

Intestate Succession: Part Two of the Scottish Law Commission's Discussion Paper on Succession

Kenneth McK. Norrie, University of Strathclyde

Introduction

It has long been traditional to characterise the law of succession as part of Property Law: the teaching of succession within Property classes at Scottish universities, which is more or less ubiquitous, creates a mindset from which it is difficult to escape. This is understandable for, after all, succession law provides the rules for the transmission of property ownership and it invariably requires deeds and conveyances to be drawn up and sometimes involves conditions, burdens and different forms of title. But at least in relation to intestate succession, it would be equally, or more, apt to characterise succession as a part of family law. For the rules that have always applied in Scotland are designed to identify the closest family relationships, and to strike an appropriate balance between family members with differing relationships to the deceased. Succession rights have always, literally, legitimated family relationships. The Scottish Law Commission's recent Discussion Paper on Succession (SLC DP 136, August 2007) is timely not because of any fundamental changes to the law of property, but because of shifting understandings in the concept of "family". Social changes such as increased levels of divorce, second marriages and step relationships, and legal changes such as the introduction of civil partnership and the recognition of the legitimacy of claims of cohabitants, have all rendered the carefully constructed complexities of the Succession (Scotland) Act 1964 more and more out of touch with how family life in Scotland operates today. The response of the SLC to the increased diversity and complexity of modern family life is to seek a simpler set of rules, for only thus, they believe, can anomalies and inconsistencies be avoided. They do not seek to challenge the principle of family-based intestate succession - it is indeed difficult to envisage any practical alternative - but instead to recalibrate the balance of interests between different potential claimants. They limit their consideration (in Part Two) to the situation of a deceased who is survived by a spouse/civil partner. The clear winner in their proposed recalibration in that situation is the spouse/civil partner; as we will

see it will usually be the issue of the deceased who are the losers. (It may be noted in passing that this will be the second time in recent years that issue lose out in law reform, for the share that cohabitants might now claim under s 29 of the Family Law (Scotland) Act 2006 will come from the portion that would otherwise have gone to issue).

Outline of the Proposals

Currently, when a person dies intestate survived by a spouse/civil partner, that spouse/civil partner has a variety of different entitlements: prior rights, which take precedence over all other claims and, subject to a financial limit, often exhaust the whole estate; legal rights, which are shared with any issue of the deceased; and rights under s 2 of the Succession (Scotland) Act 1964, though these last are postponed to preferred claimants including the deceased's issue, siblings (or their representatives, i.e. nephews and nieces) and parents. In their Discussion Paper, the SLC propose a much simpler approach, based on two all-embracing propositions. First, where a person dies leaving a spouse/civil partner but no issue, that surviving spouse/civil partner should simply take the whole estate, whatever its nature and whatever its value (DP 136, para 2.26). Secondly, where a person dies leaving a spouse/civil partner and issue, the surviving spouse/civil partner should be entitled to a fixed sum, tentatively set at £300,000, with the remainder being shared with the issue. This would mean that the whole estate goes to the spouse/civil partner where its value is less than the stated sum; if the estate's value were more than the fixed sum the excess would be divided equally with half going to the spouse/civil partner and the other half being shared amongst the issue (DP 136, para 2.57). This approach is likely in most cases to give rather more than currently to the spouse/civil partner though the Discussion Paper (DP 136, para 2.50) provides some examples to show that the shift away from issue will often be modest.

Possible Exceptions

Following the traditional Scottish approach to intestate succession, which eschews discretion and variation due to the actual circumstances of the family relationship

involved, the SLC are not keen on any qualifications to the rules they propose, arguing that individual family circumstances are likely to be so diverse that subsidiary rules might not produce any more satisfactory results. This is sensible. The fewer subsidiary rules there are, the less scope there is for the disgruntled to seek a judicial examination of the nature of his or her parents' personal relationships. Having absolute rules fixed by the legal recognition of relationships has insulated Scotland from the bitterly fought family disputes for sometimes very modest successions that are common in countries that allow courts to sit in judgment on the nature of individual family relationships. This strongly inclines the SLC to propose that the rules stated above should not be affected by the fact that the spouses/civil partners had separated (either in fact or judicially): the actual state of the relationship should be completely subsumed to its very existence (DP 136, para 2.64).

The SLC are only slightly less convinced on the question of whether a child accepted by the deceased as a member of his or her family (typically a step-child) should be treated in the same way as a blood child in the deceased's intestate succession. The simplifying instinct of the Commission, which inclines them to a negative answer (DP 136, para 2.80), is sound. The concept of the "accepted child", though well-known in, for example, the law of aliment, is ill-tuned to the absolutist traditions of intestate succession where certainty and predictability are far more important than in needs-based alimentary claims. "Acceptance" is not determined by something as simple as a DNA test but by a minute examination of how the family organised itself and the interrelationship between its members. Perhaps an even more serious objection to giving step-children and accepted children rights on intestacy is that that class of children would then be entitled to two (or perhaps even more) inheritances: the more a family is reconstituted, the more disparate will be the claims of children depending upon their life-experiences. This would be bad social policy.

A More Difficult Scenario

A major imperative of the SLC is to ensure general public acceptance of how the rules on intestate succession operate. This is important not because of a need for the law to reflect what people want, but because expectations are the basis of what can reasonably be assumed to be intended by a person who dies without a will. I

have little doubt that the proposals so far discussed meet that imperative. But I am far less sure that the result of always preferencing the spouse/civil partner without exception or qualification will be generally welcomed in some fairly common situations.

Imagine that a man, let us call him Abraham, marries Sarah while they are young, and they have a child, Isaac. They live together for 30 or 40 years (acquiring wealth, perhaps including family property inherited by Sarah from her parents). On Sarah's death most people would probably agree with the SLC that Abraham should succeed to most or all of her estate. Isaac is likely to be content to wait for his mother's inheritance while his father yet lives. But suppose further that after some years of lonely widowhood, Abraham meets and then marries Hagar, when they are both in their declining years. On Abraham's death it is Hagar and not Isaac who would then take most of Abraham's estate (including that portion he succeeded to on the death of Sarah). It is possible that Isaac might be persuaded to accept the justice of this result as the cost to be borne for the years of his father's twilight happiness, and perhaps for the care and companionship Hagar relieved him from providing. But the real problem comes when Hagar dies, because at that point all her property, including that which originally was acquired by Sarah and Abraham, would, on the existing law which is not affected by the SLC's proposals, pass to her (by now middle-aged) son called, of course, Ishmael. Isaac gets nothing from his parents' estates because, through marriage, it has all passed to Ishmael who had no blood connection to either Sarah or Abraham. The heirlooms from Sarah's family move out of her family. It is not self-evident that this is a just outcome, nor one acceptable to Scottish society generally, nor one that is justified by any principle identified by the SLC - except the sterile tyranny of simplicity.

In reality this is not really a competition between surviving spouse/civil partner and issue but between a first family (represented by issue) and a second family (represented by the surviving spouse) and it may well be that the balance of interests is that situation needs to be struck differently from the balance in intra-familial competitions which will, presumably, be the norm. The SLC address this issue at paras 2.65 – 2.70 and express their "inclination at present" to make no distinction between different types of surviving spouse/civil partner – issue competitions. They say: "the range of possible situations is too great and it is not clear that any new rule

would produce more satisfactory results than [the one being proposed]”. The SLC also points out that applying a different rule to non-parental spouses would have the practical effect of making a sharp distinction between spouses and civil partners, since the latter will seldom be shared (legal) parents.

Taking the latter objection first, I am not sure that it is as strong as it sounds. Changes in the law (both adoption and human fertilisation) will in the coming years make it much more common for same-sex couples to be joint parents, and step-relationships amongst opposite-sex couples already mean that substantial numbers of married couples are *not* joint parents of the children they are bringing up. The other objection is more substantial. In the example postulated above there is a clear separation between the first family and the second family, but this will not always be so and the variety of circumstances involving reconstituted families is almost infinitely great. Hagar might have been the woman who brought Isaac up; Ishmael might have been the son of Abraham and Hagar and half-brother of Isaac; Hagar might have other children, now grown, who never lived in family with Abraham; Abraham might have other non-marital issue; Abraham’s first marriage might have lasted one year, while his second lasted ten, or forty. Where, in other words, is the line to be drawn between the claims of a first and those of a second (or subsequent) family, and indeed the line between these families themselves? The SLC have been unable to identify a clear principle upon which a departure from their simple spouse-takes-virtually-everything rule might be based. And nor can I.

Conclusion

The lesson here is perhaps that whatever the rules of intestacy are, they can deal satisfactorily only with the norm, and that protection from an unjust result in other cases can and must be sought through the simple expediency of *making a will*. For it is to be remembered that intestacy rules are default rules, applicable only when there has been a failure by the deceased to express his or her wishes in valid form. It is to be hoped that when the new law, whatever its eventual shape, comes into force the Scottish Government and the legal profession make serious efforts to advise, encourage and persuade far more people to make a will than do so currently.

Might the marriage/civil partnership celebrant not also have a role in persuading any parent who marries of the need to at least consider whether or not to make a will?