The Law Commission

Working Paper No. 108

Distribution on Intestacy

HER MAJESTY'S STATIONERY OFFICE

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

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This working paper, completed on 10 June 1988, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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SUMMARY

In this working paper, the Law Commission examines the distribution of property on intestacy (i.e. where someone has died without leaving a will), with a view to ascertaining whether there is a need for reform and what the reforms might be. The paper sets out a range of possibilities and concludes that, while the Commission does not yet have any firm opinions, reform should probably be in the direction of giving more to the surviving spouse. The purpose of the paper is to obtain a wide variety of reasoned views from members of the public as well as from lawyers.

The Commission would like to express its gratitude to Professor J.G. Miller of the University of East Anglia who has greatly assisted in the preparation of this paper by giving the Commission the benefit of his knowledge and understanding of this subject. The views expressed are, of course, the Commission's own.

DISTRIBUTION ON INTESTACY

PART I

INTRODUCTION

1.1 In our first programme, we undertook to look at family inheritance.[1] We reported on discretionary provision in 1974.[2] Prompted by discussions with the Lord Chancellor's Department at the time of the recent uprating of the statutory legacy, we have now undertaken a review of the law of intestacy, with particular reference to the share of the deceased's property received by a surviving spouse. It is thought that in some cases the present law results in a distribution which is unfair and leads to hardship. How property should be distributed when there is no valid will, is, we think, a topic on which many people, both lawyers and non-lawyers, will wish to express their views. This paper sets out the problems and options for reform in some detail.[3] We are also carrying out a survey of opinions on the topic. We hope that a wide range of people will respond to this paper, and that these responses, together

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1. First programme, item X (1965), Law Com. No. 1.

2. Second Report on Family Property: Family Provision on Death (1974), Law Com. No. 61. The Bill attached to that report became the Inheritance (Provision for Family and Dependants) Act 1975.

3. This paper contains little reference to comparative material. A proper comparison of intestacy laws would have to examine as well the differing property laws of the countries chosen including their matrimonial property laws, patterns of property ownership, and demographic data. We decided that such a study would have made this paper so unwieldy as to limit its use as a consultation paper.

with the survey, will enable us to formulate a satisfactory policy for reform.

1.2 Although the particular problem that we were asked to look at was the share received by the surviving spouse, we have found it necessary to look at the whole question of distribution of an intestate's estate, both who should receive a share, and what the size of that share should be. This paper does not examine the law relating to the procedure of administering the estate.

1.3 The law of intestacy affects many people every year. It is difficult to estimate with any accuracy the number of intestacies. Every year, in England and Wales, about 600,000 people die.[4] Letters of administration are taken out in about 65,000 cases, and grants of probate (which means that there must have been a will) in 165,000.[5] As can be seen from these figures, in many cases no formal steps are taken to settle the estate. In many of these cases the estate will be small[6] or the deceased may have owned property that passes outside a will or intestacy,[7] in others there may be informal distribution among the family. It is impossible to know how many of the estates where there is neither grant of probate nor letters of administration taken out involve intestacy. It seems likely that people

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4. Annual Abstract of Statistics, 1987, C.S.O.

5. Judicial Statistics, Annual Report, 1986.

6. Personal property of less than £5,000 can be distributed without a grant, Administration of Estates (Small Payments) Act 1965, and Administration of Estates (Small Payments) (Increase of Limit) Order 1984 (S.I. 1984/539).

7. See para. 2.12.

with little property will be less likely to make a will. Therefore we believe that it is probably fair to say that about half the population die intestate. In the next Part, we describe briefly who at present gets the property of somebody who dies intestate.[8]

8. Provided he was domiciled in England or Wales (not Scotland, where the law is very different - see Scottish Law Commission Consultative Memorandum No. 69 (1986)), or he had immovable property in England or Wales. For a fuller account of choice of law issues in intestacy, see C.H. Sherrin and R.C. Bonehill, The Law and Practice of Intestate Succession (1987), p.307 et seq., 11th ed., Dicey and Morris on The Conflict of Laws 11th ed., (1987), p.1005 et. seq., and Cheshire and North's Private International Law, 11th ed., (1987), pp. 834 and 848.

PART II

THE PRESENT LAW

2.1 The present law is to be found in the Administration of Estates Act 1925 (as amended) and in the Family Provision (Intestate Succession) Order 1987 (S.I. 1987/799). When a person dies without leaving a valid will, his or her property is held by the personal representatives[1] on trust for sale.[2] With the exception of certain items[3] they have to sell the property, use the money to pay funeral and other expenses, inheritance tax and debts, and then distribute what is left according to the scheme set out in the Administration of Estates Act 1925.[4]

Where there is a surviving spouse

2.2 If there is a surviving spouse,[5] then he or she receives all the deceased's personal chattels, which are

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1. Usually a close relative, or relatives, see r.22 of the Non-Contentious Probate Rules 1987 (S.I. 1987/2024). The rules give the following order of priority: spouse, children of the deceased or issue of a child who died before the deceased and other relatives in the same order as those entitled to take on intestacy (see para. 2.4). If none of these take out letters of administration, a creditor may apply. If no-one has a beneficial interest, the Treasury Solicitor may be entitled to apply if he claims bona vacantia (see para. 2.5).

2. Administration of Estates Act 1925, s. 33.

3. Personal chattels and reversionary interests.

4. Administration of Estates Act 1925, s. 46.

5. By spouse is meant someone who was validly married

defined in the Act[6] to exclude articles used for business purposes, money and securities, but to include cars, heirlooms and valuable collections. What else the surviving spouse receives (i.e. other than personal chattels) depends upon what other relatives survive. If there are no issue,[7] parents, brothers or sisters of the whole blood (or issue of any of them), the surviving spouse takes the whole estate. If there are any issue, the surviving spouse takes the first £75,000,[8] and a life interest in half the rest of the deceased's property. The remainder of the estate goes to the issue.[9] If there are no issue, but the deceased is survived by a parent, a brother or sister, or their issue, the spouse receives the

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5. Continued
to the deceased at the time of his death. A separated spouse can take unless there was a decree of judicial separation in force at the time of death, Matrimonial Causes Act 1973, s.18(2). However, non-cohabitation orders made by magistrates' courts, which were abolished by the Domestic Proceedings and Magistrates' Courts Act 1978, did not have this effect, see Matrimonial Causes Act 1973, s.18(3).

6. S.55(1)(x).

7. This includes minor and adult children and their children and grandchildren.

8. Family Provision (Intestate Succession) Order 1987 (S.I. 1987/799). Plus interest at a specified rate from the date of death, see Administration of Justice Act (1977), s.28(1) and Intestate Succession (Interest and Capitalisation) Order 1977 (Amendment) Order 1983 (S.I. 1983/1374).

9. It is held on the statutory trusts, Administration of Estates Act 1925, ss. 46 and 47(1)(i). Issue includes minor and adult children and their children and grandchildren. Illegitimate children are included, see Family Law Reform Act 1987, and adopted children are treated as the children of their adoptive parents, not their natural parents, see Adoption Act 1976, s.39. Issue take per stirpes, i.e. if a child has already died, his children take the share he would have received.

first £125,000,[10] and half the rest absolutely. The other half is divided between the parents, or brothers and sisters. If both parents and brothers and sisters survive, the parents take the part of the estate that does not go to the spouse. If neither parent survives, then brothers and sisters of the whole blood take the part of the estate that does not go to the spouse.[11]

Where there is no surviving spouse but issue

2.3 If there is no surviving spouse, then, if there are issue, they take the whole estate. The interests of the issue are held upon the statutory trusts,[12] i.e. conditionally upon attaining majority or marrying below that age, and equally. If a child of the deceased has died before him, issue of that child take the share the child would have received. In deciding what each child receives, account must be taken of property given to them by the deceased during his or her lifetime, either by way of advancement or on the occasion of marriage, unless the deceased had a contrary intention.[13] There is some uncertainty as to the precise extent of this particular rule, and it is discussed further in Part III.

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10. Plus interest, see n.8 above.

11. Note that if there is a surviving spouse, brothers and sisters of the half blood do not have any entitlement.

12. Administration of Estates Act 1925, s.47 and see n.9 above.

13. Administration of Estates Act 1925, s.47(1)(iii).

Where there is neither spouse nor issue

2.4 If the deceased is not survived by spouse or by issue, the estate passes to relatives in the following order:

(i) parents; failing these,

(ii) brothers and sisters of the whole blood; failing these,

(iii) brothers and sisters of the half blood; failing these,

(iv) grandparents; failing these,

(v) uncles and aunts of the whole blood; failing these,

(vi) uncles and aunts of the half blood.

The issue of any of these relatives can take in their place, so that, for example, if the deceased has left a nephew and a grandparent, the nephew will take, being issue of a brother or sister, and not the grandparent.

Where there are no surviving relatives

2.5 Where there are no relatives within any of these categories, the Crown[14] takes the estate as bona vacantia.

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14. Or the Duchy of Lancaster, or the Duke of Cornwall, Administration of Estates Act 1925, s.46(1)(vi).

However under section 46 of the Act, the Crown has a discretion to provide for any person dependent on the intestate, whether related to him or not.[15]

The matrimonial home

2.6 The way in which the estate is distributed where there is a surviving spouse does not give the surviving spouse any absolute entitlement to the matrimonial home. In many cases, the surviving spouse will take the matrimonial home regardless of the law of intestacy because it will have been owned by the spouses as joint tenants, and will pass to the survivor by the right of survivorship. Where this does not happen, the spouse has a right to have the matrimonial home appropriated to him or her towards any absolute interest in the estate. This right can be exercised if the spouse's entitlement is less than or greater than the value of the matrimonial home. If the spouse's entitlement is less than the value of the matrimonial home, the right of appropriation can only be exercised if the spouse is able to make up the difference from his or her own resources. The right can only be exercised in respect of a dwelling house in which the survivor was resident at the time of the intestate's death. In certain circumstances, the right can only be exercised by order of the court.[16]

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15. This discretion may in some cases overlap with the Inheritance (Provision for Family and Dependants) Act 1975, but it is understood that in such cases the discretion is still often exercised, in order to save costs.

16. Intestates' Estates Act 1952, Sched. 2:

    2. Where -

    (a) the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; or

Life interests

2.7 Where a spouse and issue survive, as has been described, the spouse receives a lump sum and a life interest in half the residue. The spouse is entitled, within twelve months of the date when letters of administration are taken out, to elect to have the life interest replaced by a capital sum.[17] The personal representatives can pay the capital sum out of the residuary estate, or raise it on the security of the residuary estate.[18] The precise method of calculating the capital value is laid down by statutory instrument,[19] and is not set out here.

Partial intestacy

2.8 If the deceased left a will, but the will effectively disposes of only part of the property, the

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16. Continued

(b) the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; or

(c) the whole or part of the dwelling-house was at the time of the intestate's death used as a hotel or lodging house; or

(d) a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes,

the right conferred by paragraph 1 of this Schedule shall not be exercisable unless the court, on being satisfied that the exercise of that right is not likely to diminish the value of assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders.

17. Administration of Estates Act 1925, s.47A.

18. But not on the personal chattels.

19. Intestate Succession (Interest and Capitalisation) Order 1977 (S.I. 1977/1491).

remainder of the property will be dealt with as though he were intestate.[20] In ascertaining how much the beneficiaries of the property not disposed of by will should receive, the property received under the will must sometimes be taken into account. Thus the lump sum due to a spouse on intestacy must be reduced by the value of the property (except for personal chattels specifically bequeathed) which he or she receives under the will.[21] If the amount exceeds £75,000 or £125,000 (as appropriate), no lump sum is payable. However, no matter how much a spouse receives under the will, the spouse receives the life or absolute interest in half the remaining intestate estate without any reduction. Children and remoter issue (but not other relatives) have their shares reduced by the amount received under the will. The precise way in which the rules apply to children and their issue are the cause of some difficulties which are discussed further below.[22]

Deeds of arrangement

2.9 The distribution of property on intestacy can be altered in two ways: by a deed of family arrangement, or by application to the court under the Inheritance (Provision for Family and Dependants) Act 1975. It may also, of course, be altered informally by agreement, but such informal alterations could have undesirable tax

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20. Administration of Estates Act 1925, s. 49.

21. Administration of Estates Act 1925, s. 49(1)(aa), added by Intestates' Estates Act 1952, because of the increased provision made for the spouse by way of the statutory legacy.

22. See para. 3.20.

consequences. If the distribution is altered by deed of arrangement within two years of the death, provided that the effect of the rearrangement is to benefit other members of the family, the Inland Revenue treats the rearrangement as though it were the original distribution, and thus it does not give rise to a double liability to inheritance tax.[23]

The Inheritance (Provision for Family and Dependants) Act 1975

2.10 If the rules of intestacy fail to make satisfactory provision, certain people can apply to the court under the Inheritance (Provision for Family and Dependants) Act 1975,[24] and the court has a discretionary power to award them a share (or a bigger share) of the estate. Those who can apply are:

(a) the spouse of the deceased;

(b) a former spouse of the deceased;

(c) a child of the deceased;

(d) any person (not being a child of the deceased) who was treated by the deceased as a child of the family;

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23. Inheritance Tax Act 1984, s.142. Similarly, such an arrangement is not a disposal for capital gains tax purposes, Capital Gains Tax Act 1979, s.49(6).

24. The result of a Law Commission Report, Family Provision on Death (1974), Law Com. No. 61.

(e) any other person who immediately before the death of the deceased was being maintained, either wholly or partly by the deceased.

2.11 The standard of provision for spouses is more generous than that for other applicants. A spouse is entitled to reasonable provision, whether or not that provision is required for his or her maintenance. Any other applicant is only entitled to such financial provision as it would be reasonable to receive for his or her maintenance. The Act has given rise to a fair number of reported cases, some of which relate to claims on intestacy.[25] This is not the place for a detailed discussion of the Act.[26] In the next Part we discuss the way in which the aspects of the 1975 Act may cause some problems for the reform of the law of intestacy.

Property passing outside the intestacy rules

2.12 It would be unrealistic to describe the present law of intestacy without also describing how the surviving members of the family may benefit from property received from the intestate in other ways. We have already mentioned that the surviving spouse is likely to receive the matrimonial home because the majority of owner-occupied matrimonial homes are jointly owned and pass to the survivor by right of survivorship. If the home is rented, then the

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25. For example, Re Coventry (decd.) [1980] Ch. 461, Re Kirby (decd.) (1982) 3 F.L.R. 249, Kourkey v. Lusher (1983) 4 F.L.R. 65, Harrington v. Gill [1983] F.L.R. 265, Re Callaghan (decd.) [1985] Fam. 1, Re Leach (decd.) [1986] Ch. 226.

26. For which, see R.D. Oughton, Tyler's Family Provision 2nd ed., (1984).

spouse may have a right to succeed to the deceased's tenancy.[27] There may also be substantial benefits to be paid out of pension funds or as a result of life insurance policies. Thus in many cases the surviving spouse will receive more from these sources than from the distribution of the estate. This should be borne in mind in reviewing what the spouse should receive on intestacy.

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27. If a secure tenant, under Housing Act 1985, s.87; if a protected tenant, under Rent Act 1977, s.2 and Sched. 1, Part 1, but see Housing Bill, cl.37 which, while altering the law relating to the succession rights of other members of the family, does not affect the spouse's right of succession.

PART III

PROBLEMS WITH THE PRESENT LAW

3.1 In this Part we set out what we see as the problems, both legal and social, caused by the present law. It may be that we have failed to identify all the problems, or identified as problems matters which are not problems. If this is so, we hope that people will not hesitate to tell us. In considering aspects of the present law which are thought to cause problems, it has to be borne in mind that any system which distributes fixed shares on intestacy will produce results in some individual cases which are unfortunate. It can only cope well with the ordinary case, and it is in the context of seeing how it works in such a case that the need for reform must be assessed.

Spouse's share

The statutory legacy

3.2 A fundamental problem with the present system whereby the surviving spouse receives a lump sum (the statutory legacy) from the estate is determining the amount of the statutory legacy. In order to do this, it is necessary to decide what it is for. Should it be fixed at a level sufficient, in the majority of cases, to ensure that the spouse receives the matrimonial home? Yet the majority of matrimonial homes are jointly owned anyway and pass to the survivor by right of survivorship. Given the large disparity between regional house prices, any figure sufficiently large for the South of England will be

excessive on this criterion for other regions.[1] Agreeing the basis for assessing the sum does not put an end to the problems. It will require regular uprating, or index-linking. If the former approach is adopted, how often should this happen; if the latter, what index is appropriate? Further, having a fixed sum which is increased from time to time creates an arbitrary cut-off point at the date of the uprating, which may look unfair. Thus someone whose spouse died leaving issue on 31 May 1987 will receive £40,000 and a life interest in half the rest, whilst someone whose spouse died a day later leaving issue will receive the first £75,000 and a life interest in half the rest.

The life interest

3.3 Where the deceased is survived by issue as well as by a spouse, the spouse receives a life interest in half the residue. This means that he or she is entitled only to the income and not to the capital. There is provision for the capitalisation of the life interest, and we would be interested to hear how often this provision is used. Indeed, we do wonder if it has become more usual to capitalise the life interest than not to do so. If the life interest is not capitalised, the property must be held on trust which may mean that additional expense is involved in administering the trust. Further, we suspect that many people do not understand what is meant by a life interest. They may think that the spouse can use what he or she needs, and that what is left goes to the issue. The distinction

1. Average house prices varied from £29,160 in Yorkshire and Humberside to £80,100 in Greater London in 1987 according to figures produced by the Nationwide Anglia Building Society. These figures may be influenced by the particular lending pattern of that lender, but the regional disparity is not in doubt.

between capital and income may also cause difficulties. It is clear that giving a life interest to a spouse was a very common form of will at the time when the present intestacy rules were devised. However, we suspect that that is no longer the case, and that it is now far more common for a spouse to be given an absolute interest.

3.4 Further, there may now be fiscal disadvantages if the spouse receives a life interest rather than an absolute interest. In either case there is no charge to inheritance tax on the first spouse's death because transfers to a spouse are exempt. On the death of the second spouse, tax is charged on the value of the whole interest, as though the spouse were an absolute owner.[2] If the spouse had an absolute interest, he or she could mitigate the likely inheritance tax liability by making transfers of property during his or her lifetime.[3]

3.5 Apart from the fiscal considerations, maintaining a reasonable income for the surviving spouse may prove difficult. The property may only be invested as permitted by the Trustee Investments Act 1961, or in land, if the deceased's estate included land. At times of high inflation, the capital may become eroded. Inability to use the capital may cause other problems. The spouse may need access to the capital to purchase, for example, sheltered accommodation.

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2. This is because the spouse's life interest is an "interest in possession".

3. Provided he or she survives for more than seven years, such transfers will not be subject to inheritance tax.

3.6 It should not be thought that we cannot see any merit in life interests. They do preserve property for the issue of the deceased, and, particularly where the deceased married twice and there are issue of the first marriage, they do ensure that the issue of the first marriage ultimately receive some or all of their parent's estate.[4]

The matrimonial home

3.7 Although in the majority of cases, the surviving spouse will receive the matrimonial home, either because the spouses were beneficial joint owners, or because the surviving spouse's share on intestacy is sufficient, we are aware that there are a significant number of cases where the spouse does not receive the matrimonial home. The recent uprating in the lump sum should reduce the number of these cases for a while, but it is inherent in the present system that this problem will continue to exist, because there is nothing in our present system to ensure that the spouse will receive the matrimonial home. Of course it may be that where the matrimonial home is very valuable, it is undesirable for the spouse to receive the entire interest, but we suspect that, in the vast majority of cases, most people would want the surviving spouse to receive the matrimonial home. On the other hand, given that most spouses receive the matrimonial home anyway through the right of survivorship, to set the lump sum sufficiently high in order to ensure that, in the majority of those cases where the right of survivorship does not apply, the surviving spouse will receive the matrimonial home, will result in the spouse in those cases where the right of survivorship does apply receiving what is arguably an unfairly large share of the estate.

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4. See further para. 3.12.

3.8 There are some specific difficulties in the operation of the present right of appropriation of the matrimonial home. The amount of the lump sum received is determined by reference to the date of the intestate's death, but where the matrimonial home is to be appropriated, the home is valued by reference to the date of appropriation.[5] In times of rapidly rising house prices this difference can obviously give rise to difficulty. Further, if letters of administration are not taken out for several years, the value of the statutory legacy is that pertaining at the date of death, and even if that exceeded the value of the house at the date of death, the passage of time may well mean that the surviving spouse can no longer retain the house. This is a problem that is particularly likely to occur when the surviving spouse, who is primarily entitled to letters of administration,[6] is living in the house and sees no reason to take any steps to administer the estate until he or she decides to sell the house.

3.9 The definition of matrimonial home might be a source of difficulty, although we have no evidence of this. Is it possible for the spouses to have two matrimonial homes? As a matter of general principle, it seems likely that they can,[7] and presumably the right of appropriation would apply to both. The surviving spouse must be residing in the property in which the intestate had an interest at the date of the intestate's death, and so a spouse who had not been living in the home, perhaps because he or she had

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5. Re Collins (decd.), Robinson v. Collins [1975] 1 W.L.R. 309.

6. See Part II, n. 1.

7. It is accepted in the context of Rent Act protection that a person may have two homes, see, e.g. Hampstead Way Investments v. Lewis-Weare [1985] 1 W.L.R. 164.

been in hospital for an extended period or because she had been forced to leave through domestic violence, might be excluded. Moreover, in certain circumstances the right to appropriate cannot be exercised without the consent of the court, for example where the dwelling house is held with agricultural land which is also comprised in the residuary estate, or where part of the dwelling house was used as an hotel or for purposes other than domestic ones. Whilst we are not aware of any decisions on the application of these provisions, it is clear that difficulties could occur if the intestate used part of the home as an office, in connection with his or her business.

Personal chattels

3.10 Although we are not aware of any significant difficulty with the definition of personal chattels,[8] it is clear that the very wide definition could give rise to problems. For example it includes heirlooms.[9] There is no provision to enable other members of the family to claim that property should have come to them because it originally belonged to their branch of the family. This may be a particular problem when there has been a second marriage. Although where the deceased is not survived by any issue the claims of the wider family are recognised, they have no claim on the personal chattels.

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8. Administration of Estates Act 1925, s.55(1)(x). The courts have normally adopted a liberal interpretation, see e.g. Re Reynolds' Will Trusts, Dove v. Reynolds [1966] 1 W.L.R. 19.

9. These are specifically excluded in Scotland, see Succession (Scotland) Act 1964, s. 8(6)(b).

3.11 We wonder whether any difficulties have arisen because of the exclusion of business chattels. Presumably this exclusion rests upon the assumption that the survivor is unlikely to have any connection with the business chattels, yet this may not be the case. If the husband and wife were partners, then the death of one of them will dissolve the partnership[10] and the partnership assets are distributed in accordance with the partnership agreement if there is one and, if not, as laid down by statute.[11] It may be that this a satisfactory approach to business assets and it is entirely appropriate if there are other partners in the business, but we do wonder whether there are not some situations where the survivor's connection with the business falls short of partnership and yet might be seen as giving rise to some claim to share in the business assets.

Second marriages

3.12 The rights of the surviving spouse are unaffected by the fact that it was a second or subsequent marriage. It may be that the intestacy rules need to make special provision for the situation where the deceased is survived by a former spouse and/or children of that marriage and by a spouse. It might be suggested that there is no particular problem where there were no issue of the first marriage, because the former spouse received her share of the deceased's property as part of the divorce settlement. However, this may well not be the case. She may have been receiving substantial maintenance rather than capital provision; the deceased may have failed to make payments to her, or, perhaps more likely, his death may have released

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10. Partnership Act 1890, s.33(1).

11. Partnership Act 1890, s.39.

assets, in the form of insurance or pension scheme payments, which were not available before.[12] The existence of the second spouse does not prevent the issue of the first marriage from being entitled, but in many cases the second spouse's lump sum will take all, or nearly all, of the estate. It may be that the existence of a spouse or issue of an earlier marriage should affect the share received by the second spouse.[13] We explore how reforms of this nature might work in Part V.

The duration of the marriage

3.13 Closely connected with the issue of second marriages is the question of whether the duration of the marriage should affect the share received by the surviving spouse. Under the present law a marriage that lasted only one day gives the spouse the same substantial share of the estate as a marriage that lasted fifty years. Is this right? The answer may depend upon who would otherwise take the property. If there are children of a previous marriage who would otherwise take, it is at least arguable that they have a better claim. Such a distinction rests upon the view taken as to the relative strength of marriage as an institution and other family relationships. However in practical terms it might be difficult to draw a distinction between long and

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12. Alternatively the surviving spouse may have received such payments on the death of the intestate, so that capital provision for the former spouse from the intestate's estate becomes a realistic possibility.

13. It would be interesting to hear from practitioners what provision their clients make for former spouses. The precedent books contain wills making substantial provision, see e.g. Precedents for the Conveyancer, pps. 9039, 9049, 9067, 9069, and 9071.

short marriages.[14] Apart from the obvious question as to where the line should be drawn, it is necessary to consider whether pre-marital cohabitation should be taken into account.[15] We would welcome views on this issue.

Separated spouses

3.14 At present, if a decree of judicial separation is in force, then the separated spouses do not take on one another's intestacy.[16] If, as is more likely to be the case, they are separated without such a decree, each will take on the other's intestacy regardless of how long the separation has lasted. As with short marriages, whether this is thought to be a problem depends on the view taken of the importance of marriage as an institution. Any change would give rise to similar problems of deciding how long a separation should disentitle a spouse. There is, however, one more definite occasion which might prove an acceptable cut-off point, and that is the commencement of divorce proceedings, or, at the very least, the grant of a decree nisi. It seems likely that there will have been cases of property passing on intestacy to a spouse between decree nisi and decree absolute or after divorce proceedings have

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14. If the surviving spouse is to continue to receive a lump sum, there could be a sliding scale according to the length of the marriage.

15. Where financial provision on divorce is concerned, pre-marital cohabitation is not relevant when considering the duration of the marriage (Matrimonial Causes Act 1973, s.25(1)(d)), Campbell v. Campbell [1976] Fam. 347. However, it may be taken into account when considering all the circumstances of the case and the conduct of the parties, Kokosinski v. Kokosinski [1980] Fam. 72.

16. Matrimonial Causes Act 1973, s.18(2).

begun, and we would be glad to hear whether this has given rise to problems.

Issue

3.15 The present law makes no distinction between minor children and adult children. If support were the major criterion for distribution on intestacy,[17] minor children are more obviously in need of support. However, giving an adequate share to the surviving spouse may be a more appropriate way of achieving this than giving a direct share to the minor children, particularly if the children's financial interests prevent the surviving spouse from keeping the matrimonial home. It should be remembered that minor children cannot consent to a deed of arrangement.[18] To what extent adult children should take a share of the estate, particularly where there is a surviving spouse, must depend on the view that is taken as to the purpose of the intestacy law. This is considered more fully in the next Part.

3.16 The present law refers to issue rather than to children of the deceased. It is a matter for discussion as to whether remoter issue should be allowed to take property which could have gone to the children of the deceased. The intestacy rules adopt a fairly narrow definition of what is meant by a child of someone. Whereas in other areas of law a child may acquire some of the rights of a child of a

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17. See further, Part IV.

18. Although an application could be made under the Variation of Trusts Act 1958. It seems more likely that in such a case the surviving spouse would apply for provision under the Inheritance (Provision for Family and Dependants) Act 1975.

particular person if that person has treated him as his or her child,[19] that is not so for the purposes of intestacy. In order to take on the intestacy of a parent, a child must either be related by blood, or be adopted,[20] or, if born as a result of A.I.D., a child may take on the intestacy of his mother's husband, as well as on the intestacy of his mother.[21] A child's rights on intestacy are largely unaffected by whether his parents, or now the parents of anyone in between, are married to each other or not.[22] The present system has the advantage of certainty in that the administrators of the estate know who is entitled, although in some cases they may have difficulty in tracing them. Any widening of the definition of issue would lead to greater uncertainty in that where there were, for example, step-children, the administrator would have to decide whether the step-child had been treated as a child of the deceased. The concept of treating a child as a child of the family was developed in the context of minor children. Extending it to adult step-children[23] would add greatly to the uncertainty, and we doubt that such a change would be beneficial.

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19. See, e.g. the Inheritance (Provision for Family and Dependants) Act 1975, s.1(1)(d).

20. The adopted child is treated in law as the child of his adoptive parents, and can thus take on their death, or on the death of anyone on whose death a natural child would take.

21. Family Law Reform Act 1987, s.27.

22. Family Law Reform Act 1987, s.18.

23. As has happened with the Inheritance (Provision for Family and Dependants) Act 1975, see, e.g., Re Leach (decd.) [1986] Ch. 226.

3.17 One further matter which might be seen as a problem where distribution to issue is concerned is the distinction between distribution "per capita" and distribution "per stirpes". Where there are surviving members of a class, for example, the children of the deceased, they take "per capita" so that, for example, if there are four of them, they each take a quarter. However any issue of those children will take per stirpes so, for example, if one child has already died leaving two children (the grandchildren), the two grandchildren will take one eighth each, while the three remaining children each take one quarter. This seems fair when there are surviving members of the original class, i.e. the children. However, when all the children have died, distribution per stirpes to the grandchildren may look unfair. For example, if all the children have died leaving respectively two children, one child, three children and four children, rather than receiving one tenth each, the first grandchildren will receive one eighth each, the second one quarter, the third one twelfth each and the fourth group one sixteenth each. We are not aware that this issue is seen as a problem in this country, although we understand that it has been seen as a problem in the United States of America.[24] We would be glad to hear people's views on this point.

Entitlement of other relatives

3.18 If the intestate died leaving a spouse but no issue the spouse has potentially to share the estate with the intestate's parents or brothers and sisters. We would very

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24. See Uniform Probate Code (1969), "A Comparison of Iowans' Dispositive Preferences", (1978) 63 Iowa L.Rev. 1041. For a discussion of the issues in Canada, see Report on Intestate Succession, Manitoba Law Reform Commission (1985), p.36.

much welcome views as to whether it is right that the spouse should have to share the estate in this way. If it is thought right that the estate should be shared, we wonder whether sharing should be confined to parents, brothers and sisters and whether the issue of brothers and sisters should be excluded. We are not aware of any problems with the list of relatives who take where there is neither spouse nor surviving issue. It might be questioned whether the distinction between relatives of the whole blood and relatives of the half blood is acceptable today, and the points we have made earlier concerning the meaning of issue apply in this context too.

Cohabitants

3.19 One of the omissions from the people who can take on intestacy is the cohabitant.[25] In order to take as a spouse, one must have been validly married to the deceased. Some cohabitants may be able to claim under the Inheritance (Provision for Family and Dependants) Act 1975.[26] However, they have no automatic claims[27] and so are in a far worse position than spouses. We would like to know the extent to which this gives rise to problems. It may be that couples living together are more likely to make wills, or that where there is a relationship of long standing the family are willing to enter into a deed of family arrangement.

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25. See para. 5.3(iii) for a further consideration of cohabitants.

26. S. 1(1)(e). But a claim can only be made if the cohabitant was being maintained by the deceased and the cohabitant can only receive reasonable provision for maintenance.

27. Although if they hold property as joint tenants, the right of survivorship will apply.

Hotchpot

3.20 Hotchpot is the bringing into account of benefits received from the intestate during his or her lifetime. The present rules contain several difficulties. The underlying principle of the rule is that the distribution should be as equitable as possible,[28] but the hotchpot rules on total intestacy apply only in relation to the succession rights of children of the intestate. The surviving spouse is not required to account for benefits received during the lifetime of the intestate. The rules cannot operate in such a way as to increase the entitlement of strangers, that is persons other than those entitled under the statutory trusts for issue.[29] In order to determine what the issue[30] of the deceased must bring into account, it is necessary to know what is meant by an advancement, and this has again caused difficulty, in particular because it is not clear what the relationship is intended to be between the statutory provision and the equitable rule against "double portions".[31] It is unlikely that any donor would realise the possible effect of making substantial gifts to his children during his lifetime. It is by no means apparent why children of the intestate should be required to bring into account benefits received, while brothers or sisters of the intestate are under no duty to do so.

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28. Administration of Estates Act 1925, s.47(1)(iii) and see Re Young [1951] Ch. 185.

29. See J.T. Farrand, "Hotchpot on Intestacy", (1961) 25 Conv. (N.S.) 468.

30. Only advancements made to children of the intestate have to be brought into account, but that may affect what is received by remoter issue.

31. Hardy v. Shaw [1976] Ch. 82.

3.21 Where there has been a partial intestacy, as has already been explained the surviving spouse and issue must account for benefits received under the will. However, neither parents nor brothers or sisters are required to do so. We find it difficult to see any coherent principle underlying the present hotchpot rule. However we are uncertain as to how much difficulty it causes in practice, and again we would welcome information on this point.

The Inheritance (Provision for Family and Dependants) Act 1975

3.22 This is not the place for a general discussion of difficulties with the family provision legislation. However, it may be worth highlighting the extent to which the legislation does or does not solve some of the difficulties that we have outlined in the preceding paragraphs. Clearly the Act can be used where the intestacy rules fail to give the matrimonial home to the surviving spouse.[32] It seems likely that such an application by a spouse would have a good chance of success. He or she would not have to prove that the home was required for his or her maintenance but merely that he or she had not received reasonable provision. The Act may also solve the problem of the person who has been treated as a child of the deceased though not actually being a child of the deceased. Recent cases[33] have shown that the courts are willing to listen to applications from such people. However, like the children of the deceased they will have to prove that they have not received reasonable provision for their

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32. See, e.g. Rajabally v. Rajabally (1987) 17 Fam. Law 314.

33. Re Callaghan (decd.) [1985] Fam. 1, Re Leach (decd.) [1986] Ch. 226.

maintenance,[34] and where the application is the result of a feeling of injustice because they have not received anything, whereas those whom they regarded as their siblings have, an application is less likely to succeed. The Act makes no specific provision for cohabitants as such. A cohabitant may be able to apply under the Act as a dependant, but will have to prove that he or she was being maintained by the deceased at the date of the deceased's death[35] as well as having to prove a claim for reasonable provision for maintenance.[36] It may be that it would be better if cohabitants were treated separately from dependants and this suggestion is discussed further in Part V.[37]

Bona vacantia

3.23 As has been said, if none of the relatives listed in the Act exist, or if they cannot be found, the property

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34. For a discussion of what is meant by "maintenance" see Re Dennis (decd.) [1981] 2 All ER 140. Re Christie (decd.) [1979] Ch. 168 had given it a very wide meaning but this was disapproved in Re Coventry (decd.) [1980] Ch. 461.

35. Under s. 1(1)(e). S.1(3) further provides that "a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person". Thus, in determining whether the applicant was being maintained by the deceased, the court has to balance the benefits received by the applicant with those provided by the applicant to the deceased. See Jelley v. Iliffe [1981] Fam. 128. The effect of this is that the more care the applicant gave the deceased, the less likely the applicant is to receive provision under the Act.

36. See n.33 above.

37. See para. 5.3.

passes to the Crown[38] as bona vacantia. Whilst we are not aware that this system causes any great difficulties, it might be worth considering whether this is the right result. It would probably not accord with the deceased's wishes. Possibly, the list of relatives who could take should be extended, but this is likely to lead to the estate being eaten up in costs. Giving the property to charity instead is a superficially attractive proposition, but who would choose the charity? We would welcome views on this issue.

Conclusion

3.24 We have thus identified a number of problems. A common theme that runs through some of them is that, possibly, the present law does not sufficiently distinguish between different possible claimants: between spouses who have the matrimonial home and those who do not, between second spouses and first spouses. Any reforms aimed at identifying who should benefit more precisely would inevitably make the law more complex and probably less certain to apply. The simplicity of the present law may lead to some unfairness, but it is a merit that should not lightly be dismissed. Such reforms would also require first some agreement about the principles on which distribution is to be based, and these form the subject matter of the next Part.

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38. Or the Duchy of Lancaster or the Duke of Cornwall.

PART IV

THE UNDERLYING PRINCIPLES

4.1 Before going on to consider what options there are for reform of the intestacy laws, it seems advisable to consider the principles on which the present intestacy law is based and the principles on which a reformed intestacy law might be based. As will be seen, the present law is not based on any one principle but rather on a mixture of principles, and it seems likely that any reformed system would be the same. The intestacy laws have to perform a variety of functions. At their most basic, they lay down what is to happen to the property of a person who has died without making a will. Short of all such property vesting in the Crown, it is necessary that some provision be made. So far as the spouse's share is concerned, they perform a function of sharing what may have been regarded as jointly owned property although it was not jointly owned in law or in equity. Insofar as the present rules recognise the claims of other members of the family, they recognise and support the institution of the family in its wider sense, while taking a traditional view of what constitutes a family.

The wishes of testators

4.2 The existing intestacy rules were based on an analysis of the provisions that testators normally make in

their wills.[1] There are serious doubts as to whether this is the proper approach. In the first place, it is very difficult to use what the "average" testator does as a basis for intestacy rules which have to cope with a very wide variety of situations. The "average" testator has probably been married only once and that marriage has probably lasted for a long time. He probably has a proper appreciation of who should benefit under his will and in particular an appreciation of the claims of the surviving spouse. Further, it seems odd to allow what the half of the population who make wills to dictate what should happen to the property of the other half who do not.

4.3 It may be that the reason for basing intestacy rules on the provisions that testators make is that it is thought that such provisions are a good guide to what most people would want to happen to their property. However, any sample of wills will contain an unknown proportion of wills the provisions of which are the result of the testator's circumstances or views being unusual. It may not be apparent on the face of the will that this is so. Further, it is not possible to assume that a will reflects the testator's wishes at the date of his death. If the will was made some time before, his circumstances may well have altered greatly by the time of his death. Even more important is the influence of the tax laws on what testators put in wills. Some dispositions may be dictated by a wish to avoid or mitigate liability to tax rather than be a reflection of what the testator actually wanted.[2]

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1. See Report of the Committee on the Law of Intestate Succession (the Morton Committee Report) (1951), Cmd. 8310, para. 3.

2. For example, a testator may have been advised that he should not leave all his property to his wife, even though he wants to, because this would result in high rates of inheritance tax becoming payable on her death,

4.4 However, the preceding paragraphs should not be taken to mean that the intestacy laws should impose rules that do not accord with what most people would want. Since so many people die intestate, it is clearly important that the intestacy rules reflect the wishes of people who leave property, and provisions in wills may be some guide to this. They cannot, however, be an overwhelming consideration.

Provision according to need

4.5 It may be that the intestacy laws should ensure that in the majority of cases the property is distributed to those most likely to need it. It may be argued that this is already the case because the greater share of the estate passes to the surviving spouse. However, the present law is not based on any requirement to establish need. The fact that no one except children of the deceased has to bring into account benefits received from the deceased during the deceased's lifetime, may indicate that need is not a major criterion. However, in the provision made for appropriation of the matrimonial home, one can see that the need for a home is treated as being of importance. The concept of need as a basis for distribution could well have a major effect when one considers the competing interests of the surviving spouse and the children of the intestate. With increasing life expectancy, it seems likely to us that

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2. Continued
although for the future, this will no longer be a factor as there is to be only one rate of inheritance tax Finance (No. 2) Bill 1988. For an interesting analysis of a survey of wills of people who died in 1973, see E.G. Horsman, "Inheritance in England and Wales: the evidence provided by wills", (1978), Oxford Economic Papers, 409.

the average age of the intestate must also have increased.[3] Men still die younger than women.[4] Thus the typical surviving spouse is an elderly widow.[5] It is probable that her husband survived some years beyond retirement and they have therefore used some of the savings they acquired during their working lives. Given the relative longevity of women, she will probably survive for a considerable period after her husband's death.[6] Their children, on the other hand, are probably middle-aged and able to provide for themselves financially. It seems to us that if the intestacy provisions place heavy emphasis upon support as a criterion for receiving a share, the surviving spouse's claim is likely to outweigh the claim of the adult children. Indeed, if support is the main criterion, then it may be that adult children should receive nothing. We have already pointed out that minor children may be better provided for by making better provision for the surviving spouse.

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3. It is of course possible, though we have no information on the point, that older people are less likely to die intestate. However, even were that so, the vast majority of people die in later life so that the majority of intestates must be over 60. In 1985, there were 590,734 deaths in England and Wales (Annual Abstract of Statistics, 1987, C.S.O.) of whom 466,341 were over 65. As to the increase in life expectancy, see Social Trends 18 (1988), C.S.O. The size of the elderly population is increasing not just because of rising life expectancy, but because of the high birth rate in the 1920s, see J.Craig, "The growth of the elderly population", Population Trends 32 (1983).

4. The life expectancy of a 50 year old man in 1984 was 24.6 years, of a 50 year old woman, 29.6 years; for a 65 year old man, 13.2 years and for a 65 year old woman, 17.2 years, Social Trends 18 (1988), p.114.

5. In 1985, there were 2,598,000 widows in England and Wales and 606,5000 widowers, Annual Abstract of Statistics, 1987, C.S.O.

6. A 65 year old woman can expect to live for another 17.2

4.6 Although the need for support may be an important element in assessing what any reformed intestacy law should be, it cannot provide a complete guide. It is of most relevance in considering the share to be received by the surviving spouse, though even here it is by no means the only factor to be taken into account. Particularly when there is no surviving spouse one must look for different principles on which to base an intestacy law.

Provision according to desert

4.7 It may be that certain people, again particularly the surviving spouse, should be seen as deserving of receiving a share of the estate. They may have contributed to the acquisition of the deceased's property in a wide variety of ways. These may not have been such contributions as would give the contributor a beneficial interest in the property, but may nevertheless have been valuable. They may deserve a share of the deceased's estate for other reasons. They may have nursed him through illness or helped him with his work. A system of inheritance based on this approach is likely to be more generous than one seeking to provide only support.[7] If support were to be the sole criterion, it would be difficult to know how to divide a very large estate where more was available than anybody needed for support. Thus a system based on desert may provide a fairer approach to distribution, but it may be impossible to base a fixed system of distribution on this criterion.

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6. Continued
years, a 70 year old for another 13.6 years, Social Trends 18 (1988), p. 114.

7. Witness the more generous provision for spouses under the Inheritance (Provision for Family and Dependants) Act 1975, see para. 3.22 above.

Status

4.8 There is another approach which is based upon the status of marriage itself. It may be suggested that the nature of marriage creates a status and a relationship whose claims outweigh all others. In other words the marriage relationship (a relationship of affinity) is given primacy over blood relationships. If this approach is adopted then, for example, the fact that a long separated spouse, or a spouse in a very brief marriage receives a major share would not appear anomalous, although it may do so if it is thought that the intestacy rules should be based on criteria of support or desert.

Discretionary provision

4.9 We do not intend in this paper to re-open the argument as to whether a fixed or a discretionary system of inheritance is better. We recognise that given the large number of intestacies, it is essential that the intestacy rules lay down a system of distribution that is acceptable to most people. It seems to us that there is general support for the discretionary system which we at present have and which enables some of those who have not received satisfactory provision under the intestacy rules[8] to apply to the court for provision to be made for them. However, it may be necessary in considering possible reforms to consider the interrelationship of the intestacy rules and the discretionary provision. For example, if it is thought that need is an important criterion for receiving a share of the deceased's estate, and yet it is also accepted that apart from the surviving spouse it is difficult (or indeed impossible) to identify with any certainty who is likely to

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8. Or under a will or partial intestacy.

be in need of support, then whether or not the discretionary rules make adequate provision may be an important factor. As a general principle, it would seem undesirable to alter the intestacy rules in such a way as to give rise to a greater number of applications under the 1975 Act. Such actions are inevitably costly and may in fact use up most of a moderately sized estate. That said, the Act does provide a useful safety net.

Taxation considerations

4.10 It is clear that wills are much influenced by tax considerations. To what extent should the intestacy rules be similarly influenced? This is an issue on which we would very much like comments. It is our view at present that intestacy laws should not be influenced at all by the tax considerations of the time. Intestacy laws change seldom, perhaps once every thirty or forty years, tax laws change far more often. Thus to link the two is inappropriate. A brief explanation of the current position may, however, be useful.[9] Gifts to a spouse are exempt from inheritance tax. Tax is due at 40 per cent on property passing on death to anyone other than a spouse if the total value of property passed exceeds £110,000. We believe that it is common advice to those with estates likely to be caught by inheritance tax that they should not leave everything to their surviving spouse, but should leave at least part of their estate to their children instead. This is to minimise the amount of inheritance tax charged on the estate of the surviving spouse when he or she subsequently dies. If his or her estate is augmented by the full amount

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9. For a more detailed explanation see Butterworths Orange Tax Handbook 1987-88 12th ed., but this does not take into account the changes made in the 1988 budget, see Finance (No.2) Bill.

of the estate of the first to die, then it is likely that this will increase the estate of the surviving spouse by sufficient to make it liable to inheritance tax. In addition, where the spouses are close in age it is likely that the additional tax will become payable quite soon. If in a particular case the intestacy rules give rise to tax problems, a deed of variation can be executed.[10]

Conclusion

4.11 It is clear that the present intestacy laws are based to a large extent on what testators commonly did in the early 1950s (and their wills may have been made long before then) with some regard being paid to the surviving spouse's need for a home. Whether the surviving spouse's share is assessed on the basis of need, desert or as a result of the status of marriage is by no means clear, and it is probable that it is a mixture of all three. It is far more difficult to assess the basis on which other members of the family are given a share of the property. It seems likely that the presumed wishes of the intestate play a large part, and in addition the rules reflect a notion of property being to some extent held in trust (though not in the legal sense) by one generation for another. They therefore carry the implication that the family in a wider sense than the spouse and children have some claim on the deceased's property.

4.12 We would very much welcome views as to the principles on which any new intestacy rules should be based. Our provisional view is that it is important that the surviving spouse should be enabled to retain the matrimonial

10. See para. 2.9 above.

home and receive sufficient money to be able to go on living there, supposing this to be a practicable proposition in the light of the available resources.[11] As to the remainder of the property or as to the distribution generally where there is no surviving spouse, we believe that whatever system is adopted it is important that it is broadly acceptable to the very large number of people who either die intestate or who are related to those who do.

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11. Although it could be suggested that where the home is unduly large, it is not unreasonable to expect the spouse to move to a smaller home.

PART V

POSSIBLE REFORMS

5.1 In this Part, we set out a variety of possible reforms. They are not all mutually exclusive. It may be that we have not considered all the reforms that might be helpful. We hope that people will tell us if they have any other suggestions, as well, of course, as telling us which of the possible reforms they prefer, and, equally as important, the reasons for this choice. The reforms are considered under three main headings: who should receive a share; how the property should be divided; and what property should be divided.

5.2 Although, as we have explained earlier, the arguments in favour of a fixed system of distribution on intestacy are overwhelming, there is a middle course between a fixed and a discretionary system which may be worth considering. It would be possible for the intestate's estate to be held on a discretionary trust for named people. The trustees could be those who are the personal representatives now.[1] The class of potential beneficiaries could be the surviving spouse and the other members of the family who at present take on intestacy. However, it should be noted that there would be a possible conflict of interest between those who were both trustees and potential beneficiaries. This problem could be solved by imposing upon the personal representatives a duty to appoint an independent trustee. Because the trustees would have a

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1. See Part II, n.1.

discretion, they could ensure that the property went where it was most needed. Anybody aggrieved by the distribution could apply to the court. The disadvantage of such a system would be extra expense in administration, added uncertainty (especially for a spouse who might face several months not knowing his or her position), and the possibility of unpleasant family disputes. In the remainder of this Part, the reforms considered assume a fixed system.

Who should receive a share

5.3 We are not aware of any suggestions that the list of possible recipients of the intestate's property should be greatly extended or diminished. However some possible areas of difficulty have been mentioned, and we therefore put forward the following suggestions, on which we would welcome views.

(i) Should separated spouses (where there is no judicial separation order) be excluded?[2] If so, should the length of separation be a factor? The present system has the virtue of simplicity. If separation were to disentitle a spouse, there would inevitably be arguments about what "separation" involved. On the other hand, for a spouse who may not have seen or heard of the deceased for thirty years suddenly to receive the bulk of the estate of the other may well seem unjust. If separation were to affect entitlement, would it be possible or desirable to have a sliding scale so that entitlement diminished according to the length of the separation?

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2. See para. 3.14.

(ii) Should filing a divorce petition or obtaining a decree nisi remove a spouse's entitlement? These are both definite acts which would not give rise to disputes. They indicate that one spouse believes that the marriage has ended. On the other hand, the surviving spouse might have been expecting a substantial transfer of property to him or her. The death will prevent property adjustment orders from being made in the divorce proceedings. If the survivor does not take on intestacy, he or she will have to claim under the Inheritance (Provision for Family and Dependants) Act 1975.

(iii) Should cohabitants be included? If so, how would they be defined? Assuming separated spouses are not excluded, how would the spouse's claim and the cohabitant's claim be reconciled?[3] There are, of course, many precedents for cohabitants being treated like husband and wife.[4] A particularly useful one in this context is the provision of the Fatal Accidents Act 1976. This Act enables certain people to bring an action in negligence against a person who has caused the death of another. Those who can bring such an action include the husband or wife of the

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3. In South Australia, the estate may be shared equally between the spouse and the cohabitant (Administration and Probate Act 1919-1975 (S.A.), s.72h), but only if the cohabitant has first obtained a declaration that he or she was a "putative spouse" (under the South Australian Family Relationships Act 1975). In New South Wales, the Law Reform Commission has recommended that the cohabitant should take in preference to the spouse where the cohabitant and the deceased have lived together for two years prior to his death and the deceased did not live with his spouse for any part of that period (Report on De Facto Relationships, 1983).

4. See, for example, Housing Act 1985, s.87,(succession to secure tenancy), Social Security Act 1986, s.20(11) (entitlement to income support)

deceased, and also a cohabitant who is defined as follows:

> any person who -
>
> (i) was living with the deceased in the same household immediately before the date of the death; and
>
> (ii) had been living with the deceased in the same household for at least two years before that date; and
>
> (iii) was living during the whole of that period as the husband or wife of the deceased.

Might this be an appropriate definition to use for intestacy? It may be that the circumstances of cohabitation vary too much to fit easily into the system of fixed shares on intestacy, and that cohabitants should rely upon testate provision or, failing that, application under the family provision legislation. However, if it were to be decided that cohabitants should not be given any automatic rights on intestacy, we do think that further consideration should be given to their position when applying under the 1975 Act. At present they can only apply as dependants.[5] We would welcome views as to whether the Act should be amended to recognise two separate categories of cohabitant and dependant. If this were adopted, we would think it right that the definition of cohabitation should be similar to that in the Fatal Accidents Act 1976.

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5. The present requirement that a cohabitant should have been maintained by the deceased has given rise to difficulties, see Part III, n.34 above.

(iv) Should the meaning of "issue" be extended to include anyone "treated" as a child of the relevant person? We have already described the difficulties that such a change might cause.[6] If such a change were nevertheless recommended, should it apply only to issue of the deceased but not, for example, to issue of a brother taking in place of that brother?

5.4 We have not formed any views as to the right answers to these questions. However, it is clear that positive answers to any of them might increase uncertainty for administrators, who would have to decide whether a person fell into the category of separated spouse or cohabitant, or had been treated as a child of the deceased. Such uncertainty could lead to litigation. Set against that, is that if the present law is unsatisfactory, it may be giving rise already to litigation. Indeed that is clearly the case so far as cohabitants and step-children are concerned.

The division of the property

Where there are a spouse and issue

5.5 (i) The present position could remain but provision be made for index-linking the statutory legacy. This would prevent the sum becoming rapidly too small in times of high inflation. It would do nothing to assist the problem of deciding what the sum should be to start with. It would be necessary to decide what index should be used.

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6. See para. 3.16.

(ii) The present position could be left as it is, but instead of the surviving spouse receiving a life interest in half the residue, the spouse could receive an absolute interest in either half or some other fraction of the residue. This would be a desirable simplification, but would not solve some of the other problems which we have discussed.

(iii) The surviving spouse could receive the matrimonial home[7] and the personal chattels, plus a proportion of the rest of the estate. This would probably ensure that he or she can retain his or her home. However, unless the proportion of the residue were very large, it might mean the surviving spouse receiving too little if the matrimonial home had been rented. For example, if the deceased had rented the home and invested his money in shares, worth say £80,000, whereas another had spent £80,000 on buying a home, and a system were adopted whereby the surviving spouse received the matrimonial home and 75 per cent of the rest, the first spouse would receive £60,000 (and the right to live in the house),[8] the second spouse would receive the £80,000 house. Further, such a system would involve splitting the residue in practically every case, even when the amount available apart from the matrimonial home was very small. This might be inconvenient and would add to

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7. If the matrimonial home is mortgaged, we would envisage that the surviving spouse would receive the matrimonial home subject to the mortgage if no insurance policy had been taken out to provide for repayment of the mortgage in event of death.

8. If the deceased were a secure or protected tenant. While that right may be valuable, it gives the survivor no capital asset if, e.g. he or she needs to move elsewhere, although the accumulated right to a discount that the successor to a secure tenancy receives does have a capital value.

the costs involved. Set against these disadvantages are some major advantages. This option would ensure that the spouse would receive the matrimonial home while not disinheriting the children. It would remove the need for regular updating of a lump sum and would, we think, be easier to understand and operate than the present system.

(iv) The last problem described could be mitigated by elaborating the previous suggestion so that the surviving spouse receives the matrimonial home plus a lump sum plus a proportion of the rest. Provided the lump sum were fixed at a sufficiently high figure (though it would be lower than if the matrimonial home were not given) this would result in the whole estate passing to the surviving spouse in a great number of cases. The sum would have to be index-linked in order to avoid the problems of uprating that are presently experienced.

(v) The practical effect of both the present law and some of the suggestions outlined above is that the surviving spouse takes the whole estate in the majority of cases. It should therefore be considered whether the intestacy rules should simply give the whole estate to the surviving spouse. As has already been said,[9] it may be that the best way of providing for minor children is through provision for the surviving spouse.[10] If so, then the real question is whether disinheritance of the adult children (in the minority of cases where they would receive anything) is acceptable. We hope to obtain views on this issue in the

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9. See para. 3.15.

10. She will be under a legal duty to maintain them in any event.

survey we are undertaking,[11] and it is a subject on which we particularly would like responses. It should, of course, not be forgotten that, if the intestacy rules do not make appropriate provision for someone in any particular case, it is always possible for a will to be made.

There is one further problem that must be mentioned, and that is the risk that a system that gives the entire estate to the surviving spouse could provide a means for the unscrupulous to take advantage of the elderly and mentally frail. A marriage with a person who cannot appreciate its legal significance is voidable, not void.[12] The effect of this is that, if the marriage is discovered only after the death of the intestate, there is no power to apply for a decree of nullity, and the marriage is valid.[13] While we are not suggesting that the number of such marriages is likely to be great, we would particularly welcome views on this problem.

(vi) An objection to the previous proposal may be that it is inappropriate for very large estates. This problem could be alleviated by a system of graduated lump sums, whereby the spouse would receive the first £X of the estate, where X would be a figure large enough to ensure that the surviving spouse took the whole estate in the majority of cases. The spouse would then receive additional lump sums

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11. See para. 1.1.

12. Matrimonial Causes Act 1973, s. 12. and see Report on Nullity of Marriage (1970), Law Com. No. 33.

13. See Re Roberts (decd.) [1978] 1 W.L.R. 653. If the marriage is discovered during the lifetime of the person who is mentally unsound, the Court of Protection has power to make a will on his or her behalf, see Re Davey (decd.) (1981] 1 W.L.R. 164.

according to the size of the estate. Thus (and these figures are purely illustrative) the spouse could receive a lump sum of £100,000, and if the estate were worth £150,000, a further £25,000; if the estate were worth £200,000 a further £15,000, and an extra £10,000 for every additional £50,000. Thus if the estate were worth £500,000, the surviving spouse would receive £200,000.

(vii) Proposals (i) to (iv) and (vi) above assume that the residue of the estate is divided equally between the issue as at present. Should it be? It would be possible to devise a system that distinguishes between children of the deceased, and remoter issue, or between minor children and adult children. If the latter were thought to be desirable, then possibly minor children should receive a larger share on grounds of need, or the surviving spouse's share should be increased where there are minor children.

(viii) We have already mentioned the problem of determining a fair system of distribution where the deceased was married more than once.[14] If the estate goes to the second spouse, on her death she may leave it to her children or other members of her family; or she may herself have remarried, and it may pass on intestacy or by will to her new spouse. Children of the deceased's first marriage may feel aggrieved, as may the former spouse. It is our tentative view that former spouses should not be given a share on intestacy. The circumstances are likely to be too various and they are best left to discretionary provision under the Inheritance (Provision for Family and Dependants) Act 1975. It is an advantage of our present system of distribution that, provided the estate is worth more than

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14. See para. 3.12.

£75,000, the children of the first marriage will obtain a share of the residue. Under some of the proposals above, they would not. If a system were adopted which, for example, gave all to the spouse, we would like views as to whether this should apply where the deceased had been married more than once, and there are issue of an earlier marriage. Possibly here the surviving spouse's share could be limited and proposals (iii), (iv) or (vi) should apply.

Where there is a spouse but no issue

5.6 The key question here is whether the surviving spouse should be expected to share the estate with the deceased's parents, brothers or sisters. It may be that where the deceased has died young, with property given to him by his parents, it is right that some of it should revert to his family. On the other hand, if his parents had made outright gifts to him (rather than giving him lifetime interests), they arguably have no special claim. Further, it would be wrong to assume that because the intestate has died without issue, he has necessarily died young. The view one takes on this issue really depends on the view taken of the relative strength of the marriage relationship as against blood relationships.

5.7 If one takes the view that a surviving spouse should have to share the estate with certain of the deceased's relatives, then a range of options similar to that in paragraph 5.5 should be considered.

Where there are issue but no spouse

5.8 Here, once again, a distinction could be made between minor issue and adult issue, and between children of

the deceased and remoter issue. Particularly where all those who are to take belong to the same class, for example, they are all grandchildren, it may be that per capita distribution would be more appropriate than the per stirpes distribution of the present law.

Where there is neither spouse nor issue

5.9 There seem to us to be four possible reforms here: extending the list of relatives who can take; limiting the list of relatives who can take; splitting the property equally between eligible relatives; and distributing on a per capita basis where issue are involved. We doubt if there is any great case to be made for either of the first two. Including remoter relatives could add to the cost of administration, while limiting the number would add to the property passing as bona vacantia. We do wonder whether splitting the property equally might be an attractive proposition, so that if the deceased was survived by his parents, a brother and a sister, they would each receive one quarter, rather than the parents taking the whole estate as at present.

What property should be taken into account

5.10 We have already described[15] how much property passes outside the intestacy rules. Here we consider whether the existence of such property in any particular case should affect the distribution of the property in that case. At present the only times when other property is taken into account is when there is a partial intestacy, and the surviving spouse and issue have to set the value of what

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15. Para. 2.12.

is received under the will against the entitlement on intestacy, and hotchpot, when children may have to bring into account certain benefits received during their lifetime.

5.11 So far as hotchpot is concerned, we have already outlined some of the difficulties. We suspect that the provision is rarely invoked, and we would particularly welcome information on this point. If we are right in this, it seems likely that there is a good case for abolishing it and so removing an unnecessary complication. The position on partial intestacy is similarly unsatisfactory. Why should only the spouse and issue have to bring property received under the will into account, and not remoter relatives? The reason for the spouse having to account is to prevent her from obtaining a much larger share of the estate as a result of the statutory legacy. Issue have to account because it is presumed that the testator would want them treated equally, and if some take under the will and others do not, a duty to account will make them equal. We suspect that the arguments in 1952 for making the spouse account are not so great today. If the end result is that she receives the majority (or all) of the estate that would not be a startling result. However, the arguments for retaining accounting for issue and for introducing it for other relatives are quite strong. If there is no duty to account, an inadvertent partial intestacy may give rise to a windfall for a particular relative whom the testator would have had no reason to favour in this way.

5.12 There is an alternative suggestion which is worthy of consideration. Should the definition of the property available for distribution on intestacy be widened so that some account could be taken of the property that at present

passes outside the intestacy laws?[16] The Inheritance (Provision for Family and Dependants) Act 1975 treats as part of the estate for the purposes of that Act property such as the deceased's share in property held on a joint tenancy.[17] For taxation purposes the meaning of "estate" is extended.[18] If a wider definition of what property is affected by the intestacy rules were adopted, then it is more likely that a similar result would be achieved in similar cases. Thus if a particular method of distribution has been adopted in order to ensure that the spouse receives the matrimonial home, should not the fact that he or she receives it as a joint tenant be taken into account?[19] Likewise the proceeds of insurance policies paid direct to the survivor could be taken into account. However, we are of the view that such a system might make the administration of intestate estates unacceptably cumbersome as administrators, who will often be lay people, try to ascertain which property is, and which is not, to be included in the estate. Further, if such a system were taken to its logical conclusion, it would involve removing some property from those who would receive it under the present law to give it to those entitled on intestacy. Such a process is possible where the courts are already involved, as with an application under the 1975 Act, but hardly possible for an administrator.[20]

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16. See para. 2.12.

17. S.9. See also ss. 8 and 25.

18. For example, where inheritance tax is concerned, all the property the deceased held just before his death is included, thus including joint tenancies, Inheritance Tax Act 1984, s.4.

19. Of course, if a system is adopted whereby the surviving spouse has a specific entitlement to the matrimonial home, this problem will not arise.

20. Such a system could work without the power to recover property from a benefiary who had received more than his

Miscellaneous reforms

Reform of the family provision legislation

5.13 We have already said that we do not wish to re-open the discussion as to the desirability of a fixed or discretionary system. However, if certain of the reforms outlined above are adopted, it may be beneficial to consider some amendments to the Inheritance (Provision for Family and Dependants) Act 1975. The position of cohabitants has already been mentioned.[21] If the spouse were to be given an even greater share (or even all) of the estate, it might be advisable, in order to prevent injustice, to alter the basis on which discretionary provision is made for children. Restricting it to provision for maintenance might be inappropriate, for example where there was very good reason to believe that the intestate would have intended a child to receive something more.[22] Such a reform could apply only to applications against intestate estates in order to prevent a general increase in the numbers of applications. Another possible reform would be to widen the class of potential applicants. If it were decided that a surviving spouse should not have to share the estate with relatives other than issue, then possibly parents, brothers and sisters of the deceased should be able to apply instead for discretionary provision. However, to increase the number of possible applicants is to increase the risk that small estates will be eaten up in costs as claims with little

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20. Continued
or her entitlement on intestacy. Although the Inheritance (Provision for Family and Dependants) Act 1975 does contain such a power, the hotchpot provisions do not. A beneficiary who has received more than his or her share in advance is merely left with it.

21. Para. 5.3(iii).

22. Re Christie (decd.) [1979] Ch. 168.

merit are disputed. If a parent, brother or sister were being maintained by the deceased, he or she can already apply for discretionary provision. On balance, therefore, we would suggest that such a change would not be beneficial.

Survivorship period

5.14 It has been suggested to us that the intestacy rules could usefully incorporate a survivorship clause, so that a potential beneficiary must survive the deceased by a set period, perhaps seven days, in order to take any benefit from the estate. This would prevent the problem that can arise, if, for example, the husband dies and the wife dies shortly afterwards. Assuming they leave no issue, all their property will pass to the wife's parents. We welcome views as to whether difficulties do arise in these circumstances, and whether the introduction of a survivorship clause is the right solution.

Conclusion

5.15 We hope that this paper has demonstrated that there are problems with the law of intestacy which suggest that the law is in need of reform. There may well be other difficulties of which we are unaware. As to the solutions, it may well be that there are other possibilities that we have failed to explore. We have no firm views as to how the law should be reformed. We believe that reforms should be directed towards greater provision for the surviving spouse but have not yet formed even a provisional view as to how this would best be achieved. This is a subject of great interest to many people, and we hope to receive wide-ranging responses, which will help us to see more clearly what the problems are and to find satisfactory solutions to them.

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