

Alexandra Braun (ed), ‘Symposium: Reforming Intestate Succession Law’(2020) 24 *Edinburgh Law Review* (forthcoming)

Introduction

Intestate succession law affects a considerable portion of society,¹ and has serious implications for how wealth is distributed on death, including for questions of wealth equality. Yet, or perhaps precisely because of its importance, it is challenging to design a satisfactory set of intestacy rules, not least because of the need to balance manifold interests. Moreover, it is notoriously difficult to reach consensus about what the exact rationale underlying intestate succession law should be and therefore what criteria should guide the legislature. It is thus perhaps unsurprising that Scots law has been struggling to implement a reform of its intestacy rules, despite the fact that dissatisfaction with the current rules looms large.

In Scotland intestate succession law has been under review since the 1980s.² The Scottish Law Commission has published two reports on succession law, one in 1990³ and one in 2009,⁴ both of which contain recommendations on intestacy which remain unimplemented. After a consultation on the 2009 recommendations carried out in 2015, and a further public attitudes survey, the Scottish Government published its response in 2018.⁵ The response was then followed by another consultation launched in February 2019,⁶ the aim of which was to seek views on a “fresh approach to reform of the law of intestacy with reference to regimes which operate elsewhere”. The consultation is now closed, and we are awaiting the response from the Scottish Government, which has been announced for spring 2020. Meanwhile, a number of questions arise. Are the proposals put forward both by the Scottish Law Commission and the Scottish Government suitable for Scotland? Do they address the right issues? What exactly are the shortcomings of the current law and, how can these be remedied? Finally, what should happen next?

These and many other questions were explored during a Symposium that took place at Edinburgh Law School on 11 October 2019. This publication includes a rich set of contributions from some of those who took part in the event. In their contributions they try to shed light on a number of the most contentious and difficult aspects of intestacy, such as the balance between the rights of the surviving spouse/civil partner and the issue of the deceased, the connection between the laws regulating dissolution of marriage on death and on divorce, and the protection of the interests of cohabitants, as well as those of the wider family. As part of this process, the Scottish law of intestacy is examined through a comparative lens in an attempt to understand where it positions itself with respect to other jurisdictions, where the Scottish Government might want to look for inspiration, but also what aspects it will want to be mindful of when devising Scotland’s new intestacy rules.

¹ It is difficult to obtain precise numbers, but it seems to be the case that many Scots have not made a will. See D Reid, “From the Cradle to the Grave: Politics, Families and Inheritance Law” (2008) 12 *EdinLR* 391 at 413 citing statistics that suggest that 31% of those who died in 2007 were intestate. By contrast, Kenneth Reid suggests that a reasonable estimate is that around half of those who die in Scotland do so without leaving a will. See K G C Reid, “Intestate Succession in Scotland”, in K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015) 371 at 388.

² For details, see Dot Reid’s contribution in this issue: “Why is it so difficult to reform the law of intestate succession?” (2020) 24 *EdinLR* 00.

³ Scottish Law Commission, Report on Succession (Scot Law Com No 124, 1990).

⁴ Scottish Law Commission, Report on Succession (Scot Law Com No 215, 2009).

⁵ *Scottish Government response to the Consultation on the Law of Succession* (2018).

⁶ Scottish Government, *Consultation on the Law of Succession* (2019).

Why is it so difficult to reform the law of intestate succession?

A. INTRODUCTION

When those interested in the law of succession look back in time, the current period of its history may be perplexing. Scotland has been attempting to reform the law of succession for over thirty years, and although minor “technical” changes have been made¹ the substantive law remains as it has been since 1964. Despite three Consultative Memoranda,² one Discussion Paper (and accompanying consultation)³ and two Reports⁴ from the Scottish Law Commission (“SLC”), followed by four consultation processes by the Scottish Government,⁵ there has been no consensus about the way forward. Unless the most recent consultation process defies all expectation, we appear to be deadlocked. The issue that has proved most difficult is the division of an intestate estate between a spouse or civil partner and children of the deceased,⁶ a difficulty aggravated where there is competition between a first family and a second family.⁷ In view of the fact that the consultation generated “widely divergent views”,⁸ the Scottish Government now wishes to take a “fresh approach”.⁹ It is hoped that the observations below may constructively inform the next stages of the process.

B. THE SHADOW OF PRIOR RIGHTS

One explanation for the difficulties we currently face lies in the fact that all the attempts to change intestate succession have taken place in the shadow of “prior rights”, the statutory entitlement of a surviving spouse or civil partner created by the 1964 Act.¹⁰ Prior rights were intended to allow the surviving spouse to have a roof over his or her head by acquiring the family home and its contents up to specified values, as well as a cash payment. However, the Act was careful to balance the claims of an intestate’s spouse and children. Between 1964 and 2005 the sums that could be claimed for prior rights were raised by statutory instrument in a

¹ The Scottish Government’s description of the changes brought about by the Succession (Scotland) Act 2016, can be found here <https://www2.gov.scot/Topics/Justice/law/damages/succession>.

² Consultative Memorandum on Intestate Succession and Legal Rights (Scot Law Com CM No 69, 1986); Consultative Memorandum on The Making and Revocation of Wills (Scot Law Com CM No 70, 1986); Consultative Memorandum on Some Miscellaneous Topics in the Law of Succession (Scot Law Com CM No 71, 1986).

³ Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007).

⁴ Report on *Succession* (Scot Law Com No 124, 1990); Report on *Succession* (Scot Law Com No 215, 2009).

⁵ *Succession Law in Scotland - A Review of the Financial Limits of Prior Rights and Confirmation to Small Estates* (2011); *Consultation on Technical Issues Relating to Succession* (2014); *Consultation on the Law of Succession* (2015); *Consultation on the Law of Succession* (2018).

⁶ See K G C Reid, “Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children” (2020) 24 EdinLR 00.

⁷ See J P Schmidt, “Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy” (2020) 24 EdinLR 00.

⁸ *Scottish Government response to the Consultation on the Law of Succession* (2018) 8.

⁹ *Ibid.* A similarly fresh approach is to be taken to the position of cohabitants on intestacy, *ibid* 14.

¹⁰ Succession (Scotland) Act 1964 ss 8 and 9.

fairly modest way with the result that the spouse was likely to inherit all of a small to medium size intestate estate and the children would benefit most in a large estate.¹¹

However, in 2005 that balance was significantly altered when the values of prior rights were uprated. The housing entitlement was increased by around 230% from £130,000 to £300,000,¹² and then raised again in 2011 by a further 57% to £473,000.¹³ The Scottish Executive originally intended the 2005 increase to be a modest one, from £130,000 to £160,000. However, despite the fact that the average net value of heritable property in the whole of the UK was less than £153,000, “the Succession Committee of the Law Society of Scotland did not consider these increases to be substantial enough” and recommended a figure of £300,000.¹⁴ Since the family home is usually the most valuable asset in the average estate, the net result of these increases is that in almost all cases the entire estate will pass to the surviving spouse or civil partner. Since 2005, therefore, Scottish children have been likely to inherit little or nothing from a married parent who is intestate, although it is doubtful if many members of the public have noticed.

The history of prior rights has exerted significant influence on the reform proposals.¹⁵ When the SLC published its Discussion Paper in 2007, the housing right had already reached £300,000. It is, therefore, no coincidence that the proposed “threshold sum” for the surviving spouse or civil partner (the first slice of the intestate estate) was £300,000. There is a good deal of discussion of housing market trends, but in the end the SLC was reluctant to propose a figure lower than the existing housing entitlement. They were chasing the value of prior rights, but without taking account of the limitations imposed within the current law: for instance, the statutory housing entitlement is a maximum figure which would rarely be claimed in full as the average value of property in Scotland is under £200,000; it is also a net figure after repayment of any loan; and the property is increasingly likely to be jointly owned by a couple thus halving the deceased’s property share. The proposed threshold sum had no such limitations but would apply in full across all assets with the result that a much greater share of the estate would be allocated to the spouse or civil partner.

The 2011 uprating of prior rights took place between the SLC’s 2009 Report and the Government’s subsequent consultation on that Report in 2015. In that intervening period the Government’s proposed a further substantial increase of the housing element in line with the 57% rise in value of average Scottish house prices between 2004 and 2009. A figure of £470,000 was deemed appropriate as it would capture over 95% of Scottish properties, and would not cause “prejudice against those surviving spouses living in [high-value] areas where the dwelling is in fact not ‘exceptional’ by relative standards”.¹⁶

The fundamental flaw in the 2011 uprating was to apply a percentage increase to an already inflated figure. Even if it is accepted that the housing market is a reliable indicator for succession rights, there is a flawed assumption of perpetual growth. According to the Office of National Statistics, Scottish housing prices have not yet recovered from their peak in June

¹¹ After prior rights have been satisfied, the surviving spouse or civil partner can also claim one third of the moveable estate as legal rights, and any remaining balance will go to the children (1964 Act s 2(1)(a)).

¹² Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2005 (SSI 2005/252).

¹³ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

¹⁴ Note by the Clerk to Justice 1 Committee, available at <http://www.scottish.parliament.uk/business/committees/justice1/papers-05/j1p05-18.pdf>.

¹⁵ For further detail see D Reid and N Sweeney, “Land reform, inheritance rights and unintended consequences” [2015] CFLQ 403.

¹⁶ *Review of Financial Limits* (n 5) Annex A, 2.

2008.¹⁷ Had the same methodology been applied twelve months later it would have led to a significantly different result, logically even to a decrease in the housing entitlement.

Is it sensible to base intestate succession rights on the assets of the wealthiest slice of the population, the vagaries of the housing market and the expectation of perpetual growth? If the law is framed to capture the highest value properties in the country, it will surely distort the distribution on intestacy for everyone else. However, there is little doubt that these uprating exercises have left their mark on all subsequent attempts to reform intestate succession.

C. CLARITY OF AIMS

Taking a step back from the detail, it would seem obvious that if the law is to be reformed some justification for change is necessary. Looking back at the work of the Mackintosh Committee, which laid the foundations for the 1964 Act, the drivers for reform were to create a law of intestate succession that would be relevant to small estates as well as large ones; that would move towards equality of the sexes; and that would improve the position of the surviving spouse in relation to other relatives.¹⁸ The aims were specific and achievable.

By contrast, the recent reform process began by appealing to high level principles that lack specificity, and policymakers have struggled to put flesh on the bones in order to achieve those aims. We are told, not unreasonably, that the “primary purpose” of intestate succession law is that it should be fair¹⁹ and the current rules need reform because they “sometimes fail to provide a fair result”.²⁰ Indeed it is striking how often reference is made to fairness and justice or injustice. There is little recognition that these are contested concepts, nor is it clear how fairness is to be assessed or whose version of justice is to be pursued. By way of illustration, where the deceased is survived by both a spouse and children the current rules sometimes produce “unjust and anomalous results”²¹ in that the children may get too much and the spouse too little. The SLC proposals aim therefore to give the surviving spouse all of a “modest” estate and to allow children to share in a “substantial” estate.²²

A second aim is for the rules to be simplified.²³ As far back as the 1990 Report, the consistent recommendation of the SLC has been to remove the distinction between heritable and moveable estates, largely with a view to simplifying the rules. This aspect of reform was enthusiastically adopted by the current First Minister in her First Programme for Government with the overarching aim of removing the current restriction of legal rights to the moveable estate, thus making the whole estate available for succession claims by the immediate family:²⁴

As part of this modernisation the distinction between movable and immovable property would be removed to give children, spouses and civil partners appropriate legal rights over both forms of property. This should ensure a just distribution of assets among a deceased’s close family to reflect both societal change and expectations. These changes will be an important aspect of our series of measures in respect of Land Reform.

¹⁷ Office for National Statistics, House Price Index June 2015, available at <http://www.ons.gov.uk/ons/rel/hpi/house-price-index/june-2015/stb-june-2015.html#tab=House-price-index-by-country>.

¹⁸ *Law of Succession in Scotland: Report on the Committee of Inquiry* (1951, Cmnd 8144).

¹⁹ 2009 Report (n 4) para 2.3; 2015 Consultation (n 5) paras 1.9 and 2.12.

²⁰ 2007 Discussion Paper (n 4) para 1.8.

²¹ *Ibid* para 2.28.

²² *Ibid* para 2.38. The terms are not defined.

²³ 2009 Report (n 4) para 2.3; 2015 Consultation (n 5) para 2.10.

²⁴ Scottish Government, *One Scotland: the Government’s Programme for Scotland 2014-15* (2014), para 11.

Land campaigners have often seen the potential for succession law to be used as a tool for the redistribution of land in Scotland,²⁵ again appealing to fairness, but in an entirely different context from that envisaged by the SLC.

A third aim of both SLC and Government is that the law of succession should be modernised to reflect social change.²⁶ This is a more specific and concrete aspect of the reform process, recognising the variety of ways in which people may choose to create family, whether in reconstituted families with step-parent and step-sibling relationships, or by choosing to cohabit rather than to marry. Up until the most recent Government consultation, the reform proposals have failed to achieve this aim: no distinction has been made between first and second families on the ground that to do so would be too complex, and no change proposed to the exclusion of step-children from intestate succession or to improve the limited discretionary claim for cohabitants.

In addition to these aims, another guiding policy rule has dominated the reform process and has contributed significantly to the current impasse. As discussed above, the uprating of prior rights aimed to allow a surviving spouse or civil partner to acquire the family home in the great majority of cases. The SLC also regarded what we might call the “spouse in the house” rule as a policy imperative in “most cases”,²⁷ and the Scottish Government subsequently confirmed that “the current policy basis that a surviving spouse/civil partner can retain the family home should be maintained”.²⁸ Once this is understood, the range of proposed values for the “threshold sum” – initially £300,000 from the SLC, rising to between £335,000 and £650,000 in the 2015 Government consultation – is comprehensible.²⁹ If all spouses are to inherit all houses it also explains why so much of the controversy has involved rising house prices and property values. If this is indeed the overriding principle to which all others are subordinate, it ought to be both explicit and subject to wider discussion and consultation. And if the net result will be to transfer virtually all of the estate to the surviving spouse or civil partner, succession law could contain the anomaly that children would have automatic rights in a testate estate regardless of the terms of a will, but none if the deceased died intestate.³⁰

D. EVIDENCE-BASED POLICY-MAKING

The Scottish Government is now of the view that “a scheme for intestacy should reflect outcomes which individuals and their families would generally expect and on which there is a degree of consensus”.³¹ This raises questions about how to discern public attitudes, and the need for a robust evidence base to inform policy changes. In the last fifteen years three major studies have been conducted in England and Wales evaluating public attitudes towards inheritance,³² as well as several smaller studies in Scotland.³³ Of particular interest is a large

²⁵ A Wightman, *The Poor had No Lawyers: Who Owns Scotland (and How They Got It)*, 3rd ed (2015) ch 28. See also Report of the Land Reform Review Group, *The Land of Scotland and the Common Good* (2014) s 6.

²⁶ 2009 Report (n 4) para 1.3; 2018 Consultation (n 5) para 2.15.

²⁷ 2009 Report (n 4) paras 2.4 and 2.9.

²⁸ 2015 Consultation (n 5) para 2.9.

²⁹ 2015 Consultation (n 5) paras 2.13-2.26.

³⁰ This important point was raised during the Symposium, and is examined in more detail in Reid (n 6).

³¹ *Scottish Government response to the Consultation on the Law of Succession* (2018) 8.

³² J Finch & J Mason, *Passing On: Kinship and Inheritance in England* (2000); K Rowlingson & S McKay, *Attitudes to Inheritance in Britain* (2005), available at <http://www.jrf.org.uk/publications/attitudes-inheritance-britain>; A Humphrey, G Morrell, L Mills, G Douglas and H Woodward, *Inheritance and the Family: Attitudes to Will-making and Intestacy* (2010). The Rowlingson and McKay study contained a representative sample of respondents from Scotland and the authors have confirmed that there were no noticeable differences in responses.

³³ Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland* (2006); Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (2005). The latter survey was repeated

scale survey of public attitudes commissioned by the Law Commission when succession law was recently reformed in England and Wales,³⁴ even if its findings were not fully implemented in the Inheritance and Trustees' Powers Act 2014.³⁵ This study focused particularly on how different groups - those with children from more than one-relationship, step-parents and cohabitants - might vary in their attitudes towards inheritance.³⁶ A recent PhD thesis conducted the only Scottish research into public attitudes by means of focus groups and interviews.³⁷ These studies represent more than a "best guess" and can provide some guidance for the framing of the law. There is also a high degree of consistency in some of the key findings:

(1) There is a strong parental desire to leave an inheritance for children of any age. Children have a privileged position in relation to inheritance, which Finch and Mason describe as "the core thread of fixity"³⁸ only to be broken in the most exceptional cases. Parents take pleasure in leaving a token of their love and affection,³⁹ as well as a financial cushion, and may be distressed at the prospect of the State interfering in inheritance either through tax or payment for care in later life.

(2) Inheritance between spouses

Married couples do not consider assets passing from one spouse to the other as "inheritance". This may seem surprising, but it rests on the strong belief that spouses own their assets jointly because they worked together to create them. The horizontal interspousal transfer is regarded as a separate process⁴⁰ whereby inheritance to the next generation is postponed while the second parent is alive, with an expectation that children will inherit in due course.⁴¹ A study of Scottish wills found that an initial transfer of property between spouses was "a temporary and transitional stage" which would ultimately lead to a vertical transfer to the next generation.⁴²

(3) First vs second families

In relation to the difficult question of inheritance where the deceased has remarried, a substantial majority expressed negative views if the second spouse inherited at the expense of adult children from a previous marriage.⁴³ This was not because they considered second or subsequent marriages to be qualitatively inferior to first marriages, but they were qualitatively *different* insofar as spouses who were also parents had obligations not just to each other but also to their children. This distinction was based on the view that a second spouse could not necessarily be trusted to provide for the deceased's children and in such instances children

in 2015, and although the Scottish Government has not made the results publicly available they are referred to in the 2018 Consultation (n 5).

³⁴ Humphrey et al, *Inheritance*; see also G Douglas, H Woodward, A Humphrey, L Mills and G Morrell, "Enduring love? Attitudes to family and inheritance law in England and Wales" (2011) 38 *Journal of Law and Society* 245.

³⁵ See R Kerridge, "Intestate succession in England and Wales" in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (2015) 337-340.

³⁶ Humphrey et al, *Inheritance* 14.

³⁷ N Sweeney, *Public Attitudes to Inheritance in Scotland* (2018), unpublished PhD thesis, available at <http://theses.gla.ac.uk/30620/7/2018SweeneyPhD.pdf>. A more detailed summary of the findings can be found in Reid & Sweeney (n 12).

³⁸ Finch & Mason, *Passing On* 59.

³⁹ Douglas et al (n 32) at 247.

⁴⁰ Finch & Mason, *Passing On* 71.

⁴¹ Rowlingson & McKay, *Attitudes to Inheritance* 7-11.

⁴² M Munro, "Housing Wealth and Inheritance" (1988) 17 *Journal of Social Policy* 417 at 432. On this point see also Schmidt (n 7) at 00.

⁴³ In the most recent study only 15% of respondents favoured the spouse receiving everything where the deceased had adult children (Humphrey et al, *Inheritance* 37). See also Finch & Mason, *Passing On* 37.

ought to inherit directly.⁴⁴ People were also troubled at the prospect of those assets passing out of the family to a second spouse and children.⁴⁵

Up to now, policy-making in succession has largely been dominated by the legal profession⁴⁶ and whilst legal expertise and understanding is valuable, it does raise a question about whether the views of the profession are representative of the general public. When given a voice, members of the public are able to express their own views on inheritance matters, and much more use could be made of these studies if there is a genuine desire to reform the law in line with public expectations.

E. CONCLUSION

If intestate succession is to be reformed in a way that endures for another fifty years, perhaps policymakers need to take a step back in order to clarify the aims of such a reform, relying on a body of existing evidence about public attitudes and expectations, together with a wealth of data about the size and composition of estates.⁴⁷ Once the purpose of reform is clear, the way forward may be more straightforward.

But perhaps there are wider questions that ought to form part of this debate. Scotland, like the rest of the UK, has rising levels of wealth inequality, much of which is property wealth. A recent study suggests that the wealthiest 1% of Scots own more than the bottom 50%; and the least wealthy 30% of Scottish households combined had no property wealth at all, but the richest 10% owned 42.5% of net property wealth.⁴⁸ The rock star economist Thomas Piketty argues that, at a time of weak economic growth and stagnant wages, inheritance has become a major contributor to creating and entrenching these inequalities.⁴⁹ Perhaps lawyers as well as politicians should be paying attention to the effects of the legal rules which ultimately determine how that wealth is distributed.

Dot Reid
University of Glasgow

Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children

⁴⁴ Douglas et al (n 32) 247; Finch & Mason, *Passing On* 37-39.

⁴⁵ Finch & Mason, *Passing On* 37.

⁴⁶ The legal profession is embedded in the law reform and consultation processes, as members of the SLC Advisory Group which shaped the initial proposals and a majority voice in both SLC and government consultations. Furthermore, the 2015 Government consultation was strongly influenced by “informal pre-consultation dialogue with stakeholders” who are referred to more than 20 times in the consultation. In answer to a Written Parliamentary Question the Minister for Community Safety and Legal Affairs confirmed that the stakeholders in question were members of the legal profession (13 June 2012, Question S4W-07665, available at http://www.scottish.parliament.uk/S4_ChamberDesk/WA20120613.pdf).

⁴⁷ See for instance A B Atkinson, *Wealth and Inheritance in Britain from 1896 to the Present* (2013).

⁴⁸ A M Soaita, K Gibb & D MacLennan, *Housing Wealth Inequalities in Scotland: An Evidence Review* (2019), available at https://housingevidence.ac.uk/wp-content/uploads/2019/07/190722-Housing-wealth-inequality-scotland_final_1.pdf.

⁴⁹ T Piketty, *Capital in the Twenty-First Century* (2014).

A. FRACTIONS AND SLABS

Jack dies intestate, survived by his widow, Jill, and by their two children. How should Jack's estate be divided as between Jill and the children? There are two main ways in which this might be done. Either Jill and the children can each be given a fractional share in the estate (for example, one-half each, or two-thirds to Jill and one-third to the children) or Jill can be given an initial slab of estate and the children some or all of the rest.¹ By and large, countries in the Civil Law tradition favour a fractional system and those in the Common Law tradition a slab system.² And in the former, where even in cases of testacy the spouse and children are entitled to a forced share (the equivalent of legal rights in Scotland), the forced share too is allocated on a fractional basis. Importantly, the choice between these methods of division is a choice of technique rather than a choice of substance: whether a spouse receives more under a slab system than under a fractional system will depend, not on the type of system, but on the size of the slab or, as the case may be, of the fractions.

And what of Scotland? Unable, apparently, to choose between a fractional system and a slab system, Scotland elects for – both. An intestate estate is divided according to a slab system, allowing the surviving spouse to scoop up, as prior rights, the family home (up to a value of £473,000), its contents (up to a value of £29,000), and £50,000 in financial provision.³ If there is anything left, which usually there is not, most (though currently not all)⁴ of it goes to the children. But the position is entirely different for legal rights (the Scottish version of a forced share) in cases of testacy. These are allocated on a fractional basis and one, moreover, which puts children on the same footing as the spouse. Thus, regardless of the terms of Jack's will, Jill is entitled to one-third of the value of the moveable estate and the children to another third.⁵

No other country, so far as I know, mixes a slab system with a fractional system, using one for intestacy and the other for the forced share. Scotland is unwise to try to do so. Of course, the forced share need not precisely follow the rules on intestacy. The situations are distinct, not least in the amount of property at stake. Yet the two must fit together, and must proceed from a consistent policy basis. To treat spouse and children equally in respect of the forced share and grossly unequally in cases of intestacy is a difference beyond rational defence. Nor can it work in practice. In the well-known case of *Kerr, Petitioner*,⁶ George Kerr died survived by Catherine, his wife now widow, and by a daughter from a previous relationship. Catherine was the sole beneficiary under George's will, but the daughter claimed a third of the moveable estate as legal rights. Disposed to resist this claim from her step-daughter, Catherine renounced her rights under the will, thus creating an artificial intestacy which, by virtue of the slab system, would give her the entire estate. It was held that she was entitled to do so. And so, in this all too simple manner, the protection provided by law for the deceased's children was cast aside.⁷ This result can be avoided only if children receive at least as much of the estate on intestacy as they would receive as legal rights; and that in turn is likely to require that the same system of

¹ Where the children are given only some of the rest, a fractional system will be used at this point to divide the property among the eligible relatives.

² For details, see K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015). The overall position is summarised at 497-499.

³ Succession (Scotland) Act 1964 ss 8 and 9.

⁴ Because the surviving spouse can claim one-third of the moveable estate by way of legal rights. The children then receive the rest, either as legal rights or under s 2(1)(a) of the 1964 Act.

⁵ Legal rights derive from the common law.

⁶ 1968 SLT (Sh Ct) 61.

⁷ In the laconic comment of the sheriff-substitute (W J Bryden) at 62, "the consequences may be unfortunate for Mrs Brands [the daughter]".

division, fractional or slab, is used for both. In reforming the law of intestate succession this key point must be kept in mind.

B. TWO ACCIDENTS OF HISTORY

The muddle of the present law comes, not from deep reflection or the zeal of law reformers, but from an accident of history or, to be precise, from two such accidents. Both the fractional system and the slab system were received from English law. The receptions, however, were 700 years apart.

The earliest source in Scotland for the fractional system of legal rights for moveables is *Regiam Majestatem*, a compilation made at the start of the fourteenth century.⁸ The relevant passages, like much else in *Regiam*, are drawn from an earlier English work, Glanvill's *Tractatus de legibus et consuetudinibus Anglie*.⁹ Already by the time of Stair, the relevant rules were seen as part of "our ancient and immemorial customs".¹⁰ In most essential respects they have remained unchanged since the later Middle Ages.

By comparison, the slab system used in intestate succession is almost brand new. Its first appearance was in legislation of 1911 where it gave widows (but not yet widowers) a priority right to £500 if no children of the deceased survived.¹¹ The legislation was an almost exact copy of an English Act of 1890¹² – an Act which was also widely adopted throughout the British Empire.¹³ The result, in England, was not to superimpose a slab system on top of a fractional system, because the fractional system of forced shares had long since been discarded.¹⁴ And even in Scotland, where forced shares survived in full vigour, any tension between the systems was avoided by the restriction of the spouse's priority right to cases where no children survived. Yet the introduction of the slab system in 1911 was decisive for the later development of the law. For when, in the 1950s and 1960s, proposals were made to increase the spouse's share on intestacy, the temptation to employ the slab system turned out to be irresistible.

The process can already be seen at work in the first version of the Succession Bill introduced by the Government in May 1963.¹⁵ This followed the Mackintosh Committee of 1951 in giving the spouse, in a question with surviving children, £1,000 plus the furniture and plenishings, a proposal which Mackintosh had in turn copied from English legislation of 1925.¹⁶ Cast in this limited form, the slab system would often leave something for the children and so was capable of a rough co-existence with the fractional system of legal rights. This version, however, was not to last. In Parliament on 25 July 1963 a Conservative backbench MP, Colonel Forbes Henry, strongly criticised the provisions as doing too little for the spouse

⁸ *Regiam Majestatem* (ed Lord Cooper, Stair Society, vol 11, 1947) II. 37.

⁹ Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie* (ed and transl GDH Hall, 1965) VII.5.

¹⁰ Stair, *Inst* 1. 1. 16.

¹¹ Intestate Husband's Estate (Scotland) Act 1911. The priority right was not extended to widowers until the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 5.

¹² Intestates' Estates Act 1890.

¹³ E.g., Probate Act 1890 (New South Wales); Intestate Estates Act 1896 (Victoria). As in Scotland, this legislation was the foundation for the slab system which was to develop later.

¹⁴ This had largely occurred by the end of the fourteenth century, although it survived in a few places, such as Yorkshire, as customary law: see eg R Helmholz, "Legitim in English Legal History" [1984] University of Illinois LR 659. In London it was not abolished until the Act of 1724 (11 Geo I c 18) s 17.

¹⁵ For a more detailed account with full references, see K G C Reid, "Intestate Succession in Scotland", in Reid et al (n 2) 370, 391-393.

¹⁶ *Law of Succession in Scotland: Report on the Committee of Inquiry* (Cmnd 8144: 1951) 14. The English legislation was the Administration of Estates Act 1925 s 46(1)(i).

and urged that the spouse be given a liferent in the family home.¹⁷ For this attack the Government appears to have been curiously unprepared. The official files for the period show what happened next.¹⁸ After summer holidays had been taken, the existing proposals were urgently reviewed by civil servants. By the start of September a new line had been agreed with Ministers. The spouse would be given, not a liferent, but the family home itself. As before, the spouse would also receive £1,000 and the furniture and plenishings. This radical change of policy, doing more for the spouse than in practically any other country in the world at that time, passed into law with the Act of 1964. In the panic of the moment, the implications for the deceased's children, let alone for the fractional system by which they benefited in cases of testacy, were simply not considered.

C. LAW REFORM: FRACTIONS OR SLABS?

For the future the lessons seem clear enough. In reforming the law of succession, an alignment is required between the rules of intestacy and the rules of forced shares (legal rights). The rules need not, indeed will not, be identical. But there must be a common policy as to the respective entitlements of spouse and children and, following on from that, probably a common system of distribution of the estate, whether by fraction or by slab. There must, in other words, be matching and not mixing.

In its 2009 proposals – now, understandably, discarded by the Scottish Government – the Scottish Law Commission paid proper attention to this issue.¹⁹ Just as a slab system was to operate on intestacy (£300,000 to the surviving spouse, with the excess, if any, split between the spouse and children), so a slab system would also operate in respect of the forced share. The forced share was to be 25 per cent of the children's entitlement on intestacy.²⁰ Underpinning these proposals was a common policy for both intestacy and the forced share, namely “to provide a surviving spouse or civil partner with a large portion of the deceased's estate”.²¹ This would be achieved by a slab system which gave most or all of the deceased's estate to the spouse. On these proposals the test mentioned earlier in this note, that children must receive at least as much on intestacy as they would receive as a forced share, would not only be met but greatly exceeded. And there would be no need for Mrs Kerr to renounce her rights under the will; indeed she would be seriously disadvantaged were she to do so. Of course, the policy behind the proposals can be and has been challenged. Arguably, children should be treated more generously than either the current law or the Law Commission's proposals allow. But the technique employed is irreproachable, and also unavoidable.

Which set of rules – intestate succession or forced share – determines the policy of the other? The Scottish Law Commission decided on the rules of intestacy first before seeking to formulate rules for the forced share. That, surely, is the right way round. To begin instead with the forced share is to allow the tail to wag the dog. Yet that is exactly what the Scottish Government appears to have done. In a paper published on 18 October 2018 the Government rejected the Law Commission's proposals for forced shares and abandoned further attempts to reform the law.²² The Government, in other words, supported the continuation of a regime

¹⁷ Hansard: HC Deb, Scottish Grand Committee, 25 July 1963, col 41.

¹⁸ National Records of Scotland, HH1/1198 8686/22H.

¹⁹ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) paras 3.36 ff and esp para 3.41.

²⁰ This is the first of two options presented by the Scottish Law Commission. Under the second option, the forced share would be replaced by a capital sum paid to dependent children only.

²¹ Report on *Succession* (n 19) para 3.40.

²² *Scottish Government response to the Consultation on the Law of Succession* (2018) 11: “The current scheme of legal rights attracts criticism but it does have the benefit of striking a balance between freedom of testation and

under which both the spouse and children receive an equal (one-third) share of the moveable property of the deceased. In due course this decision may have to be reconsidered. If it is not, then the proposals now to be brought forward for intestate succession would need to mirror the existing law of legal rights. It would mean either a fractional system for intestate succession, or a slab system so modified as to give children at least as much on intestacy as they are to receive on testacy (for example, by ranking legal rights ahead of the spouse's prior rights). Judging by its most recent paper, however, there is no sign that the Scottish Government is alert to the issue.²³

D. NEXT STEPS

The reform of intestate succession law needs re-thought. There is much to learn from the law in other countries, as Jan Peter Schmidt's paper shows.²⁴ And it is certainly necessary to look further than the two jurisdictions (Washington State and British Columbia) – both from the Common Law and neither with a system of forced shares – which, rather puzzlingly, were singled out for attention by the Scottish Government.²⁵ Possibilities for reform abound. There could be a fractional system but with the larger share (say, three-quarters) for the surviving spouse; or a slab system which took more account of the interests of children; or a scheme in which the children's share was substantial but postponed until the death of the surviving spouse. And the distinction between heritable and moveable property must surely be abandoned, as it has long been abandoned virtually everywhere else.

It is no reflection on the valuable work carried out by the Scottish Government to say that such a re-consideration is beyond its resources. As the experiences of 1963-4 show only too clearly, law reform on the hoof does not usually work out well. Fortunately, there is a public body which is exactly designed for a project of this scale and importance. It is time that reform of the law of intestate succession was returned to the Scottish Law Commission.

Kenneth G C Reid
University of Edinburgh

Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy

A. GENERAL OVERVIEW

Of the many aspects of intestate succession, the position of the surviving spouse¹ vis-à-vis the deceased's children is arguably not only the most practically relevant, but also the most difficult

limited protections for spouses/civil partners and children ... [W]e do not intend to bring forward reforms in this area." This view is repeated in Scottish Government, *Consultation on the Law of Succession* (2019) para 1.11.

²³ *Consultation on the Law of Succession* (n 22).

²⁴ See J P Schmidt, "Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy" (2020) 24 EdinLR 00.

²⁵ *Consultation on the Law of Succession* (n 22) paras 2.23 ff.

¹ Insofar as jurisdictions recognise same-sex equivalents of marriage, as Scottish law does with civil partnerships, what is said here about spouses applies accordingly.

to decide upon for a legal order.² Current Scottish law is characterised by a very favourable treatment of widows and widowers who, thanks to their generous “prior rights”, often take the entire estate of the deceased. Judging, moreover, from the different reports and consultation papers,³ there appears to be consensus that, even though the rights of children might need to be strengthened in a future reform, the spouse should continue to take the largest share.

In general terms, the Scottish position is fully in line with the global trend, which for the last two centuries has been marked by a constant improvement of the intestate succession rights of surviving spouses at the expense of the deceased’s blood relatives.⁴ At the heart of this development has been the conviction that the surviving spouse should not merely be protected against destitution, but be able to continue living in the same house and with the same degree of comfort as before. This approach not only marked a turn away from the traditional “dynastic” model of intestate succession that was built on the desire to keep the assets within the blood family; it was also a reaction to the steep increase in life expectancy. For the death of the first spouse will now often occur at a moment when the other is living on a pension (and is possibly faced with costly bills for care or medical treatment), whereas the children are typically middle-aged and fully set up in life.⁵

If contemporary jurisdictions thus largely agree on the purposes and justifications of spouses’ intestacy rights, they show remarkable differences as regards implementation. In terms of substance, two general approaches can be distinguished. Under the first, the estate is given to the spouse in its entirety, at least when it is of small or medium size (as is the typical case of intestacy),⁶ with the children only benefitting, if at all, on the death of the second spouse. This solution is favoured in Scotland and most Common Law jurisdictions, while on the European Continent it is only found in exceptional cases (examples being Dutch and Swedish law). The second approach, which is predominant in Civilian regimes, is more nuanced. The spouse receives only a fraction of the estate, thus inheriting alongside children, but he or she enjoys further benefits under matrimonial property law. In addition, many Civilian jurisdictions grant surviving spouses the right to remain in the family home.

At first sight, the treatment of the surviving spouse under intestacy is a direct consequence of the chosen legislative technique. As Kenneth Reid shows in his paper, jurisdictions such as Scotland and England adopt a slab system, which means that they grant the spouse a minimum participation in the estate in the form of “prior rights” or a “statutory legacy”. Civilian regimes, by contrast, opt for a fractional system, which means that the entire estate is divided into shares.⁷ And yet there is no necessary connection between substance and form. Just as a slab system can be combined with a modest threshold sum (as is perfectly illustrated by former Scottish and English law), in a fractional system the share of the spouse can be set at 100% (as is illustrated by Dutch law). As a result, a lawmaker needs carefully to distinguish both dimensions. Arguably, the substantive question (how much should the spouse get?) should be decided before the technical question (should the spouse’s entitlement take the form of prior rights or a share in the estate?).

² As R Zimmermann aptly remarks, “the surviving spouse does not fit into the system of classes established related to the deceased by blood”: see R Zimmermann, “Intestate Succession in Germany”, in K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015) 181 at 209.

³ For further details, see the paper by D Reid in this issue: “Why is it so difficult to reform the law of intestate succession?” (2020) 24 EdinLR 00.

⁴ On this development “(f)rom penury to affluence”, see K G C Reid, M J de Waal and R Zimmermann, “Intestate Succession in Historical and Comparative Perspective”, in Reid et al (n 2) 442 at 489 f.

⁵ Ibid at 491 f.

⁶ The data presented by the Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.1 is probably more or less valid for other European jurisdictions, too.

⁷ See K G C Reid, “Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children” (2020) 24 EdinLR 00.

The following analysis focuses on the substantive dimension. It shows that although the “spouse-takes-all” approach currently in place in Scotland works well in ordinary cases, it can lead to highly problematic results in others. The approach prevailing in Civilian regimes avoids these pitfalls, but only at the price of additional complexity.

B. THE “SPOUSE-TAKES-ALL” APPROACH

The decision to give the entire estate to the surviving spouse rests on a sound foundation. To the considerations mentioned above one can add that the transfer of wealth between the spouses will normally be just “a temporary and transitional stage”, as it is expected that the property will in due course flow down to the children.⁸ In Germany, spouses frequently opt for such a postponement of the childrens’ inheritance in their joint and mutual wills,⁹ and the Dutch regime of intestacy enacted in 2003 was directly modelled on a similar will-making practice.¹⁰

And yet the “spouse-takes-all” approach is faced with two major problems. The first occurs in those jurisdictions which, like Scotland, protect children against complete disinheritance, be it in the form of a “forced share”, a “compulsory portion”, or a “legal right”.¹¹ For if these institutions prevent a testator from giving his or her entire estate to the surviving spouse in a will, then it seems highly inconsistent to allow this result to happen under intestacy.¹² If anything, the children’s rights should be greater in intestacy than in testacy, and not the other way round. Against this background, it is no coincidence that there is a high correlation between jurisdictions which tend to make the spouse the sole intestate heir and those which do not guarantee children a certain fraction of the estate in testate succession (a prime example being English law, which only allows children, and certain other persons, an application to the court for “family provision”).¹³ This does not mean that it is impossible to square a “spouse-takes-all” approach with the existence of legal rights. But if children’s rights are relegated in intestacy, then the same must happen, in principle, with regard to indefeasible rights in testate succession.¹⁴

The second, and even bigger, problem is that there is no guarantee that the deceased’s estate, having passed to the surviving spouse, will eventually fall to the deceased’s children. Leaving aside the risk that assets are consumed by the surviving spouse’s medical bills or squandered in an excessively luxurious lifestyle, they may be diverted from the path of their natural destination by intestate succession law itself. The most obvious scenario in which the ties between the deceased’s estate and his or her children are severed is the one where the surviving spouse is not the biological parent of the deceased’s children. Another is the case where the surviving spouse dies after having remarried, so that, in the absence of a will, the “spouse-

⁸ See Report on *Succession* (n 6) para 2.26, citing M Munro, “Housing Wealth and Inheritance” (1988) 17 *Journal of Social Policy* 417. As has been said, the spouse is regarded as a kind of “interim owner”: see Reid, de Waal and Zimmermann (n 4) at 499. On this point see also Reid (n 3) at 000.

⁹ See R Zimmermann, “Das Ehegattenerbrecht in historisch-vergleichender Perspektiv” (2016) 80 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 39 at 85 f.

¹⁰ See W D Kolkman, “Intestate Succession in the Netherlands”, in Reid et al (n 2) 224 at 241-242.

¹¹ For extensive comparative analysis, see K G C Reid, M J de Waal, and R Zimmermann (eds), *Comparative Succession Law vol III: Mandatory Family Protection* (forthcoming 2020).

¹² See the criticism by K G C Reid, “Intestate Succession in Scotland”, in Reid et al (n 2) 370 at 395-396. In current Scottish law, the problem mentioned here is primarily caused by the mixing of a slab system in intestacy with a fractional system for legal rights: see Reid (n 7). However, a unified approach is not free from the danger of inconsistency either.

¹³ Inheritance (Provision for Family and Dependants) Act 1975. It should also be noted, however, that the corresponding provisions apply to testacy and intestacy alike (s 1(1)), so that arbitrary differences are avoided.

¹⁴ Once more it is Dutch law which illustrates such an approach: see Ar. 4:81(2) *Burgerlijk Wetboek*. For a detailed account, see W D Kolkman, “Compulsory Portion and Family Provision in the Netherlands”, in Reid et al (n 11).

takes-all” solution kicks in for a second time, with calamitous consequences for the children of the first marriage.

From a comparative point of view, it is interesting to see how differently jurisdictions react to the “step-family danger”.¹⁵ Whereas current Scottish law ignores it, just like its English counterpart, other jurisdictions that adopt a “spouse-takes-all” approach make determined efforts to protect the children’s interests. One technique is to reduce the spouse’s entitlement where the deceased had children from an earlier relationship;¹⁶ another, more radical solution is to grant the children, whether common or not, a kind of deferred yet binding entitlement at the death of the (first) parent.¹⁷ For instance, under Dutch law, the children receive an immediate monetary claim against the surviving spouse, which, however, is due and payable only if the spouse is declared bankrupt or dies.¹⁸ The phrase by which the current Dutch regime was characterised in the legislative proceedings, namely that “the surviving spouse takes all, the children the rest”,¹⁹ is thus more than a flippant euphemism, since the children will in fact receive that which is left. A different method, namely a kind of “subsequent succession”,²⁰ is used in Swedish law: when the surviving spouse later dies, half of his or her estate goes to those persons who would have been next in line in the succession of the predeceased spouse (which is the children if they exist).²¹

The approach adopted in Sweden and the Netherlands resembles one which was once quite fashionable in Civilian regimes, such as Italy or Belgium, but which came to be regarded as outdated for its impracticality, namely, to give ownership in the estate assets to the children but grant the surviving spouse a usufruct (liferent) in them.²² However, under the Dutch and Swedish solutions, the rights of the surviving spouse are largely free from restrictions, so that they come close to that of a full owner.²³

A lawmakers’ choice between ignoring and addressing upfront the dangers of a “spouse-takes-all approach” for the deceased’s children is, as so often, marked by a sharp trade-off between simplicity of rules and fairness of outcomes. Can the accidental disinheritance of the children, as it is tolerated by current Scottish law, be justified with the argument that it falls within the necessary margin of error of any regime of intestacy, and that the introduction of safeguards would make the law overly complex?²⁴ Yet even if reconstituted families were a rare occurrence (which they no longer are), this view would be hard to defend, and many Scottish lawyers do in fact regard the existing regime as seriously defective.²⁵ The problem

¹⁵ The expression used by Kolkman (n 10) at 245.

¹⁶ This solution is found, e.g., in the laws of Sweden and New South Wales, as well as in the Uniform Probate Code: see Reid, de Waal and Zimmermann (n 4) at 499; Zimmermann (n 9) at 80.

¹⁷ See Reid, de Waal and Zimmermann (n 4) at 499 f, who also mention additional reinforcements for the children’s rights in case the surviving spouse decides to re-marry.

¹⁸ For detailed account, see Kolkman (n 10) at 241-246.

¹⁹ See Ibid at 242.

²⁰ Though not identical with it, the solution resembles the Civilian concept of a *substitutio fideicommissaria* (in German law the *Vor- und Nacherbschaft*), by which a testator is allowed to appoint a “subsequent heir” who is to obtain the estate after the death of the “first” or “prior heir” (or after some other event). For comparative analysis, see A Dutta, “Succession, Subsequent”, in J Basedow, K J Hopt, and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 1631; G Gretton, “Quaedam Meditationes Caledoniae: The Property/Succession Borderland” (2014) 3 *European Property Law Journal* 109 at 124-126.

²¹ See J Scherpe, “Intestate Succession in the Nordic Countries”, in Reid et al (n 2) 307, at 314 and 318; Zimmermann (n 9) at 79 f.

²² For further details, see Reid, de Waal and Zimmermann (n 4) at 497. On the practical problems which the spouse’s usufruct had caused in former Dutch law, see Kolkman (n 10) at 241. It should also be noted, however, that French law still allows the spouse to opt for a usufruct in the totality of the estate: see Art 757 *Code civil*.

²³ See Reid, de Waal and Zimmermann (n 4) at 499.

²⁴ As Reid (n 12) at 395 points out, the 2009 Report of the Scottish Law Commission decided to leave matters as they are “as no general rule could cope with the large variety of possible situations”.

²⁵ See Reid (n 12) at 395, with further references.

here is not one of a rule that is reasonable in the abstract but ill-suited to a few particular cases. Rather, the problem is that there is an inbuilt risk of grossly unfair results, by allowing the estate of the first deceased to be taken away from his or her children and be given (indirectly) to someone with little moral entitlement to receive it (such as the second spouse of the surviving spouse). The result resembles a lottery,²⁶ which is something that succession law should try to avoid, and in fact does generally make considerable efforts to avoid.²⁷

If one accepts this analysis, then a “spouse-takes-all” approach is only tolerable if the children are protected in some way.²⁸ But even if experiences with such protection in the Nordic countries and Sweden seem to have been positive, the technical difficulties should not be underestimated, as can be illustrated by reference to the will-making practice of spouses with children in Germany. There, the mutual institution of spouses as first heirs and of the children as second or final heirs is greatly facilitated by the fact that the survivor’s will becomes binding once the first will has taken effect.²⁹ In other words, upon the death of the first spouse, the succession of the surviving spouse is locked in place. For additional protection of the children, spouses often include so-called “re-marriage clauses” in their wills. These render the institution as heir of the surviving spouse ineffective retrospectively in the event he or she re-marries.³⁰ For rules of intestate succession to replicate such complex effects of wills is far from easy.³¹

These two problems – potential conflicts with the rules on testate succession and the danger for the rights of the deceased’s children – are part of the explanation why the great majority of Civilian regimes have so far refrained from adopting a “spouse-takes-all” approach. As will be seen in the following section, this does not mean that the interests of the spouse are disregarded.

C. THE “SIMULTANEOUS INHERITANCE” APPROACH

(1) Overview

The share to which a surviving spouse is entitled in a case with issue not only varies among jurisdictions in the Civil Law world, but is sometimes also dependent on the number of the deceased’s children. Roughly speaking, the spouse’s share lies somewhere between one-quarter and one-half of the estate.³² From the perspective of a regime like Scotland’s, this comparatively modest entitlement seems to leave the surviving spouse rather unprotected. However, for a comprehensive assessment, it is necessary to take into account two additional

²⁶ See the pointed criticism of English law by R Kerridge, “Intestate Succession in England and Wales”, in Reid et al (n 2) 323 at 333-334.

²⁷ Good examples are provided by (i) the use of representation, which ensures that the chronological order in which the deceased’s descendants die does not affect the distribution among the different stirps, and also as by (ii) the protection of creditors, to the effect that although their debtor has died, creditors can still satisfy their claims.

²⁸ To address the problem by granting step-children the same rights under intestacy as biological children, as has been discussed in Scotland (see Scottish Government, *Consultation on the Law of Succession* (2019) paras 2.63-2.70), would clearly overshoot the mark. It is no coincidence that jurisdictions worldwide let step-children inherit only in very limited circumstances, if at all: see Reid, de Waal and Zimmermann (n 4) at 488-489.

²⁹ § 2271 BGB. The same effect can be achieved by a mutual contract of inheritance: see § 2298 BGB.

³⁰ The underlying rationale of “re-marriage clauses” is that the new spouse acquires the right to a “compulsory portion”, which would diminish the inheritance of the children.

³¹ See also Zimmermann (n 9) at 86.

³² Under French law, for example, the spouse receives one-quarter of the estate (though he or she can also opt for a usufruct in the totality of the estate: see Art 757 *Code civil*). Under Italian law, the spouse receives one-half if there is one child and one-third if there are two or more children (Art 581 *Codice civile*). Under Austrian and Swiss law the spouse receives one-third and one-half respectively (see § 744 ABGB and Art 462 ZGB). Under German law, the spouse receives half of the estate (§§ 1931(1), 1371(1) BGB), but it is important to take into account that this share also compensates for the participation under matrimonial property law: see below at n 44.

benefits that the spouse is often granted, one being the participation under matrimonial property law, the other the right to remain in the family home.

The existence of these additional entitlements not only explains why the position of the surviving spouse is not as weak as it may appear at first sight, but also why it has even come to be regarded as over-generous in some Civilian jurisdictions.³³ About the reasons underlying this change in perception one can only speculate, but two possible explanations come to mind. The first refers to the fact that, in times of ever-more liberal divorce laws, the idea of “protecting the blood rather than the bed” (to borrow a phrase from Alan Barr) is on the rise again. The second possible explanation is economic in nature and refers to the fact that, unlike in the early decades after the Second World War, when many of the current spouse-friendly regimes of intestacy were enacted, children can no longer take for granted that, through their income alone, they will attain the same level of prosperity as their parents, let alone a higher level.

(2) Matrimonial property law

Unlike most Common Law countries, Civilian regimes have long since established some form of community of property as the default regime for married couples. Marriage is thus viewed as a kind of partnership, the economic fruits of which must, in principle, be divided equally between the partners regardless of which partner has the formal legal title. The death of one spouse is treated in the same way as the ending of marriage through divorce, meaning that the common assets or economic gains are distributed in a separate procedure that precedes the distribution of the estate under succession law.³⁴ As a result, it is only the deceased’s spouse’s share in the community property that falls into the estate, and the corresponding share of the surviving spouse is excluded. From a Scottish perspective, this share could be conceived of as a prior right, although it must also be remembered that where all economically significant assets are held as common property by husband and wife, as frequently happens in Scotland today,³⁵ the effects are the same, or are even stronger when there is also a survivorship destination.

The fact that, in Civilian regimes, the surviving spouse is potentially served twice from the pot of the deceased’s property is not only relevant from an economic point of view; it also explains why Civilian regimes of intestacy can afford to treat spouses less generously than their Common Law counterparts. The participation of the surviving spouse in the deceased’s assets can be seen to rest on two separate pillars, the first being the contribution to the marriage and the second the proximity to the deceased. And whereas Civilian regimes provide a neat separation of labour between matrimonial property law and intestate succession, in Common Law countries it is succession law alone which has to “carry the burden”.³⁶ That means it must not only take into account the deceased’s presumed intention or ties of solidarity,³⁷ but also recognise and reward the surviving spouse’s contribution to the marriage.

This integrated approach also characterises current Scottish succession law, where, however, its adoption could be regarded as inconsistent.³⁸ In the case of divorce, Scottish law distributes the assets in a manner very similar to a community property regime; the question then arises why the same procedure is not applied where the marriage is ended by the death of

³³ An example from Europe is Italian law: see A Braun, “Intestate Succession in Italy”, in Reid et al (n 2) 67 at 90. Examples from Latin America are Brazil and Chile: see J P Schmidt, “Intestate Succession in Latin America”, in Reid et al (n 2) 118 at 144 and 147-148. See also Reid, de Waal and Zimmermann (n 4) at 503.

³⁴ See Reid, de Waal and Zimmermann (n 4) at 495-496.

³⁵ The same is true for other Common Law countries, see Reid, de Waal and Zimmermann (n 4) at 496.

³⁶ Reid, de Waal and Zimmermann (n 3) at 492.

³⁷ On the purposes and justifications of intestate succession, see generally Reid, de Waal and Zimmermann (n 4) at 445-448.

³⁸ The topic is discussed in much more detail by George Gretton’s paper in this issue: “3-D Vision is Difficult: Dissolution, Death, Divorce” (2020) 24 EdinLR 00.

one of the spouses.³⁹ Following the compelling criticism by Dot Reid of the current state of affairs,⁴⁰ the Scottish Government in its recent Consultation Paper does actually consider adopting a “community property approach”, by which the regime applying in divorce would, in principle, be extended to succession law.⁴¹ The intestacy rules would thereby be freed from the contribution aspect and could, as a consequence, afford to be more generous to the issue. However, to take the law of Washington State as a potential model in this regard⁴² seems questionable for two reasons. First, it would be much more natural to look to jurisdictions, such as France and Italy, where corresponding solutions have been in place for a long time already. Second, and more importantly, the law of Washington State actually seems to work differently, for instead of being shared between the spouses, the community property is given entirely to the survivor.⁴³

There is no doubt that a single distribution process is much simpler than two separate ones; but the lumping together of two different rationales also makes it harder to provide for satisfactory results. Whether priority should be given to simplicity or to nuanced outcomes is difficult to decide. German law makes an interesting attempt to reconcile both aims, by paying the spouse’s share in the accrued gains in the form of an additional fixed share of one-quarter on intestacy, thus avoiding the difficulty and potential controversy of an actual calculation.⁴⁴ However, since the surviving spouse is rewarded regardless of any actual gains, the rule still falls squarely on the side of simplicity and is criticised on that ground in German legal writing.⁴⁵ Whatever solution a lawmaker adopts, at least some form of coordination between matrimonial property law and succession is needed. This is all the more necessary where spouses mimic a matrimonial property regime by holding assets as common property, because the regime of intestacy then risks “paying” the survivor for a second time.⁴⁶

(3) The right to remain in the family home

In recent decades, numerous Civilian regimes have introduced a specific right for the surviving spouse to stay in the family home, precisely to spare him or her a traumatic change of living conditions.⁴⁷ This right can, but need not, take the form of a usufruct. In some cases it is granted

³⁹ The problem is not only one of potential over-protection of spouses, because in some circumstances a widow or widower may also be in a position distinctly worse than he or she would have been in the case of divorce. As is pointed out in Scottish Government, *Consultation* (n 28) para 2.21, this is what happened in the Scottish case of *Pirie v Clydesdale Bank plc* [2006] CSOH 82, 2007 SCLR 18. To allow such arbitrary results to happen is to violate an old and basic principle of succession law, namely that “[d]eath is to make as little difference as may be to those who have had dealings with him who has died, to those who have wronged him, to those whom he has wronged”: see F Pollock and F W Maitland, *The History of English Law before the time of Edward I*, vol II, 2nd edn (1898 repr 1952) 257.

⁴⁰ See D Reid, “From the Cradle to the Grave: Politics, Families and Inheritance Law” (2008) 12 EdinLR 391 at 414-416.

⁴¹ *Consultation on the Law of Succession* (n 28) paras 2.20-2.31.

⁴² *Ibid* paras 2.26-2.31.

⁴³ This is at least how the functioning of Washington State law is presented in the *Consultation on the Law of Succession* (n 28) paras 2.27, 2.59, which, however, seems to conflict with the assertion that this system is “very similar to that operating for divorcing couples under the Family Law (Scotland) Act 1985” (para 2.28).

⁴⁴ See § 1371(1) BGB, which in combination with § 1931(1) BGB gives the spouse half the estate in a case with children.

⁴⁵ See Zimmermann (n 2) at 211-213.

⁴⁶ See the criticism of developments in the Common Law world in this regard by Reid, de Waal and Zimmermann (n 4) at 496-497 and 500.

⁴⁷ Examples from Europe are Austria, France and Italy (see Reid, de Waal and Zimmermann (n 4) at 501); examples from Latin America are Argentina, Brazil and Chile (see Schmidt (n 33) at 148 f. In Germany, where the family members of the deceased are only entitled to continue to use the deceased’s house for a period of thirty days, the introduction of a fully-fledged right to the family home is advocated in legal writing: see Zimmermann (n 9) at 88.

as an additional entitlement, in others as a right whose value is deducted from the share in the inheritance.⁴⁸ Since practical experiences with the right to remain in the family home seem to have been positive, it is tempting to regard it as a kind of silver bullet for balancing the interests of spouses and children. The spouse stays in the house, the children own it. The age-old idea of splitting up ownership and the right to use a thing is thus shown to be quite useful,⁴⁹ and criticism of it has arguably become overly dogmatic.

Interestingly, in the debates leading up to the Succession (Scotland) Act of 1964, the idea of granting the surviving spouse only a liferent in the matrimonial home was also considered.⁵⁰ Its rejection on the basis that liferents are awkward to administer was understandable and very much representative of the general comparative trend at the time. Yet, in light of the subsequent developments one wonders whether the decision to give the house outright to the spouse has not, ultimately, come at too high a price.

D. CONCLUDING REMARKS

A comparative overview not only shows that Scotland is faced with the same difficult questions as other jurisdictions in matters of intestate succession; it also reveals that around the world a number of interesting ways have been devised to tackle these issues. Lawmakers ignore this enormous pool of experience at their peril.

The fact that the Scottish rules of intestacy can be regarded as forming part of the Common Law camp could make it seem natural to look primarily to English-speaking jurisdictions in the search of models for reform. However, given the important structural commonalities between Scottish law and its Civilian counterparts – such as the recognition of indefeasible legal rights and the sharing of assets on divorce – the European continent is arguably the more fitting place to seek inspiration.

Jan Peter Schmidt*

Max Planck Institute for Comparative and International Private Law, Hamburg

3-D Vision is Difficult: Dissolution, Death, Divorce

A. THE SCOTTISH GOVERNMENT IN AN AWKWARD POSITION

It often happens that there is a majority for the view that a particular area of law is unsatisfactory. But a majority *against* the current law is one thing; a majority *in favour* of a *specific* alternative is another. Most people would sign up to the proposition that the current law of succession – both testate and intestate – is unsatisfactory and should be reformed. But agreement as to what the new law should be is hard to attain. Thus the current law, which few like, lives on. Of course, since the debate of reforming the law began in the 1980s there have

⁴⁸ See Reid, de Waal and Zimmermann (n 4) at 501.

⁴⁹ This view was corroborated in the discussion following the talk upon which this paper is based, when Alan Barr mentioned that liferents were still a popular instrument in will-making.

⁵⁰ See Reid (n 12) at 392.

* I am grateful to Alexandra Braun, George Gretton, and especially to Kenneth Reid, for comments and stylistic advice.

been some changes, such as the introduction of a possible award to a cohabitant (Family Law (Scotland) Act 2006) and the raft of “technical” changes contained in the Succession (Scotland) Act 2016. But the basic structure of law, both in testacy and in intestacy, remains what it has been since the Succession (Scotland) Act 1964.

Perhaps the Scottish Government will be able to build general support for specific change. But if - as is likely - it cannot, then the choice is: (i) impose major change without such support, or (ii) do nothing. The Scottish Government has already – alas - chosen the second option as to testate succession, and it may well be feared that the same will happen for intestate succession.

Basic *policy* choices in this area are difficult. But there are also technical considerations, which, while they cannot dictate what should be the substance of the new law – if there is to be new law – can at least point out constraints that have to be understood if the new law is to be rational and coherent. (And likewise the existing law can be looked at technically to see what existing incoherence there may be.) This paper looks at the relationship of the concept of “matrimonial property” in the context of succession.

B. OVERVIEW OF THIS PAPER

The recent Scottish Government consultation¹ touches on the possibility of using some sort of idea of “matrimonial” or “community” property idea as a basis for intestate succession where there is a surviving spouse, taking as its starting point the system in operation in the state of Washington,² and using the divorce rules of Scots law to apply that system to Scots law. But the exposition of the Washington system is brief, and little is said about how it might play out in a Scottish context. The present paper looks at this idea in more detail – but only a little, for a comprehensive examination would have to be on the scale of a doctoral thesis.³ Whilst the focus of this paper is intestacy, the approach taken means that testate succession must also be considered. Finally, what of conclusions, or recommendations? This paper offers none. It seeks only to explore.

C. DISSOLUTION OF MARRIAGE: DEATH OR DIVORCE

Marriage is dissolved in two ways: death or divorce. There is no dictate of reason (as the natural lawyers would put it) that the patrimonial consequences of dissolution must be unitary. But at the same time the law on the one should, at least preferably, not operate as if the other did not exist – which is what happens currently in Scotland.

(1) The patrimonial consequences of divorce

The patrimonial consequences of divorce can be complex; the following is a simplified account. The couple’s “matrimonial property” is to be “shared fairly” between the spouses.⁴ That means it should be shared “equally” unless there are “special circumstances” indicating

¹ *Consultation on the Law of Succession* (2019).

² Many jurisdictions around the globe have community property. See K G C Reid, M J de Waal and R Zimmermann, “Intestate Succession in Historical and Comparative Perspective” in K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015) 444 at 495. It is not known why Washington State law was selected.

³ Jan Peter Schmidt’s paper in this issue, “Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy” (2020) 24 EdinLR 00, has some insightful comments on the matrimonial property question.

⁴ Family Law (Scotland) Act 1985 s 9(1)(a).

that some departure from equality is justified.⁵ “Matrimonial property” means “all the property belonging to the parties or either of them at the relevant date which was acquired by them or him⁶ (otherwise than by way of gift or succession from a third party) (a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or (b) during the marriage but before the relevant date.”⁷ The term “relevant date” means, in the normal case, the date when cohabitation ceases.⁸ The system is, in a limited sense, one of “community of acquests”, ie a system in which assets acquired after marriage are regarded as belonging – in a broad sense⁹ – to both parties, subject to certain exceptions. But one must stress the words “limited extent” because it applies only on divorce. Thus it is not a true system of *communio bonorum* – community property.¹⁰ It operates neither while the parties are married nor when the marriage is dissolved by death.

(2) Death and divorce: the patrimonial consequences compared

Jack and Jill are married. The marriage fails. Jill raises a divorce action. While the action is pending, Jack dies – or it may be that Jill dies, though in this paper we will keep him as the deceased. Divorce law is now inapplicable. Succession law applies. He may be testate or intestate. So there are several possibilities. And the number of possibilities quickly multiplies when one takes into account the question of whether he had issue, whether the assets, such as the family home, are in the name of the one or the other, or co-owned, whether the title to the family home includes a survivorship destination, and so on. In this short paper we cannot explore all these possibilities. But a few points can quickly be brought into an admittedly imperfect focus.

(a) Divorce compared with testate succession

Since the break-up with Jill, Jack has made a will, leaving everything to his children – who are not Jill’s. What will Jill receive on Jack’s death?¹¹ Jack’s estate consists of a house worth £400,000, in his name alone, and £120,000 of other property all of which is “matrimonial”. Jill likewise has £120,000 of property, all “matrimonial”. The total matrimonial property is thus £640,000.¹²

If the marriage is dissolved by death she receives £40,000, ie *jus relictæ* amounting to a third of the value of Jack’s moveable estate. (That figure would be the same regardless of the state of the title to the house – owned by him alone, co-owned, or owned by her alone.) Had Jack lived, and the divorce had gone ahead, Jill, absent special circumstances, would have been entitled to half of the matrimonial property, ie £320,000. So she would be due £200,000 from Jack. Thus the difference between death and divorce is £160,000.¹³

⁵ Family Law (Scotland) Act 1985 s 10(1).

⁶ *Sic*. Better wording would have been “by them or by one of them” which was the wording later adopted for civil partnerships. Incidentally, for such partnerships the matching term for “matrimonial property” is “family property”, an intriguing choice.

⁷ Family Law (Scotland) Act 1985 s 10(4).

⁸ Family Law (Scotland) Act 1985 s 10(3).

⁹ Community property can be effected by full-blown automatic co-ownership. But it can also be effected in other ways, namely through the law of obligations or the law of trusts. These issues, however important, cannot be pursued here.

¹⁰ In the USA, the term “community property” is standard.

¹¹ Yet another variant is that on separation they entered into a mutual separation agreement. Such agreements often contain terms about succession rights. This paper cannot explore all possibilities, so we shall assume that Jack and Jill have not signed such an agreement.

¹² Of course, this is just one randomly-chosen set of figures. To develop a fully rounded view one would need to calculate, collate and compare dozens of different examples.

¹³ See further Dot Reid’s important article, “From the Cradle to the Grave: Politics, Families and Inheritance Law” (2008) 12 EdinLR 391 at 416, referring to the facts of *Pirie v Clydesdale Bank plc* [2006] CSOH 82, 2007 SCLR

Rotate the facts and the story changes. (i) If the attribution of ownership is precisely the other way round (including the house being in Jill's name, not Jack's), on divorce Jill must pay Jack (absent special circumstances) the same figure, ie £200,000. (ii) If Jack dies before the divorce Jill inherits £40,000. So, for Jill the difference between divorce and death would be, overall, £240,000 (in one case she pays £200,000, in the other she pays nothing and receives £40,000).

The possibilities are endless, but one thing is clear: there is no link between the patrimonial consequences of (i) dissolution by divorce on the one hand and (ii) dissolution by death (testate) on the other.

(b) Divorce compared with intestate succession

Perhaps Jack dies intestate. The law of intestacy is complex where the deceased is survived by both spouse and issue.¹⁴ Jill will receive (1) the three elements of prior rights namely (i) dwellinghouse right, (ii) right to furniture and plenishings and (iii) financial right, and (2) *jus relictæ* out of any moveables that may exist after prior rights. Let us see how these rights would operate, using the figures above.

Assume that the household contents are all matrimonial property and are all co-owned¹⁵ and are worth £50,000. On Jack's intestate death, the division is as follows. By the first prior right, Jill takes the house.¹⁶ By the second prior right, she takes the contents.¹⁷ Her third prior right is financial provision, which is £50,000 (because the deceased left issue¹⁸). After prior rights what remains of his estate is £41,000, all moveable. Jill receives a third of this by way of *jus relictæ* (£13,667). Jack's children take the rest (£27,333), part by way of legitim and part by way of being heirs under s 2 of the 1964 Act.¹⁹ Put another way, Jill would inherit everything except £27,333. On these facts Jill has done much better than she would have done had Jack lived a few months longer, with a divorce being the result – for details of which see above.

Rotate the facts and the story changes. If the attribution of ownership is precisely the other way round (including the house being in Jill's name, not Jack's), and Jack dies, the first prior right is irrelevant. Everything else would be the same and thus Jill would receive everything except £27,333. By contrast, had the marriage ended by divorce she would as we have seen, have had to pay Jack £200,000.

We may repeat the conclusion to the previous section. The possibilities are endless, but one thing is clear: there is no link between the patrimonial consequences of (i) dissolution by divorce on the one hand and (ii) dissolution by death (intestate) on the other.

D. REFLECTIONS

18. The Scottish Government's consultation paper (n 1) takes note of *Pirie* and Dot Reid's comments on it: see para 2.21. *Pirie* is interesting, but, as my text seeks to make clear, it would be dangerous to take it in isolation.

¹⁴ For the following, see chiefly sections 8 and 9 of the Succession (Scotland) Act 1964.

¹⁵ As indeed is presumed by law: see the Family Law (Scotland) Act 1985 s 25.

¹⁶ Its value being within the current limit of £473,000.

¹⁷ She already owns half of each item. The other half passes to her because its value is within the current limit of £29,000.

¹⁸ Had Jack left no issue the figure would have been £89,000.

¹⁹ It is absurd that legal rights are based on the moveable estate only. The Scottish Government insists that that absurdity is not to be removed. It is also absurd that legal rights exist in intestate as well as testate succession. Their purpose being to protect against disinheritance, they have no place in the former.

Apart from noting the fact of discrepancy, one must hesitate to draw further conclusions. Is the quasi²⁰ matrimonial/community property approach seen in divorce law so reasonable that it should be extended to intestacy? (Of course in jurisdictions where true community property exists, it operates in both testate and intestate succession.) Perhaps, but several grounds for hesitation exist. These issues are not discussed in the Scottish Government consultation.

The first is that the divorce rules, as already mentioned, do not work on a *fixed* equal-share basis. They can vary substantially from that (“special circumstances”), and, moreover, they presuppose that the division will be decided *by litigation*. To make every intestate death, where there is a surviving spouse, a decision for the court, would be problematic. So if some form of quasi matrimonial property approach were to be adopted for intestate succession, it would have to be simplified.

The second is that even with a simplified quasi matrimonial property system, there might still be difficulties in practice in deciding what assets are matrimonial. This might be a source of dispute, driving up costs. And there is the difficulty that (unlike divorce) one of the two parties with detailed knowledge of the assets is dead and thus unable to give information as to what assets are or are not matrimonial.²¹

The third is that if some sort of quasi matrimonial property system is to be introduced for intestate succession, why not also for testate succession? It is hard to see any reason for such a distinction. And of course other legal systems where true community property systems exist (ie systems where community property is recognised not only notionally at dissolution but also while the marriage subsists²²) apply community property rules not only in intestate cases but also in testate cases.

In the fourth place, a community property system means that one party may have to pay, or convey, something to the other spouse upon dissolution. That happens in our current divorce law. If some sort of quasi community property were to be made applicable on death, it could, in certain types of case (see above), and depending on what precisely the legislation were to say, mean that *the surviving spouse would have to pay (or convey) to the estate of the deceased* for, so to speak, a balancing of accounts. The issue would be more likely to arise in testate than in intestate succession, for in intestate succession a typical legal system having community property would say that, on intestacy, the *whole* of the community property would pass to the survivor. (That is, for instance, what the law of the state of Washington says.²³) As already said, everything would depend on what the proposed legislation said: the point that I seek to make is that the idea of matrimonial/community property needs in the context of the dissolution of a marriage by death, very careful consideration.

Fifthly, the oddity just commented on - that in some circumstances a community-type regime might involve payment by the surviving spouse to the deceased’s estate – certainly looks very odd, but the reason for that oddity is that a community-type system, when applied on death, does not in itself have *succession* as its purpose. Rather, its function is to form part of the answer to the question: what is the deceased’s estate composed of?”

²⁰ “Quasi” because not a true community property system, in the sense that it does not operate when the marriage is still in existence.

²¹ I owe these points to Alan Barr. See also Alan Barr’s contribution in this issue: “Death the Leveller – Happy and Unhappy Family Succession” (2020) 24 EdinLR 00.

²² There is a range of possibilities: (i) quasi-community just for divorce (current Scots law), (ii) quasi-community for both divorce and intestate succession (a possibility adumbrated in the Scottish Government consultation), (iii) the foregoing plus testate succession and (iv) full-scale (not quasi) community property. One suspects that there exists in Scotland at present little appetite for (iv).

²³ Revised Code of Washington (RCW), section 11.04.015 titled “Descent and distribution of real and personal estate”. This rule is in itself a succession rule. There is nothing in the concept of community property that would dictate such a result.

Sixthly, one of the current concerns – which admittedly not everyone shares – is that the surviving spouse under current law usually takes most or all of the estate, leaving the issue with nothing,²⁴ something that is of particular concern when some or all of the issue are not also the issue of the surviving spouse. This depends on the nature of the estate: in general terms it can be said that only in large estates – which of course are the minority – do the issue take much or even anything at all. That is seldom controversial where the issue of the deceased are also the issue of the surviving spouse. But in other cases (such as Jack and Jill) it may be controversial. A quasi-community property system might not help in this respect. On some sets of facts a quasi-community property system could leave less to the issue than the current law. Having said that, as Dr Schmidt's paper notes, a quasi-community property system can also in a sense help the issue, because giving the surviving spouse her/his matrimonial property rights, the law is then freed to be more generous to the issue.²⁵

Having set out some reasons to hesitate, the attractions of a community-based system are undoubted. One, not mentioned so far, is that the longer the marriage the more property is likely to fall within the scheme: a marriage that lasts for one year is likely to have less matrimonial property than one that has lasted forty years, and so result in a smaller share of the estate for the surviving spouse. That makes intuitive sense.

Two further thoughts, which indeed are connected. The first is that systems of community property are not all the same. One point of difference is the following. Suppose that Jill inherits a house from her parents. Later she marries Jack. Later still she sells the house and with the money buys another. Under the 1985 Act the new house is matrimonial property, having been bought during the marriage. In some legal systems, by contrast, it would be separate property, because a tracing rule (real subrogation) would apply.²⁶ This is a major issue. The second thought is that no move towards some sort of quasi-community approach in succession law should be made without proper comparative research – including research not only into North American systems but also European ones. That would involve time and resources: the Scottish Law Commission would no doubt have to be involved.

*George L Gretton**
University of Edinburgh

Succession Rights for Cohabitants

A. FROM STATUS TO SUBSTANCE

During the past decades, the number of couples living together without being married has increased continuously across Europe, and this trend is set to continue.¹ The most recent statistics in the UK show that cohabiting couple families are on the rise and are now the second

²⁴ Here see Kenneth G C Reid's paper in this issue: "Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children" (2020) 24 EdinLR 00.

²⁵ Schmidt (n 3) at 00.

²⁶ The text here is admittedly oversimplified. A house acquired before marriage may or may not become matrimonial property, depending on the detailed facts: *Mitchell v Mitchell* 1994 SC 601.

* I am grateful to Alexandra Braun, Kenneth Reid and Jan Peter Schmidt for comments.

¹ For a detailed analysis in 12 European countries, see N Sánchez Gassen and B Perelli-Harris, "The Increase in Cohabitation and the Role of Union Status in Family Policies: A Comparison of 12 European Countries" (2015) 25 Journal of European Social Policy 431.

largest family type at 3.4 million (17,9%) after married couples and civil partners, whose share has declined from 69.1% to 67.1% of all couples in the UK since 2008. Cohabiting couple families are also the fastest growing family type in the last decade and they are those with the largest percentage increase of families with dependent children at 23.9% between 2008 and 2018, rising to 1.3 million in 2018.²

In Scotland, the Family Law (Scotland) Act 2006 updated the law in order to reflect this reality and thus introduced a set of provisions³ that grant cohabitants some protection where one of the partners dies or where the relationship is ended for other reasons. However, the legislature is very clear that cohabitants do *not* enjoy the same rights as spouses. In case one of the cohabitants dies without a will, the court may under certain conditions, and upon application within six months from the date of death, make an award to the surviving cohabitant.⁴ This provision has been the subject of much criticism and for a number of reasons, including because the court is not given any meaningful guidance as to the purpose and the amount of the award, but also because of a potential conflict of interest between the applicant and the deceased's children, especially where the only asset left is the family home.⁵ Mainly due to these shortcomings, 70% of the respondents to the Scottish Consultation on Succession Law of 2015 were in favour of repealing section 29 of the Family Law (Scotland) Act 2006 and replacing it with an entirely new provision.⁶

From a comparative perspective, only few other European legal systems have granted intestacy rights to cohabitants.⁷ For a variety of practical, political, ideological and religious reasons, most jurisdictions have continued to rely on status and have therefore completely disregarded factual relationships.⁸ It is usually claimed that there is no need to protect such relationships since the deceased is free to make a will in favour of those whom he had a close non-status-relationship with such as cohabitants, step children, friends etc. Yet, this argument is questionable. For instance, surveys carried out in England, Wales and Scotland show that almost half of cohabiting couples mistakenly believe that they have a “common law marriage” and therefore enjoy the same rights as married couples.⁹ Moreover, one must not forget that cohabitants are not exempted from inheritance tax, so that there may be also financial

² Office for National Statistics, “Families and households: 2018” (2019), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018>.

³ Family Law Act (Scotland) 2006 ss 25-31.

⁴ Family Law Act (Scotland) 2006 s 29.

⁵ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) paras 4.3 ff.

⁶ Scottish Government, *Analysis of Responses to the Consultation of the Law of Succession* (2015) para 6.13.

⁷ Croatia, the Czech Republic, Norway, Sweden, Scotland, Slovenia, Austria and some of the Autonomous Communities in Spain (Basque Country, Balearic Islands, Catalonia, Galicia, Navarre) have introduced intestacy rights for cohabitants. For an overview of all member states, see the detailed information available at https://www.euro-family.eu/atlas_scheda-ee.

⁸ For a recent study that includes country reports from all EU-member states, see L Ruggieri, I Kunda and S Winkler (eds), *Family Property and Succession in EU Member States – National Reports on the Collected Data* (2019) available at https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf. Even outside the European Union, the position is – with few exceptions e.g. in Latin America (Mexico, Columbia) or Australia – very much the same. See K G C Reid, M J de Waal and R Zimmermann, “Intestate Succession in Historical and Comparative Perspective”, in K G C Reid, M J de Waal and R Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015) at 505.

⁹ J Curtice, E Clery, J Perry, M Phillip and N Rahim (eds), *British Social Attitudes: The 36th Report* London: The National Centre for Social Research (2019) at 123: 49% of those who live in an unmarried relationship believe in “common law marriage”, which suggests that almost half of cohabiting couples in Britain believe that they are protected in case of relationship breakdown or bereavement. This finding is not new for it has remained roughly unchanged in almost twenty years (56% of all participants had believed in common law marriage in the year 2000).

disincentives for making a will in their favour.¹⁰ Also, considering that not all people make wills and that especially those who die at a younger age will very often leave a cohabitant but no will, it seems obvious that cohabitants cannot be completely disregarded when it comes to intestacy. Moreover, if one takes the view that the presumed intention of the average testator¹¹ and the assumed duty of the deceased¹² are important factors in determining the rules of intestate succession,¹³ then it would appear natural that surviving cohabitants should be granted some form of participation on intestacy.

The steadily growing numbers of cohabiting couples increases the pressure on lawmakers to introduce legislation to that effect and indeed in some European countries intestacy rights for cohabitants have already been recognized, albeit typically only to a very limited extent.¹⁴ When considering whether cohabitants should be entitled under intestacy law, there are two major challenges that need to be tackled: first, a definition is required in order to find out who qualifies as a cohabitant and, second, if one agrees that under these conditions cohabitants should participate in the estate, it must be defined how much they should take and, especially, whether they should be treated like spouses.

B. QUALIFYING AS A COHABITANT

But who is to qualify as a cohabitant? This question probably causes most difficulties for in the absence of form, substantial criteria for eligible relationships need to be defined. According to Scots law, the requirement is simply that a couple should have been living together “as if they were husband and wife” or, in case of same-sex cohabitants, “as if they were civil partners” without any further requirements. However, in order to establish whether a person is a cohabitant the court shall take into account the length of cohabitation, the nature of the relationship, and the nature and extent of financial agreements.¹⁵ A similarly broad definition is adopted also in Sweden where, just as in Scotland, cohabitants do not enjoy the same rights as spouses. By contrast, in jurisdictions where cohabitants are treated just like spouses, the definition of cohabitant is typically much more precise. Thus, in Catalonia, a couple needs to have lived together in a stable and uninterrupted relationship for at least two years, or must have had a “common child” while living together, or must have formalized the cohabitation by way of a notarial deed.¹⁶

For a relationship to qualify as a marriage-like relationship, the minimum length required usually ranges between two and five years¹⁷ and in some jurisdictions (Australia, New Zealand,

¹⁰ F Hannah, “Cohabiting couples risk financial disaster”, Independent, 14.2.2018, available at <https://www.independent.co.uk/money/spend-save/co-habiting-finances-unmarried-couples-inheritance-death-money-saving-property-life-insurance-a8210741.html>.

¹¹ In Scotland, the law of intestate succession introduced in 1964 was based on “the principle that when a man dies without a Will the law should try to provide so far as possible for the distribution of his estate in the manner he would most likely have given effect to himself if he had made a Will”: Law of Succession in Scotland: Report of the Committee of Inquiry (1951, Cmd No 8144, 8).

¹² On this justification, see R J Scalise, “Honour Thy Father and Mother?: How Intestate Law Goes Too Far in Protecting Parents” (2006) 27 Seton Hall LR 171 at 174 ff.

¹³ On these justifications, see Reid et al (n 8) at 445 ff.

¹⁴ This is true e.g. for Scotland, but it is especially true for Austria, see n 28.

¹⁵ Family Law (Scotland) Act 2006 s 25.

¹⁶ Art. 234-1 Código Civil of Catalonia.

¹⁷ See, e.g. in Latin American jurisdictions: 2 years: Mexico, Colombia; three years: El Salvador, Costa Rica; four years: Ecuador, Peru; five years: Uruguay. For details, see J P Schmidt, “Intestate Succession in Latin America”, in Reid et al (n 8) 119 at 152. In most Australian jurisdictions the minimum length of cohabitation is two years, while it is three years in New Zealand: N Peart and P Vines, “Intestate Succession in Australia and New Zealand”, in Reid et al (n 8) 349 at 358.

Mexico, Paraguay),¹⁸ it can be substituted by the presence of a common child.¹⁹ In Norway, a common child used to be a necessary requirement in order to become a beneficiary under intestacy, but this requirement can now be substituted by cohabitation for at least five years.²⁰ According to Austrian law, a surviving cohabitant must have lived together with the decedent for at least three years prior to his death. However, similarly to Norwegian law,²¹ Austrian law expressly states that the requirement of common residence can be waived where the couple lives apart due to work, illness or the like.²²

Cohabitation is typically excluded if the couple does not meet the personal requirements for marriage or registered partnership. Therefore, minors and blood-relatives within a certain degree (descendants, ascendants and collaterals until the 2nd degree) can usually not be cohabitants. Similarly, in most jurisdictions cohabitants must also not be married to another person.²³ In those jurisdictions where marriage is not incompatible with cohabitation (e.g. New Zealand, Australian jurisdictions) the solution is to divide the spousal share either equally, or in accordance with the circumstances between the spouse and the cohabitant, or to allow the spouse to take priority over the cohabitant, which is the case under Scots law. It seems, however, that the position of those jurisdictions which consider cohabitation incompatible with marriage should be followed. In other words, a conflict between a cohabitant and a spouse should be avoided. This can be achieved by treating factual separation like divorce for the purpose of intestacy law, as is the case in Spain,²⁴ many Latin American countries as well as in British Columbia. Hence, a spouse who is factually separated but still legally married loses the inheritance rights just like a cohabitant who is no longer cohabiting at the time of death, except in cases where this separation is due to work or health reasons or the like.

This comparative overview shows that usually more than just “living together as husband and wife” is required in order to qualify as cohabitant for purposes of inheritance law. A minimum length of cohabitation or, as an alternative, a common child, are typical requirements. The minimum length of cohabitation which must always have lasted until the decedent’s death may only be interrupted where work, illness or similar reasons made cohabitation practically impossible. Those who are still married to another person should not qualify as cohabitants of the deceased, as long as they are not factually separated from the spouse.

C. COHABITANTS AND OTHER INTESTATE BENEFICIARIES

Given that in all jurisdictions cohabitants are required to show that they have lived together with the deceased in a permanent and stable marriage-like relationship, it seems only natural that they be treated accordingly, that is to say in the same manner as a surviving spouse. Yet, this is not necessarily the case, and certainly not in Scotland where the rights of a spouse or civil partner are given priority over a cohabitant. The prior and legal rights of a spouse or civil

¹⁸ See Reid, de Waal and Zimmermann (n 8) at 506.

¹⁹ According to the proposal of the English Law Commission those who had lived for at least five years immediately prior to the death of the deceased in the same household qualify as cohabitants for the purposes of inheriting on intestacy. In case of a common child, the minimum length of cohabitation is reduced to two years. English Law Commission, “Intestacy and Family Provision Claims on Death” (Law Com No. 331), 13 December 2011 paras 8.77 ff.

²⁰ § 28b Arvelova-al.

²¹ § 28b Arvelova-al.

²² § 748 para 2 ABGB.

²³ E.g. in most European jurisdictions: Austria, Croatia, Czech Republic, Norway, Sweden, Slovenia. In Catalonia, for instance, a married person can be a cohabitant if he or she separated from the spouse (separación de hecho). Art 234-2 d) Código civil of Catalonia.

²⁴ See Art. 645 Código civil of Spain.

partner are firstly deducted from the deceased's intestate estate and any award to the cohabitant under section 29 of the Family Law (Scotland) Act 2006 can only be made out of the remaining balance. This position is difficult to defend considering how many cohabitants believe that they enjoy the same rights as spouses and that, as a consequence, real hardship will be caused to those who only discover on their partner's death that they were mistaken.²⁵ In fact, the presumed intention of an average testator appears to be that a cohabitant ought to be treated like a spouse. Finally, the argument of equal treatment is particularly compelling where the couple had children and the cohabitant was economically dependent on the decedent. However, such a plain and simple solution seems to be more common outside of Europe, e.g. in most Australian jurisdictions, in New Zealand,²⁶ as well as in most Latin American jurisdictions.²⁷ By contrast, in the few European jurisdictions that protect the cohabitant on death, the equal treatment of cohabitants and spouses is still the exception, and can to date be found only in Croatia, Slovenia and in some Autonomous Spanish Communities (Basque Country, the Balearic Islands, Catalonia and Galicia). In Austria,²⁸ Norway, Scotland, and Sweden cohabitants enjoy some protection but not the same rights as spouses. This is not just incoherent but also unfair.

According to the Scottish Government, it is important that, if cohabitants do not leave a will, "the law of intestacy delivers fair outcomes reflecting the way they have arranged their affairs in life".²⁹ If this is the policy, there is a strong case for treating cohabiting couples in the same way as married couples for the purposes of intestacy. The proposal of the Scottish Law Commission according to which courts should determine the extent to which the cohabitant should be treated like a spouse on a case-by-case basis³⁰ would obviously not achieve this result. In addition, a case-by-case approach seems inconsistent with intestate succession which for the sake of simplicity should contain rules that fit the average case.³¹

That said, as the papers by Kenneth Reid and Jan Peter Schmidt show,³² the entitlement of spouses should be adjusted so that the children of the deceased will also benefit on intestacy. Just like a spouse, however, also the cohabitant should be guaranteed the same right to continue living in the home owned by the deceased and to use its contents. In some jurisdictions this right is limited to a certain period of time on the grounds that *de facto* relationships are less stable.³³ However, in view of the strict requirements that are imposed in order to qualify as a cohabitant, this discrimination between spouses and cohabitants should be avoided.

D. SUMMARY

²⁵ English Law Commission, "Intestacy and Family Provision Claims on Death" (n 19) para 8.36.

²⁶ See Peart and Vines (n 17) at 358 ff.

²⁷ See Schmidt (n 17) at 152.

²⁸ In Austria, the cohabitant was introduced as an "extraordinary intestate heir" in 2017 (Succession Law Reform of 2015, BGBl I No 87/2015) and was placed at the very end of the list of eligible heirs under intestacy. For a study of the Austrian succession law reform in a comparative perspective, see G Christandl and K Nemeth, "Austrian succession law reform – a comparative analysis" (2020) ERPL 1 (forthcoming).

²⁹ Scottish Government, *Consultation on the Law of Succession* (2019) para 3.3.

³⁰ Report on Succession (n 5) para 4.14.

³¹ Therefore, it is not surprising that the proposal of the Scottish Law Commission turns out to be even more complex than the current provision in section 29 Family Law Act (Scotland) Act 2006.

³² K G C Reid, "Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children" (2020) 24 EdinLR 00; J P Schmidt, "Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy" (2020) 24 EdinLR 00.

³³ In Austria, the right to live in the home and to use its content is limited to one year (§ 745 para 2 ABGB). In Italy, where the cohabitant is not a beneficiary under intestacy, the cohabitant could be granted a right to live in the home (owned by the deceased) and to use its contents for at least two years up to a maximum of five years, depending on the length of the relationship. Law 20 May 2016, no 76, Art. 1 para 46.

There is a strong case for treating cohabitants like spouses for the purposes of intestate succession law. Any change in this direction should not however take place without first reforming intestacy rules for spouses, so as to avoid the spouse's priority over children of the deceased. Neither the presence of a spouse nor that of a cohabitant should leave the children without protection. Also, for a person to qualify as a cohabitant under intestacy rules, further requirements should be imposed, especially a minimum duration or a common child, as well as the requirements for marriage or registered partnership. Conflicts between factually separated spouses and cohabitants should generally be avoided. Indeed, with regard to married or cohabiting partners, the more appropriate approach seems to be that substance should always prevail over status.

Gregor Christandl
University of Innsbruck

Death the Leveller – Happy and Unhappy Family Succession

A. INTRODUCTION

Intestate succession is by its very nature a default system. If on death a person wishes to regulate the succession to their estate, by far the most effective way of doing this is of course by making a will. This is true even in systems with a degree of forced inheritance, such as Scotland. But in the absence of testamentary instruction what is to happen? The law of intestate succession is designed to provide the answer. That answer cannot be what the deceased, subjectively, would have wanted, because by definition that is not known and will vary to the extent of almost infinite possibilities. Rather, the law of intestate succession provides objectively for what society, in the form of its legal levers, considers that most deceased persons would or – perhaps should - wish to happen.

The Scottish Law Commission and latterly the Scottish Government have been wrestling with reform of intestate succession for well over 30 years. Certain relatively minor matters were resolved in the Succession (Scotland) Act 2016; but the fundamentals of intestate succession remain open to question and the possibility of further reform. Somewhat surprisingly, the Scottish Government took the rather brave decision to leave unchanged the law on legal rights, including the restriction of their effects to moveable property.¹ But the fundamentals of intestacy law were in late 2018 made the subject of further consultation;² and further action and reaction remains to be resolved.

Perhaps the most contentious issues arise from that increasingly rare nuclear family, where a deceased is survived by both a spouse/civil partner and children. The question is the balance to be struck between succession based on “bed” or that based on “blood”; and whether one should dominate the other. Where this balance should lie is a question which will get a multitude of answers depending on numerous factors, including in particular the parentage of the immediate children and the size and make-up of the estate. This fundamental issue of “bed”

¹ See *Scottish Government response to the Consultation on the Law of Succession* (2018) paras 28-14.

² Scottish Government, *Consultation on the Law of Succession* (2019).

against “blood” is addressed in other notes in this issue of the Edinburgh Law Review.³ So is another fundamental issue on which wider reform may be anticipated, that being the position of that nebulous and vague creature, the cohabitant at the time of death of an intestate.⁴

The purpose of this note is to look in a little more detail at a much simpler proposition – and one that appears to require no further consultation, according to the Scottish Government. This relates to the position where the deceased is survived by either a spouse/civil partner and no issue; or issue and no spouse/civil partner.

B. SPOUSE BUT NO CHILDREN: THE CURRENT POSITION

Here, the Scottish Government considered the proposals put forward by the Scottish Law Commission and having consulted further opined to the following effect:

..... there was support for the recommendations that if there was a surviving spouse/civil partner and no children, the survivor should inherit the whole estate; and where there were children and no spouse/civil partner, the children should share the whole estate.⁵

It has been said at times that support for this was unanimous among consultees.⁶ The Scottish Government agreed with those proposals and simply confirmed that they will be implemented in future succession legislation.

The proposal in relation to estates where there are issue but no spouse/civil partner seem indeed to be non-contentious and in fact reflect exactly the current law. But as regards the position where only a spouse or civil partner survives, it is worth a reminder of the current rules on prior and legal rights. Under prior rights, the spouse will be entitled to

- (a) a relevant interest in a dwelling house up to a value of £473,000 (or that sum of money if the value of the relevant interest exceeds that figure);
- (b) furniture and that splendidly preserved concept “plenishings”, up to a value of £29,000; and
- (c) a cash sum of £89,000.⁷

The surviving spouse or civil partner will also be entitled to a one third of the value of remaining moveable property as legal rights. Of course, by far the largest part of the surviving spouse or civil partner’s inheritance will or may come from the relevant interest in a dwelling house. That is subject to the following vital qualification, found in the Succession (Scotland) Act 1964, Section 8(4): -

This section applies, in the case of any intestate, to any dwelling house in which the surviving spouse of the intestate was ordinarily resident at the date of death of the intestate.

Furthermore, in terms of sub-section 8(3) the right to furniture and plenishings also depends on those being within a dwelling house which falls within section 8(3) – and thus in which the

³ See K G C Reid, “Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children” (2020) 24 EdinLR 00 and J P Schmidt, “Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy” (2020) 24 EdinLR 00.

⁴ G Christandl, “Succession Rights for Cohabitants” (2020) 24 EdinLR 00.

⁵ *Consultation on the Law of Succession* (n 2) para 2.6. This follows the Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.5 and Report on *Succession* (Scot Law Com No 124, 1990) para 2.3.

⁶ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.5.

⁷ Succession (Scotland) Act 1964, ss 8 and 9, as amended by the Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436.

survivor was ordinarily resident. Thus at present, if there is no dwelling house in which the survivor was ordinarily resident, such a survivor is only entitled to the relatively limited prior right cash sum, together with legal rights. The perceived importance of the survivor continuing to have access to a place to live is a vital factor not only in the present law (and in particular the very substantial increase in the prior housing right), but in interpreting what the deceased, objectively, would have wished to happen.

It will be the case that under the present system, most spouses or civil partners residing with the deceased at the time of the death will inherit all of the estate under the current law. Indeed, that remains among the strongest criticisms of the current rules and most versions of intended reform where both of a spouse/civil partner and issue survive the deceased.⁸ But if any interest in a dwelling house is the principal asset owned by an intestate (as will usually be the case where such an interest is among the intestate's assets), the current rules provide what might be seen as vital protection for other members of the deceased's family by the condition of ordinary residence of the survivor at the date of death.

C. SPOUSE BUT NO CHILDREN: THE NEW LAW

Consider the following example. A married couple have been separated for a number of years, amicably or otherwise. They have neither divorced nor got around to resolving financial matters between them, not least because their current arrangements are working practically. One member of the couple owns, and continues to live, in what was the matrimonial home; but then dies, intestate. Under the present law, the spouse of the deceased would be entitled only to the prior cash right and legal rights. Under the new rule, the surviving spouse would take everything. It is not being over-dramatic to suggest that the intestate successor in such a case might be literally the last person on Earth whom that particular intestate would wish to benefit.

This is a hard case; and that hard cases make bad law is both trite and true. There is a wide spectrum of happy and unhappy married and civil partnered couples; and as the Scottish Government note in a slightly different context:-

We accept that it would not be viable for the “quality” of any relationship to be considered on a case by case basis and be taken into account when deciding on the distribution of an intestate estate, this would involve valuable court time and would also be costly.⁹

But in this context, it is easier (and more relevant) to assess the quality of a “bed” relationship than one based on “blood”. There may be very good reasons why a separated couple remain in a legal relationship – indeed religious rules may have precluded ending it formally. Furthermore, blood relationships exist as a matter of fact, with no element of continued consent, intent or choice. The deceased's actual subjective or objectively judged attitude to children or remoter issue might reasonably be considered to be very much less relevant than the position in relation to partners.

Here other areas of the law can offer valuable guidance and indeed a simple and effective hint for drafting a new rule. That could readily be to the effect that where there are no issue, a surviving spouse or civil partner would only inherit the whole of the intestate estate of their former partner if at the date of death, the couple were both (a) married or civil partners and (b)

⁸ See D Reid, “From the Cradle to the Grave: Politics, Families and Inheritance Law” (2008) 12 EdinLR 391 and other papers in this issue by Kenneth Reid, Jan Peter Schmidt, George Gretton and Gregor Christandl.

⁹ *Consultation on the Law of Succession* (n 2) para 2.18.

living together. The latter concept has a long and detailed legislative and judicial hinterland;¹⁰ and while its introduction to succession law would not eliminate all problems in this area, its addition to the necessary legal status for inheritance would remove the most outrageous perceived injustices. (It should be noted that this suggestion relates to situations where there is a legal relationship – but in fact such a test could readily and usefully overlap with whatever the rules turn out to be for cohabitants. Indeed the law on cohabitation in the context of social security law may prove a useful source for resolution of parts of this problem. It may introduce a schizophrenic element, as those wishing to argue that they were cohabitants for succession purposes may have had different views when being assessed for social security purposes.)

D. THE SPOUSE VERSUS OTHER BLOOD RELATIVES

The debate between “bed” and “blood” is at its most acute where a division between spouse/civil partner and issue is concerned. But it can also arise where an intestate deceased is survived not by issue but by a spouse/civil partner who are at the date of death living together (thus meeting the proposed additional test), but the bulk of the deceased’s estate derives from the deceased’s blood family.

Under current Scottish intestate succession law, while prior and legal rights will take the entirety of most estates to the surviving spouse/civil partner, in very large estates (or more modest ones without an owned interest in a dwelling house), the deceased’s parents and/or siblings will take intestate estate in preference to the surviving spouse/civil partner.¹¹

If this is considered to be wrong or undesirable, it is a much more difficult problem to solve than by the addition of such simple words as are suggested above. Answers could include putting a financial limit on succession by any spouse/civil partner; or introducing a concept akin to that of “matrimonial property” in divorce law. Each would introduce a significant degree of complexity; and while in effect the latter is suggested as one solution to the division between spouse/civil partner and issue,¹² the better answer to keeping family property in the bloodline is to insist on the owner making an effective will.

E. CONCLUSION

Making a will remains the best answer to almost all of the conundrums in the field of intestate succession - don’t let the monster into well-regulated families! This note has concentrated on what appears to be among the simplest situations. My own belief is that in the more complex case, where both spouse/civil partner and issue survive, any solution involving trying to establish the extent of community or matrimonial property and then dividing it “fairly” will create a dripping roast for lawyers, even in relatively modest estates. Perhaps on behalf of my fellow professionals I should be cheering on this potential new work stream – but the fullest possible encouragement to reduce the proportion of intestate deaths by more wills being made is a preferable source of new work.

¹⁰ See for examples which could be multiplied many times Taxation of Chargeable Gains Act 1992, s 58; Income Tax Act 2007, s 45(2); and numerous aspects of social security legislation and guidance.

¹¹ Succession (Scotland) Act 1964, s 2(1) (b) – (d).

¹² *Consultation on the Law of Succession* (n 2) paras 2.26-2.31. Here see also the discussion in G Gretton, “3-D Vision is Difficult: Dissolution, Death, Divorce” (2020) 24 EdinLR 00 and Schmidt (n 3) at 00.

Concluding reflections

A. INTRODUCTION

The contributions to this Symposium have shown that, as compared to other jurisdictions, Scotland has in some ways been ahead of the curve. This is certainly true with regards to the protection of the rights of the surviving spouse. Already in 1964, the Scottish legislature decided to award the surviving spouse most or, usually, all of the deceased's estate albeit, as we have seen,¹ without careful deliberation. In addition, Scotland is one of the very few European jurisdictions to protect the interests of cohabitants, though, unlike in the case of spouses, the protection has arguably not gone far enough.

We have also learned something about the dangers inherent in law reform and the role historical accidents can play in bringing about change.² The contributions further reveal that reform can prove difficult partly because the starting point for deliberations is usually the law that is already there so that some of the important questions are no longer expressly articulated or addressed. In other words, the legacy of the immediate past is not always the best basis from which to proceed. As the contributions illustrate, sometimes it is necessary to take a step back to be able to see new (or old) solutions and, importantly, to be able to ask what is it that we are trying to fix and why.

B. THE STATE OF THE ART

The contributions confirm that dissatisfaction with the current state of the law in Scotland is not without justification. Several of them highlight instances of incoherencies and inconsistencies that can lead to irrational and arbitrary results. Kenneth Reid shows, for example, that due to the lack of coordination between intestate succession laws and legal rights, a surviving spouse may be better off under intestacy than as sole beneficiary under the deceased's will, and thus may be inclined to create an artificial intestacy, at the expense of the deceased's children. Jan Peter Schmidt³ illustrates that although the approach of giving most or even all of the estate to the surviving spouse on intestacy rests on a sound foundation, it is problematic in some cases, particularly where the surviving spouse/civil partner is not the biological parent of the children of the deceased. As Kenneth Reid and George Gretton highlight, some of the absurd results here are caused also by the fact that legal rights are currently only based on the moveable estate.⁴

¹ K Reid, "Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children" (2020) 24 EdinLR 00.

Reid (n 1) and D Reid "Why is it so difficult to reform the law of intestate succession?" (2020) 24 EdinLR 00 on the spouse's accidental prior rights and the role the 2011 prior rights uprating has played.

³ JP Schmidt, "Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy" (2020) 24 EdinLR 00.

⁴ Reid (n 2) at 00 and G L Gretton, "3-D Vision is Difficult: Dissolution, Death, Divorce" (2020) 24 EdinLR 00.

In addition, focusing on the lack of alignment between the consequences of dissolution of a marriage on death and dissolution on divorce, George Gretton demonstrates how this can lead to puzzling outcomes.⁵ More importantly, as Jan Peter Schmidt shows, the lack of a formal dissolution of matrimonial property on death tends to overburden intestacy rules, and to favour the surviving spouse to the detriment of the issue.⁶ Similarly, Gregor Christandl's contribution highlights that, although Scots law requires cohabitants to prove that they have been living together "as if they were husband and wife", they are not treated like spouses.⁷ Thus, there is much that can be criticised. Although hard cases should not necessarily guide the legislature in its reform, equally the law should not lead to arbitrary results.

C. THE IMPORTANCE OF SETTING CLEAR OBJECTIVES

As Dot Reid illustrates,⁸ however, before any changes are proposed, greater clarity is required as to what needs are being catered for by the new rules and thus what objectives are being pursued and why. One of the main objectives underpinning especially the Scottish Law Commission's proposals of 2009 was "simplicity" of the rules.⁹ Yet as Gregor Christandl points out, the Commission's suggestion that courts should determine the extent to which a cohabitant should be treated like a spouse/civil partner on a case-by-case basis would defeat such objective.¹⁰ Other contributions reveal that simplicity can come at a price that may not be worth paying. Jan Peter Schmidt's paper demonstrates this with regards to the protection of the children of the deceased.¹¹ Thus, complexity can sometimes be a necessary evil.

Another important objective driving the Scottish Government's consultation of 2019 seems to have been the desire to design a law that reflects "outcomes which individuals and their families would generally expect and on which there is a degree of consensus".¹² Yet, Alan Barr¹³ shows that the Commission's proposal (accepted by the Government) to confer the entire estate on the spouse/civil partner in the absence of children can lead to results that the deceased may have never intended, e.g. where the couple were separated but not divorced. In recent years the Scottish Law Commission has also put increasing emphasis on public opinion as supported by empirical studies.¹⁴ But is public opinion necessarily always be the best guide? As the 2005 and 2015 surveys show, public opinion can change. Also, public opinion may be swayed by hard cases,¹⁵ and sometimes no clear view emerges from public attitude surveys. That said, much depends on how the surveys are carried out, what questions are asked, and who responds. Here Dot Reid rightly suggests that lawyers can learn a great deal from social scientists as to how surveys are conducted, and that they should avoid placing too much weight on the views expressed by certain members of the legal profession who represent only certain types of client.¹⁶ Even so, public opinion should perhaps be just one of the factors to be taken

⁵ Gretton (n 4) at 00.

⁶ Schmidt (n 3) at 00.

⁷ G Christandl, "Succession Rights for Cohabitants" (2020) 24 EdinLR 00.

⁸ Reid (n 2) at 00.

⁹ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.3.

¹⁰ Christandl (n 7) at 00.

¹¹ Schmidt (n 3) at 00.

¹² Scottish Government, *Consultation on the Law of Succession* (2019) 3.

¹³ A Barr, "Death the Leveller – Happy and Unhappy Family Succession" (2020) 24 EdinLR 00.

¹⁴ Scottish Law Commission, Report on *Succession* (Scot Law Com No 124, 1990) and Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009). On the reliance on public opinion surveys, see F Burns, "Surviving spouses, surviving children and the reform of total intestacy law in England and Scotland: Past, present and future" (2013) 33 Legal Studies 85 at 108-109.

¹⁵ I am indebted to Lord Drummond Young for this point.

¹⁶ D Reid (n 2) at 00.

into account. Nor should the difficulty of achieving full public consensus be a reason for halting a reform that is long overdue.

Once the objectives are clear, different technical choices are to be made and preferably in a consistent manner. For instance, if one of objectives is that children should benefit together with the surviving spouse/civil partner, this can be achieved by choosing either a slab or a fractional system but, as Kenneth Reid shows, whatever the choice, the same system should apply in case of intestacy and testacy. Equally, if another objective is to guarantee that the spouse/civil partner continues living in the family home then that can be achieved by ways other than giving the spouse/civil partner ownership of the house, e.g. by granting the spouse/civil partner a right to live in the property, as is the case in many Civil law jurisdictions.¹⁷

D. THE NEED FOR A HOLISTIC APPROACH

Not only is it crucial to be clear about the objectives that are being pursued, but it is also vital that the rules of intestacy are not looked at in isolation. In other words, reform in this area should take account of the fact that the operation of intestacy rules is intimately connected to other areas, not just of succession law but also beyond. For this reason, Kenneth Reid suggests that there be an alignment of the protection on intestacy with the protection in case of testacy, and that a reform of the former must come first.

Similarly, George Gretton¹⁸ and Jan Peter Schmidt show the need to pay greater attention to the interface between intestacy rules and family law, more specifically the patrimonial regime as it currently operates on divorce. In other words, coordination between matrimonial property law and succession is needed, especially if the tendency is for couples to own property jointly.¹⁹ In fact, a reform of current rules should consider not just how frequently couples co-own their home but also the effect that the existence of will-substitutes,²⁰ such as special destinations, have on the distribution of the estate. Thus, a more holistic view has to be taken if intestacy rules are to work properly and in line with the objectives they were meant to achieve.

E. THE VALUE OF COMPARISON

Kenneth Reid has shown that, in the context of intestacy, Scots law has often taken inspiration from south of the border. This is not, however, where the Scottish Government has invited us to look for solutions. Instead, and for reasons that are unclear, it has suggested that inspiration should be found in British Columbia (Canada) and in Washington State (USA). The law in neither of these jurisdictions, however, seems to be particularly fitting. While the British Columbia model is relatively new, so that it is difficult to judge what problems it may give rise to in practice, the Washington model, for reasons pointed out by both George Gretton and Jan Peter Schmidt, poses particular difficulties in the Scottish context.

¹⁷ Schmidt (n 3) at 00.

¹⁸ Gretton (n 4) at 00.

¹⁹ Schmidt (n 3) at 00.

²⁰ For an overview of will-substitutes in Scots law, see D Carr, "Will-Substitutes in Scotland" in A Braun and A Röthel (eds), *Passing Wealth on Death. Will-Substitutes in Comparative Perspective* (2016) 79.

This is not to say that comparative law cannot or should not play an important role in the reform, even though possible solutions may sometimes lie closer to home than we think.²¹ On the contrary. The point is rather that, while it is useful to look for inspiration elsewhere, it is important to choose one's models with care and to justify the choices. In fact, as several contributions have pointed out, it is somewhat surprising that the Scottish Government has not looked at models drawn from Civil law, especially given the "important structural commonalities between Scottish law and its Civilian counterparts".²²

F. CONCLUSION

Even though reform in this area is difficult, the answer to current problems cannot simply be to try to persuade more people to make wills.²³ Of course, Dot Reid²⁴ is right in pointing out that the lack of public information (or one could say too much misinformation)²⁵ regarding succession rights in case of intestacy needs addressing, and, as Alan Barr states,²⁶ it is highly desirable that people should make wills. But this cannot be a justification for maintaining deficient intestacy rules. The response must rather be to try to remedy the deficiencies referred to above and to do so by: setting clear objectives; choosing techniques that reflect such objectives (whether they are home-grown or taken from elsewhere); ensuring that intestacy rules operate as much as possible in harmony with testacy rules, will-substitutes but also matrimonial property law; and, overall, striving to achieve a balance between simplicity and a need to protect more than just the interests of the surviving spouse/civil partner.

This may well mean that the Scottish Government (or the Scottish Law Commission where, it is suggested, the reform should be sent back to) may have to reconsider some of its earlier decisions including, for instance, the decision to leave in place the distinction between heritable and moveable property, but also the decisions not to reform legal rights, and to leave the entire estate to the spouse/civil partner in the absence of any children. A renewed attempt at reforming intestacy rules may also provide an opportunity to consider whether and, if so, how intestate succession law can provide compensation for those who cared for the deceased free of charge – an issue of huge practical importance, which has not, so far, been considered by either the Law Commission or the Scottish Government.

*Alexandra Braun**
University of Edinburgh

²¹ See Schmidt (n 3) at 00 where he refers the possibility of a liferent in the matrimonial home which was considered during the debates leading up to the Succession (Scotland) Act of 1964.

²² Schmidt (n 3) at 00.

²³ K McK Norrie, "Reforming Succession Law: Intestate Succession" (2008) 12 EdinLR 77 at 80.

²⁴ This point was raised during the Symposium but is also referred to indirectly in D Reid (n 2) at 00.

²⁵ Here see the point Christandl (n 6) at 00 has made with regards to cohabitants who believe that they will inherit even though that is not the case.

²⁶ A Barr (n 13) at 00.

* I would like to thank Jan Peter Schmidt and Kenneth Reid for their helpful comments.