



**STEPCHILDREN AND THE LAW OF
SUCCESSION: WHERE SHOULD
THE BALANCE LIE?**

SLSA, RGU Aberdeen – 10th April 2014

INTRODUCTION

- Link to abstract/title?!
- Focus: step-parents vs deceased's children from a former relationship (intestacy)
- Importance?



DIFFERENT APPROACHES TO INTESTACY

- Fixed fractional share
 - Ireland – Succession Act 1965
 - Balance?
- Preferential share/Statutory legacy
 - Balance?
 - Conduit theory
 - Problems in mixed/blended families



RESPONSES TO THE PROBLEM

- Canada
- British Columbia
 - Wills, Estate and Succession Act 2009
- Manitoba
 - Intestate Succession Act
- Alberta
 - Wills and Succession Act 2010
- United States of America (18 states)
 - Uniform Probate Code



RESPONSES TO THE PROBLEM

- England and Wales
- Administration of Estates Act 1925
 - Trustees' Powers Bill 2013
- Inheritance (Provision for Family and Dependents) Act 1975

- Australia
- National Committee for Uniform Succession Laws (New South Wales Law Reform Commission)



REASONS AGAINST REFORM

- Law Commission for England and Wales:
 1. Focused on prioritising the surviving spouse
 2. Doubted that a surviving spouse's share should be affected by presence of children from a former relationship
 3. A desire for simple rules
 4. Doubted the relevance of the conduit theory
 5. Believed that parents are in best position to judge whether to give children something



DIFFICULTIES WITH THESE ARGUMENTS?

1. Desire to prioritise the spouse does not have to be abandoned... it's a question of balance
2. Should a surviving spouse's share be affected by presence of children from a former relationship?
 - Status as spouse?
 - Evolution of intestacy schemes – Status as parent/conduit?
 - Is it unfair to treat the situations differently?



DIFFICULTIES WITH THESE ARGUMENTS?

3. Importance of simple rules?
 - Simplicity of rules v complexity of families
 - Fairness?

4. ‘Conduit theory paints too simplistic a picture of family relationships... step-parent will not always be an unreliable [conduit]’
 - Shouldn't be dealing in absolutes
 - Likelihood/probability
 - Public recognition of heightened threat



DIFFICULTIES WITH THESE ARGUMENTS?

5. Does the notion that parents are the best people to judge and to decide what to leave the children from a former relationship apply?
 - Mistakes the purpose of intestacy regimes?
 - Suggests that parents have chosen to die intestate...



PURPOSE OF INTESTACY REGIMES

- Intestacy schemes - ‘Intent-serving’
 - 2010 Public survey (Nuffield):
 - Where the children were all common, the support for ‘all to spouse’ was 51%
 - Only 11-16% of respondents favoured ‘all to spouse’ where there were children from a former relationship, irrespective of age
 - NB: Support for ‘prioritising’ the surviving spouse
 - Responses to reform initiatives (1950, 1989, 2011)



PURPOSE OF INTESTACY REGIMES

- J E Dekker and M V A Howard, 'I give, devise and bequeath: an empirical study of testators' choice of beneficiaries' (NSW Law Reform Commission Research Report 2006)
 - Limitations
 - Clear distinction in the distribution of estates where children from former relationship existed
- Practitioners responses in England and Wales?



PROPOSAL

- Tricky!
 - Professor Kerridge (2007)
 - Professor Burns (2013)
- Relevance of home-ownership
 - Post-Stack future?
- Automatic co-ownership of the family home – too ambitious & too asset-specific



PROPOSALS?

- Learn from North American experience?
- BC: Reduce (-50%?) statutory legacy where there are children from a former relationship
 - Strengths? Amend family provision legislation
 - Weaknesses?
- Have a very low statutory legacy + 50% or the remainder OR just 50% of entire estate?
 - Rejected because....?



CONCLUSION

- Socio-legal context for intestacy provision – radically changed
- Succession rights for cohabitants?
- This ‘inconvenient truth’ needs to be responded to in a more pro-active way

