

Response of the Capacity, Succession and Estate Planning Sub-Committee to the Government of Jersey's Consultation on proposed amendments to the Wills & Succession (Jersey) 1993 (the "1993 Law")

Right to enjoy the family home

Proposed change - A spouse or civil partner should have the legal right to life enjoyment of the family home if their spouse or civil partner dies and does not leave it to them in their will (see Article 5A of the draft Law).

1. The Sub-Committee agrees with the principle of the proposed change but would like to raise some ancillary/drafting points.
2. The sub-committee takes the view that it would make practical sense for rights afforded to a surviving spouse/civil partner in a testate estate to align with rights afforded to those persons in an intestate estate, and so it would be in favour of the proposal. That said, it is noted that this proposed change would not permit a Jersey domiciled person who was married/in a civil partnership to have complete testamentary freedom with respect to his/her immovable property, which has arguably been the direction of travel for Jersey succession law over the last few decades.
3. The sub-committee does have some concerns about the precise drafting of the new Article 5A.
4. Firstly, on its face, it is unclear whether Article 5A is meant to substitute the legal right of life enjoyment of the matrimonial home for the customary law right of dower in all circumstances, or whether that statutory right runs in tandem with any existing customary right of dower over any other immovable property owned by the deceased person. This could presumably be clarified by express language in the statute.
5. It is acknowledged in the absence of any statutory/customary law rights in relation to the testate succession of immovable property, that surviving spouses/civil partners (in particular women) may face disadvantages and hardships. The sub-committee accepts that it is generally a "good thing" for Jersey law to ensure that a surviving spouse/civil partner is not "left without a roof over his/her head". Nevertheless, a "one size fits all" statutory right of life enjoyment is not without its issues.
6. For example, a surviving spouse/civil partner might not have the financial means to maintain the matrimonial home over the course of several years, which could ultimately devalue the property to the detriment of the reversionary owners, particularly if the surviving spouse/civil partner was relatively young.
7. Conversely, if the surviving spouse/civil partner is financially independent then he/she might have no need for a right of life enjoyment to the matrimonial home. This scenario could arise for example in the case of a second marriage where the testator has intentionally left their immovable property to their children of their first marriage in the full knowledge that their surviving spouse/civil partner was wealthy in their own right.
8. In the event of the surviving spouse/civil partner wishing to disclaim their right to the life enjoyment there should be a clear and cost-effective mechanism for them to do so. The sub-committee would favour a procedure which did not require an application to the Royal Court.
9. At least one member of the sub-committee has advocated for an amendment to the Law to enable the ability not only to disclaim the right to the new dower (as proposed above) but in fact to enable anyone who inherited a share of immovable property whether on an intestate or a testate succession by way of statutory right. At present, a potentially costly court application is required. It

would be far more cost effective if an heir who wished to disclaim could simply sign an Instrument of Disclaimer before an Advocate or Ecrivain which could be registered in the Public Registry.

10. At present parties to a marriage or civil partnership are able to disclaim their succession rights by way of *contrat de mariage*. Presumably the new proposals would not override these rights?
11. In the sub-committee's view, Article 5A should also expressly state whether the legal right to the (new) statutory right of life enjoyment is an automatic right or whether it has to be claimed within a particular time period as is the case with *légitime*.

Change to the "principal heir"

Proposed change – The concept of the principal heir would be changed so that it would be the eldest heir regardless of gender (see Article 14C of the draft Law).

12. The sub-committee agrees with this proposal. It removes the current discriminatory position and will prevent unfortunate errors in relation to small estates where an individual may unexpectedly find themselves in breach of the law by identifying themselves as the principal heir when they actually are not.
13. Indeed, there is a case for saying that the (now largely historic) concept of the principal heir should be abolished completely. In the UK there is a class of people who are entitled to apply for a Grant of Representation rather than just one person.
14. It would make the point that proposed change would probably make little or no difference to the current practice. Most of the historic rights of the principal heir have now been abolished or made redundant. Further, the Probate Registrar has always had a discretion under Article 14 of the Probate (Jersey) Law 1998 to appoint a suitable person to administer the estate irrespective of their gender or age, and so in recent years the identification of the principal heir has become an informal "default setting" for the administrator/executor dative.

Relatives of the whole and half-blood

Proposed change – To do one of two things, either:

- (a) Restore the position to the pre-1993 Law position so that the whole/half blood rule expressly applies to both immovable and movable property; or*
 - (b) Abolish the rule so that whole and half blood relatives inherit the same proportion of a person's estate on intestacy*
15. The members of sub-committee were unable to reach a consensus view on this proposal. Roughly half of them favoured the restoration of the pre-1993 position and the remainder opted for the abolition of the rule.

Proposed Drafting Changes

The sub-committee members have no comments save in relation to Article 6: Devolution of immovable estate on intestacy.

Given that this article recites who is entitled to inherit and in what shares it seems strange to leave out option 3: if the individual is survived by issue but no spouse or civil partner.

Future Amendments – further matters to consider

The sub-committee is of the view that there is more scope for amending the law. In particular consideration should be made to the following:

1. Minor/vulnerable children – they have no protection in regard to the family home and could potentially be disinherited accidentally or by design.

The sub-committee is still completely split as to whether we should retain our system of quasi-forced heirship (*légitime*) or whether there should be testamentary freedom (which was approved in principle by the States of Jersey in 2001); however, if the former then:

2. A process should exist whereby a legal heir can disclaim their succession rights prior to death – this is a halfway house and allows for testamentary freedom if all the heirs agree. There is a similar provision in French law but the process is highly regulated as an important safeguard – separate *Notaires* to advise on the consequences. Certain members of the sub-committee are of the view that this would work well in Jersey and would mean that we do not need to abolish forced heirship but have an ability to plan around it. Alternatively, we could increase the scope for marriage contracts to include all legal heirs – the oldest generation of heir would need to be able to bind the generations below.
3. With the retention of forced heirship consideration should be given to the distinction between immovable property and share transfer (movable property). If the main asset is immovable property, then an individual has testamentary freedom (save for the *usufruit* on an intestacy and the (new) dower on a testate succession); however, if the main asset is share transfer property then (subject to the above) this is also subject to *légitime*. Should forced heirship be widened to include immovable property although perhaps this is a little too controversial!

The sub-committee is keen to be consulted again before the proposals are finalised.

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