

NSW LAW REFORM COMMISSION

## REPORT 116

### Uniform succession laws: intestacy

April 2007

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# Letter to the Attorney General

To the Hon John Hatzistergos  
Attorney General for New South Wales

Dear Attorney

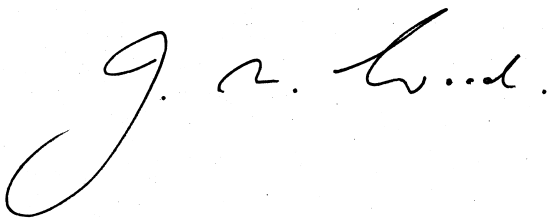
## **Uniform succession laws: intestacy**

We make this Report pursuant to the reference to this Commission received 16 May 1995.

The Commission has since that date participated in a project to develop uniform succession laws for Australia. The project was initiated by the Standing Committee of Attorneys-General (SCAG) in 1991 and has been coordinated by the Queensland Law Reform Commission. Each State and Territory, as well as the Commonwealth, has been represented on the committee overseeing the project.

This Report endorsed by the National Committee for Uniform Succession Laws was submitted to the standing Committee of Attorneys-General in April 2007. A draft bill to implement the Committee's recommendations is contained in Appendix A.

The Commission has previously published reports on Wills (Report 85) and Family Provision (Report 110) as part of the reference. The final report of the work of the National Committee which deals with Administration of Estates is currently being prepared by the Queensland Law Reform Commission.

A handwritten signature in black ink, appearing to read 'J. Wood', with a large, stylized initial 'J'.

The Hon James Wood AO QC

**Chairperson**

April 2007

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TERMS OF REFERENCE

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MP, referred the following matter to the Law Reform Commission by letter dated 16 May 1995:

1. To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.
2. In undertaking this inquiry the Commission is to consult with the Queensland Law Reform Commission which has accepted responsibility for the coordination of a uniform succession laws project.

PARTICIPANTS

The Hon Justice David Hodgson (Commissioner-in-charge)

The Hon Gordon Samuels AC CVO QC

The Hon James Wood AO QC

Professor Michael Tilbury

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Geoffrey Hackett-Jones QC

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**LIST OF RECOMMENDATIONS**


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**Chapter 2****Recommendation 1 – see page 27**

A domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

- (a) it has been in existence for two years;
- (b) a child has been born to the relationship; or
- (c) it has been registered under a law of the jurisdiction that deals with the registration of domestic partnerships.

**Recommendation 2 – see page 28**

There should be no provision stating that spouses should be treated as separate persons.

**Chapter 3****Recommendation 3 – see page 33**

The surviving spouse or partner should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

**Recommendation 4 – see page 52**

Where the intestate is survived by a spouse or partner and issue, the spouse or partner should be entitled to the whole intestate estate except in cases where some of the issue are issue of the intestate from another relationship. In cases where some of the issue are issue of the intestate from another relationship, the intestate estate should be shared between the surviving spouse and all surviving issue.

**Chapter 4****Recommendation 5 – see page 62**

Where the intestate is survived by a spouse or partner and issue from another relationship, the spouse or partner should be entitled to all of the tangible personal property of the intestate except for:

- (a) property used exclusively for business purposes;
- (b) banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
- (c) property held as a pledge or other form of security;
- (d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds; and
- (e) any interest in land.

**Recommendation 6 – see page 71**

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to a statutory legacy.

The statutory legacy should be set at \$350,000 for all jurisdictions.

The amount of the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate. The spouse or partner should also be entitled to interest in addition to the legacy, with the interest calculated in accordance with the provisions that will apply to general legacies, namely 2% above the last cash rate published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

**Recommendation 7 – see page 73**

In cases where the surviving spouse or partner is entitled to claim statutory legacies in more than one jurisdiction, he or she should receive legacies of a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled.

**Recommendation 8 – see page 76**

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to one-half of the residue of the intestate estate after he or she has received the personal effects of the intestate and the statutory legacy (with interest). The issue of the intestate should be entitled to the remaining half-share *per stirpes*.

**Chapter 5**

**Recommendation 9 – see page 86**

The surviving spouse or partner should be able to elect to obtain any property in the intestate's estate.

**Recommendation 10 – see page 88**

Anyone (who is not the surviving spouse or partner) who seeks to apply for letters of administration or distribute an intestate estate must give the surviving spouse or partner written notice advising of his or her right to make an election before they apply or distribute (as the case may be). The notice should indicate the requirements for exercising the right to election including relevant time limits.

**Recommendation 11 – see page 89**

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she should give notice of his or her election to the people who gave the notice advising of the right and to the issue of the intestate.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she should give notice to the other personal representatives and to the issue of the intestate.

**Recommendation 12 – see page 90**

The surviving spouse or partner should give notice of his or her election in writing.

**Recommendation 13 – see page 92**

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of receiving notice of the right of election.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of applying for the letters of administration or of commencing the distribution of the estate as the case may be.

The court should have the power to extend this period when it considers it proper to do so for any reason affecting the administration or distribution of the estate, including when a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when administration of the estate was first granted or the distribution first commenced.

**Recommendation 14 – see page 93**

A requirement or consent made or given concerning election by a surviving spouse who is a minor should be as valid and effective as it would be if the spouse had attained majority.

**Recommendation 15 – see page 94**

The surviving spouse or partner should be able to revoke his or her election at any time before the transfer of the relevant property without the need for consent by any other person.

**Recommendation 16 – see page 95**

The spouse or partner should be able to require that the personal representative obtain a valuation of the relevant property from a qualified valuer.

**Recommendation 17 – see page 97**

When the spouse wishes to obtain property that is subject to a charge (being a mortgage, other charge, encumbrance or lien) at the time of the transfer and the holder of that charge agrees to the spouse assuming the liability, the value of the interest in the relevant property should be the market value of the property, less any amount needed to discharge the liability and, on the transfer of the property, the liability should pass to the spouse and the estate be exonerated from it.

The value should be the value calculated at the death of the intestate.

**Recommendation 18 – see page 99**

The valuer who determines the value of the property should be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

**Recommendation 19 – see page 102**

The surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of the intestate estate to which they are entitled and, then, if his or her share is insufficient to cover the value, by paying the difference from other resources that are available to him or her.

**Recommendation 20 – see page 104**

The surviving issue or personal representative should be able to apply to the court to restrict the surviving spouse or partner's right to elect to acquire any property in the estate in situations where the acquisition would be likely to diminish the assets of the intestate or make the administration of the estate substantially more difficult.

**Recommendation 21 – see page 107**

The personal representatives should not sell or otherwise dispose of the property in the estate when:

- (a) the surviving spouse or partner's election is pending; or
- (b) the surviving spouse or partner has elected to acquire the interest, except where:
- (c) the proceeds of such a sale are needed as a last resort to satisfy any of the intestate's liabilities;
- (d) the property is perishable or likely to decrease rapidly in value;
- (e) the surviving spouse or partner is also the sole personal representative of the estate;
- (f) the election requires the court's authorisation and an application of the surviving spouse or partner to acquire the relevant property has been refused or the application has been withdrawn; or
- (g) the surviving spouse or partner has notified the personal representatives in writing that he or she will not elect to obtain any property.

These restrictions should not affect the validity of the sale of any of the intestate's estate.

**Recommendation 22 – see page 108**

Where the spouse or partner is a trustee, express provision should be made that he or she may acquire property from the estate notwithstanding his or her role as trustee.

## Chapter 6

### Recommendation 23 – see page 118

Where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate.

Where there is more than one spouse or partner and descendants of the intestate from at least one other relationship:

- (a) each spouse or partner should be entitled to a statutory legacy (rateably if there are insufficient funds) and a share of half the residue of the estate; and
- (b) each child (or representative) of the intestate should be entitled to an equal share of the remaining half.

The Queensland provisions for distributing an intestate estate where there are multiple spouses and/or partners should be adopted.

## Chapter 7

### Recommendation 24 – see page 125

Persons conceived before the death of the intestate but born after should inherit as if they had been born in the intestate's lifetime.

### Recommendation 25 – see page 129

The model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy.

### Recommendation 26 – see page 133

Step-children of the intestate should not be recognised for the purposes of intestacy.

### Recommendation 27 – see page 137

Where a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy.

## Chapter 8

### Recommendation 28 – see page 148

Distribution to relatives of the intestate should be *per stirpes* in all cases.

### Recommendation 29 – see page 151

Persons entitled to take in more than one capacity ought to be entitled to take in each capacity.

### Recommendation 30 – see page 154

The distinction between siblings who have one parent in common and those who have both parents in common should be immaterial for determining entitlements on intestacy.

## Chapter 9

### Recommendation 31 – see page 157

Where an intestate is not survived by a spouse or partner, the issue of the intestate should take their share *per stirpes*.

### Recommendation 32 – see page 158

Where an intestate is not survived by a spouse or partner, or issue, the surviving parents should be entitled to take in equal shares.



**Recommendation 33 – see page 159**

Where an intestate is not survived by a spouse or partner, or issue or parents, the brothers and sisters should be entitled to take.

**Recommendation 34 – see page 162**

The issue of deceased brothers and sisters should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

**Recommendation 35 – see page 166**

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, the surviving grandparents should be entitled to take in equal shares.

**Recommendation 36 – see page 166**

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, or grandparents, the aunts and uncles should be entitled to take.

**Recommendation 37 – see page 173**

The children of deceased aunts and uncles should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

No further categories of relative should be entitled beyond the children of deceased aunts and uncles.

**Chapter 10****Recommendation 38 – see page 180**

Bona vacantia estates should vest in the relevant State or Territory.

**Recommendation 39 – see page 187**

The responsible Minister should have the discretion, upon application, to make provision out of *bona vacantia* estates for people in the following classes:

- (a) any dependants of the intestate;
- (b) any persons having in the opinion of the Minister a just or moral claim to the grant of the property;
- (c) any persons or organisations for whom the intestate might reasonably be expected to have made provision;
- (d) the trustees of any person as mentioned in paragraphs (a) to (c);
- (e) any other organisation or person.

**Chapter 11****Recommendation 40 – see page 196**

A 30-day survivorship period should apply to all persons entitled to take on intestacy.

A 30-day survivorship period should apply to persons born after the death of the intestate but who were *en ventre sa mere* at that death.

The 30-day survivorship period should not apply where the effect would be that the intestate estate passes to the Crown as *bona vacantia*.

**Chapter 12****Recommendation 41 – see page 204**

A minor's share in an intestate estate should not be contingent but vest immediately.

**Recommendation 42 – see page 210**

Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate.

**Chapter 13**

**Recommendation 43 – see page 219**

There should be no provisions that take account of benefits given during the intestate's lifetime.

**Recommendation 44 – see page 225**

There should be no provisions that account for benefits received under the intestate's will.

**Chapter 14**

**Recommendation 45 – see page 246**

A person who claims to be entitled to take an interest in an Indigenous person's intestate estate under the customs and traditions of the community or group to which the Indigenous intestate belonged or a personal representative may apply to the Court for an order for distribution of the estate. A plan of distribution of the estate, prepared in accordance with the traditions of the community or group to which the Indigenous person belonged, must accompany the application. An application must be made within 12 months of the grant of administration. The Court may extend this time subject to any conditions it thinks fit, whether or not the 12 months has expired. No application will be allowed after the intestate estate has been fully distributed according to law.

The Court:

- (a) may order that the intestate estate (or part thereof) be distributed in a specified manner;
- (b) must, in making an order, take into account the traditions of the community or group to which the intestate belonged and the plan of distribution;
- (c) must not make any order for distribution unless it is satisfied that it would, in all the circumstances, be just.

The Court order may include property which the personal representative distributed within the 12 month period before he or she had notice of any application. The Court will not disturb any distribution if it was made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before his or her death.

## **Chapter 15**

### **Recommendation 46 – see page 249**

An “intestate” should be defined as a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.

### **Recommendation 47 – see page 250**

There should not be a provision relating to beneficially interested personal representatives.

# 1. Introduction

- Background
- Aim of intestacy rules
- This reference
- Outline of this report

## BACKGROUND

### Testate and intestate succession

1.1 When people die owning property, the property must be distributed according to a preordained scheme. One method is to distribute the property according to the wishes of the deceased as expressed in his or her will. This method of distribution is referred to as testate succession. However, there will be cases where the deceased has not executed a will, or has failed to execute a will that disposes of some or all of his or her property effectively. The property that has not been dealt with effectively by will is usually distributed according to a regime established by statute. This method of distribution is referred to as intestate succession. Intestate succession is the subject of this Report.

### When intestacy occurs

1.2 Intestacy occurs when the whole or part of the estate of a deceased person is not disposed of by will.

#### **Total intestacy**

1.3 Total intestacy arises in circumstances where the whole of the estate of a deceased person is not disposed of by will, for example, where the deceased:

- failed to make a will;
- failed to make a valid will; or
- made a valid will but all the beneficiaries died before the deceased.

#### **Partial intestacy**

1.4 A partial intestacy arises in circumstances where part of the estate of a deceased person is not disposed of effectively by will, for example, where the deceased:

- failed to dispose of the residue of the estate (that is, property that has not otherwise been specifically disposed of) either expressly or impliedly;
- failed to appoint a substitute in the will, and some beneficiaries repudiate or, for other reasons, cannot take (for example, forfeiture); or
- made a gift of the residue and part of the gift fails to take effect.<sup>1</sup>

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1. This circumstance may be avoided by the National Committee's recommendation concerning the construction of dispositions: NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.97-6.105. See also *Wills Act 1997* (Vic) s 46(3); *Succession Act 1981* (Qld) s 33P; *Wills Act 2000* (NT) s 41(2).

### ***Distinction between total and partial intestacies***

1.5 There was once a distinction between total and partial intestacies for the purposes of administering an estate. Partially intestate estates are now administered, so far as possible, according to the same rules that apply to wholly intestate estates.

1.6 The ACT, WA, SA and NT make statements covering both wholly intestate and partially intestate estates.<sup>2</sup> For example, the ACT's provision states:

*The personal representative of an intestate holds, subject to his or her rights, powers and duties for the purposes of administration, the intestate estate on trust for the persons entitled to it in accordance with this division.*<sup>3</sup>

The other jurisdictions, however, maintain separate provisions dealing with total intestacies and partial intestacies. There seem to be two reasons for this distinction: a substantive reason and one relating to statutory construction or interpretation.

1.7 The substantive reason for the distinction is to require the issue to bring into account benefits received under the will. This is the situation, for example, in Tasmania and Victoria, where general provision is made for dealing with intestate estates<sup>4</sup> subject to the bringing into account of any beneficial interests acquired by the issue of the deceased under the will.<sup>5</sup>

1.8 Elsewhere, the distinction has been made for reasons of statutory construction or interpretation. NSW, for example, provides in respect of wholly intestate estates:

*Where a person dies wholly intestate, the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate, be distributed or held in trust in the manner specified in this section...*<sup>6</sup>

And, in respect of partially intestate estates:

*Where a person dies having made a will which effectively disposes of only part of the person's estate, [the division], so far as applicable and subject to the modifications specified in subsection (2), shall apply to and in relation to*

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2. *Administration and Probate Act 1929 (ACT) s 45; Administration and Probate Act 1969 (NT) s 62; Administration and Probate Act 1919 (SA) s 72C(1); Administration Act 1903 (WA) s 13(1).*
  3. *Administration and Probate Act 1929 (ACT) s 45.*
  4. *Administration and Probate Act 1935 (Tas) s 44; Administration and Probate Act 1958 (Vic) s 52. See also Administration Act 1969 (NZ) s 78 and s 79.*
  5. *Administration and Probate Act 1935 (Tas) s 47(a); Administration and Probate Act 1958 (Vic) s 53(a).* The Law Reform Committee of SA also recommended this approach in relation to the surviving spouse: Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8. This is no longer a relevant concern: See para 13.44-13.49.
  6. *Wills, Probate and Administration Act 1898 (NSW) s 61B(1).*

*the part of the person's estate that is not disposed of by the will as if the last-mentioned part had comprised the whole of the person's estate.*<sup>7</sup>

1.9 In Queensland, general provision is made for distribution according to the rules<sup>8</sup> but separate provision is still made in relation to partial intestacies:

*The executor of the will of an intestate shall hold, subject to the executor's rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it.*<sup>9</sup>

1.10 The modern trend has been to assimilate the administration of partially intestate estates as much as possible to the administration of wholly intestate estates. This is generally consistent with recommendations of the various law reform agencies when such questions are still considered.<sup>10</sup> For example, in 1951, the English Committee on the Law of Intestate Succession favoured applying the same rules to both partial intestacies and total intestacies. The Committee acknowledged that a "partial intestacy" could arise in a vast range of cases:

*For instance, a man dies partially intestate (i) if he disposes effectively of one chattel, such as a gold watch, and fails to make an effective disposition of the rest of his estate and (ii) if he disposes effectively of the whole of his estate except his gold watch, and the cases lying between these two extremes are unlimited in number and variety.*<sup>11</sup>

The Committee considered that any benefit that might result from a separate regime to deal with partial intestacies was "outweighed by the advantage of having simple and comprehensive rules which apply to all cases of intestacy, total or partial".<sup>12</sup>

1.11 The National Committee agrees with this approach and the model law is, therefore, drafted on the basis that there is to be no distinction in the administration of wholly and partially intestate estates.

7. *Wills, Probate and Administration Act 1898* (NSW) s 61F(1). See also *Administration of Estates Act 1925* (Eng) s 49(1).

8. The Queensland Act states that "the personal representative of a deceased person shall be under a duty to ... distribute the estate of the deceased, subject to the administration thereof, as soon as may be": *Succession Act 1981* (Qld) s 52(1)(d).

9. *Succession Act 1981* (Qld) s 38.

10. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8 (subject to the surviving spouse having to account for benefits received under the will). See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 88 (where the question was uncontroversial).

11. England and Wales, *Report of the Committee on the Law of Succession* (Cmd 8310, 1951) at para 37.

12. England and Wales, *Report of the Committee on the Law of Succession* (Cmd 8310, 1951) at para 37. The English Law Commission did not treat this as a live issue when it reported in 1989: See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 16.

## Incidence of intestacy

1.12 Intestacy would appear to occur quite frequently in Australia. In 1994, in South Australia, 6.44% of applications for grants were made in circumstances of intestacy. In the same year, the rate was believed to be 14% in Queensland, just over 10% in Western Australia, and between 6% and 8% in other jurisdictions.<sup>13</sup>

1.13 In NSW in 2003, of the 23,140 matters dealt with in the Probate Division, 6% involved the grant of letters of administration. In 2002, 46,712 deaths were registered, 22,828 matters were dealt with in the Probate Division, and 6% of these involved the grant of letters of administration. Approximately 20,000 estates per year do not come to the NSW Probate Division. There may be a number of reasons for these estates not being formally administered, including that the deceased's property has been transmitted by other means upon death (for example, by survivorship in the case of property owned jointly with another), or the estate may simply have been administered informally by members of the family or friends.<sup>14</sup> It is not known how many of these estates are intestate.

1.14 In Tasmania in 2005, the level of intestate estates was around 13% of the approximately 2,000 matters that are filed annually in the Probate Registry.<sup>15</sup>

## Characteristics of intestates and their estates

1.15 In many cases, a deceased person who is intestate will be an older person, have a surviving spouse who will be in the same age group, and issue who are mature (rather than infants) and no longer dependent on their parents.<sup>16</sup> This is part of a general trend across society. For example, in 1670, the year the Statute of Distributions, which dealt with intestacy, was first enacted, the average life expectancy in England at birth was something in the order of 38.1 years for men and 36.3 years for women.<sup>17</sup> Those who made it to 25 years of age could expect to live, on average, until just after they turned 55.<sup>18</sup> In Australia in 2001-2003, the average life expectancy at birth was 77.8 years for men and 82.8 years for women.<sup>19</sup>

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13. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173.

14. See, eg, England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 2.

15. R Walker, *Consultation*. See also Registry, Supreme Court of Tasmania, *Consultation*; K McQueenie, *Consultation*.

16. While some groups in the community may die intestate at a younger age, for example, Indigenous people (who have lower life expectancies than the general population) and young people who are killed in car accidents, these groups are less likely to have substantial assets to be distributed upon death.

17. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 308.

18. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 282.

19. Australian Bureau of Statistics, *Deaths 2003* (3302.0) at 6.



1.16 There is some evidence to suggest that, as a group, those who are intestate die younger than those who die with wills. A sample of probate files from the NSW Probate Registry in 2004 showed that the age at death for those who died with wills ranged from 37 years to 102 years with an average of 81.21 years, while those who died without wills ranged from 28 years to 99 years with an average of 60 years.<sup>20</sup>

1.17 There is also evidence to suggest that intestate estates are, in general, of smaller value than their testate counterparts. A sample of probate files from the NSW Probate Registry in 2004 showed that the average value of the estates of those who died with wills was \$774,802, while the estates of those who died without wills had an average value of \$213,888.<sup>21</sup> This tendency has also been observed by a number of law reform bodies over the years, including those of Western Australia, England and Wales, and Alberta.<sup>22</sup>

## Transmission of property by other means

1.18 Many estates both with and without wills will likely involve property that will not be distributed according to the deceased's will or rules of intestacy. This is because the property has been distributed by other means. For example, property might pass through families by family trusts, or more commonly now by way of jointly-held property and superannuation.<sup>23</sup>

### **Joint property**

1.19 Jointly held property will transmit to the surviving owner without the need for probate. This applies not just to land held subject to a joint tenancy, but to any property held in two or more names such as bank accounts and motor vehicles. Most couples in relationships will hold at least some property as joint tenants.

1.20 The Queensland Law Reform Commission has observed that joint ownership is a "highly efficient mechanism for distributing property upon death without having to resort to the technicalities of succession law".<sup>24</sup>

### **Superannuation assets**

1.21 In the past 15 or 20 years, superannuation funds have taken on an increasing importance to the financial future of most Australians.<sup>25</sup>

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20. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.4 and para 3.29.

21. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.4 and para 3.29.

22. Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 13 and Appendix 2; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 46-47.

23. See S M Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77 at 91.

24. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 8.

1.22 Superannuation trustees usually distribute superannuation assets in accordance with binding elections or their trusts. It should be noted, however, that in some cases, where there is no obvious beneficiary, the trustees will pay the assets into the deceased estate. Superannuation will come to play an increasing role in disputes over inheritance.<sup>26</sup> In the case of intestacies, superannuation has the potential to alter the balance in the distribution of an estate between the intestate's spouse and issue.<sup>27</sup>

## AIM OF INTESTACY RULES

1.23 The rules of distribution on intestacy are, at the most general level, the community's view of what should be done with the estate of a person who has died intestate.<sup>28</sup> The parliaments of the various Australian jurisdictions, as representatives of their communities, have established and amended the rules from time to time. One of the purposes of this Report is to determine the extent to which any proposed scheme of distribution meets the collective requirements of the Australian community.

1.24 In this Report, these questions are brought into sharpest focus when considering the needs of an intestate's spouse or partner and issue (that is, descendants - children, grandchildren and so on). The changing position of the spouse or partner in intestacy law has been one of the consistent themes across most jurisdictions.<sup>29</sup>

## Carrying out the presumed intentions of the intestate

1.25 One of the more widely acknowledged aims of intestacy rules is to produce the same result as would have been achieved had the intestate had the foresight, the opportunity, the inclination or the ability to produce a will.<sup>30</sup>

1.26 The rules in the various jurisdictions identify beneficiaries for the estate from among the intestate's family in an order of preference beginning with those to whom the

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25. See, eg, Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 6-7.

26. *Sydney Consultation 1*; *Sydney Consultation 2*; Succession Law Section, Queensland Law Society, *Consultation*.

27. *Sydney Consultation 2*; K McQueenie, *Consultation*.

28. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 3-4; Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 6, 1974) at 2; W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 2; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 2; Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 12; *Sydney Consultation 1*.

29. See para 3.5-3.9 and para 3.26-3.34.

30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 163; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 2, 7; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 59; Tasmania, Office of the Public Trustee, *Consultation*; A Dunham, "The Method, Process and Frequency of Wealth Transmission at Death" (1962) 30 *University of Chicago Law Review* 241 at 241.

intestate was most closely related – starting with the intestate’s spouse and descendants, then parents, brothers and sisters, nephews and nieces, grandparents, uncles and aunts, and finally cousins. Such a distribution scheme will generally suit many people who die intestate with estates that must be administered. However, the rules are not uniform across Australia and there are many differences of detail.

1.27 While the aim of achieving the distribution that an intestate would have wanted is generally desirable, it is important to note that any system that has to cover all situations adequately will not cover individual cases perfectly. Families may not be close in the sense that the legislation assumes. Relatives who appear biologically closer to the intestate may be further away from the intestate’s favour than those who are biologically distant. Close family members may not get on. A spouse may become estranged.

1.28 People cannot be forced to make comprehensive wills and may fail to produce a valid will through no fault of their own. It is with this in mind that the rules of intestacy should be standardised and reformed to the extent that will enable them to produce a result that will be fair in most cases.

### ***Establishing the presumed intention***

1.29 How one establishes what the intestate might have intended is sometimes fraught with difficulty. There has been some debate about whether the distribution patterns established by those who have actually executed wills should be used to shape the rules for distribution upon intestacy. The Law Commission of England and Wales put it succinctly:

*it seems odd to allow... the half of the population who make wills to dictate what should happen to the property of the other half who do not.*<sup>31</sup>

However, wills that have been written are one of the few reliable sources of information about how people actually intend to distribute their property upon death.<sup>32</sup> Many law reform agencies have carried out surveys of wills in an attempt to discern how people might like their property to be distributed should they die intestate.<sup>33</sup> As part of this project, the NSW Law Reform Commission has carried out an empirical study of matters filed in the Probate Registry of the Supreme Court of New South Wales during a specified period

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31. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 32.

32. See England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 32

33. See England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at para 18; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) Appendix A; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) Appendix F and G.

in 2004.<sup>34</sup> The Department for Constitutional Affairs in the UK is also currently carrying out a survey of terms in wills in its probate registries.<sup>35</sup>

1.30 It is also possible that at least some of the people who do not write wills are satisfied with the distribution regime established by the current intestacy rules. Indeed, it can be argued that a decrease in the number of people who execute wills could be taken as an indication of a general endorsement of a particular intestacy regime. However, the National Committee ultimately has no data on which to conclude that there is or is not a general level of endorsement of any particular intestacy regime.

1.31 The rules of intestacy should not be viewed as removing the need for wills, and they should not be seen to be lessening the importance of making a valid will.

## Simplicity, clarity and certainty

1.32 Some law reform agencies have stated that one of their principal aims is to make the rules of distribution simple, clear and certain.<sup>36</sup> This is seen as being beneficial both to lawyers and to members of the public who have to administer the rules.<sup>37</sup>

1.33 The Law Commission of England and Wales recognised that the rules of intestacy:

*should be certain, clear and simple both to understand and to operate. They do not lay down absolute entitlements, because the deceased is always free to make a will leaving his property as he chooses. They operate as a safety net for those who, for one reason or another, have not done this. If the rules can conform to what most people think should happen, so much the better. If they are simple and easy to understand, the more likely it is that people who want their property to go elsewhere will make a will. It is also important to enable estates to be administered quickly and cheaply. The rules should be such that an ordinary layman can easily interpret them and consequently administer them. Also the rules should make it unnecessary for an administrator to have to determine complex or debatable questions of fact.*<sup>38</sup>

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- 34. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006).
  - 35. England and Wales, Department for Constitutional Affairs, *Administration of Estates: Review of the Statutory Legacy* (CP 11/05, 2005) at 9.
  - 36. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at para 12; Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 11; Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 163. But see Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 2.
  - 37. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7.
  - 38. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 7.

1.34 While it is desirable to have rules that are as simple as possible, simple rules may also fail to deal with some common circumstances that arise in intestate estates.<sup>39</sup> An appropriate balance is required.

1.35 Several submissions urged the importance of preferring the simple approach wherever possible.<sup>40</sup>

## Meeting the needs of family members

1.36 The rules of distribution acknowledge the needs of family members only at the most general level. For example, the provisions relating to the spouse or partner's entitlement to the shared home acknowledge the survivor's need to continue to live in the shared home.<sup>41</sup> The current provisions also generally acknowledge the needs of the issue of an intestate to inherit a share in the estate. However, it can also be argued that the needs of younger issue are not met effectively by receiving a share that is held in trust for them until they turn 18.<sup>42</sup>

1.37 The most important question to be considered at the present time is that of balancing the competing needs of the surviving spouse or partner and the issue of the intestate. There is no doubt that needs of the surviving spouse or partner have become more and more important over time. This is partly a result of changing demographics which make spouses and partners more reliant on the intestate's estate in their later years and the children less reliant. This report therefore considers the surviving spouse or partner as the primary concern of distribution on intestacy. This reflects a trend in most comparable jurisdictions towards giving more recognition to the needs of the surviving spouse or partner.

1.38 The balancing of the competing needs of the surviving spouse or partner and the issue of the intestate is dealt with in Chapter 3 of this report.<sup>43</sup> The question of need is going to be a less relevant concern for categories of relationship beyond that of spouse or partner and issue.<sup>44</sup>

1.39 However, the rules of distribution cannot always meet the needs of family members on the individual level. There will be specific cases where the uniform application of standard rules may produce hardship. Such hardship may be alleviated by an application

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39. Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 2.

40. Trustee Corporations Association of Australia, *Submission* at 1; Law Society of NSW, *Submission* at 1; *Sydney Consultation 2*.

41. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 33.

42. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).

43. Para 3.19-3.76.

44. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 35.

under family provision legislation.<sup>45</sup> For example, WA specifically acknowledges this problem in its family provision legislation when it states that the court “shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases”.<sup>46</sup>

## Provision for deserving family members

1.40 Provision for deserving family members is probably the most difficult category to deal with. It is certainly a consideration in relation to the surviving spouse or partner. The surviving spouse or partner can be said to deserve a substantial portion of the intestate estate because of the contribution he or she has made to the relationship with the intestate.

1.41 In Canada, the question of desert has historically had a negative application in that many statutes once contained a provision denying a surviving spouse his or her entitlement on the grounds of marital misconduct, for example, adultery. All Canadian law reform agencies have moved away from such provisions.<sup>47</sup>

1.42 However, beyond the consideration of spouses or partners, desert becomes a harder criterion to apply. The English Law Commission observed that, while a system that acknowledged individuals’ contributions to the care of the intestate might be “fairer”, it “would be impossible to base a fixed system of distribution on this criterion”.<sup>48</sup> The Queensland Law Reform Commission has also observed that fixed systems of distribution cannot “differentiate between deserving and undeserving persons within a class”.<sup>49</sup>

1.43 The question of desert or disentitlement of any potential beneficiary is obviously best dealt with by executing a will that distributes an estate taking into account such factors.<sup>50</sup> If the deceased has not written a will, such questions may be dealt with by way of a claim for family provision. In some cases, it is also possible that the beneficiaries may agree amongst themselves to a different distribution in order to achieve a more “just”

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45. See the proposals of the National Committee for Uniform Succession Laws relating to family provision: National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); and National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004).

46. *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 6(2).

47. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.

48. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 35.

49. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 2.

50. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166; Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).

distribution.<sup>51</sup> Such deeds of variation will, however, be difficult to finalise where there are family tensions or beneficiaries who are under 18.<sup>52</sup>

## Interaction with family provision regimes

1.44 There is an important interrelationship between intestacy regimes and family provision regimes. Family provision regimes are important for dealing with individual cases that involve questions about such criteria as need and desert.

1.45 In general, it would be undesirable to use intestacy rules to achieve the aims of family provision. However, by the same token, an intestacy regime that encouraged the making of family provision claims would not be ideal.<sup>53</sup> The English Law Commission considered that it would seem “undesirable” to change the rules of distribution in such a way as to give rise to a greater number of applications for family provision.<sup>54</sup>

## THIS REFERENCE

1.46 This Report is part of the work of the National Committee for Uniform Succession Laws.

## Work of the National Committee for Uniform Succession Laws

1.47 The Standing Committee of Attorneys General (“SCAG”) established the National Committee in 1995 to review the existing State laws relating to succession and to propose model national uniform laws. The Committee comprises representatives from the various jurisdictions in Australia. The Queensland Law Reform Commission is the co-ordinating agency.

1.48 The NSW Attorney General asked the NSW Law Reform Commission to participate in the deliberations of the National Committee under terms of reference that were issued on 5 May 1995:

*To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.*

1.49 The National Committee has divided the project into different phases, each of which deals with a discrete area of succession law. The areas of law are:

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- 51. See M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 121-145; Law Reform Commission of WA, *Aboriginal Customary Laws* (Project No 94, Discussion Paper, 2005) at 286. See also para 3.46.
  - 52. N Preston, “A lasting legacy” (2005) 155 *New Law Journal* 1594 at 1596.
  - 53. Tasmania, Office of the Public Trustee, *Consultation*.
  - 54. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 37. See also Tasmania, Office of the Public Trustee, *Consultation*.

- the law of wills;<sup>55</sup>
- family provision (also called “testator’s family maintenance”);<sup>56</sup>
- administration of estates of deceased persons;<sup>57</sup> and
- intestacy.

This Report is the final stage of the review of the law relating to intestacy.

## Issues Paper 26

1.50 In April 2005, the NSW Law Reform Commission published an Issues Paper (“Issues Paper 26”) on the law relating to intestacy in all Australian jurisdictions.<sup>58</sup> It invited submissions on these issues and also on any related matters to assist in the framing of a national model bill on intestacy.

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55. See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (Working Paper 46, 1995); NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Issues Paper 10, 1996); National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (Queensland Law Reform Commission, Miscellaneous Paper 29, 1997); Queensland Law Reform Commission, *The Law of Wills* (Report 52, 1997); NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) and National Committee for Uniform Succession Laws, *Wills: The Anti-Lapse Rule* (Queensland Law Reform Commission, Report 61, 2006).
  56. See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: Family Provision* (Working Paper 47, 1995); NSW Law Reform Commission, *Uniform Succession Laws: Family Provision* (Issues Paper 11, 1996); National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004); NSW Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report 110, 2005).
  57. See National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons* (Queensland Law Reform Commission Miscellaneous Paper 37, 1999); NSW Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (Discussion Paper 42, 1999); Queensland Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Discussion Paper, WP 55, 2001); NSW Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Issues Paper 21, 2002).
  58. NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Issues Paper 26, 2005).



## Submissions and consultations

1.51 Ten submissions were received in response to Issues Paper 26. Appendix B lists the submissions received. Officers of the Commission also conducted consultations with members of the legal profession, academics, and representatives of the courts in Sydney, Brisbane, Melbourne, Adelaide, Perth and Tasmania. Appendix C lists the participants in these consultations.

## Research Report 13

1.52 The NSW Law Reform Commission decided that, in framing recommendations relating to intestate estates, it would be useful to obtain information about the characteristics of both testate and intestate estates, and also about how people who make wills choose to distribute their estates. This decision was made in light of studies that have informed recommendations for changes to the law of intestacy in other jurisdictions. These other reviews were considered useful in determining how people who do not write wills might have intended to distribute their property upon death. The study, which was conducted by two Master of Psychology students from the University of NSW, involved a survey of 650 matters filed in the Probate Registry of the Supreme Court of NSW in September 2004. The survey elicited information concerning the demographic characteristics of the deceased persons, the nature of their estates and how they intended their property to be distributed.<sup>59</sup>

## OUTLINE OF THIS REPORT

1.53 The recommendations in this Report are arranged as follows. The draft bill, implementing the recommendations, is in Appendix A to this Report.

## Spouses and partners

1.54 The following five chapters make recommendations relating to spouses and partners who survive the intestate.

### ***Preliminary issues***

1.55 **Chapter 2** deals with questions about the identification and general treatment of spouses and partners, including the requirements for recognition of domestic partners.

### ***General distribution***

1.56 **Chapter 3** makes recommendations about the distribution of property when a spouse or partner survives the intestate. A number of scenarios are dealt with, including where a spouse or partner but no issue of the intestate survive; and where a spouse or partner and issue of the intestate survive. In both cases, it is generally proposed that the spouse or partner receive the entire estate. However, where at least some of the issue of

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59. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006).

the intestate are the issue of another relationship, it is proposed that the estate be shared between the spouse or partner and the issue. The following two chapters deal with the special provisions required in such a case.

### ***Special provisions***

1.57 **Chapter 4** details the provisions that are required to ensure that the surviving spouse or partner receives the personal chattels of the intestate, a statutory legacy, and a share of the remainder of the estate. The remaining share is distributed to the issue of the intestate.

### ***Election to obtain any property***

1.58 **Chapter 5** details the provisions necessary to allow the surviving spouse or partner to obtain any property from the intestate's estate. The recommendations expand on the more limited provisions that currently allow the surviving spouse or partner to elect to obtain the intestate's interest in the home they shared.

### ***Multiple spouses or partners***

1.59 **Chapter 6** makes provision for the distribution of property where the intestate is survived by more than one spouse or partner.

## **The parent-child relationship**

1.60 The parent-child relationship is important to determining the distribution of intestate estates, not only with respect to the intestate's children and their descendants, but also, in some cases, for determining the intestate's ancestors and collateral relatives and their offspring. **Chapter 7** covers issues of identifying and dealing with the parent-child relationship, including the position of children not yet born, step-children, and children who have been adopted by a step-parent.

## **Distribution to next of kin**

1.61 The following chapters deal with the question of distribution to the relatives of the intestate other than the spouse or partner.

### ***Preliminary issues***

1.62 **Chapter 8** contends for a *per stirpes* distribution in preference to a *per capita* distribution regime. It also deals with the question of persons who may be entitled to share in a distribution in more than one capacity and confirms the position that siblings of the whole and half blood should be treated without distinction.

### ***General order of distribution***

1.63 **Chapter 9** establishes the general order of distribution to next of kin of the intestate as being to issue first, then parents, then brothers and sisters and their descendants, then grandparents and, finally, aunts and uncles and their children. This chapter fixes the limit for distribution at children of aunts and uncles (that, is first cousins of the intestate) and rejects the idea of treating separately the maternal and paternal sides of the intestate's family.

## Bona vacantia

1.64 **Chapter 10** deals with cases where the intestate is survived only by relatives who are more remote than first cousins. It recommends that such estates should continue to be paid to the State or Territory for general purposes. It also recommends the circumstances in which the State or Territory should waive its rights in favour of certain people.

## General aspects of distribution

### *Survivorship*

1.65 **Chapter 11** makes recommendations necessary to implement a survivorship period for intestacy beneficiaries so that no one may take who does not survive the intestate by at least 30 days. Provision is also made to prevent such estates falling to *bona vacantia* and to apply the survivorship period to children conceived before but born after the death of the intestate.

### *Vesting*

1.66 **Chapter 12** recommends that a person's share of an estate should vest immediately without the need for them to turn 18 or marry. It also deals with the problems that arise when a potential beneficiary has disclaimed or forfeited his or her entitlement.

### *Accounting for benefits received*

1.67 **Chapter 13** rejects any schemes whereby persons must account for any benefits received from the deceased either before death or, in the case of a partial intestacy, in the deceased's will.

## Indigenous people

1.68 It is questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous<sup>60</sup> person dies intestate. Indigenous concepts of family and time may well be incompatible with the assumptions underlying the general law. If so, the extent to which different distribution rules can, and should, apply arises. **Chapter 14** recommends an alternative regime for the distribution, in appropriate cases, of the intestate estates of Indigenous people.

## Miscellaneous provisions

1.69 **Chapter 15** considers the necessity of some miscellaneous provisions, including provisions that define "intestacy", that relate to beneficially interested personal representatives, that construe references to statutes of distribution, heirs and next of kin, and that abolish courtesy and right of dower.

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60. In this Report, "Indigenous" refers to Aboriginal people of Australia, and Torres Strait Islanders.

## 2. Spouse or partner – preliminary issues

- Introduction
- Who is a spouse or partner?
- Spouses to be treated as separate persons

## INTRODUCTION

2.1 The next five chapters deal with the entitlements of the intestate's surviving spouse or partner. The National Committee will recommend that the whole of the intestate estate should be given to the surviving spouse or partner except where the intestate is also survived by issue of another relationship. In these cases, the surviving spouse will be entitled to:

- the personal effects of the intestate;
- a statutory legacy;
- a portion of the residue; and
- the right to elect to obtain particular items of property in the intestate estate.

The following chapters will deal with these issues. The remainder of this chapter will consider the important question of identifying the spouse or partner who will be entitled on intestacy.

## WHO IS A SPOUSE OR PARTNER?

2.2 As spouses and partners are the first parties considered when distributing an intestate estate, it is important to know who is considered a spouse or partner and how broadly the term is to be construed.

### Spouses

2.3 A person will be a spouse of another when the two marry in Australia in accordance with the *Marriage Act 1961* (Cth) or, when a person is married overseas, that marriage is recognised in Australia under Part 5A of the *Marriage Act*.

2.4 In Queensland, SA, Victoria and NSW, the term "spouse" is now taken to include not only husband or wife but also de facto partner or other equivalent terms such as putative spouse or domestic partner.<sup>1</sup> The ACT includes "spouse" together with "domestic partner" within the term "partner".<sup>2</sup> Other jurisdictions specifically make reference to the intestate's husband or wife rather than spouse.<sup>3</sup> Issues relating to the identification of domestic partners are dealt with below.<sup>4</sup>

2.5 The NT is the only jurisdiction which specifically includes in its definition of spouse Aboriginal or Torres Strait Islander people who marry in accordance with the customs and

1. Succession Act 1981 (Qld) s 5AA; Administration and Probate Act 1919 (SA) s 4; Administration and Probate Act 1958 (Vic) s 3(1); and Wills, Probate and Administration Act 1898 (NSW) s 32G.
2. *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner" and "partner").
3. *Administration Act 1903* (WA) s 14; *Administration and Probate Act 1935* (Tas) s 44(9).
4. See para 2.6-2.18.

traditions of the particular community of Aboriginal or Torres Strait Islander people with which either person identifies.<sup>5</sup>

## Domestic partnerships

2.6 For the purposes of this Report, the term “domestic partner” has been adopted with the intention of encompassing the variety of terms used to describe such a person – de facto spouse, putative spouse, partner or domestic partner.

2.7 The domestic partner of the intestate will usually be entitled to take the spouse’s share of the deceased’s estate. The possible extent of the entitlement means it is important that such partners be identified and distinguished from, for example, mere cohabitants, close friends or carers.

2.8 Domestic partners are included in intestacy provisions in all Australian jurisdictions. Each jurisdiction sets out requirements that must be met before a domestic relationship will be recognised in law. There are also further requirements that domestic partners must meet in order to become entitled in intestacy, such as specified time frames.

### ***Requirements for recognition as a domestic partner***

2.9 Generally, a domestic partner is either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family. In all jurisdictions except SA, a domestic partner may be of the same gender as the intestate.<sup>6</sup>

2.10 The indicia of a domestic partnership, which are identified in other statutes, include the nature and extent of the couple’s common residence; the length of their relationship; whether or not a sexual relationship exists or existed; the degree of financial dependence or interdependence, and any arrangement for financial support; their ownership, use and acquisition of property; the degree of mutual commitment to a shared life, including the care and support of each other and of children; the performance of household tasks; and the reputation and public aspects of their relationship.<sup>7</sup>

2.11 For the purposes of determining entitlement on intestacy, most jurisdictions recognise a domestic partner only if the relationship has existed continuously for a certain

5. See *Interpretation Act 1978* (NT) s 19A(1) and para 14.10.

6. *Succession Act 1981* (Qld) s 5AA(1)(b); *Acts Interpretation Act 1954* (Qld) s 32DA(5)(a); *Administration and Probate Act 1929* (ACT) s 44(1); *Legislation Act 2001* (ACT) s 169(2); *Wills, Probate and Administration Act 1898* (NSW) s 32G; *Property (Relationships) Act 1984* (NSW) s 4(1); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2-3; *De Facto Relationships Act 1991* (NT) s 3A(3)(a); *Relationships Act 2003* (Tas) s 4(1); *Administration and Probate Act 1958* (Vic) s 3(1); *Administration Act 1903* (WA) s 15; *Interpretation Act 1984* (WA) s 13A(3)(a).  
7. *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Administration and Probate Act 1958* (Vic) s 3(3); *Property Law Act 1958* (Vic) s 275(2); *Legislation Act 2001* (ACT) s 169(2); *De Facto Relationships Act 1991* (NT) s 3A; *Relationships Act 2003* (Tas) s 4; *Interpretation Act 1984* (WA) s 13A(2); *Property (Relationships) Act 1976* (NZ) s 2D(2); and *Property (Relationships) Act 1984* (NSW) s 4(2).

period before the death of the intestate or if a child has been born to the relationship.<sup>8</sup> SA requires either five continuous years or a five year aggregate over a six year period.<sup>9</sup> The ACT, NT, Queensland Tasmania, Victoria and WA require two years.<sup>10</sup>

2.12 In the ACT and Victoria, the requirement that a child be born to the relationship is subject to an additional requirement that the child must be under 18 years at the intestate's death if the surviving partner is to be eligible to take on intestacy without having to prove the relationship existed for a continuous period immediately before the intestate's death.<sup>11</sup>

2.13 In NSW and Tasmania, where the intestate is survived by a domestic partner and issue (not being issue of the domestic partner), the partner will not be entitled to anything if the relationship has existed for less than two years.<sup>12</sup> However, in NSW, there is no time period required where the intestate has had no marriage and no children.<sup>13</sup> (This outcome is thought to have been unintended.<sup>14</sup>)

2.14 In SA, a person must apply to the court for a declaration of his or her status as a domestic partner.<sup>15</sup> Such a claim will not be entertained unless it is supported by credible corroborative evidence.

2.15 In its Supplementary Report on Family Provision, the National Committee for Uniform Succession Laws, in considering how to identify a de facto relationship for the purposes of family provision, noted that, while the various jurisdictions enjoyed a degree of consistency in their definitions, each jurisdiction had slightly different provisions for determining whether two people had been in a de facto relationship, and that there were also differences in the qualifying period necessary to establish a relationship for the purposes of family provision. The Committee noted that the differences in each jurisdiction were necessary "to achieve consistency across the range of legislation within [each]

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8. *Family Relationships Act 1975* (SA) s 11(1); *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner"); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Administration and Probate Act 1935* (Tas) s 44(3A) and s 44(3B); *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).

9. *Family Relationships Act 1975* (SA) s 11(1)(a).

10. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(i) to the definition of "eligible partner"; *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Succession Act 1981* (Qld) s 5AA(2)(b)(ii); *Administration and Probate Act 1935* (Tas) s 44(3A) and (3B); *Administration and Probate Act 1958* (Vic) s 3(1) paragraph (b)(i) of the definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).

11. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(ii) to the definition of "eligible partner"; *Administration and Probate Act 1958* (Vic) s 3(1) para (b)(ii) to the definition of "domestic partner".

12. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3B); *Administration and Probate Act 1935* (Tas) s 44(3B).

13. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3B).

14. *Sydney Consultation 1*.

15. *Family Relationships Act 1975* (SA) s 11(2).

individual jurisdiction concerning the rights or obligations of de facto partners”.<sup>16</sup> The Committee, therefore, decided that the uniform legislation should not attempt a uniform definition of de facto partner but rather that a de facto partner should be identified “according to the relevant legislation in the enacting jurisdiction”.<sup>17</sup> A similar approach could be taken to identifying domestic partners for the purposes of distribution on intestacy.

2.16 There are significant problems involved in identifying when some domestic relationships begin and end.<sup>18</sup> This is particularly the case when young people die intestate.<sup>19</sup> Some opinions expressed in submissions and consultations generally supported the imposition of some form of minimum time requirement for the existence of a domestic partnership.<sup>20</sup> Others considered that any time limit would be arbitrary, with one drawing attention to a clear de facto relationship of six months that was cut tragically short.<sup>21</sup> It was suggested that parties to relationships that fall outside of the time limit could resort to a family provision claim.<sup>22</sup> Another submission suggested that the two-year limit could be reduced by the court in appropriate circumstances.<sup>23</sup>

#### **National Committee’s conclusion**

2.17 The National Committee considers that model legislation should not attempt a uniform definition of domestic partner but should adopt the definition relevant to each jurisdiction. The National Committee therefore suggests that a domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

- (a) it has been registered under a relevant law of the jurisdiction;<sup>24</sup> or
- (b) a child has been born to the relationship; or
- (c) it has been in existence for two years.

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- 16. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.21.
  - 17. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.22 and cl 3(1) of the *Family Provision Bill* in Appendix 2.
  - 18. *Sydney Consultation 1; Sydney Consultation 2*; Succession Law Section, Queensland Law Society, *Consultation*; W V Windeyer, *Submission* at 3; J North, *Submission* at 1.
  - 19. S Samek, *Consultation*.
  - 20. Probate Committee, Law Society of SA, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 4; Public Trustee NSW, *Submission* at 3; *Sydney Consultation 1*; W V Windeyer, *Submission* at 3; *Melbourne Consultation*; Law Society of Tasmania, *Submission* at 4.
  - 21. *Sydney Consultation 2*.
  - 22. Probate Committee, Law Society of SA, *Consultation*; *Sydney Consultation 2*; W V Windeyer, *Submission* at 3; *Melbourne Consultation*.
  - 23. Law Society of Tasmania, *Submission* at 4.
  - 24. For example, in NSW, the statute would read “a de facto relationship under the *Property (Relationships) Act 1984*”.



2.18 The Committee is of the view that the relationship, absent registration or children, should have been in existence for at least two years before it can be recognised for the purposes of intestacy. Such a provision is necessary because of the serious consequences to the intestate estate of a short-term or temporary relationship coming to be regarded as a domestic relationship.

### Recommendation 1

A domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

- (a) it has been in existence for two years;
- (b) a child has been born to the relationship; or
- (c) it has been registered under a law of the jurisdiction that deals with the registration of domestic partnerships.

See Intestacy Bill 2006 cl 7.

## SPOUSES TO BE TREATED AS SEPARATE PERSONS

2.19 In Australia, a woman's property does not become that of her husband upon marriage. Married women have the same powers to deal with their interests in property that single women (and men, married or not) enjoy.<sup>25</sup> Nevertheless, five jurisdictions state that spouses are to be treated as separate persons for the purposes of distribution under intestacy.<sup>26</sup> The issue of spouses being treated as separate persons arises, for example, where parents, grandparents or married cousins are entitled to distribution on intestacy. It goes without saying that each partner ought to be able to take the share to which they are entitled. It is surprising to find this expressly stated in modern statutes since the proposition is so obviously part of the general law today.

2.20 In Queensland, the rule that spouses are to be treated as separate persons applies generally to the "acquisition of any interest in property".<sup>27</sup> Property law statutes might be an appropriate place for those jurisdictions who feel that the statement needs to be preserved in some form.

2.21 Some submissions considered that such a provision was not necessary.<sup>28</sup> Other submissions felt that an express statement was preferable for the sake of certainty.<sup>29</sup>

25. *Property Law Act 1974* (Qld) s 15; *Married Persons' Property Act 1986* (ACT) s 3(1); *Married Persons (Equality of Status) Act 1996* (NSW) s 4(1); *Married Persons (Equality of Status) Act 1989* (NT) s 3(1); *Law of Property Act 1936* (SA) s 92, s 93; *Married Women's Property Act 1935* (Tas) s 3(1); *Marriage Act 1958* (Vic) s 156(1)(a), s 157; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 2.

26. *Wills, Probate and Administration Act 1898* (NSW) s 61B(9); *Administration and Probate Act 1969* (NT) s 61(2)(a); *Administration and Probate Act 1929* (ACT) s 44(2)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(viii); and *Administration and Probate Act 1935* (Tas) s 44(8). See also *Administration of Estates Act 1925* (Eng) s 46(2); and *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

27. *Property Law Act 1974* (Qld) s 15. See also *Law of Property Act 1925* (Eng) s 37.

28. Trustee Corporations Association of Australia, *Submission* at 4; J North, *Submission* at 2.

29. Public Trustee NSW, *Submission* at 4. See also Law Society of Tasmania, *Submission* at 5.

## National Committee's conclusion

2.22 There would appear to be no need, in this modern age, to state that spouses are to be treated as separate persons.

2.23 The National Committee recognises that particular problems arise in relation to cousins of the intestate who are married and have issue, and maternal and paternal aunts and uncles of the intestate who marry and have children. These are dealt with elsewhere in this report.<sup>30</sup>

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### Recommendation 2

There should be no provision stating that spouses should be treated as separate persons.

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30. See para 8.36.

### 3. Spouse or partner – general distribution

- Surviving spouse but no surviving issue
- Surviving spouse and surviving issue

3.1 This chapter deals with the broad issue of distribution to a surviving spouse or partner in two situations. First, where there are no surviving issue of the intestate and, secondly, where there are also surviving issue of the intestate.

## SURVIVING SPOUSE BUT NO SURVIVING ISSUE

3.2 In Queensland, NSW, ACT, SA, Tasmania and Victoria, the surviving spouse or partner is entitled to the whole of the intestate's estate in the absence of surviving issue.<sup>1</sup>

3.3 However, in WA and the NT, the surviving spouse or partner is only so entitled when the intestate has not been survived by any issue, parents nor siblings (nor the issue of siblings).<sup>2</sup> In the case of these jurisdictions, if the intestate is survived by a parent or brother or sister (or the issue of a sibling), the spouse or partner is only entitled to the whole of the intestate's estate if its value is below a prescribed amount - \$75,000 in Western Australia. If the value is greater than the prescribed amount, the spouse or partner is entitled to the threshold amount (plus interest calculated from the date of the death of the intestate until the date of payment<sup>3</sup>) and half of the intestate estate remaining.<sup>4</sup> The spouse or partner's absolute right to the personal (household) chattels<sup>5</sup> remains untouched.<sup>6</sup> A similar situation applied in Queensland before recommendations of the Queensland Law Reform Commission were adopted in 1997.

3.4 In New Zealand, in the absence of surviving issue, only the presence of a parent will affect the surviving spouse's right to the whole of the estate.<sup>7</sup> The rules in England still make provision for parents and siblings when the intestate is survived by a spouse or partner but no issue.<sup>8</sup> However, in the United States, the Uniform Probate Code provides that a spouse is entitled to the whole estate if no descendants and no parents survive the intestate.<sup>9</sup>

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1. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 1(1); *Wills, Probate and Administration Act 1898* (NSW) s 61B(2); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 1; *Administration and Probate Act 1919* (SA) s 72G(a); *Administration and Probate Act 1935* (Tas) s 44(2)(b); and *Administration and Probate Act 1958* (Vic) s 51(1).
  2. *Administration Act 1903* (WA) s 14(1) Table It 4; and *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 3. See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 1.
  3. See para 3.52.
  4. *Administration Act 1903* (WA) s 14(1) Table It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
  5. See para 3.36-3.44.
  6. *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1969* (NT) s 66(2), s 67(1) and (2); and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
  7. *Administration Act 1969* (NZ) s 77 It 3.
  8. *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
  9. Uniform Probate Code s 2-102.

## Law reform developments

### **England and Wales**

3.5 In England in 1951, the Committee on the Law of Intestate Succession considered proposals that, in cases where the intestate was not survived by issue, the spouse should get the whole estate, to be “rather... striking”. The Committee considered that in the case of a large estate, an intestate would have wished that “close relatives, such as parents or brothers and sisters, should take some benefit from the estate, subject always to adequate provision being made for the spouse”.<sup>10</sup> The Committee accordingly recommended a vastly increased statutory legacy be given to the surviving spouse in situations where the intestate was survived by no issue but by parents or brothers and sisters.<sup>11</sup> The Law Commission considered this question again in 1988,<sup>12</sup> and its recommendation in 1989, that the surviving spouse should receive the whole estate, operated to exclude other family members as well as issue of the intestate.<sup>13</sup> The Law Commission’s recommendations have not been adopted.

### **Australia**

3.6 In 1972, only Victoria and Tasmania allowed the surviving spouse, in absence of descendants, to take everything whether or not there were other surviving relatives of the intestate.<sup>14</sup> In 1973, the Western Australian Law Reform Commission decided to follow the lead of these two jurisdictions and recommended that, in the absence of issue of the intestate, the whole estate should go to the spouse.<sup>15</sup>

3.7 In 1993, the Queensland Law Reform Commission recommended that a surviving spouse or partner should have to share only with the issue of the intestate.<sup>16</sup> The recommendation was adopted in 1997.<sup>17</sup>

### **Canada**

3.8 In 1974, the Ontario Law Reform Commission recommended that, when an intestate dies leaving a spouse but no issue, the surviving spouse should be entitled to the whole estate.<sup>18</sup> The recommendation was adopted in 1978.<sup>19</sup>

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10. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 12.
  11. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 13.
  12. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.
  13. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) para 28-46.
  14. See Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6.
  15. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 29. See also Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6.
  16. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at para 4.2.
  17. *Succession Amendment Act 1997* (Qld) s 15(1)-(2).

3.9 In 1999, the Alberta Law Reform Institute recommended the retention of the scheme whereby the estate goes wholly to the surviving spouse or partner.<sup>20</sup>

## Arguments for and against

3.10 Provisions allocating part of the estate to members of the intestate's family might have been justified in the past by the belief that it would be unreasonable that a widow, who might remarry, could carry off the whole of the intestate's estate in preference to consanguine relatives of the intestate.<sup>21</sup> In 1993, the Queensland Law Reform Commission observed that the "relatively ungenerous provisions which intestacy rules make for surviving spouses" possibly reflected such concerns, "as may the fact that a significant majority of surviving spouses are women, who have traditionally been discriminated against in succession law".<sup>22</sup>

3.11 Concerns about the transmission of family wealth may have some relevance in cases where the estate can be said to have been derived from the family of the intestate. An argument could be made, at least in the case of relatively younger intestates, that their parents may have supported them either directly or indirectly in the building up of any estate and it is, therefore, right that some of it revert to the family.<sup>23</sup> However, such intestacies will be relatively rare. Certainly not all people who die childless will die young.<sup>24</sup> If, as it has been said in Queensland, the surviving spouse "will most probably be a retired woman in the 75 to 80 year age group",<sup>25</sup> it seems inequitable today that he or she should have to share the estate with anyone other than the issue of the intestate. Where the estate is only small, the unfairness of any forced division will be even more apparent.

3.12 Whatever views about the protection of family wealth were commonly held in the past, they are certainly not commonly held today. The argument that at least intestates

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18. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.

19. See A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 61.

20. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 63.

21. Law Society of Tasmania, *Submission* at 5. See an analogous argument in *Blackborough v Davis* (1701) P Wms 41 at 49; 24 ER 285 at 288.

22. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 36-37.

23. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.

24. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.

25. Queensland, *Parliamentary Debates (Hansard)*, 20 August 1997, Succession Amendment Bill, Second Reading at 3017.

with large estates would wish other close relatives to share in the estate<sup>26</sup> is not borne out by the empirical study of some wills admitted to probate in NSW in 2004.<sup>27</sup>

3.13 Another argument has been made in the past that some near family, for example, elderly parents, could be dependent on the intestate.<sup>28</sup> Such an argument can be rejected on the grounds that family provision regimes now apply to intestate estates and are usually sufficiently broad to cover the dependency of near relatives.<sup>29</sup> The Ontario Law Reform Commission concluded:

*there will be no necessity for having intestate succession laws on assumed need of near relatives. Provision can be made for actual need.*<sup>30</sup>

3.14 Other law reform agencies have concluded that next of kin should not be allowed to share with the surviving spouse in the distribution of an intestate estate. Reasons given include that such a provision is “unnecessary, if not directly counter to common expectations”.<sup>31</sup> The Alberta Law Reform Institute observed that benefiting only the spouse or partner reflected how Albertans distribute their property in their wills.<sup>32</sup>

3.15 One member of the NSW Parliament in 1977 observed “the plight of widows of intestate spouses, whose immediate personal tragedy has too often been compounded by their being told that they will have to share the estate with their children or, in extreme cases, with distant relatives, such as aunts and uncles of their husbands”.<sup>33</sup>

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26. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 12.

27. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators’ choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.8.

28. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 13.

29. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.

30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166. See also A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 62.

31. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 28.

32. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 63.

33. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 28 November 1977, at 10325.



## Submissions

3.16 Submissions that considered this issue were generally supportive of the position in the majority of Australian jurisdictions.<sup>34</sup>

## National Committee's conclusion

3.17 The surviving spouse or partner should get the whole of the intestate estate where there are no surviving issue.

3.18 There is no warrant for a provision that recognises family members other than the spouse or partner in situations where there are no issue who have survived the intestate. This is especially so given the availability of family provision legislation to provide for other family members who are also dependants. There is also no justification for introducing further situations where spousal shares and entitlements must be calculated.<sup>35</sup> The majority of Australian jurisdictions have abandoned such provisions.

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### Recommendation 3

The surviving spouse or partner should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

See Intestacy Bill 2006 cl 12.

## SURVIVING SPOUSE AND SURVIVING ISSUE

3.19 Presently, in all jurisdictions where there is a surviving spouse and surviving issue of the intestate, the surviving spouse generally takes:

- a statutory legacy (fixed amount);
- an interest in the family home (met in various ways; except in Tasmania);
- the personal chattels of the deceased; and
- a share of the residue.

The issue of the intestate take the remaining share of the residue. The remainder of this chapter focuses on the question of whether the surviving spouse should have to share the estate with the issue of the intestate. Special circumstances that arise in cases where the estate has to be apportioned between the spouse or partner and issue are dealt with in chapters 4, 5 and 6.

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34. Public Trustee NSW, *Submission* at 4; Trustee Corporations Association of Australia, *Submission* at 4; Public Trustee NSW, *Submission* at 4; J North, *Submission* at 2. But see Law Society of Tasmania, *Submission* at 5.

35. See para 3.21, ch 4 and ch 5.

## Problems with the current position

3.20 Arguably, the current arrangements are inadequate where there is a surviving partner and issue. They do not necessarily reflect the current demographic make-up of early 21st century Australia, community expectations (as evidenced by wills that are actually made, the intentions of those who do not make wills and the results of family provision applications), and other factors.

### **Complexity**

3.21 The current regime involves a degree of unwanted complexity for administrators of intestate estates. For example, questions will arise concerning valuations, and what property should be sold or distributed in satisfaction of various entitlements.<sup>36</sup> Problems may also arise where the shared home is the principal asset and there are surviving dependent children. In such cases, the surviving partner may get only a share of the home, and the remaining share is controlled by trustees.<sup>37</sup> Each child will then be entitled to his or her share of the asset upon reaching the age of 18.<sup>38</sup>

### **Unfairness**

3.22 The current regime may be unfair in cases where the estate consists almost entirely of the family home, especially where there has been a marriage of long standing and independent adult children have also survived the intestate. In such cases, the shared home may have to be sold to satisfy the entitlements of the surviving children. Consultations in Victoria suggested that it has been difficult in some cases to get the approvals for compromise agreements to allow the surviving partner to continue to live in the shared home.<sup>39</sup>

### **Demographic changes**

3.23 The current schemes benefit the children of the deceased at the expense of the surviving spouse or partner. This is a product of the society in which the Statute of Distributions was enacted in England, over 330 years ago.<sup>40</sup>

3.24 Given current life expectancies, most surviving spouses are going to be elderly and their children independent adults. This is a completely different situation to that which applied when the current regime was first established. In 1670, the average life expectancy at birth was something in the order of 38.1 years for men and 36.3 years for women.<sup>41</sup> Those who made it to 25 years of age could expect to live, on average, until just

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36. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

37. *Melbourne Consultation*.

38. P Worrall, *Consultation*.

39. *Melbourne Consultation*.

40. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 65.

41. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 308.

after they turned 55.<sup>42</sup> In Australia in 2001-2003 the average life expectancy at birth was 77.8 years for men and 82.8 years for women.<sup>43</sup>

3.25 It can be argued that an elderly surviving spouse clearly has greater needs than relatively younger, independent, adult children.<sup>44</sup> The Law Commission of England and Wales suggested that “the effect of the present rules can be to transfer resources from the retired to the working population at just the time when the former need them most”.<sup>45</sup>

### **Community expectations**

3.26 As intestacy rules essentially produce a “default will”, it would be unreasonable for them to stray too far from community expectations.<sup>46</sup>

3.27 The protection of the spouse in intestacy is seen generally as an acceptable development.<sup>47</sup> In fact, some have suggested that community expectations are often that everything will go to the surviving spouse.<sup>48</sup>

3.28 Some studies (albeit conducted a number of years ago and in other common law jurisdictions) have shown that the public thinks the surviving spouse should receive a larger share of the estate than can be justified by need alone.<sup>49</sup> The Law Commission of England and Wales conducted a survey of members of the public which showed that 79% of respondents believed that the spouse should be entitled to the whole estate where there were dependent children of the relationship, and 72% believed that the spouse should be entitled to the whole estate where there were independent adult children of the intestate.<sup>50</sup>

3.29 Data gathered about dispositions made in wills also tends to show that, where there is a surviving spouse and surviving children, testators give the entire estate to the surviving spouse. A survey of 548 wills proved in the NSW Probate Registry in 2004 revealed that approximately 75% of testators with a spouse and children choose to give the entire residue of their estate to their spouse, only about 2% share the residue between

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42. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 282.

43. Australian Bureau of Statistics, *Deaths 2003* (3302.0) at 6.

44. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 66; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11 (although the MLRC considered that their current scheme adequately met those needs).

45. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 23.

46. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

47. *Sydney Consultation 1*. See also S M Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77 at 79-86.

48. *Sydney Consultation 2*.

49. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

50. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 29.

spouse and children, and about 19% give the residue to the children (subject to life estates in a few cases).<sup>51</sup>

3.30 These figures are supported by data from other jurisdictions. For example, data gathered from government sources in British Columbia in 1977 and 1981 showed that the deceased left everything to the surviving spouse in almost 80% of cases where the deceased was survived by both his or her spouse and at least one child.<sup>52</sup>

3.31 A survey of 800 wills in Alberta in 1992 showed that, in the 260 cases where a spouse and children survived, approximately 64% gave all to the spouse, 24% shared the estate between spouse and children, and 9% gave all to the children.<sup>53</sup>

3.32 In the United States, the National Conference of Commissioners on Uniform State Laws, in favouring an increased spousal share, was influenced by findings that people with smaller estates tend to give the entire estate to the surviving spouse.<sup>54</sup>

3.33 A study of estates in Ohio published in 1970 found that, in a significant number of cases, the surviving spouse received more than his or her share of the intestate estate because the surviving issue signed over their entitlements.<sup>55</sup>

3.34 In cases where the current intestacy rules do not make adequate provision for the surviving spouse, the surviving spouse can apply for family provision. The needs of the surviving spouse will generally be preferred over independent adult children. It can be argued that a surviving spouse should not have to apply in order to ensure adequate provision.<sup>56</sup> This is not only on moral grounds, but also on the practical grounds that family provision applications will delay administration, reduce the size of the estate, and cause unnecessary stress for surviving spouses.<sup>57</sup>

#### ***Taking contributions to family into account***

3.35 Arguably, some of the current Australian regimes do not adequately take into account the surviving spouse's contribution to the family. The surviving spouse will, in most cases, have contributed significantly to the acquisition and maintenance of the property, and the raising of the children of the relationship. Such a contribution would have been recognised, for example, if the couple had divorced under the *Family Law Act 1975*

51. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.9.

52. See Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) Appendix F and Appendix G.

53. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 190.

54. Uniform Probate Code s 2-102 (comment).

55. M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 126.

56. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 26. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 60.

57. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 67.

(Cth), or separated under the relevant de facto relationships legislation. The Alberta Law Reform Institute has suggested that it is unfair that, after making sacrifices on behalf of their children, a parent's "financial security in old age should be seen as less important than the financial position of the children".<sup>58</sup> Other law reform agencies have made similar observations concerning the contribution of the surviving spouse to the family.<sup>59</sup>

## Possible approaches

3.36 In determining an approach to this issue, the National Committee bears in mind the desirability of producing a clear and simple scheme of distribution. Other law reform agencies have also advocated this approach. The Alberta Law Reform Institute, for example, expressly recommended that their Intestate Succession Act should "create a clear and orderly scheme of distribution" which would promote certainty and make administration of estates easy.<sup>60</sup> The Manitoba Law Reform Commission aimed to simplify its legislation "for the convenience of the public and the legal profession".<sup>61</sup> Any scheme should also reflect the reasonable expectations of the community.<sup>62</sup>

3.37 It is often suggested that shortcomings of each of the possible approaches can be resolved by way of an application for family provision. As a default regime, the scheme of distribution on intestacy should aim to reduce the number of family provision applications if possible, while still achieving its other aims. The use of family provision applications ought to be avoided for a number of reasons, including:

- the expense involved in such applications;
- the detriment to family relationships which can result from such applications;
- the unwillingness of many family members to litigate.

### ***Keep the current system (with some amendments)***

3.38 A number of submissions supported the retention of the current system, subject to any necessary increases in the statutory legacy.<sup>63</sup> Some of them noted that family

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58. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 67.

59. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11 (although in this case the MLRC considered that their current regime adequately took this into account).

60. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

61. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7.

62. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7 ("ensure that the law is compatible with the wishes of the average property owner as well as present social values").

63. J North, *Submission* at 2; Probate Committee, Law Society of South Australia, *Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5; Public Trustee NSW, *Submission* at 4; W V Windeyer, *Submission* at 3; *Melbourne Consultation*; Law Society of Tasmania, *Submission* at 5; P Worrall, *Consultation*.

provision applications have always been available for surviving partners who are dissatisfied with their allocation.<sup>64</sup>

***Give everything to the surviving partner***

3.39 Much complexity has been caused by the need to apportion a share for the surviving spouse or partner in order to accommodate other relatives who are also entitled to take, usually the surviving issue of the intestate. A simpler plan may be for the intestate estate to devolve in its entirety to the surviving spouse or partner, regardless of the presence of other relatives.

3.40 Questions have been raised from time to time concerning the desirability of preferring the surviving spouse or partner to the issue of the intestate.

3.41 In 1967, the family law project of the Ontario Law Reform Commission proposed that everything should be given to the surviving spouse as a way of ensuring that the needs of intestate's family are taken care of.<sup>65</sup> The Ontario Commission ultimately rejected this proposal in 1974.<sup>66</sup>

3.42 In 1989, the Law Commission of England and Wales recommended that the surviving spouse should receive the whole estate no matter what other relatives remain.<sup>67</sup> The Commission's view was stated as follows:

*Given that, on any view, there would be very few intestate estates which did not all go to the surviving spouse, and that of the remainder there would be many where this was still the right result, it does not seem to us that the disadvantages entailed in the alternative solutions can be justified by any advantage.*<sup>68</sup>

The Law Commission's recommendation was the subject of some controversy and was ultimately not implemented.<sup>69</sup>

3.43 Objections to such an approach include:

- it might be too generous to the surviving spouse or partner in the case of large estates;

64. *Sydney Consultation 1*; Public Trustee NSW, *Submission* at 4; Trustee Corporations Association of Australia, *Submission* at 5; Public Trustee NSW, *Submission* at 4; W V Windeyer, *Submission* at 3.

65. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).

66. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

67. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 28-46.

68. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 33.

69. See G Miller, "Intestacy, divorce and wills" (1995) 145 *New Law Journal* 1693; S M Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77 at 77.

- it pays insufficient attention to the “legitimate expectations” of issue;
- there will be cases where “legitimate expectations” will not be met, especially where the issue are not also the issue of the surviving spouse, or where a surviving spouse remarries;
- it could provide a means for the “unscrupulous to take advantage of the elderly and mentally frail” by marrying them in order to inherit the whole of the estate;<sup>70</sup>
- the law should not be designed for the rich (who have sufficient property to distribute, and who can afford to take legal advice and draw up wills) but should be designed for the average family.<sup>71</sup>

3.44 This position has some support,<sup>72</sup> with submissions suggesting that community expectations are often that everything will go to the surviving spouse.<sup>73</sup> This approach can be justified on the following grounds:

- it removes the need to retain provisions for obtaining the family home;<sup>74</sup>
- in many cases the surviving (usually elderly) spouse will have greater need of the estate than the issue, who are usually mature, rather than mere infants or young adults, and not financially dependent on the deceased;<sup>75</sup>
- the surviving spouse or partner would be expected, in the normal course of events, to look after the needs of children of the intestate who were in their minority or otherwise still dependent on their parents;
- it eliminates the need for statutory trusts for minor issue;<sup>76</sup>
- the practical result of raising the statutory legacy to a level which is sufficient to ensure adequate provision for the surviving spouse (see below), will have the practical result that, in the vast majority of cases, the surviving spouse will receive the whole estate anyway;
- the “legitimate expectations” of issue will usually be met on the eventual death of the surviving partner;
- it ensures that the surviving spouse or partner is not the one who has to fight for a sufficient allocation by bringing a family provision application;<sup>77</sup>

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70. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(v).

71. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165. See also Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 581 (rev).

72. Probate Committee, Law Society of South Australia, *Consultation*; Tasmania, Office of the Public Trustee, *Consultation*; S Samek, *Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.

73. *Sydney Consultation 2*.

74. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 34.

75. *Sydney Consultation 2*.

76. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 36; *Sydney Consultation 2*.

- it recognises the co-dependency of the couple;<sup>78</sup>

3.45 Keeping money in trust until dependent children turn 18 may also not be the best way to meet the needs of the surviving spouse and the surviving family as a whole.<sup>79</sup> It has been suggested that the interests of minor children are “normally best served by their surviving parent being adequately provided for”.<sup>80</sup> For example, it has been suggested that the surviving partner should not be hampered by continually having to apply for funds from trustees.<sup>81</sup>

3.46 There is also some limited evidence of compromises being reached in favour of the surviving spouse or partner, at least in the case of uncomplicated estates. One Tasmanian practitioner suggested that there were few problems with the statutory legacy in his experience because, in most cases, the children of the intestate have let the surviving spouse take everything.<sup>82</sup> The literature occasionally refers to the fact that families will sometimes enter such agreements,<sup>83</sup> although the actual extent of the practice is not known.

3.47 **The problem of issue of another relationship.** One of the chief reasons why this proposal has not proved popular in other jurisdictions is that it fails to take into account the position of children of the intestate’s other relationships.<sup>84</sup> Some views in consultations agreed that such outcomes do not reflect community expectations that property should ultimately devolve to issue of the intestate.<sup>85</sup>

3.48 The basic problem is that the children would have expected, in the normal course of events, to receive something of the estate upon the death of the surviving spouse, so long as the surviving spouse was their parent.<sup>86</sup> Such an expectation is unlikely to be

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77. It should be noted that in many family provision cases the interests of the surviving spouse or partner will be preferred over that of surviving adult children of the intestate.
78. *Sydney Consultation 2*.
79. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 66.
80. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 37. See also *Sydney Consultation 2*; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.
81. *Sydney Consultation 2*.
82. S Samek, *Consultation*.
83. See, eg, W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at para 5.19; M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 126-133; N Preston, “A lasting legacy” (2005) 155 *New Law Journal* 1594 at 1596.
84. See R Hudson, “No will to implement” (1992) 142 *New Law Journal* 899; R Kerridge, “Distribution on intestacy, the Law Commission’s report (1989)” [1990] *Conveyancer and Property Lawyer* 358.
85. *Sydney Consultation 2*; W V Windeyer, *Submission* at 3.
86. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11; R Kerridge, “Distribution on intestacy, the Law Commission’s report (1989)” [1990] *Conveyancer and Property Lawyer* 358 at 364.



fulfilled on the death of the surviving spouse who is only a step-parent.<sup>87</sup> This is because people are less likely to leave anything in their wills to step-children, especially those step-children who attained their status when they were independent adults. Also, step-children are currently not recognised in any intestacy regime in Australia and only in some family provision regimes.

3.49 The English Law Commission considered that making provision for the children of earlier relationships went against the primary aim of ensuring that the surviving spouse receives adequate provision.<sup>88</sup> One view is that the surviving partner's needs will remain the same regardless of the presence of children of any earlier relationships.<sup>89</sup> However, it can also be said that giving the whole estate to a subsequent spouse is "unfair in that children of former marriages could end up inheriting none of what was originally their parents' property".<sup>90</sup> This is especially so where the former spouse or partner has predeceased the intestate. In such cases it is possible that the surviving spouse or partner will inherit property that was substantially derived from the deceased former spouse or partner. It can be argued that the children of the former relationship would have a greater sense of entitlement to at least some of this property.<sup>91</sup>

3.50 A series of US studies conducted before 1985 revealed that respondents were prepared to give a lesser entitlement to second or subsequent spouses where there were also issue from a previous relationship than they were prepared to give to a spouse where the only surviving issue were those of that relationship.<sup>92</sup> The Law Reform Commission of Tasmania also considered the situation where the intestate is survived by children of another relationship and these children cannot rely on the surviving spouse for support.<sup>93</sup>

3.51 In Australia, some courts have noted community attitudes to making adequate provision for a surviving spouse when there are also children of another relationship. For the most part, at least in the case of small estates, the courts are likely to give the whole of the estate to the surviving spouse as the only way to ensure adequate provision.<sup>94</sup>

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- 87. See L W Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 *Iowa Law Review* 223 at 233.
  - 88. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 42.
  - 89. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 17.
  - 90. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 41. See also Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 17.
  - 91. R Kerridge, "Distribution on intestacy, the Law Commission's report (1989)" [1990] *Conveyancer and Property Lawyer* 358 at 364. See also *Strojczyk v Kopyczynski* [2006] NSWSC 588 at para 48.
  - 92. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 18.
  - 93. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.
  - 94. See, eg, *Woolnough v Public Trustee* [2005] TASSC 50 where the surviving spouse was granted the whole estate in preference to her receiving a life estate with the remainder going both to the surviving issue of the testator and the surviving spouse and to the issue of a previous marriage. See also *McDougall v Roger* [2006] NSWSC 484 at para 48-49.

(Although there are instances of life estates being granted in these circumstances.<sup>95</sup>) However, in the case of larger estates, considerations may be slightly different, depending on the facts of the case, in particular the size of the estate. In 2004, Justice Nettle of the Victorian Supreme Court observed:

*Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a first marriage; although of course it is always a question of fact. But equally, upon the death of the widow, and as it were in the event of a surplus, most would surely say that the children of the first marriage should rank for their fair share.*<sup>96</sup>

However, even if there is a “surplus”, the courts will also consider such factors as the extent to which the estate of the natural parent contributed to the deceased step-parent’s estate and how much of the natural parent’s estate passed to the children.<sup>97</sup>

3.52 There is some authority for the suggestion that upon the death of the surviving partner, most would expect some part of the surplus of the estate to go to the children of the earlier relationship. This approach would leave the determination of the rights of the surviving children of the deceased to family provision proceedings following the death of the surviving spouse (on the assumption that the surviving spouse did not make adequate provision for his or her step-children). Because the definition of “child” does not always encompass “step-child”, this outcome would not currently be possible in some Australian jurisdictions and there would, therefore, be a need either:

- to adopt the category of “responsibility” currently in force for family provision applications in Victoria<sup>98</sup> and proposed by the National Committee for Uniform Succession Laws;<sup>99</sup> or
- to alter the definition of “child” to include “step-child” as is the case in some other jurisdictions.<sup>100</sup>

***Special provisions where there are issue of another relationship***

3.53 This option involves giving greater recognition to surviving issue of other relationships. Such situations are more common now with a higher incidence of re-

95. *Strojczyk v Kopyczynski* [2006] NSWSC 589.

96. *McKenzie v Topp* [2004] VSC 90 at para 58. See also *James v Day* [2004] VSC 290 and *Keets v Marks* [2005] VSC 172 at para 26-30; *Powell v Monteath* [2006] QSC 24 at para 40-46.

97. See *Freeman v Jaques* [2005] 1 QdR 318.

98. *Administration and Probate Act 1958* (Vic) s 91(1).

99. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission Miscellaneous Paper 28, December 1997) at 20-24.

100. *Family Provision Act 1969* (ACT) s 7(1)(d) and s 7(2); *Family Provision Act 1970* (NT) s 7(1)(d) and s 7(2)(b); *Succession Act 1981* (Qld) s 40 (definition of “child”); *Inheritance (Family Provision) Act 1972* (SA) s 6(g); *Testator’s Family Maintenance Act 1912* (Tas) s 2(1).

marriage following divorce, and of people living together in de facto relationships following the breakdown of a previous relationship.<sup>101</sup>

3.54 Approaches to this situation include:

- generally giving the whole estate to the surviving spouse but allocating a share to issue of the deceased where some of those issue are not also issue of the surviving spouse;
- giving a share of the estate to the surviving spouse but allocating a greater share to issue of the deceased where some of those issue are not also issue of the surviving spouse.

3.55 For example, in 1992 the Queensland Law Reform Commission proposed, on a preliminary basis, that where an intestate is survived by a spouse or partner and issue of the relationship, the surviving spouse or partner should take the entire estate to the exclusion of all others. This proposal envisaged that where the surviving spouse or partner was a step-parent to the intestate's children, the surviving spouse or partner would be entitled to a generous statutory legacy of \$500,000 and half the residue of the estate. The other half of the residue would then go to the surviving issue of the intestate who were also not the issue of the surviving spouse or partner.<sup>102</sup>

3.56 In Manitoba, the whole of the intestate estate goes to the surviving spouse or partner where the surviving issue are also issue of that relationship.<sup>103</sup> In cases where one or more of the issue are issue of another relationship, the share of the surviving spouse is C\$50,000 or one half of the intestate estate (whichever is greater) and one half of the residue.<sup>104</sup>

3.57 The Manitoba Law Reform Commission in 1985 recommended that the surviving spouse should be given a C\$100,000 statutory legacy in situations where the surviving issue were also issue of the surviving spouse. However, in cases where some of the surviving issue were not issue of the surviving spouse, the Commission recommended that the surviving spouse should receive a C\$50,000 statutory legacy.<sup>105</sup>

3.58 Another example may be seen in Montana (a US State that has adopted the Uniform Probate Code)<sup>106</sup> where the surviving spouse is entitled to:

- the entire estate if all of the surviving issue are issue of the current relationship;

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101. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 16; L W Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 *Iowa Law Review* 223.

102. Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 14.

103. *Intestate Succession Act* CCSM c 185 s 2(2).

104. *Intestate Succession Act* CCSM c 185 s 2(3).

105. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 15-16, 19-20.

106. *Montana Code Annotated 2003* s 72-2-112. See also Uniform Probate Code s 2-102 and L W Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 *Iowa Law Review* 223 at 229-235.

- US\$200,000 and three-quarters of the residue if the deceased is survived by no issue but by at least one parent;
- US\$150,000 and one-half of the residue if the deceased is survived by issue who are also issue of the surviving spouse and also by issue of the surviving spouse who are not issue of the deceased;
- US\$100,000 and one-half of the residue if one or more of the deceased's issue are from another relationship.

3.59 A provision was introduced in Ontario in 1966 which denied the surviving spouse his or her preferential share if there was one or more surviving infant of a previous marriage.<sup>107</sup> The Ontario Law Reform Commission rejected this approach on the grounds that it could apply equally to marriages of 17 years duration as it would to marriages of one or two years; there was no guarantee that the surviving spouse would not look after the infant children of the previous marriage; and family provision legislation was available to make further provision for any infant children if necessary.<sup>108</sup> The provision is not contained in the current statute which was enacted in 1990.<sup>109</sup>

3.60 The English Law Commission suggested that children who were not also children of the surviving spouse could seek remedies elsewhere if they were not being adequately cared for by their step-parent,<sup>110</sup> an approach which one commentator described as “oversimplistic” and as presupposing “an ability and willingness to litigate” and not taking into account “the detriment to family relationships which could result from any such application to the court”.<sup>111</sup> One commentator has noted that there are serious drawbacks in relying on a family provision regime in such cases, pointing to the unpredictability of outcomes and the cost of defending claims.<sup>112</sup> In one consultation, it was suggested that the law should try to avoid creating grounds for litigation between the surviving spouse and the issue of another relationship.<sup>113</sup>

3.61 A view expressed in one consultation was that a separate arrangement where the surviving issue were from another relationship would better reflect community expectations.<sup>114</sup> Some submissions expressly supported such an arrangement.<sup>115</sup> Others, however, vigorously rejected this and supported the current system with an increase in the statutory legacy if required.<sup>116</sup>

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107. *Devolution of Estates Act* RSO 1970 c 129 s 13.

108. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

109. *Succession Law Reform Act* RSO 1990 c S-26.

110. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 46.

111. R Hudson, “No will to implement” (1992) 142 *New Law Journal* 899.

112. S M Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77 at 97.

113. R Walker, *Consultation*.

114. *Sydney Consultation 2*.

115. *Sydney Consultation 2*; Law Society of NSW, *Submission* at 1; Law Society of NSW, *Submission* at 1; K McQueenie, *Consultation*; K Mackie, *Consultation*; R Walker, *Consultation*.

116. Succession Law Section, Queensland Law Society, *Consultation*.

3.62 The Uniform Law Conference of Canada has observed that parties to a later relationship will generally have commenced that relationship at a relatively older age and the surviving spouse or partner is likely to have been “self-supporting” for a significant period. This arguably equalises the deceased’s obligations as between his or her issue and spouse or partner.<sup>117</sup>

3.63 The survey of wills in the NSW Probate registry revealed 16 estates where the testator had a surviving spouse or partner and children from another relationship. Of these, seven (43%) gave the residue all to the spouse; two (12.5%) shared the residue between spouse and children; five (31%) gave everything to the children; and two (12.5%) shared everything between their children and others, but not the spouse.<sup>118</sup>

#### **Recognition of dependency**

3.64 Some proposals for the recognition of dependants have been raised from time to time, albeit unsuccessfully. For example, the Law Commission for England and Wales raised the possibility of minor children receiving a greater share than adult children.<sup>119</sup>

3.65 The recognition of dependency was also mooted in some consultations.<sup>120</sup> In one consultation, it was proposed that dependency be recognised so that step-children of the intestate could be included in a distribution.<sup>121</sup> Such an approach would be particularly desirable, for example, in cases where the step-child had been brought up alongside the children of the more recent relationship.

3.66 Some submissions rejected any approach that distinguished dependent from non-dependent issue.<sup>122</sup> One submission expressly rejected the idea of making separate provision for dependent children principally on the grounds of equality and because the cut-off was seen as arbitrary.<sup>123</sup>

#### **Substantially increase the statutory legacy**

3.67 Another option is to increase the statutory legacy to ensure that it is enough for the surviving spouse or partner to purchase a home and continue to live comfortably.

3.68 The practical result of substantially increasing the statutory legacy in most cases will be that the surviving spouse will be entitled to the whole of the estate.<sup>124</sup> In this

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117. Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 221-222.

118. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators’ choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.14.

119. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(vii) and para 5.8.

120. P Worrall, *Consultation; Melbourne Consultation*.

121. *Melbourne Consultation*.

122. Public Trustee NSW, *Submission* at 5; W V Windeyer, *Submission* at 4; Law Society of Tasmania, *Submission* at 7.

123. J North, *Submission* at 2.

124. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

context, it has been suggested that an adequate statutory legacy is to be preferred to options such as giving the whole of the estate to the surviving spouse because it recognises “that a large estate can be distributed so as to ensure that the surviving spouse’s requirements are met without disinheriting children of the marriage”.<sup>125</sup>

3.69 Some US studies have suggested that people will support the issue receiving a share of an intestate estate where the estate is a large one.<sup>126</sup>

3.70 While there will obviously be some estates that are so large that only a small share will be needed to ensure adequate provision for a surviving spouse, it has been argued that these should not exercise a strong influence on the final form of intestacy rules.<sup>127</sup> The principle reason is their comparative rarity. Another reason is that such estates will have sufficient resources to meet any family provision applications that independent adult children should decide to make.<sup>128</sup> In any case, even a substantial increase to the statutory legacy may not necessarily guarantee that the surviving spouse will continue to live in the family home, especially if that home is located in a market characterised by high property values.

3.71 There was some support in consultations for a substantial increase in the statutory legacy. This was particularly so in Victoria, WA and SA, where the statutory legacies (\$100,000, \$50,000 and \$10,000 respectively) are widely regarded as too low.<sup>129</sup>

3.72 The most recent Australian law reform agency to consider this question was the Queensland Law Reform Commission in 1993. The QLRC recommended a generous provision for the surviving spouse or partner, including the personal property of the intestate, a statutory legacy of \$100,000, the matrimonial home, a sum of up to \$150,000 sufficient to discharge any mortgage on the matrimonial home, and one-half of the intestate estate remaining.<sup>130</sup> The QLRC considered that making such provision was consistent “with the discernible policy of the courts in dealing with ‘usual’ family provision applications and of the practice of many spouses who do make wills”.<sup>131</sup>

## National Committee’s conclusion

3.73 The option of giving everything to the surviving spouse in all cases has some attractions, principally on the grounds of simplicity, and conforms with practice in the majority of testate estates. However, there is some genuine concern about the position of children of other relationships.

125. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

126. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

127. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

128. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

129. *Melbourne Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Probate Committee, Law Society of SA, *Consultation*.

130. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 37-38.

131. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 35.

3.74 The National Committee considers that the surviving spouse should take everything unless the intestate is also survived by issue of another relationship. This option eliminates the need to make special arrangements for the surviving spouse or partner in most cases. The survey of 548 wills proved in the NSW Probate Registry in September 2004 revealed only 16 estates (3%) where there was a surviving spouse or partner and children of another relationship.<sup>132</sup>

3.75 It is still necessary to make special provision for the surviving spouse in cases where there are issue of another relationship. Reasons for adopting this approach include:

- that the underlying assumption that issue will ultimately receive a share of the intestate's estate through the surviving spouse does not apply in such cases;
- the second or subsequent spouse or partner, generally having entered the relationship at an older age, is likely to have other resources at his or her disposal;
- the second or subsequent spouse or partner is less likely to look after the interests of dependent children of an earlier relationship; and
- a trend is evident among testators to make provision for children of an earlier relationship even where their current spouse or partner also survives them.

The special provisions where there are issue of another relationship are dealt with in the following chapters.

3.76 It can be argued that only the issue of the other relationship should be entitled to a share on the basis that the children of the surviving spouse could still expect to inherit from their surviving parent. However, there was a concern about the disharmony this might cause in some families. While it is not desirable to make avoiding family provision applications an aim of intestacy law, excluding the natural children of the surviving spouse in these circumstances could well lead to an increase in family provision applications.

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132. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.14.

**Recommendation 4**

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Where the intestate is survived by a spouse or partner and issue, the spouse or partner should be entitled to the whole intestate estate except in cases where some of the issue are issue of the intestate from another relationship. In cases where some of the issue are issue of the intestate from another relationship, the intestate estate should be shared between the surviving spouse and all surviving issue.

See Intestacy Bill 2006 cl 13, cl 28(2).



## 4. Spouse or partner – special provisions

- Personal effects of the intestate
- The statutory legacy
- Statutory legacy and conflict of laws
- Apportioning the residue between surviving partner and issue

4.1 The provisions in this chapter will apply in the limited circumstance where the intestate is survived by a spouse or partner and issue who are issue of another relationship. In such cases, the estate will be shared between the surviving spouse or partner and all of the surviving issue of the intestate.

## PERSONAL EFFECTS OF THE INTESTATE

4.2 In all jurisdictions, except Tasmania, the surviving spouse is entitled to the household (or personal) effects (often referred to as “chattels”).<sup>1</sup> It is generally stated that these effects include articles of household or personal use or adornment (or ornament).<sup>2</sup>

4.3 The spouse’s right to the personal, or household, effects has been recognised as minimising the disruption caused by the death of the intestate, and producing “some continuity of lifestyle for the spouse and any surviving children”.<sup>3</sup> This was also said to be the reason that formerly motivated testators in the practice of willing their personal effects to the surviving spouse. The provisions on intestacy were originally included to follow what was considered to be the practice of the majority of testators.<sup>4</sup>

4.4 Another reason for giving the surviving spouse or partner a right to personal, or household, effects is that it spares the surviving spouse or partner from a potentially unseemly struggle with other beneficiaries over the ownership of particular items, for example, kitchenware, lawnmowers, and so on. In these cases, it may be difficult or impossible for the surviving spouse or partner to prove ownership, and undesirable to require her or him to do so.

### Definition of effects

4.5 The question of what items fall within the definitions of effects or chattels takes on an importance when part of the intestate estate must be shared with the children of the

1. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Administration and Probate Act 1969* (NT) s 67(1), (2); *Administration and Probate Act 1919* (SA) s 72H(1); *Administration and Probate Act 1929* (ACT) s 49A; *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1958* (Vic) s 51(2)(a); and *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(a). See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2; and *Administration Act 1969* (NZ) s 77 It 1, 3.
2. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of “personal chattels”; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of “personal chattels”; *Administration Act 1903* (WA) s 14(2)(a); and *Administration and Probate Act 1919* (SA) s 72B(1). See also *Administration of Estates Act 1925* (Eng) s 55(1)(x); and *Administration Act 1969* (NZ) s 2(1).
3. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 362.
4. See NZ, *Parliamentary Debates (Hansard)* House of Representatives, 23 November 1944 at 288.

intestate. It is also relevant, to a lesser extent, in cases of partial intestacy where the will has made specific bequests of categories of items, such as jewellery.<sup>5</sup>

### **Inclusive lists**

4.6 Of the five Australian jurisdictions which give detailed definitions of effects,<sup>6</sup> there are a number of common inclusions. Linen, china, glassware, liquors, consumable stores and domestic animals are all included.<sup>7</sup> Most also include furniture,<sup>8</sup> wines,<sup>9</sup> motor cars<sup>10</sup> and motor car accessories<sup>11</sup> (not used for business at the time of the intestate's death), as well as plate (and/or plated articles), books, pictures, prints, jewellery, and musical and scientific instruments or apparatus.<sup>12</sup>

4.7 Other items which are specifically identified as personal effects in some jurisdictions include curtains, drapes, carpets, ornaments, domestic appliances and utensils, garden appliances and utensils, other chattels of ordinary household use or decoration,<sup>13</sup> garden effects or appliances,<sup>14</sup> carriages (not used for business),<sup>15</sup> horses

5. See P Fudakowska, "Who gets the iPod?" (2006) 156 *New Law Journal* 487.
6. *Succession Act 1981* (Qld) s 34A; *Administration and Probate Act 1929* (ACT) s 44(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1958* (Vic) s 5(1) definition of "personal chattels". See also *Administration Act 1969* (NZ) s 2(1); and *Administration of Estates Act 1925* (Eng) s 55(1)(x).
7. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
8. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); and *Administration and Probate Act 1958* (Vic) s 5(1).
9. *Succession Act 1981* (Qld) s 34A(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
10. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) to the definition of "personal chattels"; *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".
11. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".
12. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
13. *Succession Act 1981* (Qld) s 34A(1); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).

(not used for business), stable furniture and effects (not used for business),<sup>16</sup> and clothing.<sup>17</sup>

4.8 In Queensland and NSW, a “thing” (household chattel) will be taken as owned by the intestate even if it was held subject to a charge, encumbrance or lien securing the payment of money; or the intestate only held the interest as grantor under a bill of sale or as hirer under a hire-purchase agreement.<sup>18</sup> In NSW, the owner’s rights with respect to the item are also expressly preserved.<sup>19</sup>

**Limiting to “personal or household” use**

4.9 Rather than go into any detail, Western Australia provides a general definition – articles of personal or household use or adornment.<sup>20</sup> The limitation to “personal or household” articles was employed because the Law Reform Commission of Western Australia was concerned that a definition of personal articles would include “such valuable items as a collection of diamonds... or a motor yacht”. The Commission preferred that the surviving spouse should be allowed to purchase such valuable items.<sup>21</sup>

4.10 Some jurisdictions have dealt with this issue by specifically excluding certain items. These items include motor vehicles, boats, aircraft, racing animals, trophies, clothing, jewellery, chattels of a personal nature, original paintings,<sup>22</sup> and other original works of art.<sup>23</sup>

4.11 However, there will always be problems in trying to draw the line. Take, for example, an estate that includes a collection of Persian carpets which are hung on the walls of the shared home. In NSW, these items would fall within the category of “carpet”. However, there is some doubt as to whether this should be read down by reference to the expression “and other chattels of ordinary household use or decoration”.<sup>24</sup>

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14. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); and *Administration and Probate Act 1958* (Vic) s 5(1).
  15. *Administration and Probate Act 1958* (Vic) s 5(1).
  16. *Administration and Probate Act 1958* (Vic) s 5(1).
  17. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of “personal chattels”; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of “personal chattels”.
  18. *Succession Act 1981* (Qld) s 34A(3)(b); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2). See also *Administration Act 1969* (NZ) s 2(1).
  19. *Wills, Probate and Administration Act 1898* (NSW) s 61B(10). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3.
  20. *Administration Act 1903* (WA) s 14(2)(a).
  21. Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34 Part 1, Working Paper, 1972) at para 21(b).
  22. *Succession Act 1981* (Qld) s 34A(2); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
  23. *Succession Act 1981* (Qld) s 34A(2).
  24. R Atherton, “Valuations and intestacy: surviving spouse v issue” (1984) 22 *Law Society Journal* 169 at 171.

**Items used for business and professional purposes**

4.12 Any items used for business at the intestate's death are generally excluded.<sup>25</sup>

4.13 The Law Reform Commission of Tasmania considered that the definition should specifically exclude business and professional items because “they do not fall within the commonly held view of what the surviving spouse should be entitled to”.<sup>26</sup>

4.14 The Queensland Law Reform Commission proposed requiring that the items be used “exclusively” for business or professional purposes on the grounds that this would let in motor vehicles that were used partly for business purposes and partly for family purposes while excluding haulage trucks and the like.<sup>27</sup>

4.15 The English Law Commission, while noting the general assumption that the spouse or partner is unlikely to have any connection with the intestate's business, considered there might be cases where the spouse has some interest in the intestate's business. The Commission noted that, if the intestate was involved in a business partnership, the items would devolve according to the law of partnerships. This would also be the case where the spouse was also the intestate's business partner. The Commission noted that there might be “situations where the survivor's connection with the business falls short of partnership and yet might be seen as giving rise to some claim to share in the business assets”.<sup>28</sup> However, it did not pursue this line of enquiry in its final report.

**Money and securities for money**

4.16 Money and securities for money are excluded in Victoria, ACT, and NT.<sup>29</sup> The Queensland Law Reform Commission has noted that this is a “traditional” exception from the list of items and further observed:

*If money and securities for money were included in the definition of “personal property”, one might as well recommend that the spouse take the entire estate.*<sup>30</sup>

25. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (c) to the definition of “personal chattels” (where chattel used exclusively for business purposes); and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (c) to the definition of “personal chattels” (where chattel used exclusively for business purposes). See also *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration Act 1969* (NZ) s 2(1).

26. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 12.

27. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 40.

28. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 20.

29. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (d) to the definition of “personal chattels”; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (d) to the definition of “personal chattels”.

30. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 41.

### Heirlooms

4.17 In 1988, the English Law Commission raised the particular question of whether heirlooms should be included, observing that “there is no provision to enable other members of the family to claim that property should have come to them because it originally belonged to their branch of the family”.<sup>31</sup> This was seen to be a particular problem in cases where the intestate had been married more than once.<sup>32</sup> It was noted that Scotland specifically excluded heirlooms. The question, however, was not traversed in the Commission’s report.

4.18 The Scottish provision, in defining “furniture and plenishing”, sets out the usual exclusions, such as items used for business purposes, and money or securities for money, and adds “any heirloom”.<sup>33</sup> An heirloom is defined as “any article which has associations with the intestate’s family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate”.<sup>34</sup>

4.19 In one consultation, it was noted that there can sometimes be a problem with children getting particular items of the intestate’s property. In particular, access to family photographs can, sometimes, be subject to dispute in the administration of deceased estates, even if only for the purposes of copying.<sup>35</sup> However, the majority view was that this was not a significant problem.<sup>36</sup>

## Law reform developments

4.20 In its working paper, the English Law Commission considered the question of personal effects, noting that a very wide definition could give rise to problems.<sup>37</sup> The question, however, was not traversed in the Commission’s report.

4.21 The Law Reform Commission of Tasmania suggested a definition of personal effects along the lines of that in New Zealand.<sup>38</sup> This recommendation has not been implemented.

4.22 The Queensland Law Reform Commission, in 1993, considered that it would be more appropriate to adopt an “open definition” of personal property so as to exclude “items which would not ordinarily be treated as personal property, rather than to devise a

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31. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.

32. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.

33. *Succession (Scotland) Act 1964* (Scot) s 8(6)(b).

34. *Succession (Scotland) Act 1964* (Scot) s 8(6)(c).

35. See, eg, *Longworth v Allen* [2005] SASC 469.

36. WA, Succession Law Implementation Committee, *Consultation*.

37. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.

38. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 12.

definition which attempts to list all possible items of property which should be treated as personal property”.<sup>39</sup> The Commission, therefore, proposed the following definition:

*An intestate’s ‘personal property’ is all of the intestate’s property excluding the following:*

- (a) any interest in land;
- (b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);
- (c) stock, shares and debentures;
- (d) property that was used exclusively for business purposes at the time of the intestate’s death.<sup>40</sup>

4.23 The outcome of this definition is that the intestate’s personal property would include items such as motor vehicles, works of art, collections and other valuable items. The Commission observed that:

*A spouse should not have to suffer the anxiety of wondering whether a brooch or a neckchain given to the deceased spouse as a wedding anniversary present is or is not “jewellery”. Even if a person has established an extremely valuable collection of articles, such as paintings, then the Commission considers that if its owner fails to make a will it is reasonable to assume that he or she intended his or her spouse to have it.*<sup>41</sup>

The Queensland recommendation has not been implemented.

## Submissions and consultations

4.24 Submissions generally supported provisions giving the personal effects of the intestate to the surviving partner.<sup>42</sup> One reason was that such assets are closely linked to the “personal relationship” between the couple.<sup>43</sup>

4.25 Some submissions supported making reference merely to “items of personal or household use or adornment”.<sup>44</sup> Others supported lists of items,<sup>45</sup> including the current

39. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 40.

40. Proposed s 35J of the draft *Succession (Intestacy) Amendment Bill 1993* in Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) Chapter 9 at 12.

41. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 39.

42. K Mackie, *Consultation*; Law Society of Tasmania, *Submission* at 5; J North, *Submission* at 2.

43. Public Trustee NSW, *Submission* at 4.

44. Trustee Corporations Association of Australia, *Submission* at 5; J North, *Submission* at 2.

45. Law Society of Tasmania, *Submission* at 6.

Queensland definition.<sup>46</sup> One submission raised the issue of marine vessels and associated equipment. These were seen as a particular problem in Tasmania because of the high level of ownership of such items in that State.<sup>47</sup> One submission also supported having a list of exclusions from this category, namely collectibles.<sup>48</sup>

## National Committee's conclusion

4.26 The surviving spouse or partner, where he or she does not get the whole of the intestate's estate, should be entitled to the personal effects of the deceased. This approach is desirable to avoid undue delay and conflict in the administration of intestate estates.

4.27 The open definition, listing only exclusions, as proposed by the Queensland Commission, has much to recommend it for certainty and simplicity. The exceptional cases where, for example, an intestate leaves a large and valuable art collection or collection of jewellery or an expensive maritime vessel, should not influence the definition of personal chattels. The listing of such exceptions, unless carefully done, will only cause confusion and give rise to doubt about, for example, small items of personal adornment, or relatively inexpensive art works that are used to decorate a family home. Even if the exceptions are carefully defined by reference to value or the reason the intestate obtained them, there will be many grey areas and borderline cases involving arbitrary distinctions. In some cases, for example, a surviving spouse could be left with the shared home devoid of any of its familiar decorations.

4.28 There are still some items of personal property that should be considered part of the estate available for distribution in addition to those proposed by the Queensland Commission. For example, the exceptions may not cover interests the intestate may have had under trusts, in deceased estates or in the results of litigation. They may also not cover interests in intellectual property such as an interest in a design which is yet to be commercially exploited, or copyright in an unpublished manuscript. The solution to this problem is to state that the surviving spouse or partner is to be entitled to the intestate's "tangible" personal property and then list only those exceptions that can be identified as tangible. Such exceptions would include:

- property used exclusively for business purposes;
- banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
- property held as a pledge or other form of security; and
- property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds.

With regard to the last category of property, the National Committee does not intend to exclude property which, while it may act as a hedge against inflation or adverse currency movements, is also an object of household, or personal, use, decoration or adornment.

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46. Public Trustee of Queensland, *Submission* at 2.

47. Law Society of Tasmania, *Submission* at 6.

48. J North, *Submission* at 2.



4.29 The term “tangible” has been adopted to distinguish the property included from choses in action, which are also classed as personal property but which are not intended to be included among the “personal effects” of the deceased. Tangible, or corporeal, personal property is synonymous with “choses in possession”, whereas intangible, or incorporeal, personal property is synonymous with “choses in action” and includes all personal chattels that are not in possession including shares, and various forms of intellectual property.<sup>49</sup> For the avoidance of doubt, it should also be made clear that tangible personal property does not include any interest in real property.

4.30 Bearing in mind that the question of the spouse receiving the personal chattels of the intestate as a separate allocation will now only arise in situations where there are issue of another relationship, the question arises as to whether “heirlooms” should be included in the list of exclusions. Including “heirloom” may, however, lead to a degree of uncertainty, especially as formulated in the Scottish provision. The National Committee does not recommend the inclusion of “heirlooms” in the list of exceptions. The question of ownership of “heirlooms” is best negotiated, where possible, between the surviving spouse or partner and the surviving issue.

#### Recommendation 5

Where the intestate is survived by a spouse or partner and issue from another relationship, the spouse or partner should be entitled to all of the tangible personal property of the intestate except for:

- (a) property used exclusively for business purposes;
- (b) banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
- (c) property held as a pledge or other form of security;
- (d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds; and
- (e) any interest in land.

See Intestacy Bill 2006 cl 4(1) definition of “personal effects”; cl 14(a).

## THE STATUTORY LEGACY

4.31 In most Australian jurisdictions, the spouse or partner is entitled to a statutory legacy<sup>50</sup> in addition to the household or personal effects.<sup>51</sup> Although there is limited correspondence, there is no uniformity and the amount differs between jurisdictions.

49. B A Helmore, *Commercial Law and Personal Property in New South Wales* (10th ed, Law Book Company, Sydney, 1992) at 4-5.

50. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(b); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B); *Administration Act 1903* (WA) s 14(1) Table It 2(b) and It 3(b); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2 and It 3.

4.32 The prescribed amount of the statutory legacy is either included in legislation or fixed by regulation. The NT and NSW set the legacy by regulation.<sup>52</sup> In NSW, the amount is \$200,000.<sup>53</sup> Legislation provides that the amount is \$150,000 in Queensland and the ACT, \$100,000 in Victoria, \$50,000 in Tasmania and WA, and \$10,000 in SA.<sup>54</sup>

## Justification of the statutory legacy

4.33 The statutory legacy can be justified on a number of grounds. First, it can be said that it is intended to remove financial hardship and ensure that the spouse can continue living in the manner to which he or she has become accustomed.<sup>55</sup> For example, the spouse might be able substantially to reduce any mortgage to which the shared home may be subject. If the estate is only small, the entitlement to a legacy means the spouse may avoid severe financial hardship and the associated “expense and domestic unpleasantness” of a family provision application.<sup>56</sup>

4.34 It was also intended that the presence of a fixed legacy should take pressure off the surviving spouse to sell essential assets so that their proceeds may be distributed to the intestate’s children.<sup>57</sup>

## The amount of the statutory legacy

4.35 The amount of the statutory legacy has been the subject of some controversy, both with regards to its size and the method of determining and adjusting it.

### **Size of the statutory legacy**

4.36 Views expressed in consultations were generally that the amounts in each jurisdiction were too low.<sup>58</sup> For some time now, there has been support among law reform

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See also *Administration Act 1969* (NZ) s 77 It 2 and It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.

51. See para 4.2-4.30.

52. *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1), It 3(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.

53. *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Wills, Probate and Administration Regulation 2003* (NSW) cl 5(2).

54. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration Act 1903* (WA) s 14(1) Table It 2; *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B).

55. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 28 November 1977 at 10326.

56. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363.

57. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, *Wills, Probate and Administration (Amendment) Bill*, Second Reading at 8998.

agencies for a reasonably large statutory legacy. The Queensland Law Reform Commission in 1993 observed that:

*the main purpose of giving a statutory legacy of a reasonably substantial amount is that it makes easy the administration of all estates of less than the amount of the statutory legacy plus the personal property. There can be no doubt as to who will inherit. This is particularly important in the case of very small estates.*<sup>59</sup>

4.37 A recent review of the size of the statutory legacy in England and Wales showed that, while in 1925 98% of intestate estates were within the original limit of £1,000, now only 59% of intestate estates fit within the current statutory legacy of £125,000. However, any alterations to the current limits would need to take into account substantial changes over the past 80 years, including increases in the levels of home ownership and the increasing incidence of joint ownership of property.<sup>60</sup>

4.38 One commentator in the UK has opposed a large house price-related statutory legacy on the grounds that many intestates do not own their own homes and that shared homes are now more frequently owned by partners as joint tenants. It is claimed that such people do not need so large a legacy because they do not need it to obtain the shared home.<sup>61</sup>

4.39 Another reason for a comparatively large statutory legacy is that, if the estate includes the intestate's interest in a family business, and the business is the surviving spouse or partner's source of livelihood, the surviving spouse or partner may be unable to continue to operate the business if a substantial share of it has to be removed to meet the entitlements of other beneficiaries.

4.40 In 1985, the Law Reform Commission of Tasmania was not satisfied with that State's relatively low figure:

*It seems that the original purpose of the legacy was to enable the spouse to remain in the matrimonial home if he or she so desired and, to assist in his or her day to day maintenance. The sum of \$50 000 is widely acknowledged as being insufficient for these purposes.*<sup>62</sup>

On the other hand, in 1974, the Law Reform Committee of South Australia supported a small legacy for the surviving spouse considering it was a problem that:

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58. Succession Law Section, Queensland Law Society, *Consultation; Melbourne Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Probate Committee, Law Society of SA, *Consultation*; S Samek, *Consultation*.

59. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 41.

60. England and Wales, Department for Constitutional Affairs, *Administration of Estates: Review of the Statutory Legacy* (CP 11/05, 2005). See also N Preston, "A lasting legacy" (2005) 155 *New Law Journal* 1594.

61. A Jack, "Intestacy and the statutory legacy" (2005) 155 *New Law Journal* 993 at 993.

62. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.

*[t]he amount is the same whether the wife is the first wife or second wife, whether she has been married for one year, five years or thirty years, whether any of the husband's assets came from the use of money provided by the wife or the wife's relatives or by her co-operation in a business, whether the relationship between the husband and wife was good or ill, whether she remarries speedily, and many other permutations and combinations of facts.*<sup>63</sup>

4.41 The Alberta Law Reform Institute, in 1999, considered the provision that should be made for a surviving spouse or partner when there are issue of another relationship:

*Much depends upon the length of the subsequent marriage, the number and age of children born to that marriage, the number and age of children of the deceased from another relationship, the assets accumulated due to the joint efforts of the spouses, the assets owned by either spouse before the marriage, the existence of insurance and so on. The best compromise is to share the estate between the spouse and the children but give a generous preferential share to the spouse. This share cannot be too large because it would defeat the intention of sharing the estate among the surviving spouse and children in all but very large estates.*<sup>64</sup>

#### **Fixing and adjusting the statutory legacy**

4.42 There are a number of options available for setting the statutory legacy:

- fix a specific sum in legislation without any mechanism for adjustment;
- fix a specific sum in legislation and include a mechanism to adjust it for inflation;
- fix it by reference to specific proportions of the estate;
- fix it in regulations and review it on a regular basis

4.43 Fixing a specific sum in legislation has proved unsuccessful in many jurisdictions. It has been suggested that changes have not been made in Victoria, SA and WA simply because of the difficulty involved in amending legislation.<sup>65</sup> The Law Reform Commission of WA observed this problem in 1973, noting that the Parliament had adjusted the statutory legacy on only three occasions in the previous 25 years.<sup>66</sup>

4.44 One view expressed in consultations and submissions was that the statutory legacy ought to be indexed in some way.<sup>67</sup> Suggestions included linking the legacy to the

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63. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.

64. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 82.

65. WA, Succession Law Implementation Committee, *Consultation; Melbourne Consultation*; Probate Committee, Law Society of South Australia, *Consultation*.

66. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34 Pt 1, Report, 1973) at 7.

67. Probate Committee, Law Society of South Australia, *Consultation*; J North, *Submission* at 2; Trustee Corporations Association of Australia, *Submission* at 5.

median price of housing in each jurisdiction<sup>68</sup> or to the consumer price index.<sup>69</sup> However, a mechanism for annual adjustment of the amount may prove difficult to implement. For example, indexing the sum according to the Consumer Price Index might fail to take into account increases in property prices in different parts of each jurisdiction.<sup>70</sup> Changes in interest rates will also have an impact on the ability of a lump sum payment to generate income for the surviving spouse.<sup>71</sup> The Law Commission of England and Wales was unable to find an agreed method of calculating any automatic annual increase to the statutory legacy.<sup>72</sup>

4.45 An example of a scheme which sets the amount by reference to a proportion of the estate may be found in Manitoba. However, this example only applies where there are surviving issue of the deceased, one or more of which are not also issue of the surviving spouse. The Manitoba provisions entitle the surviving spouse to a statutory legacy of \$50,000 or half the estate, whichever is greater, and then gives the surviving spouse a further half share of the residue of the estate.<sup>73</sup>

4.46 In England and Wales, the Law Commission floated the possibility of a system of “graduated lump sums” whereby the surviving spouse would receive a large initial statutory legacy and then additional lump sums according to the size of the estate.<sup>74</sup> This proposal was not pursued in the Commission’s final recommendations.

4.47 Opinions expressed in many submissions and consultations supported setting the statutory legacy in regulations rather than in legislation.<sup>75</sup>

4.48 The Law Reform Commission of Tasmania suggested that the legacy should be altered by regulation to allow for easier adjustments to take place in a climate of fluctuating property values.<sup>76</sup>

#### ***A uniform amount for all jurisdictions?***

4.49 It is important to bear in mind that property values differ according to location as well as over time. The Law Commission of England and Wales observed that, if the purpose of the statutory legacy is to allow the surviving spouse to purchase the intestate’s

68. Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5.

69. Probate Committee, Law Society of South Australia, *Consultation*.

70. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31.

71. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31.

72. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31.

73. *Intestate Succession Act* CCSM c 185 s 2(3).

74. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(vi).

75. WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5; Law Society of Tasmania, *Submission* at 6.

76. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.

share of their shared home, a legacy which allows for the purchase of a London house will provide a spouse who lives elsewhere with a substantial surplus.<sup>77</sup>

4.50 There was some support for allowing the prescribed amount to be fixed on a jurisdiction by jurisdiction basis to take into account differences in property prices across Australia.<sup>78</sup> Some submissions recognised that there may need to be local variations in the statutory legacy between the jurisdictions.<sup>79</sup> Others had no objection to a uniform sum.<sup>80</sup> One submission suggested that the statutory legacy should be sufficient to cope with real estate prices in Australia's most expensive city.<sup>81</sup>

#### ***Interest on the statutory legacy***

4.51 When the spouse or partner is entitled to a statutory legacy, he or she is also entitled to interest on it in ACT, NSW, Tasmania, Victoria and WA. The interest is calculated from the date of death of the intestate until the prescribed amount is paid.<sup>82</sup> The interest is payable from the intestate estate. Currently, where the rate is set by subordinate legislation, it is 9.5% in Victoria<sup>83</sup> and 6% in New South Wales.<sup>84</sup> The rate is fixed by legislation at 8% in the Australian Capital Territory,<sup>85</sup> 5% in Western Australia and 4% in Tasmania.<sup>86</sup>

4.52 Queensland, the Northern Territory and South Australia make no provision for interest on the statutory legacy.

4.53 Provisions of this sort are said to be statutory recognition of the common law principle that "pecuniary legacies carry interest unless the contrary is indicated in the will or instrument of their creation".<sup>87</sup> However, the position at common law was strictly that if a legacy was charged out of land, the legacy carried interest from the date of death of the

77. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 5.

78. Public Trustee NSW, *Submission* at 5; Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 6; Law Society of NSW, *Submission* at 1; *Sydney Consultation* 2; W V Windeyer, *Submission* at 3.

79. Law Society of NSW, *Submission* at 1.

80. J North, *Submission* at 2; Succession Law Section, Queensland Law Society, *Consultation*.

81. J North, *Submission* at 2.

82. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(ii); *Administration Act 1903* (WA) s 14(4); *Administration and Probate Act 1935* (Tas) s 44(3). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.

83. The Attorney-General under *Penalty Interest Rates Act 1983* (Vic) s 2 (less 2.5%).

84. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Wills, Probate and Administration Regulation 2003* (NSW) cl 6(2).

85. *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b).

86. *Administration and Probate Act 1935* (Tas) s 44(3).

87. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Second Reading at 8994. See, eg, *Succession Act 1981* (Qld) s 52(1)(e) and s 52(1A).

deceased, but if a legacy was given out of personal estate, the legacy carried interest only from the year after the death of the deceased, unless other provision was made in the will.<sup>88</sup>

4.54 Charging interest on the statutory legacy can be said to reflect the general objective of the law “that estates should be distributed as soon as may be”.<sup>89</sup> However, this can really only affect the speed of an administration when the other beneficiaries whose interests are likely to be reduced (that is, the children of the intestate) either are, or have some influence with, the administrator. Even if the administrator is one of the children, he or she will still have a direct interest in the speedy administration of the estate even without the charging of interest on the statutory legacy. A more likely reason for the charging of interest on the statutory legacy may be that it acts as a form of compensation to the spouse or partner for any delays in the administration and to make up for any loss in value of the statutory legacy as the result of inflation.

4.55 The Law Reform Commission of WA provided no reason when recommending, in 1973, that the spouse should continue to be entitled to interest on the statutory legacy.<sup>90</sup> The NSW provisions were included in 1977 at the same time that the right to interest on legacies was given a statutory basis.

4.56 Some submissions supported the payment of interest on the spouse or partner’s statutory legacy.<sup>91</sup>

4.57 One submission suggested that the interest rate should be set by regulation based on the Reserve Bank interest rates for the previous quarter or year.<sup>92</sup>

## National Committee’s conclusion

4.58 The option of substantially increasing the statutory legacy presents itself as a reasonable approach to providing for a spouse or partner in cases where there are also children of another relationship. This will effectively ensure that the surviving spouse or partner will get the whole estate in the majority of cases while at the same time ensuring that the issue of the intestate get something when the estate can bear it.

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88. *Maxwell v Wettenhall* (1722) 2 P Wms 26; 24 ER 628. See also *Bird v Lockey* (1716) 2 Vern 743; 23 ER 1086; and F Jordan, *Administration of the Estates of Deceased Persons* (3rd ed, 1948) at 34-36.

89. W A Lee and A A Preece, *Lee’s Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 131. See also NSW Law Reform Commission, *Uniform Succession Laws: Administration of estates of deceased persons* (Discussion Paper 42, 1999) at para 8.19.

90. Law Reform Commission of Western Australia, *Report on Distribution on Intestacy* (Project No 34, Part 1, 1973) at para 25.

91. Trustee Corporations Association of Australia, *Submission* at 6; Public Trustee NSW, *Submission* at 5; Law Society of Tasmania, *Submission* at 6; J North, *Submission* at 2.

92. Trustee Corporations Association of Australia, *Submission* at 6.

4.59 While there would appear to be support for setting the amount of the statutory legacy by regulation on a jurisdiction by jurisdiction basis, it should be noted that there are vast variations in property prices within states, as well as between them (for example, Broken Hill as opposed to Sydney), and that lower sums in some jurisdictions might reduce mobility for the surviving spouse or partner within Australia. Having a single figure for the whole of Australia will also reduce the potential for “forum shopping” for statutory legacies where real property is held in more than one jurisdiction.

4.60 The National Committee considers that a sum of \$350,000 would be appropriate for all jurisdictions. The National Committee further considers that there should be a mechanism to increase the amount on a regular basis. Accordingly, the National Committee proposes that the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate.

4.61 While it is desirable to charge interest in order to look after the interests of the surviving spouse where there may be delays in the administration of an intestate estate, the National Committee considers the statutory legacy should be treated as a general legacy and that, therefore, interest should only be calculated one year after the intestate's death at a rate set in accordance with the provisions that relate to general legacies. The National Committee will be proposing that the interest on general legacies should be 2% above “the last cash rate published by the Reserve Bank of Australia before the close of business on the last day of business in the preceding calendar year”.<sup>93</sup>

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#### Recommendation 6

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to a statutory legacy.

The statutory legacy should be set at \$350,000 for all jurisdictions.

The amount of the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate.

The spouse or partner should also be entitled to interest in addition to the legacy, with the interest calculated in accordance with the provisions that will apply to general legacies, namely 2% above the last cash rate published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

See Intestacy Bill 2006 cl 8(1), (4); cl 14(b).

## STATUTORY LEGACY AND CONFLICT OF LAWS

4.62 There is a potential problem with the allocation of statutory legacies where real property is held in more than one Australian jurisdiction. An example given in one consultation was of a person domiciled in Nauru who died intestate with land in Victoria and Queensland. She left a husband and adult daughter. The surviving husband was entitled to the statutory legacies in both States to the detriment of the daughter.<sup>94</sup> This

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93. The wording comes from *Supreme Court Rules 2000* (Tas) r 5A(a).

94. *Melbourne Consultation*.



outcome was consistent with the traditional approach to such circumstances, which is to apply the law of the place where the immoveable property is located.<sup>95</sup>

4.63 Options for dealing with this problem include:

- barring the surviving spouse from claiming the statutory legacy in one jurisdiction when he or she has already obtained the statutory legacy in another jurisdiction;
- establishing a regime whereby the surviving spouse can receive statutory legacies to a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled;
- allowing the surviving spouse only the statutory legacy in the jurisdiction with which they were most closely connected at death, for example, by domicile or habitual residence.

4.64 The second option was the approach chosen by the Court of Queen's Bench in Manitoba in 1987. In that case, the intestate held real property in Saskatchewan and Manitoba. The widow received a statutory legacy of C\$40,000 in Saskatchewan and claimed a further statutory legacy of C\$50,000 from Manitoba. The Court considered the question whether the widow was entitled to the statutory legacy under Manitoba law, having already received the statutory legacy under Saskatchewan law. The Court treated the Manitoba provisions as remedial and found that the "equitable distribution of the estate" would not allow the widow to claim the full benefit of the statutory legacies in more than one province. The Court found that the widow was entitled to no more than the C\$50,000 prescribed by Manitoba and, accordingly, ordered that she receive C\$10,000 from the estate in Manitoba, having already received C\$40,000 in Saskatchewan.<sup>96</sup> Subsequent decisions have held that the surviving spouse is entitled to the highest preferential share.<sup>97</sup>

4.65 This approach would achieve much the same result as the first option. However, it has the benefit of accounting for any property that is subsequently discovered in another jurisdiction after the estate has been wound up in the other jurisdictions and the decision as to the statutory legacy already made.

4.66 The third option was proposed by the Manitoba Law Reform Commission, which considered that the adoption of a "single choice of law rule" was the best way of dealing with the problem.<sup>98</sup>

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95. See *In re Rea* [1902] 1 IR ChD 451 where a domiciled Irishman died intestate in Ireland but also held property in Victoria. It was held that his widow was entitled to a statutory legacy of £500 out of the Irish estate as well as the statutory legacy of £1000 out of the Victorian estate. This judgment was followed in *Queensland Trustees Ltd v Nightingale* (1904) 4 SR (NSW) 751. See also A A Preece, "Intestacy law reform in Queensland" (2000) 20 *Queensland Lawyer* 180 at 186.

96. *Thom v Thom* (1987) 40 DLR (4th) 184 (Man QB).

97. *Manitoba (Public Trustee) v Dukelow* (1994) 117 DLR (4th) 122 at para 20-46. See also A A Preece, "Intestacy law reform in Queensland" (2000) 20 *Queensland Lawyer* 180 at 186.

98. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 70.

## National Committee's conclusion

4.67 The surviving spouse should not be able to claim statutory legacies in more than one jurisdiction simply because real property is held in each. This could result in a substantial windfall for the surviving spouse to the detriment of surviving issue.

4.68 The Committee prefers the second option, which results in the surviving spouse receiving statutory legacies to a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled. The third option is unacceptable because there will be exceptional circumstances where domicile or habitual residence will not be obvious, and a determination of such will be productive of expense and delay the administration.

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### Recommendation 7

In cases where the surviving spouse or partner is entitled to claim statutory legacies in more than one jurisdiction, he or she should receive legacies of a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled.

See Intestacy Bill 2006 cl 8(2).

## APPORTIONING THE RESIDUE BETWEEN SURVIVING PARTNER AND ISSUE

4.69 If any of the intestate estate remains after the distribution of personal or household chattels and the statutory legacy to the surviving spouse, the estate is then divided between the surviving spouse and issue. There are currently two approaches to this exercise.

4.70 In some jurisdictions, the spouse or partner is entitled to the same proportion of the remainder no matter how many children or issue of the intestate survive. In Tasmania, Victoria and WA, the entitlement is one-third of the remainder,<sup>99</sup> and in NSW and SA the entitlement is one-half.<sup>100</sup>

4.71 Other jurisdictions make different provisions for situations where there is only one child of the intestate and situations where there is more than one child of the intestate. So, in Queensland, ACT and NT, if only one child survives the intestate, the spouse is entitled to the prescribed amount and one-half of the remaining intestate estate. If more than one of the intestate's children has survived, the spouse is entitled to the prescribed legacy and

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99. *Administration and Probate Act 1935* (Tas) s 44(3)(a); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(iii), s 52(1)(a); and *Administration Act 1903* (WA) s 14(1) Table It 2(b). See also *Administration Act 1969* (NZ) s 77 It 2.

100. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(c); and *Administration and Probate Act 1919* (SA) s 72G(b). See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.

one-third of the remaining estate.<sup>101</sup> This approach dates back at least as far as the Statute of Distributions of 1670. In more modern times, it can be treated as a compromise between the jurisdictions that offer the spouse one-third of the residue and those that offer one-half in all circumstances.<sup>102</sup>

## Law reform developments

4.72 In 1985, the Law Reform Commission of Tasmania recommended a change to that State's allocation of one-third to the surviving spouse or partner, so that the spouse would receive one-half where there was one surviving child and one-third where there was more than one surviving child. The Commission considered that this was likely to achieve a fairer result, apparently on the basis that, if there was more than one surviving child, it was more likely that he or she would not be able to rely on the surviving spouse for assistance.<sup>103</sup> The Law Reform Committee of South Australia recommended a similar change in 1974, but without giving reasons.<sup>104</sup> These recommendations were not adopted in either jurisdiction, although SA now gives the surviving spouse a one-half share of the estate in all cases.

4.73 NSW moved to giving the spouse one-half of the estate in all cases in 1977.

4.74 In 1974, the Ontario Law Reform Commission saw no reason to change the arrangements in that province whereby a spouse with one child received one-half of the residue and a spouse with more than one child received one-third of the residue.<sup>105</sup>

4.75 The British Columbia Law Reform Commission considered that a one-half allocation in all cases was more in accord with community expectations.<sup>106</sup> The Uniform Law Conference of Canada also supported a one-half allocation, noting that there appeared to be no basis for the assumption that deceased persons would generally prefer to leave more of their estates to their issue where they had more than one child than they would if they had only one child.<sup>107</sup> The Alberta Law Reform Institute in 1999 supported

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101. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(b)(ii) and It 2(2)(b)(ii); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(c); and *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1)(b)(ii).

102. See W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at para 5.36.

103. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.

104. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.

105. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

106. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 26-27.

107. Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 219.

giving the spouse a half-share in all cases, observing that the spouse or partner's "need for support remains constant, no matter how many children may survive the intestate".<sup>108</sup>

## Submissions and consultations

4.76 Some submissions supported giving a half-share to the surviving spouse or partner regardless of the number of issue of the intestate.<sup>109</sup> Reasons given for supporting this position include simplicity,<sup>110</sup> and the paramountcy of the interests of the surviving spouse or partner.<sup>111</sup>

4.77 Two submissions supported giving a half-share to the spouse or partner when there is one surviving child or one-third if there are two or more children.<sup>112</sup> Another submission supported giving the surviving spouse or partner one-third of the remaining estate.<sup>113</sup>

## National Committee's conclusion

4.78 In light of the preference for supporting the surviving spouse or partner, a one-third share is too small regardless of whether there are one or more surviving issue. A one-half share is, therefore, to be preferred in all cases.

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108. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 71.

109. Trustee Corporations Association of Australia, *Submission* at 6; Public Trustee NSW, *Submission* at 5; W V Windeyer, *Submission* at 4.

110. Trustee Corporations Association of Australia, *Submission* at 6.

111. W V Windeyer, *Submission* at 4.

112. Public Trustee of Queensland, *Submission* at 2; J North, *Submission* at 2.

113. Law Society of Tasmania, *Submission* at 7.

**Recommendation 8**

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Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to one-half of the residue of the intestate estate after he or she has received the personal effects of the intestate and the statutory legacy (with interest). The issue of the intestate should be entitled to the remaining half-share *per stirpes*.

See Intestacy Bill 2006 cl 14(c), cl 28(2).

## 5. Spouse or partner – election to obtain any property

- The right to the shared home
- A new approach
- The spouse or partner's entitlement
- Power of the personal representative to dispose of property

5.1 In most Australian and other common law jurisdictions, the question of the spouse or partner's share would also involve consideration of the surviving spouse or partner's right to the home he or she shared with the intestate. Following the recommendation in chapter 3, such provisions will be relevant only in cases where the intestate is survived by a spouse or partner and at least one child from another relationship.

## THE RIGHT TO THE SHARED HOME

### Current provisions

5.2 All Australian jurisdictions except Tasmania extend to surviving spouses or partners a conditional right to obtain the intestate's (undisposed) interest in the home they shared until the intestate's death.<sup>1</sup> While, the nature of this right differs among the jurisdictions, each will usually have relatively complex provisions for identifying the shared home. These include a definition of the shared home, an identification of the land associated with the shared home and residential requirements, as well as provisions that outline the spouse or partner's right to elect to obtain the home, establish the home's value, and the means by which the value of the home may be satisfied.

### General arguments

5.3 There is general support for giving the surviving spouse or partner some form of right to obtain an interest in the shared home.

5.4 The Law Reform Commission of Tasmania has suggested that:

*Wherever possible, if the surviving spouse so desires, he/she should be able to remain in the matrimonial home. To be forced to leave the home after the partner's death, and after possibly years of home life there, could be a most traumatic experience.*<sup>2</sup>

5.5 Hardingham, Neave and Ford support the spouse's ability to acquire the intestate's interest in the matrimonial home for the same reasons they are in favour of the spouse's entitlement to the household, or personal, chattels. That is, such provision will help minimise the disruption caused by the intestate's death and will "produce some continuity of lifestyle for the spouse and any surviving children".<sup>3</sup>

1. Succession Act 1981 (Qld) s 34B, Part 3 Div 3; Administration and Probate Act 1929 (ACT) s 49F-49M; Wills, Probate and Administration Act 1898 (NSW) s 61A(2), s 61B(13), s 61D, s 61E, Sch 4; Administration and Probate Act 1969 (NT) s 72-79; Administration and Probate Act 1919 (SA) s 72B(1), s 72L; Administration and Probate Act 1958 (Vic) s 37A; and Administration Act 1903 (WA) s 14(6), Sch 4. See also Intestates' Estates Act 1952 (Eng) s 5, Sch 2.
2. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.
3. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 362.

5.6 The Law Reform Commission of British Columbia supported a right of election to obtain the shared home on the grounds that “it ensures that the surviving spouse is involved in resolving questions which are of paramount concern to his or her future”. The Commission further noted that it would significantly ease problems of allocating assets to satisfy the interests of those who are also entitled to share in the estate.<sup>4</sup> The Victorian provisions, which were introduced in 1994, were intended to overcome situations where the family home had to be sold to enable the distribution of estate assets to those entitled.<sup>5</sup>

5.7 The Tasmanian Law Reform Commission concluded that the option of allowing the surviving spouse to purchase the intestate’s entitlement to the shared home from the statutory legacy was the “fairest option”.<sup>6</sup> The English Committee on the Law of Intestate Succession came to a similar conclusion in 1951, considering that giving the surviving spouse the option to purchase the shared home maintained the “balance of interests” between the surviving spouse and issue of the intestate.<sup>7</sup>

5.8 Other law reform agencies have supported allowing the surviving spouse or partner to obtain the family home using, at least in part, the other entitlements from the intestate estate such as the statutory legacy and the spouse’s share of the residue.<sup>8</sup>

5.9 Submissions also supported giving the spouse or partner the right to obtain the intestate’s interest in the shared home.<sup>9</sup>

5.10 The National Committee generally agrees with the above positions. However, for reasons identified later in this chapter, the National Committee considers that, while the right to obtain the shared home should be available, it ought to be incorporated in a wider right for the surviving spouse or partner to elect to obtain any items of real property, or items of intangible personal property from the intestate estate.

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4. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.
  5. See R Cook, “Wills and Probate Law: The new rules” (1995) 69 *Law Institute Journal* 784 at 784.
  6. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.
  7. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 9.
  8. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42-43; Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34 Part 1, Report, 1973) at 7.
  9. Trustee Corporations Association of Australia, *Submission* at 8; Public Trustee of Queensland, *Submission* at 2; Public Trustee NSW, *Submission* at 6; K McQueenie, *Consultation*; J North, *Submission* at 3.



## Alternative approaches

5.11 The alternative approaches, outlined below, are not acceptable because they fail to achieve the appropriate balance between the surviving spouse or partner and the issue of the intestate.

### ***Giving the shared home to the spouse or partner***

5.12 Giving the shared home to the spouse or partner, in addition to any other entitlements, including the statutory legacy, is another approach to ensuring that the spouse or partner's living arrangements are not disrupted.

5.13 Such approaches have not proved popular for a number of reasons, including:

- it would lead to unequal treatment between those whose deceased spouse or partner owned a home and those whose spouse or partner did not;<sup>10</sup>
- it would be particularly unfair in situations where the intestate had previously sold his or her interest in the shared home, for example, to fund the couple's entrance to a retirement facility;<sup>11</sup>
- the intestate's children from another relationship could receive nothing from the estate.<sup>12</sup>

5.14 The Queensland Law Reform Commission framed a proposal that would overcome at least some of the objections outlined above. The Commission proposed that the surviving spouse should be entitled to the intestate's interest in the shared home absolutely or, if there was no shared home or the spouse chose not to take it, to an additional legacy of \$150,000.<sup>13</sup> On the other hand, one commentator in the UK has suggested that giving the shared home outright to the surviving partner could justify a much smaller statutory legacy on the grounds that the legacy was no longer required to obtain the shared home.<sup>14</sup>

5.15 The option of giving the shared home to the surviving spouse or partner has been specifically rejected by a number of law reform agencies.<sup>15</sup> It was also specifically rejected in one consultation.<sup>16</sup>

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10. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32; England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 9.

11. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32. See also W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 17.

12. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.

13. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 44-45.

14. A Jack, "Intestacy and the statutory legacy" (2005) 155 *New Law Journal* 993 at 993.

15. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32.

### A life estate

5.16 Another approach to the issue of the shared home has been to grant the surviving spouse a life estate in the home. Life estates are still used by testators in some cases. The survey of NSW Probate files revealed provisions establishing life estates in 28 wills, or 5.1% of all testate cases. However, the spouse benefited from the life estate in only 35.7% of cases, the bulk of life estates going to children and siblings.<sup>17</sup> It is possible the use of life estates may become more common with the higher incidence of second and subsequent marriages.<sup>18</sup>

5.17 There are a number of reasons why life estates are no longer desirable. The chief among them are that

- they are more expensive to administer and prolong the administration, sometimes for substantial periods;<sup>19</sup>
- they give rise to problems of meeting maintenance costs and other expenses (such as rates), especially in cases where the funds at the disposal of the surviving spouse or partner are insufficient to maintain the property;<sup>20</sup>
- they give rise to problems if the property needs to be sold and another purchased in its place;<sup>21</sup> and
- the shared home that is subject to a life estate may prevent the sale of a larger estate of land of which it is only part.<sup>22</sup>

5.18 When mentioned in consultations, life estates were generally not supported.<sup>23</sup> Life estates have also been specifically rejected by a number of law reform agencies.<sup>24</sup>

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16. *Melbourne Consultation*.

17. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.28.

18. *Melbourne Consultation*.

19. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32; Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 45.

20. *Melbourne Consultation*; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 39; England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

21. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 39-40.

22. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14. See also W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 17-18.

23. *Melbourne Consultation*.

24. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 35; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 41. But see R Kerridge, "Distribution on intestacy, the Law Commission's report (1989)" [1990] *Conveyancer and Property Lawyer* 358 at 366-369.

## A NEW APPROACH

5.19 The National Committee has already indicated its support for allowing surviving spouses and partners the option of obtaining the shared home. However, the National Committee has come to the view that the restriction of this right to the intestate's interest in the shared home is productive of unnecessary complexity in the administration of intestate estates, especially in relation to the identification of the shared home and some of the restrictions that have been imposed where shared homes are tied up in larger estates or commercial ventures.

5.20 The National Committee has already recommended that the surviving spouse or partner be entitled to receive all of the intestate's personal effects. This leaves a range of types of property to be distributed between the spouse or partner and the intestate's surviving issue, including property used exclusively for business purposes, real estate, shares and intellectual property rights. It is easy to envisage situations where the surviving spouse or partner may have an interest in obtaining such items of property for the sake of continuity of lifestyle or because of other personal interests. For example, the surviving spouse or partner might choose to obtain the holiday home which he or she shared with the intestate in addition to, or instead of the property that meets the strict requirements for a shared home. He or she might also, for example, wish to continue managing a portfolio of shares that the intestate owned, carry on a business venture or continue a publishing venture in relation to material over which the deceased held copyright.

5.21 The National Committee sees no reason why surviving spouses or partners should not be entitled to elect to obtain any part of the intestate's estate, so long as they can provide satisfaction for its value. The only group which could conceivably be opposed to such a proposal would be the issue of the intestate. In such cases, the preservation of particular items of property claimed by individuals has always been a point for negotiation between the parties. The Law Reform Commission of British Columbia, for example, observed that the position at common law would appear to be that the spouse may elect to take particular items as part of his or her entitlement, and the administrator could also elect to satisfy the spouse's share with particular items. However, both rights were considered to be subject to the rights of other entitled persons to insist that the estate be liquidated.<sup>25</sup> Assuming this position to be correct, while issue are not strictly losing any pre-existing rights to insist on particular items of property in satisfaction of their share, it may be that they will be losing the right to insist that an estate be liquidated.

5.22 There is also a danger that a surviving spouse or partner could deliberately cause damage to the economic value of the remaining estate by electing to obtain items of property that are necessary to the functioning of the remaining assets. For example, the surviving spouse or partner could elect to obtain the stock in trade of a business, but not the premises. The Law Reform Commission of British Columbia considered the possibility that the right to elect could be used to affect the value of an estate significantly and

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25. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.

prejudice the interests of other persons who are entitled. After consultation, the Commission concluded that there was no need for a legislative response.<sup>26</sup>

5.23 The potential for the right of election to affect the economic value of the remaining estate has been addressed in current Australian provisions relating to the shared home whereby the court can prevent the exercise of the right in certain circumstances. While it is the case that such acts would most likely be motivated by spite, it should be noted that the person would still have to provide value for the items that he or she has elected to obtain. The surviving issue would still be entitled to receive their share of the value of the estate. The National Committee will make recommendations later in this chapter to deal with the rare circumstances where the exercise of the right to elect will adversely affect the remaining estate.<sup>27</sup>

5.24 It should also be noted that extending the right of election to all property in the estate solves a number of problems that arise when dealing only with the shared home, for example:

- **Defining the shared home.** The home is generally stated to be a building<sup>28</sup>, or part of a building, designed to be used principally<sup>29</sup> as a separate<sup>30</sup> residence for one family or person.<sup>31</sup> In Western Australia, reference is made to a “dwelling house that... was ordinarily used by the surviving husband or wife as his or her ordinary place of residence”.<sup>32</sup> However, in Queensland, for example, it also includes caravans and manufactured homes.<sup>33</sup> Some submissions suggested that the NSW definition should include caravans and manufactured homes.<sup>34</sup> All types of residence, including caravans and manufactured homes will now be included in the broader scheme.
- **Identifying the land associated with the shared home.** Most jurisdictions include in the interest that the spouse or partner has the right to obtain as much land as is necessary for the use and enjoyment of the home.<sup>35</sup> The provisions

26. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.

27. See para 5.82.

28. A “unit or building lot.” in NT; and apartment or flat in NSW.

29. Or “solely” in SA and NT.

30. “and permanent” in the NT.

31. *Succession Act 1981* (Qld) s 34B(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (a) of the definition of “dwellinghouse”; *Administration and Probate Act 1969* (NT) s 72(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).

32. *Administration Act 1903* (WA) Sch 4 cl 1(1)(b).

33. *Succession Act 1981* (Qld) s 34B(2).

34. Public Trustee NSW, *Submission* at 6; J North, *Submission* at 3; Trustee Corporations Association of Australia, *Submission* at 8. See also Law Society of Tasmania, *Submission* at 7.

35. *Administration and Probate Act 1929* (ACT) s 49F paragraph (a) to the definition of “dwelling house”; *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) of the definition of

sometimes involve drawing a line as to the area allowed and, in NSW for example, if any question arises as to the curtilage of the shared house, the court may make an order on the issue which it considers to be just, on the application of the administrator (or any person beneficially interested in the estate).<sup>36</sup> Under the new proposals, the surviving spouse or partner can elect to obtain as much land as he or she can afford, subject to the right of issue to challenge the election when it adversely affects the remaining estate or makes it more difficult to administer.<sup>37</sup>

- **The residential requirement.** The current position is generally that the spouse or partner must be living in the shared home at the date of death of the intestate.<sup>38</sup> NSW requires that the spouse or partner and/or the intestate must have occupied the home at the time, as their only or principal residence.<sup>39</sup> In Victoria, it must have been the principal residence of both parties.<sup>40</sup> There are a number of reasons why a couple may not be living together and it is unfair in many cases for this fact to have an impact on the survivor's ability to elect to obtain the shared home.<sup>41</sup> For example, one or both could be being cared for elsewhere, either privately by family members or in an aged care facility. The surviving spouse or partner may have needed accommodation near to the intestate's aged care facility, or have gone to live with family during the final stages of the intestate's illness. The surviving spouse or partner may also have had to live interstate or in another region for work purposes. It may also be the case that the intestate and the surviving spouse or partner may have been separated at the time of the intestate's death.<sup>42</sup> Under the new proposals, there is no need to establish a period of residence for either partner in the relationship.

5.25 The National Committee, therefore, prefers the option of giving the surviving spouse or partner the option of purchasing any property in the intestate estate. This allows greater flexibility for surviving spouses or partners to determine which parts of the intestate estate they can keep and creates a simpler regime, while still achieving the most

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"dwellinghouse"; *Administration Act 1903* (WA) Sch 4 cl 1(4). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 7(1).

36. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 4.

37. See below, para 5.78-5.82. Such a provision would also be subject to any restrictions on subdivision under general law.

38. *Succession Act 1981* (Qld) s 39A(1)(b); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1919* (SA) s 72L(1); and *Administration Act 1903* (WA) Sch 4 cl 1(1)(b). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).

39. *Wills, Probate and Administration Act 1898* (NSW) s 61D(1). For a definition of "principal residence" see *Lasptitis v Lasptitis* [2001] NSWSC 749 (Master Macready).

40. *Administration and Probate Act 1958* (Vic) s 37A(1).

41. While one submission supported the current position (see J North, *Submission* at 3), others supported alternative provisions such as allowing that only one member of the relationship need reside in the shared home at the death of the intestate: Trustee Corporations Association of Australia, *Submission* at 8; Public Trustee of Queensland, *Submission* at 2; Public Trustee NSW, *Submission* at 6; *Sydney Consultation 1*.

42. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 43.

appropriate balance between the interests of the surviving spouse or partner and the issue of the intestate in the limited range of circumstances to which the provisions will apply.

5.26 The question of how the spouse or partner meets the expense of obtaining the items will be dealt with below.

#### Recommendation 9

The surviving spouse or partner should be able to elect to obtain any property in the intestate's estate.

See Intestacy Bill 2006 cl 16(1).

## THE SPOUSE OR PARTNER'S ENTITLEMENT

### Election

5.27 The jurisdictions that give the surviving spouse some right to the shared home achieve this by allowing the surviving spouse to elect to obtain the intestate's interest in the shared home.<sup>43</sup> Submissions generally supported this right.<sup>44</sup> The National Committee agrees that the right of election should be retained, but applied to all property in the intestate estate, not just the shared home.

#### ***Procedural requirements for personal representatives***

5.28 Victoria provides that, where the surviving spouse or partner is not the personal representative, the personal representative must, within 30 days of the grant of administration, provide written notice to the spouse or partner advising of his or her right to make an election.<sup>45</sup>

5.29 In Queensland and SA, the personal representative must also give notice to the surviving spouse or partner, but there is no time limit.<sup>46</sup> Queensland also requires the notice to state that the spouse must obtain a court order before they can make an election if any restrictions apply to the home.<sup>47</sup>

43. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G; *Wills, Probate and Administration Act 1898* (NSW) s 61D(1); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1919* (SA) s 72L; *Administration and Probate Act 1958* (Vic) s 37A(2); *Administration Act 1903* (WA) Sch 4 cl 1(1). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).

44. *Sydney Consultation 2*; Public Trustee NSW, *Submission* at 7; Law Society of Tasmania, *Submission* at 8.

45. *Administration and Probate Act 1958* (Vic) s 37A(4).

46. *Succession Act 1981* (Qld) s 39A(3)(b); *Administration and Probate Act 1919* (SA) s 72L(2).

47. *Succession Act 1981* (Qld) s 39A(3)(b)(ii).

5.30 For the right to elect to have any meaning, it is important that the spouse or partner be made aware that they can exercise it.<sup>48</sup> The Law Reform Commission of British Columbia considered it important to give the surviving spouse notice of the right to elect. The Commission therefore proposed that the notice should be given with the application for letters of administration.<sup>49</sup>

5.31 Given the importance of the right of election to the surviving spouse or partner, requiring that the personal representatives give notice of it before they can administer the estate is the most effective way of ensuring that the notice is in fact given. This also eliminates the need to establish a separate period during which the personal representative must give the notice. In order to accommodate the possibility of informal administration, the model provision should state that a person may not apply for administration or distribute an estate until they have given the surviving spouse or partner notice of the right to election. The notice should include advice about the relevant time limits for exercising the right to elect.<sup>50</sup>

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#### Recommendation 10

Anyone (who is not the surviving spouse or partner) who seeks to apply for letters of administration or distribute an intestate estate must give the surviving spouse or partner written notice advising of his or her right to make an election before they apply or distribute (as the case may be). The notice should indicate the requirements for exercising the right to election including relevant time limits.

See Intestacy Bill 2006 cl 17.

#### **Procedural requirements for the spouse**

5.32 There are a number of procedural requirements that must be met by the surviving spouse or partner in order for an election to be effective.

5.33 **To whom the election must be made.** In all jurisdictions except Victoria, the election must be communicated to different people in different circumstances. If the spouse is not the personal representative, election must be given to the personal representative.<sup>51</sup> If the spouse is one of two or more representatives, then election must be given to each other representative.<sup>52</sup> If the spouse is the sole representative, election

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48. *Sydney Consultation 2*.

49. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 43.

50. See para 5.38-5.46.

51. *Succession Act 1981* (Qld) s 39A(4)(a); *Administration and Probate Act 1929* (ACT) s 49G(4)(a); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(a); *Administration and Probate Act 1969* (NT) s 73(4)(a); *Administration and Probate Act 1919* (SA) s 72L(3)(a); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(a). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

52. *Succession Act 1981* (Qld) s 39A(4)(b); *Administration and Probate Act 1929* (ACT) s 49G(4)(b); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(b); *Administration and Probate Act 1969* (NT) s 73(4)(b); and *Administration Act 1903*

must be given to the Registrar,<sup>53</sup> except in South Australia, where the election must be given to the Public Trustee if the spouse is an administrator.<sup>54</sup>

5.34 In Victoria,<sup>55</sup> if the partner is not a personal representative, the election must be given to the personal representative who sent the notice advising of the spouse's right to make an election and, if the partner is a representative, election must be given to the Registrar.<sup>56</sup>

5.35 The Law Reform Commission of British Columbia proposed that the notice should be given to the administrator and to the issue of the intestate who are entitled to share in the intestacy. This would get around the problems associated with situations where the surviving spouse or partner is also the administrator of the estate.<sup>57</sup>

5.36 The requirements of giving notice to various public officials are invoked only in situations where the surviving spouse or partner is a personal representative of the intestate estate. The intention would appear to be to protect the interests of the others who are entitled to share in the estate. This approach, however, does not guarantee that the interests of others will be protected. Different officers will also have to be identified in different jurisdictions. The British Columbian proposal would appear to deal with this issue more effectively by requiring notice be given to the issue of the intestate who are entitled to share in the estate. The National Committee recommends accordingly.

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#### Recommendation 11

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she should give notice of his or her election to the people who gave the notice advising of the right and to the issue of the intestate.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she should give notice to the other personal representatives and to the issue of the intestate.

See Intestacy Bill 2006 cl 19(2).

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(WA) Sch 4 cl 4(1)(b). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

53. *Succession Act 1981* (Qld) s 39A(4)(c); *Administration and Probate Act 1929* (ACT) s 49G(4)(c); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(c); *Administration and Probate Act 1969* (NT) s 73(4)(c); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(c).

54. *Administration and Probate Act 1919* (SA) s 72L(3)(b).

55. *Administration and Probate Act 1958* (Vic) s 37A(5)(b).

56. *Administration and Probate Act 1958* (Vic) s 37A(5)(a).

57. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 43



5.37 **Election must be in writing.** All jurisdictions expressly require that the election must be in writing.<sup>58</sup> Submissions generally agreed that the election should be in writing.<sup>59</sup>

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#### Recommendation 12

The surviving spouse or partner should give notice of his or her election in writing.

See Intestacy Bill 2006 cl 19(1).

5.38 **Time for making the election.** The spouse is generally required to make an election within a certain time.

5.39 In Victoria, SA and Queensland, if the spouse is the personal representative, election must be made within three months of the representative's appointment (or from the grant of administration).<sup>60</sup> If the spouse is not the representative, election must be made within three months of the representative giving written notice.<sup>61</sup>

5.40 In the ACT, NT, WA and NSW, the time limit is one year from the grant of representation or administration subject to the court's power to extend it.<sup>62</sup> This accords with the original recommendation of the English Committee on the Law of Intestate Succession in 1951,<sup>63</sup> which was also adopted in England in 1952.<sup>64</sup>

5.41 In the ACT and NT, the extension may be granted where probate of the intestate's will has been revoked because the will was invalid; where a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when

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58. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G(4); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1); *Administration and Probate Act 1969* (NT) s 73(4); *Administration and Probate Act 1919* (SA) s 72L(3); *Administration Act 1903* (WA) Sch 4 cl 4(1); and *Administration and Probate Act 1958* (Vic) s 37A(5). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

59. Trustee Corporations Association of Australia, *Submission* at 9; Public Trustee NSW, *Submission* at 7; Law Society of Tasmania, *Submission* at 8; J North, *Submission* at 3.

60. *Succession Act 1981* (Qld) s 39A(3); *Administration and Probate Act 1919* (SA) s 72L(2); and *Administration and Probate Act 1958* (Vic) s 37A(3)(a). The period may be extended at the discretion of the Court in South Australia.

61. *Succession Act 1981* (Qld) s 39A(3)(b)(i); *Administration and Probate Act 1958* (Vic) s 37A(3)(b); and *Administration and Probate Act 1919* (SA) s 72L(2)(b).

62. *Administration and Probate Act 1929* (ACT) s 49G(2); *Administration and Probate Act 1969* (NT) s 73(2); *Administration Act 1903* (WA) Sch 4 cl 3; and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1)(b).

63. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

64. *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(a).

administration of the estate was first granted; or for any other reason affecting the administration or distribution of the estate, where the court considers it proper to do so.<sup>65</sup>

5.42 The Law Reform Commission of British Columbia supported a 12-month period from the date of death of the deceased on the grounds that estates in that jurisdiction could not be distributed before the end of this period.<sup>66</sup> The English Committee on the Law of Intestate Succession concluded that a period of 12 months from the grant of administration was sufficient to satisfy the requirement that, “wherever possible there should be no delay in completing the administration of the estate of a deceased person”.<sup>67</sup>

5.43 If the surviving spouse or partner is not notified of his or her right to elect to obtain the shared home until immediately before the filing of the application for administration or the commencement of distribution, then a period that commences at the death of the intestate may be too short, or may even have expired. It is preferable to require that the period commence once the surviving spouse or partner has received notice of the right of election.

5.44 Some submissions supported a period of three months from when the spouse or partner received written notice from a personal representative.<sup>68</sup> One submission supported a six-month period from the date of grant,<sup>69</sup> while another supported a 12-month period from the date that the survivor is notified of the entitlement.<sup>70</sup>

5.45 Under the current regimes which deal only with the entitlement to the shared home, a period of three, or even six, months may be considered too soon after the death of the intestate for the spouse to make a decision about his or her future living arrangements. However, in light of the recommendation that the spouse or partner should be entitled to elect to obtain any property in the estate, a period of 12 months might be considered too long to freeze the whole of the estate pending the spouse or partner’s decisions. The National Committee, therefore, prefers a period of three months from when the surviving spouse or partner has received notice of the right of election.

5.46 The court should have the power to extend this period when it considers it proper to do so, especially where a person’s status as a spouse or partner of the deceased is only established some time after the commencement of the distribution.

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#### Recommendation 13

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65. *Administration and Probate Act 1929* (ACT) s 49G(3); *Administration and Probate Act 1969* (NT) s 73(3).

66. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42-43.

67. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

68. Trustee Corporations Association of Australia, *Submission* at 9; Public Trustee NSW, *Submission* at 7.

69. Law Society of Tasmania, *Submission* at 8.

70. J North, *Submission* at 3.

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of receiving notice of the right of election.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of applying for the letters of administration or of commencing the distribution of the estate as the case may be. The court should have the power to extend this period when it considers it proper to do so for any reason affecting the administration or distribution of the estate, including when a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when administration of the estate was first granted or the distribution first commenced.

See Intestacy Bill 2006 cl 18.

#### **Minor's power to make an election**

5.47 Victoria, NSW, NT, ACT and WA include a specific provision concerning the power of a surviving spouse who is also a minor to make a valid requirement, election or consent where necessary. In these jurisdictions, a requirement or consent made or given concerning the acquisition of a shared home by a surviving spouse who is a minor is as valid and effective as it would be if the spouse had attained majority.<sup>71</sup>

5.48 No general provisions appear to have been made in the law relating to the capacity of minors who are also married. It is not clear what the position is in Queensland and SA.

5.49 Some submissions supported allowing spouses who are minors to make an election to acquire the shared home.<sup>72</sup>

5.50 Such a provision would appear to be necessary. The National Committee recommends accordingly.

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#### **Recommendation 14**

A requirement or consent made or given concerning election by a surviving spouse who is a minor should be as valid and effective as it would be if the spouse had attained majority.

See Intestacy Bill 2006 cl 19(3).

#### **People with a mental disability**

5.51 In the ACT, NT and WA, where the surviving spouse or partner has a mental disability, a requirement or consent concerning the spouse's right to the shared home may be validly made or given on his or behalf. In ACT, this may be done by his or her

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71. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 6; *Administration and Probate Act 1969* (NT) s 79(2); *Administration and Probate Act 1929* (ACT) s 49N(2); *Administration and Probate Act 1958* (Vic) s 37A(9)(b); and *Administration Act 1903* (WA) Sch 4 cl 8(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(2).

72. Law Society of Tasmania, *Submission* at 9; Trustee Corporations Association of Australia, *Submission* at 10; Public Trustee NSW, *Submission* at 8; J North, *Submission* at 3.

committee,<sup>73</sup> in NT by the guardian,<sup>74</sup> and in WA by a person who has the care and management of the estate.<sup>75</sup> If there are no such carers, the court may itself act.

5.52 One submission observed that, in the ordinary course of events, the manager under the *Protected Estates Act* or an attorney under an enduring power would make the election.<sup>76</sup>

5.53 The National Committee is of the view that it is preferable to allow the situation regarding such spouses or partners to be governed by the laws relating to persons who are under a disability in the management of their affairs.<sup>77</sup>

## Revocation

5.54 Once made, an election in some jurisdictions may only be revoked with consent. In ACT, WA and NT, the consent is that of the personal representatives.<sup>78</sup> In Queensland, the consent of the personal representative must be in writing<sup>79</sup> and in NSW the consent of the court is required.<sup>80</sup>

5.55 Some submissions considered that the requirement of consent from the court “may be unduly onerous”.<sup>81</sup> Another considered that the surviving spouse or partner ought to be able to revoke the election by giving notice to the personal representatives in writing.<sup>82</sup> One submission, however, supported requiring either the consent of the personal representatives or the court.<sup>83</sup>

5.56 The National Committee cannot conceive of a situation where a personal representative or the court could validly withhold consent to the revocation of a notice of election by the surviving spouse or partner before the settlement of the administration. The Committee is also not aware of any instances of consent to a revocation being

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73. *Administration and Probate Act 1929* (ACT) s 49N(1). See also *Intestates’ Estates Act 1952* (Eng) Sch 2 para 6(1).

74. *Administration and Probate Act 1969* (NT) s 79(1).

75. *Administration Act 1903* (WA) Sch 4 cl 8(1).

76. W V Windeyer, *Submission* at 4.

77. See, eg, *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 2000* (Qld); *Guardianship and Management of Property Act 1991* (ACT); *Aged and Infirm Persons’ Property Act* (NT); *Guardianship and Administration Act 1990* (WA).

78. *Administration and Probate Act 1929* (ACT) s 49G(5); *Administration Act 1903* (WA) Sch 4 cl 4(2); *Administration and Probate Act 1969* (NT) s 73(5). See also *Intestates’ Estates Act 1952* (Eng) Sch 2 para 3(2).

79. *Succession Act 1981* (Qld) s 39A(7).

80. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(2).

81. Trustee Corporations Association of Australia, *Submission* at 10; Public Trustee NSW, *Submission* at 8.

82. J North, *Submission* at 3.

83. Law Society of Tasmania, *Submission* at 9.

refused. The Committee accordingly recommends that a spouse or partner should be able to revoke the election without the need for consent by any other person.

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#### Recommendation 15

The surviving spouse or partner should be able to revoke his or her election at any time before the transfer of the relevant property without the need for consent by any other person.

See Intestacy Bill 2006 cl 19(4), (5).

## Valuing the intestate's interest in the relevant property

### ***Spouse may require valuation***

5.57 Prior to making an election, the spouse may request that the personal representative obtain the value of the intestate's interest from a qualified valuer and inform the spouse.<sup>84</sup> In Queensland, the personal representative must promptly comply with such a request and provide a copy of the valuation once obtained.

5.58 In Victoria, there is no provision for the surviving spouse to request a valuation. This is because the personal representative is positively obliged to obtain a valuation of the home in cases where the intestate is survived by a child or other issue.<sup>85</sup>

5.59 The National Committee considers it reasonable for the spouse or partner to require the personal representative to obtain a valuation from a qualified valuer. Such a valuation is necessary in order to determine what proportion of the relevant property satisfies the spouse or partner's entitlements on intestacy. It is also appropriate that the estate bear the costs of obtaining the valuation.

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#### Recommendation 16

The spouse or partner should be able to require that the personal representative obtain a valuation of the relevant property from a qualified valuer.

See Intestacy Bill 2006 cl 20(3).

### ***Fixing the value of the interest***

5.60 **The value.** In Queensland, ACT, NT, WA and Victoria, the value of the intestate's interest in the shared home is the market value of the intestate's interest,<sup>86</sup> but in SA and

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84. *Succession Act 1981* (Qld) s 39A(5); *Administration and Probate Act 1929* (ACT) s 49G(6) and s 49H; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(3); *Administration and Probate Act 1969* (NT) s 73(6) and s 74; and *Administration Act 1903* (WA) Sch 4 cl 4(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(2) and *Administration of Estates Act 1925* (Eng) s 41(3).

85. *Administration and Probate Act 1958* (Vic) s 37A(6).

86. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1929* (ACT) s 49G(6); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3)(a); *Administration and Probate Act 1969* (NT) s 74; and *Administration Act 1903* (WA) Sch 4 cl 5.

Victoria, it is given no more elaboration than “value”.<sup>87</sup> Where the spouse is entitled to acquire the intestate’s interest, Queensland provides that it shall be acquired for its “transfer value” at the intestate’s death. As in NSW, this is held to mean the market value of the interest, less any amount needed to discharge any mortgage, charge, encumbrance or lien to which the interest may be subject at the time of transfer.<sup>88</sup> Some submissions supported this approach.<sup>89</sup> The National Committee prefers to make it clear that the value of the intestate’s interest in the property does not include any part of the value that is still subject to a mortgage or other encumbrance.

**5.61 Liability for any mortgage, charge or encumbrance.** The question of the discharge or continuance of any mortgage or other charge over the property which the surviving spouse or partner elects to obtain is a question for negotiation between the lender and the surviving spouse or partner. If, for example, the lender requires the discharge of the mortgage and the surviving spouse or partner is unable to arrange another loan, then the property will no longer be available. It is sometimes assumed that appropriate arrangements will be made in cases where the surviving spouse or partner is in a position to meet the obligations for him or her to take over the debt and exonerate the estate. The National Committee prefers to make express provision to ensure the liability passes to the spouse and the estate is exonerated in situations where the spouse and the holder of the mortgage or other charge agree to the spouse assuming the liability. Such a provision will ensure the protection of the rights and interests of mortgagees and other beneficiaries of the estate.

**5.62 Date of the valuation.** In Queensland, SA, Victoria and NSW, the value will be calculated as at the death of the intestate.<sup>90</sup> The alternative is to determine the value as at the date when the spouse exercises his or her right.<sup>91</sup> This is the case in NSW, if the spouse or partner exercises his or her right more than 12 months after the death of the intestate.<sup>92</sup> Some submissions supported the NSW position.<sup>93</sup> Another submission supported the valuation being taken at the date of death without any further qualification.<sup>94</sup>

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87. *Administration and Probate Act 1919* (SA) s 72L(1); *Administration and Probate Act 1958* (Vic) s 37A(2); and *Administration of Estates Act 1925* (Eng) s 41(3).

88. *Succession Act 1981* (Qld) s 34B(4); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3).

89. Public Trustee NSW, *Submission* at 7; Trustee Corporations Association of Australia, *Submission* at 9; Law Society of Tasmania, *Submission* at 8; J North, *Submission* at 3.

90. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1919* (SA) s 72B(1); and *Administration and Probate Act 1958* (Vic) s 37A(2). In NSW, this is the case where the spouse exercises his or her right within 12 months of the intestate’s death: *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(i) to the definition of “value”.

91. In England, see *Robinson v Collins* [1975] 1 All ER 321.

92. *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(ii) to the definition of “value”.

93. Public Trustee NSW, *Submission* at 7; Trustee Corporations Association of Australia, *Submission* at 9.

94. J North, *Submission* at 3.

5.63 Given the rapid increases that can occur in the price of real estate, the time of its valuation can make a great difference to the value of the property. This was seen in *Robinson v Collins*,<sup>95</sup> where “the matrimonial home was appropriated at £8,000, its value at the date of appropriation, and not £4,200, its value at the date of death of the deceased”.<sup>96</sup> This case was cited by the Law Commission of England and Wales to support its argument that:

*[I]n the interval between the intestate’s death and the time of appropriation, house prices will often have risen quite sharply so that the statutory legacy will no longer be sufficient to enable the surviving spouse to remain in the matrimonial home.*<sup>97</sup>

5.64 The National Committee agrees that the value should be calculated at the death of the intestate. The NSW provision that takes effect when the election is made more than 12 months after the death of the intestate can be seen as unfairly prejudicial to the surviving spouse or partner, especially if the delay not of his or her making. The Committee accordingly recommends that the value of the intestate’s interest in the relevant property should be the value at the date of death.

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#### Recommendation 17

When the spouse wishes to obtain property that is subject to a charge (being a mortgage, other charge, encumbrance or lien) at the time of the transfer and the holder of that charge agrees to the spouse assuming the liability, the value of the interest in the relevant property should be the market value of the property, less any amount needed to discharge the liability and, on the transfer of the property, the liability should pass to the spouse and the estate be exonerated from it.

The value should be the value calculated at the death of the intestate.

See Intestacy Bill 2006 cl 20(1), (2).

5.65 **The valuer.** In Victoria, the professional engaged to value the interest is a “valuer”,<sup>98</sup> in Queensland a “registered valuer”,<sup>99</sup> in ACT and WA a “qualified valuer”,<sup>100</sup> in NSW a “duly qualified agent”,<sup>101</sup> and in NT a Fellow or an associate member of the Australian Institute of Valuers Incorporated, and includes a person who, in the opinion of

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95. *Robinson v Collins* [1975] 1 All ER 321.

96. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 35.

97. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 9. See also England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10. See also R Atherton, “Valuations and intestacy: surviving spouse v issue” (1984) 22 *Law Society Journal* 169 at 171-172.

98. *Administration and Probate Act 1958* (Vic) s 37A(6).

99. Registered under the *Valuers Registration Act 1992* (Qld) as defined in *Valuation of Land Act 1944* (Qld) s 2.

100. *Administration and Probate Act 1929* (ACT) s 49H; and *Administration Act 1903* (WA) Sch 4 cl 5.

101. *Wills, Probate and Administration Act 1898* (NSW) s 61E(1). A duly qualified agent is one qualified under the *Valuers Act 2003* (NSW).

the Minister, possesses equivalent qualifications.<sup>102</sup> The NT and Queensland provisions define valuer by reference to another statute that deals with the professional regulation of valuers.

5.66 Valuations produced by qualified valuers may sometimes differ substantially but still be in “good faith”. Under the NSW model, a substantial overvaluation of the home could benefit the surviving spouse or partner, while under the models where the spouse must meet the difference, a substantial overvaluation of the home could benefit the surviving issue. A substantial undervaluation would be to the benefit of the surviving spouse or partner, especially if it brought the value of the estate under the threshold of the statutory legacy. The personal representative’s choice of valuer is therefore crucial. This may be problematic where the personal representative has an interest in the administration of the estate as either the surviving spouse or partner or as issue. It has, therefore, been suggested that “it would appear eminently desirable to provide for the valuer to be an independent valuer, one that is not appointed by any of the persons interested in the estate”.<sup>103</sup>

5.67 While it is desirable to appoint a valuer who is appropriately registered and qualified, the National Committee does not consider it necessary that the valuer be independently appointed. There would appear to be insufficient evidence of any real concerns regarding the appointment of valuers to justify the additional administrative expense that would be incurred in setting up a system for independent appointment. The Committee notes that such a system would merely remove the outcome from the control of the personal representative rather than eliminate the occurrence of overvaluations. The Committee is satisfied that professional regulation will be enough to ensure that an objective value is determined in most cases and, therefore, recommends that the valuer be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

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#### Recommendation 18

The valuer who determines the value of the property should be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

See Intestacy Bill 2006 cl 20(3), cl 4(1) definition of “registered valuer”.

### Satisfying the value of the interest

5.68 As already noted, the jurisdictions that give the surviving spouse some right to the shared home achieve this by allowing the surviving spouse to elect to obtain the intestate’s interest in the shared home. However, there are several different ways in which the surviving spouse or partner can make satisfaction for the value of the intestate’s interest in the shared home. Most jurisdictions allow the value of the interest to be met in part from the surviving spouse or partner’s share of the estate.

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102. *Administration and Probate Act 1969* (NT) s 74; and *Valuation of Land Act 1963* (NT) s 4.

103. R Atherton, “Valuations and Intestacy: Surviving Spouse v Issue” (1984) 22 *Law Society Journal* 169 at 170.



5.69 In SA, Victoria, WA and Queensland, the surviving spouse or partner can provide satisfaction for the interest in the shared home, first by relying on any share of the intestate estate to which they are entitled on distribution and, then, if his or her share is insufficient to cover the value of the intestate's interest in the shared home, by paying the difference from his or her own resources.<sup>104</sup>

5.70 In NSW, the surviving spouse or partner can provide satisfaction for the shared home, first by relying on any share of the intestate estate to which he or she is entitled on distribution, but, if the value of the intestate's interest in the shared home exceeds the surviving spouse or partner's entitlement, any difference is then met from the share of the estate to which any issue of the intestate are entitled.<sup>105</sup>

5.71 Finally, the NT and ACT provide that the surviving spouse or partner may elect to use the shared home in satisfaction of any entitlement the surviving spouse or partner may have in a share of the intestate estate.<sup>106</sup> However, these jurisdictions appear to make no provision to cover any difference that may arise if the value of the intestate's interest in the shared home exceeds the value of the survivor's share in the intestate estate.

5.72 Each of the above scenarios could potentially leave a surviving spouse with only the shared home and no other assets from the estate, assuming the value of the shared home is equal to, or greater than, any share in the estate to which the surviving spouse or partner may be entitled on distribution. In some jurisdictions, the surviving spouse or partner may also end up substantially out of pocket if he or she wishes to continue living in the shared home. While it may be considered that a home's "value is not purely monetary, but extends to the emotional investment and the sense of wellbeing and security that comes with long-term home ownership",<sup>107</sup> the continued right to the shared home may be meaningless if there are no other assets available to the surviving spouse or partner.

5.73 It may be argued that ensuring that the surviving spouse can obtain the shared home with little difficulty is desirable because it will help lessen the disruption caused by the intestate's death and will ensure some continuity of lifestyle for the spouse and any surviving dependent children.

5.74 However, while many supported an increase in the statutory legacy, there was considerably less support in other jurisdictions for the NSW option of using the issues' share in some cases to satisfy the value of the shared home. Requiring the surviving spouse or partner to meet the difference between his or her entitlement and the value of

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104. *Administration and Probate Act 1919* (SA) s 72L(1) and s 72L(4); *Administration and Probate Act 1958* (Vic) s 37A(2) and s 37A(7); *Administration Act 1903* (WA) Sch 4 cl 1(1) and cl 7(2); and *Succession Act 1981* (Qld) s 39C(2), s 39C(4). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1 and para 5(2).

105. *Wills, Probate and Administration Act 1898* (NSW) s 61B(13). This has particular implications for the administration of the intestate estate: see para 5.80 below.

106. *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1969* (NT) s 73(1).

107. Queensland, *Parliamentary Debates (Hansard)*, 7 October 1997, Succession Amendment Bill, Second Reading at 3632.

the home can be seen as protecting the interests of the issue of the intestate.<sup>108</sup> However, some submissions preferred the interests of the surviving spouse or partner and supported the NSW provision on the grounds that ensuring accommodation for the surviving partner is paramount.<sup>109</sup>

5.75 It has been argued, in relation to the NSW position, that the intestate's interest in the shared home cannot be seen as going towards, or as satisfying, the partner's share if its value exceeds the value of that share. It has been suggested that, "[o]ne does not ... properly speak of the 'satisfaction' of a surviving spouse's entitlement to receive, say, \$250,000 by the transfer to him or her of property worth \$600,000, especially when that would mean that other close family members ... would be deprived of an entitlement to \$350,000". The better alternative may be to have the surviving partner pay any excess into the intestate estate to be distributed.<sup>110</sup> One submission suggested that, if the estate has no assets other than the shared home, the surviving spouse or partner may be living beyond his or her needs. In such cases, it is submitted that the expensive house could be sold in order to pay for a more modest house and still have some funds left over.<sup>111</sup>

5.76 There are a number of other problems with the NSW option. First, under its provisions, a surviving spouse or partner may receive a greater sum than a survivor would where the intestate did not own a home. This may be a particular problem where the family home sits on a large property, or is part of a farm or other business.

#### **National Committee's conclusion**

5.77 In light of the National Committee's recommendation that the right to election be extended to all property in the estate, it is clearly appropriate that the surviving spouse or partner should only be able to exercise the election in cases where he or she can afford to purchase the intestate's interest in the relevant property, either from the value of his or her entitlement or from other available resources. This will mean that, in some cases, the surviving spouse or partner may not be able to obtain the intestate's interest in the shared home if the value of the property is too great in proportion to the rest of the estate. Notwithstanding the general preference for benefiting the surviving partner, the circumstances in which these provisions come into play are those in which the National Committee has decided the surviving children ought to receive something if the estate can bear it. This will clearly not be achieved if a surviving spouse can obtain a greater share by electing to purchase the home using part of the issue's share and then selling the property later. The National Committee considers that it is inappropriate to give the surviving partner an excessive benefit in cases where the shared home is of substantial value. At least in the case of small estates, there will be no question of leaving the surviving spouse "on the street" in order to meet the issue's share. This will be achieved by setting the statutory legacy at a sufficient level to cover most estates. The National Committee, therefore, recommends that the surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of

108. N Crago, "The rights of an intestate's surviving spouse to the matrimonial home" (2000) 29 *Western Australian Law Review* 197 at 202.

109. Public Trustee NSW, *Submission* at 6; Trustee Corporations Association of Australia, *Submission* at 8.

110. N Crago, "The Rights of An Intestate's Surviving Spouse to the Matrimonial Home" (2000) 29 *Western Australian Law Review* 197 at 199.

111. J North, *Submission* at 3.

the intestate estate to which they are entitled and, then, if the share is insufficient to cover the value, by paying the difference from other available resources. In the interests of clarity, the manner in which any shortfall is made up should be expressly stated in the legislation.

#### Recommendation 19

The surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of the intestate estate to which they are entitled and, then, if his or her share is insufficient to cover the value, by paying the difference from other resources that are available to him or her.

See Intestacy Bill 2006 cl 21.

## Restrictions on the right to acquire property

5.78 In Queensland, ACT, WA, NT, and NSW, there are a number of situations in which the current intestacy rules will restrict the surviving spouse's right to elect to acquire the shared home.<sup>112</sup> They are generally concerned with maintaining the administrator's ability to sell or dispose of the rest of the intestate's estate. These situations generally concern shared homes forming part:

- of a building in which the intestate has an interest in the whole building;
- of a registered or registrable interest in land (in which the intestate has an interest in the whole of that interest) used (either solely or partly) for agricultural purposes;
- of a building used as a hotel, motel, boarding house or hostel at the date of the intestate's death; or
- where part of the shared home was used for purposes other than domestic purposes at the date of the intestate's death.<sup>113</sup>

Should any of these situations apply, the surviving spouse will only be entitled to elect to acquire the shared home if the court makes an order to that effect. Such an order will only be made if the court is satisfied that the acquisition would not be likely to diminish the assets of the intestate or make the disposal of the assets substantially more difficult.<sup>114</sup>

5.79 Of the above jurisdictions, ACT, WA and NT also restrict the spouse's right if the interest in a shared house is a tenancy that will determine within two years after the

112. These restrictions are apart from any restrictions in general law such as, for example, planning restrictions on the subdivision of certain types of land.

113. *Succession Act 1981* (Qld) s 39B(1); *Administration and Probate Act 1929* (ACT) s 49K(a)-(d); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(a)-(d); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.

114. *Succession Act 1981* (Qld) s 39B(5); *Administration and Probate Act 1929* (ACT) s 49K(e), (f); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(e), (f); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.

intestate's death, or if the landlord would be entitled to determine the lease within that period.<sup>115</sup>

5.80 In NSW, 12 months after the date on which letters of administration are first taken out in respect of the intestate's estate, the spouse will lose his or her right to acquire the shared home in a number of circumstances (in addition to those above). These circumstances will arise:

- when the administrator requires the intestate's interest in the shared home to meet funeral and administration expenses, debts and other liabilities payable out of the estate of the intestate, or
- in any case when the administrator's transfer or conveyance of the interest of the intestate in the shared home to the spouse would require compliance with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW), *Conveyancing Act 1919* (NSW), *Strata Schemes (Freehold Development) Act 1973* (NSW) and *Strata Schemes (Leasehold Development) Act 1986* (NSW) – all of which concern the division of land.<sup>116</sup>

The former provision is necessary in NSW in light of the fact that the value of the intestate's interest in the shared home can also be met from the share of the estate to which the issue are otherwise entitled.<sup>117</sup>

5.81 In Victoria land that cannot be severed from the shared home is taken to be part of the shared home and express provision is made so that farmland (even if technically severable) cannot be severed from the shared home.<sup>118</sup> This latter provision would appear to be aimed at preserving the economic value of farmland.

#### **National Committee's conclusion**

5.82 The general provisions outlined above, so far as they relate specifically to the shared home, are no longer relevant to the broader scheme proposed by the National Committee. However, the question remains whether there should be a right to challenge a spouse or partner's election where that election results in the diminution of the remaining assets of the estate or makes the disposal of assets substantially more difficult. The National Committee considers that, given the breadth of the right given to the surviving spouse, the issue who are also entitled to share in the estate should have the right to challenge an election that adversely affects the intestate estate. For the sake of convenience, personal representatives should also have the right to challenge a spouse's election in Court.

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#### **Recommendation 20**

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115. *Administration and Probate Act 1929* (ACT) s 49J; *Administration Act 1903* (WA) Sch 4 cl 1(2); and *Administration and Probate Act 1969* (NT) s 75. See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(2).

116. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1).

117. See para 5.70.

118. *Administration and Probate Act 1958* (Vic) s 37A(10) and (11), inserted by *Administration and Probate (Amendment) Act 1994* (Vic) s 8.

The surviving issue or personal representative should be able to apply to the court to restrict the surviving spouse or partner's right to elect to acquire any property in the estate in situations where the acquisition would be likely to diminish the assets of the intestate or make the administration of the estate substantially more difficult.

See Intestacy Bill 2006 cl 16(2), (3).

## POWER OF THE PERSONAL REPRESENTATIVE TO DISPOSE OF PROPERTY

5.83 Most jurisdictions limit a personal representative's powers concerning the disposal of an intestate's interest in a shared home in two situations:

- when the surviving spouse's election is pending; and
- when the election has been made to acquire the interest.

### The current law

5.84 In Queensland, WA, ACT, NT and NSW, the intestate's interest in a shared home is not to be sold, or otherwise disposed of, if the time within which an election may be made has not expired, or if to do so would be contrary to an election. This restriction does not, however, stop a personal representative from disposing of such an interest as a last resort should the proceeds be needed to satisfy any of the intestate's liabilities.<sup>119</sup> In the ACT and NT, this restriction also will not apply if the surviving spouse is the personal representative (or one of them).<sup>120</sup> In the ACT and NT, it is expressly stated that the restriction will not affect the validity of the sale of any of the intestate's estate<sup>121</sup> and in Queensland, it will not affect the validity of the sale of the intestate's interest in the shared home.<sup>122</sup>

5.85 In NSW and the NT, the intestate's interest in the shared home may be disposed of before the expiration of the period within which election may be made, if the court rejects the application of a surviving spouse to acquire the shared home.<sup>123</sup>

119. *Succession Act 1981* (Qld) s 39D(3); *Administration Act 1903* (WA) Sch 4 cl 6(2); *Administration and Probate Act 1929* (ACT) s 49L(1); *Administration and Probate Act 1969* (NT) s 77(1); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(1).

120. *Administration and Probate Act 1929* (ACT) s 49L(3); and *Administration and Probate Act 1969* (NT) s 77(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(4).

121. *Administration and Probate Act 1929* (ACT) s 49L(4); and *Administration and Probate Act 1969* (NT) s 77(4).

122. *Succession Act 1981* (Qld) s 39D(4). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(5).

123. *Administration and Probate Act 1969* (NT) s 77(2); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(4).

5.86 In SA, the surviving spouse or partner is entitled to continue to live in the shared house until the expiration of the period in which he or she can elect to acquire the house. However, the administrator (personal representative) may sell the intestate's interest in a shared house before the period within which an election may be made has expired, if the spouse or partner has ceased to live there.<sup>124</sup>

## National Committee's conclusion

5.87 The National Committee is of the view that there should be a general limitation on the power of a personal representative to dispose of property in the estate that is or may be subject to the right of election. Subject to the following paragraphs, most of the provisions described above have some utility and should be adopted in a form that applies to the more general scheme now proposed.

5.88 Given the extension of the provisions to cover property other than the shared home, a provision should be inserted which allows a personal representative to dispose of property, other than land, that is perishable or likely to deteriorate or decrease in value. Such a provision is necessary to avoid loss to the estate during the albeit relatively brief period when the surviving spouse or partner is deciding whether to exercise his or her right of election.

5.89 A provision that allows property to be disposed of before the expiration of the period within which election may be made if the court rejects the surviving spouse's application may unnecessarily restrict the exception to cases where there has been a hearing on the merits. The National Committee, therefore, considers that the provision should also encompass the situation where an application has been withdrawn prior to determination by the court.

5.90 The National Committee is further of the view that the removal of the restrictions in cases where the spouse or partner is only one of the personal representatives should not be included since it is conceivable that the personal representatives, as a group, could act against the wishes of the spouse or partner.

5.91 The National Committee also considers that provisions should be made for cases where the spouse or partner chooses not to exercise the right to elect. In such cases, notification to the personal representatives in writing should be sufficient to allow them to dispose of assets in the estate if required.

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124. *Administration and Probate Act 1919* (SA) s 72M.

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**Recommendation 21**


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The personal representatives should not sell or otherwise dispose of the property in the estate when:

- (a) the surviving spouse or partner's election is pending; or
- (b) the surviving spouse or partner has elected to acquire the interest, except where:
  - (c) the proceeds of such a sale are needed as a last resort to satisfy any of the intestate's liabilities;
  - (d) the property is perishable or likely to decrease rapidly in value;
  - (e) the surviving spouse or partner is also the sole personal representative of the estate;
  - (f) the election requires the court's authorisation and an application of the surviving spouse or partner to acquire the relevant property has been refused or the application has been withdrawn; or
  - (g) the surviving spouse or partner has notified the personal representatives in writing that he or she will not elect to obtain any property.

These restrictions should not affect the validity of the sale of any of the intestate's estate.

See Intestacy Bill 2006 cl 22.

## Where the spouse is a trustee

5.92 When the deceased has died intestate, the surviving spouse or partner may be the intestate's personal representative and, as such, the trustee of the intestate estate for those entitled. In all jurisdictions, where the spouse or partner is a trustee, express provision is made that he or she may acquire the intestate's interest in the shared home notwithstanding his or her role as trustee.<sup>125</sup> Law reform agencies that have considered this question have also proposed similar provisions.<sup>126</sup>

5.93 If the spouse, as trustee, is not entitled to acquire the intestate's interest in the shared home, that interest will remain part of the intestate estate to be divided and distributed in accordance with the rules, potentially leaving the spouse without a residence.

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125. *Succession Act 1981* (Qld) s 39C(5); *Administration and Probate Act 1929* (ACT) s 49M; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 7(2); *Administration and Probate Act 1969* (NT) s 78; *Administration and Probate Act 1919* (SA) s 72L(5); *Administration and Probate Act 1958* (Vic) s 37A(9)(a); and *Administration Act 1903* (WA) Sch 4 cl 7(1). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 5(1).

126. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 44.

5.94 Some submissions supported an express provision that the surviving spouse or partner should be able to acquire the intestate's interest in the shared home notwithstanding any role as trustee.<sup>127</sup>

5.95 The National Committee accordingly recommends that, where the spouse or partner is a trustee, he or she should be able to acquire property from the estate notwithstanding his or her role as trustee.

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**Recommendation 22**

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Where the spouse or partner is a trustee, express provision should be made that he or she may acquire property from the estate notwithstanding his or her role as trustee.

See Intestacy Bill 2006 cl 16(4).

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127. Law Society of Tasmania, *Submission* at 10; Public Trustee NSW, *Submission* at 9; Trustee Corporations Association of Australia, *Submission* at 11; J North, *Submission* at 3.



## 6. Multiple partners

- Intestate leaves a spouse and a de facto partner
- Intestate leaves more than one partner
- Bigamous unions
- Personal effects
- Submissions and consultations
- National Committee's conclusion

## INTESTATE LEAVES A SPOUSE AND A DE FACTO PARTNER

6.1 When an intestate is survived by a spouse, that spouse will be entitled to a share in the intestate's estate. When the intestate is survived by a spouse and a de facto partner, the spouse's entitlement will sometimes be divided between them. There are a number of ways by which the spouse's entitlement can be divided between them.

### Distribution in Queensland

6.2 Queensland, unlike the other jurisdictions, does not use the length of the relationship to allocate shares between de facto partners and spouses. It allows the parties to divide the spouse's entitlement by three different methods.<sup>1</sup>

6.3 The first is for the spouse and de facto partner to produce a distribution agreement. They reach agreement between themselves as to how the spouse's entitlement is to be divided and put it in writing.<sup>2</sup>

6.4 The second method involves a partner or the personal representative applying to the court for a distribution order. The granting of such an order may be conditional. It may require that the entitlement be distributed in a way the court considers just and equitable – in so requiring it makes no assumption in favour of an equal distribution as a starting point or otherwise; it may find one partner to be solely entitled. The conditions for the granting of a court order are that there is no distribution agreement and that the personal representative has not commenced distribution of the estate.<sup>3</sup>

6.5 The third approach allows the personal representative to divide the estate into equal shares to distribute to the partners. This will be subject to the presence of surviving issue. Where issue exist, the statutory legacy must be equally split between the partners. Three conditions must be met for distribution to occur in this manner:

- the partners must have three months notice (given as soon as practicable) of the distribution;
- the personal representative must have no notice of a distribution agreement; and
- the personal representative must:
  - have no notice of an application for a distribution order, or
  - have a copy of a court order striking out or discontinuing an application for a distribution order, or
  - have been notified that the partners agree that the estate should be equally distributed by the personal representative (despite any prior application for a distribution order).<sup>4</sup>

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1. See *Succession Act 1981* (Qld) s 36.

2. *Succession Act 1981* (Qld) s 36(1)(a).

3. *Succession Act 1981* (Qld) s 36(6).

4. *Succession Act 1981* (Qld) s 36(1)(c).

## Distribution in other Australian jurisdictions

### ***When the whole entitlement goes to the de facto partner***

6.6 In many jurisdictions, the de facto partner of an intestate will take the spouse's entitlement exclusively if a number of conditions are met. The de facto relationship must have existed for a specified period before the intestate's death. In NSW, NT and Tasmania, the relevant period is at least two years;<sup>5</sup> at least five years in WA<sup>6</sup> and ACT;<sup>7</sup> and six years or more in Victoria.<sup>8</sup>

6.7 Some jurisdictions require that the relationship should have existed continuously for the period specified.<sup>9</sup> In some of these jurisdictions, the period must also have been immediately before the intestate's death.<sup>10</sup> Another condition is added in some jurisdictions that the intestate must not have lived with his or her lawful spouse (or lived as the spouse of his or her lawful spouse<sup>11</sup>) at any time during that period.<sup>12</sup>

6.8 In NT and Victoria, the de facto partner will take the spouse's share regardless of the above conditions, where the intestate is survived by issue<sup>13</sup> of the intestate and the de facto partner.

### ***When the whole entitlement goes to the spouse***

6.9 In NT, NSW and Tasmania, if the applicable conditions are not met by the surviving de facto partner, the spouse will be entitled to the spouse's share exclusively.<sup>14</sup> In Victoria, this will be the case if the de facto partner has not lived with the intestate continuously for at least two years immediately before the intestate's death and if the intestate was not survived by issue of the intestate and de facto partner, or such issue was not under 18 at the intestate's death.<sup>15</sup> A similar position applies in ACT.<sup>16</sup>

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5. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A); and *Administration and Probate Act 1935* (Tas) s 44(3A).

6. *Administration Act 1903* (WA) s 15(3).

7. *Administration and Probate Act 1929* (ACT) s 45(1)(b).

8. *Administration and Probate Act 1958* (Vic) s 51A(1).

9. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration and Probate Act 1958* (Vic) s 51A(1); *Administration and Probate Act 1929* (ACT) s 45A(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).

10. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration Act 1903* (WA) s 15(3)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).

11. *Administration Act 1903* (WA) s 15(3)(b).

12. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).

13. In Victoria, the issue must have been under 18 years at the intestate's death.

14. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1; *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(b); and *Administration and Probate Act 1935* (Tas) s 44(3A)(b).

15. *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner".

***When the entitlement is apportioned between the spouse and the de facto partner***

6.10 In SA, the spouse and each de facto partner will be entitled to an equal share in the spouse's entitlement regardless of the length, or nature of, the relationships involved.<sup>17</sup> One submission suggested that some people held the view that this approach had the benefit of being "equitable and simple".<sup>18</sup>

6.11 In a number of jurisdictions, the spouse's share will be divided equally between the spouse and de facto partner provided certain conditions are met. For example, the de facto relationship must have existed for a specified period before the intestate's death. This means at least two years but less than five years in the ACT and WA.<sup>19</sup> Additionally, in WA, the relevant period is that immediately before the death of the intestate, and the intestate must not have lived as the spouse of his or her lawful spouse during that period.<sup>20</sup> Victoria and the ACT require the period to have been continuous.<sup>21</sup>

6.12 It is also possible to apportion entitlements according to the duration of the relationships involved. In Victoria, if the de facto relationship has existed for at least two years but less than four years before the death of the intestate, the spouse will be entitled to two-thirds and the de facto partner one-third of the spouse's entitlement. Where the de facto relationship has existed for at least four years but less than five, the spouse's entitlement is one half and where the de facto relationship has existed for at least five years, but less than six, the spouse's entitlement is one-third, while that of the de facto partner is two-thirds.<sup>22</sup>

## INTESTATE LEAVES MORE THAN ONE PARTNER

6.13 The situation is less clear where more than one de facto partner survives the intestate. In NSW a de facto partner will only be entitled to the spouse's share of an intestate estate if he or she was the sole partner in a de facto relationship with the deceased and was not a partner in any other de facto relationship.<sup>23</sup> Western Australia provides that, where an intestate has been survived by two or more de facto partners, they are entitled to equal shares in the de facto partner's entitlement.<sup>24</sup> This is also the position in New Zealand.<sup>25</sup>

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16. *Administration and Probate Act 1929* (ACT) s 44(1) definition of "eligible partner".

17. *Administration and Probate Act 1919* (SA) s 72H(2). See also *Administration Act 1969* (NZ) s 77C.

18. Trustee Corporations Association of Australia, *Submission* at 7.

19. *Administration and Probate Act 1929* (ACT) s 45A(1)(a); and *Administration Act 1903* (WA) s 15(2)(a).

20. *Administration Act 1903* (WA) s 15(2).

21. *Administration and Probate Act 1929* (ACT) s 45(1)(a); *Administration and Probate Act 1958* (Vic) s 51A(1).

22. *Administration and Probate Act 1958* (Vic) s 51A(1).

23. *Wills, Probate and Administration Act 1898* (NSW) s 32G(1).

24. *Administration Act 1903* (WA) s 15(4).

25. *Administration Act 1969* (NZ) s 77C.

6.14 In the ACT it can be argued that the definitions of “spouse” and “domestic partner” are such that there can only be one eligible partner (in addition to a spouse).<sup>26</sup> “Domestic partnership” is defined as “the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis”. This is similar to the position in Queensland where the rules provide for the distribution of the spouse’s entitlement if more than one “spouse” survives the intestate.<sup>27</sup> Since “spouse” is defined to include de facto partners, it appears that the spouse’s entitlement may be apportioned when the intestate is survived by more than one de facto partner. However, Queensland defines “de facto partner” in much the same way as the ACT as being “either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family”.<sup>28</sup>

6.15 In SA, the question of multiple putative spouses arguably cannot arise since a putative spouse is required to be living with the deceased “as the husband or wife de facto”.<sup>29</sup> It can be argued that the reference to “husband or wife” imports the idea of a relationship that is like marriage and, thus, is monogamous.

6.16 While the NT provides that a couple will be in a de facto relationship “if they are not married but have a marriage-like relationship”,<sup>30</sup> in determining whether such a relationship exists it is expressly irrelevant that “either of the persons is in another de facto relationship”.<sup>31</sup> Western Australia also requires the relationship to be “marriage-like”,<sup>32</sup> but makes it irrelevant that either of the persons is in another de facto relationship.<sup>33</sup>

6.17 The other Australian jurisdictions also do not appear to import the idea of monogamy into the concept of de facto relationships.

6.18 Envisaging the impracticalities of addressing the intestacy of “the itinerant with a ‘wife in every port’; or the open polygamist, perhaps with many children,” the Queensland Law Reform Commission in its 1993 Report suggested that, where the intestate was survived by more than one de facto, none should be entitled to the spouse’s share.<sup>34</sup>

6.19 No clear view on this has come out of consultations. In consultations in Victoria, it was said that there have not yet been any cases of multiple domestic partners. It was felt that the Victorian provisions would not be able to cope with such an eventuality.<sup>35</sup>

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26. “Domestic partnership” is defined as “the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis”: *Legislation Act 2001* (ACT) s 169(2).

27. *Succession Act 1981* (Qld) s 36. See para 6.2-6.5.

28. *Acts Interpretation Act 1954* (Qld) s 32DA(1).

29. *Family Relationships Act 1975* (SA) s 11.

30. *De Facto Relationships Act 1991* (NT) s 3A(1).

31. *De Facto Relationships Act 1991* (NT) s 3A(3)(c).

32. *Interpretation Act 1984* (WA) s 13A(1).

33. *Interpretation Act 1984* (WA) s 13A(3)(b).

34. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 27.

35. *Melbourne Consultation*.

## BIGAMOUS UNIONS

6.20 A question may arise as to the status of a surviving spouse who finds that the deceased entered into a bigamous union with that “spouse”. Where a deceased man, for example, underwent a marriage ceremony in Australia at the time he had a valid subsisting marriage to another woman, what is the position of the more recent wife? Can she claim to be the deceased’s spouse for the purposes of intestate distribution?<sup>36</sup>

6.21 In *Re Milanovic*,<sup>37</sup> the deceased had been married in Serbia. During the Second World War, he was separated from his wife and did not return to her. Some years later he “went through a form of marriage” with a second woman, who had no knowledge of his previous marriage. Despite the unwitting nature of this bigamous union (at least on the second wife’s part), the Court held that the second wife was not entitled to make an application for testator’s family maintenance. It held that the nature of this second marriage meant that, “[s]he is thus not the widow of the testator, and not in the class of persons who may make application for provision out of the testator’s estate”.<sup>38</sup>

6.22 This situation may now be addressed by the provisions that most jurisdictions use to deal with situations where the deceased is married and also has a de facto partner.<sup>39</sup> So, although not married, a bigamist’s second or subsequent partners may be entitled to a share of an intestate estate if they are found to be in a de facto relationship with the deceased.<sup>40</sup>

## PERSONAL EFFECTS

6.23 The distribution of personal effects of the intestate is a particular problem where there is more than one surviving spouse and/or partner. Special provisions are sometimes made for the distribution of these items.

6.24 SA provides that, where an intestate is survived by a lawful spouse and a putative spouse, they shall both be entitled to equal shares in the property (including personal effects).<sup>41</sup> Where any dispute arises between the two as to the division of any items, the administrator may sell them and distribute the proceeds of the sale equally.<sup>42</sup>

6.25 In the NT, where the intestate is survived by both a spouse and a de facto partner – (a) the de facto partner is entitled to the personal effects absolutely if – (i) he or she was the de facto partner of the intestate for a continuous period of not less than two years

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36. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 59.

37. *Re Milanovic* [1973] Qd R 205.

38. *Re Milanovic* [1973] Qd R 205 at 206 (Douglas J).

39. See also Trustee Corporations Association of Australia, *Submission* at 3; Public Trustee NSW, *Submission* at 3.

40. See the recommendations relating to spouse and partners of an intestate: para 6.28-6.35, below. The criminal law would deal with a person who was knowingly a party to the bigamy.

41. *Administration and Probate Act 1919* (SA) s 72H(2).

42. *Administration and Probate Act 1919* (SA) s 72H(3).

immediately preceding the intestate's death, and the intestate did not at any time during that period live with the person to whom he or she was married; or (ii) the intestate is also survived by issue of the intestate and the de facto partner; and (b) except where paragraph (a) applies, the spouse is entitled to the personal effects absolutely.<sup>43</sup>

6.26 One submission suggested that personal effects in the custody of each person should remain with that individual or, alternatively, that they should be distributed to the spouse or partner depending on whether they were obtained during the relevant relationship.<sup>44</sup> However, some items will almost always be contested in such circumstances.

## SUBMISSIONS AND CONSULTATIONS

6.27 Some submissions supported the Queensland provisions.<sup>45</sup> Another submission supported a provision along the lines of that in NSW, noting that each situation is different and a partner who is not entitled can always apply for family provision.<sup>46</sup>

## NATIONAL COMMITTEE'S CONCLUSION

6.28 The Queensland provisions should be adopted as being sufficiently flexible to deal with most eventualities. For example, they will allow the question of distribution of the intestate's personal effects to be negotiated or imposed by the Court. They also provide a framework for negotiation of any dispute. The Committee notes that negotiated outcomes are not unknown in other jurisdictions. For example, alternative dispute resolution procedures are generally used in Tasmania in cases where there is a surviving spouse and a surviving de facto partner.<sup>47</sup>

6.29 The National Committee has considered whether there should be a limit on the number of de facto partners who may share in the intestate estate. The Committee can think of no good reason to place a limit on the number of de facto partners, so long as they meet the definitional requirements. This is especially so in cases where there are children of the various partnerships and a limit on the number of de facto partners may lead to the parents of some children not being provided for.

6.30 The Committee, therefore, recommends that where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate. There will be no rights to personal effects, statutory legacies, or rights of election. However, the distribution of items from the estate can be subject to negotiation between the parties in accordance with the Queensland provisions.

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43. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3.

44. Trustee Corporations Association of Australia, *Submission* at 7.

45. Public Trustee of Queensland, *Submission* at 2; Law Society of Tasmania, *Submission* at 7.

46. Public Trustee NSW, *Submission* at 5.

47. K McQueenie, *Consultation*.

6.31 The Committee further recommends that, where there is more than one spouse or partner and descendants of the intestate from at least one other relationship, each spouse or partner and each child (or representative) of the intestate should share in the estate. Each spouse or partner should be entitled to a statutory legacy and a share of half the residue of the estate. If there are insufficient funds for a full statutory legacy for each spouse, the amount that is available should be shared rateably. Each child (or representative) of the intestate should be entitled to an equal share of the remaining half. Rights of election and the distribution of the personal effects of the intestate can be negotiated in accordance with the Queensland provisions.

## Where there are also surviving issue

6.32 Consideration needs to be given to the impact of surviving issue on the above proposal. The presence of a child will always mean that there is a child who is also not the child of at least one of the surviving spouses or partners. There are essentially three scenarios:

- where there is a surviving spouse or partner and another surviving spouse or partner with at least one child;
- where there are two surviving spouses or partners with at least one child each;
- where there are two surviving spouses or partners with or without children, and at least one child from at least one other relationship.

6.33 In the first two cases, the surviving spouses and/or partners should be entitled to share the entire estate without the need to take account of their children. This follows the proposals that a spouse or partner should take the whole estate to the exclusion of children where those children are also the children of the surviving spouse or partner. This can be justified on the grounds that each child in this situation will, if a minor, continue to be cared for by his or her parent and, if an adult, can expect, in the normal course of events, ultimately to inherit from his or her surviving parent.

6.34 In the third case, the spouses and/or partners should share in the spouse's entitlement and the surviving children should be entitled to their share of the residue in the same way they would be if the intestate had died leaving only one surviving spouse or partner and at least one child from another relationship.

6.35 The model provisions relating to distribution where the intestate is survived by multiple spouses and/or partners should be drafted to ensure that issue of the intestate only participate in the distribution when at least one descendant is the issue of another relationship.

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### Recommendation 23

Where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate.

Where there is more than one spouse or partner and descendants of the intestate from at least one other relationship:

- (a) each spouse or partner should be entitled to a statutory legacy (rateably if there are insufficient funds) and a share of half the residue of the estate; and



- (b) each child (or representative) of the intestate should be entitled to an equal share of the remaining half.

The Queensland provisions for distributing an intestate estate where there are multiple spouses and/or partners should be adopted.

See Intestacy Bill 2006 **Part 2 division 3, cl 8(3)**.

## 7. The parent – child relationship

- Establishing parentage
- Children not yet born (en ventre sa mere)
- Step-children
- Step-parent adoptions

7.1 In intestacy, establishing the parent-child relationship is chiefly concerned with identifying the descendants of the intestate, that is, children, grandchildren, great grandchildren and so on. However, it is also relevant to identifying the ancestors of an intestate, that is, parents, grandparents and so on, as well as the children of collaterals, such as nieces and nephews and cousins.

## ESTABLISHING PARENTAGE

7.2 The issue of a person are that person's lineal descendants: his or her children, grandchildren, great grandchildren, and so on. In most cases, there will be no difficulty establishing the relevant relationship. Children who are adopted will be treated as children of their adopting parents and, at the same time, cease to be children of their natural parents.<sup>1</sup> Further, the fact that a person's parents were not married to each other will not affect whether a person will be identified as issue in the distribution of an intestate estate.<sup>2</sup> In a few cases, however, parentage will be established by presumption.

### Presumptions of parentage

7.3 Presumptions of parentage may arise from a number of circumstances depending on the relevant provisions in each jurisdiction. Parentage may be presumed from:

- marriage;<sup>3</sup>
- cohabitation when the parents are not married;<sup>4</sup>
- use of artificial fertilisation procedures;<sup>5</sup>

1. *Adoption of Children Act 1964* (Qld) s 28(1); *Adoption Act 1993* (ACT) s 43; *Adoption Act 2000* (NSW) s 95; *Adoption of Children Act 1994* (NT) s 45; *Adoption Act 1988* (SA) s 9; *Adoption Act 1988* (Tas) s 50; *Adoption Act 1984* (Vic) s 53(1); and *Adoption Act 1994* (WA) s 75. See also *Adoption Act 1955* (NZ) s 16(2); and *Adoption Act 1976* (Eng) s 39.
2. *Status of Children Act 1978* (Qld) s 3(1); *Parentage Act 2004* (ACT) s 38(2); *Status of Children Act 1979* (NT) s 4; *Status of Children Act 1996* (NSW) s 5(1); *Family Relationships Act 1975* (SA) s 6(1); *Status of Children Act 1974* (Tas) s 3(1); *Status of Children Act 1974* (Vic) s 3; and *Administration Act 1903* (WA) s 12A. See also *Family Law Reform Act 1987* (Eng) s 1(1); and *Status of Children Act 1969* (NZ) s 3(1).
3. *Status of Children Act 1996* (NSW) s 9; *Parentage Act 2004* (ACT) s 7; *Status of Children Act 1978* (Qld) s 18A; *Status of Children Act 1974* (Tas) s 5; *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; and *Status of Children Act 1979* (NT) s 4A. See also *Status of Children Act 1969* (NZ) s 5(1), s 7(1)(a); *Family Law Act 1975* (Cth) s 69P; and *Family Court Act 1997* (WA) s 188.
4. *Parentage Act 2004* (ACT) s 8; *Status of Children Act 1996* (NSW) s 10; *Status of Children Act 1978* (Qld) s 18E; *Status of Children Act 1974* (Tas) s 8; *Status of Children Act 1979* (NT) s 5. See also *Family Law Act 1975* (Cth) s 69Q; and *Family Court Act 1997* (WA) s 189.
5. *Parentage Act 2004* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 3; *Status of Children Act 1974* (Vic) Part 2; *Status of*

- birth registration;<sup>6</sup>
- court findings;<sup>7</sup> and
- acknowledgement of paternity.<sup>8</sup>

In each jurisdiction, these presumptions are contained in legislation that is separate from the provisions that deal with intestacy. Apart from the use of artificial fertilisation procedures, all the above categories of presumption are contained in the *Family Law Act 1975* (Cth).<sup>9</sup>

7.4 Court findings, or determinations of parentage, may be made following DNA testing procedures. Since DNA tests only produce a probability of parentage, they cannot conclusively prove a relationship, although they can conclusively disprove one.<sup>10</sup> This means that, in the context of succession law, DNA tests can either give rise to a presumption of paternity (resulting in a court order) or rule out the possibility. There are currently no provisions directly or indirectly regulating the use of DNA tests to determine entitlements on intestacy.<sup>11</sup>

7.5 Some jurisdictions have specific provisions that deal with presumptions of parentage in the context of intestacy. In the ACT, any presumption arising from registration of the birth will only operate in intestacy if the registration takes place before the death of the intestate.<sup>12</sup> In WA and Victoria, in circumstances where parents of the

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*Children Act 1978* (Qld) s 14-17; *Family Relationships Act 1975* (SA) s 10c, s 10d; *Status of Children Act 1979* (NT) Part 3A. See para 7.21-7.32 below.

6. *Status of Children Act 1978* (Qld) s 18B; *Status of Children Act 1974* (Tas) s 8A; *Status of Children Act 1979* (NT) s 9; *Status of Children Act 1996* (NSW) s 11; *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1974* (Vic) s 8(1). See also *Status of Children Act 1969* (NZ) s 8(1); *Family Law Act 1975* (Cth) s 69R; and *Family Court Act 1997* (WA) s 190.
7. *Status of Children Act 1978* (Qld) s 18C; *Status of Children Act 1974* (Tas) s 8B; *Status of Children Act 1979* (NT) s 9B; *Status of Children Act 1996* (NSW) s 12; *Parentage Act 2004* (ACT) s 10; and *Family Relationships Act 1975* (SA) s 7(c). See also *Status of Children Act 1969* (NZ) s 8(3); *Family Law Act 1975* (Cth) s 69S; and *Family Court Act 1997* (WA) s 191. Court findings are rules of law rather than presumptions.
8. *Status of Children Act 1996* (NSW) s 13; *Status of Children Act 1978* (Qld) s 18D; *Status of Children Act 1979* (NT) s 9A; *Family Relationships Act 1975* (SA) s 7(b); *Status of Children Act 1974* (Tas) s 8C; and *Status of Children Act 1974* (Vic) s 8(2). See also *Status of Children Act 1969* (NZ) s 7(1)(b); *Family Law Act 1975* (Cth) s 69T; and *Family Court Act 1997* (WA) s 192.
9. *Family Law Act 1975* (Cth) s 69P-s 69T. See also *Family Court Act 1997* (WA) s 188-192.
10. See Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2003) at para 35.17-35.19.
11. See Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2003) at para 35.55-35.57. See also P Farnell, *Submission*.
12. *Administration and Probate Act 1929* (ACT) s 49E.

intestate are entitled to a benefit, the parents must have admitted parentage, or had the presumption established against them, in the intestate's lifetime.<sup>13</sup>

7.6 There was some support in consultations and submissions for including the presumptions of parentage among the provisions relating to intestacy.<sup>14</sup> Another submission considered that the presumptions were best left to other enactments in the individual jurisdictions.<sup>15</sup>

#### **Artificially conceived children**

7.7 When a child is artificially conceived, the child's mother and her husband are presumed to be the parents of the child.<sup>16</sup> Paternity will not be imposed unless the procedure was conducted with the husband's consent.<sup>17</sup> The couple need not be married; it is sufficient that they be living together on a *bona fide* domestic basis. In the ACT, NT and WA, the law expressly applies to heterosexual and same-sex couples alike.<sup>18</sup> In the latter case, the law can only apply to lesbian relationships.

7.8 Situations of surrogacy may also need to be taken into account, where a woman carries a child to term, on behalf of another woman, under an arrangement made before the child's birth which sees the assignment of her parental rights to that woman and that woman's partner (who may or may not be the father).<sup>19</sup> The law can experience difficulty in responding to such recent practices.<sup>20</sup> As with artificial conception, it would seem preferable for the intestacy provision to adopt a general approach, leaving the specifics to each jurisdiction.

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13. *Administration Act 1903* (WA) s 12A(2); and *Status of Children Act 1974* (Vic) s 7(1)(b). See also *Status of Children Act 1969* (NZ) s 7(1)(b).
  14. Trustee Corporations Association of Australia, *Submission* at 12; Public Trustee NSW, *Submission* at 10; J North, *Submission* at 4.
  15. Law Society of Tasmania, *Submission* at 11.
  16. *Family Provision Act 1969* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 23; *Status of Children Act 1974* (Vic) Part 2; *Family Relationships Act 1975* (SA) s 10c, s 10d; and *Status of Children Act 1978* (Qld) s 14-17. See also *Status of Children Act 1969* (NZ) s 18; and *Family Law Act 1975* (Cth) s 60H.
  17. *Status of Children Act 1978* (Qld) s 15(2); *Status of Children Act 1979* (NT) s 5D; *Status of Children Act 1974* (Vic) s 10C(2); *Status of Children Act 1996* (NSW) s 14(1)(a); *Family Provision Act 1969* (ACT) s 11(4); *Status of Children Act 1974* (Tas) s 10C(1); and *Artificial Conception Act 1985* (WA) s 6. See also *Status of Children Act 1969* (NZ) s 18(1)(c); and *Human Fertilisation and Embryology Act 1990* (Eng) s 28(2)(b). The requirement of consent may lead to confusion since it would seem that a man will not be the child's father if he does not consent to his wife undergoing the procedure.
  18. *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1979* (NT) s 5DA; and *Artificial Conception Act 1985* (WA) s 6A.
  19. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 56.
  20. See the comments by Bryson J concerning the making of an adoption order in relation to a child who had been born as the result of a surrogacy arrangement: *Re A and B* (2000) 26 FamLR 317 at 321.

## National Committee's conclusion

7.9 There is a danger that any general provisions relating to parentage may, over time, become inconsistent with the various other State and Commonwealth provisions. The Committee, therefore, considers that the provisions relating to presumptions of parentage do not need to be included in the model laws.

## CHILDREN NOT YET BORN (EN VENTRE SA MERE)

7.10 A child *en ventre sa mere* is a child that, although conceived or implanted in its mother's uterus, has not yet been born at the relevant time, namely the death of the deceased.

### Rights of children not yet born

7.11 At common law, a child *en ventre sa mere* when the intestate dies, once born, is entitled to take his or her share of the estate.<sup>21</sup> The issue of children *en ventre sa mere* is relevant not only to children of the intestate, but applies also to more distant descendants of an intestate, such as grandchildren and great grandchildren and also, conceivably, to collateral relatives such as siblings, cousins and even aunts and uncles,<sup>22</sup> who may have been conceived but not yet born at the time the intestate died.

7.12 Allowing children *en ventre sa mere* to take on intestacy can be justified, at least in relation to children of the intestate, on the grounds that a parent owes all of his or her children a duty, including those conceived but not born. (Note this argument is strictly irrelevant to most cases under our proposals since the surviving spouse will receive everything, unless there are children of another relationship.)

7.13 Posthumous children can also be included on the basis that such a person must be born within the executor's year and, therefore, will not unduly delay the administration of the estate.<sup>23</sup>

7.14 Some jurisdictions have restated the common law position. For example, NSW provides that references "to a child or issue living at the date of death of any person shall be construed as including references to any child or issue who has been conceived and not born at that date but who is subsequently born alive".<sup>24</sup> Victoria provides that "references to a child or issue living at the death of any person include a child or issue *en*

21. *Ball v Smith* (1698) 2 Freeman 230; 22 ER 1178; *Wallis v Hodson* (1740) 2 Atk 114; 26 ER 472; *Burnet v Mann* (1748) 1 Ves Sen 156; 27 ER 953.

22. Notwithstanding that the intestate does not owe a "debt of nature" to his or her collateral relatives: see *Wallis v Hodson* (1740) 2 Atk 114 at 116; 26 ER 472 at 473.

23. A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 12. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 419.

24. *Wills, Probate and Administration Act 1898* (NSW) s 61A(3).

*ventre sa mere* at the death".<sup>25</sup> Tasmania makes similar provision,<sup>26</sup> while Queensland adds that the child *en ventre sa mere* at the death of the intestate must remain alive for a period of 30 days.<sup>27</sup>

7.15 Another version is that adopted by the Uniform Law Conference of Canada:

*kindred of the intestate conceived before his death but born thereafter inherit as if they had been born in the lifetime of the intestate.*<sup>28</sup>

7.16 The Law Reform Committee of South Australia considered that it was necessary to restate the law in relation to posthumous children in case a court were to construe "the new Act as a code on intestacy" and "might think that an omission to restate this rule was intentional".<sup>29</sup>

7.17 The above position is problematic in the case of some artificial reproductive techniques which may result in children who have not yet been conceived or who have been conceived before death but not implanted until some time afterwards. This issue is discussed below.<sup>30</sup>

#### **National Committee's conclusion**

7.18 The National Committee considers that, for the sake of clarity, the law relating to rights of children *en ventre sa mere* at the death of the intestate, and who are subsequently born, should be restated in the model laws.

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#### **Recommendation 24**

Persons conceived before the death of the intestate but born after should inherit as if they had been born in the intestate's lifetime.

See Intestacy Bill 2006 cl 4(2)(b), cl 9.

## **Presumptions of parentage**

7.19 While the law establishes the rights of a child that is born posthumously, it is also necessary to establish the parentage of a child so born. This is generally achieved in the Australian jurisdictions by relevant sections of the status of children legislation.

7.20 Children will be presumed to be the issue of the intestate husband if the wife gives birth within a period ranging from 10 months<sup>31</sup> to 44 weeks<sup>32</sup> after the husband's death (in

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25. *Administration and Probate Act 1958* (Vic) s 5(2).

26. *Administration and Probate Act 1935* (Tas) s 3(2).

27. *Succession Act 1981* (Qld) s 5A. On the 30 day survivorship rule, see ch 11.

28. Uniform Intestate Succession Act, s 1(4)(b) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 284.

29. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 10.

30. See para 7.21-7.32.

31. *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; *Status of Children Act 1969* (NZ) s 5(1).

the absence of evidence to the contrary). These time limits have been used, traditionally, to ensure that the issue is indeed that of the relevant person. Today, more reliable means of testing paternity can be employed where necessary.

## Delayed conception and suspended gestation

7.21 Advances in human artificial reproductive technology have rendered current provisions for children *en ventre sa mere* inadequate to deal with all the possible situations where a child of the deceased is born after the deceased's death. These situations include cases where, for example, the sperm of the deceased has been removed and stored either before or after his death<sup>33</sup> and inseminated after death (posthumous or post mortem conception) or where insemination has already taken place before death but the resulting zygote or embryo is frozen and only placed in the uterus after death.

7.22 An example of such a situation may be found in a 1996 Tasmanian case in which a husband died intestate leaving two frozen embryos which had been produced by him and his wife as part of an *in vitro* fertilisation program. The deceased was survived by his wife and four children. The embryos were fertilised ova that had been frozen before they began to divide into cells (zygotes). The questions before the Court were whether the zygotes were living issue at the date of the intestate's death, and whether they became issue on being born alive. The judge held that zygotes were not actually living at the date of the deceased's death. The rights that attach to the unborn zygotes are contingent on being born alive. The Court held that a zygote would become a child of the deceased on being born alive. No reason could be seen for differentiating between zygotes and children *en ventre sa mere*.<sup>34</sup>

7.23 Legislation and codes of practice in various jurisdictions may have an impact on whether children can be conceived after the death of a parent. For example, in Victoria, the use by a surviving spouse or partner of gametes from the deceased or the transfer of embryos formed from the gametes of the deceased may not be possible on account of consent requirements and the requirement that the couple be living together at the time the procedure is carried out.<sup>35</sup> Various codes of practice also prevent the use of artificial reproductive technologies in certain circumstances where one partner has died:

*Directions under the Western Australian Act state that no consent given by a gamete provider may include a consent for the posthumous use of the gametes. A person must not knowingly use gametes in an artificial fertilisation procedure after the death of the gamete provider. The South*

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32. *Status of Children Act 1978* (Qld) s 18A(2); *Status of Children Act 1996* (NSW) s 9(2); *Status of Children Act 1974* (Tas) s 5(2)(b); *Status of Children Act 1979* (NT) s 4A(2); and *Family Provision Act 1969* (ACT) s 7.

33. For examples of applications for post mortem removal of reproductive material, see *Re Denman* [2004] 2 QdR 595; and *Y v Austin Health* (2005) 13 VR 363.

34. *Re the Estate of the Late K* (1996) 5 Tas R 365 (Slicer J). See also D Clark, "En ventre sa frigidaire: Zygotes as children" (1996) *Alternative Law Journal* 165.

35. *Infertility Treatment Act 1995* (Vic) s 8, s 12. See, eg, *Y v Austin Health* (2005) 13 VR 363.



*Australian Code of Practice states that a licensee must dispose of an embryo that is kept in storage for future use of a couple if either member of the couple dies, unless the storage consent specifies how an embryo is to be dealt with or disposed of in the event of death, in which case the licensee must deal with the embryo or dispose of it in accordance with those conditions.*<sup>36</sup>

7.24 On the other hand, in the United Kingdom, a recent enactment has allowed that a man may be treated as the father of a child conceived or implanted as an embryo after his death provided he has previously consented in writing to such procedures being carried out after his death.<sup>37</sup>

#### **Law reform developments**

7.25 In 1986, the New South Wales Law Reform Commission considered the question of posthumous conception in so far as it affected the rules of distribution on intestacy.<sup>38</sup> The Commission noted the practical difficulty that could arise where the deceased parent's estate was either wholly or partly distributed after the date of conception or birth of the artificially conceived child. It therefore recommended that any child so conceived should not be entitled to participate in the distribution of the deceased parent's estate. It was considered that this would remove the need for the personal representative to enquire into the "possibility of the subsequent birth of persons who... will be regarded as children of the deceased".<sup>39</sup> The Commission, however, also recommended that any children born as a result of such procedures should be entitled to make an application for family provision on the basis that the complexity of such an application (involving tracing to beneficiaries) was outweighed by the rarity of such cases.

7.26 A United Kingdom Committee of Inquiry into Human Fertilisation and Embryology which reported in 1984 recommended that any child born by artificial conception who was not *in utero* at the date of death of his or her father should be "disregarded for the purposes of succession to and inheritance from the latter".<sup>40</sup> The Committee also considered that posthumous conception was a practice that ought to be "actively discouraged".

7.27 The Ontario Law Reform Commission, on the other hand, preferred to give the posthumously conceived child, so far as possible, the same rights of inheritance as though the child were conceived in the deceased's lifetime. The Commission did not consider it practical to allow for the postponement of distribution or the upsetting of distributions already made but instead recommended that:

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36. NSW Department of Health, *Review of the Human Tissue Act 1983 - Discussion Paper: Assisted Reproductive Technologies* (1998) at para 6.5.

37. *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK) s 1.

38. NSW Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.6-12.12.

39. NSW Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.9.

40. United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) at para 10.9.

*a posthumously conceived child of a husband should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is en ventre sa mere, as if the child were conceived while the husband was alive.*<sup>41</sup>

### **Arguments for and against**

7.28 The above position is problematic in the case of some artificial reproductive techniques. These may have the effect of delaying birth (or, indeed, further births) well beyond the period of 10 months from the death of the intestate. This could lead to delays and complexity in the administration of a deceased estate, especially when the number of people in a generation have to be determined for the purposes of *per stirpes* distribution. The problem could be compounded further when dealing with collateral kin of the intestate.

7.29 It may, therefore, be preferable to adopt the simple approach of disregarding for the purposes of intestate succession any child born by means of artificial reproductive technologies where the child was not *en ventre sa mere* at the death of the intestate.

7.30 In any case, it can be argued that the giving of the whole of the intestate estate to the surviving spouse or partner will, in the normal course of events, ensure that any child so born is adequately provided for.<sup>42</sup>

### **Submissions**

7.31 Some submissions considered it important that personal representatives be able to complete the administration of the estate and so proposed that a fairly short time limit be incorporated into the rules. One proposed a 10 month/44 week period<sup>43</sup> while some proposed a period of no more than 12 months.<sup>44</sup> This would effectively mean that the child would need to have been in the uterus at the date of the death of the intestate or shortly thereafter.

### **National Committee's conclusion**

7.32 Options for dealing with the problem of children born more than 10 months after the death of the intestate include:

- giving no express recognition to the problem (and leaving it to judges to deal with on an *ad hoc* basis);<sup>45</sup>
- making no provision other than to provide for an ultimate limit of a fixed period after the death of the intestate, for example, one or two years;
- disregarding such children when distributing an intestate estate.

41. Ontario Law Reform Commission, *Human Artificial Reproduction and Related Matters* (Report, 1985) vol 2 at 182.

42. See Trustee Corporations Association of Australia, *Submission* at 13.

43. Trustee Corporations Association of Australia, *Submission* at 13.

44. Public Trustee of Queensland, *Submission* at 3; Public Trustee NSW, *Submission* at 11.

45. See *Sydney Consultation 1*.

The National Committee considers that the simplest answer is to exclude them, by requiring that they be in the uterus at the intestate's death.

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#### Recommendation 25

The model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy.

See Intestacy Bill 2006 cl 9(1)(b).

## STEP-CHILDREN

7.33 The following paragraphs deal with step-children of the intestate. Children of another relationship of the intestate, that is, step-children of the surviving spouse or partner, are considered in the context of the surviving spouse's share.<sup>46</sup> Step-children who have been adopted by their step-parent are considered later in this chapter.<sup>47</sup>

7.34 At common law, with the exception of the spouse of an intestate, a person related only by marriage is not entitled to share in the estate of the intestate.<sup>48</sup> Step-children of the intestate, therefore, are not entitled to a share in the intestate's estate.<sup>49</sup> It was therefore the case, before the introduction of adequate family provision legislation, that:

*if a man accepted full responsibility for his wife's children by a previous marriage without a formal adoption, those children had no rights against his estate.*<sup>50</sup>

7.35 It should also be noted that, at common law, step-children cease to be step-children of the step-parent upon the death of the natural parent.<sup>51</sup> This means that if the natural parent dies, the child ceases to be a step-child of the surviving spouse, even if the child continues to be part of the surviving spouse's domestic arrangements.

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46. See para 3.53-3.63.

47. See para 7.47-7.59.

48. S Toller, *The Law of Executors and Administrators* (3rd ed, J Butterworth and Son, London, 1814) at 385.

49. *Re Leach (deceased)* [1985] 2 All ER 754 at 759.

50. *Re Leach (deceased)* [1985] 2 All ER 754 at 759. See also K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23. A child adopted by a husband and wife is, in the event of divorce and the wife remarrying, a step-child of the wife's second husband: *Re O'Malley (dec'd)* [1981] Qd R 202.

51. See *Re Burt* [1988] 1 QdR 23. See also M Wall, "Who is a step-child?" (2005) 17(1) *Australian Superannuation Law Bulletin* 1 at 1; K Mackie, "Stepchildren and succession" (1997) 16 *University of Tasmania Law Review* 22 at 35-36.

## Arguments for and against

7.36 It can be argued that the number of step-children in the general community has increased with the higher incidence of parents divorcing and subsequently remarrying, and that:

*the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their biological parents.*<sup>52</sup>

It may, therefore, be considered unfair that step-children are excluded from intestacy provisions when natural children are included.<sup>53</sup>

7.37 However, in considering the question of step-children, it must be borne in mind that step-children of an intestate may well have two living natural parents. Some of the discussions around this point assume that one natural parent has died or otherwise removed themselves entirely from any responsibility for his or her offspring and the step-parent has chosen to be at least partly responsible for the upbringing of the step-child. An equally, if not more likely scenario, however, is that a person will become a step-child upon the remarriage of a parent after divorce.

7.38 Any attempt to limit the category of step-children to those who are dependent upon the step-parent, or who are under 18 years of age, would be undesirable. It could be seen as arbitrary on the basis of age. It may also require investigations as to whether the step-children were in fact dependent upon the step-parent or whether the step-children had been treated as children of the deceased. This would lead to greater uncertainty in the administration of intestate estates.<sup>54</sup>

7.39 If there is a dependency, it is more appropriately addressed in an application for family provision rather than allowing it to confuse unnecessarily distributions upon intestacy.<sup>55</sup> This is recognised in some jurisdictions in so far as step-children may now bring proceedings for family provision.<sup>56</sup> The National Committee's proposed *Family*

52. K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23.

53. See *Melbourne Consultation*.

54. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 49; England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 24.

55. See Trustee Corporations Association of Australia, *Submission* at 12. See other arguments relating to dependency, at para 3.64-3.66.

56. *Succession Act 1981* (Qld) s 40, s 40A; *Family Provision Act 1969* (ACT) s 7; *Family Provision Act 1970* (NT) s 7; *Testator's Family Maintenance Act 1912* (Tas) s 2(1) paragraph (b) to the definition of "child", s 3A; *Family Protection Act 1955* (NZ) s 3; and *Administration and Probate Act 1958* (Vic) s 91(1), as "a person for whom the deceased had responsibility to make provision". See also M Wall, "Who is a step-child?" (2005) 17(1) *Australian Superannuation Law Bulletin* 1 at 2; R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed,

*Provision Bill 2004* expressly states that a non-adult child of the deceased, for the purposes of automatic eligibility for family provision, “does not include a step-child of the deceased person”,<sup>57</sup> but leaves a step-child, whether under the age of 18 or not, to apply as a person to whom the deceased person “owed a responsibility to provide maintenance, education or advancement in life”.<sup>58</sup>

7.40 There are other considerations to be taken into account. First, if step-children were to be entitled in intestacy, in some cases they could be seen as benefiting from a form of “double dipping”. This is because, in addition to receiving a share of the intestate’s estate, they could potentially be beneficiaries under each natural parent’s will, or entitled to take upon their intestacy, and also potentially entitled, upon intestacy, to a share from the estate of any further spouses of their natural parents. Secondly, it is possible that a step-parent may be estranged from or never even have met his or her step-child, especially if the marriage has taken place after the step-child has become an adult.

## Law Reform developments

7.41 The English Law Commission considered expanding the definition of issue to include “children of the family” but rejected any provision on the grounds of “double dipping” and complexity.<sup>59</sup>

7.42 The Law Reform Commission of Tasmania in 1985 considered that a scheme of family provision was the more appropriate way to ensure that dependants of an intestate were adequately provided for.<sup>60</sup>

7.43 The Alberta Law Reform Institute, while acknowledging the position of step-children who may know of no other father or mother than their step-parent, concluded “the relationships between step-parents and step-children vary too much to support a generalization that the majority of step-parents would want their stepchildren to share in

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LexisNexis Butterworths, Australia, 2003) at 74. In NSW some step-children may make application as persons who were “at any particular time, wholly or partly dependent upon the deceased person, and ... was a that particular time or at any other time, a member of the household of which the deceased person was a member”: *Family Provision Act 1982* (NSW) s 6. See, eg, *Marshall v Public Trustee* [2006] NSWSC 402.

57. Family Provision Bill 2004 cl 6(2) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

58. Family Provision Bill 2004 cl 7(1) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

59. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 49.

60. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 17.

their estate”.<sup>61</sup> The Institute also observed that intestacy provisions “cannot address all the permutations that need to be addressed” in such cases.<sup>62</sup>

## Submissions and consultations

7.44 Opinions expressed in submissions and consultations generally rejected any idea of providing for step-children of an intestate by way of distribution on intestacy.<sup>63</sup>

## National Committee’s conclusion

7.45 There should be no recognition for step-children of the intestate for reasons of simplicity and certainty.

7.46 If the more general approach of allowing the whole estate of an intestate to go to the surviving spouse even when there are issue surviving is adopted,<sup>64</sup> the step-children of the intestate would most likely be cared for by the surviving spouse, usually their natural parent.

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### Recommendation 26

Step-children of the intestate should not be recognised for the purposes of intestacy.

## STEP-PARENT ADOPTIONS

7.47 In Australia, the effect of adoption is generally that the adopted child becomes a full member of the adopting parents’ family and that, in the eyes of the law, all prior familial relationships cease to exist. In most jurisdictions, this effect applies equally to intestacy as it does to all other circumstances, so that adopted children are not entitled to take a share of a biological relative’s estate upon intestacy.<sup>65</sup>

7.48 However, NSW and SA make special provision for situations where a biological parent has died and the surviving parent establishes a new relationship with a person who then agrees to adopt the child of the previous relationship. In these cases, the property of any next of kin of the deceased parent can devolve on the child as if the adoption had never taken place.<sup>66</sup>

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61. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 137.

62. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 125.

63. Probate Committee, Law Society of SA, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 12; Public Trustee NSW, *Submission* at 10; W V Windeyer, *Submission* at 4; *Melbourne Consultation*. But see *Melbourne Consultation*.

64. See para 3.73-3.76 and Recommendation 4.

65. See, eg, *Adoption Act 1984* (Vic) s 53(1); *Adoption of Children Act 1964* (Qld) s 28.

66. *Adoption Act 2000* (NSW) s 97; *Adoption of Children Act 1966* (SA) s 30(3).

7.49 The current arrangements in NSW and SA, contained as they are in adoption of children legislation, will produce an anomalous result in any national intestacy regime. Children who are subject to a “step-adoption” will be able to take on the intestacy of next of kin of their deceased parent in some jurisdictions, but not in others.

7.50 Step-adoptions, although not common, and decreasing in number, continue to occur in Australia.<sup>67</sup> In 2002-2003, 72 step-parents adopted their step-children. However, it is not clear how many of these step-parent adoptions arose from the death of one of the natural parents. Three of the step-children were aged 1-4 years, 28 (39%) were aged 5-9, 25 (35%) were aged 10-14, and 16 (22%) were over 15. The number of step-adoptions is decreasing steadily. In 1998-1999, there were 116 step-adoptions. Figures for “relative” adoptions (which includes other relatives as well as step-parents) show that there were 605 relative adoptions in 1987-1988 but only 154 in 1997-1998.<sup>68</sup> Some of the more recent decline is probably due to the fact that NSW now restricts step adoptions to children who are at least five years old and with whom the step-parent has lived for at least three years.<sup>69</sup>

## Law reform developments

7.51 This situation has not often been considered in the context of the law of intestacy. The Uniform Law Conference of Canada considered and adopted a proposal that “the adoption of a child by a spouse of a natural parent does not terminate the relationship of parent and child between the child and either natural parent for purposes of succession”.<sup>70</sup> American States that have adopted the Uniform Probate Code also have a provision that preserves the familial relationships of an adopted child in the case of step-adoption, at least so far as the adopted child’s ability to inherit from his or her natural parents:<sup>71</sup>

*An adopted individual is the child of an adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on ... the right of the child or a descendant of the child to inherit from or through the other natural parent.*<sup>72</sup>

It should be noted that these North American examples go further than their Australian counterparts in that the death of a natural parent is not required. The adoption by the step-

67. Australian Institute of Health and Welfare, *Adoptions Australia 2002-2003* (Child Welfare Series No 33) at 20-22.

68. The 1987-1988 figures should be larger since before 1994-1995, NSW data excluded step-parent adoptions.

69. *Adoption Act 2000* (NSW) s 30.

70. Uniform Intestate Succession Act s 1(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 214. See also Uniform Intestate Succession Act s 1(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 284.

71. The natural parents and their families, however, do not have a right to inherit from the adopted child: Uniform Probate Code s 2-114 (comment).

72. *Montana Code Annotated 2005* s 72-2-124(2). See Uniform Probate Code s 2-114(b). See also J E Rein, “Relatives by Blood, Adoption, and Association: Who Should Get What and Why” (1984) 37 *Vanderbilt Law Review* 711 at 730-731.

parent can take place in the context of the previous relationship having ended for other reasons, such as divorce or separation.

7.52 In contrast, the Alberta Law Reform Institute considered Alberta's existing law, which denies any connection with the person's biological family,<sup>73</sup> to be "adequate", finding that there appeared to be no problem.<sup>74</sup>

## Arguments for and against

7.53 Step-parent adoption provisions would appear to have arisen because of the greater potential for children to retain or re-establish some form of social contact with the family of their other natural parent.<sup>75</sup> For example, upon the death of a parent, a child may well be of an age to have established a relationship with his or her grandparents and this relationship may continue, notwithstanding the surviving natural parent's new relationship.<sup>76</sup> On the other hand, not all adopted children in such circumstances will remain in contact with their former parent's family. This may be even less likely in the case of divorce or separation of the natural parents. Retaining intestacy rights with respect to prior family relationships may lead to unnecessary complications in some deceased estates where personal representatives must locate persons who have been adopted out of the family.<sup>77</sup>

7.54 Provisions of the type outlined above may also lead to "double dipping" with a person becoming entitled to inherit from the estates of family of both the former parent and the new adoptive parent.<sup>78</sup>

7.55 It has also been suggested that the question of inheritance in such cases is best dealt with in the context of the adoption process. In 1997, the NSW Law Reform Commission observed:

*In considering securing the right to benefit automatically from the step-parent's estate, the loss of rights to benefit from the relinquishing parent's estate, and possibly the estates of other members of the relinquishing parent's family, has to be taken into account. The adults involved should*

73. See *Re Matthews Estate* (1992) 1 Alta LR (3d) 198.

74. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 136.

75. See Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 214-217. On the issues surrounding step-parent adoption, see also NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at para 4.23-4.88.

76. See J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 729-731.

77. J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 730.

78. J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 725.



*attend carefully to the consequences of this for the child and, where appropriate, the child should be counselled on these consequences.*<sup>79</sup>

## National Committee's conclusion

7.56 There are two broad options available. First, leave the law as it is in the majority of Australian jurisdictions, that is, the previous family relationships should have no recognition at law. Secondly, include a provision along the lines of those contained in the NSW and SA adoption legislation, or even the North American models.

7.57 Desirable though the second option may be in that it recognises what may well be a continuing social connection with the family of the child's deceased parent, this approach leads to other problems.

7.58 As already noted, step-parent adoptions, while not frequent, do occur in Australia. However, the National Committee considers that the consequences of such adoptions are best considered and dealt with in the individual cases in the context of the adoption process itself. This approach is preferable to trying to frame a provision for the intestacy rules that will meet even the majority of such cases.

7.59 The National Committee considers that, in the case of adoption (including a step-parent adoption), the previous family relationships should have no recognition at law for the purposes of inheritance on intestacy. For the sake of uniformity across all Australian jurisdictions, an express provision to this effect should be included in the model provisions.

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79. NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at para 4.66.

**Recommendation 27**

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Where a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy.

See Intestacy Bill 2006 cl 10.

## 8. Next of kin – preliminary issues

- Per stirpes or per capita distribution?
- Persons entitled in more than one capacity
- Relationships between siblings

8.1 This chapter considers a number of issues that are generally relevant to the distribution of an intestate's estate to the next of kin.

## PER STIRPES OR PER CAPITA DISTRIBUTION?

8.2 If some people within a group of those who are entitled to take on intestacy die, their descendants are sometimes entitled to take their share. The situations in which this can occur differ from jurisdiction to jurisdiction. Mostly, this will occur where there are surviving issue of deceased children of the intestate or where there are surviving children or issue of siblings or aunts and uncles of the intestate.

8.3 There are two ways in which the distribution to descendants can be managed. The distribution can be either *per stirpes* (by stock) or *per capita* (by head). Intestate distribution is generally *per stirpes*.

8.4 *Per stirpes* distribution means that the entitlement of descendants will be determined by the entitlement of those who have predeceased them and would otherwise have been entitled to take. For example, the grandchildren of an intestate will only take proportionately among themselves the share that their deceased parent would have taken if he or she were alive.

8.5 On the other hand *per capita* distribution gives each person an equal share regardless of the degree of his or her descent. For example, the grandchildren of an intestate whose parent has predeceased the intestate will take in equal shares together with the other surviving children of the intestate.

## Current Australian provisions

8.6 Currently, where representation among descendants is permitted, distribution is generally *per stirpes*, with *per capita* distribution permitted in SA and Victoria in certain limited circumstances:

- In SA, the nephews and nieces of the intestate take as if they were issue of the intestate if all the intestate's siblings are dead, and the first cousins of the intestate take as if they were issue of the intestate if all the intestate's aunts and uncles are dead.<sup>1</sup> This is effectively a *per capita* distribution, so long as none of the nieces and nephews or cousins have died leaving issue.
- In Victoria, the nephews and nieces of the intestate take *per capita* if all the intestate's siblings are dead.<sup>2</sup>

8.7 The Victorian and SA variations are an attempt to achieve a more equitable distribution where the people entitled to take on intestacy are the nearest surviving generation to the intestate. For example, one sibling may have one child but another sibling may have three children. If both siblings die before the intestate, a *per stirpes*

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1. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).
  2. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi). This was also the case in Manitoba: See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 27; and Alberta: See *Intestate Succession Act* RSA 1980 c I-9 s 7.

distribution would give one half to the single child and the other half to be shared equally between the other three children. This means that some nieces and nephews of the intestate will receive more than others, even though they are all of the nearest surviving generation to the intestate. A limited *per capita* distribution among the surviving nephews and nieces ensures a more equitable distribution, with each one receiving a one-quarter share.

8.8 The current Australian provisions appear illogical in only allowing the descendants of collaterals to take *per capita*. Some would argue that there is no reason in principle why the issue of the intestate should not also take *per capita* if, for example, all the intestate's children were to die leaving only grandchildren.

## Law reform developments

### Queensland

8.9 In 1978, the Queensland Law Reform Commission recommended the adoption of *per capita* distribution in situations where all the persons entitled were of the same degree of relationship.<sup>3</sup> In making this recommendation, Queensland was following recommendations made by the Ontario Law Reform Commission in 1974<sup>4</sup> and the text of the US *Uniform Probate Code*.<sup>5</sup> The Queensland recommendations were enacted in 1981.<sup>6</sup> However, problems were encountered, particularly in identifying all persons within the same degree of relationship.<sup>7</sup> The provisions were repealed in 1997<sup>8</sup> following further recommendations by the Queensland Law Reform Commission.<sup>9</sup>

### England and Wales

8.10 The Law Commission of England and Wales in 1989 made no recommendation for the introduction of *per capita* distribution, observing that there was “little public call for change in the method of distribution”.<sup>10</sup>

### Canada

8.11 Some law reform agencies in Canada have proposed amendments to the system of *per stirpes* distribution. In 1967, the Ontario Law Reform Commission floated the possibility that issue, where they are of the “same kindred” (for example, all grandchildren) should take their shares *per capita*.<sup>11</sup> The Commission, in its 1974 report, adopted this

3. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
4. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 167-168.
5. *Uniform Probate Code* s 2-103 (as at 1985).
6. See *Succession Act 1981* (Qld) s 36 (repealed).
7. Succession Law Section, Queensland Law Society, *Consultation*.
8. *Succession Amendment Act 1997* (Qld) s 9.
9. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 58.
10. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 48. See also England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 3.17 and para 5.8.
11. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 581 (rev).

proposal and extended it to apply *per capita* distribution where the surviving collateral relatives were all of the same degree.<sup>12</sup> This recommendation was adopted in 1978 so that, in Ontario, the estate is now divided initially at the generation closest to the intestate that has at least one surviving member.<sup>13</sup>

8.12 On the other hand, the Law Reform Commission of British Columbia, in 1983, concluded that amendment of the current law was “not called for”, on the basis that arguments for and against limited *per capita* distribution were “equally balanced, and preference is largely a subjective matter”.<sup>14</sup>

8.13 In more recent times, some have considered even more complex “*per capita* at each generation” schemes, whereby the shares of any predeceased persons in one generation are combined and shared *per capita* amongst their survivors in the next generation.<sup>15</sup> The aim is, first, to achieve equality between those entitled to take in each generation and, secondly, to avoid a person from a more remote generation to the intestate becoming entitled to a greater share than a person from a closer generation. So, for example, a surviving great grandchild of the intestate cannot take more than any grandchild of the intestate who is also entitled.

8.14 Manitoba adopted this system in 1988.<sup>16</sup> A limited system of *per capita* distribution was already in place in Manitoba in 1985 so that nephews and nieces of the intestate took *per capita* when all the intestate’s brothers and sisters had predeceased him or her.<sup>17</sup> The Manitoba Law Reform Commission proposed further amendments to the system so as to “ensure the equal treatment of grandchildren when no children of the intestate survive” and to “achieve a result likely supported by a majority of Manitobans”.<sup>18</sup> The Manitoba Commission finally recommended the employment of a “*per capita* at each generation” scheme so as to “produce the best, and most logically consistent, result in most survivor situations”.<sup>19</sup>

#### **United States Uniform Probate Code**

8.15 In 1990, the National Conference of Commissioners on Uniform State Law adopted a similar system of *per capita* distribution at each generation in their revised *Uniform Probate Code*.<sup>20</sup> The Commissioners observed that this system “is more responsive to the

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12. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 168.

13. See *Succession Law Reform Act* RSO 1990 c S-26 s 47(1) and s 47(2).

14. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38.

15. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 39-42.

16. *Intestate Succession Act* CCSM c I-85 s 5.

17. *Devolution of Estates Act* CCSM c D-70 s 8(3). See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 27.

18. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 39.

19. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 42.

20. Uniform Probate Code s 2-106(b).

underlying premise of the original UPC system, in that it always provides equal shares to those equally related”.<sup>21</sup>

## Arguments for and against

8.16 There are many models available for implementing *per capita* and *per stirpes* distribution schemes. The Alberta Law Reform Institute has suggested that “there is no public policy argument favouring one system over another” and preferred to adopt the model that best reflected the “views of the majority of its citizens”.<sup>22</sup> As noted above, some law reform agencies have concluded that no change from *per stirpes* distribution is warranted.

### ***Per stirpes distribution***

8.17 In general, *per stirpes* distribution of an estate can be justified on the grounds that it would replicate the distribution that would generally occur if the person entitled had died after the intestate. That is, the estate would most likely go to his or her surviving children, and so on.<sup>23</sup> It can also be justified on the grounds of convenience of administration,<sup>24</sup> particularly since it allows the personal representatives to reserve the shares of “missing” relatives and to make interim distributions to relatives who are known.<sup>25</sup>

8.18 However, there are also said to be some problems with *per stirpes* distribution. First, it treats people of the same generation unequally, depending upon the number of siblings they have.<sup>26</sup> So, for example, a grandchild of the intestate who is the only child of his or her deceased parent will receive a greater share than another grandchild whose parent is dead but who also has surviving siblings.<sup>27</sup> Some trustee companies have reported receiving queries from people who have inherited less than their cousins from the same estate.<sup>28</sup> Secondly, a descendant of remoter degree may potentially receive more than a descendant of closer degree. For example, a surviving great grandchild of the intestate who is the only child of an only child would receive more than a surviving grandchild of the intestate who has three living siblings.<sup>29</sup>

21. Uniform Probate Code s 2-106 (Comment).

22. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 144.

23. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 139-140.

24. G Clarke, “Succession - Amendments to the Intestacy Rules Including De Facto Recognition” (1997) 17(11) *Proctor* 18 at 19. See also para 8.24-8.25 below.

25. Trustee Corporations Association of Australia, *Submission* at 14.

26. See, eg, G Clarke, “Succession - Amendments to the Intestacy Rules Including De Facto Recognition” (1997) 17(11) *Proctor* 18 at 19.

27. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 140.

28. Trustee Corporations Association of Australia, *Submission* at 14.

29. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 140.

***Per capita distributions***

8.19 *Per capita* distributions include limited *per capita* distributions, for example, where all of one generation are dead and have left issue who can take, as well as more extensive schemes, for example, *per capita* distribution at each generation.

8.20 Such schemes are generally seen as a way of removing the unequal distribution that is said to result in some cases from a strict *per stirpes* distribution.

8.21 It can be argued, for example, that where a person is survived only by grandchildren, that person would most likely want to distribute the estate in equal shares, that is *per capita*, rather than *per stirpes*.<sup>30</sup> In 1987, the joint editorial board of the Uniform Probate Code conducted a survey of clients of members of the American College of Probate Counsel. The majority of those surveyed (71/1%) preferred a system of *per capita* distribution at each generation. The survey also found that there was a “striking difference between what lawyers believe their clients want..., and what the clients themselves want”. Responses from the lawyers themselves indicated a preference for advising clients to use a traditional *per stirpes* method to distribute their estate.<sup>31</sup> Based on this survey and other surveys in North America,<sup>32</sup> the Alberta Law Reform Institute has recently argued that most Albertans would prefer a *per capita* distribution at each generation.<sup>33</sup> The Alberta proposals for *per capita* distribution at each generation were said to bring that province closer to the goal of a “system that represents what most people would want to do in a given situation”.<sup>34</sup>

8.22 If all of one generation have predeceased the intestate, there would appear to be no valid reason why some of their children should receive less if they are from a family with more siblings than some of the others. In 1978, the Queensland Law Reform Commission considered that the unequal distribution arising from a *per stirpes* distribution in such circumstances was “unwarranted”.<sup>35</sup>

8.23 On the other hand, provisions such as those in Victoria and South Australia may be seen as arbitrary. For example, it can be argued that there is no reason why the share of a grandchild of the deceased should depend on whether any of that grandchild’s aunts or uncles are still alive.<sup>36</sup> Even if one were to accept that *per stirpes* distribution is unfair where all of the nearest generation have predeceased the intestate, it is arguably equally

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30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 168.

31. R H Young, “Meaning of ‘Issue’ and ‘Descendants’” (1988) 13 *Probate Notes* 225.

32. See, eg, “Iowans’ Dispositive Preferences” (1978) 63 *Iowa Law Review* 1041 at 1111 and 1146; and M L Fellows, R J Simon, T E Snapp and W D Snapp, “An Empirical Study of the Illinois Statutory Estate Plan” [1976] *University of Illinois Law Review* 717 at 741.

33. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 145.

34. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 147.

35. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.

36. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38.



unfair when, for example, someone in the nearest generation survives and there is still an unbalanced distribution among the children of his or her deceased siblings.

8.24 It is possible that any system involving *per capita* distribution may be productive of extra expense and delay in the administration of estates.<sup>37</sup> For example, distribution may be delayed if the administrator is unable to trace the descendants of one branch of a family. This is because *per capita* distribution requires the identification of all members of a class before distribution can take place.<sup>38</sup> The problem is likely to be exacerbated the more distant the family connections become.<sup>39</sup>

8.25 Indeed, schemes that seek to go further by imposing *per capita* distribution at each generation would introduce an unwarranted level of complexity and delay beyond that already involved in an ordinary *per stirpes* distribution. This is especially so in cases where some potential beneficiaries cannot be traced immediately.

8.26 Some would argue that schemes such as that in Manitoba should not be adopted because they involve such a minor change of result in such a limited range of circumstances that the “argument of fairness is not so compelling”.<sup>40</sup>

## Submissions and consultations

8.27 Some submissions addressed the question of *per stirpes* or *per capita* distribution in the context of distribution to siblings and their descendants. One of these supported the issue taking *per stirpes* their parent’s entitlement, preferring *per stirpes* to *per capita* distribution for reasons of equitable distribution.<sup>41</sup> Others, however, supported the idea of the children of deceased brothers and sisters taking *per capita* the interest of all deceased brothers and sisters.<sup>42</sup>

8.28 Other submissions considered that *per capita* distribution ought to be employed where cousins of the intestate stand to inherit.<sup>43</sup>

8.29 One submission expressed a variety of views but tended towards applying *per stirpes* distribution to all intestacies on the grounds of simplicity.<sup>44</sup> Other submissions supported *per stirpes* distribution for reasons of “equitable distribution”<sup>45</sup> or because it

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37. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 48.

38. See Succession Law Section, Queensland Law Society, *Consultation*.

39. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 57-58.

40. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 147 n 396.

41. Public Trustee NSW, *Submission* at 12.

42. J North, *Submission* at 4-5; Law Society of Tasmania, *Submission* at 12.

43. Tasmania, Office of the Public Trustee, *Consultation*; J North, *Submission* at 5.

44. Trustee Corporations Association of Australia, *Submission* at 14.

45. Public Trustee NSW, *Submission* at 11.

allows interim distributions to take place when known family members cannot be traced immediately.<sup>46</sup>

## National Committee's conclusion

8.30 The current variations in Victoria and SA are illogical in that they only extend to the descendants of some collateral relatives and not to descendants of the children of the intestate.

8.31 Even if the provisions were to extend to all cases of representation, the application of *per capita* distribution only when the whole of one generation has predeceased the intestate appears to be arbitrary. Inequitable results can be achieved in cases where only some of the elder generation are dead.

8.32 The National Committee acknowledges that a majority of people would probably prefer the equality achieved by a system of *per capita* distribution at each generation. However, it should be noted that substantial differences are only likely to arise where the whole of one generation predeceases the intestate. Attempts to ameliorate unequal treatment between members of more remote generations and those of closer generations are arguably unnecessary as being likely to occur in only an insignificant proportion of cases. Such cases would involve, for example, at least one great grandchild of the intestate being the only surviving member of one branch of the family.

8.33 Any *per capita* system of distribution will also involve a degree of complexity and delay. For example, attempts to achieve equality among the different generations will only be productive of greater complexity in the administration of intestate estates. *Per capita* distribution will only delay the administration of some estates where difficulty is encountered tracing the members of some classes, for example, where the deceased has lost touch with an estranged child who may or may not still be alive and who may or may not have produced issue.

8.34 The National Committee concludes that *per stirpes* distribution should be employed in all cases. It is important to note here that the system the National Committee is proposing is a default system. People who feel strongly about achieving the equality that results from a *per capita* system of distribution should order their affairs accordingly and execute a will.

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### Recommendation 28

Distribution to relatives of the intestate should be *per stirpes* in all cases.

See Intestacy Bill 2006 cl 28(4), cl 30(3), cl 32(3).

## PERSONS ENTITLED IN MORE THAN ONE CAPACITY

8.35 Most of the intestacy provisions in Australia state that spouses are to be treated as separate persons for the purposes of distribution under intestacy.<sup>47</sup> The National

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46. Public Trustee of Queensland, *Submission* at 3.

Committee has already observed that the question of spouses being treated as separate persons should go without saying, for example, where parents, grandparents or married cousins are entitled to distribution.<sup>48</sup>

8.36 However, a particular issue arises where, for example, an intestate has nieces and nephews from different siblings and some of these nephews and nieces (being cousins) have married each other. If those nephews and nieces predecease the intestate but are survived by children, these children will represent each of their parents and be entitled to take twice as much as they would be entitled to if only one parent were entitled. The same would apply where, for example, a maternal uncle and a paternal aunt marry and have children.

8.37 The law is uncertain as to the result in these cases. The only reported Australian decisions were delivered under old provisions which followed the Statute of Distributions more closely. So, in Victoria in 1945 (where surviving spouses had to share with the nearest next of kin), the Supreme Court held that the wife of the intestate could take as both wife and first cousin.<sup>49</sup> However, Justice Zelling of the South Australian Supreme Court held, in 1976, that first cousins who were entitled as children of both the intestate's paternal aunt and the intestate's maternal brother, could only take one share each equally with the other first cousins of the intestate.<sup>50</sup> The South Australian decision can be distinguished on the grounds that the former distribution regimes permitted no representation beyond the issue of brothers and sisters of the intestate, so each first cousin took *per capita* as a first cousin, without reference to his or her deceased parents.<sup>51</sup> Today, first cousins of the intestate, except in NSW, take the share that their deceased parent would otherwise have taken. It is possible, therefore, that a first cousin could take the share of each deceased parent and, thereby, receive a double share.

## Law reform developments

8.38 American States that follow the Uniform Probate Code have adopted a provision that entitles a person who is related to the intestate through two lines of relationship to "only a single share based on the relationship that would entitle the individual to the larger share".<sup>52</sup> This provision, however, may have been included in order to deal with the situation that is possible under the Uniform Probate Code that persons who have been

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47. *Wills, Probate and Administration Act 1898* (NSW) s 61B(9); *Administration and Probate Act 1969* (NT) s 61(2)(a); *Administration and Probate Act 1929* (ACT) s 44(2)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(viii); and *Administration and Probate Act 1935* (Tas) s 44(8). See also *Administration of Estates Act 1925* (Eng) s 46(2); and *Law of Property Act 1925* (Eng) s 37. In *Queensland Property Law Act 1974* (Qld) s 15 applies generally to the "acquisition of any interest in property".

48. See para 2.19-2.23.

49. See, eg, *In re Morrison; Trustees Executors and Agency Co Ltd v Comport* [1945] VLR 123, noted at (1945) 19 ALJ 78.

50. *In the Estate of Cullen* (1976) 14 SASR 456.

51. See also *Re Adams* (1903) 6 OLR 697 (HC).

52. See, eg, *Montana Code Annotated 2005* s 72-2-123.

adopted by other relatives, such as grandparents, uncles or siblings, retain both their pre-adoption and post-adoption rights on intestacy.<sup>53</sup>

## Submissions

8.39 Submissions generally supported spouses being treated as separate persons in this context.<sup>54</sup>

8.40 One submission suggested that such perceived “double dipping” should be allowed since people who are entitled in more than one capacity will have “fewer members in their extended family (thus less chance to inherit from other relatives) and [share] more genetic material with the intestate”.<sup>55</sup>

8.41 The National Committee considers that it is entirely appropriate that intestacy beneficiaries should be able to receive each of their deceased parents’ shares by representation. To allow otherwise would effectively achieve the same outcome as would have been achieved before the married women’s property reforms of the 19th century and override the provisions stating that spouses are to be treated as separate persons. The provisions that spouses are to be treated as separate persons had their origins in the English *Administration of Estates Act 1925* (Eng) which stated that “a husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons”.<sup>56</sup> This was to overcome the effect of the law before the married women’s property reforms whereby a gift to a husband, his wife and another person was taken to be a gift of a one-half share to the husband (and wife) and a one-half share to the other person. It was not, in absence of contrary intention, taken to be a gift of a one-third share to the husband, a one-third share to the wife and a one-third share to the other person.<sup>57</sup> To require that the children of deceased parents who were each entitled to a share from the intestate estate receive only one share, rather than two, would effectively be treating the parents as if they were one person. This clearly runs counter to the intent of the provisions which state that spouses are to be treated as separate persons.

8.42 There are also practical problems with trying to limit such beneficiaries to a single share each, especially when distribution is *per stirpes*. Assume you have a maternal aunt and a paternal uncle of the intestate who marry and have three children. The intestate dies with no surviving issue, siblings, parents or grandparents. Consider how a *per stirpes* distribution could be managed in the following cases if the beneficiaries were limited to a single share:

1. The maternal aunt has died but the paternal uncle has not.

53. *Montana Code Annotated 2005* s 72-2-124(2). See also Uniform Probate Code s 2-113 and comment; J E Rein, “Relatives by Blood, Adoption, and Association: Who Should Get What and Why” (1984) 37 *Vanderbilt Law Review* 711 at 730 n 77 and 725-727.

54. Public Trustee NSW, *Submission* at 13; J North, *Submission* at 5.

55. Trustee Corporations Association of Australia, *Submission* at 17.

56. *Administration of Estates Act 1925* (Eng) s 46(2).

57. See, eg, *Gordon v Whieldon* (1848) 11 Beav 170; 50 ER 782. See also *Halsbury’s Laws of England* (2nd edition, Butterworth & Co, 1935) Vol 16 at para 964.

2. The maternal aunt has died, survived by three other siblings, and the paternal uncle has died, survived by four other siblings.
3. The maternal aunt and paternal uncle have both died but are survived only by their three children and one child of the maternal aunt's previous marriage.

For the sake of simplicity, the National Committee considers that persons should not be limited to a single share if they are entitled to more than one.

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#### Recommendation 29

Persons entitled to take in more than one capacity ought to be entitled to take in each capacity.

See Intestacy Bill 2006 cl 33.

## RELATIONSHIPS BETWEEN SIBLINGS

8.43 Two of the general categories, namely the intestate's brothers and sisters and brothers and sisters of the intestate's parents (that is, aunts and uncles), raise the question of what are traditionally referred to as relationships of the whole and half blood. Siblings who share both parents are relatives of the whole blood and siblings who have only one parent in common are relatives of the half blood (also referred to as half-brothers or half-sisters).

8.44 Most jurisdictions state that the distinction between whole and half blood is immaterial for the purposes of determining entitlement,<sup>58</sup> so that siblings with only one parent in common are entitled to take together with siblings who have both parents in common. (Siblings with only one parent in common may, therefore, benefit by the possibility of inheriting from two family groupings instead of one.) Such provisions are said to codify the common law position.<sup>59</sup>

8.45 However, NSW draws a distinction between siblings of the whole blood and siblings of the half blood, so that siblings with both parents in common and their issue are entitled to take before siblings with only one parent in common and their issue.<sup>60</sup> The NSW provision reversed a decision of the House of Lords in 1690.<sup>61</sup> That decision held

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58. *Succession Act 1981* (Qld) s 34(2); *Administration Act 1903* (WA) s 12B; *Administration and Probate Act 1929* (ACT) s 44(2)(b); *Administration and Probate Act 1969* (NT) s 61(2)(b); *Administration and Probate Act 1919* (SA) s 72B(2); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vii); and *Administration and Probate Act 1935* (Tas) s 44(7)(a) and (c). See also *Administration Act 1969* (NZ) s 77 It 6 and It 7 and Uniform Probate Code s 2-107.

59. See Law Reform Commission of British Columbia, *Statutory Succession Rights* (Working Paper 35, 1982) at 28.

60. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v).

61. *Watts v Crooke* (1690) Shower PC 108; 1 ER 74.

that collaterals of the half blood ranked equally with collaterals of the whole blood in taking on intestacy.

8.46 The distinction between relatives of the whole and half blood was also employed under the old English law relating to the inheritance of land under primogenitor. In such cases, for example, brothers of the half blood could only inherit after sisters of the whole blood, and so on.<sup>62</sup> This and other such distinctions in the old law of heirship were described in 1881 as “precious absurdities in the English law of real property”.<sup>63</sup>

## Law reform developments

### **Australia**

8.47 The Law Reform Committee of South Australia observed in 1974:

*There are many families in which the half blood and the whole blood live together perfectly happily and it has been the experience of at least one member of this Committee that when distinctions between the whole and the half blood have been made by will, they have been productive of great unhappiness.*<sup>64</sup>

The Law Reform Committee of South Australia recommended against the incorporation of such a distinction.<sup>65</sup>

### **Canada**

8.48 In Canada, it would appear that provisions mostly codified the common law position that siblings of the half blood could take equally with siblings of the whole blood. The Law Reform Commission of British Columbia noted an old provision whereby “ancestral property” could only be inherited by next of kin of the whole blood. This provision was repealed in 1925 to bring the rules relating to real property into line with those that already applied to personal property.<sup>66</sup>

8.49 In 1999, the Alberta Law Reform Institute concluded that there was nothing wrong with the current Alberta provision which ranks kindred of the half blood equally with kindred of the whole blood.<sup>67</sup>

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62. Inheritance Act of 1833 (3&4 William IV c 106) s 9.

63. *In re Goodman's Trusts* (1881) 17 ChD 266 at 299 (James LJ).

64. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7.

65. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7.

66. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 16.

67. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 179.

## Submissions and consultations

8.50 Most submissions supported making the distinction between whole blood and half blood relatives immaterial in intestacy.<sup>68</sup> Reasons in support of this view included:

- uniformity with the majority of Australian jurisdictions;<sup>69</sup>
- the distinction was not in line with community expectations;<sup>70</sup> and
- the distinction merely added complexity.<sup>71</sup>

An example was given at one consultation of half-brothers and sisters looking after a sibling with a disability. When that sibling died, in NSW, only the siblings of full blood would be entitled, those of half blood would not be.<sup>72</sup>

8.51 However, another submission raised the possibility of a half-sibling inheriting who had absolutely no connection with the deceased. The example was given of an elderly person dying intestate leaving two siblings who were unaware of the existence of siblings from an earlier relationship of their father which had taken place over 75 years ago. These previously unknown half-siblings and their descendants would, under the provisions in most jurisdictions, be able to share in the distribution.<sup>73</sup>

## The National Committee's view

8.52 In reaching its conclusion, the National Committee has had to weigh up the different scenarios that may arise in relation to half-siblings. A distribution scheme for intestate estates should be a default mechanism that serves the majority of likely cases. Given the modern acceptance of relationship breakdown and the prevalence of melded families, it is more likely that people will have been raised with, or at least know, their half-siblings. The Committee considers that the scenario of a previously unknown half-sibling is rather less likely to occur.

8.53 The National Committee therefore agrees with the views in the majority of submissions and consultations. In tracing family relationships for the purposes of distribution on intestacy it should be immaterial whether siblings have one parent or both parents in common.

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68. J North, *Submission* at 4; Public Trustee NSW, *Submission* at 12; *Sydney Consultation 2*; Trustee Corporations Association of Australia, *Submission* at 16; Law Society of Tasmania, *Submission* at 13.

69. Public Trustee NSW, *Submission* at 12

70. *Sydney Consultation 2*.

71. *Sydney Consultation 2*.

72. *Sydney Consultation 2*.

73. See L Reid, *Submission*.

Recommendation 30

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The distinction between siblings who have one parent in common and those who have both parents in common should be immaterial for determining entitlements on intestacy.

See Intestacy Bill 2006 cl 4(1) definition of “**brother/sister**”.



## 9. Next of kin – general order of distribution

- Issue
- Parents
- Brothers and sisters
- Descendants of brothers and sisters
- Maternal and paternal branches of the family
- Grandparents
- Aunts and uncles
- Setting a limit

9.1 When an intestate is not survived by a spouse or partner, each jurisdiction makes provision for the distribution of the intestate estate to the next of kin, that is the nearest relatives of the deceased and, in some degree, their issue. Each jurisdiction has adopted the following broad order of those relatives of the intestate who are entitled to take:

- children and their descendants; then
- parents; then
- brothers and sisters; then
- grandparents; and then
- aunts and uncles.

9.2 While the above applies as a general scheme, each jurisdiction makes different provision with respect to each of the categories. So, for example, there is some difference among the jurisdictions about the extent, if any, to which descendants of siblings or aunts and uncles should be entitled to take. Also there is some debate as to whether recognition should be given to both maternal and paternal sides of an intestate's family where grandparents and aunts and uncles are entitled to take.

9.3 This order is broadly reflective of all schemes that have departed from the system of inheritance by degrees of relationship established by the old *Statute of Distributions*. The *Statute of Distributions* established an order whereby those next of kin in closest relationship to the intestate were entitled to take in preference to relatives of remoter degree. So, for example, parents were entitled as relatives of the first degree, brothers and sisters were entitled together with grandparents as relatives of the second degree and nephews and nieces, aunts and uncles and great grandparents were entitled as relatives of the third degree and so on. It is generally felt that the modern provisions, which give prominence to those who are "closer" in relationship to the intestate, would accord more with the presumed intentions of those who die intestate.<sup>1</sup>

9.4 Submissions supported the general order of distribution outlined above, subject to some variation in detail.<sup>2</sup>

9.5 Subject to the following recommendations, the National Committee considers that the general order of distribution outlined above should be preserved.

## ISSUE

9.6 Where an intestate has been survived by issue but not by a spouse or partner, all the jurisdictions provide means for the intestate's estate to flow to the intestate's issue or

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1. See A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 72.
  2. Public Trustee NSW, *Submission* at 12; J North, *Submission* at 4; Law Society of Tasmania, *Submission* at 13.

to be divided amongst the issue on a *per stirpes* basis where more than one survive.<sup>3</sup> There is no reason to change this arrangement.

#### Recommendation 31

Where an intestate is not survived by a spouse or partner, the issue of the intestate should take their share *per stirpes*.

See Intestacy Bill 2006 cl 28.

## PARENTS

9.7 If the intestate is not survived by a spouse or de facto partner, nor by any issue, all jurisdictions provide that the intestate's surviving parent, or parents, will be next entitled. In all jurisdictions except WA, the surviving parent is entitled to the whole of the intestate's estate unless both parents survive, in which case the estate is to be divided equally between them.<sup>4</sup>

9.8 However, in WA, if the intestate dies without spouse or partner and without issue, but leaves a parent or parents and brothers and/or sisters and/or children of a deceased brother or sister, the surviving parents are entitled to the first \$6,000 of the estate and, in relation to any amount in excess of the first \$6,000, the parents will be entitled to half of the remaining estate (in equal shares if both parents survive), and the surviving brothers and sisters or the children of deceased brothers and sisters will be entitled to the other half.<sup>5</sup>

9.9 In 1973, the Law Reform Commission of Western Australia preferred the approach taken by all other Australian jurisdictions of giving the whole estate to the surviving parent or parents of the intestate.<sup>6</sup> This recommendation has not been implemented.

3. *Succession Act 1981* (Qld) s 35, s 36A, Sch 2 Pt 2 It 1; *Administration and Probate Act 1929* (ACT) s 49(1), s 49B, Sch 6 Pt 6.2 It 1; *Wills, Probate and Administration Act 1898* (NSW) s 61B(1), (4), s 61C; *Administration and Probate Act 1969* (NT) s 66(1), s 68; Sch 6 Pt 4 It 1; *Administration and Probate Act 1919* (SA) s 72G(c), s 72I; *Administration and Probate Act 1935* (Tas) s 44(5), s 46(1); *Administration and Probate Act 1958* (Vic) s 52(1)(b)-(ea), s 52(1)(f); and *Administration Act 1903* (WA) s 14(1) Table It 5, s 14(2a), (2b). See also *Administration Act 1969* (NZ) s 77 It 4, s 78(1), (2); *Administration of Estates Act 1925* (Eng) s 46(1)(ii).
4. *Succession Act 1981* (Qld) s 35 and Sch 2 Pt 2 It 2; *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.2 It 2; *Wills, Probate and Administration Act 1898* (NSW) s 61B(5); *Administration and Probate Act 1969* (NT) Sch 6 Pt 4 It 2; *Administration and Probate Act 1919* (SA) s 72J(a); *Administration and Probate Act 1935* (Tas) s 44(6); *Administration and Probate Act 1958* (Vic) s 52(1)(b)-(ea); and *Administration Act 1903* (WA) s 14(1) Table It 7. See also *Administration Act 1969* (NZ) s 77 It 5; and *Administration of Estates Act 1925* (Eng) s 46(1)(iii) and (iv).
5. *Administration Act 1903* (WA) s 14(1) Table It 6.
6. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at 9.

9.10 Submissions generally agreed that parents should be entitled next after issue.<sup>7</sup> One submission added that no other relatives should be entitled to take together with the parents of the intestate on the basis that the degree of consanguinity should be a test of the fairness of a distribution. Parents would, therefore, rank ahead of siblings of the intestate.<sup>8</sup> Other submissions, however, supported allowing siblings to share in the distribution where parent also survived.<sup>9</sup>

9.11 There would appear to be no reason to depart from the position adopted by the vast majority of Australian jurisdictions.

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#### Recommendation 32

Where an intestate is not survived by a spouse or partner, or issue, the surviving parents should be entitled to take in equal shares.

See Intestacy Bill 2006 cl 29.

## BROTHERS AND SISTERS

9.12 In each jurisdiction, if the intestate is not survived by a spouse or partner, issue or parents, the brothers and sisters of the intestate who survive are entitled to take.<sup>10</sup>

9.13 One view expressed in consultations is that there is now a stronger preference among testators for benefiting nephews and nieces instead of brothers and sisters.<sup>11</sup> However, the survey of wills in the NSW Probate Registry found that in cases where the deceased had no spouse or children, the majority of testators provided for brothers and sisters (33.3%) and their children, being the testators' nephews and nieces (24.6%).<sup>12</sup>

9.14 There is no compelling reason to change the current arrangement, especially since nephews and nieces will usually either inherit when their parents die or become entitled as children of deceased brothers and sisters.

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#### Recommendation 33

7. Trustee Corporations Association of Australia, *Submission* at 15; Public Trustee NSW, *Submission* at 11.
8. Trustee Corporations Association of Australia, *Submission* at 15.
9. Law Society of Tasmania, *Submission* at 12; J North, *Submission* at 4.
10. *Succession Act 1981* (Qld) s 37(1)(a); *Administration and Probate Act 1929* (ACT) s 49C(1)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b); *Administration and Probate Act 1969* (NT) s 69(1)(a); *Administration and Probate Act 1919* (SA) s 72J(b); *Administration and Probate Act 1935* (Tas) s 44(7)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v)-(vi); *Administration Act 1903* (WA) s 14(1) Table 1t 8. See also *Administration Act 1969* (NZ) s 77 1t 6, s 78(3); *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3).
11. K McQueenie, *Consultation*.
12. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.22.

Where an intestate is not survived by a spouse or partner, or issue or parents, the brothers and sisters should be entitled to take.

See Intestacy Bill 2006 cl 30(1), (2).

## DESCENDANTS OF BROTHERS AND SISTERS

9.15 Each jurisdiction makes different provision when a brother or sister predeceases the intestate.

- Queensland, Victoria and WA allow the children of the deceased brother or sister (that is, the intestate's nieces and nephews) to take their parent's entitlement in equal shares.<sup>13</sup> Victoria provides two exceptions: first, when all of the siblings have predeceased the intestate, the surviving nephews and nieces take in equal shares, without reference to their parents' entitlement;<sup>14</sup> and, secondly, grand-nephews and grand-nieces may take after aunts and uncles as relatives of the fourth degree.<sup>15</sup>
- NT, Tasmania, SA, NSW and ACT allow the issue (that is, the intestate's nieces, nephews, grand-nieces, grand-nephews, etc) to take *per stirpes*.<sup>16</sup> However, in SA, there is a limited form of *per capita* distribution. When all the brothers and sisters predecease the intestate, their surviving issue are treated as if they were issue of the intestate.<sup>17</sup>

9.16 One reason for limiting the distribution to children of brothers and sisters is historical. The *Statute of Distributions* originally allowed the children of deceased siblings to take their parent's share but admitted "no representations... among collaterals after brothers' and sisters' children". Representation is said to have been allowed among the issue of brothers and sisters because the intestate stood in a quasi-parental position to nieces and nephews since marriage between them was prohibited.<sup>18</sup>

9.17 Limiting the descendants of brothers and sisters can be justified on the grounds that an "unrestrained succession might... lead to confusion, to protracted delays in

13. *Succession Act 1981* (Qld) s 37(1)(a), s 37(2)(a); *Administration Act 1903* (WA) s 14(1) Table 1t 8, s 14(3a); *Administration and Probate Act 1958* (Vic) s 52(1)(f). See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 369-370.

14. See para 8.6-8.7.

15. See para 9.37, below.

16. *Administration and Probate Act 1969* (NT) s 69(1)(a) and s 69(2); *Administration and Probate Act 1935* (Tas) s 44(7)(a), s 46(3); *Administration and Probate Act 1919* (SA) s 72J(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b), s 61C(3); and *Administration and Probate Act 1929* (ACT) s 49C(1)(a). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v) and s 47(3); and *Administration Act 1969* (NZ) s 77 1t 6, s 78(3).

17. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).

18. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 150.

settlement, and to a multiple fractioning of the estate".<sup>19</sup> Such concerns, in particular the fractioning of estates, will diminish if current population trends continue.<sup>20</sup> For example, the fertility rate for Australia in 2002 was 1.76 children per woman. The fertility rate at the turn of the last century was estimated to be 3.93. The rate dropped below the replacement level of 2.1 children in 1976.<sup>21</sup> This means that, in general, most people will have fewer siblings and these siblings will have fewer descendants than was often previously the case.

9.18 It could be argued that grand-nephews and grand-nieces are too remote from the intestate. However, this was not the view of the Manitoba Law Reform Commission in 1985 when it favoured the *Uniform Probate Code* approach of preferring grand-nephews and grand-nieces (as issue of the intestate's parent) over first cousins (as children of the intestate's grandparents).<sup>22</sup> The Manitoba Commission adopted the reasoning of the Uniform Law Conference of Canada which said that the inclusion of grand-nieces and grand-nephews:

*is based on the conclusion that, because of age, a decedent today is likely to have developed a closer relationship with young grandnephews and grandnieces than he has maintained with cousins of his own generation, and that he would prefer to bestow his wealth on the former class.*<sup>23</sup>

9.19 Some would also say that there is an appearance of injustice where the children of deceased nephews and nieces miss out on a share.<sup>24</sup> This would seem to be the more so if cousins (who, like grand-nieces and grand-nephews, were relatives of the fourth degree under the old Statute of Distributions) are entitled to take as children of deceased aunts and uncles of the intestate.

9.20 Some submissions supported distributing shares to the issue of any deceased siblings as the fairest outcome.<sup>25</sup>

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19. *Canada Permanent Trust Company (Hind Estate) v Canada Permanent Trust Company (McKim Estate)* [1938] 3 WWR 657 at 659. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 138.
  20. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 151.
  21. See Australian Bureau of Statistics, *Year Book Australia* (No 87, ABS Catalogue No 1301.0, 2005) at 114-116.
  22. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32.
  23. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 228, quoted in Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32.
  24. Confidential, *Submission*.
  25. Trustee Corporations Association of Australia, *Submission* at 16; Public Trustee NSW, *Submission* at 13; Law Society of Tasmania, *Submission* at 13; Confidential, *Submission*.

## National Committee's conclusion

9.21 Given the diminishing size of most families, the view an intestate is likely to have developed a reasonably close relationship with grandnephews and nieces, and the fact that the majority of jurisdictions already extend to issue of brothers and sisters, the National Committee recommends that the uniform legislation should allow the issue of deceased siblings of the intestate to take the share their parent would otherwise have taken.

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**Recommendation 34**


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The issue of deceased brothers and sisters should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

See Intestacy Bill 2006 cl 30(3).

## MATERNAL AND PATERNAL BRANCHES OF THE FAMILY

9.22 A question arises in the context of the intestate's surviving grandparents and aunts and uncles of recognising maternal and paternal branches of the intestate's family.

9.23 In Australia, each jurisdiction provides that surviving grandparents are the next category entitled to take on intestacy<sup>26</sup> and, if no grandparents survive, then aunts and uncles of the intestate. This means that in some cases, for example, where both maternal grandparents have predeceased the intestate, the whole of the estate will devolve to a single branch of the intestate's family.

9.24 New Zealand, however, treats the maternal and paternal families separately.<sup>27</sup> Half of the intestate estate is made available to the surviving maternal grandparents and, if neither of them has survived, their half devolves to their children, that is, the maternal aunts and uncles of the intestate. Likewise, the other half of the estate is made available to the surviving paternal grandparents and, if neither of them has survived, their half devolves to their children, that is, the paternal aunts and uncles of the intestate. It is only if no one from the paternal side of the family has survived that their half then goes to the maternal side, and vice versa.

9.25 This result is not achieved in Australia, where the estate will only go to the surviving aunts and uncles of the intestate if the grandparents of both branches of the family have died before the intestate. This means that, in some cases, the whole of the intestate estate will devolve to a single branch of the intestate's family. The Alberta Law Reform Institute identified this as a deficiency in their existing system, noting that "division between both sides of the family would likely be the intention of "average Albertans" who find themselves in that situation".<sup>28</sup> The Manitoba Law Reform Commission also preferred a system which shared the estate between the intestate's maternal and paternal branches, to avoid situations where, for example, a maternal aunt would take the whole of

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26. *Succession Act 1981* (Qld) s 37(1)(b); *Administration and Probate Act 1929* (ACT) s 49C(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(c); *Administration and Probate Act 1969* (NT) s 69(1)(b); *Administration and Probate Act 1919* (SA) s 72J(c); *Administration and Probate Act 1935* (Tas) s 44(7)(b); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v); *Administration Act 1903* (WA) s 14(1) Table 1t 9. See also *Administration of Estates Act 1925* (Eng) s 46(1)(v).

27. *Administration Act 1969* (NZ) s 77 1t 7.

28. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 156.



an estate even where a paternal first cousin had also survived.<sup>29</sup> A report to the Uniform Law Conference of Canada in 1983 also proposed a method of distribution that ensured maternal and paternal branches of the intestate's family each received a share. This was achieved by allowing "universal representation" from grandparents, thereby picking up surviving aunts and uncles and first cousins, where appropriate.<sup>30</sup> This was not the view of the Ontario Law Reform Commission's Family Law Project which noted, in 1967, that where an intestate was married but had no children, "the spouse who neglected to make a will would usually want the survivor to have the whole estate and not share it with his [or her] relatives".<sup>31</sup>

9.26 In 1985, the Law Reform Commission of Tasmania proposed a system of distribution which recognised the maternal and paternal branches so that one half of the residuary should be shared between the grandparents and aunts and uncles (or, if they predecease the intestate, their issue *per stirpes*) on the maternal side and the other half to the same categories on the paternal side. If there were no paternal relatives, their half would go to the maternal side, and *vice versa*. The Tasmanian Commission argued that such a division was desirable on the grounds that an estate could not be distributed *per stirpes* to aunts and uncles unless the whereabouts of both branches of the family were known:

*It has happened, for example, that contact with one line of a family was completely lost when the other line migrated to Australia.*<sup>32</sup>

The Tasmanian proposals would allow for an immediate distribution of at least half of the estate in such circumstances. This approach and the reasons for it were supported by one submission.<sup>33</sup>

9.27 An alternative explanation for such provisions would appear to lie in the old idea of people deriving their wealth from family. The English Committee on the Law of Intestate Succession observed in 1951:

*It often happens that a large portion of the intestate's estate has been derived from his family and it seems just, therefore, that the family should have an opportunity of sharing in it after the intestate's death.*<sup>34</sup>

29. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32-33.

30. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 228-229. This proposal was adopted in 1985: Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 285-286.

31. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 582 (rev). The proposals were rejected in the Commission's final report: Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165-166.

32. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 44.

33. Public Trustee of Queensland, *Submission* at 3.

34. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 12-13.

These comments were made in the context of the intestate leaving a spouse and no issue, but other next of kin, but could equally be applied to branches of the intestate's family in the more limited situation considered here. However, it is unlikely that the average Australian intestate, in modern times, would need to consider the idea of family derived wealth being "returned" to the "correct branch" of the family.

9.28 One submission supported the general Australian position.<sup>35</sup> Others supported a provision along the lines of the New Zealand model.<sup>36</sup>

## National Committee's conclusion

9.29 The National Committee rejects any model that attempts to distinguish between paternal and maternal branches of the intestate's family, for the following reasons:

- while it might make the administration of estates easier in certain limited cases where the intestate has lost touch with an entire branch of his or her family, it would generally introduce an unjustifiable complexity into the administration of deceased estates;
- no Australian jurisdiction currently seeks to ensure an equitable distribution between the maternal and paternal branches of an intestate's family; and
- the National Committee is not convinced that the average person, faced with being survived only by one or more grandparents on one side of the family and only by aunts and uncles on the other, would actually consider benefiting both maternal and paternal sides of the family.

## GRANDPARENTS

9.30 Each jurisdiction provides that surviving grandparents are the next category entitled to take on intestacy.<sup>37</sup>

9.31 Although it is unlikely that grandparents will inherit in this way, one circumstance where this could conceivably occur is where a child is orphaned and subsequently cared for by his or her grandparents. The child will likely have inherited from his or her parents' estates and will, barring exceptional circumstances, be unable to execute a will during his or her minority.<sup>38</sup> This means that if the child were to die the estate would normally be

35. Public Trustee NSW, *Submission* at 13.

36. J North, *Submission* at 5; Public Trustee of Queensland, *Submission* at 3.

37. *Succession Act 1981* (Qld) s 37(1)(b); *Administration and Probate Act 1929* (ACT) s 49C(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(c); *Administration and Probate Act 1969* (NT) s 69(1)(b); *Administration and Probate Act 1919* (SA) s 72J(c); *Administration and Probate Act 1935* (Tas) s 44(7)(b); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v); and *Administration Act 1903* (WA) s 14(1) Table 1t 9. See also *Administration Act 1969* (NZ) s 77 1t 7; *Administration of Estates Act 1925* (Eng) s 46(1)(v).

38. See, eg, *Wills, Probate and Administration Act 1898* (NSW) s 6A, *Succession Act 2006* (NSW) s 16; *Wills Act 2000* (NT) s 18; *Wills Act 1997* (Vic) s 20; *Succession*

distributed according to the rules of intestacy. In such cases the most desirable outcome would be for the surviving grandparents to inherit the estate.

9.32 Submissions supported grandparents inheriting after siblings of the intestate.<sup>39</sup>

9.33 The National Committee agrees that grandparents should inherit after siblings of the intestate.

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*Act 1981 (Qld) s 19-20. See also NSW Law Reform Commission, Uniform Succession Laws: The Law of Wills (Report 85, 1998) at para 5.1-5.11.*

39. Trustee Corporations Association of Australia, *Submission* at 17; Public Trustee NSW, *Submission* at 13.

**Recommendation 35**

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, the surviving grandparents should be entitled to take in equal shares.

See Intestacy Bill 2006 cl 31.

## AUNTS AND UNCLES

9.34 The terms “aunt” and “uncle”, in this context, refer only to the siblings of the intestate’s parents and not also to their respective spouses. All jurisdictions provide that surviving aunts and uncles of the intestate are the category of next of kin next entitled to take on intestacy after grandparents.<sup>40</sup> There is no reason to change this arrangement.

**Recommendation 36**

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, or grandparents, the aunts and uncles should be entitled to take.

See Intestacy Bill 2006 cl 32(1), (2).

## SETTING A LIMIT

9.35 The question now arises of placing a limit on the categories of next of kin who are entitled to take after aunts and uncles of the intestate. There are generally two approaches to the question of establishing the point beyond which an intestate’s estate cannot be distributed. One is to allow an unlimited number of degrees of kin who are entitled to take so long as they can be determined. The other is to impose a limit on the degrees of kin who are entitled to take on intestacy. In both cases, provisions need to be made for *bona vacantia* to deal with situations where no eligible relatives can be identified.<sup>41</sup>

9.36 The majority of Australian jurisdictions have a limitation. This is fixed at aunts and uncles of the intestate in NSW,<sup>42</sup> their children (that is, first cousins of the intestate) in Queensland and WA,<sup>43</sup> and their issue in NT, SA and ACT (that is, first cousins once

40. *Succession Act 1981* (Qld) s 37(1)(c); *Administration and Probate Act 1929* (ACT) s 49C(1)(c); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d), (e); *Administration and Probate Act 1969* (NT) s 69(1)(c); *Administration and Probate Act 1919* (SA) s 72J(d); *Administration and Probate Act 1935* (Tas) s 44(7)(c); *Administration and Probate Act 1958* (Vic) s 52(1)(f); *Administration Act 1903* (WA) s 14(1) Table 1t 10. See also *Administration Act 1969* (NZ) s 77 1t 7; *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3).

41. See ch 10.

42. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d) and (e), s 61C(3).

43. *Succession Act 1981* (Qld) s 37(1)(c); *Administration Act 1903* (WA) s 14(1) Table 1t 10, s 14(3a).

removed, etc).<sup>44</sup> These jurisdictions allow the descendants of deceased aunts and uncles to take *per stirpes*. However, SA has a limited form of *per capita* distribution, so that when all the aunts and uncles predecease the intestate, their surviving issue are treated as if they were issue of the intestate.<sup>45</sup>

9.37 Victoria and Tasmania are different. After allowing the issue of aunts and uncles to take,<sup>46</sup> they allow next of kin to take according to the old civil law (that is, Roman law) rules of distribution so that an intestate's estate will be distributed equally among the "next of kin of equal degree of consanguinity" and without representation after nieces and nephews of the intestate.

9.38 In Canada, most provinces have retained the old civil law rules of distribution.<sup>47</sup> There are also some examples of lists that place a limit at the intestate's great grandparents or their issue (that is, the intestate's second cousins and their issue). These include Manitoba,<sup>48</sup> and the Uniform Law Conference of Canada's *Uniform Intestate Succession Act*.<sup>49</sup> Such limits are still subject to debate.<sup>50</sup>

## Should there be a limit?

9.39 Some law reform agencies have opposed the limiting of degrees of inheritance. For example, the Law Reform Committee of South Australia considered that any proposals to limit the degree of inheritance involved "purely arbitrary "cut-off" points which do not have any compelling logic to support them".<sup>51</sup>

9.40 "Unlimited" schemes may be justified on the grounds that most people would prefer a distant relative to inherit rather than the government, even though the relative may be

44. *Administration and Probate Act 1969* (NT) s 69(1)(c) and s 69(2); *Administration and Probate Act 1919* (SA) s 72J(d); and *Administration and Probate Act 1929* (ACT) s 49C(1)(c). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3); and *Administration Act 1969* (NZ) s 77 It 7, s 78(3).

45. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).

46. *Administration and Probate Act 1935* (Tas) s 44(7)(c), s 46(3); *Administration and Probate Act 1958* (Vic) s 52(1)(f).

47. *Intestate Succession Act* RSA 2000 c I-10 s 8; *Estate Administration Act* RSBC 1996 c 122 s 89; *Devolution of Estates Act* RSNB 1973 c D-9 s 28; *Intestate Succession Act* RSNL 1990 c I-21 s 10; *Intestate Succession Act* RSNS 1989 c 236 s 10; *Intestate Succession Act* RSNWT 1988 c I-10 s 8; *Succession Law Reform Act* RSO 1990 c S-26 s 47(6); *Probate Act* RSPEI 1988 c P-21 s 93; *Intestate Succession Act* SS 1996 c I-13.1 s 12; *Estate Administration Act* RSY 2002 c 77 s 86.

48. See, eg, *Intestate Succession Act* CCSM c I85 s 2-4.

49. *Uniform Intestate Succession Act* s 4(1)(e) in Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 286-287.

50. See, eg, Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 157-159.

51. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8.

unknown to them.<sup>52</sup> However, it has also been suggested that an aversion to the government inheriting in preference to remote relatives is “more an emotional reaction than one rooted in fact and logic”.<sup>53</sup> It has also been suggested that people with such an aversion should make sure they write a will. Indeed, a study conducted in Illinois concluded the question of whether distant relatives or the state should inherit as follows:

*It would appear here that decedents in this category are likely to have a will when they want to provide for deserving friends and charities, and in other cases they simply do not care what happens to their property.*<sup>54</sup>

9.41 Other American studies have found there is no strong preference in favour of distant relatives.<sup>55</sup> There is also some evidence from another American study that “indicates that distant relatives who had received intestacy benefits often felt undeserving and uncomfortable in taking estate assets”.<sup>56</sup>

9.42 The expense and delay caused by tracing remote relatives is the strongest argument in favour of a limit.<sup>57</sup> It will be especially difficult to trace distant relatives in a migrant society<sup>58</sup> where cousins in some families may have stayed in the homeland while others may have gone, for example, to US, NZ, Canada and/or UK. In such cases, these distant relatives may be utterly unknown to the deceased, notwithstanding today’s greater ease of communication. The Manitoba Law Reform Commission has observed that “in our mobile and urban society most intestates are now unlikely to know, let alone have a familial relationship with, the more remote relatives”.<sup>59</sup> A particular problem has arisen in recent years with identifying relatives of survivors of the Holocaust and other refugees from Eastern Europe.

9.43 Some of the problems involved in tracing relatives more remote than first cousins may be illustrated by a 1998 NSW case. A 76-year-old testator died leaving no issue, parents, siblings, grandparents, aunts or uncles who survived him. If not for a valid will, the testator’s estate would have gone to *bona vacantia*. He gave the bulk of his estate to

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52. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 33.

53. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 159.

54. A Dunham, “The Method, Process and Frequency of Wealth Transmission at Death” (1962) 30 *University of Chicago Law Review* 241 at 263.

55. See list in Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 35.

56. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 35. See M B Sussman, J N Cates, and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 138-142.

57. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1811; Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 34; S Samek, *Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.

58. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63; *Melbourne Consultation*.

59. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 34.

be distributed, in equal shares, among those of the issue of his grandparents (that is, first cousins, first cousins once removed, and so on) who survived him. The executor engaged a genealogist who, after two years of searching, identified no fewer than 1,675 beneficiaries.<sup>60</sup>

9.44 While tracing relatives can be carried out quite efficiently, usually by relying on family members or professional genealogists<sup>61</sup> - for example, State Trustees in Victoria have a genealogical research department - it can be argued that the expense of tracing remote relatives cannot be justified, especially in the case of relatively small estates. It has also been observed that applications to the courts to exclude possible future claimants likewise involve time and money.<sup>62</sup>

9.45 The Law Reform Commission of British Columbia concluded that, although “probably most people” would lean in favour of benefiting distant relatives, practical considerations should limit the extent to which distant relatives are sought out by an administrator, “particularly when it seems probable that the deceased simply did not care what happened to his property”.<sup>63</sup>

9.46 Although shares in the intestate’s estate may be distributed to known beneficiaries while some remain unknown, the presence of undiscovered beneficiaries would require the setting up of a trust.

9.47 It is also possible that allowing distant relatives to inherit on intestacy may increase the number of challenges to the validity of wills where testators with no close relatives choose to leave their estate to a combination of friends and charities.<sup>64</sup> The persons entitled to take on intestacy would clearly have a lot to gain from challenging the validity of such a will. A report to the Uniform Law Conference of Canada suggested that “allegations that a testator lacked testamentary capacity, or that a will was procured through duress or fraud, are frequently enough to extort the settlement of a spurious will contest”.<sup>65</sup> The Alberta Law Reform Institute initially considered this scenario fanciful, but received advice from Alberta lawyers that “heir hunters” do exist.<sup>66</sup>

9.48 Studies conducted in the US prior to 1985 showed no clear support for distant relatives inheriting an estate in preference to the government.

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60. *West v Weston* (1998) 44 NSWLR 657.

61. See Tasmania, Office of the Public Trustee, *Consultation*; K McQueenie, *Consultation*; R Walker, *Consultation*.

62. Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 7.

63. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 35.

64. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 34.

65. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 229.

66. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 148.

9.49 There was some support in consultations and submissions for a limit to be imposed.<sup>67</sup>

## What should the limit be?

9.50 A limit will only affect a small minority of cases. For example, in NSW, which has the strictest limit and highest number of estates in Australia, it is estimated that there are no more than 30 *bona vacantia* cases established in any one year.

9.51 It has been suggested that first cousins were removed from the list in NSW in the 1950s because, at that time, there were often too many cousins and they were difficult to find, especially where the family had migrated.<sup>68</sup> While such arguments still have some force, they are said by some not to carry so much weight. Several submissions noted the increasing efficiency with which the tracing of family members can be carried out. One submission suggested that, in 1998, a search for cousins took one trust company 100 working hours but that today the time taken is approaching 30 working hours even where the bulk of the research is overseas.<sup>69</sup>

9.52 In NSW, the provisions which give the State the discretion to distribute property from *bona vacantia* estates<sup>70</sup> are used in 10-15 cases each year. It is usually cousins that benefit from this procedure.<sup>71</sup> This eliminates the need to seek a court declaration if cousins can't be located and the need to provide proof of family relationships.

### Law reform developments

9.53 The Law Reform Commission of Western Australia, in 1973, considered that the claims of grandchildren and further issue of uncles and aunts were "strong enough to warrant their inclusion notwithstanding possible difficulties in tracing".<sup>72</sup>

9.54 The most recent Australian law reform agency to consider the question was the Queensland Law Reform Commission in 1993. They suggested "there seems to be no reason to make this list shorter, for example, by excluding cousins, or to make it longer, by including great-grandparents, great uncles and aunts or their issue".<sup>73</sup>

9.55 In Canada, some consideration has been given to the claims of great grandparents and their issue. The Alberta Law Reform Institute recently recommended that great grandparents should be entitled to take on intestacy, but not their issue. The Institute considered that, while it will be infrequent for a great grandparent to be the only ancestor

67. Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 15-16; S Samek, *Consultation*. But see R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 14.

68. Views in some submission still support this view: Trustee Corporations Association of Australia, *Submission* at 17.

69. Trustee Corporations Association of Australia, *Submission* at 19.

70. *Wills, Probate and Administration Act 1898* (NSW) s 61B(8).

71. See para 10.25, 10.27.

72. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at 10.

73. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63.



to survive the intestate, “those that do will likely be known by the intestate and should inherit the estate”. The same, apparently, could not be said for their issue, that is, great aunts and uncles and second cousins.<sup>74</sup> The Institute observed that limiting representation among collaterals (for example, allowing children of aunts or uncles to inherit, but not their issue) is “intended to avoid confusion, protracted delays in settlement and a multiple fractioning of the estate”.<sup>75</sup>

### **Submissions and consultations**

9.56 Opinions expressed in submissions and consultations have been divided on where to set the limit. A view expressed in one submission, for example, considered that the limit should be aunts and uncles, since cousins were seen as “too far removed” from the intestate “to be entitled as of right”.<sup>76</sup> One supported limiting the list to nieces and nephews.<sup>77</sup> Others supported first cousins only,<sup>78</sup> or the children of first cousins (that is, the intestate’s first cousins once removed).<sup>79</sup> Others preferred more distant relationships.<sup>80</sup> One view was that distribution should extend at least as far as second cousins on the basis that it is extremely rare for a case to proceed to second cousins let alone beyond.<sup>81</sup> One submission was equivocal, noting that first cousins once removed and second cousins may be viewed by some communities as too distant and by others as close family.<sup>82</sup>

9.57 Participants in NSW consultations reported that members of the public were sometimes surprised to learn that first cousins are not entitled in that State, notwithstanding the problems of identifying them.<sup>83</sup> Some supported extending the limit beyond aunts and uncles so that fewer estates would then pass to *bona vacantia*.<sup>84</sup>

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74. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 159.

75. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 138. See also *Canada Permanent Trust Company (Hind Estate) v Canada Permanent Trust Company (McKim Estate)* [1938] 3 WWR 657 at 659.

76. Trustee Corporations Association of Australia, *Submission* at 15, 17-18; Public Trustee NSW, *Submission* at 13.

77. Tasmania, Office of the Public Trustee, *Consultation*.

78. Probate Committee, Law Society of South Australia, *Consultation*; Public Trustee of Queensland, *Submission* at 3; Succession Law Section, Queensland Law Society, *Consultation*; W V Windeyer, *Submission* at 4; *Melbourne Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.

79. Law Society of NSW, *Submission* at 2.

80. P Worrall, *Consultation*

81. Trustee Corporations Association of Australia, *Submission* at 16.

82. Trustee Corporations Association of Australia, *Submission* at 18.

83. *Sydney Consultation 1*; *Sydney Consultation 2*.

84. See also G L Certoma, “Intestacy in New South Wales: the 1977 statutory amendments” (1979) 53 *Australian Law Journal* 77 at 82-83.

## The National Committee's conclusion

9.58 There should be a limit to avoid complexity, delay and expense in the administration of intestate estates. If the list of distribution is too thorough and expansive, it runs the risk of confusing those who must interpret the Act's operation. For example, the provisions in NSW before the list was limited to the aunts and uncles of the intestate were considered "forbidding".<sup>85</sup>

9.59 The limit should be set at children of aunts and uncles, that is, first cousins of the intestate. This follows the position in Queensland and WA, and represents a compromise between the narrower limit in NSW and the wider limits in SA, NT and ACT. Consultations in Victoria disclosed no serious objection to fixing the limit at first cousins.

9.60 Issue of first cousins are clearly of a different order of remoteness compared with the issue of nephews and nieces. (In the old civil system, first cousins are relatives of the fourth degree, as are grand-nieces and grand-nephews, who will already be entitled as issue of brothers and sisters of the intestate.) More distant relatives, if "deserving", may still apply to the Crown to receive part of the estate under provisions proposed in the next chapter.<sup>86</sup>

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### Recommendation 37

The children of deceased aunts and uncles should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

No further categories of relative should be entitled beyond the children of deceased aunts and uncles.

See draft Intestacy Bill 2006 cl 32(3).

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85. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1815.

86. See para 10.38-10.40.

## 10. Bona vacantia

- Where should it go?
- How should it be distributed?
- Discretionary distribution

10.1 *Bona vacantia* is the Crown's statutory right to the property of an intestate, when no relatives are entitled. In most jurisdictions when the intestate is not survived by a spouse or partner, issue, parents or remoter eligible relatives, the State or Territory is entitled to the intestate's estate by *bona vacantia*.<sup>1</sup>

10.2 Given the reduction in the size of the average family in Australia and the higher incidence of single child families, the possibility of an intestate's estate passing to a State or Territory may not be so unlikely as it once was.<sup>2</sup> The following hypothetical example illustrates the point:

*Alan died intestate leaving no spouse and no issue. Alan was an only child of parents each of whom was an only child. His parents and all of his grandparents had predeceased him.*<sup>3</sup>

10.3 A further example may be found in a 1991 case where one-third of the large estate of an elderly woman (who left no relatives entitled on intestacy) went on partial intestacy to the Crown, contrary to her intention, because her will was badly drawn.<sup>4</sup>

10.4 *Bona vacantia* occurs most frequently in NSW because the limit is set at aunts and uncles rather than first cousins or more remote relatives. In NSW, in the period 2001-2005, the Public Trustee paid \$24,289,946.86 into Treasury from 92 estates (averaging

1. Succession Act 1981 (Qld) s 35 and Sch 2 Pt 2 It 4; Administration and Probate Act 1919 (SA) s 72G(e); Administration and Probate Act 1958 (Vic) s 55; Administration and Probate Act 1929 (ACT) Sch 6 Pt 6.2 It 4; Administration and Probate Act 1969 (NT) s 66(1) and Sch 6 Pt 4 It 4; Wills, Probate and Administration Act 1898 (NSW) s 61B(7); and Administration and Probate Act 1935 (Tas) s 45. See also Administration Act 1969 (NZ) s 77 It 8; and Administration of Estates Act 1925 (Eng) s 46(1)(vi). Western Australia does not employ *bona vacantia*. It is the only Australian jurisdiction which maintains escheat to the Crown. Escheat is the feudal rule whereby real property would revert to the Crown, or lord of the fee, should the owner of such property die intestate and without heirs. Land may also have reverted if the holder grossly breached his or her feudal bond. In Western Australia escheated property includes real and personal property: Administration Act 1903 (WA) s 14(1) Table It 11; Escheat (Procedure) Act 1940 (WA) s 2, s 9. In cases of intestacy, at least, escheat has been expressly abolished in Property Law Act 1974 (Qld) s 20(3)(a); Wills, Probate and Administration Act 1898 (NSW) s 61B(7); Law of Property Act 2000 (NT) s 20; Administration and Probate Act 1935 (Tas) s 45; Administration and Probate Act 1958 (Vic) s 55; Administration Act 1969 (NZ) s 76; and Administration of Estates Act 1925 (Eng) s 45(1)(d).
2. Cases of property passing to the Crown on intestacy were once more frequent, notwithstanding the old civil degrees of kinship, in the time before ex-nuptial children were accorded equal status for the purposes of intestacy: See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at para 2704.
3. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 65.
4. *Mortensen v State of New South Wales* (NSW Court of Appeal, No 40544/1990, 12 December 1991, unreported).

\$264,000 each) where there were no next of kin closer than cousins.<sup>5</sup> Some have suggested that the incidence of *bona vacantia* estates is increasing in NSW for a number of reasons. First, people are generally having fewer children.<sup>6</sup> Secondly, because the now elderly population of refugees from World War II and its aftermath generally have fewer surviving near relatives.<sup>7</sup>

## WHERE SHOULD IT GO?

10.5 At present, all *bona vacantia* estates go to consolidated revenue. There is some support for this position.<sup>8</sup> For example, the Western Australian Law Reform Commission argued that “the general community should benefit rather than remote relatives, who would usually have little or no contact with the deceased”.<sup>9</sup>

### Distribution to charities

10.6 An alternative could be to let *bona vacantia* estates go to a charity or charities rather than to a State or Territory. In 1985, the Law Reform Commission of Tasmania noted:

*The Commission believes that most people would prefer their estate to go to charity than to the Crown, given that no close family exist at the time of their death. Although many people might object to the property going to the State rather than to relatives of the deceased, they are less likely to object to it going to charity.*<sup>10</sup>

10.7 The Tasmanian proposal, which has not been implemented, would require the establishment of a “Charities Board” to distribute the funds received. Attention has been drawn to the establishment, in 1995, of the Tasmanian Community Foundation, which is described as an “independent philanthropic organisation working in a specific geographic area”,<sup>11</sup> as an appropriate body for receiving *bona vacantia* estates.<sup>12</sup> Community

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5. Information supplied by Mr B Maher, Counsel, Public Trustee NSW (22 June 2005). A further 808 estates, totalling \$22,323,729.85, were also dealt with where no beneficiaries could be identified or located.
  6. *Sydney Consultation 1*; *Sydney Consultation 2*.
  7. *Sydney Consultation 2*.
  8. The NT makes express provision for the payment of the proceeds of an estate into consolidated revenue: *Public Trustee Act* (NT) s 67A.
  9. Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 7. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, 1989) at para 1609.
  10. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 15.
  11. «<http://www.tasmaniancommunityfoundation.org>» (as at 28 February 2007).
  12. Law Society of Tasmania, *Submission* at 15.

Foundations, based on the same principles, have been established in various regions across Australia.<sup>13</sup>

10.8 In similar vein, the Society of Trust and Estate Practitioners in England has recently suggested that the Crown, the Duchy of Lancaster and the Duchy of Cornwall could be replaced by charities as recipients of *bona vacantia* estates.<sup>14</sup>

10.9 A provision to similar effect has been enacted in Queensland with respect to Indigenous people who die intestate under schemes whereby the chief executive of the Aboriginal and Islander Affairs Corporation may grant aid to Indigenous people who apply for it on such terms as the chief executive may think fit. In cases where the chief executive is unable to determine that any person is entitled to succeed to the estate or a part of the estate, that property shall “vest in the chief executive who shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of [Aborigines/Islanders] generally”.<sup>15</sup> Similarly in WA, where no kin can be identified, an Indigenous intestate estate will go to the Aboriginal Affairs Planning Authority for the benefit of Indigenous people.<sup>16</sup>

10.10 In Alberta, *bona vacantia* estates are held on trust to pay an annual income to the boards of various universities to provide such scholarships and assistance in fields of research as each board considers proper. The Crown holds the estates on trust and the Minister responsible for universities initially determines the allocation of income.<sup>17</sup>

10.11 A public opinion survey conducted by the English Law Commission found that 60% of respondents supported the property in a *bona vacantia* estate going to a charity. Only 17% of those surveyed supported the current position.<sup>18</sup> However, the Commission ultimately opposed such a proposal as the chosen charity would then also have the job of administering the intestate estate and might be required to account to any beneficiaries that are subsequently discovered.<sup>19</sup>

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13. See «<http://www.philanthropy.org.au/community/auscf.html>» (as at 28 February 2007).

14. P Hewitt and H Labes, “Wills and probate update” (2006) 156 *New Law Journal* 55 at 55.

15. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 56, s 60(4); *Community Services (Torres Strait) Act 1984* (Qld) s 179, s 183(4). See para 14.19.

16. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3). See para 14.25.

17. *Ultimate Heir Act* RSA 2005 c U-1, s 9-10.

18. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 52.

19. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 54.

## Submissions and consultations

10.12 Some opinions expressed in submissions and consultations generally supported *bona vacantia* estates going to charity rather than a State or Territory.<sup>20</sup> Some submissions supported the idea of a “Charities Board”,<sup>21</sup> with one suggesting that the Board should be responsible for redress to relatives who are later discovered.<sup>22</sup>

10.13 Other submissions supported the current position of the proceeds of *bona vacantia* estates being paid into consolidated revenue.<sup>23</sup>

## National Committee’s conclusion

10.14 The suggestions outlined above would involve complex arrangements or are otherwise inappropriate. In particular, the National Committee is of the view that any scheme to apply intestate estates to “charitable purposes”, in the absence of a body to administer it, would be unworkably broad and it would not be possible to achieve agreement on anything more specific, such as a particular charity.

10.15 The National Committee also considers it possible that a really worthwhile cause might defeat some moral claims. However, it is possible that specific charities and other organisations which have a special connection with the intestate may be able to make a moral claim for discretionary distribution.<sup>24</sup>

10.16 It should also be noted that a State or Territory will be in a better position to account to beneficiaries who come to light at a later date.

10.17 The proceeds of a *bona vacantia* estate should be paid into consolidated revenue to be used for public purposes.

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### Recommendation 38

Bona vacantia estates should vest in the relevant State or Territory.

See Intestacy Bill 2006 cl 37.

## HOW SHOULD IT BE DISTRIBUTED?

10.18 In all Australian jurisdictions, apart from the ACT, an estate where no-one is entitled to take passes immediately to the Crown.

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20. Probate Committee, Law Society of South Australia, *Consultation*. See also Trustee Corporations Association of Australia, *Submission* at 19; Law Society of Tasmania, *Submission* at 15; P Worrall, *Consultation*.

21. J North, *Submission* at 5; Tasmania, Office of the Public Trustee, *Consultation*.

22. J North, *Submission* at 5.

23. Public Trustee NSW, *Submission* at 14

24. See para 10.37.

10.19 In the ACT, conditions are imposed upon the public trustee where the Territory is entitled to an intestate estate. The estate must be held in trust until six years have passed since the intestate's death. At that point, the estate must be sold and the proceeds paid to the Territory, less all costs and charges lawfully due to the public trustee or any other person.<sup>25</sup>

10.20 Such an arrangement would appear to be of practical utility only where the class of persons who may be entitled on intestacy is wider than the National Committee has recommended and it may take some considerable time for beneficiaries to be identified. Such provisions were common in Canada in jurisdictions that retained the system of distribution by civil degrees of relationship. So, the Law Reform Commission of British Columbia was able to observe in 1983 that their recommendation limiting the range of persons entitled to take would permit estates to pass to the Crown without waiting the prescribed period of 10 years.<sup>26</sup>

## DISCRETIONARY DISTRIBUTION

10.21 In most jurisdictions, a person may, in certain circumstances, apply to the Crown for provision to be made out of a *bona vacantia* estate. In some cases, the right is expressly provided in legislation. In others, the exercise of the right is based in practice only.

10.22 Legislation in Tasmania, NSW and Victoria expressly states that certain persons may apply to the State for provision. These people are dependants and other people for whom the intestate might reasonably have been expected to make provision.<sup>27</sup> WA makes similar provision, referring instead only to persons who have a "moral claim" against the estate.<sup>28</sup> Queensland provides a more extensive list of persons in whose favour the responsible Minister may waive the rights of the State. They are:

- (a) *any dependants, whether kindred or not, of the intestate;*
- (b) *any other persons for whom the intestate might reasonably have been expected to make provision;*
- (c) *any persons to whom the State would, if the State's title had been duly proved by inquisition, have the power to grant such property;*
- (d) *any other persons having in the opinion of the Minister a just claim to the grant of the property;*

25. *Administration and Probate Act 1929* (ACT) s 49CA.

26. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 36.

27. *Wills, Probate and Administration Act 1898* (NSW) s 61B(8); *Administration and Probate Act 1935* (Tas) s 45(2); and *Financial Management Act 1994* (Vic) s 58(3). See also *Administration Act 1969* (NZ) s 77(1)(8); and *Administration of Estates Act 1925* (Eng) s 46(1)(vi).

28. *Escheat (Procedure) Act 1940* (WA) s 9.



- (e) the trustees of any person as mentioned in paragraphs (a) to (d).<sup>29</sup>

The NT has also adopted the Queensland list.<sup>30</sup>

10.23 The statutory provisions can be seen as a recognition of the common law right “of certain dependants of the intestate who, although not entitled at law, may nevertheless petition the Crown for a waiver of its rights of *bona vacantia* in any estate in respect of which there are no legal next of kin”.<sup>31</sup> The Queensland provisions appear to have been a response to a 1962 case involving the old method of petitioning the Crown for a waiver of rights.<sup>32</sup> Such provisions have been said to be “desirable” as a means of benefiting more remote kin who are unable to take directly on intestacy and dependants who are not related to the intestate.<sup>33</sup>

10.24 In SA there is a procedure which applies only to real estate. Application can be made to the Governor for waiver of the Crown’s right with respect to land in a *bona vacantia* estate. No guidance is offered with respect to whom application may be made, the provision merely stating that the Governor may “by warrant under his hand, authorise the waiver of such right on such terms, whether for the payment of money or otherwise, as may be specified in the warrant; and the Public Trustee may, in pursuance of such warrant, convey to the person in whose favour the waiver is made the right of His Majesty so waived”.<sup>34</sup> It would appear that the provision is rarely used. No applications with respect to *bona vacantia* estates have been made in recent memory.<sup>35</sup>

10.25 In NSW, applications are handled initially by the Crown Solicitor’s Office before being passed to Treasury. It is estimated that only around 10 to 15 applications are made per year.<sup>36</sup>

10.26 The Victorian provision is not widely known, being located in a different statute, and seldom taken advantage of, not least because of the use of civil degrees of kinship to find potential beneficiaries. One Victorian practitioner recalled having once written a letter to the Department of Justice concerning an estate that had gone to *bona vacantia*.<sup>37</sup> Such circumstances are all but unknown in Tasmania.<sup>38</sup> Since 1998, there has been one *bona*

29. *Property Law Act 1974* (Qld) s 20(5).

30. *Law of Property Act 2000* (NT) s 20(3).

31. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8993.

32. *Re Bonner* [1963] QdR 488. See *Re Suncorp Insurance and Finance* [1991] 2 QdR 704 at 708.

33. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, 1989) at para 1610.

34. *Law of Property Act 1936* (SA) s 115.

35. Probate Committee, Law Society of SA, *Consultation*.

36. Information supplied by Mr P Crollini, NSW Crown Solicitor’s Office (21 April 2005).

37. *Melbourne Consultation*.

38. Registry, Supreme Court of Tasmania, *Consultation*; K Mackie, *Consultation*.

*vacantia* matter in Tasmania. An application was made to the Governor for discretionary distribution but there was no evidence to support it.<sup>39</sup>

## Circumstances in which distribution may be made

10.27 Although the circumstances in which such provisions can be applied are limited, it has been suggested that they could cover persons who are otherwise not entitled to distribution on intestacy, such as foster children, step-children, and carers, such as “an old friend... who looked after the intestate in the last days of his life”.<sup>40</sup> One submission noted that as families become smaller people come to rely more on friends for their social network.<sup>41</sup> It has been noted, at least in NSW, that the provision allowing dependants to make application was of particular importance to de facto couples, both heterosexual and same-sex, before the reforms of 1984 and 1999 respectively, since they could not apply under family provision legislation.<sup>42</sup> The provisions would also have had some significance before ex-nuptial children were granted equal status. On intestacy, an ex-nuptial child’s estate could only be distributed if that child left a surviving “lawful” spouse and/or “lawful” children.<sup>43</sup>

10.28 The most comprehensive list of categories of applicants for distribution is contained in a 1971 English publication. It summarised the grounds in respect of which the UK Treasury most often granted applications. These were:<sup>44</sup>

- “Where the applicant performed essential services or substantial acts of kindness for the deceased person”. In such cases, the services should normally have been provided for no reward. Cases where remuneration or reward were contemplated were more appropriately dealt with as legal claims against the estate.
- “Where the deceased person was of illegitimate birth, but was survived by blood relatives”. This ground is no longer relevant since the bars associated with ex-nuptial children have been removed.
- “Where the deceased person left a document of a testamentary character which was not valid as a will”.
- “Where there existed between the applicant and the deceased person, over a long period, an association which was similar to some close blood relationship”. This category covered de facto partners and people brought up as if they were children of the family.
- “Where the deceased person made his home with the applicant for an appreciable period and became regarded as a member of the applicant’s family”. The most

39. Tasmania, Office of the Public Trustee, *Consultation*.

40. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 November 1954, Administration of Estates Bill, Second Reading at 1715.

41. Trustee Corporations Association of Australia, *Submission* at 19.

42. K Mason and L G Handler, *Wills Probate and Administration Service* (Butterworths, Service 70) at para 1305.6.

43. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at para 2704; and *Re Bonner* [1963] QdR 488.

44. N D Ing, *Bona Vacantia* (Butterworths, London, 1971) at 105-107.

common person in this category was said to be “the lodger who shared the life and amusements of his landlord’s or landlady’s family”.

10.29 The publication also listed applications that were often made but did not, at the time, by themselves result in grants being made:<sup>45</sup>

- where the applicant was related to the intestate by marriage;
- where the whole or part of the intestate’s estate was derived from a particular source, for example, from a previously deceased spouse, so that the estate ought to be returned to the spouse’s family;
- where the intestate had verbally stated that he or she intended to make provision for the applicant.

10.30 It can be argued that such provisions are no longer necessary given the broader scope of family provision legislation to cover dependants, and especially in light of the recommendations of the National Committee in relation to persons to whom the deceased “owed a responsibility to provide maintenance, education or advancement in life.”<sup>46</sup> In making a family provision order in relation to such an application, the court may have regard to whether the applicant “was being maintained, either wholly or partly, by the deceased person before the deceased person’s death”.<sup>47</sup>

10.31 However, it is important to distinguish between the nature of an application under family provision and the nature of an application for provision out of *bona vacantia*. In the case of a claim for family provision, people who are not entitled to a share of the deceased’s estate may only make a claim if the deceased had been maintaining them or if the deceased had a responsibility towards them. In the case of *bona vacantia*, people may apply in cases where they have a purely moral claim to a share of the estate. Examples of purely moral claims may include foster children who are now adult, or beneficiaries whose inheritance has been struck out on a technicality, for example, a sole beneficiary who had signed as a witness.<sup>48</sup>

10.32 It should also be noted that an application for provision out of *bona vacantia* is a relatively inexpensive procedure and that, in some cases, it will be cheaper and easier for dependants to seek an exercise of discretion rather than pursue a claim for family provision.<sup>49</sup>

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45. N D Ing, *Bona Vacantia* (Butterworths, London, 1971) at 107.

46. Family Provision Bill 2004 cl 7 in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

47. Family Provision Bill 2004 cl 11(2)(j) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

48. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 36.

49. See England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 8 n 15.

## Criteria for assessment of claims

10.33 As already noted, NSW, Tasmania, Queensland and Victoria refer to “dependants” and to other people for whom the intestate might reasonably have been expected to make provision.<sup>50</sup> WA refers only to persons who have a “moral claim” against the estate.<sup>51</sup> In WA, the term “moral claim” is used to distinguish a separate procedure that deals with any legal or equitable claims that may be made against the estate.<sup>52</sup>

10.34 In British Columbia, the *Escheat Act* provided for the restoration of property to anyone having a “legal or moral” claim upon the intestate.<sup>53</sup> In that province, it has been reported that every claim is treated as a moral claim, leaving the term “legal claim” undefined in practice.<sup>54</sup> Other Canadian provinces have similar provision for moral claims.<sup>55</sup>

10.35 While some have suggested that *ex-gratia* distributions from *bona vacantia* in NSW are “completely Delphic”,<sup>56</sup> submissions generally supported a system of giving the Crown a discretion.<sup>57</sup> It was felt to be very difficult to “lay down specific criteria to cover all circumstances”.<sup>58</sup> Another submission suggested that setting out criteria would be restrictive rather than helpful.<sup>59</sup> However, one submission has suggested that a court should determine any claims,<sup>60</sup> while another suggested that, if applications were to be made, they should be handled in the same way as family provision applications.<sup>61</sup>

10.36 In NSW, it has been noted that applicants stand a good chance of receiving some of the intestate estate if they are really part of the family. That is, if the deceased had made a will, they would have included the applicant.<sup>62</sup> One example given was that of the cousin of a Holocaust survivor’s deceased husband who cared for her in her final years.<sup>63</sup>

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50. *Wills, Probate and Administration Act 1898* (NSW) s 61B(8); *Administration and Probate Act 1935* (Tas) s 45(2); *Financial Management Act 1994* (Vic) s 58(3); and *Property Law Act 1974* (Qld) s 20(5). See also *Administration Act 1969* (NZ) s 77 It 8; and *Administration of Estates Act 1925* (Eng) s 46(1)(vi).

51. *Escheat (Procedure) Act 1940* (WA) s 9.

52. See *Escheat (Procedure) Act 1940* (WA) s 8.

53. *Escheat Act* RSBC 1996 c 120 s 5.

54. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 36.

55. See *Escheats Act* CCSM c E-140 s 3; *Escheats and Forfeiture Act* RSNB 1973 c E-10 s 3 and s 6; *Escheats Act* RSO 1990 c E-20 s 3; *Escheats Act* RSPEI 1988 c E-10 s 2 and s 5; *Escheats Act* RSS 1978 c E-11 s 4.

56. *Sydney Consultation 2*. See also *Sydney Consultation 1*.

57. Public Trustee NSW, *Submission* at 14.

58. Public Trustee NSW, *Submission* at 14; Trustee Corporations Association of Australia, *Submission* at 20.

59. W V Windeyer, *Submission* at 5.

60. J North, *Submission* at 5.

61. Law Society of Tasmania, *Submission* at 15.

62. *Sydney Consultation 2*.

63. *Sydney Consultation 2*.

## Corporate claimants

10.37 The Law Commission suggests that in the English provisions “person” includes a corporate body.<sup>64</sup> It is, therefore, possible that a charity or community organisation with which the deceased had a close association could make an application for provision out of a *bona vacantia* estate.<sup>65</sup> The Law Commission observed that “payments may also be made to charities having such a claim or where the deceased has tried to benefit a charity by a testamentary disposition which failed”.<sup>66</sup> This could potentially be the case in all Australian jurisdictions where the relevant interpretation acts each include a body corporate in their definition of “person”.<sup>67</sup>

## National Committee’s conclusion

10.38 The National Committee has concluded that it should adopt a version of the provisions that allow for the discretionary distribution of *bona vacantia* estates. Provisions of this kind are a fair solution to the problem arising from the imposition of a limit on the degrees of kin who are entitled to take. They involve a relatively inexpensive procedure that saves on having to find remote relatives, but ensures the “deserving” ones get something. Such provisions will also be rarely invoked, considering that approximately half of the NSW applications in any year already go to cousins of the intestate.

10.39 The National Committee has decided to adopt a version of the Queensland provision. It has a number of benefits, including that it provides a reasonably comprehensive list of the types of application that might be entertained. It also does not require an application from each person who may be eligible, leaving open the possibility that an application can be made on behalf of a group. However, the National Committee considers that the provision relating to proof of title by inquisition should be omitted from the model provisions as being otiose in the context of intestacy. A further category of “any other person” should also be added to ensure that any person who may be deserving but does not fit within any of the other categories will not be excluded.

10.40 The Committee also considers that it should be made clear in the provision that it extends to corporate entities as well as individuals in order to cover any rare cases where, for example, a charity or social group can demonstrate a sufficient case for provision.

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64. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 15.

65. On the possibility of a religious organisation establishing a “moral claim” in the context of a family provision application, see: P Ridge, “Moral duty, religious faith and the regulation of testation” (2005) 28 *University of New South Wales Law Journal* 720 at 732-733.

66. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 53.

67. *Interpretation Act 1987* (NSW) s 21(1); *Interpretation Act 1984* (WA) s 5; *Acts Interpretation Act 1915* (SA) s 4; *Interpretation Act 1978* (NT) s 19; *Acts Interpretation Act 1954* (Qld) s 36; *Interpretation of Legislation Act 1984* (Vic) s 38A; *Acts Interpretation Act 1931* (Tas) s 41(1); *Legislation Act 2001* (ACT) s 160(1).

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**Recommendation 39**

The responsible Minister should have the discretion, upon application, to make provision out of *bona vacantia* estates for people in the following classes:

- (a) any dependants of the intestate;
- (b) any persons having in the opinion of the Minister a just or moral claim to the grant of the property;
- (c) any persons or organisations for whom the intestate might reasonably be expected to have made provision;
- (d) the trustees of any person as mentioned in paragraphs (a) to (c);
- (e) any other organisation or person.

See Intestacy Bill 2006 cl 38.

## 11. Survivorship

- Application of survivorship clauses to intestacy
- Length of time
- Preventing bona vacantia
- Application to children en ventre sa mere
- Submissions and consultations
- National Committee's conclusion

11.1 This chapter looks at whether there should be a general delay of a specified period before each estate vests in those who are entitled. The question of survivorship, as it affects intestacy provisions, arises in two situations:

where the intestate and someone who may be entitled to take on intestacy have both died (either in the same event or separately) but, because of the circumstances of the deaths, the order in which they died is uncertain; and

- where a person who is otherwise entitled survives the intestate but dies within a certain number of days (usually less than a month) of the intestate.

The first situation will be dealt with in the National Committee's final report on the administration of estates of deceased persons.<sup>1</sup>

## APPLICATION OF SURVIVORSHIP CLAUSES TO INTESTACY

11.2 Two Australian jurisdictions provide for the situation where a person who is entitled to take on intestacy survives the intestate but dies within a certain number of days of the intestate.

11.3 SA provides that when a spouse or partner does not survive the intestate by more than 28 days, the estate will be distributed as if the spouse or partner had not survived the intestate.<sup>2</sup>

11.4 Queensland covers all people entitled on intestacy, not just spouses or partners, and states that, if the person does not survive the intestate for a period of 30 days, the estate will be dealt with as if the person had not survived the intestate.<sup>3</sup>

## Law reform developments

11.5 The Queensland Law Reform Commission, in 1978, recommended the inclusion of a survivorship clause.<sup>4</sup>

11.6 In Canada, general survivorship clauses have been proposed by the Uniform Law Conference of Canada in 1983,<sup>5</sup> in Manitoba in 1985,<sup>6</sup> and in Alberta in 1999.<sup>7</sup>

1. National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons* (Report, 2007).
2. Administration and Probate Act 1919 (SA) s 72E. See also Administration of Estates Act 1925 (Eng) s 46(2A).
3. *Succession Act 1981* (Qld) s 35(2).
4. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
5. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 229-231.
6. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53-54. This was implemented in 1990: *Intestate Succession Act*, SM 1989-90 c 43, CCSM c I-85, s 6(1). In 2003, the Manitoba Law Reform Commission recommended



11.7 In 1989, the Law Commission of England and Wales recommended a survivorship clause that applied only to spouses.<sup>8</sup>

11.8 The National Committee has previously recommended that the law of wills include a survivorship clause.<sup>9</sup>

## Arguments for and against

11.9 There are a number of benefits of such provisions, chiefly related to reducing the cost of probate. First, they avoid the cost of multiple administration in some cases.<sup>10</sup> Secondly, they do away with the need to determine the order of death in the case of simultaneous or near-simultaneous deaths, since such determinations may require expert evidence.<sup>11</sup> Consultations carried out by the English Law Commission singled out the absence of a survivorship clause as a “factor leading to delay and extra expense”.<sup>12</sup> Such savings in a limited number of cases will need to be offset against any perceived complexity or delays involved in applying survivorship clauses to all intestate estates.<sup>13</sup>

11.10 Provisions requiring that beneficiaries survive testators by 30 days are common in wills. The Queensland Law Reform Commission, in 1978, recommended the inclusion of a 30-day survivorship clause for the sake of consistency with similar provisions recommended in the case of wills.<sup>14</sup> Such provisions were originally included in wills to avoid an accumulation of death duties in the case of simultaneous or near-simultaneous deaths.<sup>15</sup> They can now be justified on the grounds that they may prevent part or all of the intestate’s estate going to the heirs of the deceased beneficiary - a result that could be

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an extension of their survivorship provisions from 15 to 30 days: Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 71.

7. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.
8. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57. This recommendation was implemented by *Law Reform (Succession) Act 1995* (Eng) s 1.
9. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.47.
10. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 173; Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230; Probate Committee, Law Society of SA, *Consultation*; Public Trustee of Queensland, *Submission* at 4.
11. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 56.
12. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 22, and see also para 56 and 57.
13. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57.
14. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
15. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.45.

seen as contrary to the intestate's wishes.<sup>16</sup> For example, if one of two children were to die within a few days of the intestate, in the absence of a survivorship clause, half of the estate would go to be distributed according to the deceased child's will.<sup>17</sup> This could be against the wishes of the intestate, who is likely to have wished the whole of the estate to go to the surviving child. Another example may be seen where a wife dies shortly after her husband, perhaps as the result of an accident, with no surviving children. In such a case, the entire estate will go to the wife's family.<sup>18</sup>

## LENGTH OF TIME

11.11 Varying lengths of time have been proposed and implemented in different jurisdictions.

11.12 In 1978, the Queensland Law Reform Commission recommended the inclusion of a 30-day survivorship clause for intestate estates for consistency with proposals for a 30-day survivorship provision for testate estates.<sup>19</sup>

11.13 In 1983, a report to the Uniform Law Conference of Canada recommended a period of only five days for a survivorship clause. However, this recommendation contemplated survivorship only in the context of a common disaster where serious injuries were inflicted:

*Although a longer period, such as 14 days, could be chosen, it is unlikely that this would alter the operative effect... fatally injured persons who linger on for five full days after an accident will probably survive a 14 day period as well.*<sup>20</sup>

The Uniform Law Conference ultimately, in 1985, recommended a 15-day period.<sup>21</sup> This was supported by the Manitoba Law Reform Commission in 1985.<sup>22</sup> However, in 2003, the Manitoba Commission recommended a period of 30 days, on the basis that other

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16. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53.
  17. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230.
  18. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57. See also England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.14; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 172.
  19. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
  20. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230-231.
  21. Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 287.
  22. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53-54.

jurisdictions had adopted this period for survivorship provisions relating to bequests and intestacies.<sup>23</sup> In 1999, the Alberta Law Reform Institute supported 15 days, on the grounds that the period “should not be so long as to interfere significantly with the administration of estates but should be long enough to deal with deaths arising from a common accident”.<sup>24</sup>

11.14 The National Conference of Commissioners on Uniform State Laws in the US also proposed a limited period of 120 hours (that is, five days). However, this was on the basis that, under the Uniform Probate Code, informal letters of administration cannot be issued in the first five days after death.<sup>25</sup>

11.15 The Law Commission of England and Wales suggested that the appropriate period was 14 days, claiming that “any longer might lead to unacceptable delays in the administration of estates”.<sup>26</sup>

11.16 The Commission’s survey of wills disclosed that 177 of 548 wills (32.3%) included a survivorship clause. The median length chosen was 30 days. Sixty one percent of clauses were 30 days and 23.2% were one calendar month, making approximately 84% being for around one month. The remainder (15.8%) ranged between 14 and 365 days.<sup>27</sup>

## PREVENTING BONA VACANTIA

11.17 There may be situations where the application of the survivorship clause will result in the intestate’s estate passing to the Crown as *bona vacantia*. Some survivorship provisions state that they do not apply where their application would result in the estate passing to the Crown.<sup>28</sup> Examples include the proposals of the Uniform Law Conference of Canada,<sup>29</sup> the Uniform Probate Code<sup>30</sup> and Manitoba.<sup>31</sup> Neither Queensland nor SA have such provisions associated with their survivorship clauses.

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- 23. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 41-42, 71. The Commission had previously recommended a period of 15 days following proposals of the Uniform Law Conference: Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 54.
  - 24. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.
  - 25. Uniform Probate Code s 2-104 and comment.
  - 26. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57.
  - 27. See J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators’ choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.27.
  - 28. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.
  - 29. *Uniform Intestate Succession Act* s 5(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 287.
  - 30. Uniform Probate Code s 2-104.
  - 31. *Intestate Succession Act*, SM 1989-90 c 43, CCSM c I-85 s 6(3).

11.18 In 1999, the Alberta Law Reform Institute recommended that a survivorship clause should not apply where it would result in the estate passing to the Crown.<sup>32</sup>

## APPLICATION TO CHILDREN EN VENTRE SA MERE

11.19 There is a question whether the 30-day survivorship clause should apply to a child born posthumously. Queensland provides that a person *en ventre sa mere* must remain alive for a period of 30 days after birth.<sup>33</sup> The survivorship clauses, as currently formulated, cannot readily apply to a child who may be born more than 30 days after the death of the intestate.

11.20 In Australia in 2000, the death rate for children aged under 28 days (referred to as “neonatal mortality”) was 3.5 deaths per 1,000 live births. In the same period, the death rate for children aged between 28 days and one year (referred to as “postneonatal mortality”) was 1.7 deaths per 1,000 live births. These rates have declined markedly in the last two decades of the 20th century.<sup>34</sup> It is much more likely that a child that dies under the age of one year will die within the first 28 days of life. It would, therefore, appear to be the case that a survivorship clause that applies to children born posthumously could avoid a double administration in some cases. However, the circumstances in which this would make a difference would be extremely limited. For example, if the posthumously born child was a child of the intestate, the intestate would have to have had children by another relationship for the rule to have any effect. In the case of the children of other relatives born after the death of the intestate, the child would also have to have been predeceased by whichever parent was the intestate’s relative.

## SUBMISSIONS AND CONSULTATIONS

11.21 There was some support for including a 30-day survivorship clause in the intestacy rules<sup>35</sup> and for extending it to all potential beneficiaries.<sup>36</sup>

11.22 Consultations in SA suggest that the SA provision has utility, and there was support for such a provision covering all beneficiaries and not just the spouse. The Queensland legislation was referred to as a possible model.<sup>37</sup>

11.23 However, some opinions were expressed that 28 or 30 days was simply an arbitrary cut-off.<sup>38</sup>

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32. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.

33. *Succession Act 1981* (Qld) s 5A.

34. See Australian Bureau of Statistics, *Australian Social Trends 2002 - Health - Mortality and Morbidity: Infant Mortality*.

35. Trustee Corporations Association of Australia, *Submission* at 21; Succession Law Section, Queensland Law Society, *Consultation*; Law Society of Tasmania, *Submission* at 16; J North, *Submission* at 5.

36. Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee of Queensland, *Submission* at 4; J North, *Submission* at 5.

37. Probate Committee, Law Society of SA, *Consultation*.

## NATIONAL COMMITTEE'S CONCLUSION

11.24 A section along the lines of the Queensland provisions should be included. Even if the cut-off is arbitrary, there will be cases in which it will save a double administration, or other costs. Thirty days is appropriate because:

- it will not unduly delay the administration of an estate;
- it is consistent with the National Committee's recommendation in the Wills Report;
- it contemplates other circumstances in which potential beneficiaries may die in close proximity, not just in the context of fatal accidents;
- it is consistent with the majority of survivorship clauses in wills in NSW.

11.25 The National Committee also considers that it is inappropriate if the operation of a survivorship clause results in an estate passing to the Crown as *bona vacantia*. A clause should, therefore, be included which states that the provisions do not have effect if they result in the estate passing to the Crown as *bona vacantia*.

11.26 Finally, for the sake of consistency, a person *en ventre sa mere* at the death of the intestate must remain alive for a period of 30 days after birth.

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### Recommendation 40

A 30-day survivorship period should apply to all persons entitled to take on intestacy.

A 30-day survivorship period should apply to persons born after the death of the intestate but who were *en ventre sa mere* at that death.

The 30-day survivorship period should not apply where the effect would be that the intestate estate passes to the Crown as *bona vacantia*.

See Intestacy Bill 2006 cl 4(2), (3).

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38. See Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee NSW, *Submission* at 15.

## 12. Vesting of entitlements

- Vesting of minors' shares
- Inheritance by representation and the "predecease" requirement

12.1 Upon the grant of administration, the estate vests in the administrator from the death of the intestate to distribute to those who are entitled according to the relevant distribution regime. Each person who is entitled to share in the estate is then said to have a “vested interest” in their share. Most people in these circumstances attain an “absolutely vested interest” which means that, subject to survivorship,<sup>1</sup> disclaimer,<sup>2</sup> and the general requirements of administration, they are entitled to take their share immediately without the need to satisfy any other conditions.

12.2 This chapter considers whether a share of the estate should or should not absolutely vest in particular people in particular circumstances, for example, where people are under 18, or where they have disclaimed or forfeited their rights to inherit.

## VESTING OF MINORS' SHARES

12.3 In some jurisdictions, special provision is made so that a minor's share will not vest absolutely in the minor unless he or she has turned 18 or married. The result is that the share of a minor who dies before meeting the necessary conditions must be distributed among the others who are also entitled to share in the estate. A minor's interest in these circumstances is sometimes referred to as being “contingent”. Other jurisdictions make no such provision, with the result that the general provisions apply and a minor's share vests immediately whether or not he or she has turned 18 or married. We are dealing here with children or minors whether they are issue of the deceased or not (for example, they could also be collateral relatives or the issue of collateral relatives).

### Contingent vesting

12.4 The ACT, NT and Tasmania make separate provision for those who have not yet attained the age of 18 and are otherwise entitled to receive a share of an intestate estate.

12.5 First, if people who are entitled on intestacy are not yet 18 years old and are not (or have not been)<sup>3</sup> married, the share will vest absolutely in them only when they turn 18 or marry.<sup>4</sup> Tasmania adds that minors who have married before they turn 18 shall “be entitled to give valid receipts for the income” of their share or interest.<sup>5</sup>

12.6 Secondly, these jurisdictions make provision for circumstances where the minor dies who would otherwise be entitled to a share on distribution. The NT and ACT provide that if the person otherwise entitled dies unmarried before he or she turns 18, then the

1. See para 11.1.
2. See para 12.29-12.32.
3. The Tasmanian provision refers to people who “marry under” the age of 18. This, unlike the ACT and NT provisions, would include persons who have been widowed before the death of the intestate.
4. *Administration and Probate Act 1929* (ACT) s 46(1); *Administration and Probate Act 1969* (NT) s 63(1); and *Administration and Probate Act 1935* (Tas) s 46(1)(a) and (3). See also *Administration Act 1969* (NZ) s 78(1); and *Administration of Estates Act 1925* (Eng) s 47.
5. *Administration and Probate Act 1935* (Tas) s 46(1)(b). See also *Administration Act 1969* (NZ) s 78(1)(b); and *Administration of Estates Act 1925* (Eng) s 47(1)(ii).

intestacy provisions take effect as if the person had died before the intestate.<sup>6</sup> In Tasmania, the same effect is achieved by stating that the estate is held in trust for any children “who attain the age of 18 years or marry”.<sup>7</sup>

12.7 Thirdly, the relevant provisions state that they do not affect any law that authorises expenditure for the maintenance, advancement or benefit of a minor out of property held on trust for him or her.<sup>8</sup> The ACT and NT both add that any amount expended from the estate for the maintenance, advancement or benefit of a minor shall be deemed, upon the death of that minor before he or she marries or turns 18, to have reduced the amount of the intestate estate available for distribution by the amount expended.<sup>9</sup>

### ***Use and enjoyment of chattels***

12.8 In Tasmania, a specific provision states that the administrator may permit a minor who has a vested or contingent interest in any personal chattels to have the use and enjoyment of them in such a manner and subject to such conditions, if any, as the administrator may consider reasonable, and without being liable to account for any consequential loss.<sup>10</sup>

## **Absolute vesting**

12.9 Queensland, NSW, SA, WA and Victoria do not limit the vesting of a minor’s share in an intestate estate. However, any property that vests absolutely in a minor is held and managed on the minor’s behalf until he or she turns 18 or marries.<sup>11</sup>

### ***Special provisions***

12.10 Some jurisdictions make some special arrangements in some circumstances for dealing with the minor’s share while it is being held on his or her behalf.

12.11 In WA, when an infant is entitled on distribution to a share worth less than \$10,000, that infant, or a person on his or her behalf, may apply to the Court to authorise the executor or administrator to expend all or part of the share for the infant’s “maintenance, advancement or education”. This provision is stated to be in addition to any power the

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6. *Administration and Probate Act 1929* (ACT) s 46(2); *Administration and Probate Act 1969* (NT) s 63(2). See also *Administration Act 1969* (NZ) s 78(2).

7. *Administration and Probate Act 1935* (Tas) s 46(1)(a); *Administration of Estates Act 1925* (Eng) s 47. New Zealand uses “attain full age or marry under that age”: *Administration Act 1969* (NZ) s 78(1)(a).

8. *Administration and Probate Act 1935* (Tas) s 46(1)(b); *Administration of Estates Act 1925* (Eng) s 47(1)(ii); *Administration and Probate Act 1929* (ACT) s 46(3); *Administration and Probate Act 1969* (NT) s 63(3).

9. *Administration and Probate Act 1929* (ACT) s 46(3); and *Administration and Probate Act 1969* (NT) s 63(3).

10. *Administration and Probate Act 1935* (Tas) s 46(1)(d). See also *Administration Act 1969* (NZ) s 78(1)(c); and *Administration of Estates Act 1925* (Eng) s 47(1)(iv).

11. See para 12.25 below.



executor or administrator may otherwise have to undertake expenditure on behalf of an infant.<sup>12</sup>

12.12 In Victoria, if only a child or children have survived the intestate (there being no surviving spouse or partner) and the estate that remains to be distributed is less than \$1,000, the administrator may pay the entitlement of any of the children to “any person having the care and control of such child or children without seeing to the application thereof and without incurring any liability in respect of such payment”.<sup>13</sup>

12.13 In Queensland, where administration is granted to a trustee company and the estate or part of it is employed in a business or undertaking, and one or more of those entitled on intestacy is a minor, the trustee company may (subject to the court’s approval) postpone the sale and conversion of the property into money and the trustee company may carry on the business during the minority of the person so entitled.<sup>14</sup>

## Law reform developments

### **Australia**

12.14 In 1972, the Law Reform Committee of Western Australia considered contingent vesting provisions to be unnecessary.<sup>15</sup> In 1974, the Law Reform Committee of South Australia considered the question purely in the context of providing for issue of the deceased. The Committee stated that it considered preventing persons from inheriting before they reached a specified age was “sensible, provided that the provisions of the Trustee Act enabling an administrator to apply the income or part of the capital of a putative share of a child who does not reach eighteen for that child’s maintenance education advance or benefit applies equally under this Act”.<sup>16</sup> The relevant provision was, however, repealed in SA in 1984.<sup>17</sup> The reason for the repeal was that amendments made to the *Income Tax Assessment Act 1936* (Cth) in 1979<sup>18</sup> severely penalised trusts in relation to property held on behalf of minors who do not immediately obtain a vested interest in the property.<sup>19</sup> These tax amendments are still in force.<sup>20</sup>

### **England and Wales**

12.15 The Law Commission of England and Wales, in its review of intestacy in 1989, made no comment on the adequacy or otherwise of the vesting provisions that are still

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12. *Administration Act 1903* (WA) s 17. This provision will be dealt with in the National Committee’s final report on the administration of estates of deceased persons.

13. *Administration and Probate Act 1958* (Vic) s 54.

14. *Trustee Companies Act 1968* (Qld) s 29(1).

15. WA Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6. The issue was not dealt with in the WALRC’s final report.

16. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.

17. *Administration and Probate Act Amendment Act (No 2) 1984* (SA) s 4.

18. See *Income Tax Assessment Amendment Act 1979* (Cth) s 5.

19. SA, *Parliamentary Debates (Hansard)* Legislative Council, 29 August 1984 at 604.

20. *Income Tax Assessment Act 1936* (Cth) s 26(b).

contained in the English legislation.<sup>21</sup> However, the Law Commission has had reason to review some of the law relating to the vesting of minors' shares in the context of its review of the forfeiture rule and the law of succession.<sup>22</sup>

### **New Zealand**

12.16 The New Zealand provisions which delay absolute vesting until a person turns 18<sup>23</sup> were first introduced in 1944.<sup>24</sup> The 1944 provisions replaced a system of absolute vesting upon the death of the intestate. They were modelled on the English system of statutory trusts for issue. At the time it was noted that the English system had been "widely approved" and had "the real advantage of placing the administrator-trustee upon a proper basis in dealing with the shares of an infant beneficiary".<sup>25</sup>

## **Arguments for and against**

12.17 An advantage of a provision preventing the absolute vesting of a share is that, should an entitled person die unmarried before they turn 18, his or her share will pass to a blood relative of the intestate, rather than to a surviving parent of the minor who may have no familial relationship to the original intestate.<sup>26</sup> However, omitting such provisions would mean that vesting can occur as soon as the intestate dies, allowing vested interests to be quickly identified and complexity avoided.<sup>27</sup>

12.18 References to "married" in some of the statutes may not be adequate in all cases. For example, the formulations in the NT and ACT both exclude persons who had been married, but were widowed by the time of the death of the intestate.<sup>28</sup> Also, while allowance is sometimes made for children to take their share if they marry before they turn 18, no consideration has been given to allowing children to take their share before they turn 18 where they have not married but have, nevertheless, parented children of their own. If the parent dies after the intestate but before reaching the age of 18, the children will not be able to inherit because their deceased parent's share did not vest absolutely. This latter situation was considered recently by the English Law Commission in the context of a grandchild of the intestate whose parent died unmarried under the age of 18

21. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 12.

22. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.30-4.34.

23. *Administration Act 1969* (NZ) s 78.

24. *Administration Amendment Act 1944* (NZ) s 6 and s 7.

25. Explanatory Memorandum to *Administration Amendment Bill 1944* (NZ) at 3.

26. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363; Public Trustee NSW, *Submission* at 15.

27. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363; Trustee Corporations Association of Australia, *Submission* at 2; Public Trustee NSW, *Submission* at 2.

28. Compare with the old SA provisions which used the words "married or widowed": *Administration and Probate Act 1919* (SA) s 72d(1), repealed by *Administration and Probate Act Amendment Act (No 2) 1984* (SA) s 4.

but after the deceased.<sup>29</sup> It has been suggested that, since the problem would not arise if the child of the intestate was married, the law still effectively discriminates against illegitimate grandchildren.<sup>30</sup> The Law Commission's solution to the problem is to deem the person who died after the intestate without having reached the age of majority to have died immediately before the intestate.<sup>31</sup>

12.19 There has also been some questioning of the age at which a person's entitlement will vest absolutely, the argument generally being that people are too inexperienced to be given complete control of large sums of money when they are only 18.<sup>32</sup> It has been suggested that few testators allow their principal beneficiaries to take absolutely at so young an age.<sup>33</sup> However, this question has a much broader reach than just the rules of intestacy, extending to contract and trust law. It is not an appropriate question to be determined in this review.

## Submissions and consultations

12.20 One submission considered that minors should not be able to take their share of an estate unconditionally.<sup>34</sup> In other submissions and consultations, however, it was agreed that minors' interests should vest immediately.<sup>35</sup>

12.21 Some submissions also considered that it should be possible to allow payment of a minor's share that is less than a certain sum to a parent or guardian.<sup>36</sup> The Public Trustee of Queensland supported allowing this in cases where the share is less than \$2,000, noting that the Public Trustee has already adopted an administrative practice of paying such small amounts.<sup>37</sup> Another submission considered that such questions would be better dealt with by the trustee acts rather than the intestacy rules.<sup>38</sup>

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- 29. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 1.16(2) and para 4.30-4.34.
  - 30. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 4.30.
  - 31. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 4.34.
  - 32. See, eg, H Tavroges, "Will supermarkets supersede solicitors?" (2005) 155 *New Law Journal* 1576 at 1576; Law Society of Tasmania, *Submission* at 3.
  - 33. Law Society of Tasmania, *Submission* at 3. Some wills precedents leave open the option of specifying an age greater than 18, for example, 21: C Rowland, G Tamsitt, *Hutley's Australian Wills Precedents* (5th edition, Butterworths, Sydney, 1994) at 240.
  - 34. Law Society of Tasmania, *Submission* at 3.
  - 35. Trustee Corporations Association of Australia, *Submission* at 2; Public Trustee NSW, *Submission* at 2; *Sydney Consultation* 2; W V Windeyer, *Submission* at 2; J North, *Submission* at 1.
  - 36. Public Trustee NSW, *Submission* at 2 (suggesting a sum of \$1,000).
  - 37. Public Trustee of Queensland, *Submission* at 1.
  - 38. W V Windeyer, *Submission* at 2. See, eg, *Trustee Act 1925* (NSW) s 43 and s 44.

## National Committee's conclusion

12.22 For reasons of certainty and simplicity, a person's share in an intestate estate should vest immediately and should not have to wait for the person to turn 18 or marry. This will ensure that children of an unmarried minor who dies after the intestate but before he or she turns 18 or marries, will be entitled, by representation, to the share of the deceased parent. This recommendation will also remove any need to deem the young person to have died before the intestate.<sup>39</sup>

12.23 The special provisions employed by Tasmania, WA, Victoria and Queensland<sup>40</sup> are not necessary to the administration of an intestate estate, and should not be enacted in the model legislation.

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### Recommendation 41

A minor's share in an intestate estate should not be contingent but vest immediately.

See Intestacy Bill 2006 cl 39.

## Trusts for minors' shares

12.24 As already noted, some jurisdictions make special provision to deal with the management of parts of an estate to which a minor is entitled.<sup>41</sup>

12.25 Once a share has vested in a minor, the question of managing that share is best dealt with under the general law relating to trusts. For example, the Law Reform Commission of Tasmania considered that the obligations in relation to the maintenance of children of an intestate should be based on the trustee provisions in general law. It was claimed that "this would help ensure the efficient and effective management of the intestate's property which could only benefit the children".<sup>42</sup> One submission agreed that no special provision was necessary so long as each jurisdiction has the equivalent of s 43 of the *Trustee Act 1925* (NSW).<sup>43</sup> The National Committee agrees that no special provision should be made for the management of a minor's share in intestacy.

## INHERITANCE BY REPRESENTATION AND THE "PREDECEASE" REQUIREMENT

12.26 In order for any relatives of an intestate to take by representation, all of their ancestors who are entitled to share in the estate must have predeceased the intestate.<sup>44</sup> This requirement for a person to die before representation to their descendants can

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39. See para 12.46 below.

40. See para 12.10-12.13.

41. See para 12.4-12.7.

42. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.

43. W V Windeyer, *Submission* at 2.

44. See para 8.4.

operate causes some problems when a person is prevented from inheriting for reasons other than death. The issue of this person are then prevented from taking by representation the share he or she would have received otherwise.

12.27 The relevant circumstances that may prevent a person from inheriting upon intestacy include:

- where the person has disclaimed his or her interest;
- where the forfeiture rule operates against the person because he or she has killed the intestate; and
- where the person has failed to attain a vested interest because he or she dies after the intestate but before turning 18 or marrying.

The recommendation above in relation to the automatic vesting of minors' shares<sup>45</sup> has dealt with the third point in this list. The following paragraphs will, therefore, consider only the cases of disclaimed interests and forfeiture.

## Disclaimed interests

12.28 A question arises about what happens if a person entitled to take in intestacy disclaims, or rather, refuses to accept, the benefit.

### ***The position in Australia***

12.29 There is no statutory provision that deals with disclaimed interests in Australia. The common law position has been explained as follows:

*Disclaimer is a refusal to accept an interest. As the old Years Books had it, nobody can put an estate into another in spite of his teeth ... Now what effect does that [disclaimer] have? It seems to me that it leaves the executor of the will still holding the interest attempted to be disposed of under the statute, and still holding it as part of the estate of the deceased.*<sup>46</sup>

12.30 If a person disclaims an interest in an intestate estate, the estate will be distributed as though that person did not exist. His or her interest will not pass to the Crown by *bona vacantia* unless no other entitled people can be ascertained. This is because the intestate estate does not automatically vest in those who are entitled to a share in it. Rather, the estate vests in the administrator and an entitled party may disclaim their interest before any distribution has been made.

12.31 This has been followed in NSW<sup>47</sup> and in SA<sup>48</sup>, where Justice Legoe said:

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45. See para 12.22-12.23 above.

46. *Re Scott (deceased); Widdows v Friends of the Clergy Corporation* [1975] 1 WLR 1260 at 1271 (Walton J).

47. *Rex v Skinner* [1972] 1 NSWLR 307.

48. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1.

*the interest does not go to the Crown bona vacantia, but devolves upon other members of that beneficiary class as if the ... disclaiming person were non-existent.*<sup>49</sup>

By declaring the person to be “non-existent” rather than deeming him or her to have died before the intestate, the law, in effect, prevents the person’s descendants from taking by representation.

12.32 A person will usually disclaim an interest on intestacy for taxation or welfare-related reasons.<sup>50</sup> While the National Committee makes no comment on these reasons, it should be noted that disclaimed interests in an intestate estate may amount to “deprived assets” and may be counted as assets of the person disclaiming for the purpose of determining his or her eligibility for Commonwealth social security benefits.<sup>51</sup> A person may also disclaim an interest if it involved taking property that was “so expensive to maintain that owning it would be a burden rather than a benefit”.<sup>52</sup>

### **Other jurisdictions**

12.33 In New Zealand, successors on intestacy have a statutory right to disclaim their entitlement. The successor must have reached majority and be of sound mind to exercise the right. The disclaimer must relate to the whole of the successor’s entitlement and must be made within one year of the date on which administration of the intestate estate is first granted. The successor cannot have enjoyed or disposed of any part of his or her interest, accepted valuable consideration for the disclaimer, provide who is to be entitled to the disclaimed interest, nor be bankrupt when the disclaimer is made. The effect of a valid disclaimer is as if the successor had died immediately before the intestate, survived by as many issue as were alive at the time of the intestate’s death.<sup>53</sup> The advantage of this provision over the common law is that it clarifies the position of the issue of the person disclaiming.

12.34 American States that have adopted the Uniform Probate Code allow for heirs on intestacy to renounce their share. The effect of the renunciation is that the share devolves as if the disclaimant had predeceased the intestate and passes, by representation, to the disclaimant’s descendants.<sup>54</sup>

### **Arguments for and against**

12.35 It can be argued that children should not miss out on an entitlement simply because of a decision of their parent. However, children miss out on potential inheritances

49. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 at 14 (Legoe J).

50. Succession Law Section, Queensland Law Society, *Consultation*.

51. See *Social Security Act 1991* (Cth) s 9(4) and Part 3.12 Div 2.

52. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 2.19.

53. *Administration Act 1969* (NZ) s 81.

54. See, eg, *Montana Code Annotated 2005* s 72-2-811(4)(a).

all the time because of their parents' financial decisions (for example, bad investments or giving property to other people), without any opportunity for redress.<sup>55</sup>

12.36 It can be argued, more convincingly, that not allowing descendants to take by representation where a person has disclaimed his or her interest goes against the distribution patterns currently established for intestate estates. For example, if the only child of an intestate were to disclaim his or her interest, it could go to the brothers and sisters of the intestate or remoter relatives, rather than the intestate's grandchildren. The distribution patterns on intestacy clearly prefer the intestate's grandchildren to the intestate's siblings or remoter relatives. There would appear to be no reason why this order should be disturbed simply because a beneficiary chooses to disclaim his or her interest.<sup>56</sup>

12.37 The current result in Australia is also, arguably, not what the intestate would have wanted if, for example, the grandchildren were to miss out because the intestate's child refused to accept the benefit.<sup>57</sup>

## Forfeiture

12.38 The forfeiture rule is a rule of law that prevents a person from inheriting from the estate of a deceased person when he or she is criminally responsible for that person's death. The rule is governed by the common law in most Australian jurisdictions and there is a degree of uncertainty about the application of the rule in some cases.<sup>58</sup> Two jurisdictions, NSW and ACT, have enacted forfeiture acts which provide for some exceptions to the rule.<sup>59</sup>

12.39 The application of the forfeiture rule to particular cases is not the concern of this report. However, the effect of the forfeiture rule, once applied, is of relevance. The effect of the rule in situations of intestacy has arisen in a recent English case where a person killed both his parents. The Court of Appeal held that not only could he not inherit but his son, the murder victims' grandchild, was also excluded from inheriting, since his father had not predeceased the intestate.<sup>60</sup>

12.40 An alternative to forfeiture, at least in the case of testate estates, is to establish a constructive trust in relation to the killer's share in order to avoid unconscionability. Under such a model, the Court, having taken into account evidence of the testator's intention,

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55. See England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 3.15 and para 4.17.

56. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.17 and para 4.19.

57. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.18.

58. See Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper 5, 2003).

59. *Forfeiture Act 1995* (NSW); and *Forfeiture Act 1991* (ACT). See also *Forfeiture Act 1982* (UK).

60. *Re DWS (Deceased)* [2001] Ch 568 (CA).

could impose a number of solutions, including treating the killer as if he or she had died before the testator, or imposing a distribution according to the intestacy rules.<sup>61</sup>

### **Arguments for and against**

12.41 The Law Commission of England and Wales has noted three general criticisms of this outcome of excluding a killer's descendants from inheritance by representation:

*First, the grandchildren should not be punished for the sins of their parent. Secondly, it is more likely that the deceased would have wished to benefit the grandchildren than the other relatives. Thirdly, the general policy of intestacy law is to prefer descendants to siblings and other relatives. To make an exception in the forfeiture case is inconsistent with that policy.*<sup>62</sup>

12.42 Other arguments against this outcome include that it is inconsistent in that relatives who take in their own right are not excluded even when their parent has killed the intestate. For example, if a spouse were to kill the intestate, his or her children, if also the children of the intestate, would still be able to take their share.

12.43 It can be argued that public policy should not allow children to benefit from the wrongdoing of their parents, especially if those parents could stand to receive essentially the same benefit by way of inheritance (or even gift) from their children. However, such arguments, if taken to one extreme, might suggest that no-one should stand to inherit when a near relative kills another near relative. Why, for example, should the position be different when brothers and sisters stand to benefit when one of their number kills a parent?

### **Law reform developments**

12.44 The Law Commission of England and Wales, having considered numerous arguments surrounding these three basic points, recommended that "there should be a statutory rule that, where a person forfeits the right to inherit from an intestate through having killed that intestate, the rules of intestate succession... should be applied as if the killer had died immediately before the intestate".<sup>63</sup> This recommendation is consistent with recommendations made in New Zealand by the Property Law and Equity Reform Committee in 1976,<sup>64</sup> and by the Law Commission in 1997.<sup>65</sup> The New Zealand proposals have not been implemented, although the 1976 proposals were included in a bill that was not enacted in 1979.<sup>66</sup>

61. See *Public Trustee v Hayles* (1993) 33 NSWLR 154.

62. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 1.8.

63. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 3.33.

64. New Zealand, Property Law and Equity Reform Committee, *The Effect of Culpable Homicide on Rights of Succession* (Report to the Minister of Justice, 1976) at 14 and 20. See also *Re Lentjes* [1990] 3 NZLR 193.

65. New Zealand, Law Commission, *Succession Law: Homicidal Heirs* (Report 38, 1997) at 11 and 24-25.

66. *Administration Amendment Bill 1979* (NZ) cl 68A(1)(a).



## National Committee's conclusion

12.45 There are a number of reasons for making express provision, when a person who disclaims or forfeits his or her interest in an intestate estate, for his or her descendants to take their share in that interest by representation:

- it will provide certainty in an otherwise uncertain area of the law;
- it will be consistent with the general policy of intestacy rules that descendants should take before siblings or ancestors;
- it will not be seen as punishing people for the misdeeds or bad decisions of their parents;
- it will result in consistent treatment between different groups of intestacy beneficiaries so that, for example, children of the killer will be in the same position regardless of whether one parent kills their grandparent or their other parent.

The option of extending constructive trusts to these situations would not be productive of certainty, which is one of the aims of the proposed intestacy rules.

12.46 The National Committee, therefore considers that the desired result of consistency, certainty and simplicity in the context of intestacy can best be achieved by deeming a person to have died before the intestate in the following circumstances:

- where the forfeiture rule prevents him or her from sharing in the intestate estate; or
- where he or she has disclaimed the share to which he or she is otherwise entitled.

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### Recommendation 42

Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate.

See Intestacy Bill 2006 cl 40.

## 13. Accounting for benefits received

- Benefits received before death
- Testamentary benefits
- Superannuation assets

13.1 This chapter looks at whether the amount available to beneficiaries ought to be reduced where they have already received a benefit from the intestate.

13.2 When an intestate benefits someone either before and/or upon death and that person is also entitled to a share of the intestate estate, some jurisdictions provide that the benefit must be taken into account in determining his or her entitlement. That is, the value of any benefit he or she receives is deducted from the share that the recipient is entitled to on intestacy. The principal reason for such arrangements is to ensure that intestate estates are divided equitably.

13.3 There are essentially two categories of provisions:

- those that deal with gifts made by the intestate during his or her lifetime;
- in the case of a partial intestacy, those where the intestate has made provision for someone in his or her will.

Five jurisdictions make such provisions. However, Queensland, WA and NSW make no provision to account for benefits received on or before the death of an intestate.

## BENEFITS RECEIVED BEFORE DEATH

13.4 Each jurisdiction that requires an account be made of benefits given by an intestate before his or her death does so in different ways.

### Origin of the rules

13.5 The rules that require a person to account for benefits received from an intestate before death originated in the Statute of Distributions. The Statute originally provided that settlements and advancements conferred by the intestate upon his children in his lifetime were to be taken into account in determining their (or their issue's) portion upon intestacy.<sup>1</sup> The rule, which is sometimes referred to as "the doctrine of hotchpot", was narrow in scope, applying only to children of the male intestate and applied only in cases of total intestacy.<sup>2</sup>

13.6 The rule essentially covered two types of benefits:

- marriage settlements whereby property was settled upon children upon marriage; and
- advancements which were usually intended to set up children in their chosen profession or business.

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1. 22 & 23 Charles II c 10 s 5.

2. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59; I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*. (2nd ed, Law Book Company, Sydney, 1989) at 432-440.

The rule did not apply to casual payments or gifts made to children.<sup>3</sup>

13.7 Hotchpot has been abolished in NSW, Queensland and WA.<sup>4</sup>

## Current provisions

13.8 All jurisdictions that have retained a version of this rule have altered it in some way. Victoria and Tasmania are closest to the rule established by the Statute of Distributions.

- **Victoria** - requires a child of the intestate (or his or her representative) to account for property settled on or advanced to him or her;<sup>5</sup> the value most likely to be taken at the date of the gift.<sup>6</sup>
- **Tasmania** - requires a child of the intestate to account for property settled on or advanced to him or her, subject to a contrary intention; the value to be taken at the death of the intestate.<sup>7</sup>
- **ACT** - requires a child of the intestate to account for any money or property given to him or her, subject to a contrary intention, provided the value of the gift is greater than \$10,000 and it was given no more than five years before the intestate's death; the value to be taken at the intestate's death.<sup>8</sup>
- **NT** - requires any person entitled on intestacy (other than a surviving spouse or partner) to account for any money or property given for the "benefit of" him or her or his or her otherwise "unentitled" spouse or partner (subject to contrary intention), provided the value of the gift is greater than \$1,000 and it was given no more than five years before the intestate's death; the value to be taken at the intestate's death.<sup>9</sup>
- **SA** - requires any person entitled on intestacy (other than a surviving spouse or partner) to account for any money or property given for his or her "benefit" (subject to contrary intention), provided the value of the gift is greater than

3. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59.

4. *Wills, Probate and Administration (Amendment) Act 1977* (NSW); *Succession Acts Amendment Act 1968* (Qld); *Administration Act Amendment Act 1976* (WA) s 3. Hotchpot has also been abolished in England: *Law Reform (Succession) Act 1995* (Eng).

5. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).

6. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*. (2nd ed, Law Book Company, Sydney, 1989) at 434-435.

7. *Administration and Probate Act 1935* (Tas) s 46(1)(c).

8. *Administration and Probate Act 1929* (ACT) s 49BA(1).

9. *Administration and Probate Act 1969* (NT) s 68(3).

\$1,000 and it was given no more than five years before the intestate's death; the value to be taken at the date of the gift.<sup>10</sup>

## Arguments for and against

13.9 A general argument in favour of such provisions is that they are based upon equitable principles and seek to achieve equality between beneficiaries.<sup>11</sup> While advancements to children, such as those given by way of marriage settlement, are not common in contemporary society, there may still be merit in a requirement which, "does not interfere with planned inequality, but, in the case of issue at least, ...rejects accidental inequality in favour of that degree of equality produced by hotchpot."<sup>12</sup>

13.10 The above arguments are generally supported by an implied intention on the part of the intestate. However, it has been suggested that this is not always the case that, for example, parents intend to achieve an equality of benefits among their children.<sup>13</sup> Indeed, if the deceased did not intend to achieve equality, any version of the rule might defeat their intentions to benefit one person more than another, especially if the burden of proving a contrary intention lies with the people who will benefit from the intestate estate.<sup>14</sup> On the other hand, it has been argued that some people would wish to have large gifts taken into account in the distribution of their estates and that these should be provided for.<sup>15</sup>

13.11 However, it can always be argued that any parent who intends to advance his or her child and who intends that the advancement be taken into account in the distribution of his or her estate should simply make a will to give effect to these intentions.<sup>16</sup> Such provisions are reported to occur in some instances.<sup>17</sup> In one consultation, it was

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10. *Administration and Probate Act 1919* (SA) s 72K(1). This provision was based substantially on recommendations in Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.
  11. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 40. See also Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9; K McQueenie, *Consultation*.
  12. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 441.
  13. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 440.
  14. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47.
  15. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167-168.
  16. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167.
  17. Registry, Supreme Court of Tasmania, *Consultation*.

suggested that in rare cases where the personal representatives take settlements and advancements into account, it is generally “very hurtful” and “counterproductive”.<sup>18</sup>

13.12 It can also be argued that the purpose of intestacy provisions is to distribute the property of the intestate and not to remedy any unequal treatment of beneficiaries during the intestate’s lifetime.<sup>19</sup>

13.13 There are many difficulties involved in applying the doctrine of hotchpot in both its traditional and modified forms. These difficulties will ultimately outweigh any equality that could arguably be achieved. It has been observed that the jurisdictions that have abolished the doctrine have done so on the basis that it is “more productive of difficulty than justice”.<sup>20</sup> The Law Commission of England and Wales has commented on the particular difficulties that hotchpot may present for lay people who have had no previous experience in administering estates.<sup>21</sup>

13.14 The traditional form of hotchpot, despite its long existence, is far from being certain in its application. There was certainly difficulty in defining “advancement”<sup>22</sup> and uncertainty concerning the date of valuation of the benefits conferred.<sup>23</sup> A time limit has been a necessary addition in some jurisdictions since the details of gifts may become “sketchy” over longer periods.<sup>24</sup>

13.15 The more traditional forms of hotchpot are also anachronistic. Marriage settlements and advancements to children are not common in modern society. The contemporary intestate, who will have given a gift upon the marriage or setting up for life of a child, will most likely die at a considerable age. Any gift made upon the marriage or setting up for life of a child will have been made many years before any of the time periods provided by some of the relevant statutes.<sup>25</sup> Any attempts to overcome some of these concerns by extending the application of the provisions to cover other benefits and gifts may unnecessarily complicate the administration of estates where such gifts and benefits may have to be ascertained and valued. The Queensland Law Reform Commission opposed any modern extensions to the doctrine of hotchpot, observing that:

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18. Tasmania, Office of the Public Trustee, *Consultation*.
  19. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38-39.
  20. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*. (2nd ed, Law Book Company, Sydney, 1989) at 440. See also, eg, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.
  21. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47.
  22. The Law Reform Committee of SA observed that the cases were “numerous and some of them irreconcilable”: Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.
  23. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*. (2nd ed, Law Book Company, Sydney, 1989) at 440.
  24. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.
  25. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60

*it would be unprecedented to confer upon an administrator the investigatory powers which would be necessary to establish the facts and strike an account.*<sup>26</sup>

Even on a shortened time frame of, say, five years, it may be difficult to investigate any relevant gifts and to obtain valuations for them.<sup>27</sup> This will unnecessarily complicate the administration of some estates. The difficulty will outweigh any “justice” that may be achieved through equality of benefit.

13.16 Finally, it can be argued that family provision is always available for children (and maybe others) who feel that an unjustified inequitable distribution has resulted.<sup>28</sup>

## Law reform developments

13.17 There are essentially two streams of law reform relating to the area of hotchpot. One approach has been to conclude that the hotchpot provisions should be repealed; the other has been to modify the provisions to make them more appropriate to a modern setting.

13.18 Queensland was the first Australian jurisdiction to repeal the hotchpot provisions in 1968.<sup>29</sup> The Law Reform Commission of Western Australia concluded against hotchpot in 1973.<sup>30</sup> The QLRC endorsed this approach in its 1993 report.<sup>31</sup> The hotchpot provisions were repealed in NSW in 1977. At the time, it was said that the repeal showed a “determination to remove anomalies, anachronisms, relics, remnants and vestiges of outmoded and outdated statutory and common law”.<sup>32</sup> The abolition of hotchpot in Queensland, NSW and WA has apparently not resulted in any substantial injustice.

13.19 The ACT was the first Australian jurisdiction to modernise hotchpot. It introduced a provision in 1967 which extended to all gifts to the intestate’s children above \$1000 and given within five years of the intestate’s death.<sup>33</sup> This was followed in 1969 by a similar provision in the NT.<sup>34</sup> In 1974, the Law Reform Committee of South Australia proposed a modified version of hotchpot that took into account all potential beneficiaries on intestacy, in addition to setting time and monetary limits.<sup>35</sup> This proposal was substantially adopted

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26. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 53.

27. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60.

28. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61.

29. *Succession Acts Amendment Act 1968* (Qld).

30. Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 36-39.

31. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60-61.

32. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.

33. *Administration and Probate Act 1929* (ACT) s 49B, introduced by *Administration and Probate Ordinance 1967* (ACT).

34. *Administration and Probate Act 1969* (NT) s 68(3).

35. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.

in 1975.<sup>36</sup> The Law Reform Commission of Tasmania recommended a scheme similar to the SA model in 1985<sup>37</sup> but its proposals have not been implemented.

13.20 A similar pattern may be observed in overseas jurisdictions. New Zealand abolished its hotchpot provisions in 1944<sup>38</sup> as a result of the deliberations of the NZ Law Revision Committee.<sup>39</sup> The Law Commission of England and Wales and the Law Reform Commission of British Columbia have both recommended the repeal of their hotchpot provisions.<sup>40</sup> The English Parliament repealed the hotchpot rules in 1995.<sup>41</sup>

13.21 However, others have opted to retain the doctrine in some form. The Alberta Law Reform Institute recommended the retention of the doctrine in its traditional form with only one variation so that grandchildren of the intestate should not have to account for advancements received by their parents.<sup>42</sup> The Manitoba Law Reform Commission recognised that most people intended that gifts should not be advancements and so recommended that the provisions should only operate where the intestate or the child had stated either orally or in writing that the gift was an advancement.<sup>43</sup> This was adopted by the legislature, which went further than the Law Reform Commission's recommendations<sup>44</sup> by extending the provisions to cover gifts to any prospective heirs under intestacy legislation.<sup>45</sup>

## Submissions and consultations

13.22 Most submissions and consultations supported the abolition of hotchpot provisions in those jurisdictions that still have them and resisted their reintroduction in jurisdictions that have abolished them.

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36. *Administration and Probate Act Amendment Act (No 2) 1975* (SA) s 10.

37. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.

38. *Administration Amendment Act 1944* (NZ) s 12(2). The Statute of Distributions provision relating to hotchpot applied in NZ before 1 January 1945: J D Willis and J H Carrad, *Garrow's Law of Wills and Administration and Succession on Intestacy* (2nd edition revised, Butterworths, Auckland, 1949) at 620.

39. NZ, *Parliamentary Debates (Hansard)* House of Representatives, 23 November 1944 at 289.

40. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38-39.

41. *Law Reform (Succession) Act 1995* (Eng) s 1.

42. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167-171.

43. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 50-51.

44. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 52.

45. See *Intestate Succession Act CCSM* c I85 s 8. The Manitoba Law Reform Commission has since recommended that the declaration may be made at any time before or after the gift was made: Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 67.



13.23 Submissions generally did not support any version of the doctrine of hotchpot,<sup>46</sup> mostly on the grounds of unnecessary complexity.<sup>47</sup>

13.24 In one consultation, it was suggested that in most cases executors will choose to ignore the provisions because of their complexity and the fact that they will cause division among the surviving family. However, it was felt that there was a real problem with abolishing the provisions because there are cases where, in justice, an account ought to be made.<sup>48</sup>

## National Committee's conclusion

13.25 The arguments in favour of even a modified form of hotchpot are, at best, equivocal. The Committee considers that the difficulties posed by any system that seeks to take account of benefits given before the intestate's death outweigh any perceived benefits of equality.

13.26 There is, therefore, a good case for simplifying the administration of intestate estates by not including such provisions in any uniform national legislation. There is nothing to prevent the surviving members from agreeing to a different distribution if the justice of the case requires it.

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### Recommendation 43

There should be no provisions that take account of benefits given during the intestate's lifetime.

See Intestacy Bill 2006 cl 41(a).

## TESTAMENTARY BENEFITS

13.27 In the case of a partial intestacy, some jurisdictions specify classes of people who are generally required to account for any testamentary gifts they have received. The result is that their entitlement under the intestacy will be reduced by the value of the testamentary gift.<sup>49</sup>

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- 46. J North, *Submission* at 5; Probate Committee, Law Society of SA, *Consultation*; K Mackie, *Consultation*. But see R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 15.
  - 47. Public Trustee NSW, *Submission* at 14; *Sydney Consultation 2*; *Sydney Consultation 1*; WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 20; *Melbourne Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.
  - 48. K McQueenie, *Consultation*. See also R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 15.
  - 49. *Administration and Probate Act 1929* (ACT) s 49D(3); *Administration and Probate Act 1919* (SA) s 72K(1)(b); *Administration and Probate Act 1935* (Tas) s 44(4), s 47(a); *Administration and Probate Act 1958* (Vic) s 53(a); *Administration and Probate Act 1969* (NT) s 70(3) and (4).

13.28 The provisions cover different classes in different jurisdictions:

- ACT and Tasmania: surviving spouses or partners only;<sup>50</sup>
- Victoria: issue only;<sup>51</sup>
- NT: surviving spouses or partners and children of the intestate;<sup>52</sup>
- SA: all persons entitled to a share of the intestate estate, so long as the gift exceeds \$1,000.<sup>53</sup>

Such provisions have been a relatively new development in intestacy law. The reasons for them would appear to differ depending upon who must account, whether it is the spouse of the intestate or other beneficiaries, in particular, the issue of the intestate.

13.29 It has been suggested that accounting for testamentary benefits is necessary in the case of the surviving spouse or partner so that he or she is prevented from gaining a double legacy (under both the will and the intestacy) at the expense of the issue of the intestate.<sup>54</sup>

13.30 It can also be said that such provisions became more generally necessary when hotchpot was extended to gifts or advancements made to beneficiaries under a partial intestacy. Originally, the doctrine of hotchpot did not apply to partial intestacies. The courts of equity were said to have been concerned “that the application of the doctrine to partial intestacies would lead to inequality, not equality”.<sup>55</sup> In the case of partial intestacy, the doctrine did not allow testamentary gifts to be taken into account, so that there might be unequal treatment of children based on whether they had received testamentary gifts or advancements.<sup>56</sup> Change has been brought about in some jurisdictions because it was seen as unfair that a person who received a gift or advancement during the intestate’s lifetime should have to account for it but a person who benefited under the intestate’s will should not have to make an account. This reason does not apply to provisions relating to the spouse or partner, since all jurisdictions that have retained a form of hotchpot have exempted spouses or partners, presumably on the grounds that there may be difficulty in separating out gifts from the normal incidents of emotional and financial interdependence. There may be:

*an untold number of substantial gifts given by one spouse to the other during their time together, and in many cases it might be difficult to*

50. *Administration and Probate Act 1929* (ACT) s 49D(3); *Administration and Probate Act 1935* (Tas) s 44(4), s 47(a).

51. *Administration and Probate Act 1958* (Vic) s 53(a).

52. *Administration and Probate Act 1969* (NT) s 70(3) and (4).

53. *Administration and Probate Act 1919* (SA) s 72K(1)(b).

54. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 25.

55. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 171.

56. See *Maiden v Maxwell* (1920) 21 SR (NSW) 16 at 23; and I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Co, Sydney, 1989) at 433-434.

*determine what is a gift and what is the result of a combined contribution by both spouses.*<sup>57</sup>

## Law reform developments

13.31 It would seem that NZ, having abolished hotchpot, has nevertheless retained accounting for testamentary benefits in the case of surviving spouses.<sup>58</sup>

13.32 In 1983, the Law Reform Commission of British Columbia concluded that there was no reason to introduce a system that required a surviving spouse to account for testamentary benefits received in the event of a partial intestacy.<sup>59</sup> On the other hand, in 1985, the Manitoba Law Reform Commission saw no reason to change its provisions requiring surviving spouses to account for testamentary gifts.<sup>60</sup>

13.33 In some jurisdictions that retain a version of hotchpot, provisions to account for testamentary benefits are not necessary because they have not extended hotchpot to partial intestacies. For example, in Alberta, the Law Reform Institute considered that the existing law was “adequate” and there was no need to extend the doctrine of hotchpot to partial intestacies.<sup>61</sup> A similar conclusion was reached in Manitoba.<sup>62</sup>

13.34 In England and Wales, spouses were required to account for testamentary benefits in calculating the statutory legacy, and issue were also required to bring any testamentary benefits into account in determining their entitlement.<sup>63</sup> The Law Commission of England and Wales recommended the abolition of such provisions in 1989.<sup>64</sup> This was achieved in 1995.<sup>65</sup> Queensland, NSW and WA make no such provisions. The Law Reform Commission of WA recommended against the introduction of such provisions in 1973.<sup>66</sup>

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57. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 17.

58. *Administration Act 1969* (NZ) s 79(2).

59. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 44-45.

60. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 26.

61. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 171.

62. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 49, where it has been argued that in cases of partial intestacy the intestate’s “wishes respecting *inter vivos* transfers will most often be embodied in his/her will; to require an accounting of them may well upset the deceased’s estate plan”.

63. *Administration of Estates Act 1925* (Eng) s 49(1).

64. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55.

65. *Law Reform (Succession) Act 1995* (Eng) s 5.

66. Law Reform Commission of WA, *Distribution on Intestacy* (Project 34, Part 1, Report, 1973) at 11.

## Arguments for and against

13.35 The main argument in favour of such provisions is that they achieve a form of equality among persons entitled on intestacy where some of them are also beneficiaries under the will.

13.36 In jurisdictions which have retained hotchpot in respect of both total and partial intestacies, there is a reasonable argument for also achieving equality between those who have received a benefit before the death of the intestate and those who receive benefits under the will. For example, in NSW, it was argued that, rather than abolish hotchpot, the doctrine should be extended to include testamentary gifts.<sup>67</sup>

13.37 In the absence of hotchpot provisions, there is, at least, a reasonable argument for the retention of a form of accounting in relation to spouses, on the basis of preventing the spouse from receiving a double portion.<sup>68</sup> However, there are a number of arguments against such a proposal. First, if such a proposal is advanced, it could equally be argued that the spouse ought to account for gifts received during the intestate's lifetime or even for jointly held property.<sup>69</sup> Secondly, it can be argued that intestacy rules ought not to be used as a means of limiting the surviving spouse's entitlement and that the provisions should be treated as providing for a minimum rather than a maximum benefit.<sup>70</sup>

13.38 It is entirely possible that accounting for testamentary gifts may defeat the intention of the deceased in making specific dispositions in the will, that is, that particular people should receive something in addition to their other entitlements.<sup>71</sup>

13.39 It has also been suggested that, for the most part, in the case of partial intestacies, the people who receive specific bequests under wills are not likely to be those who are entitled to take on intestacy. That is, the testator usually intends the residue to go to the people who are entitled to take on intestacy, but it is the residue that usually fails in a partial intestacy - often because people use standard will forms, list specific bequests and then forget to deal with the residue.<sup>72</sup>

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67. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 40.

68. See para 13.29 above.

69. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 52. Notwithstanding the argument that requiring a spouse to account for testamentary gifts is quite different to requiring a spouse to account for gifts given in the intestate's lifetime: see Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.

70. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 53.

71. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55. See also Law Reform Commission of WA, *Distribution on Intestacy* (Project 34, Part 1, Report, 1973) at 11; Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61; W V Windeyer, *Submission* at 1.

72. *Sydney Consultation 1*.

13.40 The provisions also add to the complexity and difficulty of an administration. Their abolition would greatly simplify the administration of estates.<sup>73</sup>

13.41 The fact that Queensland, NSW and WA make no such provisions has apparently not resulted in any substantial injustice in those States.

## Submissions and consultations

13.42 Submissions generally did not support taking account of testamentary gifts.<sup>74</sup> Some opposed it on the grounds of unnecessary complexity.<sup>75</sup> Another opposed it, arguing that “the deceased must be presumed to have known about the potential intestacy”.<sup>76</sup>

13.43 One submission opposed making provision but conceded that there might “well be differing points of view on this question”.<sup>77</sup>

## National Committee’s conclusion

13.44 The main reason for making intestacy beneficiaries (other than spouses or partners) account for benefits received under the intestate’s will, is to achieve some form of equality with intestacy beneficiaries who have received benefits before the intestate’s death. The abolition of the doctrine of hotchpot recommended above largely eliminates the need for these other provisions, at least in relation to beneficiaries other than surviving spouses or partners.

13.45 Separate consideration needs to be given to the issue of reducing a surviving spouse or partner’s statutory legacy by any amounts received under a partially intestate will. In this respect, it should be noted that New Zealand has made provision for taking testamentary benefits to spouses into account without having made provision for either testamentary gifts to other potential beneficiaries or for hotchpot.

13.46 The most important point to bear in mind is that there will be very few circumstances where a surviving spouse or partner will receive anything close to a double portion. First, the need for a statutory legacy will now only arise in circumstances where some of the surviving children are not also children of the surviving spouse or partner. Secondly, in cases where the will is valid as to specific bequests but fails as to the residue, it is unlikely that the surviving spouse will be especially advantaged, unless he or she receives a substantial specific bequest. Thirdly, in cases where the will is valid as to

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73. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55.

74. W V Windeyer, *Submission* at 1; *Sydney Consultation 2*; *Sydney Consultation 1*; Trustee Corporations Association of Australia, *Submission* at 21; J North, *Submission* at 5; Public Trustee NSW, *Submission* at 15; *Melbourne Consultation*; K Mackie, *Consultation*; Law Society of Tasmania, *Submission* at 15.

75. *Sydney Consultation 2*; *Sydney Consultation 1*; Trustee Corporations Association of Australia, *Submission* at 21.

76. J North, *Submission* at 5.

77. Public Trustee NSW, *Submission* at 15.

the residue but fails in relation to specific bequests, the surviving spouse is, again, unlikely to be especially advantaged. In such cases, it should also be noted that the National Committee's Wills Report, if implemented, will reduce the incidence of partial intestacies for failure to include a substitutionary clause.<sup>78</sup>

13.47 The only situations where a surviving spouse or partner is likely to receive substantially more than might be considered fair would be where the testate and intestate parts of the estate are both substantial, and the survivor is also substantially benefited from the testate portion of the estate. The National Committee considers that there is little to be gained by including a complex and time-consuming provision to cover a very narrow range of potential circumstances where a survivor might receive more than the minimum he or she would otherwise be entitled to.

13.48 In general, the National Committee considers that the arguments in favour of any system of accounting for testamentary benefits are, at best, equivocal. The Committee considers that the potential complexity outweighs any perceived benefits of equality among intestacy beneficiaries.

13.49 There is, therefore, a good case for simplifying the administration of intestate estates by not including such provisions in any uniform national legislation.

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#### Recommendation 44

There should be no provisions that account for benefits received under the intestate's will.

See Intestacy Bill 2006 cl 41(b).

## SUPERANNUATION ASSETS

13.50 It has been suggested that, if schemes that take account of gifts are to continue to be part of the law of intestacy, some account should be taken of superannuation assets. A lot more is now locked up in superannuation funds and these assets are distributed on death at the discretion of the superannuation trustees. This may, for example, change the balance in the division between the surviving partner and issue. It was put in consultations that the resulting inequity in distribution to people who may be entitled on intestacy could be dealt with in much the same way as hotchpot.<sup>79</sup> However, there was no support for actually implementing such a scheme.

13.51 In 1993, the Queensland Law Reform Commission responded to similar proposals by noting that some superannuation lump sums are paid into the estate rather than to the spouse and that "any general requirement to account would be difficult to police and would produce anomalies".<sup>80</sup>

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78. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) para 6.64-6.96. See *Wills Act 2000* (NT) s 40; *Wills Act 1997* (Vic) s 45; *Succession Act 1981* (Qld) s 33N; *Succession Act 2006* (NSW) s 41.

79. *Sydney Consultation 2*.

80. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 52.

13.52 The National Committee rejects any such proposals on the same grounds as those on which it rejects making provision for gifts received by intestacy beneficiaries before or after death.

## 14. Indigenous people

- Indigenous kinship
- Incidence of intestacy among Indigenous people
- Current provisions
- Possible approaches
- National Committee's conclusion



14.1 Indigenous<sup>1</sup> concepts of family and time may well be incompatible with the assumptions underlying the general law relating to intestacy. It is, therefore, questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous person dies intestate. The extent to which different distribution rules can, and should, apply is dealt with in this chapter.

14.2 There are many different types of Indigenous communities in Australia: rural, urban, traditional and historical communities, including groups that have gathered together from different regions. Indigenous people live in a diversity of lifestyles. This makes it difficult to formulate a general scheme that would be inclusive of all the diversity in Indigenous communities throughout Australia.

## INDIGENOUS KINSHIP

14.3 In general in Australia, the distribution of property on intestacy is based on a relatively narrow range of family relationships that are reflective of English, or at least Western, law and society. It may, therefore, be inappropriate to apply the current general intestacy rules to members of Indigenous communities, who may have a broader concept of family relationships.<sup>2</sup> For example, the Australian Law Reform Commission, in a 1986 report, stated that, unless the particular nature of Indigenous family relationships was recognised in the intestacy provisions, the application of the general principles, with their fixed lists of next of kin, would remain inappropriate. The Commission noted that, “[t]he Aboriginal kinship system may include persons who are not blood relations at all (as distinct from classificatory relations), and yet there may be important obligations and rights existing between the deceased and such a person”.<sup>3</sup> Other commentators have observed:

*It is very important to note that Aboriginal kinship structures are very different from Western kinship structures and that customary law obligations flow from those kinship relationships. This applies whether or not the Aboriginal people seem to have traditional lifestyles.*<sup>4</sup>

14.4 It has also been noted that “the extreme emphasis on lineal, bloodline relationships in the common law contrast with the acceptance of collateral, adopted and maritally linked relatives in Aboriginal customary law”.<sup>5</sup> Examples of such differences include:

1. In this Report, “Indigenous” refers to Aboriginal people of Australia and Torres Strait Islanders.
2. See R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.
3. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 227.
4. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 33; P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
5. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.

*willingness to recognise kinship without blood relationship, including adoption and by marriage;*

*equivalence of some relatives (eg all sisters' sons may be regarded as brothers, while opposite-sex siblings may be regarded as cousins);*

*non-lineal view of time - kin names like 'father' may be repeated at what non-Aborigines would regard as different generational levels. This reflects a more circular view of time with regards to kinship.<sup>6</sup>*

14.5 The possibility has been raised that the relationships specified in the legislation could, for the purposes of that legislation, be interpreted more broadly than they would be at common law. As Justice McPherson said:

*I am conscious of the fact that the designation of Aboriginal relationships such as mother, brother, sister and so on, may not necessarily be the same as those relationships in western society, which is evidently the criterion used as the basis for distribution on intestacy under the Succession Act. It is possible (I say no more) that for succession purposes relationships are capable in some circumstances of being understood in ways that are broader than would ordinarily be the case at common law...<sup>7</sup>*

## INCIDENCE OF INTESTACY AMONG INDIGENOUS PEOPLE

14.6 It has been suggested that it is quite common for Indigenous people to die intestate.<sup>8</sup> The Queensland Department of Aboriginal and Torres Strait Islander Policy has reported that “very few” Indigenous people leave a will. This observation is based on the Department’s experience in administering the cases where the eligible claimants have died under the Compensation for Non-Payment of Award Wages and the Indigenous Wages and Savings Reparations processes.<sup>9</sup> In Queensland, a number of factors have been suggested as contributing to the incidence of intestacy among Indigenous communities, including literacy, mobility, and differing cultural practices.<sup>10</sup> For example, cultural attitudes towards death may mean that Indigenous people are unwilling to record their succession plans in a will.<sup>11</sup>

6. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.

7. *Jones v Public Trustee of Queensland* (2004) 209 ALR 106 at para 20 (McPherson JA).

8. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.

9. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1, 4.

10. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1.

11. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

14.7 In the NT, Indigenous intestate estates are mostly small or have had superannuation benefits paid into them. Large estates are uncommon now because more Indigenous people are being advised to put their property into joint names.<sup>12</sup>

## CURRENT PROVISIONS

14.8 Only a few jurisdictions make special provision for Indigenous persons in relation to intestacy. Broadly, these provisions fall into two categories. First, there are those that recognise Indigenous customary marriages for the purpose of distribution according to the general intestacy rules. Secondly, there are those that provide for a separate or additional distribution regime for Indigenous people in certain circumstances.

### Recognition of customary marriage

14.9 At its most basic level, the recognition of Indigenous customary marriages for the purposes of intestacy is simply a means of bringing Indigenous persons into the general scheme for distribution on intestacy by including customary marriage in the definition of spouse. The recognition of customary marriage took on a greater importance in times before the legal recognition of de facto partnerships and ex-nuptial children. The general law of intestacy did not recognise the claims of persons who were not legally married, or ex-nuptial children.<sup>13</sup> Persons who were married according to Indigenous customs and their children, therefore, could not take part in any distribution on intestacy. This problem was alleviated in Queensland, for example, in 1939 by a special provision which applied where “an aboriginal man and woman have lived together as husband and wife in accordance with recognised tribal practice”. In such cases, the children of the union were to be considered legitimate, and the claims of the surviving spouse and children to the deceased’s estate were not to be prejudiced.<sup>14</sup> In WA, the non-recognition of customary marriage was overcome by an enactment that passed all Indigenous intestate estates to the Chief Protector to distribute accordingly.<sup>15</sup> This replaced an earlier informal arrangement, whereby the Curator of Intestate Estates simply paid the residue of Indigenous estates to the Chief Protector who had been “given authority to distribute the proceeds of the estate as he appears morally bound to do”.<sup>16</sup>

14.10 In the NT, Indigenous customary marriages are recognised in intestacy. The relevant provision states that:

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12. G Fleay, *Consultation*.

13. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at para 2704.

14. *Aboriginals Preservation and Protection Act 1939* (Qld) s 19(2). Regulations under the Act also recognised the claims of any ex-nuptial children of an Indigenous intestate, as well as the claims of any adopted or foster children: *Aboriginals Regulations 1945* (Qld) reg 16.

15. *Aborigines Act 1905* (WA) s 33A inserted by *Aborigines Act Amendment Act 1936* (WA) s 21.

16. WA, *Parliamentary Debates (Hansard)* Legislative Council 22 September 1936 at 716.

*an Aboriginal who has entered into a relationship with another Aboriginal that is recognized as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.*<sup>17</sup>

14.11 WA recognises some Indigenous marriages for the purposes of distribution to Indigenous persons on intestacy. The relevant provisions state that a person may be the spouse of the deceased “according to the social structure of the tribe to which [s]he belonged”. The intestate’s children and parents may also be determined in the same manner.<sup>18</sup> However, these provisions only apply in cases where the deceased “had not married in accordance with the laws relating to marriage”.<sup>19</sup>

14.12 A provision recognising Indigenous customary marriages was included in proposed intestacy provisions published by the Queensland Law Reform Commission in 1992:

*Where a relationship between two persons is recognised by Aboriginal or Torres Strait Island customary law that relationship is recognised for the purposes of this Part unless recognition of the relationship would confer rights which would not be conferred by customary law.*<sup>20</sup>

However, this provision was not included in the Commission’s final report.<sup>21</sup>

### **Polygamy**

14.13 It is possible that an intestate may have been, at death, in a polygamous customary marriage. Despite the decline of polygamy, especially in urban Indigenous communities, it has been observed that, “...it is not uncommon for second and third marriages to be concealed from authorities where those authorities disapprove of polygyny...At present one must assume that polygyny will be around for an indefinite future, even if it continues to decline in gross terms.”<sup>22</sup> The presence, albeit declining, of polygamous customary marriage between Indigenous people was identified by the Australian Law Reform Commission in its report into the recognition of Aboriginal customary laws.<sup>23</sup>

14.14 The above comments about the incidence of polygamous unions were now made more than 20 years ago. However, the current NT provisions specifically provide for situations where Indigenous people leave more than one spouse. In such cases, the

17. *Administration and Probate Act 1969* (NT) s 6(4).

18. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9(1).

19. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9(1)(b).

20. Draft s 34(3) in Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 31.

21. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 13.

22. P Sutton, “Aboriginal Customary Marriage – Determination and Definition” (1985) 12 *Aboriginal Law Bulletin* 13 at 14.

23. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 169.

spouse's entitlement, including the value of personal chattels, will be divided equally among the spouses.<sup>24</sup>

### ***The relevance of de facto relationships provisions***

14.15 Notwithstanding the fact that a union involving Indigenous people may not comply with the *Marriage Act 1961* (Cth), the union may be recognised for the purposes of intestacy if it fulfils the requirements for a de facto relationship under State or Territory law.<sup>25</sup> Distribution can then be made according to the general provisions.<sup>26</sup>

## **Additional/separate distribution regimes**

14.16 Only three Australian jurisdictions make additional or separate provisions for the distribution of estates of intestate Indigenous persons. The provisions in two of these jurisdictions appear to draw on attitudes and approaches that are more appropriate to the old Aboriginal protection systems. One commentator has noted that the effect of the WA and Queensland regimes has been to remove control over intestate estates from Indigenous next of kin (as administrators) and give control to government officials.<sup>27</sup> Such a removal of control from Indigenous people in the management of their families' affairs is inappropriate.

### ***Queensland***

14.17 Queensland has separate regimes for both Aboriginal people and Torres Strait Islanders who die intestate. The basic form of the current provision dates from 1934.<sup>28</sup>

14.18 If an Aboriginal person or Torres Strait Islander dies intestate and it proves "impracticable to ascertain the person or persons entitled in law to succeed to the estate ... or any part of it", the chief executive of the Aboriginal and Islander Affairs Corporation may determine "which person or persons shall be entitled to so succeed or whether any person is so entitled".<sup>29</sup> This distribution is entirely at the chief executive's discretion and, although he or she may have reference to Indigenous customary law, the distribution is not required to accord with any customary practices.

14.19 If the chief executive is unable to determine that any person is entitled to succeed to the estate or a part of the estate, that property shall "vest in the chief executive who

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24. *Administration and Probate Act 1969* (NT) s 67A. This position is similar to the general provisions in SA and NZ, which divide the spouse's entitlement equally between the spouse and the de facto regardless of the length of their relationships or their living arrangements: See para 6.10 above.

25. See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 175.

26. See para 3.17-3.18 and para 3.73-3.76.

27. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17.

28. See *Aboriginals Protection and Restriction of the Sale of Opium Act Amendment Act 1934* (Qld) s 26(1) item (5). See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 16(3); *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) s 31; *Aborigines Act 1971* (Qld) s 40.

29. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 60(1); *Community Services (Torres Strait) Act 1984* (Qld) s 183(1).

shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of [Aborigines/Islanders] generally". The proceeds are applied under the schemes whereby the chief executive grants aid to Indigenous persons who apply for it on such terms as the chief executive may think fit.<sup>30</sup>

14.20 The Queensland provisions are said to have been retained because the births and deaths of many Indigenous people are not registered. Certificates evidencing such registration are said to be required for distribution of an estate in accordance with the *Succession Act 1981* (Qld).<sup>31</sup> Practitioners in Queensland have also commented on the difficulty in proving relationships in Indigenous communities owing, in some cases, to the adoption of traditional names.<sup>32</sup> However, the proof of family relationships for the purposes of intestacy is a matter of procedure that does not need to be resolved by establishing an entirely separate system of discretionary distribution for Indigenous people.<sup>33</sup> An alternative method of proof would be a more appropriate response. For example, relationships could be proved by statutory declarations from elders or other family members, or evidence from anthropologists.<sup>34</sup>

14.21 The original Queensland provisions were part of a raft of provisions introduced in 1934 which rendered the will of an Indigenous person invalid if entered into without the consent of the Protector of Aborigines; prevented Indigenous people from purchasing on credit without similar permission; and sought to appropriate monies otherwise belonging to certain Indigenous people for the welfare of Indigenous people generally.<sup>35</sup> According to the Queensland Home Secretary, who introduced the bill, the provision was chiefly about raising revenue to support Indigenous welfare programs:

*If these people have no immediate relatives it is desirable that any funds they possess should on their death go to a fund that will be used for the benefit of aborigines generally.*<sup>36</sup>

14.22 Regulations made under an equivalent 1939 provision constrained the Director's discretion to distribute rather more closely than the chief executive's discretion is now. The Director was required to distribute according to the Statute of Distributions, and an estate would only be paid into the Welfare Fund if the deceased left no spouse, sibling, parent, grandparent, grandchild, nephew or niece. The chief purpose of the regulation was to

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30. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 56, s 60(4); *Community Services (Torres Strait) Act 1984* (Qld) s 179, s 183(4).

31. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 4.

32. Succession Law Section, Queensland Law Society, *Consultation*. See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286, 292-293.

33. Compare with the practice in NT of obtaining statutory declarations about family relationships from elders and other family members: see para 14.52.

34. See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 292-293.

35. See *Aboriginals Protection and Restriction of the Sale of Opium Act Amendment Act 1934* (Qld).

36. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 November 1934 at 1555.

recognise, within the pattern established by the Statute of Distributions, the rights of ex-nuptial children and adopted or foster children of the deceased.<sup>37</sup>

### **Western Australia**

14.23 In WA, the property of all people of Aboriginal descent who die intestate vests in the Public Trustee, to be distributed according to the State's intestacy rules. If those entitled under the general regime cannot be found, distribution is to be made by reference to the Regulations. The *Aboriginal Affairs Planning Authority Act 1972* (WA) states that the Regulations should, to the extent that it is practicable, "provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death".<sup>38</sup>

14.24 However, the current provisions recognising customary law really only acknowledge "tribal marriage", and then provide for a more limited range of relatives who are entitled than the regime that applies to the general community allows.<sup>39</sup> There is no consideration of a category of customary next of kin any wider than the spouse, children and parents of the intestate. This arrangement has been subject to some criticism<sup>40</sup>

14.25 If no valid claim is made within two years of the intestate's death, a beneficial distribution may be made to a person with a moral claim, or the estate may be held in trust by the Aboriginal Affairs Planning Authority to be "used for the benefit of persons of Aboriginal descent".<sup>41</sup> It has been reported that such "moral claims" are "regularly made and approved".<sup>42</sup>

14.26 The Act defines an Aboriginal person as "a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one fourth of the full blood".<sup>43</sup> This definition does not accord with the generally accepted definitions of Aboriginality contained in other legislation.<sup>44</sup> Given the small size of the estates of many Aboriginal intestates, such a requirement may prove relatively costly, as the blood descent of each claimant must be determined.<sup>45</sup> The application of the provisions is further limited by the additional requirement that the Aboriginal person must not have been married under the *Marriage Act 1961* (Cth).<sup>46</sup>

37. *Aboriginals Regulations 1945* (Qld) reg 16.

38. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(2).

39. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9.

40. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 228; P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17; Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286.

41. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3).

42. Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 287.

43. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 33.

44. See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 285-286.

45. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 229.

46. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9.

14.27 It has been suggested that, while the provisions outlined above appear to apply to all Indigenous estates, there may be many cases in which they are not used. The Public Trustee may not necessarily be notified of all deaths, nor know whether a person who dies is an Indigenous person.<sup>47</sup> It has been suggested that the provisions have been useful in small estates where it is often difficult to find an administrator.<sup>48</sup> In some cases, distributions are made informally after consultation with family and community of the deceased.<sup>49</sup>

14.28 The WA provisions were first adopted in 1936,<sup>50</sup> following the Queensland model introduced in 1934. The provisions aimed to do two things. First, they overcame the consequences of the failure to recognise customary marriages by vesting all Indigenous intestate estates in the Chief Protector. This failure of recognition prevented an Indigenous intestate estate passing to the Crown in cases where there was no “lawful” spouse or legitimate children. Secondly, when distribution was not feasible, they allowed for payment into a special purpose fund for the benefit of Indigenous people to supplement government funding.<sup>51</sup>

14.29 The Law Reform Commission of Western Australia, in its 2006 report on Aboriginal customary law, has recommended a number of amendments to the regime in WA, including that:

- the current definition of “person of Aboriginal descent” be deleted;
- the intestate estate should not vest automatically in the Public Trustee, so that persons entitled may apply to administer the estate; and
- the limited distribution provided for in the current rules be removed and replaced with a provision that recognises a person’s “classificatory kin relationship with the deceased under the deceased’s customary law” but only as a factor that the Minister for Indigenous Affairs can take into account in assessing a “moral claim” for distribution from the estate.<sup>52</sup>

#### **Northern Territory**

14.30 The NT has a separate regime for distributing the intestate estate of an Indigenous person, but only in relation to a person who “has not entered into a marriage that is a valid marriage under the *Marriage Act 1961* of the Commonwealth”.<sup>53</sup> This requirement may prove to be limiting in some cases, especially for older Indigenous persons, as “a *Marriage Act* marriage is one of the few things that Aborigines living on reserves run by missions

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47. T Hands, *Consultation*; Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 285.

48. WA, Succession Law Implementation Committee, *Consultation*.

49. WA, Succession Law Implementation Committee, *Consultation*.

50. *Aborigines Act 1905* (WA) s 33A. See also *Native Welfare Act 1963* (WA) s 26.

51. See WA, *Parliamentary Debates (Hansard)* Legislative Council 22 September 1936 at 716.

52. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report, 2006) at 235.

53. *Administration and Probate Act 1969* (NT) s 71(1)(a). See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 290.



did have performed in a non-Aboriginal manner”.<sup>54</sup> In such cases, a marriage under the *Marriage Act 1961* (Cth) may be entirely incidental to other relationships of kinship of which some individuals may be a part. However, the number of people affected may be small, as it has been estimated that at least 90% of marriages between “traditional Aborigines” were not made according to the requirements of the Commonwealth Act.<sup>55</sup>

14.31 A person who claims to be entitled to take an interest in an intestate Indigenous person’s estate under the customs and traditions of the community or group to which the Indigenous intestate belonged, or a professional personal representative, may apply to the Court for an order for distribution of the estate. In the NT, a professional personal representative is defined as either the Public Trustee, a trustee company, or a legal practitioner.<sup>56</sup> The application must be accompanied by a plan of distribution of the intestate estate prepared in accordance with the traditions of the community or group to which the Indigenous intestate belonged.<sup>57</sup>

14.32 An example of the application of such a plan can be found in a recent judgment of the NT Supreme Court:

*[3] The estate comprises cash only in the hands of the Public Trustee amounting to approximately \$28,700.*

*[4] The affidavit evidence of each of three deponents, senior members of clan groups making out the Jawoyn people, asserts that she or he is qualified and authorised by Jawoyn tradition to say who is entitled to take an interest in the estate under the customs and traditions of the Jawoyn. That evidence is consistent in showing that the intestate was the last member of another clan, that he was “grown up” by the late Gerry Mumbin who has three living children, Kevin, Kathleen and Lisa. Those children, in classificatory terms, were the “wives” and “brother-in-law” of the intestate. As the deceased had no children, the Mumbin siblings were his close family. The evidence also shows that Kevin, Kathleen and Lisa Mumbin succeeded to the non Aboriginal estate of the intestate in accordance with the customs and traditions of the Jawoyn and are entitled in equal shares. A letter to the Public Trustee from the Executive Director of the Jawoyn Association confirms that evidence. ...*

*[6] The plan of distribution proposes that the estate be divided into three parts (I assume equal parts) and that one of each part be distributed to Kevin, Kathleen and Lisa Mumbin.*

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54. P Vines, “Wills as Shields and Spears” (2002) 5(13) *Indigenous Law Bulletin* 16 at 17.

55. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 173.

56. *Administration and Probate Act 1969* (NT) s 6(1).

57. *Administration and Probate Act 1969* (NT) s 71B.

*[7] I am satisfied that in all the circumstances it would be just to order that the estate be distributed in accordance with the plan and order accordingly.*<sup>58</sup>

14.33 An application must be made within six months after a grant of administration. However, the Court may extend this time subject to any conditions the Court thinks fit, whether or not the six months has expired. No application will be allowed after the intestate estate has been lawfully and fully distributed.<sup>59</sup>

14.34 The Court may order that the intestate estate (or part thereof) be distributed in a specified manner. In making the order for distribution, the Court must take into account the traditions of the community or group to which the intestate belonged, and the plan that accompanied the application. In any event, the Court will not make any order for distribution “unless it is satisfied that to make the order would, in all the circumstances, be just”.<sup>60</sup>

14.35 The Court may distribute any or all of the Indigenous intestate’s estate, including that which has been distributed by the administrator before the administrator has had notice of any application. Where the administrator has made a distribution, before or after receiving notice of an application, the Court will not disturb such a distribution as long as it was “made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate Aboriginal [person] immediately before his or her death”.<sup>61</sup>

14.36 As with the general provisions, the debts and liabilities of the estate, the funeral and testamentary expenses, the costs and expenses of administering the estate and estate duties, succession duties and other duties and fees are not included in the estate of an intestate Indigenous person.<sup>62</sup>

14.37 The NT provisions are used infrequently.<sup>63</sup> The Office of the Public Trustee in the NT usually distributes Indigenous estates according to the general scheme of distribution established by statute. In most cases, the families accept such general distributions. Distribution plans are only required when traditional relatives are identified and the family of the intestate cannot agree on an alternative distribution to accommodate them.<sup>64</sup> Distribution plans can also prove useful in cases where the estate would otherwise pass to *bona vacantia*. Avoidance of *bona vacantia* was the reason for the distribution plan quoted above,<sup>65</sup> as the deceased had no surviving blood relatives.<sup>66</sup> There would appear to be no

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58. *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52.

59. *Administration and Probate Act 1969* (NT) s 71C.

60. *Administration and Probate Act 1969* (NT) s 71E.

61. *Administration and Probate Act 1969* (NT) s 71F.

62. *Administration and Probate Act 1969* (NT) s 71A.

63. The WA review could identify only one occasion where the NT provisions were applied: Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 291.

64. G Fleay, *Consultation*.

65. Para 14.32.

66. See T Hands, *Consultation*.

examples of cases where there have been competing claims for distribution between persons entitled at general law and those entitled to apply for a customary distribution.<sup>67</sup>

### **New Zealand**

14.38 New Zealand has established a scheme of entitlement in relation to Maori freehold land on intestacy. The scheme applies when the owner of any beneficial interest in Maori freehold land dies intestate. Distribution is made *per stirpes* and will go first to any of the intestate's issue who survive him or her. If there are no surviving issue, then the land will go to the intestate's siblings or the issue of these siblings, if a sibling has not survived the intestate, but has left issue. Should no such relatives be found, the chain of title shall be followed and priority granted to "the issue, living at the deceased's death, of the person nearest in the chain of title to the deceased who has issue living at the deceased's death".<sup>68</sup>

14.39 If the intestate leaves a surviving spouse, that spouse is entitled to a life interest, or an interest until remarriage, in the intestate's land, unless a separation order or separation agreement is in force in respect of the marriage between the surviving spouse and the intestate. The spouse is entitled to surrender his or her entitlement.<sup>69</sup>

14.40 Aside from the scheme of entitlement to Maori freehold land, all other property devolves according to the general scheme of distribution on intestacy.<sup>70</sup>

## **POSSIBLE APPROACHES**

14.41 Broadly, the National Committee has considered three possible approaches to distribution of intestate estates of Indigenous people:

- make no special provision, leaving distribution of estates of Indigenous people to the general law;
- leave it to each jurisdiction to make special provision for its Indigenous communities;
- make special provision for identifying Indigenous kinship structures.

### **Make no special provision**

14.42 Despite the distinctive and important role that kinship and marriage plays in Indigenous society, the Queensland Law Reform Commission, in 1993, recommended against the recognition of customary rules:

*Until extensive work has been done to bring knowledge of customary law clearly into focus and widespread consultation has been initiated and brought to fruition, the Commission is of the view that it could be counter-productive, even misleading, to introduce legislation at the present time*

67. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 291.

68. *Te Ture Whenua Maori Act 1993* (NZ) s 109(1).

69. *Te Ture Whenua Maori Act 1993* (NZ) s 109(2)-(4).

70. *Te Ture Whenua Maori Act 1993* (NZ) s 110(1).

*purporting to affect customary law, or to recognise it, in the narrow context of intestacy rules.*<sup>71</sup>

Deeds of family arrangement, which do not require legislative backing, are always available for cases where entitled family members can agree to an alternative distribution.<sup>72</sup>

## Leave regulation to each jurisdiction

14.43 Some submissions supported the recognition of Indigenous customs and practices being made on a jurisdiction by jurisdiction basis.<sup>73</sup> At present, this would mean that some jurisdictions will provide no assistance at all, while others will offer a regime that operates exclusively in relation to intestate estates of Indigenous people. There are some arguments for the retention of provisions in Queensland and WA, chiefly on the grounds that they work well informally. However, in their current form, the provisions are not desirable, since they no longer accord with practice and were generally designed to meet a situation that no longer applies, namely the failure of intestacy law to recognise relationships outside of marriage and ex-nuptial children.

14.44 Amendment is one option which could be pursued by each jurisdiction. For example, the Law Reform Commission of WA has proposed a series of amendments to the WA provisions which overcome some of the shortcomings of the current model. However, even as amended, the WA provisions are undesirable. First, one of the reasons for the original provision - accommodating the failure to recognise customary marriages - has long been superseded by laws recognising relationships other than marriage and according full rights to ex-nuptial children. Secondly, in any case, the amended provisions, as proposed by the Law Reform Commission of WA will only come into effect when there is no-one entitled under the general scheme for distribution on intestacy.<sup>74</sup>

14.45 Allowing provision on a jurisdiction by jurisdiction basis runs counter to aims of national uniformity in the administration of intestate estates. The results that are being achieved informally, by consultation with the relevant families and communities, can still be achieved by implementing a model along the lines of the one in the NT that seeks to incorporate Indigenous custom in an appropriate and consultative way, when the circumstances demand it.

## Make special provision for identifying Indigenous kinship structures

14.46 Another option is to make special provision for dealing with Indigenous kinship structures within the intestacy rules. This is the approach adopted by the NT. One of the

71. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 13.

72. See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286.

73. Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee NSW, *Submission* at 15; *Sydney Consultation 2*; Public Trustee of Queensland, *Submission* at 4.

74. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 292.

chief advantages of this approach is that it can accommodate “the diversity of customary laws on succession”.<sup>75</sup> One submission highlighted the desirability of having a single scheme within succession legislation “which provides for distribution of an intestate Indigenous person’s estate according to Aboriginal and Torres Strait Islander customs and traditions”.<sup>76</sup>

14.47 The NT model has been considered appropriate by a number of commentators. The Australian Law Reform Commission supported it in its 1986 report on the recognition of Aboriginal customary laws.<sup>77</sup> Professor Vines has usefully suggested that:

*The first step in legislation should be to extend the kinship group entitled on intestacy to one matching customary law patterns. If the requirement not to have been in a Marriage Act marriage is removed, the Northern Territory model is the best one on offer because it allows for the recognition of different patterns of customary law amongst different groups.*<sup>78</sup>

14.48 The Law Reform Commission of Western Australia has more recently identified a number of advantages to the NT model<sup>79</sup> although ultimately did not adopt it.<sup>80</sup> There was some support for the NT model in consultations.<sup>81</sup> One submission supported it as a “sound starting point”.<sup>82</sup> In one consultation, there was general support for Indigenous communities being able to apply for distributions according to traditional kinship structures.<sup>83</sup>

14.49 One view is that the NT model provides a useful mechanism for the complex cases where there is uncertainty or families cannot agree. In such cases, the availability of a mechanism that recognises traditional or customary relationships can be a comfort to the family and community of the deceased.<sup>84</sup>

14.50 The NT model, while allowing that somebody may claim to be entitled to a distribution under Indigenous customs and traditions, also allows distribution to be made

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75. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 289.

76. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1.

77. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

78. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 18. The ALRC also supported the removal of the *Marriage Act* requirement: Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

79. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 289-290.

80. See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report, 2006) at 233-239.

81. G Fleay, *Consultation; Sydney Consultation 1*.

82. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

83. WA, Succession Law Implementation Committee, *Consultation*.

84. See G Fleay, *Consultation*.

according to the general rules, which may be the most appropriate response in the circumstances. It can also accommodate children who have been brought up under traditional child-rearing practices, whereby children are sometimes permanently transferred, by mutual consent, from their birth families to other individuals or families. In most Australian jurisdictions, succession legislation does not currently accommodate traditional child-rearing practices either directly or indirectly.<sup>85</sup>

14.51 However, some reservations have also been expressed about the NT model. One concern is that its introduction in other parts of Australia might create unrealistic expectations among Indigenous people, especially in light of the infrequent use of the provisions in the NT.<sup>86</sup>

14.52 It is also possible that such a scheme may prove costly for individual estates. Reasons for this include the move in recent years to put public trustee offices on a commercial footing, the need to produce genealogies, often in the absence of adequate documentation, and the charging of court fees. The costs involved in such administrations may be especially problematic for small estates.<sup>87</sup> However, such problems may not be so great, as even where births and deaths have not been registered, most communities can confirm the relevant relationships and, if necessary, statutory declarations can be obtained from elders of the relevant communities.<sup>88</sup> It is reported that the NT Public Trustee Office has “strong working relationships with several legal and community organisations which help in the provision of an intestate deceased person’s family tree”.<sup>89</sup>

14.53 It has also been suggested that six months is too short a period for making an application in light of extensive mourning periods in some communities. Applications to the Supreme Court for an extension of time may prove costly, especially in the case of smaller estates.<sup>90</sup>

14.54 Another submission opposed giving any preference to the Public Trustee or trustee companies in the procedures.<sup>91</sup> The NT provisions currently single out the Public Trustee, trustee companies and legal practitioners as “professional personal representatives” who are entitled to make an application.

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85. See Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 3-4.

86. T Hands, *Consultation*.

87. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2-3.

88. G Fleay, *Consultation*; Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2. Such simple procedures would obviate the need for an applicant to seek from, for example, the Minister for Indigenous Affairs a certificate of conclusive evidence as to his or her family relationships as proposed by the Law Reform Commission of WA: Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report 2006) at 238.

89. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

90. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 290.

91. Law Society of Tasmania, *Submission* at 16.

## NATIONAL COMMITTEE'S CONCLUSION

14.55 The National Committee recommends that NT provisions be adopted so that Indigenous kinship structures can be identified where required in order to administer an intestate estate appropriately.

14.56 The National Committee expects that distribution plans will only need to be used in a small number of cases. This has been the experience in the NT where the vast majority of Indigenous intestate estates are administered as they would be for the general community.<sup>92</sup> The distribution plans are only required in exceptional cases where, for example, there are traditional or customary relatives and the family cannot agree to a deed of family arrangement to accommodate them or to avoid an estate passing to *bona vacantia*.

14.57 It is also expected that the provisions will be used chiefly to identify established kinship structures for the purposes of distribution on intestacy, rather than to identify customary methods for dealing with the property of deceased persons, especially where these may not translate easily into the modern environment.

14.58 Notwithstanding concerns about the recognition of Indigenous customary law, the NT provision appears to provide an appropriate framework for the recognition of the aspects of Indigenous customary law that may be relevant to identifying an intestate's kin in the rare circumstances in which such questions may arise.

14.59 Allowing the Court to extend the time for making applications will ensure that appropriate account can be taken of the extensive periods of mourning in some Indigenous communities.<sup>93</sup> However, in light of the costs involved in applying to the Supreme Court, the National Committee is of the view that the period of six months should be extended to 12 months.

14.60 In making this recommendation, the National Committee considers that the fact that the intestate entered into a marriage under the *Marriage Act 1961* (Cth) should not preclude that person's estate from being dealt with under the proposed provisions. The National Committee also sees no reason why "professional" personal representatives should be singled out as being appropriate persons who can apply for an order for distribution of the estate of an Indigenous person. Any personal representative should be able to apply for such an order.

14.61 An alternative form of drafting that is to the same effect as the NT provisions may be found in the recommendations of the Australian Law Reform Commission in its 1986 report on the recognition of Aboriginal customary law.<sup>94</sup>

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92. G Fleay, *Consultation*.

93. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

94. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 2 at 260.

**Recommendation 45**

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A person who claims to be entitled to take an interest in an Indigenous person's intestate estate under the customs and traditions of the community or group to which the Indigenous intestate belonged or a personal representative may apply to the Court for an order for distribution of the estate. A plan of distribution of the estate, prepared in accordance with the traditions of the community or group to which the Indigenous person belonged, must accompany the application.

An application must be made within 12 months of the grant of administration. The Court may extend this time subject to any conditions it thinks fit, whether or not the 12 months has expired. No application will be allowed after the intestate estate has been fully distributed according to law.

The Court:

- (a) may order that the intestate estate (or part thereof) be distributed in a specified manner;
- (b) must, in making an order, take into account the traditions of the community or group to which the intestate belonged and the plan of distribution;
- (c) must not make any order for distribution unless it is satisfied that it would, in all the circumstances, be just.

The Court order may include property which the personal representative distributed within the 12 month period before he or she had notice of any application. The Court will not disturb any distribution if it was made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before his or her death.

See Intestacy Bill 2006 **Part 4**.



## 15. Miscellaneous provisions

- Legislative definition of “intestate”
- Beneficially interested personal representative
- References to statutes of distribution, heirs and next of kin
- Abolition of courtesy and right of dower

## LEGISLATIVE DEFINITION OF “INTESTATE”

15.1 Not all jurisdictions include a definition of intestacy in their relevant statutes. WA and NSW have no definition at all. Queensland, SA, ACT and NT define “intestate” as:

*a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.*<sup>1</sup>

15.2 Tasmania and Victoria provide that an “intestate” includes:

*a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.*<sup>2</sup>

15.3 In NT, the *Trustee Act 1893* (NT) deems a person to have died intestate in respect of a “beneficial interest in real estate or land” where that interest is “owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of”.<sup>3</sup>

15.4 Other possible approaches include that adopted by the Uniform Law Conference of Canada in its Uniform Succession Act, which merely states that “any part of the estate of a deceased not disposed of by will shall be distributed under this Act”.<sup>4</sup>

15.5 Some submissions supported a legislative definition of an “intestate” along the lines of those definitions adopted by Queensland, SA, ACT and NT.<sup>5</sup>

15.6 One view is that intestacy appears to have an accepted meaning.<sup>6</sup> A legislative definition may, therefore, be unnecessary. However, it can also be argued that a definition may be of assistance, particularly to lay people who may have to administer an estate, in understanding what intestacy is. To this end, the definition employed by Queensland, SA, ACT and NT, is better suited to explaining what an intestate is. The National Committee, therefore, recommends that such a definition be adopted.

1. *Succession Act 1981* (Qld) s 5; *Administration and Probate Act 1919* (SA) s 72B(1); *Administration and Probate Act 1969* (NT) s 61(1); and *Administration and Probate Act 1929* (ACT) s 44(1).
2. *Administration and Probate Act 1935* (Tas) s 3(1); and *Administration and Probate Act 1958* (Vic) s 5(1). See also *Administration Act 1969* (NZ) s 2(1); and *Administration of Estates Act 1925* (Eng) s 55(1).
3. *Trustee Act 1893* (NT) s 75.
4. Uniform Intestate Succession Act s 2(2) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 284. This differs from the 1962 consolidation which stated: “All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate”: Conference of Commissioners on Uniformity of Legislation in Canada, *Model Acts Recommended from 1918 to 1961 Inclusive* (1962) at 167.
5. Trustee Corporations Association of Australia, *Submission* at 1; Public Trustee NSW, *Submission* at 1; Law Society of Tasmania, *Submission* at 2.
6. See J North, *Submission* at 1.

#### Recommendation 46

An “intestate” should be defined as a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.

See Intestacy Bill 2006 cl 5.

## BENEFICIALLY INTERESTED PERSONAL REPRESENTATIVE

15.7 NSW, Tasmania, Victoria and WA make special provision in relation to beneficially interested personal representatives.<sup>7</sup> In Tasmania, for example, the relevant provision states that:

*The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.*<sup>8</sup>

15.8 Queensland had a similar provision,<sup>9</sup> which was not carried over into the *Succession Act 1981* (Qld). The Queensland Law Reform Commission recommended the removal of the provision in 1978 on the grounds that it “might be construed as meaning that where the spouse or issue of an intestate happen to be his executor they cannot take benefit under a partial intestacy”.<sup>10</sup> The provision was originally intended to deal with the historical position that an executor was entitled at law to such personal property of the testator that was undisposed of by will. Equity, however, took the view that an executor would be entitled to the testator’s personal property that was not expressly disposed of, unless a contrary intention could be found on the part of the testator to exclude the executor from the benefit. In such cases, the personal property went to those entitled upon intestacy.<sup>11</sup> The English *Executors Act of 1830*,<sup>12</sup> upon which the former Queensland provision was based, shifted the burden of proof in such circumstances in favour of those entitled to take on intestacy. The executor was, therefore, deemed to hold personal property that had not been disposed of for the persons entitled to take on intestacy, unless an express statement could be found in the will that the executor was intended to take the residue beneficially. The Queensland Law Reform Commission concluded that:

7. *Wills, Probate and Administration Act 1898* (NSW) s 61F(3); *Administration and Probate Act 1935* (Tas) s 47(b); *Administration and Probate Act 1958* (Vic) s 53(b); *Administration Act 1903* (WA) s 13(2). See also *Administration of Estates Act 1925* (Eng) s 49(1)(b).
8. *Administration and Probate Act 1935* (Tas) s 47(b).
9. *Succession Act 1867* (Qld) s 34(2).
10. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
11. W A Lee, “Queensland Intestacy Rules 1968” (1970) 7 *University of Queensland Law Journal* 74 at 83.
12. 11 George IV and 1 William IV c 40.

*It is quite clear that the only persons who may take on intestacy in Queensland are those persons designated by [the intestacy provisions] and, therefore, there is no need to retain what is, in effect, an archaic amendment to an even more archaic rule.<sup>13</sup>*

The National Committee agrees with this conclusion.

15.9 Submissions that considered this issue also agreed that there is no need for a special provision negating the statutory trusts where the personal representative takes the intestate estate beneficially.<sup>14</sup>

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#### Recommendation 47

There should not be a provision relating to beneficially interested personal representatives.

## REFERENCES TO STATUTES OF DISTRIBUTION, HEIRS AND NEXT OF KIN

15.10 A number of jurisdictions include provisions dealing with the use of superseded legal terminology relating to the distribution of estates and other transfers of property.

15.11 For example, both Queensland and Victoria provide that references made to any statutes of distribution in wills or other instruments shall be construed as references to the current intestacy rules.<sup>15</sup> Queensland also adds that references to an “heir or heir at law or next of kin of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on the intestacy of that person”.<sup>16</sup> Lee suggests that the Queensland provision is one of a number of construction provisions “designed to remedy comparatively common problems arising from inappropriate use of terminology in wills”.<sup>17</sup>

15.12 In this context, the word “heir” may have a specific (historical) legal meaning which is different to the current understanding of the word by ordinary people. Historically, land could not be disposed of by will, but was transmitted by inheritance to the deceased’s heir. The system came under the jurisdiction of the courts of common law. A system of primogeniture was used to identify the heir, whereby the land devolved to the eldest son. A complex series of rules was developed to identify heirs at law if there was no eldest son available to inherit. After 1540, it became possible to transmit land by will but, upon intestacy, the land passed directly to the heir, subject ultimately to rights of courtesy and

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13. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23-24.

14. Trustee Corporations Association of Australia, *Submission* at 1; Public Trustee NSW, *Submission* at 1; Law Society of Tasmania, *Submission* at 2.

15. *Succession Act 1981* (Qld) s 39; and *Administration and Probate Act 1958* (Vic) s 56.

16. *Succession Act 1981* (Qld) s 39.

17. W A Lee and A A Preece, *Lee’s Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173; see also 225 and 230.

dower.<sup>18</sup> On intestacy, real estate, like personalty, is now distributed according to the intestacy rules in each jurisdiction. There is now no need to identify the heir at common law for the purposes of succession to land.

15.13 Notwithstanding this, there are some provisions still in force in Australia that deal with the identification of the common law heir-at-law, based in part on an English Act of 1833.<sup>19</sup> For example, the *Inheritance Act 1901* (NSW)<sup>20</sup> and *Property Law Act 1958* (Vic) Part 5 are such provisions. In 1893, a Judge of the Supreme Court of NSW asked of such provisions, "can it really be said that there exists such a person as an heir at law in this colony?"<sup>21</sup> However, in 1901, the NSW Commissioner for the Consolidation of the Statute Law considered that, notwithstanding such doubts, the provisions contained in the *Inheritance Act* could not "yet be treated as entirely unnecessary". In Victoria, the Scrutiny of Acts and Regulations Committee has recommended the repeal of the equivalent provisions in Victoria.<sup>22</sup>

15.14 NSW applies the current intestacy rules to any gifts made in a will or other instrument that are expressed to vest in an "heir" or "next of kin" or "next of kin of a person to be determined in accordance with the Wills, Probate and Administration Act 1898".<sup>23</sup> However, this *prima facie* position is subject to the expression of a "contrary or other intention" in the instrument.<sup>24</sup> This exception leaves open the possibility, for example, that the use of the term "heir" could still be construed as the heir at common law. In 1944, Chief Justice Jordan considered that terms such as "heir at law", "right heir" and even "heir" could still be construed as referring to the heir at common law. This was notwithstanding the view that it was "inherently unlikely" that most people, in referring to an "heir", would intend to "revive what has become a piece of legal antiquarianism".<sup>25</sup> The Victorian Supreme Court did not follow the NSW approach in 1956 when it decided that a gift to "heirs and assigns" of a testatrix passed to her next of kin. However, the Court there left open the possibility that the term "heir at law" could still be intended to refer to the heir at common law.<sup>26</sup> It should be noted that Victoria does not have an equivalent provision relating to the use of the term "heir". Victoria merely provides that references to "statutory next of kin or to the like effect" shall be taken as referring to those beneficially entitled on an intestacy.<sup>27</sup>

18. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*. (2nd ed, Law Book Company, Sydney, 1989) at para 1404. On courtesy and dower, see para 15.19-15.21 below.

19. 3&4 William IV c 106 *Inheritance Act of 1833* (Eng).

20. The provisions were originally contained in the English Act, 3&4 William IV c 106 (as adopted by 7 William IV No 8 (NSW)) and 26 Vic No 12 (NSW).

21. *Morrice v Morrice* (1893) 14 LR(NSW) Eq 211 at 213.

22. Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under s 207 of the Equal Opportunity Act 1995* (Final Report, 2005) at 22-23.

23. *Conveyancing Act 1919* (NSW) s 33(1).

24. *Conveyancing Act 1919* (NSW) s 33(2).

25. See *Ex parte Price* (1944) 45 SR(NSW) 53 at 58-59.

26. *In re Kane; Carmody v Kane* [1956] VLR 292 at 294.

27. *Succession Act 1981* (Qld) s 39; and *Administration and Probate Act 1958* (Vic) s 56.

15.15 The Queensland provisions, referring to “heir” and “heir at law”, were included following a recommendation of the Queensland Law Reform Commission in 1978. The Commission considered that, since heirship had been abolished in 1877, it was “virtually inconceivable that any person would use the word “heir” to mean heir at law in accordance with the exceedingly complex rules of the common law”.<sup>28</sup> The use of the term “heir at law” in Queensland makes this position clearer than it is in NSW, which does not refer to the “heir at law”, using only the term “heir”.

15.16 Neither England nor New Zealand includes “heir” or “heir at law” in their equivalent provisions.<sup>29</sup>

15.17 Some submissions supported the retention of these provisions.<sup>30</sup> Others preferred that they not be included in the model laws.<sup>31</sup>

## National Committee’s conclusion

15.18 Despite the fact that the Queensland and Victorian provisions are contained in the parts of their statutes that deal with intestacy, these provisions can have no impact upon the distribution of an intestate estate. This is because they apply to the vesting of property under a will or other instrument. They are, therefore, more appropriately contained in legislation dealing with the law of property. The NSW provisions, for example, are contained in the *Conveyancing Act 1919* (NSW).

## ABOLITION OF COURTESY AND RIGHT OF DOWER

15.19 Estate by courtesy (or curtesy) and the right of dower both concern real property.

15.20 Estate by courtesy was a husband’s right to a life estate in all of his wife’s land on her death. The right was only exercisable if the wife:

- could dispose of her title by will;
- had possession of the land before her death;
- had not already disposed of the land,

and if no child capable of inheriting the land had been born to the marriage.

15.21 The right of dower was a wife’s right to a life estate in a third of all her husband’s land (including that which he had alienated) on his death. This right was again only exercisable if the husband’s title in the land could be disposed of by him through his will, and if the husband had possession of the land before his death. Although the right could

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28. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 24.

29. See also *Administration Act 1969* (NZ) s 80(1); and *Administration of Estates Act 1925* (Eng) s 50(1).

30. Public Trustee NSW, *Submission* at 16; Trustee Corporations Association of Australia, *Submission* at 22; J North, *Submission* at 5.

31. Law Society of Tasmania, *Submission* at 16.

still have been exercised if a child had been born to the marriage, it could not if the dower had been “barred”.

15.22 Courtesy and right of dower have become irrelevant in light of the modern rights on intestacy of the surviving spouse or partner.<sup>32</sup>

15.23 All jurisdictions have abolished courtesy and the right of dower. The majority have included the abolition in their current provisions relating to intestacy, in the case of ACT, NT and WA,<sup>33</sup> or at least administration of estates, in the cases of SA and NSW.<sup>34</sup> Queensland, Tasmania and Victoria abolished dower and courtesy in other statutes during the 19th century.<sup>35</sup>

15.24 Some submissions supported the removal of such provisions so long as the rights have been expressly abolished in all Australian jurisdictions.<sup>36</sup>

## National Committee’s conclusion

15.25 Courtesy and right of dower have been expressly abolished in all Australian jurisdictions. There would, therefore, appear to be no reason why such a provision should be included in any future legislation relating to intestacy.

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32. See ch 2-6.

33. *Administration and Probate Act 1929* (ACT) s 48; *Administration and Probate Act 1969* (NT) s 65; and *Administration Act 1903* (WA) s 16. See also *Administration of Estates Act 1925* (Eng) s 45(1)(c) and (d).

34. *Administration and Probate Act 1919* (SA) s 46(3); *Wills, Probate and Administration Act 1898* (NSW) s 52.

35. *Intestacy Act 1877* (Qld) s 28; *Conveyancing and Law of Property Act 1884* (Tas) s 89; *Dower Abolition Act 1880* (Vic); *Married Women’s Property Act 1884* (Vic) s 25. See also *Married Women’s Property Act 1952* (NZ) s 4. On the effect of a repeal of a provision repealing the right of dower, see *Marshall v Smith* (1907) 4 CLR 1617; and in Queensland, see *Acts Interpretation Act 1954* (Qld) s 20 whereby a repeal of the Act will not revive the interests.

36. Trustee Corporations Association of Australia, *Submission* at 22; Public Trustee NSW, *Submission* at 15. See also Law Society of Tasmania, *Submission* at 16; J North, *Submission* at 5.

# Appendices

- Appendix A - Draft bill
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South Australia

## **Intestacy Bill 2007**

A BILL FOR

An Act to make provision for the distribution of intestate estates; and for other purposes.

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#### Schedule 1—Transitional provision

- 1 Transitional provision

The Parliament of South Australia enacts as follows:

## Part 1—Preliminary

### 1—Short title

This Act may be cited as the *Intestacy Act 2007*.

### 2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

### 3—Purpose of Act

The purpose of this Act is to revise and re-state the rules for distribution on intestacy.

### 10 4—Definitions

(1) In this Act, unless the contrary intention appears—

**brother/sister**—a person is the brother or sister of another if they have one or both parents in common;

**Court** means the Supreme Court;

15 **CPI** means the All Groups Consumer Price Index, being the weighted average of the 8 capital cities, published by the Australian Statistician;

**deceased**—a deceased person is one who did not survive the intestate;

20 **domestic partnership**—see section 7;

**eligible relative** means a relative of the intestate who is entitled to share in the distribution of the intestate estate under Part 3;

25 **(indexed)** indicates that the sum of money to which it relates is to be adjusted to reflect changes in the CPI between 1 January 2007 and 1 January in the calendar year in which the intestate died;

**Indigenous**—an Indigenous person is one who—

- (a) is of Aboriginal or Torres Strait Islander descent; and
  - (b) identifies as an Aboriginal or Torres Strait Islander; and
  - (c) is accepted as an Aboriginal by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community;
- 30

**intestate**—see section 5;

**intestate estate** means—

(a) in the case of an intestate who leaves a will—property that is not effectively disposed of by will;

(b) in any other case—all the property left by the intestate;

[Entitlements to an intestate estate (or a proportion of an intestate estate) are to be net of administrative expenses. The exact form of the provision will depend on the National Committee's recommendations on the administration of deceased estates.]

**leave**—a person leaves another if the person dies and is survived by the other;

**personal effects** of an intestate means the intestate's tangible personal property except—

(a) property used exclusively for business purposes;

(b) banknotes or coins (unless forming a collection made in pursuit of a hobby or for some other non-commercial purpose);

(c) property held as a pledge or other form of security;

(d) property (such as gold bullion or uncut diamonds)—

(i) in which the intestate has invested as a hedge against inflation or adverse currency movements; and

(ii) which is not an object of household, or personal, use, decoration or adornment;

(e) an interest in real property;

**personal representative** of an intestate means a person who distributes, or proposes to distribute, the intestate estate under a grant of letters of administration, an order having equivalent effect, or a statutory authorisation;

**predecease**—a person is taken to predecease the intestate if the person does not survive the intestate;

**presumptive share** of an intestate estate of a deceased eligible relative of the intestate means the entitlement the relative would have had if he or she had survived the intestate;

**registered valuer**

[to be defined according to the local law in force regulating valuers.]

*spouse*—see section 6;

*statutory legacy* for a spouse—see section 8;

*survive*—see subsections (2) and (3).

(2) A person will not be regarded as having survived another unless—

- 5 (a) the person survives the other by at least 30 days; or
- (b) the person is conceived before, but born after, the other's death and survives for at least 30 days after birth.

(3) The rules stated in subsection (2) are not to be applied if, as a result of their application, the intestate estate would pass to the State.

## 10 **5—Intestate**

An intestate is a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property.

## **6—Spouse**

15 A *spouse* of an intestate is a person—

- (a) who was married to the intestate immediately before the intestate's death; or
- (b) who was a party to a domestic partnership with the intestate immediately before the intestate's death.

## 20 **7—Domestic partnership**

A *domestic partnership* is a relationship (other than marriage) between the intestate and another person—

- (a) that is a de facto relationship/domestic partnership/civil union within the meaning of the [here insert the name of the local legislation dealing with the recognition of de facto relationships]; and
- 25 (b) that—
  - (i) has been in existence for a continuous period of at least 2 years; or
  - 30 (ii) has resulted in the birth of a child; or
  - (iii) is registered under the [here insert the name of the local legislation dealing with registration of de facto relationships; or if there is no such legislation, omit this subparagraph].

## 8—Spouse's statutory legacy

- (1) The statutory legacy for a spouse consists of—
  - (a) \$350 000 (indexed); and
  - (b) if the statutory legacy is not paid, or not paid in full, within 1 year after the intestate's death—interest at the relevant rate on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full.
- (2) If, however, a spouse is entitled to a statutory legacy under this Act and under the law of another jurisdiction or other jurisdictions—
  - (a) the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including this Act); but
  - (b) the following qualifications apply:
    - (i) amounts received by the spouse, by way of statutory legacy, under any of the other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under this Act; and
    - (ii) if any of the relevant laws contains no provision corresponding to subparagraph (i), no amount is payable by way of statutory legacy under this Act until the spouse's entitlement under that law is exhausted, or the spouse renounces the spouse's entitlement to payment, or further payment, by way of statutory legacy, under that law.
- (3) If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or statutory legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate ratably.
- (4) The *relevant rate* of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

## 9—General limitation of non-spousal entitlements

- (1) A person is not entitled to participate in the distribution of an intestate estate unless—
  - (a) born before the intestate's death; or

- (b) born after a period of gestation in the uterus that commenced before the intestate's death.

- (2) A reference in this Act to a child, descendant, relative, or descendant of a relative, of an intestate is limited to a person of the relevant description whose entitlement to share in the distribution of the intestate estate is not excluded under subsection (1).

## **10—Adoption**

An adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents and—

- (a) the child's family relationships are to be determined accordingly; and
- (b) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

## **15 Part 2—Spouses' Entitlements**

### **Note—**

In the case of an Indigenous estate, this Part is subject to exclusion or modification by a distribution order under Part 4.

## **Division 1—Entitlement of surviving spouse**

### **20 11—Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

### **12—Spouse's entitlement where there are no descendants**

- If an intestate leaves a spouse but no descendants, the spouse is entitled to the whole of the intestate estate.

### **13—Spouse's entitlement where descendants are also descendants of the spouse**

- If an intestate leaves a spouse and descendants and the descendants are all also descendants of the spouse, the spouse is entitled to the whole of the intestate estate.

**14—Spouse’s entitlement where at least one descendant is not a descendant of the spouse**

If an intestate leaves a spouse and at least one descendant who is not a descendant of the spouse, the spouse is entitled to—

- 5 (a) the intestate’s personal effects; and
- (b) a statutory legacy; and
- (c) one-half of the remainder (if any) of the intestate estate.

**Division 2—Spouse’s preferential right to acquire property from the estate**

**15—Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

**16—Spouse’s right of election**

- 15 (1) A spouse is entitled to elect to acquire property from an intestate estate.
- (2) A spouse’s election to acquire property from an intestate estate requires the Court’s authorisation if—
  - (a) the property forms part of a larger aggregate; and
  - 20 (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.

**Examples—**

- 25 1 The acquisition of a single item from a collection of items might substantially diminish the value of the remainder of the collection or make it substantially more difficult to dispose of the remainder of the collection.
- 30 2 The acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder of the farming property or make it substantially more difficult to dispose of it.
- 35 (3) The Court may grant or refuse an authorisation under subsection (2) and, if the Court grants its authorisation, it may impose conditions, including a condition that the spouse pay compensation to the estate in addition to consideration to be given for the property under this Division.



- (4) A spouse who is a personal representative of the intestate is not prevented from making an election to acquire property from the intestate estate by the fact that the spouse is a trustee of the intestate estate.

#### 5      **17—Notice to be given to spouse of right of election**

- (1) An intestate's personal representative must, before commencing the administration of the intestate estate, give notice to the intestate's spouse of the spouse's right of election stating—
- (a) how the right is to be exercised; and
  - 10      (b) the fact that the election may be subject to the Court's authorisation and the circumstances in which such an authorisation is required; and
  - (c) that the right must be exercised within 3 months (or a longer period allowed by the Court) after the date of the notice.
- 15      (2) Notice is not required under this section if the spouse is the personal representative, or one of the personal representatives, of the intestate.

#### **18—Time for making election**

- (1) The election must be made—
- 20      (a) if the spouse is entitled to notice of the right of election—within 3 months after the date of the notice; or
  - (b) if the spouse is the intestate's personal representative (or one of the personal representatives)—within 3 months after the administration commences.
- 25      (2) The Court may, however, if it considers there are proper reasons for doing so, extend the time for making the election.

##### **Example—**

- 30      The Court might, for example, extend the period for making an election if the Court's authorisation for making the election is required or if a question remains unresolved regarding the existence, or the nature, of a person's interest in the intestate estate.

#### **19—How election to be made**

- (1) A spouse's election is made by written notice identifying, with reasonable particularity, the property the spouse elects to acquire.
- (2) The notice of election must be given—
- 35      (a) to each person, apart from the spouse, who is a personal representative of the intestate; and

- (b) to each person, apart from the spouse, who is entitled to share in the intestate estate.
- (3) A spouse who has not reached the age of majority may make an election as validly and effectively as an adult.
- 5 (4) A spouse may revoke his or her election at any time before the transfer of the property to the spouse.
- (5) A revocation is made by written notice of revocation given to the same persons as the notice of election.

## 20—Basis of the election

- 10 (1) The price for which a spouse may elect to acquire property from the intestate estate (the *exercise price*) is the market value of the property as at the date of the intestate's death.
- (2) If, however, the spouse and the holder of a mortgage, charge or encumbrance over property that the spouse has elected to acquire agree to the assumption by the spouse of the liability secured by the mortgage, charge or encumbrance—
  - 15 (a) the exercise price is to be reduced by the amount of the liability (as at the date of transfer) secured by the mortgage, charge or encumbrance; but
  - 20 (b) the spouse takes the property subject to the mortgage, charge or encumbrance; and
  - (c) on the transfer of the property, the liability passes to the spouse and the estate is exonerated from it.
- 25 (3) The personal representative of an intestate must obtain a valuation from a registered valuer of property forming part of the intestate estate if—
  - (a) a spouse elects to acquire the property; or
  - (b) a spouse asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it.
  - 30 (4) The personal representative must give a copy of the valuation to the spouse and to the other beneficiaries entitled to share in the intestate estate.

**21—Exercise price—how satisfied**

If a spouse elects to acquire property from the intestate estate, the exercise price is to be satisfied—

- 5 (a) first from money to which the spouse is entitled from the intestate estate; and
- (b) if that is insufficient, from money paid by the spouse to the estate on or before the date of transfer.

**22—Restriction on disposal of property from intestate estate**

- 10 (1) The personal representative of an intestate must not dispose of property from the intestate estate (except to a spouse who has elected to acquire it) unless—
  - (a) the personal representative is the spouse entitled to make the election; or
  - (b) the time for exercising the election has elapsed and no election has been made; or
  - 15 (c) the election requires the Court's authorisation but—
    - (i) the necessary authorisation has been refused; or
    - (ii) the application for authorisation has been withdrawn;
  - 20 (d) the spouse has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate; or
  - (e) sale of the property is urgently required to meet liabilities of the estate; or
  - 25 (f) the property is perishable or likely to decrease rapidly in value.
- (2) A transaction entered into contrary to this section is not invalid.

**Division 3—Multiple spouses****23—Spouses' entitlement where there are more than one but no descendants**

If an intestate leaves more than one spouse, but no descendants, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.

**24—Spouses' entitlement where descendants are also descendants of one or more of the spouses**

If an intestate leaves more than one spouse and descendants who are all descendants of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.

**25—Spouses' entitlement where at least one descendant is not a descendant of a surviving spouse**

If an intestate leaves more than one spouse and at least one descendant who is not a descendant of a surviving spouse—

- (a) the spouses are entitled to share the intestate's personal effects in accordance with this Division; and
- (b) each spouse is entitled to a statutory legacy; and
- (c) the spouses are entitled to share one-half of the remainder (if any) of the intestate estate in accordance with this Division.

**26—Sharing between spouses**

- (1) If property is to be shared between spouses under this Division, the property is to be shared—
  - (a) in accordance with a written agreement between the spouses (a *distribution agreement*); or
  - (b) in accordance with an order of the Court (a *distribution order*); or
  - (c) if the conditions prescribed by subsection (2) are satisfied—in equal shares.
- (2) The following conditions must be satisfied if the personal representative is to make an equal division of property between spouses under subsection (1)(c):
  - (a) the personal representative has given each spouse a notice in writing stating that the personal representative may distribute the property equally between the spouses unless, within 3 months after the date of the notice—
    - (i) they enter into a distribution agreement and submit the agreement to the personal representative; or
    - (ii) at least one of the spouses applies to the Court for a distribution order; and

- (b) at least 3 months have elapsed since the giving of the notices and—
  - (i) the personal representative has not received a distribution agreement or notice of an application for a distribution order; or
  - (ii) an application for a distribution order has been made but the application has been dismissed or discontinued.
- (3) If a spouse asks the personal representative to initiate the process for making an equal division of property under subsection (1)(c), the personal representative must, as soon as practicable—
  - (a) give the notices required under subsection (2)(a); or
  - (b) make an application to the Court for a distribution order.
- (4) The personal representative must give the spouses written notice at least 30 days before beginning distribution between them on the basis of a distribution agreement or under subsection (1)(c).

## **27—Distribution orders**

- (1) An intestate's spouse or personal representative may apply to the Court for a distribution order.
- (2) If, however, the personal representative has given written notice of intention to begin distribution between them under section 26(4) the application cannot be made more than 30 days after the date of the notice.
- (3) On an application under this section, the Court may order that the property be distributed between the spouses in any way it considers just and equitable.
- (4) If the Court considers it just and equitable to do so, it may allocate the whole of the property to one of the spouses to the exclusion of the other or others.
- (5) A distribution order may include conditions.

## **Part 3—Distribution among relatives**

### **Note—**

In the case of an Indigenous estate, this Part is subject to exclusion or modification by a distribution order under Part 4.

## 28—Entitlement of children

- (1) If an intestate leaves no spouse but leaves a descendant, the intestate's children are entitled to the whole of the intestate estate.
- (2) If—
  - (a) an intestate leaves—
    - (i) a spouse or spouses; and
    - (ii) at least one descendant who is not also a descendant of a surviving spouse; and
  - (b) a part of the estate remains after satisfying the spouse's entitlement, or the spouses' entitlements,the intestate's children are entitled to the remaining part of the intestate estate.
- (3) If no child predeceased the intestate leaving a descendant who survived the intestate, then—
  - (a) if there is only one surviving child—the entitlement vests in the child; or
  - (b) if there are 2 or more surviving children—the entitlement vests in them in equal shares.
- (4) If one or more of the intestate's children predeceased the intestate leaving a descendant who survived the intestate—
  - (a) allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child; and
  - (b) the presumptive share of any such deceased child is to be divided between that child's children and, if any of these grandchildren (of the intestate) predeceased the intestate leaving descendants who survived the intestate, the deceased grandchild's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great grandchild who predeceased the intestate leaving descendants who survived the intestate), and so on until the entitlement is exhausted.

## 29—Parents

- (1) The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves—
  - (a) no spouse; and

(b) no descendant.

(2) If there is only one surviving parent, the entitlement vests in the parent and, if both survive, it vests in equal shares.

### 30—Brothers and sisters

5 (1) The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

(c) no parent.

10 (2) If no brother or sister predeceased the intestate leaving a descendant who survived the intestate, then—

(a) if only one survives—the entitlement vests in the surviving brother or sister; or

15 (b) if 2 or more survive—the entitlement vests in them in equal shares.

(3) If a brother or sister predeceased the intestate leaving a descendant who survived the intestate—

20 (a) allowance must be made in the division of the estate between brothers and sisters for the presumptive share of any such deceased brother or sister; and

25 (b) the presumptive share of any such deceased brother or sister is to be divided between the brother or sister's children and, if any of these children predeceased the intestate leaving descendants who survived the intestate, the deceased child's presumptive share is to be divided between the child's children (again allowing for the presumptive share of a grandchild who predeceased the intestate leaving descendants who survived the intestate), and so on until the entitlement is exhausted.

### 30 31—Grandparents

(1) The grandparents of an intestate are entitled to the whole of an intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

35 (c) no parent; and

(d) no brother or sister, or descendant of a deceased brother or sister.

(2) If there is only one surviving grandparent, the entitlement vests in the grandparent and, if 2 or more survive, it vests in equal shares.

### 5 32—Aunts and uncles

(1) The brothers and sisters of each of an intestate's parents are entitled to the whole of the intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

10 (c) no parent; and

(d) no brother or sister, or descendant of a deceased brother or sister; and

(e) no grandparent.

15 (2) If no brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, then—

(a) if only one survives—the entitlement vests in the surviving brother or sister; or

(b) if 2 or more survive—the entitlement vests in them in equal shares.

20 (3) If a brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, the child is entitled to the deceased parent's presumptive share and, if there are 2 or more children, they share equally.

### 33—Entitlement to take in separate capacities

25 A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

#### Example—

30 Suppose that an intestate dies leaving no spouse and no surviving relatives except children of a deceased maternal aunt and paternal uncle who had a child in common as well as children of other unions. In this case, the child of the union between the maternal aunt and the paternal uncle would be entitled to participate in the estate both as representative of the maternal aunt and as representative of the paternal uncle.



## Part 4—Indigenous estates

### 34—Application for distribution order

- 5           (1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.
- 10          (2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.
- 15          (3) An application under this section must be made within 12 months after administration commences or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.
- 20          (4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate unless—
  - (a) the application has been determined; or
  - (b) the Court authorises the distribution.

### 35—Distribution orders

- 25          (1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.
- 30          (2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).
- 35          (3) In formulating an order under this Part, the Court must have regard to—
  - (a) the scheme for distribution submitted by the applicant; and

(b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.

(4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just.

### 5 **36—Effect of distribution order under this Part**

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

## **Part 5—Absence of eligible beneficiaries**

### 10 **37—Intestate leaving no eligible beneficiaries**

If an intestate dies leaving no spouse, no eligible relative and no other person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate.

### 15 **38—State has discretion to make provision out of property to which it becomes entitled**

(1) If the State is entitled to an intestate estate under this Part, the Minister may, on application for a waiver of the State's rights, waive the State's rights in whole or part in favour of—

- (a) dependants of the intestate; or
- 20 (b) any persons who have, in the Minister's opinion, a just or moral claim on the intestate; or
- (c) any organisation or person for whom the intestate might reasonably be expected to have made provision; or
- 25 (d) the trustees for any person or organisation mentioned in paragraph (a), (b) or (c); or
- (e) any other organisation or person.

(2) The Minister may grant a waiver under this section on conditions the Minister considers appropriate.

## **Part 6—Miscellaneous**

### 30 **39—Non-deferral of the interest of a minor**

The entitlement of a minor to an interest in an intestate estate vests immediately (ie it is not deferred until the minor reaches majority or marries).

**40—Effect of disclaimer etc**

For the purposes of the distribution of an intestate estate, a person will be treated as having predeceased the intestate if the person—

- 5 (a) disclaims an interest, to which he or she would otherwise be entitled, in the intestate estate; or
- (b) is disqualified from taking an interest in the intestate estate for any reason.

**Note—**

10 It follows that, if the person has descendants, they may be entitled to take the person's presumptive share of the intestate estate by representation.

**41—Effect of testamentary and other gifts**

The distribution of an intestate estate is not affected by gifts made by the intestate to beneficiaries—

- 15 (a) during the intestate's lifetime; or
- (b) in the case of a partial intestacy—by will.

**Schedule 1—Transitional provision****1—Transitional provision**

- 20 (1) This Act applies to the distribution of the intestate estate of a person who dies intestate on or after the commencement of this Act.
- (2) The distribution of the intestate estate of a person who died intestate before the commencement of this Act is governed by the law of this State as in force at the date of death.

| Appendix B - SUBMISSIONS

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Public Trustee NSW (20 June 2005)

Queensland, Department of Aboriginal and Torres Strait Islander Policy (23 June 2005)

Patricia Farnell (29 June 2005)

Confidential submission (4 July 2005)

Law Society of NSW (6 July 2005)

Public Trustee of Queensland (12 July 2005)

Jane North, Solicitor, Booth Brown Samuels and Olney, Solicitors (15 July 2005)

Trustee Corporations Association of Australia (29 July 2005)

The Hon Mr Justice W V Windeyer (30 August 2005)

Law Society of Tasmania (15 November 2005)

Les Reid (September 2006)

Appendix C - CONSULTATIONS

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Sydney Consultation 1, 20 June 2005

*Pru Vines, Jon Finlay (Probate Registrar), Pam Suttor, Brian Maher, Peter Whitehead, John Poole.*

Sydney Consultation 2, 22 June 2005

*Ross Ellis, John Stinson, Paul Blackburn-Hart, Richard Neal, Deborah Linwood, Jenny MacMillan, Justice David Hodgson (NSWLRC).*

Probate Committee, Law Society of South Australia, Adelaide, 3 August 2005

Melbourne Consultation, 8 August 2005

*Marcia Neave (VLRC), Dorothy Kovacs, Ian Hardingham, Mercia Chapman, Mary Polis, Michael Halpin (Probate Registrar), Richard Phillips, Geoff Park, John Henry, Julie Grainger.*

Tatum Hands, Researcher, Law Reform Commission of WA, 8 August 2005

Western Australia, Succession Law Implementation Committee, Perth, 9 August 2005

*Ilse Petersen, Professor Peter Handford, Simon Dixon (Acting Registrar, Supreme Court), Elizabeth Heenan, Anne McMahon, Peter McMillan, John Hockley, Sabina Schlink, Susan Fielding.*

Succession Law Section, Queensland Law Society, 30 August 2005

*Dr John de Groot (chair), Alex Hams (Deputy Registrar, Queensland Supreme Court), Glenn Dickson, Gary Lanham, Barbara Hamilton, Michele Sheehan, Geoffrey Funnell, Gregory Mann, Peter Wilson, Matthew Dunn.*

Registry, Supreme Court of Tasmania, 21 November 2005

*Merrin Mackay (Court Legal Officer), Ian Richards (Registrar).*

Tasmania, Office of the Public Trustee, Hobart, 22 November 2005

*Peter Maloney and Brendan McManus.*

Peter Worrall, solicitor, Tasmania, 22 November 2005

Ken Mackie, Faculty of Law, University of Tasmania, 22 November 2005

Kate McQueenie, Tasmania Law Reform Institute, 22 November 2005

Robert Walker, Deputy Registrar, Supreme Court of Tasmania, 22 November 2005

Sam Samek, Solicitor, Crisp, Hudson and Mann, Burnie, Tasmania, 23 November 2005

Gail Fleay, Deputy Public Trustee, Northern Territory, by telephone, 18 January 2006

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| <i>Burt, Re</i> [1988] 1 QdR 23 .....  | 7.35       |
| <i>Canada Permanent Trust Company (Hind Estate) v Canada Permanent</i><br><i>Trust Company (McKim Estate)</i> [1938] 3 WWR 657 ..... | 9.17, 9.55 |
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## Wills, Probate and Administration

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**NORTHERN TERRITORY**

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