INTESTACY RULES

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Queensland Law Reform Commission
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Previous papers on this Reference: *Intestacy Rules Working Paper No. 37, July 1992.*

To: The Hon Mr Dean Wells, M.L.A.
Attorney-General of Queensland

In accordance with the provisions of section 15 of the Law Reform Commission Act 1968, I am pleased to present the Commission's report on the Intestacy Rules.

Yours faithfully,

The Honourable Mr Justice R E Cooper (Chairman)

Her Honour Judge H O'Sullivan (Deputy Chair)

Ms R G Atkinson

Mr W G Briscoe

Mr J M Herlihy

Mr W A Lee

Ms L Willmott

7 June 1993

CONTENTS

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1 Chapter 9 is separately paginated.

QUEENSLAND LAW REFORM COMMISSION

INTESTACY RULES

Chapter 1 - Preliminary

1.1 *Introduction*

Intestacy rules are the rules which determine the manner in which the estate of a deceased person is distributed when, or to the extent that, the deceased fails to make a will.[2] Intestacy rules can also be likened to the will the law would expect a member of an average family to make if he or she got around to it. The rules provide for a distribution of the deceased's estate to the spouse and issue (i.e. children, grandchildren etc) of the intestate (the deceased) and, if there is no spouse or issue, then provision is made for the intestate's parents, brothers and sisters, nephews and nieces, then grandparents, then uncles and aunts, then cousins.[3] There is no provision for a distribution of the intestate's estate to relatives more remote than first cousins of the intestate.

1.2 *History*[4]

Historically, intestacy rules emerged from common law rules which restricted a person's power to make a will.

For many centuries, in England, although there were regional variations, a man was commonly allowed to dispose by will of only one half or one third of his chattels: one half if he had a wife but no children; one third if he had a wife and children. The wife was entitled to the other half or a third, and the children a third. These

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2 The deceased may never have made a will. If he or she had made a will, the will may have subsequently been revoked (for example, by marriage or divorce). If a will had been made, it may not have disposed of all of the deceased's property. The will may have been an invalid will. See *Succession Act 1981*, ss 8, 9, 17, 18, 34.

3 *Succession Act 1981*, s.35 and Schedule 2. See Ch.4 and Appendix 2.

4 See Sir William Holdsworth, *A History of English Law*, Vol. III, Ch.5; Hardingham, Neave & Ford, *Wills and Intestacy in Australia and New Zealand*, (2nd ed) 1989 Ch.14.

restrictions on testamentary capacity became a benchmark for what a wife and issue should receive where there was no will. Upon the intestacy of a married woman, however, the husband took all of his deceased wife's estate.[5] This was connected with the rule that upon marriage the wife's property became her husband's.

Historically, intestacy rules were concerned with personal property such as cattle and furniture, not land. Land descended according to ancient rules designed to ensure that it passed to the (usually male) heir at law, under the doctrine of primogeniture - that the eldest son should inherit his father's wealth. That rule was finally abolished in Queensland by the *Intestacy Act 1877*. Nevertheless, the old rules applicable to personal property still affect the present Queensland intestacy rules and the distribution of both land and personal property: a spouse still has to share the intestate's estate with the intestate's issue.

1.3 *Assumptions and limitations*

Intestacy rules are necessarily limited by the fact that they refer to classes of persons and therefore cannot differentiate between deserving and undeserving persons within a class as the following hypothetical examples show. Those who complain of the "injustice" of the intestacy rules often do not appreciate this.

1.3.1 *Examples*

Example 1

John died intestate leaving a widow, Elspeth and two children, Peter and Margaret.

Comment

Under the existing intestacy rules, Elspeth, Peter and Margaret will each receive one third of the estate.

Since we know nothing of the circumstances of Elspeth, Peter or Margaret, we might wish to suspend judgment as to whether the equal division is "fair". We may feel the need for more facts as in Examples 2 and 3.

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5 Holdsworth *History of English Law* Vol.3 p.561.

Example 2 - facts added to Example 1

Elspeth, John's widow, left him soon after they were married, thirty years before he died. They never divorced. John lived in a relationship with Catherine which lasted for twenty-five years until his death. She survived him. Peter and Margaret are the children of John and Catherine.

Comment

Under the existing intestacy rules Elspeth is entitled to one third of the estate, since she is still John's wife.[6] Catherine will take nothing. An attempt is made, in the recommendations which follow, to dispense better justice for people in Catherine's position.

Example 3 - different facts added to Example 1

Elspeth, John's widow, who is some thirty years younger than John, had married him only three months before he died, at a time when it was clear that he was in the last stage of his life. Elspeth was a wealthy woman, having inherited money from three previous wealthy husbands all of whom she had married in their old age. Peter and Margaret are the children of John's first wife, who died three years ago. Margaret is financially secure but Peter has a severe intellectual disability and his parents always cared for him.

Comment

Under the present rules Elspeth will still take one third of the estate.[7] The estate might be insufficient to enable Peter to be properly looked after, if Elspeth's share is taken from it. Peter could make an application for "family provision" under Part IV of the *Succession Act 1981* so that he gets adquate provision from his father's estate.[8]

Example 4 - a different example

Pablo died intestate. He was married to Anna, but they had no children. His only relative is a sister, Alicia, a member of a religious order living in Spain. They had not seen each other for forty years, but always exchanged Christmas cards.

Comment

The present intestacy rules give Anna the first $50,000 of Pablo's estate and half the rest. Alicia is entitled to the other half.[9] No doubt Anna would consider the intestacy rules to be "unjust", particularly if the only major asset of the estate is the family home, worth $150,000, in which she lived with her husband for many years and which she is now obliged to sell. In the Commission's recommendations which follow, Anna would not have to sell the family home.

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6 Distribution of John's estate will be in accordance with *Succession Act 1981*, Schedule 2, Part I, item 2. See Appendix 2.

7 Ibid.

8 See para. 1.5 and Appendix 2.

9 *Succession Act 1981*, Schedule 2, Part I, item 3. See Appendix 2.

Example 5

Angela, aged 17, was killed in a car crash. An insurance policy she had taken out when she was 16 paid $30,000 to her estate. She was an only child, survived by both her parents. Her father, however, had deserted her mother when Angela was 7, in blameworthy circumstances. Angela had never seen him since.

Comment

Both parents are entitled to Angela's estate. She died intestate because at 17 she was too young to have made a will. Angela's mother is critical of a law which deprives her of half of Angela's estate. If Angela had been 18, the solution would have been for her to have made a will in favour of her mother.

These examples, which could be multiplied indefinitely, demonstrate that intestacy rules cannot differentiate between the deserving and the undeserving.

1.4 *The usual application of intestacy rules*

The average age for deaths amongst males in Australia, in 1991, was 72.2; and for women, 78.8 years.[10] The intestacy rules would operate, primarily, in relation to this older age group and this fact has strongly influenced the Commission in its recommendations. A surviving spouse will most probably be in that age group and retired. Any children of the intestate and the spouse will most probably be mature rather than young adults or infants. The parents of the intestate will most probably already be dead. It is difficult to include the case where an intestate dies leaving more than one spouse, as Examples 2 and 3 in para. 1.3.1 illustrate.

1.5 *Relief in cases of unfairness - "family provision"*

Queensland is advantaged in having a statutory mechanism, called "family provision".[11] The mechanism applies if adequate provision has not been made from a deceased person's estate[12] for the proper maintenance and support of his or her spouse, child or dependants. In such cases the court may, in its discretion, order that such provision as the court thinks fit be made out of the estate for the

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10 Australian Bureau of Statistics' Publication *Deaths, Australia, 1991* (Cat. No. 3302.0) at p.1.

11 *Succession Act 1981*, Part IV. See Appendix 2.

12 Either as a consequence of the terms of a will or of the operation of the intestacy rules.

spouse, child or dependant.[13]

1.6 *Changing patterns of family wealth*[14]

1.6.1 *Changing forms of wealth*

There have been significant changes in the form of wealth and the patterns of family wealth in Australia in the last century. A hundred years ago where family wealth existed, it was likely to consist of a small-holding or business. The entire family might have cleared and cultivated land, built a home on it, and made a living by the land. A family business would have been built up in a similar way. It was essential, in that context, that the business, including any home forming part of it, should remain in the family. Today, although family businesses still exist which provide careers for the future for members of the family, private wealth in Australia has become increasingly diversified. The corporatising of private investment represents one major shift in the patterns of wealth. Individual Australians may participate in the corporatised wealth of Australia by owning shares in public companies. The advantage of this form of wealth is that it is readily realisable. A shareholder knows the daily trading price of any shares she or he may own because the stock market publishes daily price lists and performs an efficient service in bringing buyers and sellers together. Such forms of wealth are individualistic rather than family-oriented.

1.6.2 *Changing attitudes towards education*

In earlier times specialised education, apart from higher education available only to a minority, would often consist of training by the parents in the skills and knowledge of the business they had built up by a life-time's effort or, in trades, by apprenticeship at work.

The object of such education was to enable the sons to remain and succeed in the business known to their parents, or to acquire a narrow manual work skill. Nowadays, education has become far more specialised and technical. Technical education is seen as playing an increasing role as a provider of employment and has changed public attitudes towards the need for, and specific content of, education. Australian society recognises the need to educate both its young men

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[13] Subject to the court's determination that it is proper for a dependant to be provided for, having regard to the extent to which the dependant had been maintained and supported by the deceased, the need for the continuation of that maintenance and support, and the circumstances of the case.

[14] See J.H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission* (1988) 86 Michigan Law Review 722, for a detailed analysis of changes in the pattern of family wealth in the USA over the last century. Broadly speaking, similar changes have occurred in Australia.

and women in individual and independent, portable skills, geared to serve the needs of the public and private sectors. This is demonstrated by the amount of money devoted to education in Australia. In the Australian Bureau of Statistics publication *Education and Training in Australia 1990*[15] it is stated:

> "Section 5.2 Education Funding Overview
>
> In the 1989-90 financial year, expenditure on education in Australia by government and private sectors totalled an estimated $19.7 billion. Ninety-one per cent of this amount came from the government sector, with private sources contributing the remaining 9 per cent. While the proportion of outlay on education by the private sector is relatively small, it has increased steadily since 1984-5, when it was 6 per cent ..."

Public expenditure on education is necessarily incurred at the taxpayer's expense. Private expenditure on education is an additional investment which parents make in their children's future. According to the *Australian Scholarship Group*,[16] parents with a child starting school in 1993 will pay out $60,000 on education by the time the student completes Year 12. Parents who opt for private secondary schooling will pay out $85,224, including $52,000 in school fees. The figures quoted reflect a realisation, both public and private, of the need to educate in the modern world, and of the fact that education is more likely than the lack of it to ensure employability and is something which, unlike inherited wealth, cannot be dissipated or stolen. Education may reduce the need for inherited wealth and its cost reduces the taxpayer's ability to accumulate private, inheritable savings.

1.6.3 *Pensions*

Entitlement to a pension, whether age pension or a pension under a superannuation fund, is another phenomenon of the changing pattern of wealth in Australia which has the effect of reducing the significance of inheritance laws and the expectation of inheritance by succeeding generations. The momentum for making provision for superannuation has gathered pace during the last ten years. Faced by the realisation that there would not otherwise be sufficient public moneys available to meet the financial needs of an ageing population, participation in a national superannuation scheme has recently become compulsory for virtually all Australian employees. The existence of superannuation funds encourages contributors who would otherwise expect to become financially dependent on the State to save. Contributors reduce their capacity and their need to save for old age by other means. It is expected that hundreds of billions of dollars will be

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15 Cat. No. 4224.0 at p.162.

16 *Your Child's Secondary Education Checklist of Main Costs with Year by Year Estimates to the Year 2014.*

accumulated in Australian superannuation funds by the end of the century.[17] However, to the extent that pensioners (contributors) will become entitled to receive annuities[18] rather than lump sums, superannuation entitlements, significant in amount though they may well become, cannot be seen as a form of inheritable wealth.

1.7 *The family home*

The growth of private home ownership in Australia is a significant development in the character of family wealth. Many Australians hope to be able to own their own home and the availability of loans on mortgage has brought such ownership within the means of families who fifty or sixty years ago could not have contemplated it.

Probably no item of property is considered to be "family" wealth more than the home and its contents. A home-owner who makes a will usually gives careful consideration to the question of who should inherit the home. It is understood that in the majority of cases a person who makes a will (testator) will leave his or her house, or share therein, to a surviving spouse. Intestacy rules must address the question of how the average testator would dispose of the family home if he or she made a will. But there are difficulties. A home may also be an integral part of a family business, for example, where the home and a retail store run by the family both form part of the same premises, or where the home is the residence for persons working in a substantial family business such as the homestead of a farming or grazing property. If ownership of the business and the home were to be separated as a result of the death of the owner, the viability and value of the business might be jeopardised. Of course there may be no privately owned family home. A family home might have been sold by the owner not long before her or his death and the family might be living temporarily in rented accommodation or living in a retirement village. Whether or not there is a family home, it is vital for a surviving spouse to have a roof over his or her head.

1.8 *Joint tenancy and joint account*

It is very common for couples to purchase the family home as joint tenants.[19]

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17 According to an Australian Treasury media release called *Security in Retirement, Planning For Tomorrow Today* (30 June 1992 at p.4), by the year 2002 $2.56 billion a year will be added to Australia's national savings. The figure of $600 billion invested in superannuation funds by the year 2000 is suggested from time to time in press reports (e.g. *Australian Financial Review* 22 October 1992 at p.3 "*Rule reform will make super safer*").

18 An "annuity" is a yearly payment of a certain sum of money. A lump sum is a one-off payment of capital and interest.

19 Sometimes spouses purchase a property as tenants-in-common. The will of one partner could transfer her or his share in such a property to someone other than the spouse.

This means that on the death of the first to die the legal title to the home passes automatically to the survivor by the legal doctrine of survivorship. It does not form part of the estate of the deceased owner and cannot therefore be affected by any will the owner has made or by intestacy rules. The practice is common where a married couple buy a home after marriage or, if unmarried, buy a home to live in together. The device is a convenient method of distributing property because it does not matter if the first of the couple to die has made a will or not. There is no doubt as to the right of the survivor and legal costs involved are minimal. It is a highly efficient mechanism for distributing property upon death without having to resort to the technicalities of succession law. Many couples adopt the same device with respect to a bank account. If a bank account is held jointly by a couple, when one dies the other can continue to operate the account. On the other hand, if a sole owner of a home or bank account dies, any executor appointed by the will may be required to produce probate of the will, that is, a court document which is issued after the court has scrutinised the will. The document authenticates the will and the authority of the executor to act. If there is no executor, an administrator may have to be appointed by the court. Both these formalities can be costly and lead to delays in settling the deceased's estate.

1.9 *Disputes and costs*

In theory, legal rules should strive to do justice. However, this is particularly difficult when faced by the dilemma of choosing between recommending rule X, which is fair in the majority of cases, easy to understand and cheap to implement, and recommending rule Y which may be fairer but more difficult to understand and costly to apply. In the case of deceased estates, most are small in amount and have very limited resources to bear the legal costs of resolving a serious dispute. A dispute over an estate of less than $10,000 might result in legal costs exhausting the whole of it. The Commission has paid attention to the view that it is better for one rather more deserving person to inherit without the possibility of conflict than for hopes to be held out to two or more persons, some more deserving than the other or others. Where there is the likelihood of great conflict amongst potential beneficiaries the resolution of such conflict might exhaust all or a large part of the estate. Nevertheless, this is a very difficult matter, by no means confined to succession law, and there are no easy solutions.

1.10 *The importance of making a will*

As has already been mentioned, intestacy rules cannot do justice in every case. They cannot distinguish between the deserving spouse and the undeserving spouse, or the loyal child and the neglectful child. They are necessarily confined to assumptions of standard family composition and conduct. The solution to many of the problems which are caused by special cases is the making of a will.

Nevertheless, although there are no available statistics, it is estimated that as many as half the adult population never get around to making a will. They may feel unable to face some difficult decision. They may feel their estate is too small to warrant making a will. Some may fear that it is too costly, or that it is something to be put off until the last minute. Some may feel that they would prefer the law to do it for them. A major purpose of intestacy rules must be to make the sort of will the average person would be likely to make if he or she got around to it. The Commission recommends that the intestacy rules should have the effect of a statutory will. Certain practical benefits flow from this approach.[20]

1.11 *Vesting and practice*

Where an executor is appointed by will, the estate vests in the executor who has, by force of the will, full authority to act in the administration of the estate.[21] Where there is no duly appointed executor, the estate vests in the Public Trustee.[22] An interested person must apply to the court for Letters of Administration which have the effect of divesting the authority to act from the Public Trustee and vesting it in the interested person as administrator. This procedure is more technical and costly than is the case where an executor is appointed by a will.

1.12 *The Commission's recommendations*

In this Report, the Commission recommends the replacement of Part III of the *Succession Act 1981* - "Distribution on Intestacy" - with a new Part III, the provisions of which are set out in Chapter 9. The new provisions, if enacted, will create a statutory will for people who die either not having made a will at all, or having made a will which does not cover all their property. The draft legislation in Chapter 9 was prepared by the Office of Parliamentary Counsel in consultation with the Law Reform Commission.

Some of the particular recommendations of the Commission which are included in the draft legislation in Chapter 9 are:

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20 See Ch.7, below.

21 Ss.45(1), 49 *Succession Act 1981*. See Appendix 2.

22 S.45 *Succession Act 1981*. See Appendix 2.

- If the intestate is survived by a spouse and no issue, the spouse should receive the whole of the intestate's residuary estate.[23]

- Where the intestate is survived by a spouse and by issue the spouse should first receive from the estate, where the estate is large enough:

(a) the personal property of the intestate;[24] and

(b) a legacy of $100,000;[25] and

(c) the matrimonial home;[26] and

(d) a sum of money, not exceeding $150,000, sufficient to discharge the capital and interest owing at the date of the death on any mortgage of the matrimonial home;[27] and

(e) if there is no matrimonial home forming part of the estate, or vested in the intestate and the spouse as joint tenants which passed on the death of the intestate beneficially to the spouse, a further statutory legacy of $150,000;[28]

(f) if the intestate's interest in the matrimonial home is not held in fee simple, then the surviving spouse is entitled to either that interest or the statutory legacy referred to in (e);[29]

(g) If there is more than one matrimonial home forming part of the estate then the spouse must elect which one he or she will take;[30] and

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23 S.37E draft legislation, Ch. 9.

24 S.37H(1)(a) draft legislation, Ch.9.

25 S.37H(1)(c) draft legislation, Ch.9.

26 S.37H(1)(b) draft legislation, Ch.9.

27 Ss.35S, 35T, 35U, 37H(1)(b) draft legislation, Ch.9.

28 S.35R draft legislation, Ch.9.

29 S.35Q draft legislation, Ch.9.

30 Ss.35O, 35P, 35Q draft legislation, Ch.9.

(h) 50% of the balance.[31]

The issue should receive the other 50% of the balance;[32]

- Where the estate is not large enough for the spouse to receive a full entitlement under (a) - (f) then the spouse should receive as much of the estate as is available to satisfy these entitlements;

- A married spouse should only be disqualified from benefiting under an intestacy where there is a qualified de facto partner who at the intestate's death has lived with the intestate for at least 5 years and the intestate and the married spouse had not lived together for any period during the five years preceding the death of the intestate;[33]

- Where there is a married spouse and more than one de facto partner, only the married spouse should benefit under the intestacy rules;[34]

- Where there is no married spouse but a number of de facto partners, none of the de facto partners should benefit under the intestacy rules;[35]

- A statutory beneficiary (surviving spouse and/or issue or next of kin) should not be required to account for any benefits received under any will made by the intestate or under any gift or entitlement received from the intestate during the intestate's life-time or payable on the intestate's death;[36]

- A surviving spouse should only have to share in the distribution of an intestate's estate with issue of the intestate;[37]

- Issue of the intestate should take under a *per stirpes* distribution;[38]

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31 Cl.37H(1)(d) draft legislation, Ch.9.

32 S.37H(2) draft legislation, Ch. 9.

33 Ss.35C and 35E draft legislation, Ch.9. A de facto partner may also be 'qualified' if he or she is a parent of the intestate's child. (S.35C draft legislation, Ch.9.)

34 S.35F draft legislation, Ch.9.

35 S.35G draft legislation, Ch.9.

36 S.37B draft legislation, Ch.9.

37 S.37H draft legislation, Ch.9.

38 Subdivision G, Division 3 draft legislation, Ch.9. See para 3.1 below for discussion of "per stirpes".

- The payment of debts and benefits from an intestate's solvent estate should be in accordance with the *Succession Act 1981* provisions relating to the payment of debts and pecuniary benefits from an estate distributed under a will;[39]

- The spouse and others entitled to share the estate of the intestate should have all the rights, powers and duties of executors of the intestate and the estate should vest directly in them upon the death so that they can immediately embark upon their duties with full authority.[40]

1.13 *Aboriginal and Torres Strait Islander customary law*

In its Working Paper[41] the Commission stated that it had initiated enquiries concerning the extent to which relationships recognised by Aboriginal and Torres Strait Islander customary law should be recognised by intestacy rules.

Responses received have caused the Commission to approach this area with caution and to refrain from recommending legislative recognition of customary laws by the intestacy rules, at least at this time. The responses pointed out:

(1) Knowledge of Aboriginal and Torres Strait Islander customary law is incomplete and fragmented. It would therefore be insufficient for the Commission to make any confident recommendation concerning its integration with existing succession law. The Commission has neither the resources nor the brief to make sufficient enquiries to bring it to a point where it could make reasoned, substantive recommendations. As the Department of Family Services and Aboriginal and Islander Affairs has recognised, the task of identifying what the customary laws are, may be daunting:[42]

> "In addressing customary law recognition, detailed information on customary practices is required and a range of legal and social issues arise for resolution. Where an issue has not otherwise been addressed, direct community consultation will usually be required. This Department is in a position to flag issues, but cannot purport

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39 Cl.10 (amending s.59 *Succession Act 1981*) draft legislation, Ch.9.

40 Subdivision B, Division 4, ss.37F, 37I, 37L, 37P, 37S draft legislation, Ch.9.

41 Queensland Law Reform Commission, *Intestacy Rules*, Working Paper No. 37, July 1992 (hereinafter referred to as the "Working Paper") at p.22.

42 Letter to the Commission from Policy Co-ordinator, Rights, Law and Justice Section, Department of Family Services and Aboriginal and Islander Affairs, 4 February 1993.

> to adequately represent the views of Aboriginal and Torres Strait Islander people in Queensland in this regard without itself undertaking consultation.
>
> Nevertheless, it would not seem practical to engage in separate consultation programs on a range of customary law issues. It may be that the need for consultation can best be addressed by a more comprehensive consultative exercise. This Division would be interested in facilitating and possibly participating in any such initiatives."

(2) Even if a great deal more were known about Aboriginal and Torres Strait Islander customary law it would still be necessary for the Commission to consult widely with representatives of Aboriginal and Torres Strait Islander groups. The Commission has neither the brief nor the resources to initiate and carry through wide consultations.

(3) The question of Aboriginal and Torres Strait Islander customary law is broader than the question of succession laws. In due course customary law may have to be considered in relation to a wide variety of legal issues, including other issues with which the Law Reform Commission is already occupied, such as De Facto Relationships and Decision-making for People with an Intellectual Disability.

The study of customary law for one area of proposed law reform will not necessarily be relevant to other law reform proposals. The impact of Federal law would also have to be considered.

Until extensive work has been done to bring knowledge of customary law clearly into focus and widespread consultation has been initiated and brought to fruition, the Commission is of the view that it could be counter-productive, even misleading, to introduce legislation at the present time purporting to affect customary law, or to recognise it, in the narrow context of intestacy rules.

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Chapter 2 - The Rights of the Spouse

2.1 *Introduction*

At present Queensland intestacy rules require a surviving spouse to share one half or one third of the residuary estate[43] of an intestate with any issue of the intestate: one half if there is only one child, or the issue of only one child, and one third if there is more than one child, or the issue of more than one child.[44] The issue take the remainder. Queensland is the only State in Australia that requires this. All other States and Territories give the surviving spouse exclusive rights to substantial parts of the estate.

In its Working Paper the Commission recommended that the spouse should take the entire estate of the intestate, even where there were issue surviving, unless there were issue who were not issue of the surviving spouse in which case it was recommended that the spouse should take $500,000 and half the residue and the issue, not being issue of the spouse, should take the remainder.[45]

These recommendations were acceptable to some respondents to the Working Paper but not to others. In particular, the Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council), both entities with extensive experience in administering deceased estates, indicated that they considered that this might be too generous to the spouse in the case of larger estates. They both proposed that the rights of the spouse be spelt out in greater detail. Their proposals are set out in paragraphs 2.7.1 and 2.7.2. Except in the case of larger estates, there is no practical difference between the proposals of the Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council) and the recommendation of the Commission in its Working Paper.

The existing rules also require the surviving spouse where there are no children or grandchildren, to share the intestate's estate with the parents, or brothers, sisters, nephews and nieces of the intestate.[46] The spouse is entitled to the first $50,000

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43 This means the estate remaining after debts have been paid and, if there is a will affecting part of the estate only, the legacies payable under that will.

44 *Succession Act 1981*, Schedule 2, item 2. See Appendix 2.

45 The Working Paper para 3.4 and proposed rules 1(a) and 1(b) p.25.

46 *Succession Act 1981*, Schedule 2, item 3. See Appendix 2.

of the estate and one half of the residue.[47] The other half of the residue goes to the parents or, if there are no parents, the brothers and sisters or the children of any brother or sister who has died before the intestate. The Commission, in its Working Paper, recommended that the spouse should not have to share with parents, brothers, sisters, nephews or nieces. None of the respondents to the Working Paper objected to that recommendation and those who referred to it approved of it.

2.2 *The definition of spouse*

Until this century, divorce was virtually impossible for ordinary people. Marriage was generally for life whilst second and third marriages were for widowers and widows only. The accessibility of divorce to Australians, particularly since the passage of the *Family Law Act 1975*, has had a considerable effect on expectations of marriage.

The Australian Bureau of Statistics has observed:[48]

> "At 30 June 1991, the estimated resident population of Australia aged 15 years and over (13,561,400) comprised 4,092,400 never married, 7,885,800 currently married, 844,300 widowed and 738,800 divorced persons. During 1990-91 the divorced population showed the highest percentage increase, rising by 4.8 per cent (34,000)."

At the same time, attitudes towards the importance of the formality of marriage have also changed. These changes of expectations and attitude are already reflected in Queensland's succession laws.

In the 1970's all Australian States conferred on ex-nuptial children the same inheritance rights as those enjoyed by children of a marriage.[49]

Since 1981 the dissolution or annulment of the marriage of a testator revokes any beneficial disposition of property made by the testator's will in favour of a spouse as well as any appointment made by the testator's will of a spouse as executor, trustee, advisory trustee or guardian.[50] A divorced spouse does not benefit from the estate of the intestate pursuant to the intestacy rules and can therefore take

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47 See Example 4 in para 1.3.1 above.

48 Australian Bureau of Statistics *Estimated Resident Population by Marital Status, Age and Sex, Australia June 1990 and Preliminary June 1991*, Cat. No. 3220.0.

49 *Status of Children Act 1978* (Qld).

50 S.18 *Succession Act 1981*. See Appendix 2.

nothing on the death intestate of the former spouse.

2.2.1 *De facto partners*

The *Succession Act 1981* already recognises the fact that many couples do not participate in a formal marriage ceremony by including in that part of the Act dealing with Family Provision, within the definition of "dependant" in relation to a deceased person, whether testate or intestate, the following:[51]

> "(b) the parent of a surviving child under the age of eighteen years of the deceased person; ...
>
> (d) a person who -
>
> (i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or
>
> (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person."

It does not follow that people who decide to live together without taking the formal step of getting married lack commitment or should be exempt from any duties or obligations to each other. Until recently, the law would not recognise the de facto relationship or any issue of it. Now it does. The duties and obligations of de facto couples who have lived together for a certain period of time are now seen as similar to those of couples who have taken the formal step of marriage. Indeed, access to the law has been facilitated for de facto couples in New South Wales, Victoria, South Australia and the Northern Territory by specific legislation.[52] The Queensland Law Reform Commission is giving this matter consideration in its De Facto Relationships reference.[53]

The proportion of persons marrying has declined over the past 20 years. The decrease in the number of first marriages is particularly noticeable. In 1971, for every 1000 men who had never married, 78 married during that year. By 1986,

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[51] S.40 *Succession Act 1981*, See Appendix 2.

[52] See e.g. the *De Facto Relationships Act 1984* (N.S.W.), the *Property Law (Amendment) Act 1987* (Vic), the *Family Relationships Act 1975* (SA), Part III and the *De Facto Relationships Act 1991* (NT).

[53] Queensland Law Reform Commission Working Paper No. 40 *De Facto Relationships*, 2 September 1992.

only 42 per 1000 of such men married during that year. For women, the rate was 112 per 1000 in 1971. This had almost halved to 57 per 1000 in 1986. The decline in the number of marriages in the younger age groups has been partially offset by the increased tendency for young persons to live together.

In 1991, approximately 59,750 or 9.6 per cent of all couples in Queensland were living in a de facto relationship,[54] compared with 8.1 per cent for Australia.[55]

Women enter relationships at an earlier age than males. Of females aged 15 to 19 years in 1986, 5.8 per cent (6,238) were living as member of a couple, compared with 1.4 per cent (1,578) of males of the same age.[56]

Further statistics are available concerning the incidence of ex-nuptial births. The number of ex-nuptial births registered in Queensland in 1990 was 11,397. In 8,222 of those births the father acknowledged paternity. Nuptial births registered for the same year were 33,471.[57]

2.2.2 *Homosexual couples*

Intestacy laws should not deny homosexual couples the same rights upon the death intestate of a partner to such a relationship as have been proposed for parties to a de facto heterosexual relationship. Participating in a homosexual sexual relationship is no longer a criminal activity.[58] Discrimination in work, education and accommodation on the ground of "lawful sexual activity", which would now include sexual activity within a homosexual relationship, is prohibited in Queensland.[59] Most recently, the Australian Defence Force policy which stated that

> "when a member [of the ADF] admits to or is proven to be involved in homosexual conduct, consideration is to be given to the termination of that member's service"

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54 Australian Bureau of Statistics, *1991 Census of Population and Housing* Cat.No.2722.3.

55 Australian Bureau of Statistics, *1991 Census of Population and Housing* Cat.No.2722.0.

56 *Queensland Families, Facts and Figures 1989*, a publication of the Department of Family Services Queensland, and the Australian Bureau of Statistics.

57 Australian Bureau of Statistics, *1990 Births Australia*, Cat. No.3301.0.

58 *The Criminal Code and Another Act Amendment Act 1990*, s.7 repealing s.211 of the *Criminal Code*. The only jurisdiction in Australia which has not decriminalised homosexual behaviour is Tasmania. Arguments for and against decriminalisation of homosexual sexual behaviour were canvassed in the Criminal Justice Commission (Qld) Information Paper on *Reforms in Laws Relating to Homosexuality*, May 1990.

59 S.7(1) *Anti-Discrimination Act 1991* (Qld).

has been revoked.[60]

Australia has declared 'sexual preference' as a ground of discrimination for the purposes of the *Discrimination (Employment and Occupation) Convention*.[61]

Equitable principles applied in the area of constructive trusts, which have long been invoked in the settlement of property disputes between married and heterosexual de facto couples, have been applied in the case of homosexual couples.[62]

The needs of a surviving partner of a homosexual couple are the same as those of a married or de facto spouse.

The arguments in support of granting partners in de facto heterosexual couples rights upon intestacy apply with equal force to the granting of such rights to partners in homosexual couples. Hereafter, the term "de facto couple" will refer to both heterosexual and homosexual couples. "De facto partner" will refer to heterosexual and homosexual partners within "de facto couples".[63]

2.3 *The present position of de facto couples*

De facto couples are given no rights upon intestacy in Queensland. At best, the survivor of a heterosexual de facto relationship is relegated to the position of a "dependant" making application for family provision.[64] The consequence of this is

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60 The policy on *Unacceptable Sexual Behaviour by Members of the Australian Defence Force* (DI(G) Pers. Ins. 35-3) is now in force and states: " ... the Australian Defence Force has no concern with the sexual activities of its members, provided they are not unlawful and not contrary to or inconsistent with the inherent requirements of the ADF."

61 *Human Rights and Equal Opportunity Commission Regulations* proclaimed 21 December 1989, effective from 1 January 1990.

62 See the case of *Harmer v Pearson* (unreported) Court of Appeal, Supreme Court of Queensland, 22 February 1993, No. 147. The President and Justices Pincus and de Jersey dismissed an appeal from the District Court in which it was declared that certain property of which the parties were registered as proprietors as joint tenants was beneficially held by the respondent and the appellant as tenants-in-common in the shares of 88.18% and 11.82% respectively (representing the amounts contributed by each party to the purchase of the property).

63 The Law Reform Commission's Working Paper No. 40, *De Facto Relationships*, September 1992 included a draft *De Facto Relationships Act* (Appendix F of the Working Paper). Clause 1.5 of the draft Act defines "*de facto partner*" so as to include heterosexual and homosexual couples:

> "*de facto partner* means a person who -
>
> (a) is living or has lived with another person whether or not of the same gender on a bona fide domestic basis but is not legally married to the other person."

Partners in a homosexual couple may be covered by the definition of "*dependant*" in the Family Provision part of the *Succession Act* 1981 (s.40, para (d) under the definition. See Appendix 2) if the term "*connubial*" were replaced by a gender neutral term.

64 *Succession Act 1981* Part IV. See Appendix 2.

that an application or threat of it is likely in every case where an intestate leaves a surviving de facto partner. Since the costs of such an application are normally ordered to be borne by the estate, the de facto partner will not usually be deterred from making an application by that factor.[65]

If the de facto partner has had children to the intestate, the children will be entitled to share the estate; if the intestate has no other children (and no surviving married spouse) they will be entitled to the entire estate. Further, if the children are infants, the estate may well fall to be administered by the Public Trustee. The Public Trustee might also be a participant in any family provision application made by the parent, with inevitable administrative costs. It is hardly fair that intestacy rules should make provision from the intestate's estate for a child of the intestate but not the surviving parent of the child who lived with the intestate at the time of death.

There is a clear case for giving the de facto partner rights upon intestacy similar to those enjoyed by the married partner. To deny intestacy rights to de facto partners may in some cases mean that the survivor is left dependent on social security and family charity for the remainder of her or his life.

The Commission's draft legislation in Chapter 9, below, does not give the de facto partner the same rights as the married partner: there is the additional requirement of duration and the relationship must still be in existence at the date of the intestate's death. In the case of marriage, however, inheritance rights are gained by each partner immediately upon marriage, and are lost only by divorce or by a contrary intention expressed in a valid will. A married couple may have separated and seen nothing of each other for many years but never obtained a divorce. However, if one dies intestate the survivor is fully entitled as a legal spouse under current law. Marriage automatically results in a legally recognised status, whereas any rights conferred on de facto couples require antecedent proof of the fact of the relationship. Proof of the relationship, particularly if it has been kept secret, can be costly and time-consuming. It may require a judicial determination.

2.3.1 *Defining the de facto partner*

The *Succession Act 1981* provides that a person who -

> "(i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or
>
> (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for

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[65] It is estimated that the costs incurred in the making and determination of a family provision application will usually lie in the $10,000 to $15,000 range even in an uncomplicated case.

> periods aggregating five years at least including a period terminating on the death of that deceased person" [emphasis added]

and who shows dependency on the deceased person, may make an application for family provision.[66]

The words "lived in a connubial relationship" are old-fashioned and have not been used in later legislation in other States dealing specifically with the question of the rights of de facto partners. The New South Wales *De Facto Relationships Act 1984* and the Northern Territory *De Facto Relationships Act 1991* use the phrase "live together on a bona fide domestic basis". A similar definition is found in the New South Wales' *Family Provision Act 1982*, at section 6. Also, in its Working Paper on *De Facto Relationships*[67] the Queensland Law Reform Commission proposes a definition of *de facto partner* as follows:

> **"de facto partner"** means a person who -
>
> (a) is living or has lived with another person whether or not of the same gender on a bona fide domestic basis but is not legally married to the other person ...

A revised definition is now proposed for the purposes of the Intestacy Rules in the following terms:[68]

> "An intestate's 'de facto partner' is a person, whether or not of the same gender as the intestate, who at the intestate's death -
>
> (a) lived with the intestate as a member of a couple on a genuine domestic basis and either -
>
> (i) in the 6 years before the intestate's death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least 5 years; or
>
> (ii) is the parent of a child of the intestate who is less than 18 years old; but
>
> (b) was not legally married to the intestate.

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66 Ss.40, 41 *Succession Act 1981*. See Appendix 2.

67 Working Paper No. 40, 1992.

68 S.35C draft legislation, Ch.9.

In New South Wales a body of judicial response to the phrase "lived together on a bona fide domestic basis" and its plain English equivalent "genuine domestic basis" is being built up. For example, in *Simonis v. Perpetual Trustee Co Ltd*[69] Kearney J examined precedents dealing with the definition[70] and said:[71]

> "This approach, as adopted by Powell J, [in *Roy v. Sturgeon* (1986) 11 NSWLR 454] was also the approach preferred by the Administrative Appeals Tribunal in Waterford's case (see at 106). I consider that the factors referred to by Powell J, while not being regarded as a complete test, serve the purpose adequately in the present case to determine the question of eligible person. The factors indicated by Powell J are as follows (at 459):
>
> 1. The duration of the relationship;
> 2. the nature and extent of the common residence;
> 3. whether or not a sexual relationship existed;
> 4. the degree of financial interdependence, and any arrangements for support, between or by the parties;
> 5. the ownership, use and acquisition of property;
> 6. the procreation of children;
> 7. the care and support of children;
> 8. the performance of household duties;
> 9. the degree of mutual commitment and mutual support;
> 10. reputation and 'public' aspects of the relationship."

His Honour also referred to the support to be gained for this approach from the report of the New South Wales Law Reform Commission concerning de facto relationships.[72] His Honour quoted the following passage in the report:[73]

> "17.10. The application of the basic definition to the myriad facets of private personal relationships between men and women will inevitably be a matter of degree and proportion. The attributes and circumstances of such relationships differ greatly, ranging from what is little more than a casual liaison, to a continuing affectionate companionship, to a long-term merging of lives and resources. Moreover, the nature and quality of a particular relationship may change and develop over time, making it sometimes very difficult to pinpoint a time when the

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69 (1990) 21 NSWLR 677.

70 Including:
- *Re Smith and the Secretary to Department of Social Security* (1985) ALN 371
- *Re Sutherland and Secretary to Department of Social Security* (1986) DFC 95-033
- *Waterford v. Director-General of Social Services* (1980) 49 FLR 98, and
- *Weston v. Public Trustee* (1986) 4 NSWLR 407.

71 *Simonis v. Perpetual Trustee Co Ltd* (1990) 21 NSWLR 677 at 685.

72 LRC 36 (1983).

73 Id at 459.

relationship should assume a new legal significance."

The Commission concurs with the approach of the New South Wales Law Reform Commission contained in the above quote and endorses the approach of Powell J and Kearney J in the cases mentioned and quoted earlier as appropriate when considering the meaning of "lived ... on a genuine domestic basis". The convenience of these and other cases considering the phrase is that they provide a body of precedent for Queensland lawyers where that phrase is used in Queensland legislation.

2.3.2 *The duration of the de facto relationship*

In its Working Paper on *Intestacy Rules,* the Commission recommended that two years of living together should be sufficient to qualify a de facto partner to inherit upon the intestacy of a deceased partner.[74] That period was taken from more recent de facto partnership legislation, in particular the New South Wales *De Facto Relationships Act 1984* and the Northern Territory *De Facto Relationships Act 1991.* Two years is also the qualifying period proposed by the Queensland Law Reform Commission in Working Paper No. 40 on *De Facto Relationships.*[75]

There was, nevertheless, some opposition from some respondents to the Working Paper to only a two year qualifying period. To give a de facto partner substantial rights upon the death intestate of a partner is a significant and novel step in law reform. De facto relationships legislation in other jurisdictions[76] is concerned with the resolution of property claims between partners to a de facto relationship who separate whilst alive. Intestacy rules are less flexible and cannot take account of any supposed wishes of the deceased person. By far the most serious problem for the surviving de facto partner is proving the relationship. The factors mentioned by Powell J and quoted above are relevant to proving the existence of the relationship but the longer the relationship has existed, the easier it is to prove. It is particularly difficult after the death of one partner to prove a de facto relationship which has endured only for a brief period.[77]

Another anxiety generated by the proposal that a de facto partner of two years should be recognised by intestacy rules was that so short a qualifying period might attract persons intent upon exploiting an older person, perhaps in declining health.

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74 See draft definition of "spouse", the Working Paper, p.20

75 See clause 3.3(1)(a) of the draft *De Facto Relationships Act* in Appendix F of the Working Paper.

76 See footnote 52 above.

77 See for example, *McKenzie v. Falconer-Brown* [1990] 3 WAR 438.

Moreover, there may be competition between a married spouse of the intestate and a de facto partner with whom the intestate formed a relationship. The Commission has therefore concluded that the present qualifying period of five years, which has been in place since 1981 in relation to Part IV - Family Provision - of the *Succession Act 1981*, and which has not, so far as the Commission is aware, attracted criticism, should be retained as the qualifying period for the right of a de facto partner to inherit upon intestacy. This period is not required where the partner is the parent of a child of the intestate under eighteen years of age and was living on a genuine domestic basis with the intestate at the time of the death.

2.3.3 *Married spouse and de facto partner*

In its Working Paper, the Commission gave consideration to the question of whether, if the intestate were survived by in effect two spouses, a married spouse and a de facto partner, (a) the married spouse should always take; (b) the de facto partner should always take; (c) criteria should be established to evaluate the rights of both the married spouse and the de facto partner; or (d) the married spouse and the de facto partner should share the estate. The Commission concluded that the spouse and the partner should share the estate.[78] There is such a provision in South Australia.[79]

The main reason for reaching that conclusion was that giving both the married spouse and the de facto partner specific rights on intestacy would reduce the likelihood of either of them seeking more by making an application for family provision under Part IV of the *Succession Act 1981*. That would save inevitable delay, acrimony and costs.

Some respondents to the Working Paper expressed concern that the proposal that a spouse and a de facto partner should share would complicate rather than simplify the administration of the estate.

Despite the attraction of the proposal, the Commission has decided not to pursue it because it would lead to practical difficulties. The de facto partner would still have to prove his or her qualification to share the estate. That would often require a judicial determination. On the procedural level a novel difficulty would arise. Ordinarily, Letters of Administration of an intestate estate are granted to the person having the greatest interest. When the grant is made the estate of the deceased is divested from the Public Trustee and vested in the grantee - the administrator. But if a married spouse and a de facto partner were given equal interests, should Letters of Administration be granted to the married spouse rather than the de facto partner, or vice versa? If Letters of Administration were granted to both they might

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78 See paras 6.14 and 6.15 of the Working Paper.

79 S.72(h)(2), *Administration and Probate Act 1919*.

not be prepared to work harmoniously together. Moreover, the proposal becomes difficult to implement in the context of the proposal that the surviving spouse should be entitled to the matrimonial home, the personal property, and sums of money. This is because consideration would then have to be given to the question of who between the married spouse and the de facto partner should inherit the matrimonial home and what compensation should be given to the other person - compensation which the estate might not be sufficient to bear.

Above all, such complications could prove disastrous in terms of costs and delays to the administration of small estates, even if they could be overcome in the case of large estates.

The Commission has therefore come to the conclusion that it should recommend giving rights on intestacy to only one surviving partner. The other partner would remain eligible to make an application for family provision under Part IV of the *Succession Act 1981*. There remains the question of in what circumstances should a de facto partner be recognised in preference to the married spouse.[80]

Example 1

John, aged 55, having been married to Susan, the mother of his three children, for thirty years, announced to her that he intended to extend his Brisbane-based business to Bundaberg. The real reason for this decision was that he had formed a relationship with a younger Bundaberg woman, Kylie. From then on John spent three or four nights most weeks in Bundaberg but the rest of his time in Brisbane where he continued to live in the matrimonial home with Susan. Susan was unaware of the circumstances. This continued for seven years when John died suddenly without leaving a will. It was then that Susan discovered the facts.

Comment

Although this is no doubt a hard case, it is arguable that Susan should be preferred to Kylie, so far as rights on intestacy are concerned. This is because Susan continued to remain in a matrimonial relationship with John and had no opportunity to take stock of that relationship. Their marriage could not be said to have ceased. Kylie has the right to apply for family provision.

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[80] See also Example 2 in para 1.3.1, above.

Example 2

Seven years ago Phyllis, aged 54, announced to her husband Peter, aged 60, that she was leaving him to live with another man, Tony, whom she had met whilst on a holiday. Peter did nothing to formally end the marriage. He remained in the matrimonial home. Phyllis died recently having made no will and having lived with Tony for the last seven years.

Comment

In this case it is arguable that Tony should inherit Phyllis's estate in preference to Peter. This is because Peter is in full possession of the facts and had had ample opportunity to take steps at least to separate from Phyllis and negotiate a financial accommodation. Moreover, the marriage had ceased and the relationship between Phyllis and Tony appeared to have been a committed relationship of substantial duration. Peter can apply for provision under Part IV of the *Succession Act 1981* and if he owned the home as joint tenant with Phyllis, he would take the home by virtue of the doctrine of survivorship.

Example 3

Frank married Heather 45 years ago. They had one child, Patrick. They separated 40 years ago and did not live together again although they did not divorce. For thirty years until his death, Frank lived with Ethel in a de facto relationship. Also living with them were Patrick and Michael, Frank and Ethel's son.[81]

Comment

In this case, it would appear that Ethel should be preferred to Heather on the distribution of the estate on intestacy although under the law as it presently exists Heather would share Frank's property with his children but Ethel would receive nothing.

These examples suggest an answer to the crucial question of in what circumstances should the de facto partner be recognised in preference to the married spouse. In New South Wales the provision is that the married spouse ceases to be entitled to a share on intestacy if the intestate has been in a de facto relationship for a period of two years before the death, and has not lived with the married spouse during that period.[82]

The Commission takes the view that two years is too short a period to warrant the disqualification of a married spouse. It is not fair to expect a deserted married spouse, particularly in the older age group, to come to terms with the fact that the marriage is over and to commence and bring to a conclusion appropriate proceedings, whether for a financial accommodation, separation or divorce, in so short a time. Divorce proceedings cannot even be commenced until the parties have been separated for a year. The existing period of five years which

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81 These facts are based on the facts in *Delehunt v. Carmody* (1986) 161 CLR 464.

82 S.61B(3A), *Wills, Probate and Administration Act 1898*.

Queensland law recognises for the qualification of a de facto partner in Part IV of the *Succession Act 1981* has not, so far as the Law Reform Commission is aware, been criticised. To disqualify a married spouse who has not lived with the intestate for five years before the intestate's death, when linked with the requirement that the intestate and the de facto partner must have lived together for five years (unless the de facto partner has a child of the intestate) ensures that the relationship between the intestate and the de facto partner is of substantial commitment, that the marriage is well and truly over, and that the married spouse has had an opportunity to realise that fact and take appropriate steps.

The Commission therefore recommends that a married spouse should only be disqualified from benefiting on intestacy where there is a qualified de facto partner and the intestate and the married spouse have not lived together for any period during the five years preceding the death of the intestate.[83] The person who is not qualified to take can still apply for provision under Part IV of the *Succession Act 1981*.[84]

2.4 *Multiple relationships*

Where there is a married spouse and more than one de facto partner it would be impossible for intestacy rules to give ascertainable rights to all. Recognition of the married spouse alone reflects the recognition of the legal status which marriage confers.[85]

Even more intractable than the situation of a married spouse and a number of de facto partners is the problem of the person who dies intestate and has a number of de facto partners: the itinerant with "a wife in every port"; or the open polygamist, perhaps with many children. It would be impracticable for intestacy rules to address the variety of needs of more than one de facto partner, and it would be inconsistent to recognise more than one partner in the light of the recommendation that as between a married spouse and a de facto partner, only one should be recognised.[86]

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[83] Ss.35D and 35E draft legislation, Ch.9.

[84] See Appendix 2.

[85] S.35F draft legislation, Ch.9.

[86] S.35G draft legislation, Ch.9.

2.5 *The needs of the partner*

The Commission takes the view that the minimum needs of the surviving partner are a proper consideration in deciding what he or she should inherit from an intestate deceased partner. This is consonant with the policy of Part IV of the Queensland *Succession Act 1981* - "Family Provision" - which allows a surviving partner[87] to apply to the court for provision from the deceased's estate if "in the terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant".[88]

The requirement of the current intestacy rules that the surviving spouse must always share one half or two thirds of the intestate's estate with surviving issue of the intestate pays scant attention to any principle of need. In the case of a very small estate consisting of, perhaps, some items of furniture, a television set, a family car and a modest balance of funds in a bank or savings account, the present rules work great injustice to the spouse and probably to the entire family. If there are adult issue they are entitled to insist that the estate be sold or valued and that they receive their entitlement to the one half or two thirds. This might well leave the spouse with no car and no means to replace it. In the case of a larger estate the main asset of which may be the family home, the same result is probable. The house may have to be sold to enable the issue to receive their one half or two thirds. The spouse may be left without a roof over his or her head. It is no easier if the intestate left infant children. Then the one half or two thirds has to be held on trust for them until they attain majority. In all cases the estate vests in the Public Trustee of Queensland who has to administer these rules.[89] The administration costs in giving effect to these rules in the case of very small estates can exhaust the entire value of the estate. In practice, no doubt, some very small estates are distributed informally,[90] but perhaps, also, in ignorance or disregard of the intestacy rules. But this does not take away the rights of issue to insist on prompt distribution of the assets according to the law.

Family provision cases have necessarily addressed the question of what is adequate provision for the surviving partner. Important decisions of the High Court of Australia in *White v. Barron*[91] and *Goodman v. Windeyer*[92] have been echoed

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87 Children and dependants are also able to apply for family provision.

88 S.41(1) *Succession Act 1981*. See Appendix 2.

89 See para 1.11, above.

90 Note s.54 *Succession Act 1981*. See Appendix 2.

91 (1979) 144 CLR 431.

92 (1980) 144 CLR 490.

in State decisions such as *Luciano v. Rosenblum*[93] where Powell J said:[94]

> "It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies."

Although all decisions in family provision cases are very much governed by the facts of the case, nevertheless the Commission takes the view that the general principles enunciated by Powell J, which expressly exclude special circumstances, as intestacy rules do, offer a proper approach to the question of what is adequate provision for the surviving partner. The death of the first partner to die is not, in the view of the Commission, an appropriate occasion for the irretrievable break-up of the family estate and sale of the family home. It is preferable that that should be delayed, as far as possible, until the death of the surviving partner.

2.5.1 *Intestacy provisions for spouses in other jurisdictions*

In other States and Territories of Australia the spouse is given specific rights in priority to issue. Very briefly these are as follows:

Australian Capital Territory

The *Administration and Probate Act 1929* (6th Schedule) gives the spouse the first $100,000.

New South Wales

The *Wills, Probate and Administration Act 1898* gives the spouse the "household chattels" and the first $100,000. Section 61B(3) of that Act refers not to a sum of money but to a "prescribed amount".[95] That amount is $100,000 at the present time.

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93 (1985) 2 NSWLR 65.

94 Id at 69-70.

95 Prescribing the amount by regulation is a convenient way to "update" the amount periodically - to maintain the true value of the statutory legacy. This has not been used in the draft legislation in Ch.9.

Northern Territory

The *Administration and Probate Act 1980* gives the spouse the "personal chattels"[96] and the first $60,000.[97]

South Australia

The *Administration and Probate Act 1919* gives the spouse the "personal chattels"[98] and the first $10,000.[99]

Tasmania

The *Administration and Probate Act 1935* gives the spouse the first $50,000.[100]

Victoria

The *Administration and Probate Act 1958* gives the spouse the "personal chattels"[101] and the first $50,000.[102] It is understood that a Bill proposing that the sum of $50,000 be raised to $125,000 was presented to the Victorian Parliament but not proceeded with.

Western Australia

The *Administration Act 1903* gives the spouse the "household chattels"[103] and the first $50,000.[104]

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96 Ss.66(2), 67.

97 6th Schedule Part I item 2 para 1(b).

98 S.72h(1).

99 S.72g(b)(i).

100 S.44(3).

101 S.50(2).

102 S.50(2)(a).

103 S.14(1) Table item 1.

104 S.14(1) Table item 2.

New Zealand

The *Administration Act 1969* gives the spouse the personal chattels and the first $50,000.[105]

2.6 *Recent Reports of Law Reform Commissions*

Tasmania, England, Scotland, Hong Kong and South Africa have published Reports on intestacy rules in recent years. In all of these reports the recommendations have been for an increase in the surviving spouse's share of the intestate's estate.

Tasmania

In its Report No. 43 published in 1985 the Tasmanian Law Reform Commission recommended that the spouse should receive an increased statutory legacy of $80,000 (the present legacy is $50,000) and the personal chattels of the deceased. It also recommended that the spouse should have the right to purchase the matrimonial home.

England

The English Law Commission published Report No. 187 entitled *Family Law Distribution on Intestacy* in 1989. It described the existing rights of a spouse, where there are issue of the intestate, at page 3 as follows:

> "9. If there are surviving issue of the deceased, the spouse will receive a statutory legacy of £75,000 [i.e. about A$170,000], the deceased's personal chattels and a life interest in half the residue. The remainder is held on the statutory trusts for the issue who take *per stirpes*."

The Commission observed that there were various defects in this law. Thus:[106]

> "18. First, the statutory legacy is often insufficient to ensure that the surviving spouse is able to remain *in the matrimonial home, even though the estate is otherwise large enough to enable him or her to do so. House values vary considerably in different parts of the country and also rise (or fall) at different rates* ..."

> "20. Secondly, the statutory legacies must from time to time be uprated by statutory instrument. The legacy applicable is that in force at the date of the

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[105] S.77(1)(a)

[106] At pp.5 and 6.

> death. This can lead to gross disparity in the treatment of deaths taking place on either side of the date on which the legacy changed ..."
>
> "22. A further defect of the present rules is that, in places, they are complex and expensive to administer. It must be remembered that many administrators of estates are lay persons who have little previous knowledge and experience of the intestacy rules." (Emphasis added)

The Commission recommended:[107]

> "Provision for the surviving spouse
>
> 28. There seem to us to be only three possible ways in which to ensure that the surviving spouse receives adequate provision: first, for the spouse to receive a greatly increased statutory legacy and a share of any residue; second, for the spouse to receive the home automatically, together with an increased statutory legacy and possibly a share of any residue; and third, for the spouse to receive the whole estate. We have concluded that the solution which will provide the right result in the great majority of cases is for the surviving spouse to receive the whole estate."

The Report continued by showing that there was considerable public opinion favouring the view that the spouse should receive the entire estate.

Scotland

The Scottish Law Commission published its Report No. 124 on *Succession* in 1990. Scottish law differs from English and Australian law because a spouse is automatically entitled to a certain proportion of the deceased estate even if the deceased made a will. But so far as intestacy is concerned the Commission recommended at paragraph 2.7 on page 4:

> "3.(a) Where a person dies intestate survived by a spouse and issue, the spouse should have a right to £100,000 [about A$220,000] or the whole estate if less. Any excess over £100,000 should be divided equally, half to the spouse and half to the issue."

Hong Kong

Some parts of Hong Kong's intestacy rules are based on English law, although Chinese law also has a part to play. In its *Report on Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants* (Topic 15) in 1990, the Commission pointed out that the surviving spouse, where there were also issue, was entitled to HK$50,000 and one half of the residuary

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[107] At p.8.

estate. It observed:[108]

> "8.9 Where a spouse and issue survive, the statutory legacy in England has generally been supposed to be related to the value of an average suburban home, the purpose being that the statutory legacy should extend at least to the value of the matrimonial home. We are of the view that a reasonable basis for calculating an appropriate level for the statutory legacy payable under the Ordinance would be to fix a sum sufficient to allow a surviving spouse in Hong Kong to purchase the average small matrimonial home. The present $50,000 is obviously insufficient for this purpose."

The Report went on to recommend that the spouse should receive a statutory legacy of HK$500,000 (about A$100,000)[109] and that the spouse should in any case take the personal chattels.[110]

South Africa

The South African Law Commission published its Report, *Review of the Law of Succession : Intestate Succession* in 1985. The Commission recommended a relatively less generous provision for the spouse than did the other Commissions. The Commission's recommendations were enacted by section 1(1)(c)(i) of the *Intestate Succession Act 1987*. That section provides that a spouse is to share equally with the intestate's children or receive an amount fixed by the Minister of Justice - whichever is the greater. The amount fixed by the Minister is R125,000 (about A$62,500).[111]

2.7 *Responses to the Commission's Working Paper*

The Commission received a number of responses to its Working Paper, all of which considerably assisted the Commission in formulating its Report. The Commission's recommendation in the Working Paper that the spouse should receive the entire estate differed from that of the English Law Commission because it recommended that in the case where the intestate was survived by issue other than issue of the surviving spouse, the spouse should receive not the whole of the estate but $500,000 plus one half of the residue and the issue, other than issue of the spouse,

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[108] At p.37.

[109] At para 8.11.

[110] At para 8.20.

[111] Notice 483 *Gazette 11188* dated 18 March 1988. Information provided by South African Law Commission 27 January 1993.

should receive the rest.

Several respondents to the Working Paper, however, took issue with the recommendation, expressing the opinion that it was too generous to the spouse and paid insufficient attention to legitimate expectations of issue. Those expressing concern in this regard appear to have been contemplating the case where the surviving spouse was not the parent of the intestate's children. However, none of the respondents argued that the spouse should always have to share with issue, whatever the size of the estate; and all respondents who mentioned the matrimonial home expressed the view that the spouse should be able to continue to reside in it and that the home be given to the spouse as part of his or her share of the estate. The Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council) offered detailed proposals concerning the spouse's rights.

2.7.1 *The Trustee Companies Association of Australia (Queensland Council)*

The Trustee Companies Association of Australia (Queensland Council) observed as follows:

> "It is submitted a surviving spouse should not be obliged to share the matrimonial home and its contents.
>
> Our view is the entitlement of the surviving spouse's 'spouse share' should be:
>
> (a) the matrimonial home
> (b) household furniture, household effects
> (c) family motor vehicle, and
> (d) first charge of $100,000 or if there is no matrimonial home forming part of the estate or passing by survivorship then $250,000.
>
> In arriving at this figure, we formed the view that any lump sum Superannuation monies or other eligible termination payments as defined by the Income Tax Act (funds held in Rollover deposits etc) paid direct to the spouse of an intestate, whether as a lump sum or commutation of a pension benefit, should be taken into account in arriving at the first charge of $100,000 / $250,000."

2.7.2 *The Public Trustee of Queensland*

In its response the Public Trustee of Queensland made the following comments concerning the rights of the surviving spouse:

"If one proceeds from the point that the deceased intestate owes a primary responsibility to make adequate provision for a second spouse the provision of a spouse's share comprising:-

- Matrimonial home
- Household chattels
- Family motor vehicle
- First $100,000
- ½ rest and residue

(The combined value of the first three components in the average value of intestate estates where there is a spouse involved would approximate $250,000)

is considered reasonable.

'Matrimonial home' would need to be defined so as to avoid confusion in situations where the house occupied by the intestate and spouse was on land forming part of a business e.g. a farm.

Issue other than issue of the surviving spouse take the other ½ share of rest and residue.

That the spouse should bring into account realty passing by the doctrine of survivorship and superannuation benefit would be consistent with this viewpoint.

The right of infant issue other than issue of the surviving spouse to make an application for better provision is protected under the Family Provision."

2.7.3 *Comment*

The advantage of the original recommendation of the Commission that the spouse should receive the entire estate or at least the first $500,000 was, and is, that it simplifies the law and eliminates many difficulties and sources of criticism, particularly criticism of the eroding effect of inflation on statutory legacies of a set amount. It is also relatively cost free, because there is no need to incur accounting and valuations expenses. If it seems unfair that issue should inherit nothing on the death of their first parent to die, nevertheless under ordinary circumstances they should not have to wait long for the death of the surviving parent.

On the other hand there are advantages in the proposals of the Public Trustee and Trustee Companies Association (Queensland Council). They spell out a clear, cogent and justifiable policy concerning the rights, based on need, of the surviving spouse, whether that spouse is an only or a later spouse. This policy is consistent with the discernible policy of the courts in dealing with "usual" family provision applications and of the practice of many spouses who do make wills. The enunciation in clear terms of the policy basis of the legislation may have the beneficial effect of clarifying expectations and of reducing family provision applications in the case of intestacy. The proposals are also flexible in the sense

that in a more affluent estate the value of the home and personal property is likely to be more than in the case of a poorer estate. This is preferable to the statutory legacy of a fixed amount. A further advantage is that it implicitly deals with the problem of making separate provision for issue of the intestate who are not issue of the surviving spouse. Since the provisions are directed to the needs of the spouse there is no particular reason for differentiating between issue of the intestate, so far as the division of the rest and residue of the estate is concerned.

In the great majority of cases, there is no difference in outcome between the original recommendation of the Commission and the proposals which it has now had the opportunity of considering. As the Public Trustee has said:

> "Thirty percent of the population are virtually without assets. Thus the possibility of inheriting wealth is exceedingly remote for perhaps 50% of the population."

For those estates which come within the limits of the statutory legacies proposed by the Public Trustee and the Trustee Companies Association of Australia (Queensland Council), therefore, the spouse will always take the entire estate. But in the case of larger estates the proposals make explicit the public policy principles underlying the rules. This policy was implicit in the Commission's original recommendations. Where a person's view of what is desirable in her or his circumstances differs from these principles, the solution is simple - the person should make a will, taking into account the special needs of the persons to whom he or she considers any moral obligations are owed.

2.8 *The Commission's proposal for spouse's entitlement where there are issue of the intestate*

2.8.1 *What the spouse should receive*

The Commission has carefully considered the views of respondents concerning what provision should be made for the surviving spouse. It recognises a concern with the possibility that "family" property could pass to a person or persons who are not "family" members. This concern is particularly acute where the surviving spouse is not the parent of the intestate's children, i.e. a second spouse. The step-parent may still be seen as a threat to the legitimate expectations of children. Even if the surviving spouse is the parent of children of the intestate, there may still be anxiety on the part of the children that the parent may remarry and leave the inherited estate away from the children. The relatively ungenerous provisions which intestacy rules make for surviving spouses very possibly reflect these concerns, as

may the fact that a significant majority of surviving spouses are women[112] who have traditionally been discriminated against in succession law.[113]

The respondents whose proposals have been referred to, take a more generous view of the entitlement of a surviving spouse than is taken by the intestacy rules of other Australian States and Territories inasmuch as they propose that the spouse should be entitled to the matrimonial home in addition to the personal effects, a statutory legacy and one half of the residue.

Taking these submissions into account, the Commission now recommends that the surviving spouse should receive:

(a) the personal property of the intestate;[114] and

(b) a statutory legacy of $100,000;[115] and

(c) the matrimonial home;[116] and

(d) a sum of money, not exceeding $150,000, sufficient to discharge the capital and interest owing at the date of the death on any mortgage of the matrimonial home;[117] and

(e) if there is no matrimonial home forming part of the estate, or vested in the intestate and the spouse as joint tenants which passed on the death of the intestate beneficially to the spouse, a further statutory legacy of $150,000;[118]

(f) if the intestate's interest in the matrimonial home is not held in absolute fee simple, then the surviving spouse is entitled to either that interest or the statutory legacy referred to in (e), above

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[112] According to the Australian Bureau of Statistics Publication, (Cat. No.3220.0 dated 6 February 1992) *Estimated Population by Marital Status, Age and Sex, in Australia June 1990 and Preliminary June 1991* (at p.1): 8.6% of men between 65 and 74 years were widowers, but 34.2% of women in that age group were widows; 20.2% of men between 75 and 84 years of age were widowers, but 57.8% of women in that age group were widows; and 38.2% of men aged 84 and over were widowers but 72.9% of women in that age group were widows.

[113] See para 1.2 above.

[114] S.37H(1)(a) draft legislation, Ch.9.

[115] S.37H(1)(c) draft legislation, Ch. 9.

[116] S.37H(1)(b) draft legislation, Ch.9.

[117] Ss.35S, 35T, 35U, 37H(1)(b) draft legislation, Ch.9.

[118] S.35R draft legislation, Ch.9.

(paragraph 2.8.10);[119]

(g) if there is more than one matrimonial home forming part of the estate then the spouse must elect which one he or she will take;[120] **and**

(h) 50% of the balance.[121]

The other 50% of the balance, if any, would be shared between the issue of the intestate.[122] The Commission takes the view that these are minimum, not maximum, provisions for the surviving spouse. A more detailed consideration of these recommendations follows.

2.8.2 *"Personal property"*

Under Queensland's present intestacy laws the spouse is not entitled to the personal property of the intestate. All the estate must be shared between the spouse and the issue, whatever form the estate takes. In theory, all the personal property of the intestate should be inventoried and valued so as to ascertain the exact entitlements of the spouse and issue. In practice, spouses and other family members may feel "entitled" on the basis of some assumed or asserted wishes of the deceased, to help themselves to given items of property but there is no legal basis for this practice.

In other jurisdictions the problems caused by the old rule have been overcome by statutory provisions which give the spouse the "personal chattels" or "household chattels" of the intestate. Several Australian States give the spouse the "personal chattels", viz. Victoria *Administration and Probate Act 1958,*[123] South Australia *Administration and Probate Act 1919,*[124] the Australian Capital Territory *Administration and Probate Act 1929,*[125] and the Northern Territory *Administration*

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[119] S.35Q draft legislation, Ch.9.

[120] Ss.35O, 35P, 35Q draft legislation, Ch.9.

[121] S.37H(1)(d) draft legislation, Ch.9.

[122] S.37H(2) draft legislation, Ch.9.

[123] S.5(1).

[124] S.72h(1).

[125] S.49A.

and Probate Act 1980.[126]

The Victorian definition is as follows:

> "'Personal chattels' means carriages horses stable furniture and effects (not used for business purposes) motor cars and accessories (not used for business purposes) garden effects domestic animals plate plated articles linen china glass books pictures prints furniture jewellery articles of household or personal use or ornament musical and scientific instruments and apparatus wines liquors and consumable stores but does not include any chattels used at the death of the intestate for business purposes nor money or securities for money." (Emphasis added)

This definition follows closely the definition of "personal chattels" in the English *Administration of Estates Act 1925.*[127] Even the broad language of the English and Victorian definitions has attracted litigation.[128]

The broad definition given by the statutes referred to is in marked contrast with the New South Wales and Western Australian definitions of "household chattels".[129] The sting of these more restrictive definitions is taken away, in the case of smaller estates, by the provision that the spouse shall receive a statutory legacy anyway, which will have the effect that, to the limit of the statutory legacy, the spouse may receive the personal chattels as part of the entire estate. But they would still have to be inventoried and valued.

In the vast majority of cases of smaller estates it would be unfortunate if a narrow, or possibly narrow, interpretation of "personal property" were imposed upon the surviving spouse. A spouse should not have to suffer the anxiety of wondering whether a brooch or a neckchain given to the deceased spouse as a wedding anniversary present is or is not "jewellery". Even if a person has established an extremely valuable collection of articles, such as paintings, then the Commission considers that if its owner fails to make a will it is reasonable to assume that he or she intended his or her spouse to have it. For this reason, the Commission has decided that it would be more appropriate to adopt an open definition of "personal

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[126] S.67.

[127] S.55(1)(x).

[128] See, for example *Re Chaplin* [1950] Ch.507 and *Re Cuthbertson* [1979] Tas R 93 - where "articles of personal use" was held to include a yacht, *Re Reynolds' Will Trusts* [1966] 1 WLR 19 where it was held to include a stamp collection and *Re Crispin's Will Trusts* [1975] Ch.245 where it was held to include a collection of clocks and watches.

[129] *Wills, Probate and Administration Act 1898* (NSW), s.61A(2) excludes "any motor vehicle, boat, aircraft, racing animal, original painting, trophy, clothing, jewellery or other chattel of a personal nature". And in Western Australia s.14(2)(a) of the *Administration Act 1903* defines "household chattels" as "articles of personal or household use or adornment".

property" which excludes items which would not ordinarily be treated as personal property, rather than to devise a definition which attempts to list all possible items of property which should be treated as personal property. The Commission's definition of "personal property" reads:[130]

> "An intestate's 'personal property' is all of the intestate's property excluding the following -
>
> (a) any interest in land;
>
> (b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);
>
> (c) stock, shares and debentures;
>
> (d) property that was used exclusively for business purposes at the time of the intestate's death."

2.8.3 *Wide coverage of definition*

The Commission's exclusive definition of "personal property" will resolve doubts about whether certain items are in fact personal property. Items such as motor vehicles, works of art, collections, and other valuable items would be included.

2.8.4 *"Property ... used exclusively for business purposes"*

The Commission agrees with the exclusion from "personal property" of items of property used for business or professional purposes. However, it does not agree that an item, particularly a vehicle, used sometimes for business and sometimes for family purposes, should be denied to the surviving spouse. Where a vehicle is used exclusively for business purposes, such as a haulage truck, then that should be excluded. Where a vehicle is used sometimes for family purposes and sometimes for business, it is considered that the spouse should keep it. It may be the family vehicle was the vehicle used for everyday family purposes or for holidays, as well as the vehicle which had been used for work by the deceased. It should not be taken away. It is therefore proposed that only where the item of personal property is used exclusively for the purposes of the business the spouse should not be entitled to it.[131] The accounting records of the intestate should reveal whether the vehicle is used exclusively or only partially for business purposes.

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[130] S.35J draft legislation, Ch.9 below.

[131] "Business" is defined in Cl.4 draft legislation, Ch.9 as "includes trade or profession."

2.8.5 *Exclusion of money and securities for money*

Traditionally, definitions of "personal chattels" and "household effects" have always excluded "money and securities for money". A person might well have substantial savings consisting of money and securities for money. Before the corporatisation of wealth in the early twentieth century, conservative investors used to lend money on mortgage, one of the traditional trustee investments. Today, they may invest in banks and building societies which do the same thing or they may buy shares in companies. If money and securities for money were included in the definition of "personal property", one might as well recommend that the spouse take the entire estate. Common forms of private wealth such as "money (other than a coin collection), cheques and security for money (including accounts with a financial institution and bonds) ... stocks, shares and debentures" are excluded from the definition of "personal property". Coin collections and other genuine collections are not excluded from the definition.

2.8.6 *A statutory legacy of $100,000*

All Australian States except Queensland give the surviving spouse a statutory legacy.[132] The main purpose of giving a statutory legacy of a reasonably substantial amount is that it makes easy the administration of all estates of less than the amount of the statutory legacy plus the personal property. There can be no doubt as to who will inherit. This is particularly important in the case of very small estates. The sum of $100,000 was suggested as appropriate by the Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council), as already mentioned[133] and the Commission agrees with their view.

2.8.7 *The matrimonial home*

Those framing intestacy rules have found difficult the question of what should be done about the matrimonial home. One of the difficulties is that in Australia the matrimonial home is very often vested in the spouses as joint tenants so that the title passes automatically to the surviving spouse on the death of the first spouse to die. That may have contributed to the omission of the matrimonial home from intestacy schemes. But most intestacy schemes provide that the surviving spouse

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[132] See para 2.5.1, above.

[133] See paras 2.7.1 and 2.7.2, above.

is given the right to purchase the matrimonial home.[134]

There is some suggestion that the amount of the statutory legacy reflects the cost of a modest home in the jurisdiction. These provisions appear to be based on the assumption that the matrimonial home has not passed by survivorship to the surviving spouse, which ignores the fact that the matrimonial home is often held in joint tenancy.

In any case if the purpose of the statutory legacy is merely to enable the surviving spouse to acquire the existing family home, and that legacy will be exhausted by the purchase, the spouse is left with the home but without the means to remain living in it. The Commission shares the view taken by the Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council) that the spouse should receive both the matrimonial home and a sum of money sufficient to enable her or him to remain living in it. At present-day interest rates even if the estate is sufficient to give the surviving spouse the home and $100,000, interest on $100,000 would be very modest (between $4,000 and $6,000 a year).

2.8.8 *The cost of purchasing a matrimonial home*

The average price of dwellings on land less than 2,000 square metres in 1991/92 was $144,988 (16,451 sales) in Brisbane, $104,556 (3,768 sales) in the Logan Shire, $136,210 (2,600 sales) in the Redlands Shire, $189,015 (2,488 sales) in the Gold Coast, and $120,806 (59,599 sales) for Queensland as a whole.[135]

2.8.9 *The definition of matrimonial home*

It is not necessarily easy to define the matrimonial home. The word "home" must be defined to describe the physical entity of the property, to include any yard or garden. The phrase "matrimonial home" must be described by reference to its character as a residence for the parties, or either of them, to the marriage or de facto relationship.

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[134] S.61D(1) *Wills, Probate and Administration Act 1898* (NSW); S.72 I(1) *Administration and Probate Act 1919* (SA); 4th Schedule *Administration Act 1903* (WA); Ss.49F-49N *Administration and Probate 1929* (ACT); Ss.72-79 *Administration and Probate Act 1980* (NT).

[135] According to a communication received from Robert Webb, Research Analyst for the Real Estate Institute of Queensland.

New South Wales defines "home", using the term "dwelling-house" as follows:[136]

> "**'dwelling-house'**" is defined as:
>
> "(a) a building that is designed to be used, or designed to be used principally, as a separate residence for one family or person, together with the land which forms the curtilage of the building; or
>
> (b) an apartment or flat that is so designed, together with any interest in any part of the building of which the apartment or flat forms part, or in any part of the curtilage of that building, that is owned or otherwise held in conjunction with that apartment or flat."

The Commission has modified this definition by using the word "home" instead of the more antiquated "dwelling-house" and using the words "a building, or a part of a building, that is designed to be used, or designed to be used principally, as a separate residence for a family or person" in preference to "apartment or flat".[137] The New South Wales definition has also been of value in that it makes clear that the "curtilage" - that is, the yard or garden or other enclosed area surrounding the house - is included.

With respect to an appropriate definition of "matrimonial home", there is the obvious definition which refers to the home in which the intestate and the surviving spouse ordinarily resided together at the time of the intestate's death. In most cases that will be the situation. But it is possible that the couple were not living together at the time of the death - they may have separated. Accordingly, a broader definition is proposed, namely "a home ordinarily or sometimes occupied by the intestate or the intestate's spouse".

Conversely, there may be more than one matrimonial home. The couple may ordinarily live in a home in the city and have a retreat at the beach or in the country where they spend a great deal of time together. In that case it is considered that the spouse should not be entitled to both homes but should have to choose which one he or she would prefer to keep under the rules.[138] It is considered that this choice should be made within nine months of the death.[139] This will give the spouse opportunity to decide what living arrangements he or she wishes to make.

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[136] S.61A(2) of the *Wills, Probate and Administration Act 1898*. The term "matrimonial home" is defined using the definition of "dwelling-house": "means a dwelling-house in which the intestate held an interest in respect of which the surviving husband or wife of the intestate for whom part of the estate of the intestate is required to be held in trust under section 61B(3), (3A) or (3B) is entitled to exercise the right conferred by section 61D".

[137] S.35K draft legislation, Ch.9.

[138] Ss.35O, 35P, 35Q draft legislation, Ch.9.

[139] S.35V draft legislation, Ch.9.

Then there is the question of what happens where the matrimonial home is occupied as part of a business which the intestate carried on, perhaps with the spouse and other members of the family. The most obvious example is the homestead of a grazing or pastoral property. The main difficulty is that it might be impossible to sell the business as a going concern without the home occupied with it. The homestead might, indeed, be a major attraction for a prospective purchaser of a business. The same might be said for a smaller business, for example, a retail store with a residence above. In the case of a very modest business the surviving spouse could well become entitled to the whole of the estate anyway. But where there is no matrimonial home, or where the matrimonial home forms part of a business, it is intended that the surviving spouse should be compensated by the provision of an additional statutory legacy.[140]

2.8.10 *The title to the matrimonial home*

The recommendation of the Commission that the surviving spouse should be entitled to the matrimonial home or, if there is no matrimonial home, an additional legacy of $150,000 is based on the assumption that the legal title to the matrimonial home which passes to the residuary estate of the intestate is a secure title which will ensure that the surviving spouse can have a roof over his or her head, so far as is possible, for the rest of his or her life. Where the title to the home is absolute, that is, in fee simple, the spouse who inherits it will have as secure a legal title as the law permits.

The vast majority of homes, particularly in urban areas, are held in fee simple. But there are other forms of title holdings including titles held under statutes, and private leases, which are not necessarily secure. For instance, the intestate may be lessee of the matrimonial home under a lease having quite a number of years to run or it may be terminable within a short period of time. Titles under statutes, where the government retains specific rights, may offer considerable security or not very much security. Obligations can attach to some titles which may make it inappropriate as a residence for a surviving spouse.

It would be unduly complicating in intestacy rules to try to describe the many different varieties of title which can exist in a matrimonial home and to make rules concerning the entitlement of the surviving spouse.

The Commission has considered the option of allowing the surviving spouse to choose between entitlement to the matrimonial home and entitlement to a legacy of $150,000.

In the case where there is a matrimonial home having an absolute, that is, a fee simple, title, the view of the Commission is that the spouse should be entitled to the

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[140] S.35R draft legislation, Ch.9.

matrimonial home. That home may be worth less or more than $150,000 but the Commission wishes to make clear its view that it is concerned that the surviving spouse should be entitled to it.

In the case of titles of a different sort, however, the Commission recommends that the spouse should be allowed to choose whether to remain in the matrimonial home or to receive the legacy of $150,000.[141] The choice of the spouse may well be governed by such factors as the duration of the title, and obligations imposed by law on the title holder, as well as by personal factors such as the age of the surviving spouse and the kind of life the spouse wishes to lead.

2.8.11 *A life interest in the matrimonial home?*

The Commission gave consideration to giving the surviving spouse a life interest in the matrimonial home rather than an absolute title. A life interest would prevent the spouse from selling the house and dissipating the proceeds of sale, and from disposing of it by will. On the death of the surviving spouse the home would go to the children and perhaps grandchildren of the intestate.

But there are disadvantages to the life interest. The *Trusts Act 1973* does not allow a life tenant, who is defined as a statutory trustee by the Act, to sell the trust property without the consent of the court.[142] It would therefore be necessary to make provision for the appointment of trustees. For intestacy rules to provide for the appointment of others as trustees, to act with or without the spouse, would be difficult. Professional trustees could cost too much if the estate were small. Moreover, the spouse would lose financial control of the home he or she might have lived in for many years.

More basically, however, there is not much point in giving a spouse a life interest in the home and $100,000. One might just as well give the absolute title in the home and not give, or reduce, the $100,000. This is because the spouse could use the $100,000 to buy out the interest of the issue in the home.

The life interest is attractive to those who are concerned with the problem of the second spouse, where the issue of the intestate are issue of a previous spouse. These can be legitimate concerns in some cases but it is considered that they are not of sufficient force to warrant imposing the constraints inherent in the life interest by intestacy rules. No Australian jurisdiction has adopted this approach. This is not to say that it may not be appropriate, in a particular case, to include such a provision in a will made by a testator. Occasionally a family provision order gives

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[141] S.35Q draft legislation, Ch.9.

[142] Ss.5, 6(1)(b)(i) and 31(3).

an applicant spouse a life interest in the home or a right to reside in it.[143]

Family provision orders also give the entire interest in the home to the spouse.[144]

2.8.12 *A sum of money (not exceeding $150,000) sufficient to discharge the capital and interest owing at the date of death on the mortgage of the matrimonial home*[145]

It would be cold comfort to a surviving spouse, entitled to the matrimonial home, to find that it is heavily mortgaged. It would be inconsistent with the general scheme of the proposed intestacy rules that the spouse should have both the matrimonial home and a sum of money to enable her or him to reside in it, to leave the spouse burdened with a heavy mortgage. The problem is more likely to affect the younger family with perhaps infant children. The surviving spouse will normally be responsible for continuing mortgage repayments.

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[143] E.g. *Re Paulin* [1950] VLR 462 (widow); *Re Lenehan* (1950) 50 SR(NSW) 318 (widower); *Neich v. Bowd* (1981) 7 Fam LR 102 (2nd wife); *Luciano v. Rosenblum* (1985) 2 NSWLR 65 (2nd wife).

[144] E.g. *Dillon v. Public Trustee NZ* [1941] AC 294 (2nd wife); *Diack v. Public Trustee* [1941] NZGLR 215 (2nd wife); *Re Bowcock* [1968] 2 NSWR 700 (widow); *Re Wilson* [1973] 2 NZLR 359 (widow); *Shah v. Perpetual Trustee Co.* (1981) 7 Fam LR 97 (widow); *Elliott v. Elliott* (1984) NSW (unrep. Powell J 18 May 1984) (widow); *Re Christie* (1985) Qld unrep. OS112/1985, Ryan J. (widower); *Langtry v. Campbell* (1991) ACLD 395 NSW 15 (2nd wife).

[145] Ss.35S, 35T, 35U, 37H(1)(b) draft legislation, Ch.9.

Example 4 Home subject to mortgage

Alison and Peter owned a home worth $280,000 when Peter died intestate. At the time of his death there was a mortgage on the home and there was $162,590 owing on that mortgage (capital and interest). Peter left two children. The rest of Peter's estate comprised personal property and $350,000 in money and other assets. This included a sum of $250,000 paid to Peter's estate as a lump sum under a superannuation scheme of which he was a member.

Comment

It is desirable to allow Alison to remain in the family home. But the home is a very good one. Its value may reflect the neighbourhood where it is situate as well as its size and amenities. If Alison were to be given as a statutory legacy the entire amount owing on the mortgage, that would give her a far better home than the average home envisaged by the statutory legacy of $150,000 proposed for the spouse where there is no matrimonial home at all.

In this case Alison will receive, under the Commission's recommendations, the home and $150,000 towards the repayment of the mortgage. This upper limit on the amount of the statutory legacy given where there is a mortgage allows the spouse the value of the equity in the existing home, that is, its value minus the mortgage debt, and the amount allowed to the spouse as an additional legacy where there is no matrimonial home.

Alison will therefore receive the personal property, the statutory legacy of $100,000, and the home (subject to the mortgage), $150,000 in respect of the mortgage, and one half of the remaining $100,000. The other half of the $100,000 will go to the children.

2.8.13 *If there is no matrimonial home forming part of the estate of the intestate and there was no matrimonial home vested in the intestate and the spouse as joint tenants which passed on the death of the intestate beneficially to the spouse, a further statutory legacy of $150,000*[146]

If there is no matrimonial home, but the estate is sufficient to enable the surviving spouse to acquire a home, provision should be made to enable the spouse to do so.

[146] S.35R draft legislation, Ch.9.

Example 5

Harry and Judith are in their late sixties. They are both age pensioners. They decide to sell the family home in which they have lived together for over thirty years and to move into a unit. Uncertain of how much their home will fetch, they decide not to buy a unit until the home has been sold. The home is sold for $185,000 and Harry and Judith go on a holiday. Harry dies during the holiday. His estate consists of the proceeds of sale of the home, personal property worth about $18,000 and money in a savings account of $15,000. Harry is survived by Judith and three children.

Comment

It is pure accident that there is no matrimonial home which could pass to Judith under the Commission's proposals. If Judith were only entitled to the personal property and the $100,000 legacy - some of the proceeds of Harry's estate would pass to the children. There may be insufficient funds to enable Judith to purchase a home. An entitlement to receive an additional legacy of up to $150,000 from Harry's estate on the basis that there was no matrimonial home would ensure that Judith had sufficient funds to purchase a home. In this case Judith would receive the whole of Harry's estate.

A statutory legacy of $150,000 would therefore suffice to enable a surviving spouse to purchase a modest home with perhaps something over to pay for legal costs and some furnishings.

Example 6

At the time of Anthony's death he and his wife Alexandria lived in a rented company house provided by Anthony's employer. Alexandria was obliged to move out. Anthony's estate was worth $220,000 plus "personal property". They had two surviving children.

Comment

Alexandria does not inherit a matrimonial home because she had lived in a rented company home. She will be entitled to a statutory legacy of $100,000 but this would not enable her to buy a home for herself and have anything to spare. The legacy paid in lieu of the matrimonial home - $150,000 - will mean that she will take the entire estate. Where a spouse lives in rented accommodation a statutory legacy of $100,000 may not be sufficient for her or his needs.

Example 7

Soon after Shane and Christine married they bought a home in joint names and paid it off. Later in life Christine bought a block of land in the country and had a country retreat built on it. Christine used money from her job for this. Shane and Christine liked their country home so much that they spent more time in it than in their original home. Christine died intestate, leaving Shane and one child surviving her. The country home was worth $160,000 and their original matrimonial home was worth $185,000. Christine had other estate worth $140,000 and "personal property".

Comment

In this case it would be unfair for Shane to inherit both the country home from Christine and to take the original matrimonial home by way of survivorship as joint tenant. He has a home to live in and will inherit Christine's personal property and $100,000. If Christine had no assets of her own other than the country home and personal property, Shane would be entitled to the $100,000 which might have to be raised from the sale of the country home. The balance would go to their child.

Example 8 Tenancy in common

Ryan and Jennifer, after they married, purchased a family home in fee simple each using personal means to do so. They decided that, reflecting their contributions towards the purchase price, they should hold the home not as joint tenants but as tenants in common in equal shares. When Ryan died intestate, leaving Jennifer and one child surviving, his one half share as tenant in common in the home passed to his estate.

Comment

Where the title to property is vested in persons as joint tenants the interest of a joint tenant who dies passes automatically to the surviving joint tenant or joint tenants by survivorship. The interest does not form part of the estate of the deceased. A joint tenant cannot dispose of an interest in joint tenancy by will, nor do intestacy rules apply to it. If the parties do not wish this to happen, as is the case here, they can have the title to the property vested in them as tenants in common in shares. The shares may be equal or unequal as they may agree. On the death of a tenant in common the share passes to the estate of the deceased tenant in common and then in accordance with any will of the deceased or the intestacy rules.

If the matrimonial home is held by spouses as tenants in common and no-one else has a beneficial interest in the home it is appropriate that the surviving spouse should be entitled to the deceased's interest in the home in satisfaction of the right to receive the matrimonial home.

In this case, therefore, Ryan's interest as tenant in common will pass to his estate and Jennifer will become entitled to it in satisfaction of her entitlement to receive the matrimonial home. Her interest will merge with Ryan's so that she will take the entire title to the home.

Example 9

Gregorio married Alpetta and they had a child Gabriela. After living in rented accommodation for three years, Gregorio entered into a contract to buy a home for $180,000, paying a deposit of $36,000. The day after the contract was signed Gregorio was killed in an accident at work. He had not made a will. His estate consisted of "personal property", $10,000 in savings and a superannuation policy which paid $220,000 to his estate.

Comment

Since Gregorio and Alpetta had not moved in to the home Gregorio had contracted to purchase, it cannot be described as a matrimonial home.

Under the proposed intestacy rules, Alpetta is therefore entitled to:

(a) the "personal property";

(b) the statutory legacy of $100,000;

(c) an additional statutory legacy of $150,000 because there is no matrimonial home; and

(d) 50% of the balance.

She will therefore be entitled to the whole of the estate. She may well be obliged to complete the contract for the purchase of the home.

2.8.14 *50% of the balance*[147]

In intestacy schemes in other States which have approached the question of the entitlement of the surviving spouse by way of the statutory legacy, it is usual to provide that the spouse should receive one half of the residuary estate in addition to all statutory legacies. The reason for this is that the estate may be very large and that fact should be recognised in the rules specifying the spouse's entitlement.

The issue of the intestate always take the remaining one half of the residuary estate in these schemes.

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[147] S.37H(1)(d) draft legislation, Ch.9.

Example 10

Silvio died intestate leaving surviving him, his wife, Andrea and two children. His estate consisted of "personal property", a matrimonial home worth $325,000 subject to a mortgage of $50,000 at the date of his death, and miscellaneous assets, including a business he owned, worth $2.5m.

Comment

Andrea will be entitled to:

(a) the matrimonial home;
(b) the "personal property";
(c) $100,000;
(d) $50,000 to enable her to pay off the mortgage; and
(e) 50% of the balance.

The residue consists of $2.5m less $150,000 (the statutory legacy of $100,000 and the $50,000 needed to pay off the mortgage), that is, $2,350,000. Andrea takes $1,175,000 and the two children take the remaining $1,175,000 between them.

2.9 *Bringing benefits otherwise received by the spouse into account*

In the context of giving the spouse specific benefits, the question arises whether the surviving spouse should bring into account, before receiving those benefits - more particularly the statutory legacy of $100,000 - benefits otherwise received upon the death, or even before the death, of the intestate.

For instance, section 38(2) of the *Succession Act 1981* provides:

> "(2) Where the spouse of an intestate acquires a beneficial interest under the will of the intestate in the property of the intestate, item 3 of Part I of the Second Schedule to this Act applies as if -
>
> (a) in a case where the value of the beneficial interest so acquired by the spouse under the will does not exceed $50,000, the references to the sum of $50,000 were references to that sum less the value of that beneficial interest; or
>
> (b) in any other case, the references to the sum of $50,000 or the whole of the residuary estate, whichever is the less, were omitted."

The relevant part of the Second Schedule provides for the spouse to receive $50,000 plus, where the value of the residuary estate exceeds $50,000, one half the residue of the estate if the intestate is not survived by issue, but is survived by a parent, brother, sister, nephew or niece. In other words, in these circumstances the spouse has to bring into account, to a maximum of $50,000, any benefits

acquired under the will of the deceased. As mentioned in paragraph 2.1 it is not considered that in future a spouse should have to share the estate of an intestate with anyone other than issue of the intestate.

Some respondents to the Working Paper suggested that the surviving spouse should bring benefits otherwise received from the intestate into account against the statutory legacy of $100,000. One suggestion was that lump sum benefits received by virtue of a superannuation scheme or Approved Deposit Fund should be brought into account. Another respondent suggested that where the spouses have separated, any sum paid to the spouse in or towards a settlement should be brought into account. If it is justifiable to bring such sums into account it must further be considered whether legacies left by the will should still be required to be brought into account and whether other forms of benefit, for instance, gifts made to the spouse within a certain time before death, or even money placed in a joint account for the benefit of a surviving spouse, should be brought into account.

The Commission has given consideration to this question in its most general application. There are substantial arguments against requiring the spouse to bring benefits otherwise acquired from the deceased into account, both practical and theoretical.

At the practical level it would be difficult to ensure that every type of benefit could be traced to ensure that the spouse would bring them into account. Separation settlements are sometimes made in confidence, perhaps with the desire of both parties that children, or some children, should never become aware of them. Gifts, even if of a considerable amount, might have been made some years before and perhaps spent. Some superannuation lump sums are paid to the estate of the deceased rather than to the spouse. Any general requirement to account would be difficult to police and would produce anomalies.

But the more fundamental issue of what intestacy rules are really about is raised. The provision quoted from the existing legislation raises this question acutely. It, and suggestions that the spouse should bring into account superannuation and other benefits, appear to be based on a view that the benefits the intestacy rules confer on the spouse are the maximum rather than the minimum the spouse should receive. Traditionally, however, intestacy rules have only been about what is to be done with that part of the estate which the deceased has failed to dispose of by will. They perform a similar function to a will.

It is hard to see what justification there can be for using intestacy rules to reduce or even deprive the spouse of benefits which the deceased intended the surviving spouse to receive. If a testator makes provision for a spouse that reflects the wishes of the testator. If a spouse enters into a superannuation scheme under which the surviving spouse will benefit in the event of death before retirement, the deceased intends to benefit the spouse. A settlement made upon separation should be similarly regarded. These propositions are all the more tenable if the deceased did not make a will so as to indicate any intention to benefit others.

Proposals that a spouse or indeed any other beneficiary under an intestacy should bring other benefits into account run counter to the basic assumption of what intestacy rules are about. An administrator should not be saddled with having to take a general account of all the benefits which the deceased intentionally conferred, whether directly or indirectly, on the surviving spouse, so as to reduce the benefit to the spouse of intestacy rules.[148] Moreover, it would be unprecedented to confer upon an administrator the investigatory powers which would be necessary to establish the facts and strike an account. Accordingly, the Commission recommends that a statutory beneficiary should not be required to account for any benefits received under any will made by the intestate or under any gift or entitlement received from the intestate during the intestate's life-time, or payable on the intestate's death.[149]

2.10 *Comment*

The surviving spouse of an intestate has always been entitled to a substantial portion of the estate. That entitlement has never been limited by any consideration of the spouse's needs. A wealthy spouse has always been just as entitled to a substantial portion of the estate as a penniless spouse. The references which have been made to the concept of need in the context of family provision applications have not been made for the purpose of justifying entitlement. They have been made because judicial pronouncements in that context are indicative of community attitudes as to what is a proper provision. When expressed as an entitlement, such provision is a minimum, not a maximum, entitlement. The recommendations of the Commission are intended to do justice for the surviving spouse. The Commission does not consider them to be overly generous.

2.11 *Spouse and no issue*

At present, where the intestate is survived by a spouse but no issue, the spouse sometimes has to share the estate with the parents or brothers, sisters, nephews and nieces of the intestate. The rules are mentioned in Chapter 4, below. For the reasons given in that chapter the Commission recommends that a spouse should not have to share the intestate's estate with relatives other than issue. Accordingly, the Commission recommends that where an intestate is survived by a spouse but no issue, the spouse should take the entire estate.[150]

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[148] Analogously, in the law of torts, the liability for damages of a tortfeasor is not reduced if the plaintiff is privately insured against the tort and receives money from the insurer.

[149] S.37B draft legislation, Ch.9.

[150] S.37E draft legislation, Ch.9.

Chapter 3 - Rights of Issue

3.1 *The traditional "per stirpes" rule*

Intestacy rules have always provided that where there is no surviving spouse but there are surviving issue, the surviving issue take the entire estate of the intestate. There is no question of changing that rule. Issue means children, grandchildren, great-grandchildren and so on. Where an intestate dies and all his or her children survive, they will all take in equal shares. But where a child has died before the intestate, leaving issue who survive the intestate, then the traditional rule has been that the issue (for example, the grandchildren or if grandchildren have died before the intestate leaving children who survive the intestate, the great-grandchildren) will take, in equal shares if more than one, the share their deceased parent would have taken had she or he survived the intestate. They are said to "represent" their deceased parent. They take "by representation". Only a deceased person can be represented. Accordingly, if a child survives the intestate that child's children cannot take any part of the intestate's estate - they may hope to inherit their parent's estate in due course, including perhaps what the parent inherited from the intestate. The Latin phrase *per stirpes*, which means literally "according to their stocks", has been traditionally used by lawyers to describe this process of entitlement by representation.

In 1981 Queensland departed from a strict *per stirpes* rule to a certain extent, following American precedent. The existing rule is provided for in section 36 of the *Succession Act 1981* which is set out below.

3.2 *Succession Act 1981 Section 36: current manner of distribution to issue*[151]

> "Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate the nearest issue of the intestate shall take that whole or part and if there be more than one such nearest issue among them in equal shares and the more remote issue of the intestate shall take that whole or part by representation."

The present Queensland rule reflects the policy of the American *Uniform Probate*

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[151] See Appendix 2 for other relevant provisions of the *Succession Act 1981*.

Code as it stood when the Queensland rules were being drafted.[152]

Example 1

Intestate is survived by two children, A and B, and six grandchildren, one the child of A, one the child of C, a child of the intestate who predeceased the intestate, and four the children of D, also a child of the intestate who predeceased the intestate. The estate is divided into four parts: A and B take one part each - they are the nearest and take in equal shares; the child of C, who "represents" C, also takes one part; and the children of D, who "represent" D, take one part between them. The child of A takes nothing because A is still alive and cannot, therefore, be "represented".

Example 2

Intestate had four children, A, B, C and D. They all predeceased the intestate leaving nine grandchildren, one being A's child, two C's and six D's. Now the estate is divided into nine equal parts and each grandchild takes one part.

Comment on Examples 1 and 2

In Example I the children are the "nearest issue" and take in equal shares. The grandchildren, however, take by representation and, as it happens, in unequal shares. But in Example 2 the grandchildren are the nearest issue and take in equal shares. There are critics of this rule who say that in Example I all the grandchildren entitled to take should take in equal shares, the inequality resulting from the present rule being the product of chance.

The argument is that it would be uncommon for a grandparent having four grandchildren - A1, the child of A and B1, B2 and B3, the children of B, to give A three times as much, for Christmas or upon A's birthday, as he or she would give B1, B2 and B3. A grandparent usually gives each grandchild the same amount, regardless of their parentage. The same argument will apply to gifts to great-grandchildren. Rights of grandchildren and great-grandchildren upon the intestacy of the ancestor should similarly be equalised.

3.3 "*Per capita*"

In its Working Paper the Commission, pursuing the argument referred to in Example 2, recommended that relatives of the same degree of kinship to the intestate should always take in equal shares.[153] That is, if the estate was to be shared only by grandchildren, they should take in equal shares. If it was to be shared only by great-grandchildren, they, too, should take in equal shares.

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[152] See Working Paper para 2.8 for text of relevant provision of the *Uniform Probate Code*.

[153] Working Paper Ch.2 s.38 of draft legislation.

Moreover, if the estate was to be shared only between nephews and nieces of the intestate, or cousins, they should take in equal shares.

Despite its apparent attractiveness, the Commission has reconsidered this proposition in light of a pertinent comment made by the Public Trustee of Queensland. The criticism relates to the practical consequences for convenience of administration, rather than the justice of the proposition. The following example illustrates the problems foreseen by the Public Trustee:

Example 3

David died intestate at a great age and was survived by at least five grandchildren, four being the children of his son, Peter, and one being the child of his daughter, Sesame. Peter and Sesame died before David. They were the children of David's second wife Elspeth, who had also died before David. He had also been married, as a young man, in the United States, to a woman called Wendy. David and Wendy had a child, Ronald, but obtained a divorce in 1935. David had never heard from Wendy since and no-one knows whether Ronald is still alive - he would be 61 years of age today - or whether he has died and, if so, left any children of his own.

Comment

The problem with a rule that would give all David's grandchildren equal shares is that the number of shares into which the estate must be divided cannot be known until it is known whether Ronald is dead and, if so, whether he left any surviving children. If Ronald died before his father and was survived by two children, David's estate will be divisible into seven shares, five for the children of Peter and Sesame, and two for the children of Ronald. But until it is known whether Ronald died before his father and, if he did, whether he left any, and, if so, how many children (grandchildren of David) who survived David, those responsible for administering David's estate cannot distribute any part of it. So the children of Peter and Sesame will have to wait until enquiries are made in the United States to try to trace Ronald and establish the facts. These enquiries can be protracted and costly.[154]

3.4 *"Per capita" v. the traditional "per stirpes" rule*

Under the traditional *per stirpes* rule the difficulty in Example 3 would not arise. The estate would be divisible into three parts - Ronald's, Peter's and Sesame's. Peter's children would receive his share equally between them, each receiving one twelfth of David's estate. Sesame's child would receive Sesame's share, that is, one third of David's estate. Those distributions could be made promptly. Ronald's share would be kept intact until appropriate enquiries had been made to establish whether Ronald was still alive and whether, if he had died before his father, he left children. If he is still alive he will be entitled to a one third share. If he died before his father, his children who survived David will take their father's one third share between them. If Ronald died before David, without leaving any child surviving

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154 It is understood that in one case some $30,000 was expended in trying to find a missing relative, entitled to a substantial portion of a very large estate.

David, Ronald's one third share would be divided into two parts. One part would go between the children of Peter and one part to the child of Sesame.

The problem caused by a strict rule of equal division is that the more remote the persons entitled are from the deceased, the more difficult it can be to trace whether they are alive or dead. A rule giving equal distribution can hold up the distribution mechanism indefinitely. Under a *per stirpes* rule the distribution of those parts where the facts are not ascertained will be delayed until the facts are ascertained, but not the distribution of the rest.

Because of the inconvenience, in practical terms, of abandoning the traditional rule, the Commission recommends that the traditional *per stirpes* rule be reinstated.[155] However, terms such as "per stirpes" and "by representation" are difficult to comprehend in practice, although at law they may have technically exact meanings. The terms have been avoided in the Commission's draft legislation.

Illustrations of how an estate is distributed *per stirpes* appear in Appendix 3 and in section 37ZB of the draft legislation in Chapter 9, below.

3.5 *Issue bringing benefits into account*[156]

There is old law, dating back to at least the *Statute of Distributions 1670*, which requires children of an intestate who claim a distributive share of the estate, to bring into account any benefit they have received from the intestate by way of settlement or advancement. The rule was re-enacted in Queensland in section 29 of the *Succession Act 1867*. Section 29 was repealed by the Queensland *Succession Acts Amendment Act 1968*, which makes no provision for the bringing into account of settlements or advancements. The rule is therefore no longer applicable in Queensland. New South Wales, Western Australia and New Zealand no longer require advancements and settlements to be brought into account.

Nevertheless, mention of it is made in this Report because there are detailed provisions requiring the bringing of such benefits into account in Victoria, South Australia, the Australian Capital Territory and the Northern Territory.

The old rule was originally set in the context of a regime where the heir-at-law, usually the eldest son, inherited the realty of the deceased and it was common for parents to make some other provision for sisters and younger brothers of the heir.

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[155] Subdivision G, Division 3 draft legislation, Chapter 9.

[156] See Hardingham, Neave & Ford, *Wills and Intestacy in Australia and New Zealand*, Law Book Co., (2nd ed) 1989, Ch.29 for a full account.

These provisions usually took one of two forms and the rules were confined to them. One form of provision was made by a marriage settlement, which made provision for a child upon marriage. The other form of provision was known as an advancement and usually consisted of setting the person up in business.

If provision had been made for some by these means but not for others, it was seen as unjust that all should be given equal shares upon the intestacy of the person who had provided the benefits. So those who benefited were required to bring the benefits into account when calculating their intestacy entitlement.

The rule was very narrow in scope. The provision had to be made with a view to providing the child with a "portion", that is, a provision in anticipation of inheritance. They only operated as between children and issue of deceased children. The rule did not operate upon the division of a mother's estate. Where the provision was of land the rule did not apply to the heir-at-law. It only applied in cases of total intestacy.[157]

The rule did not apply to casual payments made to a child. The cost of educating a child was not considered to be an advancement, nor the payment of debts incurred by a child. There has been litigation as to whether the payment of a large sum to a child should be presumed to be an advancement[158] and as to whether a payment is or is not an advancement.[159]

Australian jurisdictions which have retained the statutory provisions have revised them. Thus the Victorian *Administration and Probate Act 1958* provides:[160]

> "Where a child has any property real or personal or any estate or interest therein by settlement of the intestate or was advanced by the intestate in his or her lifetime that child or his or her representative shall bring such property estate interest or advance into account in estimating the share (if any) to be taken by him, her or them in the distribution".

In South Australia there is a more detailed provision in section 72k of the *Administration and Probate Act 1975* with time and financial provisions. There is also a provision in section 46(1)(c) of the Tasmanian *Administration and Probate Act 1935*. There is a long and detailed provision in the Australian Capital Territory in section 49BA of the *Administration and Probate Act 1929*. The Northern Territory *Administration and Probate Act 1980* sections 68(3) and (4) provide:

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[157] See *Maiden v. Maxwell* (1920) 21 SR (NSW) 16 per Harvey J at 23.

[158] *National Trustees, Executors and Agency Co. v. Ward* (1896) 2 ALR 119; *Re Mills* [1952] SASR 274.

[159] E.g. *Re Lamshed* [1970] SASR 224.

[160] S.52(1)(f)(i).

"(3) Where -

(a) an intestate has, within the period of 5 years immediately before his death, paid any money, or transferred or assigned any property, to or for the benefit of his child, or settled any money or property for the benefit of his child, by way of advancement or on marriage of the child; and

(b) his intestate estate, or a part of his intestate estate, is divisible between the child, or the issue of the child, and other issue of the intestate,

the money or property shall be taken to have been paid, transferred, assigned or settled in or towards satisfaction of the share that the child will become entitled to take, or would become entitled to take if he were to survive the intestate, as the case may be, in the intestate estate or the part of the intestate estate unless -

(c) the contrary intention was expressed or appears from the circumstances of the particular case; or

(d) the value, as at the date of death of the intestate, ascertained in accordance with the requirements of the personal representative of the intestate, of all the money so paid or settled, of all the property so transferred, assigned or settled or all that money and property, or of so much of all that money or property, or money and property, in respect of which such a contrary intention was not expressed or did not appear, does not exceed 1,000 dollars.

(4) Where any money or property is taken to have been paid, transferred, assigned or settled, in accordance with sub-section (3), in or towards satisfaction of the share of a child of an intestate, the money or property shall be brought into account, at a valuation, as at the date of death of the intestate, in accordance with the requirements of the personal representative of the intestate, in calculating the share that the child or the issue of the child, as the case may be, is entitled to take under this Division in the intestate estate or a part of the intestate estate."

In the view of the Commission there are substantial arguments against adopting provisions of this kind. A main argument is that because the average age of death for men is now over 72 years, a provision made upon the marriage or setting up in life of a child will generally have been made many years before the death of the parent who made the gift. It would entail going back and making valuations based on events of many years before. The Northern Territory enactment restricts the liability to bringing into account gifts made within five years of the death. It is hard to see how there could be many gifts by way of marriage settlement or advancement which would be made by an elderly parent less than five years before his or her death. In some cases the provision applies only to gifts in excess of $1,000 or $3,000. With respect, such gifts would probably, under the old rule, not have been accounted as advancements, because they would be considered to be too small in value. Another argument against restoring the repealed rule is that it requires investigations and valuations to be made.

There are now means of correcting an injustice which may arise partly as a result

of the making of a very large gift to a child which has been denied to another. The other may be able to show that the operation of the intestacy rules does not make adequate provision for his or her proper maintenance and support. That could be a ground for the bringing of a family provision claim under Part IV of the *Succession Act 1981*. It is considered that this jurisdiction is both more accessible and less constrained by precedent than the application of a strict accounting rule would be. Furthermore, it is always open to a parent who has provided for some children but not others to make a will to correct any possible injustice. The Commission therefore recommends that the repeal of the requirement to bring benefits into account, which has not been criticised in Queensland so far as the Commission is aware, should stand. Nevertheless, it is considered that it is desirable, to set all argument to rest, to state the position explicitly.[161]

3.6 *Bringing into account testamentary benefits*

It has never been the law in Queensland that children sharing upon intestacy should have to bring into account benefits received under the will of the intestate. The old rule only applied to full intestacies. The comparatively recent statutory provision requiring a widow to bring testamentary benefits into account, which has been considered in paragraph 2.9, has been criticised on the grounds that it is contrary to intestacy theory. Where a benefit is left to a child by will, presumably the testator intends that child to receive that benefit. If other provisions of the will fail to provide comparable benefits for other children, that too, presumably, reflects the testator's intention. Sometimes a requirement that a child bring testamentary benefits into account may be clearly against the testator's intention. Sometimes it could appear to reinforce the testator's intention. The imposition of a rule would have unpredictable results, as the following examples show. The Commission therefore recommends that children should not have to bring into account any benefits received under a will made by the parent.[162]

Example 1

Richard left his child, Felicity, $25,000 by will. He failed to include a clause in his will affecting the rest of his estate. He had another child, Charles, for whom Richard made no provision by the will. The rest of the estate is worth $75,000.

To insist that Felicity should bring her $25,000 into account would mean that the estate would be accounted at $100,000 and Felicity and Charles would each receive $50,000. The application of that rule would negate the will and disregard completely Richard's reason for leaving Felicity the $25,000. Not to apply the rule would approach more closely to the testator's intention. However, it would be difficult to determine what would be just in this case not knowing Richard's attitudes toward Felicity and Charles.

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[161] S.37B draft legislation, Ch.9.

[162] S.37B draft legislation, Ch.9.

Example 2

Hyacinth, a widow, left $30,000 to her son Julian by her will and the residue of her estate to her sister Rita. The residue of the estate was worth $170,000. But Rita died before Hyacinth and so the residue of the estate passes on intestacy. Hyacinth had one other child, a daughter Katherine, as well as her son Julian. Julian and Katherine are therefore entitled to the residuary estate in equal shares. If Julian has to bring the $30,000 into account the residuary estate will be accounted at $200,000 and Julian and Katherine will each receive $100,000. If Julian does not have to bring the legacy of $30,000 into account Julian will receive one half of $170,000, that is, $85,000 and the $30,000, that is, $115,000. But Katherine will only receive $85,000. Again, it would be difficult to determine what would be just in this case not knowing Hyacinth's attitudes toward Julian and Katherine.

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Chapter 4 - Next of Kin

4.1 *Limits to kin entitled to share*

The next of kin entitled to share the estate of an intestate are confined by statute in Queensland to the parents, brothers, sisters, nephews and nieces, grandparents, uncles and aunts and cousins of the intestate.[163] One reason for this is the difficulty of discovering remoter kin in a country a large proportion of whose population are immigrants, or children or grandchildren of immigrants. There seems to be no reason to make this list shorter, for example, by excluding cousins, or to make it longer, by including great-grandparents, great uncles and aunts or their issue.[164]

4.2 *The entitlement of kin where there is a spouse*

At the present time if an intestate is survived by a spouse and a parent, brother, sister, nephew or niece, the spouse must share with those kin, the nearer excluding the more remote. The Working Paper recommended that the spouse should no longer have to share with them.[165] Respondents to the Working Paper who considered this question agreed with the Commission's recommendation. The recommendation of this Report is that a spouse should have to share with issue only after receiving the substantial benefits described in Chapter 2, above. If relatives more remote than issue were permitted to share with the spouse it would be appropriate to increase the spouse's benefits in such circumstances. That would mean that relatives other than issue would take only in the case of very large estates. It would be an unnecessarily complicating factor. The Commission recommends that this course should not be taken and that a surviving spouse should have to share only with issue of the intestate.[166]

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[163] S.37 *Succession Act 1981*, see Appendix 2.

[164] Cl.4 draft legislation, Ch.9 (amending s.5 of the *Succession Act 1981*).

[165] Working Paper para 7.2.

[166] S.37H draft legislation, Ch.9.

4.3 *The entitlement of kin where there is no spouse or issue*

It is proposed that the law should remain as it is.[167] This means that parents take first; if there are no parents, then brothers, sisters, nieces and nephews; then grandparents; then uncles, aunts and cousins. No-one more remote can take. Next of kin should not have to account for benefits otherwise received from the intestate for the same reasons issue and spouses should not have to so account.[168]

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[167] Division 3 draft legislation, Ch.9.

[168] S.37B draft legislation, Ch.9. See paras 2.9, 3.4 and 3.6 above.

Chapter 5 - The Crown - Bona Vacantia

Where there is no spouse and no kin within the range described, the Crown will take the entire estate of the intestate as bona vacantia, that is, goods without an owner.[169] Needless to say every person whose estate would pass to the Crown on intestacy should consider whether that is what that person wishes, and if not, should make a will. In any case, the Crown can sometimes be persuaded to make *ex gratia* payments, where it has taken an intestate's estate, to persons who have a moral claim against the intestate, even although they are not eligible to make an application under Part IV of the *Succession Act 1981*. Unless there is an executor of a will made by the intestate, the Public Trustee will be the executor of the intestate's estate.[170]

Example

Alan died intestate leaving no spouse and no issue. Alan was an only child of parents each of whom was an only child. His parents and all of his grandparents had predeceased him.

Alan's estate will pass to the Crown.

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[169] S.37R draft legislation, Ch.9.

[170] S.37S draft legislation, Ch.9.

Chapter 6 - Payment of Debts

Under the existing intestacy rules the residuary estate of the intestate is defined as the property of the intestate "which is available for distribution after payment thereout of all such debts as are properly payable thereout".[171]

Such a provision cannot be retained in the context of intestacy rules which give what are in effect statutory specific and general legacies to the surviving spouse.

Example 1

The estate consists of "personal property" worth $100,000, a matrimonial home worth $150,000 and miscellaneous assets worth $250,000. But there are debts of $220,000 - namely, $120,000 owing on a mortgage of the home, and $100,000 unsecured.

Comment

Quite apart from the question of whether and to what extent the spouse should be required to pay off the debt owing on the mortgage of the matrimonial home, the question arises as to what assets must be used to pay off the other $100,000 owing in unsecured debts. Should the "personal property" be sold to pay these debts, or the miscellaneous assets? A scheme must be constructed to answer such questions.

In the case of wills there is a scheme, set out in sections 55 to 61 of the *Succession Act 1981.*[172] The scheme is as follows:

(1) Unless the will otherwise provides, property comprising the residuary estate of the testator, that is, property that is neither effectively disposed of by the will, nor included in a residuary disposition contained in the will, is used first for the payment of debts.[173] This property is called Class 2 assets.

(2) Property specifically devised or bequeathed is used next to pay the debts. In other words, properties specifically left are not used to pay debts until other assets have been exhausted. This property is called Class 3 assets.

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[171] S.34, *Succession Act 1981*. See Appendix 2.

[172] See Appendix 2.

[173] Ss55, 59 class 2, *Succession Act 1981*. See Appendix 2.

(3) Pecuniary legacies, that is, legacies of sums of money, are paid out of the residuary estate, after the debts have been paid. If there is not enough in the residuary estate to pay the debts and the pecuniary legacies, the pecuniary legacies abate proportionately.[174]

(4) There is an important provision in the *Succession Act 1981* to the effect that property on which a debt is secured, e.g. by way of mortgage, must pay off its own mortgage.[175]

It is appropriate that this scheme should be extended to the proposed intestacy rules because the rules themselves differentiate between certain specific properties which the spouse will receive, namely: the personal property and the matrimonial home; statutory pecuniary legacies of sums of money, which the spouse will also receive; and the rest, which the spouse will share with any surviving issue of the deceased.

Example 2

Moshe died intestate leaving a wife, Rebecca, and three children. His estate consisted of personal property worth $10,000, a matrimonial home worth $250,000, subject to a mortgage of $180,000 and miscellaneous assets worth altogether $500,000. He owes various debts. In addition to the mortgage debt of $180,000, he owes $60,000. One of these debts, for $4,000, is secured on the family motor car.

Comment

Under the statutory scheme currently provided for wills[176] the $180,000 owing on the mortgage must be paid by the person to whom it is specifically left by will. Under the proposed intestacy rules Moshe's spouse, Rebecca, is entitled to the home. It is inevitable that Rebecca should be liable to pay the mortgage of $180,000 on the home because the mortgagee has rights of recourse against the home in the event of failure to pay the debt owing. But she will be compensated to a certain extent by the provision that she will receive a statutory legacy, not exceeding $150,000, because the home is mortgaged.[177] The debt of $4,000 owing on the motor car must also be paid by her for the same reason. She will have to pay that debt from her entitlements.

cont'd

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[174] Ss55, class 2, *Succession Act 1981*. See Appendix 2.

[175] S.61, *Succession Act 1981*. See Appendix 2.

[176] Ss55-61, *Succession Act 1981*. See Appendix 2.

[177] See para 2.8.12 above.

On the other hand, Rebecca should not be obliged to pay all of the remaining unsecured debts of $56,000, because that would not only reduce her entitlement to the statutory legacy or legacies, but would defeat the purpose of giving those specific benefits to her in priority to any surviving issue.

The accounts of this estate can no doubt be presented in different ways. The following is one way of doing it:

(1) It is clear that the residue of the estate ($500,000) is ample to pay all the debts and the statutory legacies to Rebecca.

(2) Rebecca must pay the $180,000 mortgage on the matrimonial home and the $4,000 debt secured on the family car.

(3) Rebecca is therefore entitled to:

(a) the personal property; and
(b) the matrimonial home. (The value of the assets in (a) and (b) is irrelevant); and
(c) the statutory legacy of $100,000; and
(d) the maximum mortgage legacy of $150,000; and

(This gives her $250,000 from which she must pay $184,000 debts. She will therefore receive $66,000.)

(e) in addition she is entitled to "50% of the balance". This is calculated as follows. The $250,000 remaining in the residuary account must pay the $56,000 debts remaining to be paid. This leaves $194,000 to be divided in equal shares between Rebecca ($97,000) and the children ($97,000).

(4) Rebecca will therefore receive:

(a)	the personal property;	
(b)	the matrimonial home;	
(c)	the legacies minus the debts payable by her;	$66,000
(d)	50% of the balance.	97,000
	The children will receive the other 50% of the balance	97,000
	The creditors will receive	240,000
	TOTAL DISTRIBUTED	$500,000
	Plus personal property and home.	

It is therefore proposed that the benefits of the rules shall be treated in the same way as if they constituted a statutory will, that is, as if they were included in a will.

The Commission therefore recommends that where the estate of an intestate is solvent the provisions of sections 59 of the *Succession Act 1981*[178] shall apply

[178] See Appendix 2.

and that, for the purposes of that section:[179]

(a) the personal property and matrimonial home are Class 3 assets;
(b) the statutory legacies are pecuniary legacies;[180] and
(c) anything left is Class 2 assets.

There are provisions in section 57 of the *Succession Act 1981* with respect to insolvent estates.[181] These provisions already apply in the case of intestate estates.

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[179] Cl.10 draft legislation, Ch.9.

[180] Cl.9 draft legislation, Ch.9 (amending definition of "pecuniary legacy" in s.55 *Succession Act 1981).*

[181] See Appendix 2.

Chapter 7 - Procedure - Statutory Executorship and Vesting

Where a person makes a will and appoints an executor the entire estate of the executor vests in the executor whose duty it is to get in the assets of the estate, pay the debts and distribute the remainder to those entitled under the will or, if the will does not dispose of the entire estate, in accordance with the intestacy rules.[182]

Where there is no will or where there is a will but there is no executor willing and able to act, the estate vests in the Public Trustee of Queensland until a person is appointed administrator of the estate by the Court. Letters of Administration are granted to a person having an interest, usually the greatest interest in the estate. When the administrator is appointed the estate is divested from the Public Trustee and vested in the administrator.

Although this difference of procedure goes back a long way it is arguable that it is no longer justifiable. Since it is now proposed that on intestacy the entire estate of an intestate will pass to the spouse, unless the estate is of considerable size and there are issue of the intestate, there is no reason why the spouse should not have the same rights, powers and duties as if the intestate had made a duly executed will appointing the spouse to be executor. Even if the spouse has to share one half of the residue of the estate, after taking the specific benefits provided for her or him, there is still no reason why the spouse should not act as executor. In very many cases where a person makes a will and that person is married, that person appoints the spouse as sole executor of the will.

Nor is there any reason why, if the intestate dies survived by no spouse but by issue, those issue, if of full age and capacity, should be denied the rights, powers and duties of executors. They are the only persons interested in the estate and are therefore the persons most likely to administer it as quickly and effectively as they can.

The same reasoning applies to remoter kin of the intestate who are entitled to share it.

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[182] See in particular ss. 49 and 52 of the *Succession Act 1981*. See Appendix 2.

Nor is there reason why the estate of an intestate should vest in the Public Trustee upon the death of the intestate. The Public Trustee is not required to act.[183]

The only procedure available to divest the property from the Public Trustee and to vest it in the spouse or members of the intestate's family is to obtain Letters of Administration from the court. In the case of small estates this procedure is prohibitively costly. The burden of ownership placed upon the Public Trustee must be onerous in the case of very small estates. It is likely that in many cases the rule is simply disregarded and members of the family of the intestate act informally to distribute the estate. Section 54 of the *Succession Act 1981* protects such persons as long as they act properly.[184]

It is therefore proposed that the spouse, or others entitled to share the estate of the deceased, should be considered to be executors of the deceased, and that the estate should vest directly in them upon the death so that they can immediately embark upon their duties with full authority.[185]

It is further proposed that the procedure to be followed should be the same as in the case where a testator has made a will. Subject to the provisions of any will, the intestacy rules should have the effect of a will of the intestate. Those entitled will therefore follow the practice prescribed for obtaining probate of the statutory will.

The practice for the grant of Letters of Administration will cease to be used except where it is more convenient. Thus, for example, where there are more than four persons of full age and capacity entitled to share in the estate it would be administratively inconvenient for a grant of probate to be made to all of them. It is therefore proposed that the grant should be made to not more than four persons, as is already the case where there is a will. The current procedure of the court is that the grant is made to those who apply first. The Commission sees no need to interfere with the recognised practice of the court.[186] The executors should also have, as executors appointed by will do, the right to renounce their executorship, as long as there remains at least one executor willing and able to act and to appoint a substitute executor if they do not wish to act. The Public Trustee will continue to be an executor of last resort.

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[183] See s.45(6) of the *Succession Act 1981*. See Appendix 2.

[184] See Appendix 2.

[185] Subdivision B, Division 4; ss.37F, 37I, 37P, 37S draft legislation, Ch.9.

[186] Compare s.48 of the *Succession Act 1981*. See Appendix 2. S.38E draft legislation, Ch.9.

Chapter 8 - Consequential Amendments to the Succession Act 1981

Consequential upon the Commission's recommendations relating to Part III (Distribution on Intestacy) of the *Succession Act 1981*, the following sections will also need to be amended.

8.1 *Section 30(2) - Construction of documents: "Die without issue"; mode of distribution amongst issue.*

The existing section reads:

> **"30. Construction of documents: "Die without issue"; mode of distribution amongst issue.** [Qld. s. 61; cf. s. 33.] (1) Any disposition or appointment of property using the words "die without issue", or "died without leaving issue", or "having no issue", or any words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.
>
> (2) Unless a contrary intention appears by the will, a beneficial disposition of property to the issue of a person shall be distributed to the nearest issue of that person and if there be more than one such nearest issue, among them in equal shares and by representation among the remoter issue of that person."

The proposed new section reads:[187]

> **"30.(1)** A disposition or appointment of property that uses the words 'die without issue', 'die without leaving issue' or 'having no issue' or other words that may be interpreted as meaning either -
>
> (a) a want or failure of issue of a person in the person's lifetime or at the time of a person's death; or
>
> (b) an indefinite failure of a person's issue;
>
> must be interpreted to have the meaning given by paragraph (a) and not

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[187] Cl.5 draft legislation, Ch.9.

paragraph (b).

(2) If a will contains a disposition of property to a person's issue, the person's issue are entitled to share the property in the way set out in Subdivision G (Distribution among issue) of Division 3 (Statutory beneficiaries and executors) of Part 3 (Distribution on Intestacy) as if references in the Subdivision to an intestate were references to the person.

(3) Subsection (2) may be displaced, wholly or partly, by a contrary intention appearing in the will.

(4) In a will, a reference to a person's personal effects or personal chattels is a reference to the person's personal property."

Sub-paragraph (5) defines "personal property" in the same way as it is defined for the purposes of the Intestacy Rules.

Comment

Where a testator leaves property to the issue of a person this provision ensures that the children of that person take, and if more than one, in equal shares. If the issue are remoter than children, they take by representation of the child or children. The existing rule speaks not of "child or children" but of "nearest issue", who might be grandchildren of the named person. The change in wording is to bring this provision into line with the proposed return, in the intestacy rules, to a strict *per stirpes* division, for the reasons referred to in Chapter 3, above.

The new provision will also ensure that commonly used terms in wills such as "personal effects" and "personal chattels" will be given the meaning ascribed to the more appropriate term "personal property" by section 35J of the draft legislation, Chapter 9, below.

8.2 *Section 33 - Statutory substitutional provisions in the event of lapse*

The existing section reads:

"**33. Statutory substitutional provisions in the event of lapse.** [Cf. Qld. s. 65; Eng. s. 33; Vic. s. 31; W.A. s. 27; A.C.T. s. 31.] (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of thirty days, the nearest issue of that issue who survive the testator for a period of thirty days shall take in the place of that issue and if more than one nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of thirty days shall take by

representation.

(2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

(3) This section applies only to wills executed or republished after the commencement of this Act."

The proposed new section reads:[188]

"33.(1) If -

(a) a will contains a disposition of property to any of the testator's issue (whether as an inividual or member of a class) for an estate or interest that is not determinable on or before the death of the issue; and

(b) either -

(i) the issue is dead at the time the will is executed; or

(ii) the issue does not survive the testator by 30 days;

the issue of the testator's issue are entitled to share the property in the way set out in Subdivision G (Distribution among issue) of Division 3 (Statutory beneficiaries and executors) of Part 3 (Distribution on Intestacy) as if references in the Subdivision to an intestate were references to the testator's issue.

(2) Subsection (1) may be displaced, wholly or partly, by a contrary intention appearing in the will.

(3) A general requirement or condition that any of the testator's issue survive the testator or attain a specified age is not a contrary intention for the purpose of subsection (2).

(4) This section applies to wills executed or republished after the commencement of this Act (including wills executed or republished before the commencement of this section)."

Comment

The proposed changes to section 33 are intended to make the provision consonant with the slight revision of the rules for distribution on intestacy contained in Subdivision G of Division 3 of the draft legislation in Chapter 9, below. The reasons for the change are to be found in Chapter 3, above. The revised subsection (1) in effect means that where a testator leaves to issue who have

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[188] Cl.6 draft legislation, Ch.9.

predeceased the testator leaving issue, the deceased issue's issue will take by representation the share their parent would have taken had the parent survived, beginning with the children of the deceased issue, not with the "nearest issue" of that issue.

8.3 *Section 40 Family Provision - meaning of terms - rights of de facto partner in relation to Family Provision*

Sub-paragraphs 40(d)(i) and (ii) form part of the definition of "dependants" for the purposes of Family Provision under Part IV of the Act. The sub-paragraphs currently read:

> "(d) a person who -
>
> (i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or
>
> (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person."

The sub-paragraphs should be revised so as to read:[189]

> "A person, whether or not of the same gender as the deceased person, who at the deceased person's death -
>
> (i) lived with the deceased person as a member of a couple on a genuine domestic basis and had so lived for a period of, or periods totalling, at least five years in the six years before the deceased person's death; but
>
> (ii) was not legally married to the deceased person."

Comment

The object of this revision is to make the provision consistent with the definition of "de facto partner" which the Commission has recommended to be inserted into the

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[189] Cl.8 draft legislation, Ch.9.

intestacy rules.[190] In relation to Family Provision applications, the applicant must show, in addition to proving the de facto relationship, that he or she was dependent on the deceased person.

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[190] S.35C draft legislation, Ch.9.

Chapter 9 - Draft Legislation[1]: Amendments to Succession Act 1981

Queensland

SUCCESSION (INTESTACY) AMENDMENT BILL 1993

TABLE OF PROVISIONS

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[1] This draft was prepared by the Office of Parliamentary Counsel in consultation with the Commission. Reference is made to page numbers of chapter 9 which is separately paginated.

1993

A BILL

FOR

An Act to amend the *Succession Act 1981* to update the intestacy rules and for other purposes

The Parliament of Queensland enacts—

Short title

Clause **1.** This Act may be cited as the *Succession (Intestacy) Amendment Act 1993*.

Commencement

Clause **2.** This Act commences on a day to be fixed by proclamation.

Amended Act

Clause **3.** The *Succession Act 1981* is amended as set out in this Act.

Amendment of s.5 (Interpretation)

Clause **4.(1)** Section 5(1) (definitions **"intestate"** and **"residuary estate"**)—

omit.

(2) Section 5(1)—

insert—

' **"business"** includes trade or profession;

"child" includes adopted child;

"de facto partner" of an intestate has the meaning given by section 35C;

"home" has the meaning given by section 35K;

"intestate" has the meaning given by section 35;

"married spouse" of an intestate has the meaning given by section 35B;

"matrimonial home" has the meaning given by section 35L;

"matrimonial home interest" has the meaning given by section 35M(1);

"mortgage legacy" has the meaning given by section 35S(1);

"next of kin" of an intestate means—

(a) the intestate's parents; and

(b) the intestate's brothers and sisters and the children of any of the brothers or sisters who die before the intestate; and

(c) the intestate's grandparents; and

(d) the intestate's uncles and aunts and the children of any of the uncles or aunts who die before the intestate;

"personal property" of an intestate has the meaning given by section 35J;

"residuary estate" of an intestate has the meaning given by section 35I;

"spouse" of an intestate has the meaning given by section 35A;

"statutory beneficiary" of an intestate is a person who is entitled to all or some of the intestate's residuary estate under Division 3 (Statutory beneficiaries and executors) of Part 3 (Distribution on intestacy);

"statutory executor" means a person entitled to be a statutory executor under Division 3 (Statutory beneficiaries and executors) or 4 (Statutory executorship and administration of intestate's estate) of Part 3 (Distribution on intestacy);'.

Replacement of s.30 (Construction of documents: "Die without issue"; mode of distribution amongst issue)

Clause

5. Section 30—

omit, insert—

'Construction of documents—"die without issue", distribution among issue and references to personal effects

'30.(1) A disposition or appointment of property that uses the words 'die without issue', 'die without leaving issue' or 'having no issue' or other words that may be interpreted as meaning either—

(a) a want or failure of issue of a person in the person's lifetime or at the time of a person's death; or

(b) an indefinite failure of a person's issue;

must be interpreted to have the meaning given by paragraph (a) and not paragraph (b).

'**(2)** If a will contains a disposition of property to a person's issue, the person's issue are entitled to share the property in the way set out in Subdivision G (Distribution among issue) of Division 3 (Statutory beneficiaries and executors) of Part 3 (Distribution on Intestacy) as if references in the Subdivision to an intestate were references to the person.

'**(3)** Subsection (2) may be displaced, wholly or partly, by a contrary intention appearing in the will.

'**(4)** In a will, a reference to a person's personal effects or personal chattels is a reference to the person's personal property.

'**(5)** In this section—

"personal property" of a person means all of the person's property excluding the following—

(a) any interest in land;

(b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);

(c) stock, shares and debentures;

(d) property that was used exclusively for business purposes at the time of the person's death.'.

Replacement of s.33 (Statutory substitutional provisions in the event of lapse)

Clause **6.** Section 33—

omit, insert—

'**Statutory substitutional provisions if lapse**

'**33.(1)** If—

(a) a will contains a disposition of property to any of the testator's issue (whether as an individual or member of a class) for an estate or interest that is not determinable on or before the death of the issue; and

(b) either—

(i) the issue is dead at the time the will is executed; or

(ii) the issue does not survive the testator by 30 days;

the issue of the testator's issue are entitled to share the property in the way set out in Subdivision G (Distribution among issue) of Division 3 (Statutory beneficiaries and executors) of Part 3 (Distribution on Intestacy) as if references in the Subdivision to an intestate were references to the testator's issue.

'**(2)** Subsection (1) may be displaced, wholly or partly, by a contrary intention appearing in the will.

'**(3)** A general requirement or condition that the testator's issue, or any of the testator's issue, survive the testator or attain a specified age is not a contrary intention for the purpose of subsection (2).

'**(4)** This section applies to wills executed or republished after the commencement of this Act (including wills executed or republished before the commencement of this section).'.

Replacement of Part 3 (Distribution on intestacy)

Clause **7.** Part 3—

omit, insert—

'PART 3—DISTRIBUTION ON INTESTACY

'Division 1—Preliminary

'Application of Part

'34. This Part applies in the case of deaths happening after its commencement.

'Division 2—Interpretation

'Subdivision A—Intestacy concept

'Meaning of "intestate"

'35. An **"intestate"** is a person who dies and—

(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 the person's property.

'Subdivision B—Spouse and related concepts

'Meaning of "spouse"

'35A.(1) An intestate's **"spouse"** is the intestate's married spouse or de facto partner.

'(2) However, if, apart from this subsection, the intestate would be survived by more than 1 spouse, sections 35B to 35G determine who, if anyone, is the intestate's spouse for the purposes of this Part.

'Meaning of "married spouse"

'35B. An intestate's **"married spouse"** is the person who was legally married to the intestate at the intestate's death.

'Meaning of "de facto partner"

'35C. An intestate's **"de facto partner"** is a person, whether or not of the same gender as the intestate, who at the intestate's death—

(a) lived with the intestate as a member of a couple on a genuine domestic basis and either—

(i) in the 6 years before the intestate's death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least 5 years; or

(ii) is the parent of a child of the intestate who is less than 18 years old; but

(b) was not legally married to the intestate.

'Married spouse is spouse if intestate and married spouse lived together within 5 years of death

'35D. If the intestate is survived by—

(a) a married spouse who lived with the intestate at any time within 5 years of the intestate's death; and

(b) a de facto partner;

the married spouse is the intestate's spouse to the exclusion of the de facto partner.

'De facto partner is spouse if intestate and married spouse did not live together within 5 years of death

'35E. If the intestate is survived by—

(a) a married spouse who did not live with the intestate at any time within 5 years of the intestate's death; and

(b) a de facto partner;

the de facto partner is the intestate's spouse to the exclusion of the married spouse.

'Married spouse is spouse if more than 1 de facto partner

'35F. If the intestate is survived by—

(a) a married spouse; and

(b) more than 1 de facto partner;

the married spouse is the intestate's spouse to the exclusion of the de facto partners.

'No spouse if more than 1 de facto partner but no married spouse

'35G. If the intestate—

(a) is survived by more than 1 de facto partner; and

(b) is not survived by a married spouse;

none of the de facto partners is the intestate's spouse.

'Family maintenance rights preserved

'35H. Nothing in this Subdivision affects a person's rights under Part 4 (Family provision).

'Subdivision C—Residuary estate and related concepts

'Meaning of "residuary estate"

'35I. An intestate's **"residuary estate"** is—

(a) if the intestate leaves a will— the intestate's property that is not effectively disposed of by the will; and

(b) if the intestate does not leave a will— the intestate's property.

'Meaning of "personal property"

'35J. An intestate's **"personal property"** is all of the intestate's property excluding the following—

(a) any interest in land;

(b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);

(c) stock, shares and debentures;

(d) property that was used exclusively for business purposes at the time of the intestate's death.

'Subdivision D—Home and matrimonial home concepts

'Meaning of "home"

'35K.(1) A **"home"** is a building, or part of a building, that is designed to be used, or designed to be used principally, as a separate residence for a family or person.

'(2) If the building is a dwelling house, the land that forms the curtilage of the building is also part of the home.

'(3) If the building is a unit, any interest in a part of—

(a) the building; or

(b) the land that forms the curtilage of the building;

that is owned or otherwise held in conjunction with the unit, is also part of the home.

'Meaning of "matrimonial home"

'35L.(1) An intestate's **"matrimonial home"** is a home ordinarily or sometimes occupied by the intestate or the intestate's spouse.

'(2) A home is not a matrimonial home if—

(a) it was used as part of, or in connection with, business of the intestate; and

(b) it would ordinarily be sold with the business if the business was to be sold as a going concern.

'Subdivision E—Matrimonial home interest and mortgage legacy concepts

'Meaning etc. of "matrimonial home interest"

'35M.(1) A **"matrimonial home interest"** is the matrimonial home interest (if any) determined under sections 35N to 35R.

'(2) The matrimonial home interest is intended to assist an intestate's

surviving spouse to maintain his or her previous general living arrangements as far as practicable.

'Matrimonial home interest if joint tenants and fee simple

'35N.(1) This section applies if, at the intestate's death—

(a) 1 or more matrimonial homes were held by the intestate and spouse as joint tenants; and

(b) the title to the matrimonial home, or any of them, is a title in fee simple.

'(2) The spouse has no matrimonial home interest.

'Matrimonial home interest if sole owner and fee simple

'35O.(1) This section applies if—

(a) section 35N (Matrimonial home interest if joint tenants and fee simple) does not apply; and

(b) at the intestate's death—

(i) 1 or more matrimonial homes were held by the intestate as sole owner; and

(ii) the title to the matrimonial home, or any of them, is a title in fee simple.

'(2) The spouse has a matrimonial home interest of the matrimonial home or the matrimonial home of the spouse's choice.

'Matrimonial home interest if tenants in common and fee simple

'35P.(1) This section applies if—

(a) the following sections do not apply—

- section 35N (Matrimonial home interest if joint tenants and fee simple)
- section 35O (Matrimonial home interest if sole owner and fee simple); and

(b) at the intestate's death—

(i) 1 or more matrimonial homes were held by the intestate and spouse as tenants in common; and

(ii) the title to the matrimonial home, or any of them, is a title in fee simple.

'**(2)** The spouse has a matrimonial home interest of the matrimonial home or the matrimonial home of the spouse's choice.

'Matrimonial home interest if matrimonial home in other cases

'**35Q.(1)** This section applies if—

(a) the following sections do not apply—

- section 35N (Matrimonial home interest if joint tenants and fee simple)
- section 35O (Matrimonial home interest if sole owner and fee simple)
- section 35P (Matrimonial home interest if tenants in common and fee simple); and

(b) at the intestate's death 1 or more matrimonial homes were held by the intestate (whether or not as sole owner).

'**(2)** The spouse has a matrimonial home interest of, at the spouse's choice—

(a) the matrimonial home, or the matrimonial home of the spouse's choice, to the extent it was held by the intestate; or

(b) a legacy of $150 000.

'Matrimonial home interest if no matrimonial home

'**35R.(1)** This section applies if, at the intestate's death—

(a) there is no matrimonial home forming part of the intestate's residuary estate; and

(b) no matrimonial home is held by the intestate and spouse as joint tenants.

'(2) The spouse has a matrimonial home interest of a legacy of $150 000.

'Meaning etc. of "mortgage legacy"

'35S.(1) A **"mortgage legacy"** is the mortgage legacy (if any) determined under sections 35T and 35U.

'(2) A mortgage legacy is also intended to assist an intestate's surviving spouse to maintain his or her previous general living arrangements as far as practicable.

'Mortgage legacy if joint tenants and fee simple

'35T.(1) This section applies if section 35N (Matrimonial home interest if joint tenants and fee simple) applies.

'(2) If—

(a) there is 1 matrimonial home to which section 35N applies; and

(b) the matrimonial home is subject to a mortgage;

the spouse has a mortgage legacy of a legacy of an amount up to $150 000 sufficient to discharge the capital and interest owing on the matrimonial home at the intestate's death.

'(3) If—

(a) there is more than 1 matrimonial home to which section 35N applies; and

(b) any of them is subject to a mortgage;

the spouse has a mortgage legacy of a legacy of an amount up to $150 000 sufficient to discharge the capital and interest owing at the intestate's death on the matrimonial home of the spouse's choice.

'Mortgage legacy in other cases

'35U.(1) This section applies if the spouse has a matrimonial home

interest of a matrimonial home under any of the following sections—

- section 35O (Matrimonial home interest if sole owner and fee simple)
- section 35P (Matrimonial home interest if tenants in common and fee simple)
- section 35Q (Matrimonial home interest if matrimonial home in other cases).

'**(2)** If the matrimonial home is subject to a mortgage, the spouse has a mortgage legacy of a legacy of an amount up to $150 000 sufficient to discharge the capital and interest owing at the intestate's death on the matrimonial home.

'Spouse to choose within 9 months

'**35V.(1)** If a spouse is given a choice under this Subdivision, the choice must be made within 9 months of the intestate's death.

'**(2)** If a choice is not made by the spouse within time—

(a) if the spouse is the sole executor—the choice may be made by the Court; or

(b) in any other case—the choice may be made by—

(i) the executors other than the spouse; or

(ii) if the executors other than the spouse do not choose within a reasonable time—the Court.

'Division 2—Statutory Will

'Effect of Part

'**36.(1)** In the case of an intestate who leaves a will, the provisions of the will and the provisions of this Part operate together to have the effect of a will of the intestate.

'**(2)** In any other case, the provisions of this Part have the effect of a will of the intestate.

'Division 3—Statutory beneficiaries and executors

'Subdivision A—Preliminary

'Explanation

'37. This Division sets out who is entitled to an intestate's residuary estate as well as who is entitled to be the executor of the estate if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'Statutory beneficiary dies within 30 days

'37A. If a person who is entitled to a part of an intestate's residuary estate under this Division does not survive the intestate by 30 days, the part must be treated as if the person had died before the intestate.

'Statutory beneficiary not required to account

'37B. A statutory beneficiary of an intestate is not required to account for a benefit—

(a) received under a will of the intestate; or

(b) received under another gift or entitlement made by the intestate; or

(c) payable on the intestate's death other than under this Part.

'Ascertaining family relationship

'37C. In ascertaining relationship, it does not matter whether the relationship is of blood or half blood.

'Subdivision B—Spouse but no issue

'Application of Subdivision

'37D. This Subdivision applies if an intestate is survived by a spouse but no issue.

'Statutory beneficiary—spouse

'37E. The spouse is entitled to the whole of the intestate's residuary estate.

'Statutory executor—statutory spouse

'37F. The spouse is entitled to be the statutory executor of the intestate's estate if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'Subdivision C—Spouse and issue

'Application of Subdivision

'37G. This Subdivision applies if an intestate is survived by a spouse and issue.

'Statutory beneficiary—spouse and, if residuary estate sufficient, issue

'37H.(1) The spouse is entitled to the following parts of the intestate's residuary estate—

(a) the intestate's personal property;

(b) any matrimonial home interest and mortgage legacy determined under Subdivision E (Matrimonial home interest and mortgage legacy concepts) of Division 2 (Interpretation);

(c) a legacy of $100 000;

(d) 50% of the balance.

'**(2)** The issue are entitled to the other 50% of the balance of the intestate's residuary estate.

'**(3)** The intestate's issue share in the way set out in Subdivision G.

Example 1

Phillip died intestate. He was survived by his wife (Alice) and 2 children. Phillip owned the only matrimonial home. It has a fee simple title and is not subject to a mortgage. Phillip also had personal property and $20 000 in various investments.

- Alice will receive Phillip's personal property under section 37H(1)(a) (see s.35J) and the matrimonial home under section 37H(1)(b) (see ss.35L and 35O).
- If Phillip's estate had been large enough, Alice would also have been entitled to a legacy of $100 000 under section 37H(1)(c) and half of anything else under section 37H(1)(d) (the children sharing the other half).
- However, because there is only $20 000 left, Alice will receive the whole of it. As a result, Alice will receive the whole of Phillip's estate.

Example 2

Tarjo died intestate. She was survived by her de facto husband of 10 years (Henchi) and 2 children (Masahiro) and (Norijuki). Tarjo owned the only matrimonial home. There was a mortgage of $190 000 owing on the home which had a fee simple title at the time of Tarjo's death. Tarjo had personal property, $480 000 in bank accounts and a business valued at $300 000.

- Henchi will receive Tarjo's personal property under section 37H(1)(a) (see s.35J); the matrimonial home and $150 000 towards the outstanding mortgage under section 37H(1)(b) (see ss.35L, 35O and 35T(1)); and a legacy of $100 000 under section 37H(1)(c).
- This will leave $530 000 in the estate. Henchi will receive half, that is, $265 000 under section 37H(1)(d); and Masahiro and Norijuki will share the other half, that is, they will receive $132,000 each under section 37H(2) and Subdivision G.

- Henchi will be responsible for the balance of the outstanding mortgage.

'Statutory executors—spouse and, if entitled, issue

'37I.(1) This section applies if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'(2) The following persons are jointly entitled to be the statutory executors of the intestate's estate—

(a) the intestate's spouse;

(b) the issue who have some entitlement to the intestate's residuary estate and are able and willing to act;

(c) if subsection (3) applies, the representative.

'(3) If—

(a) there are issue of the intestate who—

(i) are not issue of the intestate's spouse; and

(ii) have some entitlement to the intestate's residuary estate; and

(b) none of the issue mentioned in paragraph (a) is able to act;

a representative of the issue mentioned in paragraph (a) who is able and willing may be a statutory executor under subsection (1).

'Subdivision D—Issue but no spouse

'Application of Subdivision

'37J. This Subdivision applies if an intestate is survived by issue but no spouse.

'Statutory beneficiary—issue

'37K.(1) The issue are entitled to the whole of the intestate's residuary estate.

'(2) The intestate's issue share in the way set out in Subdivision G.

'Statutory executor—issue

'37L. This section applies if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'(2) The following person is entitled (or, if more than 1, are jointly entitled) to be the statutory executor of the intestate's estate—

(a) the issue who have some entitlement to the intestate's residuary estate and who are able and willing to act;

(b) if there is no issue who has some entitlement to the intestate's residuary estate who is able to act—a representative of the issue who is able and willing to act.

'Subdivision E—Next of kin but no spouse or issue

'Application of Subdivision

'37M. This Subdivision applies if an intestate is survived by next of kin but no spouse or issue.

'Statutory beneficiary—next of kin

'37N. The next of kin are entitled to the whole of the intestate's residuary estate.

'Distribution among next of kin

'37O.(1) The intestate's next of kin are entitled to the residuary estate, and, if there is more than 1 next of kin, in equal shares, in the following order—

(a) the intestate's surviving parents; but if none survives then—

(b) the intestate's surviving brothers and sisters and the surviving children of any of the brothers or sisters who die before the intestate; but if none survives then—

(c) the intestate's surviving grandparents; but if none survives then—

(d) the intestate's surviving uncles and aunts and the surviving

children of any of the uncles or aunts who die before the intestate.

'(2) The intestate's surviving brothers and sisters and the surviving children of any of the brothers and sisters who die before the intestate share in the way set out in Subdivision H.

'(3) The intestate's surviving uncles and aunts and the surviving children of any of the uncles or aunts who die before the intestate share in the way set out in Subdivision I.

'Statutory executor—next of kin

'37P.(1) This section applies if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'(2) The following person is entitled (or, if more than 1, the following persons are jointly entitled) to be the statutory executor of the intestate's estate—

(a) the next of kin who have some entitlement to the intestate's residuary estate and who are able and willing to act;

(b) if there is no next of kin who has some entitlement to the intestate's residuary estate who is able to act—a representative of ~~the~~ ~~a~~ next of kin who is able and willing to act.

'Subdivision F—No spouse, issue or next of kin

'Application of Subdivision

'37Q. This Subdivision applies if an intestate is not survived by a spouse, issue or next of kin.

'Statutory beneficiary—State

'37R. The State is entitled to the whole of the intestate's residuary estate.

Example—

Janusz died intestate leaving no spouse or issue. He was the only child

of parents, each of whom was an only child. His parents and all of his grandparents died before him. His estate will pass to the State as *bona vacantia*.

'Statutory executor—Public Trustee

'37S.(1) This section applies if there is no properly appointed executor of a will made by the intestate who is able and willing to act.

'(2) The Public Trustee is the statutory executor of the intestate's estate.

'Subdivision G—Distribution among issue

'Explanation

'37T.(1) If an intestate's issue are entitled to all or part of the residuary estate, this Subdivision sets out the way the entitlement is to be shared among them.

'(2) The steps provide for a *per stirpes* distribution, that is, for a method of distribution where a group of distributees take between them the share to which their deceased ancestor (issue of the intestate) would have been entitled if the deceased ancestor had not died before the intestate.

'(3) The steps are to be applied sequentially until the entitlement of all entitled issue has been determined.

'Step 1—determine which issue are entitled

'37U. Only people who—

(a) are surviving issue of the intestate; and

(b) do not have a surviving parent, grandparent or other ancestor who is also issue of the intestate;

are entitled to take as the intestate's issue (the **"entitled issue"**).

'Step 2—determine number of child's shares

'37V. If an intestate's issue are entitled to the whole or part of the

intestate's residuary estate, the entitlement must be divided into as many equal shares (**"child's shares"**) as there are—

(a) surviving children of the intestate; and

(b) children of the intestate who—

(i) died before the intestate; and

(ii) have issue who survived the intestate.

'Step 3—distribute child's shares

'37W.(1) Each surviving child of the intestate is entitled to a child's share.

'(2) In respect of each child of the intestate who—

(a) died before the intestate; and

(b) has issue who survived the intestate;

the surviving issue are entitled to share a child's share in the way set out in sections 37X to 37ZB.

'Step 4—determine number of grandchild's shares

'37X. If surviving issue of 1 of the intestate's children (a **"deceased child"**) are entitled to share a child's share, the share must be divided into as many equal shares (**"grandchild's shares"**) as there are—

(a) surviving children of the deceased child; and

(b) children of the deceased child who—

(i) died before the intestate; and

(ii) have issue who survived the intestate.

'Step 5—distribute grandchild's shares

'37Y.(1) Each surviving child of a deceased child is entitled to a grandchild's share of the deceased child's share.

'(2) In respect of each child of a deceased child who—

(i) died before the intestate; and

(ii) has issue who survived the intestate;

the surviving issue are entitled to share a grandchild's share of the deceased child's share in the way set out in sections 37Z to 37ZB.

'Step 6—determine number of great-grandchild's shares

'37Z. If surviving issue of 1 of the intestate's grandchildren (a **"deceased grandchild"**) are entitled to share a grandchild's share, the share must be divided into as many equal shares (**"great-grandchild's shares"**) as there are—

(a) surviving children of the deceased grandchild; and

(b) children of the deceased grandchild who—

(i) died before the intestate; and

(ii) have issue who survived the intestate.

'Step 7—distribute great-grandchild's shares

'37ZA.(1) Each surviving child of a deceased grandchild is entitled to a great-grandchild's share of the deceased grandchild's share.

'(2) In respect of each child of a deceased grandchild who—

(a) died before the intestate; and

(b) has issue who survived the intestate;

the surviving issue are entitled to share a great-grandchild's share of the deceased grandchild's share in the way set out in section 37ZB.

'Step 8—determine number of, and distribute, next generation child's shares

'37ZB. If there are entitled issue whose entitlement has not been determined under sections 37V to 37ZA, section 37Z (Step 6—determine number of great-grandchild's shares) and section 37ZA (Step 7—distribute great-grandchild's shares) must be applied and reapplied (with the appropriate modification for the later generation concerned) until the

entitlement of all entitled issue has been determined.

Example—

Facts

Alfred died intestate leaving an estate worth $480 000. He was 95. His wife died 10 years earlier. He had 6 children, Florence, Elizabeth, Ruth, Harold, John and Robert. The people mentioned below survived Alfred, unless otherwise indicated. The names of those who will benefit from his estate and their entitlements are bolded.

Florence (Alfred's child)

died in her infancy

Elizabeth (Alfred's child)

died before Alfred. She had 3 children—

- Elsie (Alfred's grandchild)

  died before Alfred with no children

- **Mary ($60 000)** (Alfred's grandchild)

  has no children

- Simon (Alfred's grandchild)

  died before Alfred leaving 3 children—

  - Alice (Alfred's great-grandchild)

    died in her infancy

  - Jennifer (Alfred's great-grandchild)

    died in a car accident before Alfred, leaving 2 infant children—

    - **Elise ($15 000)** (Alfred's great-great-grandchild)
    - **Phoebe ($15 000)** (Alfred's great-great-grandchild)

  - **Ben ($30 000)** (Alfred's great-grandchild)

    is married with a child—

    - Susan (Alfred's great-great-grandchild)

- **Ruth ($120 000)** (Alfred's child)
  has 2 children—
  - Giulio (Alfred's grandchild)
  - Salvatore (Alfred's grandchild)

- Harold (Alfred's child)
  died in the 1939–1945 War leaving a child—
  - Sam (Alfred's grandchild)
    died before Alfred leaving a child—
    - Choy (Alfred's great-grandchild)
      died of leukaemia before Alfred.

- **John ($120 000)** (Alfred's child)
  - has no children

- Robert (Alfred's child)
  died before Alfred leaving a child—
  - Ian (Alfred's grandchild)
    died before Alfred leaving a child—
    - **May Lin ($120 000)** (Alfred's great-grandchild)
      has no children

'Step 1—determine which issue are entitled (s.37U)

The names of entitled issue are bolded.

'Step 2—determine number of child's shares (s.37V)

Alfred's estate ($480 000) must be divided into 4 shares of $120 000 because 2 of Alfred's children (Ruth and John) survive him and there are

surviving issue of 2 of his children who died before him (Elizabeth and Robert).

'Step 3—distribute child's shares (s.37W)

Under section 37W(1), Ruth and John are each entitled to a child's share of $120 000. Because Ruth survived Alfred, her children (Giulio and Salvatore) have no entitlement. Under section 37W(2), Elizabeth's surviving issue are entitled to share a child's share in the way set out in the remaining sections of the Subdivision. Similarly, Robert's surviving grandchild is entitled to a child's share.

'Step 4—determine number of grandchild's shares (s.37X)

Elizabeth's child's share of $120 000 must be divided into 2 grandchild's shares of $60 000 because 1 of her children (Mary) survives Alfred and there are surviving issue of another of her children who died before Alfred (Simon).

Robert's child's share of $120 000 becomes a grandchild's share of $120 000 because he has no surviving children and there is issue of his child (Ian) who died before Alfred.

'Step 5—distribute grandchild's shares (s.37Y)

In relation to Alfred's issue through Elizabeth, her daughter (Alfred's grandchild) Mary is entitled to a grandchild's share ($60 000) under section 37Y(1) and Elizabeth's son's (Simon's) issue are entitled to share a grandchild's share ($60 000) in the way set out in the remaining sections of the Subdivision.

In relation to Alfed's issue through Robert, Robert's grandchild (May Lin) is entitled to a grandchild's share of $120 000.

'Step 6—determine number of great-grandchild's shares (s.37Z)

Simon's grandchild's share of $60 000 must be divided into 2 great-grandchild's shares of $30 000 because 1 of his children (Ben) survives

Alfred and there are surviving issue of another of Simon's children who died before Alfred (Jennifer).

'Step 7—distribute great-grandchildren's shares (s.37ZA)

In relation to Alfred's issue through Jennifer, her son (Alfred's great-grandchild, Ben) is entitled to a great-grandchild's share ($30 000) under section 37ZA(1) and her daughter's (Jennifer's) children are entitled to share a grandchild's share ($30 000) in the way set out in section 37ZB.

'Step 8—determine number of, and distribute, next generation child's shares (s.37ZB)

Under modified section 37Z, Jennifer's great-grandchild's share of $30 000 must be divided into 2 shares of $15 000 because 2 of her children (Elise and Phoebe) survive Alfred. Under modified section 37ZA(1), Elise and Phoebe are each entitled to 1 share ($15 000). There are no other entitled issue and Alfred's residuary estate has been fully distributed.

'Subdivision H—Distribution among siblings

'Explanation

'37ZC.(1) If an intestate's surviving brothers and sisters, and the surviving children of any of the brothers and sisters who die before the intestate, are entitled to the residuary estate, this Subdivision sets out the way the entitlement is to be shared among them.

'(2) The steps provide for a *per stirpes* distribution, that is, for a method of distribution where a group of distributees take between them the share to which their deceased ancestor (a brother or sister of the intestate) would have been entitled if the deceased ancestor had not died before the intestate.

'(3) The steps are to be applied sequentially.

'Step 1—determine number of shares

'37ZD. If the intestate's surviving brothers and sisters, and the surviving children of any of the brothers or sisters who die before the intestate, are

entitled to the whole of the intestate's residuary estate, the entitlement must be divided into as many equal shares as there are—

(a) surviving brothers and sisters of the intestate; and

(b) brothers and sisters of the intestate who—

(i) died before the intestate; and

(ii) have children who survived the intestate.

'Step 2—distribute shares

'37ZE. The shares into which the entitlement is divided under section 37ZE are distributed among the intestate's brothers and sisters and their children as follows—

(a) each surviving brother or sister of the intestate is entitled to 1 share;

(b) each surviving nephew or niece of the intestate who is a child of a brother or sister of the intestate who died before the intestate is entitled (and, if more than 1, in equal shares) to the share to which the nephew or niece's parent would have been entitled under paragraph (a) if the parent had survived the intestate.

Example—

Facts

Gamel died intestate leaving an estate worth $6 000. He had no surviving spouse, issue or parents. He had 2 siblings, Melek and Muhammad. The names of those who will benefit and their entitlement are bolded.

Melek ($3 000) (Gamel's sister)

survives Gamel. She has a child—

- Christopher

survives Gamel. He has 3 surviving children—

- Peter
- Paul
- Mary

Muhammad (Gamel's brother)

died before Gamel leaving 3 children—

- Hafiz

  died before Gamel leaving a child—

  - Bilal

    survives Gamel

- **Biruni ($1 500)**

  survives Gamel

- **Kurd ($1 500)**

  survives Gamel

'Subdivision I—Distribution among uncles and aunts

'Explanation

'37ZF.(1) If an intestate's surviving uncles and aunts, and the surviving children of any of the uncles and aunts who die before the intestate, are entitled to the residuary estate, this Subdivision sets out the way the entitlement is to be shared among them.

'(2) The steps provide for a *per stirpes* distribution, that is, for a method of distribution where a group of distributees take between them the share to which their deceased ancestor (an uncle or aunt of the intestate) would have been entitled if the deceased ancestor had not died before the intestate.

'(3) The steps are to be applied sequentially.

'Step 1—determine number of shares

'37ZG. If the intestate's surviving uncles and aunts, and the surviving children of any of the uncles or aunts who die before the intestate, are entitled to the whole of the intestate's residuary estate, the entitlement must be divided into as many equal shares as there are—

(a) surviving uncles and aunts of the intestate; and

(b) uncles and aunts of the intestate who—

(i) died before the intestate; and

(ii) have children who survived the intestate.

'Step 2—distribute shares

'37ZH. The shares into which the entitlement is divided under section 37ZG are distributed among the intestate's uncles and aunts and their children as follows—

(a) each surviving uncle or aunt of the intestate is entitled to 1 share;

(b) each surviving cousin of the intestate who is a child of an uncle or aunt of the intestate who died before the intestate is entitled (and, if more than 1, in equal shares) to the share to which the cousin's parent would have been entitled under paragraph (a) if the parent had survived the intestate.

'Division 4—Statutory executorship and administration of intestate's estate

'Subdivision A—Appointment and renunciation of statutory executor

'Other statutory executor

'38. If—

(a) there is no properly appointed executor of a will made by an intestate who is able and willing to act; and

(b) there is no person who is entitled to be the statutory executor of the intestate's estate who is able and willing to act;

the Public Trustee is the statutory executor of the intestate's estate.

'Substitute executor

'38A.(1) A statutory executor may, by writing, appoint another person

who is able and willing to act in the statutory executor's place.

'(2) The person appointed is a statutory executor.

'Renunciation

'38B. A statutory executor may renounce executorship of an intestate's estate as long as there remains at least 1 executor who is able and willing to act.

'Subdivision B—Vesting and powers

'Powers of statutory executor

'38C. A statutory executor has all the rights powers and duties of an executor as if appointed as an executor by a properly executed will made by the intestate.

'Vesting in statutory executor

'38D. An intestate's estate vests in the statutory executor or executors on the intestate's death and Division 1 (Devolution of property probate and administration) of Part 5 (Administration) applies accordingly.

'Probate granted to statutory executor

'38E. The Court may grant probate of the intestate's statutory will to the statutory executor or executors who apply first.'.

Replacement of s.40 (Meaning of terms)

Clause **8.** Section 40—

omit, insert—

'Definitions

'40. In this Part—

"child" of a deceased person means a child, stepchild or adopted child of

the person;

"dependant" of a deceased person means any of the following persons who was wholly or substantially maintained or supported (other than for full valuable consideration) by the deceased person at the deceased person's death—

(a) a parent of the deceased person;

(b) the parent of a surviving child under 18 of the deceased person;

(c) a person under 18;

(d) a person, whether or not of the same gender as the deceased person, who at the deceased person's death—

(i) lived with the deceased person as a member of a couple on a genuine domestic basis and had so lived for a period of, or periods totalling, at least 5 years in the 6 years before the deceased person's death; but

(ii) was not legally married to the deceased person;

"spouse" of a deceased person means—

(a) a person who was legally married to the deceased person at the deceased person's death; or

(b) a person who—

(i) was divorced (whether before, on or after the commencement of this Act) from the deceased person at the deceased person's death; and

(ii) had not legally married another person since the divorce; and

(iii) was receiving, or entitled to receive, maintenance from the deceased person at the deceased person's death;

"stepchild" of a deceased person means a child of the deceased person's spouse who is not a child of the deceased person.'.

Replacement of s.55 (Interpretation)

Clause **9.** Section 55—

omit, insert—

'Definition

'55. In this Division—

"pecuniary legacy" includes a legacy under Part 3 (Distribution on intestacy);

"residuary estate" of a deceased means—

(a) if the deceased leaves a will—the deceased's property that—

(i) is not effectively disposed of by the will; or

(ii) is not specifically devised or bequeathed but is included (whether by specific or general information) in a residuary disposition; or

(b) if the deceased does not leave a will—the deceased's property.'.

Amendment of s.59 (Payment of debts in the case of solvent estates)

Clause **10.** Section 59(4)—

insert—

'(4) For the purposes of applying this section to an intestate's estate—

(a) the intestate's personal property is Class 3 property; and

(b) a matrimonial home interest is Class 3 property; and

(c) anything else in the intestate's estate is Class 2 property.'.

Insertion of new ss.73 and 74

Clause **11.** After section 72—

insert—

'Gender neutral terms in wills and related documents

'73. It is sufficient in wills and related documents (including, for example, documents relating to a grant, or revocation, of probate of a will or letters of administration of a deceased person's estate) to call a person 'testator', 'executor' or 'administrator' whatever the person's gender.

'Renumbering of Act

'74.(1) In this section—

"commencement" means the commencement of this section;

"law" means—

(a) an Act; or

(b) a statutory instrument;

"new Act" means this Act after the commencement;

'(2) The Parts of the new Act are renumbered so that they bear consecutive arabic numerals starting with '1'.

'(3) The Divisions of each Part of the new Act are renumbered so that they bear consecutive arabic numerals starting with '1'.

'(4) The Subdivisions of each Division of the new Act are renumbered so that they bear consecutive alphabetical letters starting with 'A'.

'(5) The sections of the new Act are renumbered in a single series so that they bear consecutive arabic numerals starting with '1'.

'(6) The sentences of each section of the new Act (whether or not they are subsections) are numbered or renumbered so that they bear consecutive arabic numerals starting with '1'.

'(7) Each mention in the new Act of a provision of the new Act that has been numbered or renumbered under this section is amended by omitting the mention and substituting a mention of the provision as numbered or renumbered.

'(8) If, before the commencement, there is, in a law, a mention of a specified provision of this Act that is numbered or renumbered because of this section, after the commencement, the mention is taken to be a mention of the specified provision as numbered or renumbered.'.

Omission of Schedule 2 (Distribution of residuary estate upon intestacy)

Clause **12.** Schedule 2—

omit.

Appendix 1

List of Respondents to Working Paper

1. Sylvia Winters
   Barrister-at-Law
   (NSW)

2. S G Oakes

3. Tim Whitney
   Solicitor

4. John K de Groot
   Associate Professor of Law
   Queensland University of Technology

5. Ms R L Matchett
   Director-General
   Department of Family Services and
   Aboriginal and Islander Affairs

6. Kevin Martin
   Public Trustee of Qld

7. Kevin Lynch
   Barrister-at-Law

8. The Law Society of New South Wales

9. Caxton Legal Centre Inc.

10. Women's Legal Service

11. Trustee Companies Association of Australia
    (Queensland Council)

12. Anti-Discrimination Board of NSW

13. Moira Rayner
    Commissioner for Equal Opportunity
    Victoria

14. Phillip V Tahmindjis
    Acting Associate Professor of Law
    Queensland University of Technology

Appendix 2

Succession Act 1981, Extracts

18. Effect of divorce on will. [Cf. American Uniform Probate Code s. 2—508.] (1) The dissolution or annulment of the marriage of a testator revokes—

(a) any beneficial disposition of property made by will by the testator in favour of his spouse; and

(b) any appointment made by will by the testator of his spouse as executrix, trustee, advisory trustee or guardian.

(2) So far as any beneficial disposition of property which is revoked by the operation of subsection (1) of this section is concerned the will shall take effect as if the spouse had predeceased the testator.

PART III—DISTRIBUTION ON INTESTACY

34. Interpretation. [Qld. s. 29.] (1) In this Part, unless a contrary intention appears " residuary estate " in relation to an intestate means—

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

(b) in any other case—the property of the intestate,

which is available for distribution after payment thereout of all such debts as are properly payable thereout.

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

(3) The provisions of this Part shall be subject to the provisions of an order made under and in accordance with the provisions of Part IV of this Act and shall be applied accordingly.

35. Distribution of residuary estate on intestacy. [Qld. s. 30.] (1) Subject to the provisions of subsection (2) the person or persons entitled to take an interest in the residuary estate of an intestate, and the interest in that estate which that person is or those persons are entitled to take shall be ascertained by reference to the Second Schedule of this Act according to the facts and circumstances existing in relation to the intestate.

For the purposes of this Act—

(a) the brothers and sisters of the intestate;

(b) the grandparents of the intestate;

(c) the brothers and sisters of a parent of the intestate;

(d) the children of any brothers or sisters of an intestate who predecease the intestate; and

(e) the children of any brothers or sisters of a parent of an intestate who predecease the intestate;

are the next of kin of the intestate.

(2) Where a person entitled to take any part of the residuary estate of an intestate under this Part does not survive the intestate for a period of thirty days that part of the residuary estate shall be treated as if that person had died before the intestate.

36. Manner of distribution to issue. [Qld. s. 31.] Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate the nearest issue of the intestate shall take that whole or part and if there be more than one such nearest issue among them in equal shares and the more remote issue of the intestate shall take that whole or part by representation.

37. Manner of distribution to next of kin. [Qld. s. 32.] (1) Where, by virtue of this Act, the next of kin of an intestate are entitled to the residuary estate of the intestate, the persons entitled to that residuary estate shall be ascertained in accordance with the following paragraphs:—

(a) the brothers and sisters of the intestate who survived the intestate, and the children of a brother or sister of the intestate who died before the intestate, being children who survived the intestate, are entitled to the residuary estate of the intestate;

(b) if the intestate is not survived by any persons entitled to the residuary estate under the last preceding paragraph but is survived by one or more of his grandparents, the grandparent is entitled to the residuary estate of the intestate, or the grandparents are entitled to the residuary estate in equal shares, as the case requires; and

(c) if the intestate is not survived by any persons entitled to the residuary estate under the last two preceding paragraphs, the uncles and aunts of the intestate who survived the intestate and the children of an uncle or aunt who died before the intestate, being children who survived the intestate, are entitled to the residuary estate of the intestate.

(2) The residuary estate of an intestate shall be divided amongst—

(a) the brothers and sisters of the intestate and the children of those brothers or sisters who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons, if the brothers and sisters had been children of the intestate and the children of a brother or sister who died before the intestate had been children of a child of the intestate who died before the intestate;

(b) the uncles and aunts of the intestate and the children of those uncles or aunts who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons if the uncles and aunts had been children of the intestate and the children of an uncle or aunt who died before the intestate had been children of a child of the intestate who died before the intestate:

Provided that the said residuary estate of the intestate shall not be divided amongst the issue of a brother or sister or of an uncle or aunt who died before the intestate more remote than the children of any such brother or sister, uncle or aunt.

38. Partial intestacies. [Qld. s. 34.] (1) The executor of the will of an intestate shall hold, subject to his rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it.

(2) Where the spouse of an intestate acquires a beneficial interest under the will of the intestate in the property of the intestate, item 3 of Part I of the Second Schedule to this Act applies as if—

(a) in a case where the value of the beneficial interest so acquired by the spouse under the will does not exceed $50,000, the references to the sum of $50,000 were references to that sum less the value of that beneficial interest; or

(b) in any other case, the references to the sum of $50,000 or the whole of the residuary estate, whichever is the less, were omitted.

For the purposes of this subsection, a beneficial interest in real or personal property acquired by virtue of the exercise, by will, of a general power of appointment, shall be taken to be an interest acquired under that will.

39. Construction of documents: references to Statutes of Distribution; meaning of "heir". [Cf. Eng. *Administration of Estates*, 1925, s. 50.] (1) References to any Statutes of Distribution in an instrument *inter vivos* made or in a will coming into operation after the commencement of this Act shall be construed as references to this Part; and references in such an instrument or will to an heir or heir at law or next of kin of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on the intestacy of that person under the provisions of this Part.

(2) Section 28 of the *Property Law Act* 1974 is amended by omitting the words ", and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act".

PART IV—FAMILY PROVISION

40. Meaning of terms. [Qld. s. 89.] In this Part unless a contrary intention appears—

"child" means, in relation to a deceased person, any child, stepchild or adopted child of that person;

"dependant" means, in relation to a deceased person, any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of his death being—

(a) a parent of that deceased person;

(b) the parent of a surviving child under the age of eighteen years of that deceased person;

(c) a person under the age of eighteen years; or

(d) a person who—

(i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or

(ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person;

"spouse" means, in relation to a deceased person, the husband or wife of that person and includes a husband or wife who has been divorced whether before, on or after the commencement of this Act by or from that person and who has not remarried before the death of that person, if he is receiving or entitled to receive maintenance from that person at the time of that person's death;

"stepchild" means, in relation to a deceased person, a child of that person's spouse who is not a child of the deceased person

41. Estate of deceased person liable for maintenance. [Qld. s. 90.] (1) If any person (hereinafter called "the deceased person") dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the Court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the Court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant:

Provided that the Court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before his death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

(2) The Court may—

(a) attach such conditions to the order as it thinks fit; or

(b) if it thinks fit, by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or

(c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

(3) The incidence of the payment or payments ordered shall, unless the Court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the Court.

(4) The Court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.

(5) The Court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested, and exonerate such portion from further liability, and direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

(6) Where an application has been filed on behalf of any person it may be treated by the Court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

(7) The personal representative or The Public Trustee of Queensland or the Director of Children's Services, or any person acting as the next friend of any infant or any mentally ill person, may apply on behalf of any person being an infant, or being mentally ill in any case where such person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.

(8) Unless the Court otherwise directs, no application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the proceedings for such application be instituted within nine months after the death of the deceased; but the Court may at its discretion hear and determine an application under this Part although a grant has not been made.

(9) A person who, if a declaration of paternity were made upon his application under the provisions of the *Status of Children Act* 1978, would be entitled to make an application under this Part may make an application under this Part but such application shall not be proceeded with until he has obtained a declaration of paternity under that Act; and the Court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this Part.

(10) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

(11) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the Court.

(12) Where any sum of money or other property is received by any person as a *donatio mortis causa* made by the deceased person that sum of money or that other property shall be treated for the purposes of this Part as part of the estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that *donatio mortis causa*.

PART V—ADMINISTRATION

Division 1—Devolution of Property Probate and Administration

45. Devolution of property on death. [Qld. *Intestacy Act*, 1877, s. 14; *Public Trustee Act* 1978, s. 56; Eng. s. 1. N.S.W. s. 44; Vic. ss. 13, 19; W.A. s. 8; N.Z. s. 24.] (1) The property to which a deceased person was entitled for an interest not ceasing on his death (other than property of which he was trustee) shall on his death and notwithstanding any testamentary disposition devolve to and vest in his executor and if more than one as joint tenants, or, if there is no executor or no executor able and willing to act, the Public Trustee.

(2) Upon the Court granting probate of the will or letters of administration of the estate of any deceased person the property vested in his executor or in the Public Trustee under the provisions of the preceding subsection shall devolve to and vest in the person to whom the grant is made and if more than one as joint tenants.

(3) Where at any time a grant is recalled or revoked or otherwise determined the property of the deceased vested at that time in the person to whom the grant was made shall be divested from him and shall devolve to and vest in the person to whom a subsequent grant is made; and during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the Public Trustee.

(4) The title of any administrator appointed under this Act to any property which devolves to and vests in him shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment:

Provided that all acts lawfully done by to or in regard to the Public Trustee before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.

(5) For the purposes of this section, and notwithstanding the provisions of section 16 of the *Trusts Act* 1973, an executor includes an executor by representation under the provisions of section 47 of this Act.

(6) While the property of a deceased person is vested in the Public Trustee under this section, the Public Trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.

(7) Nothing in this section shall affect the operation of section 88 of the *Real Property Act* 1861–1981, sections 32 and 32A of the *Real Property Act* 1877–1979, section 290 of the *Land Act* 1962–1981 or the provisions of any other Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

48. Provisions as to the number of personal representatives. [Cf. Eng. *Judicature Act*, 1925, s. 160; *Trusts Act* 1973, s. 11.] (1) A grant shall not be made to more than four persons at any one time and where a testator appoints more than four persons as executors the order of their entitlement to a grant shall be the order in which they are named.

(2) This section shall apply to grants made after the commencement of this Act whether the testator or intestate died before or after such commencement.

49. Powers of personal representatives. [Cf. Eng. s. 1 (3); N.S.W. s. 48; N.Z. s. 23.] (1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act* 1973.

(2) Upon the making of a grant and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the Court.

(3) The personal representatives may, during and after the period of thirty days after the death of a deceased person, make reasonable provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if he survived the deceased for a period of thirty days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased for whom any provision has been so made does not survive the deceased for a period of thirty days any sum expended in making such provision shall be treated as an administration expense.

(4) Subject to the grant, the powers of those personal representatives to whom a grant is made shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the grant.

(5) The powers of personal representatives shall be exercised by them jointly.

(6) The Court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

52. The duties of personal representatives. [Qld. s. 6; Eng. *Administration of Estates Act* 1971, s. 9; Vic. s. 28.] (1) The personal representative of a deceased person shall be under a duty to—

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the Court, exhibit on oath in the Court a full inventory of the estate and when so required render an account of the administration of the estate to the Court;

(c) when required to do so by the Court, deliver up the grant of probate or letters of administration to the Court;

(d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be;

(e) pay interest upon any general legacy—

(i) from the first anniversary of the death of the testator until payment of the legacy; or

(ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date, from that date until payment of the legacy

at the rate of eight per cent per annum or at such other rate as the Court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

Nothing in this subsection abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.

(2) If the personal representative neglects to perform his duties as aforesaid the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for

damages and an order requiring the personal representative to pay interest on such sums of money as have been in his hands and the costs of the application.

54. Protection of persons acting informally. [Eng. s. 40; Vic. s. 33 (1).] (1) Where any person, not being a person to whom a grant is made, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or effects the release of any debt or liability due to the estate of the deceased,

he shall be charged as executor in his own wrong to the extent of the estate received or coming into his hands, or the debt or liability released, after deducting any payment made by him which might properly be made by a personal representative to whom a grant is made.

(2) An executor who has intermeddled in the administration of the estate before applying for a grant of probate may renounce his executorship notwithstanding his intermeddling.

(3) A personal representative may ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done himself.

Division 2—Administration of Assets

55. Interpretation. In this Division unless a contrary intention appears " residuary estate " means—

(a) property of the deceased that is not effectively disposed of by his will; and

(b) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition.

56. Property of deceased assets for the payment of debts. [Eng. s. 32; Vic. s. 37.] (1) The property of a deceased person which on his death devolves to and vests in his executor or the Public Trustee is assets for the payment of his debts and any disposition by will inconsistent with this enactment is void as against creditors, and the Court shall, if necessary, administer the property for the purposes of the payment of the debts.

(2) This section shall take effect without prejudice to the rights of mortgagees or other encumbrancees.

57. Payment of debts in the case of insolvent estates. [Eng. s. 34; Vic. s. 39; Cf. *Commonwealth Bankruptcy Act* 1966-1973, s. 109 (1) (e).] Where the estate of a deceased person is insolvent—

(a) the funeral, testamentary and administration expenses have priority; and

(b) subject as aforesaid and to this Act, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the administration of estates of deceased persons in bankruptcy.

58. Retainer, preference and the payment of debts by personal representatives. [Eng. *Administration of Estates Act* 1971, s. 10.] (1) The right of retainer of a personal representative and his right to prefer creditors are hereby abolished.

(2) Nevertheless a personal representative—

(a) other than one mentioned in paragraph (b), who, in good faith and at a time when he has no reason to believe that the deceased's estate is insolvent, pays the debt of any person (including himself) who is a creditor of the estate; or

(b) to whom letters of administration have been granted solely by reason of his being a creditor and who, in good faith and at such a time pays the debt of another person who is a creditor of the estate;

shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

59. Payment of debts in the case of solvent estates. [Eng. s. 34 (3), 35 (2); N.S.W. s. 46C; Vic. s. 39, 40 (2).] (1) Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely;

Class 1—Property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;

Class 2—Property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;

Class 3—Property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;

Class 4—*Donationes mortis causa.*

(2) Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably.

(3) The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

60. Payment of pecuniary legacies. Subject to a contrary or other intention signified by the will—

(a) pecuniary legacies shall be paid out of the property comprised in Class 2 referred to in section 59 after the discharge of the debts or such part thereof as are payable out of that property; and

(b) to the extent to which the property comprised in Class 2 referred to in section 59 is insufficient the pecuniary legacies shall abate proportionately.

61. Payments of debts on property mortgaged or charged. [Eng. s. 35; Vic. s. 40.] (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in property, which at the time of his death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.

(2) A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

SECOND SCHEDULE

DISTRIBUTION OF RESIDUARY ESTATE UPON INTESTACY

PART I—MANNER OF DISTRIBUTION WHERE INTESTATE IS SURVIVED BY A SPOUSE

[Sections 34-39]

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
1	Where the intestate is not survived by— (a) issue; or (b) a parent, a brother or sister or a child or children of a brother or sister	The spouse is entitled to the whole of the residuary estate.
2	Where the intestate is survived by issue	1. The spouse is entitled to one-half of the residuary estate if there is only one child or to one-third of the residuary estate if there is more than one child. 2. The issue of the intestate are entitled to the balance of the residuary estate.
3	Where the intestate is not survived by issue but is survived by a parent, a brother or sister or a child or children of a brother or sister	1. The spouse is entitled— (a) to the sum of fifty thousand dollars together with interest thereon from the first anniversary of the death of the intestate at the rate of eight per cent per annum from the residuary estate or to the whole of the residuary estate, which ever is the less; and (b) if the value of the residuary estate exceeds fifty thousand dollars, to one-half of the balance of the residuary estate. 2. If the intestate is survived by one or both of his parents (whether or not the intestate is also survived by a brother or sister or a child or children of a brother or sister), the surviving parent is entitled or the surviving parents are entitled in equal shares, as the case may be, to the remaining one-half of the balance of the residuary estate. 3. If the intestate is not survived by a parent, the brothers and sisters of the intestate, who survive the intestate, and a child or children who survive the intestate of a brother or sister of the intestate who died before the intestate, are entitled to the remaining one-half of the balance of the residuary estate in such shares as he or they would have been entitled to the residuary estate of the intestate if the intestate had not been survived by his spouse.

Appendix 3 - Distribution Amongst Issue

Intestate died leaving estate of $400,000
Intestate had had six children

Note: (d) means died before intestate; (ni) means died without issue.

Children See Note 1	A(d)(ni)	B(d)	C	D(d)	E	F(d)
Grandchildren See Note 2		B1(d)(ni) B2(d) B3	C1 C2	D1(d)		F1(d)
Great grand children See Note 3		B4(d) B5 B6(d)(ni)		D2(d)(ni)		F2
Great great grandchildren See Note 4		B7 B8				

Note 1: Children

The intestate left only four children who either survived or died leaving issue who survived the intestate. A died before the intestate, childless. D had had issue but they all died before the intestate.
The estate is therefore divided into FOUR parts, each of $100,000. C and E each take one part.

Note 2: Grandchildren

(a) The issue of B

B2 would have taken equally with B3, the share B would have taken had B survived the intestate. B would have taken $100,000. Therefore, B3 takes $50,000 and the issue of B2 are entitled to the other $50,000.

(b) The issue of C

Although C left issue they are not entitled to anything. Their parent C survived the intestate and took the share of $100,000.

(c) The issue of F

F1 would have taken F's share. But FI predeceased F leaving issue. Therefore, F1's issue will take F's share of $100,000.

Note 3: Great-grandchildren

(a) The issue of B

B2 had three children, B4, B5 and B6. But B6 died before the intestate without issue. So the share B2 would have taken ($50,000) is divided into two parts. B5 takes one part ($25,000) and B4's issue take the other part.

(b) The issue of F

F2 survives the intestate. F2 is the only surviving issue of F and is therefore entitled to F's share of $100,000.

Note 4: Great-great-grandchildren

B7 and B8 are the great-great-grandchildren of the intestate. Their parent B4 would have shared $25,000 with B5 had B4 survived. So B7 and B8 take $12,500 each.

Accordingly

C will receive	$100,000 -	Child
E will receive	$100,000 -	Child
B3 will receive	$ 50,000 -	Grandchild - "represents" B
F2 will receive	$100,000 -	Great-grandchild - "represents" F through F1
B5 will receive	$ 25,000 -	Great-grandchild - "represents" B through B2
B7 will receive	$ 12,500 -	Great-great-grandchild - "represents" B through B4 and B2
B8 will receive	$ 12,500 -	Great-great-grandchild - "represents" B through B4 and B2
TOTAL DISTRIBUTED	$400,000	