NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

New Developments in UK Succession Law
Report to the XVIIth International Congress of Comparative Law, July 2006

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1. Introduction

The law of succession in the UK operates under three separate legal regimes in its three constituent jurisdictions of Scotland, England and Wales, and Northern Ireland. The latter two are virtually identical; the Northern Irish law of succession is based closely on the regime applicable to England and Wales, both systems being rooted in the common law tradition, and will be discussed together here. The Scots law of succession is entirely different, being rooted in the civilian tradition. As well as the differences being rooted in the very different systems of property law from which the law of succession derives, they also result from the differing regimes of family law that apply to each jurisdiction. The primary distinction between the Scots and English law of property, and thus to some extent also the law of succession, lies in the more elaborate concept of the trust in English law. While the legal sources of the law of succession in each jurisdiction are a mix of common law and statue, common law in the Scots sense denotes the law that has developed from custom and judicial precedent within the context of the civilian tradition and not the common law as derived from the courts of Equity in the English sense. Thus, in complete contrast to Scots law, a surviving spouse, civil partner or cohabitant may be entitled under English law to a share in the family home under the law of implied trusts and proprietary estoppel rather than as a matter of legal title. If not, however, he or she does not have a right to the family home under the English law rules of intestate succession. By contrast, Scots law has no concept of the common law trust[2] and thus no means for the survivor to acquire an interest other than having title registered in his or her name, A surviving spouse or civil partner without legal title will, however, be entitled to

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[2] For an analysis of the nature of trusts in Scots law see K G C Reid, 'Patrimony not Equity: the trust in Scotland' 2 European Review of Private Law 427.

the family home, or to its monetary value (up to specified statutory limits), if the deceased dies intestate.

That said, although further exploration of these differing concepts of ownership in general and rights in the family home in particular between the two jurisdictions is outwith the scope of this paper, they are essential to understanding the forms of current developments in the law of succession within the UK as whole since, notwithstanding their diverging legal traditions, the major developments in the law of succession in each jurisdiction in recent years have been concerned with the same issues. First, the extension of rights in succession to partners other than spouses; and, secondly, increasing the level of entitlement to surviving partners while eroding the entitlement of children. At the more general level, there seems to be emerging a trend towards the re-integration property and succession law and family law following the split between them that took place between throughout the twentieth century. Accordingly, the outline that follows does not outline those other developments that may be seen as more technical in nature.[3]

Given the different traditions and legal regimes operating in the two main jurisdiction of the UK, setting out an overview of their particular rules is essential in trying to make sense of recent and proposed reforms to them. Setting out the background rules will not only enable emerging trends to be more clearly identified but will also point to whether and how far the two systems may achieve their respective reform objectives within their own, particular traditions and whether, as a matter of wider patterns of development across and between jurisdictions, they may become more closely linked.

2. The Current Law and Current Proposals for Reform

A. Scotland

The Current Law

(1) Testate succession

At common law (that is, the law as developed by custom and by judicial decisions rather than common law in the Anglo-American sense), the deceased has an absolute right to test over only one third to one half of his or her moveable estate. This common law right was extended to civil partners by the Civil Partnership Act 2004.[4] Legal rights (exigible from the moveable estate only) are available to spouses or civil partners and to issue (including by way of representation) in both testate and intestate succession. The issue's right of legitim cannot be extinguished by ante-nuptial contract[5] and 'issue' includes all

[3] In common with other jurisdictions, however, one of the major changes in both main UK jurisdictions has been the loosening of the formal requirements for the execution of testamentary dispositions.

[4] Civil Partnership Act 2004 s.131. The Civil Partnership Act 2004 applies to the UK as a whole and came into force on 5 December 2005. It sets out the legal rules for the constitution and dissolution of civil partnerships but the greater part of the Act functions as an almost comprehensive series of amendments and repeals to existing legislation, in order to confer legal recognition of civil partnerships through creating an identity with the position of spouses.

[5] Succession (Scotland) Act 1964 s.12.

descendents[6], regardless of whether their parents were married or not.[7] However, although they are valid legal instruments, ante-nuptial contracts are not used as a matter of common practice in Scotland.

Where the deceased is survived by both a spouse or civil partner and issue, the moveable estate is divided into three parts, with the spouse or civil partner receiving one third, the issue one third and the remaining third falling to the free estate. Where he or she is survived only by a spouse or civil partner or only by issue, it is divided into two parts with the spouse or civil partner or the children receiving half. The remaining half falls to the free estate. The free estate is available to fulfil the purposes of the will; where the deceased has died intestate, the free moveable estate is available to pay the heirs in intestacy. Where the deceased died testate, legal rights may not be claimed in addition to a legacy and the claimant must elect whether to take his or her testamentary provision or to discharge the claim to legal rights.

Neither statute nor judicial discretion permits the courts to alter the terms of a will where either no provision or little provision has been made for a surviving spouse or civil partner or children and legal rights are all that may be claimed in these circumstances. The only ground on which a will may be challenged is that it is invalid, either formally (i.e. there is a fatal defect in the execution of the deed) or essentially (i.e. the provisions of the will were not made freely by the deceased because of, for example, a weakness of mind). The consequence of any such invalidity will be that the will is reduced (wholly or partially) and the estate falls into intestacy (total or partial), It will then be distributed according to the rules of intestacy set out in the Succession (Scotland) Act 1964 (see below).

The right of maintenance (known as aliment) that was owed to spouses and children[8] by the deceased during his or her life can, in theory at least, mitigate on his or her death any inadequacy in the value of legal rights as a means of family provision where the bulk of an estate is comprised of immoveable property. Aliment for a period longer than six months – after which time the estate may be distributed to beneficiaries – may be claimed not from the estate but from trustees administering the executory estate or from beneficiaries that have received legacies, to the extent that they have been enriched by their rights in succession to the deceased and to whom the duty to aliment has transmitted. The right aliment seems rarely to be claimed. The idea that children ought to be maintained out of the estate of the deceased, rather than by their surviving parent with continuing responsibility for them, has become outdated both socially and legally and, in relation to spouses, a full and final settlement out of the estate rather than a continuing dependence on the assets of the deceased corresponds more closely with the 'clean break' provisions that apply on divorce Together with its corresponding legal impracticality, this has rendered the right to aliment largely obsolete.[9]

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[6] Succession (Scotland) Act 1964 s.9

[7] Succession (Scotland) Act 1964 s.1 (2). The Family Law (Scotland) Act 2006 s.15B abolishes the status of illegitimacy entirely.

[8] While aliment may be owed by one civil partner to another during their lives, any such obligation ends on death: Family Law (Scotland) Act 1985 s.1.

[9] The Scottish Law Commission recommends the abolition of the right to aliment from a deceased, arguing that alimentary creditors should not be preferred to general creditors; and, most persuasively, that payments to account of any entitlements due to claimants out of the deceased's estate are adequate to meet their

(2) Intestate succession

(a) Surviving spouses or civil partners, children and other relatives

The Succession (Scotland) Act 1964 sets out a scheme for the distribution of intestate estates which provides that the first claim to an intestate estate is by a spouse or civil partner. He or she is entitled to fixed sums from the estate known as prior rights up to statutorily fixed maximum values, with the total entitlement of the surviving spouse or civil partner depending on whether the deceased was also survived by issue.

The value of the share of the estate available to the spouse or civil partner is increased from time to time by secondary legislation at the discretion of the Secretary of State. Because a surviving spouse or civil partner may also claim legal rights (see above), the intestate estate is, strictly speaking, only that estate which remains after satisfaction of claims for prior and legal rights by a surviving spouse or civil partner and may be claimed by classes or persons in a ranked order of preference. The effect of the rules is that unless the estate is large, a surviving spouse or civil partner will take all or most of it since whether or not it is possible to pay legal rights to issue depends on there being moveable estate remaining after payment of prior rights; and whether there is any property available to transmit to the heirs in intestacy depends on whether any heritable or moveable estate remains after payment of prior and legal rights. The courts have no power to alter the provisions of the statutory law of intestate succession.

After payment of debts, the estate of a person who has died intestate will thus be distributed in the following order: (1) prior rights; (2) legal rights; (3) the intestate estate

(i) Prior rights.

The value of the prior rights in an intestate estate available to surviving spouses and civil partners was increased in 2005 from their 1999 values.[10]

	1999	**2005**
Housing right	130,000	300,000
Furniture/household goods	20,000	24,000
Monetary right where issue survive the deceased	35,000	42,000
Monetary right where no issue survive the deceased	58,000	75,000

Under ss. 8-9 of the 1964 Act, a surviving spouse or civil partner has a right to:

(a) the interest of the deceased in the family home up to the value of £300,000 or a cash payment up to that value in certain circumstances, provided that he or she was ordinarily resident in it at the time of the intestate's death[11];

needs: Report on Succession (Scot Law Com No 124) 1990 paras 9.6–9.10. See also Aliment and Financial Provision (Memorandum No 22, 1976) paras 4.1–4.16.

[10] The Prior Rights of Surviving Spouse (Scotland) Order 2005/252 The very great increase in the value of the housing right reflects house prices inflation during the period.

[11] Succession (Scotland) Act 1964 s.8.

(b) furniture and plenishings up to the value of £24,000 from the family home, again provided that he or she was ordinarily resident in it at the time of the intestate's death[12]; and
(c) money up to the value of £75,000 where the deceased is not survived by issue or £42,000 where he or she has been, provided that he or she not has not received a legacy greater than the value of the right other than a type relating to (i) or (ii). [13]

(ii) Legal rights

The surviving spouse or civil partner and children (or their representatives) are entitled to legal rights on the same basis as in testate succession set out at above, payable after claims for prior rights have been satisfied.

(iii) The net intestate estate

Section 36 of the 1964 Act provides that the net intestate estate is the estate remaining after payment of liabilities of the estate as remains after provision for liabilities of the estate having priority over legal rights, the prior rights of a surviving spouse and rights of succession.[14] It is payable to relatives ranked in the following order of preference:[15] (1) children;[16] (2) parents and siblings equally between them where both classes survive the deceased; (2) siblings where no parents survive; (3) parents where no children survive; (4) the surviving spouse or civil partner;[17] (5) more remote relatives; (6) the Crown.[18] Collaterals of the full blood take in preference to collaterals of the half blood but where only collaterals of the half blood (or their representatives) survive, they are entitled to claim as if they were collaterals of the full blood.[19] Only if there is no prior relative may a claim be made by the next category of claimant in the list. If the deceased has not been survived by issue or any other prior relative, the surviving spouse or civil partner will, accordingly, take the whole estate in preference to more remote relatives.

(b) Cohabitants

The Family Law (Scotland) Act 2006 s.29 extends to cohabitants in either a heterosexual or same-sex relationship the right to apply to the court for provision from a deceased partner's intestate estate. The right is merely the right to claim and, unlike claims for prior rights by surviving spouses and civil partners, the Act confers no entitlement to any

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[12] Succession (Scotland) Act 1964 s.8(3); furniture and plenishings are defined in s.8(6)(b).
[13] Succession (Scotland) Act 1964 s.9. The term 'issue' includes grandchildren or remoter descendants who may claim by way of representation: Succession (Scotland) Act 1964 s.5.
[14] This definition has not been amended by the Civil Partnership Act 2004 but must be interpreted, in light of the substantive amendments to the 1964 Act, as including civil partners.
[15] Succession (Scotland) Act 1964 s.2
[16] Section 5 provides that where a person who would have had a right to the estate has predeceased survived by issue, the issue shall have like as he or she would have had if he or she had survived.
[17] Prior to the 1964 Act, only the heir-at-law could take the intestate estate; a surviving spouse did not rank at all.
[18] In practice, the Crown has discretion to make provision for persons whom the intestate might reasonably be expected to have made provision and applications may be made to the Crown Office.
[19] Succession (Scotland) Act 1964 s.3.

provision from the deceased partner's intestate estate. Application must be made to the court and any order made in favour of the applicant is to be made on a discretionary basis.

The claimant must first establish that he or she was a cohabitant of the deceased within the terms of the Act. Section 25(1) defines a 'cohabitant' as: (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners'. There is no minimum qualifying period; rather, s.25(2) provides that the court must take into account the length of the period during which the parties have been living together or lived together; the nature of their relationship during that period; and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period. For any award to be made, the deceased must have been domiciled in Scotland and have been cohabiting with the survivor immediately before his or her death.

Providing that cohabitation is proved, the court may make orders under s.29(2) for a capital payment or for the transfer of property to the applicant from the net intestate estate or any other orders that it considers appropriate; for example, the payment of the capital sum may be payable in instalments. In defining the net intestate estate, s.29(10) states that it is 'so much of the intestate estate as remains after provision for the satisfaction of inheritance tax, debts and the legal rights and prior rights of any surviving spouse or surviving civil partner'. Absent from this list are the legal rights of children which means, presumably, that an order in favour of a surviving cohabitant takes priority over claims for legitim by the children of the deceased. There have been no reported cases in this area to date and it remains to be seen how the provisions of the 2006 are actually to be implemented.

In determining the level of any award to the surviving cohabitant, the court must take into account a number of factors set out in s.29 (3). These are: (a) the size and nature of the deceased's net intestate estate; (b) any benefit received or to be received by the survivor on or in consequence of the deceased's death which is payable other than from the net intestate estate; (c) the nature and extent of other rights against, or claims on, the deceased's net intestate estate; and (d) any other matter the court considers appropriate. If an award is made, it may not exceed the amount to which the survivor would have been entitled had he or she been the spouse or civil partner of the deceased

Legal rights are not available to cohabitants. In consequence, cohabitants have no right or entitlement to make a claim on the estate where the deceased partner has died testate.

Proposals for Reform

The last major reform of the law of succession was the Succession (Scotland) Act 1964, the most important provisions of which were the assimilation of moveable and immoveable property (with both vesting in the executor), the abolition of primogeniture, the introduction of fixed (and more extensive) rights for surviving spouses in intestacy and the inclusion of surviving spouses in the ranking of persons entitled to succeed to an intestate estate. In 1990, the Scottish Law Commission produced its *Report on Succession*[20], together with a draft Succession Bill. One of its purposes was to make technical alterations to the rules of testate succession but its main purpose was to increase

[20] Scot Law Com No 124 1990.

the provision available to the surviving spouses in intestate succession and to substitute for legal rights a new right of legal shares, available in testate succession only. Both proposals for reform were aimed at further shifting the balance between the rights of surviving spouses and the rights of issue and other relatives towards those of spouses. The 1990 recommendations relating to the rights of a surviving spouse can be summarised as follows.

(a) Intestate succession

1. Where a person dies intestate survived by a spouse but no issue the spouse should take the whole intestate estate
2. Where a person dies intestate survived by issue but not by a spouse, the issue should inherit the whole intestate estate (as under the existing law)
3. Where a person dies intestate survived by a spouse and issue, the spouse should have a right to £100,000 or the whole intestate estate if less. Any excess over £100,000 should be divided equally, half to the spouse and half to issue.[21]
4. Where relatives other that a spouse or issue survived the deceased, collaterals of the half-blood should share equally with collaterals of the whole blood.

(b) Testate succession

1. Surviving spouses and children should remain entitled to fixed shares from the estate of the deceased rather than discretionary provision
2. Moveable and immoveable property should be fully assimilated in order that legal shares be exigible from the whole net estate of the deceased
3. The surviving spouse's legal share should be 30% of the first £200,000 of the net estate and 10% of any excess over £200,000[22]
4. Where there is no surviving spouse, the issue's legal share should be 30% of the first £200,000 of the net estate and 10% of any excess over £200,000
5. Were there is a surviving spouse and issue, the issue's legal share should be 15% of the first £200,000 of the net estate and 5% of any excess over £200,000 but the estate subject to the issue's legal share should not include the first £100,000 of any estate to the fee (or absolute right) of which the surviving spouse succeeds (otherwise than by virtue of a claim for legal share)

Unlike the current position where legal rights may be claimed from both testate and intestate estates – so that a surviving spouse is entitled to claim both prior rights and legal rights – the Scottish Law Commission proposals would require a claimant for legal shares to forfeit all other rights in succession, including rights on intestacy.

In effect, the proposed reforms would have introduced a greater similarity with the law in England and Wales and Northern Ireland. In relation to testate succession, a greater part of the estate available to a surviving spouse would be 'ringfenced', albeit in the form of fixed rather than discretionary provision. The overall effect would have been to give the surviving spouse a claim to a greater proportion, if not all of, an estate, whether

[21] These figures would be increased from time to time by the Secretary of State.
[22] These figures would be increased from time to time by the Secretary of State.

testate or intestate; however, no legislative programme followed on the draft Bill and the recommendations of the Scottish Law Commission were never enacted. This was partly for lack of legislative time but mainly because of opposition from farmers and landowners, whose objections were based on the fact that assimilating moveable and immoveable property in order to pay increased legal shares to surviving spouses would break up landholdings into unviable economic units and prevent a single successor assuming management of the land. In addition, it seems likely that its recommendations, particularly the shift in preference from children to spouses, were too controversial to be enacted with public support at that time. Following devolution and the creation of the Scottish Parliament in 1999, interest in and momentum towards its reform was revived and the Scottish Law Commission included the law of succession within its Seventh Programme of Law Reform that commenced in January 2005. Its justification for returning to law of succession is that "the law no longer reflects current social attitudes nor does it cater adequately for the range of family relationships that are common today." More specifically, it lists these social changes as including: Increased incidence of cohabitation, either in same-sex or opposite-sex relationships; increased longevity with the consequence that children are older when their parents die; increased distribution of wealth and particularly increased ownership of immoveable property; increased incidence of divorce and of step-families.

Its view that "the surviving spouse comes too low in the order of succession to the free estate on intestacy" is recognition of the partnership aspect of the relationship. Accordingly, the Scottish Law Commission proposes to leave intact its 1990 recommendations relating to the more technical aspects of the law but to revisit the rights of surviving spouses and civil partners in intestate succession and their protection from disinheritance in testate succession. It also intends to review the question of greater protection for cohabitants. This latter aim may or may not have been superseded by the discretionary provision set out in the Family Law (Scotland) Act 2006 in relation to intestate succession and it remains to be seen whether its proposals go further than those contained in the 2006 Act. It also seems likely that it will recommend a diminution of the rights of children to an automotive share of their parent's estate. Two possibilities have already been mooted. First, that any children of the deceased under the age of 25[23] could be required to apply to the court for aliment by way of either payment of a capital sum or periodical payments if there is no surviving spouse or cohabitant who is also under the obligation; or secondly, a child could be entitled to a) a fixed share only where the estate has been left to a person or persons outside the family.[24]

As part of its research, the Scottish Law Commission commissioned a survey of public attitudes that was published in 2005.[25] It showed that there is broad public support for increasing the rights of surviving spouses and cohabitants and significant support for extending rights in intestate succession to stepchildren. In relation to intestate succession, 88% of respondents felt that a surviving spouse ought to take the whole estate in

[23] In Scots law, parental responsibility to children is extended from 18 up till the age of 25, providing that the child is undergoing education or training; Family Law (Scotland) Act 1985 s.1(5) (a) and (b).

[24] Unpublished paper by a member of staff at the Scottish Law Commission given at the Ius Commune conference at the University of Edinburgh in December 2005

[25] The survey was commissioned many years prior to the passing of the Civil Partnership Act 2004 and, in consequence, only questions about the rights of surviving spouses were asked.

preference to parents and collaterals (in contrast to the present law). Where the deceased was also survived by adult children, 46% felt that they should not be entitled to anything from the estate. 67% of respondents felt that any estate remaining after payment of a fixed share to a surviving spouse should be divided equally between the surviving spouse and any adult children. In relation to stepchildren, 68% felt that they should be entitled to share equally with the deceased's own children. In relation to testate succession, 75% of respondents felt that a surviving spouse should be entitled to claim a fixed share rather than applying to the court for a discretionary provision. 87% felt that young children should be able to claim a share, with 56% of them preferring that this be a fixed rather than discretionary share. 70% of respondents felt that adult children should also be entitled to a share, again with 56% of these preferring that this be a fixed share. In relation to stepchildren, 65% felt that where only stepchildren survive the deceased and the estate has been left to other, the stepchildren should be entitled to claim a share.

B. England and Wales

The Current Law

In contrast to Scots law, the English law of succession adheres, at least theoretically, to the principle of absolute freedom of testation. In consequence, fixed shares are not available as a matter of right to spouses, civil partners or issue where the deceased has made little or no provision for them by will. However, the court has a discretionary power under the Inheritance (Provision for Family and Dependents) Act 1975 whereby a range of persons may apply to the court for a share of the estate. The 1975 Act may also be used to alter the effects of the statutory intestacy rules under the Administration of Estates Act 1925. The general rule of English law is that pre-nuptial agreements are not enforceable; rather, they may be a factor to take into account when making an order for financial provision on divorce under the Matrimonial Causes Act 1973.[26]

(1) Testate succession

The courts have discretion under the Inheritance (Provisions for Family and Dependents) Act 1975[27] to alter the terms of a will where no provision or inadequate provision has been made for certain categories of person; these are not confined to spouses, civil partners or children. Those entitled to apply to the court for a share of the estate are:

(a) a surviving spouse or civil partner;
(b) a former spouse who has not remarried;

[26] *See for example: F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 (Fam Div); S v S (Matrimonial Proceedings: Appropriate Forum) [1997] 2 FLR 100 (Fam Div); N v N (Jurisdiction: Pre Nuptial Agreement [1999] 2 FLR 745 (Fam Div); M v M (Pre Nuptial Agreement) [2002] 1 FLR 654 (Fam Div).*

[27] As amended by the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2005.

(c) a child of the deceased;
(d) any person who was treated by the deceased as a child of the family in relation to a marriage;
(e) any other person who was maintained wholly or partly by the deceased prior to his or her death;
(f) any person living in the same household as the deceased as husband or wife or as civil partner during the whole of the two year period preceding the date on which the deceased died, where the deceased died on or after 1 January 1996.

There is a very substantial body of case law relating to applications made under each category of applicants and although general principles have developed over time, applications must be decided on a case by case basis. In practice, however, the Act gives rise to relatively few claims, partly because of the expense of litigation but possibly because persons who would be entitled to apply have in fact been provided for adequately by the testator.[28]

Section 2 of the Law Reform (Succession) Act 1995[29] amended the Inheritance (Provision for Family and Dependents) Act 1975. It inserted a new s.1(1)(ba) into the 1975 Act by providing that in addition to the persons already entitled, s.1(1) would be extended to give "any person living in the same household as the deceased as husband or wife or civil partner during the whole of the two year period preceding the date on which the deceased died" the right to apply to the court for a share in that person's estate.[30] In considering an application by a cohabitant, it further provides that the court shall have regard in making an order to: (a) the age of the applicant and the length of the period during which he or she lived as husband or wife of the deceased and in the same household as the deceased; and (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family. The same provision was added in relation to same-sex cohabitants under the Civil Partnership Act 2004.

Prior to the 1995 Act, a cohabitant may have been able to establish a claim under s.1(1)(e) based on financial dependence on the deceased but the effect of the 1995 reform is to emphasise that a claim to a share of the deceased's estate is to be based on the nature of the relationship with the deceased. Not only is this relationship not to be placed within the same category as any other dependents, it is not necessarily based on financial factors at all. The main difference from marriage (or civil partnership) is that the partnership basis of the relationship must be demonstrated rather than, as in marriage, be presumed. It is not necessary that the relationship be sexual but that it resembles a marital relationship more generally. [31] Given that the 1975 Act applies not only in testate succession but may also be the basis of an action seeking to alter the rules of intestate succession set out in the Administration of Estates Act 1925, this reform can be seen as broadly equalising the

[28] There were 73 claims in 2002 and 83 claims in 2003 relating to testate succession but no figures area available for claims made in relation to intestacy: Judicial Statistics 2002, Judicial Statistics 2003.
[29] The 1995 Act came into force on 1 January 1996.
[30] Section 2 of the Law Reform (Succession) Act 1995 Act inserted a new s.3A into the Inheritance (Provision for Family and Dependents) Act 1975.
[31] Re Watson [1999] 1 FLR 878.

positions of the married and the non-married in relation to succession. These provisions have been extended to same-sex cohabitants by the Civil Partnership Act 2004.[32]

(2) Intestate succession

(a) Surviving spouses or civil partners, children and other relatives

The English law of intestate succession is governed by the Administration of Estates Act 1925[33], which sets out a scheme of fixed shares. If the deceased is not survived by children or any other prior relative, the surviving spouse or civil partner will take the whole estate; similarly, if the deceased is survived by issue but not by a spouse or civil partner, the issue will take the whole estate. When both a spouse or civil partner and issue survive, the rights of the issue are postponed to the rights of the surviving spouse or civil partner. Since 1 January 1996, a spouse or civil partner must survive the deceased for 28 days in order to acquire rights in succession to the deceased.[34]After payment of debts, the estate of a person who has died intestate will be distributed in the following order: (1) the statutory legacy together with personal chattels; (2) the residuary estate.

(i) The statutory legacy

Where a spouse or civil partner survives the deceased, he or she is entitled to a fixed sum known as the 'statutory legacy', the value of which depends on whether the deceased was also survived by issue. Where no issue but other relatives survive the intestate, the value is £200,000; where issue do survive the intestate, the value is £125,000. [35] Where neither issue nor other relatives survive the intestate, the surviving spouse or civil partner is entitled to the whole estate. The value of the 'statutory legacy' is increased from time to time by the Lord Chancellor and was last increased in 1993.[36] The surviving spouse or civil partner is also entitled to all of the deceased's personal chattels.[37] Where there is no surviving spouse or civil partner, the whole estate comprises the residuary estate.

(ii) The residuary estate

The estate remaining after payment of the statutory legacy and the personal chattels of the deceased is the residuary estate and it includes a dwelling house in which the intestate has an interest and in which the surviving spouse or civil partner was resident at the date of the intestate's death. The surviving spouse has no express right to the house but can require the personal representatives to appropriate it in total or partial satisfaction of any

[32] Schedule 4 Part 2 s.15(5).
[33] As amended by the Civil Partnership Act 2004.
[34] Administration of Estates Act 1926 s.46(2A).
[35] Family Provision (Intestate Succession) Order 1993.
[36] The value of the statutory legacy is currently under review: 'Administration of Estates – Review of the Statutory Legacy (DCA, CP 11/05), 7 June 2005.
[37] Administration of Estates Act 1925 s.46. These are defined under 55(1)(x) and, in contrast to the definition of furniture and plenishings under the Succession (Scotland) Act 1964 include cars and domestic animals.

absolute rights in the residuary estate which he or she acquires.[38] The distribution of the residuary estate depends on whether the deceased was survived by a spouse or civil partner and/or by issue or by other relatives.

(a) Where the deceased is survived by both a spouse or civil partner and issue, the surviving spouse is entitled to a life interest in half the residuary estate. The issue taking the other half and the right to the other half absolutely on the death of the surviving spouse or civil partner.[39]
(b) Where the deceased is survived by a spouse or civil partner and relations of the whole blood but not issue, the surviving spouse or civil partner takes half of the residuary estate absolutely.
(a) Where the deceased is survived by issue but not by a spouse or civil partner, the issue residuary estate is held on a statutory trust for the issue.[40]
(b) Where the deceased is survived by neither a spouse or civil partner nor issue, the residuary estate is distributed to relatives in the following order of preference: parents; brothers and sisters (or their issue); brothers and sisters of the half-blood (or their issue); grandparents; uncles and aunts of the whole blood (or their issue); uncles and aunts of the half-blood (or their issue).

Where there are no surviving relatives, the estate is taken by the Crown as *bona vacentia*.[41]

(iii) Modifying the intestacy rules

Under the Inheritance (Provision for Family and Dependents) Act 1975, the court has discretion to amend the terms of the statutory scheme set out in the Administration of Estates Act 1925, either wholly or partially, where it considers it equitable to do so, in the same manner as in testate succession.

(b) Cohabitants

Cohabitants have no entitlement to the intestate of the deceased. They may, however, apply to the court for discretionary provision under the Inheritance (Provision for Family and Dependents) Act 1975 on the same basis as in testate succession.

Proposals for Reform

The current rules on intestacy were introduced by the Administration of Estates Act 1925 as amended by the Intestate Estates Act 1952. The 1952 Act greatly increased the value of the statutory legacy, gave the surviving spouse the right to the family home in satisfaction or partial satisfaction of the statutory legacy and extended the provisions of

[38]Intestates' Estates Act 1952 Second Schedule para 1(1).
[39] Administration of Estates Act 1925 s.46.
[40] Administration of Estates Act 1925 s.46(1)(ii)
[41] The Crown may exercise its discretion to make provision for persons whom the intestate might reasonably have been expected to provide for: Administration of Estates Act 1925 s.46(1)(vi).

the Inheritance (Family Provision) Act 1938 to intestate as well as testate estates. The 1938 Act, as passed, had enabled surviving spouses and children of the deceased to apply to the court for maintenance, up to a maximum proportion of the income of the estate, by way of either by periodic payments or a capital sum paid from the estate. As well as spouses, applications could be made by unmarried daughters, sons under the age of 21 and children whose disability prevented them from maintaining themselves. The Matrimonial Causes (Property and Maintenance) Act 1958 extended the range of applicants to former spouses who had not remarried and removed the limit on the level of provision that could be made. The current legislation, the Inheritance (Provision for Family and Dependents) Act 1975, consolidated the previous family provision legislation and expanded its scope. In relation to provision for a surviving spouse, maintenance was no longer to be the aim but, rather, provision such as 'would be reasonable in all the circumstances for a husband or wife to receive'. In relation to children, children treated as children of the family were included within the categories of eligible applicants. Anti-avoidance provisions were also introduced.

The scope of the 1975 Act was further extended by the Law Reform (Succession) Act 1995 to include cohabitants (subject to certain criteria being fulfilled) and any person maintained wholly or partly by the deceased immediately before the death. For various reasons, ranging from the costs of legal action to the problems of dealing with the 'unwieldy machinery of trust law',[42] the provisions of the Act relating to cohabitants have been criticised as unsatisfactory. The Law Commission for England and Wales published a Discussion Paper in May 2006 in which it set out options for reform of the intestacy rules provided in the Administration of Estates Act 1925 so as to include cohabitants within the scope of its statutory scheme.[43] Its preferred option is not to extend the 1925 Act to cohabitants, on the ground that conferring fixed rights on all cohabitants would not address fairly the range of factual circumstances that exist. Rather, it takes the view that the 1975 Act ought instead to be adapted to fit contemporary facts, circumstances and expectations.

Other proposals for reform that are currently being considered relate not to the framework of provision but to their value. Given that the value of the statutory legacy available to surviving spouses (and, since the coming into force of the Civil Partnership Act 2004, civil partners) has not been increased since 1993 the Department for Constitutional Affairs put out for consultation in September 2005 a paper proposing that the value be increased from the level set in 1993. The main argument in favour of increasing it are that the relatively low current levels of £125,000 and £200,000 at a time of high house price inflation (some 165% between 1993 and 2004[44]), means that there is a risk that the family home will have to be sold in order to pay the claims of children or other relatives with the surviving spouse being unable to remain in the family home. In order for the statutory legacy to achieve the same purchasing power today as in 1993, the values would have to be increased to £331,000 and £530,000, depending on whether issue as well as a spouse (or civil partner) survived the intestate. As against this argument, most intestate estates are not sufficiently large to pay much more than the

[42] See for example S Bridge 'Reforming Cohabitation Law' (2005) 35 Fam L J 679.
[43] Cohabitation: The Financial Consequences of Relationship Breakdown (The Law Commission Consultation Paper No 179).
[44] Figures taken from HM Land Registry's Intelligent Register database.

statutory legacy anyway; given the increased incidence of second marriages and step-families, an increased statutory legacy would mean little if anything being available to stepchildren. In addition, the increased incidence of joint ownership of the family home (a consequence of both the general increase in home ownership and the increase in spouses buying jointly) means that the share of the deceased spouse will, in most cases, pass automatically to the survivor so that he or she will not require the statutory legacy in order simply to remain in the family home. [45] He or she will, therefore, remain in the family home and receive the statutory legacy as well, to the detriment of the deceased's children or other relatives. Having considered the evidence and examined the principles on which the general concept of the statutory legacy is based, the DCA concluded that the level ought to be increased since this would correspond most closely with the expectations of married persons today. In cases of real hardship, the effect could be mitigated by an application by children or others under the Inheritance (Provision for Family and Dependents) Act 1975.

C. Northern Ireland

(1) Testate succession

The law of succession in Northern Ireland is based on English law and the parallel statute granting power to the court to amend the terms of a will on application by specified persons is the Inheritance (Provision for Family and Dependents) Order 1979,[46] with the provisions of the Northern Ireland legislation being identical to those under the Inheritance (Provision for Family and Dependents) Act 1979 that applies in England.

Section 4 of the Succession (Northern Ireland) Order 1996[47] amended the Inheritance (Provision for Family and Dependents) Order 1979 to include an application for financial provision by a person who lived with the deceased as husband or wife and the criteria that must be satisfied are identical with the provisions made by the Law Reform (Succession) Act 1995 that applies to England and Wales.

(2) Intestate succession

The law of intestate succession in Northern Ireland is governed by the Administration of Estates Act (Northern Ireland) 1955 and by the Inheritance (Provision for Family and Dependents (Northern Ireland) Order 1979 No 924. Their provisions are similar to those which apply in England but with some significant differences:

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[45] The position depends on whether the parties owned the home as joint tenants or as tenants in common; this will not be explained further here but the main point is that even if the deceased spouse's share does not pass automatically to the survivor, in most cases the survivor will require only to buy out the deceased's half share and not the total value of the house. Based on average house prices, the current value of the statutory legacy is high enough to achieve this. About 90% of spouses hold the property as joint tenants and 10% as tenants in common: figures taken from HM Land Registry's Intelligent Register database.

[46] Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 No 924 (NI 8) (as amended by the Succession (N Ireland) Order 1996 SI 1996 No 3163 (NI 26)).

[47] SI 1996 No 3163 (NI 26).

(a) Where the intestate is survived by more than one child, the surviving spouse or civil partner takes one-third of the residue and the provision also applies to issue of a predeceasing child taking by way of representation.[48]
(b) Where the intestate is survived by a spouse or civil partner and issue, the surviving spouse or civil partner take a one-half share of the residue absolutely.[49]
(c) Where neither a spouse nor a civil partner survives the intestate, parents or collaterals (or their issue), whom failing the next of kin, take the whole intestate estate.[50]
(d) Relatives of the half-blood are treated equally with relatives of the whole blood within the same degree.[51]

3. General Tendencies

In contrast to the situation in Scotland, reform of the law of succession in England and Wales has been more frequent, incremental and far-reaching. In relation to intestate succession and family provision in particular, law reform has been uneven as between Scotland and England and Wales and Northern Ireland. Although there have been other, more minor, changes to the law of succession in the UK, by far the most significant have been in relation to partners in intimate domestic relationships, these reforms are the direct result of a very clear shift in policy. The general trend has been towards enlarging the rights or claims of adult partners of the deceased and reducing those of children, the rationale being that adult partners require increased protection from disinheritance while the welfare of children is primarily the responsibility of their surviving parent or carer. This is, in general, justified on the basis that this is how most adults would wish their estates to be distributed given changing family patterns and changing expectations and ideas of entitlement following termination of the relationship.

Extending rights in succession to a wider range of partners in marital-type relationships has had two main consequences: first, it has reduced the scope of the principle of testamentary freedom; and secondly, it has shifted the balance of entitlement away from children and towards those of intimate relationships. This has taken place not only by widening the range of entitled or potentially entitled persons but also by increasing the size or value of the share to which they are entitled. However, it is not only or even primarily the case that by widening the range of potential claimants to an estate to same-sex and cohabiting relationships that the principle of testamentary freedom is eroded. Current work on law reform in Scotland and in England and Wales (Northern Ireland generally following the latter model) can be seen as being aimed at achieving the

48 Section 7.
49 S. 7.
50 S. 11. Next of kin are ascertained by counting upwards from the intestate to that ancestor and degrees of blood relationship of any other relative are ascertained by counting upwards from the intestate to the nearest ancestor common to the intestate and that relative, and then downward from that ancestor to the relative, but, where a direct lineal ancestor and any other relative are so ascertained to be within the same degree of blood relationship to the intestate, the other relative shall be preferred to the exclusion of the direct lineal ancestor: s.12.
51 S. 14.

second means by which the further extension of the rights of surviving partners is to be achieved; that is, by increasing the value of the claims that may be made by an enlarged category of entitled or potentially entitled persons. In England and Wales and Northern Ireland, it seems likely that, the framework of entitlement having been established by previous reforms, any further reform will be aimed towards increasing the value of claims. Since reform in Scotland has moved at a slower pace than reform in England and Wales and Northern Ireland, it is likely that the Scottish proposals will be more far-reaching and extend not only the value of claims which may be made but will also change their basic framework.

It is clear that the main developmental trend of the law of succession within the UK, in terms of both enacted legislation and current law reform projects, follows what Sjef van Erp, citing Puelinckx-Coene,[52] refers to in his General Report on New Developments in Succession Law[53] as a shift from the 'logic of blood' to the 'logic of affection'. Puelinckx-Coene points to the contraction of family ties resulting in enhanced solidarity between spouses (or other partners) and thus to the demise of an adult partner being treated as a 'stranger'. Equally, however, the shift in the legal framework could be thought of as emphasising the ideal of personal choice (or presumed choice); one cannot choose one's children but one can choose whether or not to live with one's partner until death and one ought to be able to choose in whom to invest and whom to reward. To a greater or lesser degree, depending on the jurisdiction, however, one can no longer choose to conduct that relationship outwith the framework of legal recognition altogether as long as it involves cohabitation (however defined). The trend towards a more inclusive legal conception of family forms, where the reality and the moral validity of same-sex and cohabiting relationships is recognised, can also be seen as representing a shift in the moral texture of succession law. The rationale given for introducing the discretionary scheme of provision for cohabitants in intestate succession in Scotland, for example, is that of 'protection of the vulnerable'.[54] Rather than liberalising sexual relationships, the extension of rights in succession to adult partners in a range of differently configured domestic situations can also be seen as a consolidation, within the private sphere, of the regulatory state. Sexual relationships carry financial consequences from which no derogation is possible; unlike in France, for example, there is no specific legal form in which partners may opt out state enforceable financial responsibility on death for each other.

Leaving aside, however, the question of whether blood and affection are mutually exclusive categories of connectedness, it cannot be said that the shift has taken place in a linear manner nor been without tensions internal to the legal system. In the early to mid-twentieth century, succession law became detached from family law and financial provision on divorce and on death became subject to separate legal regimes. On the one hand, divorcing spouses became, in general, considerably better provided for when a marriage was terminated by divorce than on death; on the other, spousal provision on death - or, at least, on intestacy – came to favour a surviving spouse to an extent previously unknown. Although the position of spouses and civil partners in Scotland and

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[52] M Puelinckx-Coene, General Report, 6th European Conference on Family Law.
[53] S van Erp, General Report New Developments in Succession Law, XVIIth Congress of the International Academy of Comparative Law 2006.
[54] Family Law (Scotland) Bill, Policy Memorandum, para 64.

England remains radically uneven today, it seems likely that their positions may be strengthened considerably, in testate and intestate succession respectively, if current proposals by Scottish Law Commission and Department for Constitutional Affairs are enacted.[55] If so, it looks like a case of 'back to the future plus', with provision on termination of a relationship by death becoming re-integrated within provision on separation and divorce, within a framework that gives priority to the claims of a partner over those of children.

The factors giving rise to this situation and cited in a number of other National Reports accord exactly with the reasons given by the Law Commission of Scotland and England and Wales, namely; an aging population where children tend to inherit long past the age of dependence on their parents; the prevalence of multiple marriages; and the range of relationship types. Legal recognition of the consequences of social change in general and intimate relationships in particular is by far the most prominent and pressing development. It follows that increased provision for surviving partners must mean decreased provision for children. As well as increasing legal provision for spouses, two developments in particular highlight this shift. First, the Civil Partnership Act 2004 introduced civil registration of same-sex relationships and conferred the new status of civil partner upon persons of the same sex. It extended to civil partners the same rights across the field of family law and succession Secondly, legal recognition of *de facto* relationships has resulted in a system of discretionary entitlements being made available, albeit somewhat belatedly and with a high degree of opacity in Scotland.

The principle of testamentary freedom remains as the fundamental starting point throughout each of the three UK jurisdictions. Testamentary freedom as a concept is itself of fairly recent origin. For example, testamentary dispositions of land were (in theory) impossible in Scotland prior to 1868; and prior to the Succession (Scotland) Act 1964, surviving spouses, not being related by blood, could never be classified as an heir to the deceased but had fixed rights to terce or courtesy, payable on either death or divorce. Similarly in England, testamentary freedom was limited by the rights of dower and curtesy until abolished by the Administration of Estates Act 1925.[56] In both Scotland and England, the widespread existence of entailed land (prior to the prohibition on the creation of new entails) meant that it could not be the subject of a testamentary gift. Further, the use of ante-nuptial contracts prior the Married Women's Property Acts meant that a testator's freedom to bequeath property to whomever he or she pleased was limited from the start of the marriage. However, it would be difficult to say that it remains a guiding principle rather than a default position that determines the distribution of an estate only where no challenges to the will of a testator are made. In Scotland, testamentary freedom remains the norm, subject to the (somewhat limited) right of spouses, civil partners and issue to claim legal rights from the moveable estate. Scotland is also different from the other two jurisdictions in that cohabitants have no entitlement in

[55] See Scottish Law Commission *Seventh Programme of Law Reform* (Scot Law Com No 198); Department for Constitutional Affairs *Administration of Estates – Review of the Statutory Legacy* CP 11/05.

[56] In Scots law, terce was the widow's right to receive a liferent of one third of the immoveable property owned by her husband at his death; courtesy was the widower's right to receive a liferent of the whole of the immoveable property owned by his wife at her death. In English law, dower was the right of a widow to receive a life interest of one third of the immoveable property owned by her husband at his death; curtesy was the right of a widower to receive a life interest in the whole immoveable property owned by his wife at death.

testate succession at all if little or no provision has been made for them. These differences between the three jurisdictions reflect the fundamental differences between the common law and civil law traditions, with the former preferring a flexible and the latter a more certain approach. At the same time, the value of a claim made by a spouse or civil partner for a share of the deceased's estate (whether testate or intestate) under English statutory law is potentially limitless, while fixed rights and the absence of a ground for any such legal challenge in testate succession in Scots law means that although certainty is achieved, it is achieved within a very narrow range of distributive possibilities. Moreover, the fact that the right to a fixed share extends not only to spouses and civil partners but also to children means that there can be no means by which to weigh the merits of competing claims. However, the extension of a discretionary claim in intestate succession to cohabitants in Scotland represents a major departure from this tradition.

The underlying rationale of the intestacy rules throughout the UK has been one of 'substituted judgement'; that is, the rules are intended to reflect how most people would have chosen to distribute their estates, had they actually made a will. They are based on what testators actually do and what public opinion feels that they should do. In other words, the law is a combination of public policy and empirical fact; accordingly, the main rationale given for both recent reforms and current reform proposals is that the law must keep pace with changing social and economic norms if it is to achieve these aims. In relation to testate succession and protection from disinheritance, the discretionary basis of the common law systems of England and Wales and Northern Ireland have given rise to a far stronger degree of protection to adult partners of the deceased than is available in Scotland. This situation stems largely from the divergence that occurred with the passing of the Divorce (Scotland) Act 1977 which detached provision for spouses on divorce from provision on death. Coupled with the doctrine of the unitary system of ownership and the absence of the constructive or resulting trust in relation to the family home, Scots law has followed an opposite trend to that in England and Wales and Northern Ireland, where family law and property law have become more closely conjoined. This situation is currently being reviewed under the current programme of law reform in Scotland[57] but unless the underlying basis of the law is changed to the extent that either the system of fixed shares or the automatic entitlement of children is abandoned entirely, it seems likely that the disparity in the positions of surviving adult partners in each jurisdiction will remain.

Cite as: Hilary Hiram, *New Developments in UK Succession Law*, vol. 10.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2006), <http://www.ejcl.org/103/article103-7.pdf>.

[57] *Seventh Programme of Law Reform* (Scot Law Com No 198) 2005.