

Briefing Note

Consultation on the Law of
Succession

On 29th June 2015, the Scottish Government issued a consultation paper on the Law of Succession (www.gov.scot/Resource/0048/00480484.pdf). The consultation is open for written responses until Friday 18th September 2015. The consultation paper is based on the Scottish Law Commission's 2009 Report on Succession (Scot Law Com No. 215) and is seeking views on the main proposals put forward in that report for some fundamental reforms of succession law in Scotland.

Intestacy

The laws of intestacy govern the succession to a person's estate if he or she dies without leaving a valid Will and also occasionally govern the succession to part of a person's estate when he or she leaves a Will but it does not deal with all of his or her assets for one reason or another.

Under the current law, if a person is survived by a spouse or civil partner, that survivor will receive "prior rights" from the deceased's estate. This consists of an interest in a home, an interest in personal effects and a cash interest, all of which have statutory values placed on them.

Following the settlement of those prior rights, surviving spouses and civil partners and surviving children of the deceased receive "legal rights". This consists of a fixed share of the deceased person's moveable assets (broadly everything except land and buildings). The balance of the deceased person's estate will then pass to the deceased's family in accordance with the statutory intestacy rules.

In certain intestate estates, there will be a surviving cohabitant and that person may also claim a share of the deceased's estate in particular circumstances.

The Scottish Law Commission recommends moving away from these "property specific" rights (i.e. the division of the estate varies depending on whether the deceased owned heritable or moveable property) and looking instead at an estate as a whole. Simplification is the main goal of the reforms. As a result, the proposal is that a surviving spouse or civil partner should inherit the whole of the deceased's estate if the deceased is not survived by any children or grandchildren. If there is no surviving spouse or civil partner, the children of the deceased should inherit the whole estate.

Where there is a surviving spouse or civil partner and the deceased is survived by children, it is suggested that the spouse should receive a lump sum figure to be set by statute (to be known as the threshold amount) with the rest of the estate being split equally between the surviving spouse or civil partner (one half) and the deceased's children (who share the other half between them).

The Scottish Law Commission proposed setting the threshold amount at £300,000 but the Scottish government is proposing to make it significantly higher than this, and the consultation paper mentions figures ranging from £335,000 to £650,000.

Protection from Disinheritance

The consultation also deals with long-awaited amendments to the legal rights rules. These are the rules mentioned previously by which a surviving spouse or civil partner and the children and grandchildren of a deceased can claim a specified portion of the deceased's moveable estate. These rules apply where the deceased leaves no Will as well as where the deceased leaves a Will and they apply regardless of what that Will says. While this limits the deceased's freedom to dispose of his/her property as he/she wishes, it is a long established principle of Scots law (and of many other jurisdictions) that children should be protected from disinheritance.

Like the intestacy rules, legal rights claims are "property specific" and can lead to arbitrary results depending on the make up of the deceased's assets at death. The paper proposes that a surviving spouse or civil partner should be able to claim a fixed share equal to 25% of the amount to which he or she would be entitled under the proposed new intestacy rules discussed above.

Two alternative proposals are put forward for a new type of claim by the deceased's children. The first proposal is that the deceased's children would share a fixed proportion of the whole of the deceased's estate (including land and buildings). The suggested figure is 25% of the value to which they would have been entitled on intestacy. All children of whatever age would be able to claim this "legal share" (as it is to be known). This would mean that, in smaller estates where the total value did not exceed the fixed sum (the threshold amount – see above) that would pass to a surviving spouse on intestacy, there would be no funds available for the children to make a claim.

In order to mitigate the impact of these changes, it is proposed that executors will be able to apply to the court to be allowed to pay a person's legal share claim in instalments. This may be useful where the estate is particularly asset rich but may be cash poor and a claim would otherwise force the sale of historic or sentimental assets.

The alternative is that adult children should no longer be able to make a claim on their parents' estates at all. However, dependent children would be entitled to apply for a capital payment. The level of that capital sum would be determined by the needs of the child or children in question and it would take into account the family's lifestyle and position.

Agricultural Units

Including heritable property in succession claims has particular implications for farms and estates. The paper contains a section devoted specifically to agricultural units. The concern is that including land and buildings into the property from which claims can be made could lead to a situation for agricultural families where the family farm needs to be sold or divided in such a way as to make it unviable. In its 2009 report, the Scottish Law Commission concluded that there should not be an exemption for agricultural property. The consultation paper asks for views on some limited form of exemption.

The paper also points out that the option to pay the succession claim in instalments would be useful in order to avoid agricultural assets having to be sub-divided or sold.

Cohabitants

A cohabitant has been able to make a claim to part of his or her partner's estate since the introduction of the Family Law (Scotland) Act 2006. These claims are currently only possible where the deceased dies without leaving a Will and they require an application to the court for the provision to be ordered.

The recommendation is that the ability of a cohabitant to make a claim should be extended to estates where the deceased did leave a Will as well as being available in intestate estates. It is also suggested that the discretion of the court should be narrowed so as to provide a level of consistency and a cohabitant should be awarded a percentage of what he or she would have inherited if he or she and the deceased had been married or had entered into a civil partnership.

The court would be asked to decide on two stages. Firstly, the court would determine whether the applicant is a cohabitant, having regard to the nature of his or her relationship with the deceased. The court would then be asked to fix an appropriate percentage for the cohabitant to inherit, again having regard for the nature of the relationship. A cohabitant would never be entitled to more than a surviving spouse or civil partner.

The court would not take into account the size of the estate and nor would it have any regard to the other beneficiaries when considering a cohabitation claim.

Additional Matters

Various other less fundamental matters are also included in the consultation.

- The consultation recommends that testamentary capacity should always be judged by the laws of a deceased's domicile at the time of making the Will.
- There is a proposal to abolish the rule whereby a Will can be revoked if a child is born to the testator after he makes the Will, and the Will does not contain any provision for that child.
- Under current rules, where a person dies without leaving a Will, his or her prospective executor may be appointed by the local Sheriff Court and the executor is known as an executor-dative. Before Confirmation will be granted to an executor-dative in these circumstances, he or she is usually required by the court to take out a policy of insurance known as a bond of caution, ensuring that the estate will be divided properly and in accordance with the laws of intestacy. The consultation recommends that the need for bonds of caution should be abolished in order to simplify the administration of such estates.

- As a safeguard against possible fraud, it is suggested that the Sheriff Courts should have a discretionary power to refuse to appoint an executor-dative. It is anticipated that, if this rule were to be introduced, it would need to provide very clear limits and guidelines about the factors to be considered by the courts if and when they consider using such a power.
- Consideration is also given as to whether such a discretionary power should be extended to executors appointed under a Will, known as an executor-nominate. Because a person has usually made a very clear determination about who he or she would like to be responsible for the administration of his or her estate, the consultation does not recommend that the discretionary power be extended in this way but views on that matter are being sought.
- Views are also sought on whether a marriage or civil partnership that takes place after the execution of a Will should render that Will revoked unless it specifically provides otherwise. This is currently the position in England. The change is not being actively recommended but the views of the public on the matter are being requested and, depending on the outcome, this could be reviewed again in the future.

General Comments

There are some useful recommendations contained in the consultation but by far the most fundamental recommendations are those surrounding changes to protection from disinheritance particularly for anyone who owns heritable property.

Anyone who is interested in the proposed reforms is encouraged to make their views known to the consultation panel whose full contact details are included in the consultation document.

If you would like to discuss any of the proposals in more detail in order to determine if and how your own personal position might be affected, please speak to your usual contact at Turcan Connell.

Please note that this briefing note is intended as a summary of the consultation on the Succession (Scotland) Bill. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.

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