THE ASSOCIATION OF HER MAJESTY'S DISTRICT JUDGES

Response to the Law Commission's Consultation Paper No 191: Intestacy and Family Provision Claims on Death

The Association of Her Majesty's District Judges represents all District Judges of the County Courts and District Registries of the High Court in England and Wales.

It is some 20 years since the intestacy rules were reviewed and considerably longer since the family provision legislation was looked at by the Law Commission. We understand that anecdotal evidence of hardship caused by the present rules and support for reform from the public, practitioners and academics has led to the present review.

We have particular experience in dealing with claims for financial provision pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ("the Act"). These claims involve members of the same family or different branches of a family at a time when that family is bereaved. Inevitably, such proceedings are, emotionally, highly-charged. They are always expensive, often involving a multiplicity of parties, the costs depleting what may be a very modest estate. The outcome may be difficult to predict. We, therefore, welcome any proposals which minimise the need for such claims and/or which clarify the likely outcome.

In considering our replies to the questions posed, we have refrained from commenting on matters of policy that are for Government to decide and have limited our consideration to those options and questions that might concern our jurisdiction as District Judges and about which we are qualified to express an opinion.

Against that background our replies to the consultation questions are as follows:

HUMAN RIGHTS

We invite consultees' views on the human rights implications of the provisional proposals made, and the issues discussed, in this Consultation Paper.

It is not appropriate for us to comment.

THE SURVIVING SPOUSE

We provisionally propose that, where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the spouse, whether or not there are other family members surviving.

We agree. Such a proposal is likely to lead to less claims being made under section 1(1)(a) of the Act.

Do consultees think that the intestacy rules should be reformed so as to provide that an entire intestate estate should pass to the surviving spouse, whether or not the deceased also leaves children and or other descendants?

By contrast, such a proposal is likely to lead to more claims under the Act. So, we disagree.

If not, which of the following models do consultees prefer:

(1) the current law, which gives the surviving spouse a statutory legacy and then a life interest in the balance (if any);

(2) a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any) and, if so, what share;

(3) a sharing structure that gives priority to the family home, either by providing that the surviving spouse inherit the deceased's share in the family home in any event, or by raising the statutory legacy but requiring the surviving spouse to account, against the legacy, for any share of the family home passing by survivorship?

Given the difficulties that arise through the creation of a life interest, we prefer option (2) and suggest a fixed share of one third of the balance. As we understand it, this achieves approximately the same result as under the present law, but without the complication of a life interest.

We provisionally propose that a revised and simplified statutory definition of personal chattels be provided, and that it should exclude items used by the deceased exclusively or principally for business purposes at the date of his or her death.

We agree.

We provisionally propose that the level of the statutory legacy (if it is retained) should be reviewed at lease every five years.

We agree. Again, it is likely to reduce the number of claims under the Act if the figures keep pace with economic factors.

We provisionally propose that the statutory legacy, if it is retained and if it is still required to be linked to house prices, should be raised in line with the average rate of increase, if any, of house prices across England and Wales on each occasion.

Agreed, for the reasons given above.

COHABITANTS

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

We agree. It reflects modern life, people's expectations and will reduce claims under the Act.

We provisionally propose that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased:
(1) was living with the deceased as a couple in a joint household; and
(2) was neither married to nor a civil partner of the deceased.

We agree, and this would accord with the definition proposed by the Law Commission in its paper "Cohabitation: The Financial Consequences of Relationship Breakdown" published on 31 July 2007.

We provisionally propose that, if the deceased and the surviving cohabitant are by law the parents of a child born before, during or following their cohabitation:
(1) there should be no minimum duration requirement for an entitlement on intestacy for the surviving cohabitant; and
(2) the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse.

We agree. It aids certainty and reduces the need for claims.

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

If it is thought appropriate that there should be a duration requirement (and see our comments below in this respect), we would agree with this proposal, save that an applicant should not fall foul of this provision by reason of any temporary absence e.g. a spell in hospital; looking after a relative etc.

We provisionally propose that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse, if the cohabitation had continued for at least 5 years before the death.

This is a matter of policy, although we would consider a period of three years to be more appropriate. Our tentative agreement is also on the basis that the suggested reform of the 1975 Act referred to later in this response is also implemented.

We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.

If such a provision is thought appropriate, we would agree this suggestion. We had initially considered that a sliding scale would be fairer but, on reflection, we think that would lead to further arguments as to when the cohabitation had commenced and, thereby, increase claims under the 1975 Act.

We provisionally propose that if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.

Subject to earlier suggestion that a more appropriate period might be three years, we agree.

We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.

We agree, subject to what we have said earlier.

We provisionally propose that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse.

We assume this proposal is made even if the couple has had a child together or if any duration requirement is met. We disagree. Proceedings would then be necessary under the 1975 Act by the cohabitant against a surviving spouse and possibly children of the deceased and the surviving cohabitant. Whilst this proposal has the advantage of simplicity, it comes at the expense of fairness. We would instead favour some mechanism of sharing the "spouse" benefit under the intestacy rules.

We invite consultees' views as to the approach to be taken where more than one cohabitant satisfies our proposed conditions for eligibility under the intestacy rules.

We suggest the entitlement is divided. In any event, such cases are likely to be rare.

We provisionally propose that if the surviving cohabitant and the deceased are by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of [the 1975 Act], provided that the cohabitation was continuing at the date of death.

We agree.

We invite consultees' views as to whether, where the couple had not had a child together, the current two-year qualifying period for the survivor to be entitled to apply under section1(1)(ba) of the 1975 Act should be retained.

We are not in favour of retaining this requirement. It is arbitrary and may result in injustice. The court, when deciding what financial provision it would be reasonable for a cohabitant to receive (we are working on the basis that the consultation's proposal as to the test to be satisfied by a cohabitant, to mirror that relating to a spouse, is implemented) will, in any event, take into account the length of the cohabitation to arrive at what is reasonable in all the circumstances.

We provisionally propose that, in all cases, in order to qualify for an award under the 1975 Act as a cohabitant the applicant must have been living as a couple in a joint household with the deceased immediately before the death.

We agree, subject to what we have said earlier about temporary absences.

We provisionally propose that the 1975 Act be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.

We agree. Dependency claims under the 1975 Act are the more problematical and expensive. This proposal will give effect to the more "holistic" approach the courts are already taking (see e.g. *Negus v Bahouse* [2008] EWCA Civ 1002).

CHILDREN

Do consultees think it appropriate to amend the 1975 Act so as to give a greater chance of success to adult children and, if so, how?

No. There is no justification for this and the number of claims under the 1975 Act would be likely to increase. The task of the court to determine what was "reasonable" in these circumstances would also be a difficult one.

Would consultees favour any change to the present method of per stirpes distribution of intestate estates, and in particular the introduction of per capita distribution at each generation?

This is a matter of policy.

We provisionally propose that trustees' powers of advancement (pursuant to section 32 of the Trustee Act 1925) should be extended (for the purposes only of the statutory trusts on intestacy) to the whole, rather than one half, of the share of a beneficiary who is not yet absolutely entitled under the statutory trusts.

This is not an issue on which it is appropriate for us to comment.

We provisionally propose that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.

This is a policy decision.

OTHER RELATIVES, DEPENDANTS AND *BONA VACANTIA*

We provisionally propose that a person who was treated by the deceased as his or her child should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party.

We agree. "Child of the family," which is what this is, is a well-known concept.

We provisionally propose that an assumption of responsibility by the deceased should not be a threshold requirement for an applicant to qualify to apply for family provision as a dependant under section 1(1)(e) of the 1975 Act, but should be regarded on an equal footing with other factors.

We agree and think it unlikely to add significantly to the number of 1975 Act claims.

We provisionally propose that it should no longer be a prerequisite to the success of a claim under the 1975 Act brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the claimant.

We agree. It would be helpful to overcome the difficulties caused by what precisely is meant by "substantial" and which can cause uncertainty and extra expense in proceedings.

We invite consultees' views as to whether the categories of applicant for family provision should be further widened to include other relatives, such as parents, descendants other than children, siblings, nephews and nieces and so on.

No. There is no justification and a widening of the categories will almost inevitably lead to an increase in the number of actions. Parents, for example, who were being financially supported are eligible to claim under section 1(1)(e) in any event.

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

No. It makes little sense.

Would consultees favour reform to the intestacy rules (and consequential amendments to the Non-Contentious Probate Rules) so that no distinction is drawn between full and half-siblings?

This is not a matter on which we feel able to comment.

We invite consultees' views as to whether there should be a presumption that administrators may distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.

This would avoid applications to the court but this is not, in our experience, a common problem.

We would like to hear the views of consultees, in particular those involved in the administration of estates, as to any practical problems which might arise as a result of a reform of section 18(2) of the Family Law Reform Act 1987.

We are not qualified to comment.

THE ADMINISTRATION OF ESTATES

We provisionally propose that the value of assets that can be administered without the need for a grant of representation be reviewed with a view to its being raised.

Although a policy issue, this would seem to be sensible.

We invite consultees' views as to whether the application of the self-dealing rule to administrators of intestate estates should be modified so that an appropriation should not be voidable by reason of the rule if it was at fair value.

This is not an issue on which it is appropriate for us to comment.

We provisionally propose that, if any beneficiary who would be entitled to take on intestacy survives the deceased but dies before the end of a period of 28 days beginning with the deceased's date of death, that beneficiary shall be treated as though he or she had not survived the deceased.

This would seem sensible.

We provisionally propose that no survivorship provision should apply where the effect of treating the beneficiary as though he or she had not survived the deceased would be that the estate passes as bona vacantia.

We agree.

We provisionally propose that it should not be a precondition to an application under the 1975 Act that the deceased died domiciled in England and Wales.

We agree.

We ask consultees whether it should be a precondition to an application under the 1975 Act that the deceased died habitually resident in England and Wales, or whether an application for family provision should be possible in any case where there is property comprised in the estate that is governed by English succession law. We also invite views on whether there should be any other requirement limiting the circumstances in which an application for family provision can be made.

We suggest an application should be possible where there is property in the estate that is governed by English property law. In those circumstances, it makes sense that a court of England and Wales deal with the matter.

We ask consultees whether the court should have discretion in an appropriate case to exercise its powers under section 9 of the 1975 Act even where the application for family provision was brought more than six months after the grant of representation.

Yes. This discretion should be retained.

We provisionally propose that the value of assets for the purposes of sections 8 and 9 of the 1975 Act should be their value at the date of the application, not at the date of death.

Yes, particularly because, in relation to claims made some time after the death, it may be problematical to value at the date of death.

We invite consultees' views on whether reform to enable an application for family provision to be issued in the absence of a grant of administration is necessary or desirable.

We consider this to be desirable especially where there is need and because others involved may, for their own motives and self-interest, deliberately delay in applying for a grant.

Would consultees favour reform of the 1975 Act to the effect that benefits from a pension fund, whether lump sum or periodical payments, could be the subject of family provision orders and. if so, what might they be?

Some provision analogous to pension sharing orders following divorce would be logical.

Do consultees foresee that legal or practical difficulties would result if payments from a pension fund could be the subject of family provision orders and, if so, what might they be?

A "beneficiary" who was relying on the fund and had made no provision for him or herself may be placed in difficulty.

QUANTIFYING IMPACT

We would welcome information and comments from consultees that would help us to assess the costs of administering intestate estates and particular issues which may add to costs and delay.

We are not qualified to comment.

We would welcome information and comments from consultees about the costs of administering life interests and trusts for under 18s that arise on intestacy.

We are not qualified to comment.

We would welcome information and comments from consultees about the likely effect of our provisional proposals on levels of litigation under the 1975 Act and any potential increase in other types of claim.

Subject to what we have said about cohabitants, we consider your proposals are likely to result in less litigation. If our comments are not taken on board, there may, for example, be an increase in applications pursuant to Schedule 1 to the Children Act 1989.

We would welcome information and comments from consultees about the costs of litigation under the 1975 Act.

We have no precise figures but our impression is that they are disproportionately costly, often substantially depleting the size of an estate.

We would welcome information and comments from consultees on the potential impact on practitioners and their clients of new legislation in this area.

We are not in a position to comment.

We would welcome information and comments from consultees on the impacts of intestacy on cohabitants and the potential impact of our provisional proposals on cohabitants and others.

We have nothing to add to what we have said earlier.

We would welcome information and comments from consultees on the impacts of the current law and of our provisional proposals on particular groups. In Particular, we are interested in comments on whether our provisional proposals will have any adverse or positive impact on the pursuit of equality in the areas of: age, gender, disability, race, religion or belief, sexual orientation or caring responsibilities.

We have no comment.

We would welcome information and comments from consultees on any other potential impacts of reform of (or failure to reform) the law of intestacy and family provision that we have not discussed.

We have nothing to add.

For and on behalf of the Association *22 February 2010*
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