, which we discuss separately below. This can be applied simply to trusts created in the settlor’s lifetime and to the statutory trusts which arise on intestacy (where the reforms would apply if the person whose estate is governed by the intestacy rules died on or after the commencement date).
- 3.48 Will trusts, however, are more difficult. A person may determine the terms of the will trust by executing his or her will – perhaps several years prior to death. However, a will does not become effective until the death of the person who made the will; the trust would not actually be constituted until the death. Should the reforms apply to new will trusts only where the will was executed following commencement, or for all deaths after commencement?
- 3.49 The approach of applying the reforms only to wills executed after the commencement date is appropriate where it is particularly important for testators to be aware of the change. On 1 January 1970, section 31 was amended to specify the age of 18 as the age at which beneficiaries would be entitled to income as of right, whereas before the age had been 21.³¹ That change does not apply to wills executed before that date.³² This upheld the expectations of testators who had executed their wills on the basis that a beneficiary would not have an absolute right to income from the trust until the age of 21. On the other hand, the reforms we have provisionally proposed in this Supplementary Consultation Paper leave the decisions to be made as to payments of income and capital under sections 31 and 32 in the hands of the trustees. They do not

³⁰ In particular, Article 1 (protection of property) of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, incorporated into English law by the Human Rights Act 1998, s 1 and sch 1.

³¹ Family Law Reform Act 1969, s 1.

³² Family Law Reform Act 1969, s 1(2)(b). This is the case even if the pre-1970 will has been confirmed by a post-1969 codicil: s 1(7). The Perpetuities and Accumulations Act 2009 takes a similar approach in relation to many of its provisions: s 15(1).

affect beneficiaries' rights under the trust in the same way as the change to the age specified in section 31.³³

- 3.50 We note that when sections 31 and 32 were included in the Trustee Act 1925, they became effective for all will trusts where the death occurred post-commencement.³⁴ Section 31 replaced, with amendments, an older statutory provision;³⁵ section 32 had no statutory precedent, and was based on established drafting practice. We consider that it would be appropriate to take the same approach for the reforms outlined above. This has the advantage of being the clearest and simplest rule and avoids treating trusts differently depending on whether they were established on intestacy or by the making of a will, which could cause unnecessary confusion, particularly in a case of partial intestacy.
- 3.51 There may be some cases in which testators have chosen to leave either section 31 or section 32 unamended because they are aware of the current state of the law and are satisfied with it. We do not think that there will be many such cases. This is partly because amendments to sections 31 and 32 in lifetime trusts and wills are common; and because even where the provisions are not amended this will not always be as the result of a conscious decision to leave them as they stand. A testator who makes a homemade will, for example, is unlikely to have these provisions in mind.
- 3.52 In some cases where testators have deliberately left sections 31 and 32 unamended it will be possible for them to change their wills to reverse the effect of the reforms. We are, however, mindful of the fact that a testator's ability to take advantage of that opportunity depends on whether he or she is aware of the change and has the mental capacity to make a new will or a codicil as required.
- 3.53 We anticipate that it will be possible to make the statutory amendments to the provisions without adversely affecting testators who have already made modifications to sections 31 and 32. The statutory powers are excluded where they are inconsistent with express powers.³⁶ Where a settlor has made amendments to the statutory powers which do not coincide with these reforms, using the existing text of the provisions to specify particular amendments, these should be treated as express powers and not affected by the reforms.

Trusts created after commencement by the exercise of a power of appointment or advancement under a pre-existing trust

- 3.54 New trust provisions may be created after commencement by trustees exercising a power of advancement or appointment which pre-dates commencement. How should the reforms apply when this occurs?

³³ The situation is also distinguishable from the provision made in the Perpetuities and Accumulations Act 2009. The imposition of a single mandatory perpetuity period (under section 5), in particular, would have had the potential to disrupt existing incompatible trust provisions. See *The Rules Against Perpetuities and Excessive Accumulations (1998)* Law Com No 251, para 8.18.

³⁴ Trustee Act 1925, s 31(5) (a will comes into operation on the death of the person who made it), s 32(3) (a will trust is "constituted or created" on death: *Re Darby* (1943) 59 TLR 418).

³⁵ Conveyancing Act 1881, s 43.

³⁶ *Re Evans' Settlement* [1967] 1 WLR 1294.

- 3.55 For example, suppose that A creates a trust under which his trustees have discretion to make provision, by exercising a power of appointment, as to how the fund is distributed between his children and grandchildren – the shares in which they take and the conditions on their entitlements. Subject to any exercise of their discretion, the trust fund will be shared equally between the children and grandchildren living 50 years after the trust was established. The trustees exercise that power of appointment to provide that part of the fund is to be held on trust so that each of A’s grandchildren B, C and D will take an equal share outright if they reach the age of 25.
- 3.56 A power of appointment of this type is termed a “special power of appointment” because the class of possible beneficiaries is limited: in this instance, it is limited to the settlor’s children and grandchildren. A “general power of appointment”, on the other hand, is a power which enables the person exercising it to appoint to anyone in the world, including himself or herself. This means that a person who holds a general power of appointment is in a position equivalent to owning outright the property which is subject to the power.
- 3.57 Since a general power of appointment is equivalent to having the property under one’s own control, the same rules should apply to trusts created under such appointments as to entirely new trusts which are settled. So we think that the reformed provisions should apply where the power is exercised after commencement.³⁷
- 3.58 We believe that a similar rule should apply where the new trusts are established by a power of advancement. For example, trustees hold property on trust for A for life and subject to that for A’s three children in equal shares on reaching 30. Section 32 applies to the trust without amendment. The trustees decide, with A’s consent, to use the section 32 power to take one-half of each child’s share and settle it on trusts by which that child will have an immediate right to the income and become entitled to the capital at 30.
- 3.59 In such cases it is considered that the trustees may include in the settled advancement new powers exercisable by the trustees of the trusts thereby created, including powers of advancement. An express power in the same terms as the section 32 power was included in the settled advancement proposed in *Pilkington v IRC*.³⁸ It was held that this did not involve an impermissible “delegation” of the trustees’ original powers: since section 32 enabled them to settle the funds advanced, the trustees had the authority to do so on the trusts envisaged.³⁹
- 3.60 In the usual case the power of advancement under which the settled advancement is made will either be the section 32 power itself, or will be in similar terms. Therefore, it seems that it would be unusual for any delegation

³⁷ *Re Bransbury’s Will Trusts* [1954] 1 WLR 496 (application of section 32 of the Trustee Act 1925 where a general power of appointment conferred by a pre-1926 instrument had been exercised after 1925).

³⁸ [1964] AC 612.

³⁹ *Pilkington v IRC* [1964] AC 612, 639, by Viscount Radcliffe; see also J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 32-20.

involved in incorporating the statutory powers in sections 31 and 32 to be unauthorised.

- 3.61 Trustees do need to exercise caution so as to avoid including powers in advancements which are so wide that the advancement is no longer for the benefit of the beneficiary in question, and therefore is an impermissible use of the power. It is difficult to imagine cases in which the reforms set out above would cause significantly more problems in this respect than the provisions as they currently stand. Therefore we think that in such specialised cases it would be reasonable for the burden of excluding the provision to be on the trustees who are making the advancement.
- 3.62 Should the same rule apply to special powers of appointment? When a special power of appointment is exercised, as in the example of the appointed trust for B, C and D, the provisions created can be considered as filling in the blanks left by the settlor of the original trust. The new provisions are not free-standing; they are, in a sense, read back into the original trust.⁴⁰
- 3.63 It has been established that the exercise of a power of appointment to create new trusts can – if the terms of the power of appointment are sufficiently wide – include a power of advancement applicable to those trusts. In the decided cases, the advancement was limited to one-half of the trust fund; that is, it was not more extensive than that in section 32.⁴¹ In *Re Morris' Settlement Trusts* Jenkins LJ commented that:

A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment by a beneficiary ... and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest.

He referred to such powers of advancement as being part of “normal conveyancing practice which made such powers no more than ‘common form’ incidents of interests conferred ...”.⁴²

- 3.64 We agree with the view taken by commentators that in such cases the trustees would similarly be able to include in the appointed trusts a power of advancement which applies to the whole of the capital of the trust fund, in accordance with the now common drafting practice of removing the one-half restriction in section 32.⁴³ Equally, assuming a sufficiently wide enabling power, they should be able to make provision as to the income of the appointed trust fund covering the same ground as section 31 – giving the trustees power to pay or apply it for

⁴⁰ Thus the perpetuity period of the original trust applies to them: *Muir v Muir* [1943] AC 468.

⁴¹ *Re Mewburn's Settlements* [1934] Ch 112; *Re Morris' Settlement Trusts* [1951] 2 All ER 528.

⁴² [1951] 2 All ER 528, 532.

⁴³ See for example J Kessler QC and L Sartin, *Drafting Trusts and Will Trusts: A Modern Approach* (10th ed 2010) para 11.5, arguing (at n 24) that *Re Joicey* [1915] 2 Ch 115 does not represent the current law; J Mowbray QC and others (eds) *Lewin on Trusts* (18th ed 2008) para 29-93.

beneficiaries' maintenance, education and advancement, requiring it to be accumulated, paid out to or held for a beneficiary, and so on.

- 3.65 It therefore seems to us that a similar approach should be taken to trusts created by a special power of appointment as is used for those created by a power of advancement. The two are not the same, but we think that they are sufficiently similar in practice to justify the same rule being applied to both. This would also have the advantage of simplicity.
- 3.66 We are aware that when the Trustee Act 1925 itself came into force on 1 January 1926, the approach taken where a special power of appointment is exercised differed between section 31 and section 32. Section 31 applies to trust provisions created following commencement by the exercise of a pre-existing power of appointment, but section 32 does not. This reflects the divergent wording of the two provisions.⁴⁴
- 3.67 We do not think that it is necessary to continue that divergence in relation to these reforms. It appears to us that in the majority of cases, trusts currently in existence which include powers of appointment wide enough to enable the creation of new trusts are unlikely to include limits which prevent the trustees from including powers to use income and capital which reflect the reforms to the statutory powers which we have outlined above. While we acknowledge that there is an important technical difference between powers of appointment and powers of advancement, we do not think that it requires us to adopt a different approach in relation to the transitional provisions for these reforms.
- 3.68 **We provisionally propose that the reforms to sections 31 and 32 of the Trustee Act 1925 should apply (subject to section 69(2) of the Trustee Act 1925) in relation to interests arising under instruments which take effect after the commencement of the implementing legislation. This includes:**
- (1) **interests arising under wills that take effect on the death of the testator after commencement; and**
 - (2) **interests arising by the exercise, after commencement, of general powers of appointment, special powers of appointment and powers of advancement contained in instruments which had already taken effect before commencement.**

⁴⁴ For section 31 the relevant interests arise by virtue of the appointment, and so it is the date of the exercise of the power which is relevant: *Re Dickinson's Settlements* [1939] Ch 27 (and see *Begg-McBrearty v Stilwell* [1996] 4 All ER 205). Section 32(3) however focuses on the date at which the trust was "constituted or created", and since the exercise of a power of appointment is read back into the existing settlement, the date of the appointment is irrelevant: *Re Batty* [1952] Ch 280.

PART 4

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

- 4.1 In this Part, we set out the provisional proposals and consultation questions on which we are inviting the views of consultees. We should be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this Supplementary Consultation Paper.
- 4.2 It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this paper in which the issue was raised.

SECTION 32: THE RESTRICTION TO ONE-HALF OF A BENEFICIARY'S SHARE

- 4.3 We provisionally propose that the power contained in section 32 of the Trustee Act 1925 to pay or apply capital to or for the benefit of a trust beneficiary should be extended, for the purposes of all trusts however established, to the whole, rather than one-half, of the beneficiary's share in the trust fund.

[paragraph 3.26]

SECTION 31: THE SECTION 31(1) POWER

- 4.4 We provisionally propose that the second part of the proviso to section 31(1) (the requirement that trustees should only pay a proportionate part of the income where they have notice that the income of another fund is applicable for the same purposes) should be removed.

[paragraph 3.34]

- 4.5 We ask consultees whether further changes should be made to the power to pay or apply income for a beneficiary's maintenance, education or benefit contained in section 31(1) of the Trustee Act 1925, and in particular whether it would be beneficial to make one or both of the following amendments:

- (1) delete the first part of the proviso to section 31(1);
- (2) redraft section 31(1)(i) so as to remove the words "as may, in all the circumstances, be reasonable" and substitute an unfettered discretion.

[paragraph 3.40]

TRANSITIONAL ISSUES

4.6 We provisionally propose that the reforms to sections 31 and 32 of the Trustee Act 1925 should apply (subject to section 69(2) of the Trustee Act 1925) in relation to interests arising under instruments which take effect after the commencement of the implementing legislation. This includes:

- (1) interests arising under wills that take effect on the death of the testator after commencement; and
- (2) interests arising by the exercise, after commencement, of general powers of appointment, special powers of appointment and powers of advancement contained in instruments which had already taken effect before commencement.

[paragraph 3.68]

APPENDIX A RESPONDENTS TO PROVISIONAL PROPOSAL IN CONSULTATION PAPER NO 191

Association of Contentious Trust and Probate Specialists

Boodle Hatfield

Sheila Campbell

Chancery Bar Association

City of Westminster and Holborn Law Society

Convenient Wills

Cripps Harries Hall LLP

Davenport Lyons

Richard Dew

Andrew East

Family Justice Council, Money and Property Committee

Family Law Bar Association

Farrer & Co LLP

Giles Harrap

Gregory Hill

Institute of Professional Willwriters

Chris Jarman

Donald Jolly

Judges of the Chancery and Family Division of the High Court

Law Reform Committee of the Bar Council

Law Society

Official Solicitor

Francesca Quint

Sidney Ross

Royal Bank of Scotland Trust & Estate Group

Paul Saunders

Society of Trust and Estate Practitioners

Anne Thom

Trust Law Committee

Richard Wallington

Mary Welstead

Withy King LLP

The Woodland Trust

The Yorkshire Law Society