Inheritance and Succession within the Bailiwick of Guernsey

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1 Terms of Reference

1.1 Fundamentally different regimes apply to movable property (les meubles) and to immovable property (les immeubles). It is common to hear advocates talk of real and personal property but the distinctions are not exactly the same as they are in England and so it is important to use those terms with care[1]. In practice however land and interests in land (other than interests conferred by a lease) are immoveable and chattels, money, investments etc. are moveable[2]. Agriculture was historically much more significant to our economies than is now the case and so our law had to think about growing crops certain of which metamorphose from immovable property to movable property at various times during the year. There is no distinction drawn, for present purposes, between tangible and intangible property.

1.2 When considering what property comprises the estate of the deceased bear in mind that real property vested in more than one individual "jointly and for the survivor" vests in the survivor by operation of law on the death of the co-owner. Personal property held in joint accounts will also vest in the survivor automatically absent evidence that the right of survivorship was not intended to apply[3]. Household effects purchased during the marriage by either or both spouses are also presumed to be owned jointly and for the survivor. The presumption is rebuttable. Such jointly held assets do not comprise any part of the deceased's estate

1.3 In the case of immeubles Guernsey Law currently draws a distinction between property inherited on intestacy[4] (known as "Propres") and property purchased by a

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[1] Practitioners will need to be familiar with the 1852 Ordonnance des Biens Meubles et Immeubles.

[2] Take care when asked to consider the succession of land held in a company.

[3] See the Husband and Wife (Joint Accounts)(Guernsey)Law, 1966 and the Husband and Wife (Joint Accounts)(Alderney)Law, 1966. These laws were expressed to be for the avoidance of doubt. Whilst they only apply to joint accounts between spouses it is submitted that the same presumptions should apply in other cases as well.

[4] Or purchased pursuant to the exercise of *retrait lignager* or given to an heir *"en avance de succession"*.

deceased during his lifetime (known as "Acquets")[5]. Property left by will, even to a person who would have inherited on intestacy is an Acquet[6] in Guernsey (but a Propres in Sark). There will be circumstances where the heirs to a deceased's Propres will not be the same as his heirs to his Acquets. Property inherited from the paternal line is also distinguished from property inherited from the maternal line. If it is not possible to say if property is a Propres or an Acquets it is deemed to be a Propres and if it is not possible to determine whether it is a Propres from the maternal or the paternal line it is presumed to be a Propres paternal.

1.4 It is also important to know when our laws apply to the succession of property and when they do not. "Les meubles suivent la personne, et les immeubles le territoire" is the applicable choice of law rule according to our private international law regime. That is to say that the choice of applicable law to determine the succession to personal property is the law of the deceased's last domicile. The applicable law to govern the succession to immovable property is the law of the jurisdiction in which the immovable is situate. Guernsey (or Alderney or Sark) law only applies to the personal estate of a Guernsey (or Alderney or Sark) domiciled person. Guernsey (or Alderney or Sark) law applies to determine the heirs of real property in Guernsey (or Alderney or Sark) regardless of where the deceased owner may have been domiciled.

1.5 Succession is said to be direct when descendants inherit from their ascendants and indirect (or "collateral") when instead of the assets passing down through the generations they pass, in default of their being any descendants, either sideways to siblings or cousins and their families or upwards to the ascendants of the deceased (the "de cujus").

1.6 In order to be capable of inheriting an heir must be (i) alive (including en ventre sa mere) and (ii) capable of living (étre né viable). Heirs will either take the property as being the person entitled to it ("de son chef") or else by standing in the shoes of a deceased ascendant of his ("a la representation"). Representation in a direct succession is permitted to but not including the seventh degree. In an indirect succession representation as regards Propres is to but not including the seventh degree[7]. In an indirect succession of Acquets representation is permitted only where a sibling of the de cujus joins in the succession. A claimant cannot represent an ascendant who is alive but has renounced his claim. Where all the heirs take "de son chef" the distribution will be per capita. Where some of the heirs do so representing their deceased ancestors the succession is divided per stirpes (or "par souche" or "by branch") which is to say that where there is more than one person stepping into the deceased persons shoes they each take a proportionate part of what their deceased ancestor would have received.

1.7 7 May 2008 is a key date. This is when the Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law, 2006 ("the 2006 Reform Law") came into force. The 2006 Reform Law abandoned the long held discrimination between legitimate and illegitimate persons in respect of all testate successions where the will was executed after 7 May 2008 and all intestate successions where the deceased

[5] One may also see reference to *Conquéts* – an acquet purchased after marriage.
[6] *Re Norris* (1995) 19 GLJ 55.

died after 7 May 2008. The distinction is also abolished for all other documents, such as trust instruments, executed after that date. Codicils executed after 7 May 2008 of wills executed before 7 May 2008 do NOT bring the will into the post May 2008 regime.

1.8 It is now possible under each of the laws of the Bailiwick to dispose of both realty and personalty by will. Historically, two different wills were required for personalty and realty. One can still have separate wills but it is not required other than in Alderney.

1.9 In all cases the testator must be over the age of eighteen[8] and have the necessary animus testandi. The Guernsey courts have due regard to the authorities in England on the subject of testamentary capacity. The required test is set out in the case of *Banks –v- Goodfellow*[9]*;*

> *"It is essential that a testator shall understand the nature of his acts and its effects; the extent of the property of which he is disposing; and shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or his will in disposing of his property and bring about a disposal of it which, if his mind had been sound would not have been made."*

1.10 Whether a testator has capacity is a legal rather than a medical question[10] but it usually a doctor's task to assess capacity. When dealing with an elderly testator or someone who has been seriously ill it is a "golden, if tactless, rule" that the lawyer preparing the will should ensure that it is witnessed and approved by a medical practitioner who ought to record his examination of his patient and his findings as to capacity[11]. Also remember that a will can be set aside on the grounds of fraud, duress or undue influence. It is a rule of professional conduct never to accept instructions to prepare a will for someone (or indeed do anything else) other than on their direct instructions[12].

2 Testamentary Inheritance

2.1 <u>Testamentary Disposition of Guernsey Immeubles</u>

2.1.1 Until 1840 the Customary Law of Normandy was the Law of Guernsey in all matters of succession and inheritance pursuant to which it was simply not possible to dispose of real estate in Guernsey by will. There was in the early 19th Century public dissatisfaction with this state of affairs which culminated in a petition to the Royal Court signed by several hundred rate payers drawing attention to the injustices caused by the application of the Customary Law and requesting a number of reforms, including the introduction of the right for a person leaving no descendants to dispose of his real property by will.

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[8] Which is now the Bailiwick wide age of majority. Formally 20 in Alderney.
[9] [1870] LR 5 QB 549
[10] *Richmond –v- Richmond* (1914) 111 LT 273
[11] *Kenwood –v- Adams* The Times, 29 November 1975.
[12] Rules 18 and 19 of the Bar Rules of Professional Conduct

2.1.2 A Committee was appointed by the Royal Court to consider the matters raised by the petition and following the submission of the Committee's Report, "the Loi Sur Les Successions" was enacted and registered in August 1840. By Article 14 of that Law a person dying without leaving descendants was given the right to leave by will real property which he had purchased during his lifetime and also the right to leave by will inherited property but only if he had no relatives in the second degree in the line from which the property had been inherited. This restriction on the ability to will inherited property was removed by an Order in Council of 1847[13] but it was not until 1954 that the right to make a will of Guernsey realty was extended to all persons whether they had descendants or not.

2.1.3 Section 4 of the Law of Inheritance 1954[14] provided that it is lawful for every person to dispose testamentarily of any interest in real estate to which he is entitled at the time of his death (a life enjoyment is of course an interest in real estate for these purposes) provided that a person leaving descendants is only able to exercise such right in favour of any one or more of the following:-

(a) his surviving spouse;

(b) his descendants;

(c) his illegitimate children and their descendants;

(d) his stepchildren and their descendants;

(e) the illegitimate children of his descendants, his illegitimate children or of his stepchildren.

(but inexplicably not the stepchildren of his descendants, his illegitimate children or of his step-children). Sub-sections (c) and (e) of section 4 of the 1954 Law have been repealed by section 3 of the 2006 Reform Law which law abolishes the long held distinction made by Guernsey law between legitimate and illegitimate children for wills executed after 7 May, 2008.

2.1.4 A surviving spouse cannot however be excluded entirely since Section 3 of the 1954 law provides that the surviving spouse is entitled to the enjoyment until remarriage of one-half of the real estate of the deceased spouse which remains after payment of the debts and funeral and testamentary expenses which have not been satisfied out of the personal estate of the deceased spouse provided that if the annual value of that real estate after payment as aforesaid is less than £200 the surviving spouse is entitled to the enjoyment of so much thereof as does not exceed an annual value of £100[15]. The right created by Section 3 will override any provision to the contrary in the will unless the surviving spouse has by a marriage contract agreed to waive the right or is prepared voluntarily to surrender it.

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[13] Ordre sur les Testaments de Meubles, 1847, I Pg 163.
[14] As amended by the Law of Inheritance (Guernsey) Law 1979.
[15] Most unlikely to occur in practice. There was previously debate as to whether the annual value refers to annual rental value or the cadastre value. The generally accepted view is that this sum is the annual rental value.

2.1.5 It is not presently possible for a testator who leaves descendants to leave his real property to trustees to hold on behalf of his descendants[16]. This rule will be abolished in the forthcoming reforms.

2.1.6 Prior to 7 May 2008 a devise to someone in a will who predeceased the testator did not necessarily fail if the recipient predeceased the testator. If the beneficiary had issue and there was nothing in the will to the contrary then the law deemed the beneficiary to have died immediately after the testator and so the beneficiary's heirs, not necessarily his issue, would take the interest in the property. It did not matter that the beneficiary left his interest to someone other than the issue which qualified him for this legal fiction[17]. Section 27 of the 2006 Reform Law modifies that principal to apply only to where the gift is to the testator's issue, where the intended beneficiary dies before the testator and issue of the intended beneficiary are living (or en ventre sa mere) at the date of the testator's death.

2.1.7 In addition to the need for the testator to have the necessary capacity the formalities to be observed for due execution of a will must be respected. Prior to 7 May 2008 the formalities for executing a will in the Bailiwick of Guernsey realty were set out in the Law of 1840 and an Order in Council of 1852[18] as amended by the Wills (Temporary Provisions) Law 1944 and the Wills (Temporary Provisions) Amendment Law 1955. These formalities may be summarised as follows:-

(a) A will of realty made in the Bailiwick of Guernsey had to be made separate from any will of personalty.[19]

(b) A will of real property made in Guernsey had to be signed by the testator in the presence of two Jurats of the Royal Court both present at the same time. A will of real property made in Alderney had to be signed in the presence of two Jurats of the Court of Alderney and a will of realty made in Sark had to be signed before the Seneschal and the Greffier of the Sark Court. In all islands the two attesting witnesses had to be both present when the testator signed his will and must then have signed in the testator's presence and in the presence of each other.

2.1.8 The need for a will of real property to be in a separate document to a will of personal property is abolished by section 20 of the 2006 Reform Law. The formalities for execution are set out in section 21 of the 2006 Reform Law.

(a) It must be in writing and signed by the testator or by someone in his presence and by his direction.

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[16] *Re Davis* [1962]
[17] Section 4(2) of the 1954 Law
[18] Ordre des formalities requises pour les testaments d'immeubles, 1852, I Pg 212
[19] A will disposing of both realty and personalty was always valid, provided that it was attested to in accordance with the requirements of (i) the lex loci actus (the law of the place where the will was signed, (ii) the lex domicilii (the law of the testator's domcile or habitual residence), (iii) the lex patriae (the law of the testator's nationality) or (iv) the lex situs (the law of the place where the real property is situate)

(b) It must appear that the testator intended by his signature to give effect to the will.

(c) The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and

(d) Each witness either attests and signs the will or acknowledges his signature in the presence of the testator but not necessarily in the presence of any other witness.

2.1.9 Witnesses are competent if aged 14 years of more and are neither married to or descended from the testator. Gifts to witnesses or spouses of witnesses result in the gift failing. Executors can act as witnesses.

2.1.10 The 2006 Reform Law establishes for the first time a trust regime that applies where heirs to the real estate are unascertained regardless of whether an estate is testate or intestate. It is important to avoid unascertained heirs where possible by identifying heirs by name rather than description ("my Children" for example).

2.1.11 In practice separate wills for realty and personalty are still made. A will disposing of realty will be registered at the Greffe and many testators prefer that their wishes regarding their personalty are not given unnecessary publicity.

2.2 Testamentary Disposition of Guernsey Meubles

2.2.1 The Customary Law of Normandy always admitted the right to dispose of personal property by will although there were and still are considerable restrictions on the testator's freedom of disposition. The matter is now governed by the provisions of the Loi Relative à La Portion Disponible des Biens Meubles des Pères et Mères of 1930[20]. Article 1 of which provides that every person who has testamentary capacity may dispose freely by will of all his personal property except that comprised in the legitimé of his descendants and the entitlement of his spouse.

2.2.2 The legitimé of the children is one-third if there is a surviving spouse and one-half if there is not[21]. Section 1 of the Law of Inheritance (Guernsey) Law 1979 permitted a Testator to direct that any stepchild or illegitimate child of his is to be treated for the purposes of the 1930 Law as if that child were a child of his born in lawful wedlock. Failure to invoke the right meant that step-children and illegitimate children were not entitled to share in the legitimé. Section 1(2) of the 2006 Reform Law has now abolished the distinction between legitimate and illegitimate heirs.

2.2.3 The entitlement of the surviving spouse is one-third of the personal estate if there are descendants living at the date of the testator and one-half if there are not[22]. Spouses may during the marriage renounce their rights in each

[20] As amended by the Law of Inheritance (Guernsey) Law 1979.
[21] Article 2 of the 1980 Law.
[22] Ibid Article 3.

other's estates and if they do the portion which is renounced falls into and forms part of the disposable portion of the testator's estate[23] ("la portion disponible").

2.2.4 By the Loi des Succession 1889 a testator may by will direct that the legitimé of any descendant shall be held in trust to pay the net income thereof to that descendant during his lifetime. After his death the capital must be distributed between the heirs or legatees of the deceased in all respects as if the legitime had not been placed in trust.

2.2.5 The formalities to be observed for the due execution in Guernsey of a will of personalty prior to 7 May, 2008 were contained in the Loi Relative aux Testaments de Meubles of 1847 and may be summarised as follows:-

(a) No will of personal property was valid unless it was in writing.

(b) Holographic wills were (and post 2008 still are) admissible to Probate provided that they are entirely written, dated and signed by the Testator. A will which is not holographic must be signed by the testator at the end of the will and his signature must either be subscribed or recognised in the presence of two witnesses who must both be present at the same time. The witnesses must then in the presence of each other and the presence of the testator attest the testator's signature by signing their own names near his at the end of the will.

(c) A testator who for whatever reason was unable to write his signature could sign his will by making his mark at the end and if he was unable even to make his mark he may authorise some other person to sign for him.

(d) Every person who had attained the age of fourteen years was competent to be a witness to a will of personalty with the exception of the spouse of the testator or any of his descendants. Attestation of a will by a beneficiary did not invalidate the will[24] but it did render void the legacy or bequest which the attesting witness could otherwise receive. The power to enable an executor to charge is considered to be a type of bequest and so if an executor witnesses the will he will not be able to rely upon any charging clause. Recent Jersey authority has considered the question of what happens when a beneficiary witnesses a codicil[25].

(e) Any instrument revoking a will must be executed in accordance with the same rules as govern the making of a will. A will may however be revoked by destruction provided that at the time of destruction the testator has the necessary animus revocandi[26].

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[23] Ibid Article 4.
[24] It does in Jersey
[25] *G& S Executors Limited et al* (2004) KRC 181 A
[26] *Re the Estate of Waterfall* 3 January 1996 as per Carey, DB: "I am satisfied that our law is that reflected in the words of Mr Justice Baker in *re Sabatini deceased* 1969 (114 SJ 35) to the effect that "as a general rule a testator must have

2.2.6 The formalities of a will of personalty after 7 May, 2008 are as set out in section 21 of the 2006 Reform Law.

2.2.7 The introduction of testamentary freedom will of course mean that there are no limits on the manner in which a deceased may dispose of his property. It is proposed, however, that “grandfathering provisions” are introduced to ensure that wills drawn up before testamentary freedom takes effect shall remain in force after testamentary freedom comes in.

2.3 Testamentary Disposition of Alderney Immeubles

2.3.1 The legal system and constitution of Alderney were both substantially altered after the end of the Second World War. Now by virtue of Section 56 of the Alderney Land and Property Law, 1949 a person is free to dispose freely of his Alderney realty subject only to two customary law rights both of which have been abolished in Guernsey and Sark; the rights of "Douaire" (the right of a widow to the life enjoyment of one-third of the realty of her husband) and "Franc Veuvage" (the right of a widower, provided there has been viable issue of the marriage, to the enjoyment until death or re-marriage of all his wife's realty).

2.3.2 A will of realty made in Alderney must be signed in the presence of two Jurats of the Alderney Court. A will of Alderney realty made in Guernsey or Sark must be executed in accordance with the formalities laid down by the Law of 1840 referred to above. By virtue of the Wills (Alderney) Law 1981 and the Execution of Wills (Bailiwick of Guernsey) Law, 1994 it is now possible to make a valid will of Alderney realty outside the Bailiwick of Guernsey notwithstanding that such will disposes of both realty and personalty.

2.4 Testamentary Disposition of Alderney Meubles

2.4.1 Until 1930 the right of a person having testamentary capacity to dispose of his personal estate was governed by an Order in Council which applied in both Alderney and Guernsey entitled "Loi Relative à la Portion Disponible des Biens Meubles des Pères et Mères" registered in 1872. At that time a married woman was not able to own property in her own right and so the Law of 1872 made no provision for any legitime in favour of children in the personal estate of their mother if she were survived by her husband and gave the surviving husband no entitlement to any part of his wife's estate.

2.4.2 In 1928 Guernsey introduced the Married Women's Property Law which gave a married woman the right (among other things) to leave her personal estate by will and this was followed by the 1930 law which put husbands and wives on the same footing as regards the legitime of their children and their entitlement in each other's estates. The Law of 1930 repealed the Law of 1872 but as Guernsey's Married Women's Property Law did not

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the same standard of mind and memory and the same degree of understanding when destroying his Will as when he made it” applies as much in Guernsey as it does in England.”

extend to Alderney the States of Alderney deemed it essential that the provisions of the 1872 law be retained in Alderney. To achieve this, legislation in terms identical to the 1872 law was passed by the States of Alderney and approved by an Order in Council of the 28th March 1930.

2.4.3 By Section 55 of the Alderney Land and Property Law 1949 Guernsey's Married Women's Property Law was introduced into the Law of Alderney but no legislation corresponding to the 1930 Law has subsequently been adopted. The result is the anomalous situation that a wife has a right to a third or a half of her husband's personal estate depending on whether or not her husband has left issue but a husband has no entitlement to any part of his wife's personal estate. So far as children are concerned, there is a right to one-third of their father's personal estate if he leaves a widow and to one-half if he does not, but a right to one-half of their mother's personal estate whether or not she is survived by her husband.

2.4.4 Like in Guernsey there is power to place a descendants' legitime on trust to pay out all of the income during the child's life[27]. On the child's death the capital must be distributed to his heirs as if the monies were never in trust.

2.4.5 The formalities for the execution in Alderney of a will of personalty are the same as in Guernsey prior to 7 May 2008.

2.5 Testamentary Disposition of Sark Immeubles

2.5.1 Until the enactment of the Real Property (Succession)(Sark), Law, 1999 (which came into force on 17 January 2000) the customary law, which denied the possibility of making any will of realty, still had full force and effect in the Island of Sark. There may still be questions in practice that shall need to be resolved in accordance with the pre-1999 law.

2.5.2 Sark now enjoys the most up to date laws of inheritance in the Bailiwick. There are no distinctions now drawn, as still remains the case in Alderney, between; children born in lawful wedlock and those who are not, those who are blood descendants and those who are adopted.

2.5.3 There remain limits on the powers of testamentary disposition for those who own Sark realty. If such a person has descendants then they may leave their Sark realty to any one of those descendants[28]. They cannot divide the ownership of Sark land which is indivisible[29]. If they have more than one property in Sark then they can leave each of their properties to different descendants or to the same descendant.

[27] Le Lois Supplementaire à La Loi des Successions, 1893.
[28] Section 6 of the Real Property (Succession)(Sark) Law, 1999.
[29] Section 1 of the Real property (Succession)(Sark) Law, 1999. It is widely believed that Sark is divided into forty parcels of land called "tenements". It is true that when Sark was colonised in 1565 by Helier de Carteret the Island was divided into forty tenements which alone carry the right to a seat in the Chief Pleas, but there was some sub-division subsequently, some of it even after James I had by Letters Patent in 1611 confirmed that lands in Sark could not be divided or split. As a result, there are in fact some sixty parcels of land in the Island to which the Law as to inheritance of realty applies. There are many long leases over land in Sark. These are movable property.

2.5.4 A person without descendants may devise his property to any one natural person and if they have more than one tenement or piece of freehold land may devise all or any one or more of the properties to any one person[30] or may leave Sark property to individual trustees to be held on trusts for sale. The trustee is entitled to exercise all the rights of the property owner pending sale but if the property is a tenement he cannot sit in Chief Pleas.

2.5.5 Like in Guernsey the property vests in the heir, testamentary or intestate, on the death of the deceased without there being any legal process to follow.

2.5.6 The devisees take the property subject to a statutory right[31] in favour of a surviving spouse to the enjoyment for life of one third of the property of his deceased spouse. The right is exercisable by the surviving spouse on such part or parts of the real estate of the deceased as the surviving spouse may reasonably select. This right replaces the customary law rights of Douaire and Franc Veuvage which have been abolished[32].

2.6 Testamentary Disposition of Sark meubles

2.6.1 A person domiciled in Sark with testamentary capacity is able to make a will of his personal estate and is now subject to the same restrictions on his testamentary capacity as a person domiciled in Guernsey. Married women in Sark only acquired property rights in Sark in 1975 and Sark's Law on the children's legitimé and the husband's entitlement was then brought into line with that then applicable in Guernsey by virtue of the Successions (Personal Estates of Married Persons) (Sark) Law 1975.

2.6.2 In Sark there is no need to treat adopted children differently to children born in lawful wedlock. The 1979 law which allowed Guernsey domiciled persons to treat step-children and illegitimate children as if born in lawful wedlock and therefore able to share in the legitimé was not extended to Sark and so step-children and illegitimate children were not able to share in the legitimé. The Personal Property (Succession) (Sark) Law, 2007 abolished any distinction between illegitimate and legitimate children in respect of wills executed after 4 July 2007 but step-children are still out in the cold as far as legitimé was concerned.

2.6.3 The formalities for the execution of a Sark will of personalty are the same as in Guernsey prior to 7 May 2008. Separate wills are no longer required.

[30] Section 7 of the Real property (Succession)(Sark) Law, 1999.
[31] Section 11 of the Real property (Succession)(Sark) Law, 1999.
[32] Section 10 of the Real property (Succession)(Sark) Law, 1999

3 Intestate Succession

3.1 Guernsey Immeubles on an Intestacy

3.1.1 Realty in Guernsey vests immediately on death in the heirs at law and there is no procedure for the appointment of an administrator to make title to the estate ("Le Mort Saisit Le Vif").

3.1.2 The rights of the heirs are always subject to the overriding right of a surviving spouse to the usufruct provided for in Section 3 of the Law of Inheritance 1954. The surviving spouse has a right to the enjoyment until remarriage of, broadly speaking, one-half of the deceased's real estate and by sub-section (2) of that section the right is exercisable by the surviving spouse on such part or parts of the real estate of the deceased as the surviving spouse may reasonably select.

3.1.3 If the deceased has left children or remoter issue the position is very straightforward, the entire estate, both Propres and Acquets, will pass to the issue of the deceased in equal shares per stirpes, representation being permitted "à l'infini".

3.1.4 If the deceased has left no issue, the system of inheritance is based upon the division of the heirs into orders or classes who are successively called upon to inherit, the second class not being called upon so long as any of the first class remain and so on. The classes in order of priority are as follows:-

(a) the brothers and sisters of the deceased;

(b) the ascendants of the deceased;

(c) other collaterals.

3.1.5 Where succession does not take place in the direct line the following points should be noted:-

(a) In a collateral succession representation is permitted à l'infini in respect of Propres but will only occur in the case of Acquets if a sibling of the deceased comes to the succession, in which case the estate will be divided per stirpes. If there are no brothers or sisters of the deceased living at the death of the testator the estate is divided amongst all the issue of the deceased brothers and sisters per capita.[33]

(b) Ascendants having no descendants living inherit the Acquets of the last of their descendants. The father is preferred to the mother and the paternal line to the maternal line in parity of degree. Propres return to the line from which they were inherited. Under the pre-

[33] Article XII of the Law of Succession of 1840.

existing customary law parents were absolutely debarred from their children's inheritance.

(c) Propres will return to the side of the family from which they were inherited even though this might mean that the next of kin will not benefit, whereas Acquets pass to the next of kin, whether in the maternal line or the paternal line, in parity of degree.

(d) Inheritance is allowed up to and including the sixth degree. "Le Septième Degré est hors de tout Lignage".

3.1.6 If no legitimate heirs can be found in any of the above classes the estate passes to the Crown as Bona Vacantia.

3.1.7 Where the de cujus dies prior to 7 May 2008 illegitimate heirs have absolutely no rights in the estate. Where the de cujus dies after 7 May 2008 illegitimate heirs have exactly the same rights as legitimate heirs.

3.2 Guernsey Meubles on an Intestacy

3.2.1 Personal property devolves on an intestacy as follows:-

(a) If the deceased leaves a spouse and issue, the surviving spouse takes one-third of the estate and the issue take two-thirds equally between them per stirpes.

(b) If the deceased leaves issue but no spouse the issue will take the entire personal estate in equal shares per stirpes.

(c) If the deceased leaves a spouse but no issue, the spouse will still only take one-half of the personal estate and the heirs to the remainder of the estate would be determined by following the same rules as would apply in determining who were the heirs to the deceased's Acquets. This will apply to the entire estate if the deceased leaves neither spouse nor issue. It is thus particularly important for childless couples in Guernsey to make wills.

3.3 Alderney Immeubles on an Intestacy

3.3.1 Intestate Succession to Alderney realty is now governed by the provisions of Section 57 of the Land and Property Law 1949, Sub-section 1 of which provides that where a person owning real estate dies without having disposed or without having wholly disposed by will of that estate, the estate or such part thereof as he has not disposed of vests forthwith in the Clerk of the Court of Alderney. The remaining sub-sections of the section give the Clerk of the Court a power to sell the estate and provide that the estate must be sold within twelve months by public auction. The Court is empowered both to extend the period and to permit a sale by some method other then Public Auction. Pending sale, the Clerk has all the powers which the deceased had of letting or managing the estate, although these powers must be exercised under the directions of the Court. The section also

contains provisions which enable the heirs to apply to the Court to have the property vested in them rather than having it sold and the proceeds of sale divided between them.

3.3.2 If there is only one person who would be entitled to the sale proceeds then, if adult, he can apply to the Court of Alderney to have the property vested in him instead of being sold. The Court must grant that application. If there are two or more people who would be entitled to the sale proceeds and they all apply to the Court to have the property vested in them the Court shall grant the application unless the land involved in agricultural and the Court is of the opinion that the resulting units would be too small to be worked properly. If there are potential heirs who do not want the property vested in them and others who do the latter can buy off the former.

3.3.3 However, assuming that the land is sold by the Clerk of the Court the order of priority of inheritance is as follows

(a) If the deceased has left a widow or widower and there is no person in any class provided for in the Law entitled to share in the proceeds of sale, the proceeds of sale are transferred to the widow or widower.

(b) If the deceased has left a widow and there is also a person of a class entitled to share in the estate, one-third of the proceeds of sale is invested in the joint names of the Clerk of the Court and the Treasurer of the States of Alderney in securities approved by the Court of Alderney and the income therefrom is paid to the widow during her life. The remaining two-thirds is available for distribution to the other heirs.

(c) If the deceased has left a widower entitled to Franc Veuvage and there is also a person of a class entitled to share in the proceeds of sale, all the proceeds of sale will be invested in securities approved by the Court and the income thereof paid to the widower during his life or until he remarries. Upon the death of the widow or upon the death or remarriage of the widower the capital is then available for distribution amongst the heirs.

3.3.4 Subject to the rights of any surviving widow or widower the classes who may inherit in their order of priority are as follows:-

(a) If there are legitimate descendants, they will take in equal shares per stirpes. Representation is permitted “a l’infini”.

(b) If there are no legitimate descendants the parent or parents of the deceased if living will take in equal shares.

(c) If the deceased left no legitimate descendants and no parents the brothers and sisters of the whole blood or descendants of such brothers or sisters who are deceased will take in equal shares per stirpes.

(d) If there are no heirs in any of the above classes but there are brothers or sisters of the half blood or descendants of deceased brothers or sisters of the half blood, they will take in equal shares per stirpes.

(e) Failing heirs in any of the above classes, the estate will pass to the surviving grandparents, if any, in equal shares failing whom to the surviving great-grandparents if any in equal shares, failing whom

(i) in equal shares to the surviving uncles and aunts of the whole blood and to each stock of descent from a deceased uncle or aunt of the whole blood, persons in the same degree within each stock of descent sharing equally the amount appropriate to that degree within that stock and failing persons so entitled,

(ii) to the surviving uncles and aunts of the half blood and to each stock of descent from a deceased uncle or aunt of the half blood persons in the same degree within each stock of descents sharing equally the amount appropriate to that degree within that stock.

(iii) If no heirs in any of the above classes can be ascertained the estate will pass to the Crown.

3.4 Alderney meubles on an Intestacy

3.4.1 Spouses have the same rights in the personal estate of the deceased as they would have had if the deceased had died leaving a will. In other words widows take one-third if there is legitimate issue and one-half if there is not and widowers receive nothing.

3.4.2 If there is legitimate issue the issue will take the rest.

3.4.3 In the absence of issue, the personal estate would devolve in the same way as it would under the Law of Guernsey that applied prior to 7 May 2008. Illegitimate children have no automatic rights to inherit.

3.5 Sark Immeubles on an Intestacy

3.5.1 Prior to 2000 the customary law applied as modified by the Letters Patent of 1611. The result was that all lands in Sark had to descend directly to the eldest son and other heirs of the son. Younger sons and daughters could participate in any succession only to the extent that this did not involve the sub-division of any tenements. The rules were complex, and not necessarily in accordance with principle, but in general the custom was;

(a) All tenements would pass to the eldest son to the exclusion of younger brothers and sisters. If the eldest son had predeceased leaving a son, that son would take in his father's place and if he had predeceased leaving no issue the next eldest son would inherit. If there were no sons but daughters, the generally

accepted view was that the eldest daughter would inherit to the exclusion of any other daughters, although this would appear to be a departure from the strict application of customary law under which daughters were treated equally.

(b) In a collateral succession, Acquets went to the next of kin whether from the paternal side or the maternal side in parity of degree and Propres return to the side from which they had been inherited.

(c) If the deceased had left a widow, the widow had a usufruct (Douaire) for her lifetime over one-third of the realty and if the deceased had left a widower, he has a usufruct (Franc Veuvage) over all the realty belonging to his deceased wife for his lifetime or until his remarriage.

(d) If there were no heirs then subject to the widow's right of Douaire or the widower's right of Franc Veuvage, the property reverted to the Seigneur of Sark.

3.5.2 The customary law was generally regarded as being inadequate and unjust and was revolutionised by the enactment of the Real Property (Succession)(Sark)Law, 1999. As well as permitting for the first time real property in Sark to be devised by will this legislation created a statutory regime providing certainty as to what would happen in the event of there being intestate succession to Sark realty.

3.5.3 The law defines four classes of heir failing which the property escheats to the Seigneur;

(a) Class 1 - descendants

(b) Class 2 - siblings and their descendants

(c) Class 3 – ascendants

(d) Class 4 – other collaterals

3.5.4 In any Class the nearest in degree, regardless of gender, inherits and in parity of degree the eldest regardless of gender inherits.

3.5.5 An ascendant can only inherit from the last of his descendants.

3.5.6 In an indirect succession Propres are returned to the line from which they came and when the de cujus was illegitimate all his property goes to the maternal line.

3.6 <u>Sark meubles on an Intestacy</u>

3.6.1 Surviving spouses take the share of the testator's estate which they would take if the deceased left a will, in accordance with the provisions of

Successions (Personal Estates of Married Persons) (Sark) Law 1975 as revised by the Personal Property (Succession)(Sark) Law, 2007.

3.6.2 In respect of intestate succession where the deceased died after July 2007 illegitimate children are treated in the same way as legitimate ones.

3.6.3 If there are no descendants, then subject to the rights of a surviving spouse, the personal estate would be inherited by whoever would be entitled to inherit any Acquets of the deceased

3.7 Proposed intestacy provisions

3.7.1 Immeubles:

(a) If the deceased leaves only a spouse, the spouse takes the whole absolutely.

(b) If the deceased leaves a spouse and descendants (i.e. children or remoter descendants), the spouse would take half, and the descendants would take the other half subject to the spouse's life enjoyment, or until remarriage, over the half inherited by the descendants.

(c) If a deceased leaves descendants but no spouse, the proposal is that the descendants share the property equally, with representation per stirpes.

(d) Where there is no surviving spouse nor descendants, the property would pass to family members in the following order: brothers and sisters, nephews and nieces, ascendants, remoter collaterals up to and including the sixth degree of relationship computed by the canonical mode.

(e) It is proposed that the distinction between "acquets" and "propres" be abolished.

3.7.2 Meubles:

(a) If the deceased leaves only a spouse, the spouse takes the whole personal estate.

(b) If the deceased leaves a spouse and descendants, the spouse would take half, and the descendants would take the other half equally in parity of degree with representation per stirpes.

(c) If a deceased leaves descendants but no spouse, the proposal is that the descendants share the property equally, with representation per stirpes.

(d) If there is no surviving spouse nor any descendants, the same order of inheritance will apply as for immeubles.

3.7.3 It is important to remember that these provisions may be subject to change.

3.8 Family provision proposals

Family provision would prevent family and dependants from being unreasonably treated in a will. The current proposal is to model any such legislation on the Inheritance (Provision for Family and Dependants) Act 1975 which operates in England and Wales. This Act allows certain classes of people to claim 'reasonable financial provision' from a deceased's estate. These classes include a spouse, a child, a dependant, and a cohabitee who has lived with the deceased for at least two years. What constitutes 'reasonable financial provision' is different between the classes and will turn on the facts of each individual case. Such new legislation should therefore cover the instances where those who were automatically entitled to provision from the deceased's estate under the forced heirship provisions, and those who would expect to be entitled, are left out of the will. The precise form of such legislation is yet to be finalised.

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Carey Olsen
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Health Warning

I have taken every effort to ensure that the contents of this paper are accurate but advice should be taken in relation to any particular circumstance. Any typos are all my own work.