Law Commission
Reforming the law

Intestacy and Family Provision Claims on Death

Overview

Consultation Paper No 191 (Overview)
29 October 2009

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THE LAW COMMISSION

INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH

OVERVIEW

1. Our Consultation Paper *Intestacy and Family Provision Claims on Death*, published on 29 October 2009, reviews two areas of the law:

   (a) the intestacy rules, which set out how property is distributed when the owner has died without disposing of it by will; and

   (b) the law on family provision, which enables certain relatives and dependants to challenge either a will, or the effect of the intestacy rules in a particular case.

2. This overview document provides an outline of the current law, and summarises the main proposals in the Consultation Paper. Inevitably, it does not provide a full discussion of the issues, and does not address detailed and technical points. The numbers of the corresponding paragraphs of the Consultation Paper are given for ease of reference. Copies of the Consultation Paper are available to download free of charge on our website at:

   www.lawcom.gov.uk/intestacy.htm

3. We should be grateful for responses to the Consultation Paper by **28 February 2010**:

   (a) by **email** to

   propertyandtrust@lawcommission.gsi.gov.uk

   (b) or by **post** to

   Jack Connah, Law Commission,
   Steel House, 11 Tothill Street, London SW1H 9LJ

4. We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. **Please note that we will disregard automatic confidentiality statements generated by an IT system**.

INTRODUCTION

5. Inheritance is a difficult subject. It is difficult not least because it goes along with bereavement; the distribution of property belonging to someone who has died has generally to be managed by those who are closely affected by the death. The process of grieving, and of adjustment to change, can be made far worse by uncertainty and anxiety about money or belongings.

6. We can determine, by making a will, what should happen to our property after we die, subject to some restrictions. The law also makes provision – known as the intestacy rules – for what is to happen to property that is not disposed of by will. The rules list and rank categories of relationship, so that the destination of the deceased's property depends upon which relatives he or she leaves. The effect of the rules is shown in the diagram on page 4 below, and we give more detail at various points in this overview.

7. The law also provides a procedure for challenging a will, or the effect of the intestacy rules, where certain categories of family members or dependants feel that reasonable provision has not been made for them. They can do so by applying to the court for what is commonly known as "family provision" under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). The family provision legislation therefore represents a limited but significant exception to the principle that we can dispose of our property as we wish by will.

8. If a claim for family provision is successful, the court will make an order to change the way in which the deceased's property is distributed. In deciding whether or not to make an order, the court will always look at the financial needs and resources of all those involved, any obligations or responsibilities of the deceased, any physical or mental disability of the applicant or of any other beneficiary, and anything else that the court considers relevant. The legislation also sets out factors to be considered in relation to particular categories of applicant, which we discuss at the relevant points in this overview.

9. The Consultation Paper seeks views on possible reform of the law governing intestacy and the operation of the 1975 Act. It does not address the law that is specific to wills, and so does not look at issues such as their validity or effect.

Background to the project

10. The Law Commission has undertaken this project in response to concerns expressed in response to Government's 2005 consultation on the "statutory legacy" (see below, paragraph 12), and in response also to a number of concerns expressed by the public and by academics. As well as researching the law and looking at the rules in other countries, we have examined the evidence of public opinion provided by a number of recent studies. Our eventual conclusions will be informed not only by the responses to this Consultation Paper but also by new research into public attitudes funded by the Nuffield Foundation (we refer to this as the "Nuffield survey").

11. We have also been able to carry out some statistical work with the Probate Service and HM Revenue & Customs ("HMRC"). One important feature revealed by that work is the markedly lower average size of intestate estates compared with estates where there is a will. The median value of an intestate estate is

£56,000, compared with £160,000 where there is a will, and almost a third of intestate estates are valued at less than £25,000. These figures are for estates where there has been formal authorisation to deal with the estate. Figures for estate sizes referred to in this overview derive from this statistical research.

Terminology

12. We have tried to avoid technical terms so far as possible, and to explain them when they have to be used. The following terms are used frequently in this overview and in the Consultation Paper:

"Estate": we use this term to refer to the whole of a deceased person's assets after payment of funeral expenses, any debts, the costs of administration and any gifts made by will.

An "intestate estate" is therefore the estate of someone who died intestate; that is, without having made a valid will that effectively disposes of all his or her property.

To "administer" an estate is to collect together the assets, sell them where that is appropriate, pay any debts of the deceased, and finally to distribute the estate to those entitled to it. Those who perform this task are known as administrators.

"Spouse": we use this term to refer to a husband, wife or civil partner.

"Statutory legacy": this is the fixed sum to which a surviving spouse is entitled from an intestate estate before any other beneficiaries are paid.

"Personal chattels": personal belongings such as cars, jewellery, china, clothes, furniture, pictures, and so on, but not anything used for business purposes.

"*Bona vacantia*": a Latin term roughly translated as "ownerless goods", used to describe property which passes under the intestacy rules to the Crown, the Duchy of Lancaster or the Duchy of Cornwall when there are no entitled relatives.

Note also that when someone is referred to as the "child" of the deceased, or of anyone else, that is a reference to a relationship; he or she may or may not be a "child" in the sense of being under the age of 18. A fuller glossary can be found at the beginning of the Consultation Paper.

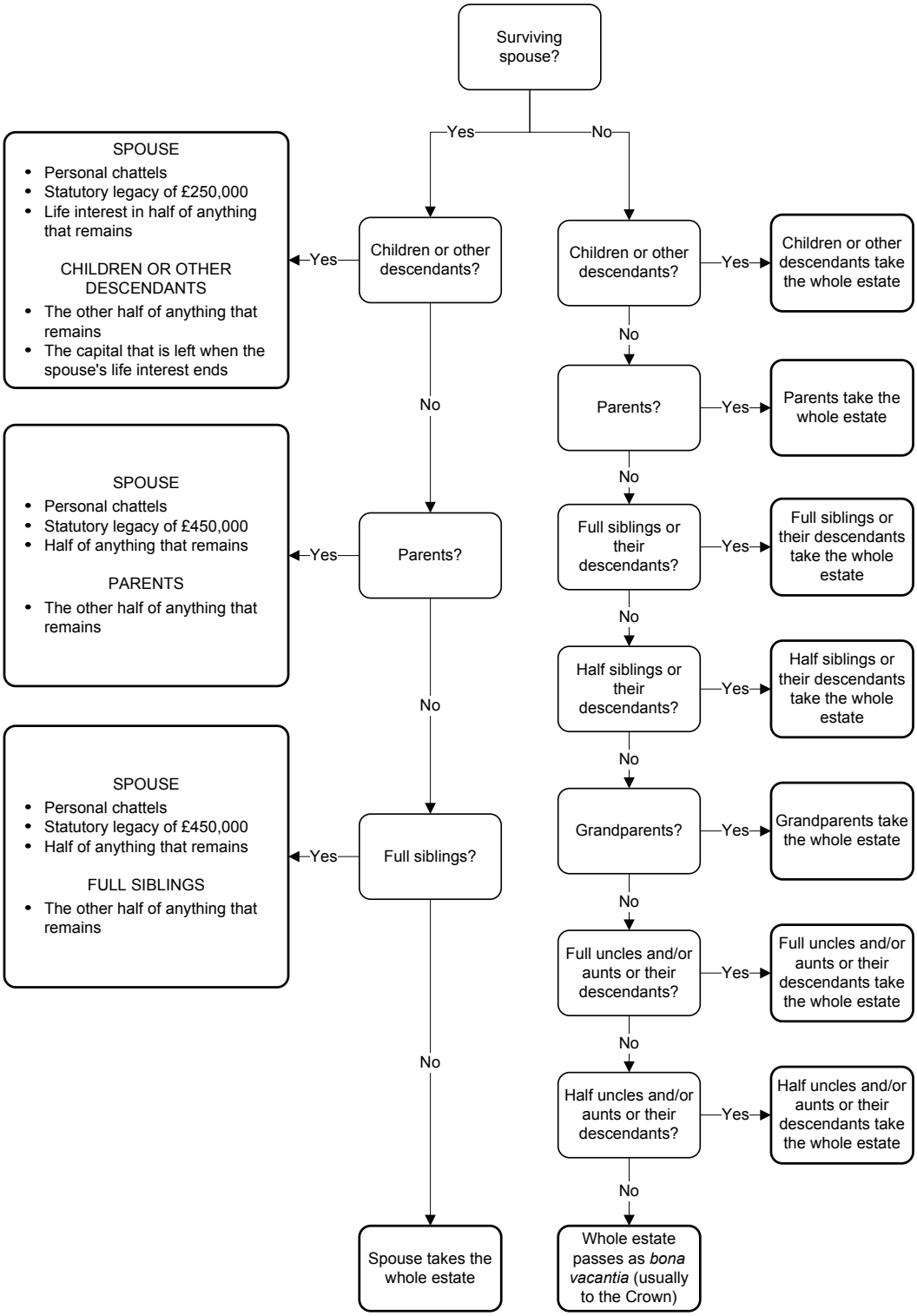
The structure of this overview

13. We have summarised our proposals and questions under headings that correspond to Parts 3 to 7 of the Consultation Paper, beginning with the law of intestacy and family provision relating to the surviving spouse, then moving on to cohabitants, children, other relatives and *bona vacantia*, and finally some technical issues about the administration of estates.

14. We welcome readers' views on all the issues raised in the Consultation Paper; specifically, on the proposals we have made and the questions asked, and on the possible impact of any changes in the law. A full list of consultation questions is set out in Part 8 of the Consultation Paper.

DIAGRAM SUMMARISING THE INTESTACY RULES

15. This diagram summarises the way in which an estate is distributed under the intestacy rules among the surviving relatives of a person who has died intestate.



THE SURVIVING SPOUSE

16. In this section we discuss the effect of the intestacy rules and the family provision legislation where the deceased left a surviving spouse – by that we mean a husband, wife or civil partner.

17. Many spouses own property jointly – most obviously their family home. Technically there are two forms of joint ownership (for both freehold and leasehold property). Under one form (known as "joint tenancy"), the deceased's share passes automatically to the surviving spouse on death. The intestacy rules do not apply to such property. Under the other ("tenancy in common"), the deceased's share of the property will be subject to the intestacy rules, in the same way as property held in the deceased's sole name.

Intestacy: the current law (Consultation Paper paragraphs 2.18 to 2.26, 3.6 to 3.28)

18. The amount a surviving spouse receives under the intestacy rules depends on which other family members are also living. The rules distinguish three possibilities.

19. First, if the deceased is survived by both a spouse and children then the spouse takes:

    (a) all of the deceased's personal chattels;

    (b) a statutory legacy, of up to £250,000; and

    (c) a life interest in half of the rest of the estate, if any – this means that the spouse receives any income which it generates and also is allowed to use any property which falls within it. For example, if that half of the remainder is made up of a house and some shares, the spouse could live in the house and would be paid the dividend income from the shares.

The rest of the estate passes to the children. The part of the estate in which the spouse has a life interest will go to them when the spouse's interest ends (usually on the spouse's death). However, 90% of intestate estates are worth less than £250,000 so it is unusual for the third rule, above, to take effect.

> *Example*: Adam died, leaving a house in his sole name worth £200,000, furniture worth £1,000 and investments worth £40,000. He did not make a will. He is survived by a widow, two adult children and three brothers. His widow will inherit the whole estate.
>
> If Adam left a house in his sole name worth £500,000, furniture and other belongings worth £5,000, and investments worth £100,000, then his widow will take the personal chattels and £250,000 outright and a life interest in £175,000. The children will be entitled to share £175,000 outright, and will become entitled to the remaining fund when the widow dies.

20. Secondly, if the deceased left a surviving spouse, and either parents or full brothers and sisters (see paragraph 114 below) but no children, the spouse takes:

    (a) all of the deceased's personal chattels – as before;

    (b) a higher statutory legacy of up to £450,000; and

    (c) half of the rest of the estate, if any, outright.

    The vast majority of intestate estates (at least 98%) are worth less than £450,000; in those few cases where there is a surplus beyond the statutory legacy, the other half of it goes to the parents in equal shares. If neither of the deceased's parents has survived, then it goes to the full brothers and sisters, in equal shares.

    > *Example*: Gemma died intestate, and was survived by her civil partner, Sarah, and her mother. She and Sarah owned their house, worth £400,000, jointly, and the rules of joint ownership (see paragraph 17 above) dictate that the house passes to Sarah. Gemma also had personal chattels worth £5,000 and savings of £15,000; these also pass to Sarah under the intestacy rules.

21. Note that if a beneficiary – whether a child of the deceased or another of the deceased's relatives – has already died, then that person's own children take any inheritance instead; in other words, children and other descendants stand in their parent's shoes, and are entitled to any inheritance that their parent would have received. So a surviving spouse might share the estate with the deceased's grandchildren, or with nieces or nephews.

22. Finally, if the deceased left neither children, nor parents, nor full brothers or sisters, then the surviving spouse is entitled to the whole estate.

Intestacy: consultation questions

23. The three sets of rules above are complex, and involve in some cases the added complication of administering a life interest. Yet in most cases the value of the estate means that the surviving spouse takes everything. In the light of that, we set out the following provisional proposal and questions.

Surviving spouse and no children (3.29 to 3.36)

24. **We provisionally propose that, where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the spouse, whether or not there are other family members living.**

25. This would mean that a surviving spouse would no longer have to share the estate with parents or full brothers and sisters (or nieces and nephews, and so on). This is a rule which has already been put in place in a number of other countries. Under the present intestacy rules, the higher level of statutory legacy means that, if a spouse also survives, it is in practice unusual for parents or siblings to receive anything. We believe that this reform would accord with public expectations of what should happen on intestacy where there is a surviving spouse but no children or other descendants of the deceased.

Surviving spouse and children (3.37 to 3.97)

26. **Do consultees think that the intestacy rules should be reformed so as to provide that an entire intestate estate should pass to the surviving spouse, whether or not the deceased also leaves children or other descendants?**

    If not, which of the following models do consultees prefer:

    (a) **the current law, which gives the surviving spouse a statutory legacy and then a life interest in the balance (if any);**

    (b) **a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any) and, if so, what share; or**

    (c) **a sharing structure that gives priority to the family home, either by providing that the surviving spouse inherit the deceased's share in the family home in any event, or by raising the statutory legacy but requiring the surviving spouse to account, against that legacy, for any share of the family home passing by survivorship?**

27. Here we ask an open question about what should happen where the deceased left both a surviving spouse and children (or other descendants). Should the whole estate pass to the surviving spouse, or should the spouse and children share it? If it should be shared, then how?

All to spouse (3.43 to 3.60)

28. There is evidence that passing the whole of the estate to the surviving spouse in all cases would accord with the expectations of many people, who assume that spouses will inherit automatically from each other on death without having to share the estate with the deceased's children. As we have indicated, in the vast majority of cases the value of the estate falls below the level of the statutory legacy; and in many of those cases that is because the family home passes automatically to the surviving spouse as a result, not of the law of intestacy, but of the rules of joint ownership. Accordingly, there are very few cases at present where the spouse does not take the whole estate.

29. In 1989 the Law Commission published a Report following an examination of the law governing the distribution of property on intestacy. The Report recommended that the whole of an intestate estate should pass to the surviving spouse in all cases. Such a reform would greatly simplify the administration of estates. There would, for example, be no need to create and administer life interest trusts, nor (where there is a surviving spouse) statutory trusts for beneficiaries under 18 (discussed below). The intestacy rules themselves would be much simpler, and there would be no need to retain (and periodically update) the statutory legacy.

30. However, the 1989 recommendation was criticised on the basis that it could disinherit the children of the deceased. Particularly strong concerns were raised about cases where the deceased left children from another relationship. The surviving spouse, as their step-parent, would be under no obligation to pass on any of the deceased's property to them, with the result that such children might be deprived of any share in their parent's property. It would occasionally be possible to challenge that outcome through the family provision legislation, but

this would be unusual because of the difficulties faced by adult children in making such applications (which we discuss below).

31. These concerns led to the retention of the current system, whereby in a minority of higher value cases the estate is shared between the surviving spouse and the children. The countervailing concern is that a very few of those cases may give rise to hardship, where the spouse's entitlement under the intestacy rules is insufficient to enable him or her to stay in the family home. This is generally only a risk where the home was not jointly owned by the deceased and the surviving spouse. The clear answer to this is that the spouse would be able to make a family provision application so as to vary his or her entitlement; and it is difficult to imagine circumstances in which such an application would not be successful. That said, making a family provision application is expensive, as well as being emotionally taxing.

32. There are therefore a number of arguments for and against the retention of a mechanism that shares between a spouse and children, and we ask consultees for their views.

33. If a sharing mechanism is retained, there is a choice to be made as to how sharing is to be achieved; the current law represents one of many possibilities. However, we should be reluctant to recommend any reform that did not in most cases provide for the surviving spouse at least as well as does the current law. Therefore, we do not for example favour a model under which all estates, whatever their size, would be split between the surviving spouse and the children. We take the view that a surviving spouse should continue to receive a statutory legacy, so as to maintain a level below which sharing is not required.

34. In the Consultation Paper we also discuss (at paragraphs 3.98 to 3.111) whether surviving spouses should be treated differently in cases where the deceased also left children from another relationship. We conclude that they should not, and that therefore the intestacy entitlement should not be reduced for surviving spouses who are step-parents to children of the deceased.

35. We consider in detail three different ways in which sharing could be achieved.

Sharing: the current law (3.65 to 3.76)

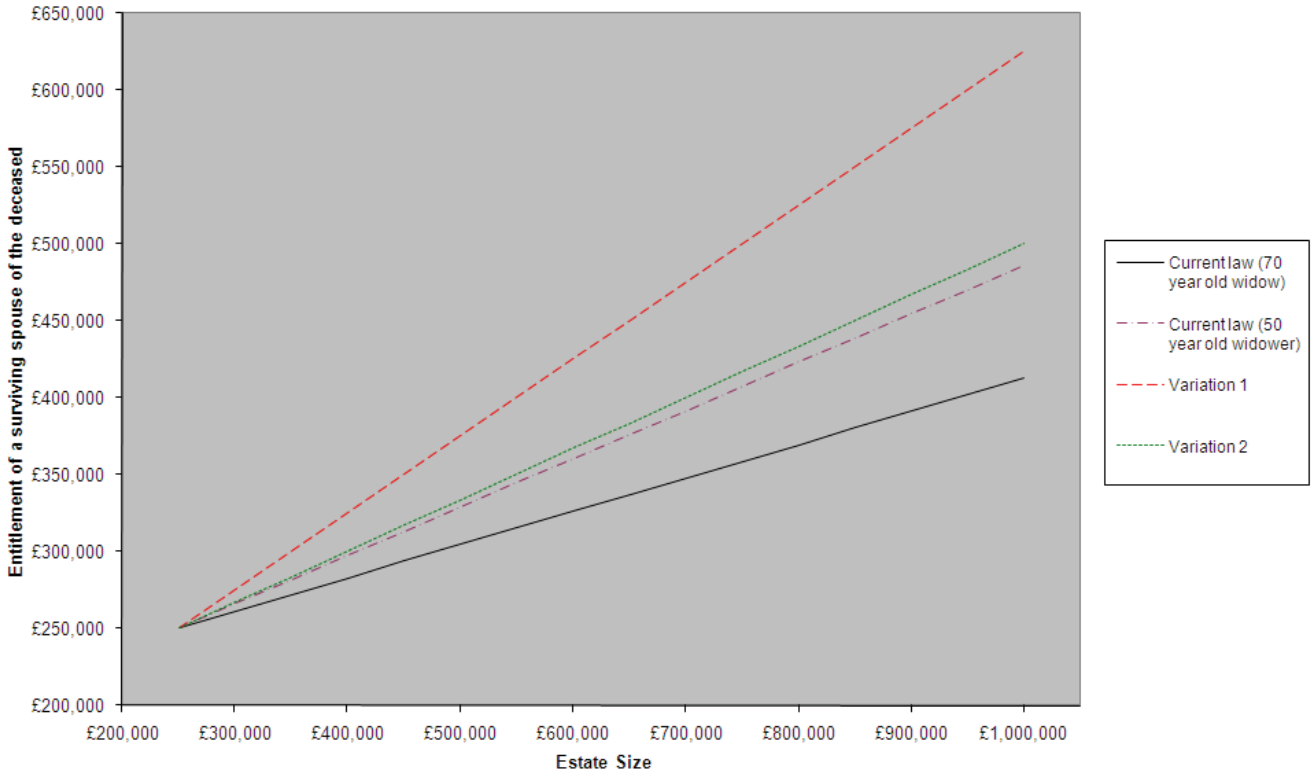
36. The current law has been in place for 80 years, with minor amendments, and lawyers are very familiar with it. Its principal disadvantage is the creation of a life interest trust over one-half of the rest of the estate, if any, after the personal chattels and the first £250,000 of the estate have passed to the surviving spouse.

37. The trustees, at least initially, will be the administrators of the estate, and they may not have legal or accountancy experience; yet the trust places considerable responsibilities on them to handle investment, payment of tax, and so on. The trust may well be an appropriate structure for the management of an estate of, say, £2 million; in that case, after paying the first £250,000 to the spouse there is £1,750,000 left and the life interest fund is £875,000. But exactly the same rules apply if the estate is £300,000, so that there is £25,000 in the life interest fund, and for a fund of that size the administration of the life interest trust is likely to be disproportionately expensive. There are means of bringing trusts to an end, but they can be cumbersome and costly, and may not be available in all cases.

Sharing: fixed share option (3.77 to 3.84)

38. A different option would be to give the surviving spouse the personal chattels and a statutory legacy, and a proportion of the rest of the estate outright. The children would take everything else. Without a life interest, there would be no trust to administer, and adult children would not have to wait for any part of their inheritance until the spouse died. A number of other countries have adopted this structure; the proportion of the rest of the estate which goes to the spouse varies from one-third to a half.

39. If this option were adopted in England and Wales, what proportion of the rest of the estate should go to the surviving spouse? The chart below illustrates the result of just two possibilities, a half ("Variation 1") or one-third ("Variation 2"), compared with the current law, in real terms (represented by translating the spouse's life interest under the current law into a capital sum, by valuing it as an actuary would). The value of a life interest – and therefore the value of a spouse's entitlement under the current law – depends upon the age and sex of the surviving spouse; the chart shows the results for a 70 year old widow and for a 50 year old widower. A fixed one-third fraction of the rest of the estate is closest to what happens under the current law in these cases. Appendix B of the Consultation Paper sets out a number of tables displaying different options, and yet more can be explored by visiting www.lawcom.gov.uk/intestacy.htm.



Sharing: focus on the family home (3.85 to 3.94)

40. The third option we have suggested focuses upon the family home. Most married and civil partnered couples own their home jointly; and in most of those cases, the rules of joint ownership will mean that when one dies, the survivor takes the family home automatically. However, in some cases the surviving spouse does not own the family home, or is left owning only a share in it. As we noted above,

in unusual cases the survivor's entitlement under the intestacy rules may be insufficient to enable him or her to keep the family home. Accordingly, current law may either be very generous, enabling the surviving spouse to take the family home under the joint ownership rules as well as a full intestacy entitlement, or it may give rise to hardship. We have suggested two alternative responses to this, and together they represent the third option presented at paragraph 26 above.

41. One alternative is to provide that the surviving spouse inherits the family home, no matter what the overall size of the estate. There would also need to be provision for a statutory legacy, so that the surviving spouse is not left with a house but nothing to live on. A further refinement would set a limit on the value of the family home that the spouse could inherit, as does the current Scottish law, so as to ensure that in higher value cases there is potential for any children to share in the estate.

42. A different approach responds to the fact that under the current law a spouse may take the deceased's share in the family home under the rules applicable to joint ownership, and in addition receive a full entitlement under the intestacy rules. Concern has been expressed that this leaves insufficient scope for sharing the estate with the children.

43. An answer to this is for the intestacy rules to provide for an enhanced statutory legacy (so as to provide properly for a surviving spouse who was not a joint owner of the family home), with the proviso that where a surviving spouse was a joint owner of the family home he or she must account for that value by subtracting it from the statutory legacy.

> *Example*: Ben and Maya own their home jointly and it is worth £500,000. Ben dies, and the rules of joint ownership mean that Maya is now sole owner of the home. Ben also leaves £275,000 in investments. If the statutory legacy were, say, £400,000, Maya would have to account for the value of Ben's half share in the house. So her statutory legacy would be reduced by £250,000, half the value of the home; she would therefore take £150,000 as her statutory legacy. The result of course varies depending on the level of statutory legacy.

44. This deals with what has been regarded as "over-providing" for the spouse; but it has the disadvantage of complexity. It may also fail to reflect the contributions the spouses have made to the acquisition of the family home, and would be particularly inappropriate in a case where the surviving spouse had in fact provided all of the purchase money for the house.

45. In the Consultation Paper we explore in more detail a number of the advantages and disadvantages of these two alternative ways of focusing on the family home.

Personal chattels (3.112 to 3.133)

46. The current law provides for the deceased's personal chattels to pass to the surviving spouse outright. This means that where a couple used or enjoyed things together, the bereaved survivor does not have to give them up; and it avoids the need for argument about the ownership of items that may vary in value from a private jet to a photograph album.

47. If the deceased had particularly valuable items (perhaps works of art) the effect of the intestacy rules may be to give the bulk of the value of the estate to the surviving spouse. We have considered whether a surviving spouse should take the personal chattels only up to a value limit. However, this could generate disputes within the family, and it would be difficult to set, and periodically update, such a limit. So we make no proposal to that effect. We do, however, propose that the current legal definition of personal chattels, which dates from 1925, be clarified and simplified.

Setting the amount of the statutory legacy (3.134 to 3.144)

48. We discuss and make proposals about the factors to be taken into account when Government updates the statutory legacy, and how often this should be done. This will be relevant only if an option to share between spouses and children is favoured, and the factors to be taken into account in updating the legacy will change depending on which option is chosen. No statutory legacy would be needed if the whole estate is to go to the surviving spouse in all cases. In the light of our proposal that the whole estate should go to the surviving spouse if there are no children, only one level of statutory legacy would be needed.

Family provision and spouses: the current law (2.54, 2.61 to 2.68) and the notional divorce factor (3.145 to 3.150)

49. Even under the current law, the result of the intestacy rules is generally that the surviving spouse takes most or all of the estate, because only a small proportion of estates are greater than the value of the statutory legacy. However, on occasions (particularly where the estate is complex or unusually large) the intestacy rules will not make reasonable provision for the spouse. In that event, a claim for family provision can be made.

50. When a spouse makes a family provision claim, the court asks whether the will, or the intestacy rules, have made the financial provision which it is reasonable for a spouse to receive in the circumstances. For other applicants, the question is whether the applicant has received what is reasonable for his or her maintenance – that is, day-to-day living costs. So the standard of provision for a spouse is higher because it is not limited to maintenance.

51. In considering the standard of provision, and making any award, the court takes into account factors specific to the surviving spouse. These are: his or her age; the length of the marriage or civil partnership; the contribution which the surviving spouse made to the family (such as looking after children); and what the surviving spouse would have been entitled to if the marriage or civil partnership had already ended – in other words, the likely award on divorce, or dissolution in the case of a civil partnership. The objective of this "notional divorce factor" is to ensure that a spouse should not be disadvantaged because he or she has been widowed rather than divorced.

52. It has been suggested to us that it is inappropriate for the family provision legislation to refer to divorce. But in view of the importance of this provision as a protection for the surviving spouse, we do not consider that any change is needed. We therefore make no provisional proposals for the amendment of this provision, although we invite consultees' views as to whether it requires amendment or clarification.

COHABITANTS

The current law (2.55, 2.69 to 2.75)

53. By "cohabitants" we mean people who live together as a couple, but are not married or in a civil partnership. Couples who "live apart together", and those who share a home for some other reason – for example siblings, close family members and lodgers – are not included in the term "cohabitants" as we use it.

54. At the moment, cohabitants do not inherit anything under the intestacy rules. Some cohabitants can make family provision claims, if the couple were living together and had done so for at least two years, immediately before the death. The 1975 Act states that the couple must have been living "as husband and wife" or "as civil partners" during that two-year period. The courts look at all the circumstances to decide whether that description applies. The couple must also have been living "in the same household" (whether or not either or both also owned another property), for the whole of the two-year period before the death.

55. When a cohabitant makes a claim for family provision, the question is whether reasonable financial provision has been made for the cohabitant's maintenance. When looking at this, and at making an order, the courts take into account: the age of the cohabitant; the length of the cohabitation; and the contribution he or she has made to the family (including contributions made by looking after children or other family members), as well as the usual factors (see paragraph 8 above).

56. Because of the "maintenance" standard of provision for cohabitants, on the face of it they are at a disadvantage compared with spouses, for whom provision is not limited to maintenance. However, the courts have come to treat cohabitants generously, looking at maintenance needs in the context of the lifestyle shared with the person who died. So a cohabitant who shared an affluent lifestyle with the deceased can expect an award in keeping with that lifestyle; but is likely to get less than a spouse.

57. In the Consultation Paper we make provisional proposals to change the position of cohabitants on intestacy; we also discuss their entitlement to family provision and propose only minor changes.

Cohabitants inheriting on intestacy (4.14 to 4.61)

58. **We provisionally propose that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions to be discussed below.**

59. Under the current law, the cohabitant of someone who dies intestate gets nothing unless a family provision claim is made. To make a claim is expensive and stressful, and involves litigation against the deceased's relatives and even perhaps the cohabitant's own children. This could be avoided if cohabitants had an entitlement under the intestacy rules – we discuss below what that entitlement should be.

60. There are about 2.25 million cohabiting couples in England and Wales and cohabitation is, increasingly, an accepted family form. For many couples cohabitation is a natural step towards marriage or civil partnership. Many cohabiting couples share their time, efforts and resources in just the same way as spouses and civil partners do, particularly if they have children. Many of the

reasons for the intestacy rules to make provision for a surviving spouse also apply to those cohabiting relationships which are similar to marriages and civil partnerships – having in common with them qualities such as commitment, permanence, interdependence and sharing.

61. There is also considerable evidence that many couples regard themselves as "common law spouses" and assume that they are in the same legal position as are spouses. Many cohabitants still think that they have an entitlement under the intestacy rules – despite efforts to publicise the current law. That may be one of the reasons why about four-fifths of cohabitants have not made a will: because they do not think that they need to.

62. So the empirical research currently available indicates that public opinion would favour reform to the intestacy rules so as to recognise at least some cohabitants, as is the case in a number of other countries; and we make provisional proposals to that effect. Before we make our final recommendations we shall have been able to study the evidence from the Nuffield survey (see paragraph 10 above), which will provide an up-to-date measure of public attitudes.

63. For the administrators of an intestate estate, identifying a cohabitant is different from identifying a spouse or blood relative. Cohabitation cannot be proved by production of a certificate, as can marriage or civil partnership. But in most cases it will be obvious whether the deceased was living as a couple with a partner. In many cases where that is disputed, there would have been litigation under the current law, because cohabitants can already apply for family provision.

64. We are also proposing an updated definition of "cohabitant" for the purposes of the intestacy rules.

65. **We provisionally propose that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased: (1) was living with the deceased as a couple in a joint household; and (2) was neither married to nor a civil partner of the deceased.**

66. The family provision legislation currently refers to couples living together "as husband and wife" or "as civil partners". This is misleading, since it uses the idea of marriage or civil partnership to identify couples who clearly have not married or civil partnered. We prefer to identify cohabitants as "living together as a couple in a joint household". Those who currently are regarded as cohabitants under the definition in the family provision legislation would fall within this suggested new definition. We are also proposing that the family provision legislation should adopt this definition, for consistency: see paragraphs 4.112 and 4.124 of the Consultation Paper.

67. We now turn to the question of how much cohabitants should receive; our provisional proposals distinguish those cohabitants who have children together from those who do not.

Cohabitants with children (4.66 to 4.68)

68. **We provisionally propose that, if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation: (1) there should be no minimum duration requirement for an entitlement on intestacy for the surviving cohabitant; and (2) the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse.**

69. In assessing the extent of a cohabitant's entitlement under the intestacy rules, our starting point is the entitlement of a surviving spouse, because one of the main arguments for giving an entitlement to cohabitants is that they will often have been in a very similar position, emotionally and financially, to a spouse. We take first those cases where the similarity is clearest: where the cohabitants have had a child together and are cohabiting at the date of death; we propose that in such cases the survivor should have the same entitlement under the intestacy rules as would a spouse.

Cohabitants without children (4.69 to 4.88)

70. **We provisionally propose that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse, if the cohabitation had continued for at least five years before the death.**

71. **We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.**

72. **We provisionally propose that any duration requirement should be fulfilled only by a continuous period of cohabitation.**

73. Interdependence tends to increase with the length of a cohabiting relationship. Public attitude surveys show that more people favour giving a cohabitant a share of the estate when the cohabitation has already lasted for a longer time, perhaps because the relationship has by then proved to be reasonably stable and there has been time for the family to accept the cohabitant.

74. Two years is a familiar period in the law relating to cohabitants; it is the minimum period at present for entitlement to apply for family provision, as well as being the qualifying period for entitlement to damages in an action under the Fatal Accidents Act 1976. Certainly a very short cohabitation, where there are no children, should not give rise to an entitlement on intestacy; and so we regard two years' cohabitation as the shortest time which could be set under the intestacy rules. Looking at the upper limit for qualification, we take the view that five years' cohabitation is the longest realistic period.

75. We therefore propose that if the couple did not have children, and they cohabited for five years before one of them died, then the survivor should be entitled to the same inheritance that a spouse would have taken under the intestacy rules.

76. Should a surviving cohabitant be entitled to anything if the cohabitation lasted between two and five years? In the Consultation Paper we discuss the possibility that the surviving cohabitant would take a proportion of what a spouse would have had; we leave aside for the moment the issue of personal chattels (see below). This would mean that the survivor of a cohabitation of less than five years would not be excluded from the intestacy rules. We suggest that, in those circumstances, he or she should inherit half of what a spouse would have had.

> *Example*: Eric died intestate, leaving an estate worth £100,000. If he had been married or in a civil partnership, his spouse would have taken the whole of the estate, whether or not he also left children (see paragraphs 18 to 22 above). As it is, he left a cohabitant with whom he had lived for four years, who will therefore take £50,000. The balance of the estate will pass to whoever is next entitled under the intestacy rules.

Personal chattels (4.89 to 4.96)

77. **We provisionally propose that if the deceased and a surviving cohabitant are by law the parents of a child born before, during or after their cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.**

78. **We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple have not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.**

79. Personal chattels can have great emotional value to other family members, such as children or parents. However, they can also be important to the bereaved cohabitant as part of the household and lifestyle shared with the person who died. And it can be difficult to disentangle who owned what after the death.

80. Cohabitants who have had children, and cohabitants who have been together for at least five years, are likely to have intermingled their lives to such an extent that it seems right for the surviving cohabitant to take all the personal chattels of the person who died, as a spouse would.

81. We can see that it may be less appropriate for that to happen if the cohabitants have not had children and they have been together for less than five years. So we suggest that in those circumstances the cohabitant should take half of what a spouse would have had other than personal chattels. The cohabitant should be able to choose to have personal chattels allocated as part of his or her share of the estate – without increasing the value received overall.

> *Example*: Ruth died intestate survived by her cohabitant Peter with whom she had lived for three years. If Ruth had been married or civil partnered, her spouse would have received from the estate £300,000 plus personal chattels valued at £50,000. Peter takes £150,000, and can choose to take that as, say, £30,000 in personal chattels, the remaining £120,000 being made up of cash.

Cohabitants and other relationships (4.97 to 4.111)

82. On occasion there may be both a surviving spouse and a cohabitant. We discuss this in the Consultation Paper and favour a clear rule that the cohabitant should not inherit under the intestacy rules if there is a surviving spouse. More difficult is the case where more than one person is entitled as a cohabitant, because the deceased shared a home with both. This is also discussed and we suggest that in those cases the amount which a spouse would have received under the intestacy rules should simply be divided between the cohabitants.

Family provision and cohabitants (4.112 to 4.137)

83. **We provisionally propose that if the surviving cohabitant and the deceased are by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975, provided that the cohabitation was continuing at the date of death.**

84. Section 1(1)(ba) of the 1975 Act enables family provision claims to be made by cohabitants who lived with the deceased for at least two years. Our proposals for the intestacy rules would give a cohabitant a share on intestacy if the couple had a child together, even if the cohabitation had been shorter than that. We also take the view that those cohabitants should be able to claim for family provision.

85. **We invite consultees' views as to whether, where the couple did not have a child together, the current two-year qualifying period for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975 should be retained.**

86. We have considered whether all cohabitants should be able to claim for family provision as cohabitants (rather than as dependants) without showing that the cohabitation lasted for a particular time. Entitlement to claim does not guarantee success, and the length of the relationship would be taken into account by the court. Clearly it would be unhelpful to encourage claims that were unlikely to succeed; and under the current law a cohabitant of less than two years' standing may be entitled to make a family provision claim on the alternative grounds of dependence. Dependants are discussed below, where we suggest opening up the definition, making these cohabitants more likely to qualify as dependants.

87. We do not propose that an ex-cohabitant, who has already split up with the deceased, should be able to make a family provision claim.

88. **We provisionally propose that the Inheritance (Provision for Family and Dependants) Act 1975 be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances for the applicant to receive, whether or not that provision is required for the applicant's maintenance.**

89. We propose that when the court considers whether reasonable provision was made for a cohabitant on the death, the measure of reasonable provision should not be restricted to maintenance. It should simply be the financial provision which it is reasonable for this cohabitant to receive. This would reflect the courts' current practice of making an award in the light of all the circumstances and in keeping with the lifestyle that the cohabitants shared.

CHILDREN

The current law (2.27 to 2.30, 2.56, 2.76 to 2.80)

90. As we noted at paragraph 19 above, where the deceased left a spouse, and the value of the intestate estate exceeds the statutory legacy, the deceased's children will receive part of the estate under the intestacy rules. If there was no surviving spouse, then the deceased's children will take the whole estate in equal shares – to the exclusion of their other parent if that parent is not a surviving spouse. Our proposals for cohabitants would put the children of cohabiting, married and civil partnered parents in the same position in this case.

91. Any child (whether or not an adult) can make an application for family provision: the only requirement is that the deceased was the child's legal parent. The court will consider whether the will, or the intestacy rules, have made reasonable financial provision for the child's maintenance. If not, then the court may order provision from the estate, limited to reasonable provision for maintenance. An adult child who is self-supporting will therefore find it difficult to show that reasonable provision for his or her maintenance has not been made. It is not enough that the child feels that he or she has been "disinherited", either by a will or by the operation of the intestacy rules – perhaps because much of the estate has passed to a surviving spouse who is the child's step-parent.

Family provision claims – adult children (5.3 to 5.19)

92. **Do consultees think it appropriate to amend the Inheritance (Provision for Family and Dependants) Act 1975 so as to give a greater chance of success to adult children and, if so, how?**

93. We have not proposed any change to the current law here. It would be difficult to find a clear and consistent alternative to awarding provision on the basis of maintenance needs. There is no generally held view as to what would be "fair". Since family provision claims can also be made where the deceased left a will, giving adult children a greater chance of success in a claim for family provision would mean that people's wishes in their wills could be contradicted more often. It could also undermine the structure of the intestacy rules, which deliberately give priority to the surviving spouse.

Distribution between children and other descendants (5.20 to 5.35)

94. We turn next to a technical point about the way an estate is distributed between children and other descendants. This is best illustrated by an example:

> *Example*: Martin, who is a widower, dies without making a will. He had two daughters Rachel and Hannah, who have both already died, and a son Felix who is still alive. Rachel left four sons and Hannah left two sons. Under the current law Martin's estate is divided into three, one for each of his three children. Felix is still alive and so takes his one-third outright. Rachel's third is divided into four, between her four sons, and Hannah's third is divided between her two sons. Therefore Hannah's sons each inherit one-sixth of Martin's estate, and Rachel's sons receive a twelfth each.

95. This is known as distribution "*per stirpes*" (Latin: "by stock" or "by family"); each child, or his or her descendants, take an equal share overall. Hannah's sons share the inheritance she would have had, Rachel's sons take her share, and Felix takes the third to which he is entitled. Martin's grandsons therefore do not share equally in his estate.

96. An alternative, found in some other countries, is distribution "*per capita* at each generation" ("*per capita*" means "by head"). This method gives an equal share to each grandchild whose parent has already died. Felix would still take a third, but the other two-thirds would be divided equally between all six grandsons, so that they inherit one-ninth each. Rachel's sons take more than under a *per stirpes* system; Hannah's son takes less, because Rachel has also died and has left more children.

97. **Would consultees favour any change to the present method of *per stirpes* distribution of intestate estates, and in particular the introduction of *per capita* distribution at each generation?**

Terms of trusts for children on intestacy (5.36 to 5.53)

98. Under the current intestacy rules, a child will take his or her share in an intestate estate outright on reaching 18 or forming a marriage or civil partnership at 16 or 17. Until then, the fund which he or she is set to inherit is held in trust, and the child is said to have a "contingent interest" in it. The trustees are able to make payments from that share to benefit the child; for example for childcare expenses, the cost of providing a home, or other outgoings. The trustees can use all of the income of the fund, and up to half of the capital. We discuss relaxing this restriction so that the trustees' power to make these payments is extended to the whole of the capital of the fund which the child is set to inherit.

99. We do not propose any change to the rule that the interest becomes absolute when the child turns 18, or marries or forms a civil partnership.

Adoption (5.54 to 5.69)

100. As discussed above, when a child's parent dies while the child is under 18 (and has not married or formed a civil partnership) the child can have only a contingent interest in the parent's estate. If the child is adopted while that interest is still contingent, it is taken away, because of the interaction of the adoption legislation and the intestacy rules. This can be prevented by making an application to court, but the point may be overlooked, and in any event court proceedings can be expensive and may delay the adoption.

101. **We provisionally propose that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.**

OTHER RELATIVES, DEPENDANTS AND *BONA VACANTIA*

Children of the family

The current law (2.57, 2.81 to 2.82)

102. A "child of the family" is someone who is not the deceased's child, but was treated as such. This means that the deceased must have taken on the role of a parent in relation to that person – not simply that the deceased was kind or affectionate to him or her. For example, a step-child may be a child of the family. The "child" may of course be under 18 or an adult.

103. A child of the family cannot inherit under the intestacy rules because the deceased is not his or her legal parent, but can make a family provision claim. The court will consider whether reasonable financial provision was made for his or her maintenance, and may order provision from the estate, which is limited to reasonable provision for maintenance. The court is required to take into account what (if any) responsibility the deceased took on to maintain the child of the family, whether the deceased did this knowing that there was not in fact a legal parent-child bond between them, and whether anyone else has a legal duty to maintain the child.

104. Currently, a person only qualifies as a child of the family at all if the deceased treated him or her as a child "in relation to" a marriage or civil partnership – not a cohabitation or other relationship.

105. **We provisionally propose that a person who was treated by the deceased as his or her children should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party. (6.2 to 6.9)**

106. Our view is that, if the deceased treated someone as his or her child, that person should be able to apply for family provision. It should not be necessary for that the relationship to have arisen while the deceased was a party to a marriage or civil partnership – or even a cohabitation: the only question should be whether the deceased took on the position of a parent towards the applicant. It seems to us to be irrelevant whether or not the deceased was part of a couple.

Dependants

The current law (2.58, 2.83 to 2.87)

107. A claim for family provision may be made by someone who was being maintained, or provided for, by the deceased immediately before his or her death – often called a "dependant". The standard of provision for a dependant is, again, reasonable financial provision for his or her maintenance: the court considers whether such provision was made in the will or by the intestacy rules (if relevant), and if not, what the dependant should receive to make that provision. In doing so, in addition to the usual factors the court looks at what responsibility the deceased had taken on for the dependant's maintenance, over how long a period, and so on.

Consultation questions (6.10 to 6.31)

108. We have looked at two issues in the current law that seem to cause difficulties for dependants in claiming financial provision.

109. First, the courts have decided that a person cannot claim as a dependant unless the deceased had taken on responsibility for that person's maintenance (often referred to as an "assumption of responsibility"). We have made a provisional proposal (at paragraph 6.18) that an assumption of responsibility – which can be very hard to assess – should no longer be a prerequisite or "threshold" to a claim, but should be regarded as one among other factors.

110. Secondly, the courts require a dependant to show that the deceased was making a substantial contribution towards his or her reasonable needs, and that this was not done for "full valuable consideration". "Full valuable consideration" could be payment for the contribution made by the deceased – for example, paying rent to live in a house owned by the deceased. But as the law currently stands it could be anything that benefits the deceased, for example doing some housekeeping for the deceased or caring for him or her.

111. The courts assess whether a person is a dependant by balancing the contributions made by him or her and by the deceased to each other's benefit. This means that a dependant who also does something for the deceased is less likely to be able to claim than a dependant who gives nothing back. Yet a dependant who also helped out the deceased seems more "deserving" than someone who did not.

> *Example*: Dan allows Jessie to live in his house without paying rent; if Jessie does the housework and helps Dan with his business, then those contributions would be balanced against the rent-free accommodation she received.

112. In that example, Jessie would probably qualify as a dependant because free accommodation is an important benefit and the courts take a fairly "broad-brush" approach. However, the balancing approach also means that if the two contribute equally to their household – putting in similar amounts of money and doing similar work around the house and for each other – neither can qualify as a dependant because their contributions balance. However, they are "mutually dependent", or interdependent: they can keep up their standard of living because they are both contributing. If one dies, the other will find it much harder to manage alone, on one salary.

113. **We provisionally propose that it should no longer be a prerequisite to the success of a claim under the Inheritance (Provision for Family and Dependants) Act 1975 brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the claimant.**

Parents, brothers and sisters, and other relatives

The current law (2.27 to 2.30)

114. Under the intestacy rules, if the deceased did not leave a surviving spouse or any children, then the whole estate goes to his or her parent – both parents share equally if both are still alive. If neither parent is still alive, then the deceased's "full siblings" take the estate in equal shares. "Full siblings" are brothers and sisters who have both the same parents as the deceased.

115. If there are no parents and no full siblings then the estate passes to any "half siblings" – brothers and sisters who share only one parent with the deceased; if there are no siblings at all, the estate will be divided between the deceased's surviving grandparents, if any. Finally, if there are no parents, siblings, or grandparents, the estate will be shared equally between the deceased's uncles and aunts. The full picture is given in the diagram on page 4; if anyone entitled to inherit has already died, leaving children or other descendants, then those descendants stand in that person's shoes and take his or her share.

116. Spouses and children can apply for family provision, but other relatives such as parents, brothers and sisters, and grandchildren cannot unless they qualify as dependants (or as children of the family).

Family provision (6.32 to 6.36)

117. **We invite consultees' views as to whether the categories of applicant for family provision should be further widened to include other relatives, such as parents, descendants other than children, siblings, nephews and nieces, and so on.**

118. Our proposal that a surviving spouse should inherit everything if there are no children means that a few parents (or siblings) who currently would take something on intestacy in that situation will no longer do so. Should they be able to apply for family provision? We make no proposal for change, but invite consultees' views on this. The changes we have proposed to the rules on dependants will mean that more relatives who were depending on the deceased will become able to apply for family provision.

Intestacy – parents and siblings (6.37 to 6.54)

119. Under the current law the deceased's brothers and sisters only inherit under the intestacy rules if neither parent has survived. There are two options for change: either siblings could inherit instead of parents, or estates could be shared between parents and siblings. We also ask if the law should continue to give priority – as to inheritance, and also as to entitlement to administer an estate – to full siblings over half siblings.

120. **We ask consultees whether the current preference in the intestacy rules for parents over siblings should be retained.**

121. **Would consultees favour reform to the intestacy rules (and consequential amendments to the Non-Contentious Probate Rules) so that no distinction is drawn between full and half siblings?**

Intestacy – other relatives (6.55 to 6.68)

122. The Consultation Paper considers whether the list of relatives entitled on intestacy should be expanded. This would reduce the number of estates which pass to the state as *bona vacantia* (see below), but it would increase the difficulties of tracing relatives. We therefore do not support it. Nor do we favour reducing the class of relatives who can inherit, which would result in more estates passing as *bona vacantia*. Instead, we discuss and ask for consultees' views on the idea that the costs of tracing missing relatives should come out of those relatives' shares in the estate, and not from the estate as a whole.

123. We also discuss the current rules relating to inheritance by unmarried fathers. In cases where a parent is entitled to inherit under the intestacy rules, the law makes a distinction depending on whether or not the deceased's father was married to his or her mother. If he was not, then it is presumed that he died before the deceased. That presumption can be overcome if someone can prove that he is the deceased's father, and if he does so then he inherits as usual under the intestacy rules. There is no similar rule for unmarried mothers.

124. We invite consultees' views as to whether reform would be appropriate. In particular would it cause any problems in dealing with intestate estates and identifying the beneficiaries who are entitled?

Bona vacantia (2.31 to 2.32, 6.69 to 6.83)

125. "*Bona vacantia*" means "ownerless goods". If the deceased did not leave a surviving spouse or any of the relatives mentioned above, then the estate is said to be *bona vacantia*. In most cases it passes to the Crown, and the estate is administered by the Treasury Solicitor. But if the deceased lived in Cornwall, then the estate goes to the Duchy of Cornwall; and if he or she lived in the "County Palatine of Lancaster" (Lancashire, Greater Manchester, Merseyside and the Furness area of Cumbria) then it goes to the Duchy of Lancaster.

126. The Treasury Solicitor and the Duchies of Cornwall and Lancaster can and do make payments from the estate to people for whom the deceased could reasonably have been expected to make provision. This means that, for example, an unpaid carer who looked after the deceased, or the deceased's cohabitant, could request an award from the estate. The Bona Vacantia Division of the Treasury Solicitors' Department publishes guidance on when and how it will make such payments. Family provision claims can be made in the usual way when the estate becomes *bona vacantia*. Subject to any such payments, the Duchy of Lancaster and the Duchy of Cornwall pay the rest of the estate (after paying costs and so on) to charity: to the Duchy of Lancaster charitable funds, or the Duke of Cornwall's Benevolent Fund. Where the Crown is entitled, the funds are used for general public expenditure.

127. It has been suggested that where no relatives are entitled, the money should go to charity. There are a number of difficulties with this proposal. There are many charities, and it is not clear how to determine what would be the appropriate charity for the estate of a particular individual. Moreover, it would not be permissible for charities to make payments to carers, dependants or anyone who did not have a right to the estate. Accordingly, we do not suggest any changes to the rules on bona vacantia.

THE ADMINISTRATION OF ESTATES

128. In Part 7 of the Consultation Paper we discuss a number of technical issues about the administration of intestate estates, for example:

(a) the value of assets that can be administered without the need for a grant of representation (that is, formal authority to deal with the estate) (7.4 to 7.8);

(b) the rules that restrict the ability of a beneficiary – particularly a surviving spouse – who is also the administrator of an estate to transfer assets to him or herself (7.9 to 7.20);

(c) whether entitlement to inherit on intestacy should depend upon the claimant surviving the deceased by a certain period (7.21 to 7.31);

(d) whether those who are entitled to inherit from an intestate estate should have to account for (that is, subtract from their entitlement) gifts already received from the deceased or anything received under foreign intestacy rules (7.32 to 7.39);

(e) the rule that a family provision claim can only be made if the deceased was domiciled (that is, had his or her permanent home) in England and Wales. The current law can give rise to difficulties when the deceased lived abroad, although not on a permanent basis, or lived here but was not domiciled here. We discuss alternative reform possibilities (7.40 to 7.56);

(f) the time limit for family provision applications in relation to property held as joint tenants, and valuation of the deceased's share (7.57 to 7.65);

(g) whether it should be possible to make a family provision claim before a grant of representation has been issued (7.66 to 7.70).

129. Finally, we discuss the range of assets that can be accessed when a family provision claim is made, and in particular the issue of the availability of pension funds (7.71 to 7.83).

130. Pension schemes often make payments after a death: perhaps a death in service lump sum, or a pension payable to a surviving spouse, cohabitant or dependent child. A payment such as this cannot be directly accessed by a family provision claim, even though it has become available as a result of the death.

131. We discuss whether it would be appropriate to reform this area, noting that pension rights, which were once inaccessible to an ex-spouse, have now become available for division when making financial arrangements following divorce. However, there are technical and practical concerns which may need to be taken into account. We ask consultees to contribute their views.