

COMMENTARY

on the

SUCCESSION LAW AMENDMENT ACT

and the

SURVIVORSHIP ACT

Law Reform Branch
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This commentary should be read with the Succession Law Amendment Act and the Survivorship Act. It explains the thinking behind the major provisions of the Bills. It also asks questions about them, and raises some further issues which are not dealt with in the Bills.

SUCCESSION LAW AMENDMENT ACT

Devolution of Estates Act

S. 1(1) This subsection changes the statutory entitlement of a surviving spouse in cases of intestacy. The amendment replaces the existing entitlement to the "personal chattels" of the deceased with an entitlement to the deceased's interest in any "marital property" of the couple. The net result will be that the survivor, on intestacy, will end up owning all of the marital property, since whatever part of it the survivor already owns will be supplemented under the Act by whatever part of it the deceased owned.

The amendment aims to bring the Marital Property Act and the Devolution of Estates Act more into line. At present, the Marital Property Act entitles the surviving spouse to claim, by application to the court, an equal division of the marital property, and that share is to include the marital home. The Devolution of Estates Act gives the spouse a right of inheritance (rather than one that requires an application to the court), and the right is to full ownership of (rather than an equal division of) the "personal chattels". The term "personal chattels" is similar in concept to "marital property," but excludes real property, and thus excludes the marital home.

There seems to be no reason why these two separate entitlements, so similar yet so different, should co-exist. Both express the idea that the surviving partner has a special interest in the ordinary property of the couple's everyday life. The proposed amendment carries this idea through by using the same concepts to define the entitlements in each Act. It also ensures that the entitlement of the surviving spouse on intestacy under the Devolution of Estates Act includes everything that he or she would normally get on an application under the Marital Property Act. In some respects this change, bringing the entire "marital property" into the

surviving spouse's entitlement on intestacy, is as much one of procedure as it is of substance. Under the law as it now stands, it seems that the surviving spouse can, in effect, combine the two statutory entitlements, first applying under the Marital Property Act for the marital home, and then claiming to be the only person entitled to the "personal chattels" under the Devolution of Estates Act. We are told that surviving spouses do now sometimes make applications under the Marital Property Act for the sole purpose of establishing the entitlement to the marital home. The amendment will make such applications unnecessary.

The effect of the proposed amendment is that in cases in which the entire estate of the deceased consists of marital property, it will all go to the surviving spouse, and none of it to any descendants of the deceased. This reflects the idea that, as between the spouse and the descendants (these being the only competing interests that the Devolution of Estates Act recognizes where there is a surviving spouse), the spouse's claim to the marital property is the stronger. The Devolution of Estates Act expresses a similar idea. Under that Act it is already the case that everything will go to the surviving spouse if the estate is composed entirely of "personal chattels". There is, one should note, a body of opinion which says that, on the death of a married person, the entire estate should go to the surviving spouse, and that this would do no

more than confirm the existing practice of the vast majority of married couples, who, when they make wills, leave everything to the survivor of them. The present amendment does not go that far. It does not suggest that the entire estate should vest in the survivor, but only that "marital property" should. Where the estate includes other things beyond marital property, the amendment would preserve the existing rule that the surplus be divided between the spouse and the children. A minor adjustment that might be appropriate here would be to say that the surplus should now be divided equally between the spouse and the children. This would remove the spouse's existing guarantee of receiving at least one third of the surplus, but would reflect the fact that the entitlement to the marital property is probably more beneficial than a right to the personal chattels, as they are now defined.

In the context of the Bill's general aim of improving the fit between the Devolution of Estates Act and the Marital Property Act, it is worth mentioning an alternative approach that, provisionally, we are not recommending. This is that the surviving spouse's special claim should relate to the "family assets" rather than to the "marital property." The "family assets" are part, but not the whole, of the "marital property" and are closer than it is to the "personal chattels" plus the

"marital home." To focus on the "family assets", however, would lose the advantage of simplicity. Under the present proposal, Marital Property Act applications in cases of intestacy should become virtually unnecessary, since the Devolution of Estates Act would already offer everything that a Marital Property Act application does. Simplicity, of course, might not be a major factor if there were some strong reason for strengthening the position of the descendants, as against that of the spouse, in relation to the part of the "marital property" that does not consist of "family assets." It is not obvious, however, that any such strong reason exists.

Another suggestion that has been put to us in relation to intestate succession is that the surviving spouse should have, in all cases, a claim to the first \$x,000 of the estate. Such a provision is found in the intestate succession legislation of several other jurisdictions. In those jurisdictions, however, it is the money figure itself which gives the surviving spouse his or her claim to priority over the other family members. New Brunswick's law was similar until the provisions relating to the "personal chattels" were introduced. These replaced the right to a prior money claim with a right to a prior claim to specific assets. Our belief is that this was a sensible course to take. The proposed amendment follows the same direction, and does not give a prior

money claim. The amendment produces the result, of course, that if the estate of the deceased contains no marital property, all of it being already owned by the survivor, the survivor will not have any preferred share, but will only share with the other family members. Again, this is already true of the existing law--if the surviving spouse is already the owner of the "personal chattels" the survivor's claim on intestacy is only to a share of the residue--and again, this appears reasonable. If the surviving spouse already owns all the "marital property", which will presumably include all the requisites of everyday life, there seems to be no reason for giving him or her a special claim to anything else.

S. 1(2) This subsection does two things. First, it removes the rule that a person who is living in adultery when his or her spouse dies intestate takes no share in the estate. Second, it describes a possible new rule under which the separation of a married couple might, in certain circumstances, extinguish the right to intestate succession.

The first part of this seems relatively straightforward. This bar on intestate succession was always peculiar in its operation, since a person who had lived in adultery for many years before his or her spouse died intestate, but who happened not to be living in adultery at the time of the death, was not barred from succession. As social values have changed, moreover, it has come to seem more

questionable that living in adultery should be sufficient ground for an automatic and complete exclusion of the spouse from any share on intestacy. The policy of legislation such as the Divorce Act and the Marital Property Act is in favour of reconciliation, this recognizing the fact that marital transgressions are sometimes forgiven and are rarely, in their nature, unforgiveable. Against this background, a rule of law that automatically disinherits a separated spouse who lives in adultery seems hard to justify. The basis for such a rule should be that it so obviously reflects what most people would think right that it is fair for the law to impose it. That, however, is not demonstrably the case. For some people, infidelity may be absolutely unacceptable, for others it may not, but the law, we suggest, should not impose the idea that it is unacceptable. The result of the amendment proposed would be that those who wished to disinherit for adultery should do so by will.

The second aspect of the amendment is the replacement of disqualification on grounds of adultery with disqualification on grounds of separation. The idea behind the proposal is that there comes a time when a separation is so final that it is a divorce in all but name, and that the law should recognize this by removing the nominal spouse's inheritance rights. The provisions of the proposed paragraphs 37(a), (b) and (c) are designed to provide a test of when the law should consider a breakdown of a marriage to be so complete as to justify

overriding the spouse's claims. The proposal listed is one that the Law Reform Branch has circulated for comment previously.

In the light of comments received, however, do not now feel that the amendment should proceed. We now prefer the view that only divorce should destroy a spouse's right to intestate succession. This is a reversal of the position from which our work on this provision began. It therefore requires some explanation.

In working towards the amendment proposed in the legislation, the starting-point was the idea that it was senseless that people who had separated so absolutely that the existence of a marriage was a mere legal technicality should still inherit from each other. This still seems a strong point, but a countervailing one seems stronger. This is that the only result of disinheriting the spouse by statute is to transfer to other beneficiaries the share that would have been the spouse's. In the normal case, in other words, if the spouse is excluded, the children benefit. If the spouse is excluded and there are no children, the parents, grandparents, brothers and sisters, and uncles and aunts of the deceased all enter the lists of possible beneficiaries.

An exclusion of the spouse in favour of whoever then turns out to be the next-of-kin seems unsatisfactory. Relationships between the deceased and the children or more distant relatives may easily have been every bit as strained as those between the deceased and the spouse. There is no obvious reason why the spouse's claim alone should be eliminated. We are therefore now of the view that the spouse should not be disinherited by statute, so long as a legal marriage exists. It should be noted, moreover, that the proposed revision under subsection 1(1) of these amendments to the entitlement of the surviving spouse on intestacy itself contains a self-correcting mechanism which may prevent the long-separated spouse from inheriting the bulk of the deceased's estate. If the spouse's entitlement is to be to the "marital property" and a share of the residue, a long separation should see the "marital property" part of the equation becoming less valuable, with residue becoming more valuable. Over time, therefore, the share of the surviving spouse will come more and more to resemble that of the children. This seems a reasonable recognition of the principle that a long separation should affect what a survivor can reasonably expect to inherit from an estranged spouse. To cut the spouse out entirely, however, would give too much force to that principle.

Marital Property Act

2(1)(a) and (b) These amendments make some adjustments to the entitlement of a surviving spouse on a Marital Property Act application. They include an attempt to deal with a difficulty which is said to arise out of the wording of the existing s. 4(1) of the Act. The difficulty is that the subsection gives the surviving spouse an entitlement--half of the marital property, that half to include the marital home--which may be self-contradictory. Where the marital home is more than half of the marital property, as may often be the case, how is the court to satisfy both branches of the entitlement?

The answer suggested by this amendment starts with the principle so far expressed in the case-law: that the right to the marital home prevails. The amendment then goes one stage further, and suggests that the right of the surviving spouse should be not merely to the marital home, but also to such other property as is necessary for the use and enjoyment of the marital home. The aim here is to ensure that the surviving spouse does not receive an empty house, which could theoretically occur otherwise if the house were half, or more than half, of the marital property. This expansion of the surviving spouse's share so that it includes other property that is necessary for the use and enjoyment of the marital home also deals with possible cases in which the marital home might be close to, but less than, half of the value of the marital property. In such cases a strict equal division of the

marital property might still, in theory, leave the surviving spouse with an empty house and a few odds and ends. The amendment will ensure that the marital home is fitted out for reasonable accommodation.

One other small change in the amendments is that, under them, if the spouse wishes to invoke the right to the marital home and ancillary property, he/she must do so expressly. At present s. 4(1) obliges the court to order that the marital home vest in the applicant. The amendment adds some flexibility, so that an applicant who wants an equal division of the marital property, but has no special desire for the marital home, may choose the equal division and leave the marital home to others.

In relation to the proposed amendments, our main interest is to see whether they are really called for. As to preferring the right to the marital home over that to an equal division, where the two are in conflict, there is already case-law supporting this under the existing s. 4(1). As to the entitlement to the other property that is reasonably necessary for the use and enjoyment of the marital home, this can already be accomplished within the wording of the existing subsection, given the various ways in which, under it, a court may order an unequal division of the marital property. On the other hand, certainty on the face of the statute may be better than case-law and a reliance on judicial discretion.

2(1)(c) This amendment extends the time limit for application following the death of a married person to four months from the date of the death. S. 3(10) of the Bill makes a comparable amendment to the Testators Family Maintenance Act. In the case of the latter Act, the time limit is being decreased. In the case of the Marital Property Act, it is being increased. Our belief is that the existing 60-day time limit under the Marital Property Act is too short. Using a single time period for both Acts has advantages, and four months--still a fairly short period--is suggested on the basis that applications of the kind permitted under these Acts should not be allowed to wait around too long. The court's discretion to extend the period for good reason will be retained, but with a longer time allowed initially for the application there should less frequently be reason for the court to exercise its discretion.

2(1)(d) This follows from the proposal above for an extension of the time allowed for application under the Act. Extending the time period increases the risk that the estate of the deceased may have been partially distributed before the application is made. The proposed amendment provides a means of recovering property that has already been distributed to a beneficiary.

2(1)(e) The amendment proposed here deals with an area of uncertainty which has existed for a number of years in relation to Marital Property Act applications by a surviving spouse. The problem relates to the treatment of the property that remains in the testator's estate after the application has been concluded. The question is whether the will should be applied mechanically to what is now left in the estate, or whether, in interpreting and applying the will, regard is to be had to the fact that the surviving spouse has already been awarded property out of the estate under the Marital Property Act. Simplified examples of the kinds of issues that arise are these. If a will distributes a testator's property (which is the entire marital property of the family) "half to my wife, half to my daughter," and the wife applies under the Marital Property Act, can the wife first get an equal division of the property under the Act and then receive half of the remainder under the will, making three-quarters in all? Alternatively, if the will leaves "my \$100,000 marital home to my son, my \$100,000 business to my husband," can the husband first claim the marital home under the Act and then claim the business under the will, leaving nothing for the son?

It is hard to see that there can be any absolute rule for dealing with cases such as this. Individual cases may have very different fact situations, and few will be straight forward. One thing that is plainly wrong, however, is that a will which is drafted by a testator to apply to the whole of

his or her estate as it exists when he/she dies (the "pre-division" estate) should be automatically applied to the estate left after a marital property application (the "post-division" estate) as though the will had been drawn up with the latter in mind as the property to which it would relate.

The starting-point of the amendment in s. 2(1)(e), therefore, is that there must be some way of ensuring that the testator's will is not automatically applied to the "post-division" estate without consideration of whether this was the property it was intended to apply to. If the will should, on the facts of the case, be so applied, so be it, but the Act should also allow for other possibilities. What the amendment does, therefore, is create a judicial discretion to make orders as to the distribution of the "post-division" estate. The key to the use of this discretion are the "express wishes" of the testator. The task of the court is to see what the "express wishes" of the testator were, to examine the effect of its division of marital property, and then to ask itself how the testator would have distributed the "post-division" estate if he or she had known what the surviving spouse was going to be awarded on the Marital Property Act application. If the court finds that the literal application of the will would produce, in the circumstances created by the application, distortion of the intent of the will, it may intervene to restore the intentions of the

testator as best it can, given that it now only has the "post-division" estate to work with.

This approach to dealing with "post-division" estate under the Marital Property Act raises one further question. We believe that some lawyers make a practice of including in wills a provision that if a surviving spouse makes an application under the Marital Property Act he/she is to take nothing under the will. We suspect that the reason for this provision lies in the difficulty that exists in drawing up a will which is intended to apply to the "post-division" estate, given that the testator cannot know what the "post-division" estate will contain, and therefore cannot sensibly plan for its distribution. If this is indeed the reason, we wonder whether the new situation created by the amendments described above would remove the raison d'être of these testamentary requirements for a surviving spouse to elect whether to take under the will or under the Act. Under the amendments, the court would be given a power to ensure that, so far as practicable in the wake of the Marital Property Act application, the testator's wishes for the distribution of the estate were observed. Under the amendments, the spouse would only get (a) his/her entitlement under the Marital Property Act, and (b) such additional property as the testator had expressly given by the will, if the court had not redirected it to others in its effort to prevent the will from being applied in a way the testator had never foreseen. Given these

amendments, would there be any need for clauses requiring a spouse to elect between the will and the Act? In the light of the provisions contained in the Bill, they add little in terms of protecting the intentions of the testator, and they do confront the surviving spouse with a harsh and unnecessary obligation to elect between the will and the Act. This might, in some cases, oblige him or her to take a gamble on what was, and what was not, going to be found to be "marital property." It is hard to see the need to put the spouse in this unenviable position. New Brunswick, unlike some other jurisdictions, has not adopted in its legislation the principle that the surviving spouse should elect between the will and the Act, and the decision seems a sound one. Should New Brunswick now take one further step along the same path, and declare that testamentary clauses imposing such an election are invalid?

Testators Family Maintenance Act

(To become "Provision for Dependants Act")

General The new title of the Act, and most of the amendments that follow, reflect the view that the Act should be expanded to apply to intestacies as well as to testacies. It may well be rare that applications will be made in the case of intestacies, since the Devolution of Estates Act provides for shares which should normally be considered reasonable. However, the Testators Family Maintenance Act is not limited to cases in which there is an unreasonable testator. It also

operates when a reasonable testator is faced with exceptional circumstances, and these may apply just as well to intestacies as to testacies.

3(3) This amendment expands the list of people who can apply under the Act. The intent is that everybody who, while the deceased was alive, could have applied under the Family Services Act for support should be able to apply for maintenance and support under the Provision for Dependents Act after the death of the deceased. The obligation to support during life, in other words, should be carried on after death. The main beneficiaries of this change are parents and common law spouses. The latter, under s. 112 of the Family Services Act, are (a) those who have cohabited for at least three years and (b) those who have cohabited in a relationship of some permanence and have a child.

In relation to parents, the proposed s. 2(1.2) will require "need" to be shown before support is awarded. This distinguishes parents from other "dependants" under the Act, the rationale being that there is less of an expectation, when a person prepares a will, that he/she will provide for parents than that he/she will provide for a spouse or children. This does raise the question, though, of whether the existing absence from the Act of any requirement for an applicant to show need is appropriate. Over the course of the years, the Testators Family Maintenance Act has come to be a means by

which close relatives of the deceased have been able to enforce what the courts have described as a moral obligation of the reasonable testator to make provision for the people listed, and this moral obligation has not always been restricted to cases where support was needed. Has the scope of the Act become too loosely defined? Should it be restricted?

As to the common law spouses, it seems straightforward to adopt the principle that an enforceable right to support that exists at the time of the death of a co-habitant should be capable of being extended in some way after he or she dies. Without this, people might be cut off entirely from their sole source of income. Such an expansion of the Act, however, raises the further question of whether common law spouses should also be brought within the scope of the Devolution of Estates Act. This would give them inheritance rights, rather than a right of support which depends on the making of a court application. On this comments would be welcome. Our provisional view is that the common law spouse probably should be included under the Devolution of Estates Act, though perhaps not on the same basis as a legal spouse. The purpose of the Devolution of Estates Act is to determine who gets a deceased person's property if that person dies without leaving a will. The Act sets out an order of priority for claimants, and it seems unrealistic that the common law spouse should be excluded. He or she may well have been much closer to the deceased, and to the property now forming the estate, than

anyone else. In principle, therefore, the common law spouse should be brought into the Act.

This then raises the question of what the share of the common law spouse should be. The proposal in s. 1(1) of these amendments, revising s. 22 of the Devolution of Estates Act, must be considered here. If, as suggested, the entitlement of a lawful spouse is to be to the "marital property," what should the common law spouse get? In the absence of a lawful marriage there is no "marital property". The result under our proposed amendment to s. 22 is that all the property of the deceased would technically be "residue," and there would be no surviving "spouse" to get a special share of the residue. It would therefore be shared equally among the children (or other increasingly distant relatives if there were no children). As an initial step, we would suggest that the common law spouse should share equally with any children and should take priority over more distant relatives.

Then there is the question of possible competing claims as between a lawful spouse and a common law spouse. Our tentative view here is that the lawful spouse's entitlement to the "marital property" should probably remain intact, bearing in mind that over time, in cases of estrangement, less and less of the deceased's property will be "marital property". If,

nevertheless, the lawful spouse's share is still so great that it deprives the common law spouse of any substantial inheritance right, the common law spouse could still apply for maintenance and support under the Provision for Dependants Act.

Bringing common law spouses under the Devolution of Estates Act would have the additional advantage of remedying a practical defect in including them under the Testators Family Maintenance Act. The problem is that in cases of intestacy, the only way in which the common law spouse would be able to claim anything under the proposed amendments to the latter Act would be by making a court application. That is how that Act works. It would be better if court applications in matters such as these could be avoided, and this would be accomplished if the common law spouse were given inheritance rights under the Devolution of Estates Act. The common law spouse would take his/her share in an uncontested estate administration, and the right to apply under the Provision for Dependants Act would only be used in exceptional cases. Without those inheritance rights, by contrast, Provision for Dependants Act applications by common law spouses might be common, since they would be the only way by which the common law spouse could claim anything when the person on whom he or she was dependent died intestate.

Wills Act

S. 4 This section attempts an improvement on the existing rule that marriage revokes a will. This rule can take people by surprise, and can lead to well-considered plans falling apart, when people who die believing they have left wills are held by the law to have died intestate. The incidence of re-marriage is also a matter that must be taken into account here.

One possibility would be simply to abolish the rule that marriage revokes a will, leaving the surviving spouse to his/her rights under the Testators Family Maintenance Act and the Marital Property Act. This does not seem a satisfactory answer. Those two Acts provide minimum entitlements. Each also requires a court application in order for the spouse to protect his/her interests. Something further than this seems to be required to protect the interests of a person who marries after a will is in existence.

The amendment therefore starts from the premise that the surviving spouse must be brought within the scope of the inheritance. It accepts also, following the existing law, that the starting point should be to replace the will with the intestacy rules. To this, though, two glosses are added. The first is that the will is not revoked by the marriage or remarriage; it is merely deprived of effect for as long as the

marriage lasts or any descendants of the marriage are alive. Since these are the people for whose benefit the will is overridden, there is no reason why, when they are all dead, the will should not take effect. The second gloss is that, even if the testator does die while the spouse or descendants are still alive, so that there is a deemed intestacy, a person who is a beneficiary under the will but is not a beneficiary under the intestacy can apply to the court for effect to be given to the gift in the will. This provision is designed largely with third parties in mind--for example, charities and friends of the testator. What the amendment contemplates in giving them the right to apply to the court is that, if the estate is large, there may well be plenty to go around, not only for the beneficiaries under the deemed intestacy, but also for third parties mentioned in the will. If, however, the estate is small, it is unlikely that the third party beneficiaries would receive anything.

Effect of Divorce on Will This is an issue which has been discussed during the preparations for the Bill, but which does not appear in the Bill because we consider that the existing law is probably better than the alternatives.

It has been suggested by various law reform agencies that divorce, by one means or another, should affect a will. Suggestions have included revoking the will, revoking all gifts to the divorcee, and deeming the divorcee dead, but leaving the balance of the will intact.

At first glance, these suggestions seem attractive. It seems to accord with common sense that a person who leaves property to his or her spouse in a will, and then divorces, would probably want the gifts to the spouse changed. The problem lies, however, in determining what the change to the will is to be. Any change is likely to distort its effect, particularly a change that is as large as one affecting the gift to the spouse would probably be. Even more uncertain is that the spouse should be excluded from the will entirely, which tends to be the effect of the proposals that other agencies have made. Even granted that one divorcing spouse might wish to leave less to the other, it is not obvious that the law should impose on the spouse a complete disentitlement, especially given that the testator, for whatever reason, has not chosen to do so.

Our provisional conclusion, then is that it should be up to the testator, and not the law, to say what happens to the will on divorce. Divorce is, after all, a process which will involve contact with lawyers. As part of this contact the lawyer should advise of the need to revise a will to prevent the former spouse from receiving things that the testator would not wish. It seems inappropriate to create a new statutory rule based on a supposed intent of testators to exclude their former spouses when the testators will in fact be in a position to state their wishes for themselves as part of the divorce process.

It is no doubt true that people who divorce may be advised to change their wills, may intend to do so, but may not get round to it. That, however, seems a poor reason for the law to step in to alter a will that the testator did not. Other wills are not revoked on the strength of evidence that a testator intended to change them but never did. Further, the fact that a testator might have intended to change a will is no indication of the particular change that might have been made. For the law to impose a predetermined change is a strong measure, especially if the result is to exclude the former spouse completely. This has the same effect as excluding the estranged spouse in cases of intestacy: it means that the spouse's share goes to somebody else. For the law to create that result, in the absence of any foreknowledge of where the share will go, involves the law in saying that, wherever it goes, it will be preferable in most cases that it go there rather than to the former spouse. Such a conclusion seems hard to reach.

Our present view, then, is that people who divorce but do not revoke existing wills should be treated in the same way as others who might be expected to change their wills but never do. In both cases, the law should do nothing. Perhaps people meant to change their wills, perhaps they did not. Perhaps they changed their minds. There is no reason why the law should prefer one of these conclusions over the others.

If the law remains unchanged, though, one thing that should be done is that steps should be taken to ensure that divorcees are made aware of the need to give serious thought to changing their wills (though wills, are only one of a number of things that may need changing--for example, beneficiaries under life insurance policies may also need to be changed). However, once practical steps have been taken to ensure that people know what they have to do to protect their interests, enough has been done. The law should not be too swift to jump in and undo the consequences of what, for all it knows, might well have been deliberate inaction.

Survivorship Act

The proposed new legislation reflects a growing consensus that the existing principle on which the Survivorship Act is based--namely, that where two people die at the same time the older is deemed to have died the first--is unsuitable. The new Act therefore adopts as its basic principle the idea that each is deemed to have survived the other. This means, essentially, that the property of each will be identified separately from the property of the other, and will pass to whoever would receive it under the terms of a will or intestacy if the other co-deceased had died first. Most of the provisions in the Bill are re-workings of provisions of the existing Survivorship Act in the light of the altered basic principle of the Act. Two sections, however are new.

The first of these is s. 4, under which the "marital property" of two co-deceased who are married will be divided equally between their respective estates. This provision will affect cases in which the respective beneficiaries of the two are different, the simplest example being the childless couple who die intestate. Without s. 4, the effect of the new Act would be that the estate of each would be determined in accordance with general property law, and would then go its separate way to one family or the other. With s. 4, the general principle of equality in the Marital Property Act overrides the common law rights, and divides the "marital property" between the two families.

In the light of s. 5 of the Marital Property Act, which prevents the estate of a deceased person from initiating an application for a division of marital property, it may seem strange to contemplate an equal sharing of the marital property under this Act when both spouses are dead. However, the case where there is one survivor is different from the case where there is no survivor. In the former case, an application by the estate would take away from the surviving spouse property that (a) was his/hers at common law, and (b) as marital property, was property in which the special interest of spouses had been expressly declared by law. To allow the claim of an estate in these circumstances would prefer the claim of the beneficiaries over that of the spouse, notwithstanding the special interest of the spouse in the property under both the common law and the Marital Property Act. In the latter case,

however, where neither spouse survives, the issue is between two sets of beneficiaries. There is therefore not the same objection to sharing the property which, as the Marital Property Act declares, is the product of the various contributions of the two partners to the marriage. The issue then boils down to two questions: first, whether the principle of joint contribution to marital property should be recognized by this legislation when both spouses die together; second, if it should be whether there are practical considerations--for example in relation to complicating the administration of estates--which override the question of principle. By including s. 4, the Bill opens both of these issues up for discussion.

The second new feature of the Bill is in s. 6(2). This proposes that people should be treated as having died together if they die within ten days of each other, subject to a small exception in s. 6(3). The purpose of this provision is to acknowledge that in some cases, although it is clear that one person died before another, their deaths came so close together--perhaps separated only by minutes--that it is silly to have the property of the first pass to the other and then to the other's heirs. The aim of the ten-day survivorship rule proposed by s. 6(2) is to ensure that the one who dies second, if he or she is to inherit, genuinely survives the one who dies

first. It is common practice to insert a similar provision in wills, though thirty days is apparently the usual survivorship period there. Inevitably such periods are arbitrary, and are a rough and ready attempt to achieve their ends. Time limits are not ideally suited to the purpose, but alternative methods are hard to find.

S. 6(3) provides a small exception to the ten-day rule. What it contemplates is that, even within the ten days, the person who has survived another may have the mental and physical capacity to deal with the property which the deceased had left to him/her, and may do so. There may have been an accident, for example, in which one was killed and the other gravely injured, but the second, seven days after the death of the first, makes a will which deals, among other things, with property coming from the first. The intention of s. 6(3) is to give effect to that will or to gifts or other transactions that the second deceased entered into in the ten-day period. The thinking here is that there is no good reason why effect should not be given to the transaction. The first deceased, in leaving property to the second, had given the second the power to do with it as he/she wished. The second, in the situation s. 6(3) contemplates, has done so, and the fact that he/she dies sooner than expected is no reason for upsetting what has been done. In such cases the ten-day rule serves no purpose. Its object is to prevent property from passing by operation of law, and without human intervention, from the first deceased to

the beneficiaries of the second deceased. Where, however, the second deceased has expressly decided what is to happen to the property, there is no reason to displace the intent of the first deceased's will, which, by leaving property to the second deceased, gave him/her the power to deal with it as he/she wished.

Like the ten-day rule itself, of course, the exception in s. 6(3) is rough and ready. Ideally what one would have would be a provision establishing a substantive test of whether one person had genuinely survived another, so that, when the survivor died in turn, one could determine whether the proper people to take the property of the first deceased were the heirs of the first deceased or those of the second deceased. However, it is extremely difficult to find a workable substantive test to achieve this end. Thus one comes to the rough and ready methods of (a) a survival period based on time, and (b) a limited exception in the case of observable acts indicating an awareness of the implications of the death of the first deceased and an attempt to do something about them. The question raised here is the familiar one of choosing the lesser of two evils. On the one hand is the rough and ready ten-day rule, with (or perhaps without) its exception. On the other hand is the fact that if one does not establish some such rule, property can pass from one deceased to another who survives only for a matter of hours, and then to the heirs of the latter. The Bill opens up the alternatives for consideration.

