

South Australian Law Reform Institute

Cutting the cake

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: <https://law.adelaide.edu.au/research/law-reform-institute/>

SALRI publications, including this one, are available to download free of charge from

<https://law.adelaide.edu.au/research/law-reform-institute/> (under 'Publications: Reports and Papers')

If you are sending a submission to SALRI on this Issues Paper, please note:

- the closing date for submissions is **Friday 27 May 2016**;
- to make it easier to respond to the questions asked in the paper, there is a questionnaire in downloadable form at www.law.adelaide.edu.au/research/law-reform-institute/ (under 'Current Projects')
- we would prefer you to send your submission by email;
- we may publish responses to this paper on our webpage with the Final Report. If you do not wish your submission to be published in this way, or if you wish it to be published anonymously, please let us know in writing with your submission.



Government of South Australia
Attorney-General's Department



THE LAW SOCIETY
OF SOUTH AUSTRALIA

TABLE OF CONTENTS

TERMS OF REFERENCE	4
PARTICIPANTS	4
ACKNOWLEDGEMENTS	5
DISCLAIMER	5
ABBREVIATIONS	5
OVERVIEW	7
BACKGROUND	9
BRIEF OUTLINE OF THE LAW	9
LIMITATIONS OF THE LAW	13
SOCIAL CHANGES	14
CONSISTENCY WITH OTHER STATES	15
GENERAL APPROACH OF THE NATIONAL COMMITTEE	16
SUMMARY OF SOUTH AUSTRALIAN INTESTACY LAW	18
DISTRIBUTION OF THE ESTATE	18
JOINTLY OWNED PROPERTY	23
SUPERANNUATION	24
REFORM ISSUES	25
DISTRIBUTION OF THE ESTATE AND RELATED ISSUES	25
SPOUSE	25
<i>The surviving spouse or domestic partner</i>	25
The general policy trend	25
Who is a domestic partner?	26
<i>One surviving spouse or domestic partner and no descendants</i>	29
<i>A surviving spouse and domestic partner or two or more domestic partners</i>	31
<i>Surviving spouse and descendants</i>	36
<i>Spouse's preferential legacy when spouse is not entitled to whole estate</i>	40
Purpose of the spouse's preferential legacy	41
Amount of spouse's preferential legacy	42
Alternatives to a preferential legacy	45
Adjusting the amount of the preferential legacy	46
Preferential legacy when there is immoveable property in more than one State	48
Interest on preferential legacy	51
Calculation of interest	51
<i>Spouse's right to chattels</i>	53
ISSUE (DESCENDANTS)	59
Deemed familial relationships	60

Posthumous children	62
Adopted children.....	66
Half and full blood descendants.....	69
<i>Distribution where there is no surviving spouse, but there are surviving issue.....</i>	<i>70</i>
<i>Step-children</i>	<i>70</i>
Social trends.....	71
Arguments for treating step-children as if they were issue of the intestate	73
Arguments against treating step-children as issue of the intestate.....	73
Ideas for giving step-children a right to inherit in some circumstances only	75
<i>Step-parents</i>	<i>76</i>
NEXT OF KIN	78
Arguments for limiting the next of kin who can inherit	80
Arguments against limiting next of kin who can inherit.....	80
BONA VACANTIA	81
INHERITING THROUGH TWO LINES OF RELATIONSHIP.....	83
PER STIRPES AND PER CAPITA DISTRIBUTION	84
SPOUSE’S RIGHT TO ACQUIRE PROPERTY FROM THE ESTATE.....	91
Any property?	91
Arguments for extending the spouse’s right to purchase property from the estate	91
Arguments against extending the spouse’s right to purchase property from the estate	91
SPOUSE’S RIGHT TO ELECT TO ACQUIRE THE INTESTATE’S INTEREST IN THE HOME.....	92
Definition of the home	94
Qualifications to the spouse’s right to elect to take the home	97
<i>Possible alternatives.....</i>	<i>99</i>
Spouse entitled to the home without payment	99
Life interest	99
Interest until youngest child is 18	100
Home when there is more than one spouse	100
Spouse under legal disability.....	101
Occupation of the home pending a decision whether to acquire	102
The price	102
How the price is determined.....	103
Time within which the election must be made	104
Who must be informed of the spouse’s decision?	105
Revocation of election	105
<i>When descendants’ shares cannot be paid without selling the home</i>	<i>108</i>
FORFEITURE	109
DISCLAIMED INTERESTS.....	113
STAMP DUTY.....	118

<i>Purchase -by spouse of intestate's interest in the home</i>	118
<i>Disclaimed or assigned interests</i>	119
GIFTS TO BE BROUGHT INTO HOTCHPOT – S.72K OF THE A & P ACT.....	121
Arguments for and against retaining hotchpot either as in South Australia or in a more limited form.....	129
SURVIVORSHIP	132
Arguments for a survivorship provision	137
Jointly owned property	141
<i>Missing intestates and beneficiaries</i>	143
SUPERANNUATION	145
CLAIMS UNDER THE INHERITANCE (FAMILY PROVISION) ACT 1972	146
ACCESS TO CASH BEFORE A GRANT OF ADMINISTRATION	149
VESTING OF MINORS' SHARES.....	150
INTESTACY OF INDIGENOUS PERSONS	153
APPENDIX 1 - GLOSSARY	163
APPENDIX 2 – ADMINISTRATION AND PROBATE ACT 1919 (SA)	169
APPENDIX 3 – MODEL BILL PROVISIONS.....	177
APPENDIX 4 – FAMILY RELATIONSHIPS ACT 1975 (SA) – RELEVANT PROVISIONS.....	192
APPENDIX 5 - BIBLIOGRAPHY.....	196
APPENDIX 6 – FULL LIST OF QUESTIONS.....	205

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 recommend reforms. The Institute has identified a number of topics for review. This Issues Paper, the fourth in the Institute's ongoing review of succession law, examines the law relating to intestacy.

Participants

South Australian Law Reform Institute

Director

Professor John Williams

Deputy Director

Helen Wighton (until her death on 20 August 2014)

Dr David Plater

Advisory Board

Professor John Williams (Chair)

The Hon David Bleby QC

Terry Evans

The Hon Justice Tom Gray

Ingrid Haythorpe

Emerita Professor Rosemary Owens AO

Jonathan Wells QC

Administrative Officer

Louise Scarman

SALRI Succession Law Reference Group

The Hon Justice Tom Gray (Supreme Court of South Australia)

Steven Roder (Registrar of Probates, Supreme Court of South Australia)

Ray Frost (Senior Partner, Treloar & Treloar, Adelaide)

Acknowledgements

This Issues Paper was written by Dianne Gray with research assistance from Dr David Plater and Katherine Varsos, a graduate of Adelaide Law School's Law Reform course in 2013.

The Institute would like to acknowledge the general contribution of students in the Law Reform course to this Issues Paper.

Louise Scarman and Dr David Plater provided proofing and bibliographic assistance.

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

Disclaimer

This paper deals with the law as it was on 31 May 2015 and may not necessarily represent the current law.

Abbreviations

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

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

DCSI—Department of Communities and Social Inclusion (SA)

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

Domestic partner—a relationship defined by s 11 and 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 See **Appendix 4** for the definition. It is a relationship that is recognised by South Australian law, but it is not a lawful marriage.

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

Issue—this is an abbreviation with the same meaning as 'descendants'. See glossary.

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

Model Bill—the model Bill entitled *Intestacy Bill 2007* appended to the Report of the National Committee. See copy in **Appendix 3** of this Issues Paper.

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

National Committee—The National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General (SCAG) in 1995. South Australia did not participate in this Committee.

Spouse—includes lawful husband, lawful wife and domestic partner, except where otherwise indicated.

States—Australian States, the Northern Territory and the Australian Capital Territory

The Committee—The National Committee. See above.

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

The Institute—the South Australian Law Reform Institute

The intestate—in this Paper—a person who has died without a valid will, or with a will that does not dispose of his or her entire estate.

VLRC—Victorian Law Reform Commission

VLRC Report—Victorian Law Reform Commission, *Succession Laws*, Report (August 2013)

OVERVIEW

1. Laws about *intestacy* are part of the broader area of the law called *Succession Law*. In simple terms, Succession Law is about who succeeds to (inherits) the property of a deceased person. Intestacy law is the set of legal rules that are used to ensure that the property (estate) of a person who dies without a valid and complete will is distributed in an orderly way to the deceased person's relatives. The South Australian statutory rules about intestacy are contained in Part 3A of the *Administration and Probate Act 1919* (the '*A & P Act*'). These rules are supplemented by the common law. Intestacy laws must work together with other aspects of succession law, including family provision legislation.²
2. An Australia-wide survey indicates that 66% of South Australian people over the age of 18 years make a will.³ This indicates that about one-third of estates are totally intestate. An unknown proportion are partially intestate.
3. In this Issues Paper the law relating to intestacy is reviewed.⁴ A number of possible reforms of the existing South Australian law are raised for consideration and comment. Particular attention has been given to the recommendations made in 2007 in a report of the Committee for Uniform Succession Laws⁵ (***the Committee***) entitled '*Uniform Succession Laws: Intestacy*' and the Model Bill appended to that report.⁶ See **Appendix 3** for a copy of the Model Bill.
4. In this Paper, a person who dies without a valid will or with a will that does not dispose of all his or her property (estate) is called *the intestate*, or sometimes the 'deceased' or 'deceased person'. The word *issue* or the word *descendants* is used to

² 'Family provision legislation' means the *Inheritance (Family Provision) Act 1972* (SA) and similar Acts in other States.

³ 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.

⁴ This Paper does not cover procedural matters such as obtaining letters of administration and the duties of administrators (recommendations for which are made in South Australian Law Reform Institute, *Sureties' Guarantees for Letters of Administration*, Final Report 2 (August 2013)) or procedures for small estates (currently under separate review by the Institute). Nor does it deal in detail with topics affecting intestate succession that are the subject of other Issues Papers or Reports such as the common law forfeiture rule on inheritance (currently under separate review by the Institute) or the *Inheritance (Family Provision) Act 1972* (SA) that will be the subject of a forthcoming separate Issues Paper and Report by the Institute.

⁵ The Committee for Uniform Succession Laws was established by the Standing Committee of Attorneys-General in 1995. The Committee's report on uniform intestacy laws was prepared by the New South Wales Law Reform Commission.

⁶ New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (April 2007) (the '*Committee's Report*') and Model Bill entitled 'Intestacy Bill 2007'.

describe the children, grand-children, great-grand-children and more remote lineal descendants of a person. By definition, these are blood relatives. These words do not include step-children or descendants of step-children.

5. The rules of intestacy, being general, can produce an unsatisfactory outcome in a particular case. Whilst often unsatisfactory or unfair outcomes can be ameliorated by a court order in legal proceedings under the *Inheritance (Family Provision) Act 1972* (SA) ('the Family Provision Act'), some cannot, and in these cases the law does not appear to work fairly. Further, proceedings under the *Family Provision Act* are likely to add delay, cost and uncertainty and exacerbate family tensions. These issues will be discussed in the Institute's forthcoming Issues Paper entitled *Family Inheritance: Looking after One Another*.
6. The crucial questions when legislating for intestacy are how to balance the interests of the several members of the intestate's family, how to minimise hardship and disruption to the living arrangements of any surviving spouse and children, and at the same time, how to encourage the timely and cost effective winding up of the estate.
7. The answers will depend to some extent upon one's view of the proper role of the State in legislating for intestacy. There are two broad views:

Is it to ensure an orderly succession to property by blood relatives (as in the past), and by any surviving spouse or domestic partner (as has been more recent policy)?

or

Is it to achieve a distribution of the estate that accords with the State's prevailing view of what people who die intestate should have done if they had made a will, and to minimise the burden on the State of supporting the intestate's surviving spouse and other relatives?
8. Increasing the entitlement of any relative will reduce the entitlement of other relatives. For example, if the entitlement of a surviving *spouse* or *domestic partner* is increased, the entitlements of lineal *descendants* will be reduced. If *step-children* are given a statutory entitlement, the entitlements of blood relatives of the intestate will be reduced. These are significant policy questions that the law cannot determine in isolation.
9. The Institute invites the views of members of the public; legal, accounting, financial, health and other professionals; trustee companies; the Public Trustee; the Legal Services Commission, any other government organisations or other groups that have an interest in this area. Questions are dispersed throughout the

Paper, but appear together, for convenience, at **Appendix 6**. They are also available in a downloadable word document on the Institute's webpage.

BACKGROUND

Brief outline of the law

10. A deceased person's *estate* comprises everything that he or she owns at the time of their death.⁷ The estate of a person who dies with a valid will is distributed according to the will. When the person dies without leaving a valid will, the person is said to have died *intestate*. When a person dies with a will that disposes of only part of his or her property, the person is said to have died *partially intestate*.⁸ If there is a partial intestacy the provisions of the will take precedence and prevail over any conflicting rules of intestacy.⁹
11. There are many circumstances that can result in intestacy. The most common situation is that the deceased did not make a will. There are various personal reasons why people may not make a will.¹⁰ Some technical reasons for intestacy include that the deceased was too young or lacked the intellectual capacity to make a valid will,¹¹ or that the will was revoked by operation of law when the person married. Sometimes a will cannot be used at all (such as when it is made under duress or through fraud). Sometimes a will cannot be used as intended because a beneficiary has already died, or disclaims his or her inheritance, and there is nothing in the will that covers that eventuality. A gift in a will to a

⁷ See the Glossary (**Appendix 1**) for a more detailed explanation.

⁸ If the intestacy is partial, the laws of intestacy apply only to that part of the estate that is not disposed of by the will.

⁹ Suppose Ian is married to Wendy. He leaves a will by which he leaves his business to his nephew, Nicholas. But Ian leaves other assets and there is nothing in his will about them, and so that part of his estate is intestate. Under the laws of intestacy, the gift to Nicholas by will prevails over the rights of Ian's widow under the laws of intestacy. Nicholas would receive the business and Wendy would receive the intestate part of the estate. Under a separate Act, the *Family Provision Act*, the widow might be able to bring proceedings in the Court seeking more from the estate.

¹⁰ Reasons given by legal practitioners in preliminary consultation include that: the person did not get around to making a will (particularly young and middle-aged people who think their death is in the distant future); procrastination about what to do; people thinking they have nothing worth giving (sometimes because the person does not realise there is a death benefit attached to their superannuation); superstition ('if I make a will, I will die soon'); deliberate choice to avoid being pressured by family or others; the person considers that the rules of intestacy will bring about the result that he or she wants; the cost of engaging a solicitor and not knowing about or not wishing to use the Public Trustee's Office to prepare the will. See generally Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, *Having the Last Word? Will Making and Contestation in Australia* (University of Queensland, 2015) 8.

¹¹ A minor or infant (that is a person who is under the age of 18 years of age) or an older person who lacks the intellectual capacity to make a will might nevertheless have a substantial estate through inheritance, receipt of damages payments for personal injuries or the acquisition of assets while competent.

spouse is generally revoked upon divorce and this may result in total or partial intestacy.¹² Sometimes there is additional property that the testator did not cover in the will and so there is a partial intestacy.

12. The law of intestacy is intended as the safety net that fills the gap in these circumstances. It is generally accepted that these laws should be as certain, clear and simple as possible to understand and use.
13. In all Australian States there is a broadly consistent order of priority of relatives who are entitled to receive the intestate's property upon intestacy, starting with the spouse, then descendants and then other blood relatives in accordance with their degree of relationship to the intestate. Differences in detail can cause significantly different results. The general order of priority is:
 - spouse;
 - spouse and children and lineal descendants of deceased children;
 - lineal descendants;
 - parents;
 - surviving siblings and lineal descendants of deceased siblings (i.e. nieces and nephews, great-nieces and great-nephews and so on);
 - grand-parents (but in some States grand-parents take priority over siblings); and
 - surviving aunts and uncles by consanguinity (by blood) and descendants of deceased aunts and uncles (i.e. first cousins and, in some States, descendants of first cousins);and if there are none of these, then
 - the State.
14. On the next page is a diagram of the distribution upon intestacy in South Australia (Diagram 1) and, following that, for comparison, a diagram of the proposal for distribution upon intestacy in the Model Bill (Diagram 2). These are simplifications of distribution which cannot illustrate the intricacies of a particular case. The design of each diagram is based on a diagram prepared by the English Law Commission.¹³

¹² *Wills Act 1936* (SA) s 20A.

¹³ Law Commission of England, *Intestacy and Family Provision Claims on Death*, Report No 331 (2011) 12.

DIAGRAM 1

Simplified diagram of distribution under the South Australian intestacy rules

(Note: only the spouse and blood relatives are eligible)

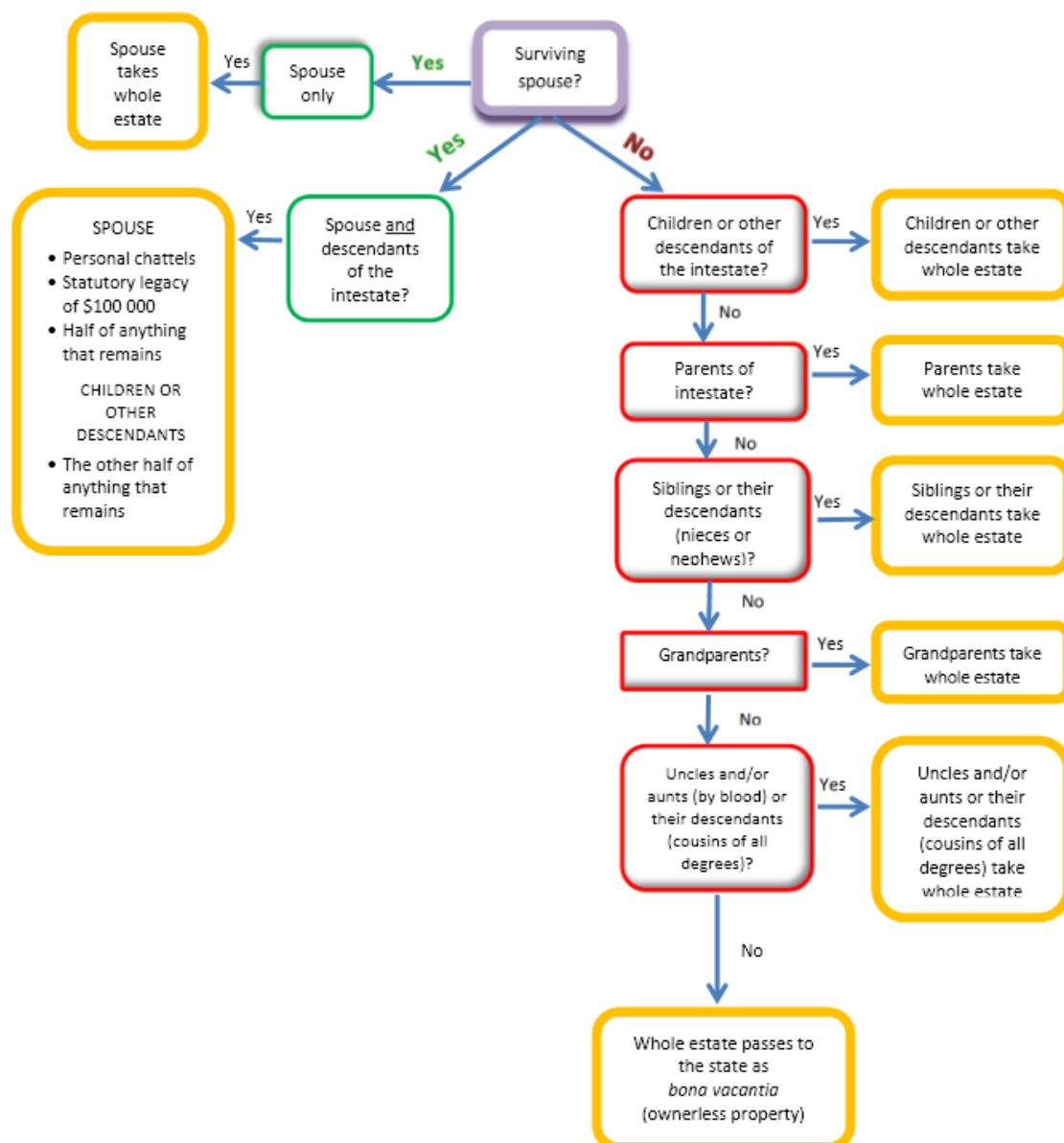
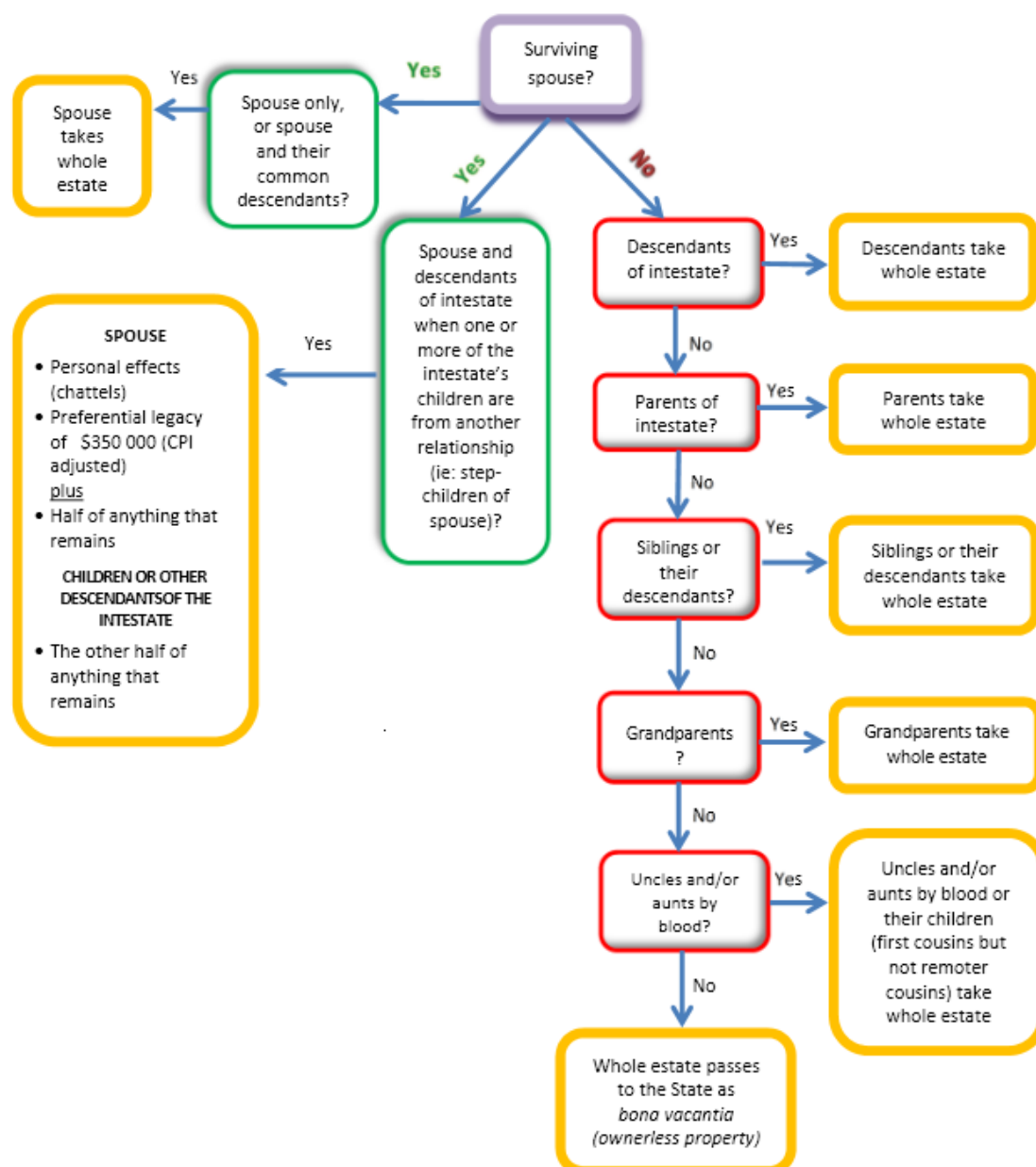


DIAGRAM 2

Simplified diagram of distribution upon intestacy under Model Bill

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



Limitations of the law

15. Fixed statutory rules cannot provide a fair result in each and every case. The best that can be achieved is a system that is as clear, certain and easy to apply as possible and that will result in a fair and reasonable result in most cases. This is particularly important for intestacy, because so many intestate estates are relatively small and cannot bear the substantial cost of resolving uncertainty through expensive legal proceedings.¹⁴ Further, uncertainty can produce disputes that can damage family relationships. On the other hand, without some degree of flexibility in the way the law operates, there will be hardship or obviously unfair results in some cases.
16. Some degree of flexibility has been achieved by the *Family Provision Act*, which allows the court to alter the way the rules of intestacy apply in individual cases.¹⁵ For example, step-children cannot inherit under the current rules of intestacy, but the *Family Provision Act* allows a step-child of the deceased who was maintained or entitled to be maintained wholly or partly by the deceased immediately before the deceased's death to claim a share of the estate. This Act allows claims by spouses, divorced spouses, children and grand-children of the deceased. It also allows a parent or sibling who cared for or contributed to the maintenance of the deceased to claim a share.
17. *Family Provision Act* claims aside, another way to deal with unfairness arising from the intestacy rules is by relatives agreeing to distribute the estate in a different way. This can only be done when all of those entitled to the estate under the rules of intestacy have been located, are adults and are of sound mind.¹⁶
18. The first question to be considered is whether the current statutory rules of intestacy produce a result that is fair and reasonable in most cases. If they do, then the only reason for substantial reform would be to make South Australian

¹⁴ See, for example, *Re Coventry (dec'd)* [1980] Ch 461, 486 (Goff LJ): '...applications in small estates should be discouraged, because the costs tend to become wholly disproportionate to the end in view'. See also *Ibid* 492, 496. See further Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011). The issue of costs in succession disputes, especially where the estate is relatively small, is of wide concern (see, for example, *Fielder v Burgess* [2014] SASC 98, [54]-[65]). These concerns are of general application in succession disputes and aren't confined to disputes about family inheritance under the *Inheritance (Family Provision) Act 1972* (SA). There are legal, policy and practical considerations in examining costs in succession disputes and it is beyond the scope of this Paper. It may be a future research project of the Institute.

¹⁵ See *Administration and Probate Act 1919* (SA) s 72N; *Inheritance (Family Provision) Act 1972* (SA) s 6.

¹⁶ The basis for this is commonly called 'the Rule in *Saunders v Vautier*' (1841) Cr & Ph 240; 41 ER 482. For example, the entitled adults might agree that a child of the deceased who has lived with and cared for the deceased for a long time should take the house and contents, or that a son who has worked a farm owned by his father for little reward should have a larger share than the rules of intestacy would give him.

law consistent with the Model Bill (one of the objectives of the Institute is ‘uniformity between laws of other States and the Commonwealth’).

QUESTION:

1.1 Do the current intestacy rules produce a result that is fair and reasonable in most cases?

Social changes

19. In England in 1836, when South Australia was established as a colony, real property (land and the things attached to the land, such as buildings, fences and windmills) passed to the heir at law of an intestate. The heir was determined according to rules of male primogeniture with preference to the first son or the descendants of the first son. Although the widow had a right to dower, the position of the widow was subordinate to the dominant interest of retaining the real property in perpetuity in the hands of male descendants.¹⁷ These laws reflected the great importance in England of ownership of land for maintaining both the wealth and the status of the family, which included the inheritance of titles, voting rights, parliamentary and social standing. Illegitimate children had no right to inherit on their father’s intestacy.
20. In Australia, some of the reasons for ensuring that real property is retained in the family have never existed (such as hereditary titles). Succession to land, although of particular importance to many members of the farming community and perhaps to people in other kinds of family businesses, is generally not of paramount importance in contemporary Australia.
21. Further, there have been significant societal changes in Australia since colonisation, and even since 1975 when the last major changes were made to South Australian intestacy law. Changes include in particular:
 - Joint ownership of the spousal home, its contents and a bank account is now common, particularly for first marriages. (Jointly owned property passes automatically to the surviving owner and so does not form part of the deceased owner’s estate.)
 - In South Australia, the legal consequences of illegitimacy were abolished and, since 29 January 1976, all of a person’s children have possessed equal rights.
 - Family structures have become more complex and diverse with many more people living together as husband and wife without being legally married and these relationships are recognised by the law as equivalent in most respects to

¹⁷ The heir may have been regarded as having a moral obligation to support his mother, infant or disabled siblings and unmarried female relatives.

marriage when they have subsisted for a sufficient time. Divorce and re-partnering is now common. South Australian law now recognises relationships between people of the same gender as ‘domestic partners’ and accords the partners rights like those of a married couple.¹⁸ Many grandparents provide much more child care than in times past. Jonathon Herring questions whether this might lead to changes in inheritance practices.¹⁹

- The status of women and their ability to earn income and purchase property has changed, as have the attitudes of many families about how their financial affairs should be arranged.
 - It has become common for testators to leave all or portion of their estates to their surviving spouse absolutely and less common for men to leave an interest for life or until remarriage to their widows with the remainder to descendants.²⁰
 - Superannuation is common and a valid nomination as to who is to receive the benefit of the intestate’s superannuation or the rules of the particular superannuation fund can result in major assets not falling into the estate.
 - Social welfare through pensions and allowances is available to those most in need.
22. As South Australian intestacy laws have not been systematically reviewed since 1975, it is timely to consider whether they are still appropriate and best suited to contemporary society.

Consistency with other States

23. The law relating to deceased estates is the responsibility of the States, except for some taxation and superannuation laws of the Commonwealth. Although Australian law relating to intestacy was inherited from England, it was the law of England at the time of proclamation of the particular colony.²¹ Each colonial, and after 1901 each State, Parliament has modified their inherited law, but in different ways so that, although there are many similarities, there are now some significant differences.

¹⁸ See *Statutes Amendment (Domestic Partners) Act 2006* which amended the *Family Relationships Act 1975* (SA) with operation from 1 June 2007.

¹⁹ Jonathan Herring, *Older People in Law and Society* (Oxford University Press, 2009) ch 9.

²⁰ ‘Remainder’ is the word used to describe the interest in the estate of the people who must wait until the death or other event that allows them to take their interest in the estate.

²¹ For South Australia, this was 28 December 1836.

24. In 1991, the Standing Committee of Attorneys-General²² directed that work be done to make succession law, including the law of intestacy, uniform throughout Australia. The National Committee for Uniform Succession Laws was established to achieve this.²³ The New South Wales Law Reform Commission (NSWLRC) prepared the Committee's report on intestacy. South Australia did not participate.
25. In April 2007, the New South Wales Law Reform Commission published the Committee's report, including a model *Intestacy Bill* (reproduced in **Appendix 3** of this Paper). It recommended that every State enact legislation mirroring the model.²⁴ More than eight years later, only the New South Wales and Tasmanian Parliaments have passed Acts that are substantially the same as the Model Bill. Enquiries made of other States indicate that it is uncertain how many intend to legislate in accordance with the Model Bill.
26. If South Australia enacted the Model Bill, some aspects of intestacy law would remain the same and some would be changed. The question is whether achieving consistency of laws on this topic with two other (possibly more in the future) Australian States and Territories will improve the law in South Australia.

QUESTIONS:

- 1.2 *How important is it that the law of intestacy be uniform across Australia?*
- 1.3 *Should the South Australian Parliament enact the Model Bill reproduced in **Appendix 3** of this Paper?*
- 1.4 *If your view is that the Model Bill should be enacted with some changes, what are those changes and why should they be made?*

(You might wish to answer these questions after reading the rest of this Paper.)

General approach of the National Committee

27. The Committee said in its introduction:

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

²² The Standing Committee of Attorneys-General was the Ministerial Council composed of Commonwealth, State and Territory Attorneys-General or Ministers for Justice. It was often known as 'SCAG'. It was then briefly known as the Standing Council of Law and Justice (SCLJ). It is now known as the Law, Crime and Community Safety Council (LCCSC).

²³ See above n 4.

²⁴ *Committee's Report*, above n 6.

It could be said that this aim asks too much of law makers, because the result it describes is surely something no set of legislated rules could ever achieve in every case.²⁵ However, from the discussion in its Report, it can be seen that the Committee actually took a less demanding approach, recommending, by and large, that the law should reflect what *most* testators choose to put in their wills – in other words that would achieve results that most people would think were fair and reasonable in the majority of cases.

28. Another approach might be to structure the intestacy laws (a) to produce the result that the State considers to be the intestate's moral obligation, and possibly (b) with the object of reducing State and Commonwealth Governments' potential welfare liability, for example, by giving parents greater priority. In contrast to the approach noted by the Committee, this alternative relies on clearly stated social policy rather than on an imaginary straw poll of what most testators would choose to do.

QUESTIONS:

- 1.5 *What should the purpose of the law of intestacy be?*
- 1.6 *Should it be to reflect what it is believed the majority of testators say in their wills? (This is the general approach taken by the Committee)?*
- 1.7 *Alternatively, should it reflect the State's view of how a person should dispose of their estate?*
- 1.8 *To what extent should the law of intestacy be designed to protect the public purse from claims for welfare payments?*

²⁵ For instance, it cannot be assumed that just because a person was married at the time of his or her death, that he or she would have preferred their spouse over all other possible beneficiaries. The deceased and spouse might have been estranged. The deceased might have made more than adequate provision for the spouse through joint ownership of assets, superannuation, life insurance policies and gifts and intended that on death his or her estate would benefit children or some other family members or charity. A child of the deceased might have been estranged while another was in daily contact all his or her life and cared for the deceased in old age or infirmity. The deceased might have had a much closer personal relationship with a nephew than with the sibling who is the parent of the nephew, despite the closer blood relationship between the deceased and the sibling that would give priority to the sibling under all Australian rules of intestacy. A person who was not the spouse, domestic partner or a blood relative and so not entitled to any of the estate on intestacy might have been the person who had the closest personal relationship with the deceased and be the person whom the deceased was in fact most likely to have wished to benefit from his estate. Persons to whom the deceased had obligations under Indigenous customary law might not be recognised by the rules of intestacy. Examples can be multiplied.

SUMMARY OF SOUTH AUSTRALIAN INTESTACY LAW

Distribution of the estate

29. When South Australia was proclaimed a British colony on 28 December 1836 Imperial law (that is English law) about intestacy became part of South Australian law, including *the Statute of Distributions 1670* that set out the order of priority for distribution of intestate estates to relatives.²⁶ The South Australian Parliament subsequently enacted its own intestacy laws, largely based on the English law, particularly major changes made to English law in 1925. In 1975, the South Australian Parliament repealed the statutory laws about intestacy, including Imperial statutes in so far as they applied in South Australia, and enacted an entirely legislative code of distribution, and related provisions.²⁷ The principal provisions are now contained in Part 3A of the *Administration and Probate Act 1929 (SA)* (the *A & P Act*), a copy of which is contained in **Appendix 2**. Part 3A has not been systematically reviewed since 1975. Minor amendments have been made for consistency with other amendments to the *Family Relationships Act 1975*, to reflect changes in social attitudes to couples who cohabit without being married and more recently to same sex relationships, and in 2009 to increase the surviving spouse's *preferential legacy* (also called *statutory legacy*) from \$10 000 to \$100 000.²⁸
30. The value of a deceased estate for the purposes of distribution is its gross value less debts and liabilities, funeral expenses, testamentary expenses, costs of administering the estate and, if there is a surviving spouse, the value of *personal chattels* is also deducted.²⁹
31. The rules in Part 3A of the *A & P Act* that govern how the estate is distributed are illustrated in simple form in Diagram 1 (on page 12) and are paraphrased below using 'spouse' to include 'domestic partner' of any gender:

²⁶ Statute 11, Geo IV and 1 Will IV, c 40. The *Statute of Distributions* established an order of distribution of intestate estates to next of kin in closest relationship to the intestate so that parents were entitled as relatives of the first degree, both siblings and grandparents were equally entitled as relatives of the second degree and aunts, uncles, nieces and nephews and great grandparents were all entitled equally as relatives of the third degree.

²⁷ See the *Administration and Probate Act Amendment Act 1975 (No 2)*. This Act was enacted in response to the Twenty-eighth Report of the South Australian Law Reform Committee in 1974 (Relating to the Reform of the Law on Intestacy and Wills), although not all of the Committee's recommendations were accepted by the Government.

²⁸ The spouse's preferential legacy (statutory legacy) is the amount to which a surviving spouse or domestic partner is entitled before other relatives receive anything from the intestate estate.

²⁹ *A & P Act* s 72F. See the Glossary. Personal chattels go to the spouse or are shared between the spouse and domestic partner or partners. They are not taken in to account in determining what estate is available for distribution to the intestate's family.

- 31.1 If the person who died intestate is survived by a spouse and no descendants, the spouse takes the whole estate.
- 31.2 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 balance (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. (See Diagram 3 below)

DIAGRAM 3

EXAMPLE—distribution where deceased is survived by a spouse and descendants

Ian dies intestate leaving a spouse Wendy and two surviving children, Adam and Ben. His third child, Claire, predeceased him leaving two children (i.e. grandchildren of Ian) and they survived Ian. The value of the estate (excluding personal chattels) is \$600 000.

Wendy would receive Ian's personal chattels (which would include any motor vehicle not used for business purposes) and \$350 000 comprising:

- \$100 000 preferential legacy
- \$250 000 being her half of the remaining \$500 000

The balance of \$250 000 would be divided into three parts, because Ian had three children.

Children Andrew and Ben would receive one part each, i.e. \$83 333 each.

The 1/3 share of Claire (Ian's deceased child) would be divided between her two children so that each of Ian's grandchildren would receive \$41 666.

- 31.3 If the intestate is survived by a spouse *and* a domestic partner, or by two or more domestic partners, then the spouse's share is equally divided between them.³⁰ (See Diagram 4 on the following page)

³⁰ *A & P Act* s 72H(3). The *Family Relationships Act 1975* (SA) defines who is a domestic partner. The relevant provisions are set out in **Appendix 4**.

DIAGRAM 4

EXAMPLE—distribution where deceased survived by spouse and domestic partner

Ian is married but not divorced from Wendy, by whom he has two children, Adam and Ben. Ian is living in a de facto relationship with Jane who qualifies as a domestic partner of Ian. Wendy, Jane, Adam and Ben all survive Ian. The net value of the estate (excluding personal chattels) is \$600 000.

Wendy and Jane each take half of Ian's personal chattels and \$175 000 each, comprising:

- *\$50 000 (half each of the spouse's statutory legacy of \$100 000); and*
- *\$125 000 (half each of \$250 000 (the spouse's half share of the balance of \$500 000)).*

This leaves \$250 000 for distribution in equal shares to the children. Children Adam and Ben take \$125 000 each.

- 31.4 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, these descendants take the share that their deceased ancestor would have taken.
- 31.5 If the intestate is not survived by a spouse or descendants, then the estate is distributed to surviving relatives (next of kin):³¹
- Parents take the whole estate, and it is equally shared between them if both survive.³²
 - 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. The descendants of each

³¹ *A & P Act* s 72J.

³² *Ibid* s 72J(a). Note that 'parent' does not include a step-parent. A parent is said to be a relative of the first degree.

deceased sibling take their deceased ancestor's share (ie: *per stirpes*).³³ (See Diagram 5 below)

DIAGRAM 5

EXAMPLE—distribution where deceased is not survived by spouse, dependants or parents

Ian dies intestate leaving no surviving spouse, child or descendant of a child, and no parent. He has three siblings, John, Ken and Leonie. John and Ken survive Ian and Leonie predeceases him leaving two children, Bill and Belle. The net value of the estate is \$600 000.

The estate will be divided in to three equal portions (one per sibling, whether alive or dead).

Siblings John and Ken will receive \$200 000 each.

The third portion (that would have gone to deceased sibling Leonie, had she survived Ian) will be divided equally between Leonie's children (Ian's niece and nephew, Bill and Belle) so that they receive \$100 000 each.

If Ian's nephew, Bill, died childless before Ian—

Belle the surviving child of Ian's deceased sibling (Ian's niece) will inherit the whole of the share that would have gone to her mother. She would receive \$200 000.

³³ *A & P Act* s 72J(b). Siblings of the intestate are said to be relatives of the second degree. When descendants take *per stirpes* they are said to take their ancestor's share as his or her representative. For a more detailed explanation of *per stirpes*, see the Glossary (at Appendix 1), [159] below and Diagram 15.

DIAGRAM 6

EXAMPLE—distribution where deceased is not survived by spouse, dependants, parents or siblings

Ian dies intestate leaving no spouse, descendants, parents or siblings. He had three siblings, John, Ken and Leonie, all of whom predeceased him. John is survived by one child, Ken is survived by two children and Leonie is survived by three children. The net value of Ian's estate is \$600 000.

The estate will be distributed to Ian's six nieces and nephews equally (per capita), so that each will receive \$100 000.

Note: Under the SA legislation, the distribution in this situation is not by reference to the shares of Ian's children (per stirpes distribution). If it were, John's child would receive John's share of \$200 000, Ken's two children would receive half each of their father's share (\$100 000 each) and each of Leonie's three children would receive one third each of their mother's share (\$66 666 each).

- If the intestate is not survived by any of the above relatives (no spouse, descendants, parents, siblings or descendants of deceased siblings), but rather is survived by one or more grand-parents, they take the estate and if more than one, in equal shares.³⁴
- If the intestate is not survived by any of the above, then the estate is divided between aunts and uncles by *consanguinity* (ie aunts and uncles related by blood).³⁵ The share of an aunt or uncle who died before the intestate passes to the descendants of the deceased aunt or uncle (ie to cousins of the intestate person) *per stirpes*.³⁶ However, if all aunts and uncles predeceased the intestate, their children (ie first cousins of the intestate) take the estate in equal shares as if they were children of the intestate without reference to what would have been the share of their parent, ie *per capita*.³⁷

³⁴ They are described in the *A & P Act* as relatives of the third degree.

³⁵ Aunts and uncles are described in the *A & P Act* as relatives of the fourth degree.

³⁶ *A & P Act* s 72J(d)(iii).

³⁷ *A & P Act* s 72J(d)(iv). See, for example, *In the estate of Hughes* (1985) 38 SASR 5 in which the intestate was a divorced woman with no descendants, but many cousins. Succession to the estate is not limited to first

31.6 If there are no relatives who are entitled, then the estate vests in the Crown (that is becomes the property of the State of South Australia).³⁸ Such property is often said to be *bona vacantia*.

32. No distinction is made between relatives of the full blood and relatives of the half blood. Except for spouses, people who are relatives only by affinity (ie relationship by marriage) are not included.³⁹
33. There are a number of subsidiary provisions in the *A & P Act* that are dealt with later in this paper. Perhaps the most important of these in practice are the provisions that give a surviving spouse a preferential share and a right to purchase the intestate's interest in the home.⁴⁰
34. There are two other circumstances that can affect succession on intestacy – *joint ownership* and *superannuation*.

Jointly owned property

35. It has been a common practice since the middle of the 20th century for married couples to jointly own their home and its contents and to have a joint bank account. When one of them dies, his or her interest devolves automatically by operation of law to the survivor so that the survivor becomes the sole owner.⁴¹ The deceased person's interest in jointly owned property does not form part of his or her estate, and so is not available to others who are entitled to a share of the estate. The effect of joint ownership is illustrated by Diagram 7 on the next page.
36. Joint ownership is an effective way for spouses to protect each other's interest in the home, it makes it less likely that the surviving spouse and any young children will have to move, and it gives the survivor some resources to go on with immediately after the other dies. On the other hand, the more property a couple owns jointly, the less will be available for descendants.

cousins. It passes to descendants of deceased first cousins, and so can go to first cousins once removed, first cousins twice removed and so on.

³⁸ *A & P Act* s 72G(1)(e).

³⁹ Examples of relatives by affinity are parents-in-law, brothers-in-law, and aunts and uncles by marriage.

⁴⁰ See [64]–[76] and [173]–[219] below.

⁴¹ The technical name for people who jointly own property is *joint tenants*. Joint tenants 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 owners may, or may not, be related. If there were three joint owners and one of them died, the remaining two would become the joint owners.

DIAGRAM 7

EXAMPLE—distribution depending on whether home owned jointly or as tenants in common

Ian died intestate leaving his widow, Wendy, and two adult children, Adam and Ben. The equity in the family home is \$500 000. Ian has some investments worth \$120 000 and personal chattels.

*If Ian and Wendy owned their home **jointly**, the value of Ian's estate for distribution is \$120 000. The estate does not include the family home because, by the law about joint ownership, Wendy automatically becomes the sole owner of the home.*

Wendy receives a total of \$110 000, comprising

- the preferential legacy (\$100 000) and
- \$10 000 (half of the balance of \$20 000).

She also receives Ian's personal chattels.

This distribution, together with the equity in home (\$500 000), gives Wendy a total of \$610 000 plus personal chattels.

*Children **Adam and Ben** share equally the \$10 000 that remains of the estate after deduction of Wendy's share. They each take \$5 000.*

*If Ian and Wendy owned the home as **tenants in common** (i.e. they each had a half interest in the home), Ian's estate will consist of his half share of the home (\$250 000), his personal chattels and his investments of \$120 000, giving \$370 000 available for distribution.*

Wendy receives a total of \$235 000, comprising

- her preferential legacy of \$100 000, and
- \$135 000 (half of the balance of \$270 000).

She also inherits Ian's personal chattels.

*Children **Adam and Ben** share equally the \$135 000 that remains of the estate after deduction of the Wendy's share. They each take \$67 500.*

Superannuation

37. Employer-paid superannuation is now compulsory for all employees, and many self-employed people also contribute to superannuation funds. It is now commonplace for the major part of a person's wealth to be his or her

superannuation and this might not form part of the deceased's estate.⁴² This is discussed in more detail below in [283]–[286].

REFORM ISSUES

DISTRIBUTION OF THE ESTATE AND RELATED ISSUES

Spouse

The surviving spouse or domestic partner

The general policy trend

38. The policy in Australia, New Zealand, the United Kingdom and Canada, has been towards preferring the surviving spouse over children, grand-children, parents or other relatives. Further, in recognition of the increasing number of couples who cohabit in a marriage-like relationship, recent policy has changed to give domestic partners rights that are the same or similar to husbands and wives. South Australia, most other Australian States and some other jurisdictions also now prefer a 'domestic partner'.⁴³
39. The extent of the preference varies. In some jurisdictions the spouse or domestic partner takes a preferential share and any descendants of the intestate take a portion of anything that then remains.⁴⁴ In a few, the spouse or domestic partner takes all.⁴⁵ In a few, surviving parents, siblings and nieces and nephews

⁴² This depends on the rules of the particular fund or whether the deceased can, and has, made a binding nomination.

⁴³ A jurisdiction is a country or state that has its own government and laws. As to who is a domestic partner, see below [40]–[42] and **Appendix 4**. The South Australian definition of 'domestic partner' includes some relationships that are not marriage-like.

⁴⁴ The surviving spouse has a preferential share with the balance being shared with issue in South Australia, the ACT, Queensland, Victoria, Western Australia, England, Scotland, British Columbia, Nova Scotia, Saskatchewan and Ontario and perhaps other common law based jurisdictions: see *A & P Act 1929* (SA) Part 3A; *Administration and Probate Act 1929* (ACT) schedule 6; *Succession Act 1981* (Qld) schedule 2; *Administration and Probate Act 1958* (Vic) s 52; *Administration Act 1903* (WA) s 14; *Administration of Estates Act 1925* (UK) as amended in 2014 s 46; *Succession (Scotland) Act 1964* ss 1, 2; *Wills, Estates and Succession Act 2009* (BC) s 21; *Intestate Succession Act 1989* (NS) s 4; *The Intestate Succession Act 1996* (Saskatchewan) s 6; *Succession Law Reform Act 1990* (Ontario) s 45.

⁴⁵ The surviving spouse takes the whole estate unless the intestate leaves descendants from another relationship in NSW, Tasmania, Manitoba and Alberta: *Succession Act 2006* (NSW) ss 112, 113 and *Intestacy Act 2010* (Tas) Part 2; *The Intestate Succession Act 1990* (Manitoba) s 2; *Wills and Succession Act 2010* (Alberta) s 61.

can take a minor portion despite there being a surviving spouse or domestic partner.⁴⁶

QUESTIONS

2.1 *Is giving preference to the surviving lawful spouse over other members of the intestate's family appropriate in all cases? If not, in what circumstances should preference be given, or not given, to the surviving spouse?*

2.2 *Is giving preference to a surviving domestic partner over other members of the intestate's family appropriate in all cases? If not, in what circumstances should preference be given to the surviving domestic partner?*

*(As to who is a domestic partner see [40]–[45] below and **Appendix 4**)*

Who is a domestic partner?

40. Opinions differ about when a relationship should be treated as a domestic partnership with similar rights and obligations as marriage, but the general prerequisites are taken to be a commitment to a shared life, social and financial inter-dependence over a period of time that enables these qualities to be established, or that the parties had a child together. Despite differences in their legislation, each State recognises these components in their statutory rules about what must be established before a person is recognised as a domestic partner (by whatever name called).⁴⁷ However, recognition of couple relationships other than lawful marriages can give rise to practical difficulties and disputes. Proving that two people were husband and wife is usually simple because there must be an official ceremony, witnesses and official records; dissolution of the marriage is proved by production of a court decree; and the death certificate shows the lawful spouse's name.⁴⁸ There is nothing so obvious and clear-cut with domestic relationships.

⁴⁶ In the Northern Territory, Western Australia and New Zealand, if the intestate leaves a spouse but no surviving descendants and the value of the estate exceeds a relatively small amount, the estate is shared between the spouse and surviving parents, and if there are no surviving parents it is shared with siblings and descendants of deceased siblings of the intestate: *Administration and Probate Act 1969* (NT) schedule 6 paragraph 3; *Administration Act 1903* (WA) s 14; *Administration Act 1969* (NZ) s 77.

⁴⁷ Some States now allow formal registration of couple relationships that are not lawful marriages under the *Marriage Act 1961* (Cth). See further, South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (September 2015).

⁴⁸ The Institute is aware that Aboriginal customary law recognises as marriages relationships that have not been formalised under the *Marriage Act* (Cth). (see further below n 398) There are some people in Australia whose marriages are commenced and ended by different means. However, conventional Australian law requires the formalities of the *Marriage Act* to create a marriage and of the *Family Law Act 1975* (Cth) to end it.

41. In South Australia, for the purposes of the law of intestacy, a ‘domestic partner’ is a person whom a court has declared to have been the domestic partner of the intestate at the date of the intestate’s death.⁴⁹ A declaration may be made:
- When two adults lived together as a couple on a genuine domestic basis (whether or not related by family and irrespective of gender) for a continuous period of three years, or for periods aggregating not less than three years during the immediately preceding four years, including when there has never been a sexual relationship.⁵⁰ People who are blood relatives and people of the same gender may be domestic partners;
 - When two adults lived together and a child was born of the relationship (whether the child is still alive or not);⁵¹ or
 - When, although the above statutory requirements have not been met, the Court is satisfied that the intestate and the person claiming to be a domestic partner were living together in a close personal relationship at the date of the intestate’s death and it would be in the interests of justice that they be declared to have been domestic partners at that time. A declaration, for example, could be made even though the domestic relationship had not subsisted for three years and did not produce a child.⁵²

⁴⁹ *A & P Act* s 4. A declaration that two people were domestic partners may be made by a court under the *Family Relationships Act 1975* (SA).

⁵⁰ The period of time is not the same in all States.

⁵¹ Query whether a declaration may be made when a child has been born of the relationship but adopted by another couple. The effect of an adoption order under the *Adoption Act 1988* (SA) is that in law the child ceases to be the child of the parent who gives the child for adoption and becomes the child of the adoptive parents. Adoption laws are being reviewed by the Government and so this might change in the future.

⁵² See ss 11 and 11A of the *Family Relationships Act 1975* (SA) which are reproduced in **Appendix 4**.

A discussion about the appropriateness of these provisions of the *Family Relationships Act* for general purposes is beyond the scope of this Paper.

An application for a declaration may be made by a person who claims to have been the domestic partner of the intestate at the time of his or her death or by any person who claims to be entitled to inherit from the estate. The application may be made to the Supreme Court, District Court or Magistrate’s Court.

See, for example, *R (Plaintiff) v Bong* [2013] SASC 39 (13 March 2013). In that case a man, R, applied to the court for a declaration that he was the domestic partner of another man at the date of that other man’s death. It appears that the deceased man was bi-sexual. He had married three times and was married and living with his third wife at the date of his death. R and the deceased had not shared a common residence at any time for a continuous period of three years or for three out of four years and they had not been financially dependent or inter-dependent. R was not living in the same household as the deceased at the time of R’s death, although he cared for the deceased in his final illness. A Master of the Supreme Court found that R and the deceased were not domestic partners at the date of the deceased’s death, but that they had been domestic partners in 1990, 21 years before the deceased’s death. The Master declared that R and the deceased were domestic partners on a specified date in 1990. The declaration meant that R was a former domestic partner of the deceased and he was entitled to make a claim for part of the deceased’s estate under the *Family Provision Act*.

42. It has been suggested to the Institute that a person who lived in the same household and cared for the intestate on an unpaid basis could be declared a domestic partner. It has been suggested, for example, that a daughter who lives with her mother, cares for her and accompanies her on social outings on an unpaid basis might be declared to be the domestic partner of the mother. Research has failed to find any South Australian Supreme Court judgments to that effect. It is possible that there have been such decisions in the Magistrates Court (Magistrates Court decisions are not reported.). The Institute has been informed in its preliminary consultation that these applications are often made in the Magistrates Court because it is a cheaper jurisdiction than either the Supreme or District Courts.⁵³

The Committee

43. The Committee concluded that the family relationships laws of the particular State should be used to determine whether a person was a domestic partner of the intestate. However, despite this conclusion, the Committee recommended that a domestic partner should be recognised if the relationship subsisted for at least *two* years or a child was born of the relationship⁵⁴ - a shorter period than required under South Australian law.
44. The Committee's conclusion and recommendation for recognition of a shorter relationship could not be adopted in South Australia without either (a) introducing a different period for the purposes of intestacy than for other purposes, or (b) amending the *Family Relationships Act 1975* (SA) to shorten the minimum period of cohabitation from three years to two years for the purposes of rights and obligations in other contexts, including at least 90 Acts that rely on the current South Australian definition of 'domestic partner', including Acts about the estates of deceased persons. It is not within the scope of this Paper to examine or canvass changes to the *Family Relationships Act* and the consequential effect on other Acts.⁵⁵

⁵³ If the administrator is in doubt about whether a person was a domestic partner of the intestate at the time of his or her death, the administrator's remedy is to require the person who claims to have been a domestic partner, or who claims through a person alleged to have been a domestic partner of the intestate, to apply to the court for a declaration. If, after receiving notice, the person fails to commence proceedings for a declaration within three months, the administrator may distribute the estate on the basis that the person was not a domestic partner of the intestate: s 12 of the *Family Relationships Act 1975* (SA). This provision protects the administrator and also any person to whom the estate has been distributed.

⁵⁴ *Committee's Report*, above n 6, 26 [2.17]–[2.18], 27 (Recommendation 1).

⁵⁵ The current definition of 'domestic partner' in the *Family Relationships Act 1975* (SA) was enacted by the *Statutes Amendment (Domestic Partners) Act 2006* (SA). That Act amended 92 other South Australian Acts. The

45. A decision will need to be made about whether it is preferable for the cohabitation period required to establish a domestic partnership to remain consistent throughout all South Australian Acts, or for the period of cohabitation to be shorter for the purposes of intestacy law only, consistent with the Committee's recommendation and NSW and Tasmanian intestacy law.

QUESTIONS

2.3 Is it more important:

- (a) for South Australian law about who is a domestic partner to be the same for all South Australian laws, bearing in mind that there are at least 90 South Australian Acts that rely on the definition of 'domestic partner' in the Family Relationships Act 1975 (SA), including Acts relevant to wills and deceased estates; or*
- (b) for South Australian intestacy laws to be consistent with the Committee's recommendation so that a relationship that subsisted for two years (instead of three years as currently required by South Australian law) could be recognised as a domestic partnership giving the surviving partner the right to inherit the intestate partner's estate?*

One surviving spouse or domestic partner and no descendants

46. In **South Australia**, the surviving spouse or domestic partner takes the whole estate when there are no surviving children or remoter descendants. This is, likewise, the position in the **ACT, NSW, Queensland, Tasmania, Victoria, New Zealand** and **England**.

Committee, NSW and Tasmania

47. The Committee recommended that the surviving spouse take the whole estate in *all* cases, with one exception. The exception is that when the intestate leaves one or more descendants of another relationship, the spouse should take personal effects (personal chattels), the preferential (statutory) legacy and half of anything that remains, with the other half of the residue being divided between the

intention was that there would be just one definition of 'domestic partner' for the purposes of all South Australian legislation.

intestate's descendants from all of his or her relationships.⁵⁶ **NSW** and **Tasmania** have enacted the model clauses to that effect in their legislation.⁵⁷

Other jurisdictions

48. In the **Northern Territory**, the surviving spouse takes the whole estate if either its value (excluding personal chattels) exceeds \$120 000, or there are no surviving descendants, parents, siblings or descendants of siblings. If there are any of these blood relatives, the spouse takes the personal chattels, the first \$120 000 and half of anything that remains. The other half of anything that remains goes to the intestate's parents, or if they predeceased the intestate, to siblings and the descendants of predeceased siblings (nieces and nephews). Thus, the parents or siblings and descendants of siblings take the share that would have gone to the intestate's descendants, if there had been any.⁵⁸
49. In **Western Australia**, the spouse takes the whole estate only if its value (excluding household chattels) is less than \$50 000. If the intestate leaves descendants, the spouse takes household chattels, the first \$50 000 and either one half or one third of anything that remains, depending on whether there is an only child (or descendants of an only child) or two or more children or their descendants. If there are no descendants and the value of the estate exceeds \$50 000 (excluding household chattels), the spouse takes the first \$75 000 and household chattels and anything that remains goes to surviving parents and/or siblings and children of deceased siblings, depending on the value of what remains.⁵⁹

QUESTIONS

- 2.4 *Should the surviving lawful spouse be entitled to the whole estate if the intestate left no surviving descendants? If not, with whom should the estate be shared and in what proportions? Please give reasons.*

⁵⁶ This is the effect of Recommendations 3–6 of the *Committee's Report* and model clauses 11–14.

⁵⁷ *Succession Act 2006* (NSW) ss 110–113; *Intestacy Act 2010* (Tas) ss 11–14. The law in Manitoba is similar to the Committee's recommendation (*Intestate Succession Act 1990* s 2) and Alberta (*Wills and Succession Act 2010* s 61). However, British Columbia, Nova Scotia or Saskatchewan, like South Australia, give the spouse a preferential share, and anything that remains is shared with the intestate's descendants.

⁵⁸ *Administration and Probate Act 1969* (NT) sch 6 item 3.

⁵⁹ *Administration Act 1903* (WA) s 14.

- 2.5 *Similarly, should a surviving domestic partner be entitled to the whole estate if the intestate had no surviving descendants? (Please take in to account the broad definition of who is a domestic partner outlined above at [40]–[45] of this Paper and ss 11–11B of the Family Relationships Act reproduced in **Appendix 4**.) If your answer is no, please describe the circumstances in which you consider that the domestic partner should, or should not, be entitled to the whole estate and why.*
- 2.6 *Are you aware of any cases where a court has declared that two people related by blood were domestic partners? If yes, please provide details and, if possible, a reference to the case.*

A surviving spouse and domestic partner or two or more domestic partners

50. This section is about how the estate should be distributed when the intestate leaves more than one spouse/domestic partner.
51. In **South Australia**, if the intestate is survived by both a spouse and a domestic partner or by two or more domestic partners, they will share equally the whole or the portion of the estate that would have gone to the spouse or domestic partner if there had been only one of them (the spouse's portion). If they do not agree how the personal chattels should be divided, the administrator may sell them and divide the proceeds.⁶⁰
52. What would happen if the intestate had entered into a bigamous marriage? The Institute considers that:
- for marriages in Australia and many other countries the first husband or wife would qualify as the lawful spouse, and the person married bigamously (and so invalidly) would share with the lawful spouse *if* he or she qualified as a domestic partner;
 - for marriages in countries that permit a man to have more than one wife, the second wife would be entitled either as a domestic partner, or because the word 'spouse' in s 72 of the *A & P Act* should be read as 'spouses'.⁶¹

⁶⁰ *A & P Act* s 72H(3). In the event of uncertainty or a dispute, the administrator may apply to the court for directions about distribution of the estate. An administrator who complies with the court's direction will be protected. The cost of an application by the administrator will normally be paid out of the estate. Alternatively, a disputant may apply to the court. As to rights in relation to the home or homes, see further below [173].

⁶¹ Section 26(b) of the *Acts Interpretation Act 1915* (SA) requires that:

‘every word in the singular number be construed as including the plural number’.

The Institute invites alternative opinions about the answer to this question and references to any court decisions that are relevant to this point.

DIAGRAM 8

EXAMPLE—entitlement of spouses and domestic partners depending on whether there are surviving descendants

Ian was married to Wendy and was the domestic partner of Jane at the time he died intestate. He left an estate worth \$600 000 and personal chattels.

If Ian had no surviving descendants—

Wendy and Jane will each receive \$300 000 comprising:

- *a half share each of the estate.*

They will share any personal chattels equally.

If Ian had surviving descendants (say, two children) —

Wendy and Jane will each receive \$175 000 comprising:

- *their half share each of the preferential legacy (\$50 000 each) and*
- *one quarter each of the balance of the estate (\$125 000 each).*

They will share Ian's personal chattels equally.

Ian's two children will share equally the balance of the \$250 000 that remains after deduction of Wendy's and Jane's shares. They would each receive \$125 000.

Other jurisdictions

53. State laws about the inheritance rights of two or more spouses/domestic partners are not uniform.
- In **Queensland**, the whole estate is equally divided between the spouses if the intestate had no surviving descendants. If the intestate left at least one

So the word 'spouse' is to be read as including the word 'spouses'.

Paragraph [6.15] of the *Committee's Report* has been overtaken by amendments to the *Family Relationships Act*. The question of 'multiple spouses' can now arise in South Australia.

surviving descendant, the spouses share equally the spouse's portion of the estate. The procedural provisions are very similar to the model clauses.⁶²

- In the **ACT**, a person who had been living with the intestate for a continuous five or more years when the intestate died takes the whole of the spouse's share (in the ACT called the 'partnership share'). If the period of cohabitation was less than five years, the partnership share is equally divided between the lawful spouse and the eligible partner.⁶³
- In the **Northern Territory**, a '*de facto* partner' who has lived continuously with the intestate for at least two years immediately before the intestate's death is treated as if he or she were the sole spouse, provided the intestate did not live with his or her lawful spouse during those two years. If these conditions do not exist, then the estate is distributed as if the intestate were survived only by the lawful spouse.⁶⁴ However, in recognition of Indigenous customary law, when an intestate Indigenous person is survived by more than one spouse, the estate is divided between the spouses.⁶⁵
- In **Western Australia**, a *de facto* spouse is entitled to all of the spouse's portion if the *de facto* spouse and the intestate lived together continuously for at least five years immediately before the intestate's death and the intestate did not live at all with his or her lawful spouse during that time. If the *de facto* relationship was for at least two years but less than five years and the intestate did not live at all with his or her lawful spouse during that time, the lawful spouse and the *de facto* spouse share the spouse's portion equally.⁶⁶
- **NSW** and **Tasmania** have enacted the model clauses and they are different from all of the above (see [58] below).⁶⁷
- The **VLRC** has recommended adoption of the model provision, preferring it to Victoria's current 'one-size-fits-all sliding scale' that provides a set proportion to an unregistered domestic partner according to the duration of

⁶² *Succession Act 1981* (Qld) ss 35–36, sch 2. In Queensland, the spouse's portion is one half of what remains after distribution of chattels and payment of the preferential legacy if there is one surviving child or descendants of a deceased only child, and otherwise one third.

⁶³ *Administration and Probate Act 1929* (ACT) s 45A. Under s 44, 'partner' means spouse, civil union partner or civil partner or eligible partner. The person who would be called a *de facto* partner in some places is called '*an eligible partner*' in the ACT.

⁶⁴ *Administration and Probate Act 1969* (NT) sch 6 pt III.

⁶⁵ *Ibid* s 67A.

⁶⁶ *Administration Act 1903* (WA) s 15.

⁶⁷ Model Bill cls 23–27 of the Model Bill; *Succession Act 2006* (NSW) ss 122–126; *Intestacy Act 2010* (Tas) ss 23–27.

that domestic partnership, and adjusts the proportion for the spouse or registered partner correspondingly.⁶⁸ The existing scale gives an unregistered domestic partner who has continuously lived with the intestate for periods of (a) less than four years - one third; (b) between four and five years – half; (c) between five and six years – two-thirds; (d) six years or more – all.

- In **New Zealand**, the spouse's portion is equally shared between a spouse or civil union partner and a *de facto* partner if the intestate and *de facto* partner lived together as *de facto* partners for at least three years. However, a court may order equal sharing where the *de facto* relationship was of shorter duration if it is satisfied that there is a child of the relationship, or that the person whom it is claimed was a *de facto* partner of the deceased made a substantial contribution to the relationship, and that there would be a serious injustice if he or she were not entitled to a share.⁶⁹
- In **England**, a *de facto* partner (as distinct from a lawful spouse or legally registered civil partner) is not entitled to any of the intestate partner's estate. The Law Commission recommended in 2011 that the English law be reformed to give *de facto* partners an entitlement.⁷⁰
- The recent **British Columbia** Act leaves any sharing between spouse and domestic partners to agreement or court order.⁷¹ Some other Canadian Provinces have fixed rules for distributing the estate in these circumstances, but they are not all identical.

⁶⁸ The scale is set out in s 51A of the *Administration and Probate Act 1958* (Vic); Victorian Law Reform Commission, *Succession Laws*, Report (August 2013) 79 [5.108], 80 (Recommendation 29) (the *VLRC Report*). See also Ibid ch 5, 77–80 of the *VLRC Report* for a summary of current Victorian law and submissions where there is a spouse and a person who fits within one of the other categories of couple relationships. Victoria's law recognises registered domestic partners, registered caring partners and unregistered domestic partners.

⁶⁹ *Administration Act 1969* (NZ) ss 77–77C; *Property (Relationships) Act 1976* (NZ) s 2E.

⁷⁰ Law Commission, Report No 331, above n 13, 24 [1.99]. The Law Commission prepared a draft Bill to this effect, the *Inheritance (Cohabitants) Bill* (see Ibid 226-235). At the time of writing this Issues Paper this Bill has not passed the British Parliament and appears to have stagnated. If such a Bill should be passed without relevant amendment, a person who was living with the intestate person at the time of the intestate's death could inherit if they had been living together as a couple for a continuous period of at least two years immediately before the intestate's death, or if they had a child together and the child is still a minor. However, the *de facto* partner would be excluded if the intestate person was married or in a registered civil partnership at the time of his or her death. Thus, it appears that this Bill would not require a lawful spouse or registered civil partner to share with a *de facto* partner. If this Bill is defeated, *de facto* partners will continue to have no right to share in the estate under the laws of intestacy. Nevertheless, a *de facto* partner could apply to the court for a share of the estate under the equivalent of the South Australian *Family Provision Act* if they have been cohabiting for the last two years.

A more extensive and similar (but not identical) bill entitled *Cohabitation Rights Bill* was introduced in the House of Lords as a Private Member's Bill on 4 June 2015, but at the time of writing it had not passed either.

⁷¹ *Wills, Estates and Succession Act 2009* (BC) s 22.

54. The effect of the Committee's recommendations is that when there is a spouse and one or more domestic partners (all called 'spouses' in the Model Bill):
- They share the whole estate equally if either (a) the intestate left no surviving descendants, or if (b) all of the intestate's descendants are from one or more of these current relationships; and
 - If the intestate leaves one or more descendants from a person other than his or her current surviving spouses, then the surviving spouses share the intestate's personal effects, the preferential legacy and half of anything that remains (that is, they would receive one quarter each of the residue). The descendants share the other half of the residue.⁷²
55. The Committee also recommended statutory procedures for dividing the estate. Division may be in accordance with a *distribution agreement* entered into between the spouses, or by a *distribution order* made by the court, or, if the spouses do not avail themselves of either of these methods, the administrator may decide on how the estate is to be equally divided. The details of these procedures are set out in clause 26 of the Model Bill.⁷³

QUESTIONS

- 2.7 *When there is more than one spouse or domestic partner, should they share equally whatever the spouse would have taken if there were only one of them, consistent with the Model Bill and South Australian law? If your answer is no, or not in all cases, when should it be shared and in what proportions? Please give your reasons.*
- 2.8 *If you agree that there should be equal sharing, do you prefer the procedure set out in s 72H of the A & P Act (SA) reproduced in **Appendix 2**, or model clauses 26 and 27 reproduced in **Appendix 3**? Please give reasons.*

⁷² The recommended rights and procedures are set out in clauses 23–27 of the Model Bill: see below **Appendix 3**.

An example of the latter would be a child from a divorced or deceased spouse. If South Australia was to retain (contrary to the Committee's recommendation) the right of issue of the relationship between the intestate and surviving spouse, then some modification to the drafting of the model clauses would be needed to preserve the descendants' entitlements.

⁷³ Reproduced below in **Appendix 3**. The Committee did not consider whether these agreements would attract *ad valorem* stamp duty in South Australia. For a discussion about stamp duty, see [239]–[240] below.

Surviving spouse and descendants

56. This section contains discussion about the extent to which, if at all, the spouse should be preferred over the intestate's descendants. This is another aspect of the law of intestacy that is not uniform in Australia.
57. Until recently, all States preferred the spouse to the extent that the spouse took the intestate's personal chattels and a legislated sum of money (or equivalent) called the preferential legacy (or statutory legacy) before children or other relatives received anything. Then anything that was left was shared, albeit in differing proportions, between the spouse and the intestate's descendants. This has been changed in **NSW** and **Tasmania** in accordance with the Committee's recommendations that the spouse take the entire estate except when the intestate left issue of a different relationship.
58. The following is a summary of the preference given to the spouse in all States and some other countries.
- In **South Australia**, when the intestate leaves surviving descendants, the spouse takes the personal chattels, the preferential legacy and one half of anything that remains. The other half is divided equally between *all* children of the intestate with descendants of predeceased children taking their parent's share. Descendants of children who died before the intestate take the share of their deceased parent. Descendants of children who died before the intestate take their deceased ancestors share.⁷⁴ It is the same in **England, British Columbia, Nova Scotia** and **Saskatchewan**.⁷⁵
 - In **NSW** and **Tasmania**, when the intestate person is survived by a spouse and issue of their relationship (that is, their children, grand-children and so on), the spouse takes the whole estate. When the intestate leaves a spouse and children, all or some of whom are from another relationship (or descendants of those children), the estate is shared between the spouse and descendants; the spouse taking the personal effects, an indexed preferential legacy and half of what remains, and the other half of the residue is shared

⁷⁴ *A & P Act 1929* (SA) ss 72G(1)(b), 72I.

⁷⁵ *Inheritance and Trustees' Powers Act 2014* (Eng) s 1(2); *Administration of Estates Act 1925* (Eng) s 47; *Wills, Estates and Succession Act 2009* (BC) ss 21, 24; *Intestate Succession Act 1989* (Nova Scotia) s 4; *Intestate Succession Act 1996* (Saskatchewan) s 6.

between all surviving descendants of the intestate.⁷⁶ The law is similar in **Manitoba** and **Alberta**.⁷⁷

- In the **ACT, Northern Territory, Queensland** and **New Zealand**, the proportion of that which is left (the residue) after the spouse receives the personal chattels and the preferential legacy varies according to the number of children the intestate had. The spouse takes one half of the residue if there is only one child, or descendants of an only child. The spouse takes one third of the residue if there are two or more children or descendants of deceased children.⁷⁸
- In **Victoria** and **Western Australia**, the spouse takes one third of any residue regardless of the number of children or descendants of deceased children.⁷⁹

59. But even when the spouse's nominal share of the residue is the same, the proportion of the estate that the spouse takes differs between States, because of large variations in the amount of the spouse's preferential legacy. When the amount of the preferential legacy is large, it exhausts smaller estates so that the intestate's descendants receive nothing. Opinions may differ on whether this is appropriate. The following diagram illustrates this.

⁷⁶ *Committee's Report*, above n 6, 52 (Recommendation 4), 76 (Recommendation 8). The English Law Commission recommended this in 1989, but the recommendation was not accepted by the British Parliament and it was not repeated in the Commission's 2011 report (see above n 13).

⁷⁷ *Intestate Succession Act 1990* (Manitoba) s 2; *Wills and Succession Act 2010* (Alberta) s 61.

⁷⁸ *Administration and Probate Act 1929* (ACT) sch 6; *Administration and Probate Act 1969* (NT) sch 6; *Succession Act 1981* (Qld) sch 2; *Administration Act 1969* (NZ) s 77 para 2.

⁷⁹ *Administration and Probate Act 1958* (Vic) s 52; *Administration Act 1903* (WA) s 14.

DIAGRAM 9

EXAMPLE—surviving spouse and descendants depending on size of preferential legacy

Ian dies intestate with an estate of \$400 000, leaving his widow, Wendy, and two children by a previous marriage.

Assume the preferential legacy is \$400 000—

Wendy would receive the whole estate.

Ian's two children would receive nothing.

Assume the preferential legacy is \$300 000—

Wendy would receive \$350 000 comprising

- *\$300 000 (the preferential legacy) and*
- *\$50 000, being half of the balance of \$100 000.*

Ian's two children would receive \$25 000 each (half each of the \$50 000 that remains of the estate after deduction of Wendy's share).

Now assume the preferential legacy is \$100,000—

Wendy would receive \$250 000 comprising

- *\$100 000 (the preferential legacy) and*
- *\$150 000, being half of the balance of the estate.*

Ian's two children would receive \$75 000 each (half each of the \$150 000 that remains of the estate after deduction of Wendy's share).

The Committee

60. The assumptions underlying the Committee's recommendation that the whole estate should go to the spouse unless the deceased spouse has descendants from another relationship are that:
- (a) the majority of people who make wills leave their whole estate to their spouse with the children or remoter descendants inheriting only if the spouse dies first;
 - (b) matching majority intentions is the preferable policy;

(c) it is in keeping with changes in the status of women and the probability that they have financially contributed to the acquisition and maintenance of the family's assets;⁸⁰

(d) the spouse will look after the interests of the children; and

(e) the children or their descendants will inherit when the surviving parent dies.

61. Some of these assumptions are questionable. For example, the assumption that the spouse will look after the interests of the children and that they will inherit when that parent dies does not always hold true in practice. It is common for a surviving spouse to re-partner, for children of the new partner to be brought into the new family and for children to be born of second or subsequent relationships. In those situations it is to be expected that the spouse will be subject to other influences and loyalties and testamentary intentions are likely to change. Further, informal preliminary consultation indicates that many people who have children by a relationship and later re-partner make wills that do not leave their entire estates to the second or subsequent spouse.
62. It could be argued that giving the whole estate to the spouse does not take into account the circumstances of the particular family and does not adequately protect the interests of children. The Alberta Law Reform Institute commented:

Much depends upon the length of the marriage, the number of children born of that marriage, the number and age of children of the deceased from another relationship, the assets accumulated due to the joint efforts of the spouses, the assets owned by either spouse before the marriage, the existence of insurance and so on. The best compromise is to share the estate between the spouse and the children but give a generous preferential share to the spouse. This share cannot be too large because it would defeat the intention of sharing the estate among the surviving spouse and children in all but very large estates.⁸¹ [The 'so on' in this quotation could include the existence and amount of superannuation and whether there are jointly owned assets.]

63. The English Law Commission proposed that the spouse take the whole estate to the exclusion of children. Andrew Borkowski questioned this when he wrote:

A number of factors appear relevant in considering whether children should be excluded from entitlement on intestacy when the intestate is survived by a spouse. For example, should it matter whether a child is a minor or an adult, or whether (if an adult) he or she is dependent on the intestate? Certainly a stronger case can be made out for

⁸⁰ Some people may consider this assumption to be offensive or inappropriate to women who devote their life to home-making, child rearing and supporting their spouses in non-financial ways.

⁸¹ Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report 78 (1999) 82.

the entitlement of minor children or dependent adult children. Should the means of the surviving spouse and children be taken into account? Should the length of the surviving spouse's marriage be relevant, or the number of marriages to which the intestate was a party? Suppose, for example, that Arthur makes a will leaving all his property to his wife for her life, remainder to his children. His wife dies after many years of marriage. Arthur marries again and dies a few months later. Since the effect of the remarriage was to revoke the will, Arthur has died intestate. His wife (of a few months) would take the entire estate under the Law Commission's proposal; his children would not be entitled. Should a marriage of a few months' duration result in the total exclusion of the children under the intestacy rules? ...

The fundamental objection to the spouse-takes-all proposal is that it fails to give sufficient weight to the importance of the parent-child bond. Is there a more important bond within the family? Possibly – many would consider the marital bond to be supreme. But even if the primacy of the marital bond is admitted, is it so pronounced that it should exclude the parent-child bond as regards entitlement on intestacy? ...⁸²

QUESTIONS

- 2.9 *Which of the assumptions underlying the recommendation of the Committee that the surviving spouse should take the whole estate when all the intestate's descendants are issue of the relationship between the intestate and the surviving spouse do you consider to be well founded (see above [60]–[63])*
- 2.10 *Do you agree with the Committee's recommendation that the whole estate should go to the intestate's spouse, except when the intestate leaves a child or children (or descendants of a deceased child) from another relationship?*
- 2.11 *Do you agree with the Committee's recommendation that when the intestate leaves a spouse and at least one descendant from another relationship, the spouse should be given priority over the intestate's descendants, but be required to share with them anything that remains after taking the priority amount?*

Spouse's preferential legacy when spouse is not entitled to whole estate

64. If it is decided that the spouse should share with the intestate's children, whether in all circumstances or only when the intestate left children of another relationship, then the question of a preferential legacy (also called statutory legacy) for the spouse needs to be considered.

⁸² Andrew Borkowski, *Textbook on Succession* (Oxford University Press, 2nd ed, 2002) 36.

Purpose of the spouse's preferential legacy

65. When the preferential legacy for the surviving spouse was increased in 2009 from \$10 000 to the current amount of \$100 000, the Attorney-General observed in the second reading speech in Parliament:

Different views exist about the purpose of the statutory legacy. One view is that it is meant to meet the spouse's needs while the estate is being distributed, which can take some time. It enables him or her to continue living for the time being as he or she is accustomed. Another is that it helps the spouse to retain the matrimonial home, where the home is not in joint names or where it is mortgaged. Another view is that it is a simple way of ensuring that, in the case of a small estate, the spouse will usually inherit the whole estate. That may be especially relevant where a small business, on which the surviving spouse depends, constitutes the main asset of the estate.⁸³

66. The Committee suggested that in small estates the preferential legacy avoids the expense and the unpleasantness of the surviving spouse making a family provision application to the Court, and that it also relieves pressure on the surviving spouse to sell essential assets so that the proceeds can be distributed to the intestate's descendants.⁸⁴ The Committee also pointed out that without a preferential legacy, particular hardship could be caused when the intestate's estate includes an interest in a small family business and its sale would deprive the spouse of his or her livelihood. The unsatisfactory result might be that the spouse becomes reliant on social security benefits.

⁸³ South Australia, *Parliamentary Debates*, House of Assembly, 27 November 2008, 1226 (Hon Michael Atkinson, Attorney-General).

⁸⁴ *Committee's Report*, above n 6, 63-64 [4.33]–[4.34].

DIAGRAM 10

EXAMPLE—National Committee's approach to spouse's preferential share

Ian was married and had two children, Adam and Ben. He divorced his first wife and married Wendy, with whom he had two children, Claire and Donna. Ian died intestate and is survived by Wendy, Ben, Claire and Donna. Ian's first son, Adam, died before Ian leaving a child, Gordon. The value of Ian's estate is \$600 000. Assume the statutory legacy is \$100 000.

According to the National Committee's recommendation,

Wendy would receive \$350 000, comprising

- \$100 000 (the statutory legacy) and
- \$250 000 (half the balance of \$500 000).

Surviving children Ben, Claire and Donna and grandchild Gordon would each receive \$62 500, comprising a quarter share each of the \$250 000 remaining of the estate after deduction of Wendy's share (Ian's deceased child Adam's share going to Adam's son, Gordon).

Amount of spouse's preferential legacy

The Committee, NSW and Tasmania

67. The Committee recommended that when a preferential legacy is payable, the amount should be \$350 000, as adjusted by the Consumer Price Index (CPI) between 1 January 2006 and 1 January of the year of the intestate's death.⁸⁵
68. **NSW** and **Tasmania** use this as the basis of their preferential legacy calculation. Their Acts specify that the CPI to be used is 'the All Groups Consumer Price Index Number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter'.⁸⁶ The adjustment is to be made up to the last quarter for which the number was published before the intestate's death. However, because they did not adopt the same date for the

⁸⁵ Ibid 71 (Recommendation 6).

⁸⁶ *Succession Act 2006* (NSW), s 106; *Intestacy Act 2010* (Tas) s 7.

commencement of indexation, the amount of the preferential legacy is not the same.⁸⁷

69. If South Australia were to adopt the Committee recommendation of a base amount of \$350 000, but to select a starting date for CPI adjustment close to the time of enactment, the amount of the preferential legacy in South Australia would be significantly lower than for either NSW or Tasmania.

States and New Zealand

70. As at 1 April 2014, the amount of the preferential legacy in each State is:
- **Western Australia** – \$50 000 if there are no children and \$35 000 if there are children (since 1982)
 - **South Australia** - \$100 000 (since 2009). The amount can be increased by regulation, but has not been.⁸⁸
 - **Victoria** - \$100 000 (since 1994)
 - **Northern Territory** - \$120 000 (since 2002)
 - **Queensland** –\$150 000 (since 1997)
 - **ACT** - \$200 000 (since 2008)
 - **Tasmania** – approximately \$375 000 as at 1 April 2014
 - **NSW** – \$440 000 as at 1 April 2014
 - The amount in **New Zealand** is \$155 000 (since April 2009).
71. Reasons for the preferential legacy being substantial include the following.
- It increases the chances of the surviving spouse being able to remain in the home and this is likely to be of great importance both financially and emotionally when the surviving spouse is elderly or there are children who are still part of the household.⁸⁹
 - In many cases it results in the whole estate going to the surviving spouse and so makes administration of the estate simpler and cheaper, and eliminates the

⁸⁷ The starting date for NSW is the CPI number for the December 2005 quarter and for Tasmania it is the CPI number for the December 2009 quarter (that is, four years later).

⁸⁸ *A & P Act* s 72G(2).

⁸⁹ The Supreme Court has demonstrated a willingness to make orders postponing the sale of the family home where there are issue who are minors, subject to conditions to protect their interests until they attain 18 years.

need to have part of the estate held on trust for children who are under the age of 18 years.

- It is said to be in keeping with contemporary expectations of how a surviving spouse should be treated.

72. Arguments against a large preferential legacy include the following.

- It reduces the amount available to the intestate's children and remoter descendants, often leaving them with nothing.
- Nowadays, many homes, bank accounts and other assets are owned jointly by the spouses, so that the intestate's interests in them pass automatically to the surviving spouse. The value of these assets is not taken into account when calculating the amount the spouse takes from the estate under the rules of intestacy. In these cases the argument that a substantial preferential legacy is necessary to enable the spouse to stay in the home is very much weaker, or even misplaced in some cases.
- A spouse who jointly owned the home with the intestate will be much better off than a spouse of an intestate who was the sole owner of the home, or a spouse who owned the home as a tenant in common with the intestate, or a spouse of an intestate who owned the home with some other person, or a spouse who lived with the intestate in a rented home. The Institute has no data on the proportion of homes that are jointly owned by spouses.
- The amount of money required to enable the surviving spouse to keep the home will vary considerably according to locality within Australia and, within South Australia, between country and city and between different parts of the country, and also by the amount owed under any mortgage.⁹⁰
- It can result in inequity when the spouse's relationship with the intestate is of short duration. As the South Australian Law Reform Committee observed in 1974:

The amount is the same whether the wife is the first wife or the second wife, whether she has been married for one year, five years or thirty years, whether any of the husband's assets came from the use of money provided by the wife or the wife's relatives or by her co-operation in their business, whether the relationship

⁹⁰ According to the South Australian Government, the median house price for the March 2015 quarter was \$425 000 in the Adelaide metropolitan area and \$275 000 in non-metropolitan areas.
<https://www.sa.gov.au/topics/housing-property-and-land/buying-and-selling/advice-for-buyers/metro-median-house-sales-statistics/median-house-sales-by-quarter>

between the husband and wife was good or ill, whether she remarries speedily, and many other permutations and combinations of facts.⁹¹

Alternatives to a preferential legacy

73. The law could be changed to give the surviving spouse a right to a proportion of the estate, rather than to a legislated sum of money. The disadvantage of this is that the chances of the spouse being able to remain in the home would be reduced where the estate is small. This is illustrated by Diagram 11 below.

DIAGRAM 11

EXAMPLE—fixed amount or proportional statutory legacies

Ian owns in his own name the home in which he and his wife, Wendy, live. His equity in the home is \$100 000 (there being a mortgage). Ian dies intestate leaving Wendy and two children, Adam and Ben. His estate comprises the equity in the home, a car and his other personal chattels.

If the law is that the preferential legacy is fixed (and for this example, fixed at \$100,000)—

Wendy would take the whole estate.

If, however, the law was that the surviving spouse and children each took a proportion of the estate, say, 60% for the spouse and 40% to be divided equally between children—

Wendy would be entitled to the personal chattels including the car and \$60 000 worth of equity in the home

Children Adam and Ben would be entitled to \$20 000 each (half each of 40% of the estate).

Note: Unless Wendy had substantial assets of her own, this would increase the likelihood that she would have to sell the home. If Wendy can refinance the loan on the home, she could apply to the court for an order postponing the sale until the youngest of Adam and Ben was 18 years of age.

74. Another alternative would be to give the surviving spouse the right to whatever interest and equity the intestate spouse had in the home, or the spouse's preferential legacy, whichever the surviving spouse chooses. This might be the simplest solution of all and it would be the approach most likely to enable the

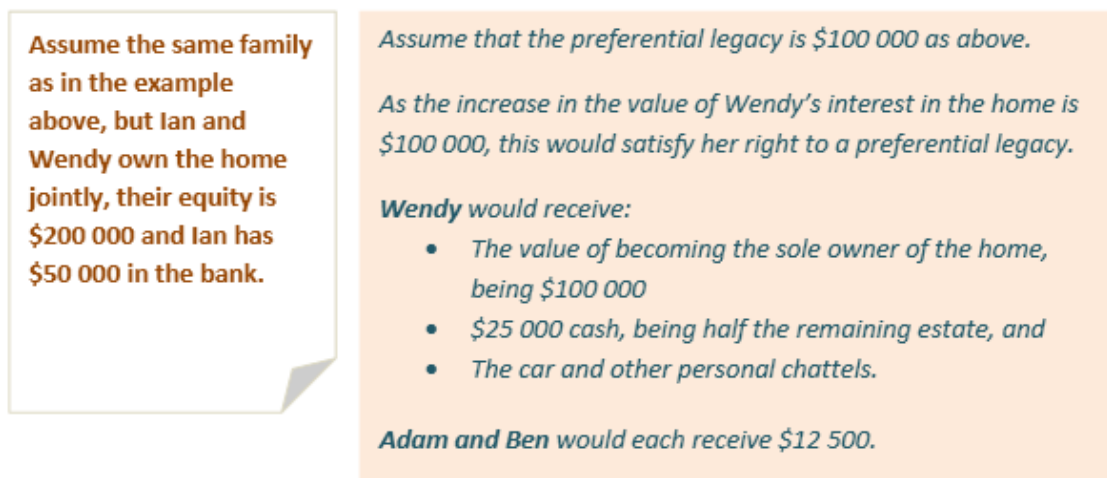
⁹¹ South Australian Law Reform Committee, *Reform of the Law on Intestacy and Wills*, Report 28 (1974) 6, noting that this would now be expressed in a way that applies equally to husbands, as wives and to domestic partners.

spouse to remain in the home if he or she wished to do so. It would also remove the complications inherent in the current statutory right of the spouse to purchase the intestate's interest in the home. This right and possible alternatives is discussed in [173]–[219] below.

75. When the home is jointly owned by the spouses, another approach would be to take into account half the value of the home as all or part of the surviving spouse's preferential legacy.⁹² This is illustrated in Diagram 12 below.

DIAGRAM 12

EXAMPLE—taking joint ownership of home into account



Adjusting the amount of the preferential legacy

76. A preferential legacy of a fixed amount reduces in buying power over time.⁹³ There are several methods by which the amount of the preferential legacy could be kept consistent with changes in money values, the main ones being as follows.
- Indexation, for example by the Australian CPI as recommended by the Committee and adopted by NSW and Tasmania, or by some variation of it such as limiting the adjustment to changes in the South Australian CPI.
 - Indexation by changes in a housing index such as the median price of housing for the State. The medium price could go down as well as up.

⁹² This assumes the two spouses are the only joint tenants. If there were three joint tenants, $\frac{1}{3}$ of the value would be treated as part of the preferential legacy.

⁹³ For example, the amount remained £5 000 (\$10 000) in South Australia from 1956 until the law was finally updated in 2009, despite the huge depreciation in the value of money during that time.

- Leaving it to Parliament to review and adjust the amount, but history demonstrates that there are likely to be many years between adjustments. No adjustment was made in South Australia for 53 years between 1956 and 2009.
- A statutory requirement for Parliament to review the amount after a specified time, say, every five years.
- Include in the legislation a power for the Executive branch of Government to adjust the amount by regulation. This is what the South Australian Act presently provides.⁹⁴ But this does not always result in practice in regular changes in the amount as it depends on the political will of the responsible Minister and Cabinet.

QUESTIONS

- 2.12 *Should the spouse continue to be preferred through an entitlement to a preferential legacy as a priority over the intestate's children and descendants of deceased children in all cases?*
- 2.13 *If the surviving spouse has priority over the intestate's issue, would you prefer:*
- (a) *a preferential legacy of a specified amount;*
 - or*
 - (b) *a specified proportion of the estate;*
 - or*
 - (c) *a right to choose to choose between taking either the intestate's interest in the home or else a preferential legacy or proportion of the estate?*
- 2.14 *When the home is owned jointly by the spouses, should the increase in the spouse's interest in it upon the death of the other spouse be taken into account as all or part of the spouse's preferential rights?*
- 2.15 *If you consider that the spouse should not have priority in all cases, you might wish to consider the following. Should the spouse's preferential entitlement depend on—*
- (a) *the size of the estate;*
 - (b) *whether the intestate person left children who are under the age of 18 years;*
 - (c) *whether the intestate person left children who are dependent, whatever their age;*
 - (d) *whether there are other members of the intestate's family who were wholly or partially dependant on the intestate (for example, grand-children, parents, siblings)*
 - (e) *other circumstances (please describe)?*

⁹⁴ *Administration and Probate Act 1919* (SA) s 72G(2). There are many statutory examples for adjusting monetary sums by regulation in South Australia.

- 2.16 *If South Australia adopts the recommendation of the Committee that the spouse should have a preferential legacy of a specified amount (in some cases), should the legislated starting amount be \$350 000? If not, what amount would be more appropriate, and what are your reasons for that figure?*
- 2.17 *Should the preferential legacy be adjusted quarterly (or for some other period) by the All Groups Consumer Price Index Number, being the weighted average of the 8 capital cities, published by the Australian Statistician, as recommended by the Committee? If not, why not, and is there a preferable index for adjusting the amount?*
- 2.18 *If South Australia adopts \$350 000 as the starting point, from what date should indexation be applied? (Note that different starting dates for indexation in NSW and Tasmania have resulted in different preferential legacies.)*
- 2.19 *If you do not favour some form of indexation of the preferential legacy, what method should be used to keep the amount consistent with changes in money values and/or housing prices?*

Preferential legacy when there is immoveable property in more than one State

77. At common law, inheritance rights to moveable property in an intestate estate are determined according to the law of the place where the intestate was domiciled when he or she died, but inheritance rights to immoveable property is determined according to the law of the place where it is located.⁹⁵ Some examples of moveable property are money, company shares, office equipment and motor vehicles. Examples of immoveable property are a house property and farming land. This distinction has its origin in the way that English law treated succession to land differently from succession to moveable property: the deceased's heir at law succeeded to land, but the deceased could dispose of moveable property by will.
78. At common law and in **South Australia**, if the intestate person owned immoveable property (usually real estate) in two or more States or was domiciled in one State and owned immoveable property in another State, the surviving spouse is entitled to preferential legacies in accordance with the law of *both* States and the amount available for children or other descendants is correspondingly decreased.⁹⁶ By way of example, assume that the intestate was resident in and

⁹⁵ The technical terms for the place of domicile and the place where property is situated are the *lex domicilli* and the *lex situ*. There has been considerable modern criticism of this distinction and suggestions that there should be no distinction between which law applies to moveable and immoveable property. See, for example, Scottish Law Commission, *Report on Succession* (No 215) (2009) 7. However, that broader topic is beyond the scope of this Paper.

⁹⁶ This aspect of the common law not only determines entitlement to statutory legacies; it affects the distribution of the estate in other ways. For example, it can result in different proportions of the residue of the

owned personal property in South Australia and also owned real property in Western Australia and the Northern Territory. Without statutory reform, the spouse would be entitled to statutory legacies of \$100 000 under South Australian law, \$120 000 under Northern Territory law, and \$50 000 under Western Australian law, giving a total of \$270 000. Under the Committee's recommendation, the spouse's entitlement by way of preferential legacy would be fixed at a maximum of \$120 000, being the highest amount under the three applicable statutes.

Other States

79. There is some variation between States.

- Five States - **South Australia**, the **Northern Territory**, **Queensland**, **Victoria** and **Western Australia** - apply the common law so that the spouse could receive more than one preferential legacy if the intestate died with immoveable property in more than one State.
- The **ACT** legislation normally caps the amount the spouse receives by way of preferential legacies at the amount legislated by the ACT (this amount is currently \$200 000).⁹⁷
- **NSW** and **Tasmania** have enacted clause 8 of the Model Bill that limits the amount the spouse can receive by way of preferential legacies to an amount equal to the highest amount legislated in a place where the intestate left immoveable property.⁹⁸ So for example, if the intestate owned houses in two States, and the preferential legacy was \$200 000 in one of those States and \$400 000 in the other, the spouse would be entitled to preferential legacies totalling \$400 000 regardless of where the intestate was domiciled (assuming that there is sufficient in the estate).⁹⁹

The Committee, NSW and Tasmania

80. The Committee canvassed three alternative reforms.

estate going to the spouse or in a different set of relatives being entitled in each relevant State. However, the Committee confined its report to the conflict of laws in relation to statutory legacies. These questions do not arise when the spouse is entitled to the whole estate.

⁹⁷ *Administration and Probate Act 1929* (ACT) s 49AA.

⁹⁸ *Succession Act 2006* (NSW) s 106; *Intestacy Act 2010* (Tas) s 7.

⁹⁹ By contrast, in the ACT, the spouse would be limited to the ACT maximum amount.

- The first was barring the surviving spouse from claiming the preferential legacy in one jurisdiction when he or she has already obtained a preferential legacy in another;
 - The second was giving the spouse statutory legacies to a combined value that does not exceed the highest preferential legacy from among the jurisdictions in which he or she is entitled;
 - The third was allowing the spouse only the preferential legacy in the jurisdiction with which the spouse was most closely connected when the intestate died, for example, by domicile or habitual residence.
81. The Committee recommended the second of these.¹⁰⁰ This was seen as the fairest and most certain choice as it allowed for the late discovery of property in another jurisdiction and avoided difficulties arising from uncertainty and possible litigation about the surviving spouse's domicile or habitual residence. The third option is favoured by some academics and is also more consistent with the *Hague Convention on Law Applicable to Succession 1988*.¹⁰¹
82. Model clauses 8(2)(b) and (3) contain subsidiary provisions to assist administrators when the intestate died with property in more than one State and these have been enacted by **NSW** and **Tasmania**.¹⁰²

QUESTION

2.20 *Do you agree with the Committee's recommendation that when the intestate leaves immovable property (usually real estate) in more than one State (thereby giving the spouse a right to more than one preferential legacy) the spouse should be entitled by way of preferential legacies to a total amount equal to the highest legacy? For example, if the spouse were entitled to a preferential legacy of \$50 000 in Western Australia and a preferential legacy of \$100 000 in South Australia, the spouse's preferential entitlement would be \$100 000. If not, what is your preferred way of determining the amount of the spouse's preferential legacy?*

¹⁰⁰ *Committee's Report*, above n 6, 73 (Recommendation 7).

¹⁰¹ This third alternative would be consistent with suggestions made by some academic writers, who mostly suggest that intestate succession to all types of property should be governed by the same law. One leading text (see Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 2nd ed, 2011) 539–540) refers to the *Hague Convention on Law Applicable to Succession 1988* under which a single law applies to all questions of succession, being either the law of nationality, or the law of habitual residence, of the deceased. The authors seem to favour habitual residence.

¹⁰² See **Appendix 3** below.

Interest on preferential legacy

83. In **South Australia**, interest is not payable on the spouse's unpaid preferential legacy. This contrasts with the requirement that interest be paid on unpaid pecuniary legacies left by a will from the first anniversary of the testator's death, or such other date as is fixed by the will.¹⁰³

Other States

84. In the **ACT, NSW, Tasmania, Victoria** and **Western Australia** (and also in **New Zealand** and **England**), interest is payable. In **Queensland**, the **Northern Territory** and **South Australia**, it is not.
85. Some arguments for requiring that interest be paid on the spouse's preferential legacy are as follows:
- The preferential legacy is analogous to a pecuniary legacy left by will and, for consistency, interest should be paid on both and on the same basis.
 - For practical reasons, there is usually a considerable time between the intestate's death and payment of the preferential legacy. So interest may be seen as compensation for the delay and any loss in real value due to inflation.¹⁰⁴
 - If there is cash, shares or other investment property in the estate, it should be earning income until transferred to the spouse and it is reasonable that the spouse have the benefit of that income or some approximation of it.
 - It encourages the timely administration of the estate and payment of the legacy, when the administrator is a descendant of the intestate, rather than the surviving spouse.

Calculation of interest

86. In **NSW** and **Tasmania**, interest accrues from the first anniversary of the intestate's death, as recommended by the Committee.¹⁰⁵ This is the same as for

¹⁰³ *A & P Act 1919* (SA) s 120A. In South Australia, unless the will excludes or modifies the beneficiary's right to interest on a pecuniary legacy (that is a legacy of \$X), the beneficiary is entitled to interest at a rate fixed by Regulation 3 of the *A & P Regulations*. See further, Regulation 3.

¹⁰⁴ The spouse becomes entitled to the preferential legacy 28 days after the intestate's death. This is because s72E of the *A & P Act* provides that the surviving spouse inherits from the intestate spouse if he or she is alive 28 days after the intestate person's death.

¹⁰⁵ *Committee's Report*, above n 6, 68–70 [4.51]–[4.61], 71 (Recommendation 6).

South Australia in relation to pecuniary legacies under wills. In the **ACT, Victoria, Western Australia, New Zealand** and **England**, interest accrues from the date of the intestate's death.

87. There is considerable diversity in the calculation of interest. In **South Australia** the rate is variable and is based on the swap reference rate published by the Australian Financial Markets Association Limited. In **NSW** and **Tasmania**, the interest rate is 2% above the cash rate last published by the Reserve Bank before 1 January in the calendar year in which interest began to accrue, as recommended by the Committee.¹⁰⁶ In **Victoria**, the rate is adjusted from time to time (effectively by the Attorney-General),¹⁰⁷ but the VLRC has recommended adoption of model clause 8(4) for the sake of uniformity.¹⁰⁸ The rates in the **ACT, Western Australia** and **New Zealand** are 8%, 5% and 5% respectively.¹⁰⁹ The **English Law Commission** recommended that simple interest be payable at the Bank of England official bank rate as declared at the date of the intestate's death.¹¹⁰ The Law Commission advised against a fixed rate of interest saying in 2011 that the rate of 6% that had been fixed in 1983 had become too high compared to commercial rates, appeared punitive and risked unfairness to other beneficiaries.¹¹¹

QUESTIONS

- 2.21 *Should interest be payable to the spouse on his or her unpaid preferential legacy? Please give reasons.*
- 2.22 *If yes, from what time should interest begin to accrue –*
- (a) the date of the intestate's death, or*
 - (b) the anniversary of the intestate's death, or*
 - (c) 28 days after the intestate's death (when the right to it is acquired), or*
 - (d) other date?*

¹⁰⁶ *Succession Act 2006* (NSW) s 106(1)(b) and (5); *Intestacy Act 2010* (Tas) s 1(b) and (5); Model clause 7.

¹⁰⁷ The rate is 2½% lower than the rate fixed by the Attorney-General by notice in the Gazette pursuant to s 2 of the *Penalty Interest Rates Act 1983*.

¹⁰⁸ VLRC Report, above n 68, 71 (Recommendations 20–21).

¹⁰⁹ *Administration and Probate Act 1929* (ACT) sch 6 para 2; *Administration and Probate Act 1903* (WA) s 14(4); *Administration Act 1969* (NZ) ss 39, 77.

¹¹⁰ Law Commission (Eng), Report No 331, above n 13, 54–55 [2.131]–[2.141].

¹¹¹ Ibid 54 [2.131].

2.23 *Should the rate be fixed by the Act or regulation or should it be variable? If you consider it should be variable:*

- (a) should the rate be set in the same way as in NSW and Tasmania for the sake of uniformity with those States (2% above the Reserve Bank cash rate); or*
- (b) should it be set in the same way as it is for legacies bequeathed by will in South Australia for the sake of consistency within South Australia;¹¹² or*
- (c) is there another alternative that you prefer?*

Spouse's right to chattels

88. When the estate is to be shared, legislation in each State gives the surviving spouse certain personal property (usually called 'personal chattels' or 'personal effects').¹¹³ The value of this personal property is not taken into account when the spouse's share of the estate is calculated. However, there are significant differences between the States in what is included.
89. The scope of the property that is included may be important to the spouse's ability to maintain the same lifestyle as before the intestate's death, but it can make a significant difference to the value of what is available for descendants. Further, although the monetary value of a chattel might be small, the emotional value to the spouse or a descendant might be great. Descendants might consider that family heirlooms should go to a descendant – not to the spouse. Indeed, **Scotland** specifically excludes heirlooms from the chattels that pass to the spouse.¹¹⁴ Disputes are most likely to arise when the surviving spouse is a second or subsequent spouse.

¹¹² *A & P Regulations 2009* Reg 3:

For the purposes of section 120A(1) of the *Administration and Probate Act 1919*, the rate of interest per annum fixed in any financial year is—

- (a) for the 6 month period commencing on 1 July—the average mid 180 day bank bill swap reference rate published by AFMA as at the first business day of the period; and
- (b) for the 6 month period commencing on 1 January—the average mid 180 day bank bill swap reference rate published by AFMA as at the first business day of the period.

(2) In this regulation—

AFMA means the Australian Financial Markets Association Limited;

business day means every day except Saturday, Sunday or a public holiday.

¹¹³ In South Australia, *A & P Act* s 72H.

¹¹⁴ *Succession (Scotland) Act 1964* s 8(6).

South Australia

90. In **South Australia** the spouse takes *personal chattels* defined in the *A & P Act* as:

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.¹¹⁵

The spouse takes things that are used in the home and things personal to the intestate and, it seems, any number of motor vehicles, provided they are not used for business purposes. Cases in both **Australia** and **England** tend to indicate that anything used by the deceased for pleasure or recreation (such as a speedboat) or for a hobby (such as a collection of coins) would be included as ‘articles of personal use’.¹¹⁶

91. The words ‘but does not include any chattels used for business purposes’, if strictly applied, could exclude some items that one might think should go to the spouse. For example, assume the intestate was a garden contractor who owned mowers and tools and a utility used for both for his business and for his home garden, and further, the utility was the family’s only vehicle. It seems that these would not go to the spouse as part of her entitlement to the intestate’s personal chattels.

Other jurisdictions

92. The following is a summary of what is included in some other jurisdictions.

- **NSW** and **Tasmania** have enacted the definition of *personal effects* in model clause 4. It includes all the intestate’s tangible property, including property that was used mainly for business purposes, with a few exceptions. This is in addition to the substantial preferential legacy.
- In **Victoria**, personal chattels include ‘motor cars’¹¹⁷ (so query utilities, trucks, and motor cycles), and a long list of articles of household or personal use, plus some additional items, provided they were not used for business

¹¹⁵ *A & P Act* s 72B(1).

¹¹⁶ Ian Hardingham, Harold Neave & Marcia Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 2nd ed, 1989) 470.

¹¹⁷ Query utilities, trucks and motor cycles.

purposes when the intestate died. In practice, the result is probably similar to South Australia.

- The **ACT** and **Northern Territory** are similar to **Victoria**, except that chattels partly used for business and partly for private purposes are included in the spouse's entitlement (unlike South Australia and Victoria).
- The **English** provision is not restricted to articles of *household or personal use* and can include chattels that were used to a minor extent for business purposes. The English Act provides:¹¹⁸

‘personal chattels’ means tangible movable property, other than any such property which – consists of money or securities for money, or was used at the death of the intestate solely or mainly for business purposes, or was held at the death of the intestate solely as an investment.¹¹⁹

- By contrast, **Western Australia** limits the chattels to ‘*household chattels*’. The definition is ‘articles of personal or household use or adornment’.¹²⁰
- The **Queensland** Act is even narrower in scope in that it specifically excludes some items of household or personal adornment. After a long list of items that are included, such as furniture, curtains, glass-ware and domestic appliances, it excludes motor vehicles, boats, aircraft, racing animals, original works of art, trophies, and ‘other chattels of a personal nature’.
- In **British Columbia** the items included are limited to ‘household furnishings usually associated with the enjoyment by the spouses of the spousal home’.¹²¹
- **Scotland** is even narrower in that the spouse only takes ‘furniture and plenishings’ (other contents of the home) up to a specified value only and only from one house.
- The **New Zealand** definition is expansive. It includes *all* vehicles, boats and aircraft and horses as well as the types of things one might expect to find in a home or to have been for the personal use of the intestate, except for those

¹¹⁸ For example, in England a car owned by the deceased and used for transporting herself and children and incidentally for delivering goods in her immediate neighbourhood as ‘an Amway lady’ would go to the surviving spouse. The wording of the South Australian statutory definition would arguably exclude it.

¹¹⁹ *Inheritance and Trustees’ Powers Act 1914* (Eng) s 3.

¹²⁰ *Succession Act 1981* (Qld) s 34A; *Administration Act 1903* (WA) s 14.

¹²¹ *Wills, Succession and Estates Act 2009* (BC) s 21.

exclusively or principally used at the time of death for business purposes and money or securities for money.¹²²

93. In some jurisdictions motor vehicles are specifically included; in some they are not. In some ‘motor cars’ are included, but on a literal interpretation, not other motor vehicles. In Australia and particularly in rural areas and outer suburbs, a motor vehicle is often essential to the ability of the spouse to remain in the home and to care for dependants. This is a persuasive argument in favour of the spouse taking at least one motor vehicle as part of the right to the deceased’s personal property. But if there are several motor vehicles used for private purposes, should all pass to the spouse thereby reducing the value of the residue available for distribution to the intestate’s descendants?

The Committee

94. The Committee reported varying preferences from consultees as to what items should be included.¹²³
95. Consistent with its general approach of preferring the spouse, the Committee recommended that the spouse be entitled to all the intestate’s ‘tangible personal property’, with some specified exceptions.¹²⁴ The word ‘*tangible*’ was used because it does not include things such as the intestate’s interest under a trust or in a deceased estate, the results of litigation, and intellectual property rights such as copyright in unpublished work or a design that has not been exploited.¹²⁵ These are *intangible*. The Committee recommended exceptions to the intestate’s *tangible* personal property are: (a) property used exclusively for business purposes; (b) banknotes and coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose; (c) property held as a pledge or other form of security; (d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds, and (d) any interest in land.¹²⁶

¹²² *Administration Act 1969* (NZ) s 2(1).

¹²³ It reported also varying preferences as to drafting method – a simple broadly worded definition, a detailed list of what is included, or a broad definition with a list of exclusions: See *Committee’s Report*, above n 6, 60 [4.24]–[4.25].

¹²⁴ See clause 4 in Appendix 3 for the model definition.

¹²⁵ *Committee’s Report*, above n 6, 61–62 [4.26]–[4.30], 62 (Recommendation 5).

¹²⁶ Some interests in land are treated by the law as personal property, including leasehold interests, for example the intestate’s interest as the lessee of a house property or business premises.

96. If the model clause were enacted in South Australia, it would substantially increase the spouse's entitlement. The nature of the personal property to which the spouse is entitled would be increased and personal property partly, or even primarily, used for business purposes would be included.
97. The main policy issue is whether the law should give the spouse a right to things that are not necessary or convenient to the spouse's ability to continue to live in the home without the spouse having to account for their value as part of his or her share of the estate.¹²⁷ The Committee's opinion was that such things should pass automatically to the spouse. The conclusion to be drawn from the current approach of the majority of other Australian States, British Columbia, Scotland and some other jurisdictions is that the answer would be 'no'.

¹²⁷ Examples of such items would be racing cars, model aeroplanes or coin collections.

DIAGRAM 13

EXAMPLE—distribution depending on how personal chattels are defined

Ian died intestate leaving a spouse, Wendy, and two children, Adam and Ben.

His estate includes a car used by him and his family. He also owned a very expensive car and motor cycle that he used for pleasure, together worth \$300 000.

The value of the rest of his estate is \$300 000.

Under the South Australian Act, where the definition of personal chattels includes any motor vehicle owned by the deceased for personal use, the amount available for distribution is \$300 000, having been reduced by the value of the vehicles used for recreational purposes.

Wendy receives

- all the motor vehicles as part of the personal chattels,
- \$100 000 (preferential legacy) and
- \$100 000 (half of the balance of the estate).

Children Adam and Ben each receive \$50,000 (half each of the \$100 000 that remains of the estate after deduction of Wendy's share).

Under a definition of personal chattels that included only the family car, the amount available for distribution would be \$600 000 instead of \$300 000 because it would include the value of Ian's recreational motor vehicles.

Wendy receives

- the family car and
- \$100 000 (preferential legacy) and
- \$250 000 (half of the balance of the estate).

Children Andrew and Ben each receive \$125,000 (half each of the \$250 000 that remains of the estate after deduction of Wendy's share).

QUESTIONS

- 3.1 *Should South Australian law be changed to expand the rights of the spouse to include all the intestate's tangible personal property (with some specified exceptions) as recommended by the Committee? (See the definition of 'personal effects' in clause 4 of the Model Bill in **Appendix 3** and above [88]-[97])*

- 3.2 *Alternatively, do you prefer the current South Australian definition that entitles the spouse to articles of household or personal use or ornament and motor vehicles not used for business purposes (but see the question about motor vehicles below)?*
- 3.3 *Should the spouse be entitled to all the intestate's motor vehicles? If not, how should it be decided which one or ones the spouse should have?*
- 3.4 *Should South Australian law be changed to expand the spouse's legislated right to include personal property used by the intestate partly for business purposes? If yes, should the spouse's right include things used principally for business purposes – or only those used principally or equally for private purposes?*
- 3.5 *Do you agree with the Committee's list of tangible personal property that is excluded and thus taken into account in calculating the spouse's share of the estate? (See definition of 'personal effects' in clause 4 of the Model bill in **Appendix 3**).*
- 3.6 *The Institute invites information about what administrators do in practice in South Australia when 'personal chattels' are used partly for business and partly for private purposes. (See s 72B(1) of the A & P Act in **Appendix 3***

Issue (descendants)

98. In modern succession law, the issue of a person are his or her lineal descendants (whether legitimate or illegitimate), that is the children, grand-children, great-grand-children and remoter descendants by consanguinity (blood relationship) or by legal adoption. It does not include step-children, unless they have been legally adopted. The definition of the people who are issue (descendants) is fundamental to the operation of the law of intestacy.
99. At common law a child who was conceived, but not born, before the death of a woman's husband is said to be '*en ventre sa mere*'.¹²⁸ The unborn child had no rights before its birth, but upon being born alive the child acquired the same rights as a child born before the husband's death.¹²⁹
100. The common law presumed that, in the absence of proof to the contrary, a child born within 10 calendar months of the husband's death was his child. A child

¹²⁸ This expression is from French and translates as 'in the stomach of his/her mother'.

¹²⁹ By a legal fiction, a child who was *en ventre sa mere* was treated as if he or she had been born before the father's death.

born more than 10 months after the death of the husband was presumed not to be his child.¹³⁰

101. These common law presumptions ensured that children of a deceased father were not discriminated against simply because he died before they were born. Later these rebuttable presumptions were enacted in the *Family Relationships Act 1975* (SA) and were extended to include a woman's male domestic partner, and children born within 10 months of dissolution of the marriage.¹³¹

Deemed familial relationships

102. These common law presumptions were satisfactory for centuries because there could be only one natural mother and one natural father and it would have been very rare for a child to be conceived otherwise than through sexual intercourse. But it is now possible to create a child from stored genetic material or embryo long after the death of the man or the woman from whom the genetic material was obtained. A child can be the result of donated sperm or ovum or both and apparently also from two ova and a sperm. A woman may carry and give birth to a child who is not genetically related to her or her husband/partner. A woman may agree to carry a child for another person or couple (surrogacy) and that child might, or might not, result from her ovum. Such practices are lawful in certain circumstances, but even if they are unlawful, they still occur.¹³² It would be unfair to these children to discriminate against them because of the unlawful acts of adults.
103. These developments in medical science and practice have created serious challenges for the law. There are likely to be other developments in the future

¹³⁰ When these presumptions became part of the common law, it was not possible to prove by pathology tests that a child was, or was not, the child of the mother's husband. Proof to the contrary was usually by evidence of the impossibility of sexual intercourse between the husband and wife at the relevant time, such as because the husband was overseas. Nowadays, if there is any question about paternity, DNA testing would normally produce an answer that would be accepted by administrators of estates, other interested parties and courts.

¹³¹ *Family Relationships Act* s 8(1).

Subject to Part 2A, a child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of proof to the contrary, be presumed to be the child of its mother and her husband or domestic partner or former husband or domestic partner.

Sections 8(2) and s 10A(1) of the *Family Relationships Act* mean that 'marriage' in s 8(1) is to be read as including a marriage-like relationship between two people who are domestic partners.

And 'month' means calendar month: *Acts Interpretation Act 1915* (SA) s 4.

¹³² A recent highly publicised example is colloquially known as 'the baby Gammy case'. See Simon King, 'Gammy Sparks Call for Law Reform', *The Australian*, 4 August 2014; Peter Reith, 'Surrogacy in Australia needs Government Conversation not just State legislation', *The Age*, 19 August 2014. Some other cases have involved male couples entering into surrogacy agreements that are unlawful under Australian law. See generally Sam Everingham, Martyn Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201 *Medical Journal of Australia* 270-273.

that will pose further challenges for legislators, policy makers and ethicists. As Professor Rosalind Croucher has noted:

The child born through reproductive technology using donated genetic material ... has presented a major challenge, not only in regard to the legal definition of children, but also in regard to the moral and social ramifications of artificial conception generally. As with adoption, the informal relationship needed rationalisation in the context of inheritance. Legislation in each jurisdiction has been the result.¹³³

104. The *Family Relationships Act 1975* (SA) now contains several provisions that define who is the mother, who is the father and who is a co-parent of a child born as a result of an artificial fertilisation procedure. These provisions deem familial relationships to exist when in fact there is no genetic relationship.¹³⁴

¹³³ Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) 53. Debate about the appropriateness or otherwise of artificial reproductive practices permitted and the *Family Relationships Act 1975* is beyond the scope of this Paper.

¹³⁴ The following summarises the provisions of the *Family Relationships Act 1975* (SA) that deem familial relationships to exist.

- The woman who gives birth to the child ('the birth mother') is deemed to be the mother to the exclusion of the woman whose ovum was used: s 10C(1)–(2).
- If a male husband/partner of the birth mother consented to the reproductive procedure, he is deemed to be the father. In the case of lesbian domestic partners, the female partner who consented to the other undergoing a reproductive procedure is deemed to be the co-parent of the child: s 10C(3).
- If the man who produced the sperm is not the husband/partner of the birth mother, he is deemed not to be the father: s 10C(4).
- If the semen of a man who has died is used, he is deemed to be the father provided he was the birth mother's husband/partner immediately before his death and he had consented to the use of his semen to achieve the pregnancy: s 10C(5).
- If a child is born as a result of a lawful surrogacy agreement and the court has made a parentage order in favour of the commissioning parents, the child is deemed to be their child and all family relationships are traced as if the child were the issue of the commissioning parents: s 10HB(13). (NSW has also enacted a similar provision: *Succession Act 2006* (NSW), s 109A. These provisions were enacted after the Committee reported and so were discussed in its Report.)

A surrogacy arrangement under which a woman bears a child for two male partners using the sperm of one is not allowed by South Australian law and would be unlawful. The man whose sperm was used would not be recognised as the father under South Australian law. This is because the effect of s 10C(4) of the *Family Relationships Act 1975* is that the man who produced the sperm is conclusively presumed not to be the father. This law was made by Parliament to keep the identities of sperm donors secret and to protect them from liability to maintain children resulting from their donation and to protect members of their families from claims against his estate.

Nor could the men adopt the child under South Australian law. The child would have no inheritance rights on the intestacy of either man. Further, it seems that the child could not make a claim against the estate under the *Family Provision Act*. The possible reform of the *Family Provision Act* is the subject of the Institute's forthcoming Issues Paper entitled *Family Inheritance: Looking after One Another*.

The men could, of course, make wills in favour of the child.

105. The law of intestacy is applied in accordance with these deemed relationships.¹³⁵ There are similar laws in other States. The Committee did not make any recommendations for reform of intestacy law in these cases, except in relation to certain children born posthumously as outlined below.

Posthumous children

106. The Committee did not recommend any change to the legal presumptions that, in the absence of proof to the contrary, a child born within 10 calendar months of the husband's death is his child and a child born more than 10 months after the death of the husband is not his child.¹³⁶ If there is doubt, the paternity of a child can now be established with a high degree of probability by pathology tests.
107. At present embryos may be kept in storage for up to 10 years.¹³⁷ Although research to date has not revealed any South Australian court decisions, it seems that a child born up to 10 years and 10 months after the father's death would be entitled to share in his estate under present South Australian law.¹³⁸ The

¹³⁵ So, for example, a child who is not genetically related to the man who is, by law deemed to be that child's father, is entitled to inherit from his estate. Although the law is clear, there might sometimes be a factual dispute, particularly if the medical procedure was carried out in another country where reliable records are not kept and made available.

¹³⁶ 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 both cases, the courts 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 and the surviving spouse was entitled to it.

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 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. Spicer J held that the zygotes were not issue of the estate and 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.

¹³⁷ *Assisted Reproductive Technology Regulations (2010)* and *Ethical Guidelines on the use of Assisted Reproductive Technology in clinical practice and research (2007)* published by the National Health and Medical Research Council.

¹³⁸ In South Australia, assisted reproductive treatment clinics must be registered under the *Assisted Reproductive Technology Act 1988* (SA) and observe the *Assisted Technology Regulations*, the *Ethical guidelines on the use of Assisted Reproductive Technology in clinical practice and research (2007)* published by the National Health and Research

Committee covered this topic under the heading *Delayed conception and suspended gestation*.¹³⁹

108. The Committee pointed out that recognition of posthumous children as issue without any limit as to time could cause practical difficulties for the administrator and unfairness to entitled relatives.
- If the surviving spouse decided to use stored material after the estate has been distributed, would the relatives who have received their shares of the estate have to return all or part of their inheritance so that it could be inherited by the late born posthumous child?
 - It is neither practical nor fair to the administrator and existing entitled relatives to require the administrator to wait for an indefinite period before distributing the estate just in case a child is born more than 10 months after the intestate's death.
 - The possibility of a child being born alive a long time after his or her parent died would cause difficulty when the number of people in a generation has to be determined for the purposes of *per stirpes* distribution.¹⁴⁰ This difficulty could extend to siblings, nieces, nephews, aunts, uncles and cousins of the intestate.

The Committee

109. The Committee canvassed three alternatives:
- Giving no express recognition to the problem and leaving it to the court to decide on a case by case basis; or
 - Fixing a period after the intestate's death after which a posthumous child would not be treated as issue of the intestate (one or two years was suggested); or
 - Disregarding children born more than 10 months after the death of the father.
110. The Committee concluded that the simplest solution was to—

Council. This, and any other conditions that the South Australian Minister for Health may impose, would make it unlawful for a clinic to provide treatment in some circumstances. Because of the fluidity of this area of medical practice regulation, the law of intestacy should be framed in a way that takes into account that there might be changes to what is possible and permitted.

¹³⁹ *Committee's Report*, above n 6, 126–129.

¹⁴⁰ *Ibid* 127–129 [7.25]–[7.32].

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.¹⁴¹

It appears that the Committee intended to maintain in conjunction with this the presumption that a child born within 10 months (44 weeks) of the father's death was *in utero*.¹⁴² It also recommended that the child be entitled to inherit only if he or she survived for 30 days after birth.¹⁴³

111. The Institute intends to consider, in its forthcoming Issues Paper entitled *Family Inheritance: Looking after One Another*, whether children who were conceived after the intestate's death using his genetic material should be permitted to apply for part of the estate under the *Family Provision Act*.¹⁴⁴

South Australia and other jurisdictions

112. There are two different approaches in Australia, New Zealand, England and in some Canadian Provinces. A third approach is taken in British Columbia.
- In **NSW, Queensland, Tasmania and Victoria**, children conceived more than 10 months after the intestate's death do not inherit under the laws of intestacy.¹⁴⁵ In **Queensland, NSW and Tasmania** there is the added requirement that the child survive for at least 30 days after birth. **New Zealand, England** and at least **some Canadian Provinces** fall into the

¹⁴¹ Ibid 129 (Recommendation 25). 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.

¹⁴² This is implied from the opening words of paragraph [7.32] of the *Committee's Report* (above n 6, 129). The recommendation is reflected in model clause 9—

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.

¹⁴³ The requirement to survive birth by 30 days is consistent with the model survival clause - model clause 4(2) - a person is entitled to inherit only if he or she survived the intestate by 30 days.

¹⁴⁴ 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 New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination*, Report No 49 (1986) [12.6]–[12.12].

¹⁴⁵ *Succession Act 2006* (NSW) s 107; *Succession Act 1981* (Qld) s 5A; *Intestacy Act 2010* (Tas) s 8; *Administration and Probate Act 1958* (Vic) s 5(2). NSW and Tasmania have enacted model clause 4(2).

same category, although some require that the posthumous child live for a specified period after birth and some do not.¹⁴⁶

- By contrast, in **South Australia**, it seems that a child born alive within the storage time permitted by the National Health and Medical Research Council's 2007 *Ethical Guidelines for the Clinical Practice of Assisted Reproductive Technology* could inherit, provided the deceased had consented to the procedure that resulted in the pregnancy.¹⁴⁷ The Guidelines currently permit storage of embryos for up to 10 years.¹⁴⁸
- **ACT, Northern Territory, and Western Australian** succession laws are like those of **South Australia** in that they are silent about inheritance by posthumously conceived children. Their assisted reproductive technology legislation requires compliance with the above guidelines.
- Since 31 March 2014, **British Columbia** has had a compromise position. It appears from a literal reading of the relevant provision that a child posthumously conceived using the sperm or ovum of a deceased person would inherit on intestacy in certain circumstances.¹⁴⁹ The circumstances are:
 - the other parent of the child was married to or in a marriage-like relationship with the deceased when the deceased died (would be called a 'spouse' in this Paper);
 - the spouse notified the administrator/executor and the beneficiaries/persons entitled to the estate that the spouse may use reproductive material of the deceased to conceive a child;
 - notice was given in writing within 180 days from a grant of probate or administration;

¹⁴⁶ *Administration Act 1969* (NZ) ss 2(1), 78; *Administration of Estates Act 1925* (Eng) s 55(2); *Wills and Succession Act 2010* (Alberta) s 58(2); *Wills, Estates and Succession Act 2009* (BC) s 8; *Intestate Succession Act 1990* (Manitoba) s 1(3); *Intestate Succession Act 1989* (Nova Scotia) s 12; *Intestate Succession Act 1996* (Saskatchewan) s 14.

¹⁴⁷ This appears from the absence of specific provisions relating to intestacy and the legislation of the State that is used to determine parentage - in South Australia, the *Family Relationships Act 1975* (SA) s 10C.

¹⁴⁸ See National Health and Medical Research Council, *Ethical Guidelines for the Clinical Practice of Assisted Reproductive Technology* (2007) [8.8].

¹⁴⁹ *Wills, Estates and Succession Act 2009* (BC) s 8; Part 3 of the *Family Law Act 2011* (BC), which is similar to the *Family Relationships Act 1975* (SA). This is not confined to intestacy cases - it applies generally, as does the British Columbia survival provision. The Institute thinks that most, if not all, cases would involve the use of sperm. Whether the use of an ovum of a deceased woman would be permitted and the circumstances in which the use of sperm of a deceased man would be permitted in British Columbia are beyond the scope of this Paper.

- the child conceived from the reproductive material was born alive within two years of the deceased's death and lived for at least three days after birth (although the court may extend that time); and
- the deceased is the child's parent by operation of the *Family Law Act*, that is, the Act that is used to determine legal parentage in British Columbia.

QUESTIONS

- 4.1 *Do you agree with the Committee's recommendation that only children who were conceived before the death of the intestate parent should inherit under the laws of intestacy?*
- 4.2 *Do you agree with the Committee's recommendation that a posthumous child should inherit only if the child survives for at least 30 days, consistent with the period of survival required for other relatives?*
- 4.3 *If you do not agree, in what circumstances should a child conceived after the intestate's death inherit? For example, should the law allow inheritance-*
- (a) *Only if the child is born within a certain time of the intestate's death, and if yes, what should the time limit be?*
 - (b) *Only if the surviving parent was the spouse of the intestate when the intestate died?*
 - (c) *Only if the person whose genetic material was used consented to it being used for posthumous conception?*
 - (d) *Only if the surviving spouse notified the administrator and all other interested parties of intention to use the intestate's genetic material, so that the administrator can hold back the part of the estate that the proposed child would inherit if born alive (and surviving birth for the required period)?*
 - (e) *Within what period of time should notice be given? (Take into account the desirability of the estate being wound up and beneficiaries receiving their inheritance without undue delay.)*

Adopted children

113. In this Paper, 'adoption' means adoption by court order.¹⁵⁰ A child may be adopted by strangers (which in the past was common when a child was illegitimate), or by members of the family of a natural parent, or by a step-parent.

¹⁵⁰ Formal legal adoption was not recognised by the common law and was not recognised by statute in South Australia until the *Adoption of Children Act 1926*. It was not recognised in England until that time either.

114. Under Australian law, a child who is adopted becomes the child of the adoptive parents and ceases to be a child of the natural (birth) parents.¹⁵¹ As Croucher and Vines explain, the adoption order severs blood relationships and substitutes new relationships as if the adoptive parents were blood relatives.¹⁵² A second adoption severs the relationships created by the first adoption, except in the case of step-parent adoptions. It follows that the rights on intestacy of an adopted child, an adoptive parent and other kin are all treated as if the adopted child and the adoptive parent were biologically parent and child.
115. If a child is adopted by his or her parent's spouse (that is, adopted by a step-parent), the child becomes the child of the parent and step-parent. A relinquishing parent ceases to be a parent.¹⁵³
116. Nevertheless, in all States, New Zealand and under a recent English Act, an adopted child retains any inheritance rights that he or she had already acquired before the adoption order was made.¹⁵⁴ The Institute is not aware of any proposals to change this.
117. In South Australia there is a further exception to the notion that adoption severs previous familial legal relationships. If a child has been adopted by a *step-parent*, the child may inherit from or through his or her natural or from or through a previous adoptive parent.¹⁵⁵ For example, assume Ian and Wendy had a child, Claire. Ian died. Wendy married John. John adopted Claire. The legal relationship between Wendy and Claire remains the same. The legal relationship between John and Claire becomes that of father and child. But Claire can still inherit from Ian's intestate estate. South Australia is now the only Australian jurisdiction that preserves that right.¹⁵⁶

For a list of ten policy questions that arise, see J E Rein, 'Relatives by Blood, Adoption, and Association: Who Should Get What and Why' (1984) 37 *Vanderbilt Law Review* 711, 718.

¹⁵¹ *Adoption Act 1988* (SA) s 9(1).

¹⁵² Croucher and Vines, above n 133, [2.22].

¹⁵³ *Adoption Act 1988* (SA) s 9(1). There is no relinquishing parent if a natural or previous adoptive parent is dead. There is no relinquishing father if the father is not recorded on the birth certificate and there is no order of a court adjudging him to be the father.

¹⁵⁴ *Adoption Act 1988* (SA) s (3a) provides - '

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.'

See also *Adoption Act 1955* (NZ) s 16(2)(d); *Inheritance and Trustee Powers Act 2014* (Eng) amending s 69 of the *Adoption and Children Act 2002* (Eng) s 69(4)(c). The recent English amendment was recommended in 2011 by the English Law Commission in its report, *Intestacy and Family Provision Claims on Death*, Report No 331 (2011) 79 [4.51].

¹⁵⁵ *Adoption Act 1988* (SA) s 9(3).

¹⁵⁶ NSW law preserved this right until 2009 when it replicated model clause 10 as s 109 of its *Succession Act 2006* (NSW). Tasmania enacted model clause 10 in 2010.

118. This South Australian law can be supported on the basis that step-parent adoptions usually occur when a child is no longer a very young infant and often relationships had been formed between the child and the child's other natural parent, grand-parents and other members of the natural parent's family and continue after adoption by the child's step-parent. They may regard each other as part of one family, despite the legal consequences of the adoption order. The colloquial saying 'blood is thicker than water' captures the situation.

The Committee

119. The Committee took a different view. It recommended that when 'a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy'.¹⁵⁷
120. It seems that the most persuasive considerations for the Committee were that:
- preservation of the child's right to inherit from his or her natural family could lead to unnecessary complications because the administrator would have to locate persons who have been adopted out of the family;¹⁵⁸ and
 - it could result in what it called 'double-dipping', when an adopted person is entitled to inherit from, or through, both a natural and an adoptive parent.¹⁵⁹

The Committee considered that these outweighed the fact that children adopted by step-parents often have a relationship with the family of the deceased or relinquishing parent and his or her family.

QUESTIONS

4.4 Should South Australian law continue to preserve the right of a person who was adopted by a step-parent to inherit from or through his or her natural parent or previous

¹⁵⁷ *Committee's Report*, above n 6, 134–135 [7.51]–[7.52], 137 (Recommendation 27). In its discussion of the arguments for and against the South Australian law, the Committee referred to the Uniform Law Conference of Canada and the Uniform Probate Code of America which include recommendations that step-parent adoption should *not* terminate the relationship between the child and natural parent for the purposes of succession, and to the Alberta Law Reform Institute that concluded the opposite. It seems the Committee was more influenced by Alberta. Model clause 10 has been enacted in the *Succession Act 2006* (NSW) s 109 and the *Intestacy Act 2010* (Tas) s 10.

¹⁵⁸ From 1937, adoptions in South Australia were surrounded by secrecy, and between 1966 and 1988 the *Adoption Act* imposed absolute secrecy. Many unmarried girls and women hid the birth of their illegitimate children from their families and so there are adopted people whose existence would not be known to administrators or relatives of the birth mother. Since 1988, the level of secrecy has been much relaxed and it is now often possible for adopted people to find out the identity of their natural parents, or at least their natural mother, and for the natural mother to find a child she gave for adoption. See South Australia, *Parliamentary Debates*, Legislative Council, 7 November 1996, 407, concerning the *Adoption (Miscellaneous) Amendment Bill*.

¹⁵⁹ Opinions could differ about whether the possibility of 'double dipping' is acceptable in the small number of cases in which it might occur.

adoptive parent? Alternatively, should this right be abolished, consistent with the recommendation of the Committee? Please give reasons for your opinion.

4.5 Alternatively, should South Australian law deal with this situation by giving a child adopted by a step-parent the right to make a claim against the estate of the deceased natural parent under the Family Provision Act, instead of the current statutory right to share in the estate as a descendant of the deceased?

Half and full blood descendants

121. Every Australian State, New Zealand and at least some Canadian Provinces have abolished the distinction between relatives of the full blood and relatives of the half blood.¹⁶⁰ Thus, people who have the same father, but different mothers, are treated as issue of the father and as siblings of equal standing, and likewise people who have the same mother but different fathers. Remoter lineal descendants and other relatives are traced without distinction as to full blood and half blood. This is consistent with the Committee's recommendation and model clause 4.¹⁶¹
122. In **England**, by contrast, full blood relatives take priority over half blood relatives so that half-brothers and half-sisters take nothing if there are full blood siblings. The Law Commission did not make a recommendation to change this, reporting that, on consultation, there was no clear preference for change.¹⁶²

QUESTION

4.6 Do you agree with the Committee's recommendation that relatives of the full blood and relatives of the half-blood should continue to have equal inheritance rights? (This is the law in every State.) If you disagree, please give reasons?

¹⁶⁰ See *Administration and Probate Act 1929* (ACT) s 44A; *Succession Act 2006* (NSW) s 101; *Administration and Probate Act 1969* (NT) s 61(2)(b); *Succession Act 1981* (Qld) s 34(2); *Administration and Probate Act 1919* (SA) s 72B(2); *Intestacy Act 2010* (Tas) s 4; *Administration and Probate Act 1958* (Vic) 52(1)(f)(vii); *Administration Act 1903* (WA) s 12B; *Administration Act 1969* (NZ) s 77; *Wills and Succession Act 2010* (Alberta) s 68(b); *Wills, Estates and Succession Act 2009* (BC) s 23(5)(b); *Intestate Succession Act 1990* (Manitoba) s 1(4); *Intestate Succession Act 1989* (Nova Scotia) s 11; *Intestate Succession Act 1996* (Saskatchewan) s 13.

¹⁶¹ *Committee's Report*, above n 6, 154 (Recommendation 30). See the definition of 'brother/sister' in model clause 4(1) below in **Appendix 3**.

¹⁶² See *Administration of Estates Act 1925* (Eng) s 46; English Law Commission (Eng), Report No 331, above n 13, 63-66 [3.16]–[3.27].

Distribution where there is no surviving spouse, but there are surviving issue

123. In South Australia, when there is no surviving spouse, the whole estate is equally divided between the intestate's surviving children. If a child has predeceased the intestate, then that child's issue (that is, grand-children and great-grand-children and remoter lineal descendants) take the share of their deceased parent or remoter ancestor. Sometimes it is said they take 'by representation' or 'as the representative of their deceased ancestor'. These remoter descendants share *per stirpes* as illustrated by diagram 15.¹⁶³
124. Inheritance by the intestate's descendants when there is no surviving spouse appears to be uncontroversial. The main points for discussion are:
- whether step-children should be entitled to a share of the estate of an intestate step-parent. (This question is not relevant if the step-parent has adopted the child: see above [113]-[115].)
 - whether the estate should be distributed to issue of the intestate's children *per stirpes* or *per capita* (see Diagram 15 for an illustration of the difference).

Step-children

125. If a parent remarries or re-partners, in a way that qualifies as a domestic partnership, the new spouse becomes the step-parent of any children of the earlier relationship. So, for example, assume Ian and Wendy had a child, Adam. Ian and Wendy divorce. Ian marries Jane. Adam becomes automatically the step-child of Jane. To take another example, Ian and Wendy had a child, Adam. Ian and Wendy separate and Wendy lives as the domestic partner of Sarah. Adam becomes the step-child of Sarah.
126. The age of the parties and whether or not the step-child is, or ever was, dependant on the step-parent, and whether or not the step-child is, or ever was, a member of the same household as the step-parent, are all irrelevant to the existence of that legal status.
127. Under Australian intestacy legislation the relatives who are entitled to an intestate's estate are the surviving spouse and blood relatives. So, a step-child is not entitled to share in an intestate step-parent's estate and a step-parent is not entitled to share in the step-child's estate, unless the child was legally adopted by the intestate.

¹⁶³ Model clause 28. The Model Bill does not use the terms *per stirpes* and *per capita*.

128. The Institute is aware that from time to time, the Attorney-General receives correspondence from lawyers and members of the public requesting that the law be reformed to treat step-children as if they were issue of the step-parent.
129. Although in South Australia step-children do not have an entitlement to their intestate step-parents' estates, they are entitled to make a claim under the *Family Provision Act* for a share of the estate of their step-parent if they were wholly or partly maintained, or were legally entitled to be wholly or partly maintained, by their step-parent immediately before the step-parent's death.¹⁶⁴

Social trends

130. When the rules about the distribution of intestate estates were developed, divorce was very rare, *de facto* relationships were not recognised and illegitimate children were generally disregarded for the purposes of succession law.¹⁶⁵ The legally recognised relationship of step-parent and step-child generally occurred after the death of one of the child's parents and the remarriage of the surviving parent and the common law used to be that the legal relationship of step-parent and step-child subsisted only for the duration of the natural parent's life.¹⁶⁶ The situation is now very different. People are more likely to become step-children following the divorce or separation of their parents and the re-partnering of one or both of them. Often step-children will have two surviving natural parents as well as one or two step-parents. Often they become step-children when they are adults.
131. The Australian Institute of Family Studies (AIFS) reported in 2004, based on the 2001 HILDA survey,¹⁶⁷ that 5.5 % of *couple families* with children under the age of 18 years and 4.9% of *all families* with children under the age of 18 years included

¹⁶⁴ *Inheritance (Family Relationships) Act 1972* (SA) s 6(g).

¹⁶⁵ However, a natural parent of an illegitimate child could make a will in favour of an identified illegitimate child.

¹⁶⁶ See *Committee's Report*, above n 6, 130 [7.35].

¹⁶⁷ The Household, Income and Labour Dynamics in Australia (HILDA) Survey. This is a longitudinal survey commenced in 2001 that is being managed by a consortium including Australian Institute of Family Studies, Melbourne University Institute of Applied Economics and Social Research and the Australian Council for Educational Research.

step-children.¹⁶⁸ The Australian Bureau of Statistics (ABS) reported that in 2009-2010 that there were 190,000 families in which there was at least one resident step-child under the age of 18 years.¹⁶⁹ This statistical information is almost certainly an underestimate. The ABS definition excludes step-children who are not usually resident in the same household and step-children who are 18 years of age or older regardless of where they live. With the *Family Law Act 1975* (Cth) now encouraging shared parenting arrangements, the number of families in which a child spends time with both parents and one or two step-parents has probably increased. Margaret Howden noted in 2007 that step-families have been underestimated in official collections of statistics because of failure to acknowledge children's membership of two households at the same time, recording them as if they were a member of only one household.¹⁷⁰ Howden says another reason for underestimation is that many step-family members wittingly or unknowingly fail to recognise their step-family status.¹⁷¹ If all people who are legally step-children were counted, the numbers would be much greater.

132. AIFS also reported that lone parent families were more likely to receive financial support from the non-resident parent than families in which the resident parent had re-partnered.¹⁷² It is likely that step-children who are under the age of 18 years and living with a step-parent are at least partially financially dependent on the step-parent.
133. Given that it is not known how many people who die intestate have step-children, the numerical consequence of changing intestacy rules for step-children cannot be estimated.

Other jurisdictions

134. In **Australia, New Zealand, England, Scotland** and those **Canadian Provinces** whose legislation was examined, step-children are not entitled to inherit from their intestate step-parents' estates.

¹⁶⁸ David De Vaus, *Diversity and Change in Australian Families: Statistical Profiles* (Australian Institute of Family Studies, 2004) 60.

¹⁶⁹ *Family Characteristics, Australia 2009-10* (ABS catalogue 4442.0).

¹⁷⁰ Margaret Howden, *Step families: Understanding and responding effectively* (Australian Family Relationships Clearing House Briefing No 6, Australian Institute of Family Studies, 2007) 1. See also De Vaus, above n 168.

¹⁷¹ Howden, above n 170, 3. See also Francesca Adler-Baeder and Brian Higginbotham, 'Implications of remarriage and stepfamily formation for marriage education' (2004) 53 *Family Relations* 448; Roni Berger, *Stepfamilies: A multi-dimensional perspective* (Haworth Press, 1998); John Visser, 'Stepfamilies: a Work in Progress' (1994) 22 *American Journal of Family Therapy* 337.

¹⁷² De Vaus, above n 168, 61.

135. The Committee recommended that there be no change in this area (a view shared by other law reform bodies).¹⁷³ The Committee highlighted that-
opinions expressed in submissions and consultations generally rejected any idea of providing for step-children of an intestate by way of distribution on intestacy.¹⁷⁴

Opinions to this effect included the Probate Committee of the Law Society of SA and the Trustee Corporations Association of Australia. The Committee resolved that it was preferable to leave inheritance by step-children to the *Family Provision* legislation.

Arguments for treating step-children as if they were issue of the intestate

136. Some arguments for treating step-children as if they were issue of the intestate follow. These are applicable to some, but not all legal step-relationships.
- It is unfair to exclude step-children who are, or who have been, members of the household of the intestate step-parent and the number of such step-children in modern society is now such that reform is warranted.
 - In some cases the relationship between the step-child and step-parent is close, especially when the child was brought up in the step-parent's household from a very young age.
 - The step-parent may have assumed at least partial responsibility for the maintenance and support of a step-child who is a member of his or her household.
 - In some cases the step-child has provided moral, physical or financial assistance to the step-parent, particularly in old age, disability or illness.

Arguments against treating step-children as issue of the intestate

137. The following are arguments for not changing the law to give step-children the same inheritance rights as issue.
- With increasing life expectancy, many people acquire the legal status of step-children when they are adults, not infrequently being of mature age themselves.¹⁷⁵

¹⁷³ These include English Law Commission, *Family Law: Distribution on Intestacy*, Report No 187 (1989) [49]; Law Reform Commission of Tasmania, *Succession Rights on Intestacy*, Report No 43 (1985) 17; Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No 78 (1999) 137.

¹⁷⁴ *Committee's Report*, above n 6, 133 [7.44] n 63.

- A person who is a step-child might never have been dependent on or a member of the intestate's household and the step-parent might never have had any moral obligations towards the step-child.
- The people who are legally step-child and step-parent might never have met each other, or in some cases, might not even be aware of each other's existence.
- Because of the above, giving all step-children a right to inherit from their intestate step-parents' estates is bound to produce many anomalous and unfair cases. These are likely to increase the number of *Family Provision Act* claims by blood relatives with the undesirable personal stress, cost, delay and use of court resources.
- On the other hand, a step-child (of any age) who was maintained, or who was legally entitled to be maintained, either wholly or partly by a step-parent when the step-parent died, may make a claim against the intestate estate for provision out of the estate under the *Family Provision Act*.¹⁷⁶ The court must take into account the circumstances of the family and, as it is not bound by rigid distribution rules, it can make orders appropriate to the individual case.
- Many step-children now have two living natural parents who can support them and from whose estates they stand to gain either by will or under the rules of intestacy. Some people have suggested that giving step-children an automatic entitlement allows for 'double-dipping'.¹⁷⁷
- Some children become the step-children of several step-parents as a result of their natural parents having a succession of marriages or domestic partners.¹⁷⁸
- As domestic partnerships are now given the same status as lawful marriages, there is potential for disputes about whether a person was a step-child of an intestate, because of the need to prove the nature of the relationship between the natural parent and the alleged step-parent. Further, although blood

¹⁷⁵ To illustrate what would happen if step-children are treated as if they were issue of the step-parent, assume these facts. Ian and Wendy have a child, Adam. Ian and Wendy divorce. Ian marries Jane when Adam is 40 and becomes Jane's step-son. Jane has a child, Jill, by her previous marriage. Ian and Jane divorce. Jane dies intestate. Under the current law, Jane's child, Jill, receives the whole of Jane's estate. If the law were changed to treat step-children as if they were blood relatives for the purposes of intestacy laws, then Jill (Jane's child) would share Jill's estate equally with Adam (Jane's adult step-child). Now assume that Adam dies before Jane, leaving a child, Annette. Assume the law has been changed to recognise step-children. Jill (Jane's child) would have to share Jill's estate equally with Annette (Jill's step-child's child).

¹⁷⁶ *Family Provision Act* s 6(g).

¹⁷⁷ *Committee's Report*, above n 6, 132 [7.40].

¹⁷⁸ The HILDA survey in 2001 showed that at that time 53% of step-family couples and 39% of blended family couples were cohabiting rather than being married. 'Blended family' was defined as a family consisting of a couple with two or more children, at least one of whom was the natural child of both members of the couple and at least one child is a step-child of either member of the couple (ABS 1998a)

relationship can be proved by scientific testing, step-relationships cannot. These differences could complicate and delay the administration of the estate.

- If entitlement were to be limited to step-children who were dependent on the step-parent, there is likely to be an increase in disputes between step-children and blood relatives of the intestate. In any event, the administrator would have to enquire into whether the step-child was dependent. And what degree of dependency would be sufficient? The Committee did not recommend this because it would result in greater uncertainty in administration of intestate estates.¹⁷⁹
- The Committee considered that limiting the entitlement to step-children who are under the age of 18 years would be arbitrary.¹⁸⁰
- If step-children are treated as if they were descendants of the step-parent, the beneficial purpose of the survivorship provision that prevents the estate of both spouses going to the family of only one spouse when they die within a short time of each other would be undermined.¹⁸¹ For example, suppose Ian and Wendy had a child, Adam. Ian and Wendy divorce. Ian marries Jane, so that Adam becomes Jane's stepchild. Ian and Jane are involved in an accident as a result of which Ian dies immediately and Jane dies a few hours later. Adam would take both Ian's estate and Jane's estate and Jane's relatives would receive nothing.¹⁸²
- South Australian law should remain consistent with the law in all other States.

Ideas for giving step-children a right to inherit in some circumstances only

138. The Committee's approach was 'all or nothing' and this is consistent with the aim of making the administration of intestate estates as simple and certain as possible. However, consideration could be given to the possibility of recognising step-children in some circumstances. Some possibilities follow.
- Give an entitlement to step-children who were wholly or partly maintained, or who were entitled to be so maintained, by their intestate step-parents

¹⁷⁹ *Committee's Report*, above n 6, [7.38].

¹⁸⁰ *Ibid.* Legally a person becomes an adult on his or her 18th birthday.

¹⁸¹ *A & P Act* s 72E.

¹⁸² Adam's age would be irrelevant, as would the degree of his dependency (if any) on Ian, and whether he had ever been part of the household of Ian and Jane.

when they died, consistently with the *Family Relationships Act*. The difference would be that the step-child would be entitled to a fixed share of the estate, rather than such amount, if any, as the court decides in the event that the step-child chooses to make a claim. In both cases, the step-child's dependence on the intestate would have to be established.

- Give an entitlement to step-children who had been members of the intestate step-parents' households for at least a specified time, for example, at least three years or at least three years out of the previous four years consistently with the time required for recognition of a domestic partnership under the *Family Relationships Act*.¹⁸³ This could give rise to factual disputes, particularly when there has been a divorce and shared parenting arrangement.
- Give an entitlement to step-children who became a step-child after the death of their parent (natural or adoptive) if they are under the age of 18 years and a member of the step-parent's household at the time of the step-parent's death.¹⁸⁴ This would be the simplest of these three possibilities. It is the alternative least likely to result in disputes and ill-feeling and would reduce the chances of the need for publicly funded welfare payments.

Step-parents

- 139. If step-children are given an entitlement to the step-parent's estate, then it would be logical to give step-parents an entitlement to the step-child's estate in the same circumstances.
- 140. And if a step-child is treated as issue of the step-parent, it would be logical to treat the step-parent's own children as if they were siblings of the step-child, and so on? If this were done, all relationships would be traced as though the step-child and step-parent were blood relatives, potentially affecting the rights of many other relatives.

¹⁸³ Note that the Committee recommended a shorter time for recognition of domestic partnerships.

¹⁸⁴ Howden, above n 170, 4. 'The structure of contemporary stepfamilies formed after a death, ... remains essentially the same as in the past, with the step-parent often becoming a replacement parent and children continuing to reside full-time in the household.'

DIAGRAM 14

EXAMPLE – illustration of the current law and the law if step-relationships are recognised for intestate inheritance

Ian and Wendy have two children, Adam and Ben.

Ian and Wendy divorce.

Ian marries Jane when Adam is 30 and Ben is 25 and they thereby become Jane's step-sons.

Ian dies.

Then Adam dies intestate without a spouse or child.

Under current law:

Ben, Adam's brother, would take the whole of Adam's estate.

If the law were changed to treat step-parents and step-children as blood relatives:

- *Jane would inherit all of Adam's estate, to the exclusion of Ben.*

QUESTIONS

- 5.1 *Should the law be left as it is, so that step-children do not have a statutory right to share in the estate, but may make a claim under the Family Provision Act if they were wholly or partly maintained, or were legally entitled to be wholly or partly maintained, by the intestate step-parent immediately before his or her death? This would be consistent with the Committee's recommendation and the law in all other States.*
- 5.2 *Alternatively, should the law be changed to give step-children a statutory entitlement to share in the estate? If yes, in what circumstances and to what extent? (See [138] above for three possibilities.)*
- 5.3 *And if step-children are entitled to share in the step-parent's estate, should all other relationships be traced as if the step-child were the natural child of the step-parent? (For example, step-parents would inherit from step-children who died intestate without a spouse or descendants. And inheritance rights would flow through to blood relatives of step-parents in the absence of relatives of the step-child with a prior right.)*

Next of kin

141. In **South Australia**, the most distant ancestors who may inherit an intestate's estate are grand-parents. Grand-parents rank after the intestate's siblings and nieces and nephews of any degree. The most distant collateral relatives who may inherit are descendants of first cousins.¹⁸⁵ So first cousins once removed, first cousins twice removed and so on can inherit, although probably there are not a great many cases in which they do. In the absence of any of these relatives, the estate passes to the Crown (the South Australian Government).
142. How far should kinship be traced? Should it be unlimited, or should the law impose a limit to reduce the cost, time and difficulty in administering some estates? (As the customary kinship laws of Indigenous Australians are different from the statutory laws, this is dealt with separately in [299] to [315] below).

The Committee

143. The Committee recommended that the most remote ancestors to inherit should be grand-parents and the most distant collateral relatives to inherit should be the children of deceased aunts and uncles (first cousins).¹⁸⁶ It recommended that grand-parents rank after the intestate's spouse, descendants, parents and siblings. This differs from South Australian law in that it gives grand-parents priority over nieces and nephews.

Other jurisdictions

144. Opinions differ about how far kinship should be traced before an estate goes to the State.
- The law in four States is now as recommended by the Committee – **NSW, Queensland, Tasmania and Western Australia** (see [143] above).¹⁸⁷

¹⁸⁵ *A & P Act* s 72(d) and *In the Estate of Hughes* (1985) 38 SASR 5.

¹⁸⁶ *Committee's Report*, above n 6, 166 (Recommendation 36), 173 (Recommendation 37). By contrast, in 1974 the Law Reform Committee of South Australia expressed the opinion that the claims of relatives of any degree should take priority over the Crown (that is the general revenue of South Australia). It concluded that any limits on the degree of inheritance would be purely arbitrary and that there was no compelling logic to support them. See Law Reform Committee of South Australia, *Relating to the Reform of the Law of Intestacy and Wills*, Report No 28 (1974) 8. However, Parliament did not fully accept this suggestion.

¹⁸⁷ *Succession Act 2006* (NSW) ss 130–1; *Succession Act 1981* (Qld) s 37; *Intestacy Act 2010* (Tas) s 32; *Administration Act 1903* (WA) s 14.

- In three States – the **ACT, Northern Territory and South Australia** – grand-parents and first cousins any number of times removed may inherit and grand-parents rank after siblings and nieces and nephews.¹⁸⁸
- **Victoria** is the only State that does not limit next of kin on intestacy.¹⁸⁹ The VLRC has recommended reforms that would make Victorian consistent with the Committee’s recommendation for reasons of practicality and to promote certainty and consistency.¹⁹⁰ If the VLRC recommendation is accepted by the Victorian Parliament, five out of the eight Australian jurisdictions will exclude collateral relatives more distant than first cousins and ancestors more distant than grand-parents. **New Zealand** appears to be basically the same as South Australia, the ACT, Northern Territory and Western Australia.¹⁹¹ The **English** Law Commission’s recommendation is consistent with these.¹⁹²
- In **Scotland**, and at least **some Canadian Provinces**, rights of inheritance are wider than in South Australia and wider than recommended by the Committee. The Institute understands that in **Scotland, Saskatchewan and Nova Scotia** ancestors and cousins of any degree can inherit. **Alberta, Manitoba** and the recent **British Columbia** Act limit inheritance to great-grand-parents and their descendants (to third cousins of any degree).¹⁹³

¹⁸⁸ *Administration and Probate Act 1929* (ACT) ss 49(5), 49C; *Administration and Probate Act 1969* (NT) s 69(1)(c); *A & P Act 1919* (SA) ss 72J(d), s72B(1).

¹⁸⁹ VLRC Report, above n 68, 58 [5.14], 59 [5.20].

¹⁹⁰ Ibid 58 [5.14], 61 [5.27], 61 (Recommendation 12). The VLRC reported that fewer than 5% of intestate estates administered by the Victorian State Trustee involve kin more remote than first cousins. One of the reasons it gave for recommending reform was that distant kin of an intestate who permanently lived in Victoria or had immoveable property in Victoria could ‘receive a windfall that they would not be entitled to anywhere else in Australia’ and that this would create an anomaly when the intestate owned immoveable property in more than one State (Ibid 60 [5.24]).

¹⁹¹ Hardringham, Neave and Ford, above n 116, [2502], [2504] referring to ss 77 and 78 of the *Administration Act 1969* (NZ).

¹⁹² Law Commission (Eng), Report No 331, above n 13, 66–68 [3.28]–[3.37].

¹⁹³ They follow the Roman-Dutch parentelic system, despite their historical connection with Great Britain. According to Wikipedia the term ‘*parentela*’ refers to a particular parental group and its descendants:

First *parentela* consists of the deceased and his descendants.

Secondly *parentela* consists of the deceased’s parents and their descendants (first-line collaterals).

Thirdly *parentela* consists of the deceased’s grandparents and their descendants (second-line collaterals).

Fourthly *parentela* consists of great-grandparents and their descendants (third-line collaterals).

The *parentelae* go on without limit. Essentially, the lowest *parentela* takes the entire estate, and parentelic heads trump others within the same *parentela*. See *Wills, Estates and Succession Act 2009* (BC) s 23.

Arguments for limiting the next of kin who can inherit

145. The following are some arguments for limiting the next of kin who can inherit.
- The time, expense, delay and sometimes difficulty involved in tracing distant relatives, of whom there may be many, may deplete the estate and keep identified kin out of their inheritance for a considerable time and there may literally end up being hundreds of eligible beneficiaries.¹⁹⁴ Tracing can be particularly difficult or impossible when people have migrated from countries afflicted by genocide, invasion, war or natural disaster.
 - As people move from the area of their birth, they are less likely to maintain relationships with distant relatives.
 - In small estates the amount to which each distant relative would be entitled does not warrant the cost of tracing them.
 - Allowing inheritance by remote relatives whom the intestate did not know, or did not even know existed, does not achieve the policy objective of attempting to replicate what the intestate would have done if he or she made a will. (Some might dispute that this is, or should be, one of the policy objectives of intestacy law).
 - An administrator who distributes the estate risks being sued by entitled next of kin whom he did not find *unless* the administrator follows certain procedures.¹⁹⁵ But, if the estate is very small, the cost might be disproportionate to the value of the estate.

Arguments against limiting next of kin who can inherit

146. Following are some arguments for not limiting the next of kin who can inherit.
- It has been asserted that most intestate people would have preferred that their estates went to distant relatives than to the Government (even if the

¹⁹⁴ In *West v Weston* (1998) 44 NSWLR 657, a genealogist was engaged and after two years of diligent searching had identified no fewer than 1,675 beneficiaries.

It may be that not limiting the classes of next of kin who may inherit increases the number of scams perpetrated by fraudsters who send emails asserting that the recipient is entitled to inherit from an un-named relative. See, for example, Robyn Dixon, 'The Lure of Easy Money', *The Guardian*, 10 November 2005.

¹⁹⁵ After making reasonable searches for entitled relatives, the administrator may apply to the Court for what is called a *Benjamin* order. The name is derived from the English case *Re Benjamin* [1902] 1 Ch 723. This is an order of the Court that gives the administrator permission to distribute the estate as if next of kin who have not been found or not identified have predeceased the intestate. The order allows the administrator to distribute the estate to the kin who have been identified and found. If the administrator distributes in accordance with the order, he or she is protected from liability. Alternatively, the administrator may apply to the court for directions about advertising for claimants: *Trustee Act 1936* (SA) s 29. Under both procedures, any kin who turn up after the estate has been distributed may attempt to recover their share from the beneficiaries who have received the estate, but they cannot recover from the administrator.

relative is unknown to them).¹⁹⁶ This is persuasive if one accepts that the law of intestacy should attempt to replicate what most intestate persons would wish.

- If one of the purposes of the rules of distribution is to lessen the burden on the taxpayer, then great-grand-parents and great-great-grand-parents should be able to inherit, as they would be elderly and likely to be in receipt of social welfare benefits. The Committee's recommendation would exclude them.

QUESTIONS

5.4 *Should the most remote kin who can inherit be the intestate's grand-parents and first cousins, consistent with the Committee's recommendations? (This would require changes to South Australian law.)*

5.5 *If not, who should be entitled to inherit from the intestate estate in the absence of closer relatives, and in what order of priority? (For example, should great-grand-parents be able to inherit? If yes, over which other relatives should they have priority?) Please give reasons.*

Bona Vacantia

147. 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 that in Western Australia it escheats to the Crown with similar result.¹⁹⁷
148. In **South Australia**, any person may ask the Governor, in Council, to waive the States' rights in his or her favour, but the legislation does not provide any guidance about when the Governor should do this.¹⁹⁸ In some other States the legislation allows for waiver in favour of a dependant who is kin, or in favour of some other person for whom it would be reasonable to expect the intestate to provide.

The Committee

149. It was suggested to the Committee that *bona vacantia* estates be given to charity. The Committee rejected this, primarily on grounds of the complex arrangements

¹⁹⁶ Manitoba Law Reform Commission, *Intestate Succession* (Report 61) (1985) 33.

¹⁹⁷ *A & P Act* s 72G(1)(e); *Public Finance and Audit Act 1987* s 5(c) and (e). In South Australia, the proceeds of the sale of property in the estate and any money is paid into the general revenue of the State through the South Australian Government Department of Treasury and Finance.

¹⁹⁸ *Law of Property Act 1936* (SA) s 115. The Governor, in Council, makes decisions on the advice of the Cabinet or a Cabinet sub-committee.

and bureaucracy that would be required to administer such a scheme and the potential for it to defeat moral claims against the estate.¹⁹⁹

150. The Committee recommended that the responsible Minister in each State be given a statutory discretion to waive the State's rights in favour of a broad class of possible applicants, being:
- (a) any dependants of the intestate;²⁰⁰
 - (b) any persons having in the opinion of the Minister a just or moral claim on the intestate;
 - (c) any organisation or person for whom the intestate might reasonably be expected to have made provision;
 - (d) the trustee of any person mentioned in (a), (b) or (c);
 - (e) any other organisation or person.²⁰¹
151. The Model Bill would allow the Minister to impose conditions. It is anticipated that these would include an indemnity to protect the Minister and the Revenue in the event that someone who is entitled to the estate turned up late so that the estate was not properly *bona vacantia*.
152. The reason given by the Committee for placing the discretion in the Minister was that it would be less expensive than going to Court. A better reason in principle is that, at the time of the application, the property is owned by the Crown, and it is appropriate that a Minister of the Crown decide whether to part with it.
153. **Tasmania** has enacted model clauses 37 and 38.²⁰² **NSW** has enacted them, but requires that applications be made to the Crown Solicitor.²⁰³ Other States have similar provisions or practices.²⁰⁴ It may be that the Crown Solicitor was thought to be better qualified to assess applications. An alternative suggestion would be to confer this role to the Attorney-General.

¹⁹⁹ *Committee's Report* 180 (Recommendation 38); 179–80 [10.14]–[10.17].

²⁰⁰ These dependants would be people who are not blood relatives of the intestate, or who are excluded by the law as being too remote in the calculation of kinship, or who, being the spouse or blood relative, is disqualified by the rule of forfeiture.

²⁰¹ See *Committee's Report*, above n 6, 187 (Recommendation 39).

²⁰² *Intestacy Act 2010* (Tas) ss 37–38.

²⁰³ *Succession Act 2006* (NSW) ss 136–137.

²⁰⁴ The Northern Territory, Queensland, Victoria and New Zealand have a provision that is similar to, but not identical with, the Model provision. See *Law of Property Act 2000* (NT) s 20(3); *Financial Management Act 1994* (Vic) s 58(3); *Property Law Act 1974* (Qld) s 20(5); *Administration Act 1969* (NZ) s 77. In Western Australia the Governor may, on application, order that the estate be given to a person having a moral, but no legal claim to it: *Escheat (Procedure) Act 1940* (WA) s 8. In the Australian Capital Territory, the Public Trustee is required to hold these estates on trust for six years and if no one entitled has come forward during that time, the Public Trustee is to sell the assets of the estate and pay the net proceeds into General Revenue.

QUESTIONS

- 5.6 *When an estate has vested in the State as bona vacantia, should the responsible South Australian Government Minister have a statutory discretion to give the estate to people or organisations not entitled to it under the rules of distribution of intestate estates? If not, please give your reasons.*
- 5.7 *If yes, should the classes of people to whom it may be given be the same as in model clause 38 (see **Appendix 3**)? If you agree in principle, but consider that model clause 38 is not satisfactory, what changes do you suggest?*
- 5.8 *Should people who wish to claim a bona vacantia estate apply to the Crown Solicitor as in New South Wales, or to the Attorney-General, rather than to the Treasurer?*

Inheriting through two lines of relationship

154. A person may have more than one line of relationship to the intestate, giving an entitlement to share in the estate in more than one capacity. This can occur when a paternal aunt or uncle marries a maternal uncle or aunt and they have children together, so that these children are double cousins of the intestate. It can occur when cousins marry and have children together. It can occur when the relationship is not a lawful marriage, but the couple are recognised as domestic partners. It can occur under current South Australian law when grandparents or other relatives adopt a child, as the adoption creates new parentage without destroying the child's right to inherit from a natural parent.²⁰⁵

Common law

155. It is not clear whether a double line of relationship entitles a person to one or two shares. The Victorian Supreme Court decided in a 1945 case that a person could inherit in more than one capacity.²⁰⁶ The South Australia Supreme Court decided in a 1976 case that they could not.²⁰⁷

²⁰⁵ Section 10 of the *Adoption Act 1988* (SA) permits adoption by a step-parent or by a relative of the child with court approval in certain circumstances.

²⁰⁶ See *In re Morrison; Trustees Executors and Agency Co Ltd v Comport* [1945] VLR 123. The decision was made by a single judge in a very brief judgment. The Victorian law at that time did not give the widow the whole estate, even when there were no descendants. The judge ruled that the widow of the intestate, who was also his cousin, was entitled to take a share as the widow and another smaller share as a cousin.

²⁰⁷ See *In the Estate of Cullen* (1976) 14 SASR 456. The judge decided that people who were cousins through two lines of relationship took only one share. It is not clear what the judge would have decided if the relationships had been of different degrees, as in *In re Morrison* [1945] VLR 123.

The Committee and other jurisdictions

156. The Committee reported that States in the **USA** that follow the Uniform Probate Code allow only a single share based on the relationship that would yield the larger share. The Committee speculated that this might be because adoption by relatives is permitted in some of the United States.²⁰⁸
157. The Committee recommended that relatives ‘entitled to take in more than one capacity ought to be entitled to take in each capacity’.²⁰⁹ The recommendation appears to have two bases. First simplicity, particularly if *per stirpes* distribution is retained. Secondly, preservation of and consistency with the effect of statutory reforms made long ago to abolish the common law notion that spouses are to be treated as one person.²¹⁰
158. **NSW** and **Tasmania** have settled the question by adopting model clause 33. The VLRC has recommended that it be adopted.²¹¹

QUESTION

5.9 Should a person who is related to the intestate in more than one way be entitled to inherit through both familial relationships as recommended by the Committee (model clause 33)? If not, should South Australian law limit the double relative to one share, being the one that yields the greatest amount? Please give reasons.

Per stirpes and per capita distribution

159. Diagram 15 below shows diagrammatic representations of the ways in which a deceased estate may be distributed (*per stirpes* and *per capita*). It illustrates the way each works and the differences in outcome. An estate that is divided *per capita* is divided equally between each person entitled, or between each person of the same degree of relationship to the intestate. An estate that is divided *per stirpes* is divided by branch of the family. Assume the intestate was divorced and had two children, one of whom died before him leaving two children (that is, grandchildren of the intestate). For *per stirpes* distribution, the estate would be divided into two equal portions with one portion going to the surviving child and the other portion passing in equal shares to the children of the deceased child.

²⁰⁸ *Committee’s Report*, above n 6, 149 [8.38].

²⁰⁹ *Ibid* 151 (Recommendation 29).

²¹⁰ *Ibid* 148 [8.35], 150 [8.42]. Since 1975, s 95A of the *Law of Property Act 1936* (SA) has provided that ‘A husband and wife shall- (a) for the purpose of the law of intestate succession; be treated as two persons’.

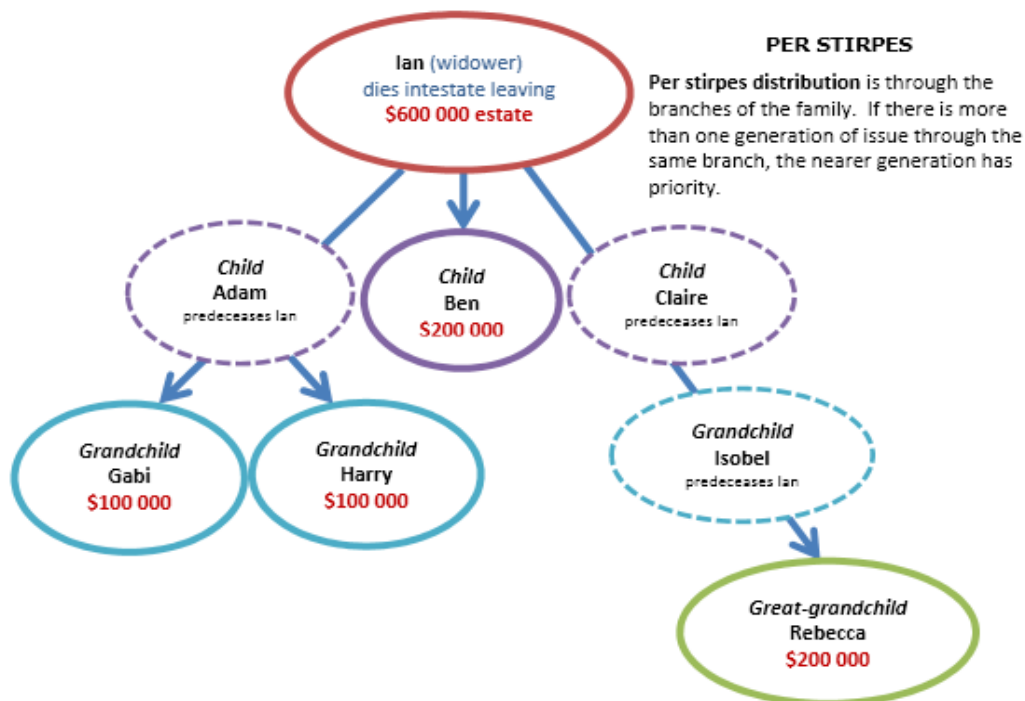
²¹¹ *VLRC Report*, above n 68, 63 (Recommendation 13).

160. Originally, *per stirpes* distribution applied only to the intestate's descendants. It has been extended to other classes of relatives, at least in some circumstances, by later legislation.

DIAGRAM 15

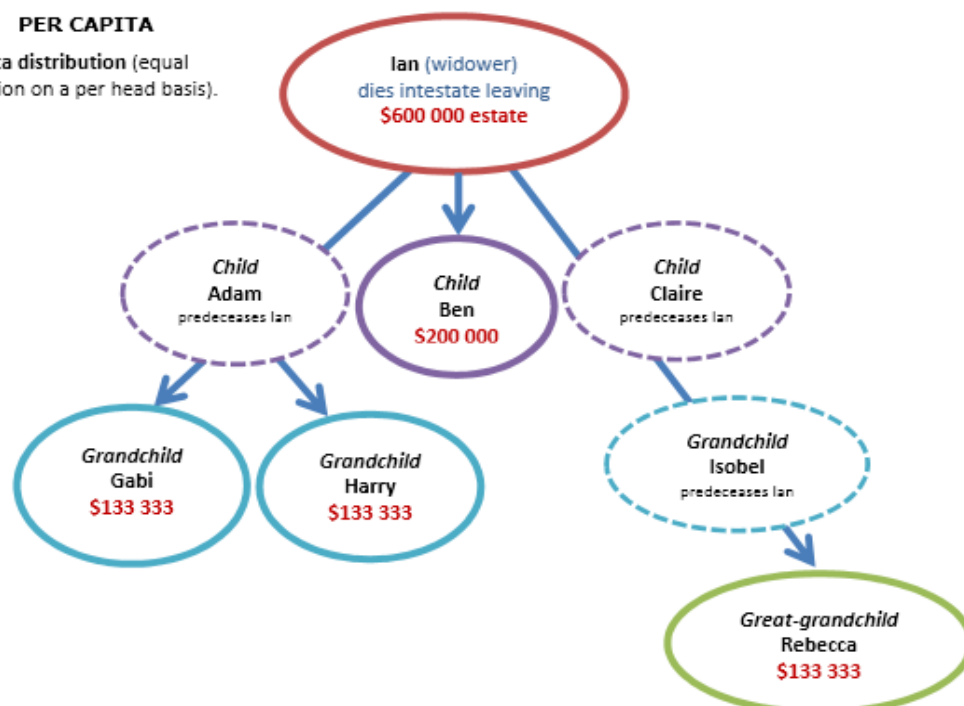
Types of distribution

Example: Ian, a widower, dies intestate leaving an estate of \$600 000. He had 3 children - Adam, Ben and Claire. Adam had 2 children: Gabi and Harry. Ben is childless. Claire had one child, Isobel. Isobel had one child, Rebecca. Ian's children, Adam and Claire, and his grand-child, Isobel, predecease him. Thus, Ian's surviving relatives are his son Ben, his grand-children Gabi and Harry, and his great-grandchild Rebecca.

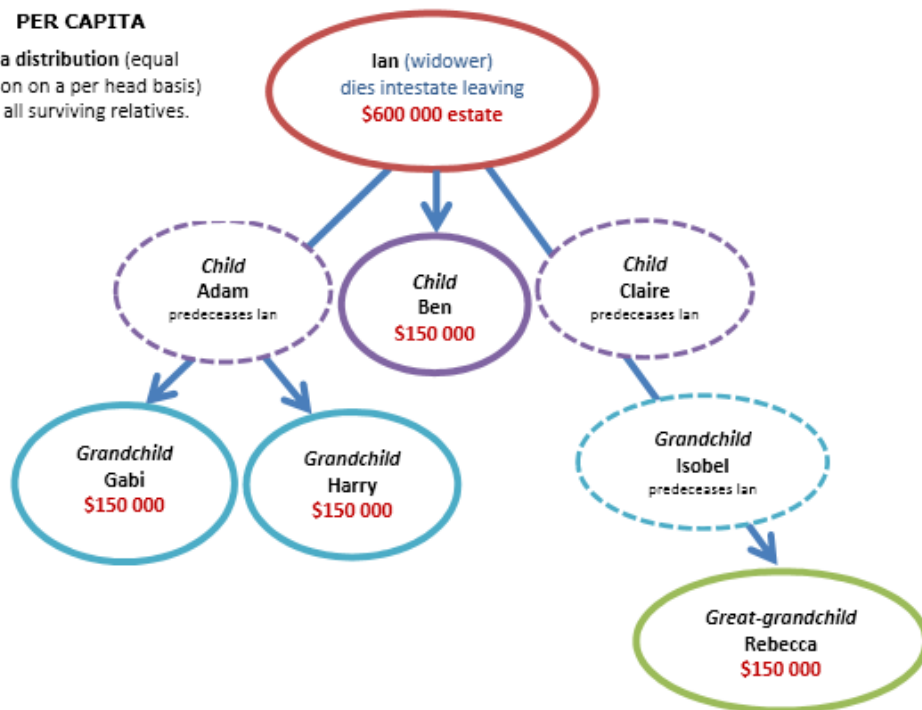


PER CAPITA

Per capita distribution (equal distribution on a per head basis).



PER CAPITA
Per capita distribution (equal
distribution on a per head basis)
between all surviving relatives.



161. Thus, relatives who claim in their own right share equally (for example, the intestate's children). Relatives who claim through an ancestor, who would have shared in the estate if he or she had out-lived the intestate, take their ancestor's share, ie *per stirpes*. It is said they inherit as representatives of the deceased ancestor (usually their parent), or by representation.²¹²
162. In **South Australia** relatives take *per capita* when they are:
- children of the intestate (and this is common to all States),²¹³
 - nieces and nephews of the intestate (descendants of the intestate's siblings) but only if *all* of the intestate's siblings predeceased the intestate;
 - first cousins but only if *all* the intestate's aunts and uncles predeceased the intestate.²¹⁴

Except for the above, the share of beneficiaries is calculated on a *per stirpes* basis.²¹⁵

²¹² See *In re Ross's Trusts* (1871) LR 13 Eq 286, 292-293; *In the estate of Cullen, deceased* (1976) 14 SASR 456, 458.

²¹³ *A & P Act* s 72I(b).

²¹⁴ *A & P Act* s 72J(d).

163. The South Australian approach reflects an attempt to achieve a more equitable distribution when the relatives who are entitled to take on intestacy are the nearest surviving generation to the intestate.²¹⁶ All those entitled are of the same generation and claim in their own right. See Diagram 16.
164. The question is whether *per stirpes* or *per capita* distribution is preferable when there are some relatives who claim in their own right and some who claim as representatives of a deceased ancestor. See Diagram 15 above. There are arguments for and against each method of distribution.
165. The following are arguments for retaining *per stirpes* distribution.
 - It would be consistent with the Committee's recommendation.
 - Each branch of the family benefits equally.
 - Usually the branches of the intestate's family can be identified without undue difficulty, but it is sometimes difficult to identify and find all members of a branch. *Per stirpes* distribution allows the administrator to divide the estate in to portions equal to the number of branches and then make an interim distribution to relatives who are clearly entitled, while reserving the other portions pending searches for surviving members of other branches. By contrast, *per capita* distribution requires the administrator to identify how many people are entitled before distributing any of the estate.²¹⁷
 - Anecdotal information tends to support the view that *per stirpes* distribution is likely to reflect what a majority of Australian people who makes wills do.²¹⁸
166. The following are arguments against *per stirpes* distribution and for *per capita* distribution.
 - *Per stirpes* distribution can result in people of the same generation being treated unequally. For example, it can result in some grand-children

²¹⁵ *A & P Act* ss 71I, 72J(iv). See also *In the Estate of Hughes* (1985) 38 SASR 5 approving *In the Estate of Cullen, deceased* (1976) 14 SASR 456 on this point.

²¹⁶ *Committee's Report*, above n 6, 141 [8.7].

²¹⁷ There are Court procedures that can be used in some cases to enable distribution when it is not known whether there are other kin who are entitled, but they add cost and so reduce the amount available to beneficiaries.

²¹⁸ The Institute is unaware of any Australian statistical data on whether the majority of people would favour *per stirpes* distribution (ie per branch of the family) or *per capita* distribution. Anecdotal information is that *per stirpes* distribution clauses are very common in Australian wills. The Committee reported that an American survey of clients in 1987 indicated a preference for *per capita* distribution, but an American survey done nearly 30 years ago might not reflect current Australian preferences.

receiving more than other grand-children simply because they have more siblings.²¹⁹ See Diagram 15.

- *Per stirpes distribution* can result in a person of a later generation receiving more than a person of a closer generation. See, as an example, the first part of Diagram 15, where great-grand-child Rebecca receives more than grand-children Gabi and Harry.

DIAGRAM 16

EXAMPLE—distribution when deceased survived only by first cousins

Ian dies leaving no surviving spouse, children, parents, siblings, grandparents, aunts or uncles. His only survivors are three of his first cousins—Bridget and Brendan (the children of his deceased aunt, Agatha) and Vincent (the child of his deceased uncle, Ulwyn). His estate is valued at \$600 000.

If the estate is distributed *per stirpes*, the estate is divided equally between Aunt Agatha (deceased) and Uncle Ulwyn (deceased) i.e: two portions of \$300 000 each.

Aunt Agatha's portion is divided equally between her children so that Bridget and Brendan each take \$150 000 ($1/2 \times \$300\ 000$).

Uncle Ulwyn's share passes to Vincent who takes \$300 000.

If the estate is distributed *per capita*, the estate would be divided into three equal parts (one part per cousin) and Bridget, Brendan and Vincent each take \$200 000.

The Committee and other jurisdictions

167. The Committee recommended *per stirpes* distribution in all cases. Its principal reason was that *per capita* distribution creates greater difficulty in administering the estate. Further, it thought the number of cases in which there would be unequal treatment between members of more remote generations and those of closer generations would occur only in an insignificant proportion of cases.²²⁰

²¹⁹ For example, Ian, the intestate, had two children, Adam and Ben, both of whom predeceased him. Adam had two children. Ben had three children. The net value of the estate is \$600 000. Adam's half share will be divided equally between his two children so that they receive \$150 000 each. Ben's half share will be divided equally between his three children so that they will receive \$100 000 each. But they are all grand-children of the intestate.

²²⁰ *Committee's Report* 146, 148 (Recommendation 28). The Institute is not aware from its preliminary research of any statistical data relevant to the number of cases in which members of a more distant generation receive more than those of a closer generation.

- In **six Australian States** intestate estates are distributed *per stirpes* in all cases.²²¹
- In **Victoria**, distribution is *per stirpes* for lineal descendants and *per capita* for collateral relatives when all of the previous generation predeceased the intestate. The VLRC recommended *per stirpes* distribution for consistency with other States.²²²
- *Per stirpes* distribution is the norm in **New Zealand, England, Scotland, British Columbia and Alberta**.²²³
- In **Nova Scotia, Ontario and Saskatchewan** the estate is mostly divided *per stirpes*, but *per capita* among nieces and nephews if all the intestate's siblings predeceased the intestate, and if there are no nieces or nephews, then *per capita* among kin who are of the same degree.²²⁴
- In **Manitoba** the estate is distributed *per capita* among all surviving successors in the nearest degree of kinship to the intestate.²²⁵

QUESTIONS

- 5.10 *Should intestate estates be distributed per stirpes (that is by branch of the family) in all cases as recommended by the Committee?*
- 5.11 *If you answer no to the question above, should the estate be distributed per capita only when all entitled relatives are of the same generation (that is the same degree of relationship to the intestate, for example, all first cousins), consistent with current South Australian law?*
- 5.12 *If you consider that there is a better method, please provide details.*

²²¹ South Australia and Victoria are the exceptions. See *Committee's Report*, above n 6, 140–141 [8.6]–[8.7]. NSW and Tasmania have enacted the model provisions. See *Succession Act 2006* (NSW) ss 127–131; *Intestacy Act 2010* (Tas) ss 28–32.

²²² VLRC Report, above n 68, 86–7, 87 (Recommendation 34).

²²³ Model Bill cls 28(4), 30(3), 32(3); *Administration and Probate Act 1929* (ACT) ss 49B, 49C; *Succession Act 2006* (NSW) ss 127(4), 129(3), 131(3); *Administration and Probate Act 1969* (NT) ss 68–9; *Succession Act 1981* (Qld) ss 36A, 37; *Intestacy Act 2010* (Tas) ss 28(4), 30(3), 32(3); *Administration Act 1903* (WA) ss 14(2b), 14(3a); *Administration and Probate Act 1958* (Vic) s 52; *Administration Act 1969* (NZ) s 78; *Administration of Estates Act 1925* (Eng) s 47. See also Borkowski, above n 82; Law Commission (Eng), Report No 331, above n 13, part 4 (recommending no change to *per stirpes* distribution); *Succession (Scotland) Act 1964* s 5; *Wills, Estates and Succession Act 2009* (BC) s 23; *Wills and Succession Act 2010* (Alberta) s 66.

²²⁴ *Intestate Succession Act 1989* (Nova Scotia) ss 7–10; *Succession Law Reform Act 1990* (Ontario) ss 46–47; *Intestate Succession Act 1996* (Saskatchewan) ss 7–12.

²²⁵ *Intestate Succession Act 1990* (Manitoba) ss 4–5.

Spouse's right to acquire property from the estate

Any property?

168. In **all States, England** and in at least **some Canadian Provinces** the surviving spouse has a statutory right to acquire by purchase the intestate's interest in the home. As mentioned earlier, the policy objectives are to minimise disruption to the living arrangements of the surviving spouse and any children who are part of the household immediately after their bereavement and to give the spouse and children secure accommodation if possible.²²⁶
169. The Committee concluded that a new approach was desirable. It recommended that the spouse should have a statutory right to elect to acquire any property he or she chose from the estate – not just the home. (The spouse has a separate statutory right to the intestate's personal chattels.)

Arguments for extending the spouse's right to purchase property from the estate

170. Some arguments for extending the right follow.
- The Committee thought restricting the right to the '*shared home*' produced unnecessary complexity in administering the estate, especially in identification of the '*shared home*' and the restrictions imposed when the home is part of a larger estate or commercial venture.²²⁷ In **South Australia**, however, it is not necessary to prove that a home was 'shared by the intestate and spouse: the right is to the dwellinghouse *in which the spouse 'was residing at the date of the intestate's death*, whether shared or not, and this avoids some of the difficulties that concerned the Committee.
 - It would give the spouse the first right to purchase business assets from the estate so that he or she can continue the business and so earn income.

Arguments against extending the spouse's right to purchase property from the estate

171. Some arguments against extending the right follow.

²²⁶ The Tasmanian Law Reform Commission said in *Succession Rights on Intestacy* Report 43 (1985) 13:

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

²²⁷ *Committee's Report*, above n 6, 82 [5.19].

- The spouse's choices could damage the value of the rest of the estate and so be detrimental to the interests of descendants. For example, the spouse might elect to take stock in trade and fittings but not the premises from which the intestate's business is conducted so that it cannot be sold as a going concern. The Committee addressed this by recommending that the court's permission be required for a spouse to elect to acquire property that forms part of a larger aggregate if it would substantially diminish the value of the rest of the estate or make its administration substantially more difficult.²²⁸
- A preferential right in the spouse could deprive descendants of the opportunity to acquire property of particular use or value to them. This is more likely to be an issue if there are children of a previous relationship.
- An extended right is not necessary for the policy of enabling the spouse and any dependants to remain in the home.

Other jurisdictions

172. **NSW** and **Tasmania** have accepted the Committee's recommendation and extended the spouse's preferential right to acquire any or all property in the estate. In all other States the preferential right is restricted to the home.²²⁹ In **England, British Columbia** and **Nova Scotia**, the right is to the home only.²³⁰ The **VLRC** has recommended adoption of the Committee's recommendation in the interests of clarity and national consistency.

QUESTION

*6.1 Should South Australia give the spouse a right to purchase from the intestate's estate **any** property he or she chooses (and can pay for) as recommended by the Committee? Please give reasons for your opinion.*

Spouse's right to elect to acquire the intestate's interest in the home

173. As mentioned above, all States give the spouse a statutory preferential right to acquire by purchase the intestate's interest in the home and in South Australia it is the home in which the spouse was residing when the intestate died.²³¹ The

²²⁸ Model Bill cl 16(2) (see below **Appendix 3**).

²²⁹ *VLRC Report*, above n 68, 76 (Recommendation 23).

²³⁰ *Intestates' Estates Act* 1952 (Eng) s 5, sch 2; *Wills, Estates and Succession Act* 2009 (BC) s 26; *Intestate Succession Act* 199 (Nova Scotia) s 4. The Institute has not searched all Canadian legislation.

²³¹ *A & P Act* s 72L. Besides the policy reasons, there are technical reasons for a statutory right. It removes the potential conflict of interest for a spouse who is the administrator and so has a duty to act in the interests

spouse may use his or her preferential legacy to pay for all or part of the price. However, differences in detail, together with differences in the amount of the spouse's preferential legacy, can produce different outcomes in different States.

174. Of course, there will still be the practical question of whether the surviving spouse can afford to purchase the deceased's interest and pay the outgoings.
175. The right to acquire the intestate's interest in the home is not relevant when the spouses own it jointly, because the deceased spouse's interest in it passes automatically and immediately to the surviving spouse.²³² So, the right is relevant only if the intestate was the sole owner, or if the spouses owned it as tenants in common, or if it was owned by the intestate and some other person as tenants in common.²³³ This is more likely when the marriage is a second or subsequent one, when the home was inherited by the intestate from his or her family, and perhaps when the relationship is a domestic partnership rather than a lawful marriage.

DIAGRAM 17

EXAMPLE—setting off statutory legacy to buy out deceased's interest

Ian and Wendy were tenants in common of their home in equal shares. The home was valued at \$500 000 at the date of Ian's death, with \$200 000 owed under a mortgage. Ian's equity was therefore ½ of \$300 000 = \$150 000. There are surviving children.

Wendy could elect to acquire Ian's interest by paying \$150 000 to the estate.

If she wished, Wendy could use her \$100 000 preferential legacy as part payment, but she would have to make up the difference of \$50 000.

of the intestate's descendants. And it prevents an administrator who is not the spouse from selling the home without giving the spouse an opportunity to acquire the deceased's interest in it.

²³² The technical description is that they are 'joint tenants'. This is part of the real property law and is not affected by intestacy laws. Many couples choose to own their home jointly because of the protection it gives a surviving spouse and dependent children. If the intestate owns the home jointly with a person other than the spouse, it will not form part of the intestate's estate and will be lost to the spouse and any descendants.

²³³ Tenants in common each own a divisible share and on the death of one, his or her share forms part of the deceased's estate.

Definition of the home

176. Although the basic policy of giving the spouse a right to acquire the home is the same in every State, the definition of what is encompassed in that right differs.

177. In **South Australia** it is the-

dwellinghouse in which the spouse or domestic partner ... was residing at the date of the intestate's death.'

dwellinghouse is defined to include-

- (a) a part of a building occupied as a separate dwelling; or
- (b) the curtilage of the dwellinghouse.²³⁴

The right relates to whatever interest the intestate had in the dwellinghouse whether a freehold interest, an interest as tenant in common or a leasehold interest²³⁵ and, perhaps also a licence to occupy.

178. In **South Australia**, the spouse's right relates to the dwelling house in which he or she was residing when the intestate died. This avoids harsh and anomalous results when, for example, the intestate was resident in a nursing home, or living in a different house for work or other reasons. The **ACT** and **Northern Territory** legislation is similar in this respect. However, in some States the right is limited to their *shared* home and this can cause difficulty and sometimes hardship.

179. Nevertheless, the spouse's exact entitlement is not always clear. As mentioned above, this was one of the reasons for the Committee's recommendation that the surviving spouse or partner be given a preferential right to choose to purchase *any* property in the estate, eliminating the need for defining the home.²³⁶

180. Does '**dwellinghouse**' mean the same as *dwelling*, in the sense of a place where a person lives? The *house* part of this compound noun probably means that a caravan, and perhaps other types of homes that are not attached permanently to land, would not be included. And what can the spouse acquire when he or she resides in a part of a building and it is difficult or even impossible physically or legally to separate the part in which the spouse *dwelled*? In such circumstances it is unclear if the spouse's right attach to the whole premises or none of the premises.

²³⁴ *A & P Act*, s 72B(1). The conjunction 'or' between paragraphs (a) and (b) of the definition of 'dwellinghouse' means 'and' the curtilage, if any.

²³⁵ *Public Trustee v O'Donnell* (2008) 101 SASR 228.

²³⁶ *Committee's Report*, above n 6, 86 (Recommendation 9).

181. Uncertainty can also arise as to the meaning and extent of the ‘**curtilage**’ of the dwellinghouse? In a recent South Australian case, the court said that the definition of *curtilage* in the *A & P Act* is a functional definition and should include the land that serves the purpose of the building and contributes to its enjoyment, and this is a matter of fact and degree in each case and may vary according to the applicable statutory context and circumstance of the land.²³⁷ When the home is a suburban house the answer is usually obvious, because the house is on a small parcel of land on one title with obvious physical boundaries such as fences. If the garden and perhaps outbuildings that are used domestically in association with the house are on a separate adjoining title, the intestate’s interest in that title would probably be included. For homes on rural land the question of what constitutes the curtilage can be difficult both legally and practically, particularly in areas where planning laws do not permit subdivision of the land into smaller parcels.
182. One such case was *Public Trustee v O’Donnell*.²³⁸ Mr O’Donnell died in tragic circumstances leaving a widow and young children. The home, water supply and other associated works, buildings and structures, including some used for the family’s business purposes, were on Crown leasehold of 175.6 hectares. The local planning rules restricted sub-division to a minimum size of 40 hectares. The Public Trustee, as trustee for the children, applied to the court for directions about what constituted the curtilage in this case and so whether Mrs O’Donnell’s statutory right was to elect to acquire (a) the whole of the lease, or (b) about 40 hectares subject to planning consent, or (c) whether she could elect at all. The court decided that her statutory right was to elect to acquire the deceased’s ‘*interest*’ in the dwellinghouse (including its curtilage) and that in this case Mr O’Donnell’s *interest* was as lessee of the 175.6 hectares on which the house and associated facilities and structures were built.²³⁹ If South Australia enacted the

²³⁷ *Public Trustee v O’Donnell* (2008) 101 SASR 228, 258–259 and the cases referred to there. This is a broader meaning than appears in some legal dictionaries.

²³⁸ (2008) 101 SASR 228.

²³⁹ Gray J rejected the argument that the word ‘interest’ in s 72L of the *A & P Act* should be read down by reference to the word ‘curtilage’ in the inclusive definition of ‘dwellinghouse’. As summarised by Gino Dal Pont and Ken Mackie in *Law of Succession* (LexisNexis Butterworths, 2013) 251, Gray J favoured a broad interpretation of s 72L, treating it as having beneficial purposes, including minimising disruption to those who survived the intestate, furthering the continuity of lifestyle of the remaining family, and acknowledging the central importance of the matrimonial home – which may be a home on a rural rather than a suburban property – in the life of the surviving spouse. Gray J said that if his decision that Mrs O’Donnell was entitled to acquire the leasehold interest in 175.6 hectares were incorrect, then the right to elect would apply to the 40.4 hectares on which the water supply, wood supply and out buildings were situated.

It appears from the judgement that the land could not be sub-divided unless the lease were first surrendered to the Crown, whereupon it would cease to be part of the estate. Assuming this legal problem were ignored, an application would have to be made to the District Council for approval to sub-divide. If approval were given,

Committee's recommendation that the spouse have an automatic right to elect to acquire any or all of the estate (consistent with the eventual result in *O'Donnell*), the cost and effort of an application to the court would not be necessary in cases such as *O'Donnell*.

Other States

183. The following is an outline of the extent of the spouse's right to purchase the intestate's interest.
- In **NSW** and **Tasmania**, the spouse may acquire any or all of the estate and so there is no need for a separate right to acquire the home.
 - In **Victoria**, the spouse has the right to elect to take the intestate's interest in the whole property when the home forms part of a larger property and the intestate's interest cannot be severed without sub-dividing, or when the home is part of a farm.²⁴⁰ The latter is based on English law intended to prevent fragmentation of agricultural land and preserve the viability of farms. In 2013, the VLRC recommended that for the sake of uniformity, adoption of the Committee's recommendation for the spouse be given a right to acquire any property from the estate.²⁴¹
 - The **ACT**, **Western Australia** and probably the **Northern Territory** and **Queensland** are at the other end of the spectrum. The spouse's right appears to be to acquire the 'garden or portion of ground attached to and usually occupied with, a dwelling house, or otherwise required for the amenity of convenience of a dwelling house ... [or of] a part of a building occupied as a separate dwelling'.²⁴²
 - In **British Columbia**, the spouse can acquire all the land around the dwelling that is treated as one parcel for taxation purposes.²⁴³

an application would have to be made to the Minister for a new lease of the 40 hectares to Mrs O'Donnell and the terms of lease negotiated. If the terms of the lease to Mrs O'Donnell were different, would she have acquired Mr O'Donnell's interest? The whole necessary process would have involved considerable time and cost.

²⁴⁰ *Administration and Probate Act 1958* (Vic) ss 37A(10)–37A(11).

²⁴¹ VLRC Report, above n 68, 76 (Recommendation 23). The amendments made to the Victorian *Administration and Probate Act* in 2014 did not enact this recommendation.

²⁴² *Administration and Probate Act 1929* (ACT) s 49F; *Administration Act 1903* (WA) Fourth Schedule para 1(4).

²⁴³ *Wills, Estates and Succession Act 2009* (BC) s 1 (definition of 'spousal home'). As there might be differences between taxation laws in British Columbia and South Australia, and because taxation laws are sometimes changed without thought for all the consequences such as the laws of intestacy, caution should be exercised if this is thought to be a possible alternative.

184. The **Queensland** Act has reduced uncertainty about caravans and other dwellings and structures not permanently attached to land by specifically including a caravan or a manufactured home. A manufactured home is a structure that has the character of a dwelling house, but is designed to be moveable.²⁴⁴

Qualifications to the spouse's right to elect to take the home

South Australia

185. In **South Australia**, the spouse's right to remain in the home while deciding whether to acquire the intestate's interest is subject to the right of anyone who has lent money on the security of the home to enter into possession and sell it.²⁴⁵ This could happen, for example, if mortgage repayments have not been made.
186. There is also a general statutory power for administrators to sell real property to pay debts.²⁴⁶ Does this allow the administrator of an intestate estate to sell the home (or the intestate's interest in it) to pay debts before expiration of the time for the spouse to decide whether to acquire it?²⁴⁷
187. Unlike some other jurisdictions, there are no other statutory restrictions in South Australia on the spouse's right to acquire the intestate's interest in the home.
188. However, acquisition of the intestate's interest in the home may prejudice the rights of descendants. For example, the value of farming land might be substantially reduced if the spouse takes the farmhouse, structures associated with it, bore or dam, and perhaps a quite large area of land if there are Council or other restrictions on sub-division. It might make carrying on a business impracticable or uneconomic.

The Committee

189. The Committee recommended that the administrator should be able to sell property before the expiration of the election period, if necessary, as a last resort,

²⁴⁴ *Succession Act 1981* (Qld) s 34B. 'Manufactured home' is defined in the *Manufactured Homes (Residential Parks Act 2003* (Qld) as-

'a structure, other than a caravan or tent, that—

(a) has the character of a dwelling house; and

(b) is designed to be able to be moved from one position to another; and

(c) is not permanently attached to land.'

²⁴⁵ *A & P Act* s 72M.

²⁴⁶ *A & P Act* s 51.

²⁴⁷ Informal consultation indicates that this would be a rare situation, because so often the administrator is the surviving spouse.

to pay the intestate's debts. Informal consultation by the Institute indicates that this would be a rare case, because usually either the surviving spouse is the administrator or there is no surviving spouse.

190. The Committee further recommended that the spouse be permitted to acquire property from the estate only with a court's approval if it forms part of a larger aggregate and its acquisition by the spouse *could* substantially diminish the value of the rest of the property or make the administration of the estate substantially more difficult.²⁴⁸ It recommended that the court should be able to impose conditions, including that the spouse pay compensation to the estate in addition to the value of the intestate's interest: (see model clause 16 at **Appendix 3**). These restrictions are to protect the interests of descendants of the intestate.

Other jurisdictions

191. The situation in some other jurisdictions is summarised below.
- **NSW** and **Tasmania** have enacted model clause 16, but with additions in that the spouse is not permitted to acquire the intestate's interest unless the spouse can comply with other legislation and pays the costs of complying. In NSW, this is limited to certain environmental planning and strata titles legislation. In Tasmania, compliance must be with any relevant Act.²⁴⁹
 - The **VLRC** recommended enactment of provisions based on the NSW provisions (ie, the model with the additional compliance and cost restriction), but this is yet to be done.²⁵⁰
 - Four States, **Queensland**, **Western Australia**, the **ACT** and **Northern Territory**, require court approval in certain circumstances that are generally consistent with model clause 16.

²⁴⁸ Examples given by the Committee appear to be taken from s 39B of the Queensland Act which requires court approval where the home forms part of a building 'owned' by the intestate; the home is on land that is used for agriculture; the home is part of a building used as a hotel, motel, boarding house or hostel; or part of the home is used for non-domestic purposes.

²⁴⁹ *Succession Act 2006* (NSW) ss 115(5), 115(8); *Intestacy Act 2010* (Tas) s 16(5).

²⁵⁰ *VLRC Report*, above n 68, 76 (Recommendation 28). The VLRC said -
Details of the expanded right of the deceased person's partner to elect to acquire property from the intestate estate, including in relation to notice requirements, time limits and valuation of property, should be based on the recommendations of the National Committee for Uniform Succession Laws, as reflected in ss 114–121 of the *Succession Act 2006* (NSW).

- In **Western Australia**, the **ACT** and **Northern Territory**, there is an additional restriction in that the spouse may not acquire the lease of the dwelling that would or could terminate within less than two years.²⁵¹

Possible alternatives

Spouse entitled to the home without payment

192. One possibility might be to give the spouse a right to choose to take the intestate's interest in the home, or the preferential legacy, but not both. In many cases it would give the spouse more than the current South Australian preferential legacy of \$100 000. It would achieve, so far as possible, the policy of not disrupting the living arrangements of the spouse and any children in the home. However, in many cases it would eliminate or substantially reduce the entitlement of children or other descendants, and for that reason might be considered unacceptable.
193. It has also been suggested that the spouse should take the house and in addition the preferential legacy. The Committee reported that this proposal had not found support. In most cases, it would result in children of other relationships being entirely excluded. Adult children of the relationship of the intestate and the surviving spouse might also receive no benefit from such a reform.

Life interest

194. The spouse could be given a life interest in the home, that is, a right to live in the home until death. Life interests and also interests until remarriage were once common. They are now less favoured by legislators, and anecdotally by testators, probably because of changes in the social status of women and increasing life expectancy.
195. No Australian States give the spouse a life interest in the home - all give the spouse a right to purchase the intestate's interest in it. **England** and **British Columbia** changed their laws in 2014 to give the spouse a right to acquire the intestate's interest in the home instead of a life interest. Some **Canadian Provinces** still give a life interest.²⁵²

²⁵¹ *Administration and Probate Act 1929* (ACT) s 49J; *Administration and Probate Act 1969* (NT) s 75; *Administration Act 1903* (WA) Fourth Schedule para 1(2). These provisions have their origin in English legislation.

²⁵² *Administration of Estates Act 1925* (Eng) s 46 gave the spouse a life interest until 2014 when it was replaced by the *Inheritance and Trustees' Powers Act 2014* (Eng) s 1. This followed the recommendation in the English Law Commission's Report No 331 (see above n 13, 37-38 [2.45]-[2.50]) that the spouse be given a right to choose to purchase the intestate's interest in the home. In British Columbia, the *Wills, Estates and Succession Act 2009* came into force in 2014 and gives the spouse a right to acquire the intestate's interest in the home.

196. Some problems that can arise from interests for life follow.
- The life interest if of indefinite duration, and with life expectancy increasing, the children or remoter descendants may nowadays be kept out of their entitlement for as long as 50 or more years.²⁵³
 - The spouse cannot sell the home unless all others entitled to a share of the estate are *sui juris* and agree to terminate the life interest. Without that unanimous agreement, the surviving spouse might be unable to afford to move to a more suitable home.
 - Administration of the estate cannot be finalised until after the death of the life tenant and there are likely to be additional administrative costs.
 - The value of the home might diminish for lack of maintenance to the detriment of the amount descendants ultimately receive.
 - It has been suggested in preliminary consultation that it is more difficult to borrow on the security of a life interest.²⁵⁴

Interest until youngest child is 18

197. An alternative might be to give the spouse an interest terminating on the youngest child attaining the age of 18 years or dying, whichever occurs first. This would have fewer disadvantages than a life interest, primarily because it is likely to be of shorter duration. One disadvantage is that it could restrict the ability of the spouse to move if he or she wished.

Home when there is more than one spouse

The Committee

198. The Committee recommended that when there are two or more spouses, none of them should have a right to acquire the intestate's interest in *any* property in the estate. This is reflected in model clause 15. **NSW** and **Tasmania** have enacted this.²⁵⁵

²⁵³ In *Re the Estate of McLaren (deceased)* [2001] SASC 103 the deceased died in 1927 leaving a life interest to her husband, which subsisted for about 9 years, and then a life interest to her daughter, which was still subsisting 65 years after the husband's death, making a total of 74 years and still ongoing.

²⁵⁴ Information as to whether this is correct is invited.

²⁵⁵ *Succession Act 2006* (NSW) s 114; *Intestacy Act 2010* (Tas) s 15.

South Australia

199. In **South Australia**, if the intestate had an interest in more than one home with a spouse or domestic partner in each when he died, then each of them would have the right to acquire the intestate's interest in the home in which he or she was residing.
200. If two or more spouses or domestic partners were living in the same home, who would be entitled to elect to acquire the intestate's interest in it? The *A & P Act* does not provide specifically for this. It is thought that technically the *A & P Act* would give them equal rights to acquire the intestate's interest,²⁵⁶ but this could pose some practical difficulties that could be resolved only by agreement or a court order.
201. If model clause 15 were enacted in South Australia, an existing statutory right for the benefit of spouses and domestic partners and any dependants in their households would be taken away. As it is more likely that the spouses will be living in different homes than in the same one, the present South Australian law might be preferable.

Spouse under legal disability

202. Generally a person who is under the age of 18 years is regarded by the law as not having full legal capacity to enter into property transactions. According to the Committee, it is not clear in South Australia whether a young surviving spouse has a right to elect to take the home. The Committee recommended that this be clarified by giving an express statutory right (model clause 19(3)), as in **Victoria, NSW, Northern Territory, ACT and Western Australia**. This is consistent with the policy of causing as little disruption as possible to the spouse and any children.
203. A more common situation is that the spouse is unable, due to age, infirmity, accident, serious illness or physical or intellectual disability, to make legal decisions. If the spouse, while competent, granted power to another person to enter into property transactions on his or her behalf by enduring power of attorney, the attorney can make the election. But many people under disability do not, and some cannot, grant an enduring power of attorney. The Committee

²⁵⁶ *Acts Interpretation Act 1915* (SA) s 26 requires that words in the singular include the plural.

In every Act – every word in the singular number will be construed as including the plural number

considered that it was better to leave these cases to be dealt with by laws relating to persons under disability in the management of their affairs.²⁵⁷

Occupation of the home pending a decision whether to acquire

204. In **South Australia**, the *A & P* a spouse who remains in the home while deciding whether to acquire the intestate's interest is responsible for paying mortgage instalments.²⁵⁸ Part 3A of the *A & P Act* does not deal with responsibility for paying rates and taxes, insurance or other outgoings and it is not dealt with in the Model Bill.²⁵⁹
205. The **British Columbia** Act requires a spouse who occupies the home pending acquisition to pay for insurance, rates and taxes, maintenance, utilities and any mortgage instalments.²⁶⁰ It was thought that that the inheritance of descendants should not be depleted by the estate giving the spouse free occupancy of the home.

The price

South Australia

206. In **South Australia**, the price the spouse must pay is the value of the intestate's interest when the intestate died – not the value at the date on which the spouse elects to acquire the home. Generally the value would not increase a great deal between the intestate's death and the spouse's decision to acquire it, and fixing the date of death for the value discourages neglect or deliberate acts that reduce its value and so reduce the amount the intestate's descendants inherit.

The Committee

207. The Committee, consistently with the South Australian approach, recommended that the price be the value when the intestate died. The Committee also recommended that any amount needed to discharge a mortgage on the home be deducted from the price the spouse pays, provided the lender agrees. The

²⁵⁷ *Committee's Report*, above n 6, 93 [5.53].

²⁵⁸ *A & P Act* s 52(1). This is a general provision to the effect that a person who is entitled to a deceased's real estate is primarily liable to pay the mortgage or other charge on it. S 72M of the *A & P Act* preserves the mortgagee's right to enter into possession and sell the home if mortgage payments are not made.

²⁵⁹ *A & P Act* s 52(1).

²⁶⁰ *Wills, Estates and Succession Act* (BC) s 32.

liability under the mortgage would then pass to the spouse.²⁶¹ This is the practice in South Australia in any event, and it might be thought that additional legislation is not necessary. **NSW** and **Tasmania** have enacted the model clause 20(2).

How the price is determined

208. The spouse must pay the value, but there is nothing in Part 3A of the *A & P Act* about how the value is to be determined.²⁶²

The Committee

209. Model clause 20 would require the spouse to pay the *market* value at the time of the intestate's death, and makes it obligatory for the administrator to determine this value by obtaining a valuation from a *registered valuer*. The administrator must give entitled descendants a copy. This gives them an opportunity to challenge the valuation.²⁶³

Other jurisdictions

210. The position in other jurisdictions is as follows:
- **NSW** and **Tasmania** have enacted the model clause.²⁶⁴
 - In four other States (the **ACT**, **Northern Territory**, **Victoria** and **Western Australia**) the price must be fixed by a valuer and in the **ACT** and **Northern Territory** the valuer must be engaged by the administrator.²⁶⁵
 - In **Queensland** the spouse must pay *market value*, but the method and date for determining this is not specified in the intestacy provisions.²⁶⁶
 - In **British Columbia**, if the spouse is the sole administrator, the spouse must obtain the approval of the court. If the spouse is not the sole

²⁶¹ *Committee's Report*, above n 6, 97 (Recommendation 17); Model Bill cl 20(2). The estate would be exonerated from liability upon transfer of the liability under the loan to the spouse.

²⁶² *A & P Act* s 72L(1).

²⁶³ The registered valuer's fee would be paid out of the estate.

²⁶⁴ *Succession Act 2006* (NSW) s 119(3)–(5); *Intestacy Act 2010* (Tas) s 20(3)–(5).

²⁶⁵ *Administration and Probate Act 1929* (ACT) s 49 H; *Administration and Probate Act 1969* (NT) s 74; *Administration and Probate Act 1958* (Vic) s 37A(6); *Administration Act 1903* (WA) Fourth Schedule para 5.

²⁶⁶ *Succession Act 1981* (Qld) ss 34B(4), 39C.

administrator, the spouse must state a value, and if the value is not agreed, the court decides.²⁶⁷

211. The Committee's recommendation might be criticised for adding cost to every estate in which the spouse is not entitled to the whole estate and wishes to acquire the intestate's interest in the home. However, if it is decided to accept the Committee's recommendation that the spouse takes the whole estate unless the intestate left descendants of another relationship, a valuation would be required only in those cases. Other alternatives would be to require a registered valuer's valuation only if either (a) the spouse is an administrator, or (b) the administrator, spouse and all other persons entitled (and the Public Trustee in the case of descendants who are not *sui juris*) cannot agree on a price within a specified time.

Time within which the election must be made

212. All States set a time within which the spouse must communicate his or her decision. The purpose is to achieve a reasonable balance between giving the spouse enough time to decide, whilst paying descendants their shares and finalising the estate without undue delay.
213. Within what period of time is it reasonable to expect the surviving spouse to be in an emotionally fit state to decide whether he or she wishes to remain living in the home, deal with banks or other lenders and make rational decisions about ability to afford to acquire and maintain the home?
214. In **South Australia**, where the spouse is an administrator, he or she must decide within three months of being granted administration. If the spouse is not an administrator, the spouse must decide within three months of the administrator serving notice requiring him or her to make a decision. Of course, the spouse will always have more than three months to decide, because administration is never granted immediately after the death.²⁶⁸ As in most places with a similar law, the Court may extend the time.

²⁶⁷ *Wills, Estates and Succession Act 2009* (BC) ss 29–30.

²⁶⁸ An application cannot be made in South Australia until at least 28 days after the intestate's death, because of s 72E of the *A & P Act* which provides that if the spouse dies within 28 days of the intestate, the spouse is treated as not having survived the intestate.

The Committee and other jurisdictions

215. The Committee recommended the same time limit as in South Australia (see model clause 18). **New South Wales, Tasmanian, Queensland and Victoria** are the same. **ACT, Northern Territory and Western Australia** allow one year from the grant of administration. **British Columbia** allows 180 days.²⁶⁹

Who must be informed of the spouse's decision?

216. In **South Australia**, a spouse who is not an administrator must notify the administrator of his or her decision. A spouse who is an administrator must notify the Public Trustee.²⁷⁰ This is intended to protect the rights of descendants. The Public Trustee may issue legal proceedings to protect the rights of any descendant who is not *sui juris*.²⁷¹

The Committee and other jurisdictions

217. Model clause 19 contains a more direct notification requirement. The spouse must notify any person who is entitled to share in the estate as well as the administrator. This has been enacted in **NSW and Tasmania** and recently recommended by the VLRC.²⁷² In **other States**, notice is given to the Registrar of Probates (not to other persons entitled or the Public Trustee). In **British Columbia**, notice must be given to any other administrator, the descendants and, and if any descendant is a minor or mentally incapable, the Public Guardian and Trustee.²⁷³

Revocation of election

218. The *A & P Act* does not say whether or how the spouse may revoke his or her election to acquire the intestate's interest in the home. Nor does the Victorian Act. In four States (**ACT, Northern Territory, Queensland and Western Australia**), the election can be revoked only if the administrator consents.

²⁶⁹ *Administration and Probate Act 1929* (ACT) s 72G(2); *Administration and Probate Act 1969* (NT) d 72(2); *Administration Act 1903* (WA) sch 4 para 3; *Wills, Estates and Succession Act 2009* (BC) s 27.

²⁷⁰ *A & P Act* s 72I(3)(b).

²⁷¹ For example, the Public Trustee made such an application by summons for directions under s 69 of the *A & P Act* on behalf of the infant children in *Public Trustee v O'Donnell* (2008) 101 SASR 228.

²⁷² *Succession Act 2006* (NSW) s 118; *Intestacy Act 2010* (Tas) s 20; *VLRC Report*, above n 68, 75 [5.88], 76 (Recommendation 28). This is also the effect of the recommendation of the British Columbia Law Institute. See Report No. 45, *Wills, Estates and Succession: A Modern Legal Framework*, June 2006, p134

²⁷³ *Wills, Estates and Succession Act 2009* (BC) s 29.

219. The Committee recommended that the spouse be at liberty to revoke his or her election at any time before the property is transferred without the need for consent by any other person.²⁷⁴ The Committee could think of no reason why an administrator would refuse to accept a revocation before transfer. In any event, the spouse is very often the administrator. However, it is unclear whether the Committee considered the case of a revocation after valuation and transaction costs associated with transfer of the property have been incurred and there are entitled descendants. The model clause requires the spouse to give notice of revocation to any other administrator and each person who is entitled to share in the estate, but no one's consent is required.²⁷⁵ **NSW** and **Tasmania** have enacted the model provision.²⁷⁶

QUESTIONS

The following group of questions are relevant to cases in which the intestate leaves a surviving spouse and one or more descendants. See also question 6.1 above (at [172]).

- 6.2 *Do you agree with the restrictions recommended by the Committee and described in model clause 16 in **Appendix 3** to protect the interests of the intestate's descendants? (In effect these are that the spouse may acquire property only with the permission of the court if the property the spouse wants is part of a larger property and acquisition by the spouse would substantially diminish the value of the rest of the property or make administration of the estate substantially more difficult. This applies both to the home, other real estate and to personal property (for example collections of items, or plant and machinery and stock.) If you do not agree, or you agree only in part, please explain what, if any restrictions, you consider desirable.*
- 6.3 *If the spouse's preferential right to acquire property of the estate is limited to the home, the following questions arise.*
- (a) *Should the spouse's right be to acquire the home in which he or she was residing when the intestate died (the current South Australian law)?*
- (b) *Is legislative clarification of the extent of the spouse's right needed, for example—*
- i. to include dwellings such as caravans and other moveable homes (as in Queensland)?*

²⁷⁴ *Committee's Report*, above n 6, 94 (Recommendation 15).

²⁷⁵ Model clauses 20(4)–(5).

²⁷⁶ *Succession Act 2006* (NSW) s 118(5)–(6); *Intestacy Act 2010* (Tas) s 19(5)–(6).

- ii. *to define more precisely the extent of what may be acquired, taking into account, for example, farm houses, dwellings that form part of larger premises and restrictions on sub-division (as in Victoria)? If yes, how should the limits of what the spouse may acquire be defined or determined?*
- (c) *When the intestate left more than one spouse, should each spouse have the right to acquire the intestate's interest in the home in which he or she was residing when the intestate died (the current South Australian law) – or do you prefer the Committee's recommendation that neither have any right? If the latter, please give your reasons.*
- (d) *If the intestate left more than one spouse living in the same house what rights (if any) should they have to acquire the intestate's interest? (The Committee's recommendation was that neither would have a right.)*
- (e) *Should a surviving spouse who is not yet 18 years of age be permitted to make his or her own decision about acquiring property from the estate as recommended by the Committee? If not, please give reasons.*
- (f) *Do you agree with the Committee's opinion that if the surviving spouse does not have the capacity to make a legal decision, it should be made according to the laws of South Australia relating to persons under disability in the management of their affairs?*
- 6.4 *What is your opinion about the alternatives to the right to elect to purchase the intestate's interest in the home described above in [192]–[197]: (a) entitlement to the home without payment; (b) life interest; (c) interest until youngest child is 18?*
- 6.5 (a) *The Institute invites information about how the value of the intestate's interest in the home is usually determined in South Australia and whether it is considered to be satisfactory.*
- (b) *Should a registered valuer's valuation be compulsory, as recommended by the Committee (model clause 20(3)–(4) in **Appendix 3**)? If not, how should value, and so the price to be paid by the spouse, be established?*
- 6.6 *If the spouse is the sole administrator, should court approval be required for the spouse to purchase property from the estate as in British Columbia?*
- 6.7 *How long should the spouse have to make a decision about purchasing property from the estate? (The Committee recommended (a) 3 months from a grant of administration when the spouse is an administrator, and (b) 3 months from service of a notice by the administrator on the spouse when the spouse is not an administrator. This is the law in South Australia. The ACT, Northern Territory and Western Australia allow one year from the grant of administration.)*

- 6.8 *To whom should the surviving spouse be required to give notice of his or her decision to purchase property from the estate? (This requirement gives others whose interests may be prejudiced a chance to object.)*
- 6.9 *Should a spouse who has elected to acquire the home be permitted to revoke his or her election? If yes, should the consent of any other person be required? If yes, whose consent should be required?*
- 6.10 *Should the spouse be required to pay outgoings on the home between the death of the intestate and the time when he or she either moves out of the home or acquires the intestate's interest in it? If not, please give reasons.*

When descendants' shares cannot be paid without selling the home

220. Sometimes there are not enough assets in the estate to pay the children's shares without selling the house. In **South Australia**, a practice has developed that ameliorates this situation. The administrator may apply to the court for an order allowing sale of the home to be postponed for a specified period, usually until the youngest child turns 18 years. The court makes such an order if it is satisfied that postponement would benefit the children, and that their interests in the estate can be protected.²⁷⁷
221. The law in **British Columbia** is similar to this practice, but its Act sets out specifically the matters about which the court must be satisfied before making an order permitting postponement of children's shares, and the types of orders the

²⁷⁷ See, for example, *Zbigniew Franczak (deceased)* [2011] SASC 70 (29 April 2011). The intestate died leaving a widow and sons aged 21 and 9 and a net estate of about \$256 000. The principal asset was the family home, which was mortgaged. The widow was required by s 65 of the *A & P Act* to pay the share of the nine year old son to the Public Trustee, but she could not do this without selling the home. She and her co-administrator applied under s 64 of the *A & P Act* for permission to postpone the sale of the house and for an order under s 67 of the *A & P Act* dispensing with the requirement to pay the child's share to the Public Trustee. Gray J was satisfied that such orders would be beneficial and expedient and so made them. Orders to protect the children's interests included that the widow insure and maintain the premises, that she deposit the duplicate certificate of title with the Public Trustee if the mortgage was discharged, and that the Public Trustee have permission to lodge a caveat on the certificate of title to prevent the widow and co-administrator from selling the home before the youngest child was 18 years without further court order. The widow, co-administrator, the Public Trustee and any other person with an interest were given permission to apply to the court for further orders. (This permission could be used if the widow failed to comply with the orders or acted to the detriment of the child's interest.)

Similar orders had been made in *In the estate of Marden* [2008] SASC 312 (14 November 2008).

See also *Moussa Adam (deceased)* [2013] SASC 70 (16 May 2013). The children were aged eight years and four years and the value of the estate was about \$296 000, the principal asset being the mortgaged family home, of which the intestate was the sole owner. Orders were made permitting postponement of sale provided the Registrar of Probates was satisfied that the widow had borrowed the amount of the children's shares (about \$40 000 each) and placed it on trust for the children with herself and a grandmother as trustees.

court may make. These include converting the unpaid entitlement of descendants into a registrable charge on the title. It also gives the descendants a statutory right to apply to the court for orders that the charge is due and payable if the spouse has not paid an amount secured by the charge, has not paid taxes on the property, or has jeopardised the value of the home to the extent that it no longer provides sufficient security for the children's interests, or has failed to comply with the charge in some other way.²⁷⁸ These protective British Columbia provisions had not been enacted when the Committee reported.

QUESTION

6.11 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 above at [211]?

FORFEITURE

222. The common law forfeiture rule embodies a principle of public policy that a person who unlawfully kills another should not obtain a benefit from committing the crime.²⁷⁹ A person who unlawfully kills another is disqualified from taking anything under the victim's will, from the victim's intestate estate, from an insurance policy on the life of the victim, or otherwise obtaining an advantage from the crime. This is described (perhaps not entirely accurately) as the rule of forfeiture.²⁸⁰ This rule is not for the purpose of punishing the killer, but to give effect to public policy, namely that the offender should not benefit from his or her wrongdoing.²⁸¹

²⁷⁸ *Wills, Estates and Succession Act 2009* (BC) ss 33, 35.

²⁷⁹ *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147. See also in the High Court of Australia, *Helton v Allen* (1940) 63 CLR 691, 709.

²⁸⁰ *Re DWS (Deceased)* [2001] Ch 568.

²⁸¹ The degree of culpability of a person who kills a relative varies greatly. The killing might have been premeditated and brutal, or it might have been the result of dangerous driving without any intention of causing harm. The killer might have been insane. The killer might, or might not be prosecuted, or might be prosecuted and found not fit to stand trial. The victim might have forgiven the killer between the infliction of fatal injuries and death. Nevertheless, the forfeiture rule will operate to disqualify the killer. For example see the unfortunate case of *State Trustees Ltd v Edwards* [2014] VSC 392 (22 August 2014).

223. In **South Australia** the forfeiture rule operates as if the killer had never existed. The killer is always a relative in an intestacy context. For example, if a man murdered his parents, he could not inherit from his parents' estates, and neither could his children.²⁸²
224. The underlying rationale for the forfeiture rule is widely accepted as sound, but its practical operation is far from straightforward in terms of both clarity and fairness.²⁸³ In 2014, the Victorian Law Reform Commission, whilst endorsing its underlying rationale, made a number of recommendations for significant reforms.²⁸⁴ The forfeiture rule in South Australia will be the subject of a separate future report by the Institute, drawing on the work of the VLRC. Whether the forfeiture rule should be changed in South Australia is beyond the scope of this Paper.
225. Some criticisms of the rule of forfeiture in intestacy cases follow.
- It disadvantages the children or other descendants of the killer, although they were not responsible in any way for the killing (to take a biblical analogy, the sins of the father are visited upon the child).
 - The policy of the law of intestacy is to prefer descendants over more distant relatives. The forfeiture rule can produce a result that is inconsistent with this policy. (For example, Kevin, who has a child, murders his widowed father, Ian. Ian's surviving relatives are Kevin, Kevin's child and a nephew. Kevin's child, Ian's lineal descendant, would receive nothing and Ian's nephew, who is a collateral relative, would take the whole estate). Diagram 18 below illustrates this.
 - Excluding lineal descendants simply because they are descended from the killer is unlikely to accord with the victim's wishes.²⁸⁵
 - The rule can produce inconsistent results. For example, if a man murdered his wife, her children will take her estate in their own right. If the same man murdered his parents, his children would not inherit from their grandparents' estates.

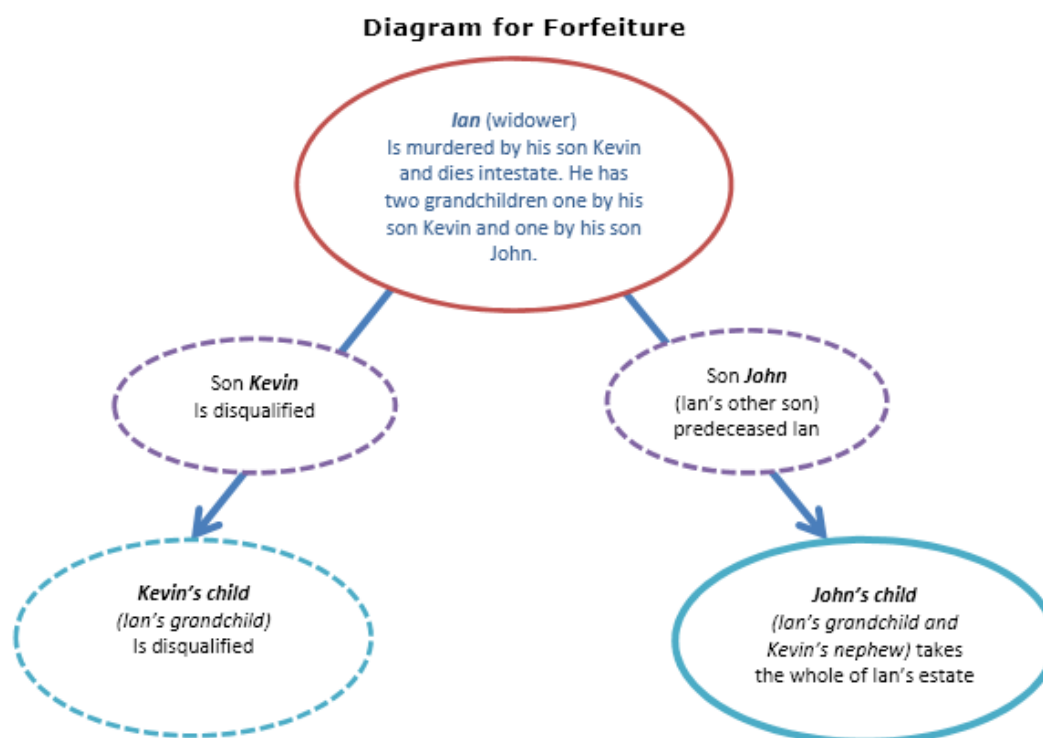
²⁸² *Re DWS (Deceased)* 2001 Ch 568 (Court of Appeal).

²⁸³ See further Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper (March 2014) ch 3, 4, and 5; Victorian Law Reform Commission, *The Forfeiture Rule Report* (September 2014) ix-x (tabled in the Victorian Parliament on 14 October 2014).

²⁸⁴ *Ibid* ix-xvi, 8-16.

²⁸⁵ This was also the opinion of the Law Commission of England.

DIAGRAM 18



The Committee and other jurisdictions

226. The Committee recommended that the law be reformed so that the killer's descendants are not automatically disqualified from inheriting the victim's estate. This would be achieved by distributing the estate as if the killer had died immediately before the victim: see model clause 40 in **Appendix 3**. This clause is drafted in a way that avoids difficulties in defining the circumstances in which the killer is disqualified.

227. **NSW** and **Tasmania** have enacted the model provision.²⁸⁶ The **VLRC** has recommended that the estate be distributed as if the killer had died *immediately before* the intestate.²⁸⁷ **England** and **New Zealand** have also modified the common law similarly.²⁸⁸ This is probably the simplest and most effective way of reforming the operation of the forfeiture rule for intestate estates so that the descendants or other people claiming through the disqualified person can inherit

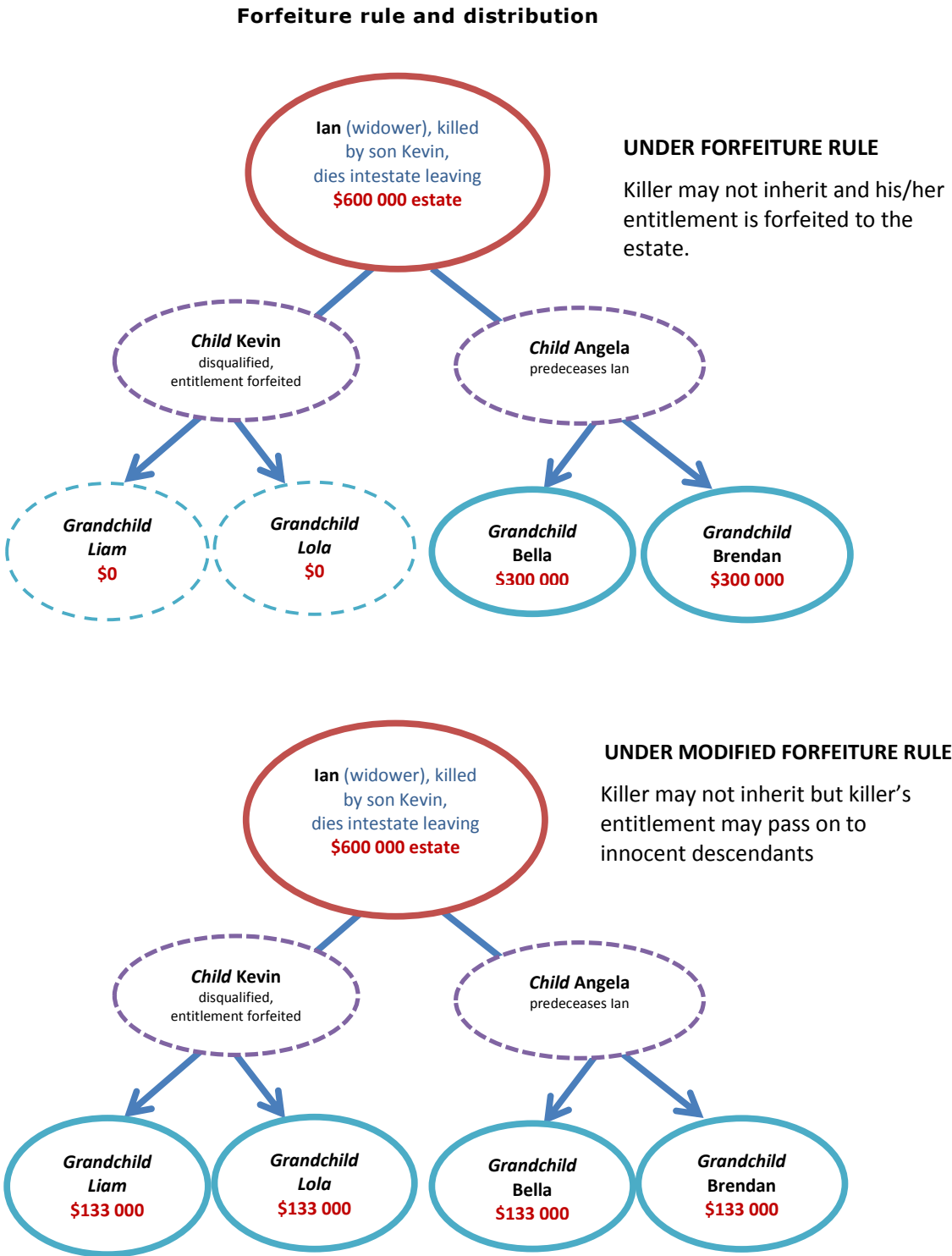
²⁸⁶ *Succession Act 2006* (NSW) s 139; *Intestacy Act 2010* (Tas) s 40. Note that the same provision covers disclaimed interests and forfeited interests.

²⁸⁷ Victorian Law Reform Commission, *The Forfeiture Rule*, Report (September 2014) 70 (Recommendation 23).

²⁸⁸ *Administration of Estates Act 1925* (Eng) s 46A as enacted by the *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (Eng) c 7 s 1; *Succession (Homicide) Act 2007* (NZ) s 7(3).

from the victim. The difference between the common law and the law recommended by the Committee is illustrated by Diagram 19 below.

DIAGRAM 19



228. Other existing alternatives involve court proceedings. Some of these are mentioned here in case they may influence any answer to the questions below. In the **ACT**, **NSW** and **England**, an application can be made to the court for an order modifying the effect of the forfeiture rule in some cases.²⁸⁹ In **England** and **NSW** the killer can apply, but the court must take into account the culpability of the killer. In **Victoria** and **New Zealand**, the killer cannot apply to the court, but interested persons may.²⁹⁰ In some jurisdictions the people for whom the victim had a responsibility to make provision may apply to the court under the *Family Provision* legislation for orders redistributing the estate in a way that modifies the results of the forfeiture rule.²⁹¹

QUESTION

7.1 Should the common law forfeiture rule that a relative who killed the intestate is treated as never having existed, thus disqualifying the killer's children or other relatives from inheriting the victim's estate even though they were not involved in the killing, be reformed? The Committee recommended that the estate be distributed as if the killer had died immediately before the intestate. Do you agree? If you answer no, please give reasons. (Note that the Institute intends to make recommendations separately from this Issues Paper in due course about the circumstances in which the killer should not be disqualified, and so this question is confined to what should happen when a person who is responsible for the intestate's death is disqualified according to the law at the relevant time.)

DISCLAIMED INTERESTS

229. No one can be forced to take a share of an estate against their will.²⁹² Any beneficiary may disclaim (refuse to accept) his or her interest in an estate. In South Australia and most States the common law applies. The disclaimed interest remains a part of the estate and does not pass to the descendants of the person disclaiming. In this respect it is like the law of forfeiture in that the estate

²⁸⁹ See Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper (March 2014) 53 [5.15]-[5.19] for a more detailed discussion of this topic.

²⁹⁰ *Administration and Probate Act 1958* (Vic) s 91(4).

²⁹¹ *Forfeiture Act 1982* (Eng) s 3; *Forfeiture Act 1995* (NSW) ss 3, 5; *Forfeiture (Homicide) Act 2007* (NZ) s 9.

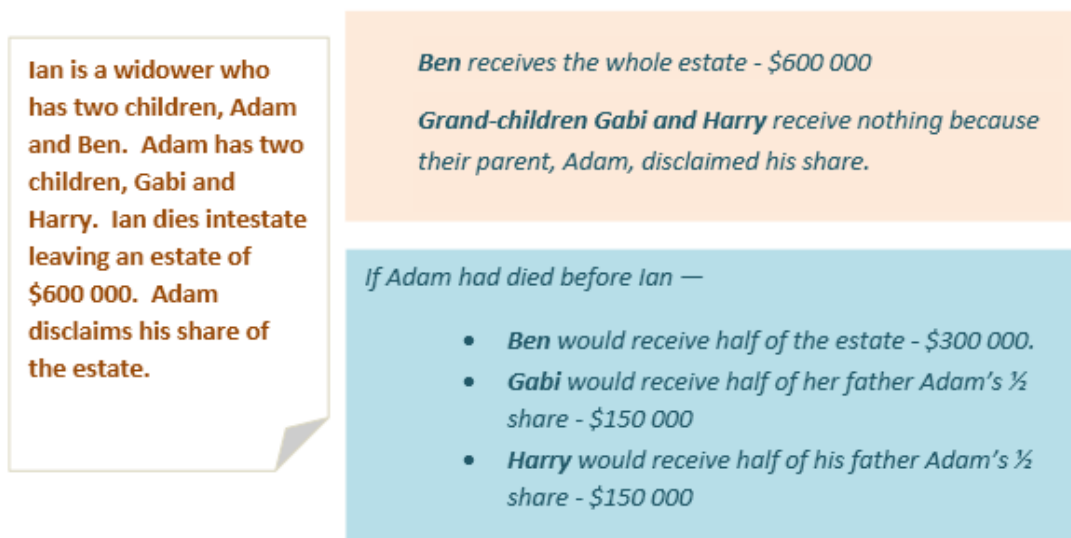
²⁹² See *Townson v Ticknell* (1819) 3 B & A 31; 106 ER 575, 576 (Abbott CJ):

‘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 turn 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.’

is distributed as if the person disclaiming had never existed.²⁹³ The result is that the descendants of the person disclaiming cannot inherit. The result is illustrated in the example below. It is not entirely clear when the time for disclaiming ceases,²⁹⁴ but a beneficiary cannot disclaim an interest from which he or she has already derived a benefit.²⁹⁵

DIAGRAM 20

EXAMPLE—distribution where a beneficiary disclaims his or her interest in the estate



230. Although the result of this common law can be circumvented by agreement if all interested people are *sui juris*, there will be additional legal costs and *ad valorem* stamp duty or court costs.²⁹⁶

²⁹³ *In the Estate of Simmons (deceased)* (1990) 56 SASR 1, 14. A disclaimed interest becomes *bona vacantia* only if there are no other relatives who are entitled.

²⁹⁴ The right to disclaim exists at least until the issue of a grant of administration, according to Haines, Englefield and Harland, Thomson Reuters, *Australian Succession Law* (at 10 October 2014) [305.230]. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 indicates that a person may disclaim at least up until the time when the precise amount of his or her interest in the estate is ascertained. A person cannot disclaim an interest from which he or she has already benefited (*In the Estate of Simmons (deceased)*; *Probert v Commissioner of State Taxation* (1998) 72 SASR 48). However, the Committee thought an entitled person could disclaim 'before any distribution has been made by the administrator'. This is later than indicated by *In the Estate of Simmons (deceased)* and later than indicated by Haines, Englefield and Harland. A disclaimer may be set aside if it was done to avoid child support or some other responsibility (see *Carmody v June Anstee & Associates Solicitors* [2001] QSC 93.)

²⁹⁵ *Re Hodge* [1940] 1 Ch 260.

²⁹⁶ See below [241]–[245].

The Committee

231. The Committee considered the common law uncertain and unsatisfactory and in need of statutory reform. It concluded that the share of the person disclaiming should be distributed to the relatives who would have been entitled to it if the disclaiming person had died before the intestate.²⁹⁷ Often they would be the children or grand-children of the person disclaiming, but it might be a parent, sibling or other collateral relative. The Committee's recommendation would replace the common law. But like the common law, the person disclaiming could not influence the destination of the disclaimed inheritance and it would pass according to strict intestacy distribution rules. The lower right hand box in Diagram 20 above illustrates what would happen if the reform recommended by the Committee is adopted.
232. The main reason stated by the Committee for its recommendation is maintaining consistency with the distribution pattern common to all States – all give priority to lineal descendants of the intestate over ancestors and siblings or other collateral relatives. Further, it would be anomalous to allow descendants of a person who is disqualified by the forfeiture rule to inherit, but not descendants of a person who has chosen to disclaim his or her interest in the estate.
233. **NSW** and **Tasmania** have now enacted model clause 40 to that effect.²⁹⁸

Scottish Law Commission

234. The **Scottish** Law Commission saw a disadvantage in the rigidity of the Committee's proposal and recommended a refinement, namely that a beneficiary should be able to choose to disclaim not only his or her own interest, but also the interests of his or her descendants.²⁹⁹ This would add flexibility to the reform.
235. To illustrate this point, assume that Ian dies intestate leaving two children, Adam and Ben. Adam is disabled. Ben is healthy, financially successful and has a child. Ben knows that his brother Adam needs all the help he can get. He disclaims his interest expecting that his inheritance will go to Adam (this is what would happen under current South Australian law). But under the Committee's recommendation and now **NSW** and **Tasmanian** law, Ben's share would go

²⁹⁷ *Committee's Report*, above n 6, 205–207 [12.26–12.37], 210 (Recommendation 42).

²⁹⁸ *Succession Act 2006 (NSW)* s 139; *Intestacy Act 2010 (Tas)* s 40. The Committee reported that its recommendation was consistent with the Uniform Probate Code of the United States of America.

²⁹⁹ Scottish Law Commission, *Report on Succession*, Report No 215 (April 2009) 29–30 [2.50]–[2.54].

automatically to his child, not to Adam. If the Scottish Law Commission's proposal were accepted, Ben could disclaim for himself and his child so that his inheritance would go to his disabled brother.

236. It might be thought that the Scottish Law Commission's proposal is unfair in allowing a beneficiary to disclaim the interests of his or her descendants, particularly if they are not *sui juris*. But provided the beneficiary is permitted to disclaim only *after* the death of the intestate, the descendants of the person disclaiming would have no right to inherit from the intestate estate anyway - their ancestor is still alive and it is their ancestor who is entitled to inherit. There is no certainty that the descendants would receive any benefit if their parent had taken the inheritance. In the example above, Ben could take his inheritance and then put it in a trust for his disabled brother, Adam, or he could give it away or spend it as he chose. Further, occasionally an inheritance is detrimental to the recipient, who might disclaim on behalf of himself and children in their best interests. For example, property in the estate might be unsaleable, and keeping it unaffordable. Another example - the beneficiary might be aware that the estate is tainted, being acquired through the intestate's crime. On the other hand, the motivation for disclaiming could be irrational or vindictive.
237. The fundamental question is – 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 not to take.

New Zealand

238. In **New Zealand**, a *valid* disclaimer has the same effect as model clause 40, but there are several statutory requirements that must be met before a disclaimer is valid.³⁰⁰ These mostly reflect the common law.³⁰¹ Three of them raise issues on which opinions might differ.

³⁰⁰ *Administration Act 1969* (NZ) s 81.

³⁰¹ The person disclaiming must have attained the age of 18 years and be of sound mind, although the court may disclaim an interest on behalf of a person who is not. The beneficiary must disclaim the whole of his or her interest – not part. The disclaimer must be made within one year of the grant of administration or such longer time as the Court allows. Then follows a list of circumstances in which a disclaimer is not valid. These may be summarised as being to prevent a person disclaiming an interest:

- (i) when the person has already enjoyed the benefit of all or some of it. (For example by taking possession of, or receiving the profits or property or using it as security for a loan);
- (ii) when the person has dealt with the interest in some way (to protect third parties);
- (iii) when the person receives valuable consideration in exchange for disclaiming his or her interest. (For example, disclaiming his or her interest in return for forgiveness of a debt owed to a member of the family);

- (a) Under the New Zealand Act a beneficiary cannot disclaim *a part* of his or her inheritance.³⁰²
- (b) A disclaimer is not valid if the person receives valuable consideration in exchange for disclaiming the interest. For example, if the beneficiary disclaimed an interest in return for forgiveness of a debt, the disclaimer would be invalid under the New Zealand Act.
- (c) A beneficiary is not permitted to by-pass the statutory distribution rules by directing who will receive the disclaimed interest. For example, assume Ian dies intestate leaving a child, Adam. Adam has a child Xavier, a grand-son of Ian. Xavier is a gambler and drug addict. Adam wants his interest to go to his mother, now a widow. He believes that it would be detrimental to Xavier to receive the inheritance. Under the Committee's recommendation and the New Zealand Act, Adam could not direct his disclaimed interest to his mother. If the Scottish Law Commission's recommendation were accepted, Adam could do this.

QUESTIONS

- 8.1 *Under South Australian law, people who disclaim their inheritance are treated as never having existed, so that their descendants (if any) or other relatives are thereby automatically disqualified from taking the disclaimed interest. Should the law be reformed so that a disclaimed interest passes to the relatives who would have been entitled to it if the person disclaiming had died immediately before the intestate, as recommended by the Committee? (But see also question 8.2.)*
- 8.2 *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 (that is, not to take)? The following questions follow on from this one.*
 - (a) *Should the law allow a person to disclaim on behalf of his or her descendants as well, 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?*
 - (b) *Should a beneficiary be entitled to disclaim in favour of a specified relative?*

-
- (iv) when the person attempts to direct who is to receive the disclaimed interest. (This is to prevent the person disclaiming from attempting to have his or her interest pass to a person who would not be entitled to it under the rules of intestacy); or
 - (v) when the person is bankrupt (to protect creditors).

³⁰² However, a beneficiary could take his or her inheritance and then give part of it away. But this might affect eligibility for social welfare.

- 8.3 Do you agree with the following New Zealand restrictions on disclaiming:
- (a) a person may only disclaim the whole of his or her interest – not a part?
 - (b) a disclaimer is not effective if the person disclaiming receives any valuable consideration (tangible benefit) in return?

STAMP DUTY

Purchase by spouse of intestate's interest in the home

239. A spouse who wishes to acquire the intestate's interest in the home will be liable to pay *ad valorem* stamp duty on the difference between the value of the home and the spouse's entitlement under the rules of intestacy.

For example, assume that Ian dies intestate leaving his widow, Wendy, and three children. Ian's estate comprises the family home that is registered solely in his name worth \$600 000 and other assets worth \$100 000. There is a mortgage of \$400 000 on the home. The net value of the estate is thus $(\$600\,000 - \$400\,000) + \$100\,000 = \$300\,000$. Wendy is entitled to a preferential legacy of \$100 000 plus half the balance, giving her \$200 000. If Wendy wishes to acquire the home, she will be liable to pay *ad valorem* stamp duty on the amount by which the value of the home exceeds her entitlement on intestacy. So she will be liable for *ad valorem* stamp duty on \$400 000, which would be \$16 330 at current rates.

Now assume the same family situation and estate, except that the home is owned by Ian and Wendy as tenants in common. Ian's equity in the home is therefore \$100 000 and his total net estate is \$200 000. Wendy is entitled to the first \$100 000 as her preferential legacy and half the balance, giving her \$150 000. If Wendy wants to keep the home, she will be liable for stamp duty on the amount by which the value of the home exceeds her entitlement on intestacy, in this case, \$50 000. She will be liable for *ad valorem* stamp duty of \$1 080 at current rates.

By way of contrast, if in both examples, Ian had made a will and left his interest in the home to Wendy, or if the home had been owned by Ian and Wendy jointly, she would not have had to pay *ad valorem* stamp duty. If Ian had no descendants so that Wendy was entitled to the whole estate, there would be no stamp duty.

240. Thus, the *Stamp Duties Act* disadvantages a person whose spouse dies intestate compared to those who owned the home jointly with the intestate spouse, and compared to those who inherit the deceased's interest under a will, and

compared to those who obtain it by court order, and perhaps most importantly, compared to the spouse of an intestate who leaves no descendants. Ironically, the person most likely to be disadvantaged by the incidence of stamp duty is the widow or widower with young children and the greatest need to acquire the intestate's interest in the home.

Disclaimed or assigned interests

241. Two ways in which the family of an intestate sometimes avoid the results of the rigid rules of intestacy by agreement (assuming all are *sui juris*) are (a) by a beneficiary disclaiming his or her inheritance, or (b) by a beneficiary assigning (transferring) his or her right to a share of the estate to another relative. If the beneficiary disclaims, 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 (i.e. on an *ad valorem* basis).³⁰³
242. By contrast, *ad valorem* stamp duty is not payable on an interest that passes by the will of a deceased person, or by operation of the laws of intestacy, or in compliance with a court order, for example under the *Family Provision Act* or the *Family Law Act 1975 (Cth)*. Further, it is not payable if a person transfers an interest in the shared home or a motor vehicle when the marriage or domestic partnership has broken down irretrievably.³⁰⁴
243. Liability for *ad valorem* stamp duty can impede families wishing to alter the distribution of an intestate estate by agreement. Paradoxically, it can encourage the issue of proceedings under the *Family Provision Act* with a view to obtaining a court order when there is no real dispute.

³⁰³ In *Probert v Commissioner of State Taxation* [1998] 72 SASR 48 the deceased left a will under which his sister was a beneficiary with a gift over to the sister's daughter (his niece) if the sister predeceased him. The sister disclaimed before probate was granted so that the gift would go to her daughter under the terms of the will. The Commissioner of State Taxes levied *ad valorem* stamp duty on the full value of the disclaimed gift. The Supreme Court ruled that the Commissioner was in error and *ad valorem* stamp duty was not payable, because the disclaimer operated to prevent any interest vesting in the sister: she had never acquired anything she could convey to her daughter or any other person. If probate had been granted before the sister disclaimed, the result might have been different. Parliament reversed the effect of the Supreme Court decision by enacting s 71AA of the *Stamp Duties Act 1923 (SA)*. Now, *ad valorem* stamp duty is payable on any instrument by which a person who is, or who may be, entitled to share in the estate, disclaims the interest or assigns or transfers it to another person. The words of s 71AA are:

- (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.*

³⁰⁴ *Stamp Duties Act 1923 (SA)* ss 71(5)(h), 71CA, 71CB, 71CBA.

For example, Ian is intellectually disabled and is unable to make a will. He lives in his sister's home and she gave up her paid employment to care for him. He dies intestate leaving an estate with a net value of \$200 000 derived from an award of compensation for his injuries. His closest surviving relatives are his mother and his sister. Under the rules of intestacy Ian's mother would take the whole estate. Ian's mother and sister agree that it would be fairer and in accordance with Ian's wishes for his sister to have the benefit of his estate. So Ian's mother disclaims so that Ian's sister, being the next closest relative, can take the whole estate. But the sister will have to pay stamp duty of \$6 830. The stamp duty would be the same if Ian's mother had assigned her interest in the estate to Ian's sister.

For example, assume Ian and Wendy had two children, Anna and Ben. Wendy dies when Anna is 12 years and Ben is 10 years and they are then raised by their grand-parents who are appointed their guardians. Ian marries Jane who has independent means. Ian dies intestate leaving an estate of \$600 000. Under the rules of intestacy Jane is entitled to \$350 000 and Anna and Adam are entitled to \$125 000 each. Jane wishes to disclaim her interest so that it will pass to Ian's orphaned children. The stamp duty at current rates would be \$13 830. If Jane assigned half her interest to Anna and half to Adam (value \$175 000 each), stamp duty of \$5 830 would be paid on each assignment (total \$11 660). If Jane and Anna and Ben's guardians are in agreement, they might find that legal proceedings under the *Family Provision Act* would cost less than the stamp duty, despite the need to satisfy the court that an order should be made.³⁰⁵

244. Parliament is entitled to legislate to impose stamp duty on any transactions it thinks fit (subject to any constitutional limitations not relevant for present purposes). However, 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 cases, the current South Australian Act appears to be inconsistent with legal principle, at least in so far as it applies to early disclaimers.³⁰⁶

³⁰⁵ The court cannot make a consent order under the *Family Provision Act*, so the person who is to receive a payment or property from the estate must issue proceedings and serve them on all interested parties, satisfy the court that he or she is a person who is permitted by the Act to make a claim (has standing), that he or she has been left without adequate provision for his or her proper maintenance, education or advancement in life and that it is just and equitable in the circumstances that an order be made in his or her favour. The court has taken a liberal view of these requirements in many cases.

As the court cannot make a family provision order by consent, there would be a risk in some cases that the court would not make an order in the terms the agreeing parties want – or possibly make no order at all.

³⁰⁶ See *In the estate of Simmons* (1991) 56 SASR 1; *Probert v Commissioner of State Taxation* [1998] 72 SASR 48. In both of these cases the persons who were beneficiaries had disclaimed their interests before probate or

245. The question is whether it would be better policy to exempt from *ad valorem* stamp duty a document by which a person who is entitled to benefit from an intestate estate disclaims, or assigns his or her interest to another member of the intestate's family. There are already exemptions in some other circumstances for inter-family transactions.

QUESTIONS

- 9.1 *Should a spouse who exercises his or her statutory right to acquire the intestate's interest in the home be liable to pay ad valorem stamp duty (calculated on the purchase price)? (A person who inherits a house under a will or receives it under a court order does not pay stamp duty. When one of two joint tenants dies there is no stamp duty.)*
- 9.2 *Should disclaimers or assignments of interests to which a person is entitled under the rules of intestacy that benefit other relatives of the intestate be exempt from stamp duty? If yes, should there be any limitations to the exemption? If yes, what should they be?*

GIFTS TO BE BROUGHT INTO HOTCHPOT – S 72K OF THE A & P ACT

246. This section is about whether the law should attempt to equalise the benefits received by relatives of the same class from a person who has died either wholly or partially intestate. In **South Australia** this is called 'hotchpot'.
247. Hotchpot is an old term that describes the requirement that a beneficiary bring into account the value of certain gifts and advancements received from the intestate during the intestate's lifetime (*inter vivos* gifts).³⁰⁷ In **South Australia**, it is also used to describe the requirement that a beneficiary bring into account gifts under the will when there is a partial intestacy. Section 72K of our *A & P Act* is a composite provision covering both.
248. Originally the doctrine of hotchpot applied only to *inter vivos* advancements to children whose fathers died *totally intestate*, and its purpose was to bring about equality between the intestate's children (other than the heir at law to whom certain estates descended by operation of other laws). An advancement was

administration had been granted. It is arguable that a disclaimer made after the grant would not prevent an interest, being the right to call on the executor or administrator to pay or transfer their share to them, from vesting in the beneficiary, so that the disclaiming person had something of value to dispose of. A practical problem would be that the value of the interest to be taxed might not be known at the time of disclaiming.

³⁰⁷ The doctrine of hotchpot has its origins in the *Statute of Distributions 1670* (Eng). The Committee said that essentially hotchpot applied to two types of *inter vivos* benefits: (a) marriage settlements whereby property was settled upon children upon their marriage; and (b) advancements which were usually intended to set children up in a profession or business: *Committee's Report*, above n 6, 212 [13.6].

treated as being an advance on the child's entitlement to the father's estate. A child of the intestate could choose not to account for the advancement or a settlement and abandon the right to share in the estate, and did not have to give up anything he or she had received from the intestate during his lifetime.³⁰⁸ This became part of South Australian law on British colonisation in 1836. In 1975, the South Australian Parliament expanded and modified this law by introducing s 72K of the *A & P Act*.

249. Hotchpot has been a vexed question for many years with opposing opinions about whether it should be retained or abolished either in some or in all circumstances.³⁰⁹

250. In 1974, the Law Reform Committee of South Australia recommended the retention of hotchpot in a modified form. It argued:

The underlying proposition that there should be equality as between beneficiaries is a good one, but it should not only apply to children. In the opinion of a majority [of the Committee], ... it should be enacted that any person other than a spouse taking under an intestacy (including a partial intestacy) who has received a gift from the deceased within five years prior to death shall bring in the value of that gift at the time it was made or the amount of the gift if it was in money and the gift shall

³⁰⁸ The term 'advancement' that was used in the *Statute of Distributions* caused much difficulty. There are many decisions in cases in which there was a dispute about whether a particular benefit conferred by the intestate on a descendant was 'an advancement', partly because the subjective intention of the parent had to be taken into account and the parent was dead. The money or property must have been given for the purpose of establishing the child in life or making provision for the child – not just a casual payment. A gift can be given for any purpose, or no purpose at all. As this term thankfully is not used in s 72K of the *A & P Act*, it is not discussed in this paper.

³⁰⁹ The following are two examples. In *In re Morton, decd. Morton v Warham* [1956] Ch 644, 647, Danckwerts J observed:

'... and the question which I have to consider is a tiresome and irritating subject, hotchpot. For some reason, which is difficult to fathom, but presumably with an idea of producing fairness, the draftsmen of the *Administration of Estates Act 1925*, introduced hotchpot provisions into the sections of the Act dealing with intestacy. It seems to me that they made a great mistake in so doing, and that it would have been far better to have left the whole thing out....'

Sir David Hughes Parry, Roger Kerridge and J B Clark, *Parry and Clark: The Law of Succession* (Sweet & Maxwell, 11th ed, 2002) discuss at [2-56] the abolition in England of hotchpot for intestate estates and the retention of what they call 'its sister rule' for wills and say:

'Although the abolition of the three hotchpot rules may make life easier for succession practitioners, it was not of obvious long term benefit to the system, and does create a potentially arbitrary distinction between cases where persons who have made substantial gifts to their children die intestate.'

be taken to be in satisfaction or part satisfaction of that person's share under the intestacy.³¹⁰

251. This, and the South Australian Law Reform Committee's other recommendations are the basis of the current South Australian hotchpot provision, which is summarised below.³¹¹

(a) If the deceased died wholly intestate, then gifts or settlements of more than \$1 000 in value made by the intestate during the last five years of his or her life to any person who is entitled to a share of the estate under the rules of intestacy must be brought into account. Gifts to a spouse or domestic partner are excepted.³¹²

(b) If the deceased died partially intestate, then gifts worth more than \$1 000 made by the deceased's will (testamentary gifts) to any person (including the spouse or domestic partner) must be brought into account.

The first, (a), relates to *inter vivos* gifts when there is a total or a partial intestacy.

The second, (b), relates to testamentary gifts when there is a partial intestacy.

The *inter vivos* gift, testamentary gift or settlement is treated as having been given in full or part satisfaction of that beneficiary's share of the intestate estate.³¹³

However, these statutory rules can be displaced by proving that the deceased expressed a contrary intention, or a contrary intention appears from the circumstances.³¹⁴

252. In the first example below where the competition is between children of the intestate only, applying the conventional method of calculating when benefits are brought into hotchpot is simple and the result is rational. But how is the calculation to be done when there is a spouse and children or a spouse, children and grand-children who are entitled to inherit? There are several possibilities,

³¹⁰ Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills*, Twenty-Eighth Report (1974) 8–9. In 1974 when this report was written, the *Statute of Distributions 1670* (Eng) applied. See also *National Trustees, Executors & Agency Co of Australasia Ltd v Ward* (1896) 21 VLR 519; 2 ALR 119. In that case a father transferred land to one of his sons during his lifetime, his motive being to reward the son for past services. The consideration for the transfer was expressed to be 'natural love and affection'. The father died intestate. The court ruled that the *Statute of Distributions* applied and the transfer was to be treated as an advancement, and the son could not take a share of his father's estate without bringing the value of the land into account.

³¹¹ South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1975, 1768.

³¹² The recommendation that gifts not exceeding \$2 000 be ignored was not accepted and the amount was fixed at \$1 000 and has never been increased.

³¹³ *A & P Act* ss 72K(1)(a), 72K(1)(c)–(d).

³¹⁴ *A & P Act* s 72K(1)(c). The person who asserts a contrary intention must prove it. The level of proof required is the civil standard, that is, on the balance of probabilities.

and as Simon Palk demonstrated by working through various examples using different methods, the possibilities can produce ‘some odd and unfair results’.³¹⁵

Example 1 - Total intestacy with only children being entitled to inherit

Ian died wholly intestate leaving two sons, Adam and Ben, and no spouse. Four years before his death, Ian gave Adam a car that was then worth \$20 000 and two years before his death he gave Ben \$10 000. The value of the estate is \$100 000. The value of the gifts to Adam and Ben are notionally added to the intestate estate, and the result is divided. The calculation would be:

Value of estate	\$100 000
Add gift to Adam	\$10 000
Add gift to Ben	<u>\$20 000</u>
Total	\$130 000
Divide total by 2	\$65 000
For Adam, deduct	\$20 000
Adam’s share of estate	\$45 000
For Ben, deduct	\$10 000
Ben’s share of the estate	\$55 000

Thus, Ben and Arthur each receive \$65 000 from Ian.

Example 2 - Partial intestacy with spouse and more than one generation is entitled to inherit

Ian makes a will leaving his estate to be divided equally between Wendy (his widow), his mother, his son and the ABC Club. The will does not say what is to happen if any of the beneficiaries under the will die or cease to exist before his death. Ian’s mother and son predecease him, but his son left a child, Gabi. The ABC Club became defunct before his death. The value of the estate is \$600 000.

³¹⁵ Simon Palk, ‘Hotchpot – or Hotchpotch’ (1980-81) 4 *Adelaide Law Review* 506-516. The Institute encourages interested readers of this Issues Paper to read this article, which is available in both print and digital form.

The gifts to his mother and the ABC Club fail and so half his estate (\$300 000) must be distributed according to the rules of intestacy to Wendy and grand-child Gabi. Because of s 72K(1)(b) of the *A & P Act*, Wendy's gift under the will must be taken into account.

The Institute has been informed that the conventional method of calculating the shares of Wendy and Gabi in this situation would be as follows.

Value of estate	\$600 000
Add value of intestate part of the estate	<u>\$300 000</u>
	\$900 000

Apply rules of intestacy to \$900 000

Wendy takes \$100 000 plus ½ the balance	\$500 000
Gabi takes the remaining ½ of the balance	\$400 000

Now deduct the share each takes under the will

Wendy \$500 000 less \$150 000 under the will	\$350 000
Gabi \$400 000 less \$150 000 under the will	\$250 000

Another very experienced South Australian estate lawyer used an alternative method, reaching the same result.³¹⁶

Testate estate

Wendy	\$150 000
Gabi	\$150 000

Intestate estate

Available estate	\$300 000
<i>Bring into hotchpot amounts received under the will</i>	<u>\$300 000</u>
Total	\$600 000

³¹⁶ Mr Ray Frost kindly provided his working method for these facts.

Wendy's share

First	\$100 000
½ balance	<u>\$250 000</u>
Total	\$350 000
Less benefit brought into hotchpot under will	<u>\$150 000</u>
Wendy's net share of intestate estate	\$200 000

Gabi's share

½ balance	\$250 000
Less amount brought into hotchpot under will	<u>\$150 000</u>
	\$100 000

Net result

Wendy's entitlement

From testate estate (under will)	\$150 000
From intestate estate	<u>\$200 000</u>
	\$350 000

Gabi's entitlement

From testate estate (under will)	\$150 000
From intestate estate	<u>\$100 000</u>
	<u>\$250 000</u>
Total estate distributed	<u>\$600 000</u>

If there were no requirement to bring into account the gift under the will to Wendy, the result for Wendy and Gabi would be as follows:

Value of estate	\$600 000
-----------------	-----------

Wendy

1/4 share under the will	\$150 000
--------------------------	-----------

from intestate part of estate

preferential legacy	\$100 000
---------------------	-----------

plus 1/2 balance	<u>\$175 000</u>
------------------	------------------

Wendy's total	<u>\$425 000</u>
---------------	------------------

Gabi

1/2 balance intestate part after Wendy's share	<u>\$175 000</u>
--	------------------

Total distributed	<u>\$600 000</u>
-------------------	------------------

253. Some commentators have viewed the South Australian provision in a favourable light, both as to its policy and its detail.³¹⁷ Others disagree and assert that it has major defects.³¹⁸

The Committee and other jurisdictions

254. The Committee recommended abolition of hotchpot.³¹⁹ The Committee considered that it caused more difficulty than benefit.

255. Approaches to hotchpot provisions in Australia differ. In summary:
- Four of the eight States - **Queensland, Western Australia, NSW** and **Tasmania** - abolished hotchpot on intestacy in 1968, 1976, 1977 and 2010 respectively.³²⁰

³¹⁷ See, for example, Hardringham, Neave & Ford, above n 116, 441–442, 452–454; Ken Mackie, *Principles of Australian Succession Law* (Lexis Nexis Butterworths, 2007) 215–217. However, in Gino Dal Pont & Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 253, Mackie's favourable comments are not repeated: see Ibid 253 under the heading 'Taking into account *Inter Vivos* Gifts'.

³¹⁸ See, for example, Palk, above n 315, 506–516.

³¹⁹ *Committee's Report*, above n 6, 219 (Recommendation 43).

³²⁰ *Succession Acts Amendment Act 1968* (Qld); *Administration Act Amendment Act 1976* (WA); currently *Succession Act 2006* (NSW) s 140 replacing the earlier repeal; *Intestacy Act 2010* (Tas) s 41.

- The **ACT**, **Northern Territory** and **Victoria**, like **South Australia**, have hotchpot provisions, but they differ considerably.
 - In the **ACT**, it is limited to gifts totalling more than \$10 000 given to any beneficiary, except the intestate's spouse, within the five years before the intestate's death. The requirement to account can be displaced by proof of contrary intention.³²¹
 - In the **Northern Territory**, hotchpot is limited to advancements to and settlements for descendants made within the five years before the intestate's death. All that exceed \$1 000 are taken into account. And the requirement to account can be displaced by proof of contrary intention.³²²
 - In **Victoria**, hotchpot is limited to settlements and advancements to descendants, but all must be taken into account.³²³ The VLRC has recommended abolition.³²⁴
 - In the **ACT** and **Northern Territory**, the date for determining the value of the advancement is the date of the intestate's death, but in **South Australia** it is the date of the gift or settlement.
 - Unlike these other States, **South Australia** includes 'gifts' of any type and settlements, not just 'advancements' or 'portions'.³²⁵

256. Turning to some international comparisons, the situation is also mixed.

- **New Zealand** has abolished hotchpot for wholly intestate estates, but requires that gifts made under the will to the spouse be set off against the spouse's share in the intestate estate.³²⁶ Other beneficiaries under the will do not have to account. [This might be explicable as a result of the matrimonial property legislation in New Zealand.]
- In **England**, hotchpot was modified in 1925 and 1952 and abolished in 1995.³²⁷
- It was abolished in **Alberta** in 2010 and **British Columbia** in 2014.³²⁸

³²¹ *Administration and Probate Act 1929* (ACT) s 49BA(1).

³²² *Administration and Probate Act 1969* (NT) s 68(3).

³²³ *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).

³²⁴ VLRC Report, above n 68, 92 (Recommendation 35).

³²⁵ Mackie, above n 317, 217 says that this simplifies the application of the hotchpot doctrine, but also covers a broader range of benefits.

³²⁶ *Administration Act 1969* (NZ) s 79.

³²⁷ *Law Reform (Succession) Act 1995* (Eng); *Succession (Northern Ireland) Order 1996*. The repeal was recommended by the Law Commission.

- In several other **Canadian Provinces**, the doctrine has been modified. In **Manitoba, Saskatchewan** and **Nova Scotia** a form of hotchpot applies only in cases of total intestacy. In **Manitoba**, the law requires that property given by the intestate during his or her lifetime to *any* person who is entitled on intestacy be taken into account, but only if the intestate declared, or the recipient acknowledged, that it was an advancement. An advancement to a person who dies before the intestate is not taken into account in calculating the share of that person's entitled descendants, unless the terms of the advancement are to the contrary.³²⁹ The **Nova Scotia** and **Saskatchewan** Acts refer to a child or grand-child being 'advanced by portion' and the rule affects the interests of descendants of the intestate through all degrees.³³⁰

Arguments for and against retaining hotchpot either as in South Australia or in a more limited form

257. Given the differing statutory approaches and academic and legal disagreement, a range of arguments for retention or abolition should be considered before any decision about reform is made.
258. Some arguments for retention follow.
 - Hotchpot is based on equitable principles for achieving equality between beneficiaries. It avoids accidental inequality between children or other relatives of the same class when one or more, but not all of them, has received the benefit of a gift or settlement, and the deceased died or became incompetent before equalising his or her beneficence as intended.
 - It may be thought that the original purpose of hotchpot, namely equality between children of the intestate, is a sound policy and should be preserved, but not its extension to other relatives.
 - Some testators attempt to equalise benefits to their children or other relatives by including in their wills a hotchpot provision.³³¹ Some testators explain by reference to earlier benefits given why unequal amounts are given to relatives of the same class by their wills.

³²⁸ *Wills and Succession Act 2010* (Alberta) s 110. For British Columbia, see the Ministry of Justice explanation of s 52 of the *Wills, Estates and Succession Act 2009* at [http://www.ag.gov.bc.ca/wills-estate-succession-act/act-ex\[aomed.htm](http://www.ag.gov.bc.ca/wills-estate-succession-act/act-ex[aomed.htm), Part 4, Division 3, Abolition of Common-Law Rules.

³²⁹ *Intestate Succession Act 1990* (Manitoba) s 8. The Act provides that an advancement does not affect the rights of descendants.

³³⁰ *Intestate Succession Act 1989* (Nova Scotia) s 13; *Intestate Succession Act 1996* (Saskatchewan) s 15.

³³¹ The Institute does not know what proportion of testators do this.

- It could be argued that hotchpot should be retained for total intestacy only, to avoid interference with testamentary freedom.
259. Some arguments for abolition or modification of the current South Australian statutory hotchpot rules follow.
- It may be argued that the purpose of intestacy laws is to distribute the estate of the intestate as at the time of death - not to remedy any unequal treatment of beneficiaries during the intestate's lifetime.³³²
 - The underlying assumption that the intestate intended to treat all children or other relatives of the same degree equally is misplaced in many cases. There are many reasons why fair minded, socially responsible people wish to prefer one child or other relative over another in the distribution of their estates.³³³
 - Where there is a partial intestacy, hotchpot may defeat the deceased's intentions. It is fair to assume that most people who make a will have taken into account, to the extent they think fair, any previous or intended *inter vivos* benefits.³³⁴ The **Manitoba** Law Reform Commission said 'the deceased's wishes respecting *inter vivos* transfers will most often be embodied in his/her will; to require an accounting of them may well upset the deceased's estate plan'.³³⁵
 - South Australian law ignores the changes in the value of money or property although it may be significant for some types of property (for example shares and intellectual property).
 - It ignores the advantage to the recipient of having received a benefit earlier than others who receive nothing until after the deceased's death.
 - Hotchpot attaches value only to gifts of real or personal property, but ignores other types of assistance that the deceased gave, for example, the

³³² Law Reform Commission of British Columbia, *Statutory Succession Rights*, Report No 70 (1983) 38–39.

³³³ The following are some examples. The relationship between the deceased and a relative might have been particularly close and, for example, the relative might have sacrificed his or her own financial interests to care for and support the intestate. The intestate might have intended to provide for a relative who is unfortunate and in need. The intestate might give away assets during his or her lifetime to avoid inheritance by a relative who is a wastrel or otherwise undeserving. In farming or business families, land or business assets are sometimes given *inter vivos* or by will to honour an express or implied promise to a relative who has worked in it for many years for little reward and made important life decisions in reliance on it. *Inter vivos* gifts may be made to enable the older generation to obtain a pension five years later while keeping intact a farm or business on which other members of the family rely for their livelihoods. The value of the land and business assets can preclude the older generation from obtaining an aged pension, but the income produced is insufficient to maintain both the older and the younger generation.

³³⁴ As mentioned above, hotchpot originally only applied in cases of total intestacy and only to advancements to children.

³³⁵ Manitoba Law Reform Commission, *Report on Intestate Succession*, Report No 61 (1985) 49.

deceased's contribution to the beneficiary's wealth by giving free labour and expertise.

- Hotchpot can require the breaking up of property resulting in a business ceasing to be viable contrary to the wishes of the intestate. In some farming families, for example, keeping the farm intact to provide for future generations, is the paramount priority.
- A rule that gifts made within the five years before the deceased's death is entirely arbitrary. Few people know when they are going to die – rarely four or five years before their death. On the other hand, with people living longer, a requirement to take into account gifts made at any time is likely to be impractical because of fading and distorted memories and loss of records.
- Hotchpot rules can cause difficulty, delay and cost in administering the estate, cause disputes and revive old family grievances.
- The South Australian hotchpot provision can cause difficulty in calculation when there is a spouse and descendants of the intestate.
- The *Family Provision* legislation can be used to equalise benefits in many deserving cases. Hotchpot rules existed from 1670 - long before the Family Provision legislation of the early 20th century.
- Anecdotal information suggests that hotchpot rules are often not applied when they should be. This might be the result of ignorance of *inter vivos* gifts or settlements, ignorance of the statutory provision when the administrator is a lay relative, or it might be the result of a calculated or agreed decision to ignore it.

QUESTIONS

10.1 *Is it correct that the South Australian hotchpot legislation that requires taking into account certain inter vivos gifts and settlements and, in cases of partial intestacy, also testamentary gifts, is largely ignored? If yes, why is that so?*

10.2 *Should hotchpot be completely abolished as recommended by the Committee?*

10.3 *If not, should hotchpot rules be retained:*

(a) in cases of total intestacy only, so taking into account only inter vivos gifts; or

(b) also in cases of partial intestacy so that both gifts under the will and inter vivos gifts are taken into account (with possible distortion of the deceased's intentions)?

(c) only as between:

(i) the intestate's children;

(ii) as between the intestate's descendants of any degree of remoteness; or

(iii) as between all entitled relatives of the same class?

10.4 *If hotchpot is retained in some form, should all gifts made to the spouse be ignored, whether inter vivos or by will?*

10.5 *If hotchpot is retained in some form, should there be an increase in the value of gifts that are to be ignored? (The current value of \$1 000 was set 40 years ago). If yes, what should the value be? And how should the value be adjusted to take into account inflation?*

SURVIVORSHIP

260. Relatives sometimes die as a result of one event, such as a motor vehicle, aeroplane or boat accident, explosion, fire, flood or other natural disaster, misadventure, suicide pact or murder, and it is not known who died first. Sometimes it is known that relatives are dead and that the immediate causes of their deaths is different, but the order of their deaths is not known. Without a special rule of law (called a ‘survivorship’ rule) the administrator or executor would have difficulty determining how the estate should be distributed.
261. A similar, but not identical, problem arises when contact with a relative has been lost and it is not known whether the relative is dead or alive or whether he or she left issue who are alive.³³⁶
262. What are the administrators to do in these situations? It depends on the jurisdiction in which the estate is being administered.
263. A related topic covered in this part of the Issues Paper is what happens when two or more relatives die within a very short time of each other.

The common law

264. The common law is that when two people who are entitled to inherit from each other die in circumstances in which it is not known who died first, each is treated as not having survived the other. Thus, for example, if it is not possible to tell the order of death of husband and wife, the husband’s intestate estate would be distributed to his relatives as if the wife had died before him, and the wife’s estate would be distributed to her relatives as if the husband had died before her.³³⁷

³³⁶ See further below [278]–[282].

³³⁷ See, for example, *Underwood v Wing* (1854) 4 De G. M. & M. 633; 43 ER 655. In this case, the husband and wife and their children were on a voyage from England to Australia, when the ship was wrecked and they and two of their children were swept into the sea by the same wave and it could not be known whether any of them lived longer than any other. See also *Wing v Angove* (1860) 8 HLC 183. These cases have been followed in

265. But the common law rule is that when the order of death *is* known, the estate of the first to die passes to the second to die and forms part of the second's estate. The estate of the second, as enlarged by the inheritance from the first, is then distributed either according to the will of the second or in accordance with the rules of intestacy to the family of the second.
266. Quite apart from the rules of intestacy, where there is jointly owned property, the interest of the first to die in the jointly owned property passes immediately and automatically to the surviving joint owner(s) and thus forms part of the estate of the second to die.

S 72E of the A & P Act (SA)

267. In **South Australia**, the common law was reformed in 1975 by s 72E of the *A & P Act*, but only in relation to the death of spouses, and only when at least one of them is intestate. So now in South Australia, if spouses die within 28 days of each other and one or both of them are intestate, neither inherits from the other. Their respective estates are distributed as if each died before the other.³³⁸
268. On one view, the weakness of s 72E of the *A & P Act* is that it is confined to spouses. It is of no assistance when other relatives die in such circumstances. The most important question is whether it should be extended to other relatives, as recommended by the Committee.
269. Diagrams 21 to 24 on the following pages illustrate examples of:
 1. what would happen at common law when spouses die within 28 days of each other (Diagram 21);
 2. how s 72E of the *A & P Act* operates when spouses die within 28 days of each other and: (A) the spouses own property jointly, and (B) the spouses do not own property jointly (Diagram 22);
 3. what happens when relatives who are not spouses die within a short time of each other (because section 72E does not apply); and
 4. what happens when the order of deaths is not known.

South Australia. See, for example, *Re Trenaman* [1962] SASR 95, a murder-suicide case in which the mother and son were found dead in their kitchen full of gas.

³³⁸ Section 72E does not affect property owned jointly by the spouses.

DIAGRAM 21

Example 1:

The common law: spouses die within a short time of each other

Ian and Wendy are spouses. They are in a motor vehicle crash. Ian dies immediately. Wendy dies 2 days later. They both die intestate.

Ian and Wendy own their home jointly with equity of \$300 000.

Ian has a child, Adam, by a previous relationship.

Wendy's closest surviving relative is her sister.

IAN

Ian dies first leaving an estate of \$100 000.

(Note: his interest as joint owner of the home does not form part of his estate)

WENDY

Immediately before Ian's death, Wendy had separate assets of: \$100 000

Add Ian's estate: \$100 000

and Wendy becomes sole owner of the home so

Add home equity: \$300 000

TOTAL *\$500 000*

- *Wendy's sister receives the whole of Wendy's estate, being \$500 000.*
- *Ian's son, Adam, receives nothing.*

DIAGRAM 22

Example 2:

EXAMPLE—With s72E of the A & P Act – spouses die within 28 days of each other

Ian and Wendy are spouses. They are in a motor vehicle crash. Ian dies immediately. Wendy dies 2 days later. They both die intestate.

Ian has a child, Adam, by a previous relationship.

Wendy's closest surviving relative is her sister.

A. Assume Ian and Wendy own their home jointly with equity of \$300 000.

IAN

Ian dies first leaving an estate of \$100 000.

- Adam (Ian's son) receives the whole of Ian's estate of \$100 000.

WENDY

Immediately before Ian's death, Wendy had:

separate assets \$100 000

and Wendy becomes sole owner of the home so

Add home equity \$300 000

TOTAL **\$400 000**

- Wendy's sister receives the whole of Wendy's estate of \$400 000.

B. Now assume there is no jointly owned property, but Ian owns a residential property with \$300 000 equity and Wendy owns a residential property with \$200 000 equity.

IAN

Ian dies first leaving:

Equity in his residential property \$300 000

Other estate \$100 000

TOTAL **\$400 000**

- Adam (Ian's son) receives the whole of Ian's estate of \$400 000.

WENDY

Wendy dies within 28 days of Ian and so Ian's estate does not pass to her estate.

Wendy dies leaving:

Equity in her residential property \$200 000

Other estate \$100 000

TOTAL **\$300 000**

- Wendy's sister receives the whole of Wendy's estate of \$300 000.

DIAGRAM 23

Example 3:

EXAMPLE— Current SA law - When other relatives die within a short time of each other (s72E of the A and P Act does not apply)

Ian, his mother Mary and his brother Bob are on a train that is derailed.

Rescuers find Ian dead. Mary dies while rescuers are removing her from the wreckage. Bob dies from injuries 2 days later.

Ian is divorced and has not re-partnered.

Mary is a widow.

Ian and Mary die intestate.

Bob leaves a will leaving his entire estate to his spouse, Sandra.

- **Ian dies first leaving an estate of:** \$300 000.

- **Mary dies next.**

Mary's estate immediately before Ian's death:	\$500 000
<u>Add Ian's estate:</u>	\$300 000
TOTAL	\$800 000

- **Bob dies 2 days later.**

Bob's estate immediately before Ian's and Mary's deaths:	\$200 000
<u>Add Mary's estate:</u>	\$800 000
TOTAL	\$1 000 000

Sandra (Bob's widow) receives the whole of Bob's estate under his will, being \$1 000 000, of which \$800 000 has come from the estates of her mother-in-law Mary and her brother-in-law Ian (not blood relatives).

If Bob had died first, Sandra would only have received Bob's estate of \$200 000.

If s72E of the A & P Act were extended to all family members who die within 28 days of each other:

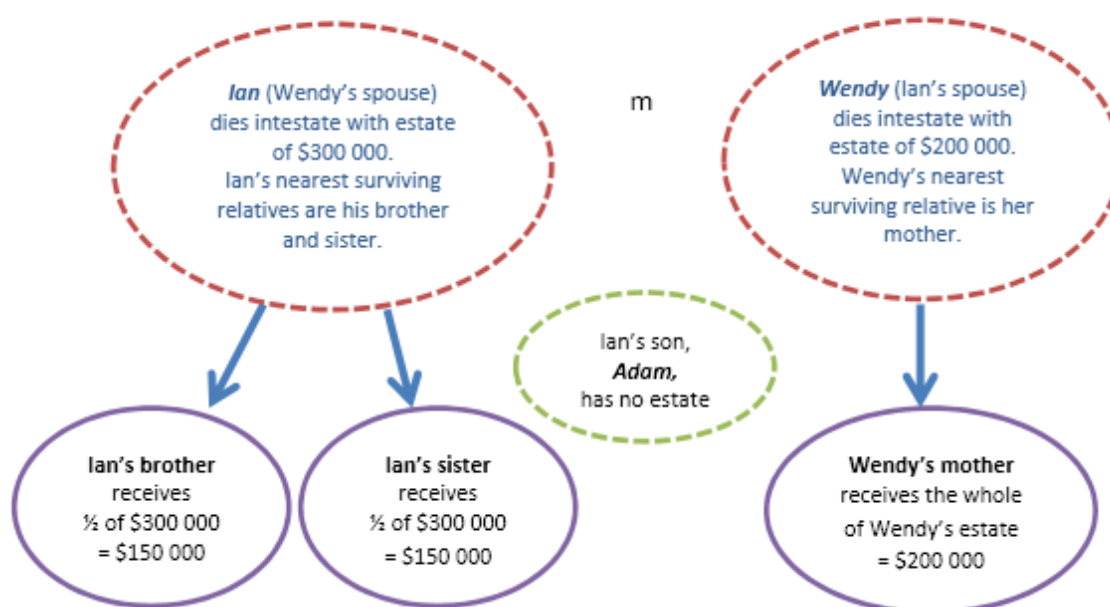
- *Sandra would have received Bob's estate.*
- *Ian's estate would not pass to Mary's estate and then Bob's. It would pass to his next closest surviving blood relatives.*
- *Mary's estate would not pass to Bob. It would pass to her next closest surviving blood relatives.*

DIAGRAM 24

Example 4: The order of deaths is not known (South Australia)

Ian and Wendy are spouses. Ian has a son, Adam, by a previous relationship. He is 12. Ian, Wendy and Adam drown when their fishing dingy overturns. It is not known who died first. Ian and Wendy are intestate. Adam is also intestate, as he is too young to have made a will. Ian's nearest surviving relatives are his brother and sister. Wendy's nearest surviving relative is her mother. Because the order of deaths is not known, each estate is distributed as if none of them had survived any other of them. (In South Australia, unlike in some other States, there is no legal presumption about who survived whom.)

EXAMPLE— Where the order of deaths is not known (South Australia)



Arguments for a survivorship provision

270. The arguments for a survivorship provision are overwhelming, but, as the differences in legislation throughout Australia indicate, there are differing opinions about the scope and detail. Some arguments in favour of statutory survivorship provisions follow.
- When there are no issue of the marriage or domestic partnership, it prevents the whole of the assets of the couple going to the relatives of the second to die, (a result that is unlikely to meet with the wishes of the first to die), and instead the assets of each passes to his or her own blood relatives. Note

however, if the law were changed to treat step-children as if they were children of the intestate the result would be very different.³³⁹

- They are consistent with the condition commonly included in professionally drawn wills that a gift is to take effect only if the beneficiary survives the testator by a specified time, often 28, 30 or 40 days.
- Often it avoids the necessity of attempting to determine who died first, so avoiding expense, delay and often distressing medical evidence, and sometimes a court case.
- It reduces delay and administration costs, because it is not necessary to administer the estate of the first to die and then administer the enlarged estate of the second.
- As the assets do not pass through two estates there would not be two lots of taxes to pay if death taxes are re-introduced.³⁴⁰
- Delaying the time when administration of the estates may commence is preferable to the negative consequences of no survivorship period, and in any event relatives are unlikely to apply for administration in the first few weeks after the death.
- The Committee recommended a 30 day survivorship provision for beneficiaries in its Wills Report and if both are adopted, intestate and testate estates would be consistently treated.³⁴¹

271. The main differences between legislated survivorship provisions are:

- whether it is confined to spouses, or extends to all relatives who are entitled to inherit;
- whether it is confined to cases in which the deceased persons died at the same time or in an order that is not known, or includes also cases in which one dies within a specified period of the other;
- differences in the length of the survival period;
- whether the estates are distributed as if each deceased person died immediately before the other (that is, neither survived the other), or as if each died immediately after the other.

³³⁹ To illustrate this, suppose Ian was divorced and had a child Anna. When Anna is 20, Ian marries Jane, so that Anna becomes Jane's stepchild. If Anna is to be treated as if she were a child of Jane, she would inherit Jane's estate, as well as Ian's, and Jane's relatives would receive nothing.

³⁴⁰ Given the current parlous state of public finances, this can never be ruled out.

³⁴¹ New South Wales Law Reform Commission, *Uniform Succession Laws: The Laws of Wills*, Report No 85 (April 1998) www.lawreform.justice.nsw.gov.au.

The Committee

272. The Committee recommended that:

- (a) a 30 day survivorship period should apply to ‘all persons entitled to take on intestacy’;
- (b) a survivorship period of 30 days from birth should apply to relatives conceived before, but born after, the intestate’s death;
- (c) the 30 day survivorship period should not apply when the effect would be that the estate passes to the State as *bona vacantia*.³⁴²

Other States

273. A summary of current Australian survivorship provisions is as follows.

- Survivorship provisions in the **ACT, NSW, Queensland, Tasmania** and **Western Australia** extend to all relatives who would inherit if they survived the intestate – not just spouses.³⁴³ In **South Australia**, it applies only to spouses and domestic partners and in the **Northern Territory** only to spouses and *de facto* spouses.³⁴⁴
- In three States, namely **ACT, Northern Territory** and **Western Australia**, the remedial provision is limited to cases in which the deaths occur at the same time or the order of deaths is not known. In four States (**NSW, Queensland, South Australia** and **Tasmania**) the provision is more far reaching in that it includes also cases in which the order of deaths is known.
- In **NSW, Queensland** and **Tasmania**, relatives inherit only if they survive the intestate by 30 days. In **South Australia**, the survival period is 28 days.
- In the **ACT, Northern Territory** and **Western Australia**, the remedial provision applies only when the deaths are simultaneous or the order of deaths is not known, and so there is no statutory period.
- In **South Australia**, a spouse who dies within 28 days of the intestate is treated as having not survived the intestate, that is, the intestate estate is distributed as if the spouse had died immediately before the intestate. In **NSW, Queensland** and **Tasmania**, where the survivorship provision extends to all persons who are entitled to inherit if they survive the intestate, a relative who dies within 30 days of the intestate is treated as having predeceased the intestate (similar to South Australia). But in the **ACT** and

³⁴² *Committee’s Report*, above n 6, 196 (Recommendation 40).

³⁴³ *Administration and Probate Act 1929* (ACT) s 49P; *Succession Act 2006* (NSW) s 107; *Succession Act 1981* (Qld) s 35; *Intestacy Act 2010* (Tas) s 8; *Property Law Act 1969* (WA) s 120.

³⁴⁴ *A & P Act* s 72E.

Western Australia, the estates are distributed as if each immediately died after the other. In some cases the same people will inherit under either approach; for example, when spouses die at the same time as each other and their only descendants are from their relationship. **The Institute invites information about the reason for the two different approaches.**

- **Victorian law** does not deal with survivorship for intestate estates, except that when the order of deaths is uncertain, the younger is presumed to have survived the elder.³⁴⁵ The VLRC has recommended adopting model clause 4(2), giving as reasons that there was general support for a 30 day survivorship requirement in submissions received; consistency with the legislated survivorship requirement for wills and the way wills are usually drafted; consistency with other States; and ensuring that the intestate's assets generally remain in their own bloodline.³⁴⁶

Other countries

274. Survivorship provisions in some other common law countries are summarised below.

- In **New Zealand**, if two or more persons die at the same time, or if the order of deaths is uncertain, their estates are distributed as if each had survived the other and had died immediately afterwards.³⁴⁷
- The **English** provision is limited to spouses (like **South Australia**).³⁴⁸ For other relatives, the order of death must be proven, or if that is not possible, it is presumed by law that the younger survived the elder (as in Victoria).³⁴⁹ In 2011, the English Law Commission recommended against extending the 28 day survivorship rule to other relatives.³⁵⁰ It concluded that the channelling of combined estates to the family of the last surviving relative 'cannot be

³⁴⁵ *Property Law Act* 1958 (Vic) s 184. There is a 30 day survivorship period in Victoria for testate estates: s 39 of the *Wills Act* 1997 (Vic).

³⁴⁶ *VLRC Report*, above n 68, 63–4 [5.31–5.40], 65 (Recommendations 14–15).

³⁴⁷ *Simultaneous Deaths Act* 1958 (NZ) s 3(1)(a).

³⁴⁸ *Administration of Estates Act* 1925 (Eng) ss 46(2A), 46(3).

³⁴⁹ *Law of Property Act* 1925 (Eng) s 184.

³⁵⁰ Law Commission (Eng), Report No 331, above n 13, 104 [5.77]. The English Law Commission in its related Consultation Paper (see Law Commission, *Intestacy and Family Provision Claims on Death*, Consultation Paper No 191 (September 2009) 144 [7.30]–[7.31]) had provisionally proposed that the survivorship provision be extended to all beneficiaries, except where it would result in the estate going to the Crown as *bona vacantia*.

seen as obviously and universally a disadvantage where the two deceased are not spouses.³⁵¹

- In **Scotland**, like South Australia, when a husband and wife die simultaneously or the order of their deaths is uncertain, it is presumed that neither survived the other, so that the estates pass to the family of each. However it does not cover cases where one survives the other and dies soon after. For other blood relatives, it is presumed that the younger survived the elder.³⁵²
- In **Alberta, British Columbia** and **Manitoba**, survivorship provisions apply to all relatives who would inherit if they survived the intestate, and each deceased relative is treated as not having survived the other(s). But there are some differences.³⁵³ In **Saskatchewan** relatives who die within five days of each other are deemed to have survived each other and the same applies when the order of deaths is uncertain.³⁵⁴ The **Alberta** provision is applicable only when the relatives die at the same time or in circumstances rendering it uncertain who survived whom. In **British Columbia**, the relatives' entitlements are conditional upon surviving the intestate by five days, as recommended by the Uniform Law Conference of Canada³⁵⁵ and the *Uniform Simultaneous Death Act* (USA) that has been adopted by some States (120 hours). In **Manitoba**, it is conditional on survival for 15 days.

Jointly owned property

275. Similar issues arise in relation to jointly owned property. The interest of the first to die passes automatically to the surviving joint owner, who becomes the sole

³⁵¹ English Law Commission, Report No 331, above n 13, 104 [5.77].

³⁵² *Succession (Scotland) Act 1964* s 31. There is an exception to the general rule in s 31(2).

³⁵³ *Wills and Succession Act 2010* (Alberta) s 5; *Wills, Estates and Succession Act 2009* (BC) ss 8–10; *Intestate Succession Act 1990* (Manitoba) s 6.

³⁵⁴ *Survivorship Act 1993* (Saskatchewan) ss 2–4.

‘2(1) Except as provided in this Act, where two or more persons die at the same time, the property of each person is to be disposed of as if that person had survived the other or others.’ ((2) and (3) omitted)

‘(3) Where two or more persons die in circumstances that make it uncertain which of them survived the other or others, they are deemed, for the purposes of this Act, to have died at the same time.

(4) Where two or more persons die within a period of five days, they are deemed for the purposes of this act, to have died at the same time.’ (Then follows an exception to protect third parties)

³⁵⁵ Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) 230–231.

owner.³⁵⁶ The property then passes in accordance with the survivor's will or to the survivor's family under the rules of intestacy.

276. The Institute is not aware of a survivorship provision in South Australia that applies to jointly owned property. In jurisdictions where there is a general presumption that the younger person survived the elder person, the interest of the elder will pass to the younger owner and then to the persons entitled to the estate of the younger.
277. When joint owners die within a short time of each other, the result can be unfortunate and not what either joint owner would have wished.³⁵⁷ The **ACT**, **Western Australia** and **New Zealand**, and some Canadian Provinces, have made changes. There, the property is treated as though each owned a half share (that is, were tenants in common), and a half share of the property goes to the relatives of each of them.³⁵⁸ The South Australian Law Reform Committee, as far back as 1985, considered that this reform was desirable and should be adopted.³⁵⁹

QUESTIONS

11.1 Do you agree with the Committee's recommendation that:

- (i) the survivorship period should apply to all persons entitled to take on intestacy – not just spouses and domestic partners;*
- (ii) children who were conceived before and born after the intestate's death should inherit only if they lived for 30 days;*
- (iii) the survivorship period should be inapplicable if its operation would result in the estate passing to the State as bona vacantia, that is, that it is preferable for the combined estates of both deceased relatives to go to one family than to the State?*

If not, please say what you think the law about survivorship should be, and why.

11.2 As some people can be kept alive on life support machines for a long time, is a 28 or 30 days survivorship requirement long enough? If not, what should the period be and why?

³⁵⁶ Technically the undivided interest of the first to die is extinguished. Many spouses choose to put their homes and other property, such as motor vehicles and bank accounts, in joint names for the purpose of ensuring that they will pass automatically to their widow or widower.

³⁵⁷ See the examples in [269] above

³⁵⁸ *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.

³⁵⁹ South Australian Law Reform Committee, *Relating to problems of proof of survivorship between two or more persons dying at about the same time in one accident*, Report 88 (1985) 28. The Committee was unanimous in this.

If there are any known instances of a person being kept alive on life support until after the specified survival period with a view to altering the distribution of the estate on intestacy or under a will, please provide details?

11.3 When spouses or other relatives die at the same time or within a short time of each other or in circumstances in which the order of their deaths is uncertain, should their jointly owned property be treated as if they were tenants in common (i.e. each owned a divisible share) so that an equal share of it would go to the family of each of the deceased persons? (This is done in the ACT, Western Australia, New Zealand and some Canadian Provinces.)

Missing intestates and beneficiaries

278. This section of the paper is about the problem of what is to be done when a person who has assets disappears and it is not known whether the person is dead or alive.³⁶⁰
279. The estate of a person cannot generally be distributed to relatives until a grant of administration has been made by the court. The court ordinarily cannot grant administration without a death certificate. And if an estate is so small that a grant of administration is not necessary, financial institutions and companies will not pay or transfer the assets without a death certificate. But a death certificate cannot be issued without proof that the person is dead and this is usually proved by a certificate from doctors who have examined the body.
280. If a person has been missing without trace for at least seven years, the court may declare that the person is presumed to be dead. In addition, if the circumstances of the disappearance strongly indicate the probability of death, the court may allow an applicant to swear to the presumed death before seven years have elapsed. The problem is the same whether the missing person is intestate or testate.³⁶¹ The Committee did not deal with this issue.³⁶²

³⁶⁰ There have been recent examples in South Australia. Two men who were fishing off the Fleurieu Peninsula from a small boat did not return home, but their bodies have not been found: See Lia Harris and Sam Kelton, 'Search for Missing peninsula Fishermen Vince Scarfo and his brother-in-law Luigi Palombo called Off', *The Advertiser* (19 February 2010). An abalone diver disappeared while diving and his business partner asserted that he was attacked by two sharks, but no remains were ever found: See Steve Rice, 'Did two Sharks Kill 'Peter Perfect' abalone diver Peter Clarkson?', *The Advertiser* (29 June 2013). In other cases a person ceases to have contact with family or friends and it is not known whether the person has died from natural causes or accident, has suicided, been murdered, or is alive, but just failed to keep in contact, chosen to disappear or is being held prisoner.

³⁶¹ For some of the difficulties that arise, and for possibilities for ameliorating those difficulties to some extent in some cases, see Millard, above n 340.

281. So a person's estate may remain in limbo for at least seven years after he or she was last heard of. This can cause considerable difficulty and hardship for the family, business partners and creditors of the missing person. On the other hand, if the common law about presumed death were relaxed to allow the missing person's estate to be distributed earlier, there is likely to be difficulty if the missing person re-appears.
282. **NSW** and **Victoria** have legislated to alleviate the difficulties. In NSW, when a person has been missing for at least 90 days and it is not known whether the person is alive, the court may appoint someone with a proper interest to manage the missing person's estate.³⁶³ If there are reasonable grounds to suppose that the missing person has died, and has died intestate leaving property in NSW, the court may make an order authorising the NSW Trustee to gather in the estate and pay debts. In addition, the Trustee may obtain an order of the court specially authorising distribution of the property to people who would be entitled under the rules of intestacy.

QUESTIONS

- 12.1 Should South Australian law enable the court to authorise distribution of the estate of a person who has been missing without trace for less than seven years if it is established that there are reasonable grounds for supposing the person has died? If yes—*
- (a) should there be a minimum time before which such an order may be made, and if yes, what should it be?*
- (b) if the missing person is intestate, should the Public Trustee be the only person whom the courts may authorise to distribute the estate?*

³⁶² In South Australia, the only legislative assistance is that, 'if there is reasonable ground to suppose that the person has died leaving property' in South Australia and that the person died intestate the court may make a limited administration order authorising the Public Trustee to administer the estate for the benefit of creditors and to discharge the person's liabilities: *Public Trustee Act 1995* (SA) s 9(2). This does not permit the Public Trustee to distribute the estate to the relatives who would be entitled if the missing person is dead.

³⁶³ *NSW Trustee and Guardian Act 2009* (NSW), ss 24, 54. The NSW Trustee is the equivalent of the South Australian Public Trustee. The Supreme Court may declare a person to be a missing person and make a management order if the person has not been heard of for at least 90 days by anyone at the missing person's residence, relatives, friends or others with whom he person is likely to communicate; and all reasonable efforts have been made to find the person; it is not known whether the person is alive; and it is in the best interests of the missing person that his or her estate be managed. The order may be granted to the spouse, a relative, business partner or employee, Attorney-General, the NSW Trustee or any other person with an interest in the estate. The appointed person must manage the estate in accordance with the Act and may distribute assets of the missing person's estate only in accordance with an order of the court authorising the distribution.

For Victoria, see the *Guardianship and Administration Act 1986* (Vic) pt 5A. This Act also provides for the appointment of an appropriate person to manage the estate of a person who has been missing for at least 90 days in similar circumstances.

(c) *what should happen if the person who was supposed to be dead reappears?*

12.2 *Should South Australian legislation provide for the appointment of appropriate persons or the Public Trustee to manage the estates of people who have been missing for at least 90 days in circumstances in which it is not known whether the missing person is dead or alive, like NSW and Victoria?*

SUPERANNUATION

283. Commonwealth and State superannuation legislation requires modern Australian employers to contribute to a superannuation fund for each employee and tax laws are structured to encourage voluntary investment in superannuation. A large part of an intestate's wealth may well be in superannuation that includes death benefits, but in many cases this wealth never falls into the intestate's estate and it is not distributed according to the rules of intestacy.³⁶⁴ This, combined with the rules of the particular superannuation fund and any valid binding nomination made by the intestate, can have a major effect on the financial position of each member of the family following the intestate's death.³⁶⁵
284. It has been suggested that superannuation benefits should be brought into account like *inter vivos* and testamentary gifts under hotchpot rules.
285. The Committee dealt with this topic very briefly. It reported that there was no support from consultees for bringing superannuation entitlements into account. It advised against bringing them into account on the same grounds as it rejected bringing into account *inter vivos* gifts or gifts by will.³⁶⁶ Accordingly, there is nothing in the Model Intestacy Bill about superannuation. The Queensland Law Reform Commission advised that a law that required superannuation entitlements to be brought into account 'would be difficult to police and would produce anomalies'.³⁶⁷

³⁶⁴ When the intestate dies, the trustee of the superannuation fund pays the benefits in accordance with the rules of the fund. For many funds, the trustees have a discretion about who receives the benefits on the member's death. Usually they exercise their discretion in favour of the surviving spouse or dependants. Some fund rules permit the member to nominate the person to whom the benefits are to be paid in a manner that is binding on the trustees. This is called a 'binding nomination', and provided legislated formalities are observed, this is permitted by the *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

See *In the estate of Peter Charles Cornford (deceased)* [2015] SASC 15 (28 January 2015) concerning superannuation and life insurance.

³⁶⁵ The intricacies of superannuation law and what is required for a valid nomination are beyond the scope of this Paper.

³⁶⁶ *Committee's Report*, above n 6, 223-224 [13.50]–[13.52].

³⁶⁷ Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993) 52.

286. Some points to consider, in addition to the Committee's recommendation, follow.
- Superannuation is a tax effective way of providing for a spouse or dependants.
 - The law allows the proceeds of life insurance policies to be paid directly to the persons nominated by the policy holder and the recipients do not have to bring them into account as part of their entitlements to the estate. Death benefits forming part of a person's superannuation are analogous to life insurance policies.
 - If hotchpot is abolished, as recommended by the Committee, it would be anomalous and inconsistent to require superannuation benefits to be brought into account.
 - When the dependant's or nominee's entitlement is in the nature of an annuity, rather than a lump sum payment, taking its value into account would require actuarial calculation of the value of the annuity and introduce uncertainty and cost that does not presently exist.
 - Perhaps the fundamental question is - to what extent should the State, through legislation, restrict the freedom of people to arrange their affairs as they see fit during their lifetime.

QUESTIONS

- 13.1 *Do you agree with the Committee's recommendation that superannuation benefits should not be taken into account by the laws of intestacy (that is. that the status quo should remain)?*
- 13.2 *If you disagree, how should they be brought into account?*

CLAIMS UNDER THE INHERITANCE (FAMILY PROVISION) ACT 1972

287. In the context of intestacy, the principal question is whether claims under the *Family Provision Act* should be permitted when there is a total or partial intestacy. The *A & P Act* currently permits this.³⁶⁸
288. The main purpose of the *Family Provision Act* (and similar legislation elsewhere in Australia)³⁶⁹ is to prevent members of the deceased's immediate family being left

³⁶⁸ *A & P Act* s 72N.

³⁶⁹ See *Family Provision Act* 1969 (ACT) ss 7, 8; *Succession Act* 2006 (NSW) ss 57, 59; *Family Provision Act* 1979 (NT) ss 7, 8; *Succession Act* 1981 (Qld) s 41; *Inheritance (Family Provision) Act* 1972 (SA) ss 6, 7; *Testator's Family*

impoverished and reliant on social security benefits and charity in circumstances in which they could have been better provided for out of the deceased's estate.³⁷⁰

It does this by allowing members of the deceased's family who would receive nothing, or who believe they have not been adequately provided for under the will or the rules of intestacy, to apply to the court for an order giving them more from the estate. If an order is made, the amounts received by at least one other beneficiary must be reduced. Many claims are made every year. In this part of the paper the people who may make a claim are called 'qualifying family members' and in **South Australia** they are:

- the spouse or domestic partner of the deceased;
- a person who has been divorced from the deceased;
- a child of the deceased;
- a child of a spouse or domestic partner (step-child), if the child was maintained wholly or partly by the deceased immediately before his or her death, or was legally entitled to be so maintained;
- a parent, brother or sister of the deceased who cared for, or contributed to the maintenance of the deceased.³⁷¹

289. The court may make an order only if it is satisfied that the applicant is a qualifying family member and has been 'left without adequate provision for his [or her] proper maintenance, education or advancement in life'. The applicant bears the onus of proving this. There has been much discussion (and some disquiet) about 'opportunistic' claims and the liberal manner in which the courts have interpreted 'without adequate provision'.³⁷² The Institute will be considering this topic in its forthcoming Issues Paper No. 8 - *Family Inheritance: Looking after One Another*.

290. Changes made to the *Family Relationships Act* with effect from June 2007 to recognise a wider range of couple relationships as domestic partnerships and thereby giving them the rights and obligations of married couples has reduced the number of cases in which the intestacy distribution rules results in hardship or unfairness.³⁷³ Despite this and the possibility of altering the distribution of the estate by agreement if all the interested parties can be found and are *sui juris*, there are some cases where the only way in which an unsatisfactory or unfair

Maintenance Act 1912 (Tas) ss 3, 3A; *Administration and Probate Act 1958* (Vic) s 91; *Family Provision Act 1972* (WA) ss 6, 7.

³⁷⁰ See *Pizimolas v Pizimolas and Zannis* (2010) 107 SASR 277.

³⁷¹ *Inheritance (Family Provision) Act 1972* (SA) s 6.

³⁷² *VLR Report*, above n 68, 99 [6.8], 100 [6.10], 118 [6.106].

³⁷³ *Statutes Amendment (Domestic Partners) Act 2006* (SA), Act No 43 of 2006, date of operation 1 June 2007.

intestacy result can be changed is by an application to the court under the *Family Provision Act*.

DIAGRAM 25

EXAMPLE—using the *Family Provision Act* to remedy unsatisfactory distribution

A. Ian dies intestate leaving a daughter of his first marriage (Christine) and a 10 year old step-daughter, Jessie, who has been a member of Ian's household since she was 2 years old and has been supported by him since then and treated as if she were his natural child.

A. Under the rules of intestacy, Christine would take the whole estate and Ian's step-child Jessie would receive nothing.

However, an application could be made under the 'Family Provision Act' to the court on Jessie's behalf and it is likely in these circumstances that the court would make an order that she receive a part of Ian's estate.

B. Under the rules of intestacy, Wendy would take the whole estate. However, Bob could make an application to the court under the 'Family Provision Act' for an order giving him a part of the estate. Brother Bill could not apply.

B. Ian became a paraplegic ten years before his death. His brother, Bob, took him into his home and provided care and companionship until Ian married Wendy a year before his death. Another brother, Bill, lived overseas and could not assist. Ian died intestate.

291. As it is impossible to make intestacy laws that will produce a fair outcome in every case, law reform bodies and academic writers have generally favoured use of *Family Provision* legislation as a means of remedying unsatisfactory results. **All States** now permit qualifying close family members to claim against intestate estates under their *Family Provision* legislation.³⁷⁴

³⁷⁴ *Inheritance (Family Provision) Act 1972* (SA); *Family Provision Act 1969* (ACT) s 8(2); *Succession Act 2006* (NSW) s 59(1)(c); *Family Provision Act 1970* (NT) s 8(1); *Succession Act 1981* (Qld) s 41(1); *Administration and Probate Act 1958* (Vic) s 91(3); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 6(1).

292. The only argument the Institute has found for differentiating between testate and intestate estates is that in testate estates the court is being asked to over-ride the testator's wishes as expressed in a valid will, but in intestate estates the court is being asked to over-ride a statutory distribution regime in the particular case before it. The Institute considers this argument unconvincing. Indeed, it could be argued that it is less objectionable for the court to have discretion to alter the effects of one size fits all intestacy rules in a particular case than to have discretion to over-ride the express and probably considered wishes of a person who has taken the trouble to make a will. Any dissatisfaction with the *Family Provision Act* or the way it is currently interpreted and applied should be considered in the wider context of both testate and intestate estates.

QUESTION

14.1 Should close family members be permitted to make a claim against wholly and partially intestate estates under the Family Provision legislation in the same way as they may claim against testate estates? If not, please give reasons.

ACCESS TO CASH BEFORE A GRANT OF ADMINISTRATION

293. The *A & P Act* allows an Authorised Deposit taking Institution (ADI) (usually a bank or credit union) to pay to the surviving spouse from the deceased person's account up to \$2 000 without a grant of probate or administration.³⁷⁵ The Act protects the bank or other ADI from liability for making the payment, provided that it has seen a death certificate and proof of the spouse's identity. If some other person is entitled to that money, he or she can attempt to recover it from the spouse, but not the ADI. In practice, some banks and ADIs will pay out a greater sum if the spouse signs an indemnity. There is a similar provision for payment by the Government when it owes money to a deceased government employee or a patient in a government hospital.³⁷⁶
294. The amount has not been increased for 40 years. The present sum of \$2 000 is insufficient to maintain a spouse or family for the period between death and a grant of probate or administration and they may suffer hardship if they do not have other resources. On the other hand, if the ADI or Government pays out

³⁷⁵ *A & P Act* s 72. The *Acts Interpretation Act 1915* (SA) defines an ADI (the abbreviation for authorised deposit taking institution) by reference to the *Banking Act 1959* (Cth).

³⁷⁶ *A & P Act* s 71.

more than the amount to which the spouse is entitled on intestacy or under the will, other beneficiaries will be disadvantaged. The amount needs to represent a reasonable balance between avoiding hardship to the spouse who does not have sufficient independent means pending a grant of probate or administration, and avoiding disadvantage to other relatives who are entitled to share in the estate.

QUESTIONS

- 15.1 *Should the amount that banks, authorised deposit-taking institutions and Government can pay out to the surviving spouse before a grant of administration or probate without incurring any liability be increased to more than \$2 000? If yes, what should the legislated amount be?*
- 15.2 *Should the amount be increased regularly by the CPI index? If not, should it be increased by some other method?*

VESTING OF MINORS' SHARES

295. In **South Australia**, a minor's share of an intestate estate vests absolutely. (A minor is a person who is not yet 18 years of age.) This means that the minor's share is ascertained and he or she has a right to it immediately, although it will be looked after by the Public Trustee or another person appointed by the court until he or she is 18. If the minor dies before the age of 18, then the minor's share passes to the people who are entitled to the minor's estate.³⁷⁷ This has been the law in South Australia since 1984.³⁷⁸ In jurisdictions where the vesting of a minor's share of an intestate estate is delayed until the minor's 18th birthday, the contingent share of a minor who dies before the age of 18 reverts to the intestate's estate and goes to other relatives entitled to the intestate's estate – *not* to the minor's estate and then the people who are entitled to his or her estate.

³⁷⁷ The general rule is that a person who is under the age of 18 years cannot make a valid will. When there is no will, the minor's estate will be distributed to his or her relatives according to the rules of intestacy. There are exceptions to this general rule. A person who is under the age of 18 years may make a will if he or she is married, or in contemplation of marriage, or if the Supreme Court authorises the making of a will in terms approved by the Court: *Wills Act 1936* (SA) ss 5–6. A court authorised will is sometimes made when a minor receives a large sum of money or other assets, for example, by inheritance or receipt of compensation for injuries suffered in a motor vehicle accident.

³⁷⁸ Before 1984, a minor's share did not vest until he or she was legally an adult and in 1974 the Law Reform Committee of South Australia recommended this continue. It said that preventing children of the intestate from inheriting before a specified age was 'sensible', provided the trustee could use the income or part of the capital for the child's maintenance, education and support during the child's minority: Law Reform Committee of South Australia, *Relating to the Reform of the Law of Intestacy and Wills*, Report No 28 (1974). Commonwealth income tax legislation was then changed in a way that severely penalised trusts on behalf of minors where one or both parents died intestate. The South Australian Parliament then repealed the delayed vesting provision of the *A & P Act* in 1984 to counteract this: see South Australia, *Parliamentary Debates*, Legislative Council (29 August 1984) 604.

The examples in Diagram 26 illustrate the differences in outcome under immediate vesting and delayed vesting.

DIAGRAM 26

EXAMPLE—immediate vesting and delayed vesting

Ian, a divorced man, died intestate leaving two children, Adam aged 19 and Ben aged 12. His estate is worth \$600 000.

Adam receives his half share (\$300 000) immediately.

Ben's half share (\$300 000) is held by the Public Trustee on trust for him until he attains the age of 18 years.

At the age of 17, Ben fathers a child (Natalie), but does not live with the mother. Ben dies just short of his 18th birthday.

Ben's mother survives him.

*In a jurisdiction with **immediate vesting**, Ben's child, **Natalie**, would inherit Ben's share (ie: \$300 000).*

*In a jurisdiction with **delayed vesting**, the \$300 000 share held on trust for Ben will revert to Ian's estate and then pass to Ian's other son, **Adam**. With his own share, Adam will thereby receive the whole estate of \$600 000.*

*Ben's child **Natalie** will receive **nothing**. (Her mother, or other guardian, could apply on her behalf to the court under the Family Provision Act for part of the estate).*

Now, suppose Ben had no children and his mother survived him:

*In a jurisdiction with **immediate vesting**, Ben's mother will inherit Ben's share (\$300 000).*

*In a jurisdiction with **delayed vesting**, Ben's mother (divorced from Ben's father) would not inherit. Ben's brother, **Adam**, would receive:*

- *his \$300 000 share immediately and*
- *upon Ben's death, Ben's contingent share, less any amounts expended for Ben's maintenance and education.*

The Committee and other jurisdictions

296. The Committee recommended that a minor's share vest immediately and model clause 39 has been enacted by **NSW** and **Tasmania**.³⁷⁹
297. In six States, a minor's share vests immediately.³⁸⁰ By contrast, vesting of a minor's share is delayed in the **Northern Territory, the ACT, England** and **New Zealand**. However, in the **Northern Territory** a minor's share can vest before the age of 18 if he or she marries earlier, and in the **ACT** and **England** also if the minor enters into a civil union **New Zealand** law is to the same effect.³⁸¹

Advantages of immediate vesting

298. Advantages of immediate vesting follow.
- Simplicity.
 - It enables the final shares of relatives to be determined quickly (instead of waiting until the youngest minor attains 18 years of age).
 - It allows the minor's share of the intestate's estate to pass to the minor's children if the minor dies before the age of 18, consistently with the policy that intestate estates should pass to the intestate's lineal descendants.
 - Because of the incidence of income tax, immediate vesting may preserve more of the income of the minor for his or her benefit.

QUESTION

16.1 Should the share of a minor (person under the age of 18) vest in the minor immediately, as it does now in South Australia? (This is consistent with the Committee's recommendation and the law in five other States). (With immediate vesting, if a minor dies before the age of 18, his or her share of the intestate's estate passes to the relatives who are entitled to the minor's estate, rather than reverting to the estate of the intestate. In most cases these relatives will be the minor's parents, spouse or domestic partner, or child.) If not, please give reasons.

³⁷⁹ *Committee's Report*, above n 6, 204 (Recommendation 41).

³⁸⁰ *Ibid* 200 [12.9].

³⁸¹ *Administration and Probate Act 1969* (NT) s 63; *Administration and Probate Act 1929* (ACT) s 46; *Administration of Estates Act 1925* (Eng) s 47; *Administration Act 1969* (Eng) s 78.

INTESTACY OF INDIGENOUS PERSONS

299. Many Indigenous people do not make a valid will and so die intestate.³⁸² This section of the Paper is about the difficulties that arise because intestacy laws based on British concepts of familial relationships and obligations and property do not always satisfy Aboriginal customary laws and expectations about who is entitled to share in the deceased's estate. Difficulties that arise when there is a dispute about where and how an intestate person's remains are to be disposed of will be the subject of a future separate paper. The Institute uses 'Aboriginal' and 'Indigenous' interchangeably and does not intend to cause offence in doing so.

300. As Prue Vines observes:

[t]he extreme emphasis on lineal, bloodline relationships in the common law contrasts with the acceptance of collateral, adopted and maritally linked relatives in Aboriginal customary law. Added to this is a level of complexity in the naming of Aboriginal relationships which is connected to specified obligations which continue to exist whether one is living traditional or non-traditional lifestyle. Ideas of family do not change just because one moves to Sydney or Brisbane or Perth [or Adelaide].³ and

³⁸² *Committee's Report*, above n 6, 229-230 [14.6]. The Institute has not found any South Australian statistical information about the proportion or number of Indigenous people who die intestate leaving property. The Registrar of Probates and the South Australian Public Trustee do not record Indigenous status. Preliminary consultation indicates that it is a high proportion. Nor is it known how many Aboriginal people have successfully used the Inheritance (*Family Provision*) Act 1972 (SA) to modify the results of the intestacy rules in a manner that meets Aboriginal expectations.

Vines and others (including both the ALRM and the South Australian Public Trustee as part of the Institute's initial consultation) suggest that a practical way to address this problem is to attempt to increase the rate of will-making among Aboriginal people.

'By allowing the testator to spell out their own intentions in relation to a range of property rights and obligations, wills can ensure that Aboriginal customary law obligations will be clearly recognised and given legal force for the purposes of the common law.... The drafting of wills which encompass a proper understanding of Indigenous kinship arrangements would allow those relationships to be protected by the common law in [a] manner consistent with the wishes of the deceased. It would also pre-empt potential disputes over burial rights through the appointment of an executor.' See Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Burial and Property Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1, 8-9.

Vines notes that this approach would require additional funding for Aboriginal legal services, legal aid and possibly a dedicated initiative from the Public Trustee in each jurisdiction. (Ibid 8-9). Regrettably, funding for the Aboriginal Legal Rights Movement has been reduced and it can no longer provide a will drafting service. Government funding to other public legal service organisations has also been cut.

See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 239-241.

‘Aboriginal kinship relationships govern all aspects of a person’s social behaviour and prescribe the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.’³⁸³

301. Apart from the priority given to spouses and domestic partners, all States’ statutory intestacy laws reflect the common law emphasis on blood relationships with preference to descendants and then ancestors (lineal bloodlines). As the Committee noted:

‘In general in Australia, the distribution of property on intestacy is based on a relatively narrow range of family relationships that are reflective of English, or at least Western, law and society.’³⁸⁴

Both the Committee and the Queensland Law Reform Commission have highlighted the potential inconsistency between Aboriginal kinship rules and practices and these current statutory intestacy regimes.³⁸⁵

302. There are other people who have come from countries where family relationships, customs and succession laws are different from the British based intestacy laws that exist throughout Australia. They, however, have migrated in

³⁸³ 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.

The Law Reform Commission of Western Australia, *Aboriginal Customary Laws: the Interaction of Western Australian law with Aboriginal Law and Culture*, Final Report (2006) 257, explained Aboriginal kinship in that State as follows:

‘Social relationships in which people refer to each other using terms of biological relatedness such as “mother”, “son”, “cousin” are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person’s sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship. Aborigines employ what is known as a “classificatory” kinship system; that is the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father’s brothers are classed as one with my father and are called “father” by me; likewise, all women my mother calls “sister” are my “mothers”. Following this logic, the children of all people I call “father” or “mother” will be classed as my “brothers” and “sisters”. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime.’

³⁸⁴ *Committee’s Report*, above n 6, 187, 228 [14.3].

³⁸⁵ See *Committee’s Report*, above n 6, 187, 228-229 [14.3]-[14.4]; Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body: Report* (No 69) (December 2011) 146 [6.34]. See also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report 31) (1986) [337]; VLRC *Report*, above n 68, 93 [5.160]-[5.161]; Lidia 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 383, n 16; Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, above n 382, 239-241.

relatively recent times to Australia. It is often said that their position is different from that of Indigenous people in that they have chosen to live in Australia and so must accept the laws of Australia, whereas Indigenous people have had ‘white man’s law’ imposed upon them through British colonisation of their country. This may be regarded as justification for special rules for Indigenous estates, but not for everyone whose country of origin has kinship and intestacy rules that differ from Australian rules (see also the report of the Australian Law Reform Commission).³⁸⁶ Further, it might be thought that as five other Australian States and New Zealand have made some effort at special provision for Aboriginal persons in intestacy contexts, South Australia should do likewise.³⁸⁷ A more pragmatic reason is that it is not practicable to make different rules for the distribution of intestate estates for *every* group of people in the modern Australian community whose traditions differ from mainstream Australian law and practice.³⁸⁸ It is unrealistic to expect lawyers, Public Trustees, trustee companies and courts to be knowledgeable in the different laws and cultural expectations of many different countries and groups. No Australian jurisdiction has attempted such refinement.

303. The Institute acknowledges that it will not be straightforward to formulate a general scheme for intestacy that would be inclusive of all the diversity in Aboriginal communities throughout South Australia. As the Committee noted:

‘There are many different types of Aboriginal communities in Australia: rural, urban, traditional and historical communities, including groups that have gathered together from different regions. Aboriginal people live in a diversity of lifestyles.’³⁸⁹

South Australia

304. The South Australian *A & P Act* is entirely based on British concepts and does not take into account Aboriginal concepts of kinship, rights and obligations. Therefore, applying the spousal and kinship rules in the *A & P Act* can produce different results than applying the rules or customs of a particular Aboriginal group. For example, the Institute as part of its preliminary research has been informed that among one Aboriginal group in the State, the men and women who by British based law and practice are ‘uncles’ and ‘aunts’, are regarded as

³⁸⁶ See generally ALRC, above n 385, [103]-[112], [127], [158]-[169] (especially [164]).

³⁸⁷ New Zealand has a statutory scheme of entitlement in relation to Maori freehold land on intestacy. The scheme applies when the owner of any beneficial interest in Maori freehold land dies intestate. See *Committee’s Report*, above n 6, 240 [14.38]-[14.40]; *Te Ture Whenua Maori Act 1993* (NZ) ss 109-110.

³⁸⁸ See generally ALRC, above n 385, [164].

³⁸⁹ See *Committee’s Report*, above n 6, 228 [14.2].

‘fathers’ and ‘mothers’, and the people who are ‘first cousins’ are regarded as ‘brothers’ and ‘sisters’. Further, the Institute is informed that the customs, kinship rules and cultural obligations of the several Aboriginal groups in South Australia are not identical.

305. Because of changes to the *Family Relationships Act 1975* (SA), South Australian law now confers spousal rights and obligations on couples who are not married in accordance with the *Marriage Act*, provided they had a child together, or had lived together as domestic partners for at least three years immediately before the intestate’s death, or had so lived for three out of four years immediately before the death.³⁹⁰ This gives inheritance rights to at least some people who are married under Aboriginal law, but not under the *Marriage Act*. However, the Institute does not know whether it includes every relationship that is recognised as a marriage under Aboriginal customary laws. **The Institute invites information about this.**

Other States

306. Five Australian jurisdictions; Queensland, Western Australia, the Northern Territory and, most recently, New South Wales and Tasmania, make additional or separate provisions for the distribution of estates of intestate Indigenous people. Broadly, these provisions fall into two categories. First, there are those States that simply recognise Aboriginal customary marriages for the purpose of distribution under the general intestacy rules. Secondly, there are those States that provide for a separate or additional distribution scheme for Aboriginal people in certain circumstances.³⁹¹
307. The legislation in **Queensland** and **Western Australia**,³⁹² as the Committee noted:

‘appear to draw on attitudes and approaches that are more appropriate to the old Aboriginal protection systems ...and remove control over intestate estates from Aboriginal next of kin (as administrators) and give control to government officials.’³⁹³

³⁹⁰ *Family Relationships Act 1975* (SA) s 11A, as amended, particularly by the *Statutes Amendment (Domestic Partners) Act 2006* (SA). See **Appendix 4** for who is a domestic partner.

South Australian law also contains one special provision for recognition of customary marriages, but in the limited context of adoption of children. The *Adoption Act 1988* provides:

‘If a man and woman are married according to Aboriginal tradition, they will be regarded as husband and wife for the purposes of this Act.’

³⁹¹ *Committee’s Report*, above n 6, 230 [14.8].

³⁹² *Aboriginal Affairs Planning Authority Act 1972* (WA); *Aboriginal and Torres Strait Islander Communities (Justice, Land and other Matters) Act 1984* (Qld).

The schemes in Western Australia and Queensland are not recommended by the Institute and are not examined in this Paper.

308. In the **Northern Territory**, there is an optional alternative for the distribution of the estate that is available if the intestate is not married under the *Marriage Act 1961*.³⁹⁴ The administrator or a person who is entitled to share in the estate under the laws, customs, traditions and practices of the Aboriginal community or group to which the deceased belonged, has a right to apply to the court for distribution of the estate according to the traditions of the group or community to which the intestate belonged. The Institute found only one officially reported Northern Territory court decision about an Aboriginal distribution plan.³⁹⁵
309. The Committee reported in 2007 that the Public Trustee in the Northern Territory usually distributes Aboriginal estates according to the British based statutory scheme in the Northern Territory *Administration and Probate Act* and that this is accepted by the intestate's family.³⁹⁶ There could be several reasons for this. The Institute speculates that these might include the work needed to put forward a distribution plan according to the relevant group's customary law and the associated cost, sensitivity or difficulty about obtaining the agreement of the intestate's family, group or community, and perhaps English literacy difficulties.
310. **New South Wales** and **Tasmania** have enacted Part 4 of the Model Bill and defined 'Aboriginal person' identically with the definition in clause 4 of the Model Bill. These are the same in concept as the Northern Territory provisions about the estates of Aboriginal people. They allow the usual statutory rules of distribution to apply. But they also give the administrator or a person who is entitled to share in the estate under the laws, customs, traditions and practices of the Aboriginal community or group to which the intestate belonged, a right to apply to the court for a distribution that accords with the customs, traditions and practices of the group. The court can make this type of distribution order only if

³⁹³ *Committee's Report*, above n 6, 233 [14.16]. See also Western Australia Law Reform Commission, *Aboriginal Customary Laws*, above n 382, 234-235 for the criticism of the WA scheme. Many of these criticisms were brought to the WA Law Reform Commission's attention by the Office of the WA Public Trustee which strongly supported reform of the law in this area. See *Ibid* 234 [12].

³⁹⁴ *Administration and Probate Act 1969* (NT) s 71(1)(a).

³⁹⁵ See *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52 (30 June 2000). In this case the intestate had no children and was the last member of his clan. He was 'grown up' by a man who had died before him. That man had three living daughters and a living son. In classificatory terms, they were the wives and brother-in-law of the intestate, according to the plan put before the court and supported by elders of the Jawoyn people. The court approved the plan that was submitted to it and the estate was equally divided between them.

³⁹⁶ *Committee's Report*, above n 6, 239 [14.37]

it is satisfied that it would be just in all the circumstances. Once made, the distribution order operates instead of the legislated distribution scheme.³⁹⁷

311. The main difference between the Model Bill and the Northern Territory Act is that in the **Northern Territory**, Aboriginal people who have been married in accordance with the *Marriage Act 1961* (Cth) cannot use these special provisions, whereas they can in **New South Wales** and **Tasmania**. The assumption underlying the Northern Territory restriction is that people who have married under the *Marriage Act* do not live by Aboriginal traditions. However, this assumption seems questionable.³⁹⁸ As the ALRC said:

‘This takes no account of the reality of why a *Marriage Act* marriage may have taken place. For example, an Aborigine brought up on a mission may have entered into a traditional marriage which was later sanctioned by a church marriage, a procedure adopted for all persons living on the mission. There is no justification for automatic exclusion from these provisions based on *Marriage Act* marriage.’³⁹⁹

The Committee considered that the fact that an intestate Aboriginal person was married in accordance with the *Marriage Act* should not preclude that person’s estate from being dealt with under the proposed specific provisions.⁴⁰⁰

The Committee

312. The Committee considered three possible approaches to distribution of intestate estates of Aboriginal people:
1. Make no special provision, leaving distribution of estates of Aboriginal people to the general law of intestacy;
 2. Leave it to each jurisdiction to make special provision for its Aboriginal communities;

³⁹⁷ See **Appendix 3** for the full text.

The question raised by the Northern Territory court in *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52 (30 June 2000) about the relationship between the legislated intestacy scheme of distribution and an order made by the court for distribution according to the relevant Aboriginal tradition does not arise under the Model Bill. Model clause 36 is:

‘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.’

³⁹⁸ It has been estimated that at least 90% of marriages between ‘traditional’ Aborigines were not made according to the requirements of the Commonwealth Act. See *Committee’s Report*, above n 6, 236 [14.30].

³⁹⁹ ALRC, above n 385, [339].

⁴⁰⁰ *Committee’s Report*, above n 6, 242 [14.60].

3. Make special provision for identifying Aboriginal kinship structures.⁴⁰¹

The Committee preferred the third. It recommended that the Northern Territory provisions with some modifications. This is reflected in Part 4 of the Model Bill.

VLRC concerns about the Model Bill

313. **Victoria**, like South Australia, has no special law for Indigenous estates. The VLRC, whilst accepting that Victorian intestacy law is not appropriate for all Indigenous people and that a more flexible approach is needed, did not recommend the approach in the Model Bill. In light of its own research and consultation, it was not satisfied that the Model Bill would greatly assist Indigenous families in Victoria. It recommended that further consideration should be given to designing a more specific and accessible scheme for the distribution of Indigenous intestate estates in Victoria that would specifically recognise traditional law adoption and next of kin and not necessarily require an application to the Supreme Court.⁴⁰²
314. As to the detail of the model provisions, the VLRC thought that it was a problem that the Model Bill did not provide in more detail for the evidence or criteria that the court must take into account when deciding whether to make a distribution order.⁴⁰³ However, as mentioned above, the Model Bill does require the court to take into account the laws, customs, traditions and practices of the Aboriginal community or group to which the intestate belonged and allows it to make an order only if it is satisfied that it is just in all the circumstances. Opinions might differ about the cogency of the VLRC view. The Institute points out that further details about evidence or criteria can be added by Rules of Court. In practice, this might give greater flexibility in dealing with different Indigenous traditions, cause less cost to

⁴⁰¹ *Committee's Report*, above n 6, 240 [14.41].

⁴⁰² *VLRC Report*, above n 68, 95 [5.172]-[15.174]. The issues it thought should be considered further are:

- 'designing a more accessible scheme ... that does not necessarily rely on a Supreme Court application
- determining whether a decision maker is needed to determine whether the Indigenous intestacy scheme applies in a particular instance and who should be entitled to a share and, if so, who that decision maker should be
- incorporating concepts of traditional law adoption and next of kin, as relevant to Indigenous communities in Victoria, into the general intestacy law by way of definition
- defining the types of information that should be accepted to prove the laws, customs, traditions and practices of the group to which the deceased person belonged and the existence of a relationship with the deceased person.'

⁴⁰³ *VLRC Report*, above n 68, 94 [5.167]

applicants and any opponents, and be easier to change if found to be unsatisfactory.

315. **The Institute seeks views on whether the Committee’s model should be made part of South Australian law. Alternative views are invited.**

Inheritance (Family Provision) Act 1972

316. In addition to, or as an alternative to, a special method for distributing the estates of Aboriginal people who die intestate, the range of people who may apply under the *Family Provision Act* could be expanded to take into account Aboriginal kinship. This Act allows the court to make orders in some cases that have the effect of altering the way the estate is distributed. Any such change could be for the estates of Aboriginal people who have made a will as well as for intestate estates.
317. As explained earlier in this Paper, the people who may apply for an order for giving them some or more of the estate under s 6 of the *Family Provision Act* are:
- the spouse or a domestic partner or of the deceased (and there can be more than one);
 - a person who has been divorced from the deceased;
 - a child of the deceased;
 - a grand-child of the deceased;
 - a child of a spouse or domestic partner (step-child), if the child was maintained wholly or partly by the deceased immediately before his or her death, or was legally entitled to be so maintained;
 - a parent, brother or sister of the deceased who cared for, or contributed to the maintenance of the deceased.

The court has no power to allow a person who is not within one of the above categories to make a family provision claim.

318. The Australian Law Reform Commission (the ALRC) in 1986 and the Western Australian Law Reform Commission in 2006 both considered that the eligibility for making a *Family Provision* claim should be expanded to adequately provide for the extended kin relationships of Aboriginal society.⁴⁰⁴ The ALRC recognised that it would be difficult to specify who may claim, given the variety of circumstances and differing kinship rules and structures of different Aboriginal

⁴⁰⁴ ALRC, above n 385, [293]–[294], [341]–[342]; West Australian Law Reform Commission, *Aboriginal Customary Laws*, above n 382, 241. See further Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 294–295.

communities. It considered that it would be preferable to give the court a discretion (and so the power) to include dependants according to the traditions of the deceased's community.⁴⁰⁵ The Law Reform Commission of Western Australian proposed that the people who are eligible to apply for family provision should include people who are in a kinship relationship with the deceased that is recognised by the customary law of the deceased and who were wholly or partly maintained by the deceased at the time of his or her death.⁴⁰⁶

319. **The Institute invites information and opinion** about whether it would be appropriate to amend the *Family Provision Act* to expand the range of people who may apply for an order to take account of Aboriginal relationships and obligations, either (a) as a supplement to special distribution provisions for Aboriginal intestacies, or (b) as an alternative. **The Institutes also invites submissions about who should be eligible to make a claim under the *Family Provision Act* when the intestate was an Aboriginal person.** (Please note that this is a request for information and opinions about the estates of Aboriginal people only. The Institute will publish a separate and more general Issues Paper about many aspects of the *Family Provision Act* in the near future.)
320. The Institute would welcome information to inform its recommendations to the Attorney-General.

QUESTIONS

17.1 Should South Australia enact the model clauses in Part 4 of the Model Bill for Indigenous estates? If not, please give reasons?

⁴⁰⁵ ALRC, above n 385, [342].

⁴⁰⁶ West Australian Law Reform Commission, *Aboriginal Customary Laws*, above n 382, 241. See further West Australian Law Reform Commission, *Aboriginal Customary Laws: Discussion Paper*, above n 404, 294–295.

The WA Law Reform Commission noted that Aboriginal people take their kinship obligations at customary law very seriously and such obligations may include the provision of housing, financial assistance, education or general support of persons in a kin relationship. In particular, the Commission noted, child-raising in Aboriginal society is often shared and the responsibility for provision for a child may fall with different kin throughout a child's life. In these circumstances, the Commission concluded there is scope for a person in a customary law kin relationship with a deceased at the time of his or her death, who is wholly or partly dependent upon the deceased, to be inadequately provided for in the distribution of an Aboriginal deceased estate.

West Australian Law Reform Commission, *Aboriginal Customary Laws*, above n 382, 242. The WA Law Reform Commission was concerned that the average Aboriginal estate is too modest to sustain the costs associated with an application for family provision. The Commission recommended that, in consultation with the Supreme Court, provision should be made to ensure that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties. See *Ibid* 242. The Institute also expresses these concerns in a South Australian context and notes that its recent Small Estates Consultation Paper has sought comment on these issues. Possibilities include vesting this power to SACAT and the Magistrates Court.

- 17.2 Should the Family Provision Act be amended to allow Aboriginal kin to seek adjustment of the way the intestacy rules work by applying to the court under the Family Provision Act? If not, please give reasons.*
- 17.3 If the Family Provision Act is amended as above, should this be in addition to, or an alternative to, Part 4 of the Model Bill?*
- 17.4 Are there marriages recognised by Aboriginal law that would not be recognised as domestic partnerships under the recently amended Family Relationships Act (see **Appendix 4**)? If yes, please describe when this would occur.*
- 17.5 The Institute invites information that may assist it in making sound recommendations to the Attorney-General.*

APPENDIX 1

GLOSSARY

Act—Act of Parliament. This is another name for a **statute**. It is a law made by Parliament, for example, the *Administration and Probate Act 1929* (SA). The date after ‘Act’ is the year in which it was first passed by Parliament, but most Acts are amended from time to time by later Acts. The letters in brackets after the date indicate the State, Territory or country whose Parliament made that law.

Administrator—A person appointed by the court to act as a person’s **personal representative**, after the person dies (a) without a valid **will**, or (b) with a will which does not name an *executor*, or, (c) with a will and a named executor who refuses to act or is unable to act because of death, incompetence or absence.

Adoption — means adoption by court order. The common law did not recognise adoption of children and preferred the rights of natural children to adopted children. In the 20th century Australian States passed statutes to regulate and recognise legal adoption and to give adopted children the same status as other children and adoptive parents the same status as natural parents. The current South Australian Act is the *Adoption Act 1988*. Successive adoption Acts and amendments reflect some fundamental changes in policy over the years.

Affidavit—an affidavit is a written statement that the person making the statement swears or affirms is true. The affidavit may be accepted by the court as evidence of the facts stated in the affidavit. The court may decline to accept an affidavit in to evidence and in that event the party who wants to rely on the affidavit may give evidence or call the person who swore or affirmed the affidavit as a witness to give oral evidence. In urgent cases about the disposal of a deceased body, the court often accepts affidavit evidence.

Beneficiary—A person or organisation to whom property is left by a *will*, and in this Paper is used for a person who is entitled to receive the whole or part of the estate on an *intestacy*.

Bona vacantia—Property that has no owner. Property that has no owner passes to the Crown, that is to the Government of South Australia.

Common law—The law as it has developed over many centuries through decisions of the higher courts and treated as precedent for deciding later similar cases. See **statute** for laws made by Parliament.

Co-parent—The lesbian domestic partner of a woman who has given birth to a child as a result of an artificial fertilisation procedure with the consent of the domestic partner. See s 10C(3) of the *Family Relationships Act 1975*, enacted by the *Family Relationships (Parentage) Act 2011*.

Distribution rules or Rules of Distribution—the statutory rules enacted by Parliaments in the *A & P Act 1919* (SA) and similar Acts in other States that define who is entitled to inherit an intestate estate. They set out the order of priority of entitlement of the intestate's family, for example, the intestate's surviving spouse and *issue* rank higher in priority than the intestate's parents or siblings.

Domestic partner— See the list of abbreviations and **Appendix 4**.

Dower—This was the right the widow had upon the death of her husband to a life interest in one third of the husband's land. This was abolished many years ago.

Estate—Everything a person owns at the time of their death. It includes all of the deceased person's freehold land, other interests in land (for example leasehold), fixtures to the land, money (including bank accounts), stocks, shares and other securities, chattels (e.g. motor vehicles, tools, personal and household effects) and choses in action (the right to sue for something, such as a debt owed to the deceased).

Executor—A person or corporation named in a **will** to carry out the terms of the *will* and to act as the deceased person's *personal representative*. Duties include gathering assets, paying debts and distributing what remains in accordance with the *will*.

Family Provision legislation—Each State and some other countries have a statute that allows certain relatives of a deceased person to apply to the court for orders that have the effect of changing entitlements to the estate to give the applicant (claimant) some, or a greater proportion, of the estate.

Grant (of representation)—The official recognition by the court (i) of the right of the **personal representative** named in the grant to administer the *estate* of a deceased person; and (ii) of the vesting in the personal representative of the title to the deceased's assets. There are three common kinds of grants of representation: a grant of *probate*, a grant of **letters of administration**, and a grant of *letters of administration with will annexed*. In this Paper the expression *grant of administration* is used for wholly intestate estates.

Hotchpot—The name 'hotchpot' is a word derived from the French *hochepot* meaning 'a dish shaken up'. It operates a little like putting all the property of the intestate and all the gifts and settlements made by the intestate before his or her death into one pot and then doling out the mixture in accordance with the intestacy rules. For a more conventional description - the process by which relatives who are entitled to share in an intestate estate must bring into account benefits received from the intestate before the intestate's death. This is explained in detail above at [246]-[253].

Inter vivos—During the lifetime of the **intestate** or **testator**. An *inter vivos* gift or settlement is a gift or settlement made by the intestate during his or her lifetime.

Intestacy rules—The rules of law that define how an intestate’s estate is to be distributed to his or her relatives. These rules are not identical in each State.

Intestate—*As a noun*: a person who dies without a valid will or with a valid will that does not dispose of all of his or her **estate** and he or she is called ‘an intestate’.

As an adjective or adverb: refers to the state of being an intestate or the state of the estate of an intestate person. For example: ‘he was intestate’; ‘he died intestate’.

Issue—The issue of a person are his or her lineal descendants, that is, children, grand-children, great-grand-children and remoter descendants. It includes children described as *en ventre sa mere*, that is, children conceived, but not born before the intestate’s death. For more detailed explanations of the meaning of ‘issue’ for the purposes of succession law, see under the heading **Issue (Descendants)** in the main text – see above [98] et seq including those about posthumous, adopted and step children.

Legislation—Law made by Parliament. This kind of law can also be called a *statute* or statutory law or an *Act*.

Letters of administration—In the context of this Paper -the **grant** of representation made by a court when a person dies **intestate**. An application to the Registrar of Probates for a grant of letters of administration must be made. In some cases the Registrar refers the application to a judge of the court. Usually letters of administration are granted to a close relative who has an interest in the estate, or to the Public Trustee.

Minor—Another word to describe a person who is not yet 18 years of age. This word can be used interchangeably with the word **infant**.

Next of kin—Kindred or blood relatives (also called relatives by consanguinity). These relationships are counted by degree both upwards to the ancestor and downwards to the *issue* and each generation is counted as a degree. Thus, from father to his child is one degree. From brother to brother is two degrees, being counted as one upwards to their father or mother and one downwards to the other son. Technically a **spouse** is not next of kin, because there is no blood relationship.

Partially intestate—Partial intestacy occurs when a **testator** makes a will but fails to dispose effectively of some of his or her property. If there is a partial intestacy the part of the deceased’s *estate* that is not disposed of by the will is distributed according to the rules of intestacy set out in the *Administration and Probate Act 1919*, Part 3A (Distribution on intestacy) and *The Probate Rules 2004*, rule 32.

Personal chattels—are defined in the context of intestacy in the *Administration and Probate Act 1929* (SA) as any articles of household or personal use or ornament and any motor vehicles not used for business purposes. When the intestate is survived by a spouse, these

pass automatically to the spouse and do not form part of the estate available for distribution to the intestate's descendants.

Personal representative—The person or corporation appointed to administer the deceased's *estate*. A personal representative may be an **executor** (appointed by the **testator** by **will**) or an **administrator** (appointed by the court).

Per capita—literally, per head. Per capita distribution gives each person an equal share. Examples of per capita distribution are given above in [159] and [160] and Diagram 15. Contrast this with *per stirpes* distribution.

Personal property—Anything capable of ownership that is not **real property**.

Preferential legacy—Also called **statutory legacy**. This is the sum of money to which a spouse is entitled before any other part of the estate is distributed. Under current South Australian law, the spouse takes the first \$100 000 of the deceased spouse's intestate estate.

Probate—The legal procedure for proving that a **will** is the last will of the deceased, that it is legally valid and that the person or corporation it names as **executor** is entitled to act.

Per stirpes—A 'stirp' may be translated literally as a branch or stem and 'per stirpes' as through the branches or through the stems. This is to be contrasted with '*per capita*' (per head). Distribution per stirpes is a principle by which an estate is distributed through branches of lineal descendants. So, a person's share in the estate is determined according to the share of the estate his or her ancestor would have had if he or she had survived the intestate. So, if A died intestate, his son S1 survived him and his son S2 predeceased him leaving two children C1 and C2, then C1 and C2 would share between them the half share of A's estate that their father, S2, would have taken if he had survived A. Examples are given in Diagram 15.

Posthumous conception—Conception by artificial means after the death of a person whose genetic material was used.

Public Trustee—A South Australian government official who is appointed under the *Public Trustee Act 1995* (SA). Public Trustee may be appointed by the Court to administer the *estate* of a deceased person or to hold property on trust for people who are not *sui juris*.

Real property—Land, including buildings and other permanent fixtures attached to the land.

Registrar of Probates—An official of the Supreme Court who performs such duties as recording and preserving **wills** admitted to **probate**, issuing *grants* of probate and **letters of administration**, and approving the accounts of **executors** and **administrators**. The Registrar can also perform some judicial functions in relation to deceased estates.

Remainder—When the deceased person has given a beneficiary an interest in his or her estate (or part of it) for life or until the happening of some other specified event, the interest in the estate of those who must wait until the death of the life tenant or the happening of the event is called the ‘remainder’. The people who must wait are called ‘the remaindermen’. In the 20th century men often left their widows a life interests or interest until remarriage in real property with remainder to a child or children.

Statutory legacy—See *preferential legacy*.

Take by representation—Children or remoter issue who take, in whole or in part, a share that would have gone to their parent or remoter ancestor if he or she had been alive when the intestate died are said to ‘take by representation’. They stand in the shoes of their deceased ancestor. See also *per stirpes*.

Testator—a person who makes a **will**. The person is said to be ‘testate’.

Spouse—Defined in the *Administration and Probate Act 1919* (SA) as a person who was legally married to the deceased at the date of his or her death: s 3. In the *A & P Act* the description ‘spouse or domestic partner’ is used, but in this Paper the Institute uses the word ‘spouse’ to include both a person who is legally married to the deceased and a person who is a domestic partner of the deceased, as defined by the *Family Relationships Act 1975* (SA), unless there is a reason to distinguish between them. So, in this Paper, ‘spouse’ generally includes de facto or putative spouses, members of same sex couples and any other person declared by a court to be a domestic partner of another person. A person who was married to the intestate, but who has divorced, is not treated as a spouse and so has no entitlement to the estate under the rules of intestacy. However, it has been held that a divorced spouse may make a claim against the estate under the *Inheritance (Family Provision) Act 1972* (SA).⁴⁰⁷

Statute—A law made by Parliament and recorded in an **Act of Parliament**. The Acts of Parliament that have force in South Australia are those made by the South Australian Parliament or the Commonwealth Parliament. Statutes are also called *statutory law*.

Succession—The right to succeed to an inheritance. The law of succession governs these rights. ‘The law of succession is concerned with the legal consequences following the death of a person on the person’s property, both real and personal, whether that person leaves a will or not.’⁴⁰⁸ The law of succession also includes many subsidiary and procedural rules.

Sui juris—having full legal capacity. A person has full legal capacity when he or she is 18 years of age or older and is mentally competent.

⁴⁰⁷ *In the Estate of Brooks v Public Trustee* (1979) 22 SASR 398.

⁴⁰⁸ Mackie, above n 317.

Testate—A person is testate when her or she dies leaving a valid **will**. Contrast with **intestate**.

Testator—A person who makes a **will**.

Will—The formal written statement by which a person leaves instructions about how his or her property should be distributed when he or she dies. A will should also name at least one person to be the executor. Requirements for a valid **will** are contained in the *Wills Act 1936* (SA).

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) the 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;
 - (a) 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) 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

Provisions of the Model Bill

(as stated in 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

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Purpose of Act
- 4 Definitions
- 5 Intestate
- 6 Spouse
- 7 Domestic partnership
- 8 Spouse's statutory legacy
- 9 General limitation of non-spousal entitlements
- 10 Adoption

Part 2—Spouses' Entitlements

Division 1—Entitlement of surviving spouse

- 11 Application of this Division
- 12 Spouse's entitlement where there are no descendants
- 13 Spouse's entitlement where descendants are also descendants of the spouse
- 14 Spouse's entitlement where at least one descendant is not a descendant of the spouse

Division 2—Spouse's preferential right to acquire property from the estate

- 15 Application of this Division
- 16 Spouse's right of election
- 17 Notice to be given to spouse of right of election
- 18 Time for making election
- 19 How election to be made
- 20 Basis of the election
- 21 Exercise price—how satisfied
- 22 Restriction on disposal of property from intestate estate

Division 3—Multiple spouses

- 23 Spouses' entitlement where there are more than one but no descendants
- 24 Spouses' entitlement where descendants are also descendants of one or more of the spouses

Intestacy Bill 2007
Contents

25	Spouses' entitlement where at least one descendant is not a descendant of a surviving spouse
26	Sharing between spouses
27	Distribution orders
Part 3—Distribution among relatives	
28	Entitlement of children
29	Parents
30	Brothers and sisters
31	Grandparents
32	Aunts and uncles
33	Entitlement to take in separate capacities
Part 4—Indigenous estates	
34	Application for distribution order
35	Distribution orders
36	Effect of distribution order under this Part
Part 5—Absence of eligible beneficiaries	
37	Intestate leaving no eligible beneficiaries
38	State has discretion to make provision out of property to which it becomes entitled
Part 6—Miscellaneous	
39	Non-deferral of the interest of a minor
40	Effect of disclaimer etc
41	Effect of testamentary and other gifts
Schedule 1—Transitional provision	
1	Transitional provision

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Intestacy Act 2007*.

2—Commencement

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.

Intestacy Bill 2007**Part 2—Spouses' Entitlements****Division 2—Spouse's preferential right to acquire property from the estate**

- (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

Intestacy Bill 2007
 Part 2—Spouses' Entitlements
 Division 3—Multiple spouses

- (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

Intestacy Bill 2007
 Part 3—Distribution among relatives

- (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.

APPENDIX 4

Family Relationships Act 1975 (SA)

This Appendix contains some of the provisions of the *Family Relationships Act 1975* (SA) that are relevant to this Paper. The full text may be found on www.legislation.sa.gov.au.

5—Interpretation

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

...

co-parent, of a child, means a person who is taken to be a co-parent of the child under Part 2A;

Court means the Supreme Court, the District Court or the Magistrates Court;

domestic partner—see section 11A;

father or ***natural father***, of a child, includes a person who is presumed to be the father of the child under Part 2A;

...

- (2) A reference in this or any other Act to the mother, father or parent (however described) of a child will, unless the contrary intention appears, be taken to include a reference to a co-parent of the child (regardless of the sex of the co-parent).

Part 2—Children

[text omitted]

7—Recognition of paternity

[Text omitted]

8—Presumption as to parentage

- (1) Subject to Part 2A, a child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of proof to the contrary, be presumed to be the child of its mother and her husband or domestic partner or former husband or domestic partner (as the case may be).
- (2) For the purposes of this section, a reference to a marriage includes a reference to a qualifying relationship (within the meaning of Part 2A).

9—Declaration of parentage

[Text omitted]

Part 2A—Children conceived following fertilisation procedures

[Text omitted]

Part 2B—Surrogacy

[Text omitted]

Part 3—Domestic partners

11—Interpretation

In this Part—

close personal relationship means the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

- (a) the relationship between a legally married couple; or
- (b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind.

Note—

Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

11A—Domestic partners

A person is, on a certain date, the *domestic partner* of another person if he or she is, on that date, living with that person in a close personal relationship and—

- (a) he or she—
 - (i) has so lived with that other person continuously for the period of 3 years immediately preceding that date; or
 - (ii) has during the period of 4 years immediately preceding that date so lived with that other person for periods aggregating not less than 3 years; or
- (b) a child, of whom he or she and the other person are the parents, has been born (whether or not the child is still living at that date).

11B—Declaration as to domestic partners

- (1) A person whose rights or obligations depend on whether—
 - (a) he or she and another person; or

- (b) 2 other persons,

were, on a certain date, domestic partners 1 of the other may apply to the Court for a declaration under this section.
- (2) If, on an application, the Court is satisfied that—
 - (a) the persons in relation to whom the declaration is sought were, on the date in question, domestic partners within the meaning of section 11A; or
 - (b) in any other case—
 - (i) the persons in relation to whom the declaration is sought were, on the date in question, living together in a close personal relationship; and
 - (ii) the interests of justice require that such a declaration be made,

the Court must declare that the persons were, on the date in question, domestic partners 1 of the other.
- (3) When considering whether to make a declaration under this section, the Court must take into account all of the circumstances of the relationship between the persons in relation to whom the declaration is sought, including any 1 or more of the following matters as may be relevant in a particular case:
 - (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) the degree of financial dependence and interdependence, or arrangements for financial support;
 - (d) the ownership, use and acquisition of property;
 - (e) the degree of mutual commitment to a shared life;
 - (f) any domestic partnership agreement made under the *Domestic Partners Property Act 1996*;
 - (fa) any Part VIIIAB financial agreement made under the *Family Law Act 1975* of the Commonwealth;
 - (g) the care and support of children;
 - (h) the performance of household duties;
 - (i) the reputation and public aspects of the relationship.
- (4) A declaration may be made—
 - (a) whether or not 1 or both of the persons in relation to whom the declaration is sought are, or ever have been, domiciled in this State; or
 - (b) despite the fact that 1 or both of them are dead.
- (5) It must not be inferred from the fact that the Court has declared that 2 persons were domestic partners 1 of the other, on a certain date, that they were domestic partners as at any prior or subsequent date.
- (6) For the purpose of determining whether a person was, on a certain date, the domestic partner of another, circumstances occurring before or after the commencement of this Part may be taken into account.

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 5

BIBLIOGRAPHY

A. Articles / Books / Reports

Adler-Baeder, Francesca and Brian Higginbotham, 'Implications of remarriage and stepfamily formation for marriage education' (2004) 53 *Family Relations* 448

Alberta Law Reform Institute, *Estate Administration*, Final Report No 102 (August 2013)

Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No 78 (1999)

Atherton, Rosalind, 'En Ventre Sa Frigidaire: Posthumous Children in the Succession Context' (1999) 19 (2) *Legal Studies* 139

Australian Bureau of Statistics, *Consumer Price Index Inflation Calculator* (ABS Canberra, 2015) <<http://www.abs.gov.au/websitedbs/d3310114.nsf/home/Consumer+Price+Index+Inflation+Calculator>>

Australian Bureau of Statistics, *Family Characteristics, Australia: 2009-10*, catalogue 4442.0 (ABS Canberra, 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4442.0Main%20Features99992009-10?opendocument&tabname=Summary&prodno=4442.0&issue=2009-10&num=&view=>>>

Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report 31) (1986)

Berger, Roni, *Stepfamilies: A multi-dimensional perspective* (Haworth Press, 1998)

Borkowski, Andrew, *Textbook on Succession* (Oxford University Press, 2nd ed, 2002)

Burns, Fiona, 'The changing patterns of total intestacy distribution between spouses and children in Australia and England' (2013) *University of New South Wales Law Journal* 470

Butt, Peter, 'Who can insist on where to bury a body?' (1994) 68 *Australian Law Journal* 67

Cartwright, Claire, 'Step-parenting' in Alan Hayes and Daryl Higgins (eds), *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) <<https://aifs.gov.au/publications/families-policy-and-law/11-step-parenting>>

Croucher, Rosalind and Prue Vines *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013)

Dal Pont, Gino & Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013)

- De Vaus, David, *Diversity and Change in Australian Families: Statistical Profiles* (Australian Institute of Family Studies, 2004)
- Department of Planning, Transport and Infrastructure, Government of South Australia, *Median House Sales by Quarter* <<https://www.sa.gov.au/topics/housing-property-and-land/buying-and-selling/advice-for-buyers/metro-median-house-sales-statistics/median-house-sales-by-quarter/>>
- Dicey, Albert Venn, John Humphrey Carlile Morris & Lawrence Collins *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 13th ed, 2000)
- Dixon, Robyn, 'The Lure of Easy Money', *The Guardian*, 10 November 2005.
- English Law Commission, *Family Law: Distribution on Intestacy*, Report No 187(1989)
- English Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Report No 307 (July 2007)
- English Law Commission, *Intestacy and Family Provision Claims on Death*, Consultation Paper No 191 (September 2009)
- English Law Commission, *Intestacy and Family Provision Claims on Death*, Report No 331 (2011)
- Everingham, Sam, Martyn Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201 *Medical Journal of Australia* 270
- Hains, David, Leonie Englefield & Madeleine Harland, *Australian Succession Law* (Thomson Reuters, at 10 October 2014)
- Hardringham, Ian James, Harold AJ Neave & Marcia A Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 2nd ed, 1989)
- Herring, Jonathan, *Older People in Law and Society* (Oxford University Press, 2009)
- Howden, Margaret, *Stepfamilies: Understanding and responding effectively* (Australian Family Relationships Clearinghouse Briefing No 6, Australian Institute of Family Studies, 2007)
- Kelly, Gregory Francis, *An Inheritance Code for New Zealand* (LLM Research Paper, Victoria University of Wellington, 2010)
- <<http://researcharchive.vuw.ac.nz/xmlui/handle/10063/1403>>
- King, Simon, 'Gammy Sparks Call for Law Reform', *The Australian*, 4 August 2014
- Law Reform Commission of British Columbia, *Statutory Succession Rights*, Report No 70 (1983)
- Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills*, Twenty-Eighth Report (1974)

- Law Reform Committee of South Australia, *Relating to Problems of Proof of Survivorship between two or more persons dying at about the same time in one accident*, Eighty Eighth Report (1985)
- Law Reform Commission of Tasmania, *Succession Rights on Intestacy*, Report No 43 (1985)
- Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005)
- Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006)
- Mackie, Ken, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2007)
- Manitoba Law Reform Commission, *Report on Intestate Succession*, Report No 61 (1985)
- Mellows, Anthony R, *The Law of Succession* (Butterworths, 4th ed, 1983)
- Millard, Leonie, 'Missing – presumed dead – or just missing?' *The Last Testament* (The Law Society of South Australia, December 2011)
- McClean, David and Veronica Ruiz Abou-Nigm, *Morris: The Conflict of Laws* (Sweet & Maxwell, 8th ed, 2012)
- Mortensen, Reid, Richard Garnett & Mary Keyes, *Private International Law in Australia*, (LexisNexis Butterworths, 2nd ed, 2011)
- National Health and Medical Research Council, *Ethical guidelines on the use of assisted Reproductive Technology in Clinical Practice and Research* (Australian Government Publishing Service, June 2007) <<https://www.nhmrc.gov.au/guidelines-publications/e78>>
- New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination*, Report No 49 (1986)
- New South Wales Law Reform Commission, *Uniform Succession Laws: The Laws of Wills*, Report No 85 (April 1998)
- New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Issues Paper No 26 (April 2005)
- New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (April 2007)
- North, Peter, *Private International Law: Problems in Common Law Jurisdictions* (Martinus Nijhoff, 1993)
- Palk, Simon, 'Hotchpot – or Hotchpotch' (1980-1) 4 *Adelaide Law Review* 506
- Parry, Sir David Hughes, Roger Kerridge and J B Clark, *Parry & Clark: The Law of Succession*, (Sweet & Maxwell, 11th ed, 2002)

- Peart, Nicola, 'New Zealand Report on New Developments in Succession Law' (2010) 14(2) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/142/art142-3.pdf>>
- Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993)
- Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body: Report* (No 69) (December 2011)
- Rein, JE, 'Relatives by Blood, Adoption, and Association: Who Should Get What and Why' (1984) 37 *Vanderbilt Law Review* 711
- Peter Reith, 'Surrogacy in Australia needs Government Conversation not just State legislation', *The Age*, 19 August 2014
- Scottish Law Commission, *Report on Succession*, Report No 215 (April 2009)
- Sherrin, C H & R C Bonehill, *The Law and Practice of Intestate Succession* (Sweet & Maxwell, 1987)
- South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1975
- South Australia, *Parliamentary Debates*, Legislative Council, 29 August 1984
- South Australia, *Parliamentary Debates*, Legislative Council, 7 November 1996
- South Australia, *Parliamentary Debates*, House of Assembly, 27 November 2008
- South Australian Law Reform Committee, *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)
- South Australian Law Reform Committee, *Relating to the reform of the law of intestacy and wills*, Report No 28 (1974)
- South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (2015)
- Tilse, Cheryl, Jill Wilson, Ben White & Linda Rosenman, *Families and Generational Asset Transfers: Making and Challenging Will in Contemporary Australia* (Report of Australian Research Council to Industry Partners, October 2012)
- Tilse, Cheryle, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, *Having the Last Word? Will Making and Contestation in Australia* (University of Queensland, 2015)
- Treitel, G H, 'The Presumption of Death' (1954) 71 *Modern Law Review* 530
- Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983)
- Victorian Law Reform Commission, *Succession Laws: Intestacy*, Consultation Paper (2012)
- Victorian Law Reform Commission, *Succession Laws*, Report (2013)
- Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper (2014)

- Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014)
- Vines, Prue, 'Consequences of Intestacy for Indigenous People: The Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1 (now *Australian Indigenous Law Review*)
- Vines, Prue, '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
- Vines, Prue, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011)
- Visher, John, 'Stepfamilies: A work in progress' (1994) 22 *American Journal of Family Therapy* 337
- Weldon, Gregory, 'Commorientes – a legislative change', *The Last Testament* (The Law Society of South Australia, April 2014) <http://welcolawyers.com.au/wp-content/uploads/2014/04/The_Last_Testament.pdf>
- Wikipedia *Historical inheritance systems* (11 June 2014) https://en.wikipedia.org/wiki/Historical_inheritance_systems>
- Wood, Olive and Giuseppe Leroy Certoma (eds), *Hutley, Woodman and Wood: Succession: Commentary and Materials* (The Law Book Company, 4th ed, 1990)

B. Cases

- AB v CD* [2007] NSWSC 1474 (17 December 2007)
- Application by the Public Trustee for the Northern Territory* [2000] NTSC 52 (30 June 2000)
- Bazley v Wesley Monah IVF Pty Ltd* [2011] 2 Qd R 207
- Burrows v Cramley* [2002] WASC 47 (15 March 2002)
- Carmody v June Anstee & Associates Solicitors* [2001] QSC 93 (29 May 2001)
- Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147
- David John Loy (Deceased)* [2012] SASC 140 (17 August 2012)
- Dodd v Jones* [1999] SASC 458 (22 October 1999)
- Doodeward v Spence* (1908) 6 CLR 406
- Helton v Allen* (1940) 63 CLR 691
- Hickman v Peacey* [1945] AC 304
- In the Estate of Brooks v Public Trustee* (1979) 22 SASR 398
- In the estate of Peter Charles Cornford (deceased)* [2015] SASC 15 (28 January 2015)
- South Australian Law Reform Institute / Issues Paper 7 / December 2015*

- In the Estate of Cullen* (1976) 14 SASR 456
- In the estate of Hughes* (1985) 38 SASR 5
- In the Estate of Jones Deceased: Jones v Dodd* [1998] SASC 723
- In the Estate of the Late K* (1996) 5 Tas R 365
- In the estate of Marden* [2008] SASC 312 (14 November 2008)
- In the Estate of Simmons (deceased)* (1990) 56 SASR 1
- In re Grover's Will Trusts* [1971] 1 Ch 168
- In re Morton, decd Morton v Warham* [1956] Ch 644
- In re Moussa Adam (deceased)* [2013] SASC 70 (16 May 2013)
- In re Morrison; Trustees Executors and Agency Co Ltd v Comport* [1945] VLR 123
- In re Ross's Trusts* (1871) LR 13 Eq 286
- Jones v Dodd* (1999) 73 SASR 328
- Lempens v Reid & Ors* [2009] SASC 179 (2 July 2009)
- Minister for Families and Communities v Brown & Ors* [2009] SASC 86 (2 April 2009)
- National Trustees, Executors & Agency Co of Australasia Ltd v Ward* (1896) 21 VLR 519; 2 ALR 119
- Peter Dale Hills* [2009] SASC 176 (16 June 2009)
- Pizimolas v Pizimolas and Zannis* (2010) 107 SASR 277
- Probert v Commissioner of State Taxation* (1998) 72 SASR 48
- Public Trustee v O'Donnell* (2008) 101 SASR 228
- Re Benjamin* [1902] 1 Ch 723
- Re Denman* [2004] 2 QR 595
- Re DWS (Deceased)* [2001] Ch 568
- Re Hodge* [1940] 1 Ch 260
- Re the Estate of McLaren (deceased)* (2001) 79 SASR 331
- Re H, AE* [2012] SASC 146 (24 August 2012)
- Re H, AE (No 2)* (2012) 113 SASR 560
- Re H, AE (No 3)* (2013) 118 SASR 259
- R (Plaintiff) v Bong* [2013] SASC 39 (13 March 2013)

Re Trenaman, Public Trustee v Hartman (1962) SASR 95

Reid v Love and North Western Adelaide Health [2003] SASC 214 (4 April 2003)

Rivers v Rivers (2001) 84 SASR 426

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)

Saunders v Vautier (1841) Cr & Ph 240; 41 ER 482

State of South Australia v Smith & Another [2014] SASC 64 (22 May 2014)

State Trustees Ltd v Edwards [2014] VSC 392 (22 August 2014)

Townson v Ticknell (1819) 3 B & A 31; 106 ER 575

Underwood v Wing 4 De G M & M 633; 43 ER 655

West v Weston (1998) 44 NSWLR 657

Zbigniew Franczak (deceased) [2011] SASC 70 (29 April 2011)

C. *Legislation*

Aboriginal Affairs Planning Authority Act 1972 (WA)

Aboriginal and Torres Strait Islander Communities (Justice, Land and other Matters) Act 1984 (Qld)

Acts Interpretation Act 1915 (SA)

Administration Act 1903 (WA)

Administration Act 1969 (NZ)

Administration and Probate Act 1919 (SA)

Administration and Probate Act 1929 (ACT)

Administration and Probate Act 1958 (Vic)

Administration and Probate Act 1969 (NT)

Administration and Probate Act Amendment Act 1975 (No 2) (SA)

Administration and Probate (Distribution on Intestacy) Amendment Act 2009 (SA)

Administration and Probate Regulations 2009 (SA)

Administration of Estates Act 1925 (Eng)

Adoption Act 1955 (NZ)

Adoption Act 1988 (SA)
Adoption and Children Act 2002 (Eng)
Adoption of Children Act 1926 (SA)
Assisted Reproductive Technology Act 1988 (SA)
Assisted Reproductive Technology Regulations (2010) (SA)
Cohabitation Rights Bill 2014 (Eng)
Coroners Act 2003 (SA)
Crown Proceedings Act 1992 (SA)
Escheat (Procedure) Act 1940 (WA)
Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 (Eng)
Family Law Act 1975 (Cth)
Family Law Act 2011 (BC)
Family Provision Act 1969 (ACT)
Family Provision Act 1970 (NT)
Family Relationships Act 1975 (SA)
Financial Management Act 1994 (Vic)
Forfeiture Act 1982 (Eng)
Forfeiture Act 1995 (NSW)
Forfeiture (Homicide) Act 2007 (NZ)
Guardianship and Administration Act 1986 (Vic)
Inheritance (Family and Dependents Provision) Act 1972 (WA)
Inheritance (Family Provision) Act 1972 (SA)
Inheritance and Trustees' Powers Act 2014 (Eng)
Intestacy Act 2010 (Tas)
Intestate Succession Act 1989 (Nova Scotia)
Intestate Succession Act 1990 (Manitoba)
Intestate Succession Act 1996 (Sask)
Law Reform (Succession) Act 1995 (Eng)

Law of Property Act 1925 (Eng)
Law of Property Act 1936 (SA)
Law of Property Act 2000 (NT)
Marriage Act 1961 (Cth)
New South Wales Trustee and Guardian Act 2009 (NSW)
Property Law Act 1958 (Vic)
Property Law Act 1969 (WA)
Property Law Act 1974 (Qld)
Property (Relationships) Act 1976 (NZ)
Public Finance and Audit Act 1987 (SA)
Public Trustee Act 1995 (SA)
Simultaneous Deaths Act 1958 (NZ)
Stamp Duties Act 1923 (SA)
Statutes Amendment (Domestic Partners) Act 2006 (SA)
The Statute of Distributions 1670, Statute 11 Geo IV and 1 Will. IV c. 40
Succession Act 1981 (Qld)
Succession Act 2006 (NSW)
Succession (Homicide) Act 2007 (NZ)
Succession Law Reform Act 1990 (Ontario)
Succession (Scotland) Act 1964 (Eng)
Succession (Northern Ireland) Order 1996
Supreme Court Probate Rules (SA)
Survivorship Act 1993 (Saskatchewan)
Trustee Act 1936 (SA)
Wills Act 1936 (SA)
Wills Act 1997 (Vic)
Wills and Succession Act 2010 (Alberta)
Wills, Estates and Succession Act 2009 (BC)

APPENDIX 6

QUESTIONS

Below is a full list of questions, as extracted from each section of the Issues Paper. If you wish to make a formal submission to one or more questions in this paper, please use the downloadable (word) version of the Questionnaire available on the Institute's webpage at <https://law.adelaide.edu.au/research/law-reform-institute/> under 'Current Projects'.

Notes:

- i. In these questions the word 'spouse' is intended to include a domestic partner as well as a lawful spouse, unless a distinction is made between them.
- ii. 'The Committee' means the National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General (SCAG) in 1995. South Australia did not participate in this Committee.

OVERVIEW AND BACKGROUND QUESTIONS (pages 7 to 24)

You might wish to review your answers to the questions in this first section after reading the whole Paper.

- 1.1 *Do the current intestacy rules produce a result that is fair and reasonable in most cases?*
- 1.2 *How important is it that the law of intestacy be uniform across Australia?*
- 1.3 *Should the South Australian Parliament enact the Model Bill reproduced in **Appendix 3** of this Paper?*
- 1.4 *If your view is that the Model Bill should be enacted with some changes, what are those changes and why should they be made?*
- 1.5 *What should the purpose of the law of intestacy be?*
- 1.6 *Should it be to reflect what it is believed the majority of testators say in their wills? (This is the general approach taken by the Committee.)*
- 1.7 *Alternatively, should it reflect the State's view of how a person should dispose of their estate?*
- 1.8 *To what extent should the law of intestacy be designed to protect the public purse from claims for welfare payments?*

REFORM ISSUES: DISTRIBUTION OF THE ESTATE

THE SURVIVING SPOUSE OR DOMESTIC PARTNER (pages 25 to 53)

- 2.1 *Is giving preference to the surviving lawful spouse over other members of the intestate's family appropriate in all cases? If not, in what circumstances should preference be given, or not given, to the surviving spouse?*
- 2.2 *Is giving preference to a surviving domestic partner over other members of the intestate's family appropriate in all cases? If not, in what circumstances should preference be given to the surviving domestic partner?*

(As to who is a domestic partner see above [40]-[45])

- 2.3 *Is it more important:*
- (a) *for South Australian law about who is a domestic partner to be the same for all South Australian laws, bearing in mind that there are at least 90 South Australian Acts that rely on the definition of 'domestic partner' in the Family Relationships Act 1975 (SA), including Acts relevant to wills and deceased estates;*
 - or*
 - (b) *for South Australian intestacy laws to be consistent with the Committee's recommendation so that a relationship that subsisted for 2 years (instead of 3 years as currently required by South Australian law) could be recognised as a domestic partnership giving the surviving partner the right to inherit the intestate partner's estate?*
- 2.4 *Should the surviving lawful spouse be entitled to the whole estate if the intestate left no surviving descendants? If not, with whom should the estate be shared and in what proportions? Please give reasons.*
- 2.5 *Similarly, should a surviving domestic partner be entitled to the whole estate if the intestate had no surviving descendants? (Please take into account the broad definition of who is a domestic partner outlined above in [40]-[45] and sections 11 to 11B of the Family Relationships Act reproduced in **Appendix 4**.) If your answer is no, please describe the circumstances in which you consider the domestic partner should, or should not, be entitled to the whole estate and why.*
- 2.6 *Are you aware of any cases where a court has declared that two people related by blood were domestic partners? If yes, please provide details and, if possible, a reference to the case.*

- 2.7 *When there is more than one spouse or domestic partner, should they share equally whatever the spouse would have taken if there were only one of them, consistent with the Model Bill and South Australian law? If your answer is no, or not in all cases, when should it be shared, and in what proportions? Please give your reasons. (see above [50]-[55])*
- 2.8 *If you agree that there should be equal sharing, do you prefer the procedure set out in s 72H of the A & P Act (SA) reproduced in **Appendix 2**, or model clauses 26 and 27 reproduced in **Appendix 3**? Please give reasons.*
- 2.9 *Which of the assumptions underlying the recommendation of the Committee that the surviving spouse should take the whole estate when all the intestate's descendants are issue of the relationship between the intestate and the surviving spouse do you consider to be well founded? (see above [60]-[63])*
- 2.10 *Do you agree with the Committee's recommendation that the whole estate should go to the intestate's spouse, except when the intestate leaves a child or children (or descendants of a deceased child) from another relationship? (see above [56]-[63])*
- 2.11 *Do you agree with the Committee's recommendation that when the intestate leaves a spouse and at least one descendant from another relationship, the spouse should be given priority over the intestate's descendants, but be required to share with them anything that remains after taking that priority amount? (see above [56]-[63])*

SPOUSE'S PREFERENTIAL LEGACY (Pages 40 to 53)

- 2.12 *Should the spouse continue to be preferred through an entitlement to a preferential legacy as a priority over the intestate's children and descendants of deceased children in all cases? (see above [56]-[58])*
- 2.13 *If the surviving spouse has priority over the intestate's issue, would you prefer:*
 (a) *a preferential legacy of a specified amount;*
 or
 (b) *a specified proportion of the estate;*
 or
 (c) *a right to choose between taking either the intestate's interest in the home or else a preferential legacy or proportion of the estate?*
- 2.14 *When the home is owned jointly by the spouses, should the increase in the spouse's interest in it upon the death of the other spouse be taken into account as all or part of the spouse's preferential rights? (see above [35], [36], Diagram 7 and [73]-[75] and [275]-[277])*

- 2.15 *If you consider that the spouse should not have priority in all cases, you might wish to consider the following. Should the spouse's preferential entitlement depend on—*
- (a) the size of the estate;*
 - (b) whether the intestate person left children who are under the age of 18 years;*
 - (c) whether the intestate person left children who are dependent, whatever their age;*
 - (d) whether there are other members of the intestate's family who were wholly or partially dependant on the intestate (for example, grandchildren, parents, siblings)*
 - (e) other circumstances (please describe)?*
- (see above [64]-[75])*
- 2.16 *If South Australia adopts the recommendation of the Committee that the spouse should have a preferential legacy of a specified amount (in some cases), should the legislated starting amount be \$350,000? If not, what amount would be more appropriate, and what are your reasons for that figure? (see above [67]-[72])*
- 2.17 *Should the preferential legacy be adjusted quarterly (or for some other period) by the All Groups Consumer Price Index Number, being the weighted average of the 8 capital cities, published by the Australian Statistician, as recommended by the Committee? If not, why not, and is there a preferable index for adjusting the amount? (see above [76])*
- 2.18 *If South Australia adopts \$350,000 as the starting point, from what date should indexation be applied? (Note that different starting dates for indexation in NSW and Tasmania have resulted in different preferential legacies.) (see above [68]-[70])*
- 2.19 *If you do not favour some form of indexation of the preferential legacy, what method should be used to keep the amount consistent with changes in money values and/or housing prices? (see above [76])*
- 2.20 *Do you agree with the Committee's recommendation that when the intestate leaves immoveable property (usually real estate) in more than one State (thereby giving the spouse a right to more than one preferential legacy), the spouse should be entitled by way of preferential legacies to a total amount equal to the highest legacy? (For example, if the spouse were entitled to a preferential legacy of \$50,000 in Western Australia and a preferential legacy of \$100,000 in South Australia, the spouse's preferential entitlement would be \$100,000.) If not, what is your preferred way of determining the amount of the spouse's preferential legacy? (see above [77]-[82])*
- 2.21 *Should interest be payable to the spouse on his or her unpaid preferential legacy? (see above [83]-[87])*

- 2.22 *If yes, from what time should interest begin to accrue – (a) the date of the intestate’s death, or (b) the anniversary of the intestate’s death, or (c) 28 days after the intestate’s death, or (d) other date?*
- 2.23 *Should the rate be fixed by the Act or regulation or should it be variable? If you consider it should be variable:*
- (a) *should the rate be set in the same way as in NSW and Tasmania for the sake of uniformity with those States (2% above the Reserve Bank cash rate); or*
 - (b) *should it be set in the same way as it is for legacies bequeathed by will in South Australia for the sake of consistency within South Australia;⁴⁰⁹ or*
 - (c) *is there another alternative that you prefer?*

SPOUSE’S RIGHT TO CHATTELS (Pages 53 to 58)

- 3.1 *Should South Australian law be changed to expand the rights of the spouse to include all the intestate’s tangible personal property (with some specified exceptions) as recommended by the Committee? (See the definition of ‘personal effects’ in clause 4 of the Model Bill in **Appendix 3**, and above [88]-[97])*
- 3.2 *Alternatively, do you prefer the current South Australian definition that entitles the spouse to articles of household or personal use or ornament and motor vehicles not used for business purposes (but see the question about motor vehicles below)?*
- 3.3 *Should the spouse be entitled to all the intestate’s motor vehicles? If not, how should it be decided which one or ones the spouse should have?*
- 3.4 *Should South Australian law be changed to expand the spouse’s legislated right to include personal property used by the intestate partly for business purposes? If yes,*

⁴⁰⁹ *Administration and Probate Regulations 2009* (SA):

For the purposes of section 120A(1) of the *Administration and Probate Act 1919*, the rate of interest per annum fixed in any financial year is—

- (c) for the 6 month period commencing on 1 July—the average mid 180 day bank bill swap reference rate published by AFMA as at the first business day of the period; and
- (d) for the 6 month period commencing on 1 January—the average mid 180 day bank bill swap reference rate published by AFMA as at the first business day of the period.

(2) In this regulation—

AFMA means the Australian Financial Markets Association Limited;

business day means every day except Saturday, Sunday or a public holiday.

should the spouse's right include things used principally for business purposes – or only those used principally or equally for private purposes?

- 3.5 *Do you agree with the Committee's list of tangible personal property that is excluded and so taken into account in calculating the spouse's share of the estate? (See definition of 'personal effects' in clause 4 of the Model Bill in **Appendix 3**).*
- 3.6 *The Institute invites information about what administrators do in practice in South Australia when 'personal chattels' are used partly for business and partly for private purposes. (See s 72B(1) of the A & P Act in **Appendix 3**).*

ISSUE (DESCENDANTS) (Pages 58 to 80)

Posthumous children

- 4.1 *Do you agree with the Committee's recommendation that only children who were conceived before the death of the intestate parent should inherit under the laws of intestacy? (see above [98]-[112])*
- 4.2 *Do you agree with the Committee's recommendation that a posthumous child should inherit only if the child survives for at least 30 days, consistent with the period of survival required for other relatives?*
- 4.3 *If you do not agree, in what circumstances should a child conceived after the intestate's death inherit? For example, should the law allow inheritance -*
 - (a) *Only if the child is born within a certain time of the intestate's death, and if yes, what should the time limit be?*
 - (b) *Only if the surviving parent was the spouse of the intestate when the intestate died?*
 - (c) *Only if the person whose genetic material was used consented to it being used for posthumous conception?*
 - (d) *Only if the surviving spouse notified the administrator and all other interested parties of intention to use the intestate's genetic material, so that the administrator can hold back the part of the estate that the proposed child would inherit if born alive (and surviving birth for the required period)?*
 - (e) *Within what period of time should notice be given? (Take into account the desirability of the estate being wound up and beneficiaries receiving their inheritance without undue delay.)*

Adopted children

- 4.4 *Should South Australian law continue to preserve the right of a person who was adopted by a step-parent to inherit from or through his or her natural parent or previous adoptive parent? Alternatively, should this right be abolished, consistent with the recommendation of the Committee? Please give reasons for your opinion. (see above [113]-[120])*
- 4.5 *Alternatively, should South Australian law deal with this situation by giving a child adopted by a step-parent the right to make a claim against the estate of the deceased natural parent under the Family Provision Act, instead of the current statutory right to share in the estate as a descendant of the deceased?*

Half blood

- 4.6 *Do you agree with the Committee's recommendation that relatives of the full blood and relatives of the half-blood should continue to have equal inheritance rights? (This is the law in every State.) If you disagree, please give reasons? (see above [121] and [122])*

STEP CHILDREN (Pages 70 to 77)

- 5.1 *Should the law be left as it is, so that step-children do not have a statutory right to share in the estate, but may make a claim under the Family Provision Act if they were wholly or partly maintained, or were legally entitled to be wholly or partly maintained, by the intestate step-parent immediately before his or her death? This would be consistent with the Committee's recommendation and the law in all other States. (see above [125]-[138])*
- 5.2 *Alternatively, should the law be changed to give step-children a statutory entitlement to share in the estate? If yes, in what circumstances and to what extent? (See above [138] for three possibilities)*
- 5.3 *And if step-children are entitled to share in the step-parent's estate, should all other relationships be traced as if the step-child were the natural child of the step-parent? (For example, step-parents would inherit from step-children who died intestate without a spouse or descendants. And inheritance rights would flow through to blood relatives of step-parents in the absence of relatives of the step-child with a prior right.) (see above [139] and [140])*

OTHER RELATIVES (Pages 78 to 81)

- 5.4 *Should the most remote kin who can inherit be the intestate's grand-parents and first cousins, consistent with the Committee's recommendations? (This would require changes to South Australian law.) (see above [141]-[146])*
- 5.5 *If not, who should be entitled to inherit from the intestate estate in the absence of closer relatives, and in what order of priority? (For example, should great-grandparents be able to inherit? If yes, over which other relatives should they have priority?) Please give reasons.*

BONA VACANTIA (Pages 81 to 83)

- 5.6 *When an estate has vested in the State as bona vacantia, should the responsible South Australian Government Minister have a statutory discretion to give the estate to people or organisations not entitled to it under the rules of distribution of intestate estates? If not, please give your reasons. (see above [147]-[153])*
- 5.7 *If yes, should the classes of people to whom it may be given be the same as in model clause 38 (see **Appendix 3**)? If you agree in principle, but consider that model clause 38 is not satisfactory, what changes do you suggest?*
- 5.8 *Should people who wish to claim a bona vacantia estate apply to the Crown Solicitor as in New South Wales or to the Attorney-General, rather than to the Treasurer?*

INHERITING THROUGH TWO LINES OF RELATIONSHIP (Pages 83 and 84)

- 5.9 *Should a person who is related to the intestate in more than one way be entitled to inherit through both familial relationships as recommended by the Committee (model clause 33)? If not, should South Australian law limit the double relative to one share, being the one that yields the greatest amount? Please give reasons. (see above [154]-[158])*

PER STIRPES OR PER CAPITA DISTRIBUTION (Pages 84 to 90)

- 5.10 *Should intestate estates be distributed per stirpes (that is by branch of the family) in all cases as recommended by the Committee?*
- 5.11 *If you answer no to the question above, should the estate be distributed per capita only when all entitled relatives are of the same generation (i.e. the same degree of relationship to the intestate, for example, all first cousins), consistent with current South Australian law?*

5.12 *If you consider that there is a better method, please provide details.*

SPOUSE’S RIGHT TO ACQUIRE PROPERTY FROM THE ESTATE (Pages 91 to 109)

Questions 6.1 to 6.10 are relevant to cases in which the intestate leaves a surviving spouse and one or more descendants.

- 6.1 *Should South Australia give the spouse a right to purchase from the intestate’s estate **any** property he or she chooses (and can pay for), as recommended by the Committee? Please give reasons for your opinion. (see above [168]-[172])*
- 6.2 *Do you agree with the restrictions recommended by the Committee and described in model clause 16 in **Appendix 3** to protect the interests of the intestate’s descendants? (In effect these are that the spouse may acquire property only with the permission of the court if the property the spouse wants is part of a larger property and acquisition by the spouse would substantially diminish the value of the rest of the property or make administration of the estate substantially more difficult. This applies both to the home, other real estate and to personal property (for example collections of items, or plant and machinery and stock.) If you do not agree, or you agree only in part, please explain what, if any restrictions, you consider desirable. (See particularly above [185]-[191] of the discussion about the spouse’s right to acquire the home or other property from the estate (see [168]-[210]))*
- 6.3 *If the spouse’s preferential right to acquire property of the estate is limited to the home, the following questions arise.*
- (a) *Should the spouse’s right be to acquire the home in which he or she was residing when the intestate died (the current South Australian law)?*
 - (b) *Is legislative clarification of the extent of the spouse’s right needed, for example—*
 - (i) *to include dwellings such as caravans and other moveable homes (as in Queensland)?*
 - (ii) *to define more precisely the extent of what may be acquired, taking into account, for example, farm houses, dwellings that form part of larger premises and restrictions on sub-division (as in Victoria)? If yes, how should the limits of what the spouse may acquire be defined or determined? (see above [176]-[184])*
 - (c) *When the intestate left more than one spouse, should each spouse have the right to acquire the intestate’s interest in the home in which he or she was residing when the intestate died (the current South Australian law) – or do you prefer the*

Committee's recommendation that neither have any right? If the latter, please give your reasons. (see above [198]-[201])

- (d) If the intestate left more than one spouse living in the same house what rights (if any) should they have to acquire the intestate's interest? (The Committee's recommendation was that neither would have a right.) (see [198]-[201])*
- (e) Should a surviving spouse who is not yet 18 years of age be permitted to make his or her own decision about acquiring property from the estate as recommended by the Committee? If not, please give reasons. (see above [202])*
- (f) Do you agree with the Committee's opinion that if the surviving spouse does not have the capacity to make a legal decision, it should be made according to the laws of South Australia relating to persons under disability in the management of their affairs? (see above [203])*

- 6.4 *What is your opinion about the alternatives to the right to elect to purchase the intestate's interest in the home described above in [192]-[197]: (a) entitlement to the home without payment; (b) life interest; (c) interest until youngest child is 18?*
- 6.5 *(a) The Institute invites information about how the value of the intestate's interest in the home is usually determined in South Australia and whether it is considered to be satisfactory.*

*(b) Should a registered valuer's valuation be compulsory, as recommended by the Committee (model clauses 20(3)–(4) in **Appendix 3**)? If not, how should value, and so the price to be paid by the spouse, be established?*
- 6.6 *If the spouse is the sole administrator, should court approval be required for the spouse to purchase property from the estate as in British Columbia.*
- 6.7 *How long should the spouse have to make a decision about purchasing property from the estate? (The Committee recommended (a) 3 months from a grant of administration when the spouse is an administrator, and (b) 3 months from service of a notice by the administrator on the spouse when the spouse is not an administrator? This is the law in South Australia. The ACT, Northern Territory and Western Australia allow one year from the grant of administration.) (see above [212]-[215])*
- 6.8 *To whom should the surviving spouse be required to give notice of his or her decision to purchase property from the estate? (This requirement gives others whose interests may be prejudiced a chance to object.) (see above [216] and [217])*

- 6.9 *Should a spouse who has elected to acquire the home be permitted to revoke his or her election? If yes, should the consent of any other person be required? If yes, whose consent should be required? (see above [218] and [219])*
- 6.10 *Should the spouse be required to pay outgoings on the home between the death of the intestate and the time when he or she either moves out of the home or acquires the intestate's interest in it? If not, please give reasons. (see above [204] and [205])*
- 6.11 *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 above at [221]?*

FORFEITURE (Pages 109 to 113)

- 7.1 *Should the common law forfeiture rule that a relative who killed the intestate is treated as never having existed, thus disqualifying the killer's children or other relatives from inheriting the victim's estate even though they were not involved in the killing, be reformed? The Committee recommended that the estate be distributed as if the killer had died immediately before the intestate. Do you agree? If you answer no, please give reasons. (Please note that the Institute intends to make recommendations separately from this Issues Paper in due course about the circumstances in which the killer should not be disqualified, and so this question is limited to what should happen when a person who is responsible for the intestate's death is disqualified according to the law at the relevant time.) (see above [222]-[228])*

DISCLAIMED INTERESTS (Pages 113 to 118)

- 8.1 *Under South Australian law, people who disclaim their inheritance are treated as never having existed, so that their descendants (if any) or other relatives, are thereby automatically disqualified from taking the disclaimed interest. Should the law be reformed so that a disclaimed interest passes to the relatives who would have been entitled to it if the person disclaiming had died immediately before the intestate, as recommended by the Committee? (see above [229]-[238])*
- 8.2 *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 (that is, not to take)? The following questions follow on from this one.*

- (a) *Should the law allow a person to disclaim on behalf of his or her descendants as well, 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?*
 - (b) *Should a beneficiary be entitled to disclaim in favour of a specified relative?*
- 8.3 *Do you agree with the following New Zealand restrictions on disclaiming:*
- (a) *a person may only disclaim the whole of his or her interest – not a part?*
 - (b) *a disclaimer is not effective if the person disclaiming receives any valuable consideration (tangible benefit) in return?*

STAMP DUTY (Pages 118 to 121)

- 9.1 *Should a spouse who exercises his or her statutory right to acquire the intestate's interest in the home be liable to pay ad valorem stamp duty (calculated on the purchase price)? (A person who inherits a house under a will or receives it under a court order does not pay stamp duty. When one of two joint tenants die, there is no stamp duty). (see above [239]-[245])*
- 9.2 *Should disclaimers or assignments of interests to which a person is entitled under the rules of intestacy that benefit other relatives of the intestate be exempt from stamp duty? If yes, should there be any limitations to the exemption? If yes, what should they be? (see above [241]-[245])*

GIFTS TO BE BROUGHT INTO HOTCHPOT – S.72 OF THE A & P ACT (Pages 121 to 132)

- 10.1 *Is it correct that the South Australian hotchpot legislation that requires taking into account certain inter vivos gifts and settlements and, in cases of partial intestacy, also testamentary gifts, is largely ignored? If yes, why is that so?*
- 10.2 *Should hotchpot be completely abolished as recommended by the Committee?*
- 10.3 *If not, should hotchpot rules be retained:*
- (a) *in cases of total intestacy only, so taking into account only inter vivos gifts; or*
 - (b) *also in cases of partial intestacy so that both gifts under the will and inter vivos gifts are taken into account (with possible distortion of the deceased's intentions)?*
 - (c) *only as between:*
 - (i) *the intestate's children;*

- (ii) *as between the intestate's descendants of any degree of remoteness; or*
- (iii) *as between all entitled relatives of the same class?*

- 10.4 *If hotchpot is retained in some form, should all gifts made to the spouse be ignored, whether inter vivos or by will?*
- 10.5 *If hotchpot is retained in some form, should there be an increase in the value of gifts that are to be ignored? (The current value of \$1,000 was set 40 years ago). If yes, what should the value be? And how should the value be adjusted to take into account inflation?*

SURVIVORSHIP RULES (Pages 132 to 143)

A survivorship rule sets a period of time for which a person must survive the intestate or testator before becoming entitled to inherit.

- 11.1 *Do you agree with the Committee's recommendation that:*
- (a) *the survivorship period should apply to all persons entitled to take on intestacy – not just spouses and domestic partners;*
 - (b) *children who were conceived before and born after the intestate's death should inherit only if they lived for 30 days;*
 - (c) *the survivorship period should be inapplicable if its operation would result in the estate passing to the State as bona vacantia, that is, that it is preferable for the combined estates of both deceased relatives to go to one family than to the State?*
- If not, please say what you think the law about survivorship should be, and why.*
- 11.2 *As some people can be kept alive on life support machines for a long time, is a 28 or 30 days survivorship requirement long enough? If not, what should the period be and why? If there are any known instances of a person being kept alive on life support until after the specified survival period with a view to altering the distribution of the estate on intestacy or under a will, please provide details?*
- 11.3 *When spouses or other relatives die within a short time of each other or in circumstances in which the order of their deaths is uncertain, should their jointly owned property be treated as if they were tenants in common (i.e. each owned a divisible share) so that an equal share of it would go to the family of each of the deceased persons? (This is done in the ACT, Western Australia, New Zealand and some Canadian provinces).*

MISSING INTESTATES AND BENEFICIARIES (Pages 143 to 145)

- 12.1 *Should South Australian law enable the court to authorise distribution of the estate of a person who has been missing without trace for less than seven years if it is established that there are reasonable grounds for supposing the person has died? If yes–*
- (a) *should there be a minimum time before which such an order may be made, and if yes, what should it be?*
- (b) *if the missing person is the intestate, should the Public Trustee be the only person whom the courts may authorise to distribute the estate?*
- (c) *what should happen if the person who was supposed to be dead reappears?*
- 12.2 *Should South Australian legislation provide for the appointment of appropriate persons or the Public Trustee to manage the estates of people who have been missing for at least 90 days in circumstances in which it is not known whether the missing person is dead or alive, like NSW and Victoria?*

SUPERANNUATION (Pages 145 and 146)

- 13.1 *Do you agree with the Committee’s recommendation that superannuation benefits should not be taken into account by the laws of intestacy (that is, that the status quo should remain)?*
- 13.2 *If you disagree, how should they be brought into account?*

CLAIMS UNDER THE INHERITANCE (FAMILY PROVISION) ACT 1972 (Pages 146 to 149)

- 14.1 *Should close family members be permitted to make a claim against wholly and partially intestate estates under the Family Provision legislation in the same way as they may claim against testate estates? If not, please give reasons. (see above [287]-[292])*

ACCESS TO CASH BEFORE A GRANT OF ADMINISTRATION (Pages 149 and 150)

- 15.1 *Should the amount that banks, authorised deposit-taking institutions and Government can pay out to the surviving spouse before a grant of administration or probate without incurring any liability be increased to more than \$2,000? If yes, what should the legislated amount be? (see [293] and [294])*
- 15.2 *Should the amount be increased regularly by the CPI index? If not, should it be increased by some other method?*

VESTING OF MINORS' SHARES (Pages 150 to 152)

- 16.1 *Should the share of a minor (person under the age of 18) vest in the minor immediately, as it does now in South Australia? (This is consistent with the Committee's recommendation and the law in five other States). (With immediate vesting, if a minor dies before the age of 18, his or her share of the intestate's estate passes to the relatives who are entitled to the minor's estate, rather than reverting to the estate of the intestate. In most cases these relatives will be the minor's parents, spouse or domestic partner, or child.) If not, please give reasons. (see above [295]-[298])*

INTESTACY OF INDIGENOUS PERSONS (Pages 153 to 162)

- 17.1 *Should South Australia enact the model clauses in Part 4 of the Model Bill for Indigenous estates? If not, please give reasons? (see above [299]-[315])*
- 17.2 *Should the Family Provision Act be amended to allow Indigenous kin to seek adjustment of the way the intestacy rules work by applying to the court under the Family Provision Act? If not, please give reasons.*
- 17.3 *If the Family Provision Act is amended as above, should this be in addition to, or an alternative to, Part 4 of the Model Bill?*
- 17.4 *Are there marriages recognised by Aboriginal law that would not be recognised as domestic partnerships under the recently amended Family Relationships Act (see **Appendix 4**)? If yes, please describe when this would occur.*
- 17.5 *The Institute invites information that may assist it in making sound recommendations to the Attorney-General.*

OVERVIEW QUESTIONS REPEATED (numbering is as reflected in original questions)

- 1.2 *How important is it that the law of intestacy be uniform across Australia?*
- 1.3 *Should the South Australian Parliament enact the Model Bill reproduced in **Appendix 3** of this Paper?*
- 1.4 *If your view is that the Model Bill should be enacted with some changes, what are those changes and why should they be made?*