

South Australia

Intestacy Bill 2007

A BILL FOR

An Act to make provision for the distribution of intestate estates; and for other purposes.

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1 Transitional provision

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Intestacy Act 2007*.

2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

3—Purpose of Act

The purpose of this Act is to revise and re-state the rules for distribution on intestacy.

4—Definitions

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

10 **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;

5 **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;

10 **(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
- 15 (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;
- 20 (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;

25 **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);
- 30 (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
- 35 (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
5 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—
- 10 (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:
 - 15 (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
 - 20 (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
25 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

- 30 (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.
- 35 (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—

- 40 (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—

- 5 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

- 10 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

- 15 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

- 20 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

25

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

- 30 (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.
- 35

Examples—

- 5
- 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.
- 10 (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.
- 15 (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

- 20 (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.
- 25 (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—
- 30 (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.

35 **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

- 40 (1) A spouse's election is made by written notice identifying, with reasonable particularity, the property the spouse elects to acquire.

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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
 - 5 (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;
 - 10 (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—

- 30 (a) the spouses are entitled to share the intestate's personal effects in accordance with this Division; and
- (b) each spouse is entitled to a statutory legacy; and
- (c) the spouses are entitled to share one-half of the remainder (if any) of the intestate estate in accordance with this Division.

26—Sharing between spouses

- (1) If property is to be shared between spouses under this Division, the property is to be shared—
- (a) in accordance with a written agreement between the spouses (a *distribution agreement*); or

- (b) in accordance with an order of the Court (a *distribution order*); or
- (c) if the conditions prescribed by subsection (2) are satisfied—in equal shares.

(2) The following conditions must be satisfied if the personal representative is to make an equal division of property between spouses under subsection (1)(c):

- (a) the personal representative has given each spouse a notice in writing stating that the personal representative may distribute the property equally between the spouses unless, within 3 months after the date of the notice—
 - (i) they enter into a distribution agreement and submit the agreement to the personal representative; or
 - (ii) at least one of the spouses applies to the Court for a distribution order; and
- (b) at least 3 months have elapsed since the giving of the notices and—
 - (i) the personal representative has not received a distribution agreement or notice of an application for a distribution order; or
 - (ii) an application for a distribution order has been made but the application has been dismissed or discontinued.

(3) If a spouse asks the personal representative to initiate the process for making an equal division of property under subsection (1)(c), the personal representative must, as soon as practicable—

- (a) give the notices required under subsection (2)(a); or
- (b) make an application to the Court for a distribution order.

(4) The personal representative must give the spouses written notice at least 30 days before beginning distribution between them on the basis of a distribution agreement or under subsection (1)(c).

27—Distribution orders

- (1) An intestate's spouse or personal representative may apply to the Court for a distribution order.
- (2) If, however, the personal representative has given written notice of intention to begin distribution between them under section 26(4) the application cannot be made more than 30 days after the date of the notice.
- (3) On an application under this section, the Court may order that the property be distributed between the spouses in any way it considers just and equitable.
- (4) If the Court considers it just and equitable to do so, it may allocate the whole of the property to one of the spouses to the exclusion of the other or others.
- (5) A distribution order may include conditions.

Part 3—Distribution among relatives

Note—

In the case of an Indigenous estate, this Part is subject to exclusion or modification by a distribution order under Part 4.

28—Entitlement of children

(1) If an intestate leaves no spouse but leaves a descendant, the intestate's children are entitled to the whole of the intestate estate.

(2) If—

(a) an intestate leaves—

(i) a spouse or spouses; and

(ii) at least one descendant who is not also a descendant of a surviving spouse; and

(b) a part of the estate remains after satisfying the spouse's entitlement, or the spouses' entitlements,

the intestate's children are entitled to the remaining part of the intestate estate.

(3) If no child predeceased the intestate leaving a descendant who survived the intestate, then—

(a) if there is only one surviving child—the entitlement vests in the child; or

(b) if there are 2 or more surviving children—the entitlement vests in them in equal shares.

(4) If one or more of the intestate's children predeceased the intestate leaving a descendant who survived the intestate—

(a) allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child; and

(b) the presumptive share of any such deceased child is to be divided between that child's children and, if any of these grandchildren (of the intestate) predeceased the intestate leaving descendants who survived the intestate, the deceased grandchild's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great grandchild who predeceased the intestate leaving descendants who survived the intestate), and so on until the entitlement is exhausted.

29—Parents

(1) The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant.

(2) If there is only one surviving parent, the entitlement vests in the parent and, if both survive, it vests in equal shares.

30—Brothers and sisters

(1) The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

(c) no parent.

(2) If no brother or sister predeceased the intestate leaving a descendant who survived the intestate, then—

(a) if only one survives—the entitlement vests in the surviving brother or sister;
or

(b) if 2 or more survive—the entitlement vests in them in equal shares.

(3) If a brother or sister predeceased the intestate leaving a descendant who survived the intestate—

(a) allowance must be made in the division of the estate between brothers and sisters for the presumptive share of any such deceased brother or sister; and

(b) the presumptive share of any such deceased brother or sister is to be divided between the brother or sister's children and, if any of these children predeceased the intestate leaving descendants who survived the intestate, the deceased child's presumptive share is to be divided between the child's children (again allowing for the presumptive share of a grandchild who predeceased the intestate leaving descendants who survived the intestate), and so on until the entitlement is exhausted.

31—Grandparents

(1) The grandparents of an intestate are entitled to the whole of an intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

(c) no parent; and

(d) no brother or sister, or descendant of a deceased brother or sister.

(2) If there is only one surviving grandparent, the entitlement vests in the grandparent and, if 2 or more survive, it vests in equal shares.

32—Aunts and uncles

(1) The brothers and sisters of each of an intestate's parents are entitled to the whole of the intestate estate if the intestate leaves—

(a) no spouse; and

(b) no descendant; and

(c) no parent; and

(d) no brother or sister, or descendant of a deceased brother or sister; and

(e) no grandparent.

(2) If no brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, then—

(a) if only one survives—the entitlement vests in the surviving brother or sister;
or

(b) if 2 or more survive—the entitlement vests in them in equal shares.

- (3) If a brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, the child is entitled to the deceased parent's presumptive share and, if there are 2 or more children, they share equally.

33—Entitlement to take in separate capacities

5 A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

Example—

10 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

- 15 (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.
- 20 (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.
- 25 (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
- 30 (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.
- 35 (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).
- 40 (3) In formulating an order under this Part, the Court must have regard to—
- (a) the scheme for distribution submitted by the applicant; and

(b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.

(4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just.

5 **36—Effect of distribution order under this Part**

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

Part 5—Absence of eligible beneficiaries

37—Intestate leaving no eligible beneficiaries

10 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

15 (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

20 (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.

25 (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

30 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—

35 (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

5 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

10 **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.

15