
THE LAW COMMISSION'S RECENT CONSULTATION PAPER: INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH

What happens to our property when we die? It should be entirely up to us: English law gives us testamentary freedom - the ability to make a will setting out who is to inherit our property. Yet it is not always as simple as that.

CURRENT INTESTACY RULES: NEAREST BUT NOT NECESSARILY DEAREST

Each year tens of thousands of people die without a will (or with a will which is invalid for some reason) at which point the law steps in with a set of rules governing the distribution of the deceased's property. These intestacy rules (which date back to 1925) provide that those inheriting will be the deceased's nearest: it is marriage and blood ties which dictate who gets what. However, in modern society - where cohabitation is commonplace - they will not necessarily be the deceased's dearest.

FREEDOM MATTERS; BUT FAIRNESS DOES TOO

Even where a valid will has been made, it is possible for the distribution of the deceased's property to be challenged. If "reasonable financial provision" has not been made for family members, or for others who were dependent on the deceased, the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act") gives the Court the ability to rewrite the will so as to make it fairer.

CURRENT EXPECTATIONS

The Law Commission has taken soundings from the legal profession and considered a number of research papers canvassing public opinion. The proposals now published and the questions raised recognise the changes in society over the last few decades and the fact that, if limits on complete testamentary freedom are to exist, it is vital that they reflect the reality of modern society. What are the current expectations of those who are left behind? A death in the family is difficult enough without those who have been bereaved having to grapple with archaic intestacy principles producing results which may just "feel wrong". If the law is going to include the concept of testamentary fairness by allowing challenges under the 1975 Act it is important that the right people have the ability to make a claim. What are our current attitudes to dependency and heirship?

WHO DOES ALL THIS MATTER TO?

The Law Commission considers three main categories of people left behind: spouses (including civil partners); cohabitants; and children. Brief highlights are as follows:

• Spouses

As things stand, when a person dies without a will leaving a surviving spouse the spouse's inheritance depends on the size of the estate and whether the deceased also left children or other relatives.

If there are no children (or other descendants) the spouse is entitled to everything in the estate up to a maximum of £450,000 but must share anything over that sum with any surviving parent or sibling. Research suggests that this is out of step with modern expectations and the Law Commission recommends *that where a person dies intestate survived by a spouse and no descendants the whole estate should pass to the spouse whether or not there are other family members living.*

Where children exist, the surviving spouse is entitled to everything up to a maximum of £250,000 but anything over this figure is divided in two with the surviving spouse entitled only to the income from half with the children taking the rest of the capital and the other half. Since in 90% of cases the surviving spouse inherits the entire estate, the Law Commission considers *whether the intestacy rules should be revised so that the spouse takes everything in every case.* It also recognises concerns, however, about children being disinherited (particularly the children of first marriages) and asks *whether some alternative sharing structure would be preferable.*

• Cohabitants

Cohabitants currently get nothing on an intestacy, no matter how serious or longstanding the relationship. This is clearly out of step with modern life. The 1975 Act recognises cohabitants but only those who have cohabited for two years and then only allows rewriting of the will to provide for basic support rather than the enhanced provision allowed to spouses. Research suggests that reform is necessary but how far should such reform go?

Our society still values the commitment shown by marriage. Also should it make a difference if the cohabitants have had children together – surely the clearest sign of commitment?

The Law Commission proposes *that a cohabitant of the deceased should have an entitlement on intestacy*, subject to conditions. In relation to those conditions it proposes *that a cohabitant for these purposes should be defined as a person who, immediately before the death of the deceased was living with the deceased as a couple in a joint household.*

Where the cohabiting couple have children, the proposal is that *there should be no minimum period of cohabitation either under the intestacy rules or the 1975 Act.*

Otherwise, the Law Commission recommends including a *two year minimum period of cohabitation requirement* in the intestacy rules (although asks whether this should be removed from the 1975 Act). It also suggests that the length of time a couple have lived together should continue to matter: it proposes that *a surviving cohabitant should have the same entitlement as a spouse provided they have lived together for a period for 5 years but only 50% of the amount a spouse would have received if the period of cohabitation is between 2 and 5 years.*

The Law Commission also proposes that the 1975 Act be updated so that “reasonable financial provision” for a surviving cohabitant is defined in the same way as it is for a surviving spouse: *a cohabitant should get what is reasonable in all the circumstances, not just what is required for basic maintenance.*

• Children

Among other things, the Law Commission considers whether the 1975 Act should make it easier for adult children to challenge a will. There is no additional (“moral obligation”) hurdle for an adult child, as was once thought, but it can still be an uphill struggle to establish the kind of dependency necessary to succeed with a claim; there are also many who feel that children ought to inherit from their parents whatever their age. However, the Law Commission thinks that this would be a step too far towards forced heirship and makes no recommendation for change.

CONCLUSION

Inheritance is a difficult subject, not least because it goes hand in hand with bereavement. The Law Commission has recognised the need to ensure that the difficult feelings involved when someone has died are not made worse by the law being out of step with modern life and attitudes.

The aim of the Consultation Paper is to generate further discussion with a view to making recommendations to parliament. Responses are invited by 28 February 2010.

Please see www.lawcom.gov.uk/intestacy.htm for further details.

This article offers general guidance only. It reflects the law as at February 2010. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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