SCOTTISH LAW ON INTESTACY AND PROBATE: BORROWING FROM THE UNITED STATES AND CANADA TO BRING SCOTTISH LAW OUT OF FLUX

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I. INTRODUCTION

Most nations that developed a legal system under the English Common Law have adopted laws for wills and succession by intestacy that suit the needs of their nationals.[1] They adapt those laws when necessary, like when the dynamics of a typical family change, which has been a prominent issue in the modern era.[2] The legal framework governing wills has been established in the United Kingdom, but in Scotland there is an ongoing debate on developing laws of intestacy.[3] Scottish legislators are reviewing potential legal schema to adopt.[4]

This article will consider the rules of intestacy and the grounds upon which legal reform is being proposed to amend the law in Scotland.[5] The

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1. *See infra* Parts II–IV.
2. *See infra* Parts II–IV.
3. Ash Denham, *Law of Succession: Consultation*, SCOTTISH GOVERNMENT (Feb. 17, 2019), https://www.gov.scot/publications/consultation-law-succession/ [perma.cc/2YL6-HNVQ].
4. *See id.*
5. *See infra* Parts II–IV.

intention is to compare the benefits of adopting legal provisions from other jurisdictions in common law countries that can serve as a framework for possible legislation.[6] This article will evaluate the jurisdictions that can serve as models for adoption, defining their laws, and evaluating the community property bases for the distribution of property.[7]

First, the laws in England and Wales will be compared to Scottish law, showing the relative issues Scottish nationals may face.[8] Instead of simply adopting English laws, this article will explore the possibility of adopting succession legal approaches from North America, namely the community property system in some of the United States and the threshold approach from British Columbia, Canada.[9]

Next, this article will address how Scotland could address conflicts of law when applying succession laws.[10] It will show that there are current methods available to Scottish nationals through the already-existing Brussels IV law, as part of the European Union, even though the United Kingdom has opted out.[11] It will then show how the United States and Canada have addressed their own conflict of law issues, and how Scotland could consider borrowing from those approaches.[12]

II. SUCCESSION IN SCOTTISH LAW

Although England and Wales have succession laws in place, Scotland has not established a clear set of rules for succession in wills and intestacy.[13] The next section will give an overview of the United Kingdom's law of succession.[14]

A. Succession in England and Wales

England and Wales allow for total freedom of testation, meaning there are no forced heirship rules.[15] Thus, individuals who die domiciled in England or Wales enjoy freedom of testamentary disposition, allowing them to dispose of their assets to whomever they wish because there are no forced heirship rules.[16] In making a determination for the distribution of an estate, the first issue is to determine if there is a valid will pursuant to the section 9

6. *See infra* Part III.
7. *See infra* Parts III–V.
8. *See infra* Part II.A.
9. *See infra* Part III.A–B.
10. *See infra* Part IV.
11. *See infra* Part IV.A.
12. *See infra* Part IV.A–B.
13. *See* Denham, *supra* note 3.
14. *See id.*
15. *See id.*
16. *See id.*

of the Wills Act.[17] A person seeking to have the legal right to manage another's estate may apply for probate.[18] Once probate has been granted, the will, along with any codicils, become public documents; however, any accompanying letters of wishes will remain confidential.[19]

There are rules and procedures that govern intestacy when an individual dies while domiciled in England or Wales.[20] The Inheritance (Provision for Family and Dependents) Act of 1975 allows for a certain class of people to bring claims to dispute a financial provision from a decedent's estate.[21] Typically, these claims are brought by individuals who believe that no reasonable financial provision was drafted for them, either under the governing intestacy rules or the terms of the decedent's will.[22]

The Administration of Estates Act 1925, which was amended in 2014 by the Inheritance and Trustee Powers Act, sets forth the rules for distributing the estate.[23] If the deceased is survived by a spouse and left no children, the spouse receives the whole estate.[24] If the deceased had children, the spouse or civil partner receives £250,000 or the full value of the estate, whichever is less; all personal belongings of the deceased; and "one-half of the remainder of the estate outright."[25] Any children receive, in equal shares, the remainder of the estate.[26]

B. Issues in Scottish Succession Law

In Scottish law, however, the Requirements of Writing (Scotland) Act of 1995 provides the formalities of a valid will.[27] There, at the age of twelve, an individual is deemed to have legal capacity to make a will.[28] A testator must further have mental capacity, cannot act as a result of undue influence or fraud, and must be aware of and approve the contents of the will.[29] The

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17. Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9, (Eng.) (stating that a valid will must be in writing, signed by or on behalf of the testator in the presence of two witnesses who must also sign in the presence of the testator; that beneficiaries, spouses, or civil partners of testators should not act as witnesses; and that it must be clear that the testator intended to give effect to the will by his or her signature, i.e., the document should state on its face that it is a will).

18. *See id.*

19. Alison Cartin, *Wills and Probate in the United Kingdom*, LEXOLOGY (Nov. 7, 2018), https://www.lexology.com/library/detail.aspx?g=8f6624b8-a006-49fa-bea9-64b85587d95b [perma.cc/PM6A-ETGT]; *see also* Re Londonderry's Settlement (Peat v. Walsh) [1965] Ch. 918.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* (The rules governing intestate succession are generally understood to reflect a testator's wishes or duties); *see, e.g.*, discussion in COMPARATIVE SUCCESSION LAW, VOLUME II: INTESTATE SUCCESSION 446 (Kenneth Reid et al. eds., 2015).

27. *See* Cartin, *supra* note 19.

28. *See id.*

29. *See id.*

Succession (Scotland) Act 2016 is the governing legislation for interpreting and executing a will.[30] This legislation has been enacted to give effect to a will.[31] For example, under a joint tenancy, assets held by a deceased person automatically pass to a surviving joint owner, applying forced heirship rights to the movable assets of the decedent, who was domiciled in Scotland at death.[32]

For intestate distribution, The Succession (Scotland) Act 1964 controls for Scottish succession.[33] If no surviving spouse or civil partner exists, the estate passes to any surviving children in equal shares upon reaching eighteen years of age.[34] Where there are either no children, or the existing children die or marry before age eighteen without having their own children, the estate passes in equal shares to the decedent's parents.[35] If that fails, the decedent's siblings take in equal shares.[36] While current law does protect cohabitants in intestacy, the rights are not automatic.[37] A cohabitant claiming rights to take under intestacy must apply to the court.[38] Under Section 29 of the Family Law (Scotland) Act of 2006, a cohabitant (within the meaning of section 25), may make a claim on the decedent's cohabitant's estate if no will is found within six months of the date of death.[39]

Existing Scottish rules stipulate that after payment of debts, the remaining estate be distributed according to Part II of the Succession (Scotland) Act 1964.[40] Once prior rights have been met, then legal rights, which are claimed only from moveable property, determine estate distribution.[41] The Consultation on the Law of Succession describes how the distribution is applied:

> The surviving spouse or civil partner has a legal right to one-third of a deceased's moveable estate if there are 'issue' (children) or to one-half of the moveable estate if there are no issue. The issue share one-half of the

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30. *See id.*

31. THE NAT'L ARCHIVES, http://www.legislation.gov.uk/asp/2016/7/enacted (last visited Oct. 7, 2019) [perma.cc/FFF4-VRPH] ("[A]n Act of the Scottish Parliament to make provision about succession; to make provision about life rents; to amend the Trusts (Scotland) Act 1921; and for connected purposes.").

32. Cartin, *supra* note 19.

33. *See* Succession (Scotland) Act of 1964, (ASP 38) § 1; *see also id.*

34. Cartin, *supra* note 19.

35. *Id.*

36. *Id.*

37. *Id.*

38. Denham, *supra* note 3, ch. 3.11.

39. *Id.*

40. Succession (Scotland) Act 1964, Part II; *see also id.*

41. Denham, *supra* note 3, ch. 2.4 (explaining that upon the payment of any estate liabilities, the prior rights of the surviving spouse or civil partner, include the following: the right to his or her current home, up to a £473,000 value, furniture up to a £29,000 value, and depending on whether the deceased had living children, either £50,000 or £89,000).

> moveable estate if there is no surviving spouse or civil partner or a third if there is a surviving spouse or civil partner.[42]

Without children or other descendants, the result will be that surviving parents or siblings will get "priority over a surviving spouse or civil partner."[43]

A survey addressing this topic was distributed among Scottish citizens in 2015.[44] In that survey, just over three-quarters of respondents agreed that the intestacy scheme should allow "the surviving spouse or civil partner to remain in their home."[45] This response demonstrates that spouses and civil partners today usually operate as an economic unit.[46]

The Law Commission report criticizes the current law because it is unnecessarily complex and because the outcome of the entire estate distribution can be affected merely by the types of assets.[47] Accordingly, it proposed a simpler scheme for distributing intestate estates:

- A spouse/civil partner should inherit the whole estate if there are no issue;
- If there is no spouse/civil partner, issue (biological or adopted) should inherit the whole estate;
- Where there is a spouse/civil partner and issue, the spouse/civil partner should get the first £300,000 (the threshold sum) of the whole estate and the remainder of the estate should be divided in two, one part for the spouse/civil partner and the other to the children (biological or adopted) between them;
- Where the deceased is survived by a spouse or civil partner and issue (biological or adopted), and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination does not exceed the threshold sum of £300,000, the threshold sum should be reduced by the net value of the deceased's right.[48]

The main thrust of the Law Commission's reform was designed to ensure that the spouse or civil partner's rights are secured when the deceased dies intestate.[49] It took into consideration the divorce rules under the Family

42. *Id.* ch 2.4.
43. *Id.* ch. 2.4.
44. *Id.* ch. 1.7.
45. *Id.* ch. 2.3.
46. *See id.*
47. *Id.* ch. 2.5.
48. *Id.*
49. *See id.*

Law (Scotland) Act 1985.[50] Where there is a valid marriage, property can be apportioned more justly and equitably than at present if standards are reconstituted by the adoption of a more appropriate framework, like under the family law regime.[51]

In *Pirie v. Clydesdale Bank PLC*, the decedent's will favored his daughter.[52] The spouse, who had been the deceased's third marriage, brought a claim for a share of the estate that had been earned in the course of her long marriage with the testator.[53] There were separate claims from the children of previous marriages who had also inherited under the will.[54]

The judge, Lord Wheatley, reasoned that the father's choice to favor his daughter was probably one of the reasons Mr. Pirie chose to create a will.[55] However, the judge also reasoned that although the daughter was unlikely to have held the father's affection in fact, there was no possible remedy for his widow.[56]

The Scottish legislature attempted to rectify unjust enrichment expressed in *Pirie*. In the past, such protections against such claims were found in section 24(2) of the Succession (Scotland) Act 1964 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, which were repealed by section 23 of the Succession Act 2016.[57] Under this provision, spouses, civil partners, and children of the decedent can claim their legal rights under the forced heirship rules regardless of the terms of the decedent's will.[58]

When an individual domiciled in Scotland dies intestate, a cohabitee has rights to bring a financial provision claim from the decedent's estate.[59] However, these rights are not automatic: they require an application to the court under section 29 of the Family Law (Scotland) Act 2006.[60] Within the definition of a cohabitant, in section 25, he may make a claim on his deceased cohabitant's estate if no will exists within six months of the death.[61] However, if they claim their legal rights, they forfeit any entitlement under the decedent's will.[62] The Consultation also highlighted that section 29 needs to be reformed because of the situation in which the decedent died with a will, leaving the cohabitants without any rights.[63]

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50. *Id.* ch. 2.48.
51. *Id.*
52. *See* Pirie v. Clydesdale Bank PLC, [2006] CSOH 82, 2007 S.C.L.R. 18 (U.K. 2007).
53. *Id.*
54. *Id.* at 24.
55. *Id.*
56. *Id.*
57. Succession (Scotland) Act 1964, § 24(2); Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, § 7; Succession (Scotland) Act 2016, (ASP 7) § 23.
58. Succession (Scotland) Act 2016, (ASP 7) § 23.
59. Family Law (Scotland) Act 2006, § 29; *see also* Cartin, *supra* note 19.
60. *See* Family Law (Scotland) Act 2006, § 29.
61. *See id.*
62. *Id.*
63. *Denham*, *supra* note 3, ch. 3.11.

It can be argued that a matrimonial property law that applies to divorce cases should also be considered for inheritance law because the law would circumvent present efforts to prioritize a spouse's rights upon death.[64] This method may be a more appropriate distribution of family property in cases where a second spouse's claim after a brief marriage competes with the claims of children from a previous marriage, when most of that property had been accumulated.[65]

The 2011 Census showed that step-families made up the following percentages of Scottish families:

- 8% (26,000) of married couple families and 29% (26,000) of cohabiting couple families;
- 8% of families with one dependent child, 6% of families with two dependent children and 12% of families with three or more dependent children; and
- Just over half of the 15,000 cohabiting couple families where the youngest dependent child was aged 12 or over.[66]

The Law Commission comes to the conclusion that regardless of how a family is structured, intestacy rules should apply universally.[67] Because of the increasing number of non-traditional families, the default laws on intestacy need to be "relevant to modern Scottish society and the rights of individuals and families."[68] Therefore, the main challenge is finding a rule that fairly differentiates between first, second, and other families, because possible family structures are greater than the current laws are able to address.[69]

The Law Commission feared that many children may be effectively disinherited if the parent's share is higher in relation to the value of the average estate in Scotland.[70] There were additional concerns about scenarios in which the deceased had children from a previous relationship.[71] If the survivor was not the parent of the deceased's children, and the estate passed to that survivor, the children would likely inherit nothing from the deceased.[72]

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64. *The L. Comm'n*, INTESTACY & FAMILY PROVISION CLAIMS ON DEATH: FINAL REPORT, No. 331 [11] (2011).
65. Denham, *supra* note 3, ch. 2.21.
66. *Id.* ch. 2.10.
67. *Id.* ch. 2.14.
68. *Id.* ch. 2.15.
69. *Id.* ch. 2.30.
70. *Id.* ch. 2.7.
71. *Id.* ch. 2.8.
72. *Id.* ch. 2.8.

III. REFORM PROPOSALS FROM NORTH AMERICA

The Scottish government's Consultation document seeks to reform intestacy rules that may be unfair.[73] The changes envisage two possible alternatives for framing Scottish intestacy law.[74] These approaches are based on the United States' community property approach, used by many states, and the threshold approach, derived from the courts in British Columbia, Canada.[75] Both options need to be considered in order to understand the practical dimensions of distributing the property of deceased individuals.[76] Each approach would offer more protection than current Scottish law for spouses in situations where there are living issues.[77]

The community property and threshold property frameworks both result in a fused family situation, in which the children of spouses are not given more favorable treatment than children who are only from the deceased.[78] These models give the value, both estimated and actual, of the heritable property.[79] The current Scottish rules correctly attach a significant value to the house.[80] For Scotland to adopt regimes from North America, it will need to alter the current rules to account for different variables, which may require a readjustment of the value placed on the house being inherited by the spouse.[81]

A. The Community Property Approach

In the United States, each state's laws govern succession both through intestacy and wills.[82] Although the states usually govern in this area, the federal government may exercise jurisdiction in some probate cases; however, it is in very limited circumstances.[83] The Supreme Court affirmed this probate exception, but cautioned against applying it too expansively, emphasizing that its application is narrow.[84]

The United States government attempted to create uniformity among the states in succession laws.[85] It created the Uniform Probate Code (UPC) 1964, which was initially intended to be adopted by all states in full, but it

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73. *Id.* ch. 2.2.
74. *See id.* ch. 2.23–2.24.
75. *See id.*
76. *See id.*
77. *Id.* ch. 2.42.
78. *See* discussion *supra* Part III.
79. *See* discussion *supra* Part III.
80. *See* discussion *supra* Part III.
81. *See* discussion *supra* Part III.
82. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).
83. *Id.*
84. Marshall v. Marshall, 547 U.S. 293, 305 (2006); *see also* Eric W. Penzer & Frank T. Santoro, *The Probate Exception to Fed. Jurisdiction*, 39 TRUSTS & ESTS. NEWSL. No. 3 (2006).
85. *See* UNIF. PROB. CODE (amended 2010).

has only formally been adopted in sixteen states.[86] The remaining states and D.C. have defined similar laws and have used the UPC as a standard for defining testator capacity, structure for a will, and procedures for probating a will.[87] The UPC provides suggestions for states to determine the structure, contents, and execution of a valid will, along with rules for intestate succession.[88] While most states follow the common law system, some states follow the community property approach, which is based on civil law.[89]

The concept of community property has at its core a form of fiduciary interest.[90] That is because one of the fundamental principles of community property law is equality of interests.[91] The issue is how both the managing and non-managing spouses can have equal ownership interests.[92] That issue has proven to be problematic, but each state in the United States has created its own solution.[93] Most community property jurisdictions consider the spouses to be equal owners, and the managing spouse acts as an agent for the non-managing spouse.[94]

There is a general presumption that property acquired by either spouse during the marriage is community property.[95] The party asserting that an asset is separate property has the burden to show why it is separate property.[96] The community presumption in some states attaches to property acquired during the marriage.[97] On the other hand, if property was acquired before the marriage, the evidence will need to show that.[98]

This community property model mirrors the approach taken in Scotland for dividing property following a divorce.[99] In that scenario, the assets are categorized as either community or separate property.[100] When a spouse and children survive the deceased, the spouse takes one-half of the deceased's share from the community property, one-half of the separate property, and the remainder would pass to the children.[101] If there are no children, or they

86. UNIF. PROB. CODE (amended 2010). *See id.*

87. *See Wills*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/inheritance-law/Wills (last visited Sept. 29, 2019) [perma.cc/K23K-5DWC].

88. *See* UNIF. PROB. CODE §§ 2-501 et seq., 2-101 et seq. (amended 2010).

89. Denham, *supra* note 3, ch. 2.23–2.24.

90. *Id.* ch. 4.3.1.

91. *See* Thomas M. Featherston, Jr., *Separate Property to Community Property: An Introduction to Marital Property Law in the Community Property States*, at Part II.A, (2017) https://www.baylor.edu/law/facultystaff/doc.php/301687.pdf [perma.cc/D5J8-GD5J].

92. *Id.*

93. *Id.*

94. Susan Black, *Succession law reform: Who would you expect to benefit?* BRODIES (Feb. 25, 2019) https://brodies.com/blog/personal-law/succession-law-reform-intestacy-rules/ [perma.cc/UL5D-R9T2].

95. Featherston, *supra* note 91.

96. *Id.*

97. *Id.*

98. *Id.*

99. Black, *supra* note 94.

100. *Id.*

101. *Id.*

are no longer dependents, the spouse's share is increased to three-fourths of the separate property.[102]

The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.[103] During the twentieth century, these jurisdictions have seen an increasing proportion of the decedent's estate allocated to the spouse and not the children under intestacy.[104] However, in some community property states, all community property went to the husband if the wife died first, and he could give the property away; but if the husband died first, the wife could only claim half in a life estate.[105]

By 1935, over 90% of common law states awarded shares to spouses at a lower amount than in community property jurisdictions; however, by 1983, those more generous jurisdictions were in the minority.[106] The community property jurisdictions that had treated widows different from widowers amended their laws to treat them the same.[107] This enabled the state jurisdictions to treat spouses more favorably than children under intestacy statutes in the twentieth century.[108] Concerning the right to devise property through a will, while protecting children from disinheritance toward the end of the twentieth century was "almost nonexistent," there were many varying spousal protections.[109] The present state of the law represents a hodgepodge, with variations in the law of each state, various individual schemes not built upon just one adequate interest given to the surviving spouse.[110] Instead, they have given the share in real estate, a widow's allowance, and some dower or statutory substitute.[111]

In a community property state, marital assets are usually classified as the separate property for one spouse, the separate property for the other spouse, or their community property.[112] The dissolution of property on intestacy is determined by whether it is joint, and therefore marital or personal property.[113] For step-children, this model serves to provide limited inheritance rights, but this only applies when another allocation would lead

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102. Featherston, *supra* note 91.

103. Mark Evans Harden & Barbara A. Lindsay-Smith, *Beware, Migrating Spouses, Texas Lacks a Quasi-Community Property Probate Statute: It Could Be a Long Cold Winter*, 3 TEX. WESLEYAN L. REV. 91, 94 (1996).

104. *United States: Inheritance Laws in the 19th and 20th Centuries*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/inheritance-laws/unitedstates.php [perma.cc/6Y3P-CV5A] (last visited Oct. 9, 2019).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; *see* also JEFFREY A. SCHOENBLUM, PAGE LAW OF WILLS, § 3.13 (2d ed. 2019).

110. WILLIAM H. PAGE, PAGE ON THE LAW OF WILLS § 3.13, at 116 (Jeffrey A. Schoenblum ed., rev. ed. 2003).

111. *Id.* at 117–18.

112. Featherston, *supra* note 91.

113. Denham, *supra* note 3, ch. 2.71.

to *ultimus haeres*, meaning that the estate would pass to the state.[114] This provision also applies where one parent (A) leaves property to spouse (B) (A's second spouse) where A has children from a the first marriage.[115] When B dies, if they have no children together, the portion of the estate inherited from A may pass to A's children, who are the step children of B.[116] If B had children, the property would pass to them instead of A's children.[117] The states have provisions to avoid *ultimus haeres* where step children may inherit.[118]

This process was considered in Scotland when the Succession (Scotland) Act 2016 was being passed through parliament.[119] A topic of discussion was the role the state had on *ultimus haeres* for survivorship if there were a common calamity.[120] The legislative committee members were not sympathetic to the Crown becoming "the ultimate heir."[121] The committee decided upon a framework called the National Ultimus Haeres Unit (NUHU), which advertises and investigates unclaimed estates so that relatives may claim them, which is the case most often.[122] It is only if estates are unclaimed that they are conveyed for administration to the Queen's and Lord Treasurer's Remembrancer (QLTR).[123]

B. The Threshold Approach

Scottish legislators may choose to adopt the threshold approach, which is used in British Columbia, Canada. For intestate succession, the Wills, Estates and Succession Act (WESA) of 2014 governs.[124] This law makes no distinction between movable and inheritable (land) property.[125] WESA does, however, include allowance for children of the decedent that are not shared by the surviving spouse by reducing the survivor's share in the case of intestacy and by increasing the share available for the children.[126] Under this act, the term "spouse" encompasses not only legally married couples, but also cohabitants in a marriage-like relationship lasting at least two years.[127]

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114. *Id.*
115. *Id.* ch. 2.72.
116. *Id.*
117. *Id.*
118. *Id.* ch. 2.73.
119. *See* Cartin, *supra* note 19.
120. Denham, *supra* note 3, ch. 2.74.
121. *Id.*
122. *Id.*
123. *Id.*
124. Wills, Estates & Successions Act, S.B.C. 2009 c. 13 (Can.); *id.* at ch. 2.32.
125. Wills, Estates & Successions Act, S.B.C. 2009 c. 13 § 82 (Can.); *see also* Denham, *supra* note 3, ch. 2.44.
126. Wills, Estates & Successions Act, S.B.C. 2009 c. 13 § 21 (Can.).
127. *Id.* § 2.

Another part of the statute becomes operative when all of the children are from both spouses.[128] In that case, the surviving spouse receives the household furnishings and $300,000 or more if prescribed from the estate's value.[129] The spouse maintains the right to purchase the deceased's interest in the family home if its value is more than the spouse's interest.[130] If the children are not from the surviving spouse, the preferential amount is only $150,000, and the remainder is distributed to the children.[131] The rule is explained because in blended families the common children may receive more favorable treatment than children who are only from the intestate.[132] When the share of the surviving spouse is reduced in this situation, a bigger share is left for the children of the decedent.[133]

This intestate system under WESA operates on a threshold basis, meaning that if the net value of the estate is lower than the spouse's preferential share, the value of the entire estate goes to the spouse.[134] If Scotland were to apply a similar regime, it would need to define its view on an appropriate threshold or preferential share.[135]

WESA's concept of preferential share is also similar to the Scottish law concept of prior rights.[136] When prior rights is applied, the value of the preferential share is greater in distributions where there are no children.[137] This differs from the Canadian model because there, the preferential share applies to the entire estate.[138] It is also dissimilar because heritable and moveable estates are distinguished from one another under Scottish law.[139]

Another distinction in British Columbia is that the threshold or preferential share amount depends on whether the children are from both spouses.[140] If they are from both spouses the threshold is $300,000.[141] If however, they are the deceased's children from a previous relationship, the threshold or preferential share decreases to $150,000.[142] After a deduction of the surviving spouse's household furnishings, the remainder of the estate is divided into two equal shares, with one share passing the deceased's children, and the other, to the surviving spouse.[143] The surviving spouse is also given the opportunity to buy the family home within a certain

128. *Id.* § 21.
129. *Id.*
130. *Id.* § 31.
131. *Id.* § 21.
132. *Intestate Succession in B.C. & Wash. St.*, *supra* note 76, para. 18.
133. *Id.* para. 17.
134. Denham, *supra* note 3, ch. 2.36.
135. *Id.* ch. 2.37.
136. *Id.* ch. 2.43.
137. *Id.*
138. *Id.* ch. 2.44.
139. *Id.*
140. Black, *supra* note 94.
141. *See id.*
142. *See id.*
143. *Id.*

timeframe.[144] WESA outlines the rules for inheritance of the spousal home.[145] Essentially, the surviving spouse has the right to use his share to acquire the spousal home in whole or in part.[146]

If Scotland were to adopt this regime, Scotland would need to consider abolishing the distinction between heritable and moveable property.[147] This approach would likely result in those who are not the spouse or civil partner being left without an inheritance, unless a downward adjustment to the current prior rights threshold were created.[148]

However, the threshold model has been criticized because it can place the heirs in a difficult position.[149] The law alone defines the right to the share in property, which could alter the balance against the children of the deceased.[150] As Jonnette Watson Hamilton describes this factor:

> [T]he assumption that each of us can define family for ourselves is not true if we die without a will. If we die intestate, (i.e., without a will), then the law will define our family for us . . . . [and] there is the possibility that the people they considered family will not inherit from them.[151]

The case *In Peters Estate (Re)*, illustrates a weakness in the threshold approach.[152] The deceased, Ileen, died intestate in 2013 after her husband of forty-three years, Lester, pre-deceased her in 2009.[153] They had one son from their marriage, and Lester had four daughters from a prior relationship.[154] They lived as a family unit for many years, and all five of the adult children worked and financially provided for Ileen.[155] The children also assisted Lester and Ileen when they had gone into bankruptcy.[156] When Lester Peters died intestate, the five adult children agreed that Ileen Peters should receive all of their father's estate.[157]

The intestacy rules came into issue after Ileen Peter's death, when her son was appointed to administer her estate.[158] One of her stepdaughters applied to the court for a direction to have the estate divided equally amongst

144. Wills, Estates & Successions Act, S.B.C. 2009 c. 13 § 31 (Can.).
145. *Id.*
146. *Id.*
147. Denham, *supra* note 3, ch. 2.45.
148. *Id.*
149. *See* Jonnette Watson Hamilton, *A Cautionary Tale for Step-Parents & Step-Children*, ABLAWG.CA (May 5, 2015), https://ablawg.ca/2015/05/05/a-cautionary-tale-for-step-parents-and-step-children/ [perma.cc/8DAG-PTQ5].
150. *See id.*
151. *Id.*
152. *See generally*, Peters v. Peters, 2015 ABQB 168 (Can. Alta. Q.B.).
153. *Id.* para. 12.
154. *Id.*
155. *See id.* para. 16.
156. *See id.* para. 12.
157. *Id.*
158. *Id.* para. 3.

the five children.[159] This was argued under section 65 of the Wills and Succession Act, which states:

> If an individual dies leaving no surviving spouse or adult interdependent partner, the intestate estate shall be distributed (a) *to the descendants* of the intestate in accordance with section 66 . . . 66(1) When a distribution is to be made under this Part to the *descendants of any individual*, the intestate estate or the portion of it being distributed shall be divided into as many shares as there are (a) children of that individual who survived the intestate (emphasis added by the court).[160]

Based on the text of these sections, the only question before the court was: "Who are the descendants of Ileen Peters?" [161] The court decided that because Ms. Peters's four stepdaughters were not her blood relatives, they were not her lineal descendants.[162] Her son was therefore deemed to be her only lineal descendant.[163] The stepdaughters appealed the decision to the Alberta Court of Appeals on the basis that intestacy law in succession had "failed to recognize the need to protect blended (step) families."[164] The court of appeals concluded that the law had historically excluded stepchildren in actions where a stepparent had died intestate.[165] However, the court could not grant relief because the law was clear, and it was bound to follow it; although, it also acknowledged that in this case the result was unfair.[166]

One writer asserts that *In Peters Estate (Re)* should serve as a cautionary tale for parents of blended families to create a will.[167] The case also illustrates that the intestate succession provisions in the 2012 Wills and Succession Act are too antiquated for dealing with blended families (especially adult stepchildren who have the ability to earn a livelihood).[168] The Wills and Succession Act should outline how an intestate parent who does not have a surviving spouse would have distributed the estate in a will.[169]

The threshold property law of British Columbia creates an issue by failing to define "children."[170] Although this gap in the law could create problems in application, the definition of children therein remains effectually unchanged since previous legislation was passed.[171] The Intestate Succession Act defines "issue" in section 1(b) to include "all lineal descendants of the

159. *Id.* para. 4.
160. *Id.* para. 7.
161. *Id.* para 8.
162. *Id.* para. 11.
163. *Id.*
164. *Id.* para. 13.
165. *Id.* para. 12.
166. *Id.* para. 25.
167. Hamilton, *supra* note 149.
168. *Id.*
169. *Id.*
170. *See id.*
171. *Id.*

ancestor."[172] By implication, this exclusion fails to recognize that blended families are a "significant and legitimate segment of Canadian society in intestate succession laws," and so has devalued these families.[173] This failure is dually detrimental because not only does it authorize inequitable estate distributions, but it also affects society's perceptions concerning the legitimacy and status of these blended families.[174]

Even if Scotland adopts the threshold approach, it needs to avoid adopting laws that do not account for these issues that arise in blended families.[175] For instance, WESA does not make any provisions for stepchildren (although there may be some room to challenge for adverse impact).[176] Until WESA is adjusted to accommodate them, stepparents must protect their stepchildren by either formally adopting them or by naming them as beneficiaries in a valid will.[177] However, neither of these solutions is feasible for many families because of the significant commitment of both time and money they require.[178]

The Canadian approach can be compared to the Uniform Probate Code (UPC) in the United States, which offers a more relationship-focused approach.[179] The UPC uses a broader concept of child by defining what it means to "*function* as a parent of the child."[180] It clarifies that to function as a parent is:

> . . .behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.[181]

The contrast between the community property and threshold property systems is that with the threshold regime, different levels of preferential

172. *Id.*
173. *Id.*
174. *Id.*; *see also* Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 226 (2004); Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than the Surviving Spouse*, (1995) 46 HASTINGS L.J. 941, 947 (1995); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 L. & INEQUALITY 1, 3 (1998); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Nonmarital Inclusion*, 41 ARIZ. L. REV. 1063, 1066 (1999); *see* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQUALITY 1 (2000).
175. *See* Denham, *supra* note 3, ch. 2.61.
176. *Id.*
177. Hamilton, *supra* note 149.
178. *Id.*
179. *See* UNIF. PROBATE CODE §§ 2-115–17 (amended 2010).
180. *See id.*
181. *Id.*

shares favor succession.[182] In the community property system, however, a different percentage split of the separate estate leads to a different result.[183] In their own ways, both legal schemas address the issue of classifying biological and adopted children of the deceased, and both offer some protection when the surviving parent remarries.[184] However, neither the community property nor the threshold system address the possibility of treating stepchildren like the deceased's biological or adopted children.[185]

IV. CONFLICT OF LAWS IN INTESTACY

The reform proposals that the Scottish government is undertaking should consider the conflict of law rules that would apply if the implemented structure is borrowed from the inheritance laws of the United States or Canada, including what would happen if a Scottish resident were to die either situated abroad or with property abroad.[186] The next section will illustrate possible solutions in the present law with the passage of the Brussels IV, then issues that could arise under the community property and threshold approaches.[187]

A. Brussels IV and the European Union

At present, if a person dies intestate in a country abroad, but has estates in Scotland, then Scottish law would be applied in the country of their death.[188] The European Succession Regulation (EU 650/2012), also known as Brussels IV, has governed the succession of heritable assets coming into force in 2015.[189] All EU member states have signed the Brussels IV except the United Kingdom, Ireland, and Denmark.[190]

Testators in England and Wales have more discretion to choose whom to leave their estates to; however, particularly for those domiciled in those countries, some notable exceptions apply.[191] In Scotland, on the other hand,

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182. Denham, *supra* note 3, ch. 2.61.
183. *Id.*
184. *Id.*
185. *Id.* ch. 2.68.
186. *See* discussion *infra* Part IV.
187. *See infra* Part IV.
188. Commission Regulation 650/2012, 2012 O.J. (L 201) art. 21 (EU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0650 [perma.cc/PJ2S-DE75] [hereinafter Brussels IV].
189. *Id.* art. 83.
190. Anna Metadjer, *The EU Succession Regulation now in force – how will it affect you?*, KINGSLEY NAPELY (Aug. 20, 2015), https://www.kingsleynapley.co.uk/insights/blogs/private-client-law-blog/the-eu-succession-regulation-now-in-force-how-will-it-affect-you [perma.cc/G3YL-43E4].
191. *Id.*; *see also* EUROPEAN JUDICIAL NETWORK, https://e-justice.europa.eu/content_which law _will_apply-340-ew-maximizeMS_EJN-en.do?member=1#toc_3_7 [perma.cc/9JUL-MWAV] (last visited Oct. 10, 2019) ("English private international law depends heavily on the domicile of the deceased. In England, succession to movable assets (everything except land) is decided by applying the law of the country of the domicile of the deceased.").

forced heirship rules apply under the Succession (Scotland) Act 1964, which reserves certain parts of the estate to the spouse and children.[192] For those who have assets in multiple countries, courts will decide which country's succession law will apply.[193]

If the property is situated in another European country where the Scottish national is habitually resident, that foreign country's laws, particularly their forced heirship rules, will dictate the way in which that property is distributed at death.[194] In such a case, the Brussels IV would apply, and the testator would be able to decide the choice of law when planning the distribution of property.[195] The testator would have a choice of law by making a separate will in the country where that property is located.[196] The testator would then be able to exclude any foreign property from the Scottish will.[197] This would be an advantage, because it would prevent the estate of the deceased from being adjudged separately under a different jurisdiction and could therefore expedite the formalities of the latter part of the distribution process.[198]

A member state that has jurisdiction over the deceased's succession will have the authority to grant a European Certificate of Succession.[199] The idea is that other states which have also adopted Brussels IV will then accept this certificate without needing it to be resealed or another grant of probate to be issued.[200] This should make estate administration in foreign jurisdictions less complex for situations in which multiple states are involved that have adopted Brussels IV.[201] Because the UK has opted out of Brussels IV, the

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192. Metadjer, *supra* note 190.

193. *Id.*; Brussels IV, *supra* note 188, at art. 21(1) (determining that the Court will implement the rules of the country of habitual residence).

194. Brussels IV, *supra* note 188, at art. 83; *The New EU Regulation (Brussels IV): Understanding the Impact on Cross-Border Estate Planning and Administration*, The American Bar Association Section of International Law 2016 Europe Forum, 4, (2016), https://shop.americanbar.org/PersonifyImages/ProductFiles/237345198/Session%205.pdf [perma.cc/A8BG-PXZB] ("[T]here are exceptional jurisdiction rules ("Privilège de jurisdiction") which exist in articles 14 and 15 of the French Civil Code and which allow a French citizen to bring claims against any other person or entity before a French court, even if the jurisdiction rules which are normally applicable lead to the jurisdiction of the courts of another country (article 14). Similarly, a claim against a French citizen can always be brought before the French courts (article 15).").

195. Brussels IV, *supra* note 188, at art. 22 (detailing that under Article 22 (1), a person may choose the law that will govern his succession according to the law of his state of nationality at time of death).

196. *Id.* (detailing that under Article 22 (1), a person may choose the law that will govern his succession according to the law of his state of nationality at time of death).

197. *See id.*

198. Katrina Venters, *Foreign will could save your inheritance*, THE SCOTSMAN (Apr. 30, 2018), https://www.scotsman.com/news/opinion/katrina-venters-foreign-will-could-save-your-inheritance-1-473 1443 [perma.cc/Y7LS-F823].

199. See Carryl Beveridge, *EU Succession – what has changed?*, MORTON-FRASER LAWYERS (Sept. 11, 2015), https://www.morton-fraser.com/knowledge-hub/eu-succession-what-has-changed [perma.cc/27GW-JLTU] (The issuing of the certificate is allowed under article 63 in the Regulation. The form referred to in article 67 should be used. The application for the issuing of the Certificate of Succession may be presented by using the form in article 65); *see also* Brussels IV, *supra* note 188.

200. *See id.*

201. *Id.*

certificate will not receive automatic recognition in the UK; therefore, someone choosing this method for succession will still need confirmation or probate.[202] Scottish nationals could benefit from creating different wills for different countries; however, it requires diligence to write two wills.[203] If this method is used, it is important to see that during the drafting process, the wills are drafted correctly and that the provisions of each will are consistent, neither revoking the other.[204]

Another complication may arise from a Scottish national's owning property in another EU country that is bound by the Brussels IV, because it may consider this deliberate avoidance of forced heirship law to be "manifestly incompatible with the public policy."[205] For example, it is unclear whether a French court that applies forced heirship might consider the election by a UK national—a state that has opted out—a deliberate avoidance of their jurisdiction, and therefore against public policy.[206]

B. United States

States with traditional community property frameworks have their own conflict of laws principles and distribution of property upon intestate death.[207] While the eight traditional community property states have concepts in common, there are some significant differences among these states.[208] They all recognize ownership in joint tenancy, tenancy in common, rights of survivorship, and the concept of resulting and constructive trusts.[209] The principle that exists in most of the community property states is that "the surviving spouse continues to own an undivided one-half interest," which is not just 50% of the value of the community estate as it existed when the first spouse died, but is an interest in "each and every former community asset upon the first spouse's death."[210] The outcome is that the decedent's former interest passes to the spouse either by will or intestate succession.[211]

Separate property usually includes assets acquired before marriage, or during marriage if acquired through inheritance or gift.[212] In community property states, the spouse will typically inherit all the community property

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202. *Id.*

203. Venters, *supra* note 198.

204. *Id.*

205. Beveridge, *supra* note 199.

206. *Id.*; *See also* Brussels IV, *supra* note 188, at art. 26 ("Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law.").

207. *See* Featherston, *supra* note 91.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Jerome Synold, *Intestate Succession & Cal.*, GERMAN PROBATE LAWYER, https://www.german-probate-lawyer.com/en/detail/article/intestate-succession-and-california-1736.html [perma.cc/QT56-W6AK] (last visited Dec. 25, 2019).

by operation of law, which is similar to what happens to assets held in joint tenancy.[213] There are many assets that are not subject to intestate succession; for example, assets are not subject to probate if they have been transferred to a trust, and assets held in a joint tenancy or as payable on death are not subject to intestacy rules.[214] There are also many retirement vehicles that are not subject to intestate succession; examples include assets held in 401(k)'s and in Individual Retirement Accounts (IRA).[215] Life insurance proceeds are commonly used to transfer wealth and are likewise generally immune from intestate succession and probate.[216]

The differences in approach among community property states include income from separate property and rebutting the community presumption.[217] Income generated during a marriage from separate property, including rent, dividends, and interest, is counted as separate property in most of these states.[218] In Texas, Idaho, and Louisiana, however, income during the marriage that is generated by separate property is usually deemed community property, unless there is an effective agreement to the contrary.[219] There are some community property states in which the party asserting separate property must prove the asset's separate character by a preponderance of the evidence standard.[220] Other states require a clear and convincing evidence standard.[221]

The principle of having situs in a common law state (meaning to deposit community funds into an account that is in a common law state) has no effect on the contribution's community property character.[222] Because the contribution is personal property, the ordinary determining factor in succession is the law of the couple's domicile.[223] Similarly, for those in common law states, residents cannot turn personal property into community property simply by investing personal property into a community property state.[224]

The law of the situs, which recognizes both spouses' interests, governs the ownership of real property purchased in a community property state.[225] The central issue there is whether the real property purchased with community property retains its classification as community property, or whether the spouses become tenants in common or joint tenants.[226] The

213. CAL. PROB. CODE § 6401 (West 1990).
214. Synold, *supra* note 212.
215. *Id.*
216. *Id.*
217. Featherstone, *supra* note 91, Part IV.A–C.
218. *Id.* Part IV.A.
219. *Id.*
220. *Id.* Part IV.B.
221. *Id.* I.
222. *Id.* III.H.
223. *Id.*
224. *Id.*
225. *Id.* Part III.H.
226. *Id.*

accepted view is that "the common law jurisdiction will respect the interest of the spouses in that property, even though the exact community nature is not recognized by that jurisdiction."[227]

There are also laws on management and liability, which determine whether a spouse "has the authority to unilaterally manage (or sell, give or encumber) a community asset, or whether joinder of both spouses is required."[228] The laws of each state can vary significantly on this issue.[229] Which assets are liable for each debt incurred by the spouses, jointly or severally, can also vary considerably by state.[230] Divorce laws in some community property states allow an *equitable* division of the community property, and in other states, there must be an *equal* division of the community property.[231] The treatment of separate property, which is not included in the marital property, varies from state to state.[232]

The California Probate Code is based on community property and is an example of how conflict rules are resolved in matters subject to its jurisdiction.[233] The non-state citizen who dies without a will may have assets determined by California's intestate succession laws if the assets are subject to California's jurisdiction.[234] The determination as to who inherits turns primarily on whether the individual dies with a spouse or children; a one-half share applies for the spouse, codified in a prior rule.[235] Assets acquired during marriage are typically held as community property, while real property and bank accounts could be characterized as assets subject to California situs.[236]

If Scotland adopts the community property model in its succession law for intestacy, a potential conflict of law issue may be the determination of how the assets are held.[237] An investigation at the practical level will allow lawmakers to assess how the community property and estate planning vehicles were formed, which may alter the final analysis of inheritance reform.[238]

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227. *Id.* (citing Gerald Treacy, *Tax Management Estates, Gifts and Trusts Portfolio*, 802-2nd, Community Property: General Considerations (BNA)). At least one case has held it is community property in the bankruptcy context: *see* Countryman v. Estate of Eisner (In re Eisner), No. 05-44474, 2007 WL 2479654, at *6 (Bankr. E.D. Tex. Aug. 28, 2007)).

228. *Id.* Part IV.E.

229. *Id.*

230. *Id.*

231. *Id.* Part IV.F.

232. *Id.*

233. CAL. PROB. CODE §§ 6400–14 (West 1990).

234. William Sweeney, *Non U.S. Citizen Owned Property in California at the Time of Death*, SWEENEY PROBATE LAW, https://www.sweeneyprobatelaw.com/Articles/Non-U-S-citizen-Owned-Property-in-California-at-the-Time-of-Death.shtml [perma.cc/V4CP-8NLF] (last visited Dec. 25, 2019).

235. CAL. PROB. CODE § 6401 (West 1990).

236. Sweeney, *supra* note 234.

237. Colin Henderson, *Scottish succession law reforms*, ANDERSON STRATHERN, https://andersonstrathern.co.uk/news-insight/scottish-succession-law-reforms/ [perma.cc/83SX-GQ2F] (last visited Dec. 25, 2019).

238. Denham, *supra* note 3, ch. 2.76.

C. Canada

If Scotland were to adopt the threshold property framework in its rules of succession law regarding intestacy, the conflict of laws principles would distinguish between movable, which is personal property, and immovable property such as real estate.[239] For immovable assets, the jurisdiction where the property is located governs the law, and for movable assets, the jurisdiction of the deceased's domicile at the date of death governs.[240]

Canadian courts use *lex fori* to determine domicile, which is the law of the jurisdiction in which the action commenced.[241] In British Columbia, the court must determine which laws apply to the deceased, and will therefore rely on the laws of the jurisdiction of domicile to decide how to distribute the property.[242] If the domicile is in another jurisdiction, the court will determine if the jurisdiction of domicile also applies to the deceased's movable assets.[243] If the Canadian court determines that the foreign jurisdiction has been satisfactorily proven, it will apply that law.[244]

A change of domicile must happen intentionally.[245] Until a person takes up residence in another jurisdiction as a domicile of choice, the domicile of origin remains the same regardless of nationality.[246] In order to create a domicile of choice, a person takes residence in a foreign jurisdiction and must have sufficient intent to make a permanent home in that jurisdiction.[247] Residence requires the person to actually reside in the new jurisdiction: it is insufficient if he only has mere future intent to live there.[248] In the case of a person with multiple residences, identification of the person's "chief" or "principal" residence will determine domicile.[249] The new jurisdiction must be the intended permanent home for the indefinite future.[250] As soon as the person acquires the intent for permanent residence indefinitely, the person has now established a new domicile.[251]

This principle was affirmed in the Alberta Court of Queen's Bench decision, *Re Foote Estate*, which involved the estate of the late Eldon Foote, who died on May 14, 2004.[252] The issues before the court were (1) Mr.

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239. Lauren Liang, *Which Jurisdiction's laws will govern your estate?*, CLARK WILSON (Feb. 9, 2017), https://www.cwilson.com/which-jurisdictions-laws-will-govern-your-estate/ [perma.cc/4WQH-7EAG].
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *See* Re Foote Estate, 2010 ABQB 197 (Can. Alta. Q.B.).

Foote's domicile at the time of his death, which would determine both the law for the distribution of his movable assets; and (2) whether his family would be entitled to make a claim against his estate.[253] The deceased was born in Alberta, where he had lived for most of his life with his first wife from 1924 to 1967.[254] In 1967, he started a business in Australia and then married his second wife in 1971, when they built a home on Norfolk Island (an island approximately 1,000 miles east of Sydney, Australia).[255] In 1977, he and his then-wife both obtained permanent residency status on Norfolk Island.[256] During this marriage, they purchased a house in Victoria, British Columbia, which was primarily occupied by Mr. Foote's son while he attended school in Victoria.[257]

Mr. Foote divorced his second wife in 1981, when the house in Victoria was sold, after which he married for the third time in 1984.[258] He lived with his third wife from 1984 to the end of the 1980s in rented accommodations in Tokyo, Japan and on Norfolk Island in Australia.[259] His wife was granted permanent residence status on Norfolk Island in 1996.[260] From 1997 to 2000, Mr. Foote and his third wife spent time on Norfolk Island, in mainland Australia, and in Canada.[261] In 2000, Mr. Foote obtained a second home in Victoria, British Columbia, where the couple spent time for the next few summers.[262] He made plans to sell his home on Norfolk Island, but never listed it for sale.[263] Then he died in May 2004.[264]

The Alberta court held that Mr. Foote died domiciled in Norfolk Island and that domestic law would govern the administration of his estate because he had acquired a domicile of choice there by 1972.[265] This was his domicile prior to his death even though he had acquired a second home in Victoria; however, he had not acquired a domicile of choice in Victoria because he lacked the necessary intention to settle in British Columbia indefinitely.[266] The court held that, although his intention was to relocate to British Columbia, it remained in an uncertain form because he had no specific intention to permanently make it his home and abandon his domicile in Norfolk.[267]

253. *See id.* para. 176 (Can. Alta. Q.B.).
254. *Id.* para. 107.
255. *Id.* para. 139.
256. *Id.*
257. *Id.* para. 142.
258. *Id.* paras. 144, 108.
259. *Id.* para. 153.
260. *Id.* para. 154.
261. *Id.* paras. 161–63.
262. *Id.* para. 165.
263. *Id.* para. 164.
264. *Id.* para. 174.
265. *Id.* para. 252.
266. *Id.* paras. 252, 450.
267. *Id.* para. 449.

This case implies that if Scotland were to adopt the threshold approach to its law of succession dealing with intestacy, the law of habitual residence would also apply in its distribution of property.[268] This would continue in the same basis as it does now, where *lex fori* applies to immovable property, and the estate in land is adjudged under the jurisdiction where it is based.[269] The preferential share that applies to the spouse in intestacy would cause a division of property if there were neither a stipulation as to the residence nor a clear intent to relocate to a different jurisdiction.[270] The issue of domicile would not be as decisive in formulating an intent on the part of the intestate because the inference would be drawn by the court based on the habitual residence.[271]

VI. CONCLUSION

The Scottish government intends to provide a more equitable intestacy framework by adopting prevalent North American laws on intestacy.[272] Current Scottish intestacy laws are outdated and need to change because the rights of a cohabitee could be usurped by the deceased's children, who may not have contributed in a meaningful way to the family property in the long span of family life.[273]

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268. *See id.* para. 513.
269. *See id.* para. 14.
270. *See id.* para. 513.
271. Gerald B. Robertson, *The Law of Domicile:* Re Foote Estate, 48 ALBERT L. REV. 189, 189 (2010) ("In the area of conflict of laws the concept of domicile has declined in importance over the last few decades, both as a connecting factor in choice of law and as a basis for jurisdiction, as well as a basis for recognition of foreign divorces.").
272. Denham, *supra* note 3, ch. 2.2.
273. *Id.* ch. 3.11.