

CONSULTATION ON THE LAW OF SUCCESSION

CONSULTATION QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

Chapter 2: Intestacy – Questions relating to Part 2 of the Commission's Report

Q.1 Should rights in intestacy be property specific?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.2 Should the policy aim of any scheme of intestacy be that a surviving spouse/civil partner should be able to remain in the family home?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.3 Would the policy aim be achieved by the scheme of intestacy proposed by the Scottish Law Commission, after further consideration of the level of the threshold sum?

Yes No Don't know

Please give reasons for your answer:

The policy aim being to protect the surviving spouse's ability to continue to reside in the family home, then in most instances the scheme does protect it. In the firm's experience the proposals will not affect the majority of intestate estates where the proposed threshold is £300,000. In a small number of cases where the deceased's estate was slightly higher in value, it would lead to the spouse receiving a greater value of the estate.

Some concerns arise when considering how the proposals will work in practice. It is not clear whether the executors will be obliged to transfer the deceased's interest in the home to the surviving spouse, or whether they are simply obliged to transfer a cash sum equivalent to the threshold?

There is no mention on whether interest will be chargeable on beneficiaries' entitlement from an intestate estate.

Q.4 Should the threshold sum be set to strike a balance between the rights of a surviving spouse/civil partner and the deceased's children?

Yes

No

Don't know

Please give reasons for your answer:

No comment

Q.5 What do you think the level of threshold sum should be? (Please circle your answer)

A - £335,000

B - £528,000

C - £558,000

D - £610,000

E - £650,000

Please give reasons for your answer:

No comment

Q.6 Should the spouse/civil partner retain the family home irrespective of value?

Yes

No

Don't know

Please give reasons for your answer:

No comment

Q.7 Should the threshold sum be reduced by the value of survivorship destinations in the title to heritable property?

Yes

No

Don't know

Please give reasons for your answer:

At Gillespie Macandrew, we advise clients on the pros and cons of putting a survivorship destination in title deeds. In recent times it has been less common for clients to opt for them. Given the client is prompted to make a decision on the destination of an asset after his death, and this decision is recorded, we would consider a survivorship destination clause to be a form of testamentary intent.

It therefore seems unjust to take account of assets passing under survivorship destination for the purposes of calculating a person's inheritance from an intestate estate. This is because there is arguably a part intestacy. The deceased's interest in a property has been dealt with by testamentary writing, but his other assets fall into intestacy. Why should this differ to the deceased who does not have a survivorship destination in his title deeds, and leaves a Will simply dealing only with his "bank accounts" thus causing the residue to fall to intestacy?

Why shouldn't other assets, such as certain investment portfolios that have survivorship destinations also be taken into account?

Q.8 Should the threshold sum take into account the value of survivorship destinations in the title to moveable property?

Yes

No

Don't know

Please give reasons for your answer:

See answer to Q.7

Q.9 Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, should the sum be deducted from the deceased's intestate estate and the surviving spouse/civil partner be entitled to half of the resulting amount, if any, with the rest of the estate shared among the issue?

Yes

No

Don't know

Please give reasons for your answer:

No comment

Q.10 Should there be a qualifying period before which a surviving spouse/civil partner could acquire some or all of the threshold sum?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.11 Where the value of the family home exceeds the threshold sum, should there be a period during which the property could not be sold?

Yes No Don't know

Please give reasons for your answer:

In the experience of staff at Gillespie Macandrew, anything more than six months delay would be a significant delay for the administration of an estate.

Q.12 If you have answered yes, should that period be two years?

Yes No Don't know

Please give reasons for your answer:

Q.13 Where a person renounces their rights under an estate should they be regarded as not having survived the deceased?

Yes No Don't know

Please give reasons for your answer:

This would allow representation, which is more in-keeping with what most people would want and consider just.

Q.14 Where a person renounces their entitlement under an estate should they also be able to renounce the entitlement of their issue?

Yes No Don't know

Please give reasons for your answer:

It would make administration of the estate easier, and in our experience it is not likely to cause any hardship. Also more in-keeping with people's expectations.

Q.15 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 2.36 above.

Impact

Q.16 What do you think the impact of implementing the Chapter 2 proposals would be:

Q.16(a) On individuals

We took a sample (21) of the intestate estates that we have administered in recent years, and in the vast majority of cases (20 out of 21) there will be no impact whatsoever. In 9 cases, this was because there was no surviving spouse nor any children and the distribution of the estate will follow the 1964 Act. In 7 cases, the deceased was survived by children but no spouse and the distribution of the estate would be the same under the new proposals as with the 1964 Act (i.e. the children inherit the whole estate). In 4 cases, the spouse inherited the entire estate under prior rights and would also inherit the whole estate under the new proposals if the threshold sum was set at £300,000.

In only one case of the sample reviewed did the distribution of the deceased's estate differ under the proposals, compared to the current law of succession. The spouse received prior rights and legal rights (valued at £110,000) with the children receiving their legal rights and then the whole of the free estate (valued at £116,000). Had the estate been distributed under the new proposals, the spouse would have received the entire estate, with the children £116,000 worse off.

In the firm's experience the proposals will not affect the majority of intestate estates where the proposed threshold is £300,000. In cases where the deceased's estate is higher in value than the value of prior rights, it would lead to the spouse receiving a greater amount of the estate. In the firm's experience most people having more wealth make Wills, and thus there are fewer high value intestate estates.

Q.16(b) On families

See above

Q.16(c) On the legal profession

Less need for a bond of caution, provided that spouse can be appointed as executor, as most estates will pass in their entirety to the surviving spouse. This will streamline the administration of intestate estates and potentially reduce legal fees.

Q.16(d) On the courts

The burden on the courts would potentially be reduced as less bonds of caution would be required, and less petitions for executor-datives, as more spouses would inherit everything.

Q.16(e) On business?

Little impact, may actually speed up administration.

Chapter 3: Protection from Disinheritance

Q.17 Should a spouse or civil partner be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes

No

Don't know

Please give reasons for your answer:

No comment

Q.18 Should that fixed share be 25% of what they would have received on intestacy?

Yes

No

Don't know

Please give reasons for your answer:

No comment

Q.19 Should all children be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.20 Should a child's claim from a fixed share from the whole estate (heritable and moveable) be 25% of what he or she would have received on intestacy?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.21 Should it be possible to renounce legal share?

Yes No Don't know

Please give reasons for your answer:

Where families are in agreement, this provides certainty and prevents a potential unnecessary delay in administering the estate. There are risks that family relationships could subsequently deteriorate so it is important that independent legal advice should always be sought so that all parties are aware of the rights that are being renounced.

Q.22 Should renunciation remove that person's issue having a right to a legal share of the estate?

Yes No Don't know

Please give reasons for your answer:

Although there is an argument that the issue of a predeceasing child who had previously renounced his or her legal share have been prejudiced by that renunciation - if the child had not renounced, his or her children would have had a valid claim - in our opinion the need for certainty overrides this. It also follows the current position.

Q.23 Should it be possible to apply to the court to pay the legal share in instalments?

Yes No Don't know

Please give reasons for your answer:

Paying legal share by instalments would be useful where there were not enough moveable assets to settle the claim and it is intended that the house be sold. This would avoid the need for bank lending, which may not be readily available. If a surviving spouse wished the property to be transferred into his or her name, payment by instalments would not be appropriate.

As an application to court will delay the administration of the estate, we do not think that it would be appropriate to allow payment of legal share by instalments in circumstances where there are sufficient liquid assets within the estate to pay legal share in full.

Q.24 Should dependent children be able to claim a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent?

Yes No Don't know

Please give reasons for your answer:

This would place an additional burden on the court and would delay the administration of the estate. A fixed share entitlement provides certainty and speed of administration. How is the court going to be able to determine whether a dependent child will go to university later in life and the costs of doing so?

Q.25 Would providing for dependent children to be able to claim a capital sum payment, have an impact on the efficient winding up of estates?

Yes No Don't know

Please give reasons for your answer:

It is noted that there is not likely to be a large number of estates where there are dependent children and no surviving spouse. However, even for a small number of applications, as the capital sum is awarded by the court based on a number of factors, it is unlikely to be a quick process. As the value of the claim is unknown, the estate could not be paid out until directions are issued by the court.

Q.26 Would a time limit of 1 year from death, unless on cause shown, assist in the efficient winding up of an estate?

Yes No Don't know

Please give reasons for your answer:

For the reasons stated above, we do not believe that dependent children should be able to claim a capital sum, unless it is by way of a fixed share. If dependent children were able to claim, a time limit of one year would assist in the efficient winding up the estate. However, who is responsible for making the claim if the dependent child is under the age of 16? If no claim was made, would the child be able to claim once they turn 16? This would seem to be fair and reasonable but would not assist in the efficient winding up of an estate, and it would not provide certainty as it would be difficult for the executors to predict the extent of the legal share as it is not fixed.

Q.27 Should dependent children with capacity be able to renounce a claim for a capital sum payment?

Yes

No

Don't know

Please give reasons for your answer:

Yes. This would speed up the administration of an estate where a dependent child has no intention of claiming. It also allows the family to make plans for succession and provides certainty.

Q.28 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 3.30.

No comment.

Impact

Q.29 What do you think the impact of implementing the Chapter 3 proposals would be:

Q.29(a) On individuals

Children of deceased

We reviewed a random selection of estates that have been wound up over the last few years and the impact on children of the introduction of legal share would appear to vary depending on whether or not there is a surviving spouse.

Where there is a surviving spouse, the proposed changes rarely leave the children in a better position. In more than half of cases reviewed (32/53), the children had no entitlement to legal share as the estate was below the proposed threshold of £300,000 and the children would not have received anything under intestacy. This proportion increases (14/15) when looking at estates where legal rights were actually claimed. If the surviving spouse was then to remarry and die leaving an estate below the threshold sum for intestacy, the children would have no claim on the estate of either parent. Likewise, if parents were to divorce and both remarry, but then predecease their new respective spouses, the child would not have a right to legal share if both parents left estates below the threshold sum for intestacy. With the rise in second marriages, these outcomes may not be uncommon. In only one case where the heritable estate was worth approx £3m (legal rights were not claimed in this instance) would the children have been better off under the new proposals.

Where there is no surviving spouse, in a majority of cases (28/45) the children are better off. In around a quarter of cases (11/45) the value of the legal share was greater than the value of the moveable property and in 4 other cases legal share would exhaust the vast majority of the moveable property (without taking into account funeral expenses and costs of administration). This would have a significant impact where the deceased intended to leave the property to one family member. This is not uncommon where a member of the family has lived in the property as a carer. Unless they were able to obtain a loan, the property may have to be sold.

Surviving Spouse

In our experience, it is unusual for a surviving spouse to claim legal rights as they usually inherit the deceased's estate. In one example where the deceased was separated (but not divorced) from the surviving spouse and left a will bequeathing her whole estate to her minor children, the surviving spouse made a claim for legal rights. The surviving spouse received approximately £17,800 but under the new proposals, they would have been entitled to over £75,000 and the house would probably have had to be sold to make payment. In instances like this the surviving spouse would clearly be better off under the new proposals but at the expense of the children who the deceased had intended to leave her property to.

Q.29(b) On families

One of the recurring complaints from families is the length of time it takes to wind up an estate. Implementing the proposals relating to capital sum payments to dependent children is likely to greatly increase the length of time to administer an estate. In most instances, increased time results in increased cost.

In our experience, families want certainty. Capital sum payment would not provide this.

Q.29(c) On the legal profession

Provided there is a clear method for calculating legal share, the administration of the estate will not be greatly affected. In some cases, the house may have to be sold in order to pay legal share and this could result in delay and increased fees.

If it is possible to apply to the court to pay legal share in instalments, it will increase the length of time taken to administer an estate and will increase the fees charged.

If dependent children are able to apply to the court for a capital sum, this is likely to result in a delay to the administration of the estate, an increase in work in advising the executors and an increase in fees.

Q.29(d) On the courts

If dependent children are able to apply to the court for a capital sum, this is likely to result in an increase in workload and a further stretch on resources.

Q.29(e) On business?

No comment

Chapter 3A: Agricultural Units

Q.30 In examples 12-15 on pages 38-9, would there be scope for the legal share to be met by the principal beneficiary borrowing against the assets they have inherited (i.e. mortgaging a mortgage-able element of the agricultural unit)?

Yes

No

Don't know

Please give reasons for your answer:

In the examples given, it may well be possible for the principal beneficiary to borrow against inherited assets to meet the legal share.

The following potential practical difficulties are foreseen:-

- There are situations where the underlying land may be very valuable, but the cashflow/income of the business is not sufficient to service borrowings and the Bank are therefore unwilling to lend;
- Where there is already debt secured against the farm, or against other farmland or assets already owned by the beneficiary, it may be difficult and more expensive for additional borrowing to be obtained which is secondary to the existing borrowing. It is recognised that the existing borrowing would have an impact on the calculation of the estate subject to legal share where it is over the land in the name of the deceased and therefore the sum required to meet this, but there could still be situations where this is relevant.
- The additional cost of borrowing and setting up a security may impact on the viability of the farming operation. Who will meet the additional cost of setting up the security etc; will this cost be shared with the beneficiary claiming legal share?
- The beneficiary will need to be given sufficient time to set up borrowings before the claim for legal share needs to be paid. The administration of the estate will need to be at a sufficient stage so that title to the land can be transferred to the beneficiary to allow him to grant security over it.

Q.31 Should there be exemptions (limited or otherwise) for certain businesses from claims for a spouse/civil partner's legal share where this will compromise the commercial viability of the business?

Yes No Don't know

Please give reasons for your answer:

We do foresee circumstances where claims by a spouse/civil partner will compromise the commercial viability of a business. However, we believe it will be difficult to define those types of business which would be exempt in such a way that would create certainty for people on whether or not their business would fall into the exemption. We believe certainty is one of the most important factors, as it allows people to plan and manage their business and personal affairs accordingly. For that reason, we do not think there should be exemptions for certain businesses on the grounds of commercial viability.

Q.32 If there were to be exemptions from claims for legal share, do you think it would be possible to define those types of businesses which would be exempt with precision?

Yes No Don't know

Please give reasons for your answer:

See above

Q.33 What criteria could be used to inform any definition of an excepted business on the basis that any formula must be clear and certain and able to withstand the tests of robustness, fairness and proportionality?

Please give reasons for your answer:

No comment.

Q.34 What could be the impact of a formula which was not clear and certain?

Please give reasons for your answer:

No comment

Chapter 4: Cohabitants

Q.35 Do you agree with the criticisms set out above of section 29 of the Family Law (Scotland) Act 2006?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.36 Do you agree that section 29 of the Family Law (Scotland) Act 2006 should be repealed?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.37 Are the factors set out in Recommendation 38 sufficient/appropriate to determine if the individual was a cohabitant?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.38 Should a cohabitant be able to make a claim in testate estates?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.39 Should a cohabitant receive a percentage of what a surviving spouse/civil partner would have received?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.40 Are the factors set out in Recommendation 39 sufficient/appropriate to determine the percentage a cohabitant should receive?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.41 Where there is a surviving spouse/civil partner and a cohabitant in an intestate estate, should the value of the estate which the spouse/civil partner would inherit be shared between the cohabitant and the spouse/civil partner in line with recommendation 42(1)?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.42 Where the deceased dies testate, should the cohabitant's entitlement be to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.43 Should, unless permitted by the court, any application for a proportion of the deceased's estate be made within the period of 1 year from the date of the deceased's death?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.44 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 4.23 above.

No comment.

Impact

Q.45 What do you think the impact of implementing these proposals would be?

Q.45(a) On individuals

No comment

Q.45(b) On families

No comment

Q.45(c) On the legal profession

No comment

Q.45(d) On the courts

No comment

Q.45(e) On business?

No comment.

Chapter 5: Additional Matters

Q.46 Should capacity to make or revoke a will, in the circumstances set out at recommendation 45, be determined by the law of the testator's domicile at the time of making or revoking the will?

Yes

No

Don't know

Please give reasons for your answer:

Would solve the practical difficulty of determining different laws on testamentary capacity where testator owns property in more than one jurisdiction.

Q.47 Should the rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) be abolished?

Yes No Don't know

Please give reasons for your answer:

Q.48 Should the right at common law to claim *aliment jure representationis* be abolished?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.49 Should the right at common law to claim temporary *aliment* be abolished?

Yes No Don't know

Please give reasons for your answer:

No comment.

Q.50 If the requirement to obtain a bond of caution is removed should any measures be put in place to protect an estate given that there are very few calls on bonds of caution currently?

Yes No Don't know

Please give reasons for your answer:

It is difficult to know if there are very few calls on bonds of caution as a result of the measures currently in place, e.g. a requirement that the executor signs an irrevocable mandate in favour of a solicitor so that the whole administration of the estate is carried out by the solicitor and all funds pass through the solicitor's client account, or because the risk of maladministration is very low. If you remove all safety measures it is possible that instances of maladministration will increase. However, any safety measures should not increase the administrative burden beyond those required by the current system. We would also have concerns about introducing an element of judicial decision-making to what was previously an administrative process. If the introduction of judicial decision-making is required, the current system of requiring a bond of caution would seem to be more appropriate.

Q.51 Should the court have the power to refuse to appoint an executor dative?

Yes

No

Don't know

Please give reasons for your answer:

Yes, but only in very limited and clearly defined instances, e.g. where the executor has a conviction for fraud. Otherwise, how would the court exercise this power? There is a danger that some family members may simply object to the appointment of another family member that they do not like. That could greatly delay the administration of the estate.

If the requirement for bonds of caution remained, the power to refuse an appointment of executor-dative would not be required by the court. That may be a better outcome.

It has been suggested that the court should consider whether the executor understands the nature of the role and has the necessary ability. This requirement is not required for an executor-nominate so why should it be necessary for an executor-dative? Also, where the surviving spouse takes the whole estate, there is currently no need for a petition and the spouse can be appointed executor-dative automatically. The ability of the spouse and understanding of the nature of the role are not questioned.

Q.52 If the court is given a discretionary power to refuse to appoint an executor-dative should small estates be excluded?

Yes

No

Don't know

Please give reasons for your answer:

Risk is minimal.

Q.53 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the prior rights of the spouse exhaust the estate and the spouse is the executor-dative be excluded?

Yes

No

Don't know

Please give reasons for your answer:

No risk as executor and beneficiary are the same person.

Q.54 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the executor-dative is the sole beneficiary be excluded?

Yes No Don't know

Please give reasons for your answer:

No risk as executor and beneficiary are the same person.

Q.55 Are there any other categories of estates which could be excluded?

Yes No Don't know

Please give reasons for your answer:

Unless you accept that the court should never have the power to refuse to appoint any executor-dative, there would be a potential risk where the executor-dative is not the sole beneficiary.

Q.56 Would a non-exhaustive list of factors which the court may want to take into account when considering a petition for appointment as executor-dative be helpful?

Yes No Don't know

Please give reasons for your answer:

If the court is to have power to refuse to appoint an executor-dative, a non-exhaustive list of factors would be helpful. However, as commented on above, with the exception of previous convictions for fraud, we do not believe that the court should have the right to refuse a petition for appointment as executor-dative.

Q.57 If so what factors should be included?

Please provide your answer:

See above.

Q.58 Should a petition for appointment as executor-dative be accompanied by (tick as many as you think would be necessary):

- a family tree
- a scheme of division
- a letter from DWP providing information on benefits in relation to the deceased?

Q.59 Please set out below any other documentation which could usefully be included.

Q.60 Should the current process of intimation be replaced by personal intimation?

Yes No Don't know

Please give reasons for your answer:

Q.61 If 'Yes', to whom should intimation be made?

Please provide your answer:

Q.62 Should the current appeal period be extended?

Yes No Don't know

Please give reasons for your answer:

No comment

Q.63 If 'Yes', what should the period be and why?

Yes No Don't know

Please provide your answer:

No comment.

Q.64 In terms of the suggested safeguards please indicate below what combination would be necessary to provide a proportionate safeguard solution (tick as many as you think would be necessary).

- Power to prevent the appointment of an executor-dative
- Non-exhaustive list of factors to be taken into account
- Attachment of other documentation to the petition e.g. family tree
- Personal intimation
- Extended appeal period
- Other*

*Please set out below any other suggested safeguards

Q.65 Do you agree with the data provided on page 65?

Yes No Don't know

Please give reasons for your answer:

Q.66 Please provide any additional data in terms of quantifiable volumes and costs associated with any of the suggested new safeguards.

Q.67 Should the court have the power to refuse to confirm an executor nominate?

Yes No Don't know

Please give reasons for your answer:

The testator has chosen who they would like to act. It should not be for the court to question this. It will also likely result in delays to the administration of the estate and increase costs.

Q.68 Are there likely impacts of such a change?

Yes

No

Don't know

Please explain your answer:

See above.

Q.69 How might any impact of such a change be mitigated?

Please explain your answer:

No comment.

Q.70 Should the doctrine of equitable compensation be abolished?

Yes

No

Don't know

Please give reasons for your answer:

No comment.

Q.71 Should a marriage or a civil partnership result in the revocation of an earlier will?

Yes

No

Don't know

Please give reasons for your answer:

With the increase in second marriages, there are likely to be instances where a testator wishes to leave his or her estate to children of the first marriage and not the surviving spouse.

