

RESPONDENT INFORMATION FORM: CONSULTATION ON THE LAW OF SUCCESSION

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CONSULTATION QUESTIONS

Preliminary Comments

Before considering the detail of the consultation questions, I would like to outline an overarching concern with this project of succession reform and the manner in which the consultation is being undertaken.

I believe the policy objectives of the proposed reforms to the law need to be made clear, and that the public opinion evidence needed to form robust evidence-based policy on succession must be obtained.

The Consultation Paper states that the rules on intestate succession should be “as simple and as easily understood as possible whilst delivering fair outcomes” (para 1.9). The law of testate succession should “strike the appropriate balance between the autonomy of individuals...and protection from disinheritance for the family” (para 1.10). **What counts as a “fair outcome”, or where the “appropriate balance” is struck, depends on the goal that succession law is trying to achieve.** This is principally a political question, rather than a legal one. If the fairest outcome is to ensure that financially vulnerable family members of a deceased are protected, that may well justify a different set of rules on intestacy than if the fairest outcome is to give effect to what the deceased might have wanted. If the fairest outcome is to ensure that land and other property remains in economic circulation, that may well justify a different set of rules on protection from disinheritance than if the fairest outcome is to recognise and reinforce family structures. If the fairest outcome is to facilitate intergenerational redistribution of wealth in light of the difficulties facing young adults today in getting onto the first rung of the housing ladder, the appropriate balance between autonomy and protection from disinheritance may be struck in a very different place than if the fairest outcome is to respect the rights of the older generation to determine the fate of property which they have worked hard for a lifetime to accumulate.

If what is fair is to be determined based on the opinions of the Scottish people, then relevant public opinion evidence must be obtained. There has been no comprehensive attempt to obtain the views of the public on appropriate (or “fair”) succession rules at any stage of the process leading to this Consultation Paper. Although the views of lawyers and other stakeholders form an important and valuable part of the reform process, they alone cannot represent the views of Scottish society as a whole. Moreover, the normal idea that the parliamentary process confers legitimacy on a decision lacks bite here, since this is a highly political issue and yet one on which no party campaigned. Before legislation is put before Parliament, I would urge the Government to gather the public opinion evidence necessary to ensure that the legislation proposed will stand the test of time.

Policy aims of current succession rules

At present, succession law in Scotland starts from the liberal, market capitalist assumption that an individual is entitled to determine what happens to his own property after his death – roughly, the principle of “freedom to test”. Legal rules deviate from this principle in two main circumstances. First, where the individual has failed to exercise his freedom to test, the law will step in with default rules which, I

would submit, are designed to represent what the testator would have wanted – or more accurately, what we as a society think the testator *should* have wanted. This can be seen in the current rules of intestacy, where provision is made for a surviving spouse/civil partner to take ownership of the family home along with furniture and a “nest egg” of money (Succession (Scotland) Act 1964, ss 8 and 9), with remaining estate split between the spouse and any children. The provisions in favour of the spouse do not replicate the policy of deferred community property that operates in divorce law, by which a spouse takes from her ex-partner the property which she is deemed to have earned as a member of that couple. These provisions are also not needs-based, applying simply to all surviving spouses regardless of financial circumstances. There is no way to challenge these rules on the basis that the deceased would not have approved their effect, since we consider he should have made a will during life if the default rules were not to his liking. Simply, these rules represent what the deceased is deemed to have wanted.

The second circumstance in which the law currently deviates from the principle of freedom to test is in relation to protection from disinheritance. Under current rules, a surviving spouse/civil partner and children of the deceased are always entitled to claim legal rights on the moveable part of the estate, even where the deceased has explicitly written them out of his will. These rules are again not based on need, but stem from a historical (and arguably continuing) understanding that spouses owe a moral obligation to one another, and parents owe a moral obligation towards their children, to make some financial provision for them on death.

Policy aims of the reform proposals

(i) Intestate Succession

In relation to intestate succession, the Consultation Paper notes that a “fair outcome” is desired in addition to simplicity in the rules. This reiterates the position of the Scottish Law Commission that, “while the primary purpose of any reform of the law of intestate succession should be to ensure that the estate is fairly distributed, we have taken the view that the rules should be as simple as possible” (Report on Succession, para 2.3). Both the Report and the Consultation paper specify that the current policy by which a surviving spouse/civil partner can retain the family home should be maintained. Since making provision for this outcome complicates the rules, it must be assumed that the objective is justified on the alternative policy ground of “fairness.” But why is this outcome considered fair? Neither the Report nor the Consultation explains. The order of succession by which the estate is inherited after the spouse has obtained the proposed threshold sum is presumably also considered fair, but without any reason being given as to why.

In my view, the proposed rules are probably described as fair because they represent what the proposers believe Scottish society thinks the deceased would (or should) have wanted. I have no objection to intestate succession policy being framed on the basis of what we as a society think the deceased would have wanted, or even what we as a society deem fair. In fact, given that succession law, including intestate succession rules, almost invariably affects natural persons and almost inevitably affects every natural person in Scotland, I think there is a strong argument for saying that public opinion *should* be the basis of our legal policy in this area. However, if the Government are making policy on this basis, this should be clearly stated. If a policy

rationale was made explicit, it would give individuals who object to public opinion as the basis of our law-making here an opportunity to object. The current obfuscation makes it difficult for a meaningful debate on the policy underlying the law to take place. A clear policy rationale is also likely to make the law easier to understand for individuals, legal practitioners and the courts. The reforms proposed to cohabitants' succession entitlements in this Consultation have resulted in large part from the absence of a clear policy rationale underlying the Family Law (Scotland) Act 2006, s 29. It seems odd to repeat this error in relation to intestacy rules at the same time as reforming the law to correct it in relation to cohabitants' claims.

(i) Protection from disinheritance

In addition to its aim of “striking the appropriate balance between the autonomy of individuals...and protection from disinheritance for the family”, the Consultation Paper paraphrases the Commission Report in asserting that a spouse/civil partner should continue to receive protection from disinheritance because she was owed an obligation of aliment by the deceased until death. Children who are no longer owed such an obligation should no longer receive such protection from disinheritance (para 3.3). This explanation cannot fully justify the proposals set out in the Paper, since “Option One” in relation to the child’s protection from disinheritance proposes that every child retains the protection, not only those children entitled to aliment. Again, I assert that it would be of value to make the policy aim here more explicit in order for meaningful debate to take place, and to assist those seeking to apply the reformed law in future.

I would also point out that the proposed restriction to the protection from disinheritance for children suggested in Option Two is out of keeping with family policy background in Scotland and the UK. The broad trend in family law over the past twenty years and more has been towards recognising that, although adults may enter and leave intimate relationships with one another easily and permanently, the parent-child relationship is for life. For parents, this understanding can be seen especially in relation to financial support. Although children attain full legal capacity for most purposes at 16 in Scotland, the state evidently expects the financial support of parents to continue long beyond that age: parental income is taken into account in the assessment of eligibility for student grants and loans; minimum wage is not available to 16 year olds, and is set at a lower rate for 18 year olds than 21 year olds; under 35s are not entitled to housing benefit at the same rate as those beyond that age. For children, the state expects that life long relationship to manifest in adult children assuming responsibility towards aging parents: in *Reshaping Care for Older People* (2011), one of the Scottish Government’s “key messages” is that “we all have a role to play: families, neighbours, communities” in supporting older people” (p10). The Scottish Government’s analysis of 2011 Census data in *Scotland’s Carers* (2015) shows that 13% of carers in Scotland (around 54,000 people) in fact are children of lone parents or couples; the Census shows that around 10,000 under-16s are carers, suggesting that the huge majority of the 54,000 children caring for parents are adults.

Family law policy suggests that responsibilities of parents towards children and, as children become adults, vice versa, should last for life. The available evidence suggests that many in Scotland act on the same assumption. It would seem odd, then, for succession policy to pull in the opposite direction.

The need for evidence-based succession policy

I have argued above that robust legislation can only result from transparent policy ambitions, both to ensure that policy aims are meaningfully debated, and to assist those seeking to apply the new law. I would also argue that is essential to robust legislation in this area that it builds upon evidence-based policy. To this end, I would strongly urge the Government to gather the public opinion evidence necessary to determine what we as a society deem “fair” in the succession context.

The Consultation Paper states that the current law “no longer meets the expectations, or provides appropriately for the circumstances, of individuals in 21st century Scotland” (para 1.6). This assertion cannot sensibly be made when the latest public opinion evidence available is ten years old (pre-dating the financial crisis) and far more limited in scope than the extensive proposals contained in this paper (*Attitudes Towards Succession Law*, 2005). The rules of intestate succession, and the reforms to those rules proposed in the Consultation Paper, are almost entirely based on what it is assumed the public think the testator should have wanted. Similarly, the reforms proposed to the protection against disinheritance for children are justified on the basis of what parents of adult children would want. It is extremely difficult to understand why so many assumptions are being made about what Scottish people would want without evidence being obtained as to what the Scottish people actually *do* want.

Recap of the points made above

To sum up, I would call on the Scottish Government to (i) undertake a further consultation focused on the policy ambitions underlying reform to the law of succession and (ii) carry out meaningful research into current public opinion on the appropriate rules to apply where an individual dies intestate and the protections from disinheritance that should apply in relation to testate succession. **Evidence-based law in this area is considerably more likely to be fit for purpose** than law based on assumptions. It would be far better to gather this evidence, despite the delay it will cause, than to rush through reforms which may be unnecessary, unwanted or produce unintended results.

Chapter 2: Intestacy – Questions relating to Part 2 of the Commission’s Report

Preliminary comments on Chapter 2: My view is that the rules on intestacy should on the whole reflect the wishes and expectations of the public. I would reiterate the call for further evidence made above in this respect.

Q.1 Should rights in intestacy be property specific?

Yes No Don’t know

The Scottish Law Commission and the Scottish Government have both noted that, since succession rules will affect us all, certainty and simplicity in the law is desirable. The heritable/moveable distinction creates uncertainty and complexity. Its

historical roots date back to a time when women were unable to own heritage and the ancestral family (rather than the nuclear family) was viewed as the centre of family life. Societal conditions have changed drastically since then, and it is hard to see what purpose the distinction, a feudal relic, can serve today.

I would also agree with the [Land Reform Review Group](#) that removing this distinction in succession law ensures coherence with the broader programme of land law reform currently underway.

Q.2 Should the policy aim of any scheme of intestacy be that a surviving spouse/civil partner should be able to remain in the family home?

Yes No Don't know

The Consultation Paper indicates that this policy aim should be retained from the current law since “it is most likely to reflect a deceased spouse or civil partner’s wishes” (para 2.9). There is no evidence on which to base this assumption about the deceased’s wishes. If this is the basis on which law reform is to occur, then as noted above, public opinion evidence should be obtained on this issue. Evidence is particularly desirable here since a provision ensuring a spouse stays in the family home decreases the simplicity of the rules, in conflict with the stated policy ambition to keep the law as simple as possible.

It is arguable that the current rules are motivated not (or not only) by the assumed wishes of the deceased, but by the desire to ensure a surviving spouse is not rendered homeless by the death, hence the requirement that she be ordinarily resident in the home before she can inherit it (Succession (Scotland) Act 1964, s8(4)). A policy ambition of this kind could be equally served by granting the surviving spouse a liferent over the house. The liferent approach would have advantages if protection of (adult) children was also considered an aim of the reforms since (i) it would reduce the possibility of children being disinherited by default since the entire estate is less likely to be eaten up by the threshold sum; (ii) where a parent is not married to his co-parent on death, his children would not be effectively disinherited by his home going to a step-parent against whom they have no rights on death (a “potential unfairness” referred to in the Consultation Document at para 2.20).

My own view is that a surviving spouse should be entitled to remain in the family home. The significance of a secure home to physical and emotional well being is recognised by the protection in article 8 of the ECHR, and the law should not interfere with that security at what is already a traumatic time for a bereaved spouse. Whether the surviving spouse obtains ownership or a liferent is a matter for public opinion evidence.

Q.3 Would the policy aim be achieved by the scheme of intestacy proposed by the Scottish Law Commission, after further consideration of the level of the threshold sum?

Yes No Don't know

Q.4 Should the threshold sum be set to strike a balance between the rights of a surviving spouse/civil partner and the deceased's children?

Yes No Don't know

Yes. I would argue that current Scottish societal understandings of the parent-child relationship, as reflected in the governmental family policies referred to in my preliminary comments, demand that children, including adult children, be given an entitlement to inherit on the death of a parent.

However, I would again urge the Government to obtain public opinion evidence on this question to ensure the policy being pursued is in line with societal wishes and expectations.

Q.5 What do you think the level of threshold sum should be? (Please circle your answer)

- A - £335,000
- B - £528,000
- C - £558,000
- D - £610,000
- E - £650,000

I do not think it is possible to give an answer to his question without evidence as to the value of estates in Scotland. I would call on the Government to obtain this evidence before a sum is determined.

I would note, however, that if the primary purpose of topslicing the threshold sum for the benefit of the surviving spouse is to ensure she retains ownership of the family home, I believe £335,000 would largely meet that objective. Since 94% of Scottish properties are valued lower than even this minimum proposed threshold sum (as per the figures in the Consultation Document), and many of those worth more than £335,000 will actually be owned in common by spouses, the number of estates where a £335,000 threshold prevents the surviving spouse remaining in the family home is likely to be extremely small. I believe that these estates are also more likely to be estates in which a will has already been made, since anecdotal evidence suggests wealthy individuals are more likely to make a will, although robust evidence to back up these anecdotes would be very useful. There would accordingly seem little reason to set the threshold sum higher.

Q.6 Should the spouse/civil partner retain the family home irrespective of value?

Yes No Don't know

As in my answer to Q2 above, I believe the surviving spouse should be entitled to remain in the family home. Whether this should come about through ownership or liferent is a matter for public opinion evidence.

Q.7 Should the threshold sum be reduced by the value of survivorship destinations in the title to heritable property?

Yes No Don't know

If the primary purpose of topslicing the threshold sum is to ensure the surviving spouse retains ownership of the family home, that purpose will almost inevitably be met by the existence of a survivorship destination. That being the case, if the threshold sum seeks to strike a balance between the rights of surviving spouses and children which I believe it should, it would be fair to reduce the threshold sum by the value of survivorship destinations.

Q.8 Should the threshold sum take into account the value of survivorship destinations in the title to moveable property?

Yes No Don't know

If the threshold sum seeks to strike a balance between the rights of surviving spouses and children which I believe it should, it would be fair to reduce the threshold sum by the value of survivorship destinations re moveable property.

Q.9 Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, should the sum be deducted from the deceased's intestate estate and the surviving spouse/civil partner be entitled to half of the resulting amount, if any, with the rest of the estate shared among the issue?

Don't know

Where the value of estate passing to the surviving spouse by way of survivorship destination(s) exceeds the threshold sum, then any claim to the threshold sum should be deemed satisfied by that. The intestate estate should simply be split equally between the spouse and the issue.

Q.10 Should there be a qualifying period before which a surviving spouse/civil partner could acquire some or all of the threshold sum?

Yes No Don't know

I think this question is asking whether spouses should be married for a minimum qualifying period before they qualify for rights in intestacy. If that is correct, my answer is no.

Q.11 Where the value of the family home exceeds the threshold sum, should there be a period during which the property could not be sold?

Yes No Don't know

I consider that the significance of a secure home to physical and emotional well being (as recognised by article 8 of the ECHR) should be recognised by the law, particularly at what is already a traumatic time for a bereaved spouse. For that reason I would argue strongly that if a surviving spouse has to leave the family home, a reasonable period of time must be given to enable her to come to terms with that fact and make the necessary arrangements.

Q.12 If you have answered yes, should that period be two years?

Yes No Don't know

Q.13 Where a person renounces their rights under an estate should they be regarded as not having survived the deceased?

Yes No Don't know

This would help to keep the intestacy rules simple.

Q.14 Where a person renounces their entitlement under an estate should they also be able to renounce the entitlement of their issue?

Yes No Don't know

Q.15 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 2.36 above.

The Commission propose that the existing list of categories of relative should continue. This is another issue on which public opinion evidence would be useful and could either confirm that the current list is correct or indicate that the law should be reformed to meet societal wishes and expectations.

Chapter 3: Protection from Disinheritance

Q.17 Should a spouse or civil partner be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes No Don't know

As explained in earlier comments, I believe public opinion evidence should be determinative of this question.

My own view, however, is that a surviving spouse or partner should be protected from disinheritance in recognition of the significance that we as a society place on the relationship between spouses or civil partners. I agree that a fixed share is much clearer and simpler than the existing succession rules and is a very workable approach to protection from disinheritance.

Q.18 Should that fixed share be 25% of what they would have received on intestacy?

Yes No Don't know

I do not think it is possible to give an answer to his question without evidence as to the value of estates in Scotland. What would 25% of an average estate be worth? Some guidance on this issue would make it easier to determine whether 25% is an appropriate figure to recognise the significance of the relationship between spouses. I would call on the Government to obtain this evidence before a percentage is determined.

Q.19 Should all children be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes No Don't know

I believe the protection of children from disinheritance is appropriate recognition of the lifelong relationship between parent and child, a relationship which is emphasised within family law policy more broadly. Strong public opinion evidence to the contrary would challenge this belief, however, and I would again call on the government to obtain that evidence.

Q.20 Should a child's claim from a fixed share from the whole estate (heritable and moveable) be 25% of what he or she would have received on intestacy?

Yes No Don't know

I do not think it is possible to give an answer to his question without evidence as to the value of estates in Scotland. What would 25% of an average estate be worth? Some guidance on this issue would make it easier to determine whether 25% is an appropriate figure to recognise the significance of the relationship between spouses. I would call on the Government to obtain this evidence before a percentage is determined.

Q.21 Should it be possible to renounce legal share?

Yes No Don't know

Q.22 Should renunciation remove that person's issue having a right to a legal share of the estate?

Yes No Don't know

I consider the protection from disinheritance a recognition of the lifelong relationship between parent and child. This same relationship does not exist in the same way between grandparent and child. I consider it reasonable for the rights of further descendants to be determined by the actions of their parents here.

Q.23 Should it be possible to apply to the court to pay the legal share in instalments?

Yes No Don't know

This would be a pragmatic solution in relation to certain estates where assets may not easily be realised, although the criteria on which an application of this kind may be granted should ensure it is used only where good cause can be shown, and not to unnecessarily prejudice a legal share claimant.

Q.24 Should dependent children be able to claim a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent?

Yes No Don't know

Need has not previously been a policy aim of Scottish succession law and I believe it would undermine the importance of the lifelong parent-child relationship in family law policy generally to introduce a protection from disinheritance rule that is based on the child's need.

Q.25 Would providing for dependent children to be able to claim a capital sum payment, have an impact on the efficient winding up of estates?

Yes No Don't know

Q.26 Would a time limit of 1 year from death, unless on cause shown, assist in the efficient winding up of an estate?

Yes No Don't know

Q.27 Should dependent children with capacity be able to renounce a claim for a capital sum payment?

Yes No Don't know

Although I do not think a capital sum payment should be introduced, if it is, I can see no basis on which a child with capacity should be prevented from renouncing it.

Chapter 3A: Agricultural Units

Q.30 In examples 12-15 on pages 38-9, would there be scope for the legal share to be met by the principal beneficiary borrowing against the assets they have inherited (i.e. mortgaging a mortgage-able element of the agricultural unit)?

Yes No Don't know

I agree with Dr John MacLeod that further time is needed to investigate these questions fully and share his doubts over the robustness of the modelling carried out so far.

Q.31 Should there be exemptions (limited or otherwise) for certain businesses from claims for a spouse/civil partner's legal share where this will compromise the commercial viability of the business?

Yes No Don't know

There are two potential situations where an exemption may be appropriate.

The first concerns businesses where the loss of particular assets will render the business commercially non-viable. In this circumstance, although these assets should be included within the valuation of legal share, they should be **exempt from transfer** to the legal share claimant. Legal share should be paid from elsewhere in the estate or, where this is not possible, provision should be made for payment of legal share in instalments from the future profits of the business.

The second concerns businesses of marginal profitability. For such business, not only would the loss of the assets render the business commercially non-viable, the requirement to pay legal share in instalments would in itself render the business non-viable. In other words, the business is insufficiently profitable to remain viable when faced with a legal share debt. These businesses should be **fully exempt from legal share claims**.

Although the assessment of the commercial viability of a business introduces an element of complexity into the rules, I think the policy here should follow the approach taken in actions for financial provision on divorce, where the court is slow to order the disposal of an income-producing asset (see Family Law (Scotland) Act 1985, s 10(6)(d); *Geddes v Geddes*, 1993 SLT 494; *Mayor v Mayor*, 1995 SLT 1097; *M v M*, [2014] CSOH 136.) Ultimately all the beneficiaries may suffer if a working business is dismembered. I also agree with Dr MacLeod's argument that exemption of marginally profitable businesses is necessary as a matter of coherence with the further land reform agenda.

Q.32 If there were to be exemptions from claims for legal share, do you think it would be possible to define those types of businesses which would be exempt with precision?

Yes No Don't know

My preference would be for a definition containing certain criteria (value of business, number of workers, area of land and/or premises) with the overarching test whether the business would no longer be viable were an immediate payment of legal share to be made from the estate. Whether the test has been met should be a matter for the court. Existing divorce jurisprudence on this issue should offer some guidance as to when the viability of the business precludes immediate disposal of all or part thereof. As in claims for financial provision on divorce, negotiation between parties "in the shadow of the law" may become the most common form of dispute resolution where this issue arises.

Q.33 What criteria could be used to inform any definition of an excepted business on the basis that any formula must be clear and certain and able to withstand the tests of robustness, fairness and proportionality?

See the answer to Q32.

Q.34 What could be the impact of a formula which was not clear and certain?

The danger is that litigation results, and that the party with greater financial assets is able to win the case simply by exhausting the other party's financial resources before the court has a chance to determine the merits. As indicated in Q32 however, the example of financial provision on divorce offers same basis to be hopeful that negotiated solutions may be preferred. In addition, the introduction of deferred payment of legal share by instalments in these circumstances, as I called for in my answer to Q31 above, would mean the financial incentive for the party who did not

wish to pay the legal share would considerably less than if businesses could be entirely exempt. That too may serve to reduce the appetite of parties for litigation.

Chapter 4: Cohabitants

Q.35 Do you agree with the criticisms set out above of section 29 of the Family Law (Scotland) Act 2006?

Yes No Don't know

Much like the proposals on reform to the rules of intestacy and protection from disinheritance outlined in the Consultation Paper, s 29 of the 2006 Act lacks a clear rationale. I agree with the comments of Janys Scott QC in *Windram, Applicant* 2009 Fam LR 157 to the effect that we need guidance as to what aim an award under s 29 is intended to achieve.

Q.36 Do you agree that section 29 of the Family Law (Scotland) Act 2006 should be repealed?

Yes No Don't know

The provision as currently drafted is fundamentally flawed. There seems little point in attempting to tweak what is currently there through amendment. Repeal of the section and insertion of a freshly drafted provision seems more likely to achieve the desired result of clear, coherent legal provision for cohabitants in succession.

Q.37 Are the factors set out in Recommendation 38 sufficient/appropriate to determine if the individual was a cohabitant?

Yes No Don't know

The Commission's reliance on the 'admirable signposts' used in social security law to determine cohabitation following *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 is sensible, in my view, and should enable practitioners and the courts to make use of the jurisprudence in that area to determine claims based on the proposed new legislation. It should be made clear in any legislation that the factors are non-exhaustive and that no one factor is determinative, in order for the diversity of types of cohabitation to be dealt with appropriately.

One thing which is not clear to me is how this definition is designed to interact with s 25 of the 2006 Act in its current form. It would be extremely confusing to have one definition of cohabitant in use for succession claims, and another for claims on the breakdown of cohabitation. It may be that this definition should apply in relation to all the succession provisions in the 2006 Act.

Q.38 Should a cohabitant be able to make a claim in testate estates?

Yes No Don't know

Again, I think public opinion evidence is key here. Do we as a society think that a deceased *ought to* have made provision for his cohabitant in the situation where he has disinherited her in his will? The opinion evidence should be determinative.

In relation to family law policy more generally, the position of cohabitants is ambiguous. When introducing the cohabitation regime under the Family Law (Scotland) Act 2006 ss 25-29, the Government was at pains to stress that cohabitation was not equivalent to marriage/civil partnership (see the [Policy Memorandum](#) accompanying the Family Law (Scotland) Bill (SP Bill 36-PM) at para [71].) The relationship between cohabitants does not have the same recognition in law as the relationship between spouses. To that extent, it would not be anomalous in family policy terms to deny a cohabitant the right to claim in testate cases despite the fact a spouse in the same position would be entitled to a legal share.

On the other hand, judicial interpretation of the 2006 Act provisions has made clear that financial claims between cohabitants are not to be treated on a strict restitutionary basis, as they would be between strangers or even siblings (see *Gow v Grant* (2013) SC (UKSC) 1 and Griffiths, Fotheringham & McCarthy, *Family Law* (4th ed) (2015) at paras 13-93 to 13-98.) Cohabitation is less than marriage, but still more than other family relationships.

An additional complication is added by the fact that the cohabitation provisions in the 2006 Act had the express goal (among others) of protecting economically vulnerable parties, presumably including bereaved cohabitants and their children. If that goal continues to underlie cohabitation policy, it creates an argument for protection from disinheritance for cohabitants that actually does not exist for spouses: the Government has expressly stated that protection from economic vulnerability is a rationale for succession law re cohabitants, when no such statement has been made in relation to succession law re spouses or children.

On balance, I think coherence with the other policy considerations does support an entitlement for a cohabitant to claim on a testate estate. The distinction between marriage/CP and cohabitation is appropriately recognised in the proposals by the need to determine the "appropriate percentage" to which a cohabitant is entitled. An automatic claim would ensure economically vulnerable former cohabitants are protected, albeit the protection would extend beyond just that group of cohabitants. Family law policy would not be rendered incoherent by a cohabitant claim on a testate estate. As I stated before, however, I believe that public opinion evidence should be determinative here.

Q.39 Should a cohabitant receive a percentage of what a surviving spouse/civil partner would have received?

Yes No Don't know

Yes. At the centre of the distinction drawn in law between marriage and cohabitation is the idea of commitment. (I expand on this idea at pp 263-366 of F McCarthy, "Playing the percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships" 2011 *New Zealand Universities Law Review* 243, available [here](#).) In questions of family property law, marriage/civil partnership operates as a shorthand signifying commitment to a relationship. The reality of an individual marriage may be that little evidence of commitment exists – parties may even be separated - but that reality is not relevant, since the commitment is evidenced through the marriage itself.

Cohabiting couples do not have this formal representation of their commitment. It is necessary for them to demonstrate commitment through their actions. Assessing this demonstration of commitment as against the "gold standard" represented by marriage is an appropriate basis on which to judge how "marriage-like" a cohabiting relationship has been. In this way, the distinction between marriage and cohabitation in law can be maintained, with only cohabitants who have demonstrated the highest levels of commitment – as with the claimant in *Windram, Applicant* who had lived with the deceased for 25 years, run a business and raised two children with him – becoming entitled to the same provision that a surviving spouse or civil partner would be. There is huge variety in cohabiting relationships, and the percentage approach proposed by the Commission seems a workable way to deal with that variation in a manner consistent with existing family law policy.

Q.40 Are the factors set out in Recommendation 39 sufficient/appropriate to determine the percentage a cohabitant should receive?

Yes No Don't know

These factors seem an appropriate basis on which to determine the level of commitment to the relationship. It should be stressed in any legislation to follow that the list is not exhaustive, no one factor is determinative and the factors must be looked at in the round.

Q.41 Where there is a surviving spouse/civil partner and a cohabitant in an intestate estate, should the value of the estate which the spouse/civil partner would inherit be shared between the cohabitant and the spouse/civil partner in line with recommendation 42(1)?

Yes No Don't know

Again, I think it is for the public to decide where the appropriate balance should be struck between the spouse/civil partner, the cohabitant and children of the deceased.

Q.42 Where the deceased dies testate, should the cohabitant's entitlement to the appropriate percentage of a spouse's legal share of the deceased's estate be in addition to the legal share of the spouse or civil partner?

Yes No Don't know

Again, I think it is for the public to decide where the appropriate balance should be struck between the spouse/civil partner, the cohabitant and children of the deceased.

Q.43 Should, unless permitted by the court, any application for a proportion of the deceased's estate be made within the period of 1 year from the date of the deceased's death?

Yes No Don't know

In a situation where conflict might arise between a surviving cohabitant and other potential beneficiaries of the estate, the ideal outcome is for an agreement to be reached between parties without litigation becoming necessary. The current six month time limit does not allow sufficient time for an amicable resolution to be sought, particularly taking into account the difficult emotional circumstances which tend to delay the start of discussions. Research indicates that practitioners have resorted to raising and immediately sisting actions to get around the time bar, which wastes time and money for clients, the court and the Legal Aid Board. (See Wasoff et al, *Report on legal practitioners' perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006*, pp134-136.) The extended time period of one year should help to alleviate these difficulties. The provision to extend the time limit on cause shown is also welcome for these reasons.

Chapter 5: Additional Matters

Q.46 Should capacity to make or revoke a will, in the circumstances set out at recommendation 45, be determined by the law of the testator's domicile at the time of making or revoking the will?

Yes No Don't know

Q.47 Should the rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) be abolished?

Yes No Don't know

I refer to the work of Professor Roderick Paisley on this issue.

Q.48 Should the right at common law to claim *aliment jure representationis* be abolished?

Yes No Don't know

I am not aware to what extent, if any, this right remains of use in practice.

Q.49 Should the right at common law to claim temporary aliment be abolished?

Yes No Don't know

This remedy may be seldom used but it remains essential to surviving spouses/civil partners who have few or no other sources of funds while they wait for the estate to be wound up.

Q.50 If the requirement to obtain a bond of caution is removed should any measures be put in place to protect an estate given that there are very few calls on bonds of caution currently?

Yes No Don't know

The main risk of removing the requirement for caution has been identified both by the Commission and in the Consultation paper: the risk of fraud, negligence or maladministration of the estate. In addition, there are more nebulous situations in which the court may have doubts about the proper administration of the estate, for example in families where there is already pre-existing conflict; where there are competing claims in relation to the estate of the deceased; or where the executor-dative is in conflict with other family members.

For those reasons the court should retain discretion to impose the requirement of caution should it consider that there is a degree of risk associated with the distribution of the estate. That discretion should extend both to executors-dative and to executors-nominate.

If caution is abolished, I would support the creation of a new power for the court to exercise its discretion to refuse the appointment of an executor, whether an executor-nominate or an executor-dative. Confirmation of the executor represents the only point in the whole process of an executry where there is any public scrutiny of the administration of an estate. Beyond the confirmation process there are no checks on how the estate is administered or distributed and executors are largely free to do as they see fit. This would alter the court process from a purely administrative exercise to one dealing with matters of judgement. In my view this would be a desirable change. It is at least arguable that dealing with the estate of a deceased person should be overseen, however lightly, by a public body and that executors should be subject to greater accountability.

A further desirable step would be to require a Statement of Distribution to be returned to the court at the end of the executry process: this would act as an incentive for executors to carry out their duties in a proper manner and would create a means of ascertaining that the estate had been distributed in accordance with the law. Some scrutiny of the confirmation process is, therefore, desirable so that persons appointed to the office of executor are considered fit and proper to administer the estate.

Q.51 Should the court have the power to refuse to appoint an executor dative?

Yes No Don't know

See the answer to Q50.

Q.52 If the court is given a discretionary power to refuse to appoint an executor-dative should small estates be excluded?

Yes No Don't know

The reasons for oversight of the executry process outlined in answer 50 outweigh the need for expediency in the small estates process.

Q.53 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the prior rights of the spouse exhaust the estate and the spouse is the executor-dative be excluded?

Yes No Don't know

In this situation, the justifications for providing the court with a discretion, as outlined in my answer to Q50, do not apply. There is no need for the court to have a discretion in this situation.

Q.54 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the executor-dative is the sole beneficiary be excluded?

Yes No Don't know

As in my answer to Q53 above, there are no risks which require to be safeguarded against by exercise of the court's discretion in this situation.

Q.55 Are there any other categories of estates which could be excluded?

Yes No Don't know

Q.56 Would a non-exhaustive list of factors which the court may want to take into account when considering a petition for appointment as executor-dative be helpful?

Yes

No

Don't know

Q.57 If so what factors should be included?

- Any history of fraud or other crimes of dishonesty on the part of the petitioner
- Any history of bankruptcy or other evidence of financial mismanagement on the part of the petitioner
- The views of potential beneficiaries under the estate as to the appointment of the petitioner

Q.58 Should a petition for appointment as executor-dative be accompanied by (tick as many as you think would be necessary):

- a family tree
- a scheme of division
- a letter from DWP providing information on benefits in relation to the deceased?

Q.59 Please set out below any other documentation which could usefully be included.

I have nothing further to suggest.

Q.60 Should the current process of intimation be replaced by personal intimation?

Yes

No

Don't know

Conflict between family members is one reason why the court may wish to refuse the appointment of an executor. For this protection to operate effectively, other members of the family must be given the best opportunity to know that a petition has been made in the first place. Posting on the walls of court is unlikely to achieve this result.

Q.61 If 'Yes', to whom should intimation be made?

Potential beneficiaries: any surviving spouse/civil partner, cohabitant or issue. If there is no spouse, civil partner, cohabitant or issue, siblings and parents should be notified, and so on through the more remote classes of descendant.

Q.62 Should the current appeal period be extended?

Yes

No

Don't know

I think this question may be intended to ask about the intimation period for a petition for appointment as executor-dative? If so, yes, I think the period should be extended

to 21 days, which is a more realistic timescale for any necessary objections to the appointment to be made and allows some small opportunity for discussion between interested parties and the petitioner in the hope that issues can be resolved without an objection being necessary.

Q.63 If 'Yes', what should the period be and why?

See the answer to Q62 above.

Q.64 In terms of the suggested safeguards please indicate below what combination would be necessary to provide a proportionate safeguard solution (tick as many as you think would be necessary).

- Power to prevent the appointment of an executor-dative
- Non-exhaustive list of factors to be taken into account
- Attachment of other documentation to the petition e.g. family tree
- Personal intimation
- Extended appeal period
- Other*

I consider all of the above to be necessary as per my answers above.

Q.65 Do you agree with the data provided on page 65?

Yes No Don't know

Q.67 Should the court have the power to refuse to confirm an executor nominate?

Yes No Don't know

See the answer to Q50 above.

Q.68 Are there likely impacts of such a change?

Yes No Don't know

As noted above, this turns the procedure from a purely administrative process into one where some element of judicial discretion is involved. I do not consider this an undesirable outcome, although I appreciate that it may increase the time and costs associated with an executry in some cases.

Q.69 How might any impact of such a change be mitigated?

I have no suggestion to make here.

Q.70 Should the doctrine of equitable compensation be abolished?

Yes No Don't know

In my understanding, this doctrine can have no further application in Scots law following the provision in the current Succession Bill that where a liferent is brought to an end early, the fee should vest immediately. For the avoidance of doubt, abolition should be expressly provided for.

Q.71 Should a marriage or a civil partnership result in the revocation of an earlier will?

Yes No Don't know

This is again an area in which public opinion evidence should be determinative, but in my view the policy reasons underlying the *conditio si testator sine liberis decesserit* are not replicated in relation to marriage/civil partnership.