

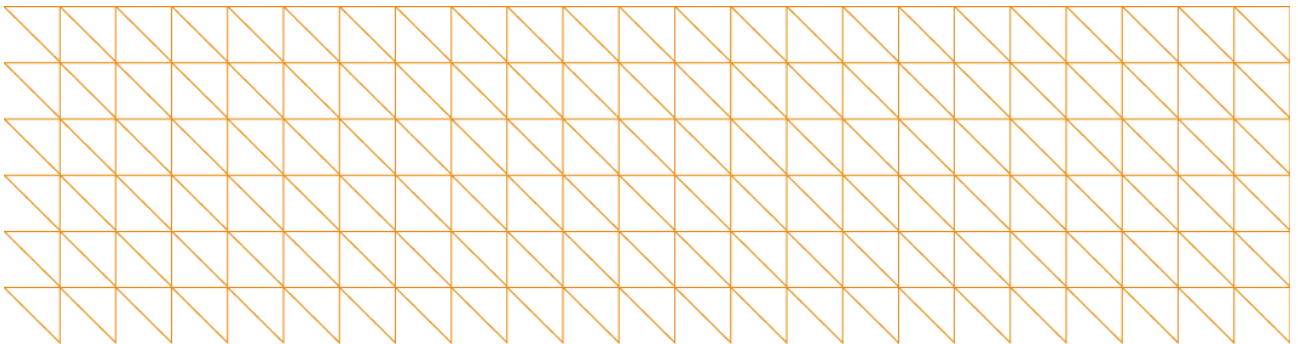


Ministry
of Justice

Inheritance and Trustees' Powers Bill

Response to Consultation CP6/2013

This response is published on 30 July 2013





Ministry
of Justice

Inheritance and Trustees' Powers Bill

Response to consultation carried out by the Ministry of Justice.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

About this consultation

To: Those with an interest in succession law, probate and private international law

Duration: From 21 March to 3 May 2013

Enquiries (including requests for the paper in an alternative format) to: Criminal Law and Legal Policy Unit
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Introduction and contact details

This document is the post-consultation report for the consultation paper, Draft Inheritance and Trustees' Powers Bill.

It will cover:

- the background to the consultation paper;
- a general summary of the responses to the consultation paper;
- a detailed summary of the responses to the specific questions raised in the consultation paper and an indication of the Government's response to the comments made;
- the Government's conclusion and details of the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Background

The consultation paper 'Draft Inheritance and Trustees' Powers Bill' was published on 21 March 2013. It invited comments on the draft Bill and impact assessment published in the consultation paper.

The draft Bill proposes to reform certain aspects of the law of inheritance and the law relating to trustees' statutory powers. The draft Bill gives effect to the recommendations made by the Law Commission in their report 'Inheritance and family provision claims on death' (Law Comm No 331) save those in Part 8 of the report. The draft Bill will:

- Ensure that where a couple are married or in a civil partnership, assets pass on intestacy to the surviving spouse or civil partner in all cases where there are no children or other descendants;
- Simplify the sharing of assets on intestacy where the deceased was survived by a spouse and children or other descendants;
- Protect children who suffer the death of a parent from the risk of losing an inheritance from that parent in the event that they are adopted after the death;
- Amend the legal rules which currently disadvantage unmarried fathers where a child dies intestate;
- Remove arbitrary obstacles to family provision claims by dependants of the deceased and anyone treated by the deceased as a child or his or her family outside the context of a marriage or civil partnership;
- Permit a claim for family provision in circumstances where the deceased died "domiciled" outside of England and Wales; and
- Reform trustees' statutory powers to use income and capital for the benefit of trust beneficiaries (subject to any express provisions in the trust instrument).

The consultation period closed on 3 May 2013. This report summarises the responses both generally and by reference to the specific questions asked in the consultation paper. The report also sets out the Government's conclusions on the issues raised and how the Government proposes to take the reforms forward. The consultation paper is available via the following link: <https://consult.justice.gov.uk/digital-communications/inheritance-trustees-power-bill>

A list of respondents is at Annex A, which also contains the abbreviations used to describe some of the respondents in the text of this response document.

The Impact Assessment accompanying the consultation was updated to take account of evidence provided by stakeholders during the consultation period. The updated Impact Assessment can be found at:

https://consult.justice.gov.uk/digital-communications/inheritance-trustees-power-bill/supporting_documents/updated-impact-assessment.pdf

Summary of responses

A total of 22 responses to the consultation paper were received. Of these, just under half (10) were from associations, some of which represent many thousands of professionals. The remaining respondents consisted of 8 individuals, 2 firms of solicitors, one barristers' chambers and the Land Registry (the Government department that is responsible for registering the ownership of land and property in England and Wales).

The consultation paper sought the views of respondents on the proposed reforms. Respondents were asked for comments on the draft Bill and its accompanying explanatory notes (Question 1). They were also asked for views in relation to a specific issue regarding an additional ground of jurisdiction for family provision claims (Question 2). Question 3 sought views on the Impact Assessment.

The overall response was supportive of the proposed reforms and did not raise any significant doubts about the accuracy of the impact assessment. However, in relation to Question 2, regarding an additional ground of jurisdiction for family provision claims, respondents put forward a range of differing views which we discuss below.

Responses to specific questions

1. Do you have any comments on either the draft Bill or its accompanying Explanatory Notes, in particular the drafting?

SPOUSES ON INTESTACY

Clauses 1 and 2: Provision for surviving spouse

General comments

The Family Law Bar Association expressly stated agreement with the intestacy reforms “and, in particular, the greater provision made therein for spouses and civil partners”.

Hugh James supported the reform to pass the whole estate to the surviving spouse where there are no descendants, but expressed doubts about the reform where there are surviving children because of the possibility that there is a second marriage and the second spouse may not have an incentive to benefit the children. However, they recognised “a number of advantages over the present position ... simplicity – thus reducing workload and costs – and a clean break as between the spouse and the issue which, from our own experience, can reduce any possibility of friction”. They suggested that 1975 Act claims by children might increase, but that this could be offset and perhaps outweighed by a reduction in 1975 Act claims by spouses.

Which? expressly supported all of the reforms regarding the spouse’s entitlement, although they recognised that the situation where there is a surviving spouse and surviving children or other descendants is more complicated. They made some supportive comments concerning provision for the spouse, public expectations and the complications of the existing law.

The reasoning for the Law Commission’s recommendation is fully set out in the Law Commission’s Report, Part 2.¹ For the spouse’s entitlement where there are also surviving children or other descendants, see paragraphs 2.27 to 2.95, including discussion specifically of children of other relationships at paragraphs 2.67 to 2.82.

¹ Intestacy and Family Provision Claims on Death (2011) Law Com No 331.

The statutory legacy (the fixed net sum)

ACTAPS supported “the simplification of the spouse’s legacy”, but wanted the statutory legacy to be increased from £250,000, to (as a minimum) the amount of the nil rate band.

The nil rate band is the amount which can be left free of inheritance tax (without invoking a specific exemption from inheritance tax). It is currently £325,000. We note that this would therefore mean an increase of £75,000 since the statutory legacy was last set at £250,000 with effect from 1 February 2009; in other words, an increase of 30% over just over four years.

The assessment of the level of the statutory legacy and the calculation of the inheritance tax nil rate band are different exercises and respond to different considerations. They are not clearly linked, since the amount which passes to the spouse is exempt from inheritance tax in any case (under the Inheritance Tax Act 1984, s 18; unless the deceased’s spouse is not UK-domiciled, but the deceased was: s 18(2)).

The Bill does not state what the statutory legacy is; see new Schedule 1A of the Administration of Estates Act 1925, paragraph 2, referring to section 1(1)(a) of the Family Provision Act 1966. If it appears to the Lord Chancellor that the amount should be changed before the five-year review point, it will be open to him to do so under the new Schedule 1A, paragraph 3(1) (see also paragraph 3(3)).

Interest on the statutory legacy

The Law Society noted that the interest rate on the statutory legacy is to be connected to the Bank of England official bank rate, whereas interest on pecuniary legacies in wills not paid within a year is calculated on the basis of the Court Funds Office’s basic account rate, which is currently 0.3%. They expressed concern that “the inconsistency may be administratively difficult”. They suggested that the rates should be aligned.

The Law Commission gave serious consideration to calculating interest on the statutory legacy in accordance with the Court Funds Office’s basic account rate during its review. However, the rate is set by administrative decision; this lacks the formality and publicity of secondary legislation, and allows for a degree of uncertainty which the Law Commission concluded was unacceptable. For example, it would be open to the Lord Chancellor to set more than two rates for funds in court or to change the way in which the rates are described. In other words, if the statute were to refer to the “basic rate for funds in court” then it could be rendered unworkable if the basic rate was to be withdrawn or renamed.

On this basis, we agree with the Law Commission’s view that to tie the statutory legacy to the Bank of England official bank rate, as it stood on the death of the deceased, would provide the best guarantee of certainty and discoverability.

It is also worth noting that the rate of interest on the statutory legacy under the current law is not aligned with the CFO's basic account rate, so the proposed reform will not add to any administrative burden.

Which? expressly agreed with "the proposed clarification of the current law about the date and rate of interest payable on the statutory legacy It will provide certainty."

Other suggestions for the spouse's entitlement

ACTAPS suggested that "a gift of the family home to the spouse ... would give the spouse greater security of accommodation".

This option was specifically considered by the Law Commission (Consultation Paper, paragraphs 3.85 to 3.90); it obtained little support on consultation (Analysis, paragraphs 3.55 to 3.62, and see also paragraphs 3.70 to 3.74) and was rejected for the reasons set out in the Report, paragraphs 2.45 to 2.50.

Sidney Ross characterised the reforms at clauses 1 to 5 as "sensible", while explaining his own reservation as to the spouse's entitlement: "I would have preferred the entitlement of the surviving spouse/civil partner to have been the capitalized equivalent of the life interest, as this may more accurately reflect the survivor's needs than an entitlement to half the residue irrespective of the survivor's age". He noted that this would require keeping the tables on capitalisation in existence, and updating them, but felt that this would not cost much and that the tables are also useful in other situations, where someone is thinking of buying out a life or other limited interest.

This suggestion was considered in the Law Commission Report, paragraphs 2.84 to 2.85, where it is noted that such a system would be more complex than a system which gives a fixed share to the surviving spouse, and that the tables for calculating the capital value of a life interest are something of a blunt instrument in that they cannot take into account any of the individual's characteristics beyond age and gender.

Clause 2 and Schedule 1: Review of the statutory legacy

ACTAPS and Which? specifically supported this provision.

Determination of the statutory legacy – drafting points in Schedule 1

ACTAPS suggested that the reference to "the report" at paragraph 5(4) of the new schedule 1A to the Administration of Estates Act 1925 to be inserted by Schedule 1 to the Bill was unclear, because it is not defined. They correctly identified that it refers to the report mentioned in paragraph 5(2)(b).

ACTAPS suggested that “those months” at paragraph 6(2)(b) of new Schedule 1A should be rephrased as “the current month and the base month”.

We are not persuaded that to define “the report” would clarify paragraph 5(4) of Schedule 1A. However, we have accepted the suggested revision of paragraph 6(2)(b) of Schedule 1A for ease of reading.

ACTAPS suggested that paragraph 6(4)(b) was too complicated and should read “in the case of each subsequent order, the month in which it was made”.

We do not share this view. “The current month” is not necessarily the month in which the order is made, since “the current month” is the most recent month for which an index figure is available (see paragraph 6(4)).

Clause 3: definition of “personal chattels”

General comments on the new definition; “personal possessions”

The Chancery Bar Association considered the new definition “a considerable improvement”. Hugh James also agreed with the new definition, although suggesting that “possessions” would be more accessible than “chattels”.

Which? also suggested that “the term ‘personal possessions’ is ... up-to-date and more readily understood”.

We recognise that “personal possessions” is closer to plain English than the old-fashioned sounding “personal chattels”. However, the latter is established terminology (not only in intestacy, but also in wills) and to introduce wholly new language may well have unintended consequences. On balance we prefer the current wording.

Uncertainties about specific “personal chattels”

Mishcon de Reya suggested that there should be some clarity “on the extent to which, for example, certain types of intellectual property (e.g. a manuscript) fall within the definition of personal chattels for estate administration purposes as this has caused disputes in our experience”.

Application of the new definition: wills, codicils and inter vivos gifts

STEP objected to the drafting of the new definition on the basis that it is stated to apply only to intestate estates, whereas the existing definition is not restricted to intestate estates, and will precedents often refer to it in relation to legacies of personal chattels.

The drafting of the definition of “personal chattels” is not intended to prevent its use in wills. The proposed definition follows the current definition, which refers to “the death of the intestate” as the time when the use to which property is put should be assessed. Although there is no direct authority on the point, we are not aware that the current drafting has caused any problems in practice, and it continues to be used in wills (taking the form, for example: “I give to [name] all my personal chattels as defined by the Administration of Estates Act 1925 Section 55(1)(x)”). We note that the testator who uses such a form of words does not incorporate the words of the statute as though they were reproduced in his will, but rather refers to section 55(1)(x) to define the scope of the gift.

It is our view there is no need to amend the draft Bill on the suggested basis.

The Association of Corporate Trustees suggested that “personal chattels” is a term also used in inter vivos dispositions, and that clause 3(2) is unclear in its application to dispositions other than gifts by will or codicil executed after the new definition is brought into force.

It is intended that the definition will be available for use in inter vivos trusts, as currently.

It may also be helpful to include some further explanation in the explanatory notes which will accompany the Bill, stating that clause 3(2) makes special provision for wills and codicils only because – unlike inter vivos trusts – they are executed on one day but take effect on another (that is, on the death of the testator).

The Association of Corporate Trustees were concerned by the special provision made in clause 3(2) of the draft Bill providing that where a will was executed before commencement, a codicil executed after commencement would not in itself be enough to cause any reference to “personal chattels” to be understood as referring to the new definition. They consider that it is the general approach of statutes to treat a will as being brought up to the date of the codicil by republication, and that the draft Bill should not be an exception to that.

A codicil, which confirms a will as amended by the codicil, “republicates” the will. Clause 3(2) as drafted is intended to ensure that republication alone does not trigger the application of the new definition. If the codicil defines a gift by reference to “personal chattels” then the new definition should be applied to it; if it does not, then the old definition applies to the gift.

After careful consideration, we believe that the effect of clause 3(2) as currently drafted is the correct one. We consider that in principle, and unless the contrary is indicated, that the testator’s intention is better preserved by the definition to which the original reference referred. We also consider clause 3(2) to be consistent with existing limits on the doctrine of republication; republication does not bring the will to the date of the codicil for all purposes, and therefore a codicil does not necessarily change the original meaning of the words in the will.

The clause also appears to us consistent with precedent set in similar legislation (see in particular the Family Law Reform Acts of 1969 and 1987 which related to the very similar situation of defining terms like "minority" and words of relationship in wills), although we acknowledge that the opposite approach has also been taken.

Chattels "held solely as an investment"

The Chancery Bar Association expressed concern that "there may be difficulties in practice with the concept of something being purchased solely as an investment". They gave the example of valuable artwork which the deceased enjoyed in his home, but purchased with a view to appreciation; or valuable jewellery. The concern is that situations will arise in practice which are "difficult to categorise".

The Law Society suggested that "more direction should be provided as to what is meant by 'solely as an investment' and that consideration should be given to including a definition of investment within the Bill to avoid any future litigation on this point".

ACTAPS also said that: "without clear guidelines as to what amounts to property held solely as an investment it was felt that this is likely [to] lead to disputes and potentially litigation".

Mishcon de Reya generally welcomed the updating of the definition, but criticised the exception for "property held solely as an investment" as "likely to give rise to confusion and disputes unless it is further clarified".

STEP asked whether it would be better to phrase this exception as "solely or mainly as an investment", and queried when "a piece of art or a stamp collection stop being held for solely personal enjoyment and start being held 'solely as an investment'".

The explanatory notes to the draft Bill make it clear that the exclusion is intended as: "a narrow exception for property held solely as an investment which had no personal use at the date of the deceased's death. Property which had some personal use but which the deceased also hoped might maintain or increase its value, for example precious jewellery worn only occasionally, will not fall within this exception (and so will pass to the surviving spouse) even if it is held outside the home, for example in a bank for security reasons."

We are not persuaded that defining "investment" or "held solely as an investment" would clarify this exclusion. Any hard cases that arise will turn on matters of fact, and be wrapped up in the intention of the deceased; they will need to be decided as such, taking all of the circumstances of the case into account,

Nor does it seem satisfactory to abandon the exclusion and simply allow such property as it is designed to cover to go to the deceased's spouse as "personal chattels". It should form part of the estate generally and be divided as such.

TRUSTS FOR CHILDREN

Clause 4: Adoption and contingent interests

General comments

Hugh James suggested that this was “sensible and much needed to ensure equality and to avoid the need to bring court applications for variation of trusts”.

Which? also supported the reform, referring to the Law Commission’s report for their reasons.

The Association of Corporate Trustees suggested that the clause might “encourage potential adopters to look to the financial benefits that might accrue to them by adopting certain children, but not others”. They argued that the Adoption Acts had had this in mind in requiring the inheritance to be lost unless the court, in the exercise of its discretion, directed it to be saved.

This point was fully taken into account in the Report (paragraphs 4.42 and 4.45) and the Law Commission considered that the risk was not substantial and should not stand in the way of reform.

The Association of Corporate Trustees also suggested that problems could arise from having to maintain a link with the birth family. See Report, paragraphs 4.42 and 4.44, in particular noting that the retention of qualifying interests under the existing law does not appear to create problems of this kind which cannot be resolved.

Commencement provision

The Association of Corporate Trustees suggested that Clause 4 would apply too widely, because it would apply to all trusts already in existence at the date of clause 4, regardless of the date of the adoption (clause 12(4)). They thought that this “may have several unexpected consequences”.

We do not agree. Clause 4 has been limited so that it only applies to contingent interests (not in remainder) in trusts created by a parent, by will or on intestacy. It is logical for the commencement to be tied to the date of the adoption, not the date of the trust.

Application to will trusts (argument to narrow to intestacy only)

The Chancery Bar Association queried whether this clause should apply both to trusts arising on intestacy and to will trusts, noting that the position under wills would then be different from the interests under lifetime trusts. However, the response stated that “the Chancery Bar Association does not have strong views against this”.

The Chancery Bar Association suggested that “the section as drafted is rather wider than the Law Commission report envisaged”. This is likely to be intended as a reference to the Consultation Paper. The Report expressly envisaged application to will trusts. This was because, as explained at paragraph 4.47 of the Report, will drafters may not be aware of the issue and “the existence or extent of a testator’s ability in a will to override the operation of the relevant statutory provision is unclear”.

The Bar Council considered that it was right to deal with will trusts, referring to the adoption trap as an “odd effect ... that is (with respect) being sensibly corrected”.

Application to lifetime trusts (argument to extend provision)

The Bar Council asked that “this sensible measure be extended to trusts created – at the very least – by the deceased parents”. They instanced a real-life example where a parent had created inter vivos trusts holding millions of pounds under which his child was the beneficiary, and had died; the child was adopted and thus lost her entitlement. The trust assets passed to the default beneficiaries, who were not actually related to the deceased.

The Society of Trust and Estate Practitioners said that the law applicable to lifetime trusts should not be left as it is “while remedying an almost identical injustice in will/intestacy trusts”.

We recognise that in some ways it would be logical to extend the protection to contingent interests created under lifetime trusts. However, the Law Commission’s recommendation is restricted to situations in which preserving the child’s entitlement is very likely to be consistent with the intentions of the parent. The adoption is most likely to have taken place as a direct result of the death. In relation to lifetime trusts, the adoption may take place not only after the parent’s death, but also during the parent’s lifetime. The automatic preservation of the child’s entitlement would therefore occur in a wider range of situations. In some cases, particularly where the parent opposes the adoption, it would be much less clearly appropriate for the legislation automatically to override the usual effect of adoption in this way. The settlor may well not intend the child to continue benefiting after adoption. Moreover, this would stray into territory which has not been the explicit subject of consultation and is outside the current scope of this Bill.

In practice, where a lifetime trust is involved professional advisers are more likely to be involved and the risk of a failure to notice the lost entitlement should be much less.

On balance, then, the Government is not minded to accept this suggestion.

Exclusion of contingent interests in remainder

ACTAPS expressed concern that deserving cases would not be helped because of the exclusion of contingent interests in remainder. They suggested the following example: A, a widower with one child X, remarries. He makes a will leaving a life interest to his new wife B, remainder to X contingent on reaching 18, and then dies. B refuses to care for X, who is adopted. X will lose his interest in A's estate.

Richard Wallington suggested a similar example where it is the surviving parent who has the life interest. A and B are married with one child, C; A makes a will leaving a life interest to B and remainder to C. A and B are involved in an accident whereby A dies and B is permanently incapacitated and unable to look after C. C is therefore adopted and still loses her interest in A's estate.

He acknowledged that "this may be a fairly unusual example", but asked for all interests which an adopted person has in the estate of a deceased parent, created by will or on intestacy, to be saved.

The Society of Trust and Estate Practitioners also objected to the exclusion of contingent interests in remainder, considering that the reform would only narrow the current trap.

We recognise that there is room for disagreement on this issue, but the Law Commission's conclusion was clear in the Report (see paragraphs 4.49 to 4.50). In essence, the exclusion of contingent interests in remainder is consistent with section 69 of the Adoption and Children Act 2002. To alter this decision could risk creating practical difficulties and could not be contemplated without further consultation.

Exclusion of trusts settled by those who are not the adopted person's parents

Richard Wallington argued that contingent interests other than contingent interests in remainder should be saved after adoption, even if created by someone who is not a parent. (His draft clause makes this quite wide, so that all such contingent interests would be saved, however created and whoever created them.)

Again this is a defensible argument, although it is worth noting that it is not a concern which has been raised by other respondents on this or the Law Commission's consultation. However, as previously, it is outside the scope of the Law Commission's project and the draft Bill, and change could not be seriously considered without further consultation. The question of reform for beneficiaries other than the deceased's children was expressly considered by the Law Commission at paragraph 4.46 of the Report.

INTESTACY: UNMARRIED FATHERS

Clause 5: presumption of prior death

The Chancery Bar Association state that they “have no difficulty” with Clause 5, since it is “tightly drawn”, even though they did not support original suggestions for reform in the Consultation Paper (paragraphs 6.64 to 6.68). The recommendation was framed deliberately narrowly in order to avoid placing a substantial burden on personal representatives (Report, paragraphs 5.21 to 5.30).

Hugh James and Which? expressly supported this reform.

GRANTS OF REPRESENTATION

Clause 7 and Schedule 3: Date on which representation is taken out

The Family Law Bar Association felt that “the proposed clarification is very helpful”. Hugh James also complimented the drafting and the adoption of a unified approach across the statutes.

Sidney Ross felt that this is “a useful tidying-up of an area in which the case-law is patchy and lacks an authoritative statement of a general principle”. Which? also supported the amendment.

Mishcon de Reya felt that “the position is still unclear, despite these proposed amendments”. They asked the Ministry of Justice to clarify whether a full grant of representation must be taken out before a 1975 Act claim can be issued. However, the amendment made at paragraph 7 of Schedule 2 to the Bill clearly states that “nothing prevents the making of an application before such representation is first taken out”. The point of Schedule 3 is to determine on what date the grant is taken out, so as to be able to calculate the six-month period in section 4 of the 1975 Act.

TRUSTEES' POWERS

Clause 8: power to apply income for maintenance (section 31 of the Trustee Act 1925)

Sidney Ross expressly supported the reforms at clauses 8 to 10, "which reflect current realities in trust drafting and administration". Which? also supported the amendment.

Hugh James expressly supported this reform, noting that it is in keeping with general practice of those adopting standard provisions.

ACTAPS expressed concern that "the removal of the reasonableness test at section 8(2) ... appears to give trustees a very wide discretion with no requirement to behave in a reasonable way".

This reform was supported by a majority of consultees on the Law Commission's consultation. It is already reflected in a number of precedents for trust documents. See in particular the Report, paragraphs 4.86 and 4.87; consultees "noted that the reform would not give the trustees the freedom – or the encouragement – to act unreasonably". The reform does not mean that trustees are not required to exercise their fiduciary powers properly.

Clause 9: power of advancement (section 32 of the Trustee Act 1925)

See Clause 8, above, for supportive comment of Sidney Ross. Which? also supported the amendments. Hugh James specifically supported this provision, noting that it reflects the position in standard precedents.

Valuation of assets and other issues: clause 9(6)

The Chancery Bar Association suggested that in Clause 9(6) (which inserts new subsection (1A) into section 32 of the Trustee Act 1925), "it ought to be made clear that it is the date of the advancement at which the value is taken and not some other date".

On a similar point, the Bar Council said that it should be made clear whether the value was to be taken at the date when the assets were advanced, or the date when they fall to be taken into account. "The traditional, and probably appropriate answer, is the value at the date of earlier advancement." They suggested that it would be possible to give trustees the discretion to use the later date where they considered it appropriate.

Richard Wallington suggested leaving out subsection (6) on the basis that such issues should be left “to trustees and the courts to sort out”. He specified in particular the date of valuation, establishing the size of the share out of which the transfer or application is made, and the possibility that the transfer or application is treated as being a percentage of the share as opposed to an amount expressed in cash terms.

After careful thought we are persuaded that the interaction between the provisions of the Bill and the current law on valuation issues in relation to advancements should be reconsidered. We do not think that it would be appropriate to introduce a fixed rule that valuation should be assessed at the time of the advancement. We are therefore reviewing clause 9 of the draft Bill in the light of the advantages of preserving the flexibility of the current law.

Clause 10: application of sections 8 and 9

See Clause 8, above, for supportive comment of Sidney Ross.

Anthony Nixon argued that clauses 8 and 9 should apply in relation to trusts whenever arising, on the basis that the current drafting is too complex, and that this change would not truly interfere with settlors' intentions since most do not understand sections 31 and 32 of the Trustee Act 1925 in the first place and have not considered their effect.

The Association of Corporate Trustees made a similar point, suggesting that the benefits of reform should be extended more widely. They added that they consider clause 10(5) to be too complicated, since it enables the extended power to apply to new interests created under trusts. They asked for trustees to be enabled to extend the power of advancement from one-half to the whole by an instrument in writing.

The Law Commission specifically consulted on transitional arrangements for these reforms (Supplementary Consultation Paper, paragraphs 3.44 to 3.67, and provisional proposal at paragraph 3.68). Clause 10 of the Bill is in line with the Law Commission's provisional proposal which was strongly supported on consultation (see the Analysis, paragraphs 8.79 to 8.100). The view that the reforms should apply to all trusts, or that they should be able to opt in, was suggested on consultation by a minority of consultees. It was considered by the Law Commission, and rejected in the light of comments by the majority; for example, because of concerns about practicality, human rights questions, and interference with settlors' intentions: see the Analysis, paragraphs 8.90 to 8.95, and the Report, paragraph 4.97.

FAMILY PROVISION CLAIMS (CLAUSE 6 AND SCHEDULE 2)

Children of the family: Schedule 2, paragraph 3 (see also paragraph 6).

General comments

The Family Law Bar Association expressly stated their agreement with the reforms in paragraphs 3 and 4 “as removing real and unnecessary restrictions on access to the court’s powers”.

Hugh James welcomed this proposal, stating that “given the changing nature of modern families, we regularly advise clients who have been treated as a child of the deceased”, but that as the treatment may not have been in relation to the deceased’s marriage, they are precluded from claiming, or have to claim as dependants. Which? also supported the reforms, saying that the amendment to section 1(1) “reflects the increasing number of serial families” and also agreeing with the extension of section 1(3) to include family units akin to single-parent families.

Drafting: general comments, and use of the word “family”

The Chancery Bar Association queried the use of the word “family” in the drafting of new section 1(1)(c) of the 1975 Act. They felt that although treatment which gives rise to a parent-child relationship does amount to a notional family. “the addition of the use of the term ‘family’ ... potentially obscures the clear, intended position where there are only two members.

The Chancery Bar Association suggested two alternative versions of the clause, one not including reference to “family”, and one which does.

The Bar Council stated “we feel that the definition is too unwieldy ... it is not clear enough what exactly is being targeted”. They agreed with the policy (to include cases where the “family” unit was simply between the claimant and the deceased” but considered that “some simplification is required to avoid litigation about the exact scope of these provisions”.

Mishcon de Reya supported the policy, but suggested that “the proposed new wording needs to be made much clearer. The inclusion of the phrase ‘at any time’ makes the class of potential claimants wide in many circumstances”.

We are not persuaded that any further change to this definition is necessary. Great care was taken in the drafting to ensure that the amendment allowed applicants to qualify as “children of the family” on the basis that they had a relationship with the deceased which had the quality of a parent-child relationship, regardless of whether it was in the context of a marriage or civil partnership, while preserving the principles established by the courts to understand and describe the term “child of the family”. The more radical re-wordings suggested by respondents risk unintentionally disturbing the continuity in the case law. Provision is made in the draft Bill to ensure that single parent families are included (see schedule 2 paragraph 2(4)).

Dependants: Schedule 2, paragraphs 4 and 6

Which? expressly agreed with the reforms as regards dependants.

Sidney Ross said that “the conduct of claims under s1(1)(e) should be considerably simplified by the elimination of the “balance-sheet” exercise and the relegation of “assumption of responsibility for maintenance” to its proper place, as a matter to which the court must have regard, not a threshold condition.” He referred to the judgments in *Baynes v Hedger* at first instance and in the Court of Appeal as “a striking illustration of the complexities (which will no longer have to be addressed) created by the existing case-law in those respects”.

Removal of the “balance sheet” test: paragraph 4

The Family Law Bar Association expressly stated their agreement with the reforms in paragraphs 3 and 4 “as removing real and unnecessary restrictions on access to the court’s powers”.

“Substantial contribution”

ACTAPS queried “substantial contribution” in paragraph 4 of Schedule 2, suggesting that “some guidance as to what would be considered ‘substantial’ would assist practitioners”.

Hugh James picked up on “substantial contribution” and anticipated that this “will continue to give rise to questions as to what constitutes a ‘substantial contribution’”. However, they preferred “an objective, rather than a subjective, test”, noting that “each case has to be taken on its own merits”. They supported the policy of removing of the “balance sheet test”.

“Substantial contribution” is already found at section 1(3) of the 1975 Act, which requires the court to assess whether “the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person”. We are not aware that this phrase has caused difficulty in the current law (despite suggestions by Hugh James).

“A contribution made for full valuable consideration pursuant to an arrangement of a commercial nature”

Mishcon de Reya supported the removal of the “balance sheet test”. They suggested, however, that “there is likely to be fresh litigation in relation to the definition of ‘a contribution made for full valuable consideration’ and ‘an arrangement of a commercial nature’ ... unless they are defined in statute”.

Mishcon de Reya also asked for clarification as to whether “in a situation where a niece looks after her elderly aunt and either is paid a small amount, or receives other benefits (such as free board and lodging, or contributions towards tuition fees) the niece would fall within the new subsection 1(3)”.

The amendments to section 1(3) of the 1975 Act are intended to remove the “balance sheet test”, without allowing those to whom the deceased made a substantial contribution in exchange for full valuable consideration in a commercial situation to apply under the 1975 Act. This is intended to exclude those with whom the deceased had a wholly commercial relationship, for example, a paid carer or a lodger paying full market rent. The niece in the above example will therefore not be barred from making a claim, although her success will depend upon the court’s assessment of whether reasonable provision for her maintenance had not in fact been made. We are not persuaded that further clarification is necessary.

Removal of the “assumption of responsibility” threshold: paragraph 6

The Family Law Bar Association expressly supported the proposed amendments in paragraph 6 as necessary “to remove the rule invented by the courts that applicants under section 1(1)(e) must prove that the deceased assumed responsibility for their maintenance”.

The Law Society suggested a concern that lifetime dependants might be able to make a claim after death “where it might not have been the deceased’s intention to benefit those persons other than during the deceased’s lifetime”. However, they acknowledged that this is unlikely to represent a considerable change in practice, given the information on the current law set out in the Law Commission’s Report (see paragraph 6.45 and following).

The Law Commission gave some attention to this issue in the Report (see paragraph 6.53). The proposed amendment is not designed to make the intention of the deceased irrelevant, but to ensure that it is a factor that must be considered rather than a threshold that must be passed. The deceased's intention remains important; if the deceased expressly disavowed responsibility, or paid debts as a one-off to give the applicant a fresh start, an assertion that reasonable provision was not made is unlikely to impress the court. The amendments to be made by the draft Bill direct the court to consider the duration and basis of the maintenance provided, and how much the deceased contributed; and whether and if so to what extent there was an assumption of responsibility by the deceased. As in all cases, the claim must also be weighed against, for example, the deceased's obligation and responsibilities to others (see section 3(1)(d) of the 1975 Act). *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183, for example, would be unlikely to have a different outcome. It is important to remember that the primary purpose of the family provision legislation is to respond to a failure to make reasonable provision, not the deceased's probable intentions.

Powers of the court in 1975 Act claims: paragraph 5

Power to vary the trusts on which the estate is held

The Family Law Bar Association expressly stated that they "see some benefit ... [and] no disadvantage" from the new power at new section 2(1)(h) of the 1975 Act.

Hugh James also supported that addition, saying that "this ... overcomes the often cumbersome need either to make a formal application under the Variation of Trusts Act 1958 or, alternatively, to create a new trust altogether". Which? also supported the reforms.

Power to take into account a repayment of inheritance tax

The Family Law Bar Association stated that it is currently assumed that a repayment of inheritance tax can be taken into account and that they have never heard an argument to the contrary. However, they "do not have serious concerns about the provision having adverse effects", although they suggest that it may be "unnecessary clutter" and that the word "may" could give the court a discretion as opposed to the current assumption that the court will take it as read that the order has been made.

Hugh James, however, expressly supported this: "this will, in our view, be particularly helpful ... where an order is made to a spouse which therefore reduces the inheritance tax liability of the estate". Which? also supported the amendment.

The Law Commission gave careful consideration to this issue in the Report; paragraphs 7.127 to 7.129 of which are reproduced below:

... there is a question as to whether, when the court makes an order under the 1975 Act, the net estate can be assessed in the light of the way in which that order itself will affect the liabilities payable, and whether the order can extend to any consequent increase in the net estate.

When a family provision order is made, it is taken to have effect as though the will or intestacy of the deceased had operated subject to the terms of the order from the date of death (see section 19(1) of the 1975 Act). This may mean that the net estate would have been increased, because an amount that was deductible from the net estate as it was originally distributed is no longer payable. In particular, if inheritance tax was originally payable on the estate, the amount due may be less by reason of the order; a common example is a successful family provision claim by a spouse, where the amount which passes to him or her attracts exemption from inheritance tax (see section 18 of the Inheritance Tax Act 1984). It has been suggested that although the 1975 Act definition of the "net estate" takes into account debts and liabilities, including inheritance tax payable on the estate, a repayment due by reason of the order itself may come too late for the court to make provision out of it in that order.

We consider that it is appropriate to clarify this point on the face of the statute. Practitioners will, of course, be mindful of the need to calculate carefully the amount of any repayment which is anticipated, taking account of matters such as revised tax calculations, and to make clear to the court making the order that the repayment is dependent on such calculations and has not yet been received.

We note the Family Law Bar Association's concern that an assumption will be replaced with a discretion, but we do not believe that such a substitution will have any practical effect on the way in which the court exercises its powers.

Claims by spouses: the divorce analogy: Schedule 2, paragraph 6(2)

The Family Law Bar Association felt that this issue had already been settled by the case law (such as *Krubert* and *P v G*), and that therefore there was no problem of the divorce fiction being considered to be either a floor or a ceiling in the assessment of a spouse's claim. In fact, they considered that the new provision might increase argument and uncertainty.

The Family Law Bar Association suggested that the provision should be redrafted to add the words "in this subsection" after "but nothing".

Hugh James, however, welcomed the addition to section 3(2), stating that it "clarifies what the Act previously sought to do. We believe that this clarification will assist practitioners".

Sidney Ross enthusiastically supported the amendment to section 3(2), considering it “particularly valuable”. He acknowledged the guidance in *P v G* and *Lilleyman v Lilleyman*, but said: “my experience is that practitioners obstinately persist in asserting that the provision on the ‘notional divorce’ does represent a floor or a ceiling’.”

Which? also supported this reform.

We note respondents’ diverging views on this issue. It is important that a judge’s discretion to make an appropriate order for family provision is not restricted. Any reform must also ensure that parties are not encouraged to attempt an analysis which simply mirrors financial proceedings on divorce. We believe that the provision as it stands achieves this goal. See further the Law Commission’s reasoning in the Report at paragraphs 2.141 to 2.146.

“Presumption of equal division”: suggestion for further reform

Sidney Ross also suggested that there should be some wording to avoid the mistaken interpretation that there is a presumption of equal division, for example by adding “or to apply a presumption of equal division of assets”. He referred to practitioners as ignoring the judicial statements to that effect in *White v White*, *P v G*, *Lilleyman* and *Cunliffe v Fielden*.

We agree that such an interpretation would be misguided. However, this is the only occasion on which this particular concern has been raised, despite extended discussion of and consultation on the “divorce analogy”, and we therefore have no evidence that this misunderstanding is widespread. Accordingly, the Government does not consider that statutory amendment is justified at this point.

Time limit for applications: paragraph 7

The Family Law Bar Association expressly supported “this much needed amendment”.

Hugh James’s response was divided on this. Some members of the firm rejected the reform on the basis that the claim would have no clear defendant, the personal representatives might renounce probate on the suggestion of a 1975 Act claim, and there could be uncertainty if an award was made but no one would come forward to administer the estate. Others agreed with the reform, on the basis that it would enable applicants who are in need to bring claims promptly (preventing delay by those who will be personal representatives), clarify the existing law (citing the conflict between *Re Searle* and *Re McBroom*) and bring it into line with other claims against a deceased person’s estate. They identified the importance of amendments to the Civil Procedure Rules.

Sidney Ross suggested that the amendment, together with procedural changes, may not effect a great change in practice from the steps which may currently be taken. He suggested that the clause might be reconsidered after looking at whether it is possible to devise a procedure to ameliorate claimants' positions where there is an absence of personal representatives, or they have failed or refused to act.

He considered that the explanatory notes are uninformative on this point.

Which? objected to the amendment on the basis that it would not help a claimant who needs prompt relief where the personal representatives are delaying in dealing with the estate. This is on the basis that a grant would be needed in order for the assets to be realised and an order to be made.

They also suggested that where the deceased's assets are passing without the need for a grant (for example, joint property), injustice might be created by the adverse effect on the rights of the surviving co-owner.

We take due note of respondents' concerns on this point. However, we take the view, supported on the original consultation, that the modest reform proposed here is necessary. There are circumstances where an applicant for family provision may be prejudiced by the inactivity of those who are entitled to a grant, and also evidence of inconsistent practice in the courts. The reform will make the law on the point clear, ensuring a consistent practice, and open the way for amendments to the Civil Procedure Rules which will further clarify the courts' powers. We will review the relevant explanatory notes to ensure that they are as clear as possible.

In relation to the comment by Which?, we note that joint assets can already be subject to a claim under section 9 of the 1975 Act.

Joint tenancies: paragraph 8

The time limit for claims to take into account joint property

The Family Law Bar Association expressly supported "the removal of the inflexible time limit". Sidney Ross said that he did not originally support it, but now feels that there is a case for making it. Which? also supported the amendment.

Hugh James's team were divided on this, expressing concern about uncertainties for surviving joint owners, but noting that the court has discretion regarding the exercise of the power under section 9 and that an order is only to be made "to such extent as is 'just in all the circumstances'".

We acknowledge those concerns, but remain of the view that, on balance, prolonging uncertainty over property rights taken by survivorship is better than allowing the injustice which can be caused by the current inflexible rule (this view was broadly supported in the response to the Law Commission's consultation). Indeed, since time runs from the grant of representation, which may be years after the death of the co-owner, the protection afforded to joint tenants under the current law may be more illusory than real. In *Dingmar v Dingmar* [2006] EWCA Civ 942, [2007] Ch 109 a claim under the current legislation was brought seven years after death. See further the Law Commission Report, paragraphs 7.74 to 7.85.

Valuation of property

Hugh James supported this reform. Sidney Ross said that he felt there is a case for the flexibility in relation to valuation. Which? also supported the amendment, though noting that "such a discretion will create more uncertainty about the value of successful claims".

The Family Law Bar Association suggested that the current draft, giving discretion of the court as to the date at which the property is valued, could create uncertainty because litigants would find it difficult to instruct their valuer. They suggested that there should be guidance as to the date, by providing that the amendments are to be valued at the date of the hearing, unless the court orders otherwise. This is on the basis that the court makes orders out of the net estate (section 2), and must take into account facts known at the date of the hearing (section 3(5)).

The Government is persuaded by the Family Law Bar Association's arguments on this point. Given that litigants in a family provision claim will need to instruct professionals to value any joint tenancy which forms part of the net estate, it is reasonable to provide a basis upon which those professionals can be instructed. The suggested reform also makes the court's discretion explicit, which preserves the intent of the original reform. The FLBA's suggestion strikes a good balance.

2. Which of the options given, in your opinion, is the most appropriate approach to an additional ground of jurisdiction for domicile claims? Please give reasons for your answer.

1975 Act: Jurisdiction

Support for Option 1

- 2.1 Richard Frimston supported Option 1. He argued that 1975 Act claims are generally settled, and only reach court in “extreme” circumstances. Therefore, “the complexities referred to are perhaps more imaginary than real”. He also agreed with the statement in the consultation paper that it would usually be necessary to resolve those complexities in any case in order to administer the estate.
- 2.2 He also felt that this option should be supported as being the Law Commission’s conclusion.
- 2.3 Richard Frimston supported Option 4 as a ground additional to domicile and Option 1 (see under Option 4, below).
- 2.4 Richard Wallington noted that “there is not likely to be a perfect answer” and therefore felt that “it is probably better to err on the side of inclusivity”, leaving enforcement concerns to the courts. He noted that the Bill’s formulation would apply the 1975 Act where an English national has opted for English law to apply to his estate.
- 2.5 Which? preferred Option 1 on the basis that “it has the advantage of having a coherent body of rules affecting family provision and English inheritance law”. They felt that this “harmonisation” was worth permitting “some cases where there is little connection to England and Wales”. (However, note that they oppose Option 4 on the basis of enforceability issues regarding overseas property.)

Opposition to Option 1

- 2.6 The Chancery Bar Association opposed Option 1 on the basis that “the ‘applicable law’ test ... does not really deal with the problem”, because the Court cannot make an order if there are no assets within the jurisdiction. They also characterised it as “complex and unnecessary”.
- 2.7 The City of Westminster and Holborn Law Society felt that although the choice was “finely balanced”, the difficulty with Option 1 would be the case where the deceased leaves no immovable property in England and Wales, but does leave assets and dependants here.

- 2.8 ACTAPS suggested that in the case of a “holiday home” here, “the link to this jurisdiction ... is minimal and it does not seem appropriate or practical to pursue or enforce claims against such foreign estates”.
- 2.9 The Bar Council opposed option 1 on the basis that it would be too complicated (particularly where renvoi is involved) and could be criticised as “intrinsically unsatisfactory, since it necessarily differentiates between land and movables”.
- 2.10 The Family Law Bar Association opposed option 1 on the basis that it was too complicated and required knowledge of private international law, and because “it potentially includes estates where the claimant and the deceased had little to do with this jurisdiction and excludes estates where the relevant relationship was carried on for years within the jurisdiction.”
- 2.11 Mishcon de Reya similarly cited issues of complexity (for example, in obtaining information from international lawyers) and enforceability. They argued that they wanted to be able to give simple advice to non-domiciled clients as to when a claim would be possible, and to advise a potential claimant quickly rather than consulting experts.
- 2.12 Sidney Ross agreed with the arguments against option 1 in the Ministry of Justice’s consultation paper and suggested that assessing whether option 1 applies might be difficult in an international estate, given also the problems as to obtaining evidence about the estate and the beneficiaries.
- 2.13 The Society of Trust and Estate Practitioners felt that “there are good arguments in favour of Option One” but on balance, opposed it on the basis that it is too difficult for a non-specialist practitioner.
- 2.14 Professor Jonathan Harris considered that it would be unacceptably broad for an English court to be able to apply the 1975 Act in respect of a foreign deceased person to all assets, including those to which foreign law is applicable. He saw no public policy justification for such a broad jurisdiction, and felt that it would be likely to lead to a great increase in the number of 1975 Act claims brought in respect of foreign domiciled deceased persons by foreign defendants. He thought that if the jurisdiction must be widened in this way it should be linked only to those assets to which English law applies and not the whole estate (see option 2, below).
- 2.15 Professor Paul Matthews was concerned that it would be a misuse of English court resources to allow a claim to proceed where the deceased was not domiciled here, and nor has the claimant any close connection. He considered further that such a rule would fulfil no discernible social policy beyond giving forum shoppers additional options and “annoying other legal systems”. These criticisms apply equally to options 2 and 3 below.

Support for Option 2

- 2.16 ACTAPS felt that option 2 would be more appropriate, limiting the claim to the extent of the assets here, making enforcement more practical and limiting the claims which are worth pursuing here. (It is not clear whether they wanted to add both Option 2 and Option 4.)

- 2.17 Hugh James supported Option 2, agreeing with the MoJ's statement that limiting Option 1 to property within this jurisdiction would be more likely to be recognised internationally and thus enforced. "Further, this approach mirrors much of our legislation."
- 2.18 Hugh James commented that obtaining disclosure of the full estate in an international case may be difficult.
- 2.19 Professor Jonathan Harris considered that the logic of conferring jurisdiction under the applicable law condition (option 1, above) leads to the 1975 Act applying only to those assets to which English Law is applicable. However, he was "highly sceptical" that any new basis of jurisdiction related to the applicable law was necessary and considered that habitual residence of the claimant the best option (option 4 below). He felt that if necessary more than one additional basis of jurisdiction could be selected.

Opposition to Option 2

- 2.20 The Bar Council did not feel that this was much of an improvement over option 1; they felt that although it was more practical, it would still be too complicated and differentiated between land and movables. They did not think that the addition of cases where the deceased had chosen English law would add much, on the basis that it is rare in practice.
- 2.21 The Society of Trust and Estate Practitioners opposed this option on the same basis as they opposed Option 1.
- 2.22 Which? preferred Option 1 rather than the "overly complicated" refinement of Option 2.
- 2.23 Professor Jonathan Harris was not convinced that any new basis of jurisdiction related to the applicable law was necessary, and felt that any attempt to further qualify the connection required was likely to be too complex and convoluted.

Support for Option 3

- 2.24 The Bar Council supported option 3, on the basis that it would apply to all property held here (not just land). This would enable orders to be made in relation to all property here, and avoid the disadvantages of scission. Holding land via corporate entities would make no distinction.
- 2.25 In addition, the Bar Council argued that: "A grant of probate in this country is needed to obtain control of all such assets. They ought all to be available to meet just claims."
- 2.26 The Law Society supported option 3, suggesting that where the deceased was not domiciled here, the claim could also be limited to being satisfied out of the property within England and Wales. The Law Society wanted to support Option 3 for both movables and immovables, suggesting that "the majority of moveable assets under consideration are likely to be bank accounts and share portfolios which are unlikely

to cause problems". They did not think that it would be a problem in practice that "this provision might trump established succession principles".

- 2.27 The Society of Trust and Estate Practitioners came to the same conclusion as the Law Society: Option 3, using both movable and immovable property, but only satisfied out of property within the jurisdiction. They agreed with the Ministry of Justice that this would be more likely to be recognised internationally and thus enforced. They also acknowledged definitional problems (for example with nominee property, and property elsewhere in the UK), but felt that these would be easier to resolve than those under Option 4.
- 2.28 Mishcon de Reya supported option 3 as clear and easy to advise on. It was suggested that there should be an additional anti-avoidance provision regarding transferring assets to another jurisdiction. They were less concerned about enforceability on the basis that the potential extent of the 1975 Act's application would be clear.
- 2.29 The Association of Corporate Trustees supported Option 3: "the court's jurisdiction should apply to the estate of individuals who die domiciled within England and Wales; and in relation to assets within the jurisdiction, regardless of the domicile or habitual residence of the deceased".
- 2.30 The City of Westminster and Holborn Law Society supported Option 3 on the basis that it would be a simple test, the order would be simple to enforce, and that it would "satisfy international comity". However, the Society also draw support from the assumption that the dependant is in England: "If the dependant is in England fairness seems to demand that the dependant may claim support out of assets in England," adding a comment that "there is also a public interest in reducing or eliminating benefit claims by such a dependant against public funds".

Option 3, immovable property only

- 2.31 Sidney Ross preferred "Option 3A", that is "Option 3 with the limitation that property could be made only out of immovable property within the jurisdiction". He felt that enforcement against immovable property should generally "be of a sufficient size to provide a significant contribution towards meeting the reasonable needs of the claimant". He conducted a review of five notable family provision cases with an international element, and concluded that "this option would save the majority of the meritorious claims which at present fail because of the domicile precondition".

Opposition to Option 3

- 2.32 ACTAPS opposed option 3 as too narrow and giving rise to similar problems to those in relation to option 1 (mainly, allowing claims against estates with a minimal connection to this jurisdiction, and issues of enforcement).
- 2.33 The Family Law Bar Association opposed limiting claims to assets within the jurisdiction because there is always a theoretical risk of enforcement difficulties (even under the current law – deceased domiciled here, assets located elsewhere) and in such cases it is less likely that people will bring claims anyway. But an express limitation could create an opportunity for avoidance.

- 2.34 Keith Wallace opposed it as having “some very capricious results” because the deceased and the claimant might not have previously come to England and Wales at all, and the claimant might simply be trying to get “better” rights in England and Wales than those available in the country of domicile, nationality and residence of the deceased and the claimant. His concern related specifically to investment funds where shares or units are registered on an English register.
- 2.35 Which? felt that although this option was “the simplest of the four”, it would not capture some cases over which jurisdiction should be taken. They did not give examples of cases which concerned them.
- 2.36 Professor Jonathan Harris thought that the justifications for the 1975 Act to apply purely on the basis of the location of assets in England were “exceptionally weak”: if the existence of a single English asset could mean that the Act applied to the whole estate of a foreign domiciled deceased person then the English courts would be open to forum shopping and it would provide a disincentive for foreign domiciliaries to invest in England. Moreover, he felt it would “border on perverse” for English law to extend the application of the Act on the basis of location alone when the rest of Europe has rejected a location based approach.
- 2.37 Professor Paul Matthews thought it possible that those who favour option 3 had confused ‘power’ jurisdiction with ‘territorial’ jurisdiction, and if so then it was misconceived because CPR r 6.36 and PD 6B para 3(1) ground (11) gives such jurisdiction in cases where the whole subject matter of the claim is property within England and Wales.

Support for Option 4

- 2.38 ACTAPS supported option 4 as a stronger link to jurisdiction and enabling provision for families and claimants living here. They noted that “careful drafting of what amounts to habitual residence will be required if disputes over the meaning of habitual residence are to be avoided.”
- 2.39 The Family Law Bar Association supported option 4 as fitting with the object of the 1975 Act to provide a remedy for want of provision on death. They felt that this would deal with most of the cases where there was “obvious injustice” (such as *Cyganik v Agulian*) and avoid the need for complex preliminary issues.
- 2.40 The Family Law Bar Association also cited the interest in providing claims to those within this jurisdiction to avoid reliance on the State. They suggested assessing habitual residence at the date of death, without “an arbitrary minimum period of residence”, which could cause injustice in cases of “early and unexpected death”. They did not want to limit to cases where there are assets within the jurisdiction. (See Option 3, above.)
- 2.41 Professor Jonathan Harris was convinced that option 4 was the only acceptable option: as with any overriding rule or public policy provision, a strong justification is needed to empower the English court to effectively restrict the application of foreign law. In this case an interest in seeing that dependants resident in this jurisdiction are adequately looked after provides that justification.

- 2.42 He favoured option 4 because (i) habitual residence ensures a more enduring connection than the eccentricities of the English law of domicile; (ii) it is the connecting factor used in most modern EU private international law instruments; (iii) there is now a substantial body of case law on habitual residence; and (iv) an English court is likely to have a much greater interest in protecting a person who is habitually resident in England (and who may otherwise be reliant on social security) than a person who has, for example, lived abroad but not relinquished their English domicile of origin.
- 2.43 Professor Paul Matthews broadly agreed with Prof Harris, although his focus was on freedom of testation. He noted that only option 4 provides a sufficiently strong justification for empowering the English court to overturn a deceased's succession provisions.
- 2.44 The Bar Council appear to have misread Option 4 as the habitual residence of the *deceased*. They assessed it as "less arbitrary than domicile", but felt that it was liable to give rise to injustice where there are substantial assets here but a connection does not amount to habitual residence. They suggested the possibility of adding both the location of assets and the habitual residence of the deceased.

Opposition to Option 4

- 2.45 Richard Frimston opposed Option 4 as "a radically new ground for jurisdiction", stating that it would be "a very new mix" to regard the 1975 Act as "partly a matter of succession ... and partly a matter of maintenance obligation". He suggests that this is "a bold and novel step that would be a maintenance obligation in parallel with succession law".
- 2.46 He was concerned about the UK's obligations under the Maintenance Obligations Regulation – "no thought seems to have been given to issues of mutual enforcement and recognition". He felt that it would be wrong to limit it to UK assets, since "there was really no need to change if the courts take a sensible view". He did not oppose Option 4 as a ground *additional* to domicile and Option 1.
- 2.47 The Law Society opposed option 4 as difficult because of problems with defining habitual residence, and the possibility that litigation would take place here where the deceased and his/her estate have little or no connection to England and Wales. They therefore foresaw comity problems.
- 2.48 The Society of Trust and Estate Practitioners objected to Option 4 on the basis that "unless it is strictly defined ... it could enable people to bring claims within only a very limited connection to the UK. ... We have concerns over the complexity of such definition and the uncertainties that would make it difficult for the non-specialist practitioner to advise on."
- 2.49 Sidney Ross opposed option 4 because it is "likely to involve serious enforcement difficulties and difficulties in obtaining evidence". He raised various problems as applicable to options 1, 2 and 4.
- 2.50 Which? felt that this test would be simple, but that "there would undoubtedly be issues of enforcement where the Courts of England and Wales made orders in respect of overseas property".

Other suggestions

- 2.51 The Chancery Bar Association preferred “a test which revolves around the location of assets regardless of the domicile of the deceased”, considering that this “would produce fairer results”. They stated that they “were unable to think of a hard case where the deceased was domiciled outside England and Wales but had property here”.
- 2.52 However, they also suggested that: “if there are applicable law issues the Court may have to deal with them in the course of proceedings but it already does that in cases where the deceased had real property overseas.”
- 2.53 The Chancery Bar Association also said that “if the deceased was not domiciled and had no property here, the Court would end up making an order which would be worthless”. It is not clear on what basis the Chancery Bar Association thought that the court would have jurisdiction to make an order in such circumstances.
- 2.54 Land Registry drew attention to the Succession Regulation and, in general terms, its implications for the Bill (including the ability of a UK citizen to choose English law to apply to his or her estate).

Conclusion

- 2.55 The Government is persuaded that option 4 provides the best answer to the limitations of the domicile precondition; it should greatly reduce the number of applicants who might otherwise be unfairly excluded and is, in our view, the best option for ensuring that only claims with a real connection to England and Wales can be brought here. We also believe that it is the option that presents the strongest justification for displacing, first, the foreign law of succession that would otherwise apply to the estate of an individual domiciled abroad and secondly, the express provisions made by the testator in his or her will.
- 2.56 Focusing on the applicant - the person for whom provision might be made – ensures that the precondition is in line with the general intention of the 1975 Act. It also has practical advantages: it is relatively easy to understand; and it should also be a comparatively simple matter to prove the habitual residence of the applicant given that they will be still living and likely to be doing so in England and Wales. Lastly, option 4 would align jurisdiction for family provision claims with maintenance in the divorce context (where jurisdiction generally lies with the courts of the country where the maintenance creditor is habitually resident). For these reasons, and after careful consideration of all the views expressed at consultation, the Government proposes to adopt option 4 as the additional ground of jurisdiction for family provision claims in addition to the existing domicile precondition.

Drafting issues

- 2.57 ACTAPS wanted the definition of the applicable law condition at Schedule 2, paragraph 2(5), to be “tightened up”: “in particular it requires the reader to have understanding of the rules of private international law”.

- 2.58 Hugh James felt that the word “or” should be added after section 1(4)(d) “to clarify that each of the definitions is mutually exclusive”.

Other issues regarding jurisdiction

- 2.59 Which?, at paragraph 19 of their response, suggest that the Bill amends the current law to enable (for example) lifetime gifts to be treated as part of the estate for the purposes of a 1975 Act claim. This is not the case: see the 1975 Act, sections 8, 10, 11 and 12.

OTHER ISSUES RAISED ON CONSULTATION

Sharia marriages

- 2.60 John Franks suggested that Sharia marriages which do not currently amount to marriages in English law should be recognised as attracting the same consequences on intestacy.
- 2.61 The issue of which relationships are recognised as marriages in English law did not form part of the Law Commission's project and the Law Commission did not consult on it. Nor was it dealt with in the subsequent Government consultation. It would not be an appropriate addition to this Bill.

Pension funds

- 2.62 The Chancery Bar Association stated that they were "disappointed" that the Bill did not include provisions to bring back pension funds into the estate, because the value of pension funds "often ... outweighs the value of the net estate by a considerable amount".
- 2.63 The Law Commission explored this matter at some length in the Consultation Paper (see paragraphs 7.75 to 7.79) before reaching a reasoned conclusion in the Report which rejected the idea of bringing pension benefits into the net estate (see paragraphs 7.111 to 7.120). The Commission found the concerns expressed by some of the respondents to their consultation persuasive (see para 7.105 to 7.110 of the Report). In particular, the Commission was of the view that although the present law can cause hardship in individual cases, the scale of the problem does not appear to be very great. Reform could detrimentally affect a larger number of straightforward cases, and be expensive to implement.

Cohabitants

- 2.64 ACTAPS drew attention to the fact that the Bill makes no provision for those in long term relationships who are not married.
- 2.65 The Law Commission made recommendations in relation to intestacy and family provision for cohabiting couples; they are set out in the Law Commission's Report, Part 8 and the draft Inheritance (Cohabitants) Bill which was published with that Report. The Government will not be taking those recommendations forward in this Parliament.

Encouraging will-writing

- 2.66 Hugh James suggested that the government should back a campaign encouraging people to make wills (while pointing out that it is in their own interests as a solicitors' firm for more disputes to arise so that they can charge for giving advice).

- 2.67 Remember a Charity commented on the desirability of encouraging will-writing in order to increase gifts to charity. The response encouraged more governmental support for “making will-writing a social norm”, in particular by reaching people at life stages such as marriage when will-writing is considered; and referred to existing work with the Cabinet Office’s Behavioural Insight Team.

3. Do you have any comments on the Impact Assessment, in particular the potential overall impact of these reforms on the number of family provision claims?

- 3.1 The Family Law Bar Association suggested that the Impact Assessment underestimates the current number of 1975 Act claims, on the basis that there are probably significantly more claims made in the Family Division than the Chancery Division as it is perceived as being more favourable to claimants than the Chancery Division by many practitioners. They also thought there were probably more claims made in county courts across the country than in the two divisions of the High Court
- 3.2 The Family Law Bar Association also suggested that “we would be very surprised if the proportion of cases settling before proceedings are issued did not exceed 14%”. This was on the basis of the successful use of Civil Procedure Rules Part 36 regarding pre-action conduct and pre-action mediation.
- 3.3 They agreed with the conclusion that the overall impact on the Ministry of Justice will be neutral. “There may be a few more cases issued as a result of the amendments, but fewer issues being argued about. The proposed amendments clarify a number of matters that have given rise to difficulties in the past that will no longer.”
- 3.4 The Family Law Bar Association also noted the independent effect of the increasing use of alternative dispute resolution.
- 3.5 The Law Society suggested that claims by spouses and civil partners under the 1975 Act would be likely to decrease, but that claims by dependants might increase.
- 3.6 ACTAPS commented that there might be some more claims from those previously excluded, but felt that “subject to the additional basis for jurisdiction being sufficiently tight this is considered to be a fair addition”. ACTAPS felt that the main reform which would reduce claims would be including cohabitants on intestacy, since they “represent a large proportion of claimants in dependency claims”.
- 3.7 In their response, Hugh James agreed that the reform to spousal entitlement was likely to lead to an increase in claims under the 1975 Act by children (particularly from previous marriages) but that this would be outweighed by a greater reduction in claims by spouses. They saw no benefit to the Legal Aid Agency from the reforms, and indeed suggested that more claims by children might lead to additional burden on legal aid.
- 3.8 They also noted the difficulty of redeploying highly specialised lawyers if their area of practice vanishes, but on balance considered that the proposed reforms would not make such specialism redundant.
- 3.9 Hugh James also agreed that the reforms to the 1975 Act were likely to lead to an increase in claims, but not a significant one.
- 3.10 They considered that the proposed reform to preserve contingent entitlements on adoption would lead to a reduction in legal costs for applicants, but may also lead to a small increase in claims under the 1975 Act made by children who have not been

- 3.11 Sidney Ross felt that there might be a small decrease in claims under the 1975 Act following reforms to the intestacy rules. He saw no benefit to the Legal Services Commission. Nor would he expect any substantial increase in claims following reform of the 1975 Act, although he felt that as regards the expanded jurisdiction the effect on the parties depended very much on the option chosen.
- 3.12 The Association of Corporate Trustees noted that while it is expected that the number of claims under the 1975 Act will fall following reform of the intestacy rules, extending jurisdiction under the 1975 Act may lead to a significant rise in cases coming before the English courts. In particular, the English courts may become an attractive venue to forum shoppers.
- 3.13 Which? restricted their comments to the impact on consumers. They agreed with the general proposition that the reform of the intestacy rules would decrease the number of claims under the 1975 Act, while the extended jurisdiction under that Act would increase such claims. They agreed also that the removal of life interests from the intestacy rules would save time and cost, but not significantly.
- 3.14 Which? felt that the proposal on adoption was appropriate because it confers an undeniable benefit, even if that benefit is enjoyed by only a very few people.

Conclusion and next steps

We are very grateful to everyone who responded to the consultation paper. Although some respondents had some concerns about some points of detail and a range of views was put forward with regard to the additional ground of jurisdiction for family provision claims, the overall response to the consultation was supportive and confirmed the assessment we had made of the impact of the proposals. We have considered all the points made and, as we have described, have decided to make several amendments to the Bill in response to the points raised.

Amendments

We will consider making the following amendments to the Bill given the responses that we received. These are as follows:

- **Clause 9(6) Power of Advancement**

We propose to amend clause 9(6) to avoid an unintended implication that the value of assets must be assessed at the time of advancement to beneficiaries. We will instead seek to preserve the flexibility of the current law on the timing of valuation.

- **Valuation of Joint Tenancies**

We propose to amend paragraph 8 of schedule 2 to make it clear that, when bringing the deceased's severable share of a joint tenancy into the net estate, the court will in general value that share as at the date a claim for family provision is heard. The court will have the discretion to value the share as at a different date, however, if that is appropriate.

- **Additional Ground of Jurisdiction for Family Provision Claims**

We intend to introduce an additional ground of jurisdiction for family provision claims that would enable claimants who are habitually resident in England and Wales to bring such claims. This ground would exist in addition to the current requirement that the deceased must die domiciled in England and Wales.

Next steps

The next step is to draft the Bill incorporating the proposed amendments. The Bill will then be introduced into Parliament when Parliamentary time permits.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Annex A – List of respondents

Professor Jonathan Harris

Professor Paul Matthews

Keith Wallace, Reed Smith LLP

Richard Frimston, Russell-Cooke LLP

City of Westminster and Holborn Law Society

Society of Trust and Estate Practitioners (STEP)

Law Society

Family Law Bar Association

Chancery Bar Association

Mishcon de Reya

General Council of the Bar of England and Wales

Antony Nixon MA CTA TEP ATT(Fellow)

Remember a Charity

Which?

Hugh James

Association of Corporate Trustees

John A Franks LL.M, F.C.I.Arb, F.Ins D

Pump Court Chambers Inheritance and Vulnerable Elderly Team

Association of Contentious Trust and Probate Specialists (ACTAPS)

Land Registry

Sidney Ross

Richard Wallington

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