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Land Reform, Inheritance Rights and Unintended Consequences

Dot Reid and Nicole Sweeney *

A. Land Reform and Succession Law

In the aftermath of Scotland's referendum on independence in September 2014 it came as no surprise to find that land reform was a key part of Nicola Sturgeon's new legislative programme (and her first as First Minister) for the remainder of the Scottish Parliament's term.¹ There has been growing pressure for land reform over the last decade thanks to the success of land campaigners such as Andy Wightman² in bringing the issue to the attention of the public. The assertion that 'Scotland has the most concentrated pattern of private land ownership in the developed world'³ has attracted the attention of journalists and opinion makers across Scotland which in turn has led to criticism of government inaction on the issue. A confident Scottish National Party, intent on delivering progressive policies as the party of government, grasped this particular nettle and made land reform central to its legislative programme.

More surprising was the inclusion of succession law in that programme. It is not a burning issue, as evidenced by the long slow road to the enactment of the Succession (Scotland) Act in 1964⁴ and, more recently, the languishing of Discussion Papers and Reports by the Scottish Law Commission ('SLC') in the government's bottom drawer.⁵ The Scottish government is explicit that the main impetus for reform of succession law is the *land* reform agenda. There is to be a radical overhaul of succession law 'so that all children are treated equally when it comes to inheriting land'.⁶

Succession is a significant issue for land reform because of the way in which the current law of succession is structured. Scotland has never fully embraced freedom of testation: theoretically, 'legal rights',⁷ a term of art in Scots succession law, can be claimed on every estate, testate or intestate. Legal rights operate as a protection against

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¹ *One Scotland: the government's programme for Scotland 2014-15* (Scottish Government, 2014), available at <http://www.gov.scot/Resource/0046/00464455.pdf>.

² A Wightman, *Who Owns Scotland* (Canongate, 1996); A Wightman, *The Poor had No Lawyers: Who Owns Scotland (and How They Got It)* (Birlinn, 3rd edn, 2015). See also his well-visited blog, Land Matters, <http://www.andywightman.com/about>.

³ J Hunter, P Peacock, A Wightman and M Foxley, 432:50 – *Towards a comprehensive land reform agenda for Scotland: A briefing paper for the House of Commons Scottish Affairs Committee* (2013) at para 2.1, available at <http://www.parliament.uk/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf>.

⁴ For the tortuous history leading to the 1964 Act see K G C Reid 'Intestate Succession in Scotland' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), at pp 380-388.

⁵ The Scottish Law Commission produced a report in 1990, none of which was implemented, see Scottish Law Commission, *Report on Succession*, Scot Law Com No 124 (HMSO, 1990). For the most recent proposals see Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com DP No 136 (TSO, 2007) and the subsequent *Report on Succession*, Scot Law Com No 215 (TSO, 2009).

⁶ *One Scotland: the government's programme for Scotland 2014-15* (Scottish Government, 2014), at p 77.

⁷ The umbrella term 'legal rights' includes the *legitim* of children and the *jus relictæ* or *jus relict* of female and male spouses respectively.

disinheritance for both spouse (and now civil partner)⁸ and children of the deceased.⁹ Solicitors administering an executry must be careful to separate the estate into immoveable (or heritable) and moveable property¹⁰ because of legal rights. If the deceased is survived by both spouse and children each can claim one third but only from the net moveable estate; if only one of those categories survives they are entitled to claim half. And here is the link with land reform: legal rights cannot be claimed on immoveable property, namely land and buildings. The Scottish Government wants to remove the distinction between different types of property thus making the whole estate available for succession claims by the immediate family.

The Land Reform Review Group ('LRRG') was set up by the Scottish Government in July 2012 to consider the structure of land ownership and to 'develop innovative and radical proposals that will contribute to Scotland's future success'.¹¹ Section 6 of its final report,¹² delivered in May 2014, is devoted to succession law. The exclusion of heritable property from the legal rights regime is deemed to be outdated and to represent the last vestiges of Scotland's feudal system.¹³

The consistent recommendation of the SLC, from its work in the 1980s to the present day, has been to treat the deceased's property as a whole, always in the face of strong opposition.¹⁴ The LRRG Report holds 'agricultural and landed interests'¹⁵ responsible for much of that opposition and for denying to the deceased's spouse and children the automatic right to inherit immoveable property, which will usually be the most valuable asset in an estate. It recommends that the distinction be abolished as 'a straightforward matter of social justice based on the current disadvantaged position of spouses and children'.¹⁶

The connection between land reform and succession reform has been explained at some length to underline the fact that land campaigners have understood that succession law can help them to achieve their aims and have been successful at elevating it onto the political agenda. If legal rights, which take priority over the provisions of a will, can be claimed on land, they would be a mechanism for overcoming the elitism of land ownership by allowing 'all children of whatever age to inherit in equal measure all heritable and moveable property'.¹⁷ Opening up heritable property to claims for legal rights could potentially alter the land economy of Scotland. As one commentator explains, children 'would have the right to have land - potentially very large tracts of land - factored into their

⁸ Civil Partnership Act 2004 s 131. To avoid repetition, 'spouse' is used in this article to include both a spouse and a civil partner.

⁹ More correctly the term 'issue' is used in succession law and includes children or their descendants, for a predeceasing child can be represented by her descendants in intestate succession and in any claim for legal rights (Succession (Scotland) Act 1964 s 11).

¹⁰ Broadly corresponding to the distinction between real and personal property in English law.

¹¹ <http://www.gov.scot/About/Review/land-reform>.

¹² *The Land of Scotland and the Common Good, Report of the Land Reform Review Group* (2014), available at <http://www.gov.scot/Resource/0045/00451087.pdf>.

¹³ The feudal system of landholding was finally abolished on 28 November 2004, Abolition of Feudal Tenure etc (Scotland) Act 2000.

¹⁴ *The Land of Scotland and the Common Good* (2014) at 6.2.

¹⁵ *Ibid* at 6.4.

¹⁶ *Ibid*. The LRRG recognises that the impact of the change on larger landed estates may not be significant since they are often held by companies and trusts. However, breaking the link between land and succession is still considered to have 'symbolic' importance (*ibid*).

¹⁷ *Ibid*.

legal rights'.¹⁸ However, this may be a pyrrhic victory. If the reforms become law legal rights will, in theory, be much more valuable than under the current law. That will certainly be the case for the children of a person who is unmarried at the point of death. However, taken as a whole the reform package will have unintended consequences (unintended at least by the land campaigners): if a parent is married at the time of death the vast majority of Scottish children will inherit nothing, either on intestacy or as legal rights.

The Scottish Government's stated justification for change is grounded in justice, equality and meeting the public's expectations of succession law:¹⁹

'As part of this modernisation the distinction between movable and immovable property would be removed to give children, spouses and civil partners appropriate legal rights over both forms of property. This should ensure a just distribution of assets among a deceased's close family to reflect both societal change and expectations.'

This article will suggest that the proposed package of reforms is unlikely to meet those objectives: the reform proposals will not benefit children; they do little to reflect social change; and they run contrary to what we know about public expectations. The proposed law of succession may even exacerbate conflict in families experiencing bereavement.

B. The Scottish Reform Proposals

The Scottish government is currently consulting on a radical programme of reform,²⁰ having adopted the recommendations of the SLC's 2009 Report.²¹ One of the current authors has previously criticised the SLC's apparently antagonistic treatment of children's rights on the grounds that its underlying rationale is out of step with public attitudes towards inheritance (the fact that most parents want their children to inherit), with the reality of family life and with social policy objectives.²² The Scottish government has substantially adopted those proposals, almost unaltered except for the fact that it has compounded the problems previously identified.²³

The two elements of the proposals which will most affect children are the rules of intestacy and changes to legal rights.²⁴ These are examined separately but, unlike under the current law, they are now structurally linked and many of the consequences flowing from the intestacy rules apply equally to legal rights.

¹⁸ <http://lallandspeatworrier.blogspot.co.uk/2014/11/the-buggers-are-out-to-get-us.html>

¹⁹ *One Scotland: the government's programme for Scotland 2014-15* (Scottish Government, 2014), at para 11.

²⁰ Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015), available at <http://www.gov.scot/Publications/2015/06/7518/downloads>.

²¹ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009).

²² D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 Edinburgh LR 391 and 'Inheritance Rights of Children' (2010) 14 Edinburgh LR 318.

²³ In particular, the threshold sum, see below.

²⁴ There are many other issues under consultation, including rights of cohabitants and stepchildren, and whether there should be a special regime for agricultural units. This article is limited to commenting on the parent-child implications of the proposals. It is worth noting, however, that the factors to be taken into account by courts in assessing the new discretionary right proposed for cohabitants is to exclude consideration of the effect of any award on the deceased's children (unlike the current law), Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015), para 4.11.

Reform of Intestate Succession

The SLC recommended that children begin to share in a parent's estate on intestacy only if it is worth more than the 'threshold sum'. Where the deceased is survived by both spouse and children, the spouse would receive the first £300,000 of the estate ('the threshold sum'), and any balance would be shared equally between spouse and children.²⁵ It has been pointed out²⁶ that a threshold sum of £300,000 would result in the children of only the wealthiest 2% of Scots inheriting on the death of an intestate parent. The SLC accepted that this was the case,²⁷ and acknowledged that the question of children's inheritance rights was a controversial issue, particularly where the surviving spouse was not the parent of the deceased's children. One of the Commissioners at that time took the unusual step of dissenting from the recommendation, stating that £200,000 would be a more appropriate threshold.²⁸ In the end the SLC took the view that this was a political matter and was for Parliament to decide.²⁹ The Scottish Government's response is to consult on a range of values for the threshold sum in which the lowest figure is £335,000 and the highest £650,000.³⁰

The Threshold Sum

The rationale behind the threshold sum proposed by the SLC lies in the current law. The 1964 Act created a statutory right (referred to as 'prior rights') for the protection of widows on intestacy (the rhetoric at the time always envisages a widow, although the Act is gender neutral).³¹ Prior rights have 3 elements: a housing right, a right to furnishings and a cash right, with the policy aim of allowing the spouse to remain in the furnished family home with a cash sum besides. However, while recognising that spouses required increased protection, the Act was careful to balance those needs 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 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 intestate 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. The sums that could be claimed for prior rights had been raised fairly modestly since 1964, the levels being set by statutory instrument. However, in 2005 the housing element (the highest of the three entitlements) was increased by 250% from £130,000 to £300,000,³² and then again in 2011 by a further 150% to £470,000.³³ Since the house will usually be the most valuable asset in the average estate, in most cases it will pass entirely to the spouse. Since 2005, therefore, Scottish children have been likely to inherit little or nothing from a married parent who is intestate, although it is doubtful if many members of the public are aware of this change.

²⁵ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at paras 2.6-2.15.

²⁶ D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 Edinburgh LR 391 at 413.

²⁷ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.14.

²⁸ Ibid at para 2.15 n 32.

²⁹ Ibid at para 2.14.

³⁰ Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at paras 2.13-2.26.

³¹ Succession (Scotland) Act 1964 ss 8-9. Unlike many European jurisdictions, Scottish prior rights only arise on intestacy.

³² Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2005 (SSI 2005/252).

³³ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

The fundamental problem with prior rights is that they were conceived in an era dominated by a nuclear family model. Ensuring that the surviving spouse was able to continue living in the furnished family home was (and still is) a relatively uncontroversial step when the model family is predicated on a stable parental relationship. Commonly 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.³⁴

However, modern family life is much more complex: an increasing number of families are 'reconstituted' through second marriages, resulting in stepparent and stepsibling relationships. As a result, prior rights are increasingly likely to benefit a second spouse and, if s/he also dies intestate, his or her biological children at the expense of any children from a first family. Scots succession law makes no attempt to address these social changes, one of the reasons stated both by the Scottish Government and the SLC for reform. And yet there has been steadfast resistance to the possibility of a different intestacy regime where the surviving spouse is not the parent of the deceased's children on the ground that the law of intestacy must be simple.³⁵ It is questionable whether this is an adequate justification.

Lies Damned Lies and Prior Rights

The current values of prior rights are highly relevant to the level of the threshold sum in the reform proposals, but the issue is bedevilled by discussion of house prices, housing market trends over time and the oft-cited value of the 'substantial city house' in Aberdeen which belonged to a law professor at the time the 1964 Act came into force.³⁶ Never have more statistics been available to public servants and yet they seem less than helpful in clarifying the issues.

There are many stated aims in this reform process, both by the SLC and the Scottish Government: the 'primary purpose' of intestate succession law is that it should be fair³⁷ (although it is not clear how fairness is to be assessed), but the rules should also be simple.³⁸ A repeated policy aim is that the surviving spouse should remain in the family home,³⁹ regardless of whether it is a first or second spouse or the length of the marriage, which in turn leads on to discussion of property values and the Scottish housing market.⁴⁰

In 2005 the Scottish Executive had originally suggested a modest increase in the housing element of prior rights from £130,000 to £160,000, but this was increased to £300,000 on the recommendation of the Succession Committee of the Law Society of

³⁴ K Rowlingson & S McKay, 'Attitudes to Inheritance in Britain' (Joseph Rowntree Foundation, 2005) pp7-11, available at <http://www.jrf.org.uk/publications/attitudes-inheritance-britain>.

³⁵ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at paras 2.26-230; Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at para 2.21.

³⁶ There appears to be some fondness for using Professor Meston's rule of thumb for the housing element, namely that the figure used in the 1964 Act was approximately three times the value of his substantial Aberdeen house at that time, see Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at para 2.23; also Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.12 n 27.

³⁷ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.3; Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at paras 1.9 and 2.12.

³⁸ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.3; Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at para 2.10.

³⁹ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at paras 2.4 and 2.9; Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015) at para 2.9.

⁴⁰ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at paras 2.8-2.13.

Scotland. The Order was passed with no parliamentary discussion, no consultation and no media attention. The second uprating in 2011 had limited consultation⁴¹ on the government's proposal to increase the housing element in line with the average Scottish house price between 2004 and 2009. This was calculated to represent an increase of 57%, hence they arrived at the figure of £470,000. This figure was said to capture over 95% of Scottish properties, and whilst acknowledging significant variation across Scotland, was deemed a suitable figure 'so not as to [sic] prejudice against those surviving spouses living in [high-value] areas where the dwelling is in fact not "exceptional" by relative standards'.⁴²

There are a number of flaws in these arguments. The fundamental flaw is to assume that the 2005 uprating was appropriate and to apply the percentage increase to an already inflated figure. Even if it is accepted that the housing market is taken to be a reliable indicator for succession rights, the consultation stated that the average price in 2004 was £103,943 and in 2009 £163,231, amounting to a 57% increase. The consultation paper uses the average increase between those years, but does not explain why a figure of three times the average house price is needed. There is also an assumption of perpetual growth in the housing market. However, according to the Office of National Statistics House Price Index, Scottish housing prices have not yet recovered from their peak in June 2008.⁴³ The limits for prior rights were, therefore, set without taking account of the economic downturn or the deflation of the housing market in Scotland. In addition, a fairly arbitrary period of time was chosen in which to measure the percentage increase. Assessing housing market trends twelve months later would have led to a significantly different result.

In its response to the consultation Consumer Focus Scotland, one of the few bodies which can claim to represent the interests of the public,⁴⁴ pointed out that most children were likely to receive nothing from a parent's estate even under the current limits and took the view that "the limits should be increased only on the basis of evidence that the increase is in the wider public interest, taking public attitudes and expectations into account".⁴⁵ The uprating went ahead nevertheless.

Unintended Consequences

In the current reform proposals the SLC chose the figure of £300,000 as the spouse's threshold sum using the current prior rights' entitlement (at that time the housing right was £300,000) as the starting point. However, there is no real equivalence because all of the limitations which were built into prior rights no longer apply to the threshold sum. The housing element could only be claimed on a house, only on the net value of that house, and it was a maximum figure which would rarely be claimed in full.

⁴¹ Scottish Government, *Succession Law in Scotland Review of Financial Limits of Prior Rights and Confirmation to Small Estates: A Consultation Paper* (Scottish Government, 2011), available at <http://www.gov.scot/resource/doc/342116/0113827.pdf>.

⁴² Scottish Government, *Succession Law in Scotland Review of Financial Limits of Prior Rights and Confirmation to Small Estates: A Consultation Paper* (Scottish Government, 2011), Annex A, p 2.

⁴³ Office for National Statistics, House Price Index June 2015, available at <http://www.ons.gov.uk/ons/rel/hpi/house-price-index/june-2015/stb-june-2015.html#tab=House-price-index-by-country>. See also a comparison with other parts of the UK <http://www.ons.gov.uk/ons/rel/hpi/house-price-index/april-2014/info-hpi-comparison.html>.

⁴⁴ Evidence to the Scottish Government from Consumer Focus Scotland, May 2011, available at <http://www.consumerfocus.org.uk/scotland/files/2011/05/CFS-response-to-law-of-succession-prior-rights-limits.pdf>.

⁴⁵ Ibid.

If, for example, a couple jointly owned a property worth £300,000 with an outstanding mortgage debt of £100,000, the net value of the property would be £200,000. However, if they are joint owners (which would now be the usual practice for couples purchasing a house) the spouse already owns 50%, so of the current £470,000 maximum entitlement the spouse will only need to claim £100,000 as the deceased's net share. Since the most recent (2014) average annual house price in Scotland is £163,563⁴⁶ few co-owned homes will require anywhere close to the maximum prior rights entitlement in order for the spouse to acquire it. The SLC counters this argument by claiming that only 42% of homes are jointly owned in Scotland.⁴⁷ Aside from the fact that this figure does not include ownership by parties with different surnames, it is asserted on the basis of a very small sample, less than 0.01%.⁴⁸ A further limitation on prior rights is that the spouse must be 'ordinarily resident' in the house, thus excluding a spouse living apart from the deceased.

However, the new threshold sum has no such limitations. It is predicated on the value of housing but does not apply specifically to immoveable property in the way that prior rights did. If it were to remain at £300,000, the result of applying that figure across the whole estate, regardless of its composition, will be the exclusion of an even greater number of children than those excluded by prior rights. The removal of the distinction between immoveable and moveable property for all succession rights will, therefore, have this unintended consequence: on intestacy children will be further disadvantaged because the spouse's threshold sum is no longer property-specific.

Comparison with English Reforms

It is instructive to compare the Scottish proposals with those recently enacted in the Inheritance and Trustees' Powers Act 2014. The Law Commission took a similar stance to that of the SLC, prioritising the need to ensure that a surviving spouse could remain in the family home.⁴⁹ Initially the Law Commission linked the statutory legacy (currently £250,000) to house price inflation, but was persuaded that the Retail Price Index was a more reliable measure because the significant regional variation in house prices 'would not reflect the reality in many areas'.⁵⁰ As in Scotland, an alternative regime for a second spouse was rejected as being too complex.⁵¹

The Bill was introduced under the House of Lords procedure for Law Commission Bills, which is designed for non-controversial measures. Indeed the Minister of State for Justice and Civil Liberties in the recent coalition government (Simon Hughes) specifically stated:⁵² 'This Bill is not controversial'. Lord McNally, introducing the Bill in the House of Lords, outlined that the rules of intestate succession aimed to 'reflect the shape of

⁴⁶ There are considerable regional variations, for instance in Scotland's major cities the figures were: Aberdeen £213,717; Edinburgh £226,551; Glasgow £131,213 and Dundee £126,426. Registers of Scotland, *House Price Information: Annual Market Review* (Registers of Scotland, 2014), Table 1.

⁴⁷ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.10.

⁴⁸ *Ibid* at para 2.10 n 20.140 property titles were sampled from a database of 1.5 million on the Land Register, which itself contains 58% of all Scottish properties, <https://www.ros.gov.uk/about-us/land-register-completion/land-register-completion-faqs>.

⁴⁹ Law Commission, *Intestacy and Family Provision Claims on Death*, Law Com No 331 (TSO, 2011), at para 2.122.

⁵⁰ *Ibid* at para 2.123.

⁵¹ *Ibid* at para 2.78.

⁵² Hansard, HC Public Bill Committee, 12 March 2014, available at <http://www.publications.parliament.uk/pa/cm201314/cmpublic/inheritance/140312/am/140312s01.htm>.

contemporary society and replicate what most people think is an appropriate division between family members'.⁵³ He also claimed that the prioritisation of the surviving spouse was supported by empirical research,⁵⁴ although this may be a questionable interpretation of the results.⁵⁵ Examining the various legislative stages of the Bill, there was only one question acknowledging that there may be difficulties for first and second families.⁵⁶ This contrasts starkly with previous attempts by the Law Commission to improve the position of the spouse at the expense of children, which were considered 'contentious' and were ultimately rejected by Parliament.⁵⁷ Attitudes may have changed and a different generation of parliamentarians bring a different worldview to the issues. However, the British public may not have changed so very much.

Reform of Legal Rights

As outlined above, the threshold sum is the single most significant element in the proposed reforms because it not only determines rights on intestacy but it is also the baseline for the new 'legal share', the proposed replacement for legal rights which can be claimed on both intestate and testate estates. Originally in its Discussion Paper the SLC recommended the removal of a legal share for all but dependent children,⁵⁸ thereby removing the 'legal disability' in Scotland of not being able to disinherit your children.⁵⁹ By the time the subsequent Report was published, the SLC had taken criticism on board and now presented two alternative options: first, that all children should receive a 'legal share' fixed at 25% of what they would be entitled to on intestacy (ie. the intestacy proposals are used to calculate legal share);⁶⁰ and a second option reiterating their original position that only dependent children should be protected from disinheritance.⁶¹

The SLC and the consultation document treat intestacy and protection from disinheritance as two separate issues, but in reality they are intrinsically linked by means of the threshold sum. And while it is acknowledged that in virtually all intestate estates children will receive nothing when a married parent dies, it is not made clear that the same will be true for the proposed legal share in a testate estate. If the legal share is to be a percentage of a child's entitlement on intestacy, and the proposals result in no entitlement on intestacy, then logically there will be no entitlement to legal share. This has not been made explicit, but it ought to be. In principle the fact that legal share can be claimed on the whole of an estate ought to be a more generous provision than legal rights were, hence the reason land campaigners have advocated for the change. If a parent is unmarried at the

⁵³ Hansard, Lords Debates, col GC337 (22 October 2013)

⁵⁴ Ibid col GC336.

⁵⁵ A Humphrey et al. 2010. *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, 2010)), see Executive Summary and tables 4.7 and 7.3. See also R Kerridge, 'Intestate Succession in England and Wales' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (2015), at pp 337-340.

⁵⁶ Hansard, Lords Debates, col GC354 (22 October 2013) by Lord Beecham.

⁵⁷ For discussion of the Law Reform (Succession) Bill see Hansard, Lords Debates, vol 561, cols 502-511 (13 February 1995). For commentary see R Kerridge, 'Intestate Succession in England and Wales' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (2015), at pp 335-337.

⁵⁸ Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com DP No 136 (TSO, 2007) at paras 3.78-3.100.

⁵⁹ Ibid at para 3.100.

⁶⁰ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at paras 3.16-3.38.

⁶¹ Ibid at paras 3.56-3.70.

time of death that will be the case and children will equally share 25% of the estate. However, very few children of a married parent will receive anything as their legal share. The spouse is also to be given a legal share amounting to 25% of their entitlement on intestacy. Given that the spouse will take all of an intestate estate in most cases, this is a generous provision for a spouse who has not been provided for in the deceased's will.

Who is succession law for?

This somewhat puzzling attitude to children's inheritance rights raises a wider question: who is influencing government policy in succession law? Agricultural and landed interests have already been identified by the Land Reform Review Group. However, there is arguably an even more influential group in Scottish society which is antagonistic towards legal rights: the Scottish legal profession. Lawyers are not identified as a lobby group, rather they are embedded in the process of law reform and consultation, forming the Advisory Group which shaped the initial SLC proposals and a majority voice in both SLC and government consultations. It is not unusual for the legal profession to be involved in and consulted on law reform projects. However they appear to have had an unusually strong influence on succession law. It was on the recommendation of the Succession Committee of the Law Society of Scotland that the 2005 large increase in prior rights came about. There are no committee minutes that can be consulted in order to understand the reasons why this might have been proposed. However, press comments by a committee member may provide a clue. He warned that the effect of prior rights were that '[i]n some cases the surviving spouse will get the house and a cash payment, but the children will scoop the rest.' He goes on to give a concrete example, which perhaps illustrates the kind of family lawyers have in mind when they register opposition to legal rights:⁶²

'People dying without making a will, who own their house, have a holiday home, a portfolio of shares worth half a million – the surviving spouse may get less than half of that and people just don't realise'.

Lawyers understand that the way to defeat legal rights under the current law is to increase the value of prior rights so that there is nothing left to claim, and this appears to be the policy the Scottish Government has adopted since 2005. The proposed level of the threshold sum fulfils the same function and may also have been influenced by the legal profession. The consultation is strongly influenced by 'informal pre-consultation dialogue with stakeholders'⁶³ but there is little transparency about who the stakeholders are other than the fact that they are 'members of the legal profession', a number of whom had concerns about the SLC Report.⁶⁴ It seems likely that the sums being consulted on have once again been elevated at the prompting of lawyers. Their motives may not be ignoble, their resistance based on concern for the surviving spouses of wealthy clients and the possibility

⁶² G Rose, 'Warning on "outdated" Scots inheritance law', The Scotsman, 26 Jan 2014, available at <http://www.scotsman.com/news/politics/top-stories/warning-on-outdated-scots-inheritance-law-1-3281647#ixzz3ITcQljg7>.

⁶³ Scottish Government, Consultation on the Law of Succession (Scottish Government, 2015), at p 3 (Ministerial Foreword). These stakeholders are referred to more than 20 times in the proposals.

⁶⁴ This was stated by the Minister for Community Safety and Legal Affairs in answer to a Written Parliamentary Question, see 13 June 2012, Question S4W-07665, available at http://www.scottish.parliament.uk/S4_ChamberDesk/WA20120613.pdf. A recent response from the current Minister (Paul Wheelhouse) confirmed the same position.

of well-drafted wills being upset by the claims of children. However, the solution to the problem is not to distort the law of succession to suit the wealthiest families. It is surprising, therefore, that in its recent response to the current consultation the Law Society of Scotland have taken the view that the proposals may unduly affect children because the proposed threshold sum is too high, perhaps indicating a change of position.⁶⁵

This begs a wider question – who should intestacy law be designed for? Although 67% of Scots have not made a will, those over 65 who are homeowners and of substantial means are the most likely to have done so.⁶⁶ Research undertaken in 2006 found that the most significant factors in determining whether someone had made a will were age, social class⁶⁷ and home ownership.⁶⁸

Those who need the law of intestate succession are likely to have fewer assets to leave behind. Research conducted in 1990 found that the value of intestate estates was less than half the value of testate estates.⁶⁹ On the most recent available figures for 2013-14,⁷⁰ the average confirmed⁷¹ estate in Scotland was £196,343⁷² and between 2008 and 2014 averages have varied between approximately £173,000 and £211,000. There is also considerable regional variation: the highest average is in Lothian and Borders at £256,568 and the lowest in Glasgow and Strathkelvin at £144,732.⁷³ However, even these figures are inflated: the real average across the population is much lower. The available statistics include only confirmed estates, which represent half of all deaths in Scotland; the other half are too small to require confirmation and are likely to be intestate.⁷⁴ The true average is probably less than £100,000.

As currently formulated this is intestate succession for the rich. Arguably it should principally be for those of modest means. Using the value of the average estate seems a more logical way to pursue that aim than the vagaries of the housing market.

Finally, it is worth examining again the item at the top of the policy agenda: ensuring that the spouse can remain in the family home regardless of all other considerations. This could be done by way of a liferent interest while the spouse is alive. However, it appears from discussions the authors have had that this is not an attractive option for the very reason that it attaches to a particular property. Many people as they grow older and children are independent want to ‘downsize’ and move to a smaller property. This is also

⁶⁵ The consultation response is available at https://www.lawscot.org.uk/media/593616/ts_succession_consultation.pdf.

⁶⁶ Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland* (Scottish Consumer Council, 2006), available at <http://webarchive.nationalarchives.gov.uk/20090724135150/http://scotcons.demonweb.co.uk/publications/reports/reports06/rp10wrep.pdf>.

⁶⁷ Only one-fifth of respondents in socio-economic category DE (those in semi-skilled or unskilled jobs and those not in employment) said they had a will, compared to 58% of those in category AB (those in professional and managerial occupations), *ibid* at pp 6-7.

⁶⁸ *Ibid*. 50% of home owners had a will compared to 15% of non-home owners.

⁶⁹ H E Jones, *Succession Law*, Scottish Office Central Research Unit Papers (1990) p.15, Table 2.

⁷⁰ Scottish Government, *Civil Law Statistics in Scotland: Supplementary tables 2013-14*, Table 6, available at <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS>.

⁷¹ Confirmation is the process whereby an executor is appointed by the court to administer the estate, broadly equivalent to a grant of representation in England and Wales.

⁷² The average ordinary estate was £214,952 and the average small confirmed estate (where the value is £36,000 or less) was £24,100.

⁷³ Data provided to the authors by the Scottish Justice Analytical Unit.

⁷⁴ Scottish Law Commission, *Report on Succession*, Scot Law Com No 215, (TSO, 2009), at para 2.1 n 2.

true after the death of a spouse when the survivor may want a smaller house to maintain or simply a change of location. Surely the policy aim ought to be to ensure that the surviving spouse is comfortable rather than specifying that intestate succession must be able to cover the value of the current family home. The Scottish Government has reiterated the same policy aim, agreeing 'that there should be no change to this policy aim as it is most likely to reflect a deceased spouse or civil partner's wishes'.⁷⁵ This is questionable. As examined below, if the aim was really to reflect the wishes of the deceased, his or her children would be a very much higher priority.

C. The Modern Family and Inheritance

Enormous social changes have taken place in the UK since the law of succession was last conceived in Scotland in 1964. Family units are less predictable and less permanent than they were for previous generations, part of what Francis Fukuyama famously labelled The Great Disruption, evidenced by among other things 'the decline of families and kinship as a source of social cohesion'.⁷⁶ Freedom has been the watchword, whether it be freedom to end relationships and re partner; freedom for women to be economically independent and make their own choices, including whether or not to bear children; or freedom to express a different sexual identity. The decline in traditional family values is thought to have been supplanted by a growth in self-seeking individualism and the quest for personal fulfilment.⁷⁷

One manifestation of the emphasis on freedom and choice in family policy has been the liberalisation of the rules governing marriage and divorce. Couples can choose to marry and then to separate with relative ease and with little social disapproval. Post-separation and divorce the policy focus has turned to children of the relationship, or the vertical relationship: disputes over contact and residence; the regulation of child support; debates about the merits of shared parenting; and at times the trench warfare of women's groups and men's groups in asserting their parenting rights.⁷⁸ Patrick Parkinson suggests that it is time to recognise that the lives of divorced parents remain intertwined in terms of parenting (and often financial) arrangements, and that 'family law has changed to recognise the indissolubility of parenthood'.⁷⁹

Succession law appears to be moving in the opposite direction, favouring horizontal relationships over descendants. From the perspective of individual choice it follows naturally that spouses be given priority as marriage is the ultimate relationship of choice. However, even if this viewpoint is accepted, it does not preclude 'choosing' to embrace fully the parent-child relationship, which may last considerably longer than the marriage and with ties of love and affection that are no less powerful for many people. The arguments

⁷⁵ Scottish Government, Consultation on the Law of Succession (Scottish Government, 2015) at para 2.9.

⁷⁶ F Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Free Press, 1999) at p 60.

⁷⁷ For helpful summaries of this complex debate and its associated literature see J Eekelaar, 'Personal Obligations' in M Maclean (ed) *Family Law and Family Values* (Hart Publishing, 2005), at pp 11-16; J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 *Journal of Law and Society* 510 at pp 510-515; L Jamieson, F Wasoff and R Simpson, 'Solo-Living, Demographic and Family Change: The Need to Know More about Men' (2009) *Sociological Research Online* 14(2)5, at paras 1.3-1.9, available at <http://www.socresonline.org.uk/14/2/5.html>.

⁷⁸ For an insightful analysis see P Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, 2011), at pp 3-15.

⁷⁹ *Ibid* p 15.

made here defending the position of children in inheritance does not imply a lack of wholehearted support for recognising the important position of the spouse in the deceased's family. However, it is by no means clear why the increased protection of the spouse has to be accompanied by an obliteration of the place of children in the inheritance family. Jane Lewis has commented that the prioritisation of spouse over children represents a trend towards '... the increasing separation of marriage and parenthood, which constitutes a more profound shift than the 1960s separation of sex and marriage'.⁸⁰

In light of the supposed disintegration of traditional families, important work has been done by British scholars seeking to understand family behaviour, in particular the relationship between personal choice and personal responsibility. The picture that emerges has a degree of consistency⁸¹ and within many, if not most, families, research studies have found implicit obligations of care and support⁸² which operate in a reciprocal way: children attend to elderly parents; parents care for and support their children, even into adulthood. Indeed, it has been suggested that the very idea of family could be said to be 'synonymous with the existence of a sense of obligation'.⁸³ For most functional families these self-imposed obligations of care exist both in life and in death. Inheritance rights symbolise the desire of most people to ensure that their children and their spouse, the parties to whom the deceased has been bound in a reciprocal obligation of care, are not cast out on death.

Attitudes to Inheritance

The law of intestate succession is often described in legal literature as attempting to replicate the 'presumed will' of the deceased, or 'the law's best guess as to what a typical deceased would have done had he or she taken the trouble to make a will'.⁸⁴ In the last 15 years three major studies have now been carried out in England and Wales evaluating public attitudes towards inheritance, and one smaller study in Scotland.⁸⁵ These studies represent more than a 'best guess' and can provide some guidance for the framing of the law. All have found a consistent thread: most people want their children to inherit 'something' from their estate.

⁸⁰ J Lewis, 'The Changing Context for the Obligation to Care and to Earn' in M Maclean (ed) *Family Law and Family Values* (Hart Publishing, 2005), at p 64.

⁸¹ See in particular J Finch and M Mason, *Negotiating Family Responsibilities* (Routledge, 1993); C Smart and B Neale, *Family Fragments?* (Polity Press, 1999); J Lewis, *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, 2001); J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 *Journal of Law and Society* 510.

⁸² See J Finch and J Mason, 'Obligations of kinship in contemporary Britain: is there normative agreement?' (1991) 42 *British Journal of Sociology* 345 at pp 356-359; J Finch and J Mason, *Negotiating Family Responsibilities* (Routledge, 1993), at pp 18-21.

⁸³ J Eekelaar, 'Personal Obligations' in M Maclean (ed) *Family Law and Family Values* (Hart Publishing, 2005), at pp 11-16

⁸⁴ See K G C Reid, M J de Waal and R Zimmermann, 'Intestate Succession in Historical and Comparative Perspective' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), at p 446.

⁸⁵ J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000); K Rowlingson & S McKay, 'Attitudes to Inheritance in Britain' (Joseph Rowntree Foundation, 2005), available at <http://www.jrf.org.uk/publications/attitudes-inheritance-britain>; A Humphrey et al. 2010. *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, 2010); *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (Scottish Executive, 2005).

Finch and Mason undertook an inheritance project in the early 1990s with a view to discovering both how inheritance was handled in ordinary families.⁸⁶ The researchers concentrated on personal relationships and the way in which individuals use inheritance as a means of confirming these relationships. In particular, inheritance was revealed as a means of active parenting whereby the paramount importance of the parent-child relationship was reconfirmed at the end of the parent's life.⁸⁷ This question was brought to the fore in situations where the deceased left both a first family and a second family. While it was clear that a spouse had to be provided for ahead of the children, first and second marriages were viewed as 'not quite equivalent' for inheritance purposes and the claims of the second spouse on the resources accumulated during the first marriage were held to be somewhat 'ambiguous'.⁸⁸ Finch and Mason found that in complex families the parent-child relationship is both predictable and privileged, and this is manifested in their attitudes to inheritance.

When the law was recently reformed in England and Wales the Law Commission commissioned a large scale survey of public attitudes,⁸⁹ even if it did not fully implement the findings in the subsequent Inheritance and Trustees' Powers Act 2014.⁹⁰ This study had a specific focus on how different groups—in particular those with children from more than one-relationship, stepparents and cohabitants—might vary in their attitudes towards defining family and kin for inheritance purposes.⁹¹ Although there was considerable support for spouses, again a distinction was drawn between first and second spouses in cases where the deceased had children from the first marriage. The qualitative component of the study⁹² suggested that the distinction was based on the view that a second spouse could not necessarily be trusted to provide for the deceased's children in every case and, consequently, in such instances children ought to inherit directly.⁹³ In the case of young children, entitlement was founded partly on their perceived need but participants also stressed the emotional relationship between parent and child, a factor that underpinned adult children's entitlement.⁹⁴

'Showing one's love and doing the right thing, ultimately, underpins people's views on how property should be passed on.'

Scottish Attitudes to Inheritance

⁸⁶ For details of the methodology employed see J Finch and J Mason *Passing On: Kinship and Inheritance in England* (Routledge, 2000), pp183-188.

⁸⁷ *Ibid* at p 59.

⁸⁸ *Ibid* at p 37.

⁸⁹ A Humphrey et al. 2010. *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, 2010); see also G Douglas et al, 'Enduring Love? Attitudes to Family and Inheritance Law in England and Wales' (2011) 38 *Journal of Law and Society* 245.

⁹⁰ See R Kerridge, 'Intestate Succession in England and Wales' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (2015), at pp 337-340.

⁹¹ A Humphrey et al. 2010. *Inheritance and the Family: Attitudes to Will-making and Intestacy* (National Centre for Social Research, 2010), at p 14.

⁹² For methodology see pp 16-17 and pp 95-99.

⁹³ *Ibid* at p 84.

⁹⁴ G Douglas et al, 'Enduring love: attitudes to family and inheritance law in England and Wales' (2011) 38 *Journal of Law and Society* 245 at p 247.

Although legislators do not generally ask the public what their views are before legislating, there are good reasons for doing so in the case of succession. Inheritance touches the lives of every member of the public: we will all die, leaving behind family members; and we are all children of parents who will one day die. The SLC did conduct a survey in 2005⁹⁵ which suggested that there was strong support for a fixed share of a deceased's estate to pass to children of any age, weaker where there was an existing will 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; or whether the spouse was not the parent of the deceased's children.

Private lawyers are not known for their interest in empirical research, least of all in relation to succession, the blackest of black letter law. However, prior to embarking on reform of almost all other areas affecting families the government has conducted social policy research to inform that process. It is, therefore, surprising that no recent work has been done to inform the current proposals.

Given the dearth of information about public attitudes⁹⁶ and an impending reform process, one of the authors designed a research study to explore attitudes towards inheritance, particularly first family and second family dynamics and children's inheritance rights.⁹⁷ 37 individuals participated in the study,⁹⁸ 31 of whom took part in one of seven focus groups conducted in July and August 2014.⁹⁹ A further six individuals were interviewed individually. While the study does not claim to be representative of the general population, it is the first study exploring these issues with members of the Scottish public and as such it offers a more indepth understanding of the attitudes expressed and the motivations behind them.

A biographical questionnaire distributed at the beginning of the focus groups revealed that seven participants lived in houses they valued as being worth less than the

⁹⁵ Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (Scottish Executive, 2005). 1008 people aged 16 and over were sampled. An omnibus survey was also conducted in 1986, summarised in Scottish Law Commission, *Intestate Succession and Legal Rights*, Consultative Memorandum No 69 (1986) App II.

⁹⁶ See, however, S O'Neill, *Wills and Awareness of Inheritance Rights in Scotland* (Scottish Consumer Council, 2006).

⁹⁷ This research was conducted as part of the second author's doctoral thesis, of which the first author is a supervisor.

⁹⁸ Recruitment was carried out via a form of snowball sampling. The author approached acquaintances who in turn recruited through their social and professional networks. Efforts were made to include people with different backgrounds and life experiences. Cognisant of grounded theory and the principles of theoretical sampling, three further waves of groups/interviewees were conducted after the initial round in response to particular patterns and associations that were emerging from the data. Data collection was halted when theoretical saturation was reached. All interviews were recorded and transcribed verbatim. The process of analysis is ongoing and coding is being used to generate concepts and theories. Further details are available from the authors.

⁹⁹ While undertaking both quantitative and qualitative research would have been valuable, obvious constraints meant that only one option could be pursued. A combination of individual and group interviews was chosen as a recognised means of providing researchers with access to others' 'experiences and perceptions'. (L Webley, 'Qualitative Approaches to Empirical Legal Research' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), at p 936). As is conventional in qualitative research, the study aimed to produced findings that were 'representative in the sense of capturing the range or variation in a phenomenon [attitudes to succession], but not in the sense of allowing for the estimation of the distribution of the phenomenon in the population as a whole' (ibid at p 934). As a useful point of comparison, the study conducted on behalf of the Law Commission for England and Wales comprised 30 interviews, although this was done in conjunction with quantitative work.

current Scottish average (£167,765),¹⁰⁰ while a further three reported that they were not home owners. In addition, thirteen participants earned between £10,000 and £24,000, less than, or in line with, the Scottish median income of £24,000¹⁰¹ and two individuals reported income in excess of £60,000.

The gender distribution of the participants was split evenly with 18 men and 19 women. The age range was also well balanced, although there was a deliberate focus on older participants (68% were over 50), and participants under thirty were excluded on the basis they were less likely to have personal experience of the central research issues, such as repartnering, parenthood and property ownership. A high number (36) of the participants were parents, 30 of whom remained in a relationship with the other parent. Following efforts to boost the number of participants having experience of first and second family dynamics, the study was able to record the views of three people who had formed second families and four who had experience of being a stepchild.

A selection of the themes which emerged from these conversations is presented below as having particular relevance to the current reform process.

The parent-child relationship

Finch and Mason found that children remain ‘the core thread of fixity’ in inheritance,¹⁰² a view borne out in this study in that most participants view their children as the ‘end point’ in their inheritance narrative. Participants posited a variety of reasons to explain the privileged position of children: the longevity of the parent-child relationship; the love between parent and child; and the self-fulfillment which the relationship offers to the parent. The parent-child relationship was clearly viewed as a ‘no exit’¹⁰³ relationship, one which, despite its ups and downs, had to be viewed over the lifecycle and which could only be broken in the most exceptional cases. Crucially, this does not represent a burden for the parent, but rather is conceived as the realisation of what Douglas describes as the ‘project of the self to which people attach most significance during their lives’.¹⁰⁴ Parents drew obvious pleasure from envisaging leaving a token of their love and affection, a token which in some cases would also provide a financial cushion.

This stands in contrast to the discourse of the grasping adult child coveting the parent’s estate. Indeed, one of the perennially difficult topics to broach in any discussion of inheritance was the question of expectation. While dominant social norms precluded any participant from openly admitting to expecting an inheritance, many clearly did anticipate that, should their parents have any unused assets, they would be the most likely recipients. But the question of children’s expectations distracts from the central message that parents expect to be able to leave an inheritance for their children. This point was thrown into sharp relief in discussion of the State’s entitlement to a share of an elderly person’s assets to pay for care. In recounting her mother’s distress at being forced to sell the family home, Gillian observed - without disputing the State’s legitimate claim - that her mother’s expectation of leaving a modest bequest to her daughters had been thwarted:

¹⁰⁰ Registers of Scotland, Statistical News Release, July 2015, available at https://www.ros.gov.uk/data/assets/pdf_file/0020/22277/RoS-Statistical-Release-Apr-Jun15-Final2107151.pdf.

¹⁰¹ A National Statistics Publication for Scotland *Poverty and Income Equality in Scotland* (2013/14), at p 3.

¹⁰² J Finch and J Mason *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 59.

¹⁰³ A L Alstott, *No Exit: What Parents Owe their Children and What Society Owes Parents* (2004), at pp 51-52.

¹⁰⁴ G Douglas et al, ‘Enduring love: attitudes to family and inheritance law in England and Wales’ (2011) 38 *Journal of Law and Society* 245 at p 247.

but what upset my mum was the fact that, in their generation, as a working class family, it was that you worked hard and, you know, at the end of your days you had something to show for it and you gave it to your family.

[Gillian, remarried, financial officer, Glasgow]¹⁰⁵

The strength of parental desire to provide an inheritance was one of the most important findings of the study and arose from a sense of love and the self-imposed obligation that flows from that love. 36 of the participants in the study were parents and all of them had provided, or planned to provide, for their children in their will. As one participant remarked:

I think it's your responsibility as a parent, even if you are not in that child's life, that when you leave, if you've got anything to leave, there should be something goes to them. I think you should...even if it was a fluke or an accident...it's your responsibility...I would say so.

[Lauren, divorced, hairdresser, Glasgow]

Participants were willing to accept that there may be exceptional circumstances under which the parent-child bond could be destroyed, but without evidence of this the expectation was that right-thinking parents would leave a bequest for their children because, as one participant expressed it, 'money...equates with love in some ways.'

First families versus second families

The problem of the spouse versus the child in the context of succession arises most acutely in cases where the deceased has two families: one comprising a second spouse and any children of that relationship and one comprising children from a prior marriage. As Reid points out, the 1964 Act which moved Scotland from 'a "dynastic" model of intestate succession...to one in which...the surviving spouse is allowed to take all or the bulk of the estate"¹⁰⁶ is largely accepted as long as the spouse can be relied upon to pass on the estate to the children of the deceased.¹⁰⁷ The data from this study suggests that most people want to see children recognised in some form, particularly where a first family/second family dynamic is involved.

The tension between first families and second families was explored in the research study by discussing a scenario in which the deceased bequeathed her entire estate to her second husband of three years at the expense of her adult children and, following his untimely death, the entire estate passed to his children on intestacy. A total of 29 participants were presented with the scenario, with 24 recorded as providing some commentary. 19 (79%) expressed an openly negative reaction to the outcome, either by voicing their opposition to what they perceived as a 'wrong' or 'unfair' outcome, or by

¹⁰⁵ Fictitious names have been given to all participants in order to protect their identity.

¹⁰⁶ K G C Reid 'Intestate Succession in Scotland' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press, 2015), at p 395.

¹⁰⁷ Ibid.

stating that it was not something that they themselves would do.¹⁰⁸ This is not to say that all participants contested the testator's right to act in such a way, simply that the outcome sat uncomfortably with them. Although the first part of the scenario relates to a testate scenario, the findings are also relevant to a discussion on intestacy. If there was discomfort about the outcome where the testator had *chosen* how to dispose of her estate, participants would be unlikely to consider the outcome any fairer where it was the result of intestacy provisions.

The reasons underpinning their views focused heavily on the potentially hurtful nature of the deceased's actions and the unfairness of depriving children of a share in what their parents had created together. By disinheriting the children, the deceased had breached not only the social norm of providing for children, but the moral obligation she owed her first spouse to honour his contribution to their joint assets. One of the participants in the project identified closely with the research scenario, having formed a second relationship following the death of his first wife. He explained his objections as follows:

I tend to see half of what I have as being June's. So that half if you like automatically goes to the children, rightfully. If you have your scenario, like there and it goes sideways and then to somebody else. I don't think that's right. That to me would be wrong.

[Ron, re-partnered, retired engineer, Inverurie]

It is important to point out that participants did not consider second marriages to be qualitatively inferior to first marriages. In response to a second scenario designed to test this hypothesis, the participants were unperturbed by a woman's estate passing entirely to her second husband at the expense of her adult siblings. However, they considered relationships with children to be qualitatively different from those without, insofar as spouses who were also parents had obligations not just to each other but also to their respective children. The competing obligations did not require that the second spouse and the children be treated identically in terms of inheritance provision, only that each party be recognised and treated 'fairly'.

The discussions which took place around these topics (which are confirmed by other empirical studies of inheritance) suggest that while the reform proposals prioritise the spouse over all other family members, members of the public seek a more even-handed approach that would allow for both the spouse and the children to be recognised. It is suggested that the Scottish law reform proposals in this case lag behind the insights scholars have provided.

Protection from Disinheritance

Attitudes towards the protection of children from disinheritance in testate succession were more nuanced. Participants still saw the children as entitled but had to balance this with the competing belief that the testator was best placed to decide how to dispose of his estate.

¹⁰⁸ These findings mirror those recorded by other studies. In the most recent study only 15% of respondents favoured the spouse receiving everything where the deceased had adult children (A Humphrey et al, *Inheritance and the Family: Attitudes to Will-making and Intestacy* (National Centre for Social Research, 2010), at p 37). See also J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 37.

However, while most supported testamentary freedom, analysis of their commentary suggests that commitment to that principle was not absolute.¹⁰⁹ This manifested itself in several ways: a readiness to make exceptions; a willingness to ignore testamentary provisions in certain cases; an acceptance of the need for a legal share; and the particular case of the limited testamentary freedom of parents. Only the last point will be explored below.

Parenthood, testamentary freedom and the temporary nature of the spousal transfer

While all of the parents in the study stated that they had or would include their children in their wills, this was by no means at the expense of the spouse, at least not where the spouse was the other parent of the participant's children. Although participants provided explanations such as the closeness of the spousal relationship in support of the spouse's claim, the belief that spouses owned their assets jointly emerged as the foundation on which their views rested. Married couples were perceived as having worked together to build up any assets the couple had and, for this reason, spouses rarely considered assets passing from one spouse to the other to constitute an inheritance. This confirms similar findings by other studies. Finch and Mason found that interspousal transfer is regarded as a separate process¹¹⁰ whereby inheritance to the next generation is postponed while the second parent is alive, with an expectation that children will inherit in due course.¹¹¹ A study of Scottish wills found that an initial transfer of property between spouses was 'a temporary and transitional stage' with an expectation that it would ultimately flow to the next generation.¹¹² In this study, 10 of the 22 participants who had wills (and who remained in a relationship with the other parent) had to be prompted to remember that their will primarily benefited their spouse, not their children. Although this is an important point, it is nonetheless subordinate to the second point to emerge from the data; namely, parents who remain together view their will as a joint undertaking and not as an expression of their individualism.

This view manifested itself in two ways: first, in the language participants used to discuss their wills, a discourse replete with references to 'our will' and 'what we've done'; secondly, the common objective their wills shared. While participants generally provided for their spouses in the first instance, they intended their children (and in some cases their grandchildren) to be the final recipients of their estate. In other words, the spousal transfer was a temporary step preceding an eventual transfer of any remaining estate to the children. John explains his will in the following terms:

I mean when I go Lynne will get any cash that I have and the house also, obviously....It will all go to Lynne initially but there will be provision for our two daughters and then ultimately to the grandchildren. I can't remember the detail...whether we've already made a formal arrangement for the

¹⁰⁹ The recent English study also revealed conflicting attitudes to testamentary freedom depending on the circumstances presented, A Humphrey et al. 2010. A Humphrey et al, *Inheritance and the Family: Attitudes to Will-making and Intestacy* (National Centre for Social Research, 2010), at p 34.

¹¹⁰ J Finch and J Mason *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p 71.

¹¹¹ K Rowlingson & S McKay, 'Attitudes to Inheritance in Britain' (Joseph Rowntree Foundation, 2005), at pp 7-11.

¹¹² M Munro, 'Housing wealth and inheritance' (1988) 17/4 *Journal of Social Policy* 417 at p 432.

grandchildren...but we did go to considerable lengths to make sure that as far as we understood things were relatively watertight and appropriate.
[John, married, retired, Glasgow]

While participants' testamentary intentions were often clear, how these intentions were to be implemented was more opaque. Eight of the participants reported that while their spouse was the first beneficiary, the estate would then pass to the children. Three of these eight believed they had binding written agreements with their spouses, while five simply stated that the property would pass first to their spouse and then to their children, without explaining how this would be achieved. A sense of unease fell over certain participants when they were pressed as to how their spouse was bound to implement their wishes, while others expressed surprise as they realised their agreements may not be legally enforceable after one of them had died: "Damn you! I'll have to think about that now!"

Other participants were fully aware that the agreement they had with their spouse was not legally enforceable. For some, this was inconsequential as they viewed their morally binding agreement to be no less unassailable than a legal one. Lauren, for example, explained that her mother would provide equally for her and her estranged brother because 'that was my dad's, her and my dad's wishes...[and] she has to follow it through'. However, while several expressed their absolute trust that their spouse would implement their agreement, a handful did reveal themselves—or more accurately their mothers—to be more circumspect:

On the point of trusting your husband, my mum and dad have spent the last 15 years trying to make a will. She's been married for 48 years and she still doesn't trust my father enough not to run off with a floozy in the event of her death and spend her children's and her grandchildren's inheritance.
[Malcolm, married, IT worker, Glasgow]

The data generated by discussion of shared testamentary intentions, and the moral obligations that bind the surviving spouse to give effect to the agreed intentions of the couple, was amongst the most significant the study produced. The couples with children almost all appeared to accept that their own testamentary freedom was circumscribed in a unique way. While they were free to set out their wills as they (as a couple) saw fit, once the first spouse had died the last mutual agreement had, within reason, to be implemented. This suggests that for parents who remain in a relationship with the other parent of their child the moral obligation between spouses trumps the principle of testamentary freedom.

Equality between Children.

As discussed above, the interest of land reformers in succession law stems from a desire to end the concentration of private landownership in Scotland. It is also fascinating to see succession law, so often associated with maintaining privilege, being characterised as a vehicle for social reform that could lead to 'land...[being]...distributed more equitably across society.'¹¹³ Sharing an estate equally between the children and the spouse (through their respective legal shares) is a question of equity. While the participants in the study, with one notable exception, made no mention of land reform, fairness and equity were watchwords.

¹¹³ A Wightman, *The Poor had No Lawyers: Who Owns Scotland (and How They Got It)* (Birlinn, 3rd edn, 2015), p 369.

All of the participants who were asked whether they would divide their estate equally between their children responded in the affirmative, although some suggested that appalling behaviour on the part of the child could change their view. A handful also reported that they could support distributing an estate to achieve greater equality of income, as opposed to distributing it in equal shares, but none appeared to have followed through with this. As one participant observed, 'I would have a big issue with putting something on paper that said some was unequal to someone else'. Once again, the data echoes other studies: Finch and Mason found that 'the principle of equal treatment of children reigns supreme when it comes to the division of major assets',¹¹⁴ while the recent English study revealed a 'strong view that where children were to inherit, the estate should usually be divided equally between them.'¹¹⁵ Maintaining a legal share for all children equally appears to be a point where the views of land reformers and public opinion converge.

D. Conclusion

The Scottish Government recognises that there may be 'unintended consequences' in these reform proposals and that they 'will not work for everyone'.¹¹⁶ It has been argued that succession law should be for ordinary families, for those of average wealth. The research studies outlined above suggest that it should also embody the social norms of ordinary people. The current raft of proposals is not in keeping with the views that emerge in study after study that children are a very significant, perhaps the most significant, recipient in the inheritance narratives of parents.

This begs the question of whether there is an alternative. If public attitudes are taken seriously it seems clear that children should almost always receive something from the estate of a parent. It need not be financially significant, but it may be emotionally and psychologically so. Intestate succession could operate on a sliding scale, with a percentage increase according to the size of the estate, thus ensuring that the spouse takes almost all of a modest estate, but children are treated generously in a larger one. This would be in keeping with the policy of the current law, although not since the changes that occurred in 2005. For instance, up to £100,000 just 1% or £1000 could be shared between any children; from £100,000 up to £250,000 (which takes the figures above the average estate) children could receive 5%; and thereafter rising to 25% or 30% for larger estates.

Another alternative would be to create a different, and less generous, regime where the spouse is not also the parent of the deceased's children. No attempt has been made to address this complex issue, although much could be learned from other jurisdictions which have a separate intestacy regime in those circumstances. For instance, in British Columbia there is a significantly smaller spousal share (half) where all the children of the deceased are not also children of the spouse;¹¹⁷ likewise in the USA the provisions of the Uniform Probate Code.¹¹⁸ The desire for succession law to be simple is arguably of less importance than the goal of being fair and meeting expectations. Jurisdictions which have made a distinction

¹¹⁴ J Finch and J Mason *Passing On: Kinship and Inheritance in England* (Routledge, 2000), at p77.

¹¹⁵ A Humphrey et al, *Inheritance and the Family: Attitudes to Will-making and Intestacy* (National Centre for Social Research, 2010), at p 9

¹¹⁶ Scottish Government, *Consultation on the Law of Succession* (Scottish Government, 2015), at para 2.4.

¹¹⁷ Wills, Estates and Succession Act SBC 2009 ss 21(3) and (4).

¹¹⁸ s 2-102. In a recent comparative study at least 7 jurisdictions are identified as having separate provisions, see R Kerridge, 'Intestate Succession in England and Wales' in K G C Reid, M J de Waal and R Zimmermann (eds) *Comparative Succession Law, Volume II: Intestate Succession* (2015), at p 340 n 95.

where the deceased leaves a first family and a second family do not appear to have found it beyond the wit of lawmakers to draft a suitable law.

As for the question of disinheritance, despite the combined efforts of landed interests and lawyers, there is no evidence that the Scottish public would support removing the current protection for spouses or children of any age. It is certainly arguable that the new legal share should not be structurally linked to the amounts that can be claimed on intestacy if a substantial threshold sum is to be maintained. The sliding scale suggested above could operate for the legal share of children, and could be revised in line with movements in the value of the average estate. Taking the latter as the baseline is a more logical approach than the uncertainties inherent in the Scottish housing market.

Finally, there may be some merit in considering a discretionary scheme for the highly unusual circumstances in which a parent may have strong grounds for disinheriting a child or altering an equal allocation of legal share: for instance, where there has been abuse or criminal activity; where it would lead to the ruin of a business (as some farmers have argued); or where a particular child has particular needs. However, in general succession law should reflect the standard case and not the exception and should, therefore, seek to ensure that most children inherit something from the estate of most parents.