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recommendations, there have been instances in practice of both a codicil and a will being made for an incapable adult under powers purportedly available under the 2000 Act.<sup>27</sup> There seem very good reasons why it should not be possible to make a will for an incapable adult, and this issue should be resolved in any legislation to follow on the new Report.

Chapters 5-7 of the Report contain a host of recommendations on issues large and small, such as dispensing with the need to obtain caution in all intestate cases,<sup>28</sup> the vesting of the fee on the renunciation of a liferent,<sup>29</sup> and the law in relation to mournings.<sup>30</sup> These represent the best of law reform, clearing out and cleaning the cupboard of succession law. Whatever the fate of the headline reforms, practitioners will hope that these useful reforms can be carried into law.

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## Inheritance Rights of Children

### A. INTRODUCTION

Legal rules move slowly in reflecting changes in society or in public attitudes. Thus it was not until the mid-twentieth century that western inheritance law shifted its focus from the dynastic family to the nuclear family, resulting in prioritisation of close kinship relationships over more distant ones, equalisation of male and female children, and improvement in the position of the surviving spouse.<sup>1</sup> In the twenty-first century, there has been even greater social upheaval with the arrival of the so-called “affective” family<sup>2</sup> – the family of choice in which non-marital and same-sex partners are “family”, as are biological and non-biological children. Gradually, inheritance law has begun to adjust to a diversity of family forms. One result has been the upgrading of the partner relationship above all others.

Many of the recommendations contained in the Scottish Law Commission’s Report on *Succession*<sup>3</sup> are consistent with the affective family model. The entitlement of the partner of choice – spouse, civil partner or cohabitant – is prioritised solely on the basis of status, regardless of need or parenthood.<sup>4</sup> However, the Commission

<sup>27</sup> See *T, Applicant* 2005 SLT (Sh Ct) 97; *G, Applicant* 2009 SLT (Sh Ct) 122.

<sup>28</sup> Report para 7.11.

<sup>29</sup> Paras 6.44-6.47.

<sup>30</sup> Paras 7.36-7.37.

<sup>1</sup> J Beckert, *Inherited Wealth* (transl T Dunlap, 2008) 84-85, 110-113.

<sup>2</sup> Beckert, *Inherited Wealth* 85, 111.

<sup>3</sup> Scot Law Com No 215 (2009). Unless otherwise stated, all references to a Report are references to this document.

<sup>4</sup> Report paras 2.3, 2.29, 2.30, 3.4, 4.10.

is out of step with the model in one significant respect: children. For while society is broadening the category of children accepted as family, Scots inheritance law is narrowing it almost to the point of non-existence. In stark contrast to the rationale for partners, children's inheritance rights under the Commission's proposals are disconnected from their status as children. Instead, entitlement to a parent's estate must derive either from need or from pre-existing legal obligation.<sup>5</sup>

I have previously criticised the Commission's antagonistic treatment of children's rights on the grounds that its underlying rationale is out of step with public attitudes towards inheritance (the fact that most parents want their children to inherit), with the reality of family life and its complex web of intergenerational dependence, and with social policy objectives on all sides of the political spectrum.<sup>6</sup> My arguments have not brought about significant changes in the reform proposals. However, the Commission has conceded that in two areas there is a political judgment to be made as well as a legal one.<sup>7</sup>

This note examines those two areas, both of which concern children's inheritance rights. The first is the so-called "threshold" sum used to determine the amount reserved to a surviving spouse or civil partner on intestacy after which the balance of the estate is shared equally with the deceased's children.<sup>8</sup> The second concerns protection from disinheritance, or "legal share", and whether to remove such protection for adult non-dependent children. Although they appear to be two separate matters (the former relating to intestacy, the latter to protection from disinheritance on all estates), they are closely related in the Report because of the structural device of the threshold sum. Under the Law Commission's proposals, children begin to share in a parent's estate on intestacy only if it is worth more than the threshold sum; and since legal share is to be 25% of what the respective parties would receive on intestacy, the threshold sum is also the key to calculating legal share.<sup>9</sup> The threshold sum is thus the single most significant element in the proposals. There may be debate about structure and process, but if the value of the threshold sum remains at £300,000, as the Commission suggests, that debate is largely irrelevant, for *de facto* only the children of the wealthiest 2% of the Scottish population will inherit on the death of an intestate parent.<sup>10</sup> The question of legal share, equally, becomes a

5 Paras 3.24, 3.30. The arguments used to exclude claims by stepchildren are inconsistent with this rationale, for here, it seems, biology matters: "intestate succession is traditionally a matter of blood relationships" and "acceptance [of a child] does not—and should not—destroy the legal relationship between the child and the biological parent" (para 2.32).

6 See D Reid, "From the cradle to the grave: politics, families and inheritance law" (2008) 12 EdinLR 391.

7 Report paras 2.14-2.15 and 3.35.

8 Throughout "children" denotes the wider concept of "issue".

9 This is the first of the Law Commission's two possible options: see paras 3.36-3.39. This note does not consider option 2, which involves a complex discretionary scheme for dependent children: see Report paras 3.65-3.86.

10 Reid (n 6) at 413-414.

non-issue. The Commission acknowledges that in the vast majority of cases children will have no inheritance rights whether the estate is intestate<sup>11</sup> or testate.<sup>12</sup>

### B. THE THRESHOLD SUM AND INTESTACY

The policy objective in the Report is specifically, and uncontroversially, “to ensure that in most cases the surviving spouse or civil partner can retain the family home and furniture and also have a capital sum”.<sup>13</sup> Furthermore, the Commission acknowledges that the intestacy rules will “generally be used to distribute estates which are of small to modest value”.<sup>14</sup> In order to achieve the stated goal, is a threshold sum of £300,000 therefore justifiable? To answer that question, a short foray into statistics is required.

The recommended figure was “clearly influenced”<sup>15</sup> by the maximum value of prior rights (currently £366,000 where there is a surviving spouse or civil partner and children) and the desire to ensure that the spouse or partner does not receive less than under the current law.<sup>16</sup> Leaving aside the lack of a robust process to determine current values,<sup>17</sup> it should be noted that the £300,000 current housing right is rarely claimed in full,<sup>18</sup> for few intestate estates comprise a net heritable value of anywhere near that sum.<sup>19</sup> The Commission based the threshold sum on the average Scottish house price (£152,256 in December 2008) plus the current capital sum value of prior rights (£42,000), a total of £210,000.<sup>20</sup> The recommended £300,000 for the threshold sum therefore provides a very generous margin to ensure acquisition of the family home.<sup>21</sup>

Further, the fact that the threshold sum can be claimed on moveable as well as heritable estate will impact very considerably on the deceased’s children. No accurate figures are available regarding the current value of intestate estates in Scotland. The median value in England and Wales is £56,000 (compared with a testate median of £160,000), and almost a third are worth less than £25,000.<sup>22</sup> The median is almost certainly lower in Scotland, where more than 50% of intestate estates are too small even to require confirmation.<sup>23</sup> To justify this high threshold sum, the Report contends that there has been no public discontent with the current value of prior

11 Report paras 2.14 and 2.18.

12 Para 3.40: “unless the estate is worth more than the threshold sum of £300,000 the deceased’s children’s legal share will in fact be of little, if any, value”. In fact, there is no uncertainty at all: the legal share of children will amount to zero.

13 Para 2.9.

14 Para 2.1.

15 Para 2.13.

16 Para 2.15.

17 Reid (n 6) at 411-412; Report paras 2.11-2.12.

18 Report para 2.13.

19 Reid (n 6) at 412-414.

20 Report para 2.10. My arithmetic suggests the total should be less than £200,000.

21 Para 2.12.

22 Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com CP No 191 (Overview), 2009) para 11.

23 Reid (n 6) at 412 n 143; Report para 2.1 n 2.

rights.<sup>24</sup> I would respectfully suggest that this argument is disingenuous given the fact that all available research confirms the depths of public ignorance in relation to inheritance entitlements.<sup>25</sup>

What then should the threshold sum be? In a dissenting note,<sup>26</sup> one of the Commissioners, Professor Gretton, suggests that £200,000 would be more appropriate – a figure which would still result in the spouse or civil partner inheriting everything in most estates. It would bring Scots law into line with Northern Ireland, where average house prices are broadly similar. The Northern Ireland Executive recently consulted on the proposal to raise the statutory legacy available to a surviving spouse or civil partner from £125,000 to £350,000. After a very wide-ranging consultation,<sup>27</sup> combined with statistical analysis and consideration of social, economic and demographic indicators,<sup>28</sup> the Executive concluded that £200,000 was more appropriate.<sup>29</sup>

Alternatively, to ensure that the surviving spouse or civil partner can retain the family home, it might be simpler to allocate the property itself up to a specified value and to divide any balance with the deceased's children. The division need not be equal – a significantly higher percentage could be allocated to the spouse or civil partner – but this model would ensure that children receive at least a small amount in many more estates.

### C. PROTECTION FROM DISINHERITANCE

Currently, children are entitled to a minimum of one third of a deceased parent's moveable estate as legal rights. This may only amount to a small cash sum or a token piece of property. But the gesture, however token, is important in the bereavement process. The finding that inheritance can play “a symbolic, identity-creating role in the material representation of family descent and continuity”,<sup>30</sup> that it can influence life decisions and impact on personal identity,<sup>31</sup> should not be dismissed lightly.

We also know that Scottish public opinion supports automatic inheritance rights for children of any age.<sup>32</sup> The Law Commission counters this by citing evidence of public dissatisfaction with legal rights for adult children, evidenced by two petitions presented to the Scottish Parliament calling for their abolition.<sup>33</sup> One of

24 Report paras 2.12, 2.15.

25 See Reid (n 6) at 396 n 40.

26 Report para 2.15 n 32.

27 Department of Finance and Personnel, *Administration of Estates: Intestacy and the Statutory Legacy*, Analysis of Responses (2007, available at [http://www.dfpni.gov.uk/analysis\\_of\\_responses\\_to\\_statutory\\_legacy\\_paper.pdf](http://www.dfpni.gov.uk/analysis_of_responses_to_statutory_legacy_paper.pdf)) 6-11.

28 Department of Finance and Personnel, *Administration of Estates: Intestacy and the Statutory Legacy*, Summary Consultation Paper (2007) 3-7.

29 Consultation Paper (n 28) 7-8.

30 Beckert, *Inherited Wealth* (n 1) 19.

31 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) 15 ff.

32 Reid (n 6) at 404-407, Report paras 3.27-3.28.

33 Report para 3.29 n 24.

these petitions claimed that legal rights were damaging the Scottish economy,<sup>34</sup> driving businesses across the border and forcing the elderly into the buy-to-let property market in order to convert moveable assets into heritable to avoid the scourge of legal rights' claims.<sup>35</sup> The second petition<sup>36</sup> alleged that a claim for legal rights led to a widow being "dragged to the brink of a court appearance" and caused sheriff officers to "descend on her home".<sup>37</sup> Neither petition can be regarded as representative of public opinion at large or as a reliable guide for policy formulation or law reform.

The Commission accepts that its proposals prioritise individual freedom and choice over the claims of kinship, but sees this as a positive opportunity: the hard-working son on the farm, the handicapped child or the daughter who has cared for elderly parents could all benefit at the expense of their undeserving siblings; so too the testator could "generation skip"<sup>38</sup> by leaving an inheritance to grandchildren in preference to their profligate parents. This, I suggest, raises the spectre of the testator attempting to control the behaviour of family members in life, or even from beyond the grave.

Finally, it is worth noting that the reform proposals relating to cohabitants will also impact most on the deceased's children. Cohabitants are now to have a discretionary claim on all estates<sup>39</sup> and, when making an award, the court must consider only the "nature and quality of the parties' relationship"<sup>40</sup> and so should no longer take into account the interests of the deceased's children, which are said to be "irrelevant".<sup>41</sup> This is entirely consistent with the thrust of the reform proposals, but surely not irrelevant to families across Scotland.

The ministerial response to the Commission's proposals refers to the reform of succession law as "a once in a generation opportunity".<sup>42</sup> There is still a pressing need for research in many areas: the composition and size of intestate estates, how they are distributed, patterns of will-making, more robust data on public attitudes. This is also an opportunity to engage the public and the opinion-makers in discussion about what kind of inheritance regime Scotland should have for the next 50 years.

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34 Petition PE1154 (available at <http://www.scottish.parliament.uk/business/petitions/docs/PE1154.htm>).

35 See a response by the petitioner, available at <http://www.scottish.parliament.uk/s3/committees/petitions/petitionsubmissions/sub-08/08-PE1154B.pdf>.

36 Petition PE994 (available at <http://www.scottish.parliament.uk/business/petitions/pdfs/PE994.pdf>).

37 Scottish Parliament, *Official Report*, Public Petitions Committee, cols 2887-2890 (15 Nov 2006, Campbell Martin MSP). The petitioner's son has since campaigned to have the speech expunged from the public record and has invoked the Parliamentary complaints procedure (see <http://www.scottish.parliament.uk/s3/committees/stanproc/inquiries/section8review/submissions/AndrewMcCabe.pdf> and <http://www.scottish.parliament.uk/s3/committees/stanproc/inquiries/section8review/phase2/AndrewMcCabe2.pdf>).

38 Report para 3.33.

39 Paras 4.8-4.9.

40 Para 4.19.

41 Para 4.19.

42 [http://www.scotlawcom.gov.uk/downloads/Ministerial\\_response\\_succession.pdf](http://www.scotlawcom.gov.uk/downloads/Ministerial_response_succession.pdf).