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# From the Cradle to the Grave: Politics, Families and Inheritance Law

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## **A. INTRODUCTION**

Property is political. The extent to which a society restricts or encourages freedom of ownership and the accumulation of wealth reflects the values of that society, whether they spring from a Marxist ideology at one end of the political spectrum

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or from a commitment to liberal individualism and the operation of a free market at the other.<sup>1</sup> Property ownership is the foundation stone of a capitalist economy<sup>2</sup> and the spread of home ownership a core philosophy of all modern political parties.

The extent to which the law should interfere with individual choice in relation to family behaviour is an issue which elicits a range of views across the political spectrum, closely related to preference for “big” or “small” government and sympathy (or lack of it) for a degree of social engineering. Modern British governments tread warily in this territory, reluctant to create controversy or to risk accusations of being a “nanny” state. But none has completely eschewed policy initiatives which affect the institution of the family.

Inheritance straddles these core institutions of property and family, for it involves the transfer of wealth between family members. Whatever legal framework is adopted to govern inheritance involves political choices. First, and on the assumption that ownership includes the freedom to dispose of property as we wish in life or in death,<sup>3</sup> a position has to be adopted on the extent to which the state will limit that freedom. Secondly, because creating inheritance rules involves conceptualising family life, choices must be made about the merits of particular forms of “family” and of particular relationships within that family. The law selects winners and losers on the basis of those political choices. The Scottish Law Commission’s recent discussion paper on *Succession*<sup>4</sup> contains proposals for a radical reform of inheritance law. This discussion paper is, therefore, inherently political.

This article does not claim to provide a solution to the complexities of creating a satisfactory set of rules to govern inheritance. Rather it seeks to evaluate the reform proposals in terms of the Scottish Law Commission’s own stated objectives of creating “a fair and rational system that adequately reflects majority views”.<sup>5</sup> Those views will be examined in the light of recent research studies and of wider

1 This is not to overlook the influence of religious belief in the formation of cultural values, but the focus of this article is on the political ideology prevalent in western secular democracies.

2 C B MacPherson, “Property as means or end”, in A Parel and T Glanagan (eds), *Theories of Property* (1979) 3; H de Soto, *The Mystery of Capital* (2000) ch 1.

3 This appears to be the basis on which the law currently operates. This article does not seek to contribute to the wider debate about the morality of inherited wealth and its potential for widening the inequality gap. The starting point is an assumption that inheritance as a concept is unlikely to be challenged and that future debate will focus on reduction of the tax burden on inherited wealth: see A Mumford, “Inheritance in socio-political context: the case for reviving the sociological discourse of inheritance tax law” (2007) *J Law & Soc* 567.

4 Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007; available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) (henceforth DP).

5 DP para 2.2.

policy implications. And on a more profound level, the underlying ideology of the discussion paper will be explored in order to assess whether the proposals represent an appropriate inheritance model for Scots law in the twenty-first century.

## B. THE REFORM PROPOSALS

The discussion paper reviews two important aspects of succession law: the default rules governing intestacy and the regime of “legal rights”,<sup>6</sup> a term of art in Scots law which denotes the centuries-old mechanism preventing the deceased from disinheriting a spouse or civil partner<sup>7</sup> or a child.<sup>8</sup> These issues are separate but related, for both affect the allocation of the deceased’s property to immediate family members. The overall trend in the discussion paper is to prioritise the rights of spouses: where there is a surviving spouse the inheritance rights of all other family members, including children, are either diminished or removed entirely. It is important to examine the underlying reasons for a change which will have a significant impact on Scottish families.

### (1) Rationale for the rules of intestacy

The current rules of intestacy need reform, according to the discussion paper, because they “sometimes fail to provide a fair result”.<sup>9</sup> One example of unfairness is that where a deceased leaves behind a spouse but no children, the deceased’s parents and siblings could in some cases inherit a “substantial proportion”. In those circumstances, the proposal is to give the whole estate to the spouse – one of the less controversial measures in the discussion paper. Matters are more complex and “difficult”<sup>10</sup> where the deceased is survived by both a spouse and by children. Again it is claimed that the current rules sometimes produce “unjust and anomalous results”,<sup>11</sup> in that the children may get too much and the spouse too little. The proposals aim therefore to give the surviving spouse all of a “modest”

6 The umbrella term “legal rights” includes the legitim of children and the *jus relictæ* or *jus relictī* of female and male spouses respectively.

7 With the introduction of (same-sex) civil partnerships by the Civil Partnership Act 2004, the positions of a surviving spouse and a surviving civil partner are equalised in succession law. See 2004 Act s 131. To avoid repetition, “spouse” is used in this article to include both a spouse and a civil partner.

8 In this article the term “children” is used to denote the wider concept of issue, i.e. children or their descendants, for a predeceasing child can be represented by her descendants for most purposes in intestate succession (Succession (Scotland) Act 1964 s 11).

9 DP para 1.8.

10 DP para 2.27.

11 DP para 2.28.

estate and to allow children to share in a “substantial” estate.<sup>12</sup> These terms are not defined, but, as will be demonstrated, the proposals only achieve this objective if “substantial” is taken to refer to the estates of a small and wealthy minority.<sup>13</sup> It is interesting how often the discussion paper appeals to “justice” or “injustice”. These terms are left unexplained but, broadly speaking, in relation to intestacy the Law Commission appears to deem it “fair” when a spouse gets more or less everything and “unfair” when anyone else gets much.

## **(2) Protection from disinheritance and ideology**

In relation to legal rights, the Scottish Law Commission’s reasoning is more explicit, in acknowledgement of the radical nature of its proposals. A new concept of “legal shares” is proposed, whereby spouses can claim 25% of what they would be entitled to on intestacy if they are not (or not generously enough) provided for in the deceased’s will.<sup>14</sup> For the deceased’s children the proposal is to remove the right of legitim currently available to all children and to replace it, for dependent children only, with a new discretionary claim.<sup>15</sup> Discretionary rights are treated inconsistently in the discussion paper.<sup>16</sup> They are rejected for spouses,<sup>17</sup> on the basis that court-based awards are uncertain, inconvenient, expensive, and likely to provoke litigation at a time of bereavement,<sup>18</sup> but are retained both for cohabitants<sup>19</sup> and for dependent children<sup>20</sup> on the ground that a fixed rule would not take account of “need”.<sup>21</sup> Hilary Hiram argues that this shift from “a kind of deferred community of property” towards “need” as an inheritance criterion “[denies] to children legal recognition as family members”.<sup>22</sup> Importantly, the Commission accepts that a child’s right to legitim does not derive from need but “from the parent-child relationship itself”.<sup>23</sup> The proposed removal of legitim, therefore, logically implies that the Commission no longer regards the parent-child relationship as a sufficiently strong reason in itself to confer a right of inheritance.

12 DP para 2.38.

13 On the most recent statistics, only 2% of intestate estates are worth more than £300,000, the proposed threshold at which children will be able to make a claim on an intestate estate: see D.(4)(a) below.

14 25% of the value of an estate up to a £300,000 limit, plus a further one-eighth share of any balance.

15 See H Hiram, “Reforming succession law: legal rights” (2008) 12 EdinLR 81.

16 Hiram (n 15) at 85-86.

17 DP para 3.39.

18 DP para 3.34.

19 To mirror a cohabitant’s discretionary claim on intestacy, for which see Family Law (Scotland) Act 2006 s 29.

20 I.e. children whom the deceased had an obligation to aliment: DP para 3.80.

21 DP para 3.81.

22 Hiram (n 15) at 84.

23 DP para 3.92.

The removal of legitim is likely to prove the most controversial proposal in the discussion paper. Indeed in view of the public support for protecting children from disinheritance, discussed below,<sup>24</sup> and the fact that Scotland, together with most other European jurisdictions, has a long tradition of doing so, it is not clear why the Commission regards this as a “difficult and controversial”<sup>25</sup> question. The same issue has vexed the Commission for almost 20 years. In its earlier, and unimplemented, report on *Succession*, it was similarly “attracted” to the idea of limiting legitim to dependent children but abandoned the proposal on the grounds that it was out of line with both public opinion and the consultation responses.<sup>26</sup>

This second attempt to convince is more robust. A range of philosophical arguments is marshalled to support the exclusion of adult children. I make no apology for quoting these arguments in detail, for they illuminate the way in which families are conceptualised and, more importantly, they reveal the ideology underlying the proposals.

- (a) *The moral argument*: “There is a difference between moral duties and legal duties.”<sup>27</sup> The diverse legal obligations of parents end at 16, 18 and 25 years of age, and any obligation to leave an inheritance should not last any longer. It is considered “anachronistic to continue to make such a duty legally enforceable”.<sup>28</sup>
- (b) *The individualist argument*: “The parent’s property is his or her own property: it is not family property.”<sup>29</sup>
- (c) *The freedom argument* (which follows logically from an individualist concept of property): “He should therefore be free to dispose of his property as he wishes”,<sup>30</sup> or again, “It is difficult to see why after they have discharged their obligation of aliment parents should be unable to dispose of their estate as they wish”.<sup>31</sup> This argument is further refined: “The prospective entitlement of a spouse or civil partner can be terminated before death by divorce or dissolution. There is no legal machinery available for parents to dissolve the parent-adult child relationship so as to prevent their children’s claims.”<sup>32</sup>

24 See C.(4) below.

25 DP paras 1.3, 1.10, 3.78.

26 Report on *Succession* (Scot Law Com No 124, 1990) paras 3.10, 3.11.

27 DP para 3.95.

28 DP para 3.100.

29 DP para 3.95.

30 DP para 3.95.

31 DP para 3.96.

32 DP para 3.95.

- (d) *The legal argument*: “Inheritance from a parent should no longer be viewed as a right.”<sup>33</sup> The Commission questions whether such a view would ever have been justifiable “as no-one has an indefeasible right to succeed to another’s estate”.<sup>34</sup> This is a curious assertion when all Scottish children have had such a right for centuries, contingent only on the death of a parent and the existence of moveable assets. Moreover, in jurisprudential terms legal rights have been characterised as “a paradigm case of ‘having a right’”.<sup>35</sup> However, it is now considered time to remove the “legal disability”<sup>36</sup> of not being able to disinherit one’s children.
- (e) *The capitalist argument*: “Compulsory shares for children reflect a static society where inherited wealth was very important: nowadays there are many more opportunities for people to amass their own wealth and indeed are expected to do so.”<sup>37</sup> The assumption can, therefore, be made that adult children “will generally not be in need”. The fact that most people are middle-aged when their parents die means that “therefore [adult children] are not in need of substantial capital to set themselves up in life”.<sup>38</sup> The implication is that financial need is the only acceptable rationale for retaining protection for children and the only acceptable limitation on freedom.
- (f) *The pragmatic argument*: “legal rights are seldom claimed by adult children”.<sup>39</sup> No allusion is made to the possibility that they are the best-kept secret in Scots law. All available research data points to the fact that the public is not well-informed about inheritance issues.<sup>40</sup>

Taken together, these arguments represent a statement of possessive individualism, firmly in the liberal tradition. From this foundation emerges a new version of inheritance law which prioritises the freedom (and rights) of the individual – as spouse and as property owner – over the claims of kinship. It could conceivably be characterised as extending the market principles which govern property transactions into family relationships: the prioritisation of freedom and

33 DP para 3.96.

34 DP para 3.1.

35 N MacCormick, “Discretion and rights” (1989) 8 *Law and Philosophy* 23 at 25.

36 DP para 3.100.

37 DP para 3.100.

38 DP para 3.95.

39 DP para 3.95.

40 K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005), available at <http://www.jrf.org.uk/knowledge/findings/socialpolicy/0385.asp>, a study commissioned by the Joseph Rowntree Foundation (henceforth the Rowntree Report) xii, ch 6; S O’Neill, *Wills and Awareness of Inheritance Rights in Scotland*, Scottish Consumer Council (2006), available at <http://www.scotconsumer.org.uk/publications/reports/reports06/rp10wrep.pdf>, 13-18; F Wasoff and C Martin, *Scottish Social Attitudes Survey 2004: Family Module Report*, Scottish Executive Social Research (2005), available at <http://www.scotland.gov.uk/Publications/2005/08/02131208/12092>, para 7.9.

the empowerment of the owner to choose how to dispose of assets, limited only by pre-existing legal obligations and the need to provide for young dependent children. Automatic provision for the current spouse fits with this theory in that a voluntarily assumed relationship can be deemed to represent the choice the deceased would have made for the disposal of his or her assets.

The transfer of property *mortis causa* is undoubtedly an economic act. However, it is based not on market exchange but on relationship and affection. Inheritance touches both material and sentimental interests<sup>41</sup> and the acquisition of a loved one's property may have a deeper symbolic function for close relatives which impacts on the continuity of relationships, memory and even personal identity.<sup>42</sup> The regulation of inheritance, therefore, involves a conceptual negotiation between the market principle of freedom (of the property owner or testator) and the non-market (emotional or moral) claims of family members. This is difficult territory for the law to regulate and, given the diversity of family life in Scotland, any attempt to formulate rules of general application is likely to generate controversy. Likewise, strong ideological claims are likely to be disputed claims. Just as my family may be radically different from yours, so may my version of justice and freedom. As we shall see, research evidence suggests that the market model outlined above may not reflect the reality of people's lives, or the way in which they conceive of family relationships and inheritance.

Few would question that Scots succession law is in need of reform. There would be widespread support for the Commission's view that it is unduly complex and should take more account of social change and diverse family forms.<sup>43</sup> The question is whether the radical change to the inheritance regime between parents and children that is proposed in the discussion paper is needed to achieve those aims. If not, it is suggested that the impetus for change is largely ideological.

### C. PROTECTION FROM DISINHERITANCE

#### (1) Legal tradition

Legal systems have different approaches to inheritance, informed by history and political and cultural values.<sup>44</sup> The Anglo-American tradition prioritises freedom

41 J Beckert, "Political and social interests in the transfer of property" (2005) 46 *European Journal of Sociology* 359 at 361-362.

42 J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) 15ff.

43 DP paras 1.3, 1.8.

44 H Willekens, "Long term developments in family law in Western Europe: an explanation", in J Eekelaar and N Thandabantu (eds), *The Changing Family: International Perspectives on the Family and Family Law* (1998) 47; B Willenbacher, "Individualism and traditionalism in inheritance law in Germany, France, England and the United States" (2003) 28 *Journal of Family History* 208.

of testation and only reluctantly interferes with the right of the individual to distribute assets as he or she sees fit, for property ownership is integral to the individual's ability to act as a free agent. One commentator has described the regulation of inheritance in England as having "a very light touch, by comparison with most continental jurisdictions".<sup>45</sup> John Stuart Mill encapsulates the Common Law's reverence for the freedom of the property owner, both in life and in death:<sup>46</sup>

bequest is one of the attributes of property: the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure.

Most Western European jurisdictions, by contrast, are more prescriptive and show varying degrees of commitment to the concept of family property. For instance, both French and German law protect the immediate family through the twin devices of a community of property regime within marriage and forced heirship provisions on death.<sup>47</sup> The German attitude to testamentary freedom has been characterised as showing "a deep skepticism against the development of an unfettered individualism" and reflecting "the (ideological) importance of the family, conceived as a crucial institution of social organization".<sup>48</sup> In both societies inheritance is regarded as a family right<sup>49</sup> and the rules which govern the process are embedded in public consciousness.

Scots law, true to its mixed nature, lies somewhere in the middle of these contrasting traditions. It has no community of property regime, but limits freedom of testation in the interests of close family members. Stair affirms that "the first rule of succession in equity, is the express will of the owner",<sup>50</sup> but this rule is immediately qualified by natural obligations which exist between husbands and wives and between parents and children, for the man who does not provide for his own family is "worse than an infidel".<sup>51</sup> The modified rule is therefore that "the first member of succession in equity must be those of the defunct's family, and not those of his institution or choice".<sup>52</sup> Thus it was not possible to test at all on heritable property until 1868<sup>53</sup> and, from ancient

45 J Finch, "The State and the family", in S Cunningham-Burley and L Jamieson (eds), *Families and the State* (2003) 29 at 35.

46 J S Mill, *Principles of Political Economy* (1848) book II ch 2 ss 3, 4.

47 For comparative detail see, S van Erp, "New developments in succession law" (2007) 11.3 *Electronic Journal of Comparative Law*, available at <http://www.ejcl.org>.

48 Beckert (n 41) 365 n 4.

49 Willenbacher (n 44) at 209.

50 *Inst* 3.4.2.

51 *Inst* 3.4.2, quoting from the Bible (I Tim v 8).

52 *Inst* 3.4.2

53 W D H Sellar, "Succession law in Scotland – a historical perspective", in K G C Reid, M J de Waal and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative*

times, a married man with a surviving spouse and children could only test on one-third of his moveable property.<sup>54</sup> This rule is preserved in modern Scots law, for children and spouses can still claim legal rights on up to two-thirds of the deceased's moveable property.<sup>55</sup> However, whilst legal rights may resemble a Civilian forced heirship entitlement, in practice they do not operate as such. The person on the Paris *métro* is likely to be well-informed about the distribution of the *réserve*, which does exactly what it says – it is automatically reserved for the *réservataires* and cannot be avoided.<sup>56</sup> Legal rights, by contrast, are not reserved in this way. Although legal rights vest at the moment of death, they are not routinely distributed.<sup>57</sup> Of course, they may be claimed by the relatives in question, but such a claim presupposes knowledge of the entitlement and, perhaps more significantly, risks upsetting the provisions of the deceased's will and causing family disputes at a difficult time.

By proposing that the legal rights of children be removed, the discussion paper re-orientates Scots law towards the Anglo-American approach. It does not yet envisage an entirely unfettered individualism, but by giving automatic protection only to the current relationship of choice<sup>58</sup> it comes closer to that model than at any time in the history of Scots law. Change is not necessarily a bad thing, of course, nor tradition good, but the impetus towards greater individualism in family relationships may be anachronistic. It is certainly at odds with the tone of current political dialogue with its emphasis on family and community obligations as the foundations of civic responsibility and its call for increased intergenerational support. Gordon Brown, for example, has said:<sup>59</sup>

People – over the life cycle from the cradle to the grave – helped in childhood, helping in youth and adulthood, helping again – and helped in old age – reciprocity across the generations – making a reality of Burke's definition of society as “a partnership extended over time”.

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(2007) 49 at 60; but see also G L Gretton, “Fideicommissary substitutions: Scots law in historical and comparative perspective”, in *Exploring the Law of Succession* 156 at 164 n 43.

54 Sellar (n 53) at 60.

55 For the history of legal rights, see: J C Gardner, *The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession* (1928); A E Anton, “The effect of marriage upon property in Scots law” (1956) 19 MLR 653; Sellar (n 53) at 57-66.

56 H Dyson, *French Property and Inheritance Law: Principles and Practice* (2003) ch 28.

57 Research carried out by the author suggests that claims for legal rights are now regarded by the legal profession as exceptional. In a recent questionnaire survey (to which 73 Scottish law firms responded) 68% of respondents, all of whom were experienced executry practitioners, had not encountered a testate estate in which legal rights had been claimed and a further 28% had only encountered this situation once or twice.

58 As well as spouses and civil partners, cohabitants' rights are also extended: see DP paras 3.63-3.75.

59 Speech to National Council for Voluntary Organisations, Feb 2000, available at [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/speeches/chancellor/exchequer/speech\\_chex\\_90200.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/speeches/chancellor/exchequer/speech_chex_90200.cfm).

## (2) Individualism and kinship

The view that British (and western) society is becoming more individualised, selfish and consumer-orientated is widely touted. In an important research study of attitudes to inheritance in England, Finch and Mason question some of the social theory analysis prevalent in the 1990s<sup>60</sup> whose dominant narrative was of family breakdown and the emergence of the “individualised society”.<sup>61</sup> Finch and Mason explicitly distance themselves from a definition of individualism which “means not just that each person is the centre of his or her own world but also that this is how it *should* be. There is a legitimacy about being ego-centred that is a requirement of contemporary living.”<sup>62</sup> Arguably this is the world view encapsulated in the Scottish Law Commission’s ideological framework.

In their study Finch and Mason examined attitudes to inheritance in interviews with around 100 adults and found evidence suggesting a different picture, one which pointed to “more connected, more relational, forms of social existence”.<sup>63</sup> The researchers redefine individualism as “relationism”, by which they mean that freedom of choice is evident in the way in which people construct their kin relationships. A “family” is a flexible concept, one that is constituted on the basis of individual relationships rather than generated automatically by family positions. For instance, a person may be closer to a particular sister, aunt or cousin (because of who they are) rather than the person’s siblings as a whole (because of the mere fact of relationship). However, within a framework constructed by choice, the evidence suggests that kin relationships and commitments are still central to people’s lives. Families do not appear to have disintegrated and most people still want to think that they belong to a functional kin group.<sup>64</sup> Within this flexible and dynamic picture of how families work, the researchers found consensus:<sup>65</sup>

The core thread of fixity is the continuing relationship between parents and children. This remains at the core even in complex families . . . the parent-child relationship is both predictable and privileged, as is seen very clearly in relation to inheritance.

60 Finch & Mason, *Passing On* (n 42) 8-9, 17-22.

61 U Beck, *Risk Society: Towards a New Modernity* (1992) 135, quoted in Finch & Mason, *Passing On* (n 42) 8.

62 Finch & Mason, *Passing On* (n 42) 21.

63 Finch & Mason, *Passing On* (n 42) 22, App A. Although this was an English study, it is unlikely that the results would be substantially different in Scotland. The Rowntree Report (n 40) was in respect of a UK-wide study and found no difference in attitudes to inheritance among Scottish participants. Professor Rowlingson has confirmed to the author that the Scottish sample was particularly scrutinised as the researchers were aware that Scots law operated differently, but no attitudinal differences were identified.

64 Finch & Mason, *Passing On* (n 42) 7; Finch (n 45) at 33-36.

65 Finch & Mason, *Passing On* (n 42) 59.

Moreover, people do not distinguish between young and adult children: “it is expected that children will form part of ‘the family’ at whatever age or point in the life course. But everything else can and does change.”<sup>66</sup>

Finch and Mason also found that the vast majority of parents wanted to leave something to their children. There was strong support for being able to use property in whatever way one chooses during life, but for most people being a good parent included passing something on to the next generation.<sup>67</sup> These findings suggest that the relationship between parents and children is fundamentally important to the way in which most people view inheritance.

The Rowntree Report, the most recent research into British attitudes to inheritance,<sup>68</sup> found that inheritance was no longer perceived to be the preserve of the rich. 90% of respondents, selected from a broad socio-demographic range, saw themselves as potential bequeathers.<sup>69</sup> When this group was asked about who they would leave their wealth to, the vast majority (89%) identified children.<sup>70</sup> Support for what the researchers call “intergenerational solidarity” and for the idea of leaving an inheritance for future generations was strongest amongst the oldest participants, Asian and black respondents, and – unsurprisingly – parents, including single parents. It was weakest amongst “babyboomers” in their 50s who had no children.<sup>71</sup> Age and parenthood appear to be significant indicators in attitudes towards inheritance and as people age and become more dependent themselves their sense of generational solidarity may increase.

Whilst most people value individualism and freedom of choice, for parents an even higher value is placed on their relationship with their children, whether young or old. That kin relationship may assume even greater importance in reconstituted families in the aftermath of a marriage or civil partnership which has failed.<sup>72</sup> Research suggests, therefore, that the parent-child relationship remains central to public conceptions of inheritance and that it has little to do with need.

### **(3) Moral and legal obligations**

The discussion paper is anxious to separate moral from legal territory. Accordingly, it proposes that only legal obligations of parents should be recognised in inheritance and, furthermore, that the public purse should look

66 Finch (n 45) at 41.

67 Finch & Mason, *Passing On* (n 42) 115, 123-125.

68 2008 adults were interviewed, including a representative sample of Scottish participants.

69 Rowntree Report (n 40) 35.

70 Rowntree Report 48.

71 Rowntree Report 40-44.

72 B Dimmock et al, “Intergenerational relationship among stepfamilies in the UK”, in S Harper (ed), *Families in Ageing Societies* (2004) 82 at 93.

after adult children: “The obligation to relieve the needs of adult children rests on the state not the parent’s estate”.<sup>73</sup> However, within many, if not most, families, research studies have found an “implicit contract”<sup>74</sup> which operates in a reciprocal way: children attend to elderly parents; parents care for and support their children, even into adulthood. Indeed, the parental obligation has been characterised as a “no exit” obligation<sup>75</sup> in modern society, one which involves both emotional and financial sacrifice. Such obligations within families may be unspoken, even taken for granted, and whilst need may be a factor, particularly with the very young and the very old, it will rarely be the source of the obligation. Finch and Mason found a high degree of consensus about what was “the proper thing to do” in parent-child relationships<sup>76</sup> and a strong sense of duty independent of any legal obligation.

To take a problem current in all western democracies, the ageing population, commentators have noted the policy shift, from all sides of the political spectrum, away from what is perceived to be an over-reliance on the welfare state to what has been described as the “welfare society”.<sup>77</sup> Rodger describes the increasing evidence of a “‘moral agenda’ shaping debate about the distribution of responsibility for social welfare between the state, the individual and the family”.<sup>78</sup> The political imperative, which appears to run directly counter to the Scottish Law Commission’s “statist” model of adult welfare, is to transfer social care from the public realm to the private sphere of voluntary organisations, families and other informal carers.<sup>79</sup> Harper’s work on the elderly demonstrates the way in which family obligations of care and support have become integral to UK government policy.<sup>80</sup>

The political rhetoric of personal responsibility (“no rights without responsibilities” or “helping people to help themselves”) is commonplace, evidence of an ongoing redefinition of social citizenship:<sup>81</sup>

73 DP para 3.95.

74 R Hancock et al, *Attitudes to Inheritance* (2002) 7; see also J Finch and J Mason, “Obligations of kinship in contemporary Britain: is there normative agreement?” (1991) 42 *British Journal of Sociology* 345 at 356-359; J Finch and J Mason, *Negotiating Family Responsibilities* (1993) 18-21.

75 A L Alstott, *No Exit: What Parents Owe their Children and What Society Owes Parents* (2004) 51-52.

76 J Finch and J Mason, “Filioal obligations and kin support for elderly people” (1990) 10 *Ageing and Society* 151 at 153-160.

77 J Rodger, *From a Welfare State to a Welfare Society: The Changing Context of Social Policy in a Postmodern Era* (2003).

78 J Rodger, “Family life, moral regulation and the state: social steering and the personal sphere”, in S Cunningham-Burley and L Jamieson (eds), *Families and the State* (2003) 47.

79 Rodger (n 78) at 51.

80 S Harper, *Ageing Societies* (2006) 190-191; also A Walker, “Intergenerational relations and the provision of welfare”, in A Walker (ed), *The New Generational Contract* (1996) 25; Finch (n 45) at 30.

81 Rodger (n 78) at 57.

The emerging family discourse from the right has become increasingly strident and marked by a vocabulary which talks of *responsibilities* and *obligations* rather than social rights, a view which has gained ascendancy on the centre left as well.

This idea has the advantage of being both socially and economically attractive – if families look after their own, the public purse is saved some of the expense of health and social care.<sup>82</sup> The change has impacted most on women. It is estimated that informal care of the elderly by (usually female) family members is the largest care sector.<sup>83</sup> Figures suggest that as much as 80% of elderly care in the UK comes from family members,<sup>84</sup> and even in reconstituted families the “dominant care relationship” is that of “blood-related daughter for mother”.<sup>85</sup>

Whatever the intrinsic merits of this policy shift, it is clear that the family retains some of the welfare functions it was solely responsible for in an earlier era, functions which are willingly assumed by many adult children.<sup>86</sup>

Despite the growth in ... individualistic values, there remains a consistent body of evidence that many families remain committed to care and support their kin in terms of expressed attitudes and behaviour.

It is arguably inconsistent for policy makers, on the one hand, to be encouraging the assumption of family responsibilities as part of a citizenship agenda and, on the other, for law reformers to be advocating the transfer of those responsibilities to the state once a child has reached adulthood. Not only is this position at odds with current social policy, it is also at odds with the moral sense which researchers have consistently found in people’s attitudes. Moreover, there is a potential inconsistency in the application of this principle in the discussion paper, for while adult children are deemed to be the responsibility of the state, adult spouses are worthy recipients of inheritance on the basis, presumably, of need; yet the rules will apply regardless of whether the children are poor and the spouse rich or vice versa.

The attempt to put clear blue water between the realms of law and morality is problematic, not least because the very attempt to do so in itself represents a particular moral position. Instead of presenting a dichotomy between moral and legal obligations, it may be more helpful to recognise that where there is consistency in social behaviour and consensus in public attitudes, taken together

82 Walker (n 80) at 32-33; Harper, *Ageing Societies* (n 80) 190-197.

83 M Knapp et al, “Social care for older people: the growth of independent-sector provision in the UK”, in S Harper (ed), *Families in Ageing Societies* (2004) 144; Harper, *Ageing Societies* (n 80) 27, 195-197.

84 Walker (n 80) at 3; Harper, *Ageing Societies* (n 80) 196.

85 S Harper, “The challenge for families of demographic ageing”, in S Harper (ed), *Families in Ageing Societies* 26; Dimmock (n 72) at 88.

86 Walker (n 80) at 1; Harper, *Ageing Societies* (n 80) 195-196.

these constitute social norms. It is perhaps a reasonable expectation that the law should not diverge too far from those norms or from the reality of most people's lives.<sup>87</sup>

#### (4) Public opinion

In its assessment of the merits of children's inheritance rights, the Scottish Law Commission relied on the results of opinion surveys which it commissioned in 1986 and in 2005. Participants in both surveys were asked to give their views on a series of fictional scenarios involving the disinheritance of various family members.

In the 1986 survey<sup>88</sup> there was clear support for children (whose ages were not specified) to receive an inheritance despite the existence of a will attempting to disinherit them, except where the will was in favour of the spouse.<sup>89</sup> In the 2005 survey,<sup>90</sup> support was even stronger. 87% of respondents agreed that young children should have a claim on a man's estate where he had left them out of his will, and 70% agreed that adult children should have a similar claim, rising to 77% where the will favoured one child to the exclusion of another.<sup>91</sup> Where the will was in favour of a wife, support for children's claim was less strong: a small majority (54%) considered that the children should be entitled to some of the estate, and 40% thought that the will should stand.

The 2005 survey suggests that there is strong support for a fixed share of a deceased's estate to pass to children of any age, although weaker where the will is in favour of the spouse. However, the survey did not ask some important questions, such as whether respondents would feel differently if the deceased was poor or wealthy. The earlier survey used this distinction in several questions and found that the size of the estate elicited different responses, suggesting that the public is able to make subtle distinctions on the basis of what is available to be claimed.<sup>92</sup> Another significant question would be to assess support for the

87 For a helpful analysis of moral, legal and social duties within families, see J Eekelaar, "Are parents morally obliged to care for their children?", in J Eekelaar and P Sarcevic (eds), *Parenthood in Modern Society* (1993).

88 992 people aged 18 and over were sampled. For a summary of the findings, see *Intestate Succession and Legal Rights* (Scot Law Com CM No 69, 1986) app II (henceforth 1986 survey).

89 1986 survey (n 88) 233-234. Support was 85% where everything was left to a charity, decreasing to 80% where it had been left to one child at the expense of the other. Only 40% supported claims of children where everything had been left to a spouse.

90 *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey*, Scottish Executive (2005) (henceforth 2005 survey), available at <http://www.scotland.gov.uk/Publications/2005/07/18151328/13297>. 1008 people aged 16 and over were sampled.

91 2005 survey (n 90) paras 2.18, 2.21, 2.28.

92 1986 survey (n 88) 227-231.

claims of children where the will was in favour of a second spouse who was not their parent. It should be noted that in every scenario where respondents were given a choice of opting for either a fixed share or a discretionary share requiring application to the court, they chose the former.<sup>93</sup> There was no evidence whatsoever that the public would support the involvement of the courts in assessing the merits of an inheritance claim.

The evidence from opinion surveys suggests that Scots do not support unfettered freedom of testation. There is clearly support for an automatic share to go to a spouse, but also strong support for the rights of children. There is little to suggest that Scottish parents would consider themselves currently under a “legal disability” in being unable to disinherit their children.

#### **(5) The demise of legal rights**

In summary, research studies and public opinion surveys show convincingly that children are important beneficiaries in the inheritance story which most people tell and that the Scottish public supports the retention of “the bairns’ part” in some form for children of all ages. The proposal to remove legitim appears to ignore significant evidence which might inform the law-making process and may also be moving in a direction which is at odds with current social policy.

### **D. THE RULES OF INTESTACY**

Much of the evidence already examined is equally relevant to the rules of intestacy, particularly in light of the Scottish Law Commission’s explicit desire to take account of both public opinion and testator behaviour, for intestacy rules should “by and large mirror the provisions for their family that people usually make in their wills”.<sup>94</sup> The broad thrust of the reform proposals is to re-orientate family entitlements so as to prioritise spouses over other family members. The ideological underpinning is thus similar to the one adopted for disinheritance. Where the deceased had both a surviving spouse and children, the proposal is to transfer to the spouse the first £300,000 of the estate, and to share any remaining balance equally between the spouse and children.<sup>95</sup> However, since HMRC figures show that less than 6% of estates are likely to be worth more than

<sup>93</sup> 2005 survey (n 90) paras 2.16, 2.19, 2.22, 2.29, 2.32, 2.35, 2.38, 2.41.

<sup>94</sup> DP para 2.2.

<sup>95</sup> DP para 2.57. Dependent children will have a claim for aliment or, if the spouse is a stepparent, can apply to the court for a discretionary award: see DP para 2.69.

£300,000 in the whole of the UK,<sup>96</sup> the claims of Scottish children on intestacy will be limited to this small minority of estates.

The “spouse-takes-virtually-everything” rule<sup>97</sup> is not so controversial within a nuclear family model, for most children would accept a postponement of inheritance until the death of their second parent. The same is not true within reconstituted families. On an estate of less than £300,000, children of a first marriage will be unlikely ever to inherit if their living parent remarries and dies intestate.<sup>98</sup> The removal of legitim combined with the effective removal of their entitlement on intestacy creates a “double whammy” effect for Scottish adult children.<sup>99</sup> There is little consideration of the effect these changes could have on family relationships or the potential for future family conflict which they represent.

Other recent changes to succession law have also impacted on children’s intestacy claims. When it created discretionary rights for cohabitants,<sup>100</sup> the Scottish Parliament made a policy choice that such a claim should not interfere with the succession rights of a, presumably estranged, spouse, but that it should rank above those of the deceased’s children. The discussion paper proposes an even more radical shift in the allocation between spouse and children.

### (1) Public opinion

In the 1986 survey respondents were asked for their views on the allocation of the intestate estate of a man survived by his wife and two adult children. Support for giving all to the surviving spouse decreased from 65% if the husband was poor, to 51% if he was neither poor nor wealthy, to 38% if he was wealthy.<sup>101</sup> The public strongly supported the “all-to-spouse” rule only in a situation of poverty, with weak support even for medium-sized estates. It is not, therefore, accurate to claim that the public supports an intestacy entitlement by children “only ... when the deceased left a substantial estate”.<sup>102</sup> In the 2005 survey, support for the “all-to-spouse” proposal was weaker. More people disagreed with it (47%) than supported it (46%).<sup>103</sup> It is important to note that these survey findings are

96 Figures for 2004-5 covering all estates notified for “probate” (including confirmed Scottish estates): see [http://www.hmrc.gov.uk/stats/inheritance\\_tax/07ir123.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/07ir123.pdf).

97 K McK Norrie, “Reforming succession law: intestate succession” (2007) 12 EdinLR 77 at 80.

98 Norrie (n 97) at 77.

99 This possibility is recognised by the Scottish Law Commission: see DP para 2.41.

100 Family Law (Scotland) Act s 29.

101 1986 survey (n 88) 227.

102 DP para 2.37.

103 2005 survey (n 90) para 2.6.

predicated upon a family scenario where there is a surviving spouse and *adult* children.

The 2005 survey proposed an alternative scenario in which a surviving spouse would be entitled to a fixed sum, the balance of the estate to be shared equally between spouse and children. 67% of respondents supported this proposition and the discussion paper relies on this finding to support its current proposal. However, this interpretation of the data is questionable. Since no details were given either about the amount of the fixed sum or the amount of the estate in question, how reliable is public support? For instance, would 67% of the sample support the proposition that a spouse should inherit all of an estate worth £300,000? Would there be more support for the spouse to inherit, say, £100,000 plus a proportion of the balance? More detail in the question and more differentiation in the range of responses are required for there to be any reliable gauge of public opinion. On the available evidence, it is questionable if there is public support for the proposition that children should only inherit on intestacy in very substantial estates, and yet the proposed figure of £300,000 would certainly produce that result.

## (2) Testator behaviour

Since there is little doubt that most spouses<sup>104</sup> leave the majority, if not all, of their wealth to their surviving spouse, it appears reasonable for the Commission to propose rules of intestacy which reflect that pattern. In a government survey of 1000 estates conducted in 2000–2001, 80% of the estates of married men and 70% of the estates of married women went to their spouse.<sup>105</sup> Research on Scottish estates confirms a similar pattern for married people<sup>106</sup> and within most nuclear families, this would be the expectation. It has, however, been suggested that inter-spousal transfers are not regarded as inheritance at all.<sup>107</sup>

People do not think that property passing to a spouse constitutes inheritance. Passing on one's property is thought of as predominantly transmission to the next generation.

Finch and Mason conclude that inter-spousal transfer is regarded as a separate process “with its own logic”, based on the assumption that property is held in

104 As no research is available on testator patterns for civil partners, discussion is limited to married people.

105 See [http://www.hmrc.gov.uk/stats/inheritance\\_tax/table12\\_9.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/table12_9.pdf).

106 M Munro, “Housing wealth and inheritance” (1988) 17 *Journal of Social Policy* 417; H E Jones, *Succession Law*, Scottish Office Central Research Unit Papers (1990) 27.

107 Finch & Mason, *Passing On* (n 42) 70-71, 174. This, of course, is an interpretation given by the researchers which was not explicitly addressed with participants. Further research would be needed in order to assess whether this represented public opinion more broadly.

common within a marriage.<sup>108</sup> Inheritance to the next generation is postponed while the second parent is alive, but there is nevertheless a widespread expectation that children will inherit in due course.<sup>109</sup>

A study of Scottish wills suggests that the initial transfer of property between spouses is “a temporary and transitional stage”, for the expectation is that wealth will flow on the death of the second spouse to the next generation.<sup>110</sup> However, this is only accurate “if each individual is assumed to form a single, lifetime partnership”,<sup>111</sup> an assumption which can no longer be made. Reconstituted families are not yet the norm, but are an increasingly significant proportion of the Scottish population. The intestacy proposals may have unanticipated effects within these families.

Finch and Mason found that interviewees who belonged to complex families made clear distinctions between first and second marriages in that property bequeathed to a second spouse often came with conditions attached because of commitments to children.<sup>112</sup> Divorce was not in itself a problem, for it did not “disturb the *balance* between the claims of a spouse and the claims of children”. The real difficulty arose on remarriage because that presented the possibility that people who did not know the deceased might in the end inherit his or her money.<sup>113</sup> The researchers identify as a dominant theme of their research people’s desire to avoid wealth passing out of the family:<sup>114</sup>

[T]he position of children is guarded jealously, particularly against the possibility that resources might pass to someone with only a distant connection through second marriage ... It is not merely that children lose out. It is also that resources pass to someone who has no real connection, either genetic or personal, and who has not been, nor would have been, *chosen* by the testator.

These findings suggest that a more sophisticated approach is needed to take account of family circumstances. Although statistics suggest that property is most commonly bequeathed to a spouse, none of the available data has specifically examined wills involving a second spouse and children of a previous marriage. Finch and Mason’s study strongly indicates that inheritance patterns would be different in those circumstances.

This is borne out by the 1986 Scottish opinion survey. In a scenario where a married man is survived by a second wife and adult children of a previous

108 Finch & Mason, *Passing On* (n 42) 71.

109 Rowntree Report (n 40) 7-11.

110 Munro (n 106) at 432.

111 Munro (n 106) at 432.

112 Finch & Mason, *Passing On* (n 42) 58.

113 Finch & Mason, *Passing On* (n 42) 33, 35.

114 Finch & Mason, *Passing On* (n 42) 60.

marriage, the researchers conclude that the introduction of the second marriage “had a considerable bearing on attitudes”<sup>115</sup> and increased support for children to share in the estate. Even where the man was very poor, only 32% of respondents thought the wife should have the whole estate, decreasing to 19% for a moderate estate and 12% for a wealthy man.<sup>116</sup> This question was not repeated in the later 2005 survey. However, the latter did ask if the *stepchildren* of a man who has been married twice should inherit from his estate on intestacy. A majority of respondents (75%)<sup>117</sup> thought they should. It seems reasonable to suppose that support for a man’s natural children to receive a share on intestacy would be even greater.

The discussion paper acknowledges the difficulties of creating rules for reconstituted families<sup>118</sup> but the final proposal adopts the same rule for all without distinction. Simplicity is no doubt a laudable objective for law reform,<sup>119</sup> but it may not be a sufficiently compelling one if the end result fails to reflect the nuances of public opinion. The complex territory of reconstituted families may require complex law, as is demonstrated by the rules adopted by other jurisdictions.<sup>120</sup>

### (3) Intestacy and reconstituted families

The discussion paper conducts a brief comparative survey and concludes that other legal systems have “widely differing solutions” to balancing the interests of a spouse and children on intestacy.<sup>121</sup> There are, however, a number of identifiable patterns. In some (mostly Common Law) countries, the spouse receives a larger proportion than the children, whose interest is deferred while the spouse is alive, often by giving the spouse a life interest or usufruct. In other (mainly Civilian) jurisdictions, the spouse receives less than children as an “inheritance”, but this is accompanied by a matrimonial property regime in which the spouse is already a co-owner. However, all jurisdictions surveyed recognise that the transfer of property to the next generation is an important goal of inheritance law and they are united in their attempts, however imperfect, to deal with the difficulties inherent in complex families. In 1989, the UK government rejected an all-to-the-spouse rule for England and Wales on the grounds that it failed to protect

115 1986 survey (n 88) 228.

116 1986 survey (n 88) 228.

117 2005 survey (n 90) paras 2.10-2.11.

118 DP para 2.70.

119 DP para 2.46.

120 DP paras 2.30-2.36, 2.41-2.45, 2.47.

121 DP para 2.30.

children of a first marriage.<sup>122</sup> If the Scottish Law Commission's proposals were to be adopted, Scots law would be in the unique position of failing to allow those children to claim on a parent's estate.

The Commission recognises the impact of divorce, cohabitation and stepfamilies on the shape of Scottish society<sup>123</sup> but there is little concession to those factors other than an extension of the claims of cohabitants.<sup>124</sup> Despite estimates suggesting that stepfamilies will be the norm in the UK by 2010,<sup>125</sup> and despite strong public support for their inclusion in any inheritance,<sup>126</sup> the reform proposals exclude stepchildren.<sup>127</sup> However, the current proposals may have the indirect effect of stepchildren inheriting everything in a reconstituted family in which the parents die intestate.

To illustrate, take a fictional family consisting of Diana and Charles and their two sons. Diana dies. Her estate is worth £150,000 so that, under the proposals, it all passes to Charles (the boys could only claim if her estate was worth more than £300,000). At this point the sons are happy for their father to inherit their mother's assets. Charles subsequently marries Camilla, who has two daughters from a previous marriage. Charles and Camilla pool their resources, including Charles' inherited wealth, and jointly purchase a new home with expensive furnishings. Charles later dies intestate leaving an estate which is valued at £250,000 and Camilla inherits all, a fact which creates a degree of unease within the family. However, when Camilla later dies (intestate), her blood relatives (the girls) inherit all since stepchildren (the boys) have no inheritance rights. Charles' wider family is now deeply aggrieved. Had Camilla died first leaving an estate equal in value to Charles', Charles would have inherited all and the boys would be the lucky beneficiaries on his death, to the exclusion of Camilla's girls. The allocation of assets within this fictional family demonstrates the effects of the current proposals. Depending on the arbitrary order of death of the parents, the blood relatives of the last surviving spouse will inherit all.

These are difficult issues and the easy answer is that parents should make a will. However, it is a fact that the majority of Scots have not done so and the rules of intestacy must therefore attempt to balance the interests of the survivors in a way that is "fair and rational".<sup>128</sup> In my view the current proposals fail to do so.

122 DP para 2.35.

123 DP para 1.3.

124 This is an extension of the current discretionary claim on intestacy to testate estates: see DP para 3.75.

125 O'Neill, *Wills and Awareness of Inheritance Rights* (n 40) 3; 2005 survey (n 90) 7-8.

126 2005 survey (n 90) 12-13. Research suggests that the most important factor in attitudes to the inclusion of stepchildren is the extent to which the child was brought up by the stepparent: see Finch & Mason, *Passing On* (n 42) 47.

127 DP paras 2.73-2.80.

128 DP para 2.2.

#### (4) The impact of the intestacy rules

In fairness to the Scottish Law Commission, it should be recognised that its proposals are merely an extension of the current rules of intestacy. Throughout Europe in the aftermath of the Second World War, the inheritance rights of widows were significantly improved at the expense of blood relatives.<sup>129</sup> The Succession (Scotland) Act 1964 was Scotland's contribution to this process and was in its time an innovative and socially responsive piece of legislation. It created prior rights for a surviving spouse,<sup>130</sup> so that the imaginary widow (although the Act is gender-neutral) would have a roof over her head, furniture in the home and some money to live on. However, while recognising that spouses required increased protection, the Act was careful to balance that imperative with the claims of an intestate's children. The spouse's prior rights are, therefore, the first claim on an intestate estate, followed by the legal rights<sup>131</sup> of spouse and children, after which any remaining balance goes to children under section 2 of the Act. Up until 2005, the spouse was likely to inherit all of a modest estate and the children would benefit most in a larger estate. However, in 2005 that balance was significantly altered when the values of prior rights changed. In particular, the housing element of prior rights was dramatically increased from £130,000 to £300,000.<sup>132</sup> It is instructive to inquire how this figure was arrived at.

An investigation of the background to the relevant statutory instrument reveals that the Executive originally intended the housing increase to be a modest one, from £130,000 to £160,000, plus an increase in the monetary claim from £58,000 to £70,000 if the deceased left no children. However, "the Succession Committee of the Law Society of Scotland did not consider these increases to be substantial enough and recommended the values of £300,000 and £75,000 be used, respectively".<sup>133</sup> The reasons for the Law Society's recommended increase are not explained, but it was not objected to<sup>134</sup> and on that basis, the Subordinate Legislation Committee determined that the attention of the Scottish Parliament

129 M A Glendon, *The Transformation of Family Law* (1989) 238.

130 Succession (Scotland) Act 1964 ss 8-9. However, unlike many European countries, Scottish prior rights only arise on intestacy and therefore can only be described as a "generous provision" (E M Clive, *The Law of Husband and Wife in Scotland*, 4<sup>th</sup> edn (1997) para 14.018) in that limited context.

131 After satisfaction of prior rights, legal rights can be claimed on any remaining moveable estate, one third being due to the spouse and one third to the children.

132 Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252. The furniture and plenishings right rose only from £22,000 to £24,000 and the monetary payment from £35,000 to £42,000 if the deceased had children and from £58,000 to £75,000 if there were no children.

133 Full text of a note by the clerk to the Justice 1 Committee is available at <http://www.scottish.parliament.uk/business/committees/justice1/papers-05/j1p05-18.pdf>.

134 By either the Scottish Courts Service or Help the Aged, the other two bodies consulted by the Executive.

need not be drawn to the instrument.<sup>135</sup> Since the average net value of heritable property in the whole of the UK was less than £153,000,<sup>136</sup> the Executive's initial figure of £160,000 would arguably have been more appropriate. Even though the housing right is rarely claimed in full,<sup>137</sup> the increase to £300,000 has the potential to make a significant impact on the division of an estate and on the amount available for children. Yet this change was subject to no public consultation, no Parliamentary debate and no media scrutiny.<sup>138</sup>

The current discussion paper has chosen the figure of £300,000 as the spouse's fixed share by analogy with the current entitlement to prior rights plus legal rights, recognising that the maximum value of prior rights is rarely claimed.<sup>139</sup> However, by applying this amount across the whole estate regardless of its composition, the result will be the exclusion of an even greater number of children.

The reform proposals aim explicitly to ensure that the spouse will inherit all of a "modest" estate, and that children should be entitled to "a reasonable (but not disproportionately large) share" of a "substantial" estate.<sup>140</sup> This raises two further questions. First, is it appropriate to define a substantial estate as one worth more than £300,000? Secondly, for whom should the rules of intestacy be designed?

*(a) What constitutes a substantial estate?*

Official statistics show that for the year 2003–4 the average estate notified for probate<sup>141</sup> in the whole of the UK was worth £166,627.<sup>142</sup> The most recent statistics available for Scotland<sup>143</sup> show that in the year to December 2007,

135 Subordinate Legislation Committee, 20th Report, 2005 (Session 2), available at <http://www.scottish.parliament.uk/business/committees/subleg/reports-05/sur05-20-01.htm>.

136 £152,898 for the year 2003–4 (the most recent figures available): see [http://www.hmrc.gov.uk/stats/inheritance\\_tax/07ir124\\_200304.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/07ir124_200304.pdf). The average value of moveable assets was £77,902.

137 For instance if a couple co-owns a house worth £500,000 which is subject to a standard security of £200,000 in joint names, the deceased's relevant interest (Succession (Scotland) Act 1964 s 8(6)) will only amount to £150,000.

138 In Northern Ireland, where house prices are broadly similar to Scotland, the Department of Finance and Personnel conducted a recent consultation on the appropriate amount for the statutory legacy available to a surviving spouse on intestacy. It was considered appropriate to set the value at £200,000 where the deceased had children and £300,000 where the deceased had no children: see *Administration of Estates: Intestacy and the Statutory Legacy* (2007), available at [http://www.dfpi.gov.uk/statutory\\_legacy\\_executive\\_summary-2.pdf](http://www.dfpi.gov.uk/statutory_legacy_executive_summary-2.pdf).

139 DP para 2.50.

140 DP para 2.49.

141 This includes confirmed estates in Scotland.

142 See [http://www.hmrc.gov.uk/stats/inheritance\\_tax/07ir124\\_200304.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/07ir124_200304.pdf) (all estates reported before 1 July 2007 for the financial year 2003–4).

143 Statistics provided by the Scottish Court Service under a Freedom of Information Act request made by the author. These figures represent all confirmed estates, which the Scottish Consumer Council estimates to be around half of all estates. See O'Neill, *Wills and Awareness of Inheritance Rights*

the average Scottish estate was worth £147,822.<sup>144</sup> In the largest population centres, Glasgow and Edinburgh, the average estate was respectively £127,951 and £199,619. It is clear from these figures that the average estate is well below the £300,000 figure selected as the fixed share to be given to a surviving spouse on intestacy. It can safely be concluded that in the vast majority of cases the surviving spouse will take the whole estate under the new proposals and only the children of the wealthiest Scots will have a claim on an intestate estate. To select a figure which is more than double the national average as the surviving spouse's share is to equate "substantial" with "unusually wealthy" in the context of the Scottish population.

*(b) For whom should intestacy rules be designed?*

Despite the increase in the amount of property the average person owns, it is still the case that most Scots have not made a will. This may, however, be misleading in that the likelihood of making a will increases with age with the result that only a minority (albeit substantial) of Scots is likely to die intestate.<sup>145</sup> Recent research found that only 37% of Scottish people had made a will, but rising to 69% of those aged 65 or over.<sup>146</sup> The most recent statistics indicate that 31% of those who died in 2007 were intestate.<sup>147</sup>

Who is likely to die intestate? O'Neill found a strong correlation between property ownership and will-making: homeowners, now around two-thirds of Scottish householders,<sup>148</sup> were six times more likely to have made a will than non-homeowners. Social class is also a significant factor in that those in professional and managerial jobs are five times more likely to have made a will than the rest of the population.<sup>149</sup> Intestate estates are also likely to be smaller. In 1986-7 the

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(n 40) 19 n 23; Jones, *Succession Law* (n 106) para 2.3. Even taking into account the effect of joint bank accounts and special destinations, it may be a further research question to establish why the confirmation figures are so low.

144 I have excluded from these figures one unusually large estate in Selkirk (c £320 million) since it significantly distorted the average. The average small estate (currently up to £30,000: see Confirmation to Small Estates (Scotland) Order 2005, SSI 2005/251) is £10,032 and the average ordinary estate is £196,623.

145 Jones, *Succession Law* (n 106) paras 1.2-1.4.

146 O'Neill, *Wills and Awareness of Inheritance Rights* (n 40) 5. This trend is also confirmed by the Rowntree Report (n 40) 71.

147 Statistics provided by the Scottish Court Service for confirmed estates, again with the caveat that they represent around half of all deaths.

148 *Scotland's People: Annual Report – Results from the 2005 Scottish Household Survey* (2006), available at <http://ucwv.scotland.gov.uk/Publications/2006/08/03090800/0>, 23-26.

149 O'Neill, *Wills and Awareness of Inheritance Rights* (n 40) 7, 20.

value of intestate estates was less than half the value of testate estates.<sup>150</sup> Scots who are wealthy, who own heritable property and who belong to the professional and managerial classes are therefore least in need of the rules of intestacy.

Under reference to four worked examples, the discussion paper claims that the figure of £300,000 “was chosen to ensure that most estates would be divided fairly between spouse or civil partner and issue”.<sup>151</sup> Two of these examples are based on an estate worth over £1 million, a third is worth £366,000. Indeed, many of the examples used in the discussion paper appear to be untypical.<sup>152</sup> Despite the recognition that most intestate estates are modest,<sup>153</sup> the Law Commission has sought also to accommodate the small number of substantial intestate estates.<sup>154</sup> “Injustice would be likely to result”, it is said, “if the ‘all to surviving spouse or civil spouse’ rule appropriate for small and modest estates were to be applied to substantial estates.”<sup>155</sup>

To meet the stated objective of being “fair and rational”,<sup>156</sup> the rules for intestacy should arguably cater for small to modest estates or alternatively for average estates, on the basis of statistical evidence. There would undoubtedly still be winners and losers, but there would also be a rational justification for the figures selected. The statistics speak for themselves. 89% of Scottish estates confirmed in 2007 had a net value of less than £300,000, i.e. only 11% of all estates would be above the proposed limit.<sup>157</sup> However, once separated into testate and intestate categories,<sup>158</sup> the effects of the intestacy proposals become clear: 85% of testate estates and 98% of intestate estates were worth less than £300,000. Applying the proposals to estates confirmed in 2007 demonstrates that only 2% of intestate estates would devolve on anyone other than the surviving spouse.

### E. A TENTATIVE SUGGESTION: MATRIMONIAL PROPERTY

A surprising omission from the discussion paper is any consideration of a matrimonial property regime for inheritance law. Scotland’s institutional writers

150 Jones, *Succession Law* (n 106) 15 (table 2), para 4.14. More recent averages for testate and intestate estates were not available from the Scottish Court Service.

151 DP para 2.54.

152 An earlier proposal (DP para 2.15) used an example based on an estate worth £1.25 million, which is perhaps unhelpful in trying to illustrate the injustice of an outcome which allocated to the unfortunate widow no less than £674,000.

153 DP para 2.38.

154 DP para 2.38.

155 DP para 2.38.

156 DP para 2.2.

157 All statistics for 2007 provided by the Scottish Court Service.

158 69% (18,435) of all confirmed estates were testate and 31% (8,357) were intestate.

considered a wife's *jus relictæ* to derive from a "communion of goods" between a married couple<sup>159</sup> and appeals for the resurrection of the concept have appeared from time to time.<sup>160</sup> In its 1986 consultative memorandum the Scottish Law Commission recognised that, historically, legal rights reflected some form of community of property and that such a principle was still relevant. Indeed, the proposals for a spouse to claim a fixed share of the estate as legal rights were justified at that time "on matrimonial property principles".<sup>161</sup> The desire in the current discussion paper to give spouses a much greater proportion of the deceased's property acknowledges the same principle but stops short of recognising common ownership.

It is particularly disappointing that the Commission has retreated from a matrimonial property regime given the potential opportunity to bring inheritance into line with divorce law. A community of acquests principle has been in operation for divorcing couples since 1985, i.e. a presumption of equal sharing in assets acquired during the marriage with exceptions for gifts, inheritance and property previously owned by either party.<sup>162</sup> The adoption of a similar regime for inheritance could shortcut current efforts to prioritise a spouse's entitlement on death. The 1986 consultative memorandum admitted that "it would be anomalous to recognise [a spouse's claims on matrimonial property] on divorce but not on death",<sup>163</sup> but it was felt that a community of acquests rule was too complicated for inheritance law where "a simpler, more rough and ready, rule may be called for".<sup>164</sup>

Twenty years on, the divorce regime is now familiar territory both for courts and lawyers and it is largely uncontroversial that the law can disregard ownership or title in the reallocation of assets between couples. There is already a statutory presumption of co-ownership of household goods,<sup>165</sup> and a common popular assumption that spouses own property in common.<sup>166</sup> A community of acquests regime has the merit of flexibility, able to take account of the length of time a

159 Stair, *Inst* 1.4.9, 17 and 3.8.30; Erskine, *Inst* 1.6.12 and 2.9.19-21; Bell, *Prin* §§1549, 1574. See also Anton (n 55) at 653-668.

160 Anton (n 55) at 668 quoting Lord President Cooper in *Preston v Preston* 1950 SC 253 at 257: "My impression is that the wider aspect of the present problem may yet have to be solved by reintroducing in a limited form the old conception of a *communio bonorum* so far as relates to the common home and its maintenance."

161 *Intestate Succession and Legal Rights* (Scot Law Com CM No 69, 1986) paras 4.4(b), 4.41.

162 Family Law (Scotland) Act 1985 s 10.

163 *Intestate Succession and Legal Rights* (n 161) para 4.21. At para 4.9 it is noted that in England and Wales the Law Commission has also taken the view that a surviving spouse's entitlement should at least be equivalent to that of a divorcing spouse.

164 *Intestate Succession and Legal Rights* (n 161) paras 4.21, 4.28.

165 Family Law (Scotland) Act 1985 s 25.

166 Rowntree Report (n 40) 30.

couple has been together and what they have acquired during that time. The devil is certainly in the detail, but it may represent a more rational system for apportioning family property between, for instance, the claims of a second spouse after a brief marriage in competition with children of a previous lengthy marriage which had generated most of that property. It would seem unreasonable to restrict the freedom of a remarried parent to spend or dissipate inherited assets whilst he or she was alive. But a community of acquests regime would be a means of acknowledging the importance of the narrative that inherited assets still identifiable on the death of the second parent should not “pass out of the family”.

In *Pirie v Clydesdale Bank plc*,<sup>167</sup> Mr Pirie left his heritable property to his adult daughter (who had learning difficulties) and moveable property of £60,000 to be divided between his wife and daughter. Mrs Pirie was his third wife, more than 20 years his junior and a Philippine national whom he had persuaded to come to Scotland leaving behind a lucrative job in Saudi Arabia. Shortly after they married Mr Pirie gave up his job and for the next 16 years Mrs Pirie worked full-time at various menial jobs, contributed all of her earnings to the household, did all the cooking and cleaning and took care of her husband and his daughter, latterly nursing him until his death from cancer. This was a morally difficult case in that the now homeless Mrs Pirie was up against the deceased’s clear intention to ensure that his daughter would have a roof over her head, despite having promised the house to his wife. As she herself argued, she would have been better off had she divorced him and gained the benefit of the matrimonial property provisions rather than sticking with him and providing the care he needed prior to death. It is surely bad social (and legal) policy for the law to provide an incentive for a woman to divorce her husband rather than stay with him and take the risk that in his declining years he could disinherit her.

## F. CONCLUSION

Inheritance is not an esoteric issue. It will affect almost every citizen—we all die and we all have loved ones who will die. In its discussion paper the Scottish Law Commission seeks to reflect both the presumed wishes of testators and also wider public opinion. Arguably, it does neither for most people want their children to inherit and, under the proposals, children, above all, lose out. The reform proposals are also based on ideological arguments, but this article questions whether the prevailing ideology is consistent with research findings, social behaviour and public attitudes. Such a radical change in the inheritance

167 [2006] CSOH 82, 2007 SCLR 18.

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regime could even be seen as an attempt to create a new ethic of family life. The evidence that most families operate within a shared normative framework of mutual obligations militates against such an ethic.

Few members of the public are likely to engage in the Commission's consultation process, and yet many will have strong views on the issues which the paper covers. This is a debate which should not be confined to the legal profession but which ought to take place in the public arena.

This article does not represent a plea for conservative family values, or for a limitation on the freedom of individuals to live in family forms of their own choosing. However, if succession law is to represent the society in which we live, it must take account of reality. The weight of research evidence suggests that most people want their assets to benefit their children after they die. There is no public support or empirical evidence to suggest that children, even adult children, should not have automatic inheritance rights. And on intestacy, notwithstanding the difficulties inherent in complex family forms, some attempt ought to be made to differentiate between the children of first and second marriages. It would be an admission of failure if Scots law were unable to do so.

But perhaps the inheritance debate raises an even bigger question: what criteria should underpin law reform? Political imperatives, social policy and public opinion would be reasonable factors to take into account, as would compatibility with the rest of the UK or harmonisation within Europe or certainty and consistency in the way the law operates. This article has argued for the importance of policy issues and public opinion. But even if the law should not always give people what they want, a more compelling rationale must be advanced for regime change than is found in the Scottish Law Commission's discussion paper.