Succession Law Challenges in Non-Traditional Families: International perspectives on step families and posthumously conceived children

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Introduction

• Family property law background
• ‘Family Law and Family Realities’: whether existing national family laws adequately reflect the rapidly changing realities of family life?
  – Are succession law regimes fit for purpose?
  – How best to reflect the realities of non-traditional families?
• Alberta Law Reform Institute (2015)
• Law Commission for England and Wales (2011)
• Scottish Law Commission (2009),
• New South Wales Law Reform Commission (2007)
• British Columbia Law Institute (2006)
Introduction

• Particular attention has been placed internationally on the position of two specific categories of ‘surviving’ children:
  – a deceased’s children from a former relationship
  – a deceased’s posthumously conceived children

• What is interesting, however, is the extent to which the various commissions have reached opposing conclusions on whether, and to what extent, the interests of such surviving children ought to be protected.
Caveats

- Succession law/family property law perspective
  - Not a medico-legal perspective

- Primary focus is on intestacy and on marital family contexts

- International reviews; focus on possible reforms for England and Wales or for Ireland
Intestacy

- Intestacy: without a will; invalid will
- Most of the common law world: ‘statutory legacy’
  - In England and Wales
    - Surviving spouse receives a statutory legacy of the first £250,000 (approx. €280,000) of the estate and one-half of the remainder absolutely
    - Children share in the other half of the remainder
  - A similar approach applies in Australia territories and Canadian provinces and in parts of the USA
  - The amount afforded to the spouse & the likelihood of children participating varies depending on level of legacy
Intestacy

• Alternative approach: ‘Fractional share approach’
  – Ireland
    • If a deceased dies leaving a surviving spouse and children (descendants), the spouse takes 2/3
    • A deceased’s children share in the remaining 1/3
  – Similar approach in Singapore and in some civil law countries
Children from a former relationship

- Fractional approach: children always share in the estate
- Statutory legacy approach?
  - In England & Wales, 90% estates worth less than statutory legacy
  - Children from an earlier relationship appear especially vulnerable: Conduit theory
  - Some legislators have reacted to this perceived vulnerability
Children from a former relationship

• British Columbia, Canada
  – Wills, Estate and Succession Act 2009:
    • Statutory legacy (Preferential share) to spouse is $300,000 (€203,600) and one half of the remainder & children share in other half of remainder
    • HOWEVER.... If the deceased survived by children from a former relationship...
    • Statutory legacy (Preferential share) to spouse is reduced to $150,000 (€101,800)
• Aim?
Children from a former relationship

- Similar (more extensive) approach adopted under the Uniform Probate Code in USA (adopted, at least in part, by 18 states)

- See also New South Wales, Australia

- Examples of intestacy regimes responding to ‘non-traditional’ family situations

- Where does that leave Ireland or England?
Children from a former relationship

- Ireland
  - Less of an issue: *all* children *always* share
  - 2017 Law Reform Commission

- Law Commission for England and Wales (2011)
  - Rejected reform 3 times in last 30 years
  - Under most pressure in 2011 in light of Douglas et al’s large empirical study:
    - Weak support for current regime especially for non-traditional families: Support for ‘all to spouse’ between 11%-16%
    - Prioritisation of the surviving spouse attracted the most support varying between 27%-45%
      - What would constitute ‘prioritisation?’
Children from a former relationship

– Yet Law Commission failed to recommend reform

– **Argument 1:** Belief that it would be *inappropriate* to treat different types of spouses differently
  
  • Would leave stepparents in a financially vulnerable position...
  
  • From a principled perspective, a surviving spouse’s share should not be affected by the presence of children from the deceased’s former relationship...
Children from a former relationship

- **Argument 2:** Any reform to take better account of non-traditional families would be *impractical* and would necessarily bring excessive complexity
- **Argument 3:** Family home could be jeopardised?

- Do these arguments stand up? Maybe not....

Posthumously Conceived Children

• ‘After-born’ or ‘posthumously conceived’ children
• New category of ‘surviving’ children

• Through assisted reproduction, they may be conceived after the death of one of their genetic parents using the deceased parent’s stored reproductive material
• Most likely situation: father has died

• Academic attention?
  – Depends on which side of the Atlantic!
Posthumously Conceived Children

3 key questions:

1. If genetic material is being preserved, who owns it and are there any limits on its being used posthumously?
2. If an after-born child does result from the use of this genetic material, how is parentage recognised or registered?
3. What is the legal position of the after-born child in relation, for example, to succession rights in their deceased genetic parent’s estate?
Posthumously Conceived Children

- After-born children have always been recognised—those that were *en ventre sa mère*...
- But the lapse of time between the deceased’s death and the child’s birth is the key difference in this new scenario...
- Cryogenic freezing of genetic material... window for birth could be 10 years or more after deceased’s death
- How have jurisdictions responded?
Posthumously Conceived Children

- Ireland: No clear answer, the issue has never been raised, unlikely to have entitlements
- England and Wales: No entitlement (debateable on testacy?) & issue not raised in 2011 review

- Jurisdictions that have reviewed the issue:
  - New South Wales Law Reform Commission (2007) declined to support reform
  - Alberta Law Reform Institute (2015) declined to support reform (though note after-born children could inherit under a will)
Posthumously Conceived Children

- Perceived difficulties in affording inheritance rights to such children
  - Delay the administration of estates unduly
  - Introduce unwanted complexity
  - Potential for generating more litigation
  - Living beneficiaries would lose out
  - The child would have enjoyed no human connection with the deceased
  - Disproportionate response to a small problem
  - Children have no legal entitlements until born
  - Knock-on effects regarding the closing of a class and the Rule against Perpetuities (where applicable)
Posthumously Conceived Children

- Arguments for the recognition of such children:
  - Best interests of the child
  - UN Convention on the Rights of the Child (Equal treatment of children)
  - Distinction based on the method of conception is like the distinction formerly made in relation to illegitimate children
  - Unborn have long been protected
  - Likely to be born in to single-parent families
  - Autonomy should be respected
  - Supports family cohesiveness
Posthumously Conceived Children

- British Columbia, Canada: Wills, Estates and Succession Act 2009
  - Written notice to personal representative of possibility within 180 days of grant of representation and...
- USA: Uniform Probate Code (2008 revision)
  - Posthumously conceived child can inherit if born within 45 months of deceased’s death (conceived within 36 months)
- Manitoba Law Reform Commission also recommended reform (2008)
Conclusion

- Families are getting more complicated ....succession law regimes need to reflect these changes

- Huge variation in willingness of legislatures to engage

- How long more can they hold out?!
THANK YOU

Biyan
Shukria

Gracias
Arigato
Shukuria

Thank you