



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 34 Part I**

**Distribution on Intestacy**

**WORKING PAPER**

**DECEMBER 1972**

## INTRODUCTION

The Law Reform Committee has been asked to consider and report on the law relating to the distribution of estates of persons dying intestate.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by 1 April 1973.

Copies of the paper are being forwarded 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

the TD he

## **TERMS OF REFERENCE**

1. To consider and report on the law relating to the distribution of estates of persons dying intestate.

## **PRESENT LAW IN WESTERN AUSTRALIA**

2. Section 13(1) of the

(c) **Spouse but no issue:**

(i)

F1 12 Ti. Tj -4 Tc TD 0

14. The most deserving relatives would usually be the spouse, the intestate's children and their issue and the intestate's parents. Paragraphs 15 to 26 set out the tentative views of the

19. In England, the Lord Chancellor is empowered under s.1 of the *Family Provision Act 1966* to increase the statutory legacy by Order (see paragraph 17 above), so that it can be adjusted to take account of any fall in the value of money (*Parl. Deb.*





- (a) to share the whole estate equally and if only one survives for that one to take the whole estate (as in all other jurisdictions mentioned in Appendix I);
- (b) to share the estate with other relatives either with (as is the case in Western Australia) or without a statutory legacy.

The Committee favours the former alternative under which the parent or parents take the whole estate.

**Other relatives**

27. If no spouse, issue or p

(a)

### **Other matters: hotchpot and partial intestacies**

30. Under s.5 of the *Statute of Distributions* a child of a male intestate who had received property by settlement from the intestate, or who had been advanced by portion by him, must bring the value of the property so received into account as hotchpot in determining his share on the intestacy.

31. This provision has given rise to much litigation, the difficulties being to determine –

- (a) what gifts must be brought into hotchpot;
- (b) at what date the gifts must be valued;
- (c) whether the provision applies to partial intestacies (the traditional view was that it did not, but on the authority of *In re Cornwall* (1910) 13 W.A.L.R. 40, it would appear to apply in this State).

32. The provision as to hotchpot has been abolished in Queensland and New Zealand and the Committee would favour a similar abolition here. The Committee says this notwithstanding that there is a similar rule of construction in regard to wills under which the making of a substantial gift to a child after the date of the making of a will is treated, in the absence of a contrary intention, as an advance of a legacy given by the will.

33. If a simple abolition is unacceptable, the Committee thinks the provision should be made to apply also on the intestacy of a mother and, possibly, to apply only to gifts made within a certain period before death and to gifts totalling a certain amount (as in the Australian Capital Territory - see the *Administration and Probate Ordinance 1929-1970*, s.49B). In any event the Committee thinks it should not apply to partial intestacies unless a corresponding provision is made requiring gifts to children under a will also to be brought into account (see paragraph 35 below).

34. In Queensland, Tasmania, the Australian Capital Territory, New Zealand and England, the value of the beneficial interest acquired by a surviving spouse under a will is deducted

from the statutory legacy in determining his or her share on intestacy. This would seem to

8. If none of the above survives, the estate passes to the Crown.

## APPENDIX 1

	<b>Western Australia</b> <i>Administration Act 1903-1971</i>	<b>New South Wales</b> <i>Wills, Probate and Administration Act 1898-1965</i>	<b>Victoria</b> <i>Administration and Probate Act 1958-1969</i>
<b>1. DECEASED SURVIVED BY:</b> <b>(a) Spouse and Issue</b>	Spouse gets first \$10,000 (last increased in 1965) + 5% p.a. thereon from the date of death to distribution + 1/3rd residue. Balance to issue per stirpes.	Spouse gets 1/3rd estate if 2 or more children but 1/2 estate if only one child. Balance to issue per stirpes.	Spouse gets personal chattels + first \$10,000 (last increased in 1967) + 4% p.a. thereon from date of death to distribution + 1/3rd residue. Balance to issue per stirpes.
<b>(b) Issue but no spouse</b>	Issue get whole estate per stirpes.	Issue get whole estate per stirpes.	Issue get whole estate per stirpes.
<b>(c) Spouse but no issue</b> (i) One or more of parent, brother, sister or issue of brother or sister	Spouse gets first \$15,000 + 5% p.a. thereon from date of death to distribution + 1/2 residue. Balance to parent(s) if no brothers or sisters or child thereof. Otherwise parent(s) get first \$2,000 + 1/2 residue, remainder to brothers and sisters and their children per stirpes. If no brother or sister, balance to next of kin.		
(ii) No parent, brother, sister or issue of brother or sister	Whole to spouse.	s) get first \$2,000	

<b>(f) Others</b>	To next of kin (Statute of Distributions).	If no issue, parent, brother, sister or issue of brother or sister, estate goes to – 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.
<b>2. OTHER MATTERS: (a) Escheat and bona vacantia to the Crown</b>	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>(b) Limitation of blood</b>	Relatives of the half blood may take.	Relatives of the half blood may take to the extent in 1(c) (i), 1(e) and 1(f) above.	Relatives of the half blood may take.
<b>(c) Hotchpot</b>	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 W.A.L.R. 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.
<b>(d) Partial intestacy</b>	No separate provision. Above rules apply to total and partial intestacy.	See paragraph 1(c)(i) above.	No separate provision (but see s.53).
<b>(e) Miscellaneous</b>	No representation of collaterals after children of brothers or 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.

	<b>Queensland</b> <i>Succession Acts Amendment Act 1968</i>	<b>South Australia</b> <i>Administration and Probate Act 1919-1972</i>	<b>Tasmania</b> <i>Administration and Probate Act 1935-1967</i>
<b>1. DECEASED SURVIVED BY:</b> <b>(a) Spouse and Issue</b>	Spouse gets 1/3rd estate if 2 or more children but ½ estate if only one child. Balance to issue per stirpes.	Spouse gets 1/3rd estate. Balance to issue per stirpes.	Spouse gets first \$17,000 (last increased in 1967) + 4% p.a. thereon from date of death to distribution + 1/3rd residue. Balance to issue who attain 21 years or marry per stirpes.
<b>(b) Issue but no spouse</b>	Issue get whole estate per stirpes.	Issue get whole estate per stirpes.	Issue who attain 21 years or marry get whole estate per stirpes.
<b>(c) Spouse but no issue</b> (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	Spouse gets first \$20,000 + ½ residue. Balance to parent(s). If no parent, balance to brothers and sisters and their children per stirpes.  Whole to spouse (if no issue, parent, brother, sister, or <i>child</i> (cf. W.A.) or brother or sister.	Spouse gets first \$10,000 (last increased in 1956) + 8% p.a. thereon from the date of death to distribution + ½ residue. Balance to the next of kin.	Spouse gets whole estate irrespective of whether there is any parent, brother, sister, or issue of brot+ 04hers e. Tj 76.525

w h e 6 | 0 T w

<b>(c) Hotchpot</b>	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.
<b>(d) Partial intestacy</b>	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).
<b>(e) Miscellaneous</b>	No representation of collaterals after children of brothers or sisters and children of uncles or 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 Uni. Qld.		



**Australian Capital  
Territory**  
*Administration and  
Probate Ordinance 1929-*

<b>(f) Others</b>	If no issue, parent, brother, sister or issue of brother or sister, estate goes to – 1. grandparents; if none 2. uncles and aunts and their issue who attain 21 years or marry per stirpes.	If no issue, parent, brother, sister or issue of brother or sister, estate goes to – 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.	If no issue, parent, brother, sister or issue of brother or sister, estate goes to – 1. grandparents; if none 2. uncles and aunts and their issue who attain full age or marry per stirpes.
<b>2. OTHER MATTERS:</b> <b>(a) Escheat and bona vacantia to the Crown</b>	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>(b) Limitation of blood</b>	Relatives of the half blood may take.	Relatives of the half blood may take to the extent in 1(c), 1(e) and 1(f) above.	Relatives of the half blood may take.
<b>(c) Hotchpot</b>	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.
<b>(d) Partial intestacy</b>	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 ( <i>Re Bowen</i> [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).

<p><b>(e) Miscellaneous</b></p>	<p>(i) Representation continues to the remotest degree amongst issue of brothers and sisters and issue of uncles and aunts.  (ii) Spouse may elect to acquire the matrimonial home at valuation in satisfaction or part satisfaction of his or her interest (see 1(a) and 1(c) (i) above).</p>	<p>(i) Representation continues to the remotest degree amongst issue of brothers and sisters and issue of uncles and aunts both whole and half blood.  (ii) Spouse may elect to acquire the matrimonial home at valuation in satisfaction or part satisfaction of his or her interest (see 1(a) and 1(c) (i) above).  (iii) In 1(b) above, in addition to the power of advancement, personal representative may permit minor contingently interested to use personal chattels.</p>	<p>(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.</p>
---------------------------------	--	--	--

**APPENDIX 2****Value of Intestate Estates**

<b>Value</b>	<b>Number</b>	<b>Percentage of total</b>
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	-	-
	<hr/>	
<b>TOTAL:</b>	<b>257</b>	