RESPONSE BY THE FACULTY OF ADVOCATES

to the Consultation on the Law of Succession

INTESTACY

Q1. Do you agree that the current approach to intestate succession needs to be reformed?

Yes.

Q2. Do you agree that the aims of any reforms should be to reflect outcomes which individuals and their families would generally expect?

The Faculty believes that the purpose of the law of intestate succession is not about meeting familial expectations, rather it is trying to provide for what the deceased could or would have anticipated happening with their estate. The focus of any legislation should therefore be on making provision for the survivors with a close connection to the deceased, and those who the law might assume had some level of dependency on the deceased.

Q3. If you favour a different approach, would you prefer to model that change on the regime in Washington State or British Columbia or neither?

If the Faculty has a preference it would be for the regime operating in Washington State. That allows for the distribution of the wealth generated within a marriage/civil partnership, and potentially other equivalent relationships, between the parties who have worked together to help create the estate, and where there is most likely to be a situation of dependency post death. It appears on the face of it to be relatively easy for someone to administer, subject to later comment. It reflects what could reasonably be anticipated to have been the wishes of the deceased. It also allows for the inclusion of step children in the event there are no other more direct successors, where it avoids *ultimus haeres.*

Q4. Which of the Washington State or British Columbia models delivers outcomes which most closely reflect what modern Scottish families (with all their many permutations) might expect to happen on the death of a spouse/civil partner?

It is felt that the Washington State model has the potential to deliver most closely what might be expected in modern Scottish society. It departs from the rather

artificial concepts of thresholds, achieving treatment which is the same regardless of the size of the estate. It focuses more on the distribution of the wealth created/assets acquired during the relationship of the deceased and the spouse/civil partner, by their efforts. The part of the deceased's estate which comes from elsewhere, "separate property", is available in larger part to the surviving spouse/civil partner in circumstances where one would assume it will be applied for the benefit of the couple's children, or ultimately transfer to them on the death of the second parent. At the same time the children receive a direct benefit from that separate property. There is an overall sense of "fairness" which accords with the Scots law approach to the distribution of wealth/assets in other circumstances such as divorce.

Q5. If the Washington State model ('community of acquests') is your preferred model, do you think that the Family Law (Scotland) Act 1985 financial provisions on divorce could be readily applied to intestate estates?

In broad terms we do consider that the concept of "matrimonial property" in the 1985 Act could be applied to intestate estates. It is a definition that has presented few issues in practice, bar the very exceptional cases. It has the certainty of assessing what has been acquired within a defined period, between the date of marriage/civil partnership and the date of separation. This could easily be used in the context of intestate succession to define what is the "community of acquests", the period no doubt being aligned to that between date of marriage/civil partnership and date of death. Separate property would be what was acquired before the marriage or civil partnership, together with those assets acquired by way of gift or inheritance from a third party. Clear and concise definitions of the "couple" or "community" property and separate property, readily understood and applied, would be required.

Where there might be difficulties are situations where, in the 1985 Act, special circumstances under s.10(6) would be considered as giving a discretion to discount certain assets or the value of them, from inclusion as community property, due to the source of funds with which they were acquired, e.g. the deceased used inherited funds from his family to purchase a property during the period of the marriage. The inherited funds if not reinvested could easily be identified as "separate property", but where subsequently used in the acquisition of assets during the marriage, more difficulties could arise. Such situations, and no doubt others, could potentially put the executor in a difficult position of determining how to attribute the estate, or any part of it, between the two pools of community property and separate property. That would also potentially give rise to a conflict of interest for an executor who, on intestacy, is a beneficiary. Other problems could be the tracing exercise and search for evidence that might be needed to establish what assets were owned pre marriage or, where pre marriage assets have been realised and reinvested during the marriage, how one accounts for that in terms of a "community of acquests".

A possible solution to the issue of alteration of assets would be to provide a rule akin to that which applies to alteration of assets by guardians or attorneys of the deceased, namely that the sale or other transformation of the inherited funds would not alter their status as "separate property" unless the sale or transformation was a necessary and unavoidable act of the deceased or his guardian or attorney (see *Turner v. Turner* 2012 S.L.T. 877).

Notwithstanding these potential issues, we consider that there is an attractive simplicity to the approach under the 1985 Act, which could transfer to intestate succession. The extent to which the executor is to have a discretion, if any, over the attribution of property between "community property" and "separate property" will need to be very clear as, apart from issues of conflict highlighted above, there may be an impact on the enquiries made by cautioners, and on the cost of bonds of caution, if these continue to be required.

Q6. If the British Columbia model (threshold) is your preferred model, what do you think should be the appropriate threshold levels in Scotland?

Not applicable.

Q7. Should step-children have a right equivalent to that of biological or adopted children to inherit in intestacy?

No. It appears to us that there should be some consistency with the treatment of other relationships arising as a consequence of the marriage of A and B. At present, there is no entitlement for A to succeed to the estate of B's parent or sibling. Individuals will become step-children when their parent remarries, possibly when the children themselves are adult, and there may be no meaningful relationship between the two. Although there will be some families where the relationship between a step-parent and step-child is strong, it does not appear to us that rights should be created as if this was a widespread occurrence.

Q8. Should step-children be able to inherit in order to avoid a step parent's intestate estate passing to the Crown?

Yes. On balance, we would favour this outcome, but it is a question of policy and either outcome is capable of justification.

COHABITANTS AND INTESTACY

Q9. Do you agree that cohabitants should continue to have to apply to the courts in order to obtain any financial provision in intestacy?

No.

An application to the courts such as the current system involves:

- the creation of an adversarial state between heir and cohabitant – with consequent antagonism and additional stress.

- expense in the sense of both parties having to pay litigation lawyers to pursue their cases, or a diminution in the value of the estate to meet such costs.

- discrimination against the economically poorer party (whether heir or cohabitant) who can less afford to fund the litigation – this can lead to imbalanced settlement agreements.

- uncertainty, in that there are no hard and fast rules for the court to apply: if such an application to courts (or an arbitrator) provision was contained in a will, it would be struck down for uncertainty and for not being the testator's will – again this favours the economically stronger who can take the risk of losing.

- delay, in that (especially if the application period were to be extended to 1 year) the executor will be unable to make any distributions to any heir on intestacy until after a year – and then is subject to the delays in the courts (usually sheriff courts) which can be substantial.

None of this is consistent with a modern, efficient and fair law of inheritance in circumstances often of great stress to the survivors of the deceased.

Succession law is meant to be clear, straightforward and efficient. Requiring applications to the courts as a matter of course for cohabitants is undesirable for all of these reasons.

Q10. Do you agree that cohabitants should have an automatic entitlement to inherit in intestacy?

Yes.

For the reasons set out in answer to Question 9, the current "non-entitlement but possible award" scheme is undesirable for a modern succession law.

Cohabitation is a free arrangement: typically it is entered into without any prior planning or consideration of legal consequences. On one view, given that circumstance, there should not be any entitlement to inherit on intestacy. That remains the case in most jurisdictions throughout the world, so far as we are aware.

Cohabitation should also not be equated to marriage or civil partnership. We do not agree with the proposals that after a certain period of time a cohabitant should have the inheritance rights of a spouse. That would not be in line with general expectations either of society or cohabiting couples. It would, in effect, create marriage for the purpose of succession or inheritance law. That could be productive of tension in a relationship were it to be well known. In *Gow v. Grant* [2012] UKSC 29, Lord Hope said "There was a respectable body of opinion that it would be unwise to impose marriage-like consequences on couples who had deliberately chosen not to marry." As far as we are aware that body of opinion continues.

That said, cohabitation is now a common feature in our society. There is no consensus in Scotland of which we are aware as to what any succession rights should be. It is interesting to see that in the countries that have given cohabitants rights of inheritance (e.g. Netherlands, Norway, Sweden, as well as the English-speaking ones mentioned in paragraph 3.10 of the consultation paper) there is also no common consensus as to what the rights are.

The question is, what should those rights be?

If the approach to intestate succession overall is to try and reflect what the deceased could or would have anticipated happening with their estate, it can probably be said, safely, that there would be a general expectation that the survivor in a stable cohabiting relationship should be able to continue to live in the home shared with the deceased after his/her death and not suffer possible eviction at the instance of the deceased's children, siblings or parents (or other heirs) with the consequences that may bring.

There is already provision in Scots law for cohabitants of intestate deceased persons inheriting both public and private residential tenancies.[1]

For these reasons we take the view that there should be some automatic entitlement to inherit either the principal place of residence of the surviving cohabitant or a liferent right to occupy that principal place of residence.

Norwegian law appears to give a type of liferent (undivided possessory right) over the "family home and household goods, to holiday homes and vehicles as long as these items are for joint use".[2] In addition Norwegian law gives the cohabitant a lump sum (equivalent to 40,000 Euros) and "on special reason" the option of buying the family home from those who would otherwise inherit it.

However, it must borne in mind that for these rights (other than the option to purchase) a cohabitant must have been the parent of a child of the deceased or be expecting the deceased's child.

Dutch law is more limited and appears to give a 6 month liferent (usufruct) after death to cover the house lived in by the cohabitant at the time of the death, and its household effects.[3] There is no parenting qualification.

Swedish law appears to give cohabitants rights only to shares (or parts of shares) of property co-owned with the deceased (i.e. shares of common (*pro indiviso*) property).

It must also be borne in mind that the competitors with cohabitants to be heirs on intestacy will most often be the deceased's children either of the relationship or from a previous relationship, or siblings, nieces or nephews and occasionally parents.

On balance, our favoured option would be for a cohabitant to inherit a liferent over the deceased's title in the principal home of the cohabitants. A continuing right to occupy the principal residence would afford some automatic protection to younger children of the relationship, as well as to the surviving cohabitant, and remove the element of competition between them that currently exists when considering claims under s.29 of the Family Law (Scotland) Act 2006. In addition, the cohabitant should inherit any share of the deceased in the household goods where the couple had a

[1] E.g. Housing (Scotland) Act 2001, s.22 & sched.3; Housing (Scotland) Act 1988, s.31; Private Housing (Tenancies) (Scotland) Act 2016, s.67 (albeit the qualifications for inheritance differ).
[2] Prof. Dr Tone Sverdrup "National Report: Norway" in ceflonline.net (Commission on European Family Law reports on informal relationships) at Question 48.
[3] Dutch Civil Code art. 4.28-2.

presumed equal share under s.26 of the Family Law (Scotland) Act 2006. Consideration could also be given to a right to inherit a capital sum, either determined as a percentage share of what a spouse would have received or a fixed amount. Such additional rights could be conditional or not, as in other jurisdictions, or variable depending on whether there are surviving children of the couple. The most fair and effective solution needs careful consideration.

For this automatic entitlement there should be some minimum qualifying period for cohabitation, simply to exclude casual relationships. A one-year period would be reasonable. We acknowledge that currently, in terms of ss.28 and 29 of the Family Law (Scotland) Act 2006, there is no minimum qualifying period of cohabitation, and that in introducing one a difference would be created between claims during lifetime and those on death. We consider, however, that should there be an automatic right to inherit by a cohabitant, that creates a very different situation to the right currently available under s.29, where the court will consider as a factor in making any award, amongst other things, the length of the cohabitation. That has an inbuilt limitation that an automatic right of inheritance, without a qualifying period, would not have.

This proposal would take account of the deceased cohabitant's presumed wish to ensure a reasonable protection of residence for the cohabitant (where he or she is not a tenant) whilst providing for his/her children or other relatives in what could be a relationship of reasonably short duration.

The proposal would also take account of the deceased cohabitant's presumed wish not to have the estate divided up as if they were married.

It would also be a condition that a cohabitant's entitlement to inherit was conditional on the deceased cohabitant not being married or in civil partnership at the time of his/her death.

We note that British Columbia law appears to allow for inheritance where the deceased cohabitant was still married or in a civil partnership. However, that is in the context that the same law disinherits spouses upon separation from the deceased. In practice, such disinheritance of spouses means that there is virtually never a competition between spouse and cohabitant.

We are not in favour of taking away spouses' inheritance rights in the event of separation. That would introduce another undesirable level of complexity into the law of succession. While separation is something that is significant for the settlement of property on divorce – and can lead to disputes over the date of separation – that is something that should not be acceptable for an efficient and stress-free law of succession.

Keeping cohabitants' rights on succession to unmarried deceased persons is consistent with, it would appear, Norwegian law and also with the proposals for English law made in the 2011 report.[4] Provided there is public awareness of the

[4] The Law Commission Report "Intestacy and Family Provision Claims on Death" (No.331), at para. 8.66 to 8.68.

position, it should not result in any hardship, the option for a married cohabitant being to prepare a will.

Q11. Do you agree that a qualifying cohabitant should have the same rights as a spouse or civil partner in intestacy?

No.

Reasons as stated in answer to Questions 9 and 10.

Q12. Should a cohabitant inherit where there is a surviving spouse or civil partner?

No.

Reasons as stated in answer to Questions 9 and 10.

Q13. Should a surviving spouse or civil partner inherit where there is a surviving cohabitant?

Yes.

Reasons as stated in answer to Questions 9 and 10.

Q14. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split equally between them?

No.

It is highly unlikely that the deceased cohabitant would have wished both the surviving cohabitant and the surviving spouse/civil partner to take the whole of the spousal share at the expense of the children, failing whom sibilings etc.

As noted above, while it is possible that the deceased cohabitant might not wish his/her surviving spouse/civil partner to inherit, to introduce provisions that cut off the spouse/civil partner's rights on separation (and possibly re-introduce the rights on reconciliation with the spouse/civil partner) would introduce undesirable complexity into the law.

With a view to the straightforward administration of intestate estates, we consider that the surviving cohabitant should not inherit while the marriage/civil partnership still exists.

Q15. Do you agree that where there is both a surviving spouse and a surviving qualifying cohabitant that the spousal share should be split between them as agreed and where the parties cannot agree that the Courts should determine

the split?

No.

Reasons as stated in answer to Question 14. The possible involvement of the courts underlines the undesirability of such a proposal.

ADDITIONAL MATTERS

Temporary aliment

Q16. Do you agree or disagree that there should be a time limit for claims for temporary aliment?

We agree. A time limit for claims for temporary aliment can mean two things: (i) a time limit for making claims against the estate, irrespective of the period to which such claims may relate; or (ii) a time limit for the period of entitlement to which a claim may relate, irrespective of when it is made.

The courts have, in practice, recognised a time limit for claims of temporary aliment in both of these senses: (i) temporary aliment has to be claimed within 6 months after death, and (ii) an eligible claimant is only entitled to temporary aliment in respect of the period of 6 months after death. One of the reasons why we previously supported the retention of temporary aliment was that its being restricted to 6 months after death did not create an open-ended liability of indeterminate duration and amount. For this reason, we favour a time limit, in both senses, for temporary aliment claims.

Q17. If you agree, should that time limit be 6 months?

Yes, for three reasons.

First, if the purpose of temporary aliment is to deal with practical cash-flow difficulties created for the claimant by the deceased's death, such difficulties are likely to arise most acutely immediately after death. The claimant's immediate need and the estate's not being manifestly insolvent should be capable of being established during the period of 6 months after death.

Second, the period of 6 months for temporary aliment claims is already aligned with the period during which executors cannot be compelled to distribute the deceased's estate to any beneficiaries (because of possible claims of the deceased's creditors). The categories of person entitled to temporary aliment should, from 6 months after death, be able to insist on any entitlement they may have against the estate under the law of intestacy or in terms of testamentary provision, as opposed to temporary aliment.

Third, any period for such claims is going to be arbitrary to some extent, but we consider that the current period strikes a good balance.

Q18. If you do not agree, what time limit would you suggest?

Not applicable.

Equitable compensation

Q19. Do you agree that the implementation of section 7 of the Succession (Scotland) Act 2016 has reduced the potential application of the doctrine of equitable compensation to the extent that no further change is required?

Yes.

The principle of equitable compensation arises where a person retains and claims his or her legal rights in an estate where he/she has had a legacy in the will of the deceased. This requires some explanation.

At common law, if a person accepted his legal rights (without discharging his right to the legacy), the effect was that, subject to a clause making the legacy conditional on discharge of legal rights or a clause making the legacy in full satisfaction of legal rights), the result was not that the legacy was forfeited but that its claim became conditional on "equitable compensation" for the taking of legal rights being made to the estate.

An example is the case of *Macfarlane's Trs* (1882) 9 R 1138 (a Full Bench decision) where the legacy was of a liferent of residue and the legatee accepted her legal rights. In the absence of a forfeiture or full satisfaction clause, upon the liferent income reaching the value of the legal rights, thereby compensating the estate for the claim of legal rights, the legatee was entitled to claim the liferent legacy.

Macfarlane's Trs made it clear that the effect of the taking of legal rights was not forfeiture of all testamentary provisions.

Section 13 of the Succession (Scotland) Act 1964 introduced a statutory "full satisfaction of legal rights clause". This gave statutory effect to the "full satisfaction" clauses in *Rose's Trs v. Rose* 1916 S.C. 827; and *Wingate v. Wingate's Trs* 1921 S.C. 857. Those cases had established that the implied meaning of such clauses was to make all legacies conditional on *the legatee* renouncing legal rights.

If the wording of s.13 (as interpreted in *Rose's Trs*) had been present in the *Macfarlane's Trs* case, the taking of the legal rights would have resulted in the lapsing of the legacy (and its fall into residue) and excluded equitable compensation.

However, where the legacy is of a liferent to a legal rights holder and fee to others and the others do not achieve a vested right upon the death of the testator and the legal rights holder elects to retain legal rights, there is no accelerated vesting of the fee in the others. The trustees hold the estate subject to the liferent until vesting, and equitable compensation to the fiars takes place gradually through the liferent income until that time. If before vesting full compensation takes place (i.e. the full value of legal rights is accumulated), the further accumulations fall into intestacy and to those

entitled thereto including the legal rights holder (by virtue of any rights under intestacy which are unaffected by s.13).

That was the situation in *Munro's Trs v. Munro* 1971 S.C 280 where equitable compensation was found to apply. The problem with equitable compensation as applied in *Munro's Trs* was thought to be complexity not its unfairness.

Section 7 of the Succession (Scotland) Act 1964 left open the possibility of an obligation to accumulate to make equitable compensation. It would not have made any difference to the outcome in *Munro's Trs*. That is because section 7 deals with situations where in a trust liferent/fee legacy the fee vests other than on the death of the liferenter. In *Munro's Trs* the fee vested on the death of the respective liferenters.

There is no unfairness with the current position, albeit that it remains complex. The proposals made by the Scottish Law Commission in s.13(2)(b) of their 2009 draft bill were flawed in that they went too far. It is better that no change be made than one that might be flawed.

Executors

Q20. Should a convicted murderer be allowed to be executor to their victim's estate?

No. We consider that there are two distinct reasons for this disqualification, based respectively on principle and on practical considerations.

First, if a convicted murderer cannot be a beneficiary of their victim's estate, they should also be considered unworthy in law to administer it as an executor. Being guilty of the deceased's murder is incompatible, without inquiry, with the kind of respect for the deceased's actual wishes, or the deceased's "will by default" in terms of the law of intestacy, which should be expected of an executor. In the vast majority of cases where this issue might arise, a convicted murderer will, by definition, be appointed executor-nominate under a will, or fall into the relevant category of person eligible to be an executor-dative. To the extent that the law is intended to reflect the deceased's intentions, actual or assumed, in respect of the identity of executors, it is unlikely in the extreme that the deceased would have wanted their murderer to administer and distribute their estate after death.

The only situation we envisage where those considerations may not apply is that of mercy killing. Any such case would be better dealt with, in our view, by the criminal law, including the exercise of discretion not to prosecute, rather than by creating an exception, in the law of succession, to the general rule that a convicted murderer should not be allowed to be appointed their victim's executor.

Second, there may well be practical difficulties in a convicted murderer discharging the duties of an executor from prison, given (i) the compulsory life sentence for murder, and (ii) the likelihood that, during the period after death which would normally be required for winding up the estate, the convicted person will be subject to the punishment part of the sentence of life imprisonment. On its own, this would

not be a sufficient reason for not allowing a convicted murderer to act as an executor, but it lends support to the principled argument from unworthiness.

Q21. Should someone convicted of culpable homicide be allowed to be executor to their victim's estate?

Only as a result of the exercise by a court of discretion to this effect. We consider that, while the considerations outlined in our preceding answer with respect to murder apply with less force to culpable homicide, they nonetheless still support the conclusion that a person convicted of culpable homicide should, *prima facie*, not be allowed to be executor of their victim's estate. But it is equitable and consistent with the treatment of culpable homicide in the Forfeiture Act 1982 for there to be the possibility of relief from the effects of the rule in cases other than murder. The position in relation to other offences of unlawful killing (for example causing death by dangerous driving) will also require to be addressed.

Q22. Should conviction automatically prevent/disqualify someone convicted of either murder or culpable homicide from acting as an executor on their victim's estate?

Yes. We favour this being an automatic disqualification, subject to potential relief in the case of a verdict of culpable homicide only, in line with the Forfeiture Act 1982, as outlined above. Even then, there should be no right of relief from disqualification if a substitute executor has been appointed and confirmed, as set out in our Answer 24.

It is reasonable for the default position to be that of disqualification. It is difficult to think of circumstances in which the general public interest in preventing someone convicted of either crime from being executor of their victim's estate would be outweighed, in a particular estate, by either the private interest of the convicted person being nonetheless permitted to act in this capacity, or the public interest in the convicted person being appointed executor for the sake of the estate and the beneficiaries. But it is not inconsistent with this to create a discretion, exercisable in particular circumstances, for example where the degree of culpability is perceived to be lower. It would, however, be impractical and conducive to delay if the court were to embark on an evaluative exercise in every such case.

Q23. Should a conviction for any type of crime which results in imprisonment automatically disqualify an executor from acting?

No. A conviction prior to appointment or confirmation should not automatically disqualify an executor from acting. It cannot be assumed that the deceased would see a conviction for any type of crime resulting in imprisonment as a reason why someone otherwise eligible to act as executor, by appointment under the will or under the rules on executors-dative, should be disqualified from holding office. A number of people share their lives with convicted persons and may well want them to act as their executors, especially where the conviction is not in any way related to the deceased or the estate. The fact of imprisonment may make it difficult for a convicted person to discharge an executor's duties from prison, but this practical consideration does not, on its own, warrant an automatic disqualification. A

conviction while in office, if it bears on an executor's fitness to discharge their duties, would be better dealt with in the context of the existing procedures for removal of executors, not by means of a disqualification triggered by the sheer fact that the executor has been convicted and received a custodial sentence.

Q24. Do you agree that someone who has been charged with the murder or culpable homicide of their benefactor should be disqualified from becoming the executor until the outcome of a trial determines whether or not the disqualified executor is guilty or innocent?

Yes.

The reference to a "benefactor" in the question could be seen as referring to :

(i) the deceased whose estate would pass to the accused, who would also be entitled to the office of executor; or

(ii) the deceased to whose estate the accused would be entitled to be executor even if he was not a beneficiary to the estate.

We assume that the question is confined to "benefactor" in the second sense.

There are a number of considerations to be taken into account in endeavouring to achieve a coherent position. There is, of course, the presumption of innocence. But the position we propose in relation to the effect of conviction for murder or culpable homicide is generally disqualification, subject to a discretion in relation only to culpable homicide. Thus, a guilty verdict in relation to either charge will render the person ineligible to act as executor. It appears to us undesirable to have an estate administered by someone who may later be found ineligible for the office of executor. Once charged in relation to the death, it appears likely that they will have other matters to attend to than the administration of the deceased's estate.

Q25. If you agree, should consideration be given to the appointment of a judicial factor, on an interim basis or otherwise, until such time as a conviction is confirmed?

No.

As a preliminary but important matter, it is unclear what is meant by a conviction being "confirmed". Hopefully what is meant is that an appeal against conviction is refused or is no longer available. After charge but before conviction at trial there is no "conviction to be confirmed". Any suggestion to the contrary is inconsistent with the presumption of innocence.

However it is also possible that what is referred to is the appointment of an interim judicial factor upon the mere charging of murder or culpable homicide.

We take the view that the proper administration of the estate is paramount. If a person charged with murder or culpable homicide is disqualified from acting as executor, the executorship should be taken up by any other person qualified to be executor before any judicial factor, interim or otherwise is thought of. That is the

normal course of events in the not uncommon situation when an executor-nominate refuses to take up office.

Only if there is no-one qualified to be executor-nominate or executor-dative is it appropriate to appoint a judicial factor, and then on a permanent, not temporary basis. The same course of events should apply if the accused is disqualified from the office of executor. In effect the disqualification due to charge should be seen as a deemed pre-decease of the deceased by the executor and following the acceptance of office, the deemed decease of the executor.

Once the executor (whether nominate or dative) is confirmed there should be no reinstatement of the disqualified accused even on his acquittal. The reason is that such reinstatement would be very disruptive to the regular administration of the estate.

Non-disclosure of sensitive information in a grant of confirmation

Q26. Are you aware of any difficulties which have been encountered as a consequence of public access to the details provided in an Inventory?

No.

Q27. Does the current process of making the Inventory (and all the attendant information contained therein including bank account details) publicly available have the potential to create difficulties for beneficiaries, executors, the deceased's family or other individuals?

No.

First, it should be noted that having access to the Inventory is an important protection for beneficiaries or potential beneficiaries in that it provides them with essential information about the assets in the estate. In the absence of a publicly available Inventory, potential beneficiaries would be dependent upon such information, if any, provided to them by the executor. We believe therefore that making the Inventory public represents an important check on the proper administration of the estate.

Second, the Inventory is only lodged some weeks or months after the deceased has died. This provides the executor with ample time to take steps to protect the assets of the deceased, for example by informing banks and insurance companies of the death of the deceased, so that accounts are closed or the proceeds of insurance policies are paid out only to the executor. Further, once confirmation has been obtained an executor should be able to ingather funds held by banks and insurance companies within a relatively short period. We think therefore that the scope for an unconnected individual to use information contained in the Inventory for fraudulent purposes is very limited, and we are not aware of any evidence that the information has been so used.

The one situation which is identified as a potential concern is a joint bank account where the survivor, usually a spouse or partner, wishes to continue operating the

account in their own name. In that situation the Inventory may contain information such as the account number which could compromise the future security of the account. We are not aware of instances of accounts being compromised as a result of this and we doubt that individuals are likely to trawl through Inventories in the hope of finding joint accounts which have not been closed. However, it is a potential concern which could, we think, be alleviated by adopting the widespread practice of revealing only the last four digits of the account number. This would allow an understanding of which account is referred to without disclosing all relevant details of it.

Q28. Do you agree that information which may compromise the security of joint accounts/assets for the survivor should be redacted?

Yes.

We agree that some information about joint accounts should be redacted, provided that the Inventory still provides information that there is an account and the value of the deceased's share in the account. See our answer to Question 27 for our suggested solution.

Q29. What sort of information contained in the Inventory should not be publicly available?

We believe it is important that information in the Inventory should be publicly available and that information should only be redacted if there is a significant risk that the information would compromise the security of particular assets, such as joint account numbers.

Q30. Should it be possible to redact information from the inventory of an estate which may compromise the security of another individual's assets?

Yes.

If there is a significant risk of assets being compromised, there would be a justification for partial redaction of the information from the inventory. However, this is unlikely to arise except in relation to joint assets, such as joint accounts, as only the assets of the deceased appear in a confirmation.

Q31. Would delaying the public availability of inventories for a year provide the necessary protections for individuals for whom the security of their assets may be compromised?

No.

We believe that delaying the public availability of an Inventory for a year would be undesirable as it could prevent potential beneficiaries from having access to information about the estate at an important stage in the administration of the estate. After 6 months the executor can distribute the estate to beneficiaries without fear of personal liability to creditors of the deceased. A delay of a year with the estate having been wound up could result in beneficiaries having to undertake a much more

difficult task of seeking to recover estate whether from the executor or from other beneficiaries.

Further, such a lengthy delay would be unnecessary. An executor should have ingathered the assets within a few weeks of confirmation, so that most of the information in the Inventory concerning accounts and insurance policies would be out of date very quickly. In so far as the concern is about joint accounts which are still operating, the delay would not address this concern.

Q32. Is there another means of providing the necessary protections to individuals who may be compromised?

Yes.

Redacting certain information from the Inventory would protect joint bank accounts as discussed above.

Q33. Should personal details of a beneficiary in wills be in the public domain?

Yes.

Wills are put in the public domain through confirmation and, often, through registration in the Register of Deeds. We are not aware of any concerns being raised in relation to this practice.

The will being in the public domain provides an important protection for beneficiaries or potential beneficiaries who can read its terms and identify if they are beneficiaries and the extent of any legacy. The personal details of beneficiaries are necessary to identify who they are. In any event, wills rarely contain information beyond the name and address of the beneficiary and their relationship to the deceased.

Q34. Should it be possible to redact personal details of a beneficiary from a will?

No.

For the reasons given in answer to Question 33 we believe this information should be in the public domain.

Q35. Would delaying the public availability of a will for a year address concerns about sharing personal details of a beneficiary?

No.

It is a common practice for solicitors when instructed to administer an estate to send the will for registration and preservation in the Register of Deeds. That provides security against its accidental loss or destruction. A will is often therefore in the public domain long before confirmation is obtained. In any event we do not see what benefit would be achieved by delaying making the will available following

confirmation. Further, there is a risk of prejudice to beneficiaries if the information is not available to them during this period.

Small estates limit

Q36. Do you agree that it would now be appropriate to review the "small estates" limit?

Yes.

There has been inflation since 2011 and this should be taken into account in order to keep the provisions under the 1979 Act as operable as they were then.

Executors, beneficiaries and timeshare contracts

Q37. How many executry cases are you aware of where there has been a difficulty created by a timeshare contract in perpetuity?

None.

Q38. What are the issues in these cases for beneficiaries?

The first issue is to decide the "location" of the timeshare contract. The location will be the country of principal base of the timeshare accommodation provider (see Currie on Confirmation of Executors (9th edn) by E.M. Scobbie para. 10-63 and see *English, Scottish and Australian Bank Ltd v. Inland Revenue Commissioners* [1932] A.C. 238).

If the location is in Scotland, it is likely that the Scottish executor will be able to deal with both the debt and the rights aspects of the timeshare contract. If not, then matters are more difficult.

Unless the deceased was domiciled in Scotland ***and*** the timeshare provider was based in another part of the U.K. it is unlikely that the Scottish executor will be able to deal with the contract.

In that case the potential beneficiary will have to obtain legal advice from the country where the timeshare provider is based and find out who is entitled to inherit the timeshare contract under the law applied for that purpose by that country. That country's law may or may not refer that decision back to the Scots law of succession.

The next issue for the beneficiary (who is entitled to inherit) is whether they are entitled and, if so, wish to terminate the contract. That will depend on the law governing the contract. The general rule in contracts governed by Scots law is that where the period is indeterminable, they are terminable on reasonable notice by the customer.

If there is no possibility for termination (or it is not activated) the final issue for a beneficiary will be to satisfy the timeshare provider that they are entitled to enjoy the benefits of the timeshare contract. What is necessary to ensure the transfer of the timeshare contract will depend on the timeshare provider and the law governing the contract.

It must be borne in mind that in most European continental jurisdictions there are no executors administering estates. Instead the assets of a deceased are transferred automatically on death to the heirs on intestacy, who must then transfer the assets according to any will (subject to legal rights). There may well be procedures for proof of heirship or legacy but these must be pursued by a potential heir or beneficiary direct (or possibly by a Scottish executor with their consent) to ensure transfer of the estate in that jurisdiction.

Q39. What are the issues in these cases for executors?

The first duty of an executor is to pay off the debts of the deceased consumer incurred up to the date of death. Typically timeshare charges will be moveable and so will be borne by the moveable estate of the deceased as a whole in the first instance.

With regard to debts allegedly incurred after death, there will be an issue of whether, like a property factoring contract,[5] the timeshare contract continues notwithstanding the death, with contractual obligations on both parties. Whether the timeshare contract continues will depend partly on the position of the law governing the contract with regard to duration of contracts for an indeterminate period. The general rule in contracts governed by Scots law is that where the period is indeterminable, they are terminable on reasonable notice by the customer. That is the position for a property factoring contract and that will be the default position for timeshare contracts governed by Scots law. It may or may not be the situation where the contract is governed by a foreign law.

Where the timeshare contract appears to continue after death, instalments due after death are likely to be borne by the person who would inherit the customer's rights under the contract, again akin to the person inheriting the flat bearing the factor's charges.[6]

The next issue for the executor will be whether he or she is entitled to deal with and transfer the timeshare agreement to the person entitled to inherit it. That depends on whether the timeshare contract is "located" outwith Scotland.

A Scottish executor's rights to transfer timeshare contracts located outwith Scotland are very limited. This is because only estate (including contractual rights) located in Scotland vests in an executor on the death of the right-holder.[7]

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[5] *Hoey v. MacEwan & Auld* (1867) 5 M 814, 817 per Lord President Inglis.
[6] *Hoey* (above).
[7] Succession (Scotland) Act 1964, s.14(1); and Bartos & Meston on the Succession (Scotland) Act 1964 (6th edn) at paras. 7-07, 7-09 & 7-11).

Therefore while the executor may require to enter the timeshare agreement (as foreign or English/Welsh/Northern Irish estate) into his application for confirmation, the confirmation subsequently granted will not, in general, vest the agreement in him to allow him to deal with it as part of the estate. The main jurisdictions where a Scottish executor may have power to deal with a foreign timeshare contract by virtue of confirmation will be in the other parts of the United Kingdom (provided the deceased was domiciled in Scotland).

A timeshare contract will be located outwith Scotland if the provider of the timeshare accommodation is based outwith Scotland.[8]

If the timeshare contract is located outwith Scotland then the executor (or the beneficiary) will have to establish title to deal with the timeshare contract in the foreign jurisdiction, as they would for any foreign property.

Even if the executor establishes title to deal with the contract in the foreign jurisdiction there will then be an issue as to the person who is entitled to inherit the customer's timeshare rights and duties. That will depend on the succession laws of Scotland and the country where the contract is located. With regard to Scots law, the person entitled to inherit the timeshare will be determined by the law of the domicile of the deceased. That may or may not be recognised by the law of location of the contract – and the timeshare provider. That law may or may not refer the matter back to Scots law.

On any view the executor would be entitled not to pay any charges arising for periods after the date of death until the inheritance of the timeshare was determined. This is because any such charges would be borne by the beneficiary to the timeshare and not by the estate as a whole.

Q40. What are the solutions?

There is no "one size fits all" solution for either beneficiaries or executors in connection with timeshare contracts. Everything depends on (a) the country in which the timeshare contract is "located" and (b) the country whose laws govern the timeshare contract.

Q41. Are there similar contracts in other areas which create difficulties for executors and beneficiaries?

The issues discussed exist for all contracts for the receipt of ongoing services where the deceased was the recipient of the services in exchange for regular payments.

If the contract is governed by Scots law and involves Scottish parties, matters are straightforward, albeit there can be a delay in payment from the point of view of the service provider, e.g. a property factor, until it is established who is to be the beneficiary in relation to the factored property in question.

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[8] see Currie on Confirmation of Executors (9th edn) by E.M. Scobbie para. 10-63 and see *English, Scottish and Australian Bank Ltd v. Inland Revenue Commissioners* [1932] A.C. 238.

If there is a foreign element, the complexities described above are inherent.

The delay in the establishment of, and transfer to, the beneficiary by the executor can cause difficulty where action must be taken by the non-deceasing party in the "*interregnum*" between the death and the transfer to the deceased party's successor.

An example is action involving the exercise of an option to terminate the contract (e.g. to serve a notice to quit in a commercial lease between individuals). If no executor has been confirmed, on whom should the surviving landlord serve a notice to quit? Similar issues arise in relation to break-notices for leases. One can see the matter arising in relation to any contract where there was a time-limited option to terminate the contract.

It is suggested that the law should provide for service of notices to exercise such options to be made on an heir on intestacy of the deceased person prior to the confirmation of the executor, so that any doubt as to what should be done can be put to rest.