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Inheritance and Trustees' Powers Bill [HL]

Bill No172 of 2013-14

RESEARCH PAPER 14/11 26 February 2014

The *Inheritance and Trustees' Powers Bill [HL]* is based substantially on a draft bill prepared by the Law Commission. It is following the special procedure which applies to Law Commission bills. The Bill is a technical Bill which would amend aspects of the law of intestacy and family provision claims; and the statutory powers of trustees in all trusts.

Catherine Fairbairn

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A person dies "intestate" if (s)he does not leave a valid will disposing of the whole of his or her property, in which case their estate is distributed in accordance with legal rules known as the intestacy rules. In distributing the estate, much depends on which relatives survive the deceased and the size of the estate. According to the Law Commission, "studies suggest that between a half and two thirds of the adult population do not have a will and that those who need one most are the least likely to have made one".

The *Inheritance (Provision for Family and Dependants) Act 1975* provides a means for someone to challenge the distribution of an estate, under a will or under the intestacy rules, by applying to court for a share, or an increased share, in the estate. This is often referred to as a claim for family provision. A successful claim results in a change to the way in which the estate is distributed.

In October 2008, the Law Commission began work on a project dealing with intestacy and family provision claims on death, which culminated, in December 2011, with the publication of a final report, including two draft Bills (one of which related to inheritance rights for cohabitants). The report recommended a package of reforms "that would modify the current legal rules to reflect modern social expectations and to remove arbitrary or unduly technical aspects, while leaving intact the fundamental structure of the English law of "succession" to property on death".

On 21 March 2013, Lord McNally, then Minister of State for Justice, announced that the Government had accepted the Law Commission's recommendations, with minor amendments, in all areas except for the recommendations relating to rights for cohabitants on intestacy, and published its own consultation on the Law Commission's draft *Inheritance and Trustees' Powers Bill*. The response to this consultation was published on 30 July 2013. This indicated that, although some respondents had concerns about some points of detail, and a range of differing views was put forward with regard to an additional ground for jurisdiction for family provision claims (which is no longer in the Bill), the overall response was supportive of the proposed reforms.

On 30 July 2013, the *Inheritance and Trustees' Powers Bill [HL]* was introduced in the House of Lords under the House of Lords procedure for Law Commission Bills. The Bill was amended in Special Public Bill Committee and on Report.

The Bill is based largely on the Law Commission's draft Bill and would introduce a number of reforms including:

- amending the entitlement of the surviving spouse or civil partner under the intestacy rules;
- providing for the statutory legacy (which the surviving spouse inherits before the deceased's estate is shared with children or other descendants) to be updated regularly;
- updating the definition of "personal chattels";
- amending other technical rules relating to intestacy and family provision claims;
- amending the management powers of all trustees under sections 31 and 32 of the *Trustee Act 1925* (powers to distribute income or capital from a trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright).

1 Introduction and background

1.1 Who inherits the property of a person who dies without a valid will?

A person dies "intestate" if (s)he does not leave a valid will disposing of the whole of his or her property, in which case their estate is distributed in accordance with legal rules known as the intestacy rules. These rules, which are set out in section 46 of the *Administration of Estates Act 1925*, have been amended from time to time. The intestacy rules determine the distribution of the deceased's estate after any debts and liabilities, funeral expenses and costs of the administration of the estate have been paid.

In distributing the estate, much depends on which relatives survive the deceased and the size of the estate. The deceased's spouse or civil partner will not necessarily inherit the whole of the estate. A surviving cohabitant has no automatic right to inherit his or her partner's estate, regardless of how long they lived together or whether they had children together. The intestacy rules are complex and anyone wishing to determine how a particular estate might be distributed should consider seeking specific legal advice.

It should be stressed that the intestacy rules only operate in the absence of a valid will, in which a person may specify how (s)he wishes the estate to be inherited. In addition, some assets pass without reference to any will or to the intestacy rules; for example, some property (particularly the family home) owned jointly passes by right of survivorship. In some cases this might form the bulk of the estate.

The Law Commission has summarised how the intestacy rules operate in practice:

> ***If the deceased is survived by a spouse[1] and children***
>
> 2.20 If the deceased is survived by a spouse and children or other descendants, the spouse is entitled to:
>
> (1) all of the deceased's personal chattels;
> (2) a statutory legacy of £250,000; and
> (3) a life interest in half of the remainder of the estate.
>
> 2.21 "Personal chattels" encompass the deceased's personal belongings, such as cars, jewellery, china, clothes, furniture, pictures, and so on, but do not include anything used for business purposes.
>
> 2.22 The spouse may use the property that is subject to the life interest and may retain or spend any income it generates (such as rent or interest) during his or her life, but may not sell the assets or diminish their capital value. The spouse also has the right to "capitalise" the life interest within 12 months of a grant of representation. This means that the fund is divided so that the spouse receives the capital value of the life interest and the remainder passes to the deceased's children and other descendants.
>
> 2.23 The surviving children or other descendants are entitled to:
>
> (1) half of what is left after payment of the statutory legacy; and
> (2) eventually, the other half of the estate when the surviving spouse's life interest comes to an end.
>
> These interests are held on the "statutory trusts", which we discuss below.

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[1] The Law Commission uses the term "spouse" to refer to a husband, wife or civil partner: Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death,* October 2009, px

If the deceased is survived by a spouse but no children

2.24 If the deceased is survived by a spouse but no children or other descendants, the entitlement of the surviving spouse depends on the existence of other relatives.

2.25 If the deceased was not survived by any parents or full siblings (or children or other descendants of a full sibling) the spouse takes the whole estate absolutely.

Otherwise, the surviving spouse is entitled to:

(1) all of the deceased's personal chattels;
(2) a statutory legacy of £450,000; and
(3) half of the rest of the estate absolutely.

2.26 The other half of the estate passes to the deceased's parents in equal shares, or to one parent if only one is still alive. If neither parent survives, then the full siblings take the remaining half, in equal shares if there are more than one of them. The children of a full sibling who has already died stand in their parent's place and share in the amount which that sibling would have received.

If the deceased is not survived by a spouse

2.27 If the deceased is not survived by a spouse then the whole estate will be inherited by other relatives, in the following order of priority:

(1) children and other descendants;
(2) parents;
(3) full siblings (or their descendants);
(4) half siblings (or their descendants);
(5) grandparents;
(6) full siblings of parents of the deceased – uncles and aunts (or their descendants);
(7) half siblings of parents of the deceased – half uncles and half aunts (or their descendants).

If there is more than one member of any of these categories, they share equally.

2.28 The list is a hierarchy; only if there are no members of a particular category does the next category become relevant. The estate will, therefore, not be split between two different categories of relatives. It can, however, be divided between different generations within a class which includes descendants, by the operation of the "statutory trusts".[2]

The Law Commission also explained the working of the statutory trusts which operate when the estate passes to certain relatives:

2.29 The statutory trusts take effect in all cases except where the estate passes only to the deceased's spouse, parents or grandparents. So, where the effect of the intestacy rules is that the estate passes, for example, to two children and two grandchildren of the deceased (the grandchildren being entitled because their parent has died), the estate will be held for them on the statutory trusts.

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[2] Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death,* October 2009, pp19-21, footnotes omitted

> 2.30 Under the statutory trusts, the beneficiaries in any given class (the deceased's children, siblings or parents' siblings) are entitled to the estate in equal shares on reaching the age of 18 (or marrying or forming a civil partnership under that age). However, if any of them have already died leaving surviving children or other descendants, then the share which the deceased beneficiary would have received will pass instead to those descendants in equal shares. This means that no one can benefit if his or her parent is still alive.[3]

If the deceased is not survived by any of the relatives listed in the intestacy rules, the estate passes "bona vacantia" (usually to the Crown):

> 2.31 If the deceased leaves none of the above relatives then the estate passes as bona vacantia (a Latin term roughly translated as "ownerless goods"). This usually means that the Crown becomes entitled to the estate, though these assets are now collected by the Treasury Solicitor and are used for general public spending. However, if the deceased died resident within the County Palatine of Lancaster, or within the county of Cornwall, the estate passes to the Duchy of Lancaster or the Duke of Cornwall.
>
> 2.32 The Administration of Estates Act 1925 gives all three bodies the discretion to make grants from the estate for dependants of the deceased and "other persons for whom the intestate might reasonably have been expected to make provision". These might include, for example, unmarried partners, friends or neighbours, or relatives by marriage or civil partnership. The Treasury Solicitor's Department publishes guidelines as to the way in which this discretion will be exercised.[4]

Further information about the intestacy rules, together with a flowchart intended to help explain the process, is available on the Government's Justice website.[5]

According to the Law Commission, "studies suggest that between a half and two thirds of the adult population do not have a will and that those who need one most are the least likely to have made one".[6]

1.2 What is a family provision claim?

The *Inheritance (Provision for Family and Dependants) Act 1975* ("the 1975 Act") provides a means for someone to challenge the distribution of an estate, under a will or under the intestacy rules, by applying to court for a share, or an increased share, in the estate. This is often referred to as a claim for family provision.[7] A successful claim results in a change to the way in which the estate is distributed and therefore restricts, to this extent, a person's freedom to dispose of their estate as they choose. The 1975 Act also sets out factors to be considered by the court in relation to particular categories of applicant.

Awards made by the court are generally limited to what is reasonable for the applicant's maintenance, although more generous awards may be made to a surviving spouse or civil partner, as set out by Law Commissioner, Professor Elizabeth Cooke:

> One could say that family provision is perhaps not what quite what people think it is, in that family provision does not rearrange an estate to make it fair. That is not its intention. Equally, it does not take provision away from people who do not deserve it.

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3 *Ibid* p21
4 *Ibid* pp21-22, footnotes omitted
5 Justice, *Why make a will?* [accessed 24 February 2014]
6 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 24 February 2014]
7 Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p4

> Again, that is not what it is designed to do. What it is designed to do is to provide a facility for a limited range of people to make an application for a rearrangement of an estate, testate or intestate, where reasonable provision has not been made for them. If an applicant is a surviving spouse, that provision is relatively generous. If the person is not a surviving spouse, the provision is limited by the term "maintenance", which has been narrowly interpreted by the courts. For example, adult children who are well able to support themselves are unlikely to recover much, if anything, on a family provision application if the parent has made a will leaving all their property to charity or whatever their choice has been.[8]

A claim can be made only if the deceased died domiciled in England and Wales. The Law Commission has stated that "domicile is a difficult legal concept that can often become a significant preliminary issue in litigation".[9] The claim must be made within six months of the grant of representation, although the court may extend this time period. (A grant of representation means a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases).

2 The Law Commission project

2.1 Background and consultation

In October 2008, the Law Commission began work on a project dealing with intestacy and family provision claims on death, against the following background:

> The intestacy rules must strive to reflect the needs and expectations of modern families. Where the rules (or the deceased's will) fail to make adequate provision for close family members or dependants, it is important that the law does not place unnecessary obstacles in the way of a valid family provision claim.
>
> The intestacy rules date back to 1925 and have not been comprehensively reviewed for more than 20 years (when the Law Commission last considered this area of the law). The 1975 Act has not been the subject of a full review since it was enacted.[10]

The project was prompted by calls for a wider review of the intestacy rules in response to a 2005 Government consultation on the statutory legacy.[11]

In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death,* which reviewed the current law, discussed options for reform and put forward questions for consultation, including provisional proposals for reform.[12] This was followed, in May 2011, by a supplementary consultation paper*, Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925* which set out options for reform of statutory provisions which enable trustees to distribute income or capital from a trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright.[13] The Law Commission said that its project benefitted from "significant new research":

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8 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p31

9 Law Commission Report Law Com No 331 (Summary), *Intestacy and Family Provision Claims on Death Executive Summary*, December 2011, p4

10 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 24 February 2014]

11 HL Deb 22 October 2013 c336GC. See section 1.1 of this paper above for information about the statutory legacy

12 Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death,* October 2009

13 Law Commission Consultation Paper No 191 (Supplementary), *Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925 A Supplementary Consultation Paper,* 26 May 2011

> This included focus group research commissioned for the project ..., a large-scale survey of public attitudes to will-making and intestacy, funded by the Nuffield Foundation, and analysis by HM Revenue & Customs of the value of testate and intestate estates. [14]

In December 2011, the Law Commission published its final report,[15] together with an analysis of consultation responses.[16]

The Law Commission found "many instances where the current law is outdated, confusing or places unnecessary obstacles in the way of those with a valid claim to share in a deceased person's assets". It recommended a package of reforms "that would modify the current legal rules to reflect modern social expectations and to remove arbitrary or unduly technical aspects, while leaving intact the fundamental structure of the English law of "succession" to property on death".[17]

2.2 Law Commission's recommended reforms

The Law Commission recommended a number of reforms including:

- Where the deceased leaves a spouse or civil partner **but no** children or other descendants, the spouse or civil partner should take the whole estate and not share it with the deceased's parents or siblings, which is the current requirement for high value intestate estates. The Law Commission stated that this "would bring the law into line with public expectations in those cases".[18]

- Where the deceased is survived by a spouse or civil partner **and** children or other descendants, the surviving spouse or civil partner should take the deceased's personal chattels and a statutory legacy (as under the current law) but then receive half of any balance of the estate outright (and not only a life interest in it as at present). The Law Commission said that this would "simplify the law and eliminate the expense and complication of the life interest structure".[19]

- The statutory legacy should be updated regularly.[20]

- There should be no significant reforms to the rules governing the deceased's "personal chattels" but the definition should be updated.[21]

- Children who are adopted after the death of a parent should not lose their entitlement to share in that parent's estate because of the adoption: "this avoids a legal trap which we have found can be easily overlooked by those involved in the adoption process".[22]

- The legal rules which currently disadvantage unmarried fathers when a child dies intestate should be amended.[23]

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14 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 24 February 2014]
15 Law Commission (LAW COM No 331), *Intestacy and Family Provision Claims on Death*, December 2011
16 Law Commission Consultation Paper No 191 (Responses), *Intestacy and Family Provision Claims on Death Analysis of Consultation Responses*, 14 December 2011
17 Law Commission Report Law Com No 331 (Summary), *Intestacy and Family Provision Claims on Death Executive Summary*, December 2011, p2
18 *Ibid* p2
19 *Ibid* p3
20 *Ibid* p3
21 *Ibid* p3
22 *Ibid* p3

- The definition of a "child of the family" should no longer be limited to situations where the deceased was married or in a civil partnership; any person who was treated by the deceased as a child of his or her family should be eligible to claim family provision.[24]

- Obstacles to claims for family provision by dependants, (defined as those who were being maintained by the deceased immediately before the death), should be removed. The courts have held that an applicant must show that the deceased assumed responsibility for the maintenance, and also that he or she contributed more to the relationship, in terms of financial value, than did the applicant. The Law Commission recommended reforms to remove both of these hurdles: "the court would still take these matters into account but they would not be sufficient to prevent a deserving applicant from making a successful claim".[25]

- It should be possible to claim family provision if the deceased died domiciled in England and Wales (as at present) and alternatively where the deceased left assets governed by English succession law.[26]

- The management powers of all trustees under sections 31 and 32 of the *Trustee Act 1925* (powers to distribute income or capital from a trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright) should be reformed.[27]

The Law Commission's final report contained a draft Bill, the *Inheritance and Trustees' Powers Bill*, to give effect to these and other more technical recommendations.

2.3 The family home

The Law Commission also consulted on whether the law should be reformed to require a surviving spouse to account for any share of the family home which passes automatically by survivorship. This would recognise the impact on the children of the deceased where a surviving spouse acquires the deceased's interest in the family home by survivorship and the rest of the estate under the intestacy rules. The Law Commission indicated that this option did not receive much support on consultation, and attracted considerable criticism. However, Law Commissioner, Professor Elizabeth Cooke, pointed out that property which has passed by survivorship is accessible for the purposes of family provision claims and that the court is able, where appropriate, to make an order which requires the value of the family home to be shared where a child or dependant can show that he or she did not receive reasonable provision from the deceased's estate.[28]

2.4 Inheritance rights for cohabitants

In addition, the Law Commission produced the draft *Inheritance (Cohabitants) Bill* which included provisions intended to give some unmarried partners, who had lived together for five years, the right to inherit on each other's death under the intestacy rules. Where the couple had a child together, this entitlement would accrue after two years' cohabitation, provided the child was living with the couple when the deceased died.[29] At present, a surviving cohabitant has no automatic right to inherit his or her partner's estate, regardless of how long they lived

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23 *Ibid* p3
24 *Ibid* p3
25 *Ibid* p4
26 *Ibid* p4
27 *Ibid* p4
28 Letter from Professor Elizabeth Cooke to Lord McNally, 28 October 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p2
29 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 24 February 2014]

together and whether they had children together. However, a survivor who had lived with the deceased for a qualifying period could go to court to claim family provision from his or her partner's estate under the 1975 Act.[30]

3 The Government's consultation and response

On 21 March 2013, Lord McNally, then Minister of State for Justice, announced that the Government had accepted the Law Commission's recommendations, with minor amendments, in all areas except for the recommendations relating to rights for cohabitants on intestacy. Lord McNally said that "after careful consideration", the Government had decided that the Law Commission's recommendations regarding rights for cohabitants on intestacy would not be implemented during this Parliament.[31]

On the same day, the Government published for consultation the *Draft Inheritance and Trustees' Powers Bill* which was produced by the Law Commission with its report.[32]

The Government's consultation paper invited comments on the draft Bill and on the impact assessment. It also sought views on which of four options would be the most appropriate approach for determining the basis of jurisdiction for family provision claims (in addition to the domicile of the deceased). The consultation period ended on 3 May 2013.

The response to this consultation was published on 30 July 2013.[33] This indicated that 22 responses had been received of which 10 were from associations, some of which represented many thousands of professionals. The response document stated that, although some respondents had concerns about some points of detail, and a range of differing views was put forward with regard to the additional ground for jurisdiction for family provision claims, the overall response was supportive of the proposed reforms and did not raise any significant doubts about the accuracy of the impact assessment. The Government summarised the changes it intended to make to the Law Commission's draft Bill in the light of consultation responses.[34]

The response document set out comments which had been received both in support of and opposing each of the four options set out in the consultation paper for determining the additional basis of jurisdiction for family provision claims. The Government proposed to differ from the Law Commission's recommendation and to adopt option four - that is, to use the habitual residence of the applicant as an additional basis of jurisdiction:

> 2.55 The Government is persuaded that option 4 provides the best answer to the limitations of the domicile precondition; it should greatly reduce the number of applicants who might otherwise be unfairly excluded and is, in our view, the best option for ensuring that only claims with a real connection to England and Wales can be brought here. We also believe that it is the option that presents the strongest justification for displacing, first, the foreign law of succession that would otherwise apply to the estate of an individual domiciled abroad and secondly, the express provisions made by the testator in his or her will.
>
> 2.56 Focusing on the applicant - the person for whom provision might be made – ensures that the precondition is in line with the general intention of the 1975 Act. It also has practical advantages: it is relatively easy to understand; and it should also be a

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30 Law Commission Report Law Com No 331 (Summary), *Intestacy and Family Provision Claims on Death Executive Summary*, December 2011, p5

31 HL Deb 21 March 2013 cc59-60WS

32 Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013

33 Ministry of Justice, *Inheritance and Trustees' Powers Bill*, *Response to Consultation CP6/2013,* 30 July 2013

34 *Ibid* p39

comparatively simple matter to prove the habitual residence of the applicant given that they will be still living and likely to be doing so in England and Wales. Lastly, option 4 would align jurisdiction for family provision claims with maintenance in the divorce context (where jurisdiction generally lies with the courts of the country where the maintenance creditor is habitually resident). For these reasons, and after careful consideration of all the views expressed at consultation, the Government proposes to adopt option 4 as the additional ground of jurisdiction for family provision claims in addition to the existing domicile precondition.[35]

4 The Bill

4.1 Progress of the Bill

On 30 July 2013, the *Inheritance and Trustees' Powers Bill [HL]* was introduced in the House of Lords as HL Bill 46 of 2013-14, under the House of Lords procedure for Law Commission Bills.[36] The Government also published Explanatory Notes.[37] On 22 October 2013, the Bill was considered by a Second Reading Committee,[38] and on 23 October 2013, the Bill had its Second Reading and was referred to a Special Public Bill Committee.[39] The Special Public Bill Committee's report was published on 20 December 2013.[40] This includes, among other things, a report of evidence from Professor Cooke, who submitted a written memorandum and gave oral evidence to the Committee on the content of the Bill and the process of policy development which preceded it. The Bill as amended in Special Public Bill Committee was published as HL Bill 68 of 2013-14. The Bill had its Report stage on 3 February 2014 and was amended again. The Bill as amended on Report was published as HL Bill 85 of 2013-14. Third Reading was on 10 February 2014. The Bill was introduced into the House of Commons on 10 February 2014 as Bill 172 of 2013-14.

4.2 Extent

The Bill would extend to England and Wales only. The Explanatory Notes state that the Bill deals with one provision, relating to the adoption of children, which is within the legislative competence of the National Assembly for Wales, and that the consent of the National Assembly will be sought for this provision and any future amendments which fall within their competence.[41]

4.3 Clauses in the Bill

The Bill has 12 clauses and 4 schedules dealing with three areas:

- the law of intestacy (**Clauses 1 to 5**);
- family provision claims (**Clauses 6 to 7**); and
- the powers of trustees in all trusts (**Clauses 8 to 10**).

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35 *Ibid* p33

36 Information about the procedure is set out in the House of Lords, *Companion to Standing Orders and Guide to the Proceedings of the House of Lords*, 2013, paragraphs 8.43 and 8.112-8.117

37 HL Bill 46-EN

38 HL Deb 22 October 2013 cc335-358GC

39 HL Deb 23 October 2013 c1009

40 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013

41 Bill 172-EN, paragraph 3

This section of this paper sets out a brief summary of these provisions and of the debate and comment on the Bill. Further detail is provided in the Explanatory Notes which accompany the Bill.[42]

A memorandum from Professor Elizabeth Cooke to the Special Public Bill Committee includes a table of comparison between the draft Bill attached to the Law Commission's report[43] and the Bill as introduced in the House of Lords.[44] Professor Cooke confirmed that the Law Commission had worked with the Ministry of Justice on the text of the Bill and was content with all the amendments which had been made (a number of which were drafting amendments for clarity).[45]

Intestacy

Clause 1 would amend section 46 of the *Administration of Estates Act 1925* to change the entitlement of an intestate person's surviving spouse or civil partner, who would have to share the deceased's estate only if the deceased was also survived by "issue" (children, grandchildren and so on). If the deceased was not survived by issue, the surviving spouse or civil partner would inherit the deceased's estate outright without having to share any of the estate with any surviving parent or full sibling (or issue of a full sibling) of the deceased.

In evidence to the Special Public Bill Committee, Professor Cooke commented that the numbers affected by this reform would not be large:

> Statistical analysis undertaken for our project indicates that only 2% of intestate estates are worth more than £450,000, and only in some of these will there be a surviving spouse or civil partner, and either parents or siblings or their descendants but no surviving children of the deceased; so the numbers affected by this reform will not be large.[46]

If the deceased was also survived by issue, the surviving spouse or civil partner would continue to inherit the deceased's personal chattels (the definition of which would be amended by Clause 3) and the statutory legacy (currently £250,000, but in future to be determined in accordance with the provisions of a new Schedule 1A to the 1925 Act, as inserted by the Bill). In addition, they would inherit half of the rest of the estate outright (instead of having a life interest[47] in that half, as at present). The other half of the balance of the estate would be held on the statutory trusts[48] for the children (or other descendants) of the deceased, as under the current law.

Professor Cooke commented that intestate estates tend to be small and that only 10% of them are worth more than £250,000, adding "and of course many of those will not exceed the statutory legacy by much".[49]

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42 Bill 172-EN

43 Law Commission (LAW COM No 331), *Intestacy and Family Provision Claims on Death*, December 2011

44 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, pp10-18

45 *Ibid* p10

46 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p4

47 See section 1.1 of this paper, above, for information about what "life interest" means

48 See section 1.1 paper, above, for information about the "statutory trusts"

49 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p4

There would be no change to cases where there is no surviving spouse or civil partner.

When introducing the Bill in Second Reading Committee, Lord McNally said that, in focusing on the closest relatives of the deceased, the Government aimed to simplify the law on intestacy "so that it can better reflect the arrangements that an individual is likely to have made had he or she executed a valid will". He acknowledged the difficulty in satisfying everyone:

> It is impossible to design intestacy rules which satisfy every view of what is right or fair. The rules stand as a legal default position. They should reflect the shape of contemporary society and replicate what most people think is an appropriate division between family members. The changes in the Bill are intended to reflect real-life expectations of what provisions the intestacy rules should make.[50]

Clause 1 would also make provision about the payment of interest on the statutory legacy and the rate of interest to be applied, being "the Bank of England rate that had effect at the end of the day on which the intestate died" (**Clause 1 (3)**). Simple interest would be paid on the statutory legacy from the date of death until the legacy was paid or appropriated.

In a written memorandum to the Special Public Bill Committee, the Law Society commented that it would be preferable for the interest rate on the statutory legacy to be to be aligned with that payable on pecuniary legacies not paid within a year, which is calculated on the basis of the Court Funds Office basic account rate.[51] In oral evidence, Professor Cooke said that the Law Commission had considered this point but had opted for the Bank of England rate:

> ...with the Court Funds Office interest rate, not only can the rate be changed, but the way it is organised can be changed. Its title can be changed and, as a result, a reference to it in legislation may be difficult to link up in the future. Therefore, linking this with the Bank of England rate seems easier.[52]

In Special Public Bill Committee, Lord Beecham (Labour) moved an amendment to require the interest rate on the statutory legacy to be determined by reference to the consumer prices index rather than to the Bank of England rate. Lord Lloyd of Berwick (Chairman) said that Professor Cooke had not been asked about the use of the consumer prices index in this context and that he would be unhappy for a vote to take place on the amendment without knowing her views on the subject. Lord Beecham withdrew the amendment.[53]

Clause 2 would insert a new Schedule 1A into the *Administration of Estates Act 1925*. The new schedule is set out at **Schedule 1** and would make provision for determining the fixed net sum (often referred to as a "statutory legacy") to which a surviving spouse or civil partner would be entitled before the estate was shared with the deceased's issue.

In Second Reading Committee, Lord McNally said that the new provisions would benefit surviving spouses and civil partners by creating a legislative framework to govern the level of the statutory legacy which would "ensure that it does not slip behind inflation and lose its real-world value".[54]

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50 HL Deb 22 October 2013 c337GC

51 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p43

52 *Ibid* p27

53 *Ibid* p45

54 HL Deb 22 October 2013 cc337-8GC

Under current law, the Lord Chancellor has power to set the level of the statutory legacy but is under no obligation to do so or to keep the level under review.[55] New Schedule 1A would retain the Lord Chancellor's power to set the level of the fixed net sum by order and the statutory instrument would be subject to the negative resolution procedure. However, the affirmative resolution procedure would apply in certain circumstances (for example, if the Lord Chancellor determined the amount of the fixed net sum without using the index-linking mechanism set out in the new schedule, and set the fixed net sum at an amount lower than the pre-existing figure). In those circumstances, the Lord Chancellor would be required to prepare and lay before Parliament a report stating the reason why it had been decided to set the fixed net sum in that way.

The Lord Chancellor would be required to make an order setting the fixed net sum at least every five years, but would have power to make an order at any time.

The Lord Chancellor would also be obliged to make an order (whether or not five years had elapsed) if the consumer prices index (CPI) had risen by more than 15%. This is a new element to the provision and was introduced by way of a Government amendment agreed on Report following earlier expression of concerns. Viscount Hanworth (Labour) had moved an amendment (later withdrawn) on this issue in Special Public Bill Committee.[56]

On Report, Lord Faulks, Minister of State at the Ministry of Justice, said that the purpose of the amendment was to allow for the statutory legacy to be updated more frequently in times of high inflation "so that it more accurately reflects the cost of living". He set out further information about how the provision would operate:

> The CPI, which is published monthly by the Statistics Board, will be judged to have risen by the requisite amount if a particular month's figure is more than 15% higher than the CPI for the month when the Bill comes into force in the first instance, and then the month when the most recent order specifying the level of the statutory legacy was made. It should be noted that although the default position would be that the order would raise the statutory legacy so that it is in line with the rise in CPI, the Lord Chancellor will still be able to amend the level of the legacy in some other way. However, if he chooses to do this, he must first submit a report to Parliament setting out his reasoning for doing so. If an order is made because the CPI has risen by the necessary amount, this will signal the start of another five-year period within which another order must be made.[57]

Lord Faulks said that the amendment was in similar terms to the one moved by Viscount Hanworth in Special Public Bill Committee. However, the earlier amendment also provided for an annual review which was not included in the Government's amendment. In Special Public Bill Committee, Lord McNally said that the five year period was decided after extensive consultation and that it struck the right balance between making sure that there was a proper check on an appropriate level "without going into uprating every year which would certainly be burdensome both in terms of deciding on the review and then carrying one out, and reviewing and possibly uprating every year, which would also be a potential source of confusion and error in the administration of estates".[58] Professor Cooke indicated to the Special Public Bill Committee that the majority of the respondents to the consultation

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55 HL Deb 22 October 2013 c337GC

56 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, pp46-7

57 HL Deb 3 February 2014 c81

58 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p47

proposed that the review should be every five years, with some respondents calling for more frequent reviews and others for less frequent reviews.[59]

On Report, Lord Faulks said that he recognised the merit in providing for more frequent updates to the statutory legacy should this be required.[60] He also said that Professor Cooke approved the Government amendment.[61]

Clause 3 would amend the definition of "personal chattels" (which the surviving spouse or civil partner is entitled to inherit). Personal chattels would be defined as "tangible movable property" other than:

- money and securities for money (as in the current statutory definition);
- property used at the death of the intestate person solely or mainly for business purposes (the current definition excludes any chattels used at the death of the intestate person for business purposes but the new clause adds the words "solely or mainly");
- property held at the death of the intestate person solely as an investment – this is a new exception. In Second Reading Committee, Lord McNally explained what this exception was intended to cover:

> This is a narrow exception that would only apply to property owned as an investment and which had no personal use whatever. For example, valuable jewellery which was worn by an individual, even if only occasionally, would still qualify as a personal chattel and would pass to the surviving spouse or civil partner, even if it was also bought and kept in the expectation that its value would increase.[62]

In a memorandum to the Special Public Bill Committee, Lord McNally said that he did not anticipate "undue problems" in interpreting this provision,[63] although the question of determining what might be considered to be held solely as an investment was raised as a potentially difficult issue in debate and in evidence.

In oral evidence to the Special Public Bill Committee, Professor Cooke said that the intention was to "be generous to the surviving spouse and give the benefit of the doubt to the surviving spouse, recognising that it can be difficult to tell".[64] She also commented, in her written memorandum to the Committee, that "There will be only few cases where an estate includes chattels of significant value held solely as an investment, and these estates are among those least likely to be intestate".[65]

Written evidence to the Special Public Bill Committee reiterated doubts about the new definition. The Society of Trust and Estate Practitioners (STEP) highlighted the difficulty in determining whether an asset had been held solely as an investment, suggesting that the clause should instead refer to assets held "solely or mainly as an investment".[66] The

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59 *Ibid* p47
60 HL Deb 3 February 2013 cc80-1
61 HL Deb 3 February 2013 c83
62 HL Deb 22 October 2013 c338GC
63 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p1
64 *Ibid* p29
65 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p5
66 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, pp39-41

> Association of Corporate Trustees (TACT) suggested that the Committee might consider whether the wording of the relevant clause might include "some element of discretion to reflect the reality of the situation, rather than apply the straight Yes/No approach taken by the Bill, perhaps by inserting the words "or mainly" immediately after "solely", in a similar vein to the definition of business assets";[67] the Law Society called for "more direction be provided in the bill as to what is meant by 'solely as an investment' and that a definition of investment within the bill "would avoid future litigation on this point".[68]

Clause 4 deals with the inheritance rights of an adopted child to the estate of a parent who had died before the adoption. Section 67(3) of the *Adoption and Children Act 2002* provides that, generally, after adoption the child is regarded for all purposes as the legal child of the adopter or adopters, and has no other legal parents, although section 69(4) of that Act contains exceptions to this rule. Clause 4 would add another exception, the effect of which would be to preserve a certain type of interest for the child in their deceased parent's estate. Certain interests created by will or in a lifetime trust would not be preserved by the new provision. The Explanatory Notes provide further detailed information about which type of interest would be affected by this provision:

> 31. New paragraph (c) applies where, immediately before adoption, the child's then legal parent has already died and some or all of that parent's estate is held on trust – whether created by will or arising on intestacy – by which the child has a contingent interest which is not in remainder. Its effect is that the child's interest in that parent's estate is not affected by the change in the child's legal parentage on adoption.
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> 32. A contingency is a condition which must be fulfilled before the beneficiary has an absolute entitlement. For example, if a child's parent died intestate with no other surviving family members, under the intestacy rules the whole estate would pass to the child contingent on reaching the age of 18. Such an interest is preserved by new paragraph (c) despite the adoption. Paragraph (c) does not apply if the contingent interest is in remainder to another beneficiary's interest. Contingent interests in remainder no longer arise under the intestacy rules, but may be created by will. For example, a parent makes a will leaving his or her estate in trust so that X has a right to the income for life and subject to that the child will take the estate if he or she reaches 25. The child's interest is contingent, but (if X is living at the date of the adoption) it is in remainder to X's interest and therefore not preserved by new paragraph (c).[69]

Clause 4 is intended to correct what the Law Commission has described as a "legal anomaly" which can deprive adopted children of an inheritance to which they are already entitled, before their adoption, on a contingent basis. In her written memorandum, Professor Elizabeth Cooke provided the following example of how the new provision might operate:

> 27. Suppose Andrew, a widower, has a 10-year-old son, Ben. Andrew dies leaving an estate worth £200,000 but no will. Under the intestacy rules, Ben will have a contingent interest; he will be entitled to inherit the whole estate provided that he reaches the age of 18 (or marries or forms a civil partnership before hat age). Ben is adopted by his aunt and uncle. Under the current law, once he is adopted Ben loses his contingent interest in the £200,000, which passes to Andrew's parents, the next in line to inherit under the intestacy rules. This is a trap within the law of adoption; the Adoption and Children Act 2002 saves vested interests on adoption, but not contingent ones. Where the problem is spotted—by an alert legal adviser—before the adoption, the trust can be

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67 *Ibid* p41
68 *Ibid* p43
69 Bill 172-EN, paragraphs 31-2

> varied to ensure that the provision for the child survives; but this is expensive and troublesome, necessitating an application to the High Court.
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> 28. Clause 4 provides that if, immediately before adoption, a child has a contingent interest (other than an interest in remainder) in the estate of his or her deceased parent, that interest shall not be affected by the adoption. The child's interest in that parent's estate is therefore not affected by the change in the child's legal parentage on adoption. This reform applies whether the parent died intestate or left a will creating a contingent interest.
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> 29. It is important to note that this change affects only those who are adopted after the death of the parent. The important general rule remains; once adopted the child loses his or her legal relationship with the birth family and will no longer inherit if, for example, a birth parent dies intestate after the child is adopted.[70]

Some written evidence submitted to the Special Public Bill Committee called for the exception to apply more widely. STEP called for it to extend to contingent interests in remainder, saying "we seek consistency to ensure the quality of the legislation regarding lifetime trusts is on an equal footing";[71] TACT saw no reason to differentiate between those entitled under a trust made by their parents during their lifetime, and trusts arising on a parent's death, calling for the Committee "to consider remedying this unfairness".[72]

In oral evidence, Professor Cooke said that the provision applied the existing law in respect of vested interests to contingent interests and commented on why the provision did not extend to contingent interests in remainder:

> The Adoption and Children Act does not save vested interests in the remainder, and therefore it would be asymmetrical and anomalous to save contingent interests in the remainder. That is why it is done in that way.[73]

In Special Public Bill Committee, Lord Beecham moved an amendment to extend the effect of the clause to contingent interests in remainder. He quoted from a letter received from Professor Cooke in response to concerns he had raised on this matter at the earlier evidence session. Professor Cooke acknowledged that both TACT and STEP had commented on this provision in their evidence, but was unconvinced of the need for reform:

> We are still not convinced that there is much real need for this reform; however, we recognise the validity of the concern in principle, and do not think that it will endanger the existing policy in the Bill".[74]

Professor Cooke also said in her letter that if the Bill were to be amended to address the concerns which had been raised, the amendment would have to be drafted "to restrict its effect to property settled only by parents who had died before their child was adopted". Without such a restriction, she said, the child's interest might be preserved in a wider range of situations, in some cases against the intention of the person who made the trust. Lord Beecham acknowledged that his amendment did not include this restriction and withdrew it.[75]

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70 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p5

71 *Ibid* p39

72 *Ibid* pp41-2

73 *Ibid* p30

74 *Ibid* p48

75 *Ibid* pp47-8

Clause 5 deals with the presumption of prior death. At present section 18(2) of the *Family Law Reform Act 1987* operates where a person dies intestate and his or her parents were not married to each other at the time of his or her birth or subsequently. The effect of this provision is that it is presumed that the father and any other person to whom the intestate was related only through his or her father, died before the intestate person. There is a similar presumption that the intestate person was predeceased by a female parent other than the mother. (A person may have a female parent other than his or her mother by virtue of section 43 of the *Human Fertilisation and Embryology Act 2008*.) The presumption operates "unless the contrary is shown".

Clause 5 provides that the presumption would not apply where the father (or second female parent) was named on the deceased's birth certificate or equivalent official birth record. In Second Reading Committee, Lord McNally set out the intent of the original provision, which, he said, discriminates against unmarried fathers, and of the proposed amendment:

> This is a pragmatic rule which derives from a time when it was common for the identity of the father of a child born out of marriage to be unknown. Tracking such parents down could present real difficulties to those administering intestate estates. The rule discriminates against unmarried fathers and, in practice, can make it less likely that the deceased's estate will pass under the intestacy rules to such a parent. Nowadays, it is quite usual for both unmarried parents to be identified as such, and the practical justification for the rule is much reduced.
>
> Clause 5 disapplies this presumption if a person is recorded as the intestate's father or as a parent other than his mother in a specified formal register of births. In such a case, the estate's administrators will have the same responsibility to the deceased's father or other parent as they would to any other relative entitled under the intestacy rules. This amendment clarifies that where such a parent has been formally acknowledged as such, irrespective of the absence of a marriage certificate, that parent should, in general, have the same rights as his married counterpart.[76]

Family provision claims

Clause 6 introduces **Schedule 2** which would amend the *Inheritance (Provision for Family and Dependants) Act 1975*:

- A person treated as a "child of the family" (that is, not a biological or adopted child, but a person treated as such), who, where relevant, is eligible to bring a claim for family provision, would mean any person to whom the deceased stood in the role of a parent. The relationship would no longer need to be referable to the deceased's marriage or civil partnership; the treatment as a "child of the family" might be by a cohabiting couple or an individual.

- A person who was being maintained by the deceased immediately before the death would no longer have to show that the deceased contributed more to the relationship in financial terms than the applicant did. The revised provision would treat a person as having been maintained by the deceased if the deceased had been making "a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an agreement of a commercial nature". Lord McNally said that this would "remove the 'balance sheet test' while preserving the other, fairly strict requirements imposed on a person applying for family provision as a dependant". He also said that this would reflect "the important understanding that 'dependency' can be mutual, and its benefits need not all or largely,

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[76] HL Deb 22 October 2013 c339GC

flow one way".[77] The court would also be required to have regard (among other things) to whether the deceased assumed responsibility for the applicant's maintenance, and if so, the extent of that assumption of responsibility. The Explanatory Notes comment:

> The requirement in the case law as it currently stands that such an assumption of responsibility must be present in order for an applicant to qualify to apply for family provision as a dependant is thereby removed.[78]

Schedule 2 would also make further amendments to the 1975 Act which Lord McNally described as being "fairly technical changes to the procedure for family provision claims", and which, he said, formed part of a package of changes "designed to modernise and generally improve the current arrangements for family provision claims".[79] In her written memorandum, Professor Cooke referred to this part of the Bill as "an exercise in fine-tuning, rather than radical reform".[80] In oral evidence she summarised the changes in Schedule 2:

> (...) the remaining amendments in the schedule are points of definition relating to the child of the family, to the position of dependants, to the position of the surviving spouse and the role of the comparison with the provision that might have been obtained on divorce. There are also a couple of very small provisions about the powers of the court and about the time for making applications.[81]

The changes are detailed in the Explanatory Notes.[82]

The Law Commission proposed creating an additional ground of jurisdiction for family provision claims (that is, additional to the domicile of the deceased), and the Government consulted on a number of options for doing so. A provision setting out an alternative ground of jurisdiction was included in the draft bill and an amended provision was included in the Bill as introduced in the House of Lords. However, in Second Reading Committee, Lord McNally said that, as a result of concerns which had been raised on this subject by the Scottish Government, the Government no longer intended to proceed with this proposal:

> Noble Lords will know that it was formerly the Government's intention to create an additional ground of jurisdiction for family provision claims in this Bill. This was to enable claimants who were habitually resident in England and Wales to bring such a claim, regardless of the deceased's place of domicile. Scottish Government colleagues have raised significant concerns about how this additional ground would operate in practice, particularly its potential to displace Scots law to the possible detriment of those who had inheritance rights under that law. We have carefully considered these concerns from our colleagues across the border. I do not now believe that it is possible to engineer a compromise on this point that would answer these concerns and retain the benefits of our original proposal. I am also aware that there has been a previous lack of consensus on the nature of the additional ground of jurisdiction—the relevant provision is at variance with both the Law Commission's original proposal and the majority view expressed in response to the Government's public consultation.

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77 HL Deb 22 October 2013 c340GC

78 Bill 172-EN, paragraph 86

79 HL Deb 22 October 2013 c340GC

80 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p7

81 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p32

82 Bill 172-EN, paragraphs 73-90

> On that basis, my intention is to bring forward an amendment to the Bill prior to consideration by the Public Bill Committee which will delete the additional ground of jurisdiction in its entirety. I hope that, by doing so, parliamentary consideration can be better focused on the Bill's other, equally important and worthwhile provisions.[83]

In a Memorandum to the Special Public Bill Committee, Lord McNally reiterated that, after extensive discussions with Scottish Government colleagues, it had not been possible to find a way of saving this provision in some form, which is why he considered it best that the provision be deleted:

> This was on the grounds that it was not appropriate for a Bill such as this, which is being taken forward under a very specific Parliamentary procedure designed for non-contentious Bills, to contain a provision that is already subject to significant opposition.[84]

In oral evidence, Professor Cooke said that this was an area "where a lot of people agree that something should be done, but very few agree on what should be done". She said that evidence submitted to the Committee had suggested three different ways of improving the current law, which illustrated the lack of consensus on the issue. In the absence of a clear answer, Professor Cooke said, the law should be left as it is. [85]

In Special Public Bill Committee, a Government amendment deleting the additional jurisdiction provision was agreed without vote.[86]

Clause 7 introduces **Schedule 3** which would amend enactments relating to the determination, for various purposes, of the date on which representation with respect to the estate of a deceased person was first taken out. In her written memorandum, Professor Cooke explained why it is important to know this date:

> 40. ...Except with the permission of the court, a claim under the 1975 Act must be made within six months of the grant of representation relating to the estate. It is therefore important to know when the six-month period starts running, and when it will expire. For most estates, only one grant of representation will be obtained, and it will trigger the six-month limitation period. But there are different types of grant, and some of these do not start time running.
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> 41. There is some doubt over how the 1975 Act is to be read, and apparent inconsistency, in that certain grants which limit the type of property which can be distributed are left out of account, while grants which are limited to special purposes and do not enable the administrator to distribute any property appear to start time running for these purposes. Clause 7 and Schedule 3 will resolve these doubts.[87]

In Second Reading Committee, Lord McNally described these changes as being important but technical and relevant in only a minority of cases.[88] The provisions are explained in detail in the Explanatory Notes.

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83 HL Deb 22 October 2013 cc339-40GC

84 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p1

85 *Ibid* p31. See also evidence submitted by Mr Sidney Ross at pp 23-5 and 35-6; by STEP at pp 39-41; by TACT at p42; and by the Law Society at p43

86 *Ibid* p48

87 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, pp7-8

88 HL Deb 22 October 2013 cc340-1GC

Trustees' powers

Clause 8 would amend the statutory power of trustees (in section 31 of the *Trustee Act 1925)* of all trusts to use the income of trust funds for the maintenance, education or benefit of a beneficiary who is under 18 and has an interest in those funds. The Explanatory Notes provide an example of when this power might arise:

> For example, if a trust fund invested in shares is held for the benefit of such of W's young children X, Y and Z as reach the age of 18, in equal shares, the trustees may use the power under section 31 to pay a maximum of one-third of the income (the dividends on the shares) for the maintenance, education or benefit of each child.[89]

Clause 8 would give the trustees discretion as to the amount of income that could be used for such purposes, replacing the current objective test of reasonableness and the list of factors that the trustees must consider. Lord McNally said that this should not adversely affect beneficiaries:

> Given that the trustees must still comply with their fiduciary duties, the reform presents no threat to the interests of beneficiaries. It is right that trustees should in future be able to exercise their discretion flexibly and free from unnecessary restrictions.[90]

In her written memorandum, Professor Cooke explained that trusts can be established under the intestacy rules, where beneficiaries are under 18, as well as within a lifetime or by will. She said that the Law Commission's consultation demonstrated that some of the statutory powers given to trustees required updating "so that the default position that arises on intestacy or where [there] has been no express provision in the trust instrument (for example, in a homemade will) matches the more appropriately-framed powers that have become standard in professionally drafted trusts." Clause 8, she said, would bring section 31 of the *Trustee Act 1925* into line with professional practice in the drafting of wills and trust documents, "thereby removing sterile technical burdens, and reducing complexity and cost".[91]

Section 32 of the *Trustee Act 1925* enables trustees to make payments of capital for the advancement or benefit of a beneficiary who has a requisite type of entitlement to the capital of the trust fund. Section 32 limits this power of advancement to a maximum of one half of the beneficiary's prospective share. **Clause 9** would remove the one-half limit, meaning that trustees would be able to exercise their discretion to pay out up to the whole of the capital of a beneficiary's prospective share for his or her advancement or benefit. Professor Cooke commented that it is common practice to remove the restriction when drafting express trusts.[92] **Clause 9** would also make some further amendments to section 32, which are explained in detail in the Explanatory Notes, and include:

- subsection (2) states that, instead of pay out cash in the exercise of the statutory power of advancement trustees could also transfer or apply property;

- subsection (6) would specify how any amount advanced by the trustees should be valued (that is on the basis of its valuation on the date of the advancement or as a proportion of the fund); the Explanatory Notes provide the following information:

> 47. Subsection (6) makes it clear that if trustees have exercised their power of advancement under section 32(1) of the Trustee Act 1925, the money or other property

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89 Bill 172-EN, paragraph 37

90 HL Deb 22 October 2013 c341GC

91 Memorandum by Professor Elizabeth Cooke, Law Commissioner, 14 November 2013, at House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, p8

92 *Ibid* p9

> advanced to a beneficiary may be treated as a percentage of the overall value of the trust (as opposed to strictly according to their monetary value) when it is brought into account. Trustees may exercise their choice to treat advancements in this way either expressly, for example in writing in the trust deed itself or in an implied way, for example through the act of dividing up the trust fund amongst the beneficiaries.

This is a new provision which was not included when the Bill was first introduced in the House of Lords. In evidence to the Special Public Bill Committee, Edward Nugee QC called for the Bill to be amended as he considered that the current law was not certain on this point and wanted to avoid trustees having to seek the court's leave to treat an advancement as a percentage of a beneficiary's share.[93] He proposed an amendment "for the avoidance of doubt" that, when making an advance, the trustees could resolve that it was to be accounted for as a percentage of the beneficiary's share. Professor Cooke said that there was "no great dispute" between the Law Commission and Mr Nugee but that she had a concern about the amendment he had suggested and that it might be an extra burden on trustees to have to make an express resolution on the matter.[94] She thought there might be problems for trustees if they failed to make a resolution and had more confidence that case law was "moving towards the acceptance of the proportionate approach".[95]

In Special Public Bill Committee, Lord Beecham moved an amendment to give effect to Edward Nugee's proposal.[96] Viscount Hanworth and Lord Lloyd of Berwick spoke to alternative amendments on this issue. On that occasion Lord Beecham withdrew his amendment and Viscount Hanworth did not move his amendment. However, Lord Lloyd pressed for a vote on his amendment, which, he said, had been drafted with the assistance of advice from independent counsel:

> The Committee is certainly grateful to Mr Nugee for raising this question. It seems to me a point of great importance. He raised it at our previous hearing and it attracted a lot of support, but I think that Professor Cooke was not inclined to think that it was necessary, and for that reason she thought it sensible to take advice from independent counsel. That advice, of Mr Barlow, has now been obtained and is included in the papers.[97]

Lord Lloyd set out how the proposed amendment differed from Edward Nugee's proposal:

> Mr Barlow's view was that no amendment was necessary, but that if any amendment was necessary his amendment was rather better than Mr Nugee's, for the reasons he gave.
>
> Those words in particular are set out at paragraph 5 of his opinion, where he agrees with Professor Cooke that, "Mr Nugee's wording has the implication that if the trustees do not expressly resolve that an advance is to be treated as a percentage at or before the time of making it, it will be brought into account at its historic amount or value, even where it has fairly obviously been made on the proportion basis, or even where it is clear that the trustees were advancing the whole of a share".[98]

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93 House of Lords Special Public Bill Committee, *Inheritance and Trustees' Powers Bill [HL],* HL Paper 105, 20 December 2013, pp18-22

94 *Ibid* pp32-3

95 *Ibid* p34

96 *Ibid* p49

97 *Ibid*

98 *Ibid* p50

The amendment was agreed by 7 votes to 3. Lord McNally said that he thought that Mr Nugee "presented a case that needed answering" and voted in favour of the amendment.[99]

Clause 10 sets out the circumstances in which **clauses 8 and 9** would apply to trusts (transitional provisions) and are detailed in the Explanatory Notes.

[99] *Ibid* pp49-51