

Title: Intestacy and Family Provision Claims on Death IA No: Lead department or agency: Ministry of Justice/ Law Commission Other departments or agencies:	Impact Assessment (IA)
	Date: 22/02/2012
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Primary legislation
	Contact for enquiries:

Summary: Intervention and Options	RPC Opinion: RPC Opinion Status
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
NQ	0	0	No NA

What is the problem under consideration? Why is government intervention necessary?

The current laws on intestacy and family provision do not operate effectively, either because they are out-dated and do not reflect modern family structures, or they are too narrow or overcomplicated in application. There are also a number of smaller, technical legal problems which exist in this area. Government intervention is necessary as this change requires primary legislation.

What are the policy objectives and the intended effects?

The policy objectives are threefold. First, to ensure that the intestacy laws reflect public expectations as to what is a fair distribution of the deceased's estate given evolving family structures and realities of modern families. Second, to ensure access to justice. This involves eliminating complexities and minimising any technicalities in the law that prevent potentially meritorious applicants from making a family provision claim. Third, to ensure that the laws do not infringe the Human Rights Act 1998 and the European Convention on Human Rights.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The proposals are divided into three options:
Option 1 - increase the entitlement of a surviving spouse and update the statutory legacy (share of estate that is distributed to the spouse) more frequently in line with inflation.
Option 2 - expand family provision. This involves, firstly broadening the definition of "child of the family" so that it is no longer limited by reference to a marriage or civil partnership. A second proposal will no longer require that a "dependant" has to show that the deceased contributed more to the relationship in financial terms than the applicant did and that the deceased assumed responsibility for that maintenance. A third proposal will eliminate the requirement that the deceased must be domiciled in England and Wales - relatives will now be able to bring a family provision claim if the deceased left property which is subject to English succession law.
Option 3 - the contingent interest which a child has in the estate of his or her deceased parent will no longer be lost if that child is adopted after the death of the parent.
The preferred approach is to implement all three options together

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:	Non-traded:	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Reforms to increase the entitlement of the surviving spouse

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It is not possible to quantify the costs due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised costs by 'main affected groups'

Costs to beneficiaries: the proposals will reduce the share in the deceased's estate for beneficiaries other than the spouse.

Costs to Ministry of Justice: it is anticipated that the proposals would result in fewer total family provision claims being lodged by applicants which would result in a reduction in HMCTS fee income. However, it is assumed that the financial impact on HMCTS would be neutral in the long run as fewer resources would also be required. There will be minor costs to the Ministry of Justice involved in producing a statutory instrument to update the statutory legacy in line with inflation.

Costs to legal service providers and financial advisors: there may a reduction in demand if the number of family provision claims falls. This would free up these profession's resources to be redeployed in other activities.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to quantify the benefits due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised benefits by 'main affected groups'

Benefits to beneficiaries: the surviving spouse will benefit from an increased share of the deceased's estate. The benefit will be equal to the amount that other beneficiaries lose out in the costs section. The changes will also reduce the time and cost of administering the estate. There would be associated savings in legal representation if the proposals reduce the number of family provision claims (through bringing the law into line with general public expectations as to how property should be distributed on death).

Benefits to Ministry of Justice: it is assumed that the financial impact on HMCTS would be neutral as HMCTS operates on a cost recovery basis. There may be a minor benefit to the LSC if there are fewer claims. There may be a cost saving of formally reviewing and updating the statutory legacy as it will be automatically updated under Option 1.

Key assumptions/sensitivities/risks

Discount rate (%)

It is anticipated that the proposals would result in fewer total family provision claims being lodged by applicants because the proposals will bring intestacy rules better into line with public expectations. It is assumed that there would be no increase in the number of intestate estates in the future following this change.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 2

Description: Expanding the circumstances under which a family provision claim can be made

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It is not possible to quantify the costs due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised costs by 'main affected groups'

Costs to beneficiaries: a successful claim by a family member under the reforms highlighted above will impose a cost to other beneficiaries who would have benefited from the claimants' exclusion under the current system. There will be costs to both claimants and defendants if family provision claims are disputed. This may include requiring professional legal advice as well as potential delays in receiving entitlements. Costs to Ministry of Justice: there may be a minor costs to the LSC if there are more legal aid eligible claims.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to quantify the benefits due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised benefits by 'main affected groups'

Benefits to beneficiaries: potential applicants who under the current law are not eligible to make a claim for family provision would benefit from receiving a share in the estate if they are able to make a successful family provision claim. Any monetary benefit will be a transfer of wealth between potential beneficiaries. There may also be resource savings to applicants in reducing the need for issue of domicile to be considered and removing administrative criteria that are necessary in bringing a claim. Benefits to Ministry of Justice: the proposal may also minimise any possible claim that the law is incompatible with the European Convention on Human Rights. The overall financial impact on HMCTS is expected to be neutral in the long run due to full cost recovery. Benefits to legal service providers: there may be small benefits to this profession due to an increase in demand for their services if the number of family provision claims increases.

Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that expanding the circumstances under which a family provision claim may be made will lead to an increase in claims. There is a risk that the expected increase in family provision claims is much larger than anticipated. This would impose increased resource costs to applicants and defendants and potentially increase capacity pressures on HMCTS.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 3

Description: Ensuring that contingent entitlements are not lost following adoption

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It is not possible to quantify the costs due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised costs by 'main affected groups'

Costs to beneficiaries: the proposal would impose a cost to beneficiaries who would have received an entitlement to the estate if an adopted child's contingent interest had been lost. The cost will be equal to the amount that the other beneficiaries gain in the benefits section. In cases where the child is able to inherit the trust under the reform, there may be some ongoing costs of maintaining the trust until the child is 18 years of age.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to quantify the benefits due to insufficient information on the precise number and value of estates that will be affected and anticipated behavioural responses.

Other key non-monetised benefits by 'main affected groups'

Benefits to beneficiaries: a small number of adopted children who under the current law do not receive their entitled share of the deceased's estate would now do so. The reform will lead to resource savings for applicants (adopted children) in terms of legal costs and court fees as they would no longer have to vary the statutory trusts under which their interest is held in order to receive his or her entitlement as they have to under the current law.

Benefits to Ministry of Justice: as the courts would no longer need to consider applications for an order varying the trusts under which the interest is held before adoption, the proposal will lead to a net reduction in the HMCTS resources required. However, it is assumed that the financial impact on HMCTS would be neutral as HMCTS operates on a cost recovery basis. The proposal may also minimise any possible claim that the law is incompatible with the European Convention on Human Rights.

Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that this reform will better meet public expectations regarding fairness of entitlements for adopted children.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Background

- 1.1 This impact assessment concerns reforms to the rules of intestacy and eligibility to bring family provision claims. Although they are distinct, both of these mechanisms concern the distribution of a person's assets on death and they are summarised below:
 - The "intestacy rules" are a set of default provisions which are engaged when a person dies leaving property that is not disposed of by a valid will. The rules determine how such property should be distributed amongst living relatives specified in the rules. The rules are largely contained in the Administration of Estates Act 1925 (the "AEA 1925").
 - Family provision claims may be made whether or not there is a will by certain close relatives and dependants of the deceased who feel that reasonable financial provision was not made for them. Under family provision claims they can apply to court for an order that they should receive more of the deceased's property. Such an application is made under the Inheritance (Provision for Family and Dependents) Act 1975 (the "1975 Act").
- 1.2 There is some uncertainty about the number of deaths that are subject to the intestacy rules and the number of family provision claims. Based on a number of assumptions, it is estimated that in 2011 around 220,000 deaths were intestate and there were more than 2,000 family provision claims between 2005 and 2011 (see Annex A for further information on these estimates). However, the proposals outlined in this Impact Assessment would only affect a small proportion of these totals and specific estimates are provided where applicable.
- 1.3 It is over 20 years since these areas of law were last reviewed. Following a Law Commission consultation, and meetings with stakeholders,¹ the law in this area has been reassessed to ensure that the distribution of estates is fair and evolves with changing family structures. It is also important that the law operates in a way that is simple to comprehend and put into practice.
- 1.4 This impact assessment accompanies the draft Inheritance and Trustees' Powers Bill, designed to implement recommendations in the Law Commission report Intestacy and Family Provision Claims on Death (2011) Law Com No 331.²

Policy Problem and Policy Objectives

- 1.5 The main policy problem is that the current laws do not operate effectively, either because they are out-dated and do not reflect modern family structures, or they are too narrow or overcomplicated in application. There are also a number of smaller, technical legal problems which exist in this area.
- 1.6 The policy objectives are threefold. First, to ensure that the intestacy laws reflect public expectations as to what is a fair distribution of the deceased's estate given evolving family structures and realities of modern families. Second, to ensure access to justice. This involves eliminating complexities and minimising any technicalities in the law that prevent potentially meritorious applicants from making a family provision claim. Third, to ensure that the laws do not infringe the Human Rights Act 1998 and the European Convention on Human Rights.
- 1.7 Three main sets of reforms are proposed to meet each of these objectives in turn and further details are provided in the following sections:
 - Three reforms are proposed to the intestacy rules regarding the entitlement of the surviving spouse.
 - Three reforms are proposed to the eligibility rules regarding who is able to bring a family provision claim.
 - One reform is proposed to entitlements under adoption.

1 In October 2009, Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 was published. More than 120 responses were received. An analysis of those responses is available on the Law Commission website (www.lawcom.gov.uk).

2 The Law Commission's report also made recommendations for reform of the rules of intestacy and family provision as they apply to cohabitants; a separate draft Bill was produced to give effect to those recommendations (the Inheritance (Cohabitants) Bill). This impact assessment identifies the impact of the recommendations which inform the Inheritance and Trustees' Powers Bill; it does not assess the impact of the Inheritance (Cohabitants) Bill.

1.8 There are also some small technical changes to simplify and clarify the existing law.

Entitlement of the surviving spouse

Entitlement of the surviving spouse where the deceased left no children

- 1.9 Under the current law, if the deceased does not leave any children or other descendants, and the estate is valued at more than £450,000, the spouse will have to share it with the deceased's parents or full siblings (or their descendants). This splits the estate and leads to a transfer of wealth away from the immediate family unit to other relatives and there is evidence that this outcome is not perceived as being fair by the public. For example research conducted by the Nuffield Foundation to build evidence around the Law Commission's project, found the majority of survey respondents (63 per cent) favoured the surviving spouse receiving all of an intestate's estate in preference to a parent when no children of the deceased were involved.³
- 1.10 **Under the proposed rule change the whole estate will pass to the surviving spouse.**⁴ This will ensure that the estate remains within the immediate family structure. It will also ensure the laws on intestacy become closer aligned with public expectations, which should reduce the risk of litigation. The proposal was also strongly supported in the consultation – of the 41 respondents who addressed this issue, 29 agreed with the proposal, four agreed but had reservations and only six disagreed.

Statutory legacy

- 1.11 Under the intestacy rules, a surviving spouse is entitled to a "statutory legacy" which is a fixed net sum from the deceased's estate before anything that is left is distributed to other beneficiaries. The Lord Chancellor may fix the levels of statutory legacy but there is no statutory guidance as to when the levels of statutory legacy should be reviewed and what factors should be taken into consideration. This has led to long delays between some reviews and the most recent review required an expensive and time-consuming consultation process. Furthermore, the legacy amount has often fallen out of line with inflation which can undermine the objective of meeting the surviving spouse's reasonable needs.
- 1.12 **Under the proposal, the statutory legacy will be automatically updated to reflect changes in the consumer prices index measure of inflation at least every five years.** This will ensure that the real value of the statutory legacy more accurately reflects changes in living costs and thus directly ensure spouses are reasonably provided for after a death.
- 1.13 Of the 40 respondents who commented on this reform in their consultation responses, all agreed with the principle that the statutory legacy should be periodically reviewed. The majority of respondents agreed with the proposal that the level of the statutory legacy should be reviewed every five years.

Entitlement of the surviving spouse where the deceased left children

- 1.14 Under the current law, if the deceased leaves a surviving spouse and children or other descendants, the surviving spouse is entitled to the first £250,000 in the estate. The children (or the children of any child who has already died) will take half of anything over that sum outright. The other half is held under a "life interest trust"; the spouse can make use of property in the trust (for example, by continuing to live in the family home or receiving the income from shares or other investments) but it then passes to the children on his or her death.

3 "Inheritance and the family: attitudes to will-making and intestacy." Humphrey, A., Mills L., Morrell, G., Gillian D. and Woodward H. National Centre for Social Research/Nuffield Foundation. The total number of respondents was 1,556 for the quantitative phase.

4 Surviving parents will still inherit where the deceased leaves no surviving spouse and no children or other descendants. At present, there exists a little known rule (in section 18(2) of the Family Law Reform Act 1987) that where a person with unmarried parents dies without leaving a will it can be presumed that that person was predeceased by his or her father. The Bill will remove this presumption for births which are registered in both the mother and father's names. This change reflects contemporary society and good practice in checking the register of births before presuming that the father did not survive the deceased and therefore has no entitlement on intestacy. The existing presumption has a limited scope and it is probable that it is not often used in practice; this change is therefore expected to have negligible impact.

- 1.15 The imposition of a trust structure is disproportionately complex and expensive, particularly where relatively small amounts of property are held in trust. England and Wales is the only comparable legal system which imposes a life interest trust in these circumstances. Furthermore, a number of consultation responses indicated these arrangements can be a source of tension between the spouse and the children, particularly the children of the deceased from a previous relationship.⁵
- 1.16 **Under the proposals, the life interest trust would be eliminated and if a person dies intestate and leaves a spouse and children or other descendants, the surviving spouse will receive the statutory legacy (currently set at £250,000 where the deceased also left children or other descendants), the personal chattels of the deceased and half of the balance of the remaining estate. Any children or other descendants will share the other half of the balance.** This again reflects public expectations of the appropriate entitlement of respective beneficiaries - the Nuffield Survey asked what should happen to an estate if a married man dies and he is survived by a wife and two children (both over 18 years of age).⁶ 80% of respondents favoured the spouse, either wholly or as part of a sharing arrangement. When asked the same question but the deceased had two young children, 76% still favoured the spouse.
- 1.17 Again the consultation respondents broadly supported the proposal – this was the most widely supported option. Consultees expressed considerable criticism of the current law and many argued that the automatic creation of life interest trusts is a cumbersome and inappropriate mechanism for the distribution of an intestate estate.

The 1975 Act and claims for family provision

The concept of a “child of the family”

- 1.18 “Child of the family” is a legal concept which describes the situation where a child has been treated as part of a family but is not legally the child of one or both “parents”. Family provision claims may be brought by a person who was treated by the deceased as a child of his or her family “in relation to a marriage or civil partnership”. This discriminates against children who were treated by the deceased as his or her child where the deceased was not married or in a civil partnership. Such a distinction is inconsistent with the range of families in which children are now brought up.
- 1.19 **Under the proposal, someone who was treated as a child of the family by the deceased will be eligible to bring a claim for family provision regardless of whether that treatment was in relation to a marriage or civil partnership or was by a cohabiting couple or an individual.**
- 1.20 The consultation responses indicate that the proposed changes are in accordance with public sentiment. 26 responses to the consultation agreed with the provisional proposal that the child of the family definition should be expanded and a further six agreed but had some reservations⁷ as opposed to eight respondents that disagreed with the proposal.

Obstacles to claims by dependants of the deceased

- 1.21 The category of “dependant” allows a person to claim for family provision if he or she was being maintained by the deceased immediately before the death. It can include somebody who is not a family member or blood relative. The current drafting of the 1975 Act and its interpretation by the courts have created two barriers to such claims. First, the “balance sheet test” requires that the deceased contributed more in financial terms to the relationship than the applicant did. Secondly, the applicant must show that the deceased assumed responsibility for maintaining him or her. These two requirements can prevent other potentially valid applicants from making a claim, and

⁵ See paragraph 3.78 in Intestacy and Family Provision Claims on Death Analysis of Consultation Responses. Available at: http://lawcommission.justice.gov.uk/docs/cp191_intestacy_responses.pdf

⁶ “Inheritance and the family: attitudes to will-making and intestacy.” Humphrey, A., Mills L., Morrell, G., Gillian D. and Woodward H. National Centre for Social Research/Nuffield Foundation. The total number of respondents was 1,556 for the quantitative phase.

⁷ The reservations largely related to whether reform of this well established section might create uncertainty – the Association of Her Majesty’s District Judges did not however share this concern. The Response to the Consultation is available at http://lawcommission.justice.gov.uk/docs/cp191_intestacy_responses.pdf

have created complexity in the law. For example, in the case of *Bouette v Rose* the applicant was claiming against the estate of her daughter, for whom she had been a full-time carer. In this claim the deceased was not capable of assuming responsibility for anyone as she was just 14 when she died and suffered from severe mental disabilities. However, the applicant was in fact dependant on her daughter, who was entitled to regular payments from the Court of Protection.

- 1.22 **Under the proposals, a person who was being maintained by the deceased immediately before the death will no longer have to show that the deceased contributed more to the relationship in financial terms than the applicant did, and that the deceased assumed responsibility for that maintenance.** This will eliminate a technicality in the law that prevents dependants in cases of mutual benefit or who cannot show a definite assumption of responsibility by the deceased from making a 1975 Act claim. Responses from the consultation supported the proposal – of the 33 consultees that addressed the proposal about “assumption of responsibility”, 24 agreed with the reform compared to only five that disagreed with it; and of the 32 consultees that addressed the proposal about “mutual dependency” 27 agreed with the reform.

The domicile of the deceased

- 1.23 If a person dies domiciled in England and Wales, his or her estate may be subject to a family provision claim under the 1975 Act. If the deceased was not domiciled in England and Wales at the date of death but left family and dependants here, those family and dependants will not be able to challenge the provision made for them under a will or the intestacy rule even if the deceased left property that is otherwise subject to English succession law. The family member may not have known that the deceased was domiciled abroad till after their death - domicile may have been changed for tax reasons for example.⁸
- 1.24 **Under the proposal currently in the Bill, family and dependants of a deceased person who wish to challenge the provision made for them by a will or under the intestacy rules shall be able to bring a claim if the deceased left property which is subject to the succession law of England and Wales.** However, there are three potential ways in which we consider the domicile precondition might effectively be amended and the Government is consulting on which of these would be the most appropriate. Each of the three options would ensure that access to justice is not denied simply because of where the deceased was domiciled. The proposal in the Bill is the most widely drawn and is thus likely to lead to the greatest increase in claims; it has therefore been used as the basis for assessment.

Entitlement and adoption

- 1.25 If a child inherits (via a will or the intestacy rules) a contingent interest (for example, in the case of an inheritance under the intestacy rules, an interest that cannot be claimed until the beneficiary reaches the age of 18 or marries or forms a civil partnership) and is subsequently adopted, if no court application has not been made to vary the trust under which the interest is held, the contingent interest is lost altogether and the child will lose his or her entitlement.⁹ This applies either under a will or the intestacy rules.
- 1.26 An application can be made to the court before the adoption for an order varying the trusts under which the interest is held. There are three problems: first, the need for a court application to vary the trusts is expensive and wasteful of court resources; and secondly, if professionals are unaware of this technical legal issue and an application is not made or is not made in time, the child will unwittingly lose his or her contingent interest in the inheritance which his or her parents have left. Finally, there is also a risk that the current law could face claims that it is not in

8 A good example of the problem which the domicile precondition can create is the case of *Cyganik v Agulian*. The deceased was born in Cyprus but had lived in England for a more or less continuous period of 43 years prior to his death. He had assets of around £6.5 million in England and an English will. Nevertheless, the Court of Appeal held that the deceased died domiciled in Cyprus. Because of this finding, the deceased's partner could not bring a claim under the 1975 Act challenging the provision made for her in the will. See [2006] EWCA Civ 129, [2006] 1 FCR 406.

9 For example, Andrew, a widower, has a 10-year-old son, Ben. Andrew dies in a car accident without leaving a will (intestate). Andrew's estate is worth £200,000. Under the intestacy rules, Ben is entitled to inherit the whole estate but it will be held on trust for him until he reaches the age of 18 or marries or forms a civil partnership. Ben is adopted by his Godparents Calum and Ciara and no variation is made to the trust for Ben as Calum and Ciara are not advised that any change is necessary. Once adopted, Ben will lose the contingent interest which he had in the £200,000. The inheritance will instead pass to Andrew's parents, the next in line to inherit under the intestacy rules.

accordance with human rights, as enshrined in the Human Rights Act 1998 and the European Convention on Human Rights.

- 1.27 **Under the proposal, the contingent interest which a child has in the estate of his or her deceased parent will no longer be lost if that child is adopted after the death of the parent.** It will thus eliminate the technicality in the law that prevents access to entitlement and justice of children who are adopted following the loss of a parent without disturbing the existing law for those adopted while their parents are alive. It will also reduce the complexity and administrative burdens of the current system. The consultation responses showed strong support for the proposal with 31 out of 37 who responded to this proposal agreeing with the reform (and an additional respondent who expressed a qualified agreement).

Economic rationale for intervention

- 1.28 Intervention would be justified primarily on equity grounds. The current laws have become outdated and fallen out of step with current family structures and what society deems fair in terms of entitlement.
- 1.29 Intervention would also be justified on efficiency grounds. Simplifying and modernising existing rules will reduce the resources required to administer and dispute how estates are settled.

Main affected groups

- 1.30 The following stakeholders will be affected by these reforms.
- Potential beneficiaries - including family members, dependants and other relations to the deceased.
 - Ministry of Justice – including Her Majesty’s Courts and Tribunals Service (HMCTS) and Legal Service Commission (LSC). The LSC is responsible for managing the legal aid fund. Applicants who are eligible for legal aid have their fees paid for them by their legal representatives, who can reclaim the money from the LSC.
 - Legal Service Providers and Financial Representatives

2. COSTS AND BENEFITS

- 1.31 This Impact Assessment provides a mainly qualitative assessment of the main costs, benefits and impacts. This is because there is limited information on precise volumes and the value of estates. There is also limited information on potential behavioural responses to the changes.
- 1.32 The impacts outlined under each option are underpinned by a number of assumptions where necessary and these are highlighted in the relevant section. It is also generally assumed that the proposed reforms do not result in changes to the relative proportions of intestate and willed estates.

Option 0: Do Nothing

- 1.33 Under Option 0 the current law and existing rules would be retained. Because the do-nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value.

Option 1: Reforms to the entitlement of the surviving spouse

Description

1a) Spouse but no children or other descendants

- 1.34 Under the current law, if the deceased leaves a spouse but no children or other descendants, the spouse is entitled to the first £450,000 in the estate. Anything over this is shared with any surviving parent or full sibling (or their descendants) of the deceased. If Option 1 is implemented then the whole estate will pass to the surviving spouse.

- 1.35 We estimate that roughly between 50 and 100 estates annually are likely to be affected under the proposal. This figure is based on a number of assumptions and demographic figures and the number of grants of representation of intestate estates – these are explained in detail in the Annex A.

1b) The statutory legacy

- 1.36 The “statutory legacy” is currently set at £250,000 where the deceased also left children or other descendants, and £450,000 where the deceased left no children or other descendants but was survived by at least one parent or full sibling (or their descendants). Under the proposal, the statutory legacy will be automatically updated to reflect changes in the consumer prices index at least every five years. The Lord Chancellor will retain the power to change the level of the statutory legacy by reference to other considerations.

1c) Spouse and children or other descendants

- 1.37 If a person dies intestate and leaves a spouse and children or other descendants, the surviving spouse will receive the statutory legacy, the personal chattels of the deceased and half of the balance of the remaining estate. Any children or other descendants will share the other half of the balance. This will remove the life trust element of the current system. It is estimated that the proposal will affect between 800 and 1,100 estates annually given the number of life interest trusts created every year by the intestacy rules.¹⁰
- 1.38 Overall, it is assumed that options 1a, 1b and 1c would result in a reduction in the number of disputes and family provisions claims made under intestacy because the reforms will result in entitlements that better accord with public expectations. As such, there would be less need for recourse to the courts through family provision claims to obtain reasonable provision.

Benefits of Option 1

Benefits to potential beneficiaries

- 1.39 The surviving spouse will benefit from an increase in share of the deceased’s estate. The benefit will be equal to the amount that other beneficiaries lose out in the costs section as this is simply a transfer of wealth. The increase which a surviving spouse in this situation will receive depends on the size of the estate.
- 1.40 The removal of the life interest trust under Option 1c will reduce the time and cost of administering the estate. It may mean that it is not necessary to seek professional advice when administering the estate. The proposals will therefore increase efficiency in the administration of estates and help maximise the net estate for beneficiaries. On average, it takes 92 days to administer an intestate estate¹¹ and the average cost of administering an estate in 2010 was around £2,200.¹²
- 1.41 Option 1c will also provide both spouses and children or other descendants with their entitlement sooner and they will have absolute control over their own share of the estate rather than it being held under the life interest trust.
- 1.42 The reform will bring the law into line with public expectations as to how property should be distributed on death. The reforms may therefore reduce the need for a surviving spouse to have resort to a family provision claim to receive access to a fair entitlement, which would bring associated savings in legal representation fees to both sides of such disputes.

Benefits to Ministry of Justice

- 1.43 As explained in the costs section above, it is expected that Option 1 will lead to a net reduction in the HMCTS resources required as the proposals bring the laws into closer line with public expectations.

¹⁰ Ministry of Justice, *Trusts (Capital and Income) Bill: Response to Consultation* (2011) p 41.

¹¹ Written Answer, *Hansard* (HC), 19 June 2009, vol 494, col 547W.

¹² J Rayner, “Consumer shift in estate services” (18 November 2010) *Law Society Gazette Online*.

- 1.44 Overall, it is assumed that the financial impact on HMCTS would be neutral as HMCTS operates on a cost recovery basis with fee income balancing operating costs in the long run
- 1.45 It is expected that as the proposals bring the laws into closer line with public expectations there will be a net reduction in the number of family provision claims under Option 1 and thus there may be a minor saving to LSC resources. However, from April 2013, family provision claims will only be eligible for legal aid where there has been an element of domestic violence or for representation of a child where a child has been made party to the proceedings, or where there are other exceptional circumstances and hence any impact on LSC resources is expected to be minor.
- 1.46 There will be a saving of the cost of updating and reviewing the statutory legacy. The Ministry of Justice has estimated that a review of both levels of the statutory legacy would cost around £20,000 (the last review was carried out in 2009, the last review before this was in the early 1990s).

Wider benefits to governmental departments

- 1.47 It will no longer be necessary to have recourse to actuarial tables produced by the Government Actuary's Department which are used to help calculate the capital value of a life interest created under the intestacy rules so these tables will no longer need to be updated. The Government Actuary's Department estimated that if a review of the capitalisation tables was necessary it would cost approximately £10,000. The cost of future updates will therefore be saved.

Costs of Option 1

Costs to potential beneficiaries

- 1.48 Options 1a, 1b and 1c will result in transfers of wealth from beneficiaries other than the spouse as they will reduce their share in the deceased's estate. The precise costs will depend on the size of the estate and the nature of the assets left by the deceased.
- 1.49 Under Option 1a, the cost in terms of a reduction in entitlement if the estate was valued over £450,000 will be borne by parents and full siblings of the deceased (or their descendants). We estimate between 50 and 100 estates annually are likely to be affected under the Option 1a.
- 1.50 The statutory legacy will be updated more regularly under Option 1b which will impose a cost to other beneficiaries, if the estate is over the statutory legacy limit, as the real value of the statutory legacy (the amount that will go directly to the spouse) under the current law would otherwise have tended to fall over time and so by updating the legacy more frequently the spouse will receive a higher share of the estate at the expense of other beneficiaries who receive the remaining share of the estate.
- 1.51 Under Option 1c, children and other descendants will face a reduction in their entitlement if the estate is valued over £250,000. Under the current law they would inherit the life trust (including any capital gains) following the death of the spouse (in addition to their half of the amount over £250,000) but this change will mean that they now only receive their half of the amount above £250,000 as the spouse will be able to retain from his or her half. We expect that this will impact between 800 and 1,100 estates annually.¹³

Costs to Ministry of Justice

- 1.52 It is anticipated that the proposals under Option 1 would result in fewer claims being lodged by applicants. This would result in a reduction in the number of claims that are contested and enter the courts system which would result in a reduction in court fee income. However, this reduction in fee income would be accompanied by a reduction in court resources required and, as HMCTS operates on a full cost recovery basis, it is assumed that the financial impact on HMCTS would be neutral in the long run.
- 1.53 There will be minor costs to the Ministry of Justice involved in producing a statutory instrument to give effect to the automatic updates and also implementing the automatic updates.

¹³ Ministry of Justice, *Trusts (Capital and Income) Bill: Response to Consultation* (2011) p 41.

Costs to legal service providers and representatives

- 1.54 There maybe some small, indirect costs to legal services providers and financial advisors from these reforms. Options 1a and 1c will simplify processes and bring the laws into closer alignment with public sentiment. We therefore expect at the margin an overall reduction in the number of disputes and, therefore, demand for legal services. This would allow resources to be redeployed in other legal activities.
- 1.55 There may also be secondary impacts for financial representatives and solicitors of eliminating life trusts (in cases where there is a surviving spouse and children or other descendants) as under the current law, relations of the deceased may pay financial companies to manage life trusts.

Risks and sensitivities of Option 1

- 1.56 There is a risk that there is no reduction in the number of family provision claims. This may occur if there is no reduction in claims from spouses. This would not free up resources to applicants and defendants.
- 1.57 It is possible that these reforms would mean that there are more intestate estates in the future as people believe that the statutory provisions are fairer. This could result in benefits to some individuals in terms of fewer resources being used to prepare wills. It is expected that any such increase would be marginal.

Option 2: Family Provision

Description

2a) Child of the family

- 1.58 Someone who was treated as a “child of the family” by the deceased will be eligible to bring a claim for family provision regardless of whether that treatment was in relation to a marriage or civil partnership or was by a cohabiting couple or an individual.
- 1.59 There are only a very small number of reported cases of people applying as a “child of the family” since the 1975 Act came into force,¹⁴ and the number of people expected to be affected by the proposal is therefore also small; however the impacts in terms of greater access to justice and fairness for these individuals are large.

2b) Dependants

- 1.60 A person who was being maintained by the deceased immediately before the death will no longer have to show that the deceased contributed more to the relationship in financial terms than the applicant did, and that the deceased assumed responsibility for that maintenance. These factors will remain relevant to the court’s overall assessment of the claim but will no longer act as automatic barriers to making one.
- 1.61 As with the reform to “child of the family”, only a small number of reported cases have involved this concept and so the impact is expected to be relatively small,¹⁵ however again the impacts for dependants eligible under the proposals are expected to be substantial.

2c) Domicile

- 1.62 Family and dependants of a deceased person who wish to challenge the provision made for them by a will or under the intestacy rules shall be able to bring a claim if the deceased left property

¹⁴ This figure is based on a small sample of family provision cases from Westlaw’s case database, where fewer than five per cent of reported cases concerning family provision were related to “child of the family”.

¹⁵ Again this is based on Westlaw’s case database – less than 20 per cent of reported family provision cases were related to dependants.

which is subject to the succession law of England and Wales, regardless of whether the deceased was domiciled there.

- 1.63 Options 2a, 2b and 2c would all serve to increase access to justice to those that society deems should be eligible to make a family provision claim against estates. It is therefore assumed that the proposals would lead to an increase in the number of family provision claims as there are currently obstacles to potentially meritorious applicants due to the outdated and complex current law.

Benefits of Option 2: Family Provision

Benefits to potential beneficiaries

- 1.64 Under Option 2, potential applicants who under the current law are not eligible to make a claim for family provision would benefit from receiving a share in the estate if they are able to make a successful family provision claim. The benefit will depend on the size of the estate.
- 1.65 Under the reform to the “child of the family” (Option 2a), any possible claim that the current law is incompatible with the European Convention on Human Rights as incorporated into English law by the Human Rights Act 1998 would be avoided. Any such claim has the potential to be expensive and lengthy to defend. Reforming the law such that it complies beyond doubt would have a potential saving for the government, as any case would be brought against the UK government for failing to ensure compatibility with Convention rights.
- 1.66 Under Option 2b, persons who were being maintained by the deceased immediately before his or her death will be able to apply for family provision without having to prove that the deceased contributed more to the relationship in financial terms than the applicant did, and that the deceased assumed responsibility for that maintenance. This will bring associated resource savings to the dependant through removing administrative criteria that are necessary in bringing a claim.
- 1.67 Option 2c (or the alternative options) will reduce the need for the issue of domicile to be considered in cases where the chosen additional ground of jurisdiction is applicable and thus may enable the distribution of the estate to be settled sooner and with fewer resources which will directly benefit those who are entitled to a share in the estate.

Benefits to Ministry of Justice

- 1.68 As explained in the costs section above, it is expected that the proposal would lead to higher fee income as a result of more claims being contested. However, there would also be an increase in HMCTS resources required. It is assumed that the overall financial impact on HMCTS would be neutral in the long run as HMCTS operate on a full cost recovery basis for civil cases and any increase in costs would be covered by greater fee income.
- 1.69 If the issue of domicile is removed under Option 2c, these cases will be able to move more swiftly to the substantive issues and reach a swifter conclusion. This may reduce court hearing lengths and thus positively impact court processing times. It could also remove a potential obstacle to cases settling outside of court.

Benefits to legal service providers and representatives

1. 1 Legal service providers may benefit indirectly if the reforms under Option 2 result in an increase in the number of family provision claims and, therefore, a small increase in the demand for legal services.

Costs of Option 2: Family Provision

Costs to potential beneficiaries

- 1.70 A successful claim by a family member under the reforms highlighted above will impose a cost to other beneficiaries who would have benefited from the claimants’ exclusion under the current system. The cost will depend on the size of the estate.

- 1.71 There will be costs to both claimants and defendants if family provision claims are disputed. This may include requiring professional legal advice as well as potential delays in receiving entitlements. The cost of a family provision claim varies from case to case, however, an indication of the costs involved can be given using data from the Legal Services Commission about the legal aid costs. The average legal aid for a family provision claim is around £3,200. However, the expected increase in the number of claims under Options 2a and 2b is likely to be small.
- 1.72 Under Option 2c, there is limited information on the number of cases likely to be affected. Research has found that 5.5 million British nationals live overseas permanently and a further 500,000 live abroad for part of the year.¹⁶ Not all of this number will die domiciled outside England and Wales, and fewer still will leave family or dependants who wish to make a 1975 Act claim. However, the number affected by this condition could still be significant.

Costs to Ministry of Justice

- 1.73 If as expected, more cases are contested as a result of the proposals in Option 2 then HMCTS would require greater resources if current waiting times and quality of service is maintained. However, this increase in resource requirement would be accompanied by an increase in fee income. HMCTS operates on a full cost recovery basis for civil cases and it is therefore assumed that the financial impact on HMCTS would be neutral in the long run as fee income would adjust to reflect any change in operating costs.
- 1.74 From April 2013, family provision claims will only be eligible for legal aid where there has been an element of domestic violence, or for representation of a child where a child has been made party to the proceedings, or where there are other exceptional circumstances. It is expected that any increase in claims under Option 2 that will be eligible for legal aid (namely "child of the family" cases) is likely to be small and therefore any impact on LSC resources is expected to be minor.

Risks and sensitivities of Option 2

- 1.75 There is a risk that the expected increase in 1975 Act claims is much larger than anticipated. Given the small number of cases that Options 2a and 2b affect, any risk is likely to be concentrated on the issue of domicile. This would impose increased resource costs to applicants and defendants and increase capacity pressures on HMCTS. However, it is expected that any increase in claims due to the implementation of option 2c will be partially offset by a reduction in court time and legal resources of tackling the issue of domicile which would no longer be relevant in all cases with a foreign element.

Option 3: Entitlement and adoption

Description

- 1.76 Anything which a person under 18 inherits under the intestacy rules is held on trust and the beneficiary only becomes fully entitled on turning 18 or marrying or entering a civil partnership before reaching that age. Such interests are therefore said to be "contingent". Under the proposal, the contingent interest which a child has in the estate of his or her deceased parent will no longer be lost if that child is adopted.
- 1.77 In 2009, there were 4,655 adoptions in England and Wales, around 60% of which were children aged between one and four.¹⁷ It is not possible to know how many of these adopted children would have had an inheritance from an intestate parent, because a very specific pattern would have to apply (i.e. the adoption must take place after the death of the parent, the child must have inherited a contingent interest, and the trust must not have been varied); we imagine there are only a small number of such cases each year.
- 1.78 We expect Option 3 to improve the access to justice and entitlement of adopted children, who under the reform will not have their entitlement removed, regardless of whether a court application to vary the trust under which the interest is held has been made.

¹⁶ Institute of Public Policy Research, *Brits Abroad: Mapping the Scale and Nature of British Emigration – Executive summary* (2006) p 2.

¹⁷ Office for National Statistics, *Adoptions in England and Wales 2009*, Statistical Bulletin (4 November 2010) p 1.

Benefits of Option 3: Entitlement and adoption

Benefits to potential beneficiaries

- 1.79 A small number of individuals who under the current law do not receive their entitled share of the deceased's estate would now do so. The benefit to this group will be 100% of their beneficial entitlement as otherwise they would have lost it completely.
- 1.80 The reform will lead to resource savings for adopted children and their families in terms of legal costs and court fees as they would no longer have to vary the statutory trusts under which their interest is held. This benefit would only apply to those that under the current law would have varied the trust.

Benefits to Ministry of Justice

- 1.81 Under the reform, any possible claim that the current law is incompatible with the European Convention on Human Rights as incorporated into English law by the Human Rights Act 1998 would be avoided. Any such claim has the potential to be expensive and lengthy to defend. Reforming the law such that it complies beyond doubt would have a potential saving for the government, as any case would be brought against the UK government for failing to ensure compatibility with Convention rights.
- 1.82 It is expected that, as the courts would no longer need to consider applications for an order varying the trusts under which the interest is held before adoption, the proposal would lead to a net reduction in the HMCTS resources required.

Benefits to other government departments

- 1.83 For those involved in the administration of adoptions, it would avoid the risk of liability for failure to identify the required variation of the trust concerned.

Costs of Option 3: Entitlement and adoption

Costs to potential beneficiaries

- 1.84 The proposal would impose a cost to beneficiaries who would have received an entitlement to the estate in the absence of the reform.
- 1.85 In cases where the child is able to inherit the trust under the reform, there may be some ongoing costs of maintaining the trust until the child is 18 years of age. These would largely be borne by the trust i.e. normally coming out of the child's inheritance.

Costs to legal service providers and representatives

- 1.86 There may be some small indirect costs to legal services providers. Under the current law, an application has to be made to the court before the adoption for an order varying the trusts under which the interest is held in order for the child to inherit his/her entitlement. This would most likely involve legal representation, which would no longer be required if Option 3 is adopted.

Net impact of Options 1 to 3

- 1.87 The preferred approach is to implement Options 1, 2 and 3 together. Most of the impacts of these reforms fall to specific groups of beneficiaries and there are not thought to be any significant interactions across these Options; these impacts are therefore assumed to be additive.
- 1.88 The overall impact on the number of family provision claims is not known with certainty. As stated previously, Option 1 is expected to reduce the number of claims by bringing intestate provisions more in line with public expectations whilst Option 2 may result in an increase in claims by increasing the scope of those that are able to make a family provision claim.

1.89 The overall impact of Options 1 to 3 on the Ministry of Justice (including HMCTS and the LSC) is assumed to be neutral. The proposals will mainly ensure that the intestacy rules and eligibility requirements for family provision claims are less complicated and in closer alignment with public expectations which should improve the overall fairness of the system. It is possible that there will be a net change in the number of family provision claims following these reforms, although given the volume of cases involved any overall impact would expect to be relatively small.

3. One-In, Two-Out

1.90 The proposals in this Impact Assessment do not directly regulate businesses - any business impacts will be secondary and are thus out of scope of the One-In, Two-Out rule.

Annex A: Indicative volume estimates

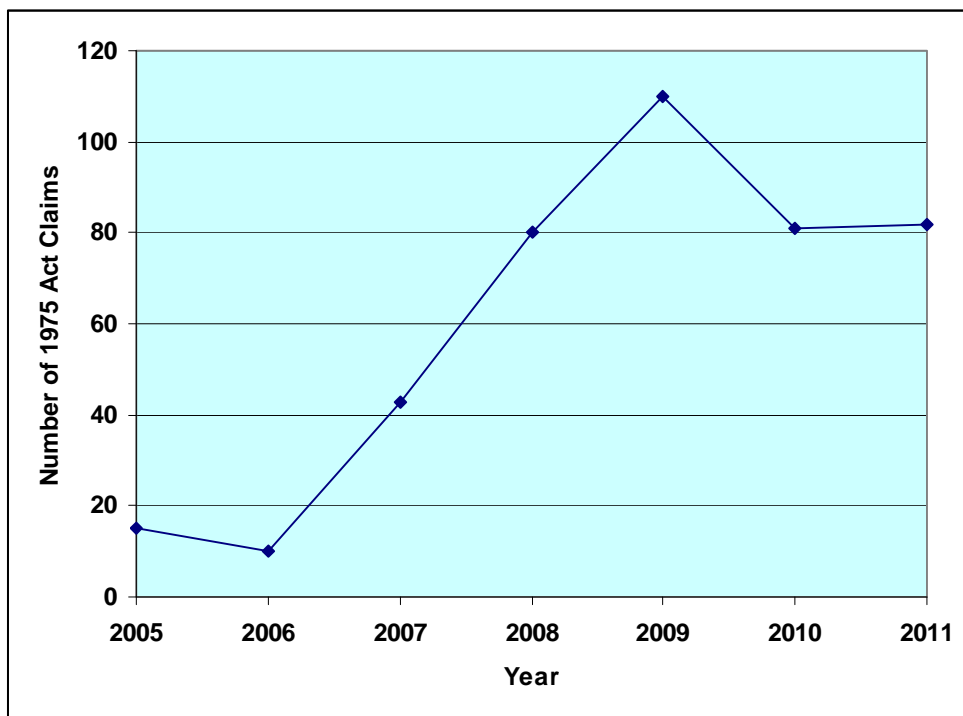
Number of intestate deaths

In 2011 more than 480,000 deaths were registered.¹⁸ In the same year there were around 260,000 grants of representation which are obtained to administer an estate. Nearly 40,000 of these were grants for intestate estates.¹⁹ Each year there are only around half as many grants of representation as there are registered deaths. For those 220,000 deaths where there was no grant, we assume around 80% of these deaths were intestate. This assumption is illustrative but may be made because the estates for which there is no grant are likely to be smaller, and smaller estates are more likely to be intestate.²⁰ We therefore estimate that in 2011 the total number of intestate deaths was approximately 220,000 although the actual number may be higher or lower than this.

Number of family provision claims

There is limited information on the total number of family provision claims although the data that is available suggests that few such claims reach court. Data is available on the number of family provision claims issued in the Chancery Division of the High Court in London from 2005 to 2011, but this only represents a subset of all family provision claims and would not capture some disputes that are settled before court. As can be seen in Figure 1 below,²¹ there has been a significant increase in family provision claims in this period. This may indicate the lack of alignment of the current inheritance laws with family structures and public expectations.

Figure 1: Number of 1975 Act Claims in the Chancery Division of the High Court (2005-2011)



Applicants can also make family provision claims in the Family Division of the High Court and in County Courts, however no information on the number of claims in these courts are available. We therefore assume, for indicative purposes, that the number of claims in the Family Division is the same as the

¹⁸ Office for National Statistics, *Births and Deaths in England and Wales, 2011*, Statistical Bulletin (17 October 2012) p1. Available at: www.ons.gov.uk/ons/dcp171778_283306.pdf, last visited 15 February 2013.

¹⁹ Ministry of Justice, *Judicial and court statistics 2011 – full report* (28 June 2012) table 2.11. Available at: www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011, last visited 15 February 2013.

²⁰ See Intestacy and Family Provision Claims on Death (2011) Law Com No 331, Appendix D.

²¹ Judicial and court statistics available at: www.justice.gov.uk/publications/statistics-and-data/courts-and-sentencing/index.htm. With effect from 2010 the Chancery Division improved the way all claims were recorded. As a result, figures for 2010 are not directly comparable with those for previous years. However the numbers of 1975 Act claims affected in 2009 and 2010 seem relatively consistent.

number in the Chancery Division and the number in the county courts is the same as in both Divisions of the High Court combined. From this, we can estimate that there were around 1,700 1975 Act claims between 2005, with approximately 320 cases in both 2010 and 2011.

Data provided by the Legal Services Commission indicates that for claims that received legal aid for the financial year 2010 to 2011, 14% settled before proceedings were issued. If we assume that the same proportion of all cases settle before proceedings are issued whether or not legal aid is involved, the total number of disputes from 2005 to 2011 would be closer to 2,000 cases.²²

Spouse but no children or other descendants

It is only possible to get an illustrative idea of how many people Option 1a will affect. It is estimated that of the approximately 21 million people living in England and Wales who are married or in a civil partnership, there are over 2 million people who have no children or other descendants but at least one living parent or full sibling (or a descendant of a full sibling).²³ We therefore assume that 9.5% of married people are in this situation. Death is however more likely to occur amongst the elderly and when people reach that stage in life they are less likely to have parents and full siblings (or their descendants) still alive and more likely to have their own descendants. To accommodate this risk, we assume that by death, this percentage will have almost halved to 5%. This proposal will only affect estates over £450,000. There were 1,045 intestate estates where a grant of representation was issued in England and Wales which were over £450,000 between November 2007 and October 2008.²⁴ We assume using the demographic figures set out above that between 5% and 10% of intestate deaths involved spouses who left parents or full siblings (or their descendants) but no children or other descendants. We therefore estimate that roughly between 50 and 100 estates are likely to be affected under the proposal.

²² This is likely to be an underestimate as there will also be claims which have settled before an application has even been made for legal aid which would not be included in this data. It also does not reflect the number of people involved as often claims will involve not only the applicant and the representative of the estate but also the wider family. The terms of the settlement are likely to be heavily influenced by the parties' perceptions of the likely outcome had the case proceeded to trial based on their understanding of the current law, often with the benefit of legal advice.

²³ Figure calculated using data from J Haskey, "Intestacy and Surviving Kin: Law Commission Research" [2010] *Family Law* 964.

²⁴ Intestacy and Family Provision Claims on Death (2011) Law Com No 331, Appendix D table 3. This data is based on the grants of representation issued excluding duplicates and grants where the death was more than five years before the grant.