



## Intestacy and family provision claims on death

## Citizens Advice response to the Law Commission.

March 2010

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## Introduction

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The CAB service is a network of 413 independent advice centres in England and Wales providing free, confidential and impartial advice and advocacy from over 3,300 outlets, in high streets, community centres, health settings, courts and prisons. Over 6,000 paid staff and more than 20,000 trained volunteers deliver advice to help clients deal with 6 million new problems a year, on issues such as debt, benefits, housing, employment and consumer matters. Advisers help fill out forms, write letters, negotiate with creditors and represent clients at court or tribunal. Of these 6 million problems, 5,176 related to wills and intestacy.

We are delighted to respond to this consultation on the rules and law concerning intestacy and subsequent inheritance of assets. This is an important issue; consumer research has reported that 27.5 million adults in England and Wales do not have a will.<sup>1</sup> But at the same time society is changing, and legal provisions concerning inheritance are becoming more relevant to the vast majority of consumers. For example, owner-occupiers make up 70 percent of households in the UK, including many who have exercised their right to buy a home they previously rented - this property will need to change hands when the owner dies. Also the law and families need to take account of complicating factors such as increased rates of divorce and subsequent re-marriage. Without appropriate legal arrangements, protections and provisions there is no guarantee that those who people need or choose to provide for can inherit their assets.

We consider that the law in relation to inheritance and dealing with family assets on death is much need of modernisation. Currently it is characterized by archaic legal terminology and has not kept pace with modern social and demographic trends in family life. We would also observe that many CAB clients have relatively low incomes and only about a third are homeowners; so consequently their assets may be well below the statutory legacy taper (currently £250,000) for asset sharing between surviving children and spouses.

Our response only covers those issues raised by the consultation highlighted in our evidence. These mainly relate to issues with processes, systems and administration. We consider that there is a need for a more holistic public policy approach to how different agencies and legal processes deal with bereavement issues. It is vital to remember that those affected by bereavement within their families or close personal relationships are often at their most vulnerable. Therefore there is a need for all agencies to deal with bereaved individuals sensitively, and with a minimum of bureaucracy, so they can move forwards with their lives. We do not think that the current systems work at all well in this regard.

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## Human rights

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We welcome the fact that that the paper starts from human rights perspective, recognizing the importance of rights to family life peaceful enjoyment of property, and equality between different groups as set out in the European Convention underpinning the Human Rights Act. Taking a human rights perspective should involve going beyond this framework in applying human rights principles to probate policy. We would suggest that this should include recognizing the importance of testamentary freedom (ie the wishes of the deceased), the relative entitlements of spouses and children, the rights of cohabitants on the death of a partner, the significance of the family home, and the need to treat

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<sup>1</sup> National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 3; K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (2005) p 71.

bereaved persons with dignity. These have all been identified by social and public attitudes research as being important to people.<sup>2</sup>

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## Surviving spouses and children

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We welcome the proposal that there should be a presumption of inheritance in respect of surviving spouses and children and we note that the Commission has attempted to address situations where there might be competing claims between surviving spouses, children and other family members. Whilst we accept the arguments that a deceased's parents and siblings should be limited in claims on the estate, we are uncomfortable with the suggestion that such conflicts can only be resolved by reverting to the Commission's previous proposals (paragraph 3.69) for a surviving spouses to have total entitlement to intestate estates.<sup>3</sup> We prefer the option of a "sharing structure" (paragraph 3.96(3)) between surviving spouses and children. We are not convinced though that the "statutory legacy" approach of fixed estate proportions will always lead to the fairest outcomes.

Also we do not think that the Commission has dealt appropriately with the situation of step-families as there are no concrete proposals to deal with the situation of "children from other relationships" (paragraph 3.98) and the Commission recommends keeping the law as it is. Citizens Advice often receives evidence on the difficulties faced by people in step-families when their relatives die intestate. There are particular problem for individuals whose parents re-marry and are outlived by their new spouses. If this happens and there is no will to the contrary, the property of the parent passes to the step parent initially, and then to the step parent's blood relatives in order of succession. This can be very distressing and can seem very unfair. For example:

A Hampshire CAB reported the case of a brother and sister who had spent considerable time and effort pursuing a claim for miner's compensation in respect of their father who had died in the 1960s of a recently recognised industrial disease. Their father had left his whole estate to his wife, the clients' mother. However, she later remarried and when she died, she left everything to her husband. The clients' stepfather then died intestate, meaning that the entire estate, including the recently agreed compensation payment for their father's illness, passed to their stepfather's children, none of whom ever knew their father. The clients felt that this situation was wholly unjust.

A woman went to a CAB in Northumberland for help because her mother had died two years previously without leaving a will. Her estate had passed to her husband, who was the client's stepfather. However, he had recently died intestate. The client said that there had been an agreement that their house would be left to the client's mother's three grandchildren as the house had been her mother's prior to the marriage. However, as the client's stepfather died intestate, the estate passed to his siblings who began clearing the house, including of the client's mother's personal possessions.

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## Cohabitants

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Citizens Advice frequently hears of cases in which recently bereaved people are left without any inheritance when their partners die, because they were not married and there was no will. Sometimes this can result in the loss of their home and financial difficulties.. For example:

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<sup>2</sup> Natcen research – The law of intestate succession: exploring attitudes (2009)

<sup>3</sup> Family Law- Distribution on intestacy Law Comm 1989

A Sussex CAB saw a man whose partner of ten years had died intestate. The house they lived in had originally belonged to his partner's father, who they had lived with and cared for, until his death some time earlier. Following the death of her father, the client's partner had inherited the house, but when she died without a will, it passed to her two brothers. The client told the CAB adviser that one of his partner's brothers had attempted to have him evicted from the house, claiming he was a squatter. As a result of the intestacy rules, this man was faced with homelessness as well as bereavement.

An South London CAB) dealt with the case of a woman whose partner had died. They had been together for 12 years and she told the adviser that she believed he had made a will naming her as beneficiary. However, this will could not be found and the client became engaged in a legal dispute with her partner's first wife and family. As the current law stands, the client would not be entitled to inherit any of her late partner's estate as they were not married.

We therefore welcome the Commission's proposals that a cohabitant of a deceased person should have an entitlement on intestacy equivalent to a surviving spouse, but subject to the conditions that they were living with the deceased as a couple in a joint household. We suggest that any "time threshold" should be similar to what the Commission has proposed in respect of the financial rights and responsibilities of co-habitants more generally.<sup>4</sup>

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## Will writing, access to wills and access to legal help

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We are very disappointed that the consultation does not consider any of these wider issues such as will-writing, will take up and the probate system except as an afterthought in terms of the "impact" that the commission's proposals might have – and even here the Commission has failed to apply the legal aid impact test.

Firstly, we consider that there is a pressing need to tackle the issue of practice and standards in will writing and services. Bureaux regularly report cases where will writing has failed to provide peace of mind. As a result, many people are not taking the proper legal steps to manage what happens to their assets after death. Worse, instead of good customer service, there has been scope for scams where bogus will-writers cash in on people's desires to make sure their financial affairs are settled according to their wishes after they die. For example:

A client of a Hampshire CAB received a letter from a firm describing themselves as 'probate genealogists,' and telling him he might be entitled to a share in the estate of a person who had died intestate. They asked him to sign an agreement giving them a third (plusVAT) of anything he might receive before disclosing any details to him. Clause 1 of the agreement set no upper limit on the amount payable to the firm.

An Oxfordshire CAB saw a man whose mother had died four weeks earlier. Six months before that while his mother was out shopping, she was stopped by a sales person working for a will writing service. They made an appointment with his mother to make a draft will. The man said his mother had paid £140 for the consultation and a further £80 per month to have her will stored by the company. The will was sent to her together with a copy, the original was signed and witnessed and sent back to the company. She paid for five months' storage of her will before she died. After his mother's death the man received a letter from the company saying that his mother had nominated him as her executor. When he contacted the company for the

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<sup>4</sup> Cohabitation – the financial consequences of relationship breakdown, Law Commission 207

will to go to probate, they said that they had not got the will. They inferred that the will was not returned to them signed.

We therefore consider that all will writing services should be covered by the Legal Services Act's regulatory regime and that there may need to be additional protection to tackle pressure selling by probate services to bereaved people (an issue we have recently raised with the Office of Fair Trading). However, addressing regulatory issues is only part of the problem helping both testators and beneficiaries to manage their asset inheritance, as consumers need access to appropriate legal services for the probate system to work. For example, the extent to which family legal aid covers probate and inheritance matters under the Access to Justice Act funding code is extremely limited, with cost recovery usually sought from the deceased's estate.<sup>5</sup> Consequently, those on low income lose out:

An East Yorkshire CAB's saw a man who had a complex problem arising from unexpected death of his wife leaving no will. Because his wife might have owned a house jointly with her previous husband, he should be able to claim inheritance of half the house under the intestacy rules, so he needed help in obtaining probate. Because he was in receipt of jobseekers allowance, he was likely to be financially eligible for legal aid. He rang a legal aid firm to seek advice, but they said that legal aid wasn't available for probate. As a result, he stood to lose a considerable inheritance if the equity in the house jointly owned by his wife is allowed by default to go to her ex-husband.

Finally, we consider that everyone would be helped by the development of a more comprehensive system for the registration of wills that have been made than is offered by the current probate jurisdiction under the Family Division of the High Court. Often it can be difficult for the relatives of a deceased person to find out if there is a valid will in existence. Citizens Advice proposes that wills could be electronically registered for a small and defined fee, operating in a similar way as the Land Registry does when buying a home. Moving to an electronic system would enable individuals to keep the original, or turn it over to a third party, such as a solicitor, bank or relative. A more sophisticated system for registration of wills could be linked to the registration of deaths, so that the existence of a will would be immediately apparent on registration. We are currently pursuing some of these ideas for a reformed probate system with the Non-Contentious Probate Rules Committee.

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## The need for plain English

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We are disappointed that the Commission's proposals do not rise to the challenge of transparency and clear language. We urgently need to simplify the legal language surrounding inheritance, through consumer information campaigns, and encourage take up of will making through properly regulated services.

In the longer term, we consider that the Ministry of Justice may need to undertake a wider review of the law of inheritance and to simplify and reform the entire probate system so that families can have confidence that intergenerational assets will be protected..

Finally, as we understand the Government has decided not to opt into proposed EU legislation on succession and wills. We believe that this may prove to be a missed opportunity to achieve common standards across Europe for the registration of wills and basic principles of succession rights.

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<sup>5</sup> LSC Funding code - family section