

Stuart McMillan MSP  
Convener of the Delegated Powers and Law Reform Committee

Dear Mr McMillan

Thank you for your letter of 17<sup>th</sup> May. It was a pleasure to provide evidence to the committee.

*In relation to S72*

In order to answer this question it might be useful to say something about the history of succession rights under the Succession (Scotland) Act 1964

*The Division of the Intestate estate post 10 Sept 1964*

The order in which the estate is distributed is

- (a) Prior rights in this order:
  - (i) S8 right to housing
  - (ii) S9 Plenishing of house
  - (iii) S9 Cash right
- (b) Legal rights
- (c) By rules of intestate succession in s2

*(a) Prior rights*

*S8 right to heritage*

The 1964 Act s8 introduced a prior right to a relevant interest in heritable property (which might be a half share) occupied by the spouse (but not necessarily by the deceased) up to a value which was set at £473,000 in 2012 by SSI. This was designed to bring the figure in line with inflation to the figure set in 1964. At the time of the SSI the Scottish Government said that this would be reviewed three yearly and updated as appropriate for inflation. That did not happen in 2015 on the basis that a Bill was being introduced dealing with succession issues as a result of the SLC report (2009). Nor has it happened since. The figure for CPI in 2012 is not readily available but the April 2023 CPI figure is 128% of the 2015 base of 100. This brings out a figure of £605,000 the current equivalent value for the housing right. The figure was designed to ensure that in the vast majority of cases the family home passed to the spouse. You will note that there is no requirement for cohabitation of the deceased and the spouse/civil partner in the 1964 Act only that the spouse/civil partner was occupying the interest in property owned by the deceased at the time of the deceased's death. We recommend that the uprating exercise be undertaken at this juncture.

*S9 rights*

These come quite deliberately and are postponed to the s8 right.

(i) furniture etc in the house claimed under s8 up to a value of £29,000 passes to the surviving spouse/civil partner. In most executries the value of contents provided by a valuer is of the order of £1000 to £2000 as the saleroom values net of expenses. This provides the survivor with a working home. We see no need to update this value.

(ii) a cash right of up to either £50,000 if the deceased has surviving children or £89,000 where there are no issue. These rights might usefully be reviewed now to £64,000 and £114,000 applying the same CPI index uplift of 28%.

In many cases this will exhaust the estate which was the intention behind the 1964 Act.

If the cash right was also updated then this will include more estates.

*(b) Legal rights*

If there is any estate left after prior rights then legal rights can be claimed. A Surviving spouse will be entitled to one half of the moveable estate left where there are no surviving children or remoter issue of the deceased and where there are children/issue one third.

*(c) Rules of intestate succession*

The first category are children or remoter issue who will take the whole residue

At present the next categories are parents and siblings of the deceased. Where both classes are present then each takes one half and if only one class is present they take the residue of the estate.

Only if there are (i) no children or remoter issue, (ii) no parents or remoter ancestors and (iii) no siblings will a spouse take the balance of the estate. S72 amends s2 of the 1964 Act to move a surviving spouse up ahead of parents and siblings but still behind children and remoter issue in the ranking. In none of the classes in s2 is there any qualification of the right to succeed. Any conditional right to succeed such as a cohabitation qualification operates as a fundamental change to the overall scheme of the 1964 Act which clarified the pre-existing law.

At present prior rights are designed to pass the whole estate to a surviving spouse/civil partner without any cohabitation requirement. It is believed over 90% of estates pass wholly to the surviving spouse/civil partner under the existing limits and the percentage will be even higher should the limits be reviewed.

The proposal in s72 has been consulted on and received wide support. In focus groups it has been approved of (albeit the case of separated spouses/civil partners has not been considered). Many consider this to be the existing law.

To include a cohabitation qualification would be a significant change of the whole underlying policy considerations underpinning the 1964.

It is a policy issue as to whether a spouse/civil partner (albeit separated) is more deserving than parents or siblings. Marriage/civil partnership are relationships with legal consequences whereas cohabitation does not have the same consequences one of which is rights of succession. The remedy is for the deceased to make a will thus excluding the default intestacy rules.

It should be noted that for there to be separation between spouses/civil partners the law would currently *animus* or intention. There is no suggestion that a spouse/civil partner who is in hospital or a care home has exercised a choice in relation to the separation. The same is equally true in relation to someone working away from home whether in the armed services

or not. If the committee is minded to recommend a qualification (of which we are not in favour) the examples do not give cause for concern.

If doubts remain as to the efficacy of s72 as drafted in our view the more appropriate way in which to proceed is to uprate the prior rights limits as suggested. This will ensure the spouse/civil partner gets the family home in the vast majority of cases. Where title is in joint names then this on our proposal will extend to houses with a value of £1.21 million accounting for the vast majority of homes in Scotland but only where the survivor was occupying the interest concerned at the time of death. It is a truism to say there is an inverse relationship between the size of the estate and intestacy. The remedy in the few situations where the rules of intestate succession will apply would be to make a will and those with the deepest pockets are those most likely to seek appropriate legal advice.

Kind regards,

Ken Swinton