

Consultation on the Law of Succession

Scottish Land & Estates represents landowners, land managers and rural businesses across Scotland. The majority of these are small to medium sized family land based businesses. The issue of succession law is of major importance to our membership and we established an internal working group on the Law of Succession consisting of practising solicitors with many years' experience between them in this very technical area.

Scottish Land & Estates welcomes the opportunity to respond to this consultation on the Law of Succession. In particular we welcome the comment at paragraph 3.27 of the consultation paper that, "*Writing a will is however a conscious and positive decision about who should inherit and not to give the appropriate respect to that decision may be seen as undermining testamentary freedom*". This principle of testamentary freedom is of vital significance and should be the paramount consideration in reviewing the Law of Succession.

We are pleased that the Scottish Government has listened to previous representations made by us and others that changes to succession law cannot be considered solely in terms of the land reform context. It is welcome that due time is now being given by the Scottish Government to this highly complex and technical area of law in a separate consultation.

We recognise that succession laws require to be balanced to reflect both contemporary economic and social conditions and the increasingly complex nature of relationships, whilst having due regard to the sustainability of land based and other family businesses. In particular we have concerns that an extension to the protection from disinheritance to include heritable property would adversely affect the smaller family farm, small land based businesses and also the tenanted farming sector. We would suggest caution in progressing the need to update legislative arrangements to reflect current society, before its wider implications for Scotland's rural sustainability are better assessed and given fuller consideration.

Ownership of estates and farms can be complex, but it is the view of Scottish Land & Estates that while it is not possible to estimate numbers, the majority of owner-occupied farms will be owned by an individual or individuals and as such that land is heritable property and therefore currently excluded from a claim from Legal Rights. Any assimilation of heritable and moveable property for succession claims would therefore have a significant impact and exemptions would be essential.

Scottish Land & Estates appreciates the work which the Scottish Law Commission has undertaken in relation to reviewing the Law on Succession, particularly in considering other jurisdictions. However, we would emphasise that no system would appear unflawed and reform should be considered in light of the Scottish context, where estates and farms are important for the social and economic wellbeing of rural areas. The impact of any reforms needs to be thoroughly considered as whilst in some senses they may be seen as dated,

the laws on succession are not merely of academic interest, but have significant practical implications and inevitably touch on all our lives.

Chapter 2: Intestacy – Questions relating to Part 2 of the Commission’s Report

Q.1 Should rights in intestacy be property specific?

Yes.

Please give reasons for your answer:

Scottish Land & Estates does not wish to comment in detail on the question of intestacy as we consider that this is, in most cases, a voluntary position given that any individual can avoid this by executing a valid will. We do appreciate that the current three tier system of distribution of an intestate estate is unduly complicated, with prior rights, legal rights and free estate, but the distinction between heritable and moveable property is longstanding and should remain. Any revised legal framework needs to be able to take account of and cater equitably for a range of different scenarios and propositions. We would be very concerned if the policy aim of simplifying succession was simply masking an alternative land reform agenda.

Q.2 Should the policy aim of any scheme of intestacy be that a surviving spouse/civil partner should be able to remain in the family home?

Yes.

Please give reasons for your answer:

We agree with this policy aim which we consider meets wider public expectation, that a surviving spouse should be afforded some protection in relation to a share of the value of heritable property.

Q.3 Would the policy aim be achieved by the scheme of intestacy proposed by the Scottish Law Commission, after further consideration of the level of the threshold sum?

Don’t know.

Please give reasons for your answer:

We note that the Scottish Law Commission recognises that one of the benefits of prior rights is that the surviving spouse or civil partner is entitled to the dwelling house (or a share of it) which belonged to the deceased and is therefore unlikely to be forced to move out of the family home. In that sense the policy objective is largely being met at present. While we agree that the current arrangements are overly complex, in our view removing the property specificity to simply value the estate as a whole, diminishes the importance of the property right. It remains to be seen how effectively this change would work in practice.

Q.4 Should the threshold sum be set to strike a balance between the rights of a surviving spouse/civil partner and the deceased’s children?

No.

Please give reasons for your answer:

The balance in our view ought to be in favour of the surviving spouse/civil partner and this we suggest would meet public expectation to a greater extent.

Q.5 What do you think the level of threshold sum should be?

A - £335,000

Please give reasons for your answer:

In terms of the properties captured under the threshold there is limited difference between the lowest and highest thresholds. It should also be remembered that the proposals for protection from disinheritance are intrinsically linked to the scheme for intestate estates and this figure is more proportionate in that context than the larger sums and balances the interests of spouse/civil partner and children better, although even at this figure we believe this may result in the whole estate going to the spouse/civil partner in most intestate cases. It is also higher than that proposed by the Scottish Law Commission. Also, while not an absolute rule, by and large individuals with larger estates are in all probability more likely to have made a will.

Q.6 Should the spouse/civil partner retain the family home irrespective of value?

No

Please give reasons for your answer:

We feel the Scottish Law Commission policy objective was that a surviving spouse should generally be able to retain the family home, as opposed to must at all costs. It should be borne in mind that given 94% of Scottish properties are valued lower than even the minimum proposed threshold sum in the consultation paper and many of those valued in excess of that will be owned in common by spouses, it is likely to be a very small pool of estates where the threshold sum prevents the surviving spouse remaining in the family home.

Q.7 Should the threshold sum be reduced by the value of survivorship destinations in the title to heritable property?

Yes.

Please give reasons for your answer:

We believe this makes sense where survivorship destinations exist and provides balance where the deceased had children.

Q.8 Should the threshold sum take into account the value of survivorship destinations in the title to moveable property?

Yes.

Please give reasons for your answer:

While we agree with this, clarity is required as to what is meant by "survivorship destination" and whether this is envisaged to include nominations and interest in joint share owning.

Q.9 Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, should the sum be deducted from the deceased's intestate estate and the surviving spouse/civil partner be entitled to half of the resulting amount, if any, with the rest of the estate shared among the issue?

Yes.

Please give reasons for your answer:

We agree with this proposal. However, consideration requires to be given to the period of administration of the estate. Assets, such as a share portfolio can obviously change in value, upwards or downwards and a statutory date of division for distribution purposes would provide clarity on definition of value i.e. whether on sale, on payment, on division etc.

Q.10 Should there be a qualifying period before which a surviving spouse/civil partner could acquire some or all of the threshold sum?

No.

Please give reasons for your answer:

We are not entirely clear of the basis for this question, which we assume relates to paragraph 2.19 of the consultation paper (albeit the following question relates to paragraph 2.18) and which "individual" is being referred to. If this "qualifying period" is suggesting some form of increment based on the number of years married, we do not agree with this. A person is either married or unmarried or in a civil partnership or not, and there should not be any form of scale introduced. That would simply complicate matters and potentially give rise to harsh anomalies. If this is not what is meant we would welcome the opportunity to comment further.

It is clear to us that the surviving spouse's right to the house should be house specific. Otherwise, the policy objective set out in bold in 2.9 of the consultation paper, that a surviving spouse/civil partner can retain the family home should be maintained, is not being met.

Q.11 Where the value of the family home exceeds the threshold sum, should there be a period during which the property could not be sold?

Yes.

Please give reasons for your answer:

On a practical basis we believe this makes sense in order to sort out estate practicalities and would ensure someone is not removed from the property immediately after the others death. However, there needs to be consideration as to whether a joint owner could force a sale and also situations where an executor would want to sell within that period for instance due to Capital Gains Tax implications.

Q.12 If you have answered yes, should that period be two years?

Yes.

Please give reasons for your answer:

We would think that a two years period would be appropriate for the prohibition on selling and tie in with the time limit for Deeds of Variation at present.

Q.13 Where a person renounces their rights under an estate should they be regarded as not having survived the deceased?

Yes.

Please give reasons for your answer:

This is equitable.

Q.14 Where a person renounces their entitlement under an estate should they also be able to renounce the entitlement of their issue?

Yes.

Please give reasons for your answer:

We agree with this proposal on the basis it is “ability” to as opposed to compulsory. We also feel that there is a distinction to be made between adult children and minors. It would seem strange to have the ability to renounce on behalf of an adult child, especially as on intestacy the estate would pass to the children. We would question whether there are any human rights implications of proceeding on this basis.

Q.15 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 2.36 above.

We have no further comment to make.

Impact

Q.16 What do you think the impact of implementing the Chapter 2 proposals would be:

Please give reasons for your answer:

Q.16(a) On individuals

We have set out our major concerns in relation to the impact of any change in the law for individuals, families and businesses in response to question 29 below on protection from disinheritance. However, the proposals are intrinsically linked so it is vital that in relation to the law on intestacy that there is clarity and certainty and that the threshold sum is not artificially and unrealistically high.

Q.16(b) On families

Please see response to question 16(a) above.

Q.16(c) On the legal profession

We consider that firms and individual solicitors are best placed to respond to this.

Q.16(d) On the courts

We consider that legal firms/solicitors are best placed to respond to this.

Q.16(e) On business?

Please see response to question 16(a) above.

Chapter 3: Protection from Disinheritance

Q.17 Should a spouse or civil partner be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes.

Please give reasons for your answer:

This is reasonable in meeting public policy objectives.

Q.18 Should that fixed share be 25% of what they would have received on intestacy?

Yes.

Please give reasons for your answer:

We have answered “yes” on the basis that if such a fixed share proposal is to be progressed, we believe that this is a reasonable figure and would suggest that if adopted, 25% ought to be the maximum figure. It should be emphasised that different jurisdictions act differently and we do not necessarily see any particularly correct approach as such or the need for change for changes sake. However, consistency is required, even if an approach is flawed and it would be vital that the figure of 25% does not become a “political football” subject to change at a whim.

Q.19 Should all children be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

No.

Please give reasons for your answer:

We would strongly suggest continuing on the existing reasonable basis and as stated at the outset believe the principle of testamentary freedom is paramount. We do not believe it is justified to interfere with a person’s freedom to testate to this extent. The impact of legal rights under the current law can be considerable and can lead to the break up or sale of a farm. It was clear from evidence supplied to the Scottish Law Commission in 2006 by our predecessor organisation (SRPBA), Scottish Estates’ Business Group and NFU Scotland that in the event of changes which introduced an extension of legal rights to heritable assets, the smaller family farm would be most adversely affected. The risk of fragmentation of farms may have significant effects on profitability and viability as well as potential changes to the rural landscape and economy. There requires to be thorough investigation undertaken into this prior to reforming succession laws in this way. Large areas of land may have high capital values in many instances, but generate low levels of income. These would be unable to support multiple owners and the level of investment required, with estates and farms having to be broken up into smaller economically unviable units as a result to pay claimants

their share. The future viability of a great many farms and diversified rural family businesses would be threatened, not simply the small number of remaining “traditional” landed estates, which conversely may not be affected due to ownership structure.

Scottish Land & Estates is firmly of the view that farms and businesses which provide employment and housing, together with many other ancillary benefits for rural areas, must be sustained for these communities to prosper. This is not least due to the ripple benefit to other supporting businesses in the local economy. In the context of a family business, dependent upon land, where there is a will, the heritable assets should remain separate and distinct from the moveable assets of the estate. As the Scottish Government recognises there is a need to maintain and encourage a viable rural land business sector. Indeed, we do not doubt that the desirability of avoiding fragmentation applies to all small family businesses.

More generally, children tend to be older nowadays when their parents die and as such are not in need of substantial capital to set themselves up in life and it is our understanding that at present legal rights are seldom claimed by adult children. As noted in an argument put in the Scottish Law Commission Discussion Paper on Succession, while obviously subject to the share of the surviving spouse or civil partner’s legal share or claim of cohabitant, “*The parent’s property is his or her own property: it is not family property. He should therefore be free to dispose of his property as he wishes*”.

Q.20 Should a child’s claim from a fixed share from the whole estate (heritable and moveable) be 25% of what he or she would have received on intestacy?

No.

Please give reasons for your answer:

We disagree with this approach and would highlight our response to question 29 below.

Q.21 Should it be possible to renounce legal share?

Yes.

Please give reasons for your answer:

We believe it should be possible to renounce legal share either in advance or after death.

Q.22 Should renunciation remove that person’s issue having a right to a legal share of the estate?

Yes.

Please give reasons for your answer:

In our view it would seem strange otherwise. Renunciation in this regard should be treated as per any other right and this therefore makes legal sense.

Q.23 Should it be possible to apply to the court to pay the legal share in instalments?

Yes.

Please give reasons for your answer:

Scottish Land & Estates believes this option should be available, but to require such claims to be paid by instalments does not avoid the issue of the financial burden to the business, but would simply place an additional burden over a period years which in the case of many farms, would render it unviable. Payment by instalments will assist but will not fully address the concerns, particularly given the uncertainties over future income streams for farmers. If Inheritance Tax has to be paid on part of the estate (where APR/BPR is not allowed) then there may already be pressure over a period on the farm income. It is also undesirable that any scheme for instalments has to depend on court action.

Q.24 Should dependent children be able to claim a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent?

Yes.

Please give reasons for your answer:

This would be our preferred replacement for legal rights, with dependency as the test. Scottish Land & Estates considers that dependent children only should be protected from disinheritance. Effectively this would be a posthumous payment of the parent's obligation to aliment their child under the Family Law (Scotland) Act 1985. As such it fits neatly with both existing law and we would suggest with public expectation.

Q.25 Would providing for dependent children to be able to claim a capital sum payment, have an impact on the efficient winding up of estates?

Yes.

Please give reasons for your answer:

There would be an impact, in that it could add to the financial costs of administering the estate and there would be an added element of uncertainty in terms of whether the dependent child was going to claim etc. Given recent reforms there is also an issue as to whether there are sufficient courts to deal with the additional work. The most convenient system for calculating the sum is required to allow legal advisers to progress administration as clearly and efficiently as possible.

Q.26 Would a time limit of 1 year from death, unless on cause shown, assist in the efficient winding up of an estate?

Yes.

Please give reasons for your answer:

We agree that a time limit of one year would assist, but assume this is for the raising of an action and therefore the proceedings would take longer.

Q.27 Should dependent children with capacity be able to renounce a claim for a capital sum payment?

Yes.

Please give reasons for your answer:

We agree with this proposal and note the position for those under age 16 per the Children (Scotland) Act 1995.

Q.28 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 3.30.

Impact

We have no further comment to make.

Q.29 What do you think the impact of implementing the Chapter 3 proposals would be:

Q.29(a) On individuals

As the Scottish Government response to the Scottish Law Commission on 13th July 2009 stated, "*We will want to take account of the fact that the farming and landowning communities have on-going concerns about legal shares for children coming out of the whole estate and the impact this might have on the continued operational viability of land holdings*". It is clear by the inclusion of Chapter 3A on Agricultural Units that the Scottish Government is indeed cognizant of concerns, but we do not believe these concerns have yet been thoroughly investigated or addressed by this consultation and proposals contained therein.

While it is not possible to estimate numbers, as stated in our introductory comments to this consultation response it is our view that the majority of owner-occupied farms will be owned by an individual (or individuals), although there may well be a trading vehicle, perhaps a company or partnership, for taxation reasons and to assist in getting other family members involved in the management and/or operation of the farm. These proposals will therefore affect a large swathe of individuals.

Q.29(b) On families

Our anxiety is that including land and buildings into the property from which claims can be made could lead to a situation for agricultural families where the family farm needs to be sold or divided in such a way as to make it unviable. The particular concern would surround family farms which are unlikely to sustain the level of payment required to meet a claim whilst still remaining viable as a business. Substantial additional borrowing to meet a claim, even if obtainable, may well prejudice future necessary investment in the farming business as well as imposing additional financial burden which may not be sustainable.

Q.29(c) On the legal profession

We assume that the Law Society of Scotland and Scottish legal firms will be submitting responses to this consultation and would suggest they are best placed to answer this question.

Q.29(d) On the courts

In relation to claims by dependent children, if handled by the Sheriff Court, there may well be difficulties with consistency of application depending upon Sheriffdom, unless specialist "probate" type courts could be introduced, albeit at cost.

Q.29(e) On business?

As with individuals, businesses require stability to be able to plan for the future and so the type of radical reform suggested could have a significant impact. We are concerned about real and long-lasting damage to land-based businesses. The removal of the heritable distinction will affect those non-agricultural or non-estate businesses as well. In this context it is likely to hit the smaller of these businesses hardest as they will not have the resources for professional planning. We consider this will particularly be the case for those essentially rural family businesses serving the agricultural and estate businesses such as the local garage for instance.

Chapter 3A: Agricultural Units

Q.30 In examples 12-15 on pages 38-9, would there be scope for the legal share to be met by the principal beneficiary borrowing against the assets they have inherited (i.e. mortgaging a mortgage-able element of the agricultural unit)?

No.

Please give reasons for your answer:

In land based businesses, there is a much larger dislocation between the capital value of the asset and its income generating capability than in other businesses. The premise of the question appears to recognise that family farms are unlikely to be able to sustain the level of payment required to meet a legal rights/share claim while still remaining viable as a business. Where substantial additional borrowing is required to meet a claim/share, even if it is obtainable by the principal beneficiary, it could well prejudice future necessary investment by them in the farming business as well as imposing an additional, and potentially unsustainable, financial burden.

There is a further issue specifically for tenant farmers. This consultation paper and previous papers do not address what happens to the value of tenancies with the recently proposed land reform and specifically agricultural holdings changes, increasing tenancy value. More problems are created for tenant farmers through failing to consider the unintended consequences of this. We understand that the value of the deceased tenant's interest in an agricultural lease will be treated as heritable property and would not fall to be excluded from a widening of the protection from disinheritance, thus leaving the viability of a tenanted farm at risk in the event of claims being made by others in the family who do not stand to succeed to the tenancy.

Q.31 Should there be exemptions (limited or otherwise) for certain businesses from claims for a spouse/civil partner's legal share where this will compromise the commercial viability of the business?

Yes.

Please give reasons for your answer:

By exempting certain businesses, the policy intent would neatly fit with the Scottish Government's vision for a vibrant rural economy. Exemptions for farm businesses should be wide enough to catch both the tenant's and the landlord's interest in a let farm. If exemption was only available on the tenant's interest this would be a further disincentive for a landowner to let land.

Q.32 If there were to be exemptions from claims for legal share, do you think it would be possible to define those types of businesses which would be exempt with precision?

Yes.

Please give reasons for your answer:

There are, of course, many examples of farming being treated as a special case over many years to ensure public benefit, for example, food security. These examples include relief from Inheritance Tax on agricultural value (APR), income tax advantages, considerable exemption from the planning regime and exclusion from business rates. It would, therefore, not be unreasonable on a wider policy basis to exclude farms and estates from the extension of succession claims to heritable property.

However, Scottish Land & Estates is of the view that a wider definition rather than “agricultural property and businesses” would be required for exemption. It would not be appropriate to tie the definition to that appropriate to reliefs which are available for Inheritance Tax purposes. It would be more appropriate to refer to rural land, buildings and houses, given that there will be situations where the main house on the farm or estate will not necessarily qualify for partial or full relief for Inheritance Tax purposes. The reasoning behind this is that, assuming that the general principle of exclusion of certain assets to avoid fragmentation of the estate is accepted, in many cases the forced sale of the main house or other buildings as a result of a claim for legal share might lead to a closure of the business as a whole, thus defeating the object of excluding certain assets to avoid fragmentation. We are mindful for instance of historic house businesses.

Q.33 What criteria could be used to inform any definition of an excepted business on the basis that any formula must be clear and certain and able to withstand the tests of robustness, fairness and proportionality?

Please give reasons for your answer:

It is essential that any definition adopted is sufficiently clear to allow certainty and avoid disputes. We would trust that the Scottish Government will consider in detail the drafting of appropriate rural business exemption, but more generally we would reiterate that we do not think going down the path of assimilating heritable and moveable property in terms of children’s legal share is appropriate. There is a whole range of criteria which may be considered from listed buildings status to tax treatment in defining any exemption and this should be subject to further consultation and engagement with stakeholders.

Q.34 What could be the impact of a formula which was not clear and certain?

Please give reasons for your answer:

Evidently there would be increased possibility of legal challenge in respect of any formula which lacked clear definition and consequently potential inconsistency in application and delays while technical points were judged upon. The successful ability to plan future family and business succession could be affected if the law was uncertain. There would also be a lack of confidence in the system which would be detrimental to Scots Law on Succession and tarnish perceptions.

Chapter 4: Cohabitants

Q.35 Do you agree with the criticisms set out above of section 29 of the Family Law (Scotland) Act 2006?

Yes.

Please give reasons for your answer:

It is our understanding that this section is not currently working well and anecdotally that family lawyers are having problems with this in practice and specifically the amount of information which is required. It is not clear what the purpose of the section is in terms of what is actually sought. Should the court be endeavouring to do what the deceased would have wished; is it to ensure contributions by the cohabitant are repaid or to protect financially vulnerable cohabitants.

Q.36 Do you agree that section 29 of the Family Law (Scotland) Act 2006 should be repealed?

Yes.

Please give reasons for your answer:

On the basis that our response to question 35 is an accurate reflection of the situation at present, then it would make sense to repeal this section in order that there may be more clarity about what is to be achieved.

Q.37 Are the factors set out in Recommendation 38 sufficient/appropriate to determine if the individual was a cohabitant?

Yes.

Please give reasons for your answer:

We consider it is unfortunate that siblings residing together in a stable, committed and mutually supportive relationship all of their lives are excluded from eligibility as cohabitants, but recognise that this anomaly is not easily resolved.

Q.38 Should a cohabitant be able to make a claim in testate estates?

No.

Please give reasons for your answer:

We do not agree with a cohabitant being permitted to make such a claim and would argue that this would be a significant change in the law which should not be extended to cover this. Rights are available where married or in a civil partnership and also where the deceased has specified rights (for instance in favour of a cohabitant) in a will. Where neither is applicable it may well in fact be that the individuals are cohabiting precisely because they do not want to be married or in a civil partnership and do not wish the rights which go with that, particularly if they have family relationships elsewhere. In the situation where an individual is prohibited from re-marrying because of religious or other reasons, then the cohabitants are able and entitled to make provision for each other in their respective wills.

Q.39 Should a cohabitant receive a percentage of what a surviving spouse/civil partner would have received?

No.

Please give reasons for your answer:

We do not agree with this for the reasons set out above.

Q.40 Are the factors set out in Recommendation 39 sufficient/appropriate to determine the percentage a cohabitant should receive?

Yes.

Please give reasons for your answer:

If progressing this approach, the factors would seem to us to be appropriate. Length of cohabitation, nature of interdependence and contribution made are all key issues. Clearly a situation where a couple have cohabited for decades, run an estate or farming business together and have raised their children, should be considered differently to an extremely short relationship, with no parenting together and separate accounts and finances.

Q.41 Where there is a surviving spouse/civil partner and a cohabitant in an intestate estate, should the value of the estate which the spouse/civil partner would inherit be shared between the cohabitant and the spouse/civil partner in line with recommendation 42(1)?

Yes.

Please give reasons for your answer:

Q.42 Where the deceased dies testate, should the cohabitant's entitlement be to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner?

Don't know.

Please give reasons for your answer:

This question does not read well.

Q.43 Should, unless permitted by the court, any application for a proportion of the deceased's estate be made within the period of 1 year from the date of the deceased's death?

Yes.

Please give reasons for your answer:

Q.44 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 4.23 above.

We have no comment to make with regard to this question.

Q.45 What do you think the impact of implementing these proposals would be?

We have no comment to make with regard to this question.

Chapter 5: Additional Matters

Q.46 Should capacity to make or revoke a will, in the circumstances set out at recommendation 45, be determined by the law of the testator's domicile at the time of making or revoking the will?

Yes.

Please give reasons for your answer:

While we accept that this would not remove all potential conflict as it is necessarily only a change to Scots domestic law, it would assist in limiting competing domiciles. However, we would emphasise this is with a view to clarity. We are as previously stated, not supportive of the removal of the specific heritable/moveable distinction which the then Scottish Law Commission appeared to have in mind. We would note that protection from disinheritance is only available where the deceased died domiciled in Scotland and so ownership of company shares by an individual domiciled outside Scotland are not subject to that protection and any change to the Law of Succession to include heritable property in that protection may encourage a change in domicile.

Q.47 Should the rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) be abolished?

We have no comment to make with regard to this question.

Q.48 Should the right at common law to claim aliment *jure representationis* be abolished?

We understand from the Scottish Law Commission's Discussion Paper that the law around this is uncertain and few claims are made. On this basis we would agree with abolition, but leave it to others to pass further comment.

Q.49 Should the right at common law to claim temporary aliment be abolished?

We have no comment to make with regard to this question.

Q.50 If the requirement to obtain a bond of caution is removed should any measures be put in place to protect an estate given that there are very few calls on bonds of caution currently?

We have no comment to make with regard to this question.

Q.51 Should the court have the power to refuse to appoint an executor *dative*?

Yes.

Please give reasons for your answer:

In relation to intestacy it may be helpful for the court to have this pre-emptive power, but we would highlight our opposition to this in relation to executors nominate per our answer to question 67 of this consultation. The power should also only be available where objection is lodged prior to the grant of the application and be subject to clearly defined parameters, for example where there has been a conviction for a crime of dishonesty such as fraud.

Q.52 If the court is given a discretionary power to refuse to appoint an executor *dative* should small estates be excluded?

No.

Please give reasons for your answer:

If this reform is to be made, it would be most straightforward for this to apply across the board on intestacy and would remove any dubiety or anomalies around defining "small"

Q.53 If the court is given a discretionary power to refuse to appoint an executor dative should estates where the prior rights of the spouse exhaust the estate and the spouse is the executor-dative be excluded?

We have no comment to make with regard to this question.

Q.54 If the court is given a discretionary power to refuse to appoint an executor dative should estates where the executor-dative is the sole beneficiary be excluded?

We have no comment to make with regard to this question.

Q.55 Are there any other categories of estates which could be excluded?

We have no comment to make with regard to this question.

Q.56 Would a non-exhaustive list of factors which the court may want to take into account when considering a petition for appointment as executor-dative be helpful?

We have no comment to make with regard to this question.

Q.57 If so what factors should be included?

We have no comment to make with regard to this question.

Q.58 Should a petition for appointment as executor-dative be accompanied by (tick as many as you think would be necessary):

- a family tree
- a scheme of division
- a letter from DWP providing information on benefits in relation to the deceased?

We have no comment to make with regard to this question.

Q.59 Please set out below any other documentation which could usefully be included.

We have no comment to make with regard to this question.

Q.60 Should the current process of intimation be replaced by personal intimation?

Don't know.

Please give reasons for your answer:

We feel the processes are for practitioners and those more directly involved in this aspect to consider.

Q.61 If 'Yes', to whom should intimation be made?

Not applicable.

Q.62 Should the current appeal period be extended?

Don't know.

Please give reasons for your answer:

Again, we feel the time periods are for practitioners and those more directly involved in this aspect to consider.

Q.63 If 'Yes', what should the period be and why?

Not applicable.

Please provide your answer:

Q.64 In terms of the suggested safeguards please indicate below what combination would be necessary to provide a proportionate safeguard solution (tick as many as you think would be necessary).

- Power to prevent the appointment of an executor-dative
- Non-exhaustive list of factors to be taken into account
- Attachment of other documentation to the petition e.g. family tree
- Personal intimation
- Extended appeal period
- Other*

*Please set out below any other suggested safeguards

We have no comment to make with regard to this question.

Q.65 Do you agree with the data provided on page 65?

Yes.

Please give reasons for your answer:

We are unclear as to the basis for this question. Page 65 contains statistical data on the structure of Scottish farming and is presumably based on Scottish Government data. The data should simply reflect matters of fact; there seems to be little anyone can disagree with. The farms are either that size or they are not and we assume Scottish Government has used the data at its disposal on actual farm sizes.

Q.66 Please provide any additional data in terms of quantifiable volumes and costs associated with any of the suggested new safeguards.

We have no comment to make with regard to this question.

Q.67 Should the court have the power to refuse to confirm an executor nominate?

No.

Please give reasons for your answer:

This effectively removes the doctrine of *delectus personae*. In our view a strong case is required to overcome an appointment of executor, given that a deliberate choice has been made by the deceased. The person entitled to the office of executor in preference to all others is the executor nominated by the deceased. While the Succession (Scotland) Act 1964 is silent as to those entitled to office as executors nominate, the accepted position is that a person expressly or impliedly appointed by the deceased or an individual placed in that position by the Executors (Scotland) Act 1900 is the executor nominate. Even in terms of the constructive appointment under the 1900 Act where a testator has not appointed a person to act as executor, provision is comprehensively made for appointment in terms of the deceased's wishes as to whom the deceased might possibly have wished to act as executor. We accept that there may be exceptional cases where an individual is incapable of fulfilling the functions of executor, whether through untrustworthiness or otherwise, but these albeit burdensome cases should not be the basis for a change to the current accepted practice.

Q.68 Are there likely impacts of such a change

Yes.

Please explain your answer:

Clearly a court procedure will be involved in the refusal to confirm and petitioning to appoint another individual, which changes an administrative process to one involving decisions by courts. This will likely cause delays in process and additional cost to the administration of an estate as alluded to in the consultation paper.

Q.69 How might any impact of such a change be mitigated?**Please explain your answer:**

Not making the change in the first place, per our answer to question 67, would obviate the need to consider mitigation measures. However, attempt would need to be made to ensure that any change which is made is not subject to vexatious or malicious behaviour for nuisance value. Additionally, any refusal would also need to be clearly and concisely stated and very much for exceptional cases. In reality it would be extremely difficult to have sufficiently robust criteria to mitigate against such instances and further consultation would be required before progressing such a material change to the law.

Q.70 Should the doctrine of equitable compensation be abolished?

We have no comment to make with regard to this question.

Q.71 Should a marriage or a civil partnership result in the revocation of an earlier will?

No.

Please give reasons for your answer:

We do not believe this is required as the terms of the Succession (Scotland) Bill 2015 reverse the former position which held that provision in a will which make provision in favour of the spouse or civil partner of the testator stands even where the relationship comes to a legal end by divorce, dissolution or annulment. The drafting of this Bill means that testamentary provisions in favour of a former spouse or former civil partner as a trustee,

executor or guardian, are effectively revoked by the legal end to the relationship. On this basis we do not think this proposal is necessary and could also result in unintended consequences.

Jason Rust
Legal Adviser

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