



Consultation Paper: Succession Law Reform

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I. Foreword



When dealing with the death of a loved one, you should not have to worry about losing your rights to personal possessions, land, and even your place of residence. However, in practice today, the archaic system of succession in Scotland places many women and children at risk of such action if no will was left to distribute the deceased's estate appropriately.

In the 1980s and 1990s, we, the Scottish public, mobilized to demand an end to the "old" politics of Westminster—closed, unresponsive, and representative primarily of the interests of those who benefited most from the status quo. Thus, we demanded that the principles of openness, accountability, and equality of opportunity form the foundations of the new Scottish Parliament. However, the current framework of succession law—and its persistence over decades, even centuries—runs counter to these key principles.

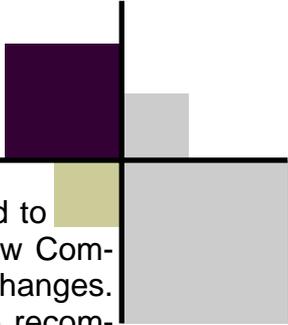
Under the existing law, when a person dies intestate (without a will), this person's spouse, civil partner, and/or children have certain legal rights to the deceased person's estate. However, the deceased person's estate is legally divided into "moveable" property (e.g., money, furnishings, farming apparatus) and "heritable" property (e.g., land and items fixed to the land). This arbitrary distinction—to be explored in greater detail later—determines the extent of a surviving spouse or child's inheritance, as the legal rights of the latter only extend to "moveable" property.

When a widow is denied ownership of any of the land that she and her husband occupied for decades, in effect she is deprived of her equal right to shared property. When large estates are never divided, and remain under the ownership of a single family across innumerable generations, the power of a few is consolidated over land which could belong to many more. This is a system of ownership that reflects neither the composition of 21st century Scotland, nor any regard for the principle of equality of opportunity.

Land reform has occurred in fits and starts in Scotland. First, Westminster abolished the principle of primogeniture in relation to intestate succession in 1964. Then, in 2000, the Scottish Parliament finally eliminated the system of feudal tenure.

This proposed legislation, which ultimately involves only a small change in the wording of the law on succession, is only the next logical step in this larger project of reforming the patterns of land ownership in Scotland. It does not call for a radical redistribution of land, but rather for the necessary redistribution of power over land.

In addition, the need for this specific legal change has been recognized for quite



some time. As early as 1951, the Mackintosh Committee recommended the end of legal distinctions between the sexes with regard to succession law. When the Succession (Scotland) Act 1964 failed to redress the moveable-heritable division, reports by the Scottish Law Commission in 1986 and 1990 noted this anomaly and recommended changes. Yet, surprisingly, the Scottish Ministers have failed to act on these recommendations. They have kept the Scottish people waiting for too long on this issue.

For these reasons, I believe that the legal distinction between heritable and moveable property must be removed. I am aware of opinions that this legal change should be considered after the Scottish Law Commission finishes its current programme (projected date: 2009). However, I feel that this is such an important issue, and it has been under consideration for such a long time, that it merits public and parliamentary consideration as soon as possible. While the Executive is considering whether to approach the issue of inheritance in the future, I have decided to take the initiative in advancing succession law reform and I hope that my proposal will be another step towards meaningful progress in land reform.

More specific details of my policy proposal are included later in this document. I would very much welcome your comments on any aspect of the proposed legislation. To help inform debate on the matters covered by this paper and in the interests of openness, the responses submitted on this consultation document will be made public. It will be assumed that responses can be made public unless the respondent indicates that his or her response is confidential. Confidential responses will nevertheless be included in any summary or statistical analysis, which does not identify individual responses. Please feel free to pass this consultation on to any other interested parties that you may be aware of. Any feedback will be welcome.

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Any responses must be received by 1st September 2006

2. Background

A. Intention of proposal

The intention of the proposal is to remove the distinction between heritable and moveable property in the calculation of legal rights on succession in Scotland. The current law provides that the legal rights of the surviving spouse, and any children, of the deceased person may only be claimed from the moveable estate of the deceased. This proposal affects both testate and intestate succession because legal rights apply in both cases.

B. Key terms and concepts

Property law

Property law is the law of things. The common law distinguishes between heritable and moveable property and this classification is significant from the point of view of the law of succession. Heritable things are, by their nature, immovable (e.g. land and items fixed to the land such as a house). By contrast, moveable property comprises anything capable of motion (e.g. a tractor that works on the land). The word heritable is used for historical reasons. It reflects the fact that, at common law, heritable property passed automatically to the deceased's heir-at-law (his nearest male relative) without having to pass via an executor. Moveable property comprised the rest of the estate and passed through the executor to the beneficiaries.

Succession law

The law of succession is concerned with the transfer of property, which belonged to a person now deceased, to a person now living. The law of succession must be general; it cannot prescribe every situation and therefore has to be capable of accommodating every size and complexity of estate. In order to be a beneficiary in a succession a person must survive the deceased person. For example a long deceased son cannot succeed to his recently deceased father's property.

It will be the net estate of the deceased that is distributed after death. All outstanding debts must be paid before any distribution to beneficiaries can take place. This includes funeral expenses, the expenses of administering the estate, and any inheritance tax (death duties) to be paid out of the deceased's estate. The first task of the executor is to assess the assets and debts of an estate. He must ensure the estate is solvent before any distribution to beneficiaries can take place.

There are two main types of succession: testate succession, which is where the deceased person makes a testamentary writing (a will), and intestate succession which occurs when a person dies without leaving a will to regulate the disposal of his property. Partial testacy can also occur where the will does not dispose of all of the property of the deceased person.

Intestate succession

Prior to 1964 the law of intestate succession provided that the heritable part of the deceased person's estate, i.e. any land and house, passed to the heir-at-law. The moveable property was distributed to the heirs *in mobilibus* (next of kin/other family members). This system, which stems from the principle of primogeniture,

was abolished by the Succession (Scotland) Act 1964 (the 1964 Act), though the distinction between heritable and moveable property remains important in certain circumstances.

Principle of primogeniture

The principle of primogeniture is inheritance by the oldest male descendent. This principle derives from the start of feudalism in Scotland and relates to the time of the monarchs when establishing the succession to the throne.

An example of this principle is where the oldest male descendant dies before his father, survived by his own son and brothers. It would be his son who would inherit the property on the death of the grandfather – not the remaining brothers. So, in practice, the inheritance would pass from the grandfather to his oldest son then on to the oldest son's, oldest son. In the worst case a distant male cousin of the deceased could inherit the estate over the spouse or children of the deceased.

C. Current law on succession

In cases of intestate succession, the current law entitles the surviving spouse to prior shares which deal mainly with moveable property. Since heritable property, such as buildings or land, is still distributed to the deceased person's children, siblings, or parents before the deceased's spouse, any land that a couple may have owned would most likely not be passed on to the surviving spouse. In the case of crofts, this law manifests itself in a similar fashion.

A crofter is entitled to bequeath the tenancy of his croft to one person. If there is no specific bequest of the croft, it is the duty of the executor to nominate a successor to the croft tenancy. The landlord in this case has no right to object to the new tenant. In the current Crofting Reform legislation this issue is drawn into scrutiny, as it calls for the surviving spouse or partner to become the formal tenant of the croft, as though the croft had been bequeathed to them.

However, for the purposes of this bill, it is advisable to leave crofting tenure for later consideration—until after the deliberations on crofting reform.

Mackintosh Committee Report 1951

This Committee's aim was to modernise the law of succession to take into account modern social circumstances and conditions. It also hoped to make succession fairer and provide for the surviving spouse who could, in the worst case scenario, be left homeless and penniless if her husband died. The overarching view of the Committee was that when a man died without leaving a will the law should try and distribute his estate, as much as possible in the manner he would most have liked if he indeed had made a will. The Committee recommended that:

- the rule of primogeniture be abolished
- the differentiation between the sexes in succession be removed
- all property be treated according to the same rules regardless of its nature
- the position of the surviving spouse be improved¹

1. *Report of the Committee of Inquiry on the Law of Succession in Scotland* (Cmd 81440 (1951))

Succession (Scotland) Act 1964

This Act came into force on 10 September 1964 and implemented in statute most of the recommendations of the Mackintosh report. The 1964 Act was radical in that it introduced the concept of prior rights for the surviving spouse. These rights would take precedence over other legal rights where the deceased was intestate, or where there is partial intestacy (in which case the prior rights would be claimed from the intestate part of the estate only).

Prior rights

Prior rights apply only where a person dies intestate, or partially intestate, and confer on the spouse a right to certain parts of the deceased's heritable and moveable property. The only heritable property affected by prior rights is the dwelling house that the surviving spouse occupied with her spouse before he died. However the surviving spouse is not guaranteed the property; she may instead receive a cash sum if the value of the property exceeds a certain amount. All other heritable property i.e. farm outbuildings or land will constitute part of the deceased's free estate and is dealt with in accordance with the rules set out in section 2 of the 1964 Act. This contains a list of beneficiaries, with the nearest relatives of the deceased, such as children, at the top. This list broadly replicates the pre-existing common law (save that the principle of primogeniture is abolished).

Sections 8 and 9 of the 1964 Act provide for the prior rights of the surviving spouse when a person dies intestate. These rights are prior rights in the dwelling house, prior rights in the furniture and plenishings in the dwelling house and a prior right to a financial sum. The current amount that the spouse is entitled to is prescribed by regulation.² A basic interpretation of section 8(1) provides that the spouse will be entitled to the dwelling house if its value does not exceed £300,000. If the value of the house exceeds £300,000 then the surviving spouse is entitled to a fixed sum of £300,000.³

Prior rights also exist in relation to the furniture and plenishings of the dwelling house that the surviving spouse was resident in at the time of the death of her spouse. Section 8(3) provides that the surviving spouse is entitled to all the furnishings and plenishings if their value does not exceed £24,000 or, if the value does exceed £24,000, such an amount of the furnishings that amount to £24,000.⁴

The surviving spouse is also entitled to a financial sum which is provided for in section 9 of the 1964 Act. Section 9(1) provides that when a person dies intestate, their surviving spouse is entitled to the first £42,000 out of the estate if there are surviving children or to the first £75,000 if there are no surviving children.⁵

If the surviving spouse is entitled to a legacy out of the estate then the financial

2. The Prior Rights of Surviving Spouse (Scotland) Order 1999 SI 1999 No. 445 (s.29).

3. Scottish Executive, *Rights of Succession: A brief guide to the Succession (Scotland) Act 1964: Revised 2005*. Last revised 05-12-05. Accessed online at <http://www.scotland.gov.uk/Publications/2005/12/05115128/51287>.

4. Ibid.

5. Ibid.

sum he or she receives under section 9 is reduced by the amount of that legacy, unless that legacy is renounced.

Legal rights

Legal rights are different from prior rights as they apply whether a deceased person dies testate or intestate. However, legal rights only apply to moveable property. These rights are described as protection for the benefit of the surviving spouse and children. If the person dies intestate then the legal rights will be calculated after the prior rights have been calculated and settled. If a person dies leaving a will it will be up to the spouse and children to claim their legal rights if they have not been provided for in the will, or have been in their view insufficiently provided for. If legal rights are claimed any other provision in a will in favour of the spouse or children making the claim is forfeited. Alternatively legal rights can be discharged. For example, the spouse or children may be left more in a will than they would have been entitled to by claiming their legal rights and, in those circumstances, legal rights will not be claimed.

Section 10(2) of the 1964 Act provides that after the prior rights of the spouse have been calculated and deducted from the net intestate estate, the legal rights of others to the remaining moveable property can be calculated and distributed. It may be that after the prior rights of the spouse are satisfied there is little or nothing of the moveable property left.

Legal rights are *jus relictii*, *jus relictiae* or legitim. *Jus relictii* is the legal right of the widower to one-half or one-third of his deceased wife's moveable estate. *Jus relictiae* is the legal right of the widow to one-half or one-third of her deceased husband's estate. Legitim is the claim of the children to one-third or one-half of the moveable estate.

When a person dies, survived by a spouse *and* children, the spouse has a legal right to one-third of the moveable property and the children also have a legal right to one-third of that property (divided equally between them if more than one child). The final third is known as the "dead's part" and the deceased can choose who this goes to as it forms part of his free estate.

If there is no will then the rest of the moveable estate, after satisfaction of prior rights and legal rights is the dead's part (the free estate) and is distributed in accordance with section 2 of the 1964 Act.

When a person dies and is survived only by a spouse or only by children then that spouse or those children will have a legal right to one-half of the deceased person's moveable property, the other half being the dead's part.

Succession to the free estate

After satisfying any claims for prior and legal rights the remainder of the net intestate estate, taking heritables and moveables together, devolves in accordance with section 2 of the 1964 Act. It specifies, in the following order of preference, those people entitled to succeed to the remainder of the estate:

1. Children take the whole
2. Either or both parents and siblings – half to parent(s) and half to siblings
3. Siblings take the whole
4. Either or both parents take the whole
5. Husband or wife or civil partner – surviving spouse or civil partner takes the whole
6. Uncles or aunts (on either parent's side) take the whole
7. Grandparent(s) (on either side) take the whole
8. Siblings of any grandparents take the whole
9. Ancestors of intestate remoter than grandparents (on either side) generation by generation successively take the whole, but if no ancestors survive in any generation their siblings come before ancestors of the next more remote generation
10. The Crown takes the whole⁶

Legal rights and heritable property

One of the main criticisms of current succession law is that legal rights may only be claimed against, and calculated by reference to, moveable property. Section 10(2) of the 1964 Act makes it clear that legal rights shall be calculated out of the net moveable estate. In the case of intestate succession, the calculation of legal rights may only be made after the prior rights of the spouse have been satisfied. Therefore the spouse or children of the deceased have no right to claim a share of the heritable property as part of their legal rights under the 1964 Act.

D. Comparisons with other countries

I. USA

Although varying slightly between states, American property succession law is based firmly in “testamentary freedom”—the ability to will ownership of various assets and property to another individual or individuals. However, in the case that no will is provided, intestate law demands that the closest living relative(s) receive control over the property. In the majority of cases, this refers to the spouse.

In most states, the act of marriage divides property equally between partners. This means that, after the death of one partner, the remaining partner simply receives the deceased's half of the marital property—giving the surviving partner possession of 100% of their shared assets. After the spouse, the term “closest” (as in, “closest living relative”) refers to the legal chain of successors that follows:

1. The spouse receives control over all of the assets
2. These assets will then be divided among any children after the death of the surviving spouse. If there are no children, and no spouse, then...
3. Property goes to the parents of the deceased. If no parents...
4. Siblings of the deceased. If no siblings...
5. Remaining relatives of the deceased. If no relatives...
6. The state receives control⁷

6. List reproduced from Scottish Executive, *Rights of Succession: A brief guide to the Succession (Scotland) Act 1964: Revised 2005*.

7. Gerry Beyer, “The Basics of Texas Intestate Succession Law,” 2005. Accessed online at http://www.professorbeyer.com/Articles/Intestacy_Texas_Basics.htm.

II. Canada

The laws of each province are distinct with respect to the division of property in cases of intestacy. Most provinces designate a “spouse’s share”—a portion of the estate which automatically passes to the surviving spouse—which leaves remaining family members empty-handed unless the value of the estate exceeds the spouse’s share. The “spouse’s share” varies from \$40,000 in Alberta to \$200,000 in Ontario. If any children or other relatives remain, they receive the remainder of the estate after the “spouse’s share” according to a line of succession which parallels that of the American system.⁸

III. England

If the deceased is survived by a spouse and children, the spouse receives a statutory legacy of £125,000, with interest at 6% per year, payable from the date of the deceased’s death until the legacy is paid; the intestate’s “personal chattels” (“articles of household or personal use or ornament,” but not money or shares); and a life interest in half of the net estate. The children receive the other half of the net estate, “plus the ‘remainder’ in the spouse’s life interest.” If, on the other hand, the deceased is survived by a spouse but no children, the spouse receives a statutory legacy of £200,000 (with interest); the personal chattels; and half of the residue (the other half going to parents or siblings). If the deceased had no spouse, the estate devolves according to a list similar to that in the U.S.

The matrimonial home, if owned jointly, will pass to the surviving spouse. If owned by the deceased, the spouse must appeal to the administrators of the estate (generally the next of kin) to receive the house. The Law Reform (Succession) Act 1995 also allowed cohabitants to claim “reasonable financial provision.” As in Scotland, the English Law Commission’s recommendation in 1989 that the entire estate should pass to the spouse was not adopted.⁹

IV. Germany

German law regards the estate of the deceased as a whole, to be passed on as a singular unit to one or several heirs to take charge of the estate. The spouse is then entitled to claim up to one-quarter of the estate if there are surviving children, one-half of the estate if the deceased was survived by siblings or parents (but no children), or all of the estate if there are no remaining blood relatives.¹⁰

V. France

In France, if one dies intestate, any children or grandchildren will receive all of the deceased’s assets, with the surviving spouse given a choice between taking an *usufruit* (a life interest in the estate, including the right to use the property and

8. Professional Referrals.ca, “If You Die Without a Will - Rules of Intestate Succession in Canada.” 2005. Accessed online at <http://www.professionalreferrals.ca/article-1219.html>.

9. Andrew Borkowski, “Succession” (London, University of London Press, 2004). Accessed online at www.londonexternal.ac.uk/current_students/programme_resources/laws/subject_guides/succession/succ_ch1to4.pdf.

10. Germany Info, “German Law of Inheritance: Intestate Succession,” 2006. Accessed online at http://www.germany.info/relaunch/info/consular_services/otherconsularservices/intestat.html.

take any income that is generated by it) in the whole of the estate, or the absolute ownership of one-quarter of the estate. However, at the request of the *héritiers réservataires* (protected heirs – usually the deceased’s children) or the surviving spouse, the *usufruit* can be converted to a *rente viagère* (a rent or annuity paid for the remainder of the spouse’s lifetime). If there are no surviving descendants, but there are surviving ascendants, the latter will be entitled to their *reserve*, with the surviving spouse receiving the remainder of the estate. If there are no surviving descendants or ascendants, the surviving spouse receives the whole estate.¹⁰ Clearly, surviving relatives (especially descendants) are generally in a stronger position than the spouse, although the spouse is still relatively well-protected.

Although Scotland has a similar definition of “closest relative” to that of North America and England, in practice its laws of succession place other obstacles between surviving family members and their rightful inheritance. Unique to Scotland is the concept of prior and legal rights, which break up and categorize which property is legally transferable, and to whom it can be assigned.

E. Recent legal reports and summaries of findings

Scottish Law Commission Consultation 1986

Three consultative memoranda were published by the Scottish Law Commission (SLC) in 1986 dealing with succession law. Only one is directly relevant to this proposal, *Intestate Succession and Legal Rights* (memo 69).¹² Memo 69 concluded that one of the criticisms of legal rights was that they only applied to moveable property. It provided three consequences of the current law:

- It makes legal rights very complex as the net moveable estate has to be calculated after prior rights have been allocated;
- It makes successors’ shares in the estate dependent on the nature of the property – the more heritable property the lesser share and vice versa;
- Not including heritable property reduces the protection given to the spouse and children. They therefore have no legal right to land or buildings¹³

Memo 69 asks if there is any reason why spouses’ legal rights should be restricted to moveable property.¹⁴ In addition it asks if there is any reason why legitime should be restricted to moveable property.¹⁵

Scottish Law Commission Report 1990

Following on from the three consultation documents in 1986, the SLC published a report on succession. It recommends a complete overhaul of the law with regards to intestate succession and legal rights and specific changes to the law relating to testate succession.¹⁶ For the purposes of this paper I have concentrated on the recommendations in the report relating to heritable property. The report also contains a draft Bill – the draft Succession (Scotland) Bill.

11. Prettys Solicitors, “An Introductory Guide to French Succession Law and French Inheritance Tax” (Suffolk, Prettys Solicitors, 2005). Accessed online at http://www.prettys.co.uk/personal_law/french_property/french_law1.shtml.

12. Consultative Memoranda No. 69 on *Intestate Succession and Legal Rights*, September 1986.

13. *Ibid*, para. 2.4

14. *Ibid*, para. 4.27

15. *Ibid*, para. 4.47

16. Scottish Law Commission *Report on Succession* No.124, 1990

At paragraph 3.5 of the report the removal of the distinction between heritable and moveable property is discussed. The report says that almost all the respondents to memo 69 supported this proposal. The Scottish Landowners' Federation (SLF) and the National Farmers Union (NFU) however made strong representations against this proposal.

The SLF thought that there was a very grave danger in giving statutory shares to spouses and children in land and holdings. They pointed out that many landowners preferred to leave their property to one member of their family to preserve the holding. In addition, if divided, holdings may be less viable. The SLF would like landowners to be able to choose who their land is left to when they die. The SLF however supported limited financial provision for the surviving spouse. The NFU backed this position saying that allowing children to have a statutory share may split up farms.

The SLC took on board these points. However the report recommends that the distinction between heritable and moveable property should be removed.¹⁷ To accommodate the concerns of the SLF and the NFU the SLC looked at various options. The option that the SLC favoured was to recommend that if legal shares (the new term for legal rights in the draft Bill) are to be paid out of agricultural property, provision should be made for them to be paid out by instalments over a period of not more than ten years.¹⁸

Clause 11 of the draft Bill provides for the payment of legal share out of agricultural property to be made to the spouse or the children of the deceased if they claim it. That payment would have to be made in no more than 10 equal instalments.

Since the report was published in 1990 there have been no further developments in this area of law.

Scottish Executive's Survey on Attitudes Towards Succession Law 2005

It has been widely recognized that since 1964, lifestyles and family units have changed in Scotland. Families have become more complex, with remarriages, step-children, and co-habitation comprising some of the leading trends. Therefore, as it is prudent to consistently revise family law, it is likewise prudent to reform the laws of succession to reflect these changing social structures.

In 2005, the Scottish Executive Legal Studies Research Team commissioned a survey on behalf of the SLC, with the principal aim of examining Scottish adults' attitudes towards succession and succession law. The final report focused on three areas of succession: intestacy, protection from disinheritance, and cohabitation. For the purposes of this document, it is necessary only to look at views on intestacy.

The survey found that in the event of intestacy, 88% of respondents (out of a sampling of 1,000 residents) supported the right of the surviving spouse to be the

17. Recommendation 7.

18. Recommendation 13.

sole beneficiary of an estate when there are no children to consider. As for when children are involved, respondents expressed support for the children receiving a portion of the estate, yet concluded that the primary beneficiary should continue to be the spouse.¹⁹ This finding reflects the legal anomaly that the legal “parent-child” relationship has no correlation to the actual social relationship between parent and child; one cannot “divorce” a child as they could a spouse, to symbolize their will to dissolve legal ties. Thus, if a divorced man dies intestate, his divorce can lead one to the conclusion that he did not want his ex-wife to inherit his property; yet even if he had a tumultuous relationship with his son, this is not immediately apparent from the man’s legal standing.

However, even in cases where the deceased explicitly disinherited the spouse or children, the report found strong support for the excluded party or parties to be entitled to receive some portion of the estate. Similarly with co-habitants, 81% of respondents agreed that the surviving partner be entitled to a share in the estate. All of these findings combined suggest that the Scottish public believe that the purpose of succession should be to support the immediate family members of the deceased.²⁰ Straying from past concepts of primogeniture and conveying all assets onto one person—namely, the eldest male heir—it is clear that the distribution of an estate should take into account *all* remaining family members, whether they be related by blood, common law, or legal marriage.

Family Law (Scotland) Bill 2005

Many of the findings of the Scottish Executive’s Survey were incorporated into the law with the passage of the Family Law (Scotland) Bill on 15 December 2005. It clarifies a number of legal matters regarding the rights of property ownership of co-habiting partners. Significantly, the Bill gives co-habiting partners—of the same or of the opposite sex—the right to apply to the court for financial provision out of his or her deceased partner’s intestate estate. In addition, if a co-habiting relationship ends other than by death, a co-habiting partner can apply to the court for financial provision to be made by his or her partner.²¹

3. Proposal

The proposal calls for the law on succession to be amended to extend the same legal rights to heritable property as apply to moveable property. This key change affects each of the following arrangements:

- Where a person dies intestate survived by a spouse, but no children, the spouse should inherit the whole of the estate
- If the deceased had no spouse, but left children, then the children should wholly inherit
- If the deceased left a spouse and children, than his estate should be split

19. Scottish Executive, “Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey.” Accessible online at <http://www.scotland.gov.uk/publications/2005/07/18151328/13400>.

20. Ibid.

21. SPICe Briefing, “Family Law (Scotland) Bill.” Accessible online at <http://www.scottish.parliament.uk/business/bills/36-familyLaw/index.htm>.

in an agreed proportion between the two groups

- If legal shares are to be paid out on agricultural property, provisions could be made for them to be paid out over no more than 10 years

A. Who will be affected by the bill?

The spouse/civil partner and the children of any individual who dies intestate will be affected by this bill. It will determine the extent of their legal rights to inherit land as well as any “moveable” goods. If the abolition of the heritable/moveable distinction also applies to testate succession, any individual writing a will may also be affected by the bill, in that they will be unable to disinherit potential heirs of their land.

B. Issues arising from the proposed legislation

The bill may affect “legal rights” and international succession law:

Legal rights: As mentioned above, “legal rights” are exercisable by spouses and/or children of a deceased person even in cases of testate succession, in order to replace—not supplement—disinheritance or unfavourable testamentary provision. If the heritable/moveable distinction were abolished, an explicitly disinherited spouse might, for instance, be entitled to claim a portion of the deceased’s land against the deceased’s written wishes? If so, this could provide debatable ground for some to appeal to the ECHR provisions protecting an individual’s right to dispose of property as that individual so wishes.

International succession law: Under the present laws of international succession, if a person dies intestate in one EU state, but owns property in another state, the following provision is made for this person’s property: this person’s moveable property is distributed to their heirs according to the laws of the state where the deceased last resided (*lex fori*), while this person’s heritable property is distributed according to the laws of the state where said property is located (*lex situs*). Could the distinction between heritable and moveable property be abolished only with regard to intestate succession in Scotland, or would it necessarily touch these other realms of law? The EU is currently debating whether to harmonize laws on international succession and divorce; depending on its decision, the heritable/moveable distinction may become more or less important in Scotland.

4. Questions

Name and Address of Individual or Organisation Responding:



1. What will the financial effects of this change be and who will be most affected ?

2. Will this Bill have any effect on equal opportunities?

3. Should all property be covered by the bill? If not, why not?

4. Do you agree with the Scottish Law Commission recommendation that payments out of agricultural property be paid in instalments over 10 years? If not, why not?





5. Are there any reasons why the proposed change should not apply to all estates, whether testate or intestate?

5. Glossary of Terms

Dead's part—see “free estate.”

Feudal tenure—the system of landownership in Scotland until 2004; under feudalism, the rights enjoyed by any landowner are determined by the nature of his or her title, which is derived from his or her place on a social hierarchy stretching from landless “tenants” to the crown and, ultimately, God. All “landownership” was thus conditional rather than absolute.

Free estate—that portion of the deceased person's estate which remains after distributing legal and prior rights among heirs; also known as the “dead's part.”

Intestate succession—distribution of a deceased person's assets without reference to any will left by the deceased person (the deceased person failed to write a proper will before dying).

Legal rights—legal rights apply whether an individual dies testate or intestate, and they guarantee any heirs protection against disinheritance or unfavourable provision in the deceased person's will. Heirs may invoke their legal rights to a set portion of the deceased person's estate in order to replace—not to supplement—the inheritance they receive according to the deceased person's will.

Primogeniture—the convention that on dying, a deceased person's property would be passed down to his or her first-born (generally male) child.

Prior rights—prior rights apply only when an individual dies intestate, and they guarantee the deceased's spouse/civil partner certain rights to the marital home and communal property which are exercisable before the claims of other heirs.

Succession—passing on one's possessions to children, spouses, or friends upon one's death.

Succession law—the law dealing with the transfer of property which belonged to a person now deceased, to a person who is living.

Testate succession—distribution of a deceased person's assets according to a will the deceased person left before their death.

6. Suggested Reading

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Victorian Law Reform Commission Succession Laws: Report. Executive summary. Need for reform. 1 This report contains 78 recommendations to reform the law and related practices that affect what happens to the assets of Victorians after they die. The need for reform has long been recognised. More than 20 years ago, the Standing Committee of Attorneys-General initiated a project to develop uniform succession law and practice across Australia. The Northern Territory law is rarely used. The Commission's consultations identified concerns that, compared to the existing scheme in Victoria, the National Committee's alternative is not necessarily more accessible or able to accommodate traditional law. The Law Commission is a statutory independent body that keeps the law of England and Wales under review and recommends reform where it is needed. Pre-consultation: Could include approaching interest groups and specialists, producing scoping and issues papers, finalising terms of project. Consultation: Likely to include consultation events and paper, making provisional proposals for comment. Policy development: Will include analysis of consultation responses. Could include further issues papers and consultation on draft Bill. Reported: Usually recommendations for law reform but can be advice to government, scoping report or other recommendations. This project is complete. PDF | Scotland has been trying to reform the law of succession for over thirty years. Despite a number of reports and consultations by the Scottish Law Commission, it remains deadlocked. Unless the most recent consultation process defies all expectation, we appear to be deadlocked. The issue that has proved most difficult is the division of an intestate estate between a spouse or civil partner and children of the deceased, a difficulty aggravated where there is competition between a first family and a second family. The Law Commission of India has released its consultation paper on "Reform of Family Law" based on the request of the Union Ministry of Law and Justice, which had asked the commission to examine matters in relation to the Uniform Civil Code. Contents. Key Points from the Consultation Paper. The commission has blindly suggested the extension of succession act to agricultural property without taking into consideration the parliamentary committee report to give the states a free hand to determine the applicability of the Act to agricultural lands since Agricultural property is a state subject. The consultation paper neither answers the government's specific reference on the uniform civil code nor makes any unprecedented recommendation for legal reform.