SUCCESSION RIGHTS

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by the Legislation Committee

STATES OF JERSEY

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Preliminary

1. In its consultative document R.C.32/99, entitled *"Succession Rights for Children born out of Wedlock"* presented to the States on 14th September 1999, the Legislation Committee, having noted that the status of the illegitimate child in Jersey law was encapsulated in the blunt statement that such a child was *"un étranger à sa famille"* - literally *"alien to his family"* - and that existing law had made only a small inroad into this underlying customary law principle, proposed that consideration be given to extending the rights of the illegitimate child to inherit from the estates of his/her wider family as though he/she were legitimate. In reaching that proposal, the Legislation Committee had regard to the European Convention on the Legal Status of Children born out of Wedlock, to which the United Kingdom signed up in 1975 subject to certain reservations, but to which Jersey has not signed up; and also to the European Convention on Human Rights which will become part of the domestic law of Jersey when the Human Rights (Jersey) Law 2000 comes into operation. By R.C.32/99, the Committee invited submissions from as many sections of the community as possible as to which of the various options canvassed in that report would best be followed.

2. The Legislation Committee was pleased to receive some very thoughtful submissions from a number of different people, and has been troubled by the possibility that the adoption of option 3 as set out in R.C.32/99, namely the widening of all succession rights on a non-discriminatory basis, might have undesirable practical consequences in cases where the existence of the illegitimate child was unknown to the legitimate family of the deceased prior to the date of his death. The Committee continues nonetheless to maintain strongly the proposition that any discrimination against illegitimate children requires objective and substantial justification. After anxious consideration, the Legislation Committee has resolved that as these two propositions come potentially if not actually into conflict as a result of the succession rights conferred by law, the better course is to adopt a two-pronged approach by both removing the discrimination against illegitimate children and also removing the fixed proportion of the movable estate (or "*légitime*") to which the surviving spouse and the legitimate children are entitled at present under the Law. It is for that reason that this report is being prepared for the States for further for further consultation.

Historical background

3. Until the Wills and Succession (Jersey) Law 1993, the customary law of the Island in essence provided that -

   (i) A man leaving a widow and legitimate children was required to leave by Will one-third of his movable estate to his widow and one-third to his children in equal shares. The Law afforded him the right to leave one-third of his movable estate wheresoever he liked (*le tiers disponible*).

   (ii) A man leaving a widow and no legitimate children was obliged to leave one-half of his movable estate to his widow.

   (iii) A man leaving no widow but legitimate children was obliged to leave two-thirds of his movable estate among his children in equal shares.

   (iv) A woman leaving a widower and children was obliged to leave two-thirds of her movable estate to her children, whether legitimate or illegitimate, in equal shares. She was not obliged to leave any part of her estate to her husband.

4. It is noteworthy that the illegitimate child only has rights in the estate of his/her deceased mother, and that this right was created by the Legitimacy (Jersey) Law 1973.

5. These historic provisions were changed by the Wills and Succession (Jersey) Law 1993, which created some further protection for the surviving spouse and in particular removed the gender discriminatory provisions of the customary law. Nonetheless, the 1993 Law left in place the basic structure for the division of personal estate such that the surviving spouse and the children, legitimate in the case of the deceased father and both legitimate and illegitimate in the case of the deceased mother, would have fixed shares out of the estate.

R.C.32/99 - Consultative process

6. One of those who made submissions to the Legislation Committee following the publication of R.C.32/99 drew attention to certain consequences which would have flowed from the Committee's preferred option of extending the rights of the illegitimate child to inherit from the estate as though he/she were legitimate. This type of example was

given -

> *'A' dies aged 75 survived by his wife, 'B'. They have been married for over 50 years but did not have any children. 'C' is the executor of the estate which is sworn for probate at a value of £300,000. 'A''s Will leaves everything to his wife. 'D' is an illegitimate son born to 'A' 45 years ago. He claims his légitime and he receives £100,000 from the estate."*

7. On the other hand, one may propose the following factual circumstances which would give rise to a quite different type of hardship -

> *"'D' dies a widower leaving two children, 'E' and 'F'. 'E' is his legitimate son, from whom he is estranged, and whom he has not seen for the last 30 years. 'F' is an illegitimate son who gave up the opportunity of promotion with his employer in order to remain in Jersey and care for his father during his last five years of a debilitating illness. 'D' has not made a Will, and the entire estate devolves upon his legitimate son, 'E'."*

Discussion

8. The Legislation Committee recognises that both these examples are at opposing ends of the spectrum. In the first case, the widow suffers not only the potential financial hardship of finding that the nest egg which she thought had been put aside for old age was no longer available, but also the emotional trauma of discovering after her husband's death that during the course of their marriage he had had a liaison with another woman about which the widow had hitherto been quite ignorant. It is too late for recrimination or questions, but happy memories may be destroyed. In the second case, the unfairness of the treatment of the two sons speaks for itself. The difficult question is to assess how examples of hardship at opposing ends of the spectrum can be resolved and avoided.

9. The Legislation Committee recognises that there will be many who would be sorry to see amended those traditional rules of Jersey law which require a fixed or reserved portion of the estate of a deceased to go to his/her family. However, the Legislation Committee is conscious of the need to ensure that laws in existence meet the current requirements of the society which they are intended to serve. Historically there are probably two distinct reasons for the *légitime* -

   (i) There is a need to ensure that the estate is available to meet the needs of the dependants of the deceased.

   (ii) There is a view that it is *"right"* for the estate to pass to the family of the deceased. This is a judgmental view, based presumably on what is perceived to be the correct morality of the situation. It may historically have emanated from the traditional view that a person is not the owner of property but merely the custodian of it during his lifetime. On this view, it may be thought unsurprising that limitations be placed on a person's right to dispose of estate on death, because it was not really his estate to dispose of in any event, and, marriage being ordained by God for the procreation of children and for the mutual society, health and comfort that one spouse ought to have in another, it is natural that the estate should pass on through the legitimate family.

10. For whatever rationale, the Law of Succession has previously been developed by a series of rules which determine how property belonging to those who live in a state of marriage which the law recognises, should be divided on death. In days gone by, the law was not concerned with illegitimate children because they were the product of people living outside the state which the law recognised, and either it was considered immoral, or conceptually absurd, or both, for the law to prescribe matters for those who wish to live outside it. Some may have regarded the law in that form to be consistent with the biblical maxim that the sins of the fathers shall be visited upon the children. Even in centuries gone by, and especially so today, it was a harsh result; it was never the fault of the child that he/she was illegitimate, and yet it was on the child that the penalty of disqualification from inheritance rights was imposed.

11. Today the changes in the structure of society suggest to the Legislation Committee that quite apart from the theoretical unacceptability of maintaining any form of discrimination between legitimate and illegitimate children, there is every practical reason not to do so. While the majority of the population appear still to favour marriage, a significant percentage prefer to cohabit and bring up a family in that state, rather than follow the traditional approach.

12. There is a further practical reason for wishing to contemplate change. The European Convention on Human Rights provides at Article 14 that the rights set out in the Convention shall be secured without discrimination *inter alia* on the grounds of birth or other status. The European Court has considered this Convention right on a number of occasions in relation to the inheritance rights of an illegitimate child to the estate of the child's mother and to the

estate of the child's paternal grandparents. However none of the cases referred to in the Legislation Committee's previous report, R.C.32/99, are cases which refer to the right of the illegitimate child to share in the father's estate where paternity has not previously been established or accepted. The link between the non-discrimination Article (Article 14) and the succession claims has generally been regarded as being Article 8 - which confers the right to respect for a person's private and family life. It may well be that in the future, determining whether the illegitimate child was or was not part of the family of his/her deceased natural father will be a key factor in determining the correct approach to the application of the Convention right. Any argument of that nature, which is an absolutely foreseeable argument, will add to the trauma and natural grief experienced by all those close to the deceased.

13. The Legislation Committee also recognises with regret that a significant proportion of marriages end up in divorce. Equally a significant proportion of marriages take place between those who have previously been married to others, and may have existing children from a first marriage. The Law of Succession which provides a fixed share in the movable estate can sometimes produce very difficult problems in practice. Where for example both spouses have previously been married to others, and have children from a first marriage, the surviving spouse, by virtue of the *légitime* acquires one-third of the deceased's estate, and by virtue of the *légitime* applying to the estate of the surviving spouse, at least two-thirds of that share will devolve upon the stepchildren of the spouse who had died first to the prejudice of that spouse's own children. This type of problem is thought to be quite common.

14. The old Law of Succession may well have been designed for regulating the division of property within the family but that does assume that there was only one family. The Legislation Committee takes the view that it is a false assumption to expect, as a matter of fact, that illegitimate children will necessarily be treated as part of the same family as legitimate children, particularly where they are illegitimate children of the father rather than the mother. It may happen from time to time, but the likelihood is that particularly in the case of a father's illegitimate children, the result will be that there are two families rather than one. The Legislation Committee considers that exactly the same problems can arise in the case of the families of divorcees, though of course they do not invariably arise. On this basis, the rules which have been provided by the law over the centuries for the division of the estate amongst one family should not necessarily be regarded as the right rules for the division of the estate amongst more than one family.

15. Nonetheless the Legislation Committee recognises that it is important that the law gives adequate protection for dependants of a deceased. There is both a public and a private interest in making proper provision. The private interest is quite obvious; and in a sense the public interest is no less obvious in that, if there are dependants of the deceased who are not adequately provided for by Will or on intestacy, then the likelihood is that the state would be obliged to intervene to alleviate any financial hardship which was being suffered.

16. There is presently a fundamental distinction between the approach in England and Wales on the one hand under which the Court is vested with a discretion to make provision for the family and dependants of the deceased, and the Jersey/Continental approach on the other hand under which the law automatically provides for a given share of the estate to devolve upon family members and/or spouses. The law of Jersey is of course closer to that of France, from which it is derived, than it is to that of England and Wales; but it is perhaps noteworthy that different yardsticks continue to apply even in European Union countries to the assessment of the rights of illegitimate children. In some countries, the deceased must have acknowledged paternity; in some countries, the offspring born through adultery within a marriage do not obtain the same share as the children born in marriage would have received.

17. Having given the matter anxious consideration, the Legislation Committee has come round to the view that the English approach, being less rigid, makes for greater fairness for spouses and dependent children, whether illegitimate or legitimate, who can claim that they deserve an inheritance. Indeed, such a regime enables common law partners and indeed any dependent persons to be able to claim for protection out of the estate of the deceased.

Overall conclusion

18. At present the Legislation Committee is therefore minded to proceed in the following manner -

(i) To bring a proposition before the States to repeal the Laws of Succession so as to allow any person to dispose of movable estate by Will as he/she sees fit, subject to paragraph (ii) below.

(ii) To create a jurisdiction in the Royal Court to make such Order as it thinks fit in the administration of the movable estate as provides a proper sum out of the estate for the maintenance and support of the dependants of the deceased.

(iii) To provide a new Law for succession to movable estate on intestacy the result of which will be to confer a

share on the surviving spouse and another share on all the children of the deceased whether legitimate or illegitimate in equal shares.

(iv) To provide protection for executors and administrators dealing with the administration of the estate of the deceased in good faith.

19. In making these proposals, the Committee recognises that it is only seven or eight years since the Wills and Successions (Jersey) Law 1993 was passed, which preserves the fixed share of succession to the movable estate of a deceased. Nonetheless the Committee's view is that once one accepts the principle that there should be no discrimination between legitimate and illegitimate children, there is no wisdom in preserving old succession rights, which are based upon a wholly different historical and social premise.

20. Submissions are therefore invited, to be received by 15th March 2001, on the Legislation Committee's proposals as set out above.

18th December 2000.