Report 7

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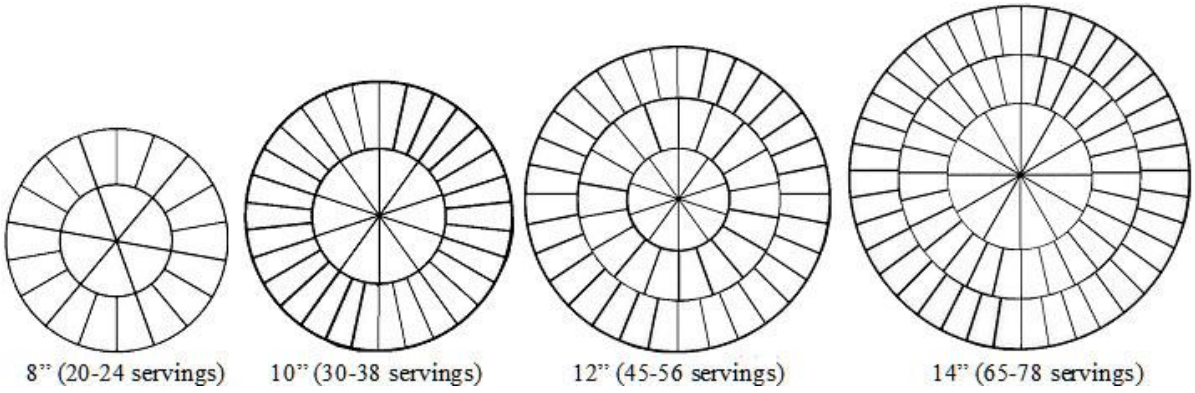

South Australian Law Reform Institute

South Australian Rules of Intestacy

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address:	SA Law Reform Institute Adelaide Law School University of Adelaide Australia 5005
Telephone:	(08) 8313 5582
Email:	SALRI@adelaide.edu.au
Webpage:	http://law.adelaide.edu.au/research/law-reform-institute/

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THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Terms of reference

The Attorney-General of South Australia, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute identified seven topics for review. This Report, on South Australian Rules of Intestacy, is the fourth in the Institute's ongoing review of succession law in South Australia. The Institute's next Report will examine the role and operation of the *Inheritance (Family Provision) Act 1972* (SA).

Participants

South Australian Law Reform Institute

Director

Professor John Williams

Deputy Director

Dr David Plater

Advisory Board

Professor John Williams (Chair)

The Hon David Bleby QC

Professor Melissa de Zwart (appointed 28 February 2017)

Mr Terry Evans

The Hon Tom Gray QC (until 7 March 2017)

Ms Ingrid Haythorpe (until 11 February 2017)

Emerita Professor Rosemary Owens (until 28 February 2017)

Mr Dini Soulio (appointed 11 February 2017)

The Hon Justice Tim Stanley (appointed 7 March 2017)

Mr Jonathan Wells QC

Administrative Officer

Louise Scarman

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The Institute would also like to acknowledge the generous support of the Law Foundation of South Australia Incorporated in providing funds for research and consultation for the Institute's review of succession law.

Disclaimer

This Report deals with the law as it was on 10 March 2017 and may not necessarily represent the current law.

Abbreviations and Glossary

A & P Act—*Administration and Probate Act 1919* (SA).

ADI—authorised deposit taking institution within the meaning of the *Banking Act 1959* (Cth) and see s 4 of the *Acts Interpretation Act 1915* (SA).

Committee's Report—Report of the New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (April 2007).

Consultee—a person or organisation who made a written submission or gave written answers to questions asked in the Issues Paper, and a person with whom the Institute met individually or in a group.

Descendants—an abbreviation for the children, grandchildren, great-grandchildren and so on of a person through all degrees of lineal descent. Descendants are also called 'issue'.

Domestic partner—a person who is in a relationship with another person in circumstances defined by s 11 and s 11A of the *Family Relationships Act 1975* (SA). The definition was enacted by Parliament in 2006 and has had effect since 1 July 2007. It operates retrospectively.[1] It is a relationship that is recognised by South Australian law, but it is not a lawful marriage. When the *Statutes Amendment (Registered Relationships) Act 2017* comes into effect, the definition of **domestic partner** in the *A & P Act* will be amended to include also a person who is in a registered relationship under the *Registered Relationships Act 2016* (SA).

Domestic Partners Property Act—*Domestic Partners Property Act 1996* (SA).

Family Law Act—*Family Law Act 1975* (Cth).

Family Provision Act—*Inheritance (Family Provision) Act 1972* (SA).

Family Relationships Act—*Family Relationships Act 1975* (SA).

Informal administration—administering an estate without a grant of probate or letters of administration and a corresponding meaning of **administered informally**.

Intestate—in this report — a noun describing a person who dies without a valid will or who has a valid will that does not dispose of the whole estate; and as an adjective describing the state of dying without a valid will or with a will that does not dispose of the whole estate.

Issue—this is an abbreviation with the same meaning as '**descendant**'.

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1 See *R (Plaintiff) v Bong & Ors* [2013] SASC 39 (19 March 2013).

Jurisdiction—a State or country with its own government and laws. The Commonwealth of Australia and each Australian State is a separate jurisdiction.

Lawful husband and **lawful wife**—a person who is married to another in Australia in accordance with the *Marriage Act 1961* (Cth) or married in another country and the marriage is recognised under Part 5A of the *Marriage Act*.

Letters of administration—the Court's grant of authority authorising a person to administer an intestate estate.

Model Bill—the model Bill entitled *Intestacy Bill 2007* appended to the Report of the National Committee and replicated in **Appendix 4** of this Report.

NSWLRC—New South Wales Law Reform Commission.

Preferential legacy—the same as **statutory legacy**. It is the sum of money to which the surviving spouse of the intestate is entitled before any other relative of the intestate receives a share.

Spouse—includes lawful husband, lawful wife, and domestic partner (which includes *de facto* husbands and wives), except where otherwise indicated. It will include parties to a registered relationship when the *Statutes Amendment (Registered Relationships) Act 2017* comes into effect and the definition of 'domestic partner' in the *A & P Act* is amended.

State—an Australian State, the Northern Territory and the Australian Capital Territory

Statutory legacy—same as **preferential legacy**.

Sui juris—having full legal capacity to do things such as making a valid will and entering into a contract.

The Committee—The **NSWLRC** and representatives of the Attorney-General's Departments and Departments of Justice in some States. The Committee was established by the Standing Committee of Attorneys-General (SCAG) in 1995 to work towards uniform succession laws throughout Australia. South Australia did not participate in this Committee. The Committee's Report was published by the NSW Law Reform Commission.

The Court—the Supreme Court of South Australia, unless otherwise stated.

The Institute—the South Australian Law Reform Institute

The Law Society—The Law Society of South Australia.

The Victorian Bill—Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 introduced into the Victorian Legislative Assembly on 22 November 2016.

Trust Officers—employees in Public Trustee's Office who administer deceased estates.

VLRC—Victorian Law Reform Commission.

Summary of Recommendations

Recommendation 1

The Model Bill should not be enacted in its entirety in South Australia, but the Institute recommends acceptance of some of the Committee's recommendations and enactment of some provisions of the Model Bill.

Recommendation 2

There should be no change to the property that is available for distribution on intestacy.

Recommendation 3

The provisions of the *Family Relationships Act* defining *domestic partner* should continue to apply to the *A & P Act* for the purpose of defining who is entitled to the spouse's share of an intestate estate.

Recommendation 4

A surviving spouse or domestic partner should have no statutory entitlement to a distribution from the intestate's estate if there has been a binding financial agreement between them, or property settlement order under the *Family Law Act 1975* (Cth) or the *Domestic Partners Property Act 1996* (SA) or corresponding interstate legislation that finalises financial arrangements between the parties.

Recommendation 5

When the intestate leaves a spouse and no descendants, the spouse should continue to take the whole estate, subject to the exception set out in Recommendation 4 above.

Recommendation 6

There should be no change to the definition of '*personal chattels*' in the *A & P Act*.

Recommendation 7

If there is a surviving spouse, the spouse should continue to receive a preferential legacy and half of any residue, with the other half of any residue being shared among the intestate's issue.

Recommendation 8

Each spouse should be entitled to an equal share of the entitlement that would have gone to the spouse if there had been only one of them (the spouse's share) subject to any contrary order of the Court and subject to the Institute's Recommendation 4 above.

Recommendation 9

If there is a dispute between the spouses about division of the intestate's personal chattels, the administrator should give the spouses notice that if they have not agreed within three months of service of the notice, the administrator will sell them and divide the proceeds of sale equally between them.

Recommendation 10

A spouse or administrator should be able to apply to the Court for an order for unequal distribution of the spouse's share of the estate if the Court considers it just and equitable: see model cl 27.

Recommendation 11

The surviving spouse should continue to be given priority by way of a preferential legacy of a monetary sum.

Recommendation 12

The surviving spouse's preferential legacy should be increased by $20 000 to $120 000 or by such other amount rounded to the nearest $1000 as is equivalent to the increase in value of $100 000 between the September quarter of 2008 and the date on which the *A & P Act* is amended using either the Residential Price Index for Adelaide or the All Groups Consumer Price Index for Adelaide published by the Australian Statistician.

Recommendation 13

The amount of the legacy should be adjusted annually using either the Residential Property Price Index for Adelaide or the All Groups Consumer Price Index for Adelaide published by the Australian Statistician, for consistency with NSW and Tasmania.

The Minister should publish a notice in the Gazette each year stating the amount for the following 12 months using cl 70N of the Victorian Bill as a model.

Recommendation 14

If the surviving spouse is entitled to a preferential legacy in more than one State, the spouse's entitlement should be limited to an amount that is equal to the highest of those legacies. The administrator should be able to satisfy the legacy from the intestate's property in more than one State.

Recommendation 15

Interest should be payable on unpaid entitlements to an intestate estate from one year after the intestate's death at the same rate as it is payable for unpaid testamentary pecuniary legacies.

The rate should be variable and easily ascertainable. Advice should be obtained from the Department of Treasury and Finance (SA) about whether the preferable rate would be the average mid 180 day bank bill swap reference rate published by the Australian Financial Markets Association Limited that applies to unpaid testamentary pecuniary legacies, or 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, as recommended by the Committee.

Recommendation 16

The rebuttable common law presumption repeated in s 8 of the *Family Relationships Act* that a child born within 10 months of the death of a woman's husband or *de facto* husband is his child should be retained for the purposes of the law of intestacy.

For children born after the death of the intestate, only those who are born within ten months of the intestate and survive the intestate by 30 days should inherit under the rules of intestacy.

Recommendation 17

Section 9(3) of the *Adoption Act 1988* (SA) that preserves the right of a child who has been adopted by a person with whom the surviving parent is cohabiting (step-parent adoption) to inherit from or through his or her natural or previous adoptive parent (by will or on intestacy) should be retained.

Recommendation 18

Section 9(3a) of the *Adoption Act 1988* (SA) that preserves any vested or contingent proprietary right acquired by a child before the making of the adoption order should be retained.

Recommendation 19

Step-children should not be recognised for the purpose of intestacy distribution rules, but should continue to be able to make a claim for provision from the intestate's estate under the *Family Provision Act* in appropriate circumstances.

Recommendation 20

Likewise, step-parents should not be recognised for the purpose of intestacy distribution rules, but the Institute will make a recommendation in a future report about whether they should be eligible to claim in the same way as natural and adoptive parents who cared for or contributed to the maintenance of an intestate step-child.

Recommendation 21

The most distant relatives to inherit should be grandparents and first cousins (the children of deceased aunts or uncles of the intestate by consanguinity) unless the estate would vest in the Crown as *bona vacantia*, in which case the issue of first cousins should be entitled to the estate.

Recommendation 22

It should continue to be immaterial whether a relationship is of the whole blood or the half blood.

Recommendation 23

If South Australia accepts the Committee's recommendation that distribution be *per stirpes* in all cases, then a relative who is related in more than one capacity should be able to inherit in each capacity.

If South Australia retains *per capita* distribution when all persons entitled are of the same degree of relationship to the intestate (of the same generation), then they should be entitled to only one share.

Recommendation 24

When there are no persons entitled to an estate under the statutory distribution rules, it should continue to vest in the Crown/State.

The Minister to whom administration of the Act is committed should have a discretion to waive the State's rights in whole or in part, conditionally or unconditionally, in favour of dependants, persons who, in the opinion of the Minister, have a just or moral claim on the estate, or other people and organisations, as set out in cl 38 of the Model Bill.

Recommendation 25

Per capita distribution should be retained for grandchildren when the intestate leaves no surviving children, but in other cases distribution should be *per stirpes*.

Recommendation 26

A minor's share of an intestate estate should continue to vest immediately.

Recommendation 27

A surviving spouse should continue to have a statutory right to elect to purchase the intestate's interest in the home in which he or she was living when the intestate died, as is presently provided by s 72L(1) of the *A & P Act*. The description of what the spouse may purchase should continue to be described as that 'in which the spouse or domestic partner of the intestate was residing at the date of the intestate's death'.[2]

Recommendation 28

If there is more than one spouse residing in the same home, then neither should have a preferential statutory right to acquire the intestate's interest in it, but the spouses should be permitted to agree or apply for orders of the Court concerning acquisition of the intestate's interest.

Recommendation 29

Court approval should be required to acquire the intestate's interest in the home if it forms part of a larger aggregate and the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult, as recommended by the Committee.

Recommendation 30

The spouse's preferential right to purchase assets of the estate should not be extended to other property.

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[2] The requirement in some States that it should be 'the shared home' or 'the matrimonial home' has caused dispute and unfortunate results in some cases and should not be adopted in South Australia.

Recommendation 31

A spouse who is a minor should be able to make an election. If, for other reasons, the spouse is not *sui juris*, the spouse's guardian should be able to make an election in accordance with South Australian legislation relating to the guardianship and management of the affairs of persons under disability.

Recommendation 32

The spouse should be entitled to continue to reside in the home pending the making of an election, subject to the rights of a mortgagee, chargee or other creditors.

Recommendation 33

The spouse should continue to have three months from the grant of administration if the spouse is an administrator or three months from being served with a notice to elect to make an election or such longer time as the Court allows.

Recommendation 34

The price should continue to be the market value of the intestate's interest in the property at the date of death.

Recommendation 35

The spouse should continue to be able to satisfy the price by first having the amount to which he or she is entitled from the estate reduced by the value of the interest with any balance being paid from other sources.

Recommendation 36

The administrator should be forbidden to sell the home until the spouse has exercised the right to elect to acquire it, or the time for making an election has expired, or the home has ceased to be the spouse's ordinary place of residence, or any proceedings before a court affecting the spouse's election have terminated, or the Court has permitted sale.

Recommendation 37

Valuation of the home by a licensed valuer should be required only if there is no agreement between the members of the intestate's family who are entitled to a share of the estate, or if a person who is entitled is not *sui juris*.

Recommendation 38

A spouse who is not an administrator should be required to give written notice to the administrator of the election to acquire the intestate's interest. A spouse who is an administrator should be required to give written notice of election to any other administrator and to all other persons who are entitled to a share of the estate, and if any are not *sui juris*, to the Public Trustee or other court or tribunal appointed administrator or manager of the affairs of the person under disability.

Recommendation 39

The spouse should be entitled to revoke an election to purchase the intestate's interest in the home up until the transfer of that interest. Any costs incurred in giving effect to the revoked election should be deducted from the spouse's share of the estate.

Recommendation 40

Consistently with the Committee's recommendation—

(a) A 30 day survivorship period should apply to all persons entitled to take on intestacy.

(b) A 30 day survivorship rule should apply to persons born after the death of the intestate but who were *en ventre sa mere* when the intestate died.

(c) The 30 day survivorship rule should not apply if it would result in the estate vesting in the Crown as *bona vacantia*.

Recommendation 41

The *Probate Rules* of Court should be varied to change the time before which an application for a grant of probate or letters of administration can be made from 28 days to 30 days.

Recommendation 42

When property is owned jointly and all joint tenants die within 30 days of each other, the property should be treated as if they were tenants in common so that an equal share falls into the estate of each of them. This should apply to both intestate and testate estates.

Recommendation 43

Section 72K(1)(a) of the *A & P Act* requiring *inter vivos* gifts within the five years before the intestate's death to be brought into hotchpot, should be repealed.

Recommendation 44

In the absence of a clear preference, the Institute recommends repeal of s72K(1)(b) of the *A & P Act* that applies hotchpot rules to partially intestate estates, consistently with abolition of all forms of hotchpot on intestacy in the Model Bill and the law in four (and probably soon five) other States.

Recommendation 45

The law should be reformed so that descendants of a killer are not automatically disqualified from sharing in the victim's estate by operation of the forfeiture rule. The estate should be distributed as if the killer died immediately before the victim.

Recommendation 46

When a relative disclaims his or her interest, the estate should be distributed as if the disclaiming relative had died immediately before the intestate.

Recommendation 47

A relative should be permitted to disclaim part only of his or her entitlement.

Recommendation 48

The *Stamp Duties Act 1923* (SA) should be amended to exempt from *ad valorem* stamp duty a transfer to the surviving spouse of the intestate's interest in the home in which the spouse was ordinarily resident at the time of the intestate's death pursuant to the exercise of the spouse's statutory right under the *A & P Act* to elect to acquire that interest.

Recommendation 49

Instruments disclaiming an interest in an intestate estate or assigning or transferring an interest in the estate to another of the intestate's relatives should be exempt from *ad valorem* stamp duty.

Recommendation 50

The *Family Provision Act* should continue to apply to wholly and partially intestate estates.

Recommendation 51

The Institute's forthcoming review of the *Family Provision Act* should include consideration of whether the classes of people who may apply for provision, or greater provision, from the estate under this Act should be different in some respects for intestate estates than for testate estates.

Recommendation 52

Sections 71 and 72 of the *A & P Act* should be amended for all estates as proposed in Recommendation 5 of the Institute's December 2016 Report, *Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*. There should additionally be no statutory minimum waiting time before an ADI may pay to the apparently entitled deceased's spouse money up to $25 000 held on account of the deceased.

Recommendation 53

That Part 4 of the Model Bill concerning the intestate estates of Indigenous persons *not* be enacted in South Australia.

Recommendation 54

The Institute recommends that approval be given for more detailed consultation and a separate report on funeral rites and the disposal of human remains.

Recommendation 55

The Institute recommends that a provision be added either to the intestacy provisions of the *A & P Act* or to the *Family Provision Act* to enable the Registrar of Probates or the Court to sanction, by order, redistribution agreements to vary the distribution mandated by the *A & P Act*, including to or among persons who are not blood relatives of the intestate within the meaning of the *A & P Act*, subject to the Registrar or court being satisfied that it is proper in all the circumstances to do so.

Recommendation 56

The *Stamp Duties Act 1923* (SA) should be amended to include an exemption from stamp duty for redistribution agreements.

Recommendation 57

A person whose marriage to the intestate is polygamous, but is lawful in the country in which it was entered into, should have the status of spouse for the purposes of the law of intestacy, whether or not that person qualifies as a domestic partner under the *Family Relationships Act.*

Recommendation 58

Consideration should be given to publishing a hand book similar to that of the NSW Trustee and Guardian for South Australian Aboriginal people and their advisors. There may be a benefit in having a summary written in Pitjantjatjara and possibly other Aboriginal languages spoken as a first language in South Australia.

Part 1 – Introduction

1.1.1 The Attorney-General of South Australia, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to conduct a review of each of these areas and to recommend reforms. The Institute identified the rules relating to intestacy as being in need of review, the last systematic review having been 43 years ago in 1974.[3] Succession law should be reformed as needed to reflect changed social values and circumstances and to meet modern expectations and needs.[4]

1.1.2 Some of the many social changes in the last 43 years are outlined in the Issues Paper.[5] Perhaps the most significant has been the increase in the diversity and complexity of family structures and the number of non-traditional nuclear families, particularly blended families. Life expectancy has increased. There have also been major economic changes with compulsory superannuation, increased participation of women in the paid workforce and an increase in joint ownership of property by spouses.

1.1.3 An Australia-wide survey indicates that about one third of adults die without a will, that is, they die wholly intestate.[6] In addition, an unknown number of people die with a valid will that does not dispose effectively of their entire estate and so die partially intestate. There are many reasons why people do not make a will and this is unlikely to change.[7] There are also people who do not have the capacity to make a valid will, although some have substantial assets.[8] Many intestate estates are of modest size; a few are large. The Public Trustee reported administering intestate estates from $100 000 or less and up to $2 500 000. The Law Society reported that the Registrar of Probates estimated that in at least half the estates in which an application was made for letters of administration, the gross value was less than $200 000, and of the remainder, the majority were between $200 000 and $500 000.[9] A solicitor who practices in the outer northern suburbs of Adelaide said she had dealt with intestate estates of between $10 000 and $1 000 000. The size of an estate, however, is not an indication of whether its administration is simple or difficult or whether it is disputed.[10]

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3 Law Reform Committee of South Australia, *Relating to the Reform of the Law of Intestacy and Wills,* Report No 28 (1974).

4 Victorian Law Reform Commission (VLRC), *Succession Laws Report* (2013) ix.

5 See South Australian Law Reform Institute (SALRI), *Cutting the Cake: South Australian Rules of Intestacy,* Issues Paper 7 (December, 2015) 14, [19]–[21].

6 Cheryl Tilse, Jill Wilson, Ben White and Linda Rosenman, 'Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia' (Report of Australian Research Council to Industry Partners – LP110200891, October 2012) 7. This is a report of an Australian Research Council funded research project sponsored by the Public Trustee of South Australia and other Australian Public Trustee Offices and managed by the University of Queensland and the Queensland University of Technology.

7 See SALRI, above n 5, 9, n 10, for some of the reasons.

8 For example, they might have accumulated wealth before becoming legally incompetent, inherited wealth or been awarded substantial damages. There is a procedure by which the Court can be asked to execute what is called 'a statutory will' for a person who lacks testamentary capacity, but this is often not used: see s 7 of the *Wills Act 1936* (SA).

9 Some very small estates are administered without a grant of letters of administration.

10 See, for example, Jeffrey Schoenblum, 'Will Contests: an Empirical Study' (1987) 22 *Real Property, Probate and Trust Journal* 607; Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011); Cheryl Tilse, Jill Wilson,

1.1.4 The Institute's starting point was to consider in detail the NSWLRC Report published in April 2007 entitled *Uniform Succession Laws: Intestacy* (referred to in this report of the Institute as 'the Committee's report')[11] together with the Model Bill entitled 'Intestacy Bill 2007' appended to the Committee's report. The Model Bill is replicated in Appendix 4 of this Report.[12]

1.1.5 Although the Committee's report was prepared at the request of the Standing Committee of Attorneys-General,[13] the South Australian Attorney-General's Department did not participate in this work and it is understood that some other States had limited involvement. So far, 10 years after the Committee's report, the Model Bill has been substantially enacted by only two States; New South Wales and Tasmania.[14] A Bill was introduced in to Victorian Parliament on 23 November 2016 in which some of the recommendations of the Committee and later recommendations of the VLRC are reflected, although drafted differently from the Model Bill.

1.1.6 In December 2015, the Institute published an Issues Paper entitled *Cutting the Cake: South Australian Rules of Intestacy*. The Issues Paper may be found on SALRI's website.[15] Mostly, the detail of that Issues Paper is not repeated in this Report; descriptions of social changes, alternatives that did not attract any support during consultation and arguments for and against propositions have not been repeated in this Report.

1.1.7 The Institute received written submissions, written answers to questions and consulted lawyers and Trust Officers in meetings and individually until March 2017. The Institute consulted with city, regional and rural succession lawyers and other interested parties and visited various locations throughout South Australia. Information about the Institute's consultation is set out in Appendix 1.

1.1.8 Although the consensus was that intestacy law should be reformed in some respects, there were differences of opinion on many issues. On some there were differences between practitioners based in the country and those working in city and metropolitan areas.

1.2 Uniformity

1.2.1 The Institute asked: How important is it that the law of intestacy be uniform across Australia?

1.2.2 There was little enthusiasm for uniform succession law and strong resistance from a few. A few thought that in principle it would be beneficial, but impractical and too hard to achieve. Legal practitioners, the Law Society, the Legal Services Commission and Trust Officers did not favour adoption of the Model Bill. They thought the law should be adapted to South Australian

Ben White, Linda Rosenman and Rachel Feeney, *Having the Last Word? Will Making and Contestation in Australia* (University of Queensland, 2015) 17. Small estates can prove more problematic than large estates.

11 NSW Law Reform Commission (NSWLRC), *Uniform Succession Laws: Intestacy* (Report No 116) (2007).

12 See below 81–95.

13 The Standing Committee of Attorneys-General (SCAG) was a committee of State, Territory and Commonwealth Attorneys-General. It is now known as the Law, Crime and Community Safety Council.

14 *Succession Amendment (Intestacy) Act 2009* (NSW); *Intestacy Act 2010* (Tas).

15 See SALRI, <https://law.adelaide.edu.au/research/law-reform-institute/> under 'Publications: Reports and Papers'.

conditions and expectations.[16] They considered that some provisions of the model would be beneficial reforms, and some would not. Three others said the Model Bill should be enacted for the sake of uniformity.[17] The Institute notes, however, that even if South Australia enacted the Model Bill in its entirety, intestacy law will not be entirely uniform throughout Australia. Even in the two States that have largely enacted the Model Bill there remain differences. Nevertheless, greater consistency would be of some benefit.

1.3 Challenges – fairness and practicality

1.3.1 Apart from some law students who were understandably more focused on fairness than practical issues, everyone who was consulted considered that intestacy legislation should contain a set of clear rules that result in the efficient and fair distribution of the estate to the intestate's family.[18] Protection of the public purse from welfare dependency was seen as being irrelevant or unimportant. All consultees thought that the State should not impose its idea of what a deceased person *should* have done. The predominant view was that the legislators should be guided by what a majority of testators do, albeit that a few considered that this was impossible to determine because variations in testators' assets and families resulted in quite different testamentary provisions. It was repeated many times that it is not possible to make clear, simple to administer rules that will produce a fair result in all circumstances. Intestacy rules were regarded by all as inferior to a will, but necessary for when the deceased did not leave a will.

1.3.2 An opinion repeated on many occasions was that the current intestacy law produces unjust results in some circumstances, particularly when the intestate's family is more complicated than a spouse and their biological children. The Law Society said:

> The Society considers that the current statutory regime relating to the distribution of intestate estates in South Australia can create unfair outcomes in some situations, particularly where the personal circumstances of the deceased fall outside of the traditional nuclear' family paradigm.
>
> The Society acknowledges the challenges involved in proposing a statutory formula to apply 'across the board' to intestate estates. However, a formula, preferably simple and easy to understand and disseminate, needs to be included as the foundation of the legislation.
>
> The Society acknowledges that this, as with any legislative regime regarding the mandatory distribution of an estate may cause unjust results in certain circumstances. Some of those circumstances may include the following:
>
> - Where the deceased is separated from a spouse but not divorced.
> - In a second marriage or blended family situation.

[16] A very experienced lawyer who practices near the border with Victoria and New South Wales said: 'I see no point in adopting the Model Bill on the basis of uniformity with other states … South Australia lags the rest of the country on most economic indicators. Indications are that the gap will widen, meaning that it is even more important that provisions in South Australia should reflect South Australian conditions.'

[17] Ms Debra Contala, the Public Trustee, Professor Prue Vines and one law student.

[18] Some law students were more concerned about fairness in every case than certainty, efficiency and cost in administering intestate estates.

- Where there are persons who are not lineal descendants of the intestate but within the family group. For example an intestate may have stood in the position of parent to a child through their life without adopting the child. A common example may be a long term foster child, but this may also be the case in certain parts of the community where children are reared by other members of the family or strangers on the basis that the children are treated as children of those persons.
- Where the concept of family as determined by blood or marriage is not reflective of the social or cultural relationships of a group.[19]

1.3.3 But the Law Society also said:

> Generally, the Society is reluctant to support any changes to the legislation's current 'one size fits all' approach if it is to be replaced by another, similar, approach which may be equally as inappropriate for many estates.

1.3.4 Two solutions of general application were proffered for cases in which the distribution rules produce a clearly unfair or unsatisfactory result. First, the *Family Provision Act* was seen as the most appropriate mechanism for dealing with these cases, although all thought that some changes are needed to that Act. Secondly, there was very strong support for allowing families to distribute the estate by agreement in a legally binding way without the disincentive and burden of incurring stamp duty under the *Stamp Duties Act 1923* (SA).[20]

1.3.5 There was a consensus that marriage/domestic partnership and blood relationship should remain the defining criteria for entitlement to inherit from an intestate estate,[21] but with some means of recognising the kinship rules of Aboriginal people in appropriate cases.

1.3.6 The most important issues on which opinion was most divided can be broadly summarised as the rights of the surviving spouse or domestic partner *vis a vis* the intestate's descendants.

Recommendation 1

The Model Bill should not be enacted in its entirety in South Australia, but the Institute recommends acceptance of some of the Committee's recommendations and enactment of some provisions of the Model Bill.

[19] Submission of the Law Society of South Australia. Similar statements were made to the Institute by several succession lawyers in both city and country private practice, Trust Officers and an employee of South East Community Legal Service in Mt Gambier.

[20] Commonwealth Capital Gains Tax may also be payable on transactions to give effect to a Deed of Family Arrangement.

[21] A law student expressed this as: 'It is necessary that blood connection be retained to "ensure unrelated outsiders do not disenfranchise direct relatives"'.

Part 2 – The Current South Australian Scheme

2.1.1 The principal legislative provisions are set out in Part 3A of the *Administration and Probate Act 1919* (SA).[22] Part 3A was enacted in 1975, to replace the previous statutory provisions, following a report of the Law Reform Committee of South Australia in 1974.[23] The only changes to the legislative scheme since then have been an increase in the amount of the surviving spouse's preferential (statutory) legacy from $10 000 to $100 000 in 2009 and amendments made for consistency with changes to the *Family Relationships Act* that gave legal status to de facto spouses and then domestic partners.

2.1.2 The rules in Part 3A of the *A & P Act* that govern how the estate is to be distributed are illustrated in simple form in Diagram 1.[24] The order of priority may be summarised in a general way as spouse, lineal descendants, parents, siblings, grandparents, aunts and uncles by consanguinity and cousins. The legislated rules are paraphrased below using 'spouse' to include 'domestic partner' of any gender:

(1) If the person who died intestate is survived by a spouse and no descendants, the spouse takes the whole estate.

(2) If the intestate is survived by a spouse and descendants:

- the spouse is entitled to the personal chattels, a preferential legacy of $100 000, and one half of any remaining estate; and,
- the surviving children are entitled to the residue (if any) in equal shares; and,
- if a child of the intestate person died before the intestate, then any children or remoter descendants of that deceased child take the share of their deceased parent or earlier ancestor. (They are said to take by representation the share of their deceased ancestor.)

(3) If the intestate is survived by both a spouse *and* a domestic partner, or by two or more domestic partners, then the spouse's share is divided equally between them.

(4) If the intestate is not survived by a spouse, but is survived by children, then the children take the whole estate in equal shares. If any of these children predeceased the intestate, leaving descendants, they take the share that their deceased ancestor would have taken.

(5) If the intestate is not survived by a spouse or descendants, then the estate is distributed to the surviving relatives according to a statutory hierarchy as follows.

(a) Parents take the whole estate, and it is shared equally between them if both survive the intestate.[25]

(b) If there are no surviving parents, the estate passes to the intestate's siblings in equal shares. If any of these siblings predeceased the intestate leaving descendants who survive the intestate, then the estate is divided in to portions equal to the number of siblings. Each surviving sibling takes one part, and the

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22 A copy of Part 3A is contained in Appendix 2. See below 73–79.

23 Law Reform Committee of South Australia, above n 3; *Administration and Probate Act Amendment Act 1975 (No 2)* (SA).

24 See below 7.

25 'Parent' does not include a step-parent. In the *A & P Act* a parent is said to be a relative of the first degree.

descendants of each deceased sibling takes their deceased ancestor's share.[26] If all siblings predecease the intestate, the estate is divided equally between all of their children.

(c) If the intestate is not survived by any of the above relatives (no spouse, descendants, parents, siblings or descendants of deceased siblings), but is survived by one or more grand-parents, they take the estate and if more than one, in equal shares.[27]

(d) If the intestate is not survived by any of the above, then the estate is divided between aunts and uncles by *consanguinity*.[28] The share of any aunt or uncle who predeceased the intestate passes to the descendants of that deceased aunt or uncle (ie cousins of the intestate) *per stirpes*. However, if all aunts and uncles predeceased the intestate, the cousins take the estate in equal shares.

(6) If there are no relatives who are entitled, the estate vests in the Crown.

2.1.3 Except for spouses, people who are relatives only by affinity are not included.

2.1.4 No distinction is made between relatives of the full blood and relatives of the half blood.

2.1.5 The rules of distribution proposed by the Committee are illustrated in Diagram 2.[29]

[26] In the *A & P Act*, siblings of the intestate are said to be relatives of the second degree.

[27] In the *A & P Act*, grandparents are called relatives of the third degree.

[28] In the *A & P Act*, aunts and uncles (siblings of the intestate's parents) are called relatives of the fourth degree.

[29] See below 8.

Diagram 1:

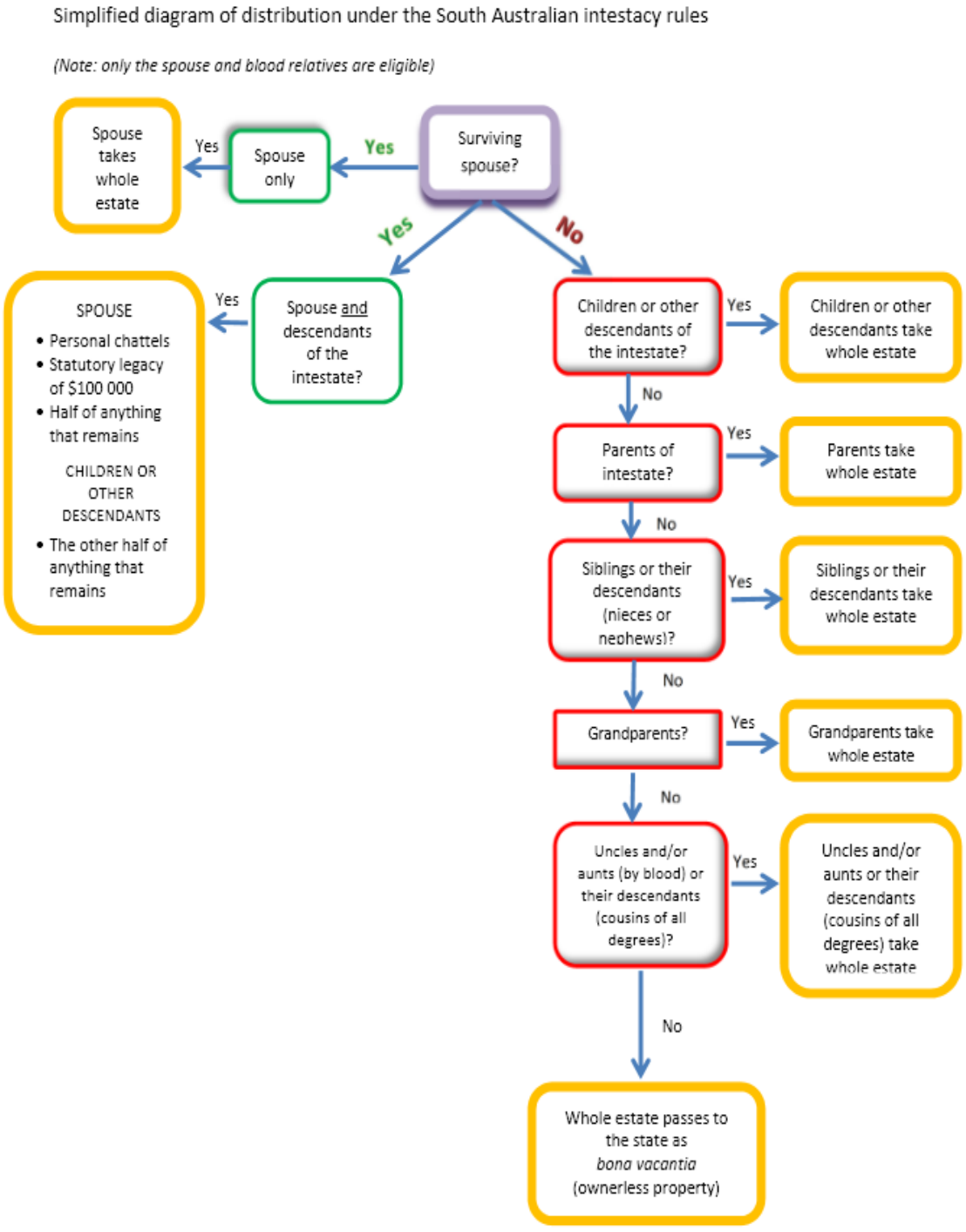
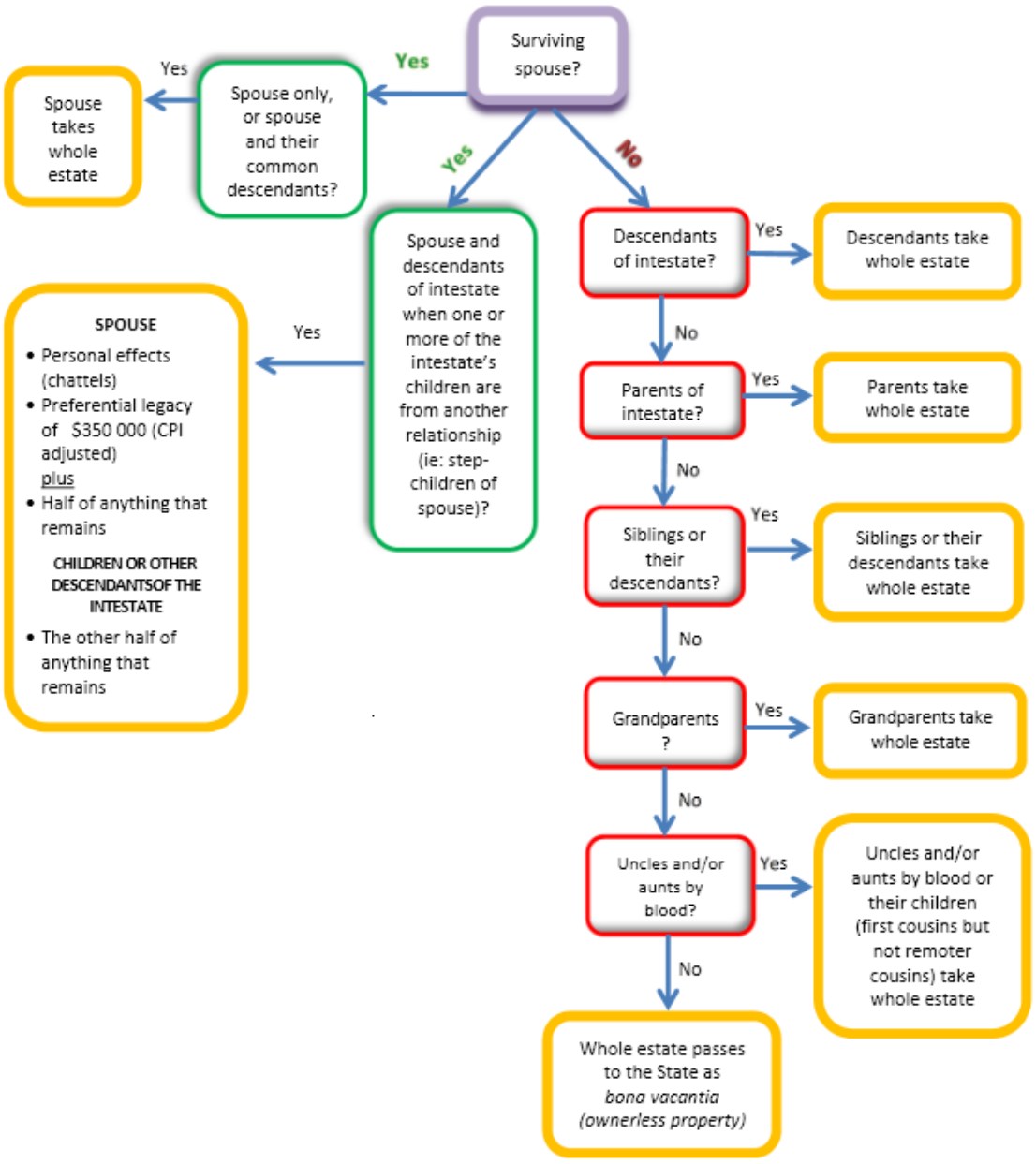

Simplified diagram of distribution under the South Australian intestacy rules
(Note: only the spouse and blood relatives are eligible)
Surviving spouse?
Yes
Spouse only
Yes
Spouse takes whole estate
Yes
Spouse and descendants of the intestate?
Yes
SPOUSE
• Personal chattels
• Statutory legacy of $100 000
• Half of anything that remains
CHILDREN OR OTHER DESCENDANTS
• The other half of anything that remains
No
Children or other descendants of the intestate?
Yes
Children or other descendants take whole estate
No
Parents of intestate?
Yes
Parents take whole estate
No
Siblings or their descendants (nieces or nephews)?
Yes
Siblings or their descendants take whole estate
No
Grandparents?
Yes
Grandparents take whole estate
No
Uncles and/or aunts (by blood) or their descendants (cousins of all degrees)?
Yes
Uncles and/or aunts or their descendants (cousins of all degrees) take whole estate
No
Whole estate passes to the state as bona vacantia (ownerless property)

Diagram 2:

Simplified diagram of distribution upon intestacy under Model Bill

(the biggest difference is that the Model Bill is more favourable to the surviving spouse)



Part 3 – Estate Available for Distribution

3.1.1 Certain property or proprietary interests of the intestate do not form part of the estate for the purposes of the law of intestacy.[30] These are jointly owned property and sometimes superannuation and death benefit entitlements, and when there is a surviving spouse, personal chattels. Funeral, testamentary or administration expenses and debts are paid out of the estate as a priority.

3.2 Personal chattels

3.2.1 If there is a surviving spouse, the intestate's personal chattels, as defined, go to the surviving spouse and their value is not taken into account.[31]

3.3 Jointly owned property

3.3.1 Many couples, especially those in their first marriage, now own their home and contents and sometimes other property (for example, a bank account) in joint names. The intestate's interest in jointly owned property does not form part of the estate. Instead it devolves automatically by operation of the law of survivorship to the other joint owner or owners.[32]

3.3.2 There was no explicit support in the Institute's consultation for a statutory severing of the joint tenancy in intestacy cases so that the property would be dealt with on intestacy as if the spouses had been tenants in common with the intestate's interest forming part of the estate available for distribution. Only two people who were consulted favoured taking the increase in the spouse's interest in the jointly owned home into account as all or part of the spouse's preferential rights.[33] Most consultees saw joint ownership as an effective way for spouses to protect each other's interest in the home and any interference with the arrangements the couple had made about this as an unwarranted intrusion on their freedom to arrange their own affairs. Joint ownership of the home also avoids the need for the surviving spouse to purchase for fair value the intestate's interest and pay *as valorem* stamp duty and other transaction costs if the spouse wishes to remain there, and this makes it less likely that the spouse and any young children will have to move soon after the intestate's death. Joint ownership of business assets is likely to increase the prospect of the survivor being able to continue the business if he or she wishes. Joint ownership of bank accounts gives the survivor some money to go on with immediately after the other dies. In view of the consultation, the Institute does not recommend deeming a share of the jointly owned property to be part of the estate for the purposes of distribution on intestacy.

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30 A deceased person's gross estate comprises everything he or she owns, including intangible property such as choses in action and intellectual property rights.

31 *A & P Act* s 72F(b) and see the definition of 'personal chattels' in s 72B. See also below [4.1.11]–[4.1.14].

32 The technical name for people who jointly own property is *joint tenants*. They are said to have an undivided interest in the jointly owned property. *Tenants in common* or co-owners are said to have severable or separate interests. Property may be jointly owned by any number of people. Joint tenants may, or may not, be related. Joint ownership is an effective way for spouses to protect each other's interest in the home. On the other hand, the more property a couple owns jointly, the less will be available for descendants.

33 Senior Counsel and an experienced South East succession lawyer.

3.4 Superannuation

3.4.1 Superannuation has become compulsory for employed persons and voluntary superannuation is more common since Part 3A of the *A & P Act* was enacted in 1975. Nowadays, most of a person's wealth may be in a superannuation fund. The Institute was informed that some people, particularly younger people, do not make a will because they think they have nothing worth leaving, but, in fact, on their death, there is a considerable sum of money from superannuation death benefits.

3.4.2 Superannuation entitlements may, or may not, form part of the estate, depending on the contractual or statutory rules of the particular superannuation fund, the manner in which trustees of the superannuation fund exercise any discretion they have as to payment of entitlements, and whether or not the intestate has made an effective binding death benefit nomination.[34]

3.4.3 Although several consultees expressed concern about the inequity that can arise as a result of superannuation payments, it is recognised that the State cannot directly change superannuation laws, except perhaps those for its own employees and officers. The State could legislate to require superannuation benefits to be taken into account in determining entitlements on intestacy. In the absence of consultation which focused on this possibility, the Institute does not at present make any recommendation about this. The Institute will consider, in its Report into the *Family Provision Act*, whether the courts should be required to take into account superannuation benefits when exercising its discretion in family provision proceedings.

Recommendation 2

There should be no change to the property that is available for distribution on intestacy.

[34] See, for example, the *Superannuation Act 1998* (SA) that governs superannuation for public sector employees and officers and requires payment to the spouse, eligible children and/or the estate according to statutorily specified circumstances. Apart from statutory State funds, superannuation is regulated by Commonwealth legislation. Some fund rules give the trustee very wide discretionary powers. Considerable litigation has arisen over the exercise of trustees' discretions for both industry and self-managed superannuation funds.

Part 4 – Distribution of the Estate

4.1 Surviving spouse[35]

4.1.1 Recent policy in Australia, New Zealand, the United Kingdom and parts of Canada has been to increase preference for the surviving spouse at the expense of the intestate's children. In most jurisdictions this has included *de facto* spouses and more recently, other domestic partners. The extent of the preference, however, has not been uniform.

Who should be entitled to share in the estate as a domestic partner?[36]

4.1.2 The definition of *domestic partner* or similar terms in other States is not uniform. The Committee was of the opinion that the status should be determined according to the law of the particular State, but said the relationship should be in existence for at least two years, unless a child has been born of the relationship. In South Australia the qualifying period of continuous cohabitation is three years or periods aggregating three years within the previous four years (see s 11A of the *Family Relationships Act*). This definition affects not only the *A & P Act*, but about 90 other Acts as well. There was no support during consultation for a shorter period and a few consultees said three years was probably not long enough to give an entitlement to the whole or most of the estate. The Institute considers that consistency with other South Australian Acts is more important than consistency with qualifying periods in some other States.

Recommendation 3

The provisions of the *Family Relationships Act* defining *domestic partner* should continue to apply to the *A & P Act* for the purpose of defining who is entitled to the spouse's share of an intestate estate.

Estranged spouses

4.1.3 Consultation elicited serious concern about giving a spouse priority when the relationship has broken down and the spouses have separated but not divorced.[37] It seems that this issue was not considered by the Committee.

4.1.4 The estranged (but not divorced) spouse is entitled to the whole estate if the intestate left no descendants. If the intestate left one or more descendants, the estranged spouse is entitled to the intestate's personal chattels and the spouse's preferential entitlements. This is so even if the spouses have entered into a property settlement agreement (called a 'binding financial agreement' in the *Family Law Act)* or an order relating to property has been made under the *Family Law Act* or they have entered into a certified agreement or obtained an order under the *Domestic Partners Property Act*. If the estate is very small, the cost and risks may be too great for the

35 SALRI, above n 5, 25–57, [38]–[97].

36 Ibid 26–29, [40]–[45].

37 There are several reasons why estranged married couples may not obtain a divorce, including religious reasons, a desire to protect the feelings of family members and simply not being bothered. A lawyer who practices law primarily in the northern suburbs, said that the court fees discouraged some people from instituting divorce proceedings.

intestate's current partner or children to pursue family provision proceedings. Lawyers and Trust Officers reported that clients are often unaware that their estate, or most of it, will pass to their estranged spouse on their intestacy. It comes as a shock to the intestate's current spouse that this is the case.

4.1.5 Some consultees suggested that the *A & P Act* should be amended so that a permanently separated spouse is not entitled to any part of the estate. A more limited view is that when there has been a property settlement by court order or a binding financial agreement recognised under the *Family Law Act*, or an agreement or property division order under the *Domestic Partners Property Act* or corresponding legislation of another State, the orders or agreement should be taken as finalising the parties' rights and neither should have any right to the assets of the other on intestacy.[38] This would be consistent with the view that people should be free to arrange their affairs as they see fit without undue interference by the State.

4.1.6 If the wider proposal is accepted, it will be necessary to define the meaning of permanent separation in order to reduce the number of disputes about whether a couple was permanently separated. The simplest, but bluntest way, would be by setting a minimum period during which the spouses have not lived together. If this is done, it would be appropriate that it be by rebuttable presumption, because there are reasons why couples live apart without being estranged, for example, because one is in a nursing home.

4.1.7 The narrower proposal would give more certain results and so less room for disputation. The Institute considers that it is undesirable to require administrators to make decisions about ambiguous facts if it can be avoided, particularly when the administrator is a member of the intestate's family by blood or marriage. For these reasons the Institute prefers the narrower proposal.

4.1.8 However, as circumstances sometimes change without the spouses or former spouses varying their earlier agreement or seeking other court orders, consideration will be given by the Institute to whether estranged and divorced spouses should be eligible to make a claim under the *Family Provision Act* in its forthcoming Report.

Recommendation 4

A surviving spouse or domestic partner should have no statutory entitlement to a distribution from the intestate's estate if there has been a binding financial agreement between them, or property settlement order under the *Family Law Act 1975* (Cth) or the *Domestic Partners Property Act 1996* (SA), or corresponding interstate legislation that finalises financial arrangements between the parties.

Spouse and no descendants

4.1.9 In New Zealand, England, South Australia and five other Australian States, the spouse takes the whole estate if the intestate left no descendants. This is consistent with the

[38] The *Family Law Act* allows married couples to obtain final property orders or to enter into a binding financial agreement concerning their property even while the marriage subsists and whether or not the marital relationship has broken down. *De Facto* couples can obtain an order only after they have separated, but they can enter into a domestic partnership agreement that is enforceable as a contract while cohabiting.

Committee's recommendation. In the Northern Territory and Western Australia, parents and siblings may take a share, depending on the size of the estate.[39]

4.1.10 Consultation elicited strong support for the Committee's recommendation and current South Australian position, except when the spouse and the intestate were estranged.[40]

Recommendation 5

When the intestate leaves a spouse and no descendants, the spouse should continue to take the whole estate, subject to the exception set out in Recommendation 4 above.

Personal property

4.1.11 In most States the surviving spouse is entitled to certain personal property of the intestate. It is not treated as part of the estate and its value is not taken into account in calculating the spouse's other entitlements. Descriptions and definitions vary, some being wider and some narrower than in South Australia.

4.1.12 In South Australia the spouse is entitled to '*personal chattels*' defined as:

> (a) any articles of household or personal use or ornament that form part of the intestate estate; and
>
> (b) any motor vehicles that form part of the estate,
>
> but does not include any chattels used for business purposes.[41]

4.1.13 The Committee recommended the continuation of a spouse's right to what it called '*personal effects*.' '*Personal effects*' are defined in the Model Bill by the general description '*the intestate's tangible property*' that is then cut down by a list of exclusions.[42] It is:

> …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.

Consultation indicated general satisfaction with the existing South Australian definition. Professor Vines preferred the South Australian definition, but saw an advantage in changing it for the benefits of uniformity. The only serious difference of opinion was about motor vehicles.[43] Some consultees thought that the vehicle principally used by the intestate, whether for

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39 SALRI, above n 5, 30, [48]–[49].

40 See above [4.1.3]–[4.1.8] and Recommendation 4 concerning estranged spouses.

41 *A & P Act* s 72B.

42 NSWLRC, above n 11, Recommendation 5 and model cls 4 and 14.

43 See SALRI, above n 5, 56, [95] for a discussion of this topic.

private use only or business as well, should be included, because in some families one motor vehicle is used for family transport as well as for business.[44] Others said that if a tax deduction was claimed for the vehicle, it should not be included in 'personal chattels'. One lawyer thought motor vehicles should be excluded because in her experience testators normally excluded them from bequests of personal effects.

Recommendation 6

There be no change to the definition of '*personal chattels*' in the *A & P Act.*

Surviving spouse and descendants of the relationship[45]

4.1.14 The Committee recommended that the spouse should take the *whole* estate unless the intestate left children or remoter descendants of another relationship.[46] This proved to be the most contentious issue considered by the Institute. From a recent survey of 2045 people over the age of 18 years throughout Australia, it appears that this recommendation is not currently consistent with the Committee's view that the rules of distribution should reflect what the majority of testators do. One result of the survey was that:

> most will makers believed it was important to make provision for immediate family members, in particular their children, their current spouse or partner, and to a lesser extent, their grandchildren.[47]

4.1.15 NSW and Tasmania have enacted this recommendation as per the Model Bill. The Bill before Victorian Parliament contains a clause to the same effect. Currently, however, in six States, England and New Zealand the spouse receives a preferential legacy and shares any remainder with the intestate's issue from all relationships. In England, the Law Commission's proposal that the spouse should take all has not been accepted by Government and, according to Borkowski, 'met with a generally lukewarm response'.[48]

4.1.16 The Institute's consultation revealed fairly equally divided opinion. The Committee similarly reported divided opinion and said some Law Societies, the Trustee Corporations Association of Australia, the NSW Public Trustee and two judges supported retention of the current scheme with adjustment of the amount of the preferential legacy.[49]

4.1.17 Several lawyers and students as part of the Institute's consultation thought that there should be a distinction between long and short marriages or domestic partnerships. The Institute notes that this is done in New Zealand in relation to *de facto* partners of less than three years standing. They do not have a right to the spouse's share unless a child has been born of the relationship, or the partner has made a substantial contribution to the relationship, or the court is satisfied that not being entitled to succeed on intestacy would result in serious injustice to the

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44 A country lawyer pointed out that 'dual cab utilities are very much in vogue on the basis that they provide family transport and are also used for business purposes'.

45 SALRI, above n 5, 36–40, [56]–[63].

46 NSWLRC, above n 11, Recommendation 4.

47 Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, 'Will-making prevalence and patterns in Australia: keeping it in the family' (2015) 50 *Australian Journal of Social Issues* 319, 328.

48 Law Commission, *Distribution on Intestacy,* Report No 187 (1989); Andrew Borkowski, *Textbook on Succession* (Oxford University Press, 2nd ed, 2002) [1.4.2].

49 NSWLRC, above n 11, [3.38].

partner.[50] As mentioned above, there was much concern about the injustice that arises when the spouses have separated but not divorced and some consultees said the Committee's proposal would exacerbate this.

4.1.18 Some consultees said the Committee's recommendation is acceptable for smaller estates, but there should be a sharing with descendants in larger estates. The Institute notes that this would be achieved in any event if the preferential legacy (assuming it is retained) is set at a level that would exhaust smaller estates.

4.1.19 The Law Society did not express an opinion. Most Trust Officers and the Legal Services Commission thought that the recommendation should be adopted. Some lawyers who were consulted separately agreed with the recommendation and some did not. A bare majority of lawyers and a majority of law students seemed to prefer the current rule whereby the surviving spouse receives chattels and a preferential legacy (although some favoured a proportion of the estate instead of a legacy of a set amount) and shares any residue with the intestate's descendants.

4.1.20 Reasons given by those who favoured the Committee's recommendation were as follows. It was seen as being consistent with the majority of wills made by people who had children only of the relationship that subsisted at the time the will was made. In some cases it would enable quicker and less expensive administration of the estate.[51] It would increase the chance of the spouse and any dependent children being able to remain in the home. When there are children of the intestate's current relationship who are minors or otherwise not *sui juris*, it would avoid the need for the spouse to apply to the Court for permission to postpone paying their shares to the Public Trustee with the associated reduction in the estate because of the costs of the application, or when the children's shares are paid to the Public Trustee, by fees and commission. Some mentioned the inconvenience, when children's shares are paid to the Public Trustee, of repeated requests to the Public Trustee for funds to meet their expenses. Reasons given by the Committee were that States with lower preferential legacies did not take into account sufficiently the probable contribution of the surviving spouse and the usual co-dependency of spouses.[52] The Committee also said that the modern surviving spouse is often elderly with independent adult children whose needs are less than those of the surviving spouse. The Committee thought that the legitimate expectations of issue will usually be met on the eventual death of the surviving parent.

4.1.21 Lawyers and students who disagreed with the recommendation were sceptical about, or disagreed with, the Committee's underpinning assumption that the surviving spouse will look after the interests of the children of the relationship and that their legitimate expectations will usually be met on the eventual death of the surviving spouse. They thought that the schemes in place in most States in which the spouse has priority by taking part of the estate and any residue is shared with descendants was the best way of protecting descendants' interests when the estate is sufficient to allow them a share, and of achieving a balance between the spouse and the children. They emphasised the frequency of second and subsequent relationships and blended

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[50] *Administration Act 1969* (NZ) s 77B and definition of 'relationship of short duration' in s 2 and s 7E of the *Property (Relationships) Act 1976* (NZ).

[51] For example, there would be no need to incur the expense of valuations.

[52] These are taken into account in proceedings about financial and property arrangements under the *Family Law Act*.

families. They mentioned the strong influence of some second partners on the surviving parent. There was serious concern about injustice in cases in which the surviving spouse re-partnered and conferred the benefit of the inheritance from the intestate on the later partner, children of the later relationship or the later partner's family whether during life, by will or by dying intestate, to the exclusion or detriment of the intestate's children. Late in life re-partnering, or re-partnering with a person who has children of another relationship, were seen as being the most problematic. Both country and city legal practitioners mentioned experiences with 'gold-diggers', especially when the widow or widower was perceived by the aspirant to be wealthy. These situations result in bad feeling and family tension and increase the incidence of claims by children of earlier relationships under the *Family Provision Act*. Some consultees stressed the importance of recognising the familial relationship and bond between parent and child through inheritance rights. Interestingly, although some Trust Officers thought the spouse should take the whole estate, they said that many *Family Provision Act* claims are motivated more by a desire for recognition of their relationship with the deceased, than a desire for money. One senior lawyer said:

> It is the responsibility of a deceased to provide as much as possible for a long-term spouse and the children they have brought into the world. It is not the responsibility of a deceased to provide for some indigent late-comer.

Another said:

> I see, more frequently, men in particular, wanting to make new Wills leaving everything to a newly acquired spouse.
>
> In the vast majority of those cases I think this is simply wrong.
>
> The greater danger is that children of a first or earlier relationship are not adequately provided for.
>
> In the interests of trying to avoid inheritance claims, I believe it is preferable to make a reasonable provision for children upfront.

4.1.22 Borkowski said, commenting on the Law Commission's recommendation that the spouse should take all: 'Should a marriage of a few months' duration result in the total exclusion of the children under the intestacy rules? Surely not.'[53]

4.1.23 The Institute's consultation did not result in a clear preference for giving the whole estate to the surviving spouse or for retaining the long-standing rule of giving the spouse first priority with a division of any residue between the spouse and the children. There are persuasive arguments for and against each proposition. The current law appears to have worked reasonably well since the amount of the spouse's preferential legacy was increased in 2009 and should continue to do so if the value of the preferential legacy is kept up to date, and in view of the Law Society's reluctance to change one set of arbitrary rules for another, and for current consistency with the majority of other States, the Institute concludes that it would be preferable to retain the existing rule.

[53] Borkowski, above n 48, [4.1.2].

Recommendation 7

If there is a surviving spouse, the spouse should continue to receive a preferential legacy and half of any residue, with the other half of any residue being shared among the intestate's issue.

More than one surviving spouse[54]

4.1.24 Section 72H of the *A & P Act* provides that if the intestate is survived by a spouse and domestic partner or by more than one domestic partner, they share the spouse's statutory entitlements equally.[55] If there is a dispute about the division of the personal chattels, the administrator may sell them and divide the proceeds of sale equally between the spouses. There are no other statutory provisions to guide the administrator but the equitable maxim 'equity is equality' is applicable.[56]

4.1.25 The Committee recommended that if the intestate leaves more than one spouse and either no descendants, or only descendants who are also descendants of the surviving spouse(s), they should share the estate equally. (This follows from the recommendation that the entire estate should go to the spouse if the only descendants are the product of that relationship.)

4.1.26 The Committee then recommended that if the intestate leaves at least one descendant of another relationship, the spouses should share the intestate's personal effects, each spouse should be entitled to a statutory legacy (rateably if there are insufficient funds) and half of any residue.[57]

4.1.27 Division 3 of Part 2 of the Model Bill contains detailed provisions about how this is to be done. The spouses may agree (distribution agreement) or obtain a court order (distribution order), or the administrator may, after following specified procedures, divide the estate in equal shares. An application to court for a distribution order may be made by a spouse or the administrator.[58]

> The Court—
>
> (3) … 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.

4.1.28 The recommendation that each spouse have a full preferential legacy (subject to there being sufficient estate) when the intestate left issue of another relationship was *not* accepted in NSW; instead the spouses share the legacy that would be payable if there were only one of them.

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54 SALRI, above n 5, 31–35, [50]–[55].

55 'Domestic partner' is to be read as including 'domestic partners' (plural) because s 26(b) of the *Acts Interpretation Act 1915* (SA) provides that in every Act every word in the singular number is to be construed as including the plural number.

56 See Samantha Hepburn, *Principles of Equity and Trusts* (Federation Press, 2009) 16. There is an equitable principle that property is to be equally divided when there are two or more people entitled to it and there are no other grounds on which to base a division.

57 NSWLRC, above n 11, Recommendation 23.

58 The Institute's research has not found any case in which a distribution order has been made.

The VLRC also recommended equal sharing of the legacy that would be available if there were only one spouse and the Victorian Bill contains a clause to that effect.[59]

4.1.29 There was no support from consultees in the Institute's consultation for giving each spouse a full preferential legacy. Equal sharing was preferred, subject to the possibility of family provision proceedings when equality was unjust.

4.1.30 As did the VLRC, the Institute received mixed views about the model provisions for distribution agreements and distribution orders.[60] Trust Officers and a very experienced country lawyer preferred the simplicity of s 72H of the *A &P Act* under which the spouse's entitlement is equally shared between the spouses and if they do not agree about the division of the personal chattels, the administrator sells them and divides the proceeds. Professor Prue Vines favoured equal division, but with the qualification that this could be varied by agreement or court order.

4.1.31 Two submissions said there should not be equal sharing in all cases and referred to cases of separation decades before without a divorce, separations in which there had been a previous informal division of matrimonial property and indigent late-comers.[61]

4.1.32 The granting of a specific power in the Court to divide the estate unequally, or to allocate it to one to the exclusion of the other, would be a means of ameliorating the injustice of equal division in some cases. One example given was when the marriage had ended in all but name many years before and the intestate had been living with another partner for several decades. Another is where the spouses have previously entered into binding agreements under the *Family Law Act* or the *Domestic Partners Property Act* or court orders have been made under one of those Acts. Another might sometimes be when the intestate was involved in two domestic relationships at the time of death, one being of long duration and resulting in the rearing of children and the other being of the minimum time to qualify as a domestic partnership.

4.1.33 The VLRC thought that court proceedings under the model provisions are likely to be less expensive than family provision proceedings.[62] However, such a procedure would detract from the simplicity of s 72H of the *A & P Act* that Trust Officers and some others wished to retain.[63]

4.1.34 The Institute concludes that equal sharing should be the general rule, but subject to Recommendation 4 concerning estranged spouses. It concludes that, on balance and for consistency with NSW, Tasmania, Queensland and possibly Victoria, variation of equal sharing by agreement or court order should be permitted and refers to model cl 27 and s 36 of the *Succession Act 1981* (Qld).

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59 Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 (VIC), cls 70ZB to 70ZE. The VLRC, whilst recognising that a partner's needs do not abate because there is another partner, said the circumstances in which there is more than one entitled partner are unusual and the model provisions that permit equal sharing of the statutory legacy by agreement or distribution order provides a better solution than Victoria's current one-size-fits all statutory formula under which entitlements vary according to the length of the relationship: VLRC, above n 4, 80, [5.111], [5.113].

60 Model cls 26 and 27.

61 An experienced South East lawyer and a Senior Counsel.

62 VLRC, above n 4, 79, [5.108].

63 A very experienced country lawyer did not favour the procedure explaining: 'Why open a can of worms trying to get two or more spouses to agree?'

Recommendation 8

Each spouse should be entitled to an equal share of the entitlement that would have gone to the spouse if there had been only one of them (the spouse's share), subject to any contrary order of the Court and subject to the Institute's Recommendation 4.

Recommendation 9

If there is a dispute between the spouses about division of the intestate's personal chattels, the administrator should give the spouses notice that if they have not agreed within three months of service of the notice, the administrator will sell them and divide the proceeds of sale equally between them.

Recommendation 10

A spouse or administrator should be able to apply to the Court for an order for unequal distribution of the spouse's share of the estate if the Court considers it just and equitable: see model cl 27.

Alternatives to a preferential legacy where spouse is not entitled to the whole estate[64]

4.1.35 The Institute canvassed with consultees whether it would be better (a) to keep a preferential legacy for the surviving spouse, or (b) to give the spouse a proportion of the estate, or (c) give the spouse a life interest in the home, or (d) to give the spouse a choice between taking the intestate's interest in the home or the preferential legacy.

4.1.36 Criticisms of preferential legacies and the Committee's recommendation that the spouse should take the whole estate unless the intestate left issue of another relationship tend to focus on the arbitrariness of its application in that it takes no account of whether the relationship is of long or short duration, whether the couple have raised children, the contribution or lack thereof of the survivor to the acquisition of the intestate's wealth or the quality of the marriage or, indeed, whether the spouses separated long ago but did not divorce and that in many cases it absorbs the whole estate leaving nothing for the intestate's children. The Institute, however, is of the opinion that it is not practical in the context of distributing an intestate estate to try to measure the quality of a relationship and adjust the entitlements of the survivor accordingly and that any preference given to the spouse, whether by preferential legacy or some other means, must of necessity remain arbitrary.

4.1.37 There was little support for a life interest.[65] There were differing opinions about whether a preferential legacy or a proportion of the estate would be preferable. There was more support for a proportion among country practitioners than city practitioners. There was no reaction to the idea of giving the surviving spouse a choice of either the legacy or a proportion of the estate. A lawyer who specialises in estate disputes and their resolution suggested during preliminary consultation that the spouse might be given a right to choose between taking the intestate's

[64] See SALRI, above n 5, 45–46, [73]–[75], Diagrams 11 and 12.

[65] The practical problems of such an arrangement were noted. The Public Trustee accepted that there was value in having a life estate when the spouse had an intellectual disability or a cognitive impairment.

interest in the home or the preferential legacy, and although this appears to the Institute to have some merit, there was no reaction to it during later consultations.

4.1.38 Giving the spouse a proportion of the estate would ameliorate the inequity that arises because of vastly different real property values depending on location in the State and it would avoid the problem of changing money and property values. It would ensure that there is always something for the intestate's children. One very experienced lawyer said that a better arrangement than the preferential legacy would be for the spouse to take the intestate's personal effects and the motor vehicle used principally for personal use with the balance being divided 2/3 to the spouse and 1/3 to the intestate's children.

4.1.39 Those who preferred a legacy said a percentage distribution could leave the spouse with insufficient if the estate were very small and so defeat the policy of enabling the spouse to remain in the home when possible. There was also concern that a percentage distribution would cause more difficulty in administering the estate. It was thought there would be valuation disputes.

4.1.40 As the Institute's consultation appears to indicate a marginal preference for a preferential legacy, and as this is the method of preferring the spouse in all other Australian States, the Institute concludes that it would be better to retain a preferential legacy.

Recommendation 11

The surviving spouse should continue to be given priority by way of a preferential legacy of a monetary sum.

Amount of preferential legacy[66]

4.1.41 Nowadays many surviving spouses receive from all sources (estate, superannuation, death benefits and devolution of jointly owned property) much more than they would have in former times, and the amount available for distribution to the intestate's children is correspondingly much less.

4.1.42 In South Australia, the amount of the preferential legacy is $100 000 and the spouse takes half of any residue and personal chattels. The remaining half of any residue goes to the intestate's descendants.

4.1.43 The most commonly stated rationale for giving the spouse a preferential legacy is that it increases the chances of the spouse remaining in the home by enabling the spouse to purchase the intestate's interest in it by using the legacy to pay all or part of the price. Because of the marked increase in joint ownership of the home and contents and bank accounts, this could be considered a less weighty consideration than at the time when the surviving spouse was first given a preferential legacy. Nevertheless, there are still cases in which a preferential legacy is needed to achieve that purpose, for example, when the home is owned solely by the intestate, or by the intestate and the spouse or another person as tenants in common. It is also beneficial when the surviving spouse is left to support dependent children, or the spouse is not able to earn a living. Law students viewed it as a fair way of reflecting contributions in money or labour made by a spouse in maintaining and improving the home.

66 See SALRI, above n 5, 42–45, [67]–[72].

4.1.44 There was no doubt among consultees that the amount should be tailored to South Australian conditions. The Law Society said: 'we question whether replacing the current arbitrary figure with different arbitrary figure was a necessary reform as no amount is always "right" for all circumstances.'

4.1.45 Opinions about what the amount should be varied. With one exception, consultees said that a starting figure of $350 000 as recommended by the Committee is too high for South Australia.

4.1.46 The very large differences in house prices according to where a person lives was emphasised by both lawyers and Trust Officers. Country lawyers generally preferred a lower figure. For example, the Institute was told that one could buy a house in Mt Gambier for $80 000 and that a preferential legacy equivalent to NSW would be far too high. There are probably a few places in the State where house prices are even lower than in Mt Gambier. Mr O'Brien reported that within the Berri Council area 78% of houses are valued at less than $200 000, 19.7% are valued at between $200 000 and $340 000 and only 2.3% are valued at above $340 000. Port Lincoln lawyers who were consulted said $350 000 would be too high and reported that the price of 'a decent home' in the town was $300 000 to $350 000. Adelaide metropolitan housing generally costs more than in country areas, but even in the metropolis there are marked differences according to location and fashion. The *average* price of houses sold by the Public Trustee across the whole State in 2015–2016 was $346 000. The Real Estate Institute of South Australia reported that for the fourth quarter of 2016 the *median* price of houses for the whole State was $405 000, and for Adelaide metropolitan $440 000, for Adelaide metropolitan home units $330 000 and for eight major regional towns $261 000.

4.1.47 The Public Trustee said the average value of intestate estates that it administers is about $250 000 to $290 000. The average for all intestate estates in South Australia is not known.

4.1.48 From its discussions with consultees and the information provided, the Institute concludes that a preferential legacy of $350 000 would absorb the whole estate in the majority of cases in South Australia.

4.1.49 For comparative purposes, the preferential legacy amounts in other Australian States and New Zealand at the time of writing is set out in Table 1 below:

Table 1: Preferential Legacy Amounts in Australia and New Zealand

State/Territory	Preferential Legacy Amounts
Western Australia	• if the estate does not exceed $50 000, then $50 000 plus ⅓ of any residue (⅔ of residue to the intestate's issue); • if the intestate left no issue, then $75 000 plus ½ of any residue (the other ½ of residue to parents, siblings and children of siblings, depending on who survives and the amount of the residue).[67]
South Australia	• $100 000 plus ½ of any residue (other ½ of residue to intestate's issue).[68]
Victoria	• $100 000 plus ⅓ of any residue (⅔ of residue to issue), but other provisions apply if there is a spouse and partner or more than 1 partner.[69] (But see note below about the Bill before the Victorian Parliament at time of writing).
Queensland	• $150 000 plus ½ of any residue if there is one child or issue of one child of the intestate (other ½ of residue to issue); • $150 000 plus ⅓ of any residue in any other case (other ⅔ of residue to issue).
New Zealand	• $155 000 plus ⅓ of any residue if there are issue of the intestate (other ⅔ to issue); • $155 000 plus ⅔ of any residue if there are no issue but a surviving parent (⅓ going to parent(s)).[70]
Australian Capital Territory	• 200 000 plus ½ of any residue if there is one child or issue of one child of the intestate (other ½ to the child or issue of the child); • $200 000 plus ⅓ of any residue in any other case (⅔ of residue to issue).[71]
Northern Territory	• 350 000 plus ½ of any residue if there is one child or issue of one child of the intestate; • $350 000 plus ⅓ of any residue if more than one child (⅔ of residue to issue); • $500 000 if there are no issue who survived the intestate, plus ½ of any residue (the other ½ of residue to parents, siblings or issue of siblings).[72]
Tasmania	• $408 271 ($350 000 adjusted from the start date of the December 2009 quarter to the December 2016 quarter) plus ½ of any residue. (This is applicable only if the intestate left children of another relationship. Those children take the other ½ of residue).[73]
New South Wales	• $459 427 ($350 000 adjusted from the start date of December 2005 to the December 2016 quarter) plus ½ of any residue. (This applies only if the intestate left issue of another relationship, in which case the intestate's children take the other ½ of residue).

Note: Clause 70M of the Bill before Victorian Parliament would increase the amount of the spouse's entitlement from $100 000 to $451 909 adjusted from the financial year commencing immediately after the commencement of cl 70M, plus ½ of any residue (the other ½ of residue going to issue).[74] But a different index would be used than in NSW and Tasmania. If passed by Parliament the Victorian index will be the All Groups Consumer Price Index for Melbourne.

67 *Administration Act 1903* (WA) s 14.

68 *A & P Act* s 72G (last increased in 2009).

69 *Administration and Probate Act 1958* (Vic) ss 51–52.

70 *Administration Act 1969* (NZ) s 77; *Administration (Prescribed Amounts) Regulations 2009* (NZ) reg 5.

71 *Administration and Probate Act 1929* (ACT) s 49 and sch 6.

72 The surviving spouse's entitlement was substantially increased on 1 July 2016 by the *Administration and Probate Regulations 2016* (NT) reg 3.

73 *Intestacy Act 2010* (Tas) ss 7, 14.

74 Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016.

4.1.50 It seems that the amount of the preferential legacy will not be uniform across Australia within the foreseeable future. As can be seen from the table above, the amounts vary substantially. Even in the two States that have accepted the Committee's recommendation, the amounts are different, because they commenced indexing $350 000 from different dates, and the Victorian figure will probably be different again because of the different index to be used.

4.1.51 The majority view at a forum of Adelaide succession lawyers was that $100 000 is about right for current conditions and it was pointed out by some that this generally left something for the intestate's children. It was also pointed out that in many cases the intestate's interest in the home and other jointly owned assets devolved upon the spouse and the spouse received benefit from the intestate's superannuation and death benefits or life insurance as well as the preferential legacy. Other figures that were suggested by consultees were $150 000, $200 000 and one said $350 000.

4.1.52 The Institute considers that it would be reasonable to increase the preferential legacy to match inflation since September 2008 using the ABS calculator for all capital cities.[75] This would result in a figure of approximately $118 662 for the December 2016 quarter — say $120 000.

Indexing the preferential legacy

4.1.53 Lawyers described the fact that the preferential legacy of $10 000 was not changed between 1975 and 2009 and dismally failed to achieve its usually stated purpose as 'an embarrassment'. Changes to the current figure of $100 000 are to be made by regulation and so depend on the priorities and decision of the Attorney-General and Cabinet. History suggests that it is likely to be a low priority.

4.1.54 The Committee recommended that the amount be adjusted automatically by the Consumer Price Index (CPI).[76] NSW and Tasmania provide for indexation by applying the All Groups Consumer Price Index, being the weighted average of the eight *capital cities*, published by the Australian Statistician to reflect changes between 1 January 2007 and 1 January in the calendar year in which the intestate died. (Their different starting dates give different preferential legacies.) The Victorian Bill includes a different formula that uses the All Groups Consumer Price Index for *Melbourne* in original terms for the most recent reference period in the preceding calendar year most recently published by the Australian Bureaus of Statistics at 15 June immediately preceding the date on which the variation is made.

4.1.55 The Victorian Bill would require the Minister to publish a notice in the Government Gazette on or before 1 July each year stating the amount of the spouse's statutory legacy.[77]

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[75] The September 2008 quarter would have been the latest available figure when the Bill to increase the legacy to $100 000 was prepared.

[76] NSWLRC, above n 11, Recommendation 6.

[77] Proposed s 70N of the Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 is: 'On or before 1 July of the financial year commencing immediately after the commencement of section 70M(1) and on or before 1 July in each subsequent financial year, the Minister must publish a notice in the Government Gazette that states the amount of the partner's statutory legacy calculated in accordance with section 70M for the following financial year.' This would overcome the difficulty that seems to be experienced with the indexation formulae used in the Model Bill. The Institute made enquiries of the Public Trust offices in Tasmania and NSW and the Tasmanian Attorney-General's Department about the current amounts. The officers concerned did not know. A trial calculation by some academic staff produced differing results. The Institute draws attention to s 33 of the *Defamation Act 2005*

4.1.56 The Institute's Advisory Board preferred an index that represented South Australian conditions and this is consistent with opinions expressed in more general terms by consultees about tailoring the Act to South Australian conditions.

4.1.57 Although automatic indexation requires frequent checking of the relevant amount and tends to result in awkward amounts, the Institute concludes that this is preferable to leaving changes in amount to political process with irregular large increases. It was suggested during consultation that quarterly indexation is too frequent. One consultee suggested five yearly adjustment, but the majority favours annual adjustment. This would be adequate and more convenient than quarterly adjustment.[78]

Recommendation 12

The surviving spouse's preferential legacy should be increased by $20 000 to $120 000 or by such other amount rounded to the nearest $1 000 as is equivalent to the increase in value of $100 000 between the September quarter of 2008 and the date on which the *A & P Act* is amended using either the Residential Property Price Index for Adelaide or the All Groups Consumer Price Index for Adelaide published by the Australian Statistician.

Recommendation 13

The amount of the legacy should be adjusted annually using either the Residential Property Price Index for Adelaide or the All Groups Consumer Price Index for Adelaide published by the Australian Statistician.

The Minister should publish a notice in the Gazette each year stating the amount for the following 12 months using cl 70N of the Victorian Bill as a model.

Preferential legacy when there is real property in more than one State[79]

4.1.58 The spouse has a right to more than one legacy at common law, including in South Australia, when the estate includes immoveable property (usually real property) in more than one State. This is more likely to happen when an intestate lived near a State border.

4.1.59 The Committee recommended:

> 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.[80]

4.1.60 The Committee preferred this to a domicile based entitlement (as used in the ACT), because it avoids the need to determine the domicile of the spouse, which is not always clear. NSW and Tasmania have acted upon this recommendation.[81]

(SA) as an example of a South Australian Act that requires the Minister to publish a notice to avoid confusion about an indexed amount.

78 The Victorian Bill provides for annual adjustment.

79 See SALRI, above n 5, 48–50, [77]–[82].

80 NSWLRC, above n 11, Recommendation 7.

81 *Succession Act 2006* (NSW) s 106(3); *Intestacy Act 2010* (Tas) s 7(3). Section 49A of the *Administration and Probate Act 1929* (ACT) is a complicated provision based on the domicile of the spouse.

4.1.61 The Institute sees no reason why a spouse should receive more than one statutory legacy merely because the intestate owned immoveable property in more than one State and agrees with the Committee's recommendation.

Recommendation 14

If the surviving spouse is entitled to a preferential legacy in more than one State, the spouse's entitlement should be limited to an amount that is equal to the highest of those legacies. The administrator should be able to satisfy the legacy from the intestate's property in more than one State.

Interest on preferential legacy[82]

4.1.62 The *A & P Act* requires payment of interest on unpaid testamentary pecuniary legacies from one year after the death, but does not require payment of interest on unpaid entitlements in an intestate estate.

4.1.63 The rate for unpaid pecuniary legacies is the average mid 180 day bank bill swap reference rate published by the Australian Financial Markets Association Limited as at the first business day of the six month period.[83] Between July 2008 and January 2017 the rate of interest payable has varied from 7.9583% to 2.045%.[84]

4.1.64 The Committee recommended that interest be payable on an unpaid preferential legacy from one year after the intestate's death calculated at 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.[85] This has been enacted in NSW and Tasmania and it is included in the Victorian Bill.[86] Using this method, the rate payable would be 3.5% compared with 2.045% in South Australia for unpaid testamentary legacies.

4.1.65 Two submissions were received, each saying that interest should be payable and that it should be payable from one year from the intestate's death. There did not appear to be a consensus among Trust Officers. One view was that not paying interest encourages agreement between interested parties. As to the rate of interest, there was only one submission. It favoured the Model Bill formula.[87]

4.1.66 Consistency with NSW, Tasmania and possibly Victoria in future, may be considered an advantage, but having a different rate for testamentary pecuniary legacies and preferential legacies may be inconvenient and more likely to cause error, particularly in partial intestacies. The rate should be variable so that it does not become too high or too low compared with prevailing rates. The Institute considers that the rate should not be significantly higher than could be obtained by investing the money on term deposit with an ADI, as otherwise there may be an incentive for spouses who are administrators to delay finalising administration. The

82 See SALRI, above n 5, 51–52, [83]–[87].

83 *A & P Act* s 120A; *Administration and Probate Regulations 2009* (SA) reg 3.

84 Law Society of South Australia, *The Last Testament,* February 2017.

85 NSWLRC, above n 11, Recommendation 6 and [4.61] and cl 8(4) of the Model Bill.

86 The Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 cl 4(1) that would define *legacy interest rate* for pecuniary legacies of all types.

87 An experienced lawyer who practices near the State border.

Institute cannot say whether the rate prescribed in South Australia for pecuniary legacies or the rate recommended by the Committee is preferable.

Recommendation 15

Interest should be payable on unpaid entitlements to an intestate estate from one year after the intestate's death at the same rate as it is payable for unpaid testamentary pecuniary legacies.

The rate should be variable and easily ascertainable. Advice should be obtained from the Department of Treasury and Finance (SA) about whether the preferable rate would be the average mid 180 day bank bill swap reference rate published by the Australian Financial Markets Association Limited that applies to unpaid testamentary pecuniary legacies, or 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 as recommended by the Committee.

4.2 Issue of the intestate, adopted children and step-children[88]

4.2.1 The issue of a person are his or her lineal descendants (whether legitimate or illegitimate), that is the children, grandchildren, great-grandchildren and remoter descendants by consanguinity (blood relationship) or by legal adoption. It does not include step-children, unless they have been legally adopted by the intestate.

4.2.2 Under South Australian law, the children of the intestate are entitled to one half of anything that remains after satisfaction of the surviving spouse's entitlements.[89] If a child of the intestate has died before the intestate leaving children or remoter lineal descendants, they take the share that would have gone to their deceased ancestor and this is described as taking by representation or *per stirpes*.

Posthumous children

4.2.3 As has been highlighted by several cases, difficult legal questions can arise when a child has been born as a result of artificial insemination or implantation of an embryo after the death of the father.[90]

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88 See SALRI, above n 5, 59–77, [98]–[140].

89 If South Australia accepted the Committee's recommendations to expand the definition of the personal effects that pass to the spouse without falling into the estate, to increase the preferential legacy to the extent recommended, and to give each of two or more spouses a full preferential legacy, there would usually be nothing left for the intestate's issue. For example, the amount of the preferential legacy in NSW is $459 427 at the time of writing, but the average value of estates administered by the Public Trustee is between $250 000 and $290 000. This would be compounded if the spouses owned property jointly or if a substantial part of the intestate's wealth is superannuation and death benefits in respect of which the surviving spouse is the nominated or selected beneficiary.

90 See, for example, *Bazley v Wesley Monah IVF Pty Ltd* [2011] 2 Qd R 207; *Roblin v Public Trustee for the Australian Capital Territory and Labservices Pty Limited as trustee of the Labservices Unit Trust trading as the Canberra Fertility Centre* [2015] ACTSC 100 (24 April 2015). In *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 (21 April 2010), the court ruled that sperm taken from a consenting man and stored by a fertility clinic for future use was the personal property of the man and on his death it formed part of his estate. See also *Re H, AE* [2012] SASC 146 (24 August 2012), where the Supreme Court of South Australia gave permission for a woman to have sperm of her recently deceased husband removed and stored. Nineteen

4.2.4 The Committee, after considering alternatives, concluded that the simplest solution was to: 'make it clear that persons born after the death of the intestate must have been in the uterus of the mother before the death of the intestate in order to gain any entitlement on intestacy.'[91]

4.2.5 It appears that the Committee intended to maintain, in conjunction with this recommendation, the presumption that a child born within 10 months (44 weeks) of the father's death was *in utero* (*en ventre sa mère* in the language of the common law). It also recommended that the child be entitled to inherit only if he or she survived for 30 days after birth.[92]

4.2.6 Consultation indicated strong support for the Committee's recommendation and no dissent.

4.2.7 The Institute intends to consider in its forthcoming family succession Report whether children who were conceived after the intestate's death using the intestate's genetic material should be permitted to apply for provision from the estate under the *Family Provision Act*.[93]

Recommendation 16

The rebuttable common law presumption repeated in s 8 of the *Family Relationships Act* that a child born within 10 months of the death of a woman's husband or *de facto* husband is his child should be retained for the purposes of the law of intestacy.

For children born after the death of the intestate, only those who are born within 10 months of the intestate and survive the intestate by 30 days should inherit under the rules of intestacy.

months later the court gave the woman permission to use the sperm for the purpose of attempting to become pregnant through an *in vitro* fertilisation procedure. See, *Re H, AE (No 2)* (2012) 113 SASR 560; *Re H, AE (No 3)* (2013) 118 SASR 259. The widow became pregnant with the deceased husband's sperm and a child was born nearly two years after the husband's death. See also, *In the Estate of the Late K* (1996) 5 Tas R 365. Several zygotes were created using the ova of the wife and the sperm of the intestate before his death. During his lifetime three zygotes had been used and resulted in the birth of a child who was alive at the date of the intestate's death. The administrator applied to the Supreme Court of Tasmania for a determination of whether: (a) the remaining two zygotes were issue of the intestate living at the date of his death; and (b) whether any children born as a result of the implantation of the zygotes after the intestate's death would become issue of the intestate upon their birth. Slicer J referred to the common law that an embryo or foetus has no legal rights until it is born and has a separate existence from its mother. It is considered to have potential or contingent legal interests that vest and become enforceable when it is born alive. Slicer J held that the zygotes were not issue of the estate, but if a child were born alive as a result of the proposed implantation of the zygotes, the child would, upon birth, be treated as issue of the intestate and entitled to inherit under the laws of intestacy. The Institute does not consider in this Report issues that might arise in relation to children born posthumously through surrogacy arrangements.

91 NSWLRC, above n 11, Recommendation 25 and cl 4(2) of the Model Bill. The term 'in the uterus of the mother' was used to avoid argument about when conception occurs. There have been significant changes to State laws about artificial reproduction since 2007 when the Committee's Report was written, but it is considered that those changes would not alter the Committee's recommendation, which is based on principle and practicality, rather than on the detail of the then existing legislation.

92 The requirement to survive birth by 30 days is consistent with the model survivorship cl 4(2).

93 The NSWLRC recommended in 1986 that children born as a result of artificial procedures be permitted to make an application for provision from the estate under the *Family Provision* legislation: see NSWLRC, *Artificial Conception: Human Artificial Insemination*, Report No 49 (1986) [12.6]–[12.12].

Adopted children[94]

4.2.8 Since the publication of the Issues Paper there have been amendments to the *Adoption Act 1988* (SA), although some amendments have not come into force at the time of writing.

4.2.9 When a child is adopted, the legal relationship between the biological or relinquishing parent and the child is severed and the child becomes the child of the adopting parents. However, there is in South Australia an exception to that severance. Sections 9(3) and 9(3a) of the *Adoption Act 1988* (SA) provide—

> (3) Where—
>
> (a) one of the birth or adoptive parents of a child dies; and
>
> (b) the surviving parent cohabits with another person in a qualifying relationship;[95] and
>
> (c) the child is adopted by that other person,
>
> the adoption does not exclude rights of inheritance from or through the deceased parent.
>
> (3a) The making of an adoption order in relation to a child does not affect any vested or contingent proprietary right acquired by the child before the making of the adoption order.

4.2.10 Section 9(3) means that a child who has been adopted by a *step-parent*, may inherit from or through his or her deceased natural parent or previous adoptive parent despite the adoption order. This applies both to testate and intestate estates. The Institute understands that South Australia is now the only State that preserves that right.[96]

4.2.11 Section 9(3a) is consistent with common law policies of testamentary freedom and not abrogating proprietary rights.

4.2.12 The Committee recommended: 'where a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy.'[97]

4.2.13 The Committee considered that, although there will be very few of these cases, the possibility of these children inheriting from both an adopting step-parent and a deceased or relinquishing parent (what it pejoratively called 'double dipping'), and of complicating administration of the estate, outweighed other considerations.

4.2.14 The five people who expressed an opinion in the context of an adopted step-child inheriting on the intestacy of the natural parent thought s 9(3) of the *Adoption Act* should not be retained.[98] At that time, the *Adoption (Review) Amendment Bill 2016* had not been passed by Parliament (the *Adoption (Review) Amendment Act 2016* has since passed Parliament and received Royal Assent on 15 December 2016).

4.2.15 A justification for the South Australian step-parent adoption exception is that the child has often formed a bond with the natural parent and the family of that parent before his or her

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94 See SALRI, above n 5, 66–68, [113]–[120].

95 The term 'qualifying relationship' was substituted for 'marriage relationship' on 16 February 2017 when part of the *Adoption (Review) Amendment Act 2016* came into force.

96 NSWLRC, above n 11, [7.48]. The right was repealed in NSW in 2009.

97 Ibid Recommendation 27 and cl 10 of the Model Bill.

98 Professor Vines, three experienced lawyers (two country and one Adelaide) and one student.

death and there is a continuing social relationship between the adopted child and the deceased parent's family, for example grandparents, aunts and uncles and cousins, who regard the child as part of their family. This can also be the situation when a child has been previously adopted when very young.

4.2.16 There have been many changes in society and attitudes to adoption have changed over the years. Adoptions have become fewer but more open and the level of secrecy about the identity of the birth parents is much reduced. The policy that prevailed in South Australia from the passing of the first adoption laws in 1925 that an adoption order should sever absolutely and for all time all knowledge and aspects of the relationship between the relinquishing parent (usually the birth mother) and the child is no longer acceptable. Under the amendments made by the *Adoption (Review) Amendment Act 2016* (SA) one of the objects of the *Adoption Act 1988* will be: 'to ensure that the adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage.'[99]

Other provisions of this Act will remove barriers to parties to adoption finding their blood relatives. And, although the *Adoption (Review) Amendment Act 2016* amends s 9 of the *Adoption Act*, Parliament has not changed the inheritance and proprietary rights of adopted children under s 9.

4.2.17 It seems to the Institute that retaining the right of a child who has been adopted by the spouse of his or her surviving natural parent to inherit by will or on intestacy is consistent with current South Australian Government and Parliamentary policy concerning adoption. The Institute is not persuaded by the view that it is unfair for a child who has been legally adopted by his or her step-parent to have the possibility of inheriting from the child's natural family as well as from the adoptive step-parent. The argument that it could make administration of the estate more difficult in a few cases might, however, be accurate. As the number of such cases will be very small, and in view of current adoption policy in this State, the Institute concludes that s 9(3) of the *Adoption Act* should be retained without amendment.

4.2.18 No one expressed an opinion about s 9(3a) of the *Adoption Act* that preserves any vested or contingent proprietary rights acquired by a child before adoption.

Recommendation 17

Section 9(3) of the *Adoption Act 1988* (SA) that preserves the right of a child who has been adopted by a person with whom the surviving parent is cohabiting (step-parent adoption) to inherit from or through his or her natural or previous adoptive parent (by will or on intestacy) should be retained.

Recommendation 18

Section 9(3a) of the *Adoption Act 1988* (SA) that preserves any vested or contingent proprietary right acquired by a child before the making of the adoption order should be retained.

[99] *Adoption Act 1988* (SA) (when amended) s 3(1)(c).

Step-children and step-parents[100]

4.2.19 The circumstances in which people become step-children at law vary enormously. For example, a person of mature age may acquire the legal status of step-child when an elderly parent living in another country remarries a person unknown to the step-child. Or a person may become a step-child and a member of the intestate's household and dependent on the intestate from an early age, and perhaps following the death of a natural parent.

4.2.20 No State includes step-children in its statutory distribution rules. The Committee recommended: 'Step-children of the intestate should not be recognised for the purposes of intestacy.'[101]

4.2.21 Some relevant social changes, arguments for and against including step-children among the relatives who are entitled to a share of an intestate estate, and ideas for possible reform to refine the law to allow step-children to take a share in some circumstances, are set out in the Issues Paper, but none of these met with much approval during consultation. The consensus was that it would be entirely inappropriate to give all step-children an entitlement because of the vastly different circumstances, and that it would be too difficult and risky to legislate to reform intestacy distribution rules to assist blended families by giving *some* step-children and step-parents entitlements on intestacy. The consensus was that a claim under the *Family Provision Act* was the best way to give step-children a share in appropriate cases, and there was support for reforming the eligibility criteria for making a claim.[102]

4.2.22 It was suggested, for instance, that a step-child should be able to claim if the relationship was, or had been, one in which the deceased stood *in loco parentis* to the step-child. There were no submissions concerning the rights of the step-parent to a share of the estate of an intestate step-child.[103] The Institute will consider in more detail the eligibility to claim under the *Family Provision Act* in its forthcoming Report.

Recommendation 19

Step-children should not be recognised for the purpose of intestacy distribution rules, but should continue to be able to make a claim for provision from the intestate's estate under the *Family Provision Act* in appropriate circumstances.

Recommendation 20

Likewise, step-parents should not be recognised for the purpose of intestacy distribution rules, but the Institute will make a recommendation in a future report about whether they should be eligible to claim in the same way as natural and adoptive parents who cared for or contributed to the maintenance of an intestate step-child.

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[100] See SALRI, above n 5, 70–76, [125]–[140].

[101] NSWLRC, above n 11, Recommendation 26.

[102] At present, a step-child who was maintained wholly or partly, or was legally entitled to be so maintained, by the deceased at the time of death may make a claim under s 6(g) of the *Family Provision Act*.

[103] A step-parent who cared for or contributed to the maintenance of the deceased during the deceased's lifetime may make a claim under s 6(i) of the *Family Provision Act*.

When descendants' shares cannot be paid without selling the home[104]

4.2.23 Sometimes the administrator cannot pay the entitlements of children of the intestate who are minors or otherwise not *sui juris* to the Public Trustee as required by s 65 of the *A & P Act* without selling the home. When this happens, the administrator may apply to the Court under s 67 of the *A & P Act* for orders dispensing with compliance with s 65 and permitting sale of the home to be postponed for a specified period, usually until the youngest child turns 18 years. The court makes such orders if it is satisfied that postponement would benefit the children, and that their interests in the estate can be protected by conditions imposed by the court, which include, for example, a caveat on the title. It is usual for conditions to include permission to apply for a variation of the orders if circumstances change.

4.2.24 In the Issues Paper, the Institute asked:

> *When the intestate leaves descendants who are under the age of 18 years and their shares cannot be paid without selling the home — is the current South Australian practice of applying to the court for permission to postpone sale of the home until the youngest child is 18, subject to orders to protect the children's interests in the estate, adequate? If not, what is your opinion about the British Columbia legislation outlined in paragraph 221?*

4.2.25 Lawyers who expressed an opinion considered that the current practice is satisfactory.[105] No alternatives were suggested other than that giving the whole estate to the spouse when all the intestate's descendants were the product of that relationship would reduce the number of applications. No one suggested that the more prescriptive British Columbia model should be followed.[106]

4.2.26 The Institute concludes that the current practice is reasonably satisfactory.

4.3 Other relatives[107]

Grandparents

4.3.1 In South Australia, surviving grandparents are entitled to the estate if the intestate left no spouse, descendants, parents or siblings. The only submission about grandparents was from the Legal Services Commission, which submitted that:

> grandparents should be added to the statutory group who have an entitlement on intestacy and be capable of making a claim under the *Inheritance (Family Provision) Act 1972*. In both Aboriginal and non-Aboriginal families, grandparents sometimes step into the role of parent, providing emotional and financial support for grandchildren. A grandparent who has raised a child to adulthood, with no or limited assistance from the deceased grandchild's living parents, should have the ability to claim against the grandchild's estate.

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104 See SALRI, above n 5, 108–109, [220]–[221].

105 Application can be made for waiving of court fees. Trust Officers considered it less than ideal because sometimes there are not enough liquid assets in the estate in some cases to meet the costs of an application to the Court and the Public Trustee sometimes pays the initial up-front costs from its own resources. The Institute understands that the Public Trustee has more difficulty in obtaining waiver of court fees. The Public Trustee would eventually recoup the up-front fees.

106 *Wills, Estates and Succession Act 2009* (BC). Sections 33–35 set out specific matters to be considered by the court and the types of orders the court may make.

107 See SALRI, above n 5, 78–81, [141]–[146].

4.3.2 Whilst agreeing that grandparents who have brought up a grandchild may have a moral right to support from the grandchild, the Institute considers that it would not be appropriate to give *all* grandparents a priority in the distribution hierarchy and that it would be undesirable to put administrators in the position of determining the moral right of the grandparents. The Institute will consider cases like those described by the Legal Services Commission in its forthcoming Report on the role and operation of the *Family Provision Act*.

Next of kin – setting a limit

4.3.3 In South Australia, grandparents are the most remote ancestors who may inherit, and descendants of deceased aunts and uncles (by consanguinity), i.e. first cousins and issue of first cousins, are the most remote collateral relatives who may inherit.[108]

4.3.4 The question is — how far should kinship be traced before an intestate estate vests in the Crown? Should there be no limit, or should there be a limit to reduce the cost, time and difficulty of administering a small number of estates?

4.3.5 The Committee recommended that the most remote ancestors should be grandparents and the most distant collateral relatives should be first cousins of the intestate (thus excluding descendants of first cousins).[109] The law in four Australian States — NSW, Queensland, Tasmania and Western Australia — is consistent with this recommendation. South Australia, Victoria, the ACT and the Northern Territory allow more distant collateral relatives to inherit. If the Bill before the Victorian Parliament at the time of writing is passed without any relevant amendments, the Victorian law will result in a majority of Australian jurisdictions limiting entitled collateral relatives to first cousins.[110]

4.3.6 Although not expressing an opinion as to what the law should be, the Registrar of Probates mentioned the cost and difficulty of tracing remote relatives, the cost of obtaining a *Benjamin* order, and that sometimes a *Benjamin* order could result in an injustice to a relative who was entitled, but not found.[111]

4.3.7 There was a marked difference of opinion among consultees. It was noticeable that people of certain cultural heritages (although not confined to these) favoured no statutory limit saying that they and their relatives knew and maintained social relationships with the children of first cousins and with second and remoter cousins.[112] Another considered that efficiency in

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[108] First cousins share a grandparent. Second cousins share a great-grandparent. Third cousins share a great-great-grandparent. A first cousin once removed is the child of one's first cousin and a first cousin twice removed is the grandchild of one's first cousin and so on.

[109] NSWLRC, above n 11, Recommendations 36 and 37 and cls 31 and 32(3) of the Model Bill.

[110] Administration and Probate and Other Acts Amendment Succession and Related Matters) Bill 2016 (Vic), cl 70ZK(3). See also VLRC, above n 4, 58 [5.14], 59 [5.20].

[111] A *Benjamin* order is an order of the Court, made on the application of the executor or administrator after making reasonable searches, to distribute the estate among those relatives who have been identified and located as if those who have not been found did not survive the deceased. See *Re: Benjamin; Neville v Benjamin* [1902] 1 Ch 723.

[112] For example, a law student, while recognising the possibility of a large number of remote relatives being entitled, observed: 'However, the Committee errs in assuming that the more remote the relationship is to the deceased, in terms of family-tree linkages, the more distant the relationship between the deceased and the distant relative. This is not necessarily the case; there would no doubt be situations where a person shares a closer relationship with their second cousin than they do with their first. It would be unfair that the

administration of a few estates should not prevail over principle. The majority view at a forum of Adelaide lawyers was that the current law should not be changed to exclude more remote cousins.

4.3.8 On the other hand, the consensus of Trust Officers was that, on balance, the Committee's recommendation to limit the most remote relatives to grandparents and first cousins should be adopted because of the delay and cost of identifying and tracing remoter relatives in some cases. This was seen as a particular problem when the estate is small or there are relatives in other countries. The Legal Services Commission, Professor Vines, two lawyers and the three students also favoured this limit, although one lawyer and one student said this should be subject to the proviso that the limit should not apply in cases when it would result in the estate vesting in the Crown as *bona vacantia.*

4.3.9 Practitioners were clear that nearly all of their clients would prefer their estates to go to distant relatives than to the Government. This is consistent with the results of consultation by the Committee and some other law reform bodies.[113]

4.3.10 The Deputy Public Trustee, suggested during preliminary consultation that the cut-off might be first cousins for small estates and no change from the current law for larger estates. If this suggestion finds favour, then for consistency with the Institute's recommendation for a scheme for more economical administration of small estates (being those with a gross value of $100 000 or less indexed for inflation) the same figure should be used.[114]

4.3.11 As opinions were divided, the Institute concludes that, in the interests of consistency with four other States (and five if the Victorian Bill is passed without relevant amendment), South Australian law should limit the classes of relatives who have an entitlement under the distribution rules on intestacy to grandparents and first cousins. However, in recognition of what it is believed most people would want, this should be subject to the proviso that issue of first cousins should be entitled if no first cousin survives the intestate and the estate would otherwise vest in the Crown as *bona vacantia.*

Recommendation 21

The most distant relatives to inherit should be grandparents and first cousins (the children of deceased aunts or uncles of the intestate by consanguinity) unless the estate would vest in the Crown as *bona vacantia*, in which case the issue of first cousins should be entitled to the estate.

state should receive the entire benefit of an intestate estate solely because of the limitations of the legislation.'

113 NSWLRC, above n 11, [9.35]–[9.60] and the references therein to other law reform bodies. For example, the Committee reported that the Law Reform Commission of British Columbia had 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.

114 See SALRI, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes,* Report No 6 (December 2016) Recommendation 2, vi.

Relatives of the half blood

4.3.12 South Australian law and the Committee's recommendation is that relatives of the half blood are entitled equally with relatives of the full blood.[115] Consultees who commented agreed with this.

Recommendation 22

It should continue to be immaterial whether a relationship is of the whole blood or the half blood.

4.4 Inheriting through two lines of relationship[116]

4.4.1 The National Committee considered that it was uncertain whether relatives are entitled to inherit through more than one line of relationship.

4.4.2 The circumstances that result in a person being related in more than one capacity are:

- When a paternal uncle marries a maternal aunt or a maternal uncle marries a paternal aunt and they have children, so that those children are double cousins of the intestate;
- when the above relatives are recognised as domestic partners;
- when cousins (having descended from different siblings of the intestate) marry and produce children.[117]

4.4.3 In the only reported South Australian case (*Cullen*), Zelling J ruled that three double first cousins of the intestate were entitled to only one share each because, although they were 'cousins twice over', their relationship to the intestate was of the same degree as all the other surviving cousins and when all entitled kin are of the same degree of relationship to the intestate they share *per capita*.[118] He regarded an earlier Victorian case (*Morrison*) in which it was ruled that the widow, who was also the first cousin of the intestate, could take a share as wife and also a share as a cousin as inapplicable because, in that case, the widow/cousin was truly entitled through two different degrees of relationship.[119] Her entitlements were first as surviving spouse and second as a blood relative of the intestate entitled to a *per stirpes* distribution as a cousin. The Institute sees no inconsistency between the decisions in *Cullen* and *Morrison.* The decision in *Cullen* is the logical result of the current structure of South Australian distribution rules under which kin of different degrees take *per stirpes* (the share to which their deceased ancestor would have been entitled if he or she had survived the intestate) and kin of the same degree each take an equal amount (*per capita*).

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115 *A & P Act* s 72B(2).

116 See SALRI, above n 5, 83–84, [154]–[158].

117 If a grandparent were to legally adopt a grandchild there would in fact be both a biological and a legal relationship, but current Australian law would treat the biological relationship as extinguished.

118 *In the Estate of Cullen* (1976) 14 SASR 456, Zelling J referred to and followed two Canadian cases. These were the only cases besides *Comport* drawn to his attention.

119 *In re Morrison, Trustees Executors and Agency Co Ltd v Comport* [1945] VLR 123. The Victorian legislation at that time required the wife to share the estate with next of kin.

4.4.4 However, the Committee recommended that: 'Persons entitled to take in more than one capacity ought to be able to take in each capacity.'[120]

4.4.5 The Committee's rationale was that limiting a relative to one share was inconsistent with the treatment of husband and wife as two separate persons for the purposes of the law of property and that it would cause practical difficulties for *per stirpes* distribution.[121] This recommendation is consistent with the Committee's recommendation that estates should be distributed *per stirpes* in all cases.[122]

4.4.6 An alternative would be to limit the beneficiary to the one share that yields the greatest amount, as the National Committee reported is done in those American States that follow the *Uniform Probate Code*.[123]

4.4.7 The Institute received only one submission on this point and that was that the distribution should be limited to one share in the interest of overall fairness.

Recommendation 23

If South Australia accepts the Committee's recommendation that distribution be *per stirpes* in all cases, then a relative who is related in more than one capacity should be able to inherit in each capacity.

If South Australia retains *per capita* distribution when all persons entitled are of the same degree of relationship to the intestate (of the same generation), then they should be entitled to only one share.

4.5 *Bona vacantia*[124]

4.5.1 In all States, when there is no relative who is entitled to take the estate, it vests in the Crown as *bona vacantia* (ownerless property), except in Western Australia where it escheats to the Crown with similar results. In South Australia, s 115 of the *Law of Property Act 1936* (SA) enables any person to ask the Governor, in Council, to waive the State's right to *bona vacantia*. In practice, these applications are dealt with through the Department of Treasury and Finance. There is no legislative restriction on who may apply or any legislative guidance about how the Governor should exercise the discretion.

4.5.2 Consultees did not question the appropriateness of estates vesting in the Crown/State when there are no entitled relatives, but legal practitioners who commented in meetings were generally of the opinion that most people would want their estate to go to remoter cousins instead of vesting in the Crown ('going to the Government' as most would say).

4.5.3 Clause 38 of the Model Bill would provide the Minister to whom administration of the Act is committed a discretionary power to waive the State's right to the estate, in full or in part,

120 NSWLRC, above n 11, Recommendation 29 and [8.35]–[8.42].

121 A husband and wife were presumed to be one person for the purpose of the law of property before statutory reforms abolished this notion.

122 NSWLRC, above n 11, Recommendation 28.

123 Ibid [8.38].

124 See SALRI, above n 5, 81–82, [147]–[153].

and either conditionally or unconditionally.[125] The clause guides the exercise of the Minister's discretion by including a list of persons in favour of whom the Minister may waive the State's rights: dependents, people who have in the Minister's opinion a just or moral claim on the intestate, organisations or persons for whom the intestate might reasonably be expected to have made provision, trustees for any of these people or organisations and finally any other organisation or person. It is not entirely clear from the drafting whether the list is intended to be in descending order of priority. The only specific written feedback about whether South Australia should adopt model cl 38 came from Professor Vines who said 'yes'.

4.5.4 The Institute asked for opinion about whether applications for a waiver of the State's right should be made to the Crown Solicitor (as in NSW), to the Attorney-General, or to the Treasurer. It is not clear from the only submission whether the consultee meant the Attorney-General or the Crown Solicitor.[126] As the money or property has vested in the Crown, it would be appropriate that applications be made to a Minister. Because a proper evaluation of claims would require knowledge of family and succession law, the Institute's opinion is that the Attorney-General would be the most appropriate Minister.

4.5.5 The Institute is of the opinion that Part 5 of the Model Bill could be usefully adopted in South Australia in order to provide guidance to potential applicants, their advisors and the Minister to whom administration of the Act is committed. It would also be a small contribution towards consistency on a matter that is not controversial and this could be useful where persons making a request to the Minister live interstate.

Recommendation 24

When there are no persons entitled to an estate under the statutory distribution rules, it should continue to vest in the Crown/State.

The Minister to whom administration of the Act is committed should have a discretion to waive the State's rights in whole or in part, conditionally or unconditionally, in favour of dependants, persons who, in the opinion of the Minister, have a just or moral claim on the estate, or other people and organisations, as set out in cl 38 of the Model Bill.

4.6 *Per stirpes* or *per capita* distribution[127]

4.6.1 Distribution *per stirpes* applies where a person inherits through an ancestor who predeceased the intestate. So, for example, if the intestate had two children, one of whom predeceased the intestate leaving three children, the estate would be divided into two equal portions (one for each of the intestate's children) and the portion for the deceased child would be divided equally between the deceased child's three children (grandchildren of the intestate).

4.6.2 In s 72I and s 72J of the *A & P Act* there is a clear distribution pattern. When all entitled relations are of the same degree (same generation), they take *per capita* (per head), and relations of different degrees take *per stirpes* (by branch of the family). So children of the intestate take equally — they are all relatives of the same degree — equal shares to those equally related.

[125] In the normal course the administration of the *A & P Act* is committed to the Attorney-General.

[126] One law student suggested an independent body, saying that the Minister would have a vested interest in the estate staying with the Crown.

[127] See SALRI, above n 5, 84–90, [159]–[167], Diagram 15 and Diagram 16.

To take one other example, if the intestate is not survived by a spouse, descendant, parent, brother or sister, the intestate's nieces and nephews would each take an equal share because all of them are related to the same degree to the intestate.

4.6.3 Distribution *per capita* requires identification of every entitled person before distribution. The practical advantage of *per stirpes* distribution is that the executor or administrator can set aside a portion for each branch of the family and distribute without delay to members of the branches where those entitled have been identified.[128]

4.6.4 However, *per stirpes* distribution has been criticised because it often results in relatives of equal degree receiving unequal amounts and occasionally in a more remote relative receiving as much as, or more than, a closer relative.

(1) To explain the first, assume that the value of the estate is $600 000 and the intestate had three children, A, B and C. A and B died before the intestate, A leaving two children and B leaving four children, all six being the intestate's grandchildren. The estate would be divided into three equal portions of $200 000 because the intestate had three children. A's children would each receive ½ x ⅓ (1/6) of the estate being $100 000 each. B's children would each receive ¼ x ⅓ (1/12) of the estate being $50 000 each. Each of A's children receive twice as much as each of B's children because B had more children than A.

(2) Circumstances in which a more remote relative receives more than a closer relative was illustrated by Diagram 15 in the Issues Paper. The intestate had three children, A, B and C and the value of the estate is $600 000. A dies before the intestate leaving two children. B survives the intestate. C dies before the intestate leaving one child who also died before the intestate leaving a child. The intestate's grandchildren from A would receive ½ x ⅓ (1/6) of the estate being $100 000 each. Child B would receive 1/3 of the estate being $200 000. The intestate's great-grandchild descended from C would receive $200 000 being the same amount as the surviving child of the intestate and twice as much as the intestate's two surviving grandchildren.

4.6.5 The Committee recommended that distribution should be *per stirpes* in all cases.[129] The Model Bill and the Victorian Bill would require, and Tasmanian and NSW Acts do require, *per capita* distribution to surviving children, parents, siblings, grandparents, aunts and uncles. They require *per stirpes* distribution to the descendants of any children, siblings, aunts and uncles or nieces and nephews who predecease the intestate.[130]

4.6.6 Trust Officers, Professor Vines, two experienced lawyers and two law students favoured *per stirpes* distribution as recommended by the Committee, saying this is consistent with many wills. (It is not known how many solicitors and Trust Officers advise clients who wish to make a will about distribution in the event that all their children predecease them.) Two lawyers favoured retaining the current distribution pattern. The Registrar of Probates suggested that, without expressing an opinion, the Institute consider whether grandchildren should share equally.

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[128] This reason was given by the Public Trustee's officers for favouring *per stirpes* distribution.

[129] NSWLRC, above n 11, Recommendation 28.

[130] Model cls 28–32; *Succession Act 2006* (NSW) ss 127–131; *Intestacy Act 2010* (Tas) ss 28–32; Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 (Vic) cls 70ZG–70ZK.

4.6.7 The Institute believes the pattern of distribution set by the *A & P Act* is both logical and fair. Its disadvantage is that it makes administration more difficult in some cases, especially when those entitled are all cousins of the intestate. As the identity and whereabouts of the intestate's grandchildren are usually known to the family, the Institute considers that a reasonable balance between fairness and efficiency of administration would be achieved by distributing *per capita* to grandchildren when the intestate leaves no surviving children and *per stirpes* in other cases.

Recommendation 25

Per capita distribution should be retained for grandchildren when the intestate leaves no surviving children, but in other cases distribution should be *per stirpes*.

4.7 Vesting of minors' shares[131]

4.7.1 In South Australia, since 1984, a minor's share of an intestate estate has vested absolutely.[132] This means that a minor's share is ascertained and he or she has a right to it immediately, although in the normal course of events it will be held by Public Trustee on trust until the minor is 18 years of age.[133] If the minor dies, his or her share (or so much of it as has not been expended by the Trustee for the minor's benefit) will go to the people who are entitled to the minor's estate under the rules of intestacy.[134] In most cases this would be the minor's parent or siblings. If the minor left a child, that child would take. If vesting is delayed, the share of a minor who dies reverts to the intestate's estate and goes to other relatives of the intestate — not to the estate of the minor. The Institute has previously summarised the advantages of immediate vesting.[135]

4.7.2 This is consistent with the law in six States and recommendation 41 of the Committee. Consultees who expressed an opinion supported immediate vesting.

Recommendation 26

A minor's share of an intestate estate should continue to vest immediately.

131 See SALRI, above n 5, 150–152, [295]–[298].

132 Before 1984, the share of a minor did not vest until the minor was 18. This was changed because Commonwealth income tax legislation had been changed in a way that penalised trusts for minors where one or both parents died intestate: see South Australia, *Parliamentary Debates*, Legislative Council, 29 August 1984, 604.

133 *A & P Act* s 65 and *Trustee Act 1936* (SA) s 33.

134 The general rule is that a minor cannot make a valid will, but there are exceptions. A will may be made by a minor who is married or in contemplation of the minor's marriage, or if the Court authorises the making of a will in terms approved by the Court.

135 SALRI, above n 5, 152, [298].

Part 5 – Spouse's Preferential Right to Acquire Property from the Estate[136]

5.1 The extent of the right

5.1.1 In all Australian States the surviving spouse has a preferential right to purchase the intestate's interest in the home, although in some States the right is confined to the home shared by the intestate and spouse at the date of the intestate's death. The policy objective is to minimise disruption to the living arrangements of the surviving spouse and any children who are part of the household.

5.1.2 In South Australia the home in relation to which the right applies is: 'the dwellinghouse in which the spouse was residing at the date of the intestate's death.'[137]

5.1.3 If there is more than one surviving spouse each may elect to purchase the intestate's interest in the home in which he or she was living when the intestate died. The rights of two spouses living in the same home are not clear. The South Australian provision is preferable to interstate provisions that limit the right to the 'shared' home, because it avoids argument about whether the intestate and spouse were in fact sharing the home at the date of death, and further, the surviving spouse's right is not lost if the intestate is living in a nursing home or some other place at the time of death.[138]

5.1.4 NSW and Tasmania have adopted the Committee's recommendation to extend the spouse's statutory right to any property of the intestate that the spouse chooses when there is only one spouse.[139] The Bill before the Victorian Parliament would also give the spouse a right to elect to acquire any of the estate property.[140] If there are two or more spouses, they are entitled to share in accordance with a distribution agreement or court order or, in the absence of an agreement or order, as determined by the administrator after following a legislated procedure.

5.1.5 NSW and Tasmania have enacted the Committee's recommendation that the right to acquire the intestate's interest in the home or other property of the estate should require court approval if it forms part of a larger aggregate and the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.[141] This is based on a more specifically worded Queensland provision.[142] The

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136 SALRI, above n 5, 91–106, [168]–[219].

137 *A & P Act* s 72L(1).

138 See above [4.1.3]–[4.1.8] and Recommendation 4 for the estranged spouses.

139 NSWLRC, above n 11, Recommendation 9 and model cl 16.

140 Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 (Vic) cls 70O, 70P.

141 See NSWLRC, above n 11, Recommendation 20 and model cl 16(2). Two statutory examples are included in the model cl: (1) Acquisition of a single item from a collection of items might substantially diminish the value of the remainder or make it more difficult to dispose of; (2) Acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder or make it substantially more difficult to dispose of.

142 *Succession Act 1981* (Qld) ss 39B(1)–(2) requires court approval if the home forms part of a building and the deceased's estate includes an interest in the whole building, it forms part of an interest in land when part or all of it is used for agricultural purposes, it is part of a hotel, motel, boarding house or hostel, or part of the home was used for non-domestic purposes when the intestate died.

Court may authorise purchase subject to conditions including the payment of compensation to the estate in addition to the price and transaction costs. Further, a spouse is not entitled to elect to purchase unless the spouse can comply with any other applicable legislation and pays any compliance costs.[143]

5.1.6 The Committee made related recommendations.[144] The price should be the market value of the intestate's interest when the intestate died. It recommended that the spouse should be able to provide satisfaction for the interest being acquired first by relying on his or her share of the estate and then by paying the difference, if any, from other resources[145] (this is the South Australian practice). Notice of the spouse's election to acquire the property should be given to any other administrator and every person who is entitled to a share of the estate. The administrator should not be permitted to dispose of property while there are proceedings for the Court's authorisation pending, or until the spouse has elected not to purchase the property; or the time to make an election has expired; or the proceeds are needed as a last resort to satisfy the intestate's liabilities; or the property is perishable or likely to decrease rapidly in value.[146] A spouse who is a minor should be able to make an election to purchase any property from the estate.[147] If the spouse is not otherwise *sui juris*, a decision should be made according to the guardianship laws of the particular State.

5.1.7 The consensus of opinion at a forum of Adelaide succession lawyers was that the spouse's preferential right should not be extended to all property. They considered the current South Australian position satisfactory, except for the onerous stamp duty liability incurred by a spouse who wishes to purchase the intestate's interest in the home. Two others who sent written submissions were of the same opinion. Three others and some Trust Officers thought the statutory right should be extended, subject to protection of the rights of descendants.[148] The Law Society and the Legal Services Commission did not comment.

5.1.8 Those who opposed the extension of the right, and also some Trust Officers, were concerned that the Committee's proposal would open the door for 'cherry picking' with serious detriment to the value of other assets of the estate, and in some cases serious detriment to the ability of other members of the family to carry on the family business. This was mentioned particularly in relation to farming families, but also other businesses, Trust Officers mentioning as an example the unfairness of the spouse taking the best part of a farm and thereby leaving an unviable area of land. It was pointed out that many family businesses of all types are conducted through family trusts and other corporate structures and giving the spouse a right to purchase all the shares or a controlling interest would thereby give the spouse effective control of significant estate assets. The Committee's remedy of applying for a court order to prevent the spouse purchasing assets was seen as less than ideal because of the cost, risk and bad feeling engendered by litigation. Another reason given is that it could deprive the intestate's children of the ability to

143 *Succession Act 2006* (NSW) ss 115(5), (8); *Intestacy Act 2010* (Tas) s 16(5).

144 NSWLRC, above n 11, Recommendations 9–22.

145 Ibid Recommendation 19 (paraphrased above).

146 Ibid Recommendation 21.

147 The Committee said it was not clear whether a minor could make an election in Queensland and South Australia: ibid [5.48].

148 Professor Vines and two lawyers supported the recommendation, subject to protection of descendants' interests. One lawyer said many wills contain a clause to allow beneficiaries to purchase property from the estate.

take as part of their share family heirlooms or items of special economic or sentimental value to them, a matter that is more likely to be of importance when they are children of another relationship. An experienced lawyer who opposed extending the right said:

> The spouse will always have the option to purchase at auction on the basis that a careful executor would take the precaution of auction in the event of differences between beneficiaries.

5.1.9 Extending the right to any property would eliminate doubt about the extent of the curtilage or land around the home that is included in the right to acquire the home, an issue that does not arise for city and town homes, but can arise when the home is part of business premises or on a farm.[149] The other reasons given were that it would give the spouse greater flexibility and that some wills include a clause permitting beneficiaries to purchase estate assets.

5.1.10 In summary, the opinion of consultees was divided, but marginally in favour of not extending the right. The Institute considers that the arguments for not extending the preferential statutory right to include all property are the more persuasive.

5.2 Subsidiary provisions

5.2.1 Consultees did not express concerns about the 'machinery' aspects of the Committee's recommendations as outlined above,[150] except as summarised below.[151] There is, however, serious concern about the imposition of stamp duty on the transfer of the intestate's interest in the home to the surviving spouse.[152]

Restriction on disposal of the intestate's interest pending the making of an election

5.2.2 Preventing the administrator from disposing of the intestate's interest in the home together with the spouse's right to continue to live there until he or she makes an election or the time for electing has expired, or he or she has moved out, is both humane and necessary to protect the spouse's legal right.[153] If the Committee's recommendation for a statutory provision requiring the Court's authorisation in certain circumstances is accepted, the restriction on disposal will need to be extended to include the time when proceedings are pending. If the spouse's right to acquire property of the estate is extended to any property, then it would be necessary to prevent the administrator disposing of other property in the same way, but with exceptions being (a) when it is necessary to meet liabilities that are due, and (b) when the property is perishable or otherwise likely to decrease rapidly in value.

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149 See, for example, *Public Trustee v O'Donnell* (2008) 101 SASR 277, a tragic case that was much in the minds of Trust Officers. However, they indicated satisfaction with the decision of the Court.

150 See above [5.1.6].

151 See below [5.2.4], [5.2.7]–[5.2.8].

152 See below [7.4.1]–[7.4.9].

153 *A & P Act* s 72M.

Time

5.2.3 The *A & P Act* requires the spouse to make an election to acquire the intestate's interest in the home within three months of a grant of letters of administration if the spouse is the administrator, or in any other case within three months of the spouse being served with notice to make an election, or such longer period as the Court may allow.[154] This is consistent with the Committee's recommendation.

5.2.4 Some consultees thought three months from a grant of administration or notice was long enough. Others, including consensus at a meeting of Adelaide lawyers, thought this was too short, especially when the surviving spouse needs to obtain a loan to pay for the difference between the value of the intestate's interest and the spouse's share of the estate. They thought six months would be preferable. Another suggestion was three months unless the spouse needed to obtain a loan, in which case it should be six months.[155]

5.2.5 Bearing in mind that there will be some time between the death and the grant of letters of administration, that the time can be extended if the entitled descendants agree or by court order, and that Victoria, NSW, Tasmania and Queensland also give three months, the Institute concludes that there should be no change to the existing three month period, despite the contrary view of some very experienced consultees.

Valuation

5.2.6 The Model Bill is drafted in a way that would require valuation of the home by a licensed land valuer in every case.[156] This is not what the Committee recommended when it said in 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.'

5.2.7 There was resistance from country lawyers to compulsory valuation. One such experienced lawyer said: 'No, on the basis that some parties might actually agree and, if they do not, an administrator would fail to engage a licensed valuer at their peril.'

5.2.8 Lawyers in Mt Gambier opposed compulsory valuation because of unnecessary cost when the family agree, in some cases lack of available funds to pay a valuer, sometimes a lack of impartiality in a small community, and difficulty of obtaining a competent valuer to value businesses. On the other hand, Trust Officers said they always obtained a valuation and it should be compulsory.

5.2.9 The Institute sees no need for compulsory valuation of the home (or other property if the spouse's right to acquire is extended) *if* all members of the family who are entitled to a share are *sui juris* and agree about the price the spouse should pay.

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154 Ibid s 72L(2).

155 This was suggested by one or two lawyers at a meeting in Mt Gambier without any disagreement being expressed by others.

156 Model cl 2(3).

Notice of election to purchase

5.2.10 In South Australia, a spouse who is not an administrator must give the administrator written notice of intention to purchase and a spouse who is an administrator must give notice to the Public Trustee.[157]

5.2.11 The Committee recommended that if the spouse is an administrator, the spouse should give written notice to each person who is entitled to share in the estate.[158] Under South Australian law this would include notice to the Public Trustee if there are descendants of the intestate who are not *sui juris*. Consultees who commented on this agreed with the Committee.

Payment of outgoings during occupation

5.2.12 Rates and other outgoings on a home that is owned by the intestate are liabilities of the estate until it is sold, whether to the spouse or someone else. Some consultees said that despite this, the spouse often pays the outgoings while he or she remains in the home.

5.2.13 The Committee did not make any recommendation about this.

5.2.14 In light of recent legislation in British Columbia that requires the spouse to pay the outgoings on the home pending acquisition or vacation, the Institute asked whether this should be required in South Australia.[159] The British Columbia Law Reform Commission thought this appropriate to protect the interests of the intestate's descendants. The Institute received only one direct response and it was 'yes'. However, it appears that this is not a practical problem in South Australia.[160]

5.2.15 The Institute concludes that changing the current law is not warranted.

Revocation

5.2.16 The Committee recommended that the spouse should be able to revoke an election to acquire the intestate's interest in the home at any time before the transfer of the property without the consent of any other person.[161] The *A & P Act* is silent on this point.

5.2.17 There were only two direct responses to a question about this. One was that the spouse should not be able to revoke an election and the other that the spouse should be able to do so. The reason given for permitting revocation was that the spouse, having elected to purchase, might find that he or she cannot raise the money required for settlement.

5.2.18 The Institute considers that a spouse should be able to revoke an election, but should have any costs incurred by the estate in giving effect to the election deducted from his or her share of the estate.

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157 *A & P Act* s 72L(3).

158 NSWLRC, above n 11, Recommendation 11; model cl 19(2).

159 *Wills, Estates and Succession Act 2009* (BC).

160 In at least one other comparable jurisdiction the spouse must pay outgoings as a condition of the right to continue to reside in the home.

161 NSWLRC, above n 11, Recommendation 15.

Recommendation 27

A surviving spouse should continue to have a statutory right to elect to purchase the intestate's interest in the home in which he or she was living when the intestate died, as is presently provided by s 72L(1) of the *A & P Act*. The description of what the spouse may purchase should continue to be described as that 'in which the spouse or domestic partner of the intestate was residing at the date of the intestate's death'.

Recommendation 28

If there is more than one spouse residing in the same home, then neither should have a preferential statutory right to acquire the intestate's interest in it, but the spouses should be permitted to agree or apply for an order of the Court concerning acquisition of the intestate's interest.

Recommendation 29

Court approval should be required to acquire the intestate's interest in the home if it forms part of a larger aggregate and the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult, as recommended by the Committee.

Recommendation 30

The spouse's preferential right to purchase assets of the estate should not be extended to other property.

Recommendation 31

A spouse who is a minor should be able to make an election. If, for other reasons, the spouse is not *sui juris*, the spouse's guardian should be able to make an election in accordance with South Australian legislation relating to the guardianship and management of the affairs of persons under disability.

Recommendation 32

The spouse should be entitled to continue to reside in the home pending the making of an election, subject to the rights of a mortgagee, chargee or other creditors.

Recommendation 33

The spouse should continue to have three months from the grant of administration if the spouse is an administrator or three months from being served with a notice to elect to make an election or such longer time as the Court allows.

Recommendation 34

The price should continue to be the market value of the intestate's interest in the property at the date of death.

Recommendation 35

The spouse should continue to be able to satisfy the price by first having the amount to which he or she is entitled from the estate reduced by the value of the interest with any balance being paid from other sources.

Recommendation 36

The administrator should be forbidden to sell the home until the spouse has exercised the right to elect to acquire it, or the time for making an election has expired, or the home has ceased to be the spouse's ordinary place of residence, or any proceedings before a court affecting the spouse's election have terminated, or the Court has permitted sale.

Recommendation 37

Valuation of the home by a licensed valuer should be required only if there is no agreement between the members of the intestate's family who are entitled to a share of the estate, or if a person who is entitled is not *sui juris*.

Recommendation 38

A spouse who is not an administrator should be required to give written notice to the administrator of the election to acquire the intestate's interest. A spouse who is an administrator should be required to give written notice of election to any other administrator and to all other persons who are entitled to a share of the estate, and if any are not *sui juris*, to the Public Trustee or other court or tribunal appointed administrator or manager of the affairs of the person under disability.

Recommendation 39

The spouse should be entitled to revoke an election to purchase the intestate's interest in the home up until the transfer of that interest. Any costs incurred in giving effect to the revoked election should be deducted from the spouse's share of the estate.

Part 6 – Survivorship[162]

6.1.1 At common law, when the order of death of two people who are entitled to inherit from each other *is* known, the estate of the first to die passes to the second to die and forms part of the estate of the second. The estate of the second, as enlarged by inheritance from the first, is then distributed either according to the will of the second, or according to the rules of intestacy to the relatives of the second.[163] If the order of deaths *is not* known, each is treated as not having survived the other and the estate of each is administered accordingly.[164]

6.1.2 In South Australia, the common law was reformed so that when spouses die within 28 days of each other, their estates are distributed as if neither had survived the other (see s 72E of the *A & P Act*). But s 72E applies only to the deaths of spouses and only when at least one of them is intestate, so for example, it would not apply when a parent and child died within the specified time.[165] The reasons for having a wider survivorship rule were outlined by the Institute in its Issues Paper.[166] Extension of this provision to other relatives who are entitled to inherit was recommended by the Law Reform Committee of South Australia in 1985, but has not been acted upon.[167]

6.1.3 The Committee recommended:

> 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 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*.[168]

6.1.4 NSW and Tasmania have enacted the model clause giving effect to this. A differently drafted clause to the same effect is included as cl 70C of the Victorian Bill before Parliament. The ACT and Queensland survivorship provisions also extend beyond spouses, as do those of New Zealand and some Canadian Provinces.[169]

6.1.5 There was strong support from consultees for accepting the Committee's recommendation 40. There was recognition of the fact that relatives other than spouses die in circumstances in which it is not known who survived whom or in which they die within a short time of each other, for example in motor vehicle, aeroplane and boating accidents, terrorist activity, murders and suicides.[170]

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162 See SALRI, above n 5, 132–142, [260]–[277].

163 Ibid Diagram 23 (examples 1 and 3).

164 *Underwood v Wing* (1854) 4 De G M & M 633, 43 ER 655; *Wing v Angove* (1860) 8 HLC 183; *Re Trenaman* [1962] SASR 95. There is no statutory presumption in South Australia that the younger survived the elder.

165 Many testators include a clause in their wills about what is to happen if a beneficiary dies at the same time as or within a specified period of the testator.

166 SALRI, above n 5, 137–138, [270] and illustrated by several parts of Diagram 21.

167 Law Reform Committee of South Australia, *Relating to problems of proof of survivorship as between two or more persons dying at about the same time in one accident,* Report No 88 (1985) 22–23.

168 NSWLRC, above n 11, Recommendation 40; Model cl 4(2) and (3).

169 In England, the survivorship provision is limited to spouses: *Administration of Estates Act 1925* s 46.

170 For example, recently parents and an adult son disappeared on a fishing trip and in *Re Trenneman* [1962] SASR 95, a mother and adult son died from gas poisoning.

6.2 Jointly owned property

6.2.1 When joint owners of real property have died in accidents at the same time or when the order of their deaths is not known, the Court has directed the Registrar-General to record on the certificate of title that the executor is the registered proprietor of an undivided moiety in the land in each of the estates.[171] The result is that half the value of the property is distributed according to the will of each of them or under the applicable rules of intestacy.

6.2.2 However, when the order of deaths of joint owners is known, the result can be unfortunate and not what either would have wished. The last to die becomes the sole owner of the property by the real property doctrine of survivorship and the property then passes according to the will of the second or to the relatives of the second under the rules of intestacy. This occurs in both testate and intestate estates.

6.2.3 The ACT, Western Australia and New Zealand, and some Canadian Provinces require that the property be dealt with as if each deceased joint tenant owned a share (that is, were tenants in common), and a share of the property goes to the relatives of each of them.[172] The South Australian Law Reform Committee, as far back as 1985, considered that this reform was desirable and should be adopted.[173]

Recommendation 40

Consistent with the Committee's recommendation —

(a) A 30 day survivorship period should apply to all persons entitled to take on intestacy.

(b) A 30 day survivorship rule should apply to persons born after the death of the intestate but who were *en ventre sa mere* when the intestate died.

(c) The 30 day survivorship rule should not apply if it would result in the state vesting in the Crown as *bona vacantia*.

Recommendation 41

The *Probate Rules* of Court should be varied to change the time before which an application for a grant of probate or letters of administration can be made from 28 days to 30 days.

Recommendation 42

When property is owned jointly and all joint tenants die within 30 days of each other, the property should be treated as if they were tenants in common so that an equal share falls into the estate of each of them. This should apply to both intestate and testate estates.

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[171] In *Graham William Dawson (Deceased) and Teresa Veronica Dawson (Deceased)* [2016] SASC 89, 29 June 2016 a husband and wife died at about the same time in a motor vehicle accident. Master Dart reviewed several reported and unreported South Australian decisions. The most recent case at the time of writing is *In the Estate of Siegfried Peter Thiel and Celia Mary Thiel (Deceased)* [2017] SASC 1, 25 January 2017 in which a husband and wife died in a road accident decided by Stanley J.

[172] *Administration and Probate Act 1929* (ACT) s 49Q; *Property Law Act 1969* (WA) s 120(d); *Simultaneous Deaths Act 1958* (NZ) s 3(d); and, for example, *Survivorship Act 1993* (Saskatchewan) s 8. The effect of these provisions is to sever the joint tenancy.

[173] Law Reform Committee of South Australia, above n 167, 28. The Committee was unanimous in this.

Part 7 – Other Issues

7.1 Gifts to be brought into hotchpot – s 72K of the *A & P Act*[174]

7.1.1 Section 72K of the *A & P Act* requires certain settlements, *inter vivos* gifts and testamentary gifts to be brought into hotchpot, that is, taken into account when calculating a beneficiary's share of the intestate's estate.

7.1.2 Hotchpot provisions have their origins in the *Statute of Distributions 1670* (England). They were designed to equalise benefits received by the deceased's children by requiring them to account in the distribution of the estate for any settlements or advancements.[175] Section 72K of the *A & P Act* is a modification of that statute and follows a recommendation of the South Australian Law Reform Committee in 1974.[176] Section 72K both extends and limits earlier hotchpot rules. It eliminates or reduces some of the difficulties encountered in the operation of earlier rules.[177]

7.1.3 The first limb of s 72K applies to *inter vivos* gifts. All beneficiaries (other than a spouse) must bring into account the value of any gift or settlement of $1000 or more made for their benefit by the intestate within five years immediately before the intestate's death. The value of the gift or settlement is its value as at the date it was given. The second limb applies to testamentary gifts. When a person dies partially intestate, any testamentary gift of $1000 or more in favour of any person (including the spouse) who is entitled to a share of the intestate part of the estate must be taken into account. The application of these rules can be negated by evidence of contrary intention of the deceased, either expressed or apparent from the circumstances.

7.1.4 In New Zealand hotchpot applies only to partially intestate estates and only to gifts made to the spouse by the will. Testamentary gifts are set off against the spouse's share of the intestate part of the estate.[178] Thus the New Zealand legislation does not permit the spouse to take both the benefits given by the deceased's will plus the full spouses' entitlement on intestacy.

7.1.5 Queensland, Western Australia, New South Wales and Tasmania repealed their hotchpot provisions in 1968, 1976, 1977 and 2010 respectively.[179] The ACT, Northern Territory, Victoria and some of the Canadian Provinces still have hotchpot provisions or apply common law hotchpot, but they are not the same as s 72K of South Australia's *A & P Act*. The Victorian

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174 See SALRI, above n 5, 121–131, [246]–[259].

175 Originally hotchpot applied only to *inter vivos* advancements to children whose fathers died totally intestate, and its purpose was to bring about equality between legitimate children (other than the heir at law to whom certain estates descended by operation of other laws). The requirement for children of an intestate father to take into account advancements to them during their father's life was recorded as far back as the 13th century: William Holdsworth, *History of English Law* (5th ed, 1942) vol 3, 550–552.

176 Law Reform Committee of South Australia, above n 3, 8–9.

177 See I J Hardringham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, 1989) 443–444 for a more detailed explanation.

178 *Administration Act 1969* (NZ) s 79. The value of personal chattels is excluded. Benefits acquired under the will include a beneficial interest acquired by virtue of the exercise by the will of a general power of appointment.

179 England abolished hotchpot in 1995, Alberta in 2010 and British Columbia in 2014.

Attorney-General stated that the Bill before Parliament would 'repeal the common law hotchpot rule'.[180]

7.1.6 The Committee recommended:

> There should be no provisions that take account of benefits given during the intestate's lifetime[181]

and

> There should be no provisions that account for benefits received under the intestate's will.[182]

7.1.7 The Institute asked whether hotchpot requirements were largely ignored, as had been suggested during preliminary consultation. The only written answer was from a very experienced succession lawyer who said they were largely ignored, 'because of the difficulty of tracking the payments and the inherent animosity in doing so.'

7.1.8 As to whether hotchpot should be retained, there were some differences of opinion in the Institute's consultation.

7.1.9 Arguments put forward by consultees who favoured abolishing hotchpot were (a) the purpose of intestacy law is to distribute the assets at time of death, not to remedy unequal gifts during the deceased's lifetime, (b) a person should be able to dispose of their assets as they wish during their lifetime, including by giving high value gifts, without affecting the distribution of their estates, (c) it should be presumed that the deceased knew that giving gifts would reduce his or her estate, (d) hotchpot could have the effect of changing what was intended to be a gift into a loan, (e) it could cause the breakup of business assets, (f) it creates unnecessary complexity in administration, (f) it relies on the memory of each family member, (h) it is arbitrary in that it is unlikely the deceased would have known whether he or she would die within five years, (i) the value of the gift might have changed substantially between the time it was given and the intestate's death, and (j) it can cause friction and disputation among family members. Trust Officers described hotchpot as 'awkward and unhelpful'.[183]

7.1.10 On the other hand, the Mount Gambier consultation indicated a view that hotchpot should be retained, as intestacy can arise unexpectedly leaving an unintended inequality between children. Two law students who favoured keeping hotchpot said it was a means of achieving equality, particularly between the intestate's children, but suggested that only gifts of a much higher value be taken into account and $5000 or $10 000 were suggested.[184] Another said that if hotchpot were retained it should be limited to gifts within one year of the intestate's death.

7.1.11 The Institute concludes that opinion and arguments for abolishing hotchpot in relation to *inter vivos* gifts outweigh those for keeping it. The Institute notes that *inter vivos* gifts can be a relevant fact in family provision proceedings.

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180 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 November 2016, 4540–4541.

181 NSWLRC, above n 11, Recommendation 43 and model cl 41(a).

182 Ibid Recommendation 44 and model cl 41(b).

183 The current s 72K of the *A & P Act* has been criticised: see Simon Palk, 'Hotchpot – or Hotchpotch' (1980-81)4 *Adelaide Law Review* 506.

184 In the ACT, the amount is $20 000: *Administration and Probate Act 1929* (ACT) s 49AB.

7.1.12 It is not clear whether testamentary gifts should be brought into hotchpot in partially intestate estates. Almost all of the reasons given for abolishing hotchpot are relevant only to gifts made during the deceased's lifetime. Therefore, it is not clear to the Institute whether these consultees considered that testamentary gifts should also be ignored in cases of partial intestacy.

7.1.13 One consultee who did distinguish between total and partial intestacy said that hotchpot could be abolished for totally intestate estates, but it should be retained for partially intestate estates, as otherwise the spouse receives double benefits — those under the will plus the full spouse's entitlement (or so much of it as can be paid from the intestate part of the estate) — at the expense of the children. The Institute considers that this reasoning is applicable to other relatives, for example, a gift by will to one of several children.

7.1.14 Taking into account benefits received under the will when distributing the intestate part of an estate can be illustrated by an example. Assume that Ingrid leaves an estate the total value of which is $600 000. She made a will using a will kit by which she leaves specific gifts to her husband that are worth $400 000 and a specific gift worth $50 000 to C1, one of her three children, but does not give any direction as to the residue, and so $150 000 of her estate is to be distributed according to the rules of intestacy. Now assume that the rules of intestacy entitle the spouse to a preferential legacy of $100 000 and half of any residue and that there is no requirement to bring testamentary gifts into account. Ingrid's husband would receive $550 000 (testamentary gift plus spouse's share of intestate estate), C1 will receive the testamentary gift of $50 000 and the other two children will receive nothing. By comparison, if hotchpot is applied to testamentary gifts and Ingrid has not expressed a contrary intention, Ingrid's husband would receive in total $425 000, and each child would receive $108 333.[185]

7.1.15 Very few people would make a will with the intention of dying partially intestate and so an argument against applying hotchpot to partially intestate estates is that it can interfere with the testator's intentions as expressed in the will. Another argument, but of less weight, is that a value has to be fixed for any testamentary gifts *in specie* which adds to the cost of administration. The contrary argument is that the testator is likely to have made a different will if he or she knew that the will would not effectively dispose of the whole estate.

7.1.16 Hotchpot was debated at length by the Institute's Advisory Board. Eventually and with some hesitation, it advised abolition of hotchpot for both totally intestate and partially intestate estates. However, it was also of the opinion that *if* hotchpot is retained for both or either, then gifts of less than $50,000 should be ignored.

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[185] Using a method provided during consultation for distributing the intestate part of the estate the calculation would be:

Value of estate	$600 000
Add value of intestate part of estate	$150 000
	$750 000
Apply rules of intestacy to $750 000	
Husband takes $100 000 plus ½ balance	$425 000
Children share of remaining ½ ($108 333 each)	$325 000
Now deduct the share husband C1 take under the will	
Husband - $425 000 less $400 000 under will	$25 000 from the intestate estate plus gift by will ($425 000)
C1 - $108 333 less $50 000	$58 333 from intestate estate plus gift under will ($108 333)
C2 share on intestacy	$108 333
C3 share on intestacy	$108 333

Recommendation 43

Section 72k(1)(a) of the *A & P Act* requiring *inter vivos* gifts within the five years before the intestate's death to be brought into hotchpot, should be repealed.

Recommendation 44

In the absence of a clear preference, the Institute recommends repeal of s 72K(1)(b) of the *A & P Act* that applies hotchpot rules to partially intestate estates, consistently with abolition of all forms of hotchpot on intestacy in the Model Bill and the law in four (and probably soon five) other States.

7.2 Forfeiture[186]

7.2.1 The common law forfeiture rule embodies the principle of public policy that a person who unlawfully kills another should not obtain a benefit from committing the crime.[187] The Institute will report separately in due course to the Attorney-General about any reform of this common law rule. There is, however, one aspect that needs to be considered specifically in the context of intestacy.

7.2.2 The forfeiture rule operates in this State as if the killer had never existed. This means that the children and remoter descendants of the killer are also disqualified from inheriting any of the deceased's estate. So, for example, if a son murdered his mother, his children would be disqualified from sharing in their grandmother's estate, even though they had nothing to do with the murder.

7.2.3 The Committee recommended that the law be reformed so that descendants are not automatically disqualified. The estate should be distributed as if the killer had died *immediately before* the intestate (see model cl 40(b)).

7.2.4 Consultees strongly supported this recommendation for reform.

Recommendation 45

The law should be reformed so that descendants of a killer are not automatically disqualified from sharing in the victim's estate by operation of the forfeiture rule. The estate should be distributed as if the killer died immediately before the victim.

186 See SALRI, above n 5, 109–113, [222]–[228].

187 See *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147 and *Helton v Allen* (1940) 63 CLR 691, 709. 'A person who unlawfully kills another is disqualified from taking anything under the victim's will, under the rules of intestacy, from an insurance policy on the life of the victim, or otherwise obtaining an advantage.' See generally VLRC, *Forfeiture Rule Report* (2014).

7.3 Disclaimed interests[188]

7.3.1 No one can be forced to accept an inheritance. There may be personal or altruistic reasons for disclaiming an inheritance or it might be done to resolve a dispute or to avoid loss of social welfare benefits.[189] In South Australia, the common law applies so that a person who disclaims an inheritance is treated as never having existed. This means that the descendants of the disclaiming person are automatically disqualified from inheriting. (This is like the automatic disqualification of the descendants of a person whose interest is forfeited because he or she unlawfully killed the intestate.)

7.3.2 The Committee recommended that the law be reformed so that a person who disclaims an interest is treated as having died immediately before the intestate with the result that the disclaimed entitlement passes to their descendants.[190] Clause 40 of the Model Bill deals with both forfeited and disclaimed interests and covers disqualification 'for any reason'.

7.3.3 There was strong support and no dissent for reforming the law of intestacy by accepting this recommendation.

7.3.4 The Institute asked several subsidiary questions:

> *To what extent should the State, through the law, curtail a person's freedom to influence who receives an inheritance to which he or she is entitled, but chooses to disclaim?' In other words, 'should a person be able to disclaim in favour of a specified relative?' and 'Should the law allow a person to disclaim on behalf of their descendants as well as themselves, so that the disclaimed interest goes to other relatives who would be entitled to it under the rules of intestate distribution (for example, a more needy relative of the intestate) as recommended by the Scottish Law Commission.*[191]

7.3.5 There was little response to these questions. Two students said a person should be able to disclaim in favour of a particular relative, but others said — 'no'.[192]

7.3.6 The Institute also asked whether a person should be able to disclaim a part of their entitlement. The one written submission was in favour. No consultee dissented.

Recommendation 46

When a relative disclaims his or her interest, the estate should be distributed as if the disclaiming relative had died immediately before the intestate.

Recommendation 47

A relative should be permitted to disclaim part only of his or her entitlement.

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188 See SALRI, above n 5, 113–117, [229]–[238].

189 See *Townson v Ticknell* (1819) 3 B & A 31; 106 ER 575, 576 (Abbott CJ): 'The law is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge, and if it turns out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift.'

190 NSWLRC, above n 11, Recommendation 42.

191 Scottish Law Commission, *Report on Succession*, Report No 215 (April 2009) 29–30 [2.50]–[2.54].

192 One said 'it is not as if descendants of a person disclaiming are being deprived of an entitlement, since they were never in a position to inherit anyway (although maybe indirectly once the would-be disclaimer died and left the original inheritance as part of their estate'.

7.4 Stamp duty

On transfer of intestate's interest in the home to the surviving spouse[193]

7.4.1 Most of the lawyers to whom the Institute spoke raised the topic of *ad valorem* stamp duty on the transfer of the intestate's interest in the home to a surviving spouse who exercises his or her statutory right to purchase it. It was seen as a harsh, unjust and irrational impost.

7.4.2 *Ad valorem* stamp duty is *not* payable on the transfer of property pursuant to a will or the laws of intestacy, not being a transfer on sale.[194] Thus, if the intestate left no issue so that the spouse takes the whole estate, including the intestate's interest in the home, the spouse does not pay *ad valorem* stamp duty. Nor is it payable when the spouse receives the home under the will of the deceased, nor when the intestate and spouse owned the home as joint tenants, nor when the property is transferred pursuant to a court order, nor when it is transferred in accordance with a family law agreement under the *Family Law Act*,[195] nor when the home is transferred to the spouse or former spouse following the irretrievable breakdown of the relationship, nor when it is transferred pursuant to a certified domestic partnership agreement or property adjustment order under the *Domestic Partners Property Act*.

7.4.3 But when a surviving spouse exercises his or her statutory right under the *A & P Act* to elect to purchase the intestate's interest in the home, *ad valorem* stamp duty must be paid on the difference between the value of the home and the spouse's entitlement under the rules of intestacy. A spouse who has an interest in the home as tenant in common with the intestate, pays stamp duty on the value of the intestate's part interest, and a spouse who has no proprietary interest in the home (more often than not the woman) pays stamp duty on the full value.

7.4.4 This penalises and discriminates irrationally against the spouse and dependent children of intestates. Ironically, although the policy reason for giving the surviving spouse a statutory right to acquire the intestate's interest in the home is to enable the spouse and any dependent children to continue to live there, the person most likely to be disadvantaged by the incidence of stamp duty is the spouse with young children and the greatest need to acquire the intestate's interest in the home or an elderly widow or widower.

7.4.5 The amount of State revenue that would be lost by reforming this would be small in the overall scheme of stamp duty.

Recommendation 48

The *Stamp Duties Act 1923* (SA) should be amended to exempt from *ad valorem* stamp duty a transfer to the surviving spouse of the intestate's interest in the home in which the spouse was ordinarily resident at the time of the intestate's death pursuant to the exercise of the spouse's statutory right under the *A & P Act* to elect to acquire that interest.

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193 See SALRI, above n 5, 118–119, [239]–[240] and the examples and calculations stated there. The calculations were verified by Revenue SA when the Issues Paper was being written.

194 *Stamp Duties Act 1923* (SA) s 71(5)(h).

195 Ibid s 71CA. 'Family law agreement' is defined as 'a maintenance agreement, a financial agreement, or a splitting agreement. These terms are defined in the *Family Law Act*.

On disclaimed or assigned interests[196]

7.4.6 Sometimes families avoid the results of the rigid rules of intestacy by a member disclaiming his or her inheritance, or by assigning his or her right to a share of the estate to another relative. If the beneficiary disclaims, *ad valorem* stamp duty is payable on the full value of the disclaimed interest. If the beneficiary assigns his or her rights to another person, stamp duty is payable on the value that each assignee receives (ie on an *ad valorem* basis).[197]

7.4.7 This can be an impediment to family members redistributing the estate in a manner they consider is more appropriate for their family. The Institute was told that on occasions it is less expensive for parties who are not really in dispute to issue proceedings under the *Family Provision Act* with a view to obtaining a court order. Thus, paradoxically, the imposition of *ad valorem* stamp duty can encourage the issue of legal proceedings and the associated cost to the State.

7.4.8 As one consultee said: 'Why should refusal of a gift or a statutory entitlement attract stamp duty?'

7.4.9 At a more theoretical level, if it is correct that a disclaimer operates to prevent the vesting of any interest in the person disclaiming, as the Supreme Court of South Australia has ruled in at least two reported cases, the current South Australian Act appears to be inconsistent with legal principle, at least in so far as it applies to early disclaimers.[198]

Recommendation 49

Instruments disclaiming an interest in an intestate estate or assigning or transferring an interest in the estate to another of the intestate's relatives should be exempt from *ad valorem* stamp duty.

7.5 Superannuation

7.5.1 Most consultees talked about the consequences of compulsory and voluntary superannuation. This was of much less importance in 1974 when South Australian intestacy laws were last reviewed. At that time many people had no superannuation and associated death benefit entitlements, and all or a much greater proportion of their wealth fell into their deceased estates. Nowadays, these entitlements may go directly to the spouse or dependants and so distort the application of the rules of distribution on intestacy and also testamentary dispositions.

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196 See SALRI, above n 5, 119–121, [241]–[245] and the examples and calculations specified there. Note also that the calculations were checked by Revenue SA when the Issues Paper was being written.

197 Section 71AA provides:

'(1) This section applies to an instrument under which a person who is, or may be, entitled to share in the distribution of the estate of a deceased person—

(a) disclaims an interest in the estate; or

(b) assigns or transfers an interest in the estate to another.

(2) An instrument to which this section applies is taken to be a conveyance of property operating as a voluntary disposition *inter vivos* (whether or not consideration is given for the transaction).

(3) For the purpose of calculating ad valorem duty payable on an instrument to which this section applies, the value of the interest subject to the conveyance is to be determined as if the estate had been distributed and the interest were an interest in possession.'

198 See, for example, *In the Estate of Simmons* (1991) 56 SASR 1; *In re Probert v Commissioner of State Taxation* [1998] 72 SASR 48.

7.5.2 As superannuation is highly regulated by Commonwealth legislation, the Institute is of the opinion that there is relatively little that the South Australian Parliament can do about this, except *perhaps* in the context of superannuation for South Australian public sector employees and officers.

7.5.3 However, consideration could be given to South Australian intestacy legislation requiring death benefits received by the spouse or dependent children of the intestate to be set off, either wholly or partially, against their share of the intestate estate. The Institute has not consulted on this and has not formed an opinion about whether it has merit.

7.5.4 Therefore, the Institute makes no recommendations about the treatment of superannuation in the context of intestacy in this Report.

7.6 When the result is unfair: the *Inheritance (Family Provision) Act 1972*[199]

7.6.1 Section 72N of the *A & P Act* preserves the right of a person who comes within the classes of permitted applicants to make a claim for provision out of the estate.[200]

7.6.2 The purpose of the *Family Provision Act* and equivalent legislation in other States is to prevent members of a deceased testator or intestate being left impoverished and reliant on social security or charity in circumstances in which they could have been better provided for out of the deceased's estate. The legislation confers a discretionary power on the Court to make orders that have the effect of over-riding the terms of the will or the rules for the distribution of intestate estates, but with limitations. In the *Estate of Bridges (deceased)*, Bray CJ said:

> In the case of an intestacy, as much as in the case of a will, it seems to me that Parliament has indicated its intention that the scheme of things set up by a testator in his will, or by the law of the State in the event of intestacy, shall be interfered with so far as is necessary to make adequate provision for the proper maintenance, education and advancement of the claimants specified in the Act, but no further. It is true that when the persons entitled on intestacy are the surviving spouse and legitimate children of the deceased as opposed to collateral relations the speculation that the deceased may have intended to die intestate may have more cogency, but nevertheless I repeat that I think the correct approach is as I have said. I think that Parliament no more intended to grant an unlimited liberty to recast dispositions resulting from the law of intestacy on moral grounds than it did to give a similar liberty to recast dispositions made by will.[201]

7.6.3 All consultees considered that this right should be retained for intestate estates. They were of the opinion that it provides the most appropriate mechanism for ameliorating the unfair results that inevitably arise when there is a fixed set of statutory distribution rules. At the same time, they considered that some changes should be made to the *Family Provision Act*. The Institute will examine the role and operation of that Act and recommend any reforms in its forthcoming Report.

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199 See SALRI, above n 5, 145–146, [283]–[286] and 160–161, [316]–[320].

200 See *In the Estate of the late Anthony Marras* [2014] NSWSC 915 where it was argued that the statutory entitlement of the surviving spouse 'was irreducible' and could not be used to make provision for other relatives of the intestate under the NSW *Family Provision* legislation. Bergin CJ in Eq rejected that argument.

201 (1975) 12 SASR 1.

7.6.4 It was notable that consultees considered that the *Family Provision Act* was the best way of dealing with step-children of the intestate and, by implication, step-parents. At present step-children who were wholly or partly maintained, or who were legally entitled to be so maintained, by the deceased immediately before his or her death have standing to make a claim.[202] There was some support amongst consultees for widening the circumstances in which step-children could claim. This issue will be the subject of further consideration in the Institute's forthcoming Report examining the role and operation of the *Family Provision Act*.[203]

7.6.5 The Institute will also consider the possibility of including among the people who may make an application under the *Family Provision Act* persons to whom an Aboriginal intestate owes kinship obligations.

7.6.6 It has been suggested that the classes of people who may apply to the Court under the *Family Provision Act* might be wider for intestate estates than testate estates because in the latter case the deceased has expressed his or her intentions as to who is to benefit from the estate, whereas in the former the estate is to be distributed according to a set of arbitrary statutory rules of general application.

7.6.7 The Law Society observed:

> The Society considers that an alternative application of the *Inheritance (Family Provision) Act* (IFPA) may be a preferable approach to dealing with the potential or perceived injustices that exist rather than altering the current statutory formula.
>
> Given the variety of possible situations, and the fact that the deceased did not exercise his or her own decision making capacity by making a will, it might be appropriate to broaden the class of persons who could bring an action under IFPA in an intestate case as compared to a testate case.
>
> In an intestate estate the class of potential claimants might, for example, include any person for whom the deceased owed a moral obligation to provide. This value judgment is more appropriately exercised by the Court in the context of the specific circumstances of each case.
>
> We acknowledge that the relatively low value of most intestate estates means that, under the current IFPA regime, many of these claims would not proceed. Accordingly, this approach might require consideration of an alternative, less expensive, method of resolution.
>
> This may involve a reform of the current process within the Supreme Court for lower value estates. We are aware that the Institute is currently investigating dispute resolution mechanisms for lower value estates and we encourage the Institute to include this concept into its review.
>
> We also note that the Institute is planning to review the IFPA generally. We recommend that the review include consideration of this proposal, or of some other mechanism to more easily manage the difficulties caused when applying a statutory formula to a specific situation within the framework of the IFPA.

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[202] *Inheritance (Family Provision) Act 1972* (SA) ss 6, 7.

[203] It has been suggested that a step-child or step-parent could be given standing to claim when the step-parent had been in the position of in *loco parentis* to the step-child.

Recommendation 50

The *Family Provision Act* should continue to apply to wholly and partially intestate estates.

Recommendation 51

The Institute's forthcoming review of the *Family Provision Act* should include consideration of whether the classes of people who may apply for provision, or greater provision, from the estate under this Act should be different in some respects for intestate than for testate estates.

7.7 Obtaining cash without a grant of administration or probate[204]

7.7.1 During consultation about intestacy, opinion was sought about the provision of the *A & P Act* that enables ADIs to release without risk of liability up to $2000 from an intestate's account without production of letters of administration. In the meantime, in December 2016, the Institute released its Report, *Administration of Small Deceased Estates and Resolution of Minor Succession Disputes,* in which changes to ss 71 and 72 of the *A & P Act* were recommended.[205] The Institute refers to this Report, but includes a brief discussion in the present Report and makes a further recommendation for reform.

7.7.2 A person who administers an estate informally cannot give an indemnity on behalf of the estate because he or she lacks formal authority. They can give only their personal indemnity. Sections 71 and 72 of the *A& P Act* authorise the Treasurer and ADI's to pay small amounts or deliver property of small value, up to $2000, in certain circumstances without production of the formal authority of a grant of probate or letters of administration. The Treasurer or ADI are protected from liability, but the person who receives the money or property is not.

7.7.3 The Treasurer may direct payment to a spouse or domestic partner of the deceased (and, at his or her discretion, to any other person who appears to be entitled to it) of up to $2000 in wages or other money, owing to a deceased government employee (see s 71(a)). The Treasurer may direct payment of money up to $2000 or delivery of property up to a value of $2000 held by a public hospital for a person who died there to the surviving spouse or domestic partner or to any other person who is, in the opinion of the Treasurer, entitled to it (see s 71(b)). Payment or delivery may be made immediately.

7.7.4 ADIs are protected from liability for paying to the spouse or domestic partner of the deceased up to $2000 standing to the deceased's credit if probate or letters of administration are not produced within three months of the death.[206]

7.7.5 The figure of $2000 was set in 1975 and has not been increased despite the enormous change in money values in the last 42 years.[207]

7.7.6 The Institute recommended in its December 2016 Report, *Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*,[208] that the amount be increased to $25 000 and

[204] See SALRI, above n 5, 149–150, [293]–[294]; SALRI, above n 114, 22–24 [2.3.104]–[2.3.113].

[205] SALRI, above n 114, vi.

[206] *A & P Act* s 72.

[207] *Administration and Probate Amendment Act (No 2) 1975* (SA).

that the amount be automatically adjusted annually consistently with the *Administration and Probate Act 1958* (Vic).[209] It also recommended, consistently with the Victorian Act, that the provision should enable *any* person who holds money or personal property for a deceased person up to a value of $25 000 (adjusted annually) to pay or deliver it to *any* person who appears to be entitled to it. However, it should be noted that the *Banking Act 1959* (Cth) specifies an amount of $15 000.[210] A person who pays money or delivers property in good faith in accordance with this provision would be protected from liability.

Recommendation 52

Sections 71 and 72 of the *A & P Act* should be amended for all estates as proposed in Recommendation 5 of the Institute's December 2016 Report, *Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*. There should additionally be no statutory minimum waiting time before an ADI may pay to the apparently entitled deceased's spouse money up to $25 000 held on account of the deceased.

7.8 Intestacy of Indigenous Persons[211]

7.8.1 The Institute has been informed that many Aboriginal people do not make a will and this is consistent with other sources of information.[212] Some Aboriginal people leave estates of considerable monetary value, particularly if they have been employed or in business and accumulated superannuation and death benefit entitlements or have been successful artists.[213] If the deceased owned real property or certain other property, the estate cannot be dealt with informally. There are many Aboriginal people who have little estate, comprising items such as a motor vehicle, perhaps a firearm and a few personal items. The Institute was told that in the latter case the estate is usually informally distributed by elders.

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208 SALRI, above n 114, Recommendation 5, vi, 23–24 [2.3.112].

209 See ss 31A, 31B. These were enacted by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) and came into force on 1 January 2015.

210 Section 69B of the *Banking Act 1959* (Cth) provides:

'(1) If a depositor of an ADI dies, the ADI may apply an amount not exceeding $15,000 held by the ADI that was deposited or paid up on a withdrawable share by the deceased person:

(a) in payment of the deceased person's funeral expenses or debts; or

(b) in payment to the executor of the deceased person's will; or

(c) in payment to anyone else who is, in the ADI's opinion, entitled to the amount, having regard to the laws of probate and accepted practice for the administration of deceased estates.

The amount may be applied without production of probate, of the will or letters of administration of the estate.

(2) No action lies against an ADI for acting, or failing to act, under subsection (1).'

211 See SALRI, above n 5, 153–161, [299]–[320].

211 See ibid 152–160 [152]–[160].

212 Aboriginal Legal Rights Movement, Mr Frank Lampard OAM, Commissioner for Aboriginal Engagement and Mr Terry Sparrow. See also, for example, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death – Text and Cases* (LexisNexis Butterworths, 4th ed, 2013) [1.50]; Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2nd ed 2013) [10.16]; Prue Vines, 'Wills as Shields and Spears: the Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia' [2001] 5(13) *Indigenous Law Bulletin* 16; NSWLRC, above n 11, [14.6].

213 It has been suggested to the Institute, but not confirmed, that some elders may have control of large sums of money from mining or other activity on Aboriginal Lands and it has been suggested that the manner in which it is dealt with on the elder's death is not consistent.

7.8.2 The Committee recommended a special provision providing for an optional procedure for Indigenous people. Part 4 of the Model Bill sets out the procedure whereby a person claiming to be entitled to a share in the intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which the Indigenous intestate belonged, may apply to the Court for an order for distribution of the estate according to a scheme submitted to the court. Part 4 of the Model Bill is based on, but is not identical with legislation that has been in force now in the Northern Territory for more than 35 years.[214] NSW and Tasmania have enacted the model provisions.

7.8.3 The Institute has found only two judgments for cases in which an application was made under these special provisions.[215] The circumstances were very different in each case. In the first, the intestate was the last member of his clan and the scheme approved by the Court revolved around classification of relationships under the customary law of the Jawoyn people.[216] In the second case, the Aboriginal family of the intestate had lived in Sydney for 50 years. The intestate had been legally adopted by a non-aboriginal family as a baby, and as an adult he lost social contact with his adoptive family and found and developed over 20 years a social relationship with his biological half-sisters. The competition was between the intestate's adoptive sisters, who were the ones entitled to the estate under the ordinary rules of distribution, and his biological half-sisters. Although the distribution plan was submitted under the special provisions for Indigenous estates, the identity of the intestate's Aboriginal community or group and customary law, traditions or practices were not relevant.[217]

7.8.4 Staff at the Aboriginal Legal Rights Movement explained the inappropriateness of intestacy laws based on British heritage for some Aboriginal people and emphasised difficulty and disputation about burial when the deceased died intestate. In its written submission, the Legal Services Commission described the inappropriateness of the existing law for many Aboriginal people in the context of both distribution of intestate estates and family provision matters and the disputation that can arise about funeral rites, including decisions about the place of interment, when there is no will or statement of wishes. It commented:

> Based on the Commission's experience, the current laws of intestacy provide a number of challenges for Aboriginal people. As noted in your Issues Paper, one of these is the definition of "family" which for many Aboriginal people is much broader than immediate blood relatives and founded on kinship rather than familial relationships.

7.8.5 The Legal Services Commission submitted:

> The Commission supports the view that consideration should be given to developing specific legislative provisions for Aboriginal deceased estates in the South Australian *Administration and Probate Act 1919*. Provisions should allow for the taking of oral evidence

[214] *Administration and Probate Act 1979* (NT).

[215] Mr Richard Bradshaw informed the Institute that he believed there was another case in the Northern Territory involving the estate of a man who had been seriously injured in a motor vehicle accident and been awarded a large sum in damages.

[216] *Application by the Public Trustee for the Northern Territory re Estate of Najaluna* [2000] NTSC 52 (30 June 2000). The value of the estate was $ 28 700.

[217] *Re Estate of Wilson*, *deceased* [2017] NSWSC 1(18 January 2017). The value of the estate was about $155 000 (about $97 000 of which comprised superannuation and life insurance payable to the estate). Lindsay J ordered that a small legacy be paid to each of the adoptive sisters with the residue going to the biological half-sisters.

> on the appropriate distribution of an estate as an alternative option to the submission of a written distribution plan.

7.8.6 The Law Society said in its submission:

> The Society is of the view that an approach should be taken under both Intestacy Laws and the IFPA that take into account the cultural complexities unique to Aboriginal estates.

7.8.7 The Law Society said there 'is some basis' for the Model provisions to apply, but suggested that applications should be permitted within 12 months of the death and that:

> the evidential onus should fall upon the applicant to prove that the relevant laws, customs, traditions and practices apply in relation to that death and the assets of the deceased.

7.8.8 The Institute's consultation with some staff at Aboriginal Legal Right Movement, other practising lawyers who are experienced in acting for Aboriginal people, Mr Frank Lampard OAM, Commissioner for Aboriginal Engagement, several Indigenous and non-Indigenous people who have lived on Pitjantjatjara Lands, and academics who have a particular interest in Indigenous affairs, revealed differing views about the appropriateness of the model. Some thought it would be a beneficial reform, some thought otherwise and some did not express an opinion. A concern for some was the need for an application to the Court. Another concern was the disputation and difficulty that could arise in determining who has standing to apply to the Court, about what 'the laws, customs, traditions and practices' are and about whether the intestate belonged to the community or group asserted. It was also said that 'community' is ambiguous and its meaning difficult to ascertain in some cases.[218]

7.8.9 The VLRC did not recommend adoption of these special provisions and also criticised the drafting.[219] The VLRC concluded:

> Implementation of the National Committee's recommended model would promote national consistency. However the Commission is not satisfied … that the recommended model would greatly assist Aboriginal and Torres Strait Islander families in Victoria.[220]

It recommended further research, community consultation and consideration *including* 'to designing a more accessible scheme for distribution of Indigenous estates that does not necessarily require a Supreme Court application'.[221]

7.8.10 Lindsay J has since described in detail the difficulties in interpreting and applying these provisions in *Re Estate of Wilson*, *deceased*.[222]

7.8.11 The Institute is of the opinion that enacting the model provisions is not the best way to cater for differences between the statutory distribution scheme and Aboriginal rules about relationships and obligations. It considers that a preferable way would be, first, to include in the classes of people who may make an application under the *Family Provision Act* people to whom the intestate owed kinship obligations.[223] Secondly, to include in the *A & P Act* a provision of

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[218] See also *Re Estate of Wilson, deceased* [2017] NSWSC 1(18 January 2017) [7]–[16].

[219] See SALRI, above n 5, 159–160, [313]–[314] for a summary of the VLRC's views.

[220] VLRC, above n 4, 95, [5.172].

[221] Ibid 93–96, [5.160]–[5.178] and Recommendation 36.

[222] [2017] NSWSC 1 (18 January 2017).

[223] The Australian Law Reform Committee recommended this in *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [337], as did the VLRC (see VLRC, above n 4, 93, [5.160]–[5.161]). See also Lidia

general application enabling the Court to approve agreed alternative schemes of distribution. The first will be considered in the Institute's forthcoming Report on family provision. The second is discussed below under the heading, 'Redistribution agreements'.

Recommendation 53

That Part 4 of the Model Bill concerning the intestate estates of Indigenous persons *not* be enacted in South Australia.

7.9 Disputes about disposal of human remains

7.9.1 When there is no will appointing an executor, there is a greater chance of dispute about disposal of the deceased's remains. During consultation this was flagged to the Institute as an area of considerable difficulty and bitterness, and of particular importance to Aboriginal people.[224] Such disputes arise occasionally in families of other cultural backgrounds where there has been a break down in family relationships and sometimes because of circumstances such as the fostering, informal adoption or step-parent adoption of the deceased.[225] It was suggested to the Institute that legislative reform in this area would be beneficial. The Institute eventually decided against including this topic in this Report. Further research and more in-depth consultation with Aboriginal people and other communities into this culturally very sensitive topic and the University of Adelaide's Human Research Ethics Committee approval will be required.[226] For those reasons, the Institute does not make any recommendations at this stage for reform of the law relating to disputes about the disposal of human remains in this Report. It is proposed that this will be the subject of a future reference by the Institute.[227]

Recommendation 54

The Institute recommends that approval be given for more detailed consultation and a separate report on funeral rites and the disposal of human remains.

Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19 *Australian Property Law Journal* 199, 207–212; Vines, 'Wills as Shields and Spears', above n 212, n 16; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian law with Aboriginal law and culture Final Report* (September 2006) 239–241.

224 Almost half of the court cases concerning disputes about the funeral arrangements of a deceased person involve Aboriginal people: VLRC, *Funeral and Burial Instructions Report* (2016) 19, [3.21]. The VLRC observed: 'The Commission was told that funerals and burials are particularly significant for Aboriginal people and form an integral part of Aboriginal culture. For many it is important to be buried on country': at 19, [3.22]. See further at 19–21, [3.21]–[3.32]; Law Reform Commission of Western Australia, *Aboriginal Customary Laws,* above n 223, 257–264.

225 See generally VLRC, above n 224, 16–26, Ch 3; Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860.

226 National Medical and Human Research Council requirements.

227 The Institute as part of a future potential reference intends to examine the role of instructions in a will about funeral arrangements, the disposal of human remains and the resolution of any disputes that may arise. This is a sensitive area, especially for Aboriginal communities.

7.10 Redistribution agreements

7.10.1 Several consultees, including the Law Society, suggested enactment of a broad-based statutory mechanism for variation of the distribution of intestate estates by agreement that it described as 'redistribution agreements'. The Law Society suggested that this might be either in the intestacy or the family provision legislation. Trust Officers also favoured court sanctioned redistribution agreements. The Law Society said:

> Where it is not possible or appropriate for the distribution agreement to merely be submitted to the administrator … (for example where one or more parties are not *sui juris)*, the Court (through the Registrar of Probates in the first instance, provided that the relevant parties are appropriately represented by a guardian *ad litem*) would approve the agreed variation of the distribution of the estate and the agreement would have the force of a Court Order with corresponding stamp duty exemptions.

7.10.2 The procedure outlined by the Law Society would be a more efficient and so generally a less expensive means of adjusting distribution than currently available *Family Provision Act* proceedings when the interested parties are in agreement. It would also pose fewer risks for the parties.[228] The Registrar or court would have to be satisfied that affected parties had notice of the application, any parties who are *sui juris* had in fact agreed, that any who were not *sui juris* are separately represented and the agreement is in their interests, and that it would be proper in all the circumstances to make the order.[229]

7.10.3 If a redistribution agreement is sanctioned by the Court, it would be enforceable as a court order without the need for and risk of separate proceedings for breach of contract. Enforceability as a court order may be useful when a party to the agreement dies, becomes bankrupt, loses mental capacity or has a change of mind before its terms have been carried out.

7.10.4 This would be available to any family of any cultural background and in any estate. It is thought that the advantages of enforceability, better tax effectiveness (although there may still be capital gains tax consequences), lesser legal and associated costs and avoidance of acrimonious and embarrassing trials are likely to be an incentive for interested parties to compromise and agree.[230]

7.10.5 The Institute also considers that it would obviate the need for special provisions for Aboriginal families and people from other non-British cultural backgrounds who wish to have an intestate estate distributed in accordance with their traditional kinship rules and cultural obligations in a way they cannot do now when there are parties who are not *sui juris*. For example, it would avoid difficult questions about who has standing and what are the relevant laws, customs, traditions and practices and sometimes about what group or community the

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[228] Consent orders for provision or further provision from the estate are not made under the *Family Provision Act*.

[229] If all parties are *sui juris* and have agreed, there would be no need for court proceedings, but the agreement would not then be enforceable as an order of the court and stamp duty would be payable on any dutiable conveyances unless the *Stamp Duties Act* were amended to include an exemption. An exemption for redistribution agreements would be consistent with the existing exemption for certified agreements under the *Domestic Partners Property Act*. See s 71CBA of the *Stamp Duties Act*.

[230] Capital gains tax is imposed by Commonwealth legislation.

deceased belonged to, as would be required under Part 4 of the Model Bill. The Institute also notes the recent suggestion in this context of Lindsay J in *Re Estate of Wilson, deceased*.[231]

Recommendation 55

The Institute recommends that a provision be added either to the intestacy provisions of the *A & P Act* or to the *Family Provision Act* to enable the Registrar of Probates or the Court to sanction, by order, redistribution agreements to vary the distribution mandated by the *A & P Act*, including to or among persons who are not blood relatives of the intestate within the meaning of the *A & P Act*, subject to the Registrar or court being satisfied that it is proper in all the circumstances to do so.

Recommendation 56

The *Stamp Duties Act 1923* (SA) should be amended to include an exemption from stamp duty for redistribution agreements.

7.11 Polygamous Marriages

7.11.1 The *Family Law Act* deems overseas polygamous marriages to be marriages for the purposes of the *Family Law Act,* but not for the purposes of State laws. Section 6 provides:

> For the purposes of proceedings under this Act, a union in the nature of a [lawful] marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.

7.11.2 As the number of migrants from countries where marriage to more than one person is lawful has increased in recent years, there may be an occasional case in which an intestate leaves more than one lawful spouse, but the second spouse and the intestate have not lived together for long enough or produced a child so as to qualify as domestic partners under South Australian law. This could be dealt with by a State provision like s 6 of the *Family Law Act.*

Recommendation 57

A person whose marriage to the intestate is polygamous, but is lawful in the country in which it was entered into, should have the status of spouse for the purposes of the law of intestacy, whether or not that person qualifies as a domestic partner under the *Family Relationships Act.*

7.12 Encouraging will making

7.12.1 The desirability of people making provision for their families and expressing their intentions by making a will was emphasised by almost everyone who was involved in the consultation.

7.12.2 Lawyers at the Aboriginal Rights Movement made a very strong submission about this saying wills would (a) make it clear who is to benefit from the deceased's estate rather than applying intestacy rules that are inappropriate for many Aboriginal people, and (b) solve some of the problems concerning burial of the deceased's body. The Legal Services Commission in its

[231] See *Re Estate of Wilson,* Missing persons *deceased* [2017] NSWSC 1(18 January 2017) [188]–[192].

submission made similar remarks about the challenges of intestacy law, family provision claims and funeral practices for Aboriginal people.

7.12.3 The NSW Trustee and Guardian has published the *Aboriginal Wills Handbook*[232] and its companion booklet, *Taking Care of Business*.[233] The aim of these publications is to:

> give specific information to help in the preparation of an Aboriginal person's Will. For example, how to provide for:
>
> - kinship
> - burial
> - secret knowledge.[234]

7.12.4 The relevant website explains:

> The advantage of a culturally appropriate Will is that it is more likely to reflect a person's wishes than intestacy laws which apply when no Will is made. This in turn can help prevent disputes relating to burial, guardianship of children and the distribution of personal property.[235]

Recommendation 58

Consideration should be given to publishing a hand book similar to that of the NSW Trustee and Guardian for South Australian Aboriginal people and their advisors. There may be a benefit in having a summary written in Pitjantjatjara and possibly other Aboriginal languages spoken as a first language in South Australia.

7.13 Interstate Grants of Probate and Letters of Administration

7.13.1 Section 17 of the *A &P Act* requires resealing of interstate grants of probate and letters of administration (grants of representation) when there is estate property in this State. The Deputy Public Trustee and Trust Officers submitted that interstate grants should be recognised as valid in South Australia without resealing, as it would save cost and delay in administering estate assets in this State.

7.13.2 This topic was extensively examined in *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys-General*.[236] It was recommended that there be automatic recognition of grants of representation that were made in the State in which the deceased was domiciled at the time of death. The reason given

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232 Prue Vines, *Aboriginal Wills Handbook: A Practical Guide to making Culturally Appropriate Wills for Aboriginal People* (2nd ed) (NSW Trustee and Guardian, 2015). See also <www.tag.nsw.gov.au/wills-for-aboriginal-people.html>.

233 NSW Trustee and Guardian, *Taking Care of Business: Planning Ahead for Aboriginal People in New South Wales* (2015). See also <www.tag.nsw.gov.au/wills-for-aboriginal-people.html>.

234 See <www.tag.nsw.gov.au/wills-for-aboriginal-people.html>.

235 Ibid. The Institute will explore the viability and benefit of a will education and will making project with the Law Society, Aboriginal communities and other interested parties to accompany any future potential reference to examine the role of instructions in a will about funeral arrangements, the disposal of human remains and the resolution of any disputes that may arise.

236 Report No 65, vol 3 (April 2009) Chapters 30–39. South Australia was not represented on this Committee.

for limiting automatic recognition in this way was to reduce the possibility of an application being made in a State in which it is less likely that it would come to the notice of people who might oppose a grant. There are consistent, if not quite uniform, resealing provisions in the legislation of all States, but it appears that no State has implemented this recommendation.

7.13.3 In some cases the South Australian Court has refused to re-seal an interstate grant for various reasons. The Court has required an application for a South Australian grant.[237]

7.13.4 The Institute does not make any recommendation about whether there should be automatic recognition of grants of representation made in the State in which the deceased was domiciled at the time of death. This is a matter that the Attorney-General may wish to discuss with other Attorneys-General and Ministers for Justice with a view to reciprocity and uniformity.

7.14 Consolidation of legislation

7.14.1 The Law Society suggested that, after any amendments in due course to the *Inheritance Family Provision) Act 1972* (noting the Institute's forthcoming Report into family provision), consolidation of South Australian succession law legislation into one new Succession Act be considered. This has been done in Queensland, New South Wales and Victoria. This seems a sensible suggestion.

[237] See, for example, *In the Estate of Tadeusz Jan Rogowski, deceased: In the Estate of Genowefa Biesiada* [2007] SASC 161.

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APPENDIX 1

Consultation

Preliminary meetings were held with the Registrar of Probates, Deputy Public Trustee and some legal practitioners including Ms Leonie Millard and Ms Elizabeth Watson.

The Issues Paper was published on the Institute's website. Hard copies were sent to over 40 legal practitioners, organisations, interested parties and academics and letters and emails were sent and phone calls made to numerous others inviting submissions.

The time for submissions formally closed on 28 August 2016, but the Institute continued oral consultation and also continued to receive written opinions until 10 April 2017.

The Institute also had the benefit of short assignments from more than 20 University of Adelaide law students who were studying Succession Law in 2016. These may be seen as indicative of the views of a generation of interested people younger than most of the people who were consulted, but without practical experience of administering deceased estates.

No submissions were received from trustee companies or the general public.

Written submissions (some very brief and some more extensive) and answers to questions were received from—

The Law Society (Succession Law Committee)

Legal Services Commission

Ms Donna Edwards of Mount Gambier

Ms Lesia Iwaniw of North Adelaide

Mr Tim O'Brien of Berri

Mr Thomas Rymill of Mt Gambier

Ms Madalena Vellotti of Mt Gambier

Professor Prue Vines, Faculty of Law, University of New South Wales

Mr John White SC of Adelaide

Consultation meetings were held with estate lawyers in Adelaide (1 August 2016), Berri (12 October 2016 and 10 April 2017), Mount Gambier (27 June 2016, 9 November 2016 and 7 April 2017), Naracoorte (9 November 2016), Port Lincoln (17 August 2016) and Wallaroo (28 October 2016).

Public Trustee, Deputy Public Trustee and staff who administer deceased and protected estates and lawyers.

Ms Rosemary Caruso

Mr Christopher Charles and Aboriginal Legal Rights Movement staff

Mr Frank Lampard OAM, Commissioner for Aboriginal Engagement and Mr Terry Sparrow

Staff in the Department of Aboriginal Affairs and Reconciliation

Mr John and Mrs Elizabeth Tregenza

Dr Sylvia Villios, Law School, University of Adelaide

Consultation was also conducted by telephone with several representatives of Indigenous communities.

Appendix 2

Administration and Probate Act 1919 (SA)

This is the statutory law in South Australia now.

4—Interpretation

[*some definitions have been omitted*]

In this Act, except where the subject matter or context or other provision requires a different construction—

administration means all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes;

administrator means any person to whom administration has been granted;

domestic partner, in relation to a deceased person, means a person declared under the *Family Relationships Act 1975* to have been the domestic partner of the deceased as at the date of his or her death;

estate comprises both realty and personalty, and includes any money or other property subject to any trust and received by the Public Trustee under order of the Court;

Public Trustee has the same meaning as in the *Public Trustee Act 1995*;

spouse, in relation to a deceased person, means a person who was legally married to the deceased as at the date of his or her death;

will comprehends ***testament*** and ***codicil*** and all other testamentary instruments of which probate can be granted.

Part 3A—Distribution on intestacy

72A—Transitional provisions

(1) This Part applies only in respect of the estate of a person who dies wholly or partially intestate after the commencement of the *Administration and Probate Act Amendment Act (No. 2) 1975*.

(2) The estate of any person who died wholly or partially intestate before the commencement of the *Administration and Probate Act Amendment Act (No. 2) 1975*, shall (in so far as it is to devolve according to the law of intestacy) be distributed according to the law of this State as in force before the commencement of the *Administration and Probate Act Amendment Act (No. 2) 1975*.

72B—Interpretation

(1) In this Part, unless the contrary intention appears—

dwellinghouse includes—

(a) a part of a building occupied as a separate dwelling; or

(b) the curtilage of a dwellinghouse;

Intestate means a person who—

(a) does not leave a will; or

(b) leaves a will but does not dispose effectively by the will of the whole or part of his estate;

intestate estate in relation to an intestate means—

(a) in the case of an intestate who leaves a will—that part of his estate that is not effectively disposed of by the will; or

(b) in any other case the whole of his estate;

personal chattels in relation to an intestate means—

(a) any articles of household or personal use or ornament that form part of his intestate estate; and

(b) any motor vehicles that form part of his intestate estate, but does not include any chattels used for business purposes;

relative means a relative of the first, second, third or fourth degree;

relative of the first degree in relation to an intestate means a parent of the intestate;

relative of the second degree in relation to an intestate means a brother or sister of the intestate;

relative of the third degree in relation to an intestate means a grandparent of the intestate;

relative of the fourth degree in relation to an intestate means a brother or sister of a parent of the intestate;

value in relation to an intestate estate, or property forming part of an intestate estate, means the value of the estate or property as at the date of death of the intestate.

(2) For the purposes of this Part it is immaterial whether a relationship is of the whole blood or the half blood.

72C—Administrator to hold property on trust

(1) The administrator of an intestate estate holds the estate on trust for the persons entitled to share in the estate in accordance with this Part.

(2) Subject to this Part, the administrator may sell, or convert into money, the whole, or any part, of an intestate estate.

72E—Presumption of survivorship not to apply

Where an intestate and the intestate's spouse or domestic partner die within twenty-eight days of each other this Part applies as if the spouse or domestic partner had not survived the intestate.

72F—Value of intestate estate

For the purposes of this Part, the value of an intestate estate shall be ascertained by deducting from the gross value of the estate an amount equal to—

(a) the—

(i) debts and liabilities of the intestate; and

(ii) funeral expenses; and

(iii) testamentary expenses; and

(iv) costs of administering the estate,

payable out of the intestate estate; and

(b) where the intestate is survived by a spouse or domestic partner, the value of the personal chattels of the intestate.

72G—Distribution of intestate estate

(1) Subject to this Part, an intestate estate shall be distributed according to the following rules:

(a) where the intestate is survived by a spouse or domestic partner and by no issue—the spouse or domestic partner is entitled to the whole of the intestate estate;

(b) where the intestate is survived by a spouse or domestic partner and by issue—

(i) he spouse or domestic partner is entitled—

(A) if the value of the intestate estate does not exceed the prescribed amount, to the whole of the intestate estate; or

(B) if the value of the intestate estate exceeds the prescribed amount, to the prescribed amount and to one-half of the balance of the intestate estate; and

(ii) the issue of the intestate is entitled to the balance (if any) of the intestate estate;

(c) if the intestate is not survived by a spouse or domestic partner, but is survived by issue—the issue is entitled to the whole of the intestate estate;

(d) if the intestate is not survived by a spouse or domestic partner or by issue but is survived by a relative, relatives, or issue of a relative or relatives—the relative, relatives or issue of a relative or relatives are entitled to the whole of the intestate estate;

(e) if the intestate is not survived by a person entitled to the intestate estate under the foregoing provisions of this section—the intestate estate shall vest in the Crown.

(2) In this section—

prescribed amount means—

(a) $100 000; or

(b) if an amount greater than $100 000 is prescribed by regulation for the purposes of this section—that amount.

72H—Division of estate when deceased is survived by spouse and/or domestic Partner

(1) If an intestate is survived by a spouse or domestic partner, the spouse or domestic partner (as the case may be) is entitled to any personal chattels of the intestate.

(2) If an intestate is survived by a spouse and a domestic partner, each is entitled to an equal share of the property (including personal chattels of the intestate) that would have devolved on the spouse or domestic partner if the intestate had been survived only by a single spouse or domestic partner.

(3) If a dispute arises between a surviving spouse and a domestic partner as to the division between them of personal chattels of an intestate, the administrator may sell the personal chattels and divide the proceeds of the sale equally between them.

72I—Distribution amongst issue

The following rules govern distribution of an intestate estate, or part of an intestate estate, amongst issue of the intestate:

(a) if the intestate is survived by a child and by no other issue (apart from issue of that child) that child is entitled to the whole, or that part (as the case may be) of the intestate estate; and

(b) if the intestate is survived by children and by no other issue (apart from issue of those children) those children are entitled to the whole, or that part (as the case may be) of the intestate estate, in equal shares; and

(c) if the intestate is survived by a grandchild and by no other issue (apart from issue of that grandchild) that grandchild is entitled to the whole, or that part (as the case may be) of the intestate estate; and

(d) if the intestate is survived by grandchildren and by no other issue (apart from issue of those grandchildren) those grandchildren are entitled to the whole or that part (as the case may be) of the intestate estate in equal shares; and

(e) in any other case, the whole or that part of the intestate estate shall be divided into portions equal in number to the number of children of the intestate who either survived the intestate or left issue who survived him and—

(i) a child (if any) of the intestate who survived the intestate is entitled to one of the portions;

(ii) where a child of the intestate died before the intestate leaving issue that survived the intestate, that issue is entitled *per stirpem*(through all degrees) to one of those portions (and if the issue comprises two or more persons, they share equally).

72J—Distribution amongst relatives

The following rules govern distribution of an intestate estate amongst relatives, or issue of relatives, of the intestate:

(a) where the intestate is survived by a single relative of the first degree, that relative is entitled to the whole of the intestate estate, and where the intestate is survived by two relatives of the first degree, those relatives are entitled to the whole of the intestate estate in equal shares;

(b) where the intestate is not survived by a relative of the first degree but is survived by a relative of the second degree or issue of any such relative, then—

(i) if the intestate is survived by one relative of the second degree, and by no issue of any such relative who predeceased him, the surviving relative is entitled to the whole of the intestate estate;

(ii) if the intestate is survived by relatives of the second degree, and by no issue of any such relative who predeceased him, those relatives are entitled to the whole of the intestate estate in equal shares;

(iii) if the intestate is survived by a relative of the second degree, and by issue of any such relative who predeceased him, the intestate estate shall be divided into portions equal in number to the number of relatives of the second degree of the intestate who either survived the intestate or left issue who survived him and—

(A) any relative of the second degree who survived the intestate is entitled to one of those portions; and

(B) where a relative of the second degree died before the intestate leaving issue that survived the intestate, the issue is entitled *per stirpem* (through all degrees) to one of those portions (and if the issue comprises two or more persons, they share equally);

(iv) if the intestate is not survived by a relative of the second degree, but is survived by issue of such a relative, the intestate estate shall devolve upon that issue as if the issue were issue of the intestate;

(c) where the intestate is not survived by any relative of the first or second degree, or by issue of a relative of the second degree, but is survived by a relative or relatives of the third degree, then—

(i) if the intestate is survived by only one such relative, that relative is entitled to the whole of the intestate estate; or

(ii) if the intestate is survived by more than one such relative, those relatives are entitled to the whole of the intestate estate in equal shares;

(d) where the intestate is not survived by a relative of the first, second or third degree, or by issue of a relative of the second degree, but is survived by a relative of the fourth degree, or by issue of such a relative, then—

(i) if the intestate is survived by one relative of the fourth degree, and by no issue of any such relative who predeceased him, the surviving relative is entitled to the whole of the intestate estate;

(ii) if the intestate is survived by relatives of the fourth degree, and by no issue of any such relative who predeceased him, those relatives are entitled to the whole of the intestate estate in equal shares;

(iii) if the intestate is survived by a relative of the fourth degree, and by issue of any such relative who predeceased him, the intestate estate shall be divided in the portions equal in number to the number of relatives of the fourth degree of the intestate who either survived the intestate or left issue who survived him and—

(A) any relative of the fourth degree who survived the intestate is entitled to one of those portions; and

(B) where a relative of the fourth degree died before the intestate leaving issue that survived the intestate, the issue is entitled *per stirpem* (through all degrees) to one of those portions (and if the issue comprises two or more persons, they share equally);

(iv) where the intestate is not survived by a relative of the fourth degree, but is survived by issue of such a relative, the intestate estate shall devolve upon that issue, as if the issue were issue of the intestate.

72K—Gifts to be brought into hotchpot

(1) Where—

(a) (a) an intestate has within the period of five years immediately before his death made any gift to, or settlement for the benefit of, a person (other than a spouse or domestic partner of the intestate) who is, or would if he were to survive the intestate become, entitled to a part of the intestate estate; or

(b) a person who dies partially intestate leaves a will containing a gift in favour of a person (including a spouse or domestic partner of the intestate) who is entitled to part of the intestate estate,

the property given or settled shall be taken to have been given or settled in or towards satisfaction of the share to which that person is entitled in the intestate estate, or to which he would become entitled if he were to survive the intestate (as the case may be) unless—

(c) the contrary intention was expressed, or appears from the circumstances of the case; or

(d) the value of the property given or settled does not exceed one thousand dollars.

(2) For the purposes of subsection (1) of this section, the value of property given or settled by an intestate in his lifetime shall be determined as at the date of the gift or settlement.

72L—Election by spouse or domestic partner to take dwellinghouse

(1) Subject to this Part, where the intestate estate of an intestate who is survived by a spouse or domestic partner includes an interest in a dwellinghouse in which the spouse or domestic partner of the intestate was residing at the date of the intestate's death, the spouse or domestic partner may elect to acquire that interest at its value as at the date of the death of the intestate.

(2) An election under this section must be made—

(a) where the spouse or domestic partner is an administrator of the intestate estate—within three months after the date on which administration of the intestate estate was granted by the Court; or

(b) where the spouse or domestic partner is not an administrator of the intestate estate—within three months after the administrator serves a notice personally or by post upon him requiring him to make an election under this section,

or within such extended period as the Court may allow.

(3) An election by a spouse or domestic partner shall be furnished in writing—

(a) if the spouse or domestic partner is not an administrator of the intestate estate—to the administrator; or

(b) if the spouse or domestic partner is an administrator of the intestate estate—to the Public Trustee.

(4) Where a spouse or domestic partner elects, pursuant to the provisions of this section, to acquire an interest in a dwellinghouse—

(a) the amount to which he is entitled out of the intestate estate shall be reduced by the value of that interest; and

(b) if the value of that interest exceeds the amount to which the spouse or domestic partner is entitled out of the intestate estate, the spouse or domestic partner shall, upon making the election, pay into the intestate estate the difference between that value and the value of his interest in the intestate estate.

(5) Where the spouse or domestic partner of an intestate is an administrator of the intestate estate, he may, notwithstanding that he is a trustee, acquire in pursuance of this section an interest in a dwellinghouse that forms part of the intestate estate.

72M—Limitation on right of personal representative to sell interest in dwellinghouse

(1) Where a spouse or domestic partner of an intestate was, at the date of death of the intestate residing in a dwellinghouse, and an interest in that dwellinghouse forms part of the intestate estate—

(a) the spouse or domestic partner shall be entitled to continue to reside in the dwellinghouse—

(i) until the expiration of the period within which he is entitled under this Act to elect to acquire the dwellinghouse; or

(ii) where a person has by virtue of a mortgage or charge the right to enter into possession of the dwellinghouse or to dispose of the interest, until that right is exercised,

whichever first occurs; and

(b) the administrator of the intestate estate shall not dispose of the interest unless—

(i) the dwellinghouse has ceased to be the ordinary place of residence of the spouse or domestic partner; or

(ii) the period within which the spouse or domestic partner is entitled under this Act to elect to acquire the dwellinghouse has elapsed.

72N—This Part not to affect operation of Inheritance (Family Provision) Act

Nothing in this Part affects the operation of the *Inheritance (Family Provision) Act 1972* in respect of an intestate estate.

72O—Certain Imperial Acts not to apply in this State

Text omitted

Appendix 3

Family Relationships Act 1975 (SA)

Extract from Part 4 of the *Family Relationships Act 1975* (SA) that protects administrators.

Part 4—Miscellaneous

12—Protection of administrators etc

(1) Where a person has an interest in property by reason of a relationship recognised under the law of this State by virtue of this Act—

(a) no action shall lie against an administrator or trustee of the property by virtue of any distribution of, or dealing with, the property made without actual notice of the relationship; and

(b) where any person has taken a beneficial interest in the property, his interest shall be undisturbed unless he took the interest with prior actual notice of the relationship.

(2) Where a person claims an interest in property by reason of a relationship that would be recognised under the law of this State if it were adjudged, in pursuance of the provisions of this Act, to exist, or to have existed, an administrator or trustee of the property may by notice in writing require that person to take proceedings under this Act seeking the appropriate declaration, and if that person fails to commence such proceedings within three months after being served personally or by post with that notice, then—

(a) no action shall lie against the administrator or trustee of the property by reason of any distribution of, or dealing with, the property made on the assumption that the relationship does not exist; and

(b) where any person has taken a beneficial interest in the property, his interest shall be undisturbed.

APPENDIX 4

Provisions of the Model Bill

(As attached to the NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (April 2007) Appendix A)

South Australia

Intestacy Bill 2007

A BILL FOR

An Act to make provision for the distribution of intestate estates; and for other purposes.

Contents

Intestacy Bill 2007
Contents

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

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.

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;

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;

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;

(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;

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—

(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.

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

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.

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

(b) that—

(i) has been in existence for a continuous period of at least 2 years; or

(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.

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

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—

(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

(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

(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—

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.

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.

(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.

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

(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.

(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—

(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.

(2) The Court may, however, if it considers there are proper reasons for doing so, extend the time for making the election.

Example—

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—

(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.

(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

(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—

(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

(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.

(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.

(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—

(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

(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

(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;

(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

(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

(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.

(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

(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—

(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

(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.

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

(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.

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

(c) no parent; and

(d) no brother or sister, or descendant of a deceased brother or sister; and

(e) no grandparent.

(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.

(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

A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

Example—

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

(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.

(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.

(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.

(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

(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.

(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).

(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.

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

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.

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

(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

(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

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—

(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—

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—

(a) during the intestate's lifetime; or

(b) in the case of a partial intestacy—by will.

Schedule 1—Transitional provision

1—Transitional provision

(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.