

Law Changes Recommended on Inheritance

The Law Reform Commission has recommended a number of legislative changes to simplify and modernize the law of succession upon death.

The Commission today (Friday) published a report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants.

The report was the result of five years work by the Commission, and a Sub-committee chaired by Mr B.S, McElney to explore in detail this complex but important area of the law.

The proposals recognize the social and legal developments that have taken place since the last comprehensive review of this area of the law in 1971.

Recent overseas legislative initiatives have also provided useful examples of how other jurisdictions have modified the law in this area.

The Commission's proposal will affect all members of the community as they encompass both the situation where a deceased has made a will and the situation where he has failed to do so.

The existing law governing the position where a deceased leaves a will is in the Commission's view excessively technical.

The Wills Ordinance imposes a number of formal requirements which must be satisfied for a will to be valid.

In particular, the requirement that a testator's signature be in a particular place, that is, at the end of the will, has resulted in wills being held invalid and the testator's clear intentions being defeated.

The Law Reform Commission has recommended amendments that will substantially relax these formal requirements. The proposed

amendment retains the present requirement that the testator signs the will in the presence of two witnesses.

Whilst the existing formal requirements of wills are overly stringent, they are accompanied by a provision which is excessively lax. The provision presently provides that any will of a Chinese testator, written wholly or substantially in Chinese and signed by the testator, shall be valid although failing to comply with any of the formalities.

This provision allows informal will-making by the vast majority of the population without any formal check as to authenticity.

The Commission considers this lack of safeguards against forgery and the like unsatisfactory. In the light of recent legislative initiatives in other common law jurisdictions, the Commission has recommended the replacement of the present provision relating to Chinese wills.

It recommends a provision applying to all wills to the effect that if the document is signed by or on behalf of the testator and it appears to the court to be one which the testator intended to be his will, then regardless of its compliance with the formal requirements it is a valid will. The Commission believes that this provision will ensure both simplicity and relative certainty in the law.

The Commission has also recommended a number of less fundamental amendments to the Wills Ordinance with the aim of removing the anomalies that the sometimes archaic existing legal provisions have created.

Many people die without leaving wills and are then said to have died “intestate”. The Intestates’ Estates Ordinance 1971 governs the manner in which an intestate estate is to be administered.

The Ordinance contains a number of rules which are based upon the assumption that people who die intestate would, if they had made a will, have wished to provide for their near relations.

The primary assumption is that people wish to provide for their widows or widowers and for their children equally.

But in the Commission's view the existing ordinance insufficiently implements these assumptions.

At present where there are children a surviving spouse is entitled to only \$50,000 and one half of the remainder of the estate, and where there are no children the amount is \$200,000.

The Commission considers that the level of these statutory legacies is presently too low. Nor do the existing provisions confer directly on a surviving spouse the right to acquire the intestate's interests in the matrimonial home with the statutory legacies.

The Commission accordingly recommends that the statutory legacy levels to the surviving spouse be increased to \$500,000 where there are children, and \$1,000,000 where there are no children.

These amounts are much more in keeping with current property prices and should be sufficient to enable the purchase of the average small matrimonial home.

The Commission also recommends that the surviving spouse have the right to acquire the interests of the deceased in the matrimonial home. The increased statutory legacy levels will facilitate the exercise of this right.

Another aspect of the existing law which the Commission considers unsatisfactory relates to the personal chattels of an intestate.

Under the existing law where an intestate is survived not only by the spouse but also other relations, that surviving spouse does not inherit the personal chattels.

At most he or she may be permitted to buy them out of his or her statutory legacy. This creates the potential for family quarrels.

The Commission accordingly recommends that a surviving spouse inherit from the intestate the household goods and personal effects that one could reasonably expect to be in or about a matrimonial home.

The Commission also considers that the Intestates' Estates Ordinance operates unfairly due to its definition of child.

As a result where a husband and wife are each in their second marriage, previous children of the husband are deemed to be his second wife's children, but previous children of the wife are not deemed to be her second husband's children. Illegitimate children are also excluded.

The Commission recommends the adoption of a new definition of child which will abolish these anomalies and provide that relationships be construed regardless of the concept of legitimacy.

The concept of illegitimacy also unfairly affects the determination of the right of relatives to inherit from an illegitimate intestate. Similarly, the Commission recommends that in determining these rights the illegitimacy of the intestate is irrelevant.

In discarding the relevance of illegitimacy in determining rights of inheritance, the Commission is mindful of Article 26 of the International Covenant of Civil and Political Rights which among other things provides that persons should not be discriminated against on the basis of social origin or birth.

The law of inheritance in Hong Kong is complicated by the fact that whilst the legislation on the matter generally follows that of England, a degree of statutory recognition is also accorded to Chinese customary law. Thus concubinage is recognised if it was entered into prior to October 7, 1971.

The rules relating to concubinage are complex and in some respects anomalous and the Commission has recommended that they be modified.

In one sphere Chinese customary law displaces the operation of the Intestates' Estates Ordinance altogether. Chinese customary law still governs inheritance upon intestacy in respect of land in the New Territories which is not exempted under the New Territories Ordinance.

Chinese customary law favours descent through the male line

and daughters can be cut out of an inheritance.

The Commission considers it difficult to justify this preservation of customary law in this context and recommends that it be abolished and that the Intestates' Estates Ordinance apply.

If a complete abolition of this customary law is considered unacceptable, the Commission proposes the very least that should be done is that the law be amended, so that its operation is limited only to non-exempted land in the New Territories which is registered in the name of or held for the benefit of a Chinese clan, family, tong or tso. Land registered or held otherwise would accordingly devolve upon intestacy under the normal provisions of the Ordinance.

The Wills Ordinance proceeds on the basis that a will-making testator is free to dispose of his property to whom he pleases. But this principle of freedom of testamentary disposition can result in inadequate provision for a testator's dependants.

The Deceased's Family Maintenance Ordinance gives jurisdiction to the courts to interfere with the testator's expressed testamentary intentions in cases where reasonable provision had not been made for the dependant's maintenance.

The Ordinance also applies where the deceased had not made a will and the provisions of the Intestates' Estates Ordinance determine the distribution of the estate in order to avoid hardship in particular cases.

The present Ordinance limits the classes of those entitled to claim under it to the deceased's spouses, legitimate unmarried daughters' legitimate infant sons, legitimate adult sons who are physically or mentally disabled, and a parent substantially maintained by the deceased immediately prior to his death.

These classes are obviously restrictive and the Commission recommends that these qualifications on entitlement to claim be substantially relaxed.

To accommodate legitimate claims by those outside the deceased's immediate family the Commission recommends the inclusion of a new class of persons entitled to apply, namely any person who immediately before the death of the deceased was being maintained by him.

At present in family maintenance proceedings the court is only empowered to order that maintenance be paid. Capital payments may not be ordered.

To increase the court's flexibility the Commission recommends that its powers be extended so that they are similar to the court's' powers to order financial provision in matrimonial proceedings.

The Commission also recommends that the matters to be taken into account by a court when considering a family maintenance application be spelt out in greater detail.

As a testator may wish to so arrange his affairs as render fruitless any application after his death, the Commission recommends the enactment of an anti-avoidance provision. This would confer upon courts certain powers to set aside transactions which are intended to avoid applications for family maintenance.