

# Distribution of Intestate Estates in Non-Traditional Families – A way forward?

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## **Abstract**

The rules governing the distribution of an intestate estate applied pursuant to section 46 of the Administration of Estates Act 1925 as amended by section 1 of the Inheritance and Trustee’s Powers Act 2014 ensure very generous provision for surviving spouses in England and Wales. However, notwithstanding the merits of such provision, the extent to which the regime strikes an appropriate balance in distributing such an estate, in particular, between the surviving spouse and a deceased’s children from a former relationship, if present, appears somewhat dubious. Part I briefly positions the intestacy regime adopted in England and Wales in an international context, placing a special emphasis on the protection afforded to the interests of a deceased’s children from a former relationship in a number of different jurisdictions. Part II then critiques the arguments recently advanced by the Law Commission for England and Wales against reform in this area and argues that such reform is, in fact, warranted. On this basis, Part III presents a novel proposal for consideration.

## **Introduction**

The rules governing the distribution of an intestate estate applied pursuant to section 46 of the Administration of Estates Act 1925 as amended by section 1 of the Inheritance and Trustee's Powers Act 2014 ensure generous provision for surviving spouses in England and Wales – significantly greater provision than that afforded to surviving spouses in many other common law jurisdictions.<sup>1</sup> While, on one hand, such provision is admirable in its efforts to provide robust financial protection to potentially vulnerable surviving spouses, the argument could be made that such provision in fact overprovides for many surviving spouses and unnecessarily reduces or eliminates the ability of the deceased's surviving children to participate in the distribution of their parent's intestate estate. In particular, the extent to which the current regime strikes an appropriate balance in distributing such an estate between the surviving spouse and a deceased's children from a former relationship, if present, appears somewhat dubious.

'Conduit theory' has long been used to justify the prioritisation of the surviving spouse over a deceased's children in relation to the distribution of a deceased's estate on intestacy. According to the theory, the surviving spouse may be viewed as a 'conduit' or medium through which the deceased's estate may ultimately be devolved to the next generation. However, where the deceased has children from a previous relationship, this theory is generally considered to be more uncertain with step parents often regarded less reliable conduits.<sup>2</sup> Given the substantial percentage of non-traditional families in England and Wales,<sup>3</sup> as well as the consistently significant level of intestacy in the jurisdiction,<sup>4</sup> the legitimacy of the regime as it is currently applied could be questioned.<sup>5</sup> Moreover, recent empirical research appears to show a sharp distinction in public opinion as to how intestate estates should be distributed depending on whether there was a nuclear or non-traditional family.<sup>6</sup> Despite this, the Law Commission for England and Wales failed to recommend reform to take better account of the interests of a deceased's children from a previous relationship in its latest review.<sup>7</sup> With the exception of recent contributions by Kerridge, this decision and the rationale

behind it has, however, attracted little analysis or comment in the interim.<sup>8</sup> This article seeks to fill this gap.

Part I briefly positions the intestacy regime adopted in England and Wales in an international context. It contrasts the approach applied pursuant to the 1925 Act with that applied in a number of different jurisdictions, placing a special emphasis on the protection afforded to the interests of a deceased's children from a former relationship. Part II then critiques the arguments recently advanced by the Law Commission for England and Wales against reform in this area and argues that such reform is, in fact, warranted. On this basis, Part III presents a novel proposal for consideration.

### **Part I: Intestacy provision in England and Wales – The international context**

Pursuant to section 46 of the Administration of Estates Act 1925, as amended by section 1 of the Inheritance and Trustee's Powers Act 2014, where a deceased dies leaving a surviving spouse and issue,<sup>9</sup> the spouse receives a statutory legacy of the first £250,000 of the estate and one-half of the remainder absolutely. The issue of the deceased share in the other half of the remainder. Although, theoretically, children may receive something from the estate of a deceased parent, in reality, the possibility of such provision is remote in all but the largest estates. According to the latest figures, issue, including children from a former relationship, only share in the intestate estate of a deceased parent under section 46 in a mere 10% of cases.<sup>10</sup> Although a child, including an adult child, may bring an application for family provision under the Inheritance (Provision for Family and Dependents) Act 1975 against their parent (or, in some cases, stepparent)'s estate,<sup>11</sup> the protection this affords is quite limited. As the 1975 Act 'responds primarily to need, rather than to fairness or desert',<sup>12</sup> the measure of provision for a child is that which is reasonable for his or her maintenance. Consequently, it has been noted, 'the expectations of an adult child under the 1975 Act must be quite limited'.<sup>13</sup>

Yet, while in England and Wales the position of the surviving spouse is clearly dominant, there are a wide variety of intestacy regimes applied across the common law world which seek to strike a different balance in protecting the interests of a deceased's surviving spouse and children, particularly children from a previous relationship.

Adopting a very different approach to the distribution of an intestate estate, the interests of all children receive very strong protection pursuant to the Irish and Singaporean regimes. In the Republic of Ireland, pursuant to section 67 of the Succession Act 1965, where an intestate dies leaving a spouse and issue, a surviving spouse takes two-thirds of the estate with the remaining one third distributed among the issue.<sup>14</sup> Similarly, section 7 of the Intestate Succession Act 1967 adopted in Singapore provides a surviving spouse takes one half the estate with the remaining half shared between the issue of the deceased.<sup>15</sup> Although neither jurisdiction makes specific provision for non-traditional family situations, *all* children will *always* share in a deceased parent's intestate estate, irrespective of its size.<sup>16</sup>

Applying an approach more akin to that in England and Wales, section 7(2) of the Administration of Estates Act (Northern Ireland) 1955 provides that where the intestate dies leaving a spouse and issue, the surviving spouse is entitled to the first £250,000. Pursuant to section 7(2)(b), however, the share of the remainder to which the surviving spouse is entitled varies depending on the number of children the deceased is survived by. Where only one child survives, the surviving spouse is entitled to one-half of the remainder; where more than one child survives the spouse is entitled to one-third of the remainder. The deceased's children share in the remainder.<sup>17</sup> A similar legislative scheme incorporating a variable fractional share of the remainder is adopted in a number of Australian states<sup>18</sup> and Canadian provinces.<sup>19</sup> In comparison to the 'one-size-fits-all' scheme applied in England and Wales, such an approach does strive to strike a better balance between the interests of the surviving spouse and children. However, the practical utility of this modification from the perspective of the child is often quite limited. The key difficulty with a regime founded on a statutory

legacy is that, depending on the level at which the legacy is fixed, an entitlement to a share of the remainder may be meaningless: the statutory legacy will, in many cases, cannibalise the entire estate.

Cognisant of this weakness, a number of jurisdictions have reformed their statutory legacy regimes to afford greater weight, in particular, to the interests of children from a former relationship. Aiming to 'modernise' the succession law regime applied,<sup>20</sup> the new Wills, Estate and Succession Act 2009 which came into force in British Columbia, Canada on March 31<sup>st</sup>, 2014 is one such example. Pursuant to section 21(3) of the 2009 Act, where a deceased dies leaving a surviving spouse and descendants who are also the descendants of the surviving spouse, the surviving spouse is entitled to the first \$300,000 and one half of the remainder of the estate.<sup>21</sup> The descendants share in the other half of the remainder. Where the deceased dies leaving a surviving spouse and descendants, including those from a former relationship, however, section 21(4) provides the preferential share of the spouse is reduced to \$150,000. The children of the deceased's ability to share in the remainder, if any, will thus be considerably greater than where the full preferential share is applied.<sup>22</sup> Similar, albeit more extensive, limitations have also been introduced in the United States of America through the Uniform Probate Code which has been adopted, at least in part, by 18 states.<sup>23</sup> Reduced spousal provision is warranted where the deceased is survived by descendants from a former relationship, the National Conference of Commissioners' argue, as such descendants 'are not natural objects of the bounty of the surviving spouse'.<sup>24</sup>

## **Part II: Reluctance for reform in England and Wales**

It is clear the interests of children, particularly children from a former relationship, receive comparatively weak protection in England and Wales on the intestate death of a parent. Yet, as noted, in its most recent review, the Law Commission for England and Wales refused to recommend reform. The Commission has, in fact, on no less than three occasions in the last thirty years, rejected any call for reform to take better account of the interests of children from a former relationship on

intestacy. In 1989, despite recommending the introduction of an 'all to spouse' regime, the Commission refused to support reform moderating the approach in the case of non-traditional families. The issue was considered again by the Commission in its 2009 Consultation Paper with a similar distaste for reform evident.<sup>25</sup> However, the responses to the consultation and, in particular, the findings of a comprehensive public attitudes survey undertaken as part of the review,<sup>26</sup> forced the Commission to 'reconsider' its position.<sup>27</sup>

The research, undertaken in 2009 by Douglas et al, involved a quantitative survey with 1,556 participants and a qualitative follow-up study involving 30 in-depth interviews with selected participants.<sup>28</sup> In order to gauge public opinion on the optimum distribution of an intestate estate where the deceased was survived by children from a former relationship, the survey sought responses on three different hypothetical scenarios where a man who had been married twice dies leaving: (1) a second wife and grown-up children from his first marriage; (2) a second wife plus children under the age of 10 from his first marriage; (3) a second wife plus children over 18 from both marriages.<sup>29</sup> Unlike the findings from a nuclear family scenario where 'all to spouse' was supported by a bare majority,<sup>30</sup> in these non-traditional family scenarios, support for 'all to spouse' fell dramatically to between 11%-16%.<sup>31</sup> Where there were no children of the second relationship, less than half of those surveyed believed that the second spouse should be even prioritised (38%-46%), much less receive the entire estate as currently arises in the vast majority of cases. Although the strongest support for surviving spouses in a non-traditional family scenario was recorded where there were children from both relationships, this support was primarily for the *prioritisation* of the surviving spouse (45%).<sup>32</sup> In this category, interestingly, almost one in five respondents supported 'all to children'.<sup>33</sup>

Overall, prioritisation of the surviving spouse attracted the most support varying between 27%-45%.<sup>34</sup> While it does not appear participants' views were elicited on what would constitute appropriate 'prioritisation', it would perhaps be reasonable to assume – particularly in the context of

the low support for ‘all to spouse’ – that many respondents would have supported more restrained provision to surviving spouses in a non-traditional family scenario than that currently afforded pursuant to the current intestacy regime.<sup>35</sup> Nevertheless, the Commission remained of the view in its 2011 Report that reform on this issue would be undesirable.<sup>36</sup>

The continuing failure of the Commission to recommend any reform in this context appears to be driven, primarily, by two fundamental beliefs: first, the belief that it would be *inappropriate* to treat different types of spouses differently; second, the belief that any reform to take better account of non-traditional families would be *impractical* and would necessarily bring excessive complexity to the overall intestacy regime. The legitimacy of these arguments is, however, open to debate.

- *The (in)appropriateness of differentiating between different categories of surviving spouse*

For almost 30 years, the Commission has steadfastly been of the view that the entitlement of the surviving spouse should not vary where the deceased also left children from a former relationship. Rejecting any reform to take account of children from a former relationship in its 1989 review, the Commission noted that ‘giving a share to children of another relationship could deny the spouse adequate provision’.<sup>37</sup> Declining to endorse any possible amendment of the Inheritance (Provision for Family and Dependants) Act 1975 facilitating applications from children where there was a risk of them being disinherited by property passing to a stepparent (in the context of reform introducing ‘all to spouse’), the Commission again noted in its 2009 Consultation Paper that such reform would be ‘problematic’, explaining:

‘Any award made to the child [under such a scheme] would diminish the funds available to the step-parent during his or her lifetime; it would place step-parents in a different and more precarious position than other surviving spouses. We do not think that this is acceptable.’<sup>38</sup>

Most recently, in its 2011 Report, the Commission restated its view that determining a surviving spouse's entitlement on the basis of whether the deceased had children from another relationship seemed 'inappropriate'.<sup>39</sup> In particular, it noted (in what Kerridge described as a 'tendentious' proposition)<sup>40</sup> that

'it might well be felt that that spouse was being penalised for circumstances beyond his or her control. This might be especially hard where the second spouse was unaware of the existence of children from another relationship....'<sup>41</sup>

Two themes emerge which seem to underlie the Commission's position: first, a belief that any reform would leave stepparents in a financially vulnerable position; and second, a belief that, from a principled perspective, a surviving spouse's share should not be affected by the presence of children from the deceased's former relationship. It is submitted both arguments may be rebutted.

In relation to the first issue, it is accepted that the needs of *all* surviving spouses must be prioritised on intestacy and the importance of protecting such spouses should remain paramount.<sup>42</sup> Since at least the first introduction of the statutory legacy in 1925, law reform in this area has consistently intensified of the rights of surviving spouses, primarily with a view to ensuring their financial protection.<sup>43</sup> In this context, the Commission stated its reluctance 'to recommend any reform that did not, in most cases, provide for a surviving spouse at least as well as does the current law'.<sup>44</sup> However, in adopting this position, the Commission was perhaps going too far. Given the level at which the statutory legacy is now set, as well as the increased prevalence of co-ownership of family homes,<sup>45</sup> in many cases the surviving spouse takes the family home under the doctrine of survivorship *in addition* to receiving the entire intestate estate. As the Commission acknowledged, 'all to spouse' is the reality 'in the overwhelming number of cases'.<sup>46</sup> It is at least arguable, therefore, that the current intestacy regime is liable to overprovide for some surviving spouses. There would appear to be ample scope for modifying the regime where the deceased had children from a former relationship without necessarily jeopardising the financial security of surviving spouses. The fear that



*any* reform of the current regime affording greater weight to the interests of deceased's children from a former relationship would potentially leave surviving spouses vulnerable appears overstated.

The Commission's doubts as to the fundamental appropriateness of treating spouses differently can also be rejected. Since its inception, the generous provision afforded to surviving spouses pursuant to the statutory legacy regime, although premised on ensuring the surviving spouse was adequately protected, has been considered justifiable, in part, thanks to conduit theory. As Burns highlighted, the shift which took place from lineal devolution to children to an approach placing the surviving spouse as the principal recipient of an intestate estate was viewed as reasonable in light, particularly, of the position of the spouse as conduit.<sup>47</sup> The entitlement of the children, which had up to that point been the primary consideration, was not, in most cases, jeopardised but simply postponed. Reflecting these origins, the Inheritance (Family Provision) Act 1938 drew a distinction between situations where the spouse was the parent of all the deceased's children and situations where they were not. Pursuant to the 1938 Act, although an application for family provision could not be made in relation to an estate where the testator had left at least two thirds of it to their surviving spouse and the only other dependants were children of the surviving spouse, where the testator was survived by children who were not also children of the surviving spouse, these children were able to bring a claim regardless of the size of the bequest to the surviving spouse.<sup>48</sup> The importance of the child inheriting and the role of the spouse as conduit were thus implicitly acknowledged.<sup>49</sup>

The argument may be made, however, that conduit theory, although historically relevant in justifying the more generous provision for surviving spouses and the corresponding reduction in importance afforded to the interests of children on intestacy, is of little importance today. Rather, it may be suggested that principles of sharing and commitment, of themselves, now operate to legitimise the generous provision afforded to surviving spouses. This shift away from relying on conduit theory would appear to be supported by the removal of the distinction originally carried in

the 1938 Act and the ever weaker legislative protection afforded to the interests of children.<sup>50</sup> Yet, notwithstanding the undoubtedly increased importance of principles of sharing and commitment in justifying the current balance struck in the distribution of an intestate estate, it is arguable that the legitimacy of the substantial provision made to surviving spouses today continues to be inextricably linked to the spouse's role as conduit.<sup>51</sup> Empirical evidence obtained in England and Wales highlights the continued significance of blood-ties on succession within the public mind. As the Commission acknowledged, there appears to be a '*strong attachment* to the idea that property should pass down the "bloodline" to children and grandchildren and so on'.<sup>52</sup> The continuing role of the spouse in achieving this outcome where possible (as conduit), was also implicitly acknowledged, it would appear, in the comparatively strong support for 'all to spouse' in a nuclear family scenario.<sup>53</sup>

If it is, therefore, accepted that the generous provision made on intestacy for surviving spouses continues to be, at least in part, justifiable on the basis of the spouse's likely role as conduit to the deceased's descendants, any perceived weakness in their execution of this role must be afforded due consideration. In this regard, although the Commission was 'not persuaded' that stepparents generally feel less obligation towards their stepchildren than their biological children,<sup>54</sup> this perception appears well entrenched.<sup>55</sup> The view of stepparents as somewhat less reliable conduits was implicit in the widespread fears expressed over the past thirty years in relation to the vulnerability of the interests of a deceased's children from a former relationship under any proposal advocating 'all to spouse'<sup>56</sup> – fears mirrored once again in the large scale public attitudes survey which found support for 'all to spouse' was dramatically reduced where the deceased had children from a former relationship.<sup>57</sup> Practitioner responses to the public consultation also suggested that testators were more likely to make provision for their children from a former relationship than they would in a nuclear family scenario – seemingly again reflecting the view of stepparents as less reliable conduits.<sup>58</sup>

Objectively, it appears such doubts may be well founded. If a surviving stepparent dies intestate, whether accidentally or intentionally, their stepchildren would possess no automatic entitlement to a share of the estate. Moreover, it appears stepparents may also be less likely to leave a bequest to their stepchildren in their will. Douglas et al reported that although 36% of survey respondents who had made a will reported that they had stepchildren, only 3% stated that they had included them in their will.<sup>59</sup> Yet, where a stepchild feels disinherited by a stepparent, whether by will or as a result of their intestate death, their ability to apply for or succeed in an application for family provision is limited.<sup>60</sup>

Viewed in the round, therefore, it is submitted that it would not be ‘inappropriate’ to distinguish between spouses. The extremely generous provision afforded to surviving spouses remains, in part, justifiable given their likely role as conduit to the deceased’s children. Where a surviving spouse appears a somewhat less reliable conduit, such as where they are not the parent of all the deceased’s children, it would seem reasonable to reflect this difference in circumstances in the balance struck in the distribution of the deceased’s intestate estate.<sup>61</sup>

- *The (im)practicability of reforming the law on intestacy*

A second major belief influencing the Commission’s decision to not recommend reform was its view that any reform to take better account of the interests of children from a former relationship would introduce unwanted complexity to the intestacy scheme. As Burns explained, ‘a significant reason’ why the Commission eschewed special provisions in favour of children from a previous relationship was its ‘preference for simple and clear rules which [could] be readily understood and easily administered.’<sup>62</sup>

Having regard to the findings of Douglas et al’s public attitudes survey outlined above – specifically the various distribution preferences identified where there were adult or minor children from a previous relationship or children from both relationships – the Commission concluded that tailor

made provision accounting for each scenario would not be appropriate.<sup>63</sup> It noted that although it would be possible to devise intestacy rules to reflect the preferences emerging from the surveys, ‘any potential benefits [would be] significantly outweighed by the disadvantages’.<sup>64</sup> At a more general level, the Commission also doubted ‘whether any system [could] adequately reflect the many different factors that may intervene to divert wealth away from the deceased’s children’.<sup>65</sup> Although it accepted that it would be possible to ‘design ever-more complex rules to try to reflect these factors’, it felt the complexity that this would introduce would ‘unjustifiably add to the burden on administrators and increase the risk of estates being incorrectly administered’.<sup>66</sup>

Notwithstanding these arguments against reform, however, such an assessment of the alternatives appears overly negative. Admittedly, in relation to the latter issue, any effort to reflect the ‘many’ distinct factors that may result in wealth being diverted away from the deceased’s children would certainly add unwanted complexity and would not seem appropriate. As the Commission noted, a surviving parent (whether remarried or otherwise), may take positive action to disinherit their children by will.<sup>67</sup> In this scenario, although wealth may be diverted away from a deceased’s children there can be little quibble with the outcome. Such disinheritance reflects the expressed intention of the testator and is in line with their testamentary freedom.<sup>68</sup> However, the possibility of accidental ‘disinheritance’ on intestacy varies dramatically depending on the marital status of the deceased parent.<sup>69</sup> Where a surviving parent who has not remarried dies intestate, the rules of intestacy ensure that on their death, their children will share in the entire estate. In a non-traditional family, however, the risk of accidental disinheritance is much more acute with the surviving spouse likely, in the vast majority of cases, to take the entire estate. Thus, in light of the consistently significant levels of intestacy in the jurisdiction,<sup>70</sup> the high percentage of non-traditional families<sup>71</sup> and the empirical research which appears to support children from a former relationship sharing in their deceased parent’s intestate estate, a strong argument could be made to advocate reform addressing this *one specific way* in which wealth may inadvertently be diverted away from the deceased’s children.

Equally, in relation to the former objection, although any effort to give effect to *all* the preferences emerging from the public attitudes survey would almost certainly prove unworkable and much too complex, reform could be introduced to give better effect to the main theme of the findings. As the practical reality of 'all to spouse' received minimal support from participants in the survey, reform continuing to ensure, at a base level, the prioritisation of the surviving spouse while better facilitating children from a former relationship sharing in the distribution of the estate, where possible, ought to be introduced.

However, although such reform would introduce *less* complexity than that which would be encountered in seeking to reflect the *many* different factors that may intervene to divert wealth away from the deceased's children or *all* the preferences emerging from the public attitudes survey, it would undoubtedly add some complexity which may still be regarded in certain quarters as unjustifiable. Nevertheless, despite the legitimate desire to ensure that rules on intestacy are as simple as possible simplicity can only be justified to the extent to which it is desirable while continuing to do justice.<sup>72</sup> Given that the Commission itself noted 'the relatively common situation where a person dies intestate leaving children from different relationships',<sup>73</sup> and in light of the significant potential for accidental disinheritance of children from a former relationship, it is submitted the intense desire for simplicity ought to be tempered.<sup>74</sup>

### Conclusion

Notwithstanding the seemingly strong public support for legislative amendment to better take account of the interests of a deceased's children from a former relationship on intestacy – as expressed in the responses to the Commission's 2009 consultation and implicit in the findings of Douglas et al's attitudes survey – meaningful reform to achieve this end was never seriously considered in the 2011 Report. Although the Commission did briefly reflect on alternative approaches where there were children from a former relationship, the proposals advanced were never likely to affect any significant recalibration of the balance struck between the interests of

surviving spouses and the deceased's children from a former relationship.<sup>75</sup> Any substantial departures from the current regime were precluded, in particular, by the Commission's reluctance to recommend any reform that did not, in the majority of cases, provide for a surviving spouse at least as well as the existing regime<sup>76</sup> and by its insistence that distinguishing between spouses would be 'inappropriate'. Absent these constraints, however, a range of alternative options for the distribution of intestate estates where the deceased is survived by a spouse and children from a former relationship may be considered. It is to these alternatives that we must now turn.

### **Part III: A way forward?**

In order to ensure that children from a former relationship enjoy a greater opportunity to participate in the distribution of a deceased's parents' intestate estate, where possible, reform is required. In this regard, although the adoption of a fractional approach to the distribution of an intestate estate affording children an automatic entitlement to a specified share of the intestate estate, irrespective of size, would ensure that children inherit some of their deceased parent's estate in every case, such reform would, in the absence of a floor of support, be liable to leave a surviving spouse in a modest estate in a precarious position.<sup>77</sup> Such reform would, therefore, not be appropriate.

Equally, the extension of family provision legislation to better facilitate the claims of children from a former relationship against their deceased parent's intestate estate – perhaps removing the 'maintenance' requirement – is not being proposed. Although the extension of discretionary provision would ensure the protection afforded to spouses would remain paramount while simultaneously affording children greater opportunity to seek provision, such reform would continue to place the onus on children to instigate litigation to secure their share. More robust protection is required. Indeed, while such reform may have held greater weight when suggested by Cretney more than 20 years ago,<sup>78</sup> the prevalence of non-traditional families in the jurisdiction could now result in a flood of litigation being produced under any such scheme.<sup>79</sup>

The rapid breakdown of traditional family structures over the past three decades and the rise of non-traditional families challenge the appropriateness of various reform proposals advanced to date. In 1990, Kerridge proposed that where the deceased was survived by a spouse and children from a former relationship, the surviving spouse's entitlement should be limited to a life interest in the intestate estate.<sup>80</sup> Whatever the merits of the proposal at time, given that such reform would, in the current context, result in the widespread application of complicated life interests to many intestate estates, it may now be viewed as less attractive.<sup>81</sup>

More recently, Kerridge presented an alternative reform based on the reintroduction and expansion of hotchpot rules formerly applied to intestate estates.<sup>82</sup> Pursuant to section 49(1)(aa) of the 1925 Act as inserted by the Intestate Estate's Act 1952, a surviving spouse who acquired any interest under the deceased's will (excluding personal chattels) was not entitled to claim the full amount of the statutory legacy. Rather, such a spouse's statutory legacy was reduced by the value of the beneficial interests passing under the will. In addition to supporting the reintroduction of such a rule,<sup>83</sup> Kerridge moreover proposed that it could be extended to require the statutory legacy to be reduced by the value of any property passing to the surviving spouse as a joint tenant under the right of survivorship.<sup>84</sup> Although section 49(1)(aa) was abolished by section 1(2) of the Law Reform (Succession) Act 1995, the merits of such an approach, particularly in the context of non-traditional families, appear clear. Moderating the distribution to the surviving spouse on intestacy by having regard to the overall provision made for them under the deceased's will or via the right of survivorship, such reform would ensure considerable protection for surviving spouses who do not benefit under the deceased's will or under the right of survivorship, while at the same time allowing the deceased's children a greater opportunity to share in their parent's intestate estate where such provision is in place. However, as Kerridge notes, the likelihood of such reform being introduced appears low, with the hotchpot rules liable to be viewed as 'old fashioned'.<sup>85</sup> Perhaps more significantly, the operation of such rules would introduce a substantial level of complexity to the distribution of many intestate estates (even if limited to non-traditional families) and would run

counter to the Law Commission's clearly stated objective of promoting simplicity in the overall scheme.<sup>86</sup> Alternative approaches must therefore be considered.

The most balanced approach would appear to be one which continues to ensure the 'prioritisation' of the surviving spouse through the retention of a statutory legacy and a minimum half share in the remainder – albeit that the portion of the estate ring-fenced and front-loaded for the surviving spouse through the statutory legacy could be substantially reduced. If, for example, adopting the approach recently introduced in British Columbia, Canada, the statutory legacy was halved to £125,000 where the deceased was survived by a spouse and children from a former relationship, it would ensure children would be able to participate in the distribution of a larger number of estates.<sup>87</sup> It would also simultaneously retain the primacy afforded to the interests of a surviving spouse.<sup>88</sup>

Where, as in the vast majority of cases, the surviving spouse takes the family home pursuant to the doctrine of survivorship,<sup>89</sup> a statutory legacy set at this level would appear to provide such spouses with adequate financial protection.<sup>90</sup> Question marks arise, however, where the home was owned by the spouses as beneficial tenants in common or, particularly, where the home was in the sole name of the deceased spouse. Although pursuant to section 5 of the Intestates' Estates Act 1952, a surviving spouse may apply the share of the intestate estate to which they are entitled towards the appropriation of the family home,<sup>91</sup> given that the average house price in the jurisdiction in March 2016 was estimated at almost £190,000,<sup>92</sup> a lower statutory legacy akin to that proposed could, even if augmented with 50% share of the remainder, be insufficient to secure the property and/or endow the surviving spouse with sufficient sums on which to live. While the 1952 Act does allow surviving spouses, through the payment of money to the personal representative, to offset any difference in value which arises between the value of the home, or the deceased's share in it, and the amount to which they are entitled, where an estate is of limited value and the surviving spouse is in an otherwise precarious financial situation, such offset may not be possible. Moreover, although such a



surviving spouse would, subject to the individual facts of the case, be 'likely to succeed in a family provision application',<sup>93</sup> this would arguably be cold comfort to a surviving spouse who has not inherited the home. Many surviving spouses may be reluctant to invest what resources they do have in the instigation of litigation, whatever the likelihood of success, while any discretionary provision awarded would presumably be at the cost of other beneficiaries on intestacy and thereby be liable to fuel what a surviving spouse may deem an undesirable family dispute.

Therefore, conscious that 'one function of the statutory legacy is to enable a surviving spouse to remain in the family home (insofar as that is possible without giving the whole estate to the spouse in every case)',<sup>94</sup> and notwithstanding that the number of cases where a surviving spouse would risk losing the home under such a proposal would be small,<sup>95</sup> the need to protect such spouses must be addressed.<sup>96</sup> One way in which this difficulty could be overcome would be by affording surviving spouses the opportunity to appropriate a life interest in the family home.<sup>97</sup> While in light of the reduced statutory legacy proposed, it may not always be financially viable for a surviving spouse to appropriate the *fee simple* estate and retain sufficient sums on which to live, the ability to appropriate a *life interest* in the home, in full or partial satisfaction of their share on intestacy, would potentially provide much needed protection for vulnerable surviving spouses. However, despite conceding that '[l]ife interests in the family home can be easier to manage than life interests in other assets',<sup>98</sup> the Commission expressly rejected proposals premised on the use of such interests over the home in 2011 and noted a number of specific concerns.

First, considering the suggestion advanced by consultees that a surviving spouse should receive a life interest in the home that they shared with the deceased, the Commission felt that such an approach 'arbitrarily' distinguished between estates that were comprised largely of real property and those where the assets were in some other form.<sup>99</sup> Second, the Commission noted difficulties could arise where the spouse wanted to move home.<sup>100</sup> Both concerns, however, may be allayed in this proposal by virtue of the fact that the ability to appropriate a life interest in the home would be just

one option for the application of the statutory legacy of £125,000 and share of the remainder. In relation to the former issue, no discrimination would arise and the underlying value of the provision made on intestacy would not vary with the composition of the estate.<sup>101</sup> In relation to the latter issue, if, as proposed, the ability to appropriate a life interest in the home was just one option for the application of the statutory legacy of £125,000 and share of the remainder, a surviving spouse would not be tied to staying in the family home after the owner spouse's death. If they wished to move from the outset, they would continue to enjoy the proposed statutory legacy and share of the remainder. Moreover, if a desire to move arose sometime after the distribution of the intestate estate and the life interest had already been appropriated, the remaining life interest could be capitalised. The surviving spouse could, in effect, 'cash-in' their interest in the property and move out.<sup>102</sup>

Third, the Commission noted the difficulties which could arise where capital is needed to maintain the property.<sup>103</sup> It is submitted that the likelihood of such capital needs proving problematic in the average case would be relatively low. In some cases, the surviving spouse may be able to offset these costs using the remainder of their entitlement on intestacy (that which they acquired beyond the value of the life interest). However, difficulties may arise where the surviving spouse cannot access the remainder of their entitlement on intestacy because the intestate estate comprised exclusively of the family home (which was not sold) or in circumstances where the high value of the life interest exhausts their full entitlement. In such a scenario, the trustees may wish to sell the family home and instead invest in a less expensive property to accommodate the surviving spouse – an outcome which would undoubtedly 'complicate' the administration.<sup>104</sup> However, the likelihood of this complication arising as a result of the costs of maintaining the property could be offset from the outset. Where it is clear that, in light of the high-costs associated with maintaining the property and the correspondingly vulnerable financial position of the surviving spouse, the surviving spouse would not objectively be able to maintain the home, the ability to appropriate a life interest ought not, arguably, to be available.

Fourth, in considering the weaknesses of using life interest trusts over the remainder on intestacy, the Commission noted the desirability, in many cases, of ‘clean break’ on intestacy. The Commission noted that it may be preferable, particularly where the surviving spouse ‘is not related by blood to some or all of the descendants’ – the precise situation envisioned in this proposal – to avoid on-going financial ties, observing that where a life interest is applied, the ‘adult children may feel that they are being “kept out of their inheritance” for too long’.<sup>105</sup> Although such feelings may equally be provoked where the proposed life interest is availed of, in the limited situations where the surviving spouse wishes to remain in the family home and has not benefited from the right of survivorship, the inconvenience for surviving children from a former relationship ought not to outweigh the desirability of protecting the surviving spouse in the property.

From the perspective of the surviving spouse, arguably the most significant weakness of any regime premised the provision of a life interest in the family home is that if the trustees in whom the legal estate is vested wished to sell or mortgage the property, any life interest in the home enjoyed by the surviving spouse could be overreached.<sup>106</sup> In such a scenario, the surviving spouse would be vulnerable to losing their residential security. While it is unfortunate that proposals advanced by the Law Commission in 1989 providing that no conveyance of a legal estate in land would overreach the interest of a person entitled to a beneficial interest in the property and who held a right to, and was in occupation of, the property at the date of the conveyance without the consent of the holder of the beneficial interest were not introduced,<sup>107</sup> a surviving spouse enjoying a life interest would nevertheless not be without protection. As a beneficiary entitled to possession, a surviving spouse ought to be consulted before the trustees deal with the property<sup>108</sup> and the trustees would be required to have regard to the rights of the surviving spouse in acting for the trust.<sup>109</sup> Where trustees acted improperly in selling or mortgaging the property, while it would be unlikely to affect the purchaser or mortgagee, the surviving spouse would be entitled to sue for breach of trust.<sup>110</sup>

- *Summary*

Reform akin to that proposed would potentially allow an intestate's children from a former relationship significantly greater opportunity to share in the distribution of their deceased parent's estate while continuing to prioritise the protection of surviving spouses. While pursuant to the regime as currently applied, where an intestate estate is valued at £250,000, a surviving spouse would take the full estate, under this proposal such a spouse would instead receive three-quarters of the estate valued at £187,500.<sup>111</sup> The deceased's children, who at present would be excluded from the distribution of the deceased's estate, would share in the final quarter valued at £62,500. Moreover, through the inclusion of a right to appropriate a life interest in the home, a potentially important protection for a surviving spouse is available. Although the Commission rightly pointed out that 'the *automatic* creation of life interest trusts is a cumbersome and inappropriate mechanism for the distribution of an intestate estate',<sup>112</sup> this proposal would only envisage such interests being utilised in the limited circumstances where the deceased is survived by children from a former relationship (and thus entitled to a reduced statutory legacy) and the surviving spouse does not have security of occupation in the family home. The simplicity of the reform as a whole would be largely ensured in the vast majority of cases.

### **Conclusion**

Akin to many other common law jurisdictions, the position of the surviving spouse in England and Wales is prioritised on intestacy. However, unlike many other common law jurisdictions, the ability of the deceased's children to inherit on intestacy is severely curtailed to the point of almost irrelevance. Yet despite the fact that 'in a significant number of estates there is more than enough to ensure that the surviving spouse is well provided for',<sup>113</sup> and thus seemingly ample scope for a different balance to be struck affording greater weight to the interests of children, particularly those from a former relationship, the Commission have steadfastly refused to advocate, or even seriously consider, any such reform.<sup>114</sup>

Despite the Commission's concerns, it is clear that reform distinguishing between different categories of spouses would indeed be appropriate and reform could be implemented without introducing excessive complexity. Moreover, although it may be feared that any reform affording greater weight to the interests of a deceased's children from a former relationship would necessarily leave a surviving spouse in a precarious financial position, especially vis-à-vis the family home, such fears have been overstated. As evident in the proposal presented, reform may be adopted which, despite reducing the entitlement of the surviving spouse through the statutory legacy, nevertheless recognises the importance of ensuring their protection in the family home where they do not take the property by the right of survivorship.

In undertaking its most recent review of the legislative scheme applied on intestacy, the Commission noted one of its objectives was 'to bring the law up to date with modern expectations and preferences'.<sup>115</sup> In so far as no reform was proposed to take better account of the interests of children from a former relationship, it is submitted this objective has not been achieved. There remains, as Kerridge aptly put it, 'unfinished business'.<sup>116</sup> The time has come to revisit this issue once again and seriously investigate the various alternatives by which a new balance may be struck on intestacy.

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<sup>1</sup> Note, in light of section 71 and schedule 4 of the Civil Partnership Act 2004, civil partners in the jurisdiction enjoy the same rights as spouses on intestacy. For ease of phrasing, however, reference is made to 'spouses'.

<sup>2</sup> See below; see also Waggoner (1991: 232-233).

<sup>3</sup> Provisional figures show that 34% of all marriages in 2012 were to couples where either one or both partners had been previously married. See ONS (2014). Note, the term 'non-traditional' is used here to refer to families where one or more spouses have children from a previous relationship. This terminology was previously utilised to describe such families by Morrell, Barnard and Legard (2009).

<sup>4</sup> In 2014, there were 247,298 grants of representation issued, 15% of which were Letters of Administration. See <https://www.gov.uk/government/collections/family-court-statistics-quarterly> [Accessed 15 August 2016]. However, a grant of representation is not required for some estates of lessor value. It would appear there may be many such estates as according to the Office for National Statistics, 501,424 deaths were registered in England and Wales in 2014, see <http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsregistrationsummarytables/2015-07-15>. Having regard to the broadly equivalent disparity between the number of deaths registered and the number of grants of representation issued in 2013, Kerridge (2015: 332) notes: 'the overall impression must be that the missing cases ... generally represent deceased persons who had little property to leave. One may assume that the vast majority of them died intestate...' See also the Law Commission for England and Wales (2009: [1.4]–[1.6]).

<sup>5</sup> Note, notwithstanding the greater likelihood of a surviving spouse being a conduit to their children, there may also be doubts as to the legitimacy of the regime vis-à-vis the entitlements of children in a nuclear family. Full discussion of such issues is, however, not within the scope of this article.

<sup>6</sup> See below.

<sup>7</sup> Law Commission for England and Wales (2011).

<sup>8</sup> Prior to the publication of the Law Commission's final report, some comment was generated, see Cooke (2009): Kerridge (2010). In the aftermath, little has been produced which focuses on the provision for children from a former relationship. Notable exceptions include Kerridge (2015) and Kerridge (2016). See also Burns (2013b) which largely focused on the provision for surviving spouses.

<sup>9</sup> The legal term 'issue' refers to a deceased's direct descendants.

<sup>10</sup> Law Commission for England and Wales (2011: [2.6]). This figure was obtained based on research analysing estates where a grant of representation was issued between November 2007 and October 2008. For a full



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outline of the figures obtained by HM Revenue & Customs, see Appendix D of the 2011 Report. However, as noted above a grant of representation is not required for some estates of small value, see also Law Commission for England and Wales (2009: [3.12]).

<sup>11</sup> Pursuant to the 1975 Act, those whom the deceased treated as a child of their family in relation to a marriage would be eligible to seek provision, thus stepchildren meeting these criteria could apply. Alternatively, if a stepchild could demonstrate they were being maintained, either wholly or partly, by the deceased immediately prior to the deceased's death, they may also be eligible to apply, see sections 1(1) and 1(3).

<sup>12</sup> Law Commission for England and Wales (2011: [1.19]).

<sup>13</sup> Law Commission for England and Wales (2011: [6.7]). For more on the approach adopted on intestacy in England and Wales, see Kerridge (2015:323-348).

<sup>14</sup> See also sections 67(4).

<sup>15</sup> For a similar albeit distinct approach, see the Intestate Succession Act 1990 (Newfoundland).

<sup>16</sup> See below, however, for criticisms.

<sup>17</sup> See also section 7(3) for more distant issue.

<sup>18</sup> See the Administration and Probate Act 1929 (Australian Capital Territory); the Administration and Probate Act (Northern Territory); and the Succession Act 1981 (Queensland).

<sup>19</sup> See the Intestate Succession Act 2000 (Alberta); Intestate Succession Act 1988 (Northwest Territories); Intestate Succession Act 1989 (Nova Scotia); Succession Law Reform Act 1990 (Ontario); Intestate Succession Act 1996 (Saskatchewan); Estate Administration Act 2002 (Yukon).

<sup>20</sup> British Columbia Law Institute (2006: *xiii*).

<sup>21</sup> Section 20 of the 2009 Act provides that where an intestate dies leaving a spouse and no issue, the spouse is entitled to the whole estate. Note also, pursuant to section 2(1)(b) of the 2009 Act, 'spouse' is defined as including those who 'lived with each other in a marriage-like relationship for at least 2 years'.

<sup>22</sup> Curiously, in justifying the reform, the British Columbia Law Institute (2006: 14) explained: 'In the case of a mixed family, it may be assumed the surviving spouse's children will inherit ultimately from their own parent. If the full preferential share is paid to that spouse, there is a potential for benefitting stepchildren to a greater extent than the intestate's biological children.' However, the lower statutory legacy is not dependent on the deceased being survived by stepchildren.

<sup>23</sup> See National Conference of Commissioners on Uniform State Laws (2014). Where the deceased has children from a previous relationship the surviving spouse receives \$150,000 and a half-share in the balance of the estate. The remaining half-share of the balance is divided between the deceased's children. Where the deceased has children which are all common descendants of the deceased and the surviving spouse, but the surviving spouse also has children from another relationship, the surviving spouse receives \$225,000 and a half share in the balance of the estate. The remaining half-share of the balance is divided between the deceased's children. Where the deceased had no children or all the children were also the children of the surviving spouse, the surviving spouse is entitled to the entire estate. See section 2-102 of the UPC, as revised in 2008.

<sup>24</sup> National Conference of Commissioners on Uniform State Laws (2014). For discussion of a range of other regimes, see Reid, Waal and Zimmermann (2015); Law Commission for England and Wales (2009: [3.83]); Cooke (2009).

<sup>25</sup> Law Commission for England and Wales (2009: [3.111]).

<sup>26</sup> Morrell, Barnard and Legard (2009).

<sup>27</sup> Law Commission for England and Wales (2011: [2.75]).

<sup>28</sup> Morrell, Barnard and Legard (2009: 8); Douglas, Woodward, Humphrey et al (2011).

<sup>29</sup> Law Commission for England and Wales (2011: [2.79]).

<sup>30</sup> Law Commission for England and Wales (2011: [2.37]).

<sup>31</sup> Law Commission for England and Wales (2011: [2.81]).

<sup>32</sup> Law Commission for England and Wales (2011: [2.81]).

<sup>33</sup> Law Commission for England and Wales (2011: [2.81]).

<sup>34</sup> Law Commission for England and Wales (2011: [2.81]). When combined with the albeit low percentage of respondents favouring 'all to spouse', 42%-61% of participants supported either giving the whole estate to the surviving spouse or, in particular, giving priority to the surviving spouse where there were children from a former relationship, see [2.82].

<sup>35</sup> See Burns (2013b: 109-110); Reid (2008). Support for restrained provision might be especially strong in circumstances where accommodation for the surviving spouse is secure.

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- <sup>36</sup> Burns (2013b: 109) noted this was another example where a law commission was ‘highly selective when recommending that the results from surveys be implemented into law...’
- <sup>37</sup> Law Commission for England and Wales (2009: [3.104]) referring to the 1989 report. Note the 1989 report referred to children of a ‘previous marriage’.
- <sup>38</sup> Law Commission for England and Wales (2009: [3.57]).
- <sup>39</sup> Law Commission for England and Wales (2011: [2.77]).
- <sup>40</sup> Kerridge (2016)
- <sup>41</sup> Law Commission for England and Wales (2011: [2.77]).
- <sup>42</sup> See Cooke (2009); Burns (2012). See also, O’Sullivan (2016).
- <sup>43</sup> Indeed Kerridge (2016) notes this intensification in the rights of spouses actually began even earlier: ‘In the 100 years starting in 1890, “progress” and “reform” had always meant that the share of an intestate’s estate given to his spouse was increased.’ See also Kerridge (2015:323-329).
- <sup>44</sup> Law Commission for England and Wales (2009: [3.62]).
- <sup>45</sup> Although the Department for Constitutional Affairs (2005) estimated that in 35% of married spouses who died intestate were the sole owners of their family home, Kerridge, (2007), reinterpreting the figures presented, established this was actually likely in a mere 6% of cases.
- <sup>46</sup> Law Commission for England and Wales (2009: [3.47]).
- <sup>47</sup> Burns (2013a).
- <sup>48</sup> Section 1(1). See also section 7 of the Intestates’ Estates Act 1952.
- <sup>49</sup> Kerridge (2015: 331) also notes that ‘to compensate for a significant increase in the statutory legacy payable to the spouse’ in 1952, hotchpot rules applicable on partial intestacy to the benefits given by the will to the surviving spouse were introduced in s 49(1)(aa) of the 1925 Act as inserted by the Intestate’s Estate Act 1952. This would also seem to highlight the importance of children inheriting and the perceived need at the time to prevent over-generous provision to surviving spouses. The potential for the reintroduction of such rules, as proposed by Kerridge, is discussed below.
- <sup>50</sup> The hotchpot rules discussed above note 48 were also abolished by section 1(2) of the Law Reform (Succession) Act 1995.
- <sup>51</sup> See Douglas, Woodward, Humphrey et al (2011).
- <sup>52</sup> Law Commission for England and Wales (2009: [3.50]) (emphasis added); Douglas, Woodward, Humphrey et al (2011: 268).
- <sup>53</sup> See above. This conclusion would appear reasonable given the much weaker support for ‘all to spouse’ where the spouse was not the parent of all the deceased’s children.
- <sup>54</sup> Law Commission for England and Wales (2009: [3.106]).
- <sup>55</sup> See Waggoner (1991: 232-233).
- <sup>56</sup> See Cooke (2009: 430-432).
- <sup>57</sup> Morrell, Barnard and Legard (2009). On the basis of the qualitative interviews undertaken, Douglas, Woodward, Humphrey et al (2011: 259) noted a sense that ‘a second spouse would not necessarily have the interests of the deceased’s children sufficiently at heart and so could not be trusted to provide for them’. Interestingly, (259-260) they noted 29 per cent of the survey respondents who were themselves in a second or subsequent marriage favoured the whole estate going to the spouse where there were adult children of the deceased. By contrast, 67 per cent of respondents who were themselves in their first marriage would give the whole estate to first spouse where there were competing adult children. The New South Wales Law Reform Commission (2007: [3.48]) in considering the issue of children from a former relationship noted: ‘The basic problem is that the children would have expected, in the normal course of events, to receive something of the estate upon the death of the surviving spouse, so long as the surviving spouse was their parent. Such an expectation is unlikely to be fulfilled on the death of the surviving spouse who is only a step-parent. *This is because people are less likely to leave anything in their wills to stepchildren...*’ (emphasis added). See also Dekker and Howard (2006).
- <sup>58</sup> See Law Commission for England and Wales (2011: [2.29] and [2.71]). Cretney (1995: 87-88), reflecting on the increasing divorce rate, noted the ‘likelihood that the deceased’s widow may never have had any parental relationship with the children of his first marriage, and may not feel under any obligation to pass on to them any of the property she inherits from their father’.
- <sup>59</sup> Douglas, Woodward, Humphrey et al (2011: 268). Having regard to a situation where a surviving spouse inherits the entire estate from their deceased spouse, where the deceased was also survived by children from a former relationship, Kerridge (2015: 334) notes: ‘It is true that the survivor could make a will leaving the property she received from her deceased spouse to the deceased spouse’s children, but it is not likely she will

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go to the trouble of making a will the purpose of which would be to take property away from her own descendants.’

<sup>60</sup> See above.

<sup>61</sup> As noted above, several common law jurisdictions already carry such a distinction. In addition to those noted above, see New South Wales Law Reform Commission (2007). Similar distinctions are also applied in European jurisdictions including Sweden and France. Ultimately, as Kerridge (2016) notes, ‘If, whether under a will or on intestacy, it is decided that, for some reason, X should get more, and that therefore Y should get less... [a] sensible discussion involves weighing up the probable wishes of the deceased, the needs of the members of his family who survive him, and the probabilities as to the likely future destination of the property involved.’

<sup>62</sup> Burns (2013b: 111). She also noted (108), ‘simplicity has... become an added justification for spousal focused intestacy distribution’.

<sup>63</sup> Law Commission for England and Wales (2011: [2.82]).

<sup>64</sup> Law Commission for England and Wales (2011: [2.82]).

<sup>65</sup> Law Commission for England and Wales (2011: [2.78]).

<sup>66</sup> Law Commission for England and Wales (2011: [2.78]). Kerridge (2015: 338) notes: ‘The Law Commission appeared to dislike complications, but, in attempting to avoid them, it had to disregard the findings of a survey of public opinion it had itself commissioned.’ He added that the findings of the research appeared to have received greater emphasis in relation to possible cohabitation reform.

<sup>67</sup> Law Commission for England and Wales (2011: [2.68]).

<sup>68</sup> A child could take a family provision claim however, see above.

<sup>69</sup> Note although some people may wish to rely on the intestacy provisions and positively chose not to make a will, anecdotal evidence suggests most intestate deaths arise as a result of a failure to make a will. Note also, any will previously made will be revoked on marriage unless made in contemplation of marriage.

<sup>70</sup> See above.

<sup>71</sup> See above.

<sup>72</sup> Burns (2013b: 111) explains: ‘While it may be possible to simplify the law from a theoretical and technical perspective, the ongoing question in intestacy law is whether the rules (whether simple or not) adequately deal with common intestacy situations in terms of estate size and relationship dynamics. It is arguable that the goal of simplicity is unattainable in the light of the increasing complexity of modern families... ‘Simplicity for the sake of simplicity’ ought not to be encouraged.’ Kerridge (2015: 338), referring to his proposal (discussed below) that where a surviving spouse was not the parent of all the deceased’s children the spouse should only take a life interest in the intestate estate, notes ‘[t]he objection to this approach is that it is said to be complicated’. He adds: ‘It is, but second or subsequent marriages, where there are issue from earlier unions, always lead to complications, one way or another.’

<sup>73</sup> Law Commission for England and Wales (2009: [3.108]).

<sup>74</sup> Albeit cognisant of the need to avoid what could be deemed excessive complexity. As Cooke (2009: 442) observed: ‘we need to find a method of sharing that is not merely simple to calculate or to administer, but also is targeted at the people we really want to protect.’ Indeed, it is arguable that if reform were introduced to take better account of children from a former relationship, the case for simplifying the law with ‘all to spouse’ where all children are common would be strengthened. Note, however, this outcome received a bare 51% support in the public attitudes survey, see Law Commission for England and Wales (2011: [2.35]).

<sup>75</sup> The Commission did consider two ways in which conduit theory could be reflected in the intestacy rules, see Law Commission for England and Wales (2011: [2.75]). The rules could: ‘(1) give the whole estate to a surviving spouse except where there are living children or other descendants from another relationship (in which case some sort of sharing mechanism would be adopted); or (2) share any part of the estate that is left after payment of the statutory legacy between a surviving spouse and any children of the deceased, but give a greater share of the estate to the children where some or all of them are not also the children of the surviving spouse.’ Notwithstanding that it failed to provide any insight into exactly what ‘sharing mechanism’ might apply where there were children from a former relationship, the Commission described the first approach [2.76] as the ‘most coherent way of reflecting conduit theory’. However, having regard to the lack of support for measures promoting ‘all to spouse’ – in particular, its potential to ‘disinherit’ children and other descendants of the deceased where the estate is large enough to support some sharing with the surviving spouse – the Commission rejected this proposal. Thus, paradoxically, although the arguments against this proposal actually supported *extending* sharing with other children, as opposed to any difficulty with the unspecified ‘sharing mechanism’ suggested, the proposal, such as it was, was dismissed. The second approach

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advanced was also rejected. Despite conceding that it was 'less vulnerable' to the criticism which proved the downfall of the first approach, the Commission rightly conceded [2.76] that 'the benefits of reform along these lines would be rather meagre'.

<sup>76</sup> Law Commission for England and Wales (2009: [3.62]); Law Commission for England and Wales (2011: [2.38]). As Kerridge (2015:337) notes, 'the official line in England seems always to be to ignore anything which could be thought of as not favouring the spouse'. Moreover, although the Consultation Paper [2009, 3.64] did invite consultees feedback on the level of the statutory legacy, provisionally proposing the existing level be maintained, no discussion on the appropriateness of the level was included in the 2011 Report.

<sup>77</sup> For criticisms of the fractional share approach in Ireland, see O'Sullivan, (2016).

<sup>78</sup> Cretney (1995: 95-98).

<sup>79</sup> Note, also, reform affording children a better opportunity to seek discretionary provision from the estate of a deceased stepparent would not be appropriate. In addition to the increase in litigation this would produce, it is submitted stepchildren have two natural parents and their interests, where possible, ought to be settled from these estates directly.

<sup>80</sup> See Kerridge (1990). Note this would only apply as proposed where the surviving spouse was not the parent of any of the deceased's children.

<sup>81</sup> Note the seemingly strong desire of the Law Commission to move away from the use of equitable interests on intestacy, see below.

<sup>82</sup> See Kerridge (2007); (2015: 334-335) and (2016). Note these proposals were not limited to situations where the deceased was survived by children from a former relationship, but would bring 'some limited relief' to such children.

<sup>83</sup> He also argues for the reintroduction of other hotchpot rules taking account of lifetime advancements to children, see Kerridge (2015: 334-335).

<sup>84</sup> Joint tenancies are well recognised as operating as will-substitutes.

<sup>85</sup> Kerridge (2015: 335)

<sup>86</sup> See above.

<sup>87</sup> See above

<sup>88</sup> The Law Commission for England and Wales (2011: [2.78]) noted its distaste, in particular, for similar reform akin to that adopted pursuant to the Uniform Probate Code applied in a number of US states discussed above. As Kerridge (2016) observes, the 2011 report 'referred to the Code but did not explain properly how it operated'. The report emphasised the difficulties associated with it and generally 'downplayed' its significance. The extension of the US provisions to situations where the deceased has children which are all common descendants of the deceased and the surviving spouse, but the surviving spouse also has children from another relationship, noted above, seemed to weaken the value of the regime as a possible source of inspiration for reform. However, while the Law Commission appeared to view it as over-complicated, Kerridge (2016) argued that, in light of the application of 'all to spouse' where the deceased and surviving spouse's children were all common, when '[t]aken as a whole... the UPC system is not complicated'. Nevertheless, having regard to the need for simplicity, this extension of the limitations on the statutory legacy is not considered here and the more straight-forward British Columbian approach, not considered by the Law Commission, is preferred. Although Kerridge (2016) did recently restate his proposals discussed above, he hinted at showing some support for an approach based on the adoption of a reduced statutory legacy.

<sup>89</sup> See above.

<sup>90</sup> Note, even the provision of £125,000 could be viewed in some quarters as excessive. Kerridge (1990) and (2015) recommended considerably less generous provision where there were no children of the latter relationship, see above. However, the importance of ensuring adequate protection to surviving spouses must be borne in mind, particularly in light of demographic changes. As the Commission (2009:363) highlighted, it is important that the primacy of the surviving spouse is upheld – 'given increases in life expectancy, many more surviving spouses are likely to be elderly and in particular need of financial support than was the case when the statutory legacy was first created'.

<sup>91</sup> The practical operation of this right where the surviving spouse is also the administrator of the deceased's estate was recently subject to some debate. Where the right to appropriate the home is exercised by the surviving spouse acting with at least one other administrator, this act does not breach the rule against self-dealing. However, in light of the removal of the life interest in the remainder of the estate, the surviving spouse is now likely to be the sole administrator of an intestate estate. This change in circumstances has made it more precarious for a surviving spouse to appropriate the home. Nevertheless, the Law Commission failed to

recommend reform reducing the danger for such spouses to be caught by the self-dealing rule, see Law Commission for England and Wales (2011: [5.44]-[5.67]).

<sup>92</sup> See Land Registry (2016).

<sup>93</sup> Law Commission for England and Wales (2009: [3.52]).

<sup>94</sup> Law Commission for England and Wales (2011: [2.122]).

<sup>95</sup> Having regard to the vulnerability of the family home prior to the latest increase of the statutory legacy, a time when the legacy stood at £125,00 where the deceased was survived by a spouse and children (an equivalent level to that presented here), the Ministry of Justice (2008: 23) estimated there were fewer than 1,200 cases per year where the surviving spouse was at risk of losing the home, see Law Commission for England and Wales (2009: [3.23]). Although house price inflation over the past eight years may have increased the likelihood of a greater number of homes being at risk in 2016 should the proposed statutory legacy apply, the figures suggest the number of situations where this is liable to happen would continue to be small.

<sup>96</sup> Douglas, Woodward, Humphrey et al (2011: 266) found that 'interviewees recognized that the deceased might have an obligation to ensure that those left behind are not left worse off. Such a view extended to spouses and partners (to keep them in the style to which they had become accustomed and *to enable them to remain in the family home*)...' (emphasis added).

<sup>97</sup> Where title to the family home was held by spouses as tenants in common, the surviving spouse will be appropriating a life interest in the deceased's share of the home. Where the home was in the sole-name of the deceased, the surviving spouse would appropriate a life interest in the entire property. The proposal delivered here differs from the advanced by Kerridge (1990). Kerridge proposed that where the deceased was survived by a spouse and children from a former relationship, the surviving spouse ought to hold the intestate's estate as a life-tenant. Where there were children from both relationships, he proposed that perhaps the spouse should receive the entire estate. Cognisant of the needs of potentially aged and vulnerable surviving spouses, this proposal by contrast advances a more generous and arguably more user-friendly approach: namely, a reduced statutory legacy and half share of the remainder in all cases where the deceased is survived by children from a former relationship. Surviving spouses would merely have the option, in those limited situations where the family home is not held in a joint tenancy, of applying this share in order to appropriate a life interest in the home.

<sup>98</sup> Law Commission for England and Wales (2011: [2.87]).

<sup>99</sup> Law Commission for England and Wales (2011: [2.87]). See also [2.46].

<sup>100</sup> Law Commission for England and Wales (2011: [2.87]).

<sup>101</sup> As the current provisions for appropriating the family home are not considered discriminatory, neither would proposals akin to those presented.

<sup>102</sup> Prior to the most recent reforms, surviving spouses and children took a life interest in a half share of the remainder intestate estate, that in excess of the statutory legacy. Under this scheme, capitalisation of the life interest over the remainder was available which facilitated the surviving spouse and the deceased's children to receive lump sums immediately and free of the trust. The availability of this was subject to quite short time limits under section 47(5) of the Administration of Estates Act 1925 and was, in the absence of such time limits being considered unfair, required to be exercised within a year of the grant of representation. No such time limit would apply to this proposal. The capital value of the life interest was determined by reference to actuarial tables contained in the Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008, SI 2008 No 3162. Although the Law Commission for England and Wales (2011: [2.85]) referring to the Government Actuary's Department suggested that actuarial tables were 'something of a blunt instrument, since they cannot take into account any of the individual's characteristics beyond age and gender', it is submitted these tables could be retained. While they would not be capable of providing perfect justice, the 'rough justice' which they may provide would arguably be welcomed by those who would wish to remain in the home with an appropriated life interest but could not otherwise do so. The tables would have to be reviewed at regular intervals, however, to ensure their accuracy, see Law Commission for England and Wales (2009: [3.76]).

<sup>103</sup> Law Commission for England and Wales (2011: [2.87]).

<sup>104</sup> Law Commission for England and Wales (2009: [3.68]).

<sup>105</sup> Law Commission for England and Wales (2009: [3.70]).

<sup>106</sup> See section 2(1) and 27 of the Law of Property Act 1925. The surviving spouse's interest would nevertheless attach to the proceeds of sale or substitute property received.

<sup>107</sup> Law Commission for England and Wales (1989). For the vulnerability of non-owning spouses in the home, see also O'Sullivan, (2013).

<sup>108</sup> Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 – however they are only required to give effect to the beneficiary’s wishes ‘so far as consistent with the general interest of the trust’, see section 11(1)(b).

<sup>109</sup> Section 6(5) of the Trusts of Land and Appointment of Trustees Act 1996.

<sup>110</sup> Although, as noted, reliance on such protection is not ideal given that a surviving spouse may be unwilling to instigate such litigation.

<sup>111</sup> Note this is the maximum difference in value which could arise between the current regime and that proposed.

<sup>112</sup> Law Commission for England and Wales (2011: [2.44]) (emphasis added).

<sup>113</sup> Law Commission for England and Wales (2011: [2.34]).

<sup>114</sup> Kerridge (2015: 340) notes: ‘Those who are cynical about the [2011 Law Commission] recommendations, and who consider them too spouse-centred, may wonder to what extent there is a subconscious desire by government to ensure that property remains in, or is put into, the possession of the older generation. The advantage of this, to government, is linked to the funding of pensions and care for the aged.’ He adds at footnote 99, ‘more property in the hands of the aged also means higher revenue from taxes on death’.

<sup>115</sup> Law Commission for England and Wales (2009: [1.26]).

<sup>116</sup> Kerridge (2016).