

5th 5 March 2010

RESPONSE OF CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY TO LAW COMMISSION CONSULTATION PAPER CP191

INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH

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.

[paragraph 1.57]

8.1 This response has been prepared by the Law Reform Committee of City of Westminster and Holborn Law Society, a local law society representing some nine hundred members mostly working in the area of its name.

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 3.36]

8.2 No implications are noted.

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]

8.3 Agreed.

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?

8.4

(a) No. The particular concern here should be to meet the reasonable expectations of children, particularly those who are not children of the surviving spouse. - Some portion should go to the children if the estate is relatively large, or, if the view in 8.4(c) below should prevail, even if it is not.

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]

8.4 (continued)

(b) We cannot offer a unanimous response, and offer two different replies in paragraphs (c) and (d) below. All three solutions proposed have the potential for unfortunate results. For example, the current law can result in a miniscule life interest trust where the estate marginally exceeds the statutory legacy; the statutory legacy needs constant reconsideration to keep pace with inflation-or deflation; treating property differently according to whether or not it is an interest in a matrimonial home would give rise to very many difficulties and anomalies. We know that often the spouse has to decide between retaining the matrimonial home and keeping income bearing assets on which to live. The survivor's need is more immediate than the expectations of the children. In a well ordered estate, whether testate or intestate, the family if all of full age very often agrees a division different from that required by the will or intestacy, and anyway the survivor is expected to pass what is left on to the children on his or her death, and not "squander the inheritance".

(c) The first view, strongly pressed, would simply give the survivor half of the estate outright (instead of a fixed statutory legacy), and half on trust with the remainder to the children. That pattern gives maximum income to the survivor, and does not prejudice the children. It is found in the majority of family wills, because it works well in practice. Children ought not, as they are now, to be cut out altogether in small intestate estates. (This proposal does not fall within any of the three models offered in the question).

(d) The second, conflicting, view recognises that the statutory legacy has operated for the last 85 years to give the surviving spouse the whole of the estate in the vast majority of cases, and that there is no evidence of any marked public wish for change. But larger estates deserve more sophisticated rules than apply at present. For example, life interest trusts may be too cumbrous in many cases. The reform should be based on model (1) (the present law), but with some variation. We propose that the survivor should be able to elect. Thus he or she should have an entitlement to a statutory legacy and a fixed share of the balance, but should be able to elect to receive instead no statutory legacy but half the estate outright and half in trust for life. There should also be a right for the survivor to elect to redeem the life interest, broadly along the lines of section 47A of the Administration of Estates Act 1925 as amended. The device of the right to elect would enable the intestacy rules to be adapted to some extent to meet the circumstances. There are of course many possible permutations.

(e) As to amounts, the surviving spouse should, where the estate is sufficient, receive outright enough in an average case to enable her/him to retain

a typical family home. We accept that this would require the statutory legacy to be set at a relatively high level (assuming that, contrary to paragraph (c) above, the statutory legacy will be retained.). We would not support the Scottish suggestion that the value of a share in the family home accruing by survivorship should be deducted from the amount of the legacy. The interest so accruing ought to be regarded as something that already belonged to the spouse (albeit conditionally on the spouse surviving the deceased). It would be unfair and inappropriate for the spouse's entitlement to be reduced because of property which he or she already owned, particularly in those cases where the major contribution had come from the spouse rather than the intestate.

(f) If we had to choose only between the models offered in the Consultation Paper we would prefer model (2) - the statutory legacy and a fixed share of residue. As to the share in residue which the spouse should take, our inclination is to prefer a one-third share in residue with a relatively large statutory legacy, rather than a half share in residue and a smaller statutory legacy. We do not comment further on the actual amount of such legacy.

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]

8.5 Agreed.

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]

8.6 Agreed.

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]

8.7 Agreed.

COHABITANTS

8.8 We provisionally propose that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions.

[paragraph 4.59]

8.8

(a) We are unable to support this proposal. We accept that in many situations this entitlement would accord with the presumed wishes of the deceased, and with the beliefs and expectations of many people. However we see insuperable difficulties. We suggest that those beliefs and expectations should not too readily be incorporated into the law, and that if they are to be so incorporated it should be done in a different way.

(b) What is the rationale for the cohabitant's proposed entitlement? Consideration of this question may be helpful. It is suggested that it should be based on a mutual commitment by the cohabitants to each other, that may be assumed to have included a commitment to provide for the survivor, sufficiently firm and clear that it ought to be publicly recognised and implemented in the

law. By definition the deceased cohabitant has not married the partner and has not made a will in favour of the partner, either of which steps would have constituted a clear affirmation of commitment. Part 2 of the Commission's Report on Cohabitation deals at some length with the various categories of cohabitants, but does not produce much convincing evidence about the real reasons why in so many cases neither step was taken. We know from discussions with clients in the course of family proceedings that in many cases the real reason is that one partner - often despite the wish of the other - was not prepared to make the commitment. That reason may often not be admitted even to the family, let alone to those conducting a social survey. We are considerably troubled by the reliance in the surveys on cohabitants' misunderstanding of present law as their reason for not marrying. We suspect that there are often other and stronger reasons as well. Popular ignorance of the law is a dubious basis for law reform. We do not find it acceptable that in such a case the cohabitant's relationship should so readily displace that of the children, who may in many cases still be minors. Where third parties are involved the absence of an overt statement of commitment does matter, and may be much more significant than hitherto recognised in research.

(c) The group of intestates which provide the most important test are those who have children from a previous relationship. Those children will for the most part have formed close family ties with the deceased, and but for the cohabitation would become entitled on the intestacy. In that context one must consider very carefully whether the new relationship is really of sufficient quality to make it right for the children's entitlement to be displaced. It will be central to any proper understanding and defining of the principles involved.

(d) We therefore propose that long-term cohabitation should not be equated with marriage for this purpose.

(e) Should public policy actively discourage the increasing movement from marriage towards cohabitation, and should it reflect this in the law of succession? Amongst our own membership there is considerable sympathy for this approach, and we think it would be dangerous to underestimate the strength of this view. One option which we suggest for consideration is that where the deceased left children the interest to be conferred on the cohabitant should be between two-thirds and three-quarters of that of the surviving spouse, both as to the statutory legacy and as to share in residue.

(f) Whatever rights cohabitants should have, they should not be rights under intestacy, that is to say as if cohabitants were included with relations as an additional category in the table in the First Schedule to the Intestates Estates Act 1952 as amended. Unlike any of the present rules for distribution on intestacy the proposed entitlement relies on a subjective judgment as to whether the claimant satisfies the test (however defined) for being treated as a cohabitant. The judgment will depend on a number of different matters which will not always be clear cut, and for which the only evidence may be the cohabitant's own recollection. The commencing date of the cohabitation is one example. The circumstances of a temporary separation are another. This aspect makes the proposed law quite different in kind from present intestacy law in which judgments of this kind play no part.

(g) There is an obvious risk that the surviving cohabitant will wrongly recollect, or indeed deliberately misrepresent, material facts. That aspect would make it impossibly dangerous to allow an application by a cohabitant for a grant

of administration to proceed in common form, without notice to persons who would otherwise be entitled. Any application by a cohabitant for a grant ought to be made only on notice to parties who may be prejudiced, who must have the opportunity to object.

(h) In the event of an objection what is to happen? Under present probate rules the contentious probate procedure would presumably apply, but that seems unsuited to the situation, and a different procedure would almost certainly be required

(i) All this indicates that the law and procedure of family provision would be the better vehicle for the surviving cohabitant's claim to an interest in the estate. On the basis proposed in the consultation paper there must even in the most straightforward case be proper scrutiny of the application for the grant. It is not appropriate for that scrutiny to be an administrative procedure - the function is truly a judicial one and must be exercised by a judge. The process could not be provided for just by adapting the common form probate procedure. It would be very different from anything else handled under the Non-Contentious Probate Rules, and would be potentially a contentious proceeding anyway. It is much more akin to procedure under the 1975 Act.

(j) To require that the cohabitant must establish entitlement by a family provision order would therefore not create any significant additional process. Nor would this approach lead to increased uncertainty. In the case of a long cohabitation the "financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive" (the test proposed in paragraph 4.134) could be expressly stated to be that which a spouse would receive on intestacy - (or a stated proportion if it were to be decided that a cohabitant should receive less). In that way quantum of the share or interest to be awarded would not be discretionary.

(k) This proposal would require reform of the law of family provision to enable an application to be made before a grant - see 8.42 below.

(l) The preceding paragraphs are based on the proposition that the grant should follow the interest - that is, that those who have the greatest interest under the intestacy should have priority in applying for the grant of administration, so that decisions in the administration may be taken by the persons with the greatest interest in them.¹ Here that would mean that the cohabitant should be the administrator. One solution might be to vary that principle where it would otherwise apply to a cohabitant, so that the administrator should be the nearest relative. That would mean that it would be for the relative rather than the court to decide on entitlement, without reference to a court except in the event of a dispute. The drawback would be that in the critical case outlined in paragraph 8.8 (c) above (cohabitant and children of a prior relationship) the administrator and the beneficiary would have adverse interests.

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 Rule 22(1) of the Non-Contentious Probate Rules 1987.

(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]

8.9 We would be content with this definition. We agree that the legislation should not include any list of factors relevant in determining whether persons were cohabitants.

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]

8.10 Agreed, subject to our submissions under 8.8..

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

[paragraph 4.79]

8.11 Agreed.

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]

8.12 In view of the great variation in reasons why cohabitants may have not chosen the commitment of marriage, we believe the period should be longer. The proper period should be ten years. Subject to that we agree.

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]

8.13 Similarly, the period should be correspondingly longer and the case for a more finely graduated system as suggested in paragraph 4.83 accordingly becomes stronger. Subject as aforesaid we agree.

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]

8.14 Subject to increasing the period as before, we agree.

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]

8.15 Subject to increasing the period as before, we agree.

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]

8.16 Agreed.

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]

8.17 It is an important part of the British concept of the 'couple' that the relationship is, broadly speaking, exclusive. Although exclusivity should not, any more than any other factor, be expressly mentioned in a statutory definition, it may occasionally be highly relevant, and in the very rare case posed in the question the claims of both persons to be cohabitants should for that reason fail. Moreover the concept of multiple partners is contrary to English culture, and it is not appropriate for English intestacy law to grant property rights to such partners. If provision for them is desirable under the traditions of another culture, it must, as in countless other situations, be made by will. A reform of the law should therefore make no provision to deal with such a situation.

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 Dependants) Act 1975, provided that the cohabitation was continuing at the date of death.

[paragraph 4.122]

8.18 Agreed.

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 Dependants) Act 1975 should be retained.

[paragraph 4.123]

8.19 Yes.

8.20 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.

[paragraph 4.124]

8.20 Agreed.

8.21 We provisionally propose that the Inheritance (Provision for Family and Dependants) 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]

8.21 Agreed.

CHILDREN

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

[paragraph 5.19]

8.22 No.

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]

8.23 No. We see no clear advantage in changing the well-established principle.

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]

8.24 Agreed.

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]

8.25 (No view is expressed).

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]

8.26 Agreed.

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]

8.26 Agreed.

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]

8.28 Agreed.

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]

8.29 No. We agree with the observations in paragraph 6.34 of the consultation paper.

8.30 We ask consultees whether the current preference in the intestacy rules for parents over siblings should be retained.

[paragraph 6.46]

8.30 Yes. No persuasive case for change has been made out.

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]

8.31 Yes. It is normal usage to refer almost always to a half sibling as brother or sister without the ‘half’, which indicates that the half-blood aspect is usually regarded as unimportant. Present law recognises this in a number of instances. For example, in the order in which relatives rank for notification before an enduring power of attorney becomes registrable and irrevocable, full and half siblings of the donor are treated equally²ⁱ We also note that in the construction of a will or other instrument a reference to a sibling is normally taken to include a half sibling, which is just another indication of the same public attitude. It would be unfair to retain the distinction.

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]

8.32 If there could be devised some effective procedure, including at the very least a process akin to advertising for creditors in an estate or an insolvency, we would be inclined to support the proposal. Otherwise the law should remain unchanged. Any rule or presumption allowing administrators to distribute to known beneficiaries without reserving for the cost of tracing the others would, as the consultation paper suggests, reduce the incentive to trace the missing kin. Administrators are more likely to be concerned for the interests of beneficiaries they know (quite probably including themselves) than for others they do not know. There remains a strong case for a rule that the distribution to the known beneficiaries should proceed only under the direction of the court.

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]

8.33 (No reply to this question)

² Enduring Powers of Attorney Act 1985, Schedule 1, Paragraph 2. (but strangely lower down in the same paragraph children of the donor’s full siblings have priority over children of half siblings, and uncles and aunts of the half blood are excluded altogether).

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]

8.34 Agreed.

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]

8.35 The rule should be so modified. It is not realistic to require that an administrator who is sole beneficiary of an intestate estate should be obliged to regard himself as a trustee. Application of the strict self-dealing rule to such a situation is legalistic, unfair and absurd.

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]

8.36 Agreed.

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]

8.37 Agreed.

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]

8.38 Agreed.

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]

8.39

(a) A family provision order should be available in any case to which English succession law applies. English succession law is properly regarded as the rules of testate and intestate succession as adjusted by the discretionary rules of family provision. English law in any particular case cannot be correctly determined if it should be impossible to apply the adjustment.

(b) English succession law may fall to be applied even where the deceased was neither domiciled nor habitually resident in England and Wales. For instance in certain countries (Japan appears to be an example) succession to movables is determined by the law of the deceased's nationality. If an English national dies domiciled and habitually resident in Japan leaving a widow inadequately provided for by will or intestacy, her discretionary entitlement to family provision ought to be included in any analysis of the applicable English law. That might be impossible under the law as it stands at present, because the English court has no jurisdiction to make any family provision order. Supposing that in the same example the deceased owned immovable property in England, the need for the proposed reform becomes even clearer.

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 Dependants) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.

[paragraph 7.60]

8.40 We can see no reason in principle why a claim in respect of the deceased's severable share in jointly owned property (s.9) should be treated differently in this respect from claims against the estate. In either case a court asked to extend the time limit must have regard to any prejudice resulting from the delay.

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]

8.41 Agreed.

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]

8.42

(a) There are many situations in which the family provision issue ought to be determined before the grant. The proposal we make in 8.8 above would require this change - see paragraph 8.8(k). In a great many cases there is considerable cooperation between parties - sharing relevant information, arranging to meet urgent needs, and so on - so that there may be a large measure of agreement as to how, and in which order, the issues may best be resolved.

(b) If a surviving cohabitant should be shown to be entitled to the whole estate, that person should be entitled to a grant of administration in priority over any relative. See 8.8(L) above. Our proposal is that the entitlement should be established only by an order for family provision, which means that the family provision application must be made before the grant.

(c) It is an attractive suggestion that the applicant for a pre-grant family provision order should have to apply to the court for directions as to the

representation of the estate, that is, who should be the administrator(s). That court would therefore need some form of probate jurisdiction³.

8.43 Would consultees favour reform of the Inheritance (Provision for Family and Dependents) 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]

8.43 (No reply is offered to this question).

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]

8.44 (No reply is offered to this question).

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³ The curious division of probate work between the Chancery Division and the Family Division was recognised as anomalous when it was introduced in 1971. The reason was the practical one, that divorce and non-contentious probate business were handled by the same registrars and staff at Somerset House. The time may have come to review this odd arrangement.