



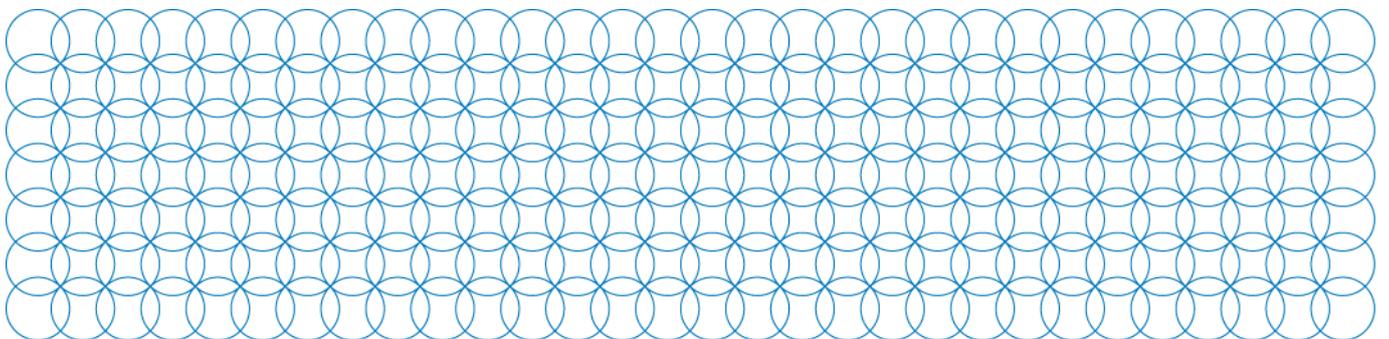
Ministry of
JUSTICE

Draft Inheritance and Trustees' Powers Bill

Consultation Paper CP6/2013

This consultation begins on 21 March 2013

This consultation ends on 3 May 2013





Ministry of
JUSTICE

Draft Inheritance and Trustees' Powers Bill

**A consultation produced by the Ministry of Justice. It is also available on the
Ministry of Justice website at www.justice.gov.uk**

About this consultation

- To:** Those with an interest in succession law, probate and private international law
- Duration:** From 21 March to 3 May 2013
- Enquiries (including requests for the paper in an alternative format) to:** Criminal Law and Legal Policy Unit
Ministry of Justice
102 Petty France
London SW1H 9AJ
Tel: 020 3334 4702
Email: CLPUcorrespondence@justice.gsi.gov.uk
- How to respond:** Please send your response by 3 May 2013 to:
Criminal Law and Legal Policy Unit
Ministry of Justice
102 Petty France
London SW1H 9AJ
Tel: 020 3334 4702
Email: CLPUcorrespondence@justice.gsi.gov.uk
- Additional ways to feed in your views:** Responses may also be submitted online at www.justice.gsi.gov.uk/consultations
- Response paper:** A response to this consultation exercise is due to be published by 30 June 2013 at: <http://www.justice.gov.uk>

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Introduction

This paper sets out for consultation the draft Inheritance and Trustees' Powers Bill. This Bill gives effect to the recommendations in parts 2–7 of the Law Commission's report, *Intestacy and family provision claims on death*.¹ The consultation is aimed at those with an interest in succession law, probate and private international law, in particular practitioners, professional groups and academics, in England and Wales.

An Impact Assessment has been prepared and is available with this consultation paper. Comments on the Impact Assessment are very welcome.

Copies of the consultation paper are being sent to the list of individuals and organisations listed at Annex A.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

¹ Law Com No 331 (14 December 2011).

The proposals

Background

In 2008, the Law Commission began work on a project considering two areas of the law of inheritance and certain aspects of trustees' powers:

- Intestacy: When a person dies “intestate”, that is without leaving a valid will disposing of the whole of his or her property, the distribution of any money and other assets (the deceased’s “estate”) among surviving family members is governed by a set of legal rules known as the intestacy rules.
- Family provision: Whether or not the deceased left a will, certain family members and dependants may apply to court for reasonable financial provision from the estate, under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”). This is often referred to as a claim for family provision.

These are both important areas of the law, affecting a large number of families at times of financial and emotional vulnerability. Studies suggest that around 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 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.

In October 2009, the Commission published a consultation paper² reviewing the current law, discussing options for reform and putting forward questions for consultees, including provisional proposals for reform. In May 2011, a supplementary consultation paper followed that set out broader options for reform of statutory provisions which enable trustees to distribute income or capital from the trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright.

Almost 150 consultation responses were received, from members of the public, lawyers and other professionals and organisations – including law firms, charities and professional bodies. The project also benefitted from significant new research. This included focus group research commissioned for the project, a large-scale survey of public attitudes to will-making and

² Law Commission Consultation Paper No 191.

intestacy, funded by the Nuffield Foundation, and analysis by HM Revenue & Customs of the value of testate and intestate estates.

The resulting report, *Inheritance and family provision claims on death*,³ was published on 14 December 2011. It sets out and explains recommendations for reform of the law and presents two draft Bills to implement the necessary changes, the first of which is the Inheritance and Trustees Powers' Bill that is the subject of this consultation.

The draft Inheritance and Trustees' Powers Bill

The draft Bill gives effect to the recommendations made in the Law Commission's report, save those in Part 8 (which are the subject of the second Bill). Subject to any amendments made as a result of this consultation, we intend to bring forward the draft Bill for introduction when Parliamentary time allows.

The draft Bill and its accompanying Explanatory Notes are available alongside this paper. In summary, the Bill includes reforms that would:

- Ensure that where a couple are married or in a civil partnership, assets pass on intestacy to the surviving spouse in all cases where there are no children or other descendants;
- Simplify the sharing of assets on intestacy where the deceased was survived by a spouse and children or other descendants;
- Protect children who suffer the death of a parent from the risk of losing an inheritance from that parent in the event that they are adopted after the death;
- Amend the legal rules which currently disadvantage unmarried fathers when a child dies intestate;
- Remove arbitrary obstacles to family provision claims by dependants of the deceased and anyone treated by the deceased as a child of his or her family outside the context of a marriage or civil partnership;
- Permit a claim for family provision in certain circumstances where the deceased died "domiciled" outside of England and Wales but English law of succession would apply to any part of the estate; and
- Reform trustees' statutory powers to use income and capital for the benefit of trust beneficiaries (subject to any express provisions in the trust instrument).

Following the Law Commission's extensive engagement work during the report's development, this consultation offers a final opportunity to comment on the Bill and the policy recommendations it gives effect to. In particular, the consultation seeks views on the balance struck by the Law Commission's

³ Law Comm No 331.

recommendation on an additional ground of jurisdiction for deciding family provision claims, which is discussed in more detail below.

Question 1: Do you have any comments on either the draft Bill or its accompanying Explanatory Notes, in particular the drafting?

Jurisdiction for deciding family provision claims

A claim for family provision is a claim by a spouse or a dependent of the deceased that the disposal of the deceased's estate, whether or not the deceased left a will, does not adequately provide for them. The current legal position is that a claim for family provision can only be brought if the deceased dies domiciled in England and Wales.

However, there are three significant difficulties with using domicile as the **sole** basis of jurisdiction:

- Domicile is a deeply complex and technical concept to apply, which can lead to expensive and drawn-out preliminary litigation before the claim can even begin to be considered on its merits;
- Domicile rules can produce unpredictable, sometimes even counter-intuitive, results (e.g. someone who has lived here many years, and has children or other dependents here, may not be domiciled here) which create a 'gap' in jurisdiction that excludes some meritorious claims;
- As domicile is in many ways in the control of the deceased, the rule is open to abuse by those who wish to avoid family provision claims.

We are in agreement with the Law Commission that domicile, as a well-established element of the law, should be maintained but that an additional, alternative ground of jurisdiction should be added to close the gap in jurisdiction and reduce preliminary litigation.

Any additional rule must seek to address the three concerns above but, balanced against this, must also provide a proper connection between the dispute and England and Wales. This is for reasons of international comity and to reflect the reality that enforcement of orders against estates overseas will be even more difficult in the absence of a clear justification for the court having taken jurisdiction to make that order.

There are a number of ways in which the law could be reformed to achieve this, each representing a different balance between the factors above. This is an area of extreme complexity, involving as it does the inter-operation of different legal systems and the rules of private international law. Before committing to legislation, we are therefore keen to ensure that the chosen approach represents the best balance between making justice as accessible as possible for those with meritorious claims, and respecting the rules and realities of international comity.

Four possible options have been identified:

Option 1: Application of English succession law (Law Commission recommendation)

The Law Commission's suggested reform, currently in Schedule 2(2) of the draft Bill, is to retain the domicile test, but add that that a claim would also be possible where English succession law applies to any part of the deceased's estate (including via 'choice of law' rules).

The Law Commission's reasons are set out at paragraphs 7.19 to 7.40 of their report. The Commission considers that harmonising the rules of family provision with the larger body of English inheritance law is desirable in principle and will be of considerable practical benefit.

The Law Commission's recommendation would cover situations in which there is immovable property in the deceased's estate in this jurisdiction, but not exclusively so. So, for example, where the deceased died domiciled abroad but had a holiday cottage in Cornwall the court would have jurisdiction to hear a family provision claim against his or her estate. There are also a number of other cases where the rule would have effect, including some cases where there is moveable property in the UK (e.g. a bank account) or, at its most remote, where the succession law of another state would cause English law to apply simply on the basis that the deceased was a British national (regardless of what other connection the deceased had to this jurisdiction – which could be none).

This approach would cover many of the cases falling within the jurisdictional gap. However, it is a very widely drawn test in some ways, and may risk including some cases with a very limited connection to England and Wales.

At the same time, it would not assist in a specific category of cases where, despite the presence of dependants in the UK, the estate is entirely overseas and English succession law does not apply (an example might be a migrant worker with family here but whose assets all remain in the country they ultimately intend to return to). It might be that it is appropriate that the court has jurisdiction in such cases too.

This test may also create practical complexity on several levels. First, where both dependants and property are overseas it will be more difficult for courts to obtain evidence. Secondly where courts in other jurisdictions are considering claims relating to the same estate (whether as to succession or family provision or both), there is a significant risk of conflicting orders about the same property, with consequent concerns around enforcement of orders. That risk cannot be entirely eliminated but the better the connection to England and Wales that the case has, the less likely such conflicts are to arise. Finally, establishing when English succession law might be applied to a part of the estate, whether by an English or a foreign court in consequence of private international law rules can be a complex exercise that would require resolution by legal advice or court consideration before the merits of the case could be considered.

However, in many cases these complications will have to be addressed in any event as part of the administration of the estate.

Option 2: Application of English succession law with an additional limiting factor

An alternative approach would be to control the breadth of the above rule by adding a limitation or qualification to ensure a good quality connection between the dispute and the jurisdiction of the English courts. This approach would address some of the concerns set out in relation to Option 1, but would still retain the underlying complexity of the succession law test.

As to the nature of any limitation, the Government's preferred option is that the court would only be able to make provision for the dependant out of property within the jurisdiction of England and Wales, as this would be more likely to be recognised by international courts and would facilitate enforcement. An alternative might be that the courts will take jurisdiction where the test is met and the deceased has *chosen* English law to govern his succession

There is a balance to be struck here. Adding a limiting factor should serve to improve the quality of connection with England and Wales, and therefore provide benefits in terms of international comity and the enforceability of orders in other jurisdictions. However, too narrow a test may continue to exclude meritorious claims, and the complexity of the underlying applicable law test remains for those cases not "knocked out" by the additional limiting factor. The views of respondents on this point would be welcome, including an indication of what additional limiting factor or factors are thought to be most appropriate.

Option 3: Location of property

A different approach would be to use the presence of property in England and Wales as the alternative ground of jurisdiction. Claims made under this rule could then also be limited to being satisfied out of the property within the jurisdiction, making enforcement of orders more likely.

While there is a risk this may not capture all the 'hard cases' reform would ideally seek to address, this option would reflect our rules of private international law on succession law and would provide a clear and simple connection to this jurisdiction. There is also a question as to whether the rule should include only immoveable property, in order to minimise the risk of remote cases, or whether moveable property should also be included to allow more potentially meritorious claims to be caught. Views on this point would be welcome.

Option 4: Habitual residence of the dependant

The final option would be to focus on the situation of the dependant rather than the situation of the deceased or the estate, and allow a claim where the dependant (the claimant) was habitually resident in England or Wales.

Habitual residence is likely to be relatively simple to apply as a test in most cases.

Family provision claims are essentially concerned with the maintenance of the dependants, albeit that they are seen as an aspect of succession law. The difference with an ordinary maintenance claim is of course that the provider has died, but otherwise the purpose of dependency claims is very similar, so England and Wales has a clear connection with the dispute if the dependent is habitually resident here.

At international level, the widely accepted ground of jurisdiction for maintenance is that jurisdiction lies with the courts of the country in which the maintenance creditor (the person seeking maintenance in their favour) is habitually resident; see, for example, the Maintenance Regulation⁴ which governs the rules on jurisdiction in maintenance cases for EU Member States. There would therefore be a rationale for adding a ground of jurisdiction for dependency claims so that the courts of England and Wales could have jurisdiction where the claimant dependant was habitually resident in this country. As with other options, however, the courts of England and Wales will be making orders that affect overseas property and therefore there may be difficulties in getting foreign enforcement, as well as risk of conflict through dual consideration.

Question 2: Which of the options given, in your opinion, is the most appropriate approach to an additional ground of jurisdiction for domicile claims? Please give reasons for your answer.

Impact Assessment

An Impact Assessment has been produced for the draft Bill and is available alongside this paper. The main groups affected by the proposals have been identified as:

- Potential beneficiaries – including family members, dependants and other relations to the deceased.
- The Ministry of Justice, including Her Majesty's Courts & Tribunals Service (HMCTS) and Legal Service Commission (LSC).
- Legal services providers and financial representatives

The proposals outlined in the consultation and Impact Assessment will mainly ensure that the intestacy rules and eligibility requirements for family provision claims are less complicated and in closer alignment with public expectations which should improve the overall fairness of the system. The economic impacts are largely transfers from one set of beneficiaries to another.

⁴ Regulation (EC) no 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters Relating to Maintenance Obligations.

There is some uncertainty about the overall impact of these reforms on the number of family provision claims (and therefore the impact on HM Courts & Tribunals Service and Legal Services Commission resources), although it is understood that the total number is currently very small (potentially around 300 annually). The central assumption in the Impact Assessment is that the overall impact on the Ministry of Justice will be neutral as any increase in family provision claims as a result of greater eligibility would be balanced by a reduction in claims through bringing the intestacy rules in better line with public expectations.

We are seeking further views on the overall impact from consultation respondents.

Question 3: Do you have any comments on the Impact Assessment, in particular the potential overall impact of these reforms on the number of family provision claims?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Question 1: Do you have any further comments on either the draft Bill or its accompanying Explanatory Notes?

Question 2: Which of the options given, in your opinion, is the most appropriate approach to an additional ground of jurisdiction for domicile claims? Please give reasons for your answer.

Question 3: Do you have any comments on the Impact Assessment, in particular the potential overall impact of these reforms on the number of family provision claims?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by 3 May 2013 to:

**Criminal Law and Legal Policy Unit
Ministry of Justice
Criminal Law and Legal Policy
Post point 6.25
102 Petty France
London SW1H 9AJ**

Tel: 020 3334 4702

Email: CLPUcorrespondence@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>

Alternative format versions of this publication can also be requested from this address.

Publication of response

A paper summarising the responses to this consultation will be published by 30 June 2013. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other

things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Annex A – Named consultees

Organisations

Advisory Committee on Private International Law
Association of British Insurers
Association of Contentious Trust and Probate Solicitors
Association of Corporate Trustees
Association of Financial Mutuals
Association of Her Majesty's District Judges
Baker & McKenzie LLP
Bangor Solicitors Association
Bar Law Reform Committee
Bates Wells & Braithwaite
Berwin Leighton Paisner LLP
Bircham Dyson Bell
Boodle Hatfield
British Bankers Association
British Property Federation
Centre for Child and Family Law Reform
Chancellor of the High Court
Chancery Bar Association
Charles Russell LLP
City of Westminster and Holborn Law Society
Collyer Bristow
Council for Licensed Conveyancers
Council of Her Majesty's Circuit Judges
European Association for Planned Giving
Family Law Bar Association
Farrer & Co
Fladgate LLP
Herbert Smith
Historic Houses Association
Institute of Chartered Accountants in England & Wales

Institute of Fundraising
Institute of Legacy Management
Institute of Professional Willwriters
Law Reform Committee of the Bar Council
Law Society
Money and Property Committee of the Family Justice Council
Notary Society England and Wales
Office of the Official Solicitor
President of the Family Division
Probate Service
Resolution
Senior District Judge
Senior Master (Queen's Bench Division)
Serle Court Chambers
Society of Legal Scholars
Society of Trust and Estate Practitioners
Trust Law Committee
Which?

Individuals

Professor Paul Beaumont (University of Aberdeen)
Dr Janeen Carruthers (Glasgow University)
Professor Chris Clarkson (Leicester University)
Professor Elizabeth Crawford (Glasgow University)
Ms Aude Fiorini (University of Dundee)
Professor Jonathan Harris (Birmingham University)
Professor Colin Harvey (Queens University, Belfast)
Trevor Hartley (LSE)
Professor Neil Hutton (Strathclyde University)
Professor Roger Kerridge (Bristol University)
Dr Donald Macdonald (Dundee University)
Professor Paul Matthews (Kings College London)
Mr Douglas Maule (Edinburgh Napier University)
Professor Peter McEleavy (Dundee University)
Professor Gareth Miller (East Anglia University)

Dr T J Murphy (Ulster University)

Professor Kenneth Norrie (Strathclyde University)

Professor Roddy Paisley (University of Aberdeen)

Professor Margaret Ross (University of Aberdeen)

Ken Swinton (University of Abertay)

Annex B

Inheritance and Trustees' Powers Bill

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- 1 Intestacy: surviving spouse or civil partner
- 2 The fixed net sum
- 3 Definition of "personal chattels"
- 4 Adoption and contingent interests
- 5 Presumption of prior death
- 6 Amendments of Inheritance (Provision for Family and Dependants) Act 1975
- 7 Date when representation is first taken out
- 8 Power to apply income for maintenance
- 9 Power of advancement
- 10 Application of sections 8 and 9
- 11 Minor and consequential amendments
- 12 Short title, commencement, application and extent

-
- Schedule 1 – Determination of the fixed net sum
 - Schedule 2 – Amendments of Inheritance (Provision for Family and Dependants) Act 1975
 - Schedule 3 – Determination of date when representation is first taken out
 - Schedule 4 – Minor and consequential amendments

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Make further provision about the distribution of estates of deceased persons; to amend the law relating to the powers of trustees; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Intestacy: surviving spouse or civil partner

- (1) Section 46 of the Administration of Estates Act 1925 (succession to real and personal estate on intestacy) is amended as follows.
- (2) For the Table in paragraph (i) of subsection (1) substitute—

“TABLE

(1) If the intestate leaves no issue:	the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely.
(2) If the intestate leaves issue:	(A) the surviving spouse or civil partner shall take the personal chattels absolutely;

(B) the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a fixed net sum, free of death duties and costs, to the surviving spouse or civil partner, together with simple interest on it from the date of the death at the rate provided for by subsection (1A) until paid or appropriated; and

(C) subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held –

(a) as to one half, in trust for the surviving spouse or civil partner absolutely, and

(b) as to the other half, on the statutory trusts for the issue of the intestate.

The amount of the fixed net sum referred to in paragraph (B) of case (2) of this Table is to be determined in accordance with Schedule 1A.”

(3) For subsection (1A) substitute –

“(1A) The interest rate referred to in paragraph (B) of case (2) of the Table in subsection (1)(i) is the Bank of England rate that had effect at the end of the day on which the intestate died.”

(4) After subsection (4) insert –

“(5) In subsection (1A) “Bank of England rate” means –

(a) the rate announced by the Monetary Policy Committee of the Bank of England as the official bank rate, or

(b) where an order under section 19 of the Bank of England Act 1998 (reserve powers) is in force, any equivalent rate determined by the Treasury under that section.

(6) The Lord Chancellor may by order made by statutory instrument amend the definition of “Bank of England rate” in subsection (5) (but this subsection does not affect the generality of subsection (7)(b)).

(7) The Lord Chancellor may by order made by statutory instrument –

(a) amend subsection (1A) so as to substitute a different interest rate (however specified or identified) for the interest rate for the time being provided for by that subsection;

(b) make any amendments of, or repeals in, this section that may be consequential on or incidental to any amendment made by virtue of paragraph (a).

- (8) A statutory instrument containing an order under subsection (6) is subject to annulment pursuant to a resolution of either House of Parliament.
- (9) A statutory instrument containing an order under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

2 The fixed net sum

- (1) In the Administration of Estates Act 1925, after the First Schedule insert the Schedule set out in Schedule 1 to this Act (which provides for the determination of the fixed net sum).
- (2) The Family Provision Act 1966 is repealed.

3 Definition of “personal chattels”

- (1) For paragraph (x) of section 55(1) of the Administration of Estates Act 1925 (definitions) substitute –
 - “(x) “Personal chattels” means tangible movable property, other than any such property which –
 - consists of money or securities for money, or
 - was used at the death of the intestate solely or mainly for business purposes, or
 - was held at the death of the intestate solely as an investment:”.
- (2) Unless the contrary intention appears, subsection (1) does not affect a reference (in any form) to personal chattels within the meaning of section 55(1)(x) of the Administration of Estates Act 1925 in a will or codicil executed (while containing the reference) before the coming into force of subsection (1).

4 Adoption and contingent interests

- (1) In section 69 of the Adoption and Children Act 2002 (rules of interpretation for instruments concerning property), in subsection (4) –
 - (a) omit “or” after paragraph (a), and
 - (b) after paragraph (b) insert “, or
 - (c) any contingent interest (other than a contingent interest in remainder) which the adopted person has immediately before the adoption in the estate of a deceased parent, whether testate or intestate.”
- (2) The amendments made by subsection (1) have effect only in relation to adoptions whose date is the day this section comes into force or later.

5 Presumption of prior death

In section 18 of the Family Law Reform Act 1987 (succession on intestacy), after subsection (2) insert –

- “(2ZA) Subsection (2) does not apply if a person is recorded as the intestate’s father, or as a parent (other than the mother) of the intestate –

- (a) in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or
- (b) in a record of a birth included in an index kept under section 30(1) of that Act (indexes relating to certain other registers etc)."

6 Amendments of Inheritance (Provision for Family and Dependants) Act 1975

Schedule 2 amends the Inheritance (Provision for Family and Dependants) Act 1975.

7 Date when representation is first taken out

Schedule 3 amends enactments relating to the determination, for various purposes, of the date on which representation with respect to the estate of a deceased person is first taken out.

8 Power to apply income for maintenance

- (1) Section 31 of the Trustee Act 1925 (power to apply income for maintenance and to accumulate surplus income during a minority) is amended as follows.
- (2) In subsection (1)(i) for "as may, in all the circumstances, be reasonable," substitute "as the trustees may think fit,".
- (3) Omit the words from "Provided that" to the end.

9 Power of advancement

- (1) Section 32 of the Trustee Act 1925 (power of advancement) is amended as follows.
- (2) In subsection (1), in the words before the proviso—
 - (a) for the words from "Trustees" to "a trust," substitute "Trustees of a trust may at any time or times pay or apply any capital money, or transfer or apply any other property, subject to the trust," and
 - (b) after "payment" insert ", transfer".
- (3) In paragraph (a) of the proviso in subsection (1)—
 - (a) for the words from the beginning to "amount" substitute "the total amount so paid, transferred or applied for the advancement or benefit of any person shall not exceed the amount of", and
 - (b) omit "one-half of".
- (4) In paragraph (b) of that proviso for "the money so paid or applied" substitute "any money so paid or applied, and any other property so transferred or applied,".
- (5) In paragraph (c) of that proviso—
 - (a) after "payment" (in both places) insert ", transfer", and
 - (b) for "paid" substitute "or other property paid, transferred".
- (6) After subsection (1) insert—

"(1A) For the purposes of subsection (1), the total amount paid, transferred or applied by trustees for the advancement or benefit of any person is found by adding—

- (a) the total amount of any money paid or applied by the trustees for the advancement or benefit of the person, to
- (b) the amount representing the total value of any other property transferred or applied by the trustees for the advancement or benefit of the person.”

10 Application of sections 8 and 9

- (1) Section 8 applies in accordance with subsections (4) and (5).
- (2) Section 9, apart from subsection (3)(b), applies in relation to trusts whenever created or arising.
- (3) Section 9(3)(b) applies in accordance with subsections (4) and (5).
- (4) Subject to subsection (5), the provisions mentioned in subsections (1) and (3) apply only in relation to trusts created or arising after the coming into force of those provisions.
- (5) Those provisions also apply in relation to an interest under a trust (not falling within subsection (4)) if the interest is created or arises as a result of the exercise, after the coming into force of those provisions, of any power.

11 Minor and consequential amendments

Schedule 4 makes minor and consequential amendments.

12 Short title, commencement, application and extent

- (1) This Act may be cited as the Inheritance and Trustees' Powers Act 2011.
- (2) This section comes into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may appoint different days for different purposes.
- (4) The provisions of this Act, except sections 4 and 8 to 10, apply only in relation to deaths occurring after the coming into force of the provision concerned.
- (5) Subject to subsection (6), this Act extends to England and Wales only.
- (6) The repeals made by paragraph 4 of Schedule 4 extend to the United Kingdom.

SCHEDULES

SCHEDULE 1

Section 2

DETERMINATION OF THE FIXED NET SUM

The following is the Schedule inserted after the First Schedule to the Administration of Estates Act 1925—

“SCHEDULE 1A

DETERMINATION OF THE FIXED NET SUM

- 1 This Schedule has effect for determining the fixed net sum referred to in paragraph (B) of case (2) of the Table in section 46(1)(i).
- 2 On the coming into force of this Schedule, the amount of the fixed net sum is the amount fixed by order under section 1(1)(a) of the Family Provision Act 1966 immediately before the coming into force of this Schedule.
- 3
 - (1) The Lord Chancellor may from time to time by order made by statutory instrument specify the amount of the fixed net sum.
 - (2) An order under sub-paragraph (1) relates only to deaths occurring after the coming into force of the order.
 - (3) The first order under sub-paragraph (1) supersedes paragraph 2 of this Schedule.
 - (4) A statutory instrument containing an order under sub-paragraph (1) is subject to annulment pursuant to a resolution of either House of Parliament.
 - (5) Sub-paragraph (4) does not apply in the case mentioned in paragraph 5(3), or in the case of an instrument which also contains provision made by virtue of paragraph 7.
- 4 The Lord Chancellor may make an order under paragraph 3(1) at any time, but must make one—
 - (a) before the end of the period of 5 years beginning with the date this Schedule comes into force, and then
 - (b) before the end of the period of 5 years since the date on which the last order under paragraph 3(1) was made, and so on.
- 5
 - (1) Unless the Lord Chancellor otherwise determines, an order under paragraph 3(1) must specify the amount given by paragraph 6(2) or (as the case requires) 6(3).

-
- (2) If the Lord Chancellor does otherwise determine—
- (a) an order under paragraph 3(1) may provide for the fixed net sum to be of any amount (including an amount equal to or lower than the previous amount), and
 - (b) the Lord Chancellor must prepare a report stating the reason for the determination.
- (3) A statutory instrument containing an order under paragraph 3(1) that specifies an amount other than that mentioned in subparagraph (1) of this paragraph may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
- (4) The Lord Chancellor must lay the report before Parliament no later than the date on which the draft of the instrument containing the order is laid before Parliament.
- 6 (1) The amount mentioned in paragraph 5(1) is found as follows.
- (2) If the retail prices index for the current month is higher than that for the base month, the amount to be specified in the order is found by—
- (a) increasing the amount of the previous fixed net sum by the same percentage as the percentage increase in the retail prices index between those months, and
 - (b) if the resulting figure is not a multiple of £1,000, rounding it up to the nearest multiple of £1,000.
- (3) If the retail prices index for the current month is the same as, or lower than, that for the base month, the amount specified in the order is to be the same as the amount of the previous fixed net sum.
- (4) In this paragraph—
- “the base month” means—
- (a) in the case of the first order under paragraph 3(1), the month in which this Schedule came into force, and
 - (b) in the case of each subsequent order, the month which was the current month in relation to the previous order;
- “the current month” means the most recent month for which a figure for the retail prices index is available when the Lord Chancellor makes the instrument;
- “retail prices index” means—
- (a) the general index of retail prices (for all items) published by the Statistics Board, or
 - (b) if that index is not published for a relevant month, any substituted index or index figures published by that Board.
- 7 (1) The Lord Chancellor may by order made by statutory instrument amend paragraph 6 so as to—
- (a) substitute for references to the retail prices index references to another index, and

- (b) make amendments in that paragraph consequential on that substitution.
- (2) A statutory instrument containing an order under sub-paragraph (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

SCHEDULE 2

Section 6

AMENDMENTS OF INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- 1 The Inheritance (Provision for Family and Dependants) Act 1975 is amended as follows.

Jurisdiction

- 2 (1) Section 1 (application for financial provision from deceased's estate) is amended as follows.
- (2) In subsection (1), for “a person dies domiciled in England and Wales” substitute “a person falling within subsection (4) dies”.
- (3) After subsection (3) insert—
- “(4) The following fall within this subsection—
- (a) a person who dies domiciled in England and Wales;
 - (b) a person whose estate includes property which satisfies the applicable law condition;
 - (c) a person whose net estate is treated by virtue of section 8(1) or (2) of this Act as including money or other property which satisfies the applicable law condition;
 - (d) a person who was immediately before death beneficially entitled to a joint tenancy of any property which satisfies the applicable law condition;
 - (e) a person in relation to whom the court is satisfied of the matters mentioned in paragraphs (a) and (b) of section 10(2) of this Act, read with section 12(1), if the property subject to the disposition mentioned there satisfies the applicable law condition.
- (5) The applicable law condition is that a court in England and Wales (after applying any relevant rules of private international law) would find that succession to the property is governed by the domestic law of England and Wales (or, in the case of property referred to in subsection (4)(c), (d) or (e), would have been so governed if it had been included in the deceased's estate).”

Children of the family

- 3 In section 1 (application for financial provision from deceased's estate)—
- (a) in subsection (1)(d), for the words from “who” to the end substitute “who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any

family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family;”

(b) after subsection (2) insert –

“(2A) The reference in subsection (1)(d) above to a family in which the deceased stood in the role of a parent includes a family of which the deceased was the only member (apart from the applicant).”

Maintenance

4 In section 1 (application for financial provision from deceased’s estate), for subsection (3) substitute –

“(3) For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was 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 arrangement of a commercial nature.”

Powers of court

5 (1) Section 2 (powers of court to make orders) is amended as follows.

(2) In subsection (1), at the end insert –

“(h) an order varying for the applicant’s benefit the trusts on which the deceased’s estate is held (whether arising under the will, or the law relating to intestacy, or both).”

(3) After subsection (3) insert –

“(3A) In assessing for the purposes of an order under this section the extent (if any) to which the net estate is reduced by any debts or liabilities (including any inheritance tax paid or payable out of the estate), the court may assume that the order has already been made.”

Matters to which court is to have regard

6 (1) Section 3 (matters to which court is to have regard when exercising powers under section 2) is amended as follows.

(2) In subsection (2), at the end of each of the final two sentences insert “; but nothing requires the court to treat such provision as setting an upper or lower limit on the provision which may be made by an order under section 2.”

(3) In subsection (3) –

(a) for paragraph (a) substitute –

“(a) to whether the deceased maintained the applicant and, if so, to the length of time for which and basis on which the deceased did so, and to the extent of the contribution made by way of maintenance;

(aa) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant;”

- (b) in paragraph (b) for “assuming and discharging that responsibility” substitute “maintaining or assuming responsibility for maintaining the applicant”.
- (4) In subsection (4), for the words from “regard” to the end substitute “regard –
- (a) to the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;
 - (b) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.”

Time limit for applications

- 7 In section 4 (time-limit for applications), at the end insert “(but nothing prevents the making of an application before such representation is first taken out)”.

Joint tenancies

- 8 In section 9 (property held on joint tenancy), in subsection (1) –
- (a) omit the words from “, before the end” to “first taken out,”;
 - (b) for “at the value thereof immediately before his death,” substitute “valued at such date as appears to the court to be appropriate,”.

SCHEDULE 3

Section 6

DETERMINATION OF DATE WHEN REPRESENTATION IS FIRST TAKEN OUT

- 1 In section 31 of the Matrimonial Causes Act 1973 (variation, discharge, etc, of certain orders for financial relief), for subsection (9) substitute –
- “(9) The following are to be left out of account when considering for the purposes of subsection (6) above when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (9A) below).
- (9A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (9) above, but is to be taken as dated on the date of sealing.”
- 2 For section 23 of the Inheritance (Provision for Family and Dependants) Act 1975 (determination of date on which representation was first taken out)

substitute –

“23 Determination of date on which representation was first taken out

- (1) The following are to be left out of account when considering for the purposes of this Act when representation with respect to the estate of a deceased person was first taken out –
 - (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (2) below).
- (2) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of this section, but is to be taken as dated on the date of sealing.”

3 In section 20 of the Administration of Justice Act 1982 (rectification of wills), for subsection (4) substitute –

- “(4) The following are to be left out of account when considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out –
- (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (5)).
- (5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (4), but is to be taken as dated on the date of sealing.”

4 (1) Schedule 1 to the Children Act 1989 (financial provision for children) is amended as follows.

(2) In paragraph 7 (variation of orders for secured periodical payments after death of parent), for sub-paragraph (6) substitute –

- “(6) The following are to be left out of account when considering for the purposes of sub-paragraph (2) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (6A)).

- (6A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (6), but is to be taken as dated on the date of sealing.”
- (3) In paragraph 11 (alteration of maintenance agreements after death of one of the parties), for sub-paragraph (4) substitute –
- “(4) The following are to be left out of account when considering for the purposes of sub-paragraph (3) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (4A)).
- (4A) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (4), but is to be taken as dated on the date of sealing.”
- 5 In Schedule 5 to the Civil Partnership Act 2004, in paragraph 60 (variation of secured periodical payments order where person liable has died), for sub-paragraph (6) substitute –
- “(6) The following are to be left out of account when considering for the purposes of sub-paragraph (3) when representation was first taken out –
- (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (7)).
- (7) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (6), but is to be taken as dated on the date of sealing.”

SCHEDULE 4

Section 11(1)

MINOR AND CONSEQUENTIAL AMENDMENTS

Administration of Estates Act 1925

- 1 (1) The Administration of Estates Act 1925 is amended as follows.
- (2) Omit section 46(3) (which relates to deaths in circumstances where it is uncertain which of two people survived the other).

- (3) Omit section 47A (right of surviving spouse to have own life interest redeemed).
- (4) In section 48 (powers of personal representative in respect of interests of surviving spouse), in subsection (2), omit the following—
 - (a) paragraph (b), and the word “and” after paragraph (a), and
 - (b) the words “in either case”.
- (5) In section 49 (application of Part 4 of Act to partial intestacies), omit subsection (4).

Intestates' Estates Act 1952

- 2 (1) Schedule 2 to the Intestates' Estates Act 1952 (rights of surviving spouse or civil partner as respects home) is amended as follows.
 - (2) Omit paragraph 1(4).
 - (3) In paragraph 3, for sub-paragraph (3) substitute—
 - “(3) The court may extend the period of 12 months referred to in sub-paragraph (1)(a) if the surviving spouse or civil partner applies for it to be extended and satisfies the court that a period limited to 12 months would operate unfairly—
 - (a) in consequence of the representation first taken out being probate of a will subsequently revoked on the ground that the will was invalid, or
 - (b) in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out, or
 - (c) in consequence of some other circumstances affecting the administration or distribution of the estate.
 - (4) For the purposes of the construction of the references in this paragraph to the first taking out of representation, there shall be left out of account—
 - (a) a grant limited to settled land or to trust property,
 - (b) any other grant that does not permit any of the estate to be distributed,
 - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
 - (d) a grant, or its equivalent, made outside the United Kingdom (but see sub-paragraph (5)).
 - (5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of sub-paragraph (4), but is to be taken as dated on the date of sealing.”

Administration of Justice Act 1977

- 3 In section 28 of the Administration of Justice Act 1977, omit subsection (1).

Inheritance Tax Act 1984

- 4 In the Inheritance Tax Act 1984 –
- (a) in section 17 (changes in distribution of deceased's estate, etc.), omit paragraph (c);
 - (b) omit section 145 (redemption of surviving spouse's or civil partner's life interest).

Annex C

DRAFT INHERITANCE AND TRUSTEES' POWERS BILL EXPLANATORY NOTES

INTRODUCTION

- A.1 The draft Inheritance and Trustees' Powers Bill implements the recommendations made by the Law Commission in Parts 2 to 7 of its Report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331 published in December 2011.
- A.2 The recommendations in Part 8 of the Report would be put into effect by the draft Inheritance (Cohabitants) Bill for which separate explanatory notes have been prepared. These can be found at Appendix B of the Report.
- A.3 The Law Commission's work was concerned with two areas of the law: the intestacy rules and the family provision legislation. In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191. Following responses to this consultation, the Law Commission considered some aspects of trustees' powers more widely and a Supplementary Consultation Paper was published in May 2011.

Intestacy

- A.4 The intestacy rules determine the distribution on a person's death of any of his or her property that is not governed by a valid will. They are largely contained in the Administration of Estates Act 1925 and the Intestates' Estates Act 1952. Priority is given to any surviving spouse or civil partner of the deceased, followed by blood relatives (children and other descendants, parents, siblings and their descendants, grandparents, aunts and uncles and their descendants).
- A.5 The Law Commission's review considered all aspects of the intestacy rules, including the circumstances in which a surviving spouse or civil partner is required to share the deceased's property with other relatives, the order of priority between the different classes of relative and the way in which property is divided between the different generations within each class.

Family provision

- A.6 The Inheritance (Provision for Family and Dependents) Act 1975 permits certain family members and dependants to apply to the court to vary the distribution of a deceased's person's property, whether that is under the intestacy rules or the terms of a valid will. An application under the 1975 Act is often referred to as a claim for family provision.
- A.7 The Law Commission's review considered the whole of the 1975 Act, including the categories of persons who are entitled to apply for an order under the Act, the factors the court must take into account when considering the application, the powers of the court to make orders and property that the court is able to take into account when making orders.

Trustees' powers

- A.8 The intestacy rules require the creation of statutory trusts where beneficiaries are under 18 or property is to be shared between beneficiaries. The trustees of assets held under these trusts are usually (but not always) the personal representatives responsible for administering the estate.
- A.9 The general law gives certain powers to trustees and imposes on them certain obligations. The Law Commission's project considered the powers and obligations under sections 31 and 32 of the Trustee Act 1925, which give trustees powers to distribute capital or income from the trust fund to a beneficiary who is under the age of 18, subject to certain restrictions.

THE DRAFT INHERITANCE AND TRUSTEES' POWERS BILL

- A.10 The draft Inheritance and Trustees' Powers Bill implements the Law Commission's recommendations by amending existing legislation, principally the Administration of Estates Act 1925, the Trustee Act 1925 and the Inheritance (Provision for Family and Dependants) Act 1975.
- A.11 The Law Commission Consultation Paper and Report use the term "spouse" to refer to a person's husband, wife or civil partner. The draft Bill uses the term "spouse" to refer to a person's husband or wife. These explanatory notes follow the approach taken by the draft Bill.

COMMENTARY ON CLAUSES

Clause 1: intestacy: surviving spouse or civil partner

- A.12 Clause 1 of the draft Bill amends the entitlement of a surviving spouse or civil partner of a person who has died intestate in two situations. First, where the deceased was also survived by "issue", meaning a direct descendant (a child, grandchild, great-grandchild and so on). Secondly, where the deceased was not survived by any issue but was survived by at least one parent or at least one full sibling (or the issue of a full sibling).
- A.13 The property of a person who has died, after payment of all debts and administrative expenses, is known as the residuary estate. The distribution of the residuary estate of a person who has died intestate is governed by section 46 of the Administration of Estates Act 1925. Section 46(1)(i) sets out in a table what is to happen if the intestate leaves a spouse or civil partner who survives for more than 28 days after the intestate's death (see section 46(2A)).
- A.14 In all cases, the surviving spouse or civil partner is entitled to all of the deceased's "personal chattels" that are not disposed of by will. The draft Bill does not change that position but clause 3 changes the statutory definition of personal chattels. That is explained in more detail in the commentary on clause 3, below.
- A.15 Clause 1(2) substitutes a new table at section 46(1)(i) of the Administration of Estates Act 1925 in place of the current table.
- A.16 Paragraph (1) of the new table provides that, where the intestate leaves no issue, the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely. This means that, in all cases where the deceased died intestate and

was survived by a spouse or civil partner, that spouse or civil partner is the only beneficiary except where the deceased was also survived by issue. This changes the current law, under which a surviving parent or full sibling (or the issue of a full sibling) is entitled to share the estate after the surviving spouse or civil partner has received the deceased's personal chattels and the first £450,000 of the residuary estate (this is referred to in section 46 as the "fixed net sum" and commonly known as a "statutory legacy").

- A.17 Paragraph (2) of the new table provides that, where the intestate leaves issue, the surviving spouse or civil partner is entitled to the deceased's personal chattels and a statutory legacy (currently £250,000). Under current law, a surviving spouse or civil partner would be entitled to a life interest in half of anything that is left in the estate. This means that he or she may use the property and is entitled to the income from it until his or her own death, at which point the property itself passes to the deceased's issue (who share it under the "statutory trusts" set out in section 47 of the Administration of Estates Act 1925). Paragraph (2) changes this: instead of a life interest in half of the rest of the estate, the surviving spouse or civil partner will take that half of the rest of the estate absolutely, as his or her own. The other half of the balance of the estate will be held on the statutory trusts for the issue of the deceased, as under the current law.
- A.18 Paragraph (2)(B) of the new table clarifies a point of uncertainty under the current law by providing that the statutory legacy accrues interest from the date of death calculated on a simple basis as opposed to a compound basis.
- A.19 The text below the new table provides for the amount of the statutory legacy to be determined in future by a new schedule 1A to the Administration of Estates Act 1925, which is explained in the commentary on clause 2 of and schedule 1 to the draft Bill below.
- A.20 Clause 1(3) substitutes a new section 46(1A) of the Administration of Estates Act 1925. This provides that the rate of interest which accrues from the date of death of the intestate on the statutory legacy (see paragraph B of case (2) of the new table at section 46(1)(i) of the Act) is the Bank of England rate that had effect at the end of the day on which the intestate died.
- A.21 Clause 1(4) inserts new subsections (5) to (9) after subsection (4) of section 46 of the 1925 Act. The new subsection (5) defines the Bank of England rate as being either the rate announced by the Monetary Policy Committee of the Bank of England as the official bank rate, or any equivalent rate determined by the Treasury in the exercise of its emergency powers under section 19 of the Bank of England Act 1998 to give the Bank directions with respect to monetary policy. The new subsection (6) gives the Lord Chancellor power to amend the definition of bank of England rate, for example if the Bank of England ceases to publish a rate using the term "official bank rate". The new subsection (8) provides that a statutory instrument containing an order made under this power is subject to annulment by either House of Parliament. This negative resolution procedure means that the new definition passes into law unless there is a resolution in either the House of Commons or House of Lords annulling it.

- A.22 The new subsection (7) contains a broader power for the Lord Chancellor to amend section 46(1A) of the 1925 Act by substituting a different interest rate for the prevailing rate and to make any consequential changes to the section. The new subsection (9) provides that a statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

Clause 2: the fixed net sum

- A.23 Clause 2(1) inserts a new schedule 1A into the Administration of Estates Act 1925. This new schedule is set out at schedule 1 to the draft Bill. It makes provision for determining the fixed net sum (often referred to as a “statutory legacy”) to which a surviving spouse or civil partner is entitled before any part of the estate is shared with any other beneficiary (under the amendments made by clause 1, only issue will be entitled to share the estate with the intestate’s spouse under the intestacy rules). The detailed provisions are explained in the commentary on schedule 1 below.
- A.24 Clause 2(2) repeals section 1 of the Family Provision Act 1966. (This is done by repealing the whole of the 1966 Act; all substantive provisions apart from section 1 had already been repealed by other legislation.) Section 1 contained the Lord Chancellor’s power to set the fixed net sum. On the coming into force of schedule 1 to the draft Bill that power will be superseded by the powers in the new schedule 1A to the Administration of Estates Act 1925.

Clause 3: definition of “personal chattels”

- A.25 The table at section 46(1)(i) of the Administration of Estates Act 1925 provides that the surviving spouse or civil partner of a person who has died intestate is entitled to all of that person’s “personal chattels”. These are defined at section 55(1)(x).
- A.26 Clause 3(1) substitutes for the current wording of section 55(1)(x) a new definition of personal chattels as “tangible movable property” with three defined exceptions. The first exception is money and securities for money, which is an exception that is found in the current statutory definition. The second exception is for property used at the death of the intestate solely or mainly for business purposes. The current statutory definition of personal chattels also excludes any chattels used at the death of the intestate for business purposes but the new clause adds the words “solely or mainly” to make clear that it is only where a chattel was used primarily for business purposes that it should be excluded under this exception and not pass to the surviving spouse or civil partner. The third exception, for property held at the death of the intestate solely as an investment, is wholly new. This is intended as a narrow exception for property held *solely* as an investment which had no personal use at the date of the deceased’s death. Property which had some personal use but which the deceased also hoped might maintain or increase its value, for example precious jewellery worn only occasionally, will not fall within this exception (and so will pass to the surviving spouse) even if it is held outside the home, for example in a bank for security reasons.

Clause 4: adoption and contingent interests

- A.27 Clause 4 concerns the rights of an adopted child to the estate of a parent who had died before the adoption. The general rule, set out in section 67(3) of the

Adoption and Children Act 2002, is that after adoption the child is regarded for all purposes as the legal child of the adopter or adopters, and has no other legal parents. This can have consequences for the child's interests in property, where those interests depend on the legal relationship between the child and the former legal parent or parents.

- A.28 Section 69(4) of the Adoption and Children Act 2002 contains exceptions to this rule. In particular, interests which are already vested in possession in the adopted child are not affected by adoption: for example, an inheritance by will which was left in such a way as to give the child an unconditional entitlement. Subsection (1) of clause 4 adds a further category of interest which is not affected by adoption, by adding a new paragraph (c) to section 69(4). It applies where that adoption occurs on or after the date on which the section comes into force (subsection (2)).
- A.29 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 trusts – 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.
- A.30 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).

Clause 5: presumption of prior death

- A.31 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. The rule does not apply to those whose parents later married or whose birth would otherwise be regarded in law as legitimate or legitimated (see Family Law Reform Act 1987, s 1; Legitimacy Act 1976, ss 2, 2A, 3, 4 and 10). In such cases, the administrators may presume that the intestate was predeceased by his or her father and also by any other person to whom the intestate was related only through his or her father. In the case of a person who has a female parent other than his or her mother by virtue of section 43 of the Human Fertilisation and Embryology Act 2008, the administrators may proceed on the basis that the deceased was not survived by the second female parent or any person related only through the second female parent (see the Family Law Reform Act 1987, s 18(2A)). The presumption operates “unless the contrary is shown”.

- A.32 Clause 5 amends section 18 of the 1987 Act by adding a new subsection (2ZA), which disapplies section 18(2) in certain circumstances. Those circumstances are that a person is recorded as the intestate's father, or as a parent (other than the mother) of the intestate in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or in a record of births included in an index kept under section 30(1) of that Act. The reference to "a parent (other than the mother)" addresses the possibility of registration as a second female parent of a child in the circumstances set out in section 43 of the Human Fertilisation and Embryology Act 2008. The reference to indexes kept under section 30(1) of the 1953 Act is to cater for the fact that births may be recorded in registers which are not kept under the 1953 Act but are included in a searchable index kept under the Act. Examples include the marine register, the air register book of births and deaths, the hovercraft register book of births and deaths, and the service departments registers.

Clause 6: amendments of Inheritance (Provision for Family and Dependents) Act 1975

- A.33 Clause 6 and schedule 2 make amendments to the Inheritance (Provision for Family and Dependents) Act 1975. These are explained in the commentary on schedule 2 below.

Clause 7: date when representation is first taken out

- A.34 A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases. Clause 7 and schedule 3 amend section 23 of the 1975 Act and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a deceased person was first taken out. These amendments are explained in the commentary on schedule 3 below.

Clause 8: power to apply income for maintenance

- A.35 Clause 8 amends the statutory power of trustees 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. 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.
- A.36 Subsection (2) concerns the assessment of the amount of income to be used under the power. Section 31(1)(i) of the Trustee Act 1925 states that the power is exercisable in respect of the trust property in which the beneficiary in question has an interest, and that it extends to "the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable". Subsection (1) amends that condition to make it clear that the amount of the income used is a matter for the trustees' discretion, and is not limited by an objective standard of reasonableness. The general law on trustees' decision-making applies; the decision must be taken in good faith after due consideration of the circumstances.

- A.37 Subsection (3) removes the proviso to section 31(1) of the Trustee Act 1925. This proviso lists factors to which the trustees are to have regard in exercising their discretion – the beneficiary's age and requirements, and the circumstances generally – and imposes a specific restriction on the amount of income which may be paid out. That restriction applies where the trustees have notice that the income of one or more other trust funds is also applicable for the maintenance, education or benefit of the beneficiary in question, and limits the payments to a proportionate part of the income, so far as practicable (unless the whole of the income is paid out, or the court directs otherwise). The removal of this proviso leaves trustees free to pay out as much of the income as they think fit; the requirement of the general law to consider all relevant factors before exercising their discretion is unaffected.
- A.38 These amendments apply in accordance with clause 10.

Clause 9: power of advancement

- A.39 Clause 9 amends section 32 of the Trustee Act 1925, which confers on trustees the power 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. This is known as the statutory power of advancement. For instance, the trustees of the trust described at paragraph A.35 above could use this power to make payments of capital for the benefit of X, Y and Z. Each of those beneficiaries is contingently entitled to one-third of the capital of the trust fund on reaching the age of 18 (see paragraph A.30 above). The trustees could sell some of the shares which represent the capital of the trust fund and use this statutory power to make payments from the proceeds for the benefit of X, Y and Z; for example, to pay for an educational trip.
- A.40 The terms of section 32 limit this power of advancement to a maximum of one half of the beneficiary's prospective share. Subsection (3)(b) of clause 9 removes that one-half limit, so that the power enables trustees in the exercise of 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.
- A.41 Subsection (2) amends the statutory power of advancement to make it clear that the trustees are able not only to pay out cash in the exercise of the statutory power of advancement but also to transfer or apply property. For example, the trustees might wish to create another trust in favour of one of the beneficiaries and his or her family; they could transfer the shares direct to the trustees of the new trust. This clarifies and extends the effect of existing case law (*Re Collard's Will Trusts* [1961] Ch 293).
- A.42 Subsection (3)(a) amends section 32(1)(a) of the Trustee Act 1925 to make it clear that advancements under the power, whether in money or other property, may not exceed the beneficiary's prospective share of the capital of the trust fund. Subsection (6) inserts new section 32(1A), which sets out the requirement to add together all cash and non-cash advancements to find the total amount advanced for this purpose.
- A.43 Subsection (4) carries this reform through to section 32(1)(b) of the Trustee Act 1925 to require that any non-cash assets advanced under the power are brought into account, in the same way as a cash payment, as part of the beneficiary's

share if and when he or she becomes absolutely entitled to it. Paragraph (c), which makes the exercise of the power of advancement subject to the consent of other trust beneficiaries in certain circumstances, is also amended to apply equally to cash and non-cash advancements: subsection (5).

A.44 These amendments apply in accordance with clause 10.

Clause 10: applications of sections 8 and 9

A.45 Clause 10 sets out the circumstances in which clauses 8 and 9 apply to trusts.

A.46 Subsection (2) concerns the amendments made by clause 9 to include within the statutory power of advancement under section 32 of the Trustee Act 1925 the ability to transfer or apply property other than money. These amendments apply to all trusts whenever established. For example, these reforms to the power would apply in relation to a trust which arose on the intestacy of a person who died before clause 9 came into force.

A.47 Under subsections (1) and (3), the removal of the one-half restriction on the statutory power of advancement pursuant to subsection (3)(b) of clause 9, and the reforms to the power in section 31 of the Trustee Act 1925 made by clause 8, apply as set out in subsections (4) and (5).

A.48 Under subsection (4), those reforms apply in relation to all interests under trusts established after the coming into force of these provisions. For example, if a trust arises under the intestacy rules on a death which occurs after the provisions have come into force, these statutory powers will apply as reformed to all interests under the trust. The same applies if the trust is created by will in these circumstances (regardless of when the will was executed), subject to amendment or exclusion of the power by the terms of the will (section 69(2) of the Trustee Act 1925). Similarly, and again subject to contrary intention expressed in the trust instrument, all interests under a trust created in lifetime after the provisions come into force will have the benefit of the powers as reformed.

A.49 Subsection (5) extends the application of the reforms to trust interests established by the exercise, after the reforms come into force, of any power held in relation to a trust, whether that power was conferred by the terms of the trust or by statute. This is relevant where the trust in question is already in existence before the reforms. For example, the trustees of such an existing trust may hold a power of appointment, enabling them to create new interests in favour of one or more of a class of beneficiaries. If that power is exercised after these provisions come into force to create new trust interests (without establishing a separate settlement, in which case subsection (4) would apply), the interests so created have the benefit of the statutory powers as amended. For example, suppose that the trustees exercised the power of appointment so as to give A an entitlement to a tenth of the trust fund contingent on reaching 25. They would then be able to use the statutory power of advancement in section 32 of the Trustee Act 1925 as amended by clause 9(3)(b) to apply anything up to the whole of that one-tenth share for A's advancement or benefit, by virtue of that contingent interest.

Clause 11: minor and consequential amendments

- A.50 Clause 11 and schedule 4 make minor and consequential amendments. These are explained in the commentary on schedule 4 below.

Schedule 1: determination of the fixed net sum

- A.51 Clause 2 of and schedule 1 to the draft Bill make provision for determining the fixed net sum (often referred to as a “statutory legacy”) to which a surviving spouse or civil partner is entitled under section 46 of the Administration of Estates Act 1925. Under current law, the Lord Chancellor has power to set the level of statutory legacy but is under no obligation to do so or to keep the level under review (see section 1 of the Family Provision Act 1966). Clause 2 inserts a new schedule 1A into the Administration of Estates Act 1925. The text of that new schedule is set out at schedule 1 to the draft Bill. References to paragraph numbers below are to the paragraph numbers of the new schedule 1A.
- A.52 Paragraph 2 provides that the amount of the fixed net sum after the coming into force of the schedule is to be the same as it was immediately before.
- A.53 Paragraph 3(1) retains the Lord Chancellor’s power to set the level of the fixed net sum by order. Paragraph 3(2) provides that any such order relates only to deaths occurring after the coming into force of the order. Paragraph 3(3) provides that the current level of the fixed net sum (see paragraph 2) will be superseded once the first order is made under the power in paragraph 3(1).
- A.54 Paragraph 3(4) provides that a statutory instrument containing an order made under paragraph 3(1) is subject to annulment by either House of Parliament. This means that the new amount of the fixed net sum passes into law unless there is a resolution in either the House of Commons or House of Lords annulling it. Paragraph 3(5) disapplies this negative resolution procedure in the case where the Lord Chancellor determines the amount of the fixed net sum without using the index-linking mechanism set out in paragraph 6 of the new schedule, or amends paragraph 6 under the powers set out in paragraph 7. In those cases, each House of Parliament must positively approve the statutory instrument containing the order (see paragraph 5(3)).
- A.55 Paragraph 4 requires the Lord Chancellor to make an order setting the fixed net sum at least every five years. The first such order must be made within five years of the date on which the new schedule comes into force. Subsequent orders must be made within five years of the previous order.
- A.56 Paragraph 5 provides that, unless the Lord Chancellor otherwise determines, the fixed net sum specified in each order should be the amount given by following the procedure set out in paragraph 6. That procedure “index-links” the fixed net sum by increasing it by an amount that reflects any increase in the retail prices index measure of economic inflation. The procedure operates on an “upwards only” basis; if there has been no inflation or there has been deflation in the economy, the amount of the fixed net sum does not change under the paragraph 6 procedure.
- A.57 Paragraphs 5(2) to 5(4) apply where the Lord Chancellor does decide to set the fixed net sum without using the index-linking mechanism at paragraph 6.

- A.58 Paragraph 5(2)(a) provides that the Lord Chancellor may set the fixed net sum at any amount, including an amount equal to or lower than the pre-existing figure.
- A.59 Paragraph 5(2)(b) requires the Lord Chancellor to prepare a report stating the reason why it has been decided to set the fixed net sum without using the index-linking mechanism at paragraph 6. This report must be laid before Parliament before or at the same time as the instrument containing the draft order is laid before Parliament (paragraph 5(4)).
- A.60 Paragraph 5(3) requires any order setting the fixed net sum at a level other than that obtained by the index-linking procedure to be positively approved by a resolution in each House of Parliament (see paragraph 3(5)).
- A.61 Paragraph 6 sets out the procedure to be used to determine the amount of the fixed net sum in any case covered by paragraph 5(1) (that is, in every case except where the Lord Chancellor has decided otherwise). This involves ascertaining the retail prices index for the current month (that is, the most recent month for which a figure is available when the Lord Chancellor makes the statutory instrument setting the new level of the fixed net sum: see paragraph 6(4)). This figure is compared with the equivalent figure for the base month (that is, the month that was the "current month" for the previous order or, in the case of the first order made under the schedule, the month in which the schedule came into force: see paragraph 6(4)).
- A.62 If the retail prices index for the current month is higher than that for the base month, then the new amount of the fixed net sum is calculated by increasing the existing figure by the same percentage as the percentage increase in the two retail prices index figures (paragraph 6(1)), and then rounding the resulting figure up to the next multiple of £1,000 (paragraph 6(2)).
- A.63 If the retail prices index for the current month is the same or lower than that for the base month, then the amount specified in the order is the same as the existing amount (unless the Lord Chancellor otherwise determines). The fixed net sum therefore remains the same.
- A.64 Paragraph 6(4) defines the terms "base month", "current month" and "retail prices index" for the purposes of paragraph 6.
- A.65 Paragraph 7 gives the Lord Chancellor power to amend paragraph 6 by specifying an index other than the retail prices index and to make any other amendments to paragraph 6 that are required as a result of that change. This power is intended to recognise that the retail prices index may cease to be the most appropriate index to use (for example, it may no longer be published, or the Government may decide that the consumer prices index or some other index is a more appropriate measure of inflation for these purposes). Paragraph 7 enables paragraph 6 to be amended by order without the need for further primary legislation. A statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

Schedule 2: amendments of Inheritance (Provision for Family and Dependants) Act 1975

- A.66 Clause 6 and schedule 2 make amendments to the Inheritance (Provision for Family and Dependants) Act 1975.
- A.67 Under the current law, a family provision claim cannot be made unless the deceased died domiciled in England and Wales. Paragraph 2 widens this precondition so that an application can alternatively be made if the deceased's estate includes, or is treated as including, certain property to which the domestic succession law of England and Wales applies.
- A.68 Paragraph 2 replaces the current reference in section 1(1) of the 1975 Act with new subsection (4). The existing condition that the deceased died domiciled in England and Wales is reproduced at paragraph (a). Paragraphs (b) to (e) refer to the new applicable law condition.
- A.69 The applicable law condition is set out at new subsection (5). This condition is satisfied, in relation to a particular asset, if a court in England and Wales would find that the domestic succession law of England and Wales applies to that asset. For example, if the deceased was not domiciled in this jurisdiction but owned land here, the applicable law condition is satisfied: land in this jurisdiction is governed by the domestic succession law of this country. In some cases, the domestic succession law of England and Wales applies not because the deceased was domiciled or owned land in this jurisdiction but because the rules of private international law lead to its application. For example, if the rules of private international law applied by the English court indicate that the law of another country applies, but a court in that country would apply the domestic succession law of England and Wales, then the applicable law condition is satisfied.
- A.70 Paragraphs (b) to (e) of subsection (4) all concern the applicable law condition; if it is satisfied in relation to the money or other property specified in one of these paragraphs, then an application for financial provision under the 1975 Act may be made. The court's power to make an order in relation to such an application is not limited to that money or other property. Paragraph (b) concerns assets included in the deceased's estate; for example, land owned in his or her sole name. Paragraph (c) relates to assets caught by section 8 of the 1975 Act: sums of money which are the subject of a nomination made by the deceased in accordance with an enactment in favour of a person, and money or other property comprised in a *donatio mortis causa* ("deathbed gift") made by the deceased. For example, if X, knowing that her death is imminent, makes a gift of land in England on the basis that it will only take effect on her death, the applicable law condition is satisfied in relation to X's estate.
- A.71 Paragraph (d) concerns property which was co-owned by the deceased and one or more others as joint tenants: where property is jointly owned in this way, on the death of one co-owner the property passes automatically to the surviving co-owner or co-owners. Despite this inheritance by survivorship, if the property itself satisfies the applicable law condition, paragraph (d) applies.
- A.72 Paragraph (e) refers to cases within section 10(2)(a) and (b) of the 1975 Act, where the court is satisfied that a gift, or a transfer at an undervalue, was made by the deceased within six years of the death with the intention to defeat an

application for financial provision under the 1975 Act. Whether the deceased had such an intention is assessed in accordance with section 12(1) of the 1975 Act; the question is whether the court is satisfied that, on the balance of probabilities, the intention of the deceased in making the gift or transfer was to prevent an order from being made or reduce the amount of provision which could be ordered. If such a gift or transfer was made, and the property subject to it satisfies the applicable law condition, then paragraph (e) applies to the deceased's estate and an application under the 1975 Act can be made. This does not affect the court's decision as to whether any order should in fact be made under section 10 of the 1975 Act, requiring the person to whom the gift or transfer was made to provide money or property from which financial provision can be made.

- A.73 Paragraph 3 of schedule 2 amends section 1(1) of the 1975 Act, which sets out the categories of relatives and dependants who can apply under the Act. These categories include, at section 1(1)(d), any person who was treated by the deceased as a "child of the family" in relation to a marriage or civil partnership to which the deceased was at any time a party. Paragraph 3 extends that category of applicant by amending section 1(1)(d) to include any person who was treated by the deceased as a child of the family, not in relation to a marriage or civil partnership, but in relation to any other family in which the deceased had a parental role (sub-paragraph (a)). The requirement that the deceased stood in a parental role in that family clarifies that the relationship between the deceased and the applicant needs to have been akin to that between a parent and a child. Other family members who form part of the deceased's family, but in relation to whom the deceased did not stand in a parental role, are not brought within the scope of the category.
- A.74 Paragraph (3)(b) inserts new subsection (2A) in section 1 of the 1975 Act. This provision establishes that an applicant can be treated as a child of the family (otherwise than in relation to the deceased's marriage or civil partnership) even if that family only existed in the relationship between the deceased and the applicant. Thus, a "single parent family" is included within the scope of section 1(1)(d) as amended.
- A.75 Paragraph 4 of schedule 2 amends section 1(3) of the 1975 Act. That subsection qualifies the interpretation of section 1(1)(e), which permits a person to make an application under the Act if immediately before the death of the deceased he or she was being maintained, either wholly or partly, by the deceased. Such applicants are usually described as "dependants" and section 1(3) as currently worded provides that a person shall be treated as being maintained by the deceased if the deceased was, otherwise than for full valuable consideration, making a substantial contribution towards that person's reasonable needs.
- A.76 The words "otherwise than for full valuable consideration" have been interpreted as requiring the court to balance the contribution made by the deceased towards the needs of the applicant against any benefits flowing the other way (from the applicant to the deceased). This is the case even if the applicant and the deceased were living in an interdependent domestic relationship with no commercial aspect. If the "balance sheet" shows that the applicant contributed more to the deceased than vice versa, then the applicant cannot be said to have been maintained by the deceased and cannot apply under section 1(1)(e).

- A.77 The new wording of section 1(3) still requires the deceased to have been making a substantial contribution towards the reasonable needs of the applicant but the words “otherwise than for full valuable consideration” are omitted. Instead, there is a narrower exception for any contribution that was made for full valuable consideration pursuant to an arrangement of a commercial nature. This will mean that contributions made between people in a domestic context should not be weighed against one another for these purposes.
- A.78 Paragraph 5 of schedule 2 amends section 2 of the 1975 Act, which governs the court’s powers to make orders if it is satisfied that the deceased’s will or the intestacy rules (or a combination of both) did not make reasonable provision for the applicant.
- A.79 Paragraph 5(2) inserts a new section 2(1)(h) into the 1975 Act, giving the court an express power to vary, for the applicant’s benefit, the trusts on which the deceased’s estate is held (whether these are trusts arising on intestacy or under a will or both). This provides a more direct way of achieving a result that under the current law may require the creation of a new trust or trusts to replace the existing trust or trusts under which the estate is held.
- A.80 Paragraph 5(3) concerns the assessment of the net estate of the deceased. Under section 2 of the 1975 Act, the court may make various orders in relation to the net estate, such as the payment of a lump sum to the applicant. The net estate is defined at section 25(1) of the 1975 Act, which specifies the assets which are included and provides for the deduction of funeral, testamentary and administration expenses, debts and liabilities, including inheritance tax payable out of the estate. It is possible, under section 19(1) of the 1975 Act, for the calculation of such liabilities to be affected by the making of an order under section 2; for example, because changes in the way in which the estate is distributed affect the calculation of tax.
- A.81 Paragraph 5(3) adds a new subsection (3A) to section 2 of the 1975 Act, confirming that in making an order under section 2 the court may assess the net estate on the assumption that the order has already been made. The court may therefore make an order which extends to the whole of the net estate after the liabilities have been recalculated in accordance with that order.
- A.82 Paragraph 6 of schedule 2 amends section 3 of the 1975 Act, which sets out matters to which the court is to have regard when exercising its order-making powers under section 2 of the Act. Where the applicant was the spouse or civil partner of the deceased, one of the matters to which the court is to have regard is the award that a court would have made in proceedings for “ancillary relief” had the marriage or civil partnership ended in divorce or dissolution: section 3(2) of the 1975 Act. The words added by paragraph 6(2) make clear, so as to avoid any uncertainty, that this exercise is not to be regarded as setting either a lower limit or an upper limit on the level of any award under the 1975 Act.
- A.83 Paragraph 6(3) of schedule 2 concerns matters to which the court is to have regard where the application is made by virtue of section 1(1)(d) of the 1975 Act, on the basis that the deceased treated the applicant as a child of the family. It amends paragraphs (a) and (b) of section 3(3) of the 1975 Act to clarify the matters which are there set out, in order to avoid any uncertainty consequent on

the amendments also made to section 3(4) of the 1975 Act, discussed immediately below.

- A.84 Paragraph (a) of section 3(3), as amended, directs the court to have regard to whether the deceased maintained the applicant; and if so, to the duration of that maintenance, the basis on which it was provided, and how much maintenance the deceased contributed. New paragraph (aa) of section 3(3) requires the court also to have regard to whether the deceased assumed responsibility for the applicant's maintenance, and if so, to what extent. A necessary consequential amendment is made to paragraph (b) of section 3(3), which concerns the requirement for the court to have regard to whether – if the deceased maintained or assumed responsibility for maintaining the applicant – the deceased did so in the knowledge that the applicant was not his or her own child.
- A.85 Paragraph 6(4) of schedule 2 amends section 3(4) of the 1975 Act, which sets out matters to which the court is to have regard in relation to an application brought by a dependant: that is, on the basis that the applicant was maintained by the deceased, under section 1(1)(e) of the 1975 Act. The amendments separate two issues to which the court is to have regard. Under section 3(4)(a), the court must consider the duration of the maintenance provided, the basis on which it was provided, and the extent of the contribution thereby made by the deceased. Under section 3(4)(b), the court must also have regard to whether the deceased assumed responsibility for the applicant's maintenance (beyond the actual provision of maintenance) and if so, the extent of that assumption of responsibility. 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 under section 1(1)(e) of the 1975 Act is thereby removed. An applicant qualifies to apply under the 1975 Act as a dependant if he or she satisfies the terms of section 1(1)(e), read with section 1(3); see paragraphs A.75 to A.77 above.
- A.86 Paragraph 7 of schedule 2 amends section 4 of the 1975 Act to expressly permit an application to be made under the Act before a grant of representation has been made in respect of the estate. A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases.
- A.87 Paragraph 8 of schedule 2 amends section 9 of the 1975 Act, which governs the way in which the court treats property which the deceased co-owned with others as a beneficial joint tenant immediately before his or her death. Under this form of co-ownership, the death of any one co-owner causes that co-owner's undivided share of the property to pass automatically to the other co-owners. It does not therefore form part of the deceased co-owner's estate. Section 9 permits the court to treat the deceased's severable share of any such property as part of the deceased's net estate to such extent as appears to the court to be just in all the circumstances of the case. Once included in the net estate for these purposes, the property can be the subject of an order under section 2 of the Act.
- A.88 Paragraph 8 amends section 9 of the 1975 Act in two ways. First, it omits the words "before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out". This permits the court to exercise the section 9 power even where the application had been made more than six months after a grant of representation was first

taken out (if the court has given permission for the application to be made; see section 4 of the 1975 Act). The second amendment replaces the words “at the value thereof immediately before his death” with the words “valued at such date as appears to the court to be appropriate”. The current wording was considered by the Court of Appeal in *Dingmar v Dingmar* [2006] EWCA Civ 92 and its meaning was found to be unclear. The amendment is intended to make clear that the court has discretion to choose the most appropriate date at which to value the property in question, taking into account such factors as the increase or decrease in its value between the death of the deceased and the hearing of the claim and the reasons for any change in value, for example the effect of any improvements or neglect for which the surviving joint tenants are responsible.

Schedule 3: determination of date when representation is first taken out

- A.89 Clause 7 and schedule 3 amend section 23 of the 1975 Act and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a deceased person was first taken out. These are section 31(9) of the Matrimonial Causes Act 1973, section 20(4) of the Administration of Justice Act 1982, paragraphs 7 and 11 of schedule 1 to the Children Act 1989, and paragraph 60 of schedule 5 to the Civil Partnership Act 2004.
- A.90 The significance of the determination of this date depends on the particular statutory context. An application for an order under section 2 of the 1975 Act, for example, must be made within six months of this date unless the court gives permission for a late application (see section 4 of the 1975 Act).
- A.91 Under section 23 (and the other statutory provisions amended by schedule 3) grants limited to settled land and to trust property are left out of account as are grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. There are a number of other types of grant which give the personal administrators certain powers (for example, to collect in the assets of the estate and protect them or to represent the estate in litigation) but do not permit any property in the estate to be distributed. There is uncertainty under the current law over whether the making of such a grant counts as the first taking out of representation for the purposes of section 23 (and by analogy for the various purposes in the other statutes which use the same wording). There is also uncertainty over the status for these purposes of a grant made outside the United Kingdom (that is, other than a grant made in England and Wales or in Scotland).
- A.92 Clause 7 and schedule 3 clarify this uncertainty by substituting in each case new provisions in place of the existing provisions. These maintain the current position by leaving out of account grants limited to settled land and to trust property as well as grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. A grant limited to trust property is issued where the deceased held legal title to property as trustee for others and there is no other estate for which a grant is required. A limited grant is needed to permit the personal representatives to deal with the trust property but it does not permit the distribution of any of the deceased's own property. Similarly, succession to settled land is governed by special rules and is not available for distribution by the personal representatives

as part of the deceased's estate. The new provisions expressly exclude from consideration any other grant which also does not permit any of the estate to be distributed. The new provisions also require grants made outside the United Kingdom to be left out of account. For these purposes, a grant which is "resealed" in the United Kingdom under the Colonial Probates Act 1892 is treated as a grant made in the United Kingdom. Any such grant is taken to have been made on the date it was sealed and not the date on which the original grant was taken out.

Schedule 4: minor and consequential amendments

- A.93 Paragraph 1 of schedule 4 makes minor and consequential amendments to the Administration of Estates Act 1925.
- A.94 Paragraph 1(2) omits section 46(3) of the 1925 Act, which operates in limited circumstances where an intestate and his or her younger spouse or civil partner died in circumstances rendering it uncertain which one survived the other. Ordinarily, section 184 of the Law of Property Act 1925 would deem the younger spouse or civil partner to have survived the intestate but section 46(3) provides that section 46 is to have effect as if the younger spouse or civil partner had not survived the intestate. In other words, for these limited purposes only, section 46(3) disapplies the deemed survival under section 184 of the Law of Property Act 1925. But section 46(2A) of the Administration of Estates Act 1925 (inserted by the Law Reform (Succession) Act 1995) has rendered section 46(3) redundant. Section 46(2A) operates where the intestate's spouse or civil partner survives the intestate but dies within 28 days of the intestate's death. In those circumstances, the spouse or civil partner is deemed not to have survived. Therefore, in the circumstances contemplated by section 46(3), the younger spouse or civil partner is deemed by section 46(2A) not to have survived for the purposes of the intestacy rules. Section 46(3) therefore no longer serves a purpose and can be repealed.
- A.95 Paragraph 1(3) omits section 47A of the Administration of Estates Act 1925, which gives a surviving spouse or civil partner a right to redeem a life interest arising on intestacy. The reforms enacted under clause 1 of the draft Bill mean that no further life interests will be created under the intestacy rules. Section 47A will therefore become redundant for deaths after the coming into force of clause 1 and can be repealed.
- A.96 Paragraph 1(4) omits section 48(2)(b) of the Administration of Estates Act 1925, which gives personal representatives power to raise capital to enable the purchase or redemption of the surviving spouse or civil partner's life interest by borrowing against the security of the rest of the estate. The reforms enacted under clause 1 of the draft Bill mean that no further life interests will arise under the intestacy rules. Section 48(2)(b) will therefore become redundant for deaths after the coming into force of clause 1. Paragraph 1(4) therefore omits section 48(2)(b) and amends the rest of section 48 accordingly.
- A.97 Paragraph 1(5) omits section 49(4) of the Administration of Estates Act 1925, which clarifies the way in which the word "property" is used in section 47A and is rendered unnecessary by the repeal of section 47A.
- A.98 Paragraph 2 of schedule 4 makes minor and consequential amendments to the Intestates' Estates Act 1952, schedule 2 of which governs the operation of a

surviving spouse or civil partner's right to appropriate his or her former matrimonial or civil partnership home.

- A.99 Paragraph 2(2) omits paragraph 1(4) of schedule 2 to the 1952 Act. That paragraph deals with the treatment of a spouse or civil partner's life interest created under the intestacy rules and is rendered redundant by clause 1 of the draft Bill, which has the effect that no such interests will be created in future.
- A.100 Paragraph 2(3) substitutes new wording for paragraph 3(3) of schedule 2 to the 1952 Act to take account of the repeal of section 47A of the Administration of Estates Act 1925.
- A.101 Paragraph 3 of schedule 4 amends the Administration of Justice Act 1977 by omitting section 28(1), which inserted subsection (1A) into section 46 of the Administration of Estates Act 1925 (giving the Lord Chancellor power to set the interest rate that accrues on the fixed net sum to which a surviving spouse or civil partner is entitled). Clause 1(3) of the draft Bill substitutes a new subsection (1A) into section 46 of the 1925 Act, rendering section 28(1) of the 1977 Act redundant.
- A.102 Paragraph 4 of schedule 4 amends the Inheritance Tax Act 1984 to take account of the repeal of section 47A of the Administration of Estates Act 1925.

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