



**Law
Commission**
Reforming the law

Intestacy and Family Provision Claims on Death

Executive Summary

Report Law Com No 331 (Summary)
14 December 2011

THE LAW COMMISSION

**INTESTACY AND FAMILY PROVISION
CLAIMS ON DEATH: FINAL REPORT**

EXECUTIVE SUMMARY

INTRODUCTION

1. There is little that the law can do directly to ease the trauma of bereavement for those who are left behind but it is important to have clear legal rules governing dealings with the property of a person who has died. That is particularly the case where there is no will; the law must step in to determine the distribution of money and other assets among the surviving family members and dependants.
2. The Law Commission's examination of the law of intestacy and family provision claims on death has found many instances where the current law is outdated, confusing or places unnecessary obstacles in the way of those with a valid claim to share in a deceased person's assets. We recommend a package of reforms that would modify the current legal rules to reflect modern social expectations and to remove arbitrary or unduly technical aspects, while leaving intact the fundamental structure of the English law of "succession" to property on death.

BACKGROUND

3. English law permits anyone aged 18 or over to make a will stating who should inherit his or her property. Research consistently shows strong support for this freedom, yet it also shows that up to two thirds of people do not have a will and every year many thousands die without leaving one ("intestate"). In other cases, a will may be invalid or fail to include all of the person's property. Any property left on death that is not covered by a valid will must be distributed among family members according to the "intestacy rules", which date back to 1925.
4. Other legislation enables certain family members and dependants to go to court to challenge the results that flow from the strict application of the intestacy rules or the distribution of property under the terms of a will. This is often referred to as a claim for "family provision" under the Inheritance (Provision for Family and Dependants) Act 1975 (which we refer to below as "the 1975 Act").
5. The Law Commission has reviewed both of these areas of the law – the intestacy rules and the family provision regime – in the light of the social context in which the law operates. We have taken account of a wide range of evidence, including a large-scale survey of public attitudes to inheritance (which was funded by the Nuffield Foundation to assist this project). We have considered the law in other countries, in particular those that share our legal traditions, and have also benefitted from new information about the amount and type of property that people leave on death (referred to as a deceased person's "estate").

6. In October 2009, we set out our initial findings and provisional proposals for reform in a consultation paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191. Further questions were asked in a supplementary consultation exercise in summer 2011. We received almost 150 consultation responses from members of the public, lawyers and other professionals and organisations – including law firms, charities and professional bodies representing many hundreds of members. Our final report (Law Com No 331) sets out and explains our reform recommendations as well as presenting two draft Bills that would implement those recommendations.
7. The consultation paper was wide-ranging and discussed a number of issues. In some areas we asked open questions, and in others we made provisional proposals, but in all cases we have kept an open mind as to whether reform is needed at all. All of these issues – and other points raised on consultation – are considered in the full report, including those where we have concluded that reform is not appropriate. This summary focuses on the most significant issues on which we do recommend reform. For full details please refer to the full report, which can be downloaded (together with other documents relevant to the project) from the project page of the Law Commission’s website at www.lawcom.gov.uk.

SPOUSES

8. Our principal recommendations relate to the entitlement of a surviving spouse on intestacy, by which we mean the husband, wife or civil partner of a person who has died leaving assets not covered by a valid will.
9. Our consultation and the findings of public attitude research have confirmed our provisional view that the surviving spouse should remain the primary beneficiary in all such cases and should only be required to share the estate with any children or other direct descendants of the deceased, and only where the estate exceeds a certain value.
10. We therefore recommend that, where the deceased leaves a spouse but no children or other descendants (grandchildren, great-grandchildren and so on), the spouse should take the whole estate. This would affect a relatively small number of high value intestate estates, where the current law requires sharing with the deceased’s parents or siblings. It would bring the law into line with public expectations in those cases.
11. More complex is the question of a spouse’s entitlement where the deceased was also survived by children or other descendants (who may or may not also be the children of the surviving spouse). Current law gives a surviving spouse priority – he or she is entitled to the deceased’s “personal chattels” (which includes most household items) and the first £250,000 in the estate (known as a “statutory legacy”). In practice, fewer than one in ten intestate estates exceed this sum but in those cases the law only gives the surviving spouse a “life interest” in half of anything that is left (this means that the property is held on trust, and the spouse is allowed to use the property and its income until his or her own death).
12. Consultees strongly approved our provisional view that it is inappropriate for the law to impose a trust arrangement in these circumstances. But there was little enthusiasm for more fundamental restructuring of a spouse’s entitlement, for example to give special status to the family home.

13. We therefore recommend that a surviving spouse should take the deceased's personal chattels and a statutory legacy (as under the current law) but then receive half of any balance of the estate outright. That would simplify the law and eliminate the expense and complication of the life interest structure. We also recommend provisions for the regular updating of the statutory legacy and for determining the rate of interest payable on it.
14. We have rejected reform that would give a surviving spouse less if the deceased had children from another relationship. We have also decided against significant reforms to the rules governing the deceased's personal chattels but we do recommend a new definition to replace the antiquated statutory wording.

ADOPTED CHILDREN

15. One small but significant reform that we recommend would ensure that children who are adopted after the death of a parent do not lose their entitlement to share in that parent's estate because of the adoption. This avoids a legal trap which we have found can be easily overlooked by those involved in the adoption process.

UNMARRIED FATHERS

16. Where a person whose mother and father were not married to each other dies intestate, the administrators of the estate are directed to presume that the deceased's father has also died (section 18(2) of the Family Law Reform Act 1987).
17. This little-known legal fiction plays a useful role where the identity of the father is unknown but is in our view more difficult to justify in other cases. We therefore recommend that the presumption should not apply where the father is named on the deceased's birth certificate or equivalent official birth record.

SMALL ESTATES

18. Certain assets can be dealt with after a person's death without a grant of representation (the official authorisation to administer a deceased person's estate), generally where their value does not exceed £5,000.
19. Consultees expressed dissatisfaction with this value limit, the range of assets to which this exemption applies and the protection for asset holders. The issues raised go beyond the scope of this project so we have recommended that the "small payments" system be examined further by Government.

CHILDREN TREATED BY THE DECEASED AS A CHILD OF THE FAMILY

20. A person who was treated by the deceased as a child of his or her family is permitted to claim family provision, but only if that treatment was in the context of a marriage or civil partnership.
21. This seemed inappropriate to us and to many of our consultees: it is the quality of the relationship between the deceased and the child that should determine eligibility to claim against the deceased's estate. We therefore recommend that the definition of a child of the family should no longer be limited to situations where the deceased was married or in a civil partnership.

DEPENDANTS

22. The 1975 Act also permits claims by dependants, defined as those who were being maintained by the deceased immediately before the death. Case law has placed obstacles in the way of such claims that do not appear to have been intended by those who drafted the Act. The courts have held that an applicant must show that the deceased assumed responsibility for the maintenance, and also that he or she contributed more to the relationship, in terms of financial value, than did the applicant.
23. We recommend reforms to remove both of these hurdles; the court would still take these matters into account but they would not be sufficient to prevent a deserving applicant from making a successful claim.

FAMILY AND DEPENDANTS OF A PERSON “DOMICILED” ABROAD

24. Family provision claims have never been possible unless the deceased died “domiciled” in England and Wales. Domicile is a difficult legal concept that can often become a significant preliminary issue in litigation. This precondition can prevent family members and dependants from accessing the family provision jurisdiction even if the administration of some or all of the deceased’s estate is otherwise governed by the law of this country.
25. We therefore recommend reform: the “domicile precondition” should be retained but an alternative precondition introduced so that a family provision claim can be made where the deceased left assets governed by English succession law.

TRUSTEES’ POWERS OF MAINTENANCE AND ADVANCEMENT

26. The intestacy rules establish continuing trusts to safeguard property where those who are to inherit are under 18. The trustees of assets held under these trusts are usually the close family members who are responsible for administering the estate. The general law confers powers and imposes obligations that are common to the trustees of all trusts, whether arising on intestacy or created under a will or while the original property owner is alive.
27. Our original consultation asked whether reform of the law in this area is needed to assist the trustees of trusts which arise on intestacy. There was strong support for this but consultees suggested that reform should extend to all trustees. A supplementary consultation paper was therefore published in May 2011 and our final recommendations include reforms to the management powers of all trustees under sections 31 and 32 of the Trustee Act 1925.

THE DRAFT INHERITANCE AND TRUSTEES’ POWERS BILL

28. Our final report contains a draft Bill, the Inheritance and Trustees’ Powers Bill, to give effect to all of the recommendations discussed above and a number of more technical recommendations which are of interest mainly to professionals involved in the administration of estates. The Bill can be found at Appendix A of the report and is accompanied by explanatory notes.

COHABITANTS

29. Where a couple live together without getting married or forming a civil partnership and one of them dies, the survivor has no automatic right under the current intestacy rules to inherit any part of his or her partner's estate. This is the case no matter how long they lived together and even if they had children together. We use the term "cohabitant" to distinguish couples who live together in intimate relationships from relatives who share a home or other home sharers who live together for convenience but not as a couple. Research suggests that there are already more than 2.3 million such couples in the UK and this is set to rise to almost four million by 2033. Many do not realise that, if one of the couple dies without leaving a will, the other will not automatically inherit.
30. Views differ on how far the law should provide for cohabitants. But the question of whether a cohabitant should inherit on his or her partner's death is very different from the treatment of cohabitants on separation. The law already recognises the claims of cohabitants in the context of inheritance; a survivor who lived with the deceased for a qualifying period can go to court to claim family provision from his or her partner's estate under the 1975 Act. We have had to consider whether this is the most appropriate approach, given the emotional and financial cost of court action, not just for the cohabitant, but for the wider family of the deceased, and (in terms of court resources) for the state.
31. We have carefully considered the arguments for and against reform and concluded that, in some circumstances, a surviving cohabitant should share in a partner's estate without having to go to court. This would have effect only where the deceased was not married or in a civil partnership. Our recommendations therefore maintain the primacy of marriage and civil partnership under the intestacy rules. This reform would not apply to all unmarried couples: to qualify, the cohabitation must have lasted for five years or – if the couple had a child who was living in the same household at the date of death – for two years.
32. We recognise that some would wish for cohabitants to qualify on intestacy after a shorter period (such as two years) or without any qualifying period where there is a child. We have recommended more stringent qualification requirements to respond to the concern that automatic inheritance rights should only be given to those in a settled relationship. We also recommend reform to permit a claim for family provision by the survivor of a shorter relationship who had a child with the deceased. This would replace, for these couples, the current requirement that the relationship must have lasted for two years before the death, whether or not the couple had a child together.
33. These recommendations reflect the growing prevalence and public acceptance of cohabitation. They would also bring English law into line with the law in other Commonwealth jurisdictions. It would still be open to cohabitants to make a will naming other beneficiaries (subject to making reasonable provision for those family members and dependants who are protected by the existing family provision legislation). We have nevertheless kept the discussion of cohabitants separate in the final report and our recommendations are embodied in a separate draft Bill, the Inheritance (Cohabitants) Bill (which can be found at Appendix B of the report, with explanatory notes). We have taken this approach to ensure that the important debate around our recommendations for cohabitants can take place separately from discussion of our other recommendations.