

**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 34 – Part I

Distribution On Intestacy

REPORT

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. B. W. Rowland, *Chairman*

Professor E. J. Edwards

Mr. E. G. Freeman

The Executive Officer of the Commission is Mr. C. W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Tel: 25 9198 and 25 7835).

TO THE HON. T. D. EVANS, M.L.A.
ATTORNEY GENERAL

TERMS OF REFERENCE

1. The Law Reform Committee was asked to consider and report on the law relating to the distribution of estates of persons dying intestate. The Commission, having taken over the functions of the Committee, issues this report.

PRESENT LAW IN WESTERN AUSTRALIA

2. The rules of distribution on intestacy in Western Australia are those contained in the English Statute of Distributions 1670, modified by the *Administration Act 1903-71* of this State, s.13(1) of which provides that, subject to payment of duties and debts and to sections dealing with the entitlement of the surviving spouse, parents, brothers and sisters and their children -

"...the administrator on intestacy, or, in case of partial intestacy, the executor or administrator with the will annexed shall hold the real and personal estate ...as to which any person dies intestate in trust for the persons who would be entitled thereto under the Statute of Distributions, and as to the real estate in trust for and as if the same had been devised to such persons as tenants in common".

3. A brief statement of the law in tabulated form appears in the first column of Appendix I to this report. The rules can be summarised under the following headings -

(a) Spouse and issue:

Spouse receives first \$10,000 plus 5% interest per annum thereon from date of death to distribution plus one third residue. Balance to issue per stirpes.

(b) Issue but no spouse:

Issue take whole estate per stirpes.

(c) Spouse but no issue:

- (i) Spouse and one or more of parent, brother, sister or issue of brother or sister:

Spouse receives first \$15,000 plus 5% interest per annum from date of death to distribution plus half residue. From the other half of the residue the parent receives \$2,000 plus half what is then left. If both parents survive, they share this entitlement equally. Balance to brothers and sisters, and children of deceased brothers and sisters, who take per stirpes. If there are no brothers or sisters or their children, the balance goes to the parent or parents. If no parent survives, what is left after the spouse receives his or her share goes to the brothers and sisters and children of deceased brothers and sisters per stirpes.

- (ii) Spouse but no parent, brother, sister or issue of brother or sister:

Spouse takes whole estate.

(d) No spouse or issue:

Parent receives first \$2,000 plus half residue. If both parents survive, they share this entitlement equally. The balance goes to brothers and sisters and children of deceased brothers and sisters, who take per stirpes. If no brothers or sisters or their children survive, the balance goes to the parent or parents. If no parent survives, the estate is shared by brothers and sisters and children of deceased brothers and sisters per stirpes.

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representation. However the rules as to the right of collateral relatives to take by representation are complicated and obscure. Representation in these cases does not extend beyond children of brothers and sisters (Statute of Distributions 1670, s.7) and at least one brother or sister must survive the intestate for children of deceased brothers and sisters to take by representation (*Lloyd v. Tench* (1750) 2 Ves. Sen. 213; 28 E.R. 138). This latter rule appears not to apply in the situations covered by s.15 of the *Administration Act* (see paragraph 3(c) (i) and (d) above, where a parent survives).

5. In the absence of next of kin the estate passes to the Crown. Under s.4 of the *Escheat (Procedure) Act 1940*, the Crown can apply to the court for a declaration that the property has escheated to the Crown. Section 9 of that Act empowers the Governor to transfer any part of the escheated estate to any person having a moral claim to it.

6. The rules of distribution are modified to a slight degree by s.55(2) of the Commonwealth *Matrimonial Causes Act 1959-1966*, which provides that "where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage".

THE LAW IN OTHER JURISDICTIONS

7. Summaries of the law in other Australian jurisdictions and in England and New Zealand are set out in tabulated form in Appendix I to this paper.

WORKING PAPER

8. The Committee issued a working paper on 22 December 1972, copies of which were sent to -

the Chief Justice and Judges of the Supreme Court

the Judges of the District Court

the Solicitor General

the Under Secretary for Law

the Public Trustee

the Master of the Supreme Court

the Law Society of Western Australia

Cmd. 8310, paragraph 12) stressed that this is a field in which brevity and simplicity are particularly desirable, and the Commission is of the same view.

12. The broad aim of the legislation should be to achieve a just distribution of the estate of an intestate in the light of prevailing social attitudes.

13. One factor which has influenced the Commission in reaching its conclusions is that the great majority of intestate estates are small. Appendix 2 sets out the values of a sample (257) of estates filed during 1971-1972. Of these, 72% were worth \$4,000 or less.

14. In the Commission's view it would be undesirable to distribute such estates widely. It would seem preferable to provide for the intestate's estate to be confined to the few considered best entitled. These would usually be the intestate's spouse, children and their issue, and parents.

15. The Commission's views as to the proper entitlement of these relatives are set out in paragraphs 16 to 30. It does not seem possible to frame rules of distribution which will do justice in all circumstances, but any hardship caused to a surviving spouse, child, grandchild or parent in a particular case can be alleviated by the court under the *Inheritance (Family and Dependents Provision) Act 1972*. The Commission's views in respect of the other relatives are set out in paragraphs 31 to 35.

PERSONS ENTITLED

Spouse and issue

16. Where a spouse and issue of the intestate survive, the following would seem to be the practical alternatives -

- (a) the spouse should be given the whole estate (in none of the jurisdictions studied does such a provision apply);
- (b) the spouse should be given a statutory legacy (that is, a specified lump sum) and either a proportion of the residue (as in Victoria, Tasmania, the Australian

Capital Territory, New Zealand and this State) or a life interest in a proportion of the residue (as in England);

- (c) the spouse should be given a proportion of the estate only (as in New South Wales, Queensland and South Australia).

Any residue after the spouse had been given his or her share under alternatives (b) or (c) should be given to the issue of the intestate per stirpes.

17. In the working paper the Committee suggested the retention of the statutory legacy principle, as in paragraph 16(b) above, to ensure that the spouse would get an adequate sum from a small estate.

18. In England the *Family Provision (Intestate Succession) Order 1972* increased the spouse's statutory legacy from £8,750 (A\$15,378) to £15,000 (A\$26,362). The object of the increase was to ensure that the wife's share of the estate was sufficient for her to retain the matrimonial home (see *Parl. Deb. (Lords) Vol. 275, 1966, p.201*).

19. The Commission adheres to the proposal in the working paper that the same policy should be followed here and that the present statutory legacy should be increased from \$10,000 to \$25,000. This is in fact the limit of the amount which is free of State probate duty where the assets pass to a spouse.

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has suggested a change. The Commission therefore recommends the continuation of the present law.

Spouse but no issue

27. In this situation, the following (as Appendix I illustrates) are the alternatives -

- (a) the spouse should receive the whole estate, whether or not there are other relatives (as in Victoria and Tasmania);
- (b) the spouse should receive the whole estate only if there are no other specified relatives (as in most jurisdictions including Western Australia);
- (c) the spouse should receive a proportion of the estate only (as in South Australia).

28. The class of relatives with whom a spouse must share the estate differs from jurisdiction to jurisdiction. The widest class is that provided for in South Australia, where a spouse must share the estate with next of kin of any degree.

29. The Commission is of the view that, in the absence of issue of the deceased, the whole estate should go to the spouse, as in Victoria and Tasmania.

Parents but no spouse or issue

30. If the parents or one of them survive, the alternatives would be -

- (a) the whole estate should be given to them equally or to the one who survives (this is the law in all jurisdictions included in Appendix I, other than Western Australia);
- (b) the parents or the survivor of them should have to share the estate with other relatives either with (as is the case in Western Australia) or without a statutory legacy.

The Commission favours the proposals set out in (a) above under which the parent or parents take the whole estate.

Other relatives

31. If no spouse, issue or parents survive, two approaches are possible -

- (a) To limit the relatives entitled to participate in the distribution to defined classes, and if no relative within those classes survives, to give the estate to the Crown. This is the position in New South Wales, Queensland, the Australian Capital Territory, New Zealand and England.
- (b) To retain the traditional approach under which next of kin continue without limit, the estate going to the Crown only if there are no next of kin.

32. In the working paper the Committee expressed the provisional view that it would not be unreasonable to exclude relatives more remote than grandparents and their descendants and in the summary of its views indicated that entitlement should be confined, in order, to brothers and sisters and issue of deceased brothers and sisters, next to grandparents and finally to uncles and aunts and issue of deceased uncles and aunts.

33. The Perpetual Executors, Trustees & Agency Co. (W.A.) Ltd. would prefer that distribution should not extend beyond the children (that is first generation issue) of deceased brothers or sisters and uncles or aunts. It considered that there may be difficulty in tracing further issue and that in any case nearer relatives should be preferred.

34. Although the Council of the Law Society agreed with the order of priority set out in paragraph 32 above it did not agree that entitlement should be confined to those persons. The Council is of the view that, in the absence of any of the relatives referred to in that paragraph, the entitlement should be to the "next of kin in accordance with the Statute of Distributions" and that the estate should pass to the Crown only if no next of kin can be found.

35. After considering the question in the light of the comments the Commission supports

38. The rule is also arbitrary. It does not apply on the intestacy of a mother, and applies only in respect of gifts to the children of the intestate, and not gifts to other persons who might equally have been advanced by the deceased.

39. The provision as to hotchpot has been abolished in Queensland and New Zealand and the Commission recommends that it be abolished here. The Public Trustee and the Perpetual Executors, Trustees & Agency Co. (W.A.) Ltd. agree.

Partial intestacies

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40. In Queensland, Tasmania, the Australian Capital Territory, New Zealand and England, in the case of a partial intestacy, the statutory legacy of the surviving spouse from the intestate part of the estate is reduced by the value of the beneficial interest acquired by the spouse undsioutFand Engl0 rg 5e case alian Capital Territory, Newintestateacquired by the sadren ohe benef0

SUMMARY OF RECOMMENDATIONS

43.

If no relative specified above survives, the estate passes to the Crown (paragraph 32).

- (b) That the legislation also provide for the abolition of hotchpot (paragraphs 36-39).

B.W. Rowland
Chairman

E.J. Edwards
Member

E.G. Freeman
Member

14 May 1973.

APPENDIX I

Western Australia

Administration Act

	Western Australia (cont.)	New South Wales (cont.)	Victoria (cont.)
(e) Brothers and sisters and their children but no spouse, issue or parent.	Brothers and sisters and their children take whole estate per stirpes. If no brother or sister, then to next of kin.	Brothers and sisters of whole blood and their issue take whole estate per stirpes. If none, brothers and sisters of half blood and their issue take whole estate per stirpes.	Brothers and sisters and their children take whole estate per stirpes. If no brother or sister, then to next of kin.
(f) Others	To next of kin (Statute of Distributions)	If no issue, parent, brother, sister or issue of brother or sister, estate goes to – <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts of whole blood; if none 3. uncles and aunts of half blood; if none 4. spouse. 	To next of kin.
2. Other Matters:			
(a) Escheat and bona vacantia to the Crown	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown (and see <i>Escheat (Procedure) Act 1940</i>).	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.	Escheat abolished. In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.
(b) Limitation of blood	Relatives of the half blood may take.	Relatives of the half blood may take to the extent mentioned in 1(c) (i), 1 (e) and 1 (f) above.	Relatives of the half blood may take.
(c) Hotchpot	Advances by father to child must be brought into hotchpot (Statute of Distributions). Applies to total and partial intestacy (<i>In re Cornwall</i> [1910] 13 WALR 40).	Advances by either parent to child must be brought into hotchpot. Applies to total intestacy only.	Advances by either parent to child must be brought into hotchpot. Applies to total and partial intestacy.
(d) Partial intestacy	No separate provision. Above rules apply to total and partial intestacy.	See paragraph 1 (c) (i) above.	No separate provision (but see s.53).
(e) Miscellaneous	No representation of collaterals after children of brothers and sisters (Statute of Distributions). Brothers and sisters preferred to grandparents.	Representation continues to the remotest degree amongst issue of brothers and sisters both whole and half blood (see 1 (c) above).	No representation of collaterals after children of brothers and sisters. Brothers and sisters preferred to grandparents.

	Queensland <i>Succession Acts Amendment Act 1968</i>	South Australia <i>Administration and Probate Act 1919– 1972</i>	Tasmania <i>Administration and Probate Act 1935-1967</i>
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1. Deceased

Survived By:

(a)

	Queensland (Cont.)	South Australia (Cont.)	Tasmania (Cont.)
(f) Others	If no spouse, issue, parent, brother, sister or child of brother or sister, estate goes to – <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts and their children per stirpes. 	To next of kin (Statute of Distributions).	If no spouse, issue, parent, brother, sister or issue of brother or sister, estate goes to – <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts and their issue who attain 21 years or marry per stirpes; if none 3. next of kin.
2. Other Matters:			
(a) Escheat and bona vacantia to the Crown	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.
(b) Limitation of blood	Relatives of the half blood may take.	Relatives of the half blood may take.	Relatives of the half blood may take.
(c) Hotchpot	No provision.	Advances by father to child must be brought into hotchpot (Statute of Distributions).	Advances by either parent to child must be brought into hotchpot. Applies to total and partial intestacy. May apply to “issue” on partial intestacy.
(d) Partial intestacy	Spouse’s interest under will is deducted from statutory legacy (see 1 (c) (i) above).	No separate provision. Above rules apply to total and partial intestacy.	Spouse’s interest under will is deducted from statutory legacy (see 1 (a) above).
(e) Miscellaneous	No representation of collaterals after children of brothers and sisters and children of uncles and aunts. It is not necessary for one brother or sister, or one uncle or aunt to survive to bring representation into effect (see (1968) 7 <i>Uni. Qld. L.J.</i> 80).	(i) No representation of collaterals after children of brothers and sisters (Statute of Distributions). Brothers and sisters preferred to grandparents. (ii) Where a mother but not a father survives, and there is no spouse or issue, the mother shares with brothers and sisters under 1 James II c.17.	(i) Representation continues to the remotest degree amongst issue of brothers and sisters and issue of uncles and aunts. (ii) In 1 (b) above, in addition to the power of advancement, personal representative may permit minor contingently interested to use personal chattels.

	Australian Capital Territory <i>Administration and Probate Ordinance 1929-1970</i>	England <i>Administration of Estates Act 1925 (as amended by the Intestates' Estates Act 1925 and the Family Provision Act 1966)</i>	New Zealand <i>Administration Act 1969-1970</i>
1. Deceased Survived By: (a) Spouse and issue	Spouse gets personal chattels + first \$10,000 (last increased in 1967) + 1/3rd residue if 2 or more children or predeceased children leaving issue. If only one child or one predeceased child leaving issue, spouse gets ½ residue. Balance to issue who attain 21 years or marry per stirpes.	Spouse gets personal chattels + first £15,000 or such larger sum as is fixed by Lord Chancellor (last increased in 1972) free of duty + 4% p.a. thereon from date of death to distribution + a life interest in ½ residue which spouse can elect to redeem. Remainder to issue who attain 18 years or marry per stirpes.	Spouse gets personal chattels + first \$12,000 + 5% p.a. (or other prescribed rate) thereon from date of death to distribution + 1/3rd residue. Balance to issue who attain full age or marry per stirpes.
(b) Issue but no spouse	Issue who attain 21 years or marry get whole estate per stirpes.	Issue who attain 18 years or marry get whole estate per stirpes.	Issue who attain full age or marry get whole estate per stirpes.
(c) Spouse but no issue	Spouse gets personal chattels + first \$50,000 + 1/2 residue. Balance to parent(s). If no parent, balance to brothers and sisters and their issue who attain 21 years or marry per stirpes.	Spouse gets personal chattels + first £40,000 or such larger sum fixed by Lord Chancellor free of duty + 4% p.a. thereon from date of death to distribution + ½ residue. Balance to parent(s). If no parent, balance to brothers and sisters of whole blood and their issue who attain 18 years or marry per stirpes. If no brother or sister of whole blood or issue thereof, whole estate to spouse.	
(i) One or more of parent, brother, sister or issue of brother or sister			
(ii) No parent, brother, sister or issue of brother or sister	Whole to spouse.	Whole to spouse (if no issue, parent, brother, sister, issue of brother or sister, grandparent, uncle or aunt).	

	Australian Capital Territory (cont.)	England (cont.)	New Zealand (cont.)
(d) Parent but no spouse or issue	Parent(s) get whole estate.	Parent(s) get whole estate.	Parent(s) get whole estate.
(e) Brothers and sisters and their children but no spouse, issue or parent	Brothers and sisters and their issue who attain 21 years or marry take whole estate per stirpes.	Brothers and sisters of whole blood and their issue who attain 18 years or marry take whole estate per stirpes. If none, then estate to brothers and sisters of half blood and their issue per stirpes.	Brothers and sisters and their issue who attain full age or marry may take whole estate per stirpes.
(f) Others	<p>If no spouse, issue, parent, brother, sister or issue of brother or sister, estate goes to –</p> <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts and their issue who attain 21 years or marry per stirpes. 	<p>If no spouse, issue, parent, brother, sister or issue of brother or sister, estate goes to –</p> <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts of whole blood and issue who attain 18 years or marry per stirpes; if none 3. uncles and aunts of half blood and issue who attain 18 years or marry per stirpes. 	<p>If no spouse, issue, parent, brother, sister or issue of brother or sister, estate goes to –</p> <ol style="list-style-type: none"> 1. grandparents; if none 2. uncles and aunts and their issue who attain full age or marry per stirpes.
2. Other Matters:			
(a) Escheat and bona vacantia to the Crown	In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.	Escheat abolished. In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.	Escheat abolished. In the absence of relatives mentioned in 1 (a) to (f) inclusive above, estate passes to Crown bona vacantia.
(b) Limitation of blood	Relatives of the half blood may take.	Relatives of the half blood may take to the extent mentioned in 1(c), 1 (e) and 1 (f) above.	Relatives of the half blood may take.

	Australian Capital Territory (cont.)	England (cont.)	New Zealand (cont.)
(c) Hotchpot	Advances by either parent to child within 5 years of death must be brought into hotchpot unless contrary intention expressed or appears from circumstances or unless total of advances does not exceed \$1,000. Applies to total and partial intestacy.	Advances by either parent to child must be brought into hotchpot on total intestacy. Advances by either parent to "issue" on partial intestacy must be brought into hotchpot.	No provision.

(d) Partial intestacy

Spouse's interest under will is deducted from statutory legacy (see 1 (a) and 1 (c) (i) above). A child of an intestate must bring his interest under the will into account in calculating his interest on intestacy.

Spouse's interest under will is deducted from statutory legacy (see 1 (a) and 1 (c) (i) above). Where spouse gets life interest by will, on partial intestacy he or she is entitled to immediate payment of statutory legacy (*Re Bowen* [1971] 3 All E.R. 636).

Spouse's interest under will (excluding personal chattels) is deducted from statutory legacy (see 1 (a) and 1 (c) (i) above).

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APPENDIX II**Value of Intestate Estates**

Value	Number	Percentage of Total
Insolvent	3	1.2
Negligible in value	33	12.8
Under \$2,000	113	44.0
2,001 – 4,000	36	14.0
4,001 – 6,000	9	3.5
6,001 – 8,000	9	3.5
8,001 – 10,000	10	3.9
10,001 – 12,000	12	4.7
12,001 – 14,000	3	1.2
14,001 – 16,000	9	3.5
16,001 – 18,000	1	0.4
18,001, - 20,000	-	-
20,001 – 25,000	3	1.2
25,001 – 30,000	3	1.2
30,001 – 40,000	2	0.8
40,001 – 60,000	4	1.4
60,001 – 80,000	2	0.8
80,001 – 100,000	3	1.2
100,001 – 200,000	2	0.8
200,001 – 300,000	-	-
Over \$300,000	-	-
TOTAL	257	