

Reviewing succession law

Robin Fulton of Turcan Connell discusses the review of succession law by the Scottish Law Commission, with a focus on intestate succession and protection against disinheritance



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The law of succession in Scotland is notoriously complex and there were several protracted reviews during the last century.

Succession law first came under review as far back as the early 1920s, followed over 20 years later by the appointment of the Mackintosh Committee in 1949. Despite the fact that the committee reported just a year later in 1950, it took a further 14 years until the Succession (Scotland) Act 1964 received Royal Assent.

The latest review has been under way since the end of 2007, when the Scottish Law Commission issued a discussion paper. Comments were invited by 31 December 2007 and are currently being considered by the Commission.

There are several strands to this review but there are two areas that have received particular attention and merit some consideration here – the rules relating to intestate succession and protection against disinheritance.

Intestate succession and the surviving spouse

It has long been recognised that the existing rules from the 1964 Act have

ceased to be relevant in the 21st Century, particularly when it comes to the provisions in favour of the surviving spouse.

Under the 1964 Act, the view was that blood relatives took preference in the order of succession so that, in a case where there is no Will, the surviving spouse is only entitled initially to what is known as Prior Rights. This means a right to the house up to a certain value along with the contents and a cash sum that varies depending on whether or not there are children.

In addition to Prior Rights, the surviving spouse is entitled to Legal Rights, which means a share in the moveable estate. After this, however, the parents and siblings of a deceased take preference. This is, unsurprisingly, no longer considered appropriate and in the current discussion paper it is now suggested that in a case where there are no children then the surviving spouse should inherit the entire estate regardless of the length of the marriage.

Where someone dies intestate survived by a spouse and children, the current proposals are to entitle the surviving spouse to a fixed sum of £300,000 together with one half of the balance of the estate in excess of that sum. The



remainder of the estate - the other half - would then pass to the children. The fixed sum would likely be increased in line with the Retail Price Index (RPI) or a similar index to ensure an appropriate annual increase.

Legal protection against disinheritance

Under the current rules of succession in Scotland, disinheritance of a spouse and children is possible so the discussion paper sets out certain suggestions for strengthening the legal protection against this.

In the case of a spouse or civil partner, important changes are proposed where the surviving spouse is eligible to claim a portion of the estate (provisionally 25 percent) even if there is no provision in the Will. This would include 25 percent of land and buildings, which is not the

case under the current rules.

Co-habitants' rights were addressed under the Family Law (Scotland) Act 2006, when they were granted certain rights on the estate of the deceased partner in the case of intestacy. The discussion paper now suggests that co-habitants should be allowed these same rights where there is a Will in place, although the proposal is that these rights would be subject to an application to the court and would not be granted automatically.

The provision with regard to children is more complex and it is here that the discussion paper proposes what is perhaps the most significant change. It is suggested the provision for a claim on a parent's estate will only be available to a dependent child and should no longer be available to an adult, non-dependent child.

There is not, however, any suggested fixed entitlement - the value of such a claim would be variable and subject to the court's discretion. This requirement on a dependent child to apply to court to enforce his or her rights would likely delay the administration of estates and could even be a source of greater acrimony than under the present rules.

Finally, the removal of the distinction between heritable property and moveable property in relation to succession law is probably welcome. But it does throw up particular problems for properties such as farms or large landed estates, where potentially dividing them up in line with succession rules could produce long-term difficulties. 