

Consultation on the Law of Succession

February 2019

CONTENTS

Ministerial Foreword

Chapter 1	Introduction	4
Chapter 2	Intestacy	6
Chapter 3	Cohabitants	22
Chapter 4	Additional Matters	30
Annex A	Responding to this consultation	40
Annex B	Respondent Information Form	42
Annex C	Consultation Questions	44
Annex D	Handling of personal data	51

Ministerial Foreword

While the law of succession affects everyone, it can also divide opinion.

It is precisely because it affects everyone that there must be some consensus on what reforms will deliver outcomes that are appropriate for the majority of modern day Scots and in line with their expectations. This is no easy task.

We consulted in 2015 on recommendations made by the Scottish Law Commission in their Report on Succession published in 2009. It was clear from the responses that there was insufficient consensus on a significant number of the recommendations to progress them further.

On testate succession, whilst the current scheme of legal rights attracts criticism, the Scottish Government has concluded from the responses that it does have the benefit of striking a balance between testamentary freedom and limited protections for spouses/civil partners and children and so will not bring forward reforms to the law on testate succession.

This paper focuses on intestacy. The key area which remained unresolved in the 2015 consultation was how an estate should be split where there are both a surviving spouse/civil partner and children. This paper therefore seeks views on a fresh approach to reform of the law of intestacy with reference to regimes which operate elsewhere.

Given that the current rules on intestacy have been in place for over half a century, the approaches explored in this paper may seem novel. Nevertheless I would urge you to consider them and would be grateful for your views. The paper also seeks views on extending an alternative approach to cohabitants to test whether views on what cohabitants' rights on intestacy should be, have shifted.

There are a number of other discrete succession issues in the final chapter on which we would welcome views

I am pleased therefore to publish this consultation paper and I look forward to considering the responses which will inform our policy in this area.

A handwritten signature in blue ink that reads "Ash Denham". The signature is fluid and cursive, written over a light grey background.

Ash Denham
Minister for Community Safety

CHAPTER ONE

Introduction

1.1 The Scottish Government consulted on the law of succession in 2015¹. That consultation focussed on recommendations in the Report on Succession produced by the Scottish Law Commission (the Commission)² on changes to substantive succession law, some of which were controversial. The recommendations were based on the removal of the distinction between heritable and moveable estate with rights coming from the whole estate and included those relating to:

- the law on intestacy (no will)
- protection from disinheritance, for spouses, civil partners and children
- cohabitants' rights

1.2 The Commission criticised the current rules because of their complexity and because the types of assets in the estate affect the outcome. They proposed a simplified scheme for dealing with intestate estates which, amongst others, included the following two recommendations:

- A spouse/civil partner should inherit the whole estate if there are no issue;
- If there is no spouse/civil partner, issue should inherit the whole estate;

1.3 As part of the earlier consultation process, the Scottish Government sought views on these recommendations. There was agreement to the proposal that, if there was a surviving spouse/civil partner and no children, the survivor should inherit the whole estate. Views were similar where there were children and no spouse/civil partner, so that the children should share the whole estate. The Scottish Government has already committed in its response³ to that consultation to legislating to make these necessary changes at the next opportunity. This should be borne in mind when alternate schemes for intestate succession are considered below.

1.4 In terms of intestacy, the key area which remained unresolved by the consultation is how an estate should be split if there is both a surviving spouse/civil partner and children.

1.5 There was little consensus around protection from disinheritance and on what share a surviving spouse/civil partner should receive and a clear split on whether or not children should have a right to a share of a parent's estate in testate succession.

1.6 There was also a lack of consensus on the factors to be used to determine if a couple should be regarded as cohabitants in order to attract inheritance rights.

¹ <http://www.gov.scot/Publications/2015/06/7518/downloads>

² <http://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf>

³ <https://www.gov.scot/Topics/Justice/law/damages/succession/scottish-government-response-succession-consultati>

1.7 In addition to the consultation, given that the Commission's Succession Report was informed by a public Attitudes Survey carried out in 2005, that exercise was repeated to gather current opinion on attitudes towards succession law and to identify shifts in attitudes between 2005 and 2015. The survey questions for both 2005 and 2015 covered three key areas related to succession law, namely:

- Intestacy - how an estate should be distributed when there is no will
- Disinheritance – whether a spouse or civil partner or children should have the right to claim part of the estate even if any will does not provide for them
- Cohabitation – what protections should be in place for cohabiting partners.

1.8 Across the three themes of intestacy, disinheritance and cohabitation, a consistent pattern of reduced support for legal protection emerged along with greater uncertainty about what should happen.

1.9 The Scottish Government also ran a 'Survey Monkey' poll to which over 800 people responded. The survey asked four questions about whether an individual should be able to disinherit a spouse/civil partner, adult children, dependent children and a cohabitant

1.10 Apart from dependent children, the Survey Monkey indicated there was significant support for testamentary freedom and the ability to disinherit others, including spouses/civil partners.

1.11 The Scottish Government's view⁴ is that whilst the current scheme of legal rights as a protection from disinheritance attracts criticism it does have the benefit of striking a balance between testamentary freedom and limited protections for spouses/civil partners and children. Further encroachment on the autonomy of individuals would undermine their ability to manage their affairs as they wish. No changes will therefore be brought forward in the area of testate succession nor will the distinction between heritable and moveable property be removed. This paper will therefore focus primarily on an intestacy scheme and cohabitants' rights.

⁴<https://www.gov.scot/Topics/Justice/law/damages/succession/scottish-government-response-succession-consultati>

CHAPTER TWO – INTESTACY

Intestacy

2.1 A scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. The Scottish Government's view is that a scheme for intestacy should reflect outcomes which individuals and their families would generally expect and on which there is a degree of consensus.

2.2. The existing law as it relates to intestacy has the potential to create unfairness. The default position therefore needs to be clear, equitable and reflective of our modern day society.

2.3. Just over three quarters of those who responded on the issue agreed that the policy aim of any scheme of intestacy should be to allow the surviving spouse or civil partner to remain in their home. This recognises that they are likely to have operated as an economic unit.

2.4. Under the current law, where a person dies without a valid will, the following scheme will apply.

Prior rights

After debts have been paid, the first call on the estate is the surviving spouse or civil partner's prior rights which comprise

- the right to the home in which s/he is living up to a value of £473,000
- furniture to a value of £29,000
- the sum of either £50,000 or £89,000, depending on whether the deceased left children.⁵

Legal rights

After prior rights have been met, the next call on the estate is legal rights. Legal rights can only be claimed from the deceased's moveable property.

The surviving spouse or civil partner has a legal right to one-third of a deceased's moveable estate if there are 'issue' (children) or to one-half of the moveable estate if there are no issue. The issue share one-half of the moveable estate if there is no surviving spouse or civil partner or a third if there is a surviving spouse or civil partner.

Remainder of the estate

What remains of the estate is distributed in accordance with section 2 in the 1964 Act. In the absence of children or remoter issue this will result in surviving parents or siblings taking priority over a surviving spouse or civil partner.

⁵ By children we mean children or adopted children of the deceased but not step children

2.5. The Commission criticised the current rules because of their complexity and because the types of assets in the estate affect the outcome. They proposed a simplified scheme for dealing with intestate estates as follows:

- A spouse/civil partner should inherit the whole estate if there are no issue;
- If there is no spouse/civil partner, issue (biological or adopted) should inherit the whole estate;
- Where there is a spouse/civil partner and issue, the spouse/civil partner should get the first £300,000 (the threshold sum) of the whole estate and the remainder of the estate should be divided in two, one part for the spouse/civil partner and the other to the children (biological or adopted) between them;
- Where the deceased is survived by a spouse or civil partner and issue (biological or adopted), 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 does not exceed the threshold sum of £300,000, the threshold sum should be reduced by the net value of the deceased's right.

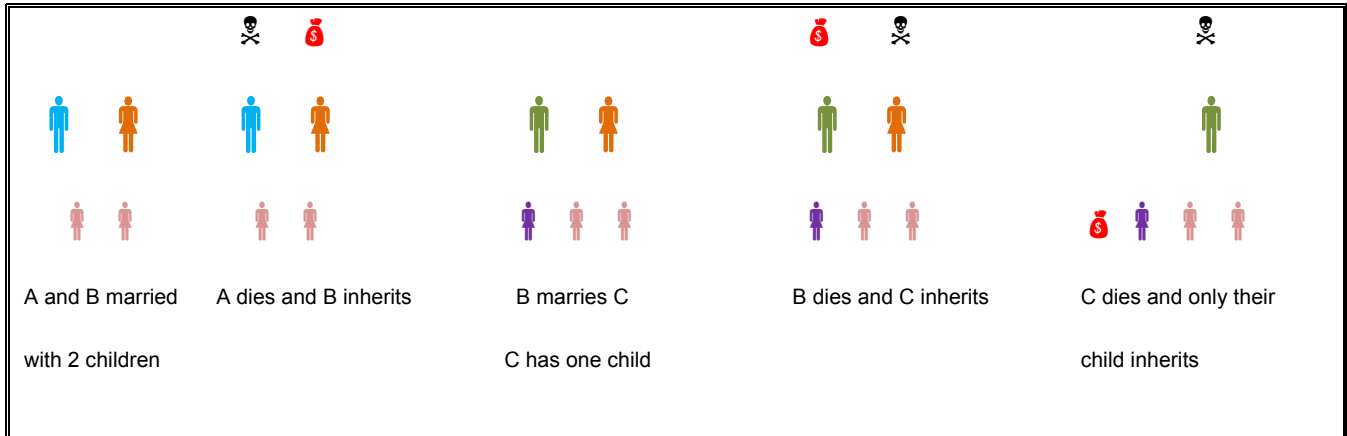
It should be noted that currently step children have no rights to a step parent's estate nor did the proposed scheme extend inheritance rights to step children.

2.6. As already indicated at paragraph 1.3 above, there was support for the recommendations that if there was a surviving spouse/civil partner and no children, the survivor should inherit the whole estate; and where there were children and no spouse/civil partner, the children should share the whole estate.

2.7 However, there was a range of views on what an appropriate split in the estate should be when there was both a surviving spouse/civil partner and the deceased's children. There is an inherent tension in this situation because the more a spouse/civil partner is entitled to, the less that is available for children (biological or adopted) to share. It was suggested that if the parent's share is high in relation to the average value of estates in Scotland, many children may be effectively disinherited.

2.8. There was also concern about the situation where the deceased had children (biological or adopted) from a previous relationship where the survivor was not the parent of those children. If the estate passed to the survivor, the likely outcome would be that the children from the previous relationship would inherit nothing from their deceased parent.

2.9 What might be considered a typical situation is the example of a married couple with 2 children, one spouse dies and the other inherits the entire estate. At a later date the surviving spouse remarries someone who has a child of their own. When they die the second spouse inherits the whole estate and in turn when they die their child inherits their estate, which is made up substantially of the deceased spouse's estate. In this way the 2 children of the original marriage inherit nothing.



2.10 Figures from the 2011 census⁶ show that step families made up:

- 8% (26,000) of married couple families and 29% (26,000) of cohabiting couple families;
- 8% of families with one dependent child, 6% of families with two dependent children and 12% of families with three or more dependent children; and
- Just over half of the 15,000 cohabiting couple families where the youngest dependent child was aged 12 or over.

2.11 Given that these figures were current in 2011, it is likely that the prevalence of step families will be even greater today. As mentioned above in a traditional family setting⁷, most children recognise that they will ultimately inherit from their parents on the death of the second parent. The Commission’s recommendations do not however address the position of step families. Whilst they considered the position of ‘second’ spouses/civil partners their view was that:-

“We remain convinced that no distinction should be made between different types of surviving spouse or civil partner. The succession rights of the surviving spouse or civil partner arise solely from their legal relationship with the deceased. Put another way, a spouse or civil partner does not have to “earn” the right to have part of the deceased’s estate; the right arises from their status. ... This is not to deny the difficulties which may arise in reconstituted families.”⁸

⁶ <https://www.scotlandscensus.gov.uk/>, Table DC1107SC - Marital and civil partnership status by sex by age, Table DC1114SC - Dependent children by family type

⁷ For the purposes of this paper, a traditional family refers to a couple in a marriage [or civil partnership] living with their biological children as a family.

⁸ <http://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf> at paragraph 2.30

2.12 The Commission thought that as any intestate scheme was a default scheme that the remedy for reconstituted families was to make a will. The Scottish Government entirely agrees that the making of a will is likely to be the best means of ensuring that the testator's estate is distributed in the way that they intended.

2.13 The Scottish Government also recognises that not everyone has made a will and that in general terms, the younger a person is, the less likely it is that they will have made a will. The lack of a will particularly in young families, reconstituted or otherwise can create significant difficulties because children may not be of an age where they are self-sufficient.

2.14 A large majority of those who responded to the Commission's Discussion paper agreed with the Commission that the same set of intestacy rules should apply regardless of how a family is constituted.

2.15 However, given the increasing prevalence of non-traditional families the default scheme of intestacy does need to be 'relevant to modern Scottish society and the rights of individuals and families'⁹. The main difficulty therefore is finding a rule which differentiates fairly between first, second or more families because the range of individual circumstances is infinitely great.

2.16 As a result of societal change we know that the current law of succession does not necessarily reflect the expectations of modern families but from responses it is clear that the proposed changes consulted on in 2015 do not do so either. The range of models of what constitutes modern families, all with their own particular circumstances, is in part why it is difficult to build a consensus on change. The law of succession should match, at least to some extent, the reality of family life.

2.17 It will therefore be difficult to settle on a scheme which is sufficiently nuanced to reflect all individual circumstances and the extent of the economic unit which may have persisted between a second/third etc. marriage or civil partnership. A child may have been born to a very short lived previous partnership and the second marriage could be one of a very long duration with many interdependencies. And in any or all circumstances the surviving spouse or civil partner may have contributed more to any jointly held assets.

2.18 We accept that it would not be viable for the 'quality' of any relationship to be considered on a case by case basis and be taken into account when deciding on the distribution of an intestate estate, this would involve valuable court time and would also be costly. Some natural children are estranged from their parents, some step-parents will have a very close relationship with their step children, others will not.

2.19 In an article entitled *From the Cradle to the Grave: Politics, Families and Inheritance Law*¹⁰, Dr Reid discussed the impact of the existing rules of intestacy on reconstituted families and was of the view that whilst divorce, cohabitation and step-families have reshaped Scottish society, the Scottish Law Commission's Report did not address these impacts and indeed the position of step-children was specifically

⁹ Extract from the Manifesto Commitment

¹⁰ Reid, D. (2008) *From the cradle to the grave: politics, families and inheritance law*. Edinburgh Law Review, 12 (3). pp. 391-417.

excluded. Nevertheless, the author considered that the proposed reforms could have the effect of step-children inheriting (indirectly) everything in an intestate reconstituted family and illustrated this potential impact with the following example: -

Take a fictional family consisting of D and C and their two sons. D dies. Her estate is worth £150,000 so that, under the proposals, it all passes to C (the boys could only claim if her estate was worth more than £300,000). At this point the sons are happy for their father to inherit their mother's assets. C subsequently marries CA, who has two daughters from a previous marriage. C and CA pool their resources, including C's inherited wealth, and jointly purchase a new home with expensive furnishings. C later dies intestate leaving an estate which is valued at £250,000 and CA inherits all, a fact which creates a degree of unease within the family. However, when CA later dies (intestate), her blood relatives (the girls) (C's step children) inherit all since CA's stepchildren (the boys) have no inheritance rights.

C's wider family is now deeply aggrieved. Had CA died first leaving an estate equal in value to C, he would have inherited all and the boys would be the lucky beneficiaries on his death, to the exclusion of CA's girls.

The allocation of assets within this fictional family demonstrates the effects of the current proposals. Depending on the arbitrary order of death of the parents, the blood relatives of the last surviving spouse will inherit all.

2.20 Dr Reid goes on to make what is described as a 'tentative suggestion' that the matrimonial property regime that applies in the event of divorce should be considered for inheritance law on the basis that it would "shortcut current efforts to prioritise a spouse's entitlement on death". It is recognised that the divorce regime set out in the Family Law (Scotland) Act 1985 has now operated for over 32 years and its operation has been largely uncontroversial. She suggests that:

"..it may represent a more rational system for apportioning family property between, for instance, the claims of a second spouse after a brief marriage in competition with children of a previous lengthy marriage which had generated most of that property."

2.21 Whilst Dr Reid has some concerns about the focus of the Commission's reforms on prioritising the rights of spouses over those of children, the example offered in the paper of the case *Pirie v Clydesdale Bank plc*¹¹ serves to demonstrate that in this particular case, looking at it through the lens of an economic partnership, the widow and pursuer was the 'loser' in comparison to the deceased's daughter. Whilst this is a testate case it nonetheless highlighted the absurdity described by Dr Reid of the spouse having "... been better off had she divorced [her husband] and gained the benefit of the matrimonial property provisions rather than sticking with him and providing the care he needed prior to death." As the judge, Lord Wheatley, commented in his decision, "...while it is easy to see that the pursuer feels that she

¹¹ [2006] CSOH 82, 2007 SCLR 18.

has been the victim of a monstrous and callous injustice, it is impossible to find on the evidence that any legal remedy can be available to her.”

2.22 It is clear that there needs to be a careful balancing, where a competing spouse/civil partner and children of the deceased neither ‘win’ nor ‘lose’.

Comparative jurisdictions

2.23 Among the comments received in response to the consultation, it was suggested that regimes in other jurisdictions be considered. One was ‘a community of acquests’ akin to that which operates in Washington State.

2.24 The alternative suggestion was to consider the succession regime which operates in British Columbia, Canada which makes provision for children of the deceased who are not the children of the survivor by reducing the value of the survivor’s share in intestacy and increasing that available for the children.

2.25 The Scottish Government therefore commissioned research¹² on these two regimes and welcomes views on the suitability of either to meet the expectations of a modern day Scotland. Further detail is set out below.

Washington State model – community property approach

2.26 In intestate succession, the surviving spouse receives a significant share of the deceased’s estate and the calculation will depend on whether or not there are dependants, natural or adopted children, or a parent or natural born or adopted siblings of the deceased

2.27 The estate is split into community property which is the property acquired in the course of the marriage (including the family house, salaries) and separate property which is the property acquired by one spouse prior to marriage, or acquired over the course of marriage by gift or inheritance to the individual spouse, and the rents, issues, and profits of separate property. Where there are dependants, the spouse takes the deceased’s share of the net community property and one half of the net separate property. The surviving spouse will take three quarters of the net separate property if there are no dependants but there is a surviving parent, or issue of a parent, of the deceased. If there are neither dependants nor a parent or natural born or adopted siblings of the deceased, the whole estate passes to the surviving spouse.

2.28 The system is very similar to that operating for divorcing couples under the Family Law (Scotland) Act 1985 apart from the provision relating to the rights of surviving parents or their issue to inherit.

2.29 In Scotland, for the purpose of divorce, in general terms, matrimonial property is all the property belonging to the parties (or either of them) at the relevant point,

¹² British Institute of International and Comparative Law. “Intestate Succession in British Columbia and Washington State. February 2018. <https://www2.gov.scot/Resource/0054/00543273.pdf>

which was acquired during the marriage (or before the marriage if it was acquired for use by both of them as a family home, or as furniture etc. for that home). Matrimonial property is shared fairly (equally or in such other proportions as are justified by special circumstances).

2.30 Property which is excluded from division is property acquired before the marriage or after the point of separation and also property which was a gift or an inheritance from another party so far as such property has not been converted into matrimonial property. For example if the 'non-matrimonial' property was sold during the course of the marriage and the proceeds used to purchase something else.

“In Scots law, if an inherited asset is not “converted” to matrimonial property during the course of the marriage, it cannot be taken into account in the financial division. The certainty of this provision contrasts with the variety of approaches taken by the English courts in assessing the extent to which inherited wealth should be divided”.

“In Scots law, if a pre-marital asset remains in the same form at the end of the marriage as at the start, it is treated as non-matrimonial and is excluded from division (unless a property bought pre-marriage as a family home - see above). An asset acquired post-separation (whether a lottery win, or a further employment-related bonus) is similarly non-matrimonial, and excluded. Again, the certainty of the Scottish position contrasts with the discretion left to the English judiciary.”¹³

2.31 Such property is excluded because it is not the fruit of the spouses' or civil partners' efforts or income. The system in Scotland has been described as clearer and more predictable¹⁴ than the equivalent system in England and Wales.

British Columbia model – threshold approach

2.32 The Wills, Estates and Succession Act ('Act' or WESA) deals with intestate succession in British Columbia. It came into force on 31 March 2014.

2.33 Under this statute, 'spouse' encompasses not only persons legally married to each other but also those who had lived with each other in a marriage-like relationship for at least 2 years. (Cohabitation is discussed in Chapter Three).

2.34 In British Columbia, when all children are the children of both spouses, the spouse will receive the household furnishings and a preferential amount of \$300,000 of the estate's value or more. The spouse has a right to purchase the family home within a set time limit. If the children of the deceased are from a prior or different relationship, the surviving spouse's preferential amount is \$150,000 with the remainder being distributed to the children.

¹³ Morton Fraser – A guide to matrimonial law in Scotland for family lawyers in England and Wales, Rhona Adams and Fiona Sasan, 14 April 2014

¹⁴ The Scottish Dimension, Scottish divorce law: what are the lessons?, Cambridge Family Law Practice - 1 January 2013.

2.35 As set out in the comparative research¹⁵.

“The rationale for the rule is that in blended families the common children may be treated more favourably than those who are only the intestate’s children. By reducing the share of the spouse, a bigger pot is left to the children of the intestate.”

2.36 This regime operates on a threshold basis where if the net value of the intestate estate is below that of the spouse’s preferential share then the entire value of the intestate estate goes to the spouse.

2.37 This is closer to the current regime under Scots law known as prior rights and as described at paragraph 2.4 above. If a similar regime were to apply in Scotland a view would need to be taken about the appropriate level of threshold or preferential share.

US Uniform Probate Code

2.38 In the United States of America, the Uniform Probate Code in relation to Intestacy, Wills and Donative Transfers (Article II) also makes similar threshold provisions where the intestate share of the deceased’s spouse is dependent upon whether or not there are other surviving descendants or parents of the deceased and in the case of descendants, whether or not those descendants are also descendants of the surviving spouse. The provisions operate on a sliding scale basis where the surviving spouse or civil partner’s share reduces where there are surviving descendants who are not the descendants of the surviving spouse.

2.39 In this code, in other jurisdictions and indeed the current law in Scotland provides for, in certain circumstances, inheritance by parents and other relatives, where the deceased is survived only by a spouse but not where the deceased is survived only by issue. Such provisions are intended to counteract the prospect of property passing out the deceased’s lineal family, should their surviving spouse go on to re-marry.

2.40 It is the view of the Scottish Government that this position is not desirable and indeed the current law in this respect has caused some surviving spouses/civil partners hardship and difficulties, particularly where in life the spouses/civil partners have established a joint land-based business; where they have both contributed significantly to the performance of the business but when one dies intestate, the business has effectively passed to a sibling or other relative of the deceased. Equally a spouse/civil partner may lose their home to a relatively remote in-law.

2.41 It is worth re-iterating therefore that for the purposes of these reforms, the Scottish Government’s position is as set out at paragraph 1.3, any reforms taken forward would provide that where there is a surviving spouse/civil partner (and no issue) the spouse/civil partner will inherit all and where there are surviving issue but no spouse/civil partner, the issue will inherit all.

¹⁵ <https://www2.gov.scot/Resource/0054/00543273.pdf>

Summary of benefits - threshold versus community property

2.42 Both of the approaches outlined above would offer some protection in situations where there are both a surviving spouse/civil partner and issue. They seem to operate in other jurisdictions without any reported difficulties.

Threshold approach

2.43 The threshold approach has some similarities to our current intestacy regime. What is dubbed the 'preferential share' in the Canadian example is similar to the concept of prior rights. In both cases the size of the preferential share or size of the monetary value of prior rights is larger where there are no children.

2.44 However, the preferential share in the British Columbia model applies to the whole of the intestate estate. Unlike the position in Scotland, there is no distinction between heritable and moveable estate. Rather there are particular rules which apply to the inheritance of the spousal home; in effect the surviving spouse may use their share to acquire the spousal home in whole or in part.

2.45 The application of this regime would therefore need to be considered in the context of the continuing distinction between heritable and moveable property. Without altering the existing prior rights threshold for heritable property downwards, perhaps considerably, it is likely that this approach would continue to result in anyone other than the spouse or civil partner not inheriting.

Community Property

2.46 Again it would be possible to adopt a similar approach on intestate death to that of the operation of the matrimonial property regime in divorce in other words the approach taken in Washington State but using the familiar terminology and application which exists in Scots matrimonial law.

2.47 In divorce some assets are specifically excluded from the pool of assets that fall to be divided between the parties - assets acquired pre-marriage and post-separation, and assets acquired by way of gift or inheritance from a third party. If a similar scheme applied in succession, the excluded assets could form the basis of estate available for children to inherit.

2.48 We know that the divorce regime is largely uncontroversial. In fairly recent research¹⁶ into how the financial provisions on divorce have operated in the Family Law (Scotland) Act 1985, in the context of the number of decided cases arising from the financial provisions it was noted that:

“...it also reinforces the views expressed in interviews to the effect that there are no significant problems with the legislative framework, it works well and,

¹⁶ Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce. J Mair, E Mordaunt & F Wasoff

contrary to suggestions that it is overly rigid, in fact it provides ample scope for flexible and diverse outcomes”¹⁷.

2.49 It seems that this approach would offer flexibility. It would take account of the inter-dependencies of the marriage/civil partnership and what had been acquired during the relationship reflecting the reality of the couple’s arrangements. The same research commented that the legislation is notable because of the way in which it manages to combine family law and family life and manages to “reflect a variety of models of marital and family relationships”¹⁸.

2.50 The continued retention of the distinction between heritable and moveable property for testate purposes would not impact on this approach as a different type of property distinction would apply in intestate cases.

2.51 Whilst a move to a regime similar to the Washington State approach would represent a more radical departure in terms of succession law reform it would have the merit that it would not be wholly unfamiliar or untested albeit in the slightly different context of divorce. As such, it appears to be quite an attractive option.

Discussion

2.52 The following is intended to illustrate the potential outcomes of the different approaches:-

SCENARIO

A married couple Angela and Brad.

Angela is widowed and has 2 children (Cosima and David) from her previous marriage. She inherited the family home worth £300k and moveable assets with a value of £120k. When she married Brad they lived in her home as she wanted to maintain some stability for her children. Brad retained the proceeds of his house sale in a personal account. The £120k was placed in a separate account as a personal nest egg. Her salary and that of Brad were paid into a joint account. Angela dies unexpectedly and did not leave a will. Her intestate estate was made up of the family home (£300k), the household contents (£29k), her personal savings of what is now £130k and half of the joint account (£4k).

2.53 The following three examples illustrate how her estate would devolve under the current law in Scotland; under the British Columbia threshold model; and under the Washington State ‘community of acquests’ approach.

Scots Law

2.54 Brad would have *prior rights* as described in paragraph 2.4 above. He would therefore inherit the family home worth £300k; furniture to the value of £29k; and £50k in cash. The remainder of the estate would be subject to a claim of *legal rights*

¹⁷ Ibid Page 183.

¹⁸ Ibid Page 182

by Brad and Angela's children, but only in respect of the moveable estate. Once the prior rights are deducted from the savings this leaves £84k. Brad has a right to one third (£28k) and Cosima and David to another third (£28k), the remaining third would pass in accordance with the order set out in the Succession (Scotland) Act 1964 which would mean the remaining third (£28k) would also pass to Cosima and David.

To summarise Brad would inherit property to the value of £407k and the children £56k.

British Columbia – threshold approach.

2.55 In this illustration the preferential shares of £300k and £150k which apply in British Columbia have been applied to this example.

2.56 No distinction is made between heritable and moveable property, the value of the estate as a whole is therefore £463k. Because there are children from a previous marriage, Brad would have a preferential share of £150k. He would also inherit the household furnishings, say £29k.

2.57 Once Brad's preferential share of the estate is removed it leaves an estate valued at £284k, this would pass to Cosima and David.

To summarise Brad would inherit property to the value of £179k and the children £284k.

Washington State – 'community of acquests'

2.58 Angela's estate would be considered in terms of what was communal or shared property with Brad and what property was separate and effectively did not form part of their joint property.

2.59 Here the house contents and the money in the joint bank account would be 'community' property and would all pass to Brad. Angela had never assimilated her inherited money into matrimonial property therefore the contents of her personal savings account would be considered 'separate' property as would the house as it was acquired before the marriage and retained in Angela's name. In terms of the Washington State model, half of the separate property would pass to Brad and the other half to the children Cosima and David.

To summarise Brad would inherit property to the value of £248k and the children £215k.

2.60 In this particular scenario both of the outcomes under the threshold and 'community of acquests' models results in a larger share for the children of the deceased than under the current law in Scotland. In the main this is attributable to the property in which Angela and Brad lived being the personal property of Angela. In all models, if a survivorship destination was in place in relation to the family property, it would pass to Brad and not form part of the estate at all.

2.61 In the British Columbia example, different levels of preferential share would obviously change the balance. Similarly in the Washington State model the application of a different percentage split to the separate estate would generate a different result.

2.62 On the basis of the particular facts of the given scenario, which outcome is the fairest? It could be argued that the law as it stands provides Brad with a windfall of the house given the fact that he retained the sale proceeds from his previous home, and that windfall is to the detriment of Angela's children.

Step-children

2.63 The alternate regimes discussed above would, in different ways, address the issue of biological or adopted children of the deceased having some potential protection where their surviving parent re-marries, but do not address the issue of step-children of the deceased being treated on an equal basis with the biological or adopted children of the deceased. As noted earlier currently step children have no rights to a step parent's estate nor did the Commission's proposed scheme extend inheritance rights to step children. In an article entitled *A Cautionary Tale for Step-Parents and Step-Children*¹⁹ it was commented that:

"People may have different ways of defining 'family' and what being part of a family means to them. The idea that "a family is what you make it" or "families are who you love" is true enough when it comes to inheritance if you make a will. But the assumption that each of us can define family for ourselves is not true if we die without a will.... then the law will define our family for us.... [and] there is the possibility that the people they considered family will not inherit from them."

2.64 The article examined the fall-out from the case *Peters Estate (Re)*²⁰ where Ileen Peters died intestate in 2013. Her husband of 43 years, Lester, had pre-deceased her in 2009. They had one biological son together and Lester had four daughters from a previous relationship. It was noted that "The children (step and biological) all assisted both financially and otherwise in the maintenance of Lester and Ileen Peters. They functioned as a family unit for many years and all five of the adult children worked together to provide for Ileen. They assisted Lester and Ileen when they were petitioned into bankruptcy. When Lester Peters died intestate, the five adult children agreed that Ileen Peters should receive all of their father's estate."

2.65 Ileen Peter's son was appointed to administer her estate and one of the step-daughters applied to the court for a direction to have the estate divided equally amongst all five children. Because the four step-daughters were not blood relatives the court found that the sole beneficiary was the son. The step-daughters appealed the decision to the Alberta Court of Appeal on the basis that the current law in relation to succession 'has failed to recognise the need to protect blended (step)

¹⁹ A Cautionary Tale for Step-Parents and Step-Children. Professor Jonnette Watson Hamilton, Faculty of Law, University of Calgary. Posted on 5 May 2015.

²⁰ *Peters Estate (Re)* 2015 ABQB 168 Can LII

families'. The Court of Appeal concluded²¹ that the law has historically excluded step-children from inheriting the estate of an intestate step-parent and that as the law was clear they were bound to follow it although they also acknowledged that in this case the result was unfair.

2.66 The only jurisdiction that has been identified which allows step children to inherit directly from their step parents is California as provided for in the California Probate Code. The Code provides a two-part test on which to establish whether a parent-child relationship subsisted for the purposes of intestate succession. Certainly the second part of the test would seem to set quite a high barrier, the two-parts being:

- (1) the relationship began during the child's minority and continued throughout the joint lifetimes of both the step child and step parent; and
- (2) the step child has established the clear and convincing evidence that the step parent would have adopted the step child but for a legal barrier.

2.67 As set out in paragraph 2.11, the Commission did not make any specific recommendations with regard to step children. They considered that to do so would over complicate the law and were not convinced by the argument that sometimes complex situations need complex law. In their view ultimately provision can be made in a will for a step child or through the process of adoption.

2.68 In British Columbia, neither did WESA make any provisions in relation to step-children. As part of the work carried out by BIICL, practitioners in British Columbia were contacted about this issue and reported "that there does not seem to be any appetite for the recognition of un-adopted stepchildren and fictive kin as successors in intestacy..."²²

2.69 When the results of the Public Attitudes Survey carried out in 2015 was compared with those of 2005, there was a marked decline in support for stepchildren inheriting from a step parent and also being treated on an equal basis with biological or adopted children.

2.70 The numbers of respondents who 'didn't know' what should happen in these circumstances also increased. Perhaps this points to more personal experience of the complexities of reconstituted families and awareness that the issues are not always clear cut with views perhaps being dependent upon the individual circumstances within a reconstituted family. Perhaps conjecture, but for example, a respondent knows 2 reconstituted families the Smiths and the Jones. They are clear that in the case of the Smiths that the step children should inherit but in the case of the Jones thinks they shouldn't, the conclusion is that they don't know what should happen as a general rule.

²¹ Peters v Peters Estate, 2015 ABCA 301

²² Op Cit Page 8

Ultimus Haeres

2.71 However, as already explained, in Washington State succession law distinguishes property according to whether it is joint/marital property or personal property. This model also serves to provide some limited inheritance rights for step-children but only where it would avoid *ultimus haeres* – the estate passing to the State.

2.72 The provision applies where a parent (A) leaves property to their spouse B (who is their second spouse) and A also has children from a previous marriage. If when B dies they have no children of their own then the portion of their estate which was inherited from A can pass to A's children i.e. the step-children of B. If B had their own children then the property would pass to them and A's children would not inherit.

2.73 Other states such as Ohio, Iowa, Kentucky and Arkansas have similar provisions where step children (issue of a pre-deceased spouse) may inherit to avoid *ultimus haeres*.

2.74 When the Succession (Scotland) Act 2016 was completing its parliamentary passage there was some discussion about the role of the State as *ultimus haeres* in the context of survivorship in the event of a common calamity. A number of the witnesses and indeed the Committee²³ themselves were not supportive of the Crown being the ultimate heir. It should be noted however that the number of estates which ultimately fall to the Crown are small in number. In the first instance, unclaimed estates are advertised and investigated by the National Ultimus Haeres Unit (NUHU) and most estates are claimed during that period by relatives. Unclaimed estates are passed to the Queen's and Lord Treasurer's Remembrancer (QLTR) for administration. But again they are firstly advertised and most are claimed. The number of estates subject to administration are generally in the low double figures.

Conclusion

2.75 None of the above would be intended to reflect the strength or other intricacies of any given step family relationship – this would need to be provided for in a will – it only provides a simple and clear means of recognising the increase in reconstituted families in Scotland today. It will still result in some unfairness.

2.76 The Scottish Government would like to determine if it is possible to identify intestacy reform which would deliver outcomes which would fair and be more in line with the expectations of modern day Scots and their families.

²³ **Delegated Powers and Law Reform Committee** - Stage 1 Report on the Succession (Scotland) Bill, 64th Report, 2015 (Session 4)

http://www.parliament.scot/S4_SubordinateLegislationCommittee/Reports/DPLRS042015R64.pdf

QUESTIONS

1. Do you agree that the current approach to intestate succession needs to be reformed?

Yes/No

Reasons

2. Do you agree that the aim of any reforms should be to reflect outcomes which individuals and their families would generally expect?

Yes/No

Reasons

3. If you favour a different approach, would you prefer to model that change on the regime in Washington State or British Columbia or neither?

Washington State/British Columbia/ Neither

Reasons

4. Which of the Washington State or British Columbia models delivers outcomes which most closely reflect what modern Scottish families (with all their many permutations) might expect to happen on the death of a spouse/civil partner?

Washington State/British Columbia

Reasons

5. If the Washington State model ('community of acquests') is your preferred model, do you think that the Family Law (Scotland) Act 1985 financial provisions on divorce could be readily applied to intestate estates?

Yes/No

Reasons

6. If the British Columbia model (threshold) is your preferred model, what do you think should be the appropriate threshold levels in Scotland?

Comments

7. Should step-children have a right equivalent to that of biological or adopted children to inherit in intestacy?

Yes/No

Reasons

8. Should step-children be able to inherit in order to avoid a step parent's intestate estate passing to the Crown?

Yes/No

Reasons

CHAPTER THREE – COHABITANTS AND INTESTACY

Statistics

3.1 According to the 2011 Census²⁴ there were 1.5 million families living in households in Scotland. Of these, 65 per cent (967,000) were married couple families, 16 per cent (237,000) were cohabiting couple families and 19 per cent (291,000) were lone parent families. Further, of the 614,000 families with dependent children, 54 per cent (333,000) were married couple families, 15 per cent (91,000) were cohabiting couple families and 31 per cent (190,000) were lone parent families.

3.2 Of families with dependent children, step-families made up 8 per cent (26,000) of married couple families and 29 per cent (26,000) of cohabiting couple families and step families accounted for just over half (54 per cent) of the 15,000 cohabiting couple families where the youngest dependent child was aged 12 or over.

3.3 As with the statistics relating to reconstituted families, it is likely that now (2019) the numbers of cohabiting couples will have continued to increase. Given the increasing numbers of couples choosing to arrange their lives in this way, it is important that, if they do not leave a will, the law of intestacy delivers fair outcomes reflecting the way they have arranged their affairs in life.

3.4 There is however a fundamental question around whether or not cohabiting couples should be treated in the same way as married couples and civil partners for the purposes of intestate succession. It has been argued that cohabitation is a deliberate lifestyle choice and a rejection of marriage or civil partnership and the obligations and benefits which accrue with marital or civil partnership status. To devise a scheme which then imposes such obligations and benefits in the event of an intestate death could be regarded as inappropriate and even perverse.

3.5 A marriage or civil partnership is a valid means of regulating a relationship and acquiring mutual rights and obligations. Alternately making a will is another means of ensuring that an individual's property devolves on death as they intend, save for the existing limited protections in relation to legal rights.

3.6 Nevertheless, we know that many people do not make a will for a whole range of reasons and when someone in a cohabiting relationship does die without a will it cannot be necessarily assumed that they would not have wanted their cohabitee to inherit. Indeed there is often an economic imperative on death, particularly where dependent children are involved.

Other jurisdictions

²⁴<https://www.scotlandscensus.gov.uk/> Table DC1107SC - Marital and civil partnership status by sex by age, Table DC1114SC - Dependent children by family type

3.7 The comparative research²⁵ carried out by BIICL revealed that in Washington State, couples who live together are not considered as spouses for the purposes of inheritance law. Only married partners or registered partners²⁶ are recognised.

3.8 The reason that cohabiting relationships are not recognised is on the basis that "...common law relationships are more likely to be casual and occasional and the couple is not presumed to support each other."²⁷ Further there appears to be no appetite in Washington State to recognise cohabitation in a way that would result in the right to inherit. Other jurisdictions which do not recognise cohabitants for intestate succession purposes include Italy.

3.9 Conversely, in British Columbia, the definition of a spouse in intestate successions includes the situation where two persons have lived with each other in a marriage-like relationship for at least 2 years. Moreover, "... the Canadian courts have held that the fact that a couple did not live together and kept separate finances was not decisive" in terms of whether or not they were deemed to live in a marriage-like relationship.²⁸

3.10 In addition to British Columbia there are other examples of jurisdictions that treat a cohabitant equally to that of a surviving spouse. These include: The Australian states, Alberta, Manitoba, the Northwest Territories, Saskatchewan, New Zealand as well as much of Latin America. As with British Columbia there is generally a qualifying period.

Current Law

3.11 The current law does make provision for cohabitants in intestacy. But the rights are not automatic; rather they involve an application to the Court. Under section 29 of the Family Law (Scotland) Act 2006 (2006 Act) a cohabitant, within the meaning of section 25, has a right to make a claim on their deceased cohabitant's estate where there is no will within six months from the date of death. Cohabitants have no rights where the deceased left a will. The Commission highlighted that Section 29 of the 2006 Act has been the subject of much criticism; these criticisms were described in the 2015 consultation paper²⁹ as follows:

- the court is given no guidance on the purpose of the award i.e. is it to provide for the cohabitant's future needs or is it in recognition of the nature and extent of contributions made by the cohabitant for the benefit of the deceased and their family during cohabitation? The only express guidance is that the award cannot be greater than the amount the applicant would have received if he/she had been the deceased's surviving spouse or civil partner.

²⁵ <https://www2.gov.scot/Resource/0054/00543273.pdf>

²⁶ Domestic partnerships were introduced to allow couples who meet the criteria to register their relationship and as a consequence not prejudice their pension or benefit rights.

²⁷ Op Cit. page 11

²⁸ Op Cit. page 3

²⁹ Consultation on the law of Succession, June 2015, Scottish Government, Chapter 4

- when exercising its discretion under section 29, the court is overwhelmed by the number of potentially relevant factors leading to difficulty in focusing on those which are significant in the particular case.
- due to a lack of case law there is very little judicial guidance on the most important factors to be taken into account.
- there is a potential conflict of interest between the applicant and the deceased's children who would otherwise inherit the estate. It is particularly acute where the only asset is the family home. A cohabitant's claim reduces the amount the deceased's children will inherit. Where the only asset is the family home, providing the cohabitant with a share of the estate, and placing the rest in trust for any children, may result in the sale of the home in which they all live.

3.12 Sixty-nine per cent of respondents agreed with the criticisms set out in the 2015 consultation paper. The remaining respondents either disagreed, or did not express a view on this. Seventy per cent also agreed that Section 29 of the 2006 Act should be repealed. Of the remainder, 23 per cent did not know. Of those who disagreed, some suggested that the section only lacked guidance on the purpose of the award whilst another pointed out that the section was still relatively new. The Commission recommended repealing section 29.

3.13 In place of section 29, the Commission recommended a two stage process to establish cohabitants' rights on death. The first stage would determine whether or not the couple were cohabitants and, if so, the second stage would determine the quality of the relationship which would be reflected in the percentage of the estate which the survivor should inherit. For the first stage, the court would consider:

- a) whether they were members of the same household,
- b) the stability of the relationship,
- c) whether they had a sexual relationship,
- d) whether they had children together or had accepted children as children of the family, and
- e) whether they as a couple appeared to others to be married, in a civil partnership, or cohabitants of each other.

3.14 If the court determined that the person making the claim was a cohabitant, the second stage would be for the court to consider and fix the "appropriate percentage" that the cohabitant would be entitled to receive from the deceased cohabitant's estate based on the quality of the relationship. That percentage would reflect the extent to which the cohabitant should be treated in the same way as a spouse or civil partner of the deceased for this purpose. Once the percentage was determined that would be the proportion of a spouse/civil partner's rights that the cohabitant would receive. The Commission set out three factors to consider in this regard:

1. how long the couple have cohabitated;
2. the nature of their interdependence during that time; and
3. what contribution the surviving cohabitant made to their life together.

3.15 The court's discretion would be fixed solely on the nature and quality of the parties' relationship. The court would not be able to take account of, for example, the size of the estate or of the other beneficiaries. Once the appropriate percentage had been fixed, the cohabitant's entitlement could be calculated. That entitlement could never be more than the amount a surviving spouse or civil partner would have received.

3.16 We asked for views on the factors and the responses were mixed. There was concern that the scheme was too complex. An appropriate test or definition is a matter on which we will reflect further.

3.17 Rather than the two step process proposed by the Commission it may be possible for the court to determine the existence of a cohabiting relationship perhaps through a more focussed or distilled version of that recommended by the Commission:

- a) they as a couple appeared to others to be married, in a civil partnership, or cohabitants of each other; and
- b) they had a financially interdependent relationship to which they both contributed.

3.18 Thereafter, if the test is met, one option is to simply provide that in these circumstances a cohabitant's rights would be equivalent to those of a spouse or civil partner. There need be no court involvement in this aspect of the process. We are therefore seeking views on what a surviving cohabitant should receive from the other's estate.

3.19 In England and Wales, cohabitants also have well established rights in intestacy to apply to the court for financial provision. In its Report *Intestacy and Family Provision Claims on Death*³⁰, the Law Commission for England and Wales considered whether the time was right for cohabitants to have an automatic entitlement in intestacy.

3.20 In making its recommendations the Law Commission was of the view that the issue was likely to be highly contentious and therefore produced a separate piece of draft legislation to give these particular recommendations effect. To date, the provisions relating to cohabitants have not been progressed by the Government in England and Wales.

3.21 Whilst there was no overwhelming support for giving cohabitants automatic rights in intestacy, the Law Commission were nonetheless motivated by a concern to address the problem "... caused to a large extent by ignorance of the law – the widespread but mistaken belief that cohabitants acquire the status of "common law spouses" after a certain period of time. Real hardship is caused to those who only discover on the death of a partner that this is not the case."³¹

³⁰ Intestacy and Family Provision Claims on Death, (Law Com No. 331), 13 December 2011

³¹ Ibid Page 160.

3.22 The Law Commission adopted a simple definition of cohabitation which was that immediately before the death of the deceased, they were living in the same household as the deceased; and as the deceased's spouse. They did not consider that the definition required any further elaboration.

3.23 The Law Commission then opted for a 'duration' qualifier on the basis that it is a useful means of indicating a serious and committed relationship. In addition, they considered that the longer the relationship the more likely there was to be some financial interdependencies.

3.24 The Law Commission recommended that where a person had lived for the whole of the five year period immediately prior to the death of the deceased in the same household and as their cohabitant, they would be a qualifying cohabitant for the purposes of inheriting in intestacy. Where the deceased and the surviving cohabitant had a child together the period was reduced to two years.

3.25 In terms of what those inheritance rights should be, the Law Commission recommended that they should be the same as for a spouse.

Washington Model

3.26 We would be interested in views on whether, if a similar approach on intestate death to that of the operation of the matrimonial property regime in divorce were to be adopted for spouses and civil partners, it would be possible to extend the regime to cohabitants on intestacy.

Surviving spouse and cohabitant

3.27 Consideration would also need to be given to situations where the deceased is survived by both a cohabitant and a surviving spouse/civil partner.

3.28 Different jurisdictions deal with this situation differently. For example, the law in British Columbia provides that they would share the spousal share as they agree and if they cannot agree then it is for the courts to determine the appropriate share for each. A similar approach is taken in New South Wales and in New Zealand provision is made for equal sharing³².

3.29 For England and Wales, the Law Commission recommended that a person would only become a qualifying cohabitant in relation to a person who died intestate where the deceased was not married or in a civil partnership immediately before his or her death. Similarly, in Norway recognition of a cohabiting relationship is precluded where one of the partners is married or a civil partner or in another established and recognised cohabiting relationship.³³

3.30 In Scotland, under the current law, the rights of a spouse or civil partner are given priority over a cohabitant. The prior and legal rights of a spouse or civil partner

³² Comparative Succession Law Volume II, Intestate Succession ed. KGC Reid, MJ De Wall & R Zimmermann, Oxford University Press 2015.

³³ Ibid.

are firstly deducted from the deceased's intestate estate and any award to the cohabitant under section 29 can only be made out of the balance.

3.31 When the Commission considered their new scheme for cohabitants they recognised that their proposal, that where a deceased died and was survived only by a spouse or civil partner (and no issue) the surviving spouse or civil partner should inherit the entire estate, would leave no estate upon which a surviving cohabitant would have a claim. Both they and a large number of their consultees agreed that this outcome was "too harsh".³⁴

3.32 The solution offered by the Commission was predicated on their proposals set out at paragraphs 3.13 to 3.15 above. They proposed that the spouse/civil partner's share should be divided between the spouse or civil partner and the cohabitee. The division was to be based on the appropriate percentage (see paragraph 3.15) being applied to half of the spouse/civil partner's share. They illustrated their proposal with some examples, one of which is set out below:

A dies intestate. He is survived by his civil partner, B and his cohabitant, C. there are no children. The estate is worth £500,000. But for A's relationship with C, B would be entitled to the whole estate. The relevant amount is therefore £500,000. The surviving cohabitant, C, is entitled to the appropriate percentage of half the relevant amount i.e. £250,000. The appropriate percentage is 25% and C is therefore entitled to £62,500. B is entitled to the balance of the relevant amount i.e. £437,500.

3.33 Under these proposals a cohabitant could never inherit more than a spouse or civil partner but where the appropriate percentage was deemed to be 100% they would inherit the same amount.

3.34 If the law is reformed in such a way as to negate the need for a cohabitant to apply to the court for a share of the intestate estate of their partner there would be no court declared appropriate percentage. In these circumstances the concept of equal sharing, or sharing as agreed may be viable alternates.

3.35 Should the current system of application to the court be retained, in a modified form or otherwise, it is clear from responses to the 2015 consultation that the period for making an application should be extended to one year from the deceased's death and in these circumstances, the Scottish Government will legislate to extend the period from six months to 1 year.

³⁴ Report on Succession (Scot Law Com No 215) 2009

QUESTIONS

9. Do you agree that cohabitants should continue to have to apply to the courts in order to obtain any financial provision in intestacy?

Yes/No

Reasons

10. Do you agree that cohabitants should have an automatic entitlement to inherit in intestacy?

Yes/No

Reasons

11. Do you agree that a qualifying cohabitant should have the same rights as a spouse or civil partner in intestacy?

Yes/No

Reasons

12. Should a cohabitant inherit where there is a surviving spouse or civil partner?

Yes/No

Reasons

13. Should a surviving spouse or civil partner inherit where there is a surviving cohabitant?

Yes/No

Reasons

14. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split equally between them?

Yes/No

Reasons

15. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split between them as agreed and where the parties cannot agree that the Courts should determine the split?

Yes/No

Reasons

CHAPTER 4 – ADDITIONAL MATTERS

4.1 Temporary aliment

4.1.1 In circumstances where the deceased has owed the obligation of aliment to an eligible person, that person may be able to claim temporary aliment, payable by the deceased's executor. Such aliment is treated as an ordinary debt on the estate.

4.1.2 The Commission recommended that it "should be abolished on the basis that if the estate is clearly solvent, payments to account of the recipient's share of the estate are sufficient"³⁵.

4.1.3 In the 2015 consultation the Scottish Government also asked if the right at common law to claim temporary aliment should be abolished. Forty-three per cent agreed that it should be abolished, thirty-nine per cent disagreed, and 17 per cent said that they didn't know.

4.1.4 It was pointed out that it can deal with practical cash flow difficulties that a recipient of aliment from the deceased might experience immediately after death and before the settlement and distribution of the estate. It was proposed that it should only be available up to 6 months from the date of death.

4.1.5 The Scottish Government set out in its response to the 2015 consultation that on the basis that the right has some practical utility it would not be abolished but that instead further views would be taken on the setting of a time limit.

QUESTIONS

16. Do you agree or disagree that there should be a time limit for claims for temporary aliment?

Agree/Disagree

Reasons

17. If you agree, should that time limit be 6 months?

Yes/No

Reasons

18. If you do not agree, what time limit would you suggest?

Reasons

³⁵ Scottish Law Commission Report on Succession (Scot Law Com No 124) 1990

4.2 Equitable compensation

4.2.1. In the 2015 consultation, we asked if the doctrine of equitable compensation should be abolished. We set out that Section 13 of the Succession (Scotland) Act 1964 ("the 1964 Act"), in relation to wills executed after 10 September 1964, provides that a beneficiary cannot claim a share of the deceased's estate and legal rights at the same time unless there is express provision to the contrary. Prior to the 1964 Act coming into force, a beneficiary could claim legal rights without necessarily forfeiting their legacy. In such a situation, the principle of equitable compensation was applied so compensation could be due to beneficiaries disadvantaged by a claim for legal rights being paid out of the estate.

4.2.2. It had been suggested that the case of *Munro's Trustees v Munro* 1971 SLT 280 cast doubt on the interpretation of section 13 and that the effect is that there may be equitable compensation for other beneficiaries adversely affected by a claim for legal rights. Professor Gretton summarised as follows:

"The doctrine of equitable compensation provides that when a testamentary provision is forfeited in order to obtain legal rights, then that provision is to be applied to compensate those persons (if any) who have been prejudiced by the claiming of legal rights."³⁶

4.2.3. The effect is that executors or testamentary trustees are required to retain the forfeited testamentary provision and to accumulate the resulting income, to provide a fund for compensation. As such, it can only operate in certain situations – where a liferent terminates otherwise on the death of the liferenter and the fee does not vest at that point and in relation to annuities or similar arrangements.

4.2.4. Fifty per cent of those who responded agreed that it should be abolished, nine per cent disagreed and 41 per cent said that they didn't know. The doctrine was described as 'ill understood'. It was suggested it would benefit from further research. Those who disagreed suggested that the doctrine still served a purpose and should therefore not be abolished. Since the consultation, section 7 of the Succession (Scotland) Act 2016 now provides that where a liferent terminates early, the fee should vest at that point. This should have the effect of reducing the application of the doctrine of equitable compensation.

4.2.5 In light of the fact that whatever mischief arose from the continued existence of the doctrine has now been largely removed we do not intend to legislate in this area

QUESTION

19. Do you agree that the implementation of section 7 of the Succession (Scotland) Act 2016 has reduced the potential application of the doctrine of equitable compensation to the extent that no further change is required?

Yes/No

Reasons

³⁶ G L Gretton, "Vesting, Equitable Compensation and the Mysteries of the Shadow Liferent" 1988 SLT (News) 149, 151

4.3 Executors

4.3.1 An executor is responsible for ingathering the property of the deceased and then distributing it to the beneficiaries. If an executor is appointed in the will they are an *executor-nominate* but if there is no will the court may appoint an executor known as an *executor-dative*. The function of the executor is to represent the deceased and is fiduciary in nature – an ethical relationship of trust.

4.3.2 Currie on Confirmation³⁷ states that “if a person who has been convicted of killing the deceased has been appointed executor-nominate, he will be entitled to act, though it will often be more appropriate for him to resign office”. By way of example the case *Hunters Executors, Petitioners*³⁸ is cited where the deceased’s husband was convicted of her murder but the husband declined the office of trustee and executor nominate.

4.3.3 Since the Scottish Government last consulted on succession law reform, it has been made aware of a situation where a convicted murderer was named in their victim’s will as executor.. The case with the distress to the family has been well documented in the press and is also the subject of a Change.Org petition entitled ‘Remove/Prevent convicted Murderers from being Executors of the person they murdered [sic] estate’.

4.3.4 Whilst this is an unusual occurrence the Scottish Government in response to a Parliamentary Question about the matter undertook to consult on whether or not such a person should be able to act as executor in these circumstances. Whilst it is currently possible to apply to the court to have an executor removed in certain circumstances, this could delay the winding up of an estate and has a cost. Under Scots law a murderer cannot inherit from their victims’ estate.

4.3.5 The Scottish Government met with the family concerned in this case and they were able to describe the personal toll that the lack of closure on the matter of the will had taken on their health, wellbeing, family life and finances. They are very keen that others, in what is already an extremely tragic circumstance, should not have to undergo a similar experience. The family considered applying to the court to have the executor removed but the costs involved proved to be prohibitive. At the time of writing and some 3 years after the executor was convicted for the murder and 4 years after the murder itself, confirmation to the estate has not been completed.

4.3.6 In practical terms and given the likely time lapse between a date of death and any conviction it may be necessary, so that confirmation is not delayed, to disqualify someone who has been charged with the murder or culpable homicide of their benefactor. Consideration could be given to the appointment of a judicial factor, on an interim business or otherwise, until such time as a conviction is confirmed.

³⁷ Currie on Confirmation of Executors W.Green/Sweet & Maxwell

³⁸ *Hunters Executors, Petitioners* 1992 SLT 1141

QUESTIONS

20. Should a convicted murderer be allowed to be executor to their victim's estate?

Yes/No

Reasons

21. Should someone convicted of culpable homicide be allowed to be executor to their victim's estate?

Yes/No

Reasons

22. Should conviction automatically prevent/disqualify someone convicted of either murder or culpable homicide from acting as an executor on their victim's estate?

Yes/No

Reasons

23. Should a conviction for any type of crime which results in imprisonment automatically disqualify an executor from acting?

Yes/No

Reasons

24. Do you agree that someone who has been charged with the murder or culpable homicide of their benefactor should be disqualified from becoming the executor until the outcome of a trial determines whether or not the disqualified executor is guilty or innocent?

Yes/No

Reasons

25. If you agree, should consideration be given to the appointment of a judicial factor, on an interim business or otherwise, until such time as a conviction is confirmed?

Yes/No

Reasons

4.4 Non-disclosure of sensitive information in a grant of confirmation

4.4.1 Another issue which has been raised through correspondence with the Scottish Government is a concern that once confirmation on an estate has been granted to an executor, the Inventory of the estate which accompanied the application for confirmation is publicly available. The concern being that the inventory may contain information which may compromise the security of joint accounts which the survivor may wish to continue operating

4.4.2 A view was sought from the Scottish Courts and Tribunal Service (SCTS) and they confirmed that they had also been made aware of concerns being raised in relation to this issue and more generally about what information is publically available.

4.4.3 More specifically, the SCTS are aware of concerns being raised by some executors about the disclosure of personal details such as bank account numbers etc. in an inventory of the person's estate – whilst these personal details related to a deceased person (and any joint account holder), there is a concern that the release of such information into the public domain together with the executor's own details could potentially lead to a fraud being attempted.

4.4.4 The SCTS also considered that there is some concern from executors about any of their personal details being shared in the public domain too, and a potential issue about the extent to which personal bequests in wills should really be in the public domain and how that plays with privacy rights.

4.4.5 The Scottish Government shares the view of SCTS that these concerns would benefit from further consideration and consultation.

4.4.6 Taken from Currie on Confirmation of Executors³⁹ an example of the information which should be included in the Inventory (and therefore placed in the public domain following confirmation) is set out below.

³⁹ Currie on Confirmation of Executors – Op Cit.

Bank and building society accounts 10-159

If these are to be treated as estate in Scotland, they must be specified as being at a Scottish branch, for instance:

Item No.	Description	Price of shares	£
2.	<i>Barclays Bank plc, Aberdeen Branch</i>		
	Current account Number...		£x

Any interest accrued to the date of death should be shown (see paras 10-72—10-74). With the exception of an ISA (Individual Savings Account), where the interest accrued on the account to the date of death is quoted gross, income tax at the basic rate for the tax year in which the death occurred should be deducted:

Item No.	Description	Price of shares	£
3.	<i>Lloyds TSB plc, West End, Aberdeen Branch</i>		
	Deposit account Number ...	£10,000.00	
	Add: Interest accrued to date of death (gross)	£60.00	
	Less: Basic rate tax thereon at 20%	(£12.00)	£10,048.00

4.4.7 The contents of a will can of course be a rich seam of information for researchers, historians or genealogists - they provide information about family relationships and about how people lived. The Inventory sets out an overall valuation of the deceased person's possessions and can be very detailed with the value of every item listed. Such items might include furniture, clothes, jewellery, books, papers, livestock, farm equipment, cash and investments.

4.4.8 A paper in the Cambridge Law Journal⁴⁰ examined the legal rule enabling the contents of a will to be available for inspection by any member of the public, albeit in the context of the system of probate which operates in England and Wales. The author highlights the positive of such access as being the potential to alert beneficiaries to the existence of the estate. They conclude however that such access is 'disproportionately wide' when balanced against the 'legitimate ends served by disclosure'.

4.4.9 Whilst views will vary on whether public access to the level of detail contained in the Inventory is warranted and whether public access serves a purpose beyond a general social interest, there are legitimate concerns about whether the detail available around bank accounts which may still be open and the personal details of the executors could lead to concerns about fraudulent activity, or has the potential to compromise individuals.

⁴⁰ Joseph Jaconelli (2012). Wills as Public Documents – Privacy and Property Rights. The Cambridge Law Journal, 71 pp 147-171.

QUESTIONS

26. Are you aware of any difficulties which have been encountered as a consequence of public access to the details provided in an Inventory?

Yes/No

Reasons

27. Does the current process of making the Inventory (and all the attendant information contained therein including bank account details) publicly available have the potential to create difficulties for beneficiaries, executors, the deceased's family or other individuals?

Yes/No

Reasons

28. Do you agree that information which may compromise the security of joint accounts/assets for the survivor should be redacted?

Yes/No

Reasons

29. What sort of information contained in the Inventory should not be publicly available?

Reasons

30. Should it be possible to redact information from the inventory of an estate which may compromise the security of another individual's assets?

Yes/No

Reasons

31. Would delaying the public availability of inventories for a year provide the necessary protections for individuals for whom the security of their assets may be compromised?

Yes/No

Reasons

32. Is there another means of providing the necessary protections to individuals who may be compromised?

Yes/No

Reasons

33. Should personal details of a beneficiary in wills be in the public domain?

Yes/No

Reasons

34. Should it be possible to redact personal details of a beneficiary from a will?

Yes/No

Reasons

35. Would delaying the public availability of a will for a year address concerns about sharing personal details of a beneficiary?

Yes/No

Reasons

4.5 Small Estates Limit

4.5.1 The Confirmation to Small Estates (Scotland) Act 1979 allows an executor to obtain confirmation by simplified court procedures in cases where the value of an estate is below a specified level. Within these procedures, the sheriff clerk is required to prepare the inventory, the declaration and do all that is necessary for confirmation. There is normally no need for the applicant to obtain the services of a solicitor and where there is no will, the executor dative requirement to obtain a bond of caution (indemnity insurance) has been removed.

4.5.2 The amounts are updated periodically. The current limit of £36,000 was set in 2011 replacing the limit of £30,000 set in 2005. In 2011, the small estates limit was set by reference to the increase in average nominal income between 2004 and 2009 which took account of both the inflationary price increases, and also the changes in the standard of living from economic growth – allowing the relative lifestyle to be maintained across time. The limits were then rounded to the nearest £1k.

4.5.3 The exercise usually includes the uprating of intestacy prior rights limits. We do not plan to uprate the prior rights limits at present until we are clear how and when substantive succession reforms might be taken forward after this consultation but in the meantime we are minded to review the 'small estates' limits.

QUESTION

36. Do you agree that it would now be appropriate to review the 'small estates' limit?

Yes/No

Reasons

4.6 Executors, beneficiaries and timeshare contracts

4.6.1 From time to time the Scottish Government receives correspondence about the apparently perpetual nature of some timeshare contracts, or the absence of clauses in contracts covering the circumstances under which consumers might bring the agreement to an end.

4.6.2 We are aware that a significant number of these contracts were agreed before the coming into force of the Timeshare Act 1992 or the former Timeshare Directive which applied.

4.6.3 In 2011 new Timeshare, Holiday Products, Resale and Exchange Regulations 2010 came into force to give effect in the UK to a new European Directive. This provides improved protections for consumers buying and selling timeshares and other long-term "holiday club" memberships including provision for consumers to withdraw from the contract. This legislation can be found at http://www.legislation.gov.uk/ukxi/2010/2960/pdfs/uksi_20102960_en.pdf .

4.6.4 Whilst consumer issues are reserved to the UK Parliament, the law of succession is devolved.

4.6.5 In view of the concerns, we are seeking information about how frequently these types of timeshare contracts in perpetuity arise and create difficulties for executors administering the estates of which they form part. Beneficiaries can of course refuse to accept a bequest hence we assume that this is most likely to be an issue for executors. We would also be interested in what solutions are possible in these situations.

QUESTIONS

- 37. How many executry cases are you are aware of where there has been a difficulty created by a timeshare contract in perpetuity?**
- 38. What are the issues in these cases for beneficiaries?**
- 39. What are the issues in these cases for Executors?**
- 40. What are the solutions?**
- 41. Are there similar contracts in other areas which create difficulties for executors and beneficiaries?**

Responding to this consultation

Responding to this Consultation

We are inviting responses to this consultation **10 May 2019**.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/law-of-succession-2019>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **10 May 2019**.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send it together with your response to:

Succession Consultation
Private Law Team
Scottish Government
GW15
St Andrew's House
Edinburgh
EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

To find out how we handle your personal data, please see our privacy policy:

<https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at succession@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

ANNEX B

Respondent Information Form

Consultation on the Law of Succession

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

Publish response only (without name)

Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

CONSULTATION QUESTIONS

INTESTACY

1. Do you agree that the current approach to intestate succession needs to be reformed?

Yes/No

Reasons

2. Do you agree that the aim of any reforms should be to reflect outcomes which individuals and their families would generally expect?

Yes/No

Reasons

3. If you favour a different approach, would you prefer to model that change on the regime in Washington State or British Columbia or neither?

Washington State/British Columbia/ Neither

Reasons

4. Which of the Washington State or British Columbia models delivers outcomes which most closely reflect what modern Scottish families (with all their many permutations) might expect to happen on the death of a spouse/civil partner?

Washington State/British Columbia

Reasons

5. If the Washington State model ('community of acquests') is your preferred model, do you think that the Family Law Act (Scotland) 1985 financial provisions on divorce could be readily applied to intestate estates?

Yes/No

Reasons

6. If the British Columbia model (threshold) is your preferred model, what do you think should be the appropriate threshold levels in Scotland?

Comments

7. Should step-children have a right equivalent to that of biological or adopted children to inherit in intestacy?

Yes/No

Reasons

8. Should step-children be able to inherit in order to avoid a step parent's intestate estate passing to the Crown?

Yes/No

Reasons

COHABITANTS AND INTESTACY

9. Do you agree that cohabitants should continue to have to apply to the courts in order to obtain any financial provision in intestacy?

Yes/No

Reasons

10. Do you agree that cohabitants should have an automatic entitlement to inherit in intestacy?

Yes/No

Reasons

11. Do you agree that a qualifying cohabitant should have the same rights as a spouse or civil partner in intestacy?

Yes/No

Reasons

12. Should a cohabitant inherit where there is a surviving spouse or civil partner?

Yes/No

Reasons

13. Should a surviving spouse or civil partner inherit where there is a surviving cohabitant?

Yes/No

Reasons

14. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split equally between them?

Yes/No

Reasons

15. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split between them as agreed and where the parties cannot agree that the Courts should determine the split?

Yes/No

Reasons

ADDITIONAL MATTERS

Temporary Aliment

16. Do you agree or disagree that there should be a time limit for claims for temporary aliment?

Agree/Disagree

Reasons

17. If you agree, should that time limit be 6 months?

Yes/No

Reasons

18. If you do not agree, what time limit would you suggest?

Reasons

Equitable compensation

19. Do you agree that the implementation of section 7 of the Succession (Scotland) Act 2016 has reduced the potential application of the doctrine of equitable compensation to the extent that no further change is required?

Yes/No

Reasons

Executors

20. Should a convicted murderer be allowed to be executor to their victim's estate?

Yes/No

Reasons

21. Should someone convicted of culpable homicide be allowed to be executor to their victim's estate?

Yes/No

Reasons

22. Should conviction automatically prevent/disqualify someone convicted of either murder or culpable homicide from acting as an executor on their victim's estate?

Yes/No

Reasons

23. Should a conviction for any type of crime which results in imprisonment automatically disqualify an executor from acting?

Yes/No

Reasons

24. Do you agree that someone who has been charged with the murder or culpable homicide of their benefactor should be disqualified from becoming the executor until the outcome of a trial determines whether or not the disqualified executor is guilty or innocent?

Yes/No

Reasons

25. If you agree, should consideration be given to the appointment of a judicial factor, on an interim business or otherwise, until such time as a conviction is confirmed?

Yes/No

Reasons

Non-disclosure of sensitive information in a grant of confirmation

26. Are you aware of any difficulties which have been encountered as a consequence of public access to the details provided in an Inventory?

Yes/No

Reasons

27. Does the current process of making the Inventory (and all the attendant information contained therein including bank account details) publicly available have the potential to create difficulties for beneficiaries, executors, the deceased's family or other individuals?

Yes/No

Reasons

28. Do you agree that information which may compromise the security of joint accounts/assets for the survivor should be redacted?

Yes/No

Reasons

29. What sort of information contained in the Inventory should not be publicly available?

Reasons

30. Should it be possible to redact information from the inventory of an estate which may compromise the security of another individual's assets?

Yes/No

Reasons

31. Would delaying the public availability of inventories for a year provide the necessary protections for individuals for whom the security of their assets may be compromised?

Yes/No

Reasons

32. Is there another means of providing the necessary protections to individuals who may be compromised?

Yes/No

Reasons

33. Should personal details of a beneficiary in wills be in the public domain?

Yes/No

Reasons

34. Should it be possible to redact personal details of a beneficiary from a will?

Yes/No

Reasons

35. Would delaying the public availability of a will for a year address concerns about sharing personal details of a beneficiary?

Yes/No

Reasons

Small Estates Limit

36. Do you agree that it would now be appropriate to review the 'small estates' limit?

Yes/No

Reasons

Executors, beneficiaries and timeshare contracts

37. How many executry cases are you are aware of where there has been a difficulty created by a timeshare contract in perpetuity?

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Handling of personal data

The data protection legislation has recently changed in the UK with the introduction of the Data Protection Act 2018. It gives you greater powers to protect your own privacy, and places greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

The identity of the data controller and contact details of our Data Protection Officer

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at dpa@gov.scot.

Why we are collecting the data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

Legal basis for processing the data

Part 2 of the Data Protection Act provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest e.g. a consultation.

With whom we will be sharing the data

We will not be sharing personal data outside of the Scottish Government.

Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you;
- b) To ask us to stop using your data, but keep it on record;
- c) To have all or some of your data deleted or corrected, and
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

The Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.



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