

## THE CHANGING PATTERNS OF TOTAL INTESTACY DISTRIBUTION BETWEEN SPOUSES AND CHILDREN IN AUSTRALIA AND ENGLAND

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### I INTRODUCTION

The reform of intestacy law in England and Australia in recent times has not generally excited a flurry of academic interest,<sup>1</sup> despite the prospect of further change.<sup>2</sup> Nevertheless, statistics strongly suggest that intestate succession in the form of ‘default’ provisions plays a role in the distribution of assets of a significant number of deceased persons and consequently in the lives of their ‘nearest and dearest.’<sup>3</sup> There are several reasons why a person may decide not to make a will such as: he is happy to rely on the rules of intestacy;<sup>4</sup> or, more likely, that he did not take into account the importance of making a will due to inertia,

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1 In this article, a reference to England includes a reference to Wales.

2 However, there has been some interest in the course of intestacy law reform in England and Australia: see Mary Ann Glendon, *The Transformation of Family Law: State Law and Family in the United States and Western Europe* (University of Chicago Press, 1989) 238–42; Roger Kerridge, ‘Distribution on Intestacy, the Law Commission’s Report (1989)’ [1990] *Conveyancer and Property Lawyer* 358; Gareth Miller, ‘Reform of the Law of Intestate Succession’ in Andrew Bainham and David Pearl (eds), *Frontiers of Family Law* (Chancery Law Publishing, 1993) 182–98; S M Cretney, ‘Reform of Intestacy: The Best We Can Do?’ (1995) 111 *Law Quarterly Review* 77; Neville Crago, ‘The Rights of an Intestate’s Surviving Spouse to the Matrimonial Home’ (2000) 29 *University of Western Australia Law Review* 197.

3 Intestacy in England appears to have been quite common. The Law Commission has pointed out that studies suggest that between one-half and two-thirds of the adult population in England has not made wills. Although there are about 500 000 deaths in England each year, there are about 280 000 grants of representation, one-third of which pertain to intestate estates. The remaining estates are so small that grants of representation are unnecessary, but it is unclear how many are intestate estates: Law Commission (UK), *Intestacy and Family Provision Claims on Death*, Consultation Paper No 191 (2009) [1.4]–[1.6]. See also the comments that approximately 20 per cent of the population makes wills: Janet Finch, *Family Obligations and Social Change* (Polity Press, 1989) 18. Australia has a discernible rate of intestacy. In Queensland it is as high as 14 per cent, just over 10 per cent in Western Australia and 6–8 per cent in the other jurisdictions: NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007) [1.12].

4 It has been suggested that this will only be the underlying reason in a few cases: Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [1.7]. However, these situations have been recognised in the case law: *Re Coventry (deceased)* [1980] 1 Ch 461; *Re Abbott; Public Trustee v St Dunstan’s* [1944] 2 All ER 457.

superstition (that making the will makes a person more vulnerable to death) or a misunderstanding of the law.<sup>5</sup> Wills may also be found to be invalid, requiring the implementation of intestate succession.

In England and Australia, intestate succession remains such an important method of distributing estates that there have been a number of law reform commission reports grappling with problems uniquely associated with it. The most recent report was released by the English Law Commission in December 2011.<sup>6</sup> Notwithstanding some differences in Australian and English law and the recommendations of the various law reform commissions, at the beginning of the 21<sup>st</sup> century English and Australian intestacy law appears to be moving in the same direction. First, the pattern of distribution has been significantly transformed from a dynastic (vertical) to a spouse-focused (horizontal) system. The contentious issue in intestate succession has changed: the question is no longer whether the issue's primary entitlement ought to be reduced to allow the spouse to inherit a portion of the intestate's estate, but the extent (if at all) that issue of the intestate (most particularly children)<sup>7</sup> ought to inherit from the intestate. Second, as the distribution pattern has been remodelled, the underlying reasons for and analysis of intestate succession have been revised.

This article will be divided into five parts. The first part will describe briefly features of intestate succession in England and Australia in the 19<sup>th</sup> century and how the distribution was unsuitable to protect the needs of female family members, most particularly widows. The second part will briefly consider why and how English total intestate succession was reformed in the 20<sup>th</sup> century.<sup>8</sup> This part will also outline the law in the various Australian jurisdictions, excluding New South Wales ('NSW') and Tasmania, for reasons which will become apparent. Although these first two parts of the article are necessarily descriptive in some respects, they set the bases for the article's subsequent parts. The third and fourth parts will respectively outline and evaluate the recommendations of modern law reform bodies in England and Australia in regard to balancing the claims of the spouse and issue (most particularly children) to the intestate's estate. In the final part, some concluding remarks are made about the likely future direction of intestacy law in both countries.

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5 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [1.7]; *Re Leach (deceased)*; *Leach v Lindeman* [1984] Fam LR 590, 602; *Re Leach (deceased)*; *Leach v Lindeman* [1985] 2 All ER 754.

6 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, Report No 331 (2011).

7 The focus of this article is the distribution of assets between the spouse and the intestate's children. The use of the words 'child' and 'children' will (unless specifically stated) include the intestate's subsequent issue such as grandchildren. This article will not consider in-depth, questions such as the definition of issue.

8 This article will not discuss in depth, partial intestacy or changes to the administrative rules governing intestacy.

## II ENGLAND AND AUSTRALIA IN THE 19<sup>TH</sup> CENTURY: A BRIEF OVERVIEW OF THE BROAD PATTERNS OF INTESTATE SUCCESSION

The earlier law of intestate succession differed significantly from the schemes operating today. In order to appreciate the nature of the changes in the 20<sup>th</sup> century and their continued momentum in the 21<sup>st</sup> century, it is necessary to understand the broad features of the earlier law. England will be considered first, followed by Australia.

### A England: Dynastic Model Prior to the Administration of Estates Act 1925, 15 & 16 Geo 5, c 23

Prior to 1925, English intestacy law was essentially medieval and dynastic.<sup>9</sup> It had been originally framed to serve and protect the interests of the landed aristocracy and aspirant business classes.<sup>10</sup> English (and indeed European) intestacy law had a ‘vertical tendency’ constituted by the primacy given to children in preference to the spouse.<sup>11</sup>

Realty and personalty were separately treated because they served different functions for both the state and the family. The ownership of realty set the stage for a family’s status, power and obligations within a society,<sup>12</sup> and the rules kept the ownership of land within the family (being blood relatives)<sup>13</sup> as much as possible. Realty (notably freehold land) passed to the heir (generally the eldest son under the principle of primogeniture).<sup>14</sup> Originally widows had no right to

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9 See generally Charles Gross, ‘The Medieval Law of Intestacy’ (1904) 18 *Harvard Law Review* 120; J H Baker, *An Introduction to English Legal History* (Butterworths LexisNexis, 4<sup>th</sup> ed, 2002) 265–74, 386–7; Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 479–80; Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class 1780–1850* (Routledge, 2<sup>nd</sup> ed, 2002) 205–6.

10 Finch, above n 3, 118.

11 Christoph Castelein, ‘Introduction and Objectives’ in Christoph Castelein, René Foqué and Alain Verbeke (eds), *Imperative Inheritance Law in a Late-Modern Society: Five Perspectives* (Intersentia, 2009) 1, 15; Glendon, above n 2, 239.

12 A W B Simpson, *A History of the Land Law* (Oxford University Press, 2<sup>nd</sup> ed, 1986) ch 1.

13 John Scott, *The Upper Classes: Property and Privilege in Britain* (Macmillan, 1982) 6–10, 18; Finch, above n 3, 20.

14 This was calculated by the rules of parentelic calculus. Children and then other remoter lineal descendants were considered first, followed by collateral heirs, and then the ascendant line. However, if there were no sons, then the land was inherited by the daughters in equal shares: see Baker, above n 9, 267–8. For an outline of the complex rules for finding the heir, see C H Sherrin and R C Bonehill, *The Law and Practice of Intestate Succession* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2004) [2-003]. See also Stuart Anderson, ‘Property’ in William Rodolph Cornish et al (ed), *The Oxford History of the Laws of England: Private Law (1820–1914)* (Oxford University Press, 2003–2012) vol 12, 1, 5–6.

their spouse's land and this was redressed by the law of dower, which was abolished during the 19<sup>th</sup> century.<sup>15</sup>

The inheritance rules for personalty afforded female family members some economic security. Under the *Statute of Distribution 1670*, 22 & 23 Car 2, c 10,<sup>16</sup> surviving widows and female relations were entitled to a portion of the intestate's estate. For example, a widow took one third of the personalty outright if there were surviving issue and the issue took the remainder *per stirpes*. In contrast, a widower was entitled to his wife's entire personalty.<sup>17</sup>

While widows were not treated equally with widowers, the law required a high degree of equality of treatment between children. The distribution of the personalty to children was balanced against any *inter vivos* advancement made to them by their father under the complex doctrine of 'hotchpot' to ensure 'equality of distribution'.<sup>18</sup> *Per stirpes* distribution ensured that not only were surviving children entitled to a share of the deceased estate, but that the issue of the deceased child would share between themselves equally the portion that the deceased child would have inherited had he survived the intestate.<sup>19</sup> This meant that the various sub-branches of the family were not disinherited simply because the child of the deceased had predeceased him. However, the distribution of personalty still reflected a dynastic heritage: a preference for blood relatives and the need to retain the property within the family.

The extent to which the rules governing realty and personalty actually applied in the 19<sup>th</sup> century is problematic. Members of wealthy families made wills and trust settlements which rendered the intestacy rules otiose because wills (embodying the intention of the deceased) were preferred to intestacy.<sup>20</sup> On the other hand, there were many estates where there were little or no assets for distribution so that the rules would not have applied.<sup>21</sup> However, the situation at the end of the 19<sup>th</sup> century provided a salient lesson about the effect of intestate succession on society: if a member of the family was not adequately provided for, it could not be expected that the remaining members of the family who were favourably treated under the rules would necessarily assist her. In many cases,

15 The *Dower Act 1833*, 3 & 4 Will 4, c 105 permitted husbands to prevent dower under will or by alienation: see Baker, above n 9, 270–1; Sherrin and Bonehill, above n 14, [2-004]; J H C Morris, 'Intestate Succession to Land in Conflict of Laws' (1969) 85 *Law Quarterly Review* 339, 346–7. For a discussion of the Australian situation, see A R Buck, "'A Blot on the Certificate': Dower and Women's Property Rights in Colonial New South Wales' (1987) 4 *Australian Journal of Law & Society* 87.

16 *Statute of Distribution 1670*, 22 & 23 Car 2, c 10. Note that there was also an amending statute: see *Statute of Distribution 1685*, s Jac 2, c 17. For a helpful overview of the legislation, see W S Holdsworth, *A History of English Law* (Methuen and Sweet & Maxwell, 2<sup>nd</sup> ed, 1937) vol 3, 550–62; Gross, above n 9, 128–31.

17 *Statute of Distribution 1670*, 22 & 23 Car 2, c 10, s 5; Holdsworth, above n 16, 561.

18 Holdsworth, above n 16, 562.

19 *Ibid* 561–2.

20 W S Holdsworth, *A History of English Law* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1937) vol VII, 376–81; Baker, above n 9, ch 16. Indeed, there was a strong tendency to find wills valid if possible, rather than apply the intestacy rules.

21 Anderson observes that in 1910 only seven per cent of estates needed someone to formally administer the personalty of intestates: Anderson, above n 14, 5.

surviving widows found it difficult to rely on what the rules of intestate succession provided to them, leading to hardship and penury. Women were not necessarily in regular employment, in receipt of an independent income or an adequate wage.<sup>22</sup> The rights of married women to own and control property had begun to be recognised<sup>23</sup> and it was acknowledged by both government and social reformers that measures were necessary to alleviate poverty amongst women.<sup>24</sup>

Therefore, it is not surprising that at the end of the 19<sup>th</sup> century, the *Intestates' Estates Act 1890* 53 & 54 Vict, c 29 was passed.<sup>25</sup> It did not fully address the archaic nature of intestate succession because it did not effectively change the rules where the estate was large (as widows could be paid out before the application of the traditional rules) and it did not apply when the intestate was survived by issue.<sup>26</sup> Nevertheless, it began a shift in the law, presaging future patterns of distribution. First, the limited rights conferred by the legislation were exercisable over realty and personalty equally. Where the value of the estate was very small, a division of assets between family members along traditional lines was impractical for widows, in the sense that the widow may not receive sufficient assets to meet their day-to-day living expenses.<sup>27</sup> Second, the legislation provided for the needs of surviving widows (rather than the legally recognised heir).<sup>28</sup> Third, widows acquired a prioritised and stable inheritance under what was later to be called a 'statutory legacy' which was 'frontloaded' in their favour; that is, their entitlement was given priority over all other claims and paid out first. In the event that the value of the entire estate did not exceed £500, the widow acquired the entire estate absolutely (and was not required to share the estate with the intestate's next of kin).<sup>29</sup> When the value of the estate exceeded £500, the widow was entitled to realty and personalty to the value of £500 in priority over all other potential beneficiaries.<sup>30</sup>

## **B Australia: The Beginning of the Breakdown of the Dynastic Model**

Australia inherited English law generally and the law of intestate succession in particular, so that the principles which were initially applied were generally

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22 Anne Morris and Susan Nott, *All My Worldly Goods: A Feminist Perspective on the Legal Regulation of Wealth* (Dartmouth, 1995) 36–8.

23 See, eg, *Married Women's Property Act 1882*, 45 & 46 Vict, c 75; *Married Women's Property Act 1893*, 56 & 57 Vict, c 63. For a helpful discussion, see Baker, above n 9, 484–7.

24 Morris and Nott, above n 22, 40–5.

25 *Intestates Estates Act 1890*, 53 & 54 Vict, c 29; Morris, above n 15, 348–9.

26 *Intestates Estates Act 1890*, 53 & 54 Vict, c 29, s 1; *Morgan v Morgan* [1920] 1 Ch 196.

27 *Intestates Estates Act 1890*, 53 & 54 Vict, c 29, s 1.

28 See Cretney, above n 9, 480.

29 *Intestates Estates Act 1890*, 53 & 54 Vict, c 29, s 1.

30 *Intestates Estates Act 1890*, 53 & 54 Vict, c 29, s 2.

similar to those in England.<sup>31</sup> Although the Australian situation was complicated by the existence of multiple jurisdictions (and this remains the case), significant changes generally occurred in the 19<sup>th</sup> century.

The basic division between the treatment of realty and personalty began to breakdown by the mid-19<sup>th</sup> century, partly because Australia never had the kind of feudal land-based system which had existed in England. Australian law therefore adapted to local conditions,<sup>32</sup> as only the English law which could apply in the colonies was received.<sup>33</sup> The structure and trends inherent in the *Statute of Distribution 1670*, 22 & 23 Car 2, c 10 generally prevailed in later schemes of intestate succession.<sup>34</sup> Widows also began to be treated equally with widowers.<sup>35</sup> For example, under the *Wills, Probate and Administration Act 1898* (NSW), intestacy law was consolidated and settled for the next 50 years (following some of the changes in the *Intestates Estates Act 1890*, 53 & 54 Vict, c 29 where there were no issue, but also allowing the spouse a prioritised portion of the estate when there were issue).<sup>36</sup>

### C Comment

The central goal of dynastic intestate succession was the preservation of family property. The family was determined by marriage and blood relations. Intestate succession had a ‘vertical tendency’ and was future focused. To the extent that there was recognition of the neediest persons in the family, children rather than spouses were treated as the most vulnerable. For example, at the end of the 19<sup>th</sup> century in England and Australia, the mortality rates for adults and children were higher than they are today.<sup>37</sup> It would not have been uncommon for a parent to have died while children were minors.

However, for the purpose of this analysis there were two significant areas of tension. The major and earlier one concerned the vertical tendency of intestate succession: how to ensure that the estate was fairly distributed amongst the intestate’s children and issue (because it could not be assumed that family

31 Alex C Castles, *An Australian Legal History* (Lawbook, 3<sup>rd</sup> ed, 1982) 9–19; Stefan Petrow, ‘A Statutory History of Wills in England and Australia’ in G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [21.18]–[21.21]. However, there were some important limitations to the jurisdiction such as the reception of ecclesiastical law into New South Wales which was restricted: see R F Croucher and P Vines, *Succession, Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009) [1.44].

32 Peter Butt, *Land Law* (Thomson Reuters, 6<sup>th</sup> ed, 2009) [1.10], [20.01]; Castles, above n 31, 18.

33 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

34 See, eg, *Real Estate of Intestates Distribution Act 1862* (NSW). See also Croucher and Vines, above n 31, [5.2]–[5.3].

35 Eg, widows and widowers were entitled to a share in personalty and realty in the same proportion as the wife had been entitled to the personalty of an intestate husband: *Probate Act 1890* (NSW) s 33.

36 See, eg, *Probate and Administration Act 1898* (NSW) ss 50–2.

37 In England and Wales for example, the life expectancy at birth in 1841 was 40 years for males and 42 years for females: Office for National Statistics, *Mortality in England and Wales: Average Life Span* (2012) 6. Indeed, the Office for National Statistics has pointed out that a significant number of children did not survive beyond their first five years: at 9.

members would act fairly towards one another). Two principles resolved this concern. Hotchpot allowed for the accounting of earlier inter vivos gifts and other testamentary benefits so that children were equally treated and were not given double portions.<sup>38</sup> *Per stirpes* (by the stocks) distribution divided the intestate estate by reference to the number of the intestate's children. Where a child of the intestate had predeceased him, the intestate's grandchildren were able to stand in their parent's shoes.<sup>39</sup>

The other and later one was how to provide satisfactorily for the intestate's widow. It became increasingly clear at the end of the 19<sup>th</sup> century that widows whose husband had died intestate could not necessarily rely on the beneficence of the family. The immediate focus of the *Intestates Estates Act 1890*, 53 & 54 Vict, c 29 was not only to provide a statutory entitlement, but to grant widows a prioritised entitlement. The Act also represented a decline of the 'vertical tendency' in favour of a 'horizontal'<sup>40</sup> one informed by the needs and wellbeing of the spouse.

### III THE PRESENT LAW IN ENGLAND AND MOST AUSTRALIAN JURISDICTIONS IN THE 20<sup>TH</sup> AND 21<sup>ST</sup> CENTURIES

#### A England

By the end of the 19<sup>th</sup> century, the 'vertical tendency' of English intestacy law in which the major preoccupation was the financial wellbeing of the descendants of the intestate no longer served society and the reform of intestate succession became increasingly necessary. In addition to concerns about the status and rights of women, there were other reasons. First, the old pattern of intestate succession was no longer relevant to the upper and middle classes who implemented complex trust and marriage settlements.<sup>41</sup> Second, economic change meant that the rules did not address the economic circumstances of typical intestates. England had industrialised and there was a large urbanised population who did not own or work on land.<sup>42</sup> Third, in relation to the development of the middle classes, other forms of finance-based personalty emerged which could be passed on. In view of the changing nature of property, it has been demonstrated that the business classes preferred and utilised the principle of partible inheritance, so that the estate was distributed between the

38 *National Trustees, Executors & Agency Co of Australasia Ltd v Ward* (1896) 2 ALR 119.

39 See, eg, Croucher and Vines, above n 31, [5.6].

40 Castelein, above n 11, 15–16.

41 Baker, above n 9, ch 16; Davidoff and Hall, above n 9, 207–15.

42 See Martine Segalen, 'The Industrial Revolution: From Proletariat to Bourgeoisie' in André Burguière et al (eds), *A History of the Family: The Impact of Modernity* (Polity Press, 1996) vol 2, 377, 383, 385–9. In relation to the urban working class, Segalen observes that due to industrialisation, 'the vertical relationship between generations was disrupted': at 389.

surviving spouse and the children of the deceased.<sup>43</sup> Indeed in some cases, the initial control of the whole estate was given to the wife exclusively.<sup>44</sup> Fourth, although spouses had obligations of care and support to one another prior to the 20<sup>th</sup> century,<sup>45</sup> this became a central function of companionate marriage.<sup>46</sup>

### ***1 The Original Administration of Estates Act 1925, 15 & 16 Geo 5, c 23***

The *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23* was a significant overhaul of English succession law and remains (subject to amendment) the foundation of intestate succession in England. The legislation made four sweeping reforms:

#### *(a) The Abolition of the Separate Rules for Realty and Personalty*

In the main, the separate rules for realty and personalty were discarded in favour of a scheme influenced by the *Statute of Distribution 1670, 22 & 23 Car 2, c 10*.<sup>47</sup> However, spouse-focused intestacy still retains some separate treatment of realty and personalty, but in ways different from that in the 19<sup>th</sup> century.

#### *(b) Gender-Neutrality and Equality*

Primogeniture no longer applied and the male and female lines had equal rights. Widows and widowers were treated equally.<sup>48</sup> The principles of hotchpot and *per stirpes* distribution were not abolished, but these principles did not prevent the application of the rules in a gender-neutral way.

#### *(c) Spouse-Focused Intestate Succession*

A new category of primary entitlement emerged. The major question was not whether the issue (particularly male children) survived the intestate. Instead, the principal determinant of the pattern of distribution became whether there was a surviving spouse. The central or 'gravitational' pull of intestate succession shifted from the preservation of family assets to the care and financial security of the surviving spouse. This was not unusual. Other European countries also prioritised the spouse. Indeed, Christoph Castelein has commented that '[t]he promotion of the surviving spouse as intestate (and in some countries as imperative) heir was one of the most remarkable changes of inheritance law during the 20<sup>th</sup> century'.<sup>49</sup>

43 Finch, above n 3, 20.

44 Davidoff and Hall, above n 9, 206.

45 Beatrice Gottlieb, *The Family in the Western World: From the Black Death to the Industrial Age* (Oxford University Press, 1994) ch 5.

46 Castelein, above n 11, 15; Gillian Douglas et al, 'Enduring Love? Attitudes to Family and Inheritance Law in England and Wales' (2011) 38 *Journal of Law and Society* 245, 257.

47 *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 45(1)(a)*.

48 *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 46*.

49 Castelein, above n 11, 13.



(d) *The Limitation of Those Relatives Entitled to Inherit from the Intestate*

The traditional rules for determining the ‘next of kin’ were largely abolished and a limited statutory scheme was introduced, entitling (in order) parents, brothers and sisters, grandparents, uncles and aunts.<sup>50</sup>

## 2 *The Present Operation of the Administration of Estates Act 1925, 15 & 16 Geo 5, c 23*<sup>51</sup>

(a) *Spouse-Focused Intestate Succession*

The spouse-focused scheme in English law prescribes the distribution of assets as follows:

- First, a surviving spouse<sup>52</sup> becomes entitled to the whole of the estate if there is no surviving issue or statutorily recognised next of kin.<sup>53</sup>
- Second, when the intestate is survived by the spouse and issue, the spouse does not necessarily acquire the whole estate. The legislation allocates specific categories of assets to the spouse. She is absolutely entitled to the intestate’s personal chattels,<sup>54</sup> a statutory legacy with interest (both of which have increased and changed over time)<sup>55</sup> and a

50 *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 46 (1)(iii)–(v).*

51 The *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23*, has been amended by several statutes: see, eg, *Intestates’ Estates Act 1952, 15 & 16 Geo 6, & 1 Eliz 2, c 64*; *Family Provision Act 1966 (UK) c 35*; *Family Law Reform Act 1969 (UK) c 46*; *Administration of Justice Act 1977 (UK) c 38*; *Family Law Reform Act 1987 (UK) c 42*; *Law Reform (Succession) Act 1995 (UK) c 41*; *Trusts of Land and Appointment of Trustees Act 1996 (UK) c 47*; *Civil Partnership Act 2004 (UK) c 33*.

52 The language of the legislation originally referred to the surviving husband and wife or widower or widow, but for ease of reference, the term ‘spouse’ will be used in the discussion. Gender neutral terminology would be used in later legislation.

53 For the original provisions, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, ss 46(1)(i), (1)(v), 47(2)(b)*. For the present provisions, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 46(1)(i), table (1)*, which was substituted by the *Intestates’ Estates Act 1952, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2), sch 1*.

54 For the original provisions, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, ss 46(1)(i), 55 (1)(x)*. For the present provision, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 46(1)(i), table (2)*, which was substituted by the *Intestates’ Estate Act 1952, s 1(2)*. Personal chattels are defined under s 55(1)(x) of the *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23* as:

[C]arriages, 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 do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.

55 For the original provision, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, ss 46(1)(i), 48 (2)(a)*. In 1925 the statutory legacy was £1000: Sherrin and Bonehill, above n 14, 53. For the present provision, see *Administration of Estates Act 1925, 15 & 16 Geo 5, c 23, s 46(1)(i), table (2)*, which was substituted by the *Intestates’ Estates Act 1952, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2)*.

life interest in one half of the balance, subject to a statutory trust.<sup>56</sup> The children acquire the other half of the residue under a statutory trust.<sup>57</sup>

- Third, when there is a surviving spouse and statutorily specified relatives, the spouse is entitled to the personal chattels and the statutory legacy. When the legislation was introduced, the remaining estate was held on trust for the surviving spouse for life with the remainder eventually inherited by the next of kin;<sup>58</sup> but the spouse is presently entitled to one half of the balance absolutely.<sup>59</sup>

The spouse may also elect to redeem the statutory life interest,<sup>60</sup> arguably diminishing the remaining residue available to the issue. The spouse may purchase the intestate's interest in the matrimonial home in satisfaction or partial satisfaction of the statutory legacy.<sup>61</sup> There have been incremental increases to the statutory legacy.<sup>62</sup> From 1 February 2009, when there are no issue the statutory legacy is £450 000 (or approximately A\$750 000) and when there are issue, £250 000 (or approximately A\$420 000).<sup>63</sup>

The operation of this scheme depends upon the estate's value. When the estate's value is small, the practical reality is that the spouse is not only primarily entitled, but she acquires the entire estate. However, if the estate's value is large, the scheme is predicated on the view that the estate can bear a distribution not only to the spouse, but to the issue or next of kin.

### (b) No Surviving Spouse or Issue

When there is no surviving spouse or issue, the relatives listed in the legislation are entitled to take the entire estate, subject to the statutorily

56 The original provision was the *Administration of Estates Act 1925*, s 46 (1)(i)(b). The present provision is *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1) (i), table (2) which was substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2).

57 For the original provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46 (1)(i)(b). For the present provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1)(i), table (2), which was substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2). See also Roger Kerridge and A H R Brierley (eds), *The Law of Succession* (Sweet & Maxwell, 12<sup>th</sup> ed, 2009) [2.29].

58 *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, ss 46 (1)(i)(a), (1)(ii)–(v).

59 For the present provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1)(i), table (3), which was substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, ss 1(2), 47(2)(a)–(b), (4).

60 *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 47A. This provision was inserted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 2, and subject to subsequent amendment by the *Administration of Justice Act 1977* (UK) c 38, s 28, sch 2, [4], sch 5, pt VI. However, generally surviving spouses have not taken advantage of this option: Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.85]. The Commission has suggested that professional advisors may not be aware of the option and notes that it may require more sophisticated means to calculate the capital value of a life interest: at [2.85].

61 This provision was added by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 5, sch 2. See also Sherrin and Bonehill, above n 14, [2-025].

62 *Family Provision (Intestate Succession) Order 2009* (UK) c 135.

63 This calculation is based on an exchange rate of 60 British pence to one Australian dollar.

prescribed order of entitlement.<sup>64</sup> Relatives of the whole blood take priority over relatives of the half-blood.<sup>65</sup> The principle of *per stirpes* distribution has been retained, while hotchpot was abolished some 70 years after the introduction of the original Act.<sup>66</sup> When there is no surviving spouse, issue or statutorily recognised relatives, the Crown takes the estate under the doctrine of *bona vacantia*.<sup>67</sup>

(c) *Modification of the Meaning of 'Spouse' and 'Issue'*

There have been changes in legislation (other than the *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23) which have had a major effect upon who may make a claim as a spouse or issue.

The definition of 'spouse' is extended by the *Civil Partnership Act 2004* (UK) c 33. This legislation accords same-sex partners who register their partnership the same rights in succession matters as married persons.<sup>68</sup> Therefore, in this article when referring to spouses in the English context, it will include same-sex registered partners. However, cohabitants are not given intestate succession rights, as English law still requires marriage or a publicly registered marriage-like relationship.<sup>69</sup> However, cohabitants may bring an application under the family provision legislation.<sup>70</sup>

The kinds of persons who may be regarded as a child or issue of the intestate have expanded to include adopted,<sup>71</sup> legitimated,<sup>72</sup> exnuptial<sup>73</sup> and artificially-conceived children.<sup>74</sup> However, stepchildren are not so regarded.<sup>75</sup> In relation to the entitlement of children amongst themselves, the doctrine of hotchpot has been abolished.<sup>76</sup>

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64 For the original provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1)(v). For the present provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, ss 46(1)(i)–(v) table (3), which were substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2) and subject to amendments made under the *Family Provision Act 1966* (UK) c 35.

65 For the present provision, see *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1)(ii)–(v), which was substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2) and subject to amendments made under the *Family Provision Act 1966* (UK) c 35.

66 *Law Reform (Succession) Act 1995* (UK) c 41, s 1(2) which applies to intestates who die after 1 January 1996: at (3).

67 *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 46(1)(vi), which was substituted by the *Intestates' Estates Act 1952*, 15 & 16 Geo 6, & 1 Eliz 2, c 64, s 1(2).

68 *Civil Partnership Act 2004* (UK) c 33, s 71, sch 4. The legislation came into force on 5 December 2005.

69 Sherrin and Bonehill, above n 14, [10-005].

70 *Inheritance (Provision for Family Dependents) Act 1975* (UK) c 63, s 1(1A).

71 *Adoption and Children Act 2002* (UK) c 38, ss 67, 144(4).

72 *Legitimacy Act 1976* (UK) c 31, ss 5(1)–(4), 10(1).

73 *Family Law Reform Act 1987* (UK) c 42, s 18(1).

74 *Human Fertilisation and Embryology Act 2008* (UK) c 22 pt 2.

75 Sherrin and Bonehill, above n 14, [10-018]. However, they may be able to apply for assistance as 'a child of the family': *Inheritance (Provision for Family and Dependents) Act 1975* (UK) c 63, s 1(d).

76 *Law Reform (Succession) Act 1995* (UK) c 41, s 1(2).

## B Australian Jurisdictions (Other Than NSW and Tasmania)

In the 19<sup>th</sup> century, Australian law both anticipated and exhibited the innovations evident in the *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23. Like England, the changing nature of wealth, marriage and the economic status of women created the necessity for reform.<sup>77</sup> Australian intestacy law was (and remains) complicated by the fact that there are multiple jurisdictions. Within Australian jurisdictions, there are two broad strands of intestate succession operating as a result of the attempt to create uniform succession laws across Australia.<sup>78</sup> The first strand comprises those states which have retained a system of intestate succession which predates the recommendations made for uniform intestate succession. The second strand comprises NSW and Tasmania which have adopted the recommendations for uniform intestacy reform. This section will provide an overview of the present law of the Australian states and territories (except NSW and Tasmania).

### 1 Broadly Consistent with the Present English Legislation

The states and territories (leaving aside NSW and Tasmania) have schemes of intestacy which are in many respects similar to the present English system. All of these jurisdictions have discarded the traditional separate treatment of personalty and realty, embraced gender equality amongst all eligible parties, enhanced the position of the spouse as primary heir and redefined those parties who may constitute a spouse and issue for the purposes of intestate succession.

There are three patterns of spouse-focused intestacy:

#### (a) Three Patterns of Spouse-Focused Intestacy

The first situation is when there is only a surviving spouse (broadly defined) and no surviving issue. In all but two of these states and territories, when only a spouse survives, then notwithstanding the survival of other blood relatives, the spouse is entitled to the whole estate.<sup>79</sup> While this approach differs from the present English scheme, it accords with the recent proposals of the Law Commission.<sup>80</sup> However, in Western Australia and the Northern Territory the spouse will take the whole estate only if there are no parents, siblings or children of siblings (or in the case of the Northern Territory, the issue of siblings).<sup>81</sup> Otherwise the spouse will be entitled to take the entire estate only if the estate is

77 See, eg, Rosalind F Atherton, 'Expectation without Right: Testamentary Freedom and the Position of Women in 19<sup>th</sup> Century New South Wales' (1988) 11 *University of New South Wales Law Journal* 133.

78 See, eg, *Real Estate of Intestates Distribution Act 1862* (NSW). See also Croucher and Vines, above n 31, [1.65].

79 *Administration and Probate Act 1929* (ACT) sch 6 pt 6.1 item 1; *Succession Act 1981* (Qld) sch 2 pt 1 item 1; *Administration and Probate Act 1919* (SA) s 72G(1)(a); *Administration and Probate Act 1958* (Vic) s 51(1).

80 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.25], Recommendation 9.1.

81 *Administration and Probate Act 1969* (NT) sch 6 pt 1 item 2; *Administration Act 1903* (WA) s 14(1) table 4.

valued below a prescribed amount.<sup>82</sup> If the estate exceeds the prescribed amount, the spouse will take the prescribed amount and one half of the residue.<sup>83</sup>

The second situation is when there is a surviving spouse and issue. While the legislation in each state and territory differs, there is a broad uniform approach because over the 20<sup>th</sup> century the spouse gradually became entitled to an increasing quantum and array of assets. When sharing between the spouse and the issue, the final distribution is dependent on the value of the estate. The schemes entitle the surviving spouse to the personal (or household chattels), a statutory legacy and a proportion of the balance of the estate. If the estate is valued less than the amount of the statutory legacy, then the spouse is entitled to the whole estate (including the intestate's personal or household chattels).<sup>84</sup> If there is a residue of assets after the distribution of the personal or household chattels and the statutory legacy, the spouse will be entitled to a portion of the residue (generally one half of the residue, but sometimes less for example when there are more than one surviving issue).<sup>85</sup> The value of the statutory legacy differs amongst the various jurisdictions.<sup>86</sup> However, the spouse often has a right to take the intestate's interest in the matrimonial home or shared home.<sup>87</sup>

The third situation is when there is no spouse, but there are surviving issue. In all jurisdictions, children are entitled to the estate ahead of other relatives.<sup>88</sup> All jurisdictions except South Australia and Victoria apply a *per stirpital* scheme. In South Australia, when all members of a preceding generation are dead, the

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82 In Western Australia, the prescribed amount is \$75 000 and special provisions apply to the residue where parents are involved as the eligible next of kin: *Administration Act 1903* (WA) s 14(1), table 3. In the Northern Territory, the prescribed amount is \$500 000: *Administration and Probate Regulations 2002* (NT) s 3(1).

83 *Administration Act 1903* (WA) s 14(1) table 3; *Administration and Probate Act 1969* (NT) sch 6 pt 1 item 2.

84 *Administration and Probate Act 1929* (ACT) ss 49(1), 49A, sch 6 item 2; *Administration and Probate Act 1969* (NT) s 67(2), sch 6 pt 1 item 2; *Succession Act 1981* (Qld) sch 2 item 2; *Administration and Probate Act 1919* (SA) ss 72G(1)(a), 72H; *Administration and Probate Act 1958* (Vic) s 51(2); *Administration Act 1903* (WA) s 14 item 2.

85 *Administration and Probate Act 1929* (ACT) s 49A, sch 6 item 2; *Administration and Probate Act 1969* (NT) sch 6 item 2; *Succession Act 1981* (Qld) sch 2 item 2; *Administration and Probate Act 1919* (SA) s 72G(1)(b). In Victoria and Western Australia, the proportion, whatever the number of children or issue, is one third: *Administration and Probate Act 1958* (Vic) s 51; *Administration Act 1903* (WA) s 14 item 2.

86 If the value of the estate does not exceed the following amounts, then the spouse acquires the entire estate. ACT, \$200 000: *Administration and Probate Act 1929* (ACT) s 49, sch 6 pt 1 item 2. NT, \$500 000: *Administration and Probate Act 1969* (NT) s 66, sch 6 pt 1 item 2; *Administration and Probate Regulations 2002* (NT), s 3(2). Queensland, \$150 000: *Succession Act 1981* (Qld) sch 2 item 2. South Australia, \$100 000: *Administration and Probate Act 1919* (SA) s 72G(2). Victoria: \$100 000: *Administration and Probate Act 1958* (Vic) s 51(2). Western Australia, \$50 000: *Administration Act 1903* (WA) s 14 item 2.

87 *Administration and Probate Act 1929* (ACT) div 3A.3; *Administration and Probate Act 1969* (NT) div 5; *Succession Act 1981* (Qld) pt 3 div 3; *Administration and Probate Act 1919* (SA) s 72L; *Administration and Probate Act 1958* (Vic) s 37A; *Administration Act 1903* (WA) sch 4.

88 *Administration and Probate Act 1929* (ACT) sch 6 pt 6.2; *Administration and Probate Act 1969* (NT) sch 6 pt IV item 1; *Succession Act 1981* (Qld) sch 2; *Administration and Probate Act 1919* (SA) s 72 G(1)(c); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration Act 1903* (WA) s 14 item 5.

issue take their share per capita;<sup>89</sup> and in Victoria, nephews and nieces take per capita.<sup>90</sup>

*(b) No Surviving Spouse or Issue*

When there are no surviving spouse and issue, a statutory list of relatives sets out those entitled to the intestate's estate by order of proximity. Generally, the list gives priority to parents, then siblings (including their offspring in substitution), grandparents, and aunts and uncles (including their offspring in substitution).<sup>91</sup>

When it is not possible to distribute the estate, the Crown takes the estate,<sup>92</sup> sometimes with the discretion to allocate assets to persons who would not otherwise have been entitled.<sup>93</sup>

## 2 *Modification of the Meaning of 'Spouse' and 'Issue'*

In all of these jurisdictions, legislation has broadened the definition of those persons who qualify as spouses in intestacy matters to include de facto spouses<sup>94</sup> and in some cases (same-sex) registered or civil partners.<sup>95</sup> Unlike England, some jurisdictions also take into account the existence of multiple partners; for example, when there is a formal surviving spouse and a de facto spouse.<sup>96</sup>

Legislation in these states and territories recognises as issue of the intestate exnuptial,<sup>97</sup> adopted<sup>98</sup> and artificially-conceived children.<sup>99</sup> Some jurisdictions

89 *Administration and Probate Act 1919* (SA) s 72I.

90 *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi).

91 *Administration and Probate Act 1929* (ACT) s 49C, sch 6 pt 6.2; *Administration and Probate Act 1969* (NT) s 66(5), sch 6 pt IV; *Succession Act 1981* (Qld) s 37, sch 2; *Administration and Probate Act 1919* (SA) s 72J; *Administration and Probate Act 1958* (Vic) s 52; *Administration Act 1903* (WA) s 14(1) items 3–10.

92 *Administration and Probate Act 1929* (ACT) s 49CA, sch 6 pt 6.2; *Administration and Probate Act 1969* (NT) sch 6 pt IV item 4; *Succession Act 1981* (Qld) sch 2; *Administration and Probate Act 1919* (SA) s 72G(1)(e); *Administration and Probate Act 1958* (Vic) s 55; *Administration Act 1903* (WA) s 14(1) item 11.

93 See, eg, *Financial Management Act 1994* (Vic) s 58(3)(a); *Escheat (Procedure) Act 1940* (WA) s 9.

94 *Administration and Probate Act 1929* (ACT) s 44; *Administration and Probate Act 1969* (NT) s 66, sch 6 pt 2; *Succession Act 1981* (Qld) s 5AA; *Family Relationships Act 1975* (SA) ss 11, 11A; *Administration and Probate Act 1968* (Vic) s 51A; *Administration Act 1903* (WA) s 15.

95 See, eg, *Civil Unions Act 2012* (ACT).

96 *Administration and Probate Act 1929* (ACT) s 45A; *Administration and Probate Act* (NT) s 67(3) (in relation to personal chattels); *Administration and Probate Act 1919* (SA) s 72H; *Administration and Probate Act 1958* (Vic) s 51A; *Administration Act 1903* (WA) s 15.

97 *Parentage Act 2004* (ACT) s 38(2); *Status of Children Act 1978* (NT) s 4(1); *Status of Children Act 1978* (Qld) s 3(1); *Family Relationships Act 1975* (SA) s 6(1); *Status of Children Act 1974* (Vic) s 3(1); *Administration Act 1903* (WA) s 12A(1).

98 *Adoption Act 1993* (ACT) s 43; *Adoption of Children Act 1994* (NT) s 45; *Adoption Act 2009* (Qld) ss 214–18; *Adoption Act 1988* (SA) s 9; *Adoption Act 1984* (Vic) s 53; *Adoption Act 1994* (WA) s 75.

99 This is a complex area, as demonstrated, for example, by the statutes and materials referred to in: LexisNexis, *Halsbury's Laws of Australia*, vol 24 (at 13 September 2012) 395 Intestacy, '3 Artificially Conceived Children' [395-1600]; Croucher and Vines, above n 31, [2.24]–[2.27].

have abolished hotchpot and others have retained it,<sup>100</sup> albeit in a modified form.<sup>101</sup> Unlike England, the distinction between relatives of the whole-blood and the half-blood is no longer relevant.<sup>102</sup>

### C Comment

By the end of the 20<sup>th</sup> century, intestate succession in England and the Australian jurisdictions so far considered was substantively different from that in the 19<sup>th</sup> century. The nature of the family for intestacy purposes had changed. It was a smaller unit, limited to the spouse, issue and a designated list of next of kin. However, the definition of such persons was broadened and the family was not always determined solely by traditional marriage or blood relationships.

The pendulum had also swung away decisively from the traditional entitlement of issue (and next of kin) to the spouse (broadly defined) as the principal heir. Intestacy distribution no longer operated to preserve automatically the assets of the family for future generations. Instead, it was primarily focused on the present needs of the spouse.

Accordingly, in those jurisdictions whether there is a surviving spouse is the single most important factor determining how the estate will be distributed. From that one fact, the relevant rules and distribution patterns fall into place. The spouse's entitlement has been statutorily mandated (whether based on value and/or a proportion of assets) with a degree of certainty. In contrast, the interests of other relatives are not stated with the same precision, because they will be dependent on the existence of a spouse, the nature of the spousal entitlement and the size of the estate.

During the development of spouse-focused intestacy succession, several distribution schemes evolved. Initially, there was what could be described as a 'simple' sharing pattern of asset distribution in which the entitlement of spouses and issue was determined by the application of a simple mathematical formula. The entire estate was valued, the spouse was entitled to a fixed monetary share, and the residue was divided equally between the spouse and issue. This pattern was already evident in the *Intestates Estates Act 1890*, 53 & 54 Vict, c 29.

By the first decades of the 20<sup>th</sup> century, spousal entitlement was not only based on a mathematical division of the estate, but also the categories of assets left by the intestate. Therefore, under the *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23 as originally enacted, the surviving spouse was entitled to the intestate's personal chattels.

By the mid-20<sup>th</sup> century, the financial security of the spouse was no longer deemed sufficiently protected by a mathematical share in the estate and/or

100 *Succession Acts Amendment Act of 1968* (Qld); *Administration Act Amendment Act 1976* (WA) s 3.

101 *Administration and Probate Act 1929* (ACT) s 49BA; *Administration and Probate Act 1969* (NT) s 68(3); *Administration and Probate Act 1919* (SA) s 72K; *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).

102 *Administration and Probate Act 1929* (ACT) s 44A; *Administration and Probate Act 1969* (NT) s 61(2)(b); *Succession Act 1981* (Qld) s 34(2); *Administration and Probate Act 1919* (SA) s 72B(2); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vii); *Administration Act 1903* (WA) s 12B.

entitlement to certain asset classes. The matrimonial home also became an important part of spousal inheritance. The ensuing schemes can be described as 'complex' because the final entitlement of the spouse was (and is) made up of a number of components and important practical questions may arise including the definition of personal (or household) chattels, the definition and valuation of the matrimonial home,<sup>103</sup> and whether personal (or household) chattels or the family home (or both) ought to be excised from the final valuation of the estate (for the purposes of the entitlement of other relatives).

Just as the spouse's entitlement has grown in value and asset categories, the practical entitlement of the children has diminished. Moreover, neither minors nor children from previous relationships are entitled to an immediate or prioritised entitlement. These children (like all the intestate's children) are legally entitled to a portion of the intestate's estate – but only if the estate can bear such a distribution after the surviving spouse has been fully awarded her entitlement.

The once robust principle of hotchpot (which was based on a desire to create a fair distribution of assets amongst the children) was abolished in England and in a number of Australian states. There are several reasons: hotchpot could be a difficult principle to apply in individual circumstances; hotchpot applied to advancements to children but not to other relatives,<sup>104</sup> thereby arguably 'skewing' the distribution; and in any event, hotchpot became almost redundant when the primary function of intestate succession was spouse-focused.

In addition, the schemes of intestate succession were set in the context of the well-established principles of joint tenancy and survivorship. While the mere creation of a joint tenancy is not a testamentary act,<sup>105</sup> it has significant consequences for the applicability of the rules of intestate succession. If some of the intestate's assets are co-owned with the surviving spouse under a joint tenancy, then the surviving spouse's interest in the assets will be enlarged automatically,<sup>106</sup> and such assets cannot be distributed under a will or under the rules of intestate succession.<sup>107</sup> The reforms did not take this into account.

Moreover, in more recent times there has been the implementation of pension schemes in England and most particularly compulsory superannuation for employees in Australia. In the event that an intestate dies before he or she is entitled to the superannuation funds, the death benefit will be paid in accordance with the scheme. Generally, the trustees of the scheme will have the discretion to determine who will be entitled to the fund and these persons will generally be persons dependent on the deceased.<sup>108</sup> Such schemes may allow an employee to nominate the beneficiary under the scheme subject to legislative oversight.<sup>109</sup> If there is no nomination, then the fund will be generally paid to the deceased's

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103 For a discussion of this matter, see Dal Pont and Mackie, above n 31, [9.54]–[9.57], [9.61]–[9.69].

104 Law Commission (UK), *Family Law: Distribution on Intestacy*, Report No 187 (1989) [47].

105 Dal Pont and Mackie, above n 31, [1.13].

106 *Corin v Patton* (1990) 169 CLR 540, 575 (Deane J).

107 *Carr-Glynn v Frearsons* [1999] 1 Ch 326.

108 Dal Pont and Mackie, above n 31, [1.12].

109 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.



spouse, partner or dependent. Where there is no person fitting the description of an entitled beneficiary under the fund, the fund will be paid to the deceased's estate.<sup>110</sup> The point is that unless the fund is paid to the intestate's estate (because there is no nomination or other eligible beneficiary), the fund will be paid to the beneficiary outside the operation of intestate succession. The reforms did not take this into account.

However, the inexorable trajectory of reforms in favour of the spouse did not resolve the problem of the distribution of intestate estates. Instead, near the end of the 20<sup>th</sup> century two broad and interrelated questions dominated the debate: did the complex sharing pattern of intestate distribution support the needs of the surviving spouse adequately; or conversely, had the pendulum gone so far so that children were not given sufficient opportunity to inherit? The first question arose in view of the changing demography in both jurisdictions and concerns that the surviving spouse (who was portrayed as archetypally older and retired) may not be inheriting sufficient assets to secure her in old age. In particular, there were concerns that, in the event that the surviving spouse did not inherit the family home, she could be removed from the home to pay out the entitlements of other relatives.<sup>111</sup> Such concerns made it clear that it could not be assumed that even aged spouses could rely on the beneficence of family members. The second question arose as a reaction to the first question because efforts to provide for and further protect the spouse appeared to squeeze out, almost completely, the intestate's issue. Accordingly, further reform of intestate succession was considered in both England and Australia.

## IV LAW REFORM PROPOSALS IN ENGLAND

The reform of intestate succession has been an ongoing matter for the Law Commission. In order to understand the nature of the proposed reforms, they will be considered at three levels, namely: the substantive recommendations; the materials and policies upon which the Commission relied and a critical evaluation of the recommendations in view of the materials and policies.

### A Law Reform Recommendations

For the purposes of this article, there have been two significant modern reports:

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110 See, eg, *Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248; *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15; *Baird v Baird* [1990] 2 AC 548.

111 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [3.22]–[3.28].

### 1 *The Law Commission Report on Family Law: Distribution on Intestacy*<sup>112</sup>

This report was published in 1989 and recommended significant changes. Some of the recommendations were enacted, such as the abolition of the doctrine of hotchpot.<sup>113</sup>

The Commission's central (and contentious) recommendation was that in all cases, a surviving spouse ought to inherit the entire estate: an 'all to spouse' scheme.<sup>114</sup> Faced with the alternative options of the spouse acquiring a greater share of the statutory legacy and a share of the residue or the spouse acquiring the matrimonial home absolutely, the Commission favoured outright and complete spousal entitlement.<sup>115</sup> Briefly stated, the reasons for the Commission's recommendation were that the scheme would be simple to apply if it guaranteed that the surviving spouse would inherit the entire estate and it replicated what occurred in a majority of estates.<sup>116</sup> The Commission also mentioned the use of joint tenancies in matrimonial home-ownership.<sup>117</sup> It considered that the different distributions that would occur depending upon whether the matrimonial home was owned by the spouses as tenants in common or joint tenants were unnecessarily arbitrary.<sup>118</sup> Implicitly, an 'all to spouse' scheme would, like a joint tenancy, ensure that the surviving co-owner retained the matrimonial home. The Commission acknowledged that there would be criticisms of its approach, particularly in relation to the exclusion of children. However, it contended that minors would be cared for by the surviving spouse and adult children would be independent and middle-aged.<sup>119</sup>

The recommendation was ultimately rebuffed. There was a strong leaning in various sectors towards children having some inheritance rights.<sup>120</sup> Some legislators and commentators expressed unease that the intestate's children who were not also children of the surviving spouse would not be entitled to any assets from the estate. They contended that children from other relationships ought to be entitled to a share of the estate after the surviving spouse had inherited an interest in the matrimonial home, a statutorily index-linked legacy and one half of the remainder of the estate.<sup>121</sup> Commentators suggested that the surviving spouse ought to obtain only a life interest in the estate, so that upon her death all children would inherit their deceased parent's assets.<sup>122</sup> In short, the implication

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112 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104.

113 *Law Reform (Succession) Act 1995* (UK) c 41, s 1(2).

114 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, [28].

115 *Ibid* [28]–[46].

116 *Ibid* [33].

117 *Ibid* [2], [10], [19].

118 *Ibid* [19].

119 *Ibid* [37], [42].

120 Kerridge and Brierley, above n 57, [2-50]; Sherrin and Bonehill, above n 14, [1-037].

121 United Kingdom, *Parliamentary Debates*, House of Lords, 16 June 1992, vol 538, cols 170–8 (Lord Mishcon). See also United Kingdom, *Parliamentary Debates*, House of Lords, 13 February 1995, vol 561, cols 502–511 (Lord Mackay LC).

122 Kerridge, 'Distribution on Intestacy', above n 2, 366–7; Miller, above n 2, 197.

was that an ‘all to spouse’ distribution would work unfairly against children and did not reflect the reality of social change and the complexity of modern life.<sup>123</sup>

## 2 *The Law Commission Report on Intestacy and Family Provision Claims on Death*<sup>124</sup>

### (a) *Spouse-Focused but Not ‘All to Spouse’*

In view of the previous controversy, the Commission did not recommend an ‘all to spouse’ scheme, although it still considered such a scheme advantageous.<sup>125</sup> However, the Commission’s recommendations still remained spouse-focused and the Commission recommended the augmentation of spousal entitlements. Such enhancements of the spouse’s position are defensible on the basis that intestate inheritance ought to provide to the spouse more than the bare necessities of life, taking into account the relationship and the size of the estate.<sup>126</sup>

When there is a surviving spouse, but no surviving children or other descendants, the Commission recommended that the spouse ought to acquire the whole of the estate (to the exclusion of any next of kin).<sup>127</sup>

When there are a surviving spouse and issue, the Commission recommended the modification of the individual components of the spousal entitlement, the combined practical effect being that the surviving spouse would acquire all or most of the estate. The Commission proposed that the definition of ‘personal chattels’ ought to be clarified and framed to ensure that only assets which were held by the intestate solely or mainly for business and investment purposes would be excluded from the definition.<sup>128</sup> This would mean that other high value items would remain in the definition and be inheritable by the spouse.<sup>129</sup>

The Commission recommended the regular review of the value of the statutory legacy at least every five years, taking into account the ‘Retail Price Index’<sup>130</sup> in order to protect the surviving spouse from the impact of inflation and to ensure that the scheme was inherently weighed in favour of the spouse. At present no recurrent review is statutorily mandated. This addressed the Commission’s (and Government’s) fears that the statutory legacy would not be adequate for the spouse to buy out the intestate’s share in the family home (in the event that the home was not co-owned under a joint tenancy with the intestate).<sup>131</sup>

The Commission also proposed that (after the distribution of the personal chattels and the statutory legacy) the spouse would acquire an outright share in

123 Cretney, above n 2, 86–93.

124 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6.

125 *Ibid* [2.33].

126 Lawrence W Waggoner, ‘The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code’ (1991) 76 *Iowa Law Review*, 223, 233.

127 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.25], Recommendation 9.1

128 *Ibid* [2.111], Recommendation 9.3.

129 *Ibid* [2.103]–[2.110].

130 *Ibid* [2.122]–[2.128], Recommendation 9.4.

131 *Ibid* [2.122].

one half of any remaining estate (if such a residue existed).<sup>132</sup> At present, the spouse only acquires a life interest in half of the estate. The Commission concluded that an absolute half-share would be highly advantageous to the spouse, although the children would ultimately inherit less of the estate.<sup>133</sup>

In addition, the Commission's recommendation evidenced the paramountcy of the spouse on another basis. The Commission rejected proposals that the value of property co-owned under a joint tenancy ought to be factored into the distribution of the estate. The Commission pointed out (in the context of the family home) that there had been little support for the option in the consultation process.<sup>134</sup>

### *(b) Cohabitants as Spouses*

For cohabitants, the Commission recommended that they ought to be entitled to a portion of the estate in specific circumstances where the spouse-like nature of the relationship was clear. A cohabitant who lived for five years in the same household as the intestate's spouse prior to the intestate's death ought to inherit a portion of the estate.<sup>135</sup> In addition, a cohabitant who had lived for two years in the same household as the intestate's spouse and was a parent of a child of the relationship ought to be a qualifying cohabitant.<sup>136</sup> Such cohabitants would have the same rights as spouses.<sup>137</sup> However, when both a formal spouse and a cohabitant survived the intestate, the Commission recommended that the spouse ought to acquire the entire spousal share.<sup>138</sup>

### *(c) The Entitlement of Children (and Other Issue)*

It is true that the Commission did not adopt an 'all to spouse' scheme and that children could have an opportunity to inherit a portion of the estate, depending upon whether the spouse survived the intestate and the estate's value and asset mix. Therefore, even if the spouse survived the intestate, if the estate was of a sufficient size, it could bear an inheritance in favour of the children. In view of this entitlement, the Commission recommended that children from previous relationships ought not to be entitled to a special portion of the estate in priority to the spouse and other relatives.<sup>139</sup> They would be treated like all other children, entitled to a share of the estate only after the spouse had acquired her entitlements.

In regard to adult children seeking inheritance from the intestate's estate, the Commission sought no specific amendment of the law,<sup>140</sup> noting that it did not

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132 Ibid [2.58]–[2.59], [2.62], Recommendation 9.2.

133 Ibid [2.58]–[2.59].

134 Ibid [2.47].

135 Ibid [8.84]–[8.87], Recommendation 9.29.

136 Ibid [8.97]–[8.102], Recommendation 9.30.

137 Ibid [8.109]–[8.119], Recommendation 9.31.

138 Ibid [8.64]–[8.68], Recommendation 9.28.

139 Ibid [2.67]–[2.82].

140 Ibid [6.19]–[6.26].

wish to undermine the appropriate priority given to the spouse and cohabitants.<sup>141</sup> Accordingly, it would remain difficult for adult children to inherit from their parent under intestate succession.<sup>142</sup>

The Commission did not propose that stepchildren ought to be entitled to inherit from the step-parent.

## B Materials and Policy

Faced with an intestacy scheme which no longer worked,<sup>143</sup> 19<sup>th</sup> century lawyers and law reformers sought a new principle. They decided that intestacy was essentially the absence of a valid will; and the state was required to provide a substituted will which, as much as possible, replicated the kind of wills which were likely to be made in the circumstances of a typical intestate.<sup>144</sup> Well into the 20<sup>th</sup> century, the rationale and goal of intestacy law was the articulation of and a distribution scheme based on the ‘presumed intention’ of the intestate by reviewing how testators had disposed of their estate.<sup>145</sup> In order to determine ‘presumed intention’, law reformers increasingly turned to the systematic survey of a broad spectrum of wills as concrete evidence of the ‘subjective’ intention of testators. Such surveys (and consultations of interested stakeholders) suggested that testators preferred to leave either the entire or most of their estate to their surviving spouses.<sup>146</sup> This provided a degree of justification for intestacy reform including the shift of primary entitlement from heirs to spouses and the introduction and augmentation of spouse-focused intestate succession.

However, the modern Law Commission consciously reduced its reliance on the principle of ‘presumed intention’ and the investigation of wills.

### 1 *The Report on the Family Law: Distribution on Intestacy*<sup>147</sup>

The Commission maintained that the application of presumed intention (through a review of probated wills) was not appropriate. It contended that wills had little relevance to intestacy reform because: it was rarely possible to ascertain from a will who were the surviving relatives and what were the will-maker’s assets; older persons made wills (while intestates often died prematurely); and wills were made to take into account taxation considerations which could artificially skew what would otherwise be the intention of the testator.<sup>148</sup> Instead, the Commission’s deliberations were underpinned by public opinion surveys and

141 Ibid [6.10]–[6.15].

142 Ibid [6.10].

143 ‘The law makes a will for intestates which no sane testator would make for himself’: H A L Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, 1911) vol 1, 172.

144 *Cooper v Cooper* (1874) LR 7 HL 53, 66 (Lord Cairns); *Public Trustee v McKee* [1931] 2 Ch 145, 157–8 (Lord Hanworth MR); *Nathan v Bowen-Buscarlet* [1972] 1 Ch 463, 468–9 (Goff J); Sherrin and Bonehill, above n 14, [1-024]; Andrew Borkowski, *Textbook on Succession* (Oxford University Press, 2<sup>nd</sup> ed, 2002) [1.1.4.1].

145 United Kingdom, *Report of the Committee on the Law of Intestate Succession*, Cmd 8310 (1951) [3].

146 Ibid [10], [12].

147 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104.

148 Ibid [4].

responses by the legal profession and other stakeholders to an earlier working paper.<sup>149</sup>

The Commission also emphasised that the intestacy rules ought to be framed with the broad social context in mind, highlighting the changing demographic context and the potentially detrimental effect of the intestacy law of the time on aged surviving spouses.<sup>150</sup>

Finally, the Commission also endorsed two overriding policy guidelines neither of which required the investigation of wills (nor necessarily reliance on public opinion surveys). One was the acknowledgement of the needs of the surviving spouse so that the spouse received adequate provision.<sup>151</sup> The other was the requirement for a simple, clear and workable scheme.<sup>152</sup> In view of the demography and policy concerns, an ‘all to spouse’ distribution was more preferable than a complex sharing scheme.<sup>153</sup>

## **2 Report on Intestacy and Family Provision Claims on Death<sup>154</sup>**

In this report, the Commission relied on published opinion surveys and focus groups (confirming favourable attitudes towards spouse-focused intestate succession and the inheritance rights for cohabitants) and data provided by public bodies (about the number and size of intestate estates).<sup>155</sup>

In relation to the former, the Commission commissioned a study from the National Centre for Social Research (‘NatCen’)<sup>156</sup> and referred to the results. NatCen undertook quantitative and qualitative surveys to determine the attitudes of a group of people over the age of 16 years to will-making and intestacy.<sup>157</sup>

First and foremost, the study found that the concept of the nuclear family was not in ‘terminal decline’ and that it was central to ‘the concept of a family rooted in partnership and parenthood.’<sup>158</sup> Therefore, the study confirmed a strong preference for the surviving spouse inheriting in priority to other relatives.<sup>159</sup> There was also substantial support for cohabitants inheriting half or more of the estate, depending upon the duration of the relationship and whether there were children from the relationship.<sup>160</sup> However, this did not mean that other relatives, particularly children ought to be excluded from inheriting from the intestate. Although the majority of participants considered that the spouse ought to be the primary and priority beneficiary, ‘a substantial proportion of respondents

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149 Ibid [29].

150 Ibid [23].

151 Ibid [26].

152 Ibid [25].

153 Ibid [28]–[36].

154 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6.

155 Ibid [1.30]–[1.35].

156 Ibid [1.31]–[1.33].

157 Ibid [1.33]; Douglas et al, above n 46, 253.

158 Alun Humphrey et al, *Inheritance and the Family: Attitudes to Will-Making and Intestacy* (National Centre for Social Research, 2010) 10.

159 Ibid 82–3.

160 Ibid 83–4.

favoured the children receiving *something* from the estate ranging from 48 to 74 per cent across all the scenarios involving children.<sup>161</sup> In relation to adult children, it was considered appropriate by a substantial portion of respondents that ought to inherit ‘something’ because blood ties ought to be recognised,<sup>162</sup> but there were different views as to whether they would be entitled to less than other children and when they would be entitled to receive their inheritance.<sup>163</sup>

When the surviving spouse was a second (or subsequent) spouse, the participants were less supportive of the second spouse inheriting the bulk of the estate (particularly when the intestate was survived by children who were minors).<sup>164</sup> There were also concerns that a spouse would not be as interested in the wellbeing of children from earlier relationships and would not be inclined to leave assets to such children.<sup>165</sup>

The question whether minors ought to inherit from their intestate parent was also raised as part of the NatCen qualitative survey. The study demonstrated that there was no clear answer, but significant concerns. Three possibilities were identified by the participants.<sup>166</sup> First, the rules ought to be based on the assumption that a spouse will always act in the best interests of the child, so that the spouse ought to inherit the entire estate.<sup>167</sup> Second, the rules ought to assume that the spouse will act in the best interests of the child, but there ought to be a process by which this will be open to challenge.<sup>168</sup> Third, it ought not to be assumed that the spouse will act in the best interests of the minor and the intestacy rules ought to allow for the minor to inherit directly from the intestate parent.<sup>169</sup>

In short, the results of the survey indicated that although there was strong support for the spouse as a primary heir,<sup>170</sup> an automatic ‘all to spouse’ scheme in all circumstances did not represent the view of the majority of participants.<sup>171</sup> Moreover, the study demonstrated that there were not always clear answers about how and in what circumstances spouses and children ought to inherit from the estate. Nevertheless, the survey arguably had limitations. For example, the survey appeared not to explore how the size and range of estates could change the attitudes of participants; nor did it appear to raise with the participants the possible effect of joint tenancies and the principle of survivorship.

The Commission also relied on the data from HM Revenue & Customs about the net value of the estates as reported for probate.<sup>172</sup> For the purposes of this

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161 Ibid 9.

162 Ibid 53.

163 Ibid 60.

164 Ibid 83.

165 Ibid.

166 Ibid 54.

167 Ibid 54–5.

168 Ibid 55.

169 Ibid 56.

170 Ibid 82.

171 Ibid 83. See also Douglas et al, above n 46, 270–1.

172 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [1.35].

article, three matters stand out. First, although the value of the intestate estates was generally lower than the value of testate estates, the value was still substantial.<sup>173</sup> Second, the value of many estates did not exceed the value of the statutory legacy, which meant that if there were a surviving spouse and issue, the spouse would inherit the entire estate.<sup>174</sup> Third, most intestates died over the age of 60 years and the average age of the intestates was 73 years (compared to the average age of 82 years for testates).<sup>175</sup> It could not be said that intestacy was solely the domain of the young and the destitute.

## C Comment

The Commission's recent recommendations have remained so anchored in a spouse-focused framework, that it is arguable, from a substantive and empirical perspective, that the Commission may not have sufficiently recognised the needs and vulnerabilities of other members of the intestate's family, the impact of joint tenancies on the property available for distribution and the sometimes less-than-unequivocal responses of participants to the NatCen survey about the division of assets.

### *1 Substantive Matters*

Substantively, five issues require comment in view of the Commission's proposals for an enhanced spouse-focused scheme:

#### *(a) High Thresholds*

The Commission did not adopt an 'all to spouse' scheme and under the recommendations, children could have an opportunity to inherit from their intestate parent. However, it must be emphasised (and it cannot be emphasised too strongly) that in most cases a spouse would inherit the entire estate, despite the legal reservation of half of the remaining portion of the estate in favour of children (after the surviving spouse obtained the personal chattels and the statutory legacy).

The Commission observed that under the currently operating scheme, the spouse already inherits the entire estate in most cases. At present there are two levels of statutory legacy: a lower level of £250 000 when the deceased is survived by children and other dependents; and £450 000 where the deceased is not survived by children and other dependents, but at least by a parent or sibling. It has been found that the spouse acquires 90 per cent of the assets when the deceased is survived by children.<sup>176</sup> On the other hand, the spouse acquires 98 per cent of the estate when the higher statutory legacy applies.<sup>177</sup>

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173 Ibid appendix D, item D.13, table 3, table 4. Grants of representation in England and Wales between November 2007 and October 2008 are also represented: at annex B, table 3A, table 4A.

174 Ibid [2.6].

175 Ibid [3.12], appendix D, table 6.

176 Ibid [2.6].

177 Ibid.



In view of these statistics, it is arguable that the proposed redefinition of ‘personal chattels’ is too wide and the threshold for the statutory legacy will be set too high, so that children will have even less prospect of inheriting directly from their intestate parent. Therefore, statutory entitlements for children are (and will remain) merely symbolic in most cases, rather than real. The potential problems faced by children from previous relationships could be exacerbated by the redefinition of ‘personal chattels’, the increase in the statutory legacy and the fact that they have no priority under the proposed rules; despite the misgivings raised in the NatCen survey.

*(b) Minors*

The Commission did not propose that there ought to be some kind of special provision or protection for minors, preferring to rely on the surviving spouse to care for them (and perhaps implicitly act as a conduit of assets to them upon her death). This would continue the present situation that minors would only inherit from their intestate parent in those circumstances when there was a residue after the provision for the spouse. The Commission pointed to the fact that the participants in the quantitative NatCen survey still supported the spouse as the primary heir, even when there were minors in the survey scenario.<sup>178</sup>

It is arguable that minors ought not to be given special treatment in intestate succession, because (due to higher standards of living) only a small proportion of younger people will die leaving a minor to be cared for by a surviving spouse,<sup>179</sup> and the adoption of a simple and straightforward scheme will reduce the costs of administration. However, such contentions emphasise the smooth running of the intestacy process at the expense of the intestate’s parental responsibilities to young and vulnerable children. As the past history of intestate succession has demonstrated, framers of intestate succession ought not to rely on the beneficence of family members and it cannot be assumed that vulnerable parties, such as minors, will necessarily be cared for adequately. Moreover, as the Commission itself acknowledged, the surviving parent may not be a reliable conduit of assets.<sup>180</sup> Accordingly, a protective approach to minors ought to have been seriously considered. A portion of the estate could be set aside automatically and ‘frontloaded’ for the wellbeing and education of minors, notwithstanding the paramountcy of the surviving spouse as heir or the value of the estate.

*(c) Children from Previous Relationships*

It is arguable that the Commission did not adequately account for concerns about the competing interests between subsequent spouses and children from earlier relationships. This was a contentious issue in 1989 when the UK

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178 Ibid [2.36], [2.38].

179 The information provided by HM Revenue & Customs indicated that only three per cent of intestates were aged 18–49 years: Ibid appendix D, table 6. See also Office for National Statistics, above n 37, 9.

180 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.68].

Parliament rejected the ‘all to spouse’ proposal because children from previous relationships would have no opportunity to inherit under it.<sup>181</sup> In the United States, these concerns are known as ‘conduit theory’. According to the theory, the surviving spouse is likely to be a reliable conduit to her children.<sup>182</sup> In contrast, in relation to children from the intestate’s previous relationships, ‘a surviving spouse in these circumstances cannot be relied upon as a “conduit” to pass inherited wealth down to the deceased’s children on his or her own death.’<sup>183</sup> In the latest report, the Commission decided not to propose amendments to deal with the problems posed by conduit theory. The Commission remained unconvinced that conduit theory provided a defensible reason for giving such children a prioritised entitlement over the spouse. For example, the Commission contended that any surviving spouse could never be relied upon completely to act as a conduit of assets to their own children (let alone children of previous relationships) so that reliance on conduit theory was untenable.<sup>184</sup> Moreover, it considered that the spousal entitlement ought not to be dependent upon the existence of children from previous relationships.<sup>185</sup> Instead, the Commission preferred to retain simple rules and treated all children the same in the (often unlikely) event that the intestate left a sufficiently valuable estate enabling them to inherit.

Yet it is arguable that in refuting the relevance of ‘conduit theory’, the Commission undermined its own proposals. For example, the Commission argued that often there will be no ‘surplus’ available when the surviving spouse dies. Therefore, ‘conduit theory’ is not relevant.<sup>186</sup> However, if surviving spouses (or step-parents) are unlikely to leave significant assets upon death, it may be even more necessary for a small proportion (for example, three to five per cent of the intestate’s assets) to be ‘frontloaded’ and distributed to children from previous relationships. This is a modest proposal in contrast to the suggestion by one commentator that when there are children from another relationship (but no children from the relationship between the intestate and the current spouse) the spouse ought to take a life interest only.<sup>187</sup> It is unlikely that the suggestion based on a life interest will be followed in the near future because this would mean that the surviving spouse would not be completely free to utilise any of the assets as he or she wished.<sup>188</sup>

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181 United Kingdom, *Parliamentary Debates*, House of Lords, 16 June 1992, vol 538, cols 170–2 (Lord Mishcon). See also Kerridge, above n 2, 363–5; Cretney, above n 2, 87–91.

182 Waggoner, above n 126, 233.

183 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.67], citing Waggoner, above n 126, 223–33. Therefore, in the United States, account is taken of the existence of children from other relationships. The entitlement of the surviving spouse is reduced when the surviving spouse has a child who is not a child of the deceased: *Uniform Probate Code* § 2-103 (3) & (4) (1969).

184 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.68].

185 *Ibid.*

186 *Ibid.*

187 Kerridge, ‘Distribution on Intestacy’, above n 2, 367–8. See also Miller, above n 2, 197.

188 See generally Butt, above n 32, ch 10.

Another argument was that it was ‘wrong in principle’ for entitlements to differ ‘because of the presence of children from other relationships’.<sup>189</sup> Yet, it is important to appreciate that even under the Commission’s proposals, spousal entitlements will differ depending on the value of the estate and the existence of the intestate’s children. If there are no children from a previous relationship and no children from the present relationship, the effect of the Commission’s proposals is that the spouse acquires all the estate. In contrast, if there is a residue after the distribution of the spousal entitlement to the personal chattels and the statutory legacy and there are children from previous relationships, then the surviving spouse (as step-parent) will be subject to the children’s claim for one half of the residue.

Moreover, the fact that the Commission has recommended that cohabitants may be able to inherit as spouses means that there is the potential for more relationships to be deemed spousal for the purpose of intestate succession, leading to the expansion of the number of children who find themselves designated ‘children from other relationships’.

#### (d) Joint Tenancies

At the beginning of the 20<sup>th</sup> century, the concept of joint tenancy may not have operated in regard to family assets because there were low rates of home-ownership,<sup>190</sup> and husbands were more likely to own the family home outright (to the exclusion of the wife).<sup>191</sup> If the husband owned the family home outright, it was important that the surviving wife was able to acquire such an asset through intestate succession. However in recent times, it has been more common for spouses to co-own property as joint tenants,<sup>192</sup> with the result that the principle of survivorship applies and the surviving spouse automatically acquires the intestate’s share without reliance on intestate succession.

Neither the NatCen survey nor the latest Commission report adequately accounted for joint tenancies as a means of augmenting the spousal inheritance and sidestepping the operation of intestate succession. In 1989, the Commission acknowledged that some spouses co-owned the family home as joint tenants, but implicitly accepted the operation of the principle of survivorship as beneficial to such spouses.<sup>193</sup> In the latest report, the Commission determined that any

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189 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.68].

190 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [3.15].

191 *Ibid* [3.17]–[3.18]. See also the comments of the Law Commission (UK) in regard to different ways in which the family home may be owned: Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, [19].

192 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, [2]; Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [3.18]–[3.19]. It ought to be noted that in a recent decision it was held that notwithstanding an unequal contribution to the purchase of the home by one of the spouses; there was a strong presumption, when the legal title is held as a joint tenancy, that the equitable title is also held as a joint tenancy: *Stack v Dowden* [2007] 2 AC 432, [69].

193 Law Commission (UK), *Family Law Distribution on Intestacy*, above n 104, [19].

accounting of co-owned assets under a joint tenancy, principally the family home, would cause unnecessary complexity and unfairness.<sup>194</sup>

Not only are joint tenancies increasingly more common, but the removal of high value assets from intestacy distribution could have a detrimental effect upon the entitlement of children. The value of the estate (for intestacy purposes) can be vastly reduced with the result that the spouse automatically acquires the remaining assets as personal chattels and the statutory legacy. There is nothing else to distribute. Thus, in practical terms, children would not have the opportunity to inherit under the intestacy scheme, even though the full value of the intestate's assets immediately prior to the intestate's death would suggest that they would be entitled to inherit. For children from previous relationships, this could amount to a double blow: high value assets would be excised from the intestate estate and the children may have no prospect of inheriting such assets from the surviving spouse at a later date.<sup>195</sup>

However, it is arguable that a degree of complexity would be possible without burdening the estate with administrative costs or exposing the spouse to the prospect of eviction from the family home. It has been suggested that the hotchpot rules ought to be revived in relation to property passing to the spouse under the principle of survivorship. Any property inherited under the principle of survivorship would be set-off against the statutory legacy. However, if the value of the property so passing exceeded the statutory legacy, then the surviving spouse would not have to surrender the asset, but would not receive the statutory legacy.<sup>196</sup> The merit of the proposal is that it restores the operation of the intestacy rules to all assets, but permits the surviving spouse to retain the family home or other jointly owned assets.

However, it ought not to be forgotten that accountability for advances to children under the doctrine of hotchpot was abolished because of its perceived inequity. One of the problems associated with hotchpot was that while advances to children had to be accounted for, this requirement did not extend to other relatives.<sup>197</sup> Similarly, it could be inequitable if the spouse was required to account for assets owned under a joint tenancy, but other relatives were not also required. Accordingly, it would be necessary to compel the accounting of all co-owned assets under a joint tenancy which could prove difficult when the co-owner would not be entitled to any assets under intestate succession.

Another argument against the introduction of accountability is that the joint tenancy is a quasi-testamentary choice, although the creation of the joint tenancy is not regarded as testamentary in nature.<sup>198</sup> If the couple decides to co-own the property as joint tenants, then this choice ought to be respected and enforced

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194 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [2.45]–[2.50].

195 See Kerridge, 'Distribution on Intestacy', above n 2, 367–8.

196 Roger Kerridge, 'Reform of the Law of Succession: The Need for Change, Not Piecemeal Tinkering' [2007] *Conveyancer and Property Lawyer* 47, 57–61; Kerridge and Brierley, above n 57, [2-61]–[2-62].

197 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, [47].

198 Dal Pont and Mackie, above n 31, [1.13]; Butt, above n 32, [14.10].

(particularly when a valid will has not been made in regard to other assets). Indeed, it is arguable that the intestate's estate is effectively a partial intestacy and just as the terms of a partially valid will can be administered without the need to account for its effect on the application of the intestacy scheme,<sup>199</sup> so too the principle of survivorship ought to be implemented fully so that there ought to be no need for further accounting.

*(e) Assumptions about the Surviving Spouse's Contribution*

The Commission may not have adopted an 'all to spouse' scheme, but it is implicitly assumed in both reports that the formal spouse contributed to the accumulation of matrimonial assets; and that the surviving spouse deserves a significant entitlement without any investigation of the duration of the marriage. However, in regard to short marriages of less than five years, the inheritance may not reflect the contribution made by the surviving spouse to the marriage relationship. It has been suggested that the entitlement of the spouse could be linked to the duration of the marriage, although it has been acknowledged that it would add complexity to the intestacy scheme and may not reflect the intention of typical intestates.<sup>200</sup> Nevertheless, such a one-dimensional approach to the contribution of the spouse means that children from previous relationships can only be more aggrieved by their limited prospects of inheritance which will be entirely based on the value and asset mix of the estate.

## **2 Empirical Material**

The Commission's use of empirical material raises two major issues:

*(a) The Shift to Surveys*

The latest Law Commission Report continued the shift away from the investigation of wills to surveys as an indicator of the likely attitudes of intestates. The advantage of surveys is that they can provide an 'objective' approach to intestacy issues unconnected to the participant's personal circumstances. However, it is questionable whether the results of surveys ought to or can completely inform how intestacy rules ought to be formulated; participants may not fully understand the questions, the implications of their choices or the regulatory context. Moreover, questions can be asked to obtain preferred answers or there may be gaps in the questions asked and the material covered.<sup>201</sup> It also cannot be assumed that what the public desires or expects is necessarily an appropriate foundation for policy.

It is debatable whether wills ought to be ignored when determining the rules for intestate succession. In the past, the problem associated with probated wills is that the testator's personal and subjective considerations necessarily

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199 Kerridge and Brierley, above n 57, [2-43]; NSW Law Reform Commission, above n 3, [1.10].

200 Miller, above n 2, 196; Borkowski, above n 144, [1.4.2].

201 See Cretney, above n 2, 92.

predominated in will-making. Testates tended to be older than intestates,<sup>202</sup> and their concerns were those commonly associated with older people: providing for their (older) spouse (as their children were mature adults). In contrast, intestates tended to be from a younger cohort, whose obligations would not only be to the spouse, but also to the children from the relationship (who were likely to be minors). However, the Commission's own recent data demonstrates that while intestates may still be younger than testates, they are a lot older than previously. The average age of an intestate is 73 years.<sup>203</sup> Therefore, intestate succession also needs to reflect the desires of an older demographic cohort, and the examination of wills could assist. Indeed, far from running counter to the spouse-focused approach adopted by the Commission, a review of probated wills may reinforce the desirability of a strong spouse-focused intestate succession.

*(b) The NatCen Survey and the Law Commission Report: The Entitlement of Children*

The results of the NatCen survey and the latest Law Commission Report were consistent in several ways. The Commission's recommendations were based on the primacy of the spouse, the centrality of the nuclear family and the importance of blood ties. The spouse would continue to acquire a significant portion of the estate (if not the entire estate), while other relations (most notably children) could still be entitled to a portion of the estate. The Commission's recommendations in relation to cohabitants were also recognition of social attitudes favouring longstanding relationships evident in the NatCen survey.

However, there were also significant differences between the NatCen survey and the latest Commission's recommendations. Law commissions can be selective about what reforms will be implemented, although the reforms are supported by findings in public surveys.<sup>204</sup> Generally speaking, the Commission favoured the simplicity of the spouse-focused framework, rather than accepting that there was an overriding view that children ought to inherit 'something'; and that intestacy reform may necessitate the adoption of rules responsive to the special vulnerabilities of some categories of children, such as minors.

Equally in the NatCen survey, there was considerably less support for a surviving spouse acquiring all or most of the assets when there were children (even adult children) from the previous relationship.<sup>205</sup> The concern was (consistent with conduit theory) that the surviving spouse was less likely to leave assets to children from the intestate's previous relationships, so that children

202 Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, [4]; Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 3, [1.40].

203 Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [3.12].

204 For example, there is evidence that where no relative or next of kin can be found, the property ought to be transferred to charity rather than being absorbed into the Crown's coffers: Law Commission (UK), *Family Law: Distribution on Intestacy*, above n 104, appendix C, [2.24], table 14. However, the Law Commission (UK) has not made a recommendation to this effect: see Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [3.38]–[3.45]; Borkowski, above n 144, [1.1.4.2].

205 Humphrey et al, above n 158, 83.

would not acquire ‘something’ from their deceased parent’s estate. However, the Commission chose to ignore the misgivings of the survey participants, preferring to rely on a complex distribution scheme in which all children may inherit from their deceased parent, depending on the value and asset mix of the estate.

## V LAW REFORM PROPOSALS IN AUSTRALIA

Like England, intestacy reform has been an ongoing concern in Australia. In order to appreciate the nature of intestacy reform it will be necessary to refer to the various reports of the state law reform commissions as well as the move to develop nationwide intestacy rules. Like the preceding section on England, the discussion on the Australian position will outline the recommendations first and discuss the major materials upon which the law reform bodies relied.

### A Law Reform Recommendations

#### 1 *Major Law Reform Reports Dealing with Intestacy Issue (Prior to the 2007 Uniform Succession Laws: Intestacy Report)*<sup>206</sup>

The state law reform commissions were heavily influenced by developments which favoured spouses in other Australian and overseas jurisdictions.<sup>207</sup> They incrementally recommended increased spousal entitlement, particularly when sharing the estate with the intestate’s other relatives. For example, they proposed the granting, retention or increasing the value of statutory legacies<sup>208</sup> for the spouse in view of concerns about inflation,<sup>209</sup> maintenance for other relatives,<sup>210</sup> the right of the surviving spouse to elect to take the matrimonial home,<sup>211</sup> and the surviving spouse’s entitlement to personal chattels.<sup>212</sup> Some made

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206 There have been several reports which have dealt with intestacy as part of the broader framework of succession law: see, eg, Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978); The Law Reform Commission of Western Australia, *The Administration Act 1903*, Project No 88 (1990). Other reports have dealt solely with intestate succession: see, eg, The Law Reform Commission of Western Australia, *Distribution on Intestacy*, Project No 34 Part 1 (1973); Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills*, Report No 28 (1974); Law Reform Commission of Tasmania, *Succession Rights on Intestacy*, Report No 43 (1985).

207 The Law Reform Commission of Western Australia, *Distribution on Intestacy*, above n 206, appendix 1; Law Reform Committee of South Australia, above n 206, 6–7; Law Reform Commission of Tasmania, above n 206, 12, 17–18.

208 The Law Reform Commission of Western Australia, *Distribution on Intestacy*, above n 206, [16]–[18].

209 Ibid [19]; The Law Reform Commission of Western Australia, *The Administration Act 1903*, above n 206, [3.24]–[3.26]; South Australia Law Reform Committee, above n 206, 6–7.

210 The Law Reform Commission of Western Australia, *The Administration Act 1903*, above n 206, [3.28]–[3.29].

211 South Australia Law Reform Committee, above n 206, 7; The Law Reform Commission of Western Australia, *Distribution on Intestacy*, above n 206, [24].

212 The Law Reform Commission of Western Australia, *Distribution on Intestacy*, above n 206, [24]; Law Reform Commission of Tasmania, above n 206, Recommendations 1, 2.

recommendations for the entitlement of de facto spouses<sup>213</sup> and for the abolition of the principle of hotchpot.<sup>214</sup>

## 2 Uniform Succession Laws: Intestacy ('Report')<sup>215</sup>

Recent recommendations for an Australia-wide and uniform succession law opened the way for a radical overhaul of intestate succession.<sup>216</sup> The NSW Law Reform Commission assumed the task of making proposals for the creation of national intestacy law on behalf of the National Committee for Uniform Succession Laws. For the purposes of this article there were five major recommendations:

### (a) *Cohabitants/De Factos as Spouses*

De facto partners had already been granted rights to the estate in some states.<sup>217</sup> As an important step towards its central recommendation, the Commission built on this, proposing that when a continuous de facto relationship had existed for at least two years before the death of the intestate or there had been a child born to the relationship (or the relationship had been registered as a civil partnership),<sup>218</sup> then the partner would be eligible to the same entitlement that a spouse would have acquired.<sup>219</sup> Such spouses and partners would be entitled to the whole of the estate when the intestate died without issue.<sup>220</sup>

### (b) *'All to Spouse' unless There Are Children from Previous Relationships*

The Commission's central recommendation was that in the event that the intestate was survived by a spouse (including a de facto partner conforming to the above criteria) and issue, then the spouse would take the whole of the estate. Generally, the issue of the intestate and the spouse would not be entitled to any assets.<sup>221</sup>

### (c) *Multiple Spouses*

The spouse's entitlement to the whole estate would be subject to the entitlement of other persons also recognised as a spouse. In the event that there was more than one person entitled to inherit as spouse, then each person would

213 Law Reform Commission of Tasmania, above n 206, Recommendations 13, 14.

214 The Law Reform Commission of Western Australia, *Distribution on Intestacy* above n 206, [36]–[39].

215 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3.

216 This is a joint project being conducted by the National Committee for Uniform Succession Laws with all States and Territories of Australia under the direction of the Queensland Law Reform Commission: Croucher and Vines, above n 31, [5.50].

217 See Part III (B) of this article.

218 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3, [2.1]–[2.18], Recommendation 1.

219 Ibid Recommendation 3.

220 Ibid [3.2]–[3.18], Recommendation 3.

221 Ibid [3.73], Recommendation 4.



equally share the spousal entitlement,<sup>222</sup> unless they had entered into a distribution agreement or a court had made a distribution order.<sup>223</sup>

*(d) Children from Previous Relationships*

The spouse's entitlement to the whole intestate estate would also be subject to the entitlement of children from other relationships. Any of the intestate's children who were not also the child of the surviving spouse would be entitled to a portion of the estate.<sup>224</sup> The spouse would be entitled to all the intestate's tangible property or personal effects (except those which existed for business purposes);<sup>225</sup> a statutory legacy (\$350 000 subject to indexation, reflecting ongoing concerns about the effect of inflationary pressures reducing the spousal interest)<sup>226</sup> plus interest,<sup>227</sup> and one half of the remaining estate absolutely.<sup>228</sup> Children from other relationships would inherit the other half of the residue *per stirpes*.<sup>229</sup> The spouse would be entitled to claim any particular item in the estate (including the matrimonial home), but would have to make an application to the court within a specified period.<sup>230</sup>

If there were a surviving spouse, a de facto spouse, and surviving issue (who were not the issue of the surviving spouse or the de facto spouse), the surviving spouse and the de facto spouse would share the statutory legacy and the surviving issue would take any remaining share equally.<sup>231</sup> The Commission considered that personal effects would be dealt with by negotiations between the spouses or court order.<sup>232</sup> Conversely, surviving issue of the intestate and the multiple spouses would have no entitlement to the estate.

*(e) No Surviving Spouse*

When there was no surviving spouse, but only issue or other relatives such as parents or siblings, the Commission recommended a statutorily prescribed order of entitlement which would be applicable whether the relationship was of the whole or half blood.<sup>233</sup> However, stepchildren would not be entitled to take from the intestacy of a step-parent,<sup>234</sup> adopted children would not be entitled to a share of a blood-parent's estate,<sup>235</sup> and the doctrine of hotchpot would be abolished.<sup>236</sup>

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222 Ibid [6.1]–[6.35], Recommendation 23.

223 Ibid.

224 Ibid [3.73]–[3.76], Recommendation 4. See also Miller, who suggested a prioritised upfront capital sum in favour of the spouse: Miller, above n 2, 197.

225 Ibid [4.1]–[4.30], Recommendation 5.

226 Ibid [4.42]–[4.44]. See also Law Reform Commission of Western Australia, *The Administration Act 1903*, above n 206, [3.28].

227 NSW Law Reform Commission, above n 3, [4.31]–[4.61], Recommendation 6.

228 Ibid Recommendation 8.

229 Ibid Recommendation 8.

230 Ibid ch 5, Recommendations 9–13.

231 Ibid [3.73]–[3.76], Recommendation 23.

232 Ibid [6.28].

233 Ibid Recommendations 31–7.

234 Ibid [7.33]–[7.46], Recommendation 26.

235 Ibid [7.47]–[7.59], Recommendation 27.

If no one could be found to take the intestate estate, the Crown would take *bona vacantia*; subject to the relevant minister having the power to make a special distribution from the estate.<sup>237</sup> The *Report* also acknowledged that the pattern of distribution for Indigenous Australians may be unlike the prescribed scheme and may need to be tailored to the requirements of different indigenous groups.<sup>238</sup>

### 3 NSW and Tasmania

In an ongoing program reforming the law of succession generally, the new intestacy provisions in NSW and Tasmania have substantially followed the uniform law recommendations of the NSW Law Reform Commission on behalf of the National Committee for Uniform Succession Laws.<sup>239</sup> However, there have been several important modifications since the release of the *Report* such as the broader definition of ‘spouse’ in NSW.<sup>240</sup> In contrast to England, in NSW and Tasmania there was a positive (and arguably uncritical) response to the ‘all to spouse in most circumstances’ scheme for a number of reasons. The legislators were satisfied that it reflected community standards and complied with empirical and statistical information upon which the recommendations relied.<sup>241</sup> In particular, the scheme recognised the entitlement of the intestate’s children from previous relationships subject to the value of the estate and the asset mix.<sup>242</sup> It was assumed that children of the intestate and the surviving spouse (or spouses) would eventually inherit.<sup>243</sup> The legislation was considered an important step towards the ‘harmonisation’ of Australian intestacy law.<sup>244</sup>

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236 Ibid [13.4]–[13.26], Recommendation 43.

237 Ibid ch 10, Recommendations 38–9.

238 Ibid ch 14, Recommendation 45. This will not be discussed further, but for more information on Indigenous persons’ estates, see *Succession Act 2006* (NSW) ch 4 pt 4.4.

239 The intestacy provisions were introduced in legislation amending the *Succession Act 2006* (NSW): *Succession Amendment (Intestacy) Act 2009* (NSW). In Tasmania there is a separate statute: *Intestacy Act 2010* (Tas).

240 *Succession Act 2006* (NSW) s 105. See also *Relationships Register Act 2010* (NSW), in relation to the registration of same-sex couples. In regard to people who will be regarded as children for the purpose of intestacy law in NSW, see *Status of Children Act 1996* (NSW) ss 5, 8 (ex-nuptial children), 14 (artificially-conceived children); *Adoption Act 2000* (NSW) ss 95(1)–(2). For a consideration of the situation in Tasmania, see *Status of Children Act 1974* (Tas) s 3(1); *Adoption Act 1988* (Tas) s 50; *Relationships Act 2003* (Tas) ss 6, 14.

241 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 April 2009, 14 283–5 (Barry Collier); New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 June 2009, 15 444 (Penny Sharpe); Tasmania, *Parliamentary Debates*, Legislative Assembly, 25 August 2010, 28–29 (Lara Giddings).

242 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 April 2009, 14 284 (Barry Collier); New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 May 2009, 14 641 (Greg Smith); New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 June 2009, 15 444 (Penny Sharpe).

243 Tasmania, *Parliamentary Debates*, Legislative Assembly, 25 August 2010, 28–29 (Lara Giddings); New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 June 2009, 15 444 (Penny Sharpe).

244 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 April 2009, 14 285 (Barry Collier).

## B Materials and Policy

In terms of the analysis of empirical material and policy development, the formal review of Australian intestacy law underwent a three-stage development.

### 1 *Law Reform Prior to the Queensland Law Reform Commission Report in 1993*

Unlike the English law reform bodies, Australian law reform commissions prior to 1993 did not fully articulate an overall rationale for intestacy law reform, sketch the social context, or rely on comprehensive statistical or public survey materials.

For example, in relation to reports entirely devoted to intestacy matters, the South Australian report relating to the 'Reform of the Law on Intestacy and Wills'<sup>245</sup> and the Tasmanian report on 'Succession Rights on Intestacy',<sup>246</sup> addressed specific distributional questions taking into account and catching up with social trends and developments in other jurisdictions. The South Australian report was not based upon any statistical or public survey material.<sup>247</sup> The Tasmanian Law Reform Commission sought the views of the public, issuing a questionnaire to which there were only a small number of respondents.<sup>248</sup>

In the earlier 1973 report, 'Distribution on Intestacy',<sup>249</sup> the Law Reform Commission of Western Australia attempted to articulate, in a rudimentary way, broad principles for legislative action. The Commission sought 'brevity and simplicity',<sup>250</sup> hoping 'to achieve a just distribution of the estate ... in the light of prevailing social attitudes.'<sup>251</sup> The Commission also noted that most intestate estates were small.<sup>252</sup>

### 2 *The Report of the Queensland Law Reform Commission in 1993*<sup>253</sup>

Like most of its predecessors, the Queensland Law Reform Commission did not rely on a review of wills or surveys of public attitudes. However, it deserves separate treatment because unlike its predecessors, the Commission's report began to map the context in which intestacy law operated (rather than responding only to perceived social trends).<sup>254</sup> For example, the Commission noted that since the implementation of the then Queensland intestacy rules, wealth patterns,<sup>255</sup> the aged pension,<sup>256</sup> and trends in the ownership of the family home had changed.<sup>257</sup>

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245 Law Reform Committee of South Australia, above n 206.

246 Law Reform Commission of Tasmania, above n 206.

247 It displayed greater regard for historical materials: Law Reform Committee of South Australia, above n 206, 3–5.

248 Law Reform Commission of Tasmania, above n 206, apps 1–3.

249 The Law Reform Commission of Western Australia, *Distribution on Intestacy*, above n 206.

250 *Ibid* [11].

251 *Ibid* [12].

252 *Ibid* [13], app II.

253 Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993).

254 *Ibid* ch 1.

255 *Ibid* [1.6.1].

256 *Ibid* [1.6.3].

The Commission remarked on altered attitudes towards education (in which both governments and parents spent heavily to the advantage of the younger generation), observing that this ‘may reduce the need for inherited wealth and its cost reduces the taxpayer’s ability to accumulate private, inheritable savings.’<sup>258</sup> Moreover, to the extent that there was inheritable property, a surviving spouse would be more deserving as she would be retired while the children would probably be ‘mature rather than young adults or infants.’<sup>259</sup> The Commission noted that a significant portion of surviving spouses had been women; and there were concerns that when there was a step-parent, this threatened the ‘legitimate expectations’ of children from previous relationships.<sup>260</sup>

In short, three important features of later Australian intestacy analysis began to emerge tentatively: a description of the context for reform in terms of intergenerational needs; provisional suggestions that distributional patterns ought to continue to favour older rather than younger generations; and concerns about the interests of children from previous relationships.

### 3 NSW Law Reform Commission, Uniform Succession Laws: Intestacy<sup>261</sup>

The recent report of the NSW Law Reform Commission was the most far-reaching and detailed report on Australian intestacy law. The Commission’s approach was consistent with that of the Queensland Law Reform Commission because the later report also considered the broad context in which intestacy distribution would be likely to operate. However, the NSW Law Reform Commission arguably stated both its contextual analysis and rationale for intestacy reform with more acute precision.

The Commission considered it was appropriate to consider the principle of ‘presumed intention’.<sup>262</sup> It defined ‘presumed intention’ as one which would ‘produce the same result as would have been achieved had the intestate had the foresight, the opportunity, the inclination or the ability to produce a will.’<sup>263</sup> Unlike the English Law Commission, the Commission regarded the information gleaned from an investigation of wills as valuable.<sup>264</sup> Indeed, in the previous year, the Commission had released a ‘*Research Report*’ on testators’ choice of beneficiaries.<sup>265</sup> The authors of the *Research Report* considered that the

257 Ibid [1.7].

258 Ibid [1.6.2].

259 Ibid [1.4].

260 Ibid [2.8.1].

261 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3.

262 Ibid [1.25]–[1.28].

263 Ibid [1.25], citing Ontario Law Reform Commission, *Family Property Law*, Report on Family Law, Part 4 (1974) 163; Manitoba Law Reform Commission, *Intestate Succession* Report No 61 (1985) 2, 7; Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No 78 (1999) 59; Tasmania, Office of the Public Trustee, *Consultation*; A Dunham, ‘The Method, Process and Frequency of Wealth Transmission at Death’ (1962) 30 *University of Chicago Law Review* 241, 241.

264 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3, [1.29].

265 NSW Law Reform Commission, *I Give, Devise and Bequeath: An Empirical Study of Testators’ Choice of Beneficiaries*, Report No 13 (2006).

disadvantage of reviewing wills is that testators tend to be older, wealthier and have a 'higher educational attainment'.<sup>266</sup> Nevertheless, it ought to be noted that for the *Research Report* the age range of intestates was broad: 28 years to 99 years and the average age was 60 years.<sup>267</sup> While the average value of a testate estate was \$774 802 (median value range was \$300 000–\$400 000),<sup>268</sup> the value of an intestate estate was \$213 888 (median value range was \$100 000–\$200 000).<sup>269</sup> Therefore, it could not be said that intestacy was the domain of only the young or the very poor, although the sample of intestate estates investigated was small, only 23 estates.<sup>270</sup>

The Commission's recommendations were informed by the *Research Report* and the large sample of files reviewed, mostly testate estates.<sup>271</sup> For the purposes of this article, four findings were influential. First, the study found that spouses inherited the entire estate in 75.2 per cent of cases. While children (or their substitutes) were named as beneficiaries, the spouse was the first choice.<sup>272</sup> Second, even when the estate was large, it was uncommon for the estate to be divided between the spouse and the children.<sup>273</sup> Third, most property owned by those who left wills was not jointly owned – only 12 per cent of intestates owned property as joint tenants, although such co-owned property was mostly owned with spouses.<sup>274</sup> Therefore, the *Research Report* did not consider that joint tenancies and the principle of survivorship had a significant impact upon wills or the administration of intestate estates. Indeed, the *Research Report* contended that a will may not be needed when the major property assets are owned under a joint tenancy.<sup>275</sup> Fourth, the *Research Report* found that testators did treat children from previous relationships more favourably. The authors commented:

In 43.7% of cases where there were children of a previous relationship, the spouse received the entire residuary estate, whereas in 31.3% of cases children of a previous marriage inherited the residue. In the 7 estates (43.7%) where the spouse was excluded, only 2 files indicated joint tenancy between the testator and spouse. In 5 cases (31.3%) the spouse was not taken care of by way of joint property or through the estate.<sup>276</sup>

The *Research Report* suggested that the reason for the 'trend toward making some provision for the testator's children'<sup>277</sup> may be due to concerns that the

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266 Ibid [4.23].

267 Ibid [3.29].

268 Ibid [3.1].

269 Ibid [3.29].

270 Ibid [3.29].

271 There were 536 files with grants of probate; 23 files with letters of administration; and 12 files with letters of administration (and a file attached): *ibid* [2.4].

272 Ibid [4.6].

273 Ibid [4.11].

274 Ibid [4.10].

275 Ibid [4.10].

276 Ibid [4.12].

277 Ibid [4.13].

current spouse would not provide for children from previous relationships or that the spouse had independent assets.<sup>278</sup>

The Commission reviewed other empirical material, such as surveys, to determine the general community's views because it considered that it would be 'unreasonable' for the rules 'to stray too far from community expectations.'<sup>279</sup> Again, the Commission found that the community expected that the surviving spouse would acquire most or the whole of the estate in most circumstances.<sup>280</sup> Therefore, Australian intestacy reform was informed by a blend of information about what will-makers had done and empirical material elucidating present community expectations.

The Commission raised several other factors which it considered relevant to the choice of beneficiaries. The Commission pointed out that there had to be careful consideration of a person's desert and need.<sup>281</sup> The Commission observed that a surviving spouse was deserving of a significant share of the estate because she had contributed to its accumulation.<sup>282</sup> In relation to need, the Commission had no difficulty identifying the surviving spouse as aged, female and retired; who would need sufficient financial resources to fund retirement and aged care,<sup>283</sup> subject to the entitlement of children from other relationships.<sup>284</sup>

The Commission observed that while simple rules and administration were preferable, this could not always be achieved because 'simple rules may also fail to deal with some common circumstances that arise in intestate estates.'<sup>285</sup> This would account, in part, for the complex recommendations dealing with the entitlement of multiple spouses,<sup>286</sup> and children from previous relationships.<sup>287</sup>

## C Comment

Like the proposals of its English counterpart, the substantive proposals of the NSW Law Reform Commission on behalf of the National Committee for Uniform Succession Laws are anchored in a spouse-focused framework.

### *1 Substantive Matters*

It is strongly arguable that a superior and significant feature of the Commission's recommendations is the recognition of the interests of children from previous relationships in view of the relationship breakdown between couples and the emergence of multiple-spouse relationships. In contrast to the English Law Commission, the Commission's approach reflects and is consistent

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278 Ibid [4.13].

279 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3, [3.26].

280 Ibid [3.26]–[3.34].

281 Ibid [1.36]–[1.43].

282 Ibid [1.40], [3.35].

283 Ibid [1.37], [3.11], [3.23]–[3.25].

284 Ibid [3.73]–[3.75].

285 Ibid [1.34].

286 Ibid Recommendation 23.

287 Ibid Recommendations 5, 6, 8.

with the concerns of conduit theory, the *Research Report* and the NatCen survey. However, to what extent children from previous relationships in NSW and Tasmania will, in a real and practical way, inherit from their intestate parent remains to be seen. The entitlement of such children is not ‘frontloaded’ and will only be realised if the size of the estate warrants it. In this regard, children from previous relationships in NSW and Tasmania may be in no better position than their English counterparts (assuming that the Law Commission’s recommendations are implemented).

The vulnerability of children is gauged by whether it is likely that they would eventually inherit from the surviving spouse rather than whether immediately before the intestate’s death they were dependent upon the intestate for care and maintenance. Therefore, minors are not accorded any special entitlement as the Commission assumed that the surviving spouse would be able to best determine the care and maintenance of minors and any special entitlement would only add further unnecessary complexity.<sup>288</sup> There was also an implicit assumption that minors would eventually inherit from their surviving parent.

## 2 *Empirical Material*

The recommendations were not only influenced by the ongoing development of spouse-focused frameworks (within Australia and overseas) and conduit theory, but the results of the *Research Report* based on the concept of presumed intention and the examination of wills. The recommendations mirrored the results of the *Research Report*’s findings that testators generally gave the entire estate (even a large one) to the surviving spouse, subject to the existence of children from other relationships. However, it is arguable that the recommendations also reflected the limitations of the *Research Report*. First, the Commission assumed that the surviving spouse would have contributed to the marriage relationship, without adequately investigating the question of the duration of the marriage.<sup>289</sup> Second, the Commission did not adequately deal with the argument that the impact of joint tenancies ought to be taken into account in modern intestacy.

The *Research Report* suggested that joint tenancies have only a minimal impact in the testamentary context.<sup>290</sup> However, the findings of the *Research Report* in regard to joint tenancies illustrate that care needs to be taken when reviewing wills. The wills investigated may not fully represent the situation in regard to testates, particularly if the testates were elderly and the family home was fully owned by one spouse to the exclusion of the other. Younger generations may own the family home as joint tenants, but this may not be reflected in the *Research Report*’s statistics on testate estates. Moreover, the *Research Report* indicated that in 21.7 per cent of the small sample of intestate estates considered, the deceased owned property jointly, generally with the

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288 Ibid [3.45].

289 Ibid [3.35].

290 NSW Law Reform Commission, *I Give, Devise and Bequeath: An Empirical Study of Testators’ Choice of Beneficiaries*, above n 265, [4.10].

spouse.<sup>291</sup> However, even if the rate of disclosed co-ownership of major assets in favour of the surviving spouse was higher than 12 per cent, it would not undermine the general thrust of the recommendations. The only (but potentially significant) group which would be adversely affected by the operation of the principle of survivorship is children of the intestate's previous relationships; and at this early stage, it is not clear to what extent they will, in practical terms, inherit a portion of intestate estates in NSW and Tasmania.

Third, the Commission did not fully consider the implication of compulsory superannuation in Australia. It accepted that '[a] lot more is now locked up in superannuation funds' and that superannuation may 'change the balance in the division between the surviving partner and issue.'<sup>292</sup> However, it wished to avoid the complexity that would arise if the surviving spouse were required to account for the receipt of the superannuation fund. The *Research Report* did not consider how the spouse's receipt of superannuation funds in testate or intestate estates would otherwise skew the distribution of assets.

## V CONCLUSION AND COMMENT

In the past, legislatures did not fully recognise the growing predominance of spouse-focused attitudes. Therefore, legislative reform lagged behind social assumptions and expectations about the primary entitlement of spouses. However, the spouse-focused framework is well entrenched in Australian and English intestate succession today. There are good reasons why the spouse ought to be a significant and even imperative heir to the intestate estate. Spousal relationships are companionate so that both spouses assume reciprocal obligations of care and maintenance and intestate succession ought to reflect such obligations. Generally, the surviving spouse has contributed to assets used commonly by the couple, so the surviving spouse deserves to inherit a significant portion of the estate.

Moreover, it is likely that the surviving spouse will need to rely on the intestate's assets because the surviving spouse may be economically vulnerable. In recent times, perceptions of the economic vulnerability of the surviving spouse have been strengthened because of demographic changes. The population is ageing and as the population ages, the average age of intestates has also risen. This has meant that it is more likely that the surviving spouse is aged and the children are middle-aged adults. In England in 1989,<sup>293</sup> and Australia in 1993,<sup>294</sup> law reformers confirmed that intestacy distribution was linked not only to intergenerational relationships, but the needs of the aged. If the attitudes of the recent reports in England and Australia serve as guides to future attitudes and

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291 Ibid [3.2].

292 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, above n 3, [13.50].

293 The Law Commission (UK), *Family Law Distribution on Intestacy*, above n 104, [23].

294 Queensland Law Reform Commission, *Intestacy Rules*, above n 253, [1.4], [1.6].



developments, then spouse-focused intestate succession will remain. Indeed, it could be argued that the era of ‘aged spouse’ intestacy has already arrived.

Spouse-focused intestate succession has been achieved, enhanced or proposed in a variety of ways. First, the definition of ‘spouse’ for intestacy purposes has been broadened, so that there will be more persons seeking entitlement to the spousal share. Second, in all the schemes either presently in operation or recommended, the spousal entitlements have been ‘frontloaded’ so that the spouse takes priority over any other potential beneficiaries. Third, in those schemes operating in NSW and Tasmania, the ‘frontloaded’ entitlement comprises the intestate’s entire assets subject to only one exception. Fourth, in schemes (such as that recommended by the English Law Commission), the ‘frontloaded’ entitlement comprises a selection of broadly defined and highly-valued asset categories, so that in many cases other potential beneficiaries will not inherit in practical terms. Fifth, in some schemes, the surviving spouse has an automatic entitlement to certain assets such as the intestate’s personal chattels or the matrimonial home. Sixth, to the extent that joint tenancies and the principle of survivorship favourably affect the final distribution to the spouse, the potential existence of joint tenancies has been ignored when creating schemes of intestate succession. Finally, law reformers have favoured schemes in which the surviving spouse is unburdened, as much as possible, by complexity both in the quantification and regulation of use of the spousal entitlement. Therefore, for example, the English Law Commission has favoured the spouse acquiring her entitlement untrammelled by any life interest in favour of the intestate’s children and has eschewed any special and prioritised treatment of children from the intestate’s previous relationships.

Despite the arguments in favour of spouse-focused intestate succession, a lingering problem is whether the pendulum may have swung too far in favour of the spouse to the detriment of the intestate’s children and other issue. The history of intestate succession establishes that although the ‘imperative heir’ may be found, adjustments may need to be made to respond to the needs of other relatives because it cannot be assumed that the heir will care for the needs of family members. In all jurisdictions considered, the definition of child or issue for the purpose of intestacy has been broadened, and such a redefinition implies that being a child or a person in a child-like relationship with the intestate is important. Moreover, to varying degrees, children may be able to inherit from their intestate parent. Yet, the question is whether such an entitlement is merely symbolic and whether symbolism in intestate succession is sufficient. In practical terms, the prospect and reality of entitlement has been reduced for children and could be further reduced.

There are several reasons for this. One is the strong view that the spouse is more deserving than the children. To a degree, the empirical resources, whether surveys or wills, can be read as supporting this view. Another reason is the contention that children will not be as needy as the surviving spouse: the deceased is likely to have discharged his parental obligations and the archetypal child will be an independent adult (probably middle-aged). It is also assumed that the surviving spouse will act favourably towards the children and after death

leave assets to the intestate's children (except possibly children who are offspring from previous relationships). Therefore, the children are not likely to be disinherited because the surviving spouse will ultimately be a conduit of family assets. To the extent that children are considered liable to disinheritance, NSW and Tasmania have specifically provided for children from previous relationships. In any event, where there are unusual circumstances, a child may be able to make an application under the relevant family provision legislation for a specifically tailored entitlement.<sup>295</sup>

Nevertheless, the assumptions made about children and community attitudes about children need to be weighed carefully.

Although the *Research Report* makes a strong case for an 'all to spouse' scheme subject to an entitlement for children from previous relationships, the results of the NatCen survey suggested that close family relationships are still considered to be important and that there was a general view that all children ought to inherit 'something'. If the NatCen survey does represent the prevailing view about the centrality of the nuclear family and the importance of blood ties, then there is a danger that the recommendations of the English Law Commission and the NSW Law Reform Commission do not completely meet community expectations because in real terms children may not even inherit a small portion of their parent's estate.

Children of intestates may not be the archetypal middle-aged independent adult. There will be a group of intestates who will be young, albeit a smaller group than in the past. The children of such intestates are likely to be young and dependent minors and the rules do nothing to maintain such children directly or 'frontload' a portion of the estate in favour of these children. It is simply assumed that they will be cared for by the surviving spouse.

It cannot be assumed that the surviving spouse will ultimately be a conduit to the surviving children or issue for two reasons. One is that the spouse may utilise the inherited assets for her requirements so that there may be little or no assets retained at the spouse's death. The other reason is that the spouse may not leave the assets to the children by will or the intestacy rules may not operate in favour of them (perhaps because there are negligible assets, or the spouse has remarried or entered into a qualifying *de facto* relationship).

While children may make an application under the family provision legislation, there are important constraints. An application under the legislation could be time consuming and costly. It could create or exacerbate family

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295 See Sherrin and Bonehill, above n 14, [18-024]–[18-030]; Dal Pont and Mackie, above n 31, ch 16.

divisions. Further, it will be by no means clear that adult children will be successful in Australia or England.<sup>296</sup>

If children were to be permitted greater opportunity to inherit from the intestate, it is arguable that a spouse-focused intestacy framework could be retained. The following are several possible methods, although it is acknowledged that they could be considered controversial and create further complexity. First, the complex pattern of distribution (such as that operating in England and some states in Australia) could be modified so that the definition of personal (or household) chattels was tightened and the value of the statutory legacy lowered. However, despite lowering the spousal entitlement, it would not be clear that in every case all children would inherit something from their parent; and if the value of the statutory legacy was too low, it may provide inadequate resources to the surviving spouse.

Second, the spouse could inherit a portion of assets outright (such as the intestate's personal assets and a statutory legacy), but only acquire a life interest over remaining assets which would eventually devolve to the intestate's children. The difficulty would be that the (aged) surviving spouse would not be able to use all assets freely, even though the need for care and maintenance demanded that this be the case.

Third, the spouse could inherit the entire estate subject to small legacies (a small percentage of the estate in favour of each child) which would be 'frontloaded' in immediate favour of the intestate's children.

Fourth, the spouse could inherit the entire estate subject only to the interests of certain classes of children significantly vulnerable to the actions of the surviving spouse. Minors could be entitled to a greater share of the estate than children from previous relationships. However, the entitlements of both groups would be a percentage of the entire value of the estate which could be 'frontloaded' so that they would have a practical opportunity to inherit from their deceased parent's estate. The problem with any form of 'frontloading' would be that the spouse could have to sell the family home in order to pay out the children's entitlement, so that the family home would have to be quarantined from this process.

Fifth, all assets co-owned by the intestate with the spouse or with a child would be taken into account in the final distribution of assets, although the family home would probably have to be excluded from the process.

Finally, there could be two or more intestacy distribution regimes operable, depending upon the age of the children. For example, when the children (but not subsequent issue) were minors, then their entitlement would be 'frontloaded' and

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296 In relation to England, see *Re Coventry (deceased)* [1980] 1 Ch 461; *Re Dennis (deceased)* [1981] 2 All ER 140; *Robinson v Fernsby* [2003] All ER (D) 414; *Re Garland (deceased)* [2007] EWHC 2 (Ch); Law Commission (UK), *Intestacy and Family Provision Claims on Death*, above n 6, [6.2]–[6.12]. In relation to Australia, see *Vigolo v Bostin* (2005) 221 CLR 191. However, it appears that in Australia adult children may be successful if it can be shown that they were not the principal or sole cause of an estrangement between their parents: see *Palmer v Dolman* [2005] NSWCA 361; *Keep v Bourke* [2012] NSWCA 64; cf *Ford v Simes* [2009] NSWCA 351.

a portion of the estate would be held on trust for their care and education. However if the children were adults, then the surviving spouse would be entitled to the bulk of the estate, subject perhaps to the special situation facing children from previous relationships.

However, while the further rebalancing of intestate distribution in favour of children may be defensible and achievable, it is unlikely that the law reform bodies or legislatures will be committed to doing so. The spouse-focused intestacy framework is too entrenched and the overall demographic context in which intestate succession operates has to be kept in mind. It is anticipated that in the short to medium term, the interests and wellbeing of the surviving aged spouse will outweigh (but not necessarily completely eliminate) the prospects for children to inherit from their intestate parent.