4. Spouse or partner – special provisions

- Personal effects of the intestate
- The statutory legacy
- Statutory legacy and conflict of laws
- Apportioning the residue between surviving partner and issue

4.1 The provisions in this chapter will apply in the limited circumstance where the intestate is survived by a spouse or partner and issue who are issue of another relationship. In such cases, the estate will be shared between the surviving spouse or partner and all of the surviving issue of the intestate.

PERSONAL EFFECTS OF THE INTESTATE

4.2 In all jurisdictions, except Tasmania, the surviving spouse is entitled to the household (or personal) effects (often referred to as "chattels").[1] It is generally stated that these effects include articles of household or personal use or adornment (or ornament).[2]

4.3 The spouse's right to the personal, or household, effects has been recognised as minimising the disruption caused by the death of the intestate, and producing "some continuity of lifestyle for the spouse and any surviving children".[3] This was also said to be the reason that formerly motivated testators in the practice of willing their personal effects to the surviving spouse. The provisions on intestacy were originally included to follow what was considered to be the practice of the majority of testators.[4]

4.4 Another reason for giving the surviving spouse or partner a right to personal, or household, effects is that it spares the surviving spouse or partner from a potentially unseemly struggle with other beneficiaries over the ownership of particular items, for example, kitchenware, lawnmowers, and so on. In these cases, it may be

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1. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Administration and Probate Act 1969* (NT) s 67(1), (2); *Administration and Probate Act 1919* (SA) s 72H(1); *Administration and Probate Act 1929* (ACT) s 49A; *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1958* (Vic) s 51(2)(a); and *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(a). See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2; and *Administration Act 1969* (NZ) s 77 It 1, 3.
2. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; *Administration Act 1903* (WA) s 14(2)(a); and *Administration and Probate Act 1919* (SA) s 72B(1). See also *Administration of Estates Act 1925* (Eng) s 55(1)(x); and *Administration Act 1969* (NZ) s 2(1).
3. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 362.
4. See NZ, *Parliamentary Debates (Hansard)* House of Representatives, 23 November 1944 at 288.

difficult or impossible for the surviving spouse or partner to prove ownership, and undesirable to require her or him to do so.

Definition of effects

4.5 The question of what items fall within the definitions of effects or chattels takes on an importance when part of the intestate estate must be shared with the children of the intestate. It is also relevant, to a lesser extent, in cases of partial intestacy where the will has made specific bequests of categories of items, such as jewellery.[5]

Inclusive lists

4.6 Of the five Australian jurisdictions which give detailed definitions of effects,[6] there are a number of common inclusions. Linen, china, glassware, liquors, consumable stores and domestic animals are all included.[7] Most also include furniture,[8] wines,[9] motor cars[10] and motor car accessories[11] (not used for business at the time of the intestate's death), as well as plate (and/or plated articles), books,

5. See P Fudakowska, "Who gets the iPod?" (2006) 156 *New Law Journal* 487.
6. *Succession Act 1981* (Qld) s 34A; *Administration and Probate Act 1929* (ACT) s 44(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1958* (Vic) s 5(1) definition of "personal chattels". See also *Administration Act 1969* (NZ) s 2(1); and *Administration of Estates Act 1925* (Eng) s 55(1)(x).
7. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
8. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); and *Administration and Probate Act 1958* (Vic) s 5(1).
9. *Succession Act 1981* (Qld) s 34A(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
10. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) to the definition of "personal chattels"; *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".
11. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".

pictures, prints, jewellery, and musical and scientific instruments or apparatus.[12]

4.7 Other items which are specifically identified as personal effects in some jurisdictions include curtains, drapes, carpets, ornaments, domestic appliances and utensils, garden appliances and utensils, other chattels of ordinary household use or decoration,[13] garden effects or appliances,[14] carriages (not used for business),[15] horses (not used for business), stable furniture and effects (not used for business),[16] and clothing.[17]

4.8 In Queensland and NSW, a "thing" (household chattel) will be taken as owned by the intestate even if it was held subject to a charge, encumbrance or lien securing the payment of money; or the intestate only held the interest as grantor under a bill of sale or as hirer under a hire-purchase agreement.[18] In NSW, the owner's rights with respect to the item are also expressly preserved.[19]

Limiting to "personal or household" use

4.9 Rather than go into any detail, Western Australia provides a general definition – articles of personal or household use or adornment.[20] The limitation to "personal or household" articles was employed because the Law Reform Commission of Western Australia was concerned that a definition of personal articles would include "such valuable items as a collection of diamonds... or a motor yacht". The Commission preferred that the surviving spouse should be allowed to purchase such valuable items.[21]

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12. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
13. *Succession Act 1981* (Qld) s 34A(1); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
14. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); and *Administration and Probate Act 1958* (Vic) s 5(1).
15. *Administration and Probate Act 1958* (Vic) s 5(1).
16. *Administration and Probate Act 1958* (Vic) s 5(1).
17. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
18. *Succession Act 1981* (Qld) s 34A(3)(b); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2). See also .*Administration Act 1969* (NZ) s 2(1).
19. *Wills, Probate and Administration Act 1898* (NSW) s 61B(10). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3.
20. *Administration Act 1903* (WA) s 14(2)(a).
21. Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34 Part 1, Working Paper, 1972) at para 21(b).

4.10 Some jurisdictions have dealt with this issue by specifically excluding certain items. These items include motor vehicles, boats, aircraft, racing animals, trophies, clothing, jewellery, chattels of a personal nature, original paintings,[22] and other original works of art.[23]

4.11 However, there will always be problems in trying to draw the line. Take, for example, an estate that includes a collection of Persian carpets which are hung on the walls of the shared home. In NSW, these items would fall within the category of "carpet". However, there is some doubt as to whether this should be read down by reference to the expression "and other chattels of ordinary household use or decoration".[24]

Items used for business and professional purposes

4.12 Any items used for business at the intestate's death are generally excluded.[25]

4.13 The Law Reform Commission of Tasmania considered that the definition should specifically exclude business and professional items because "they do not fall within the commonly held view of what the surviving spouse should be entitled to".[26]

4.14 The Queensland Law Reform Commission proposed requiring that the items be used "exclusively" for business or professional purposes on the grounds that this would let in motor vehicles that were used partly for business purposes and partly for family purposes while excluding haulage trucks and the like.[27]

4.15 The English Law Commission, while noting the general assumption that the spouse or partner is unlikely to have any connection with the intestate's business, considered there might be

22. *Succession Act 1981* (Qld) s 34A(2); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
23. *Succession Act 1981* (Qld) s 34A(2).
24. R Atherton, "Valuations and intestacy: surviving spouse v issue" (1984) 22 *Law Society Journal* 169 at 171.
25. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (c) to the definition of "personal chattels" (where chattel used exclusively for business purposes); and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (c) to the definition of "personal chattels" (where chattel used exclusively for business purposes). See also *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration Act 1969* (NZ) s 2(1).
26. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 12.
27. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 40.

cases where the spouse has some interest in the intestate's business. The Commission noted that, if the intestate was involved in a business partnership, the items would devolve according to the law of partnerships. This would also be the case where the spouse was also the intestate's business partner. The Commission noted that there might be "situations where the survivor's connection with the business falls short of partnership and yet might be seen as giving rise to some claim to share in the business assets".[28] However, it did not pursue this line of enquiry in its final report.

Money and securities for money

4.16 Money and securities for money are excluded in Victoria, ACT, and NT.[29] The Queensland Law Reform Commission has noted that this is a "traditional" exception from the list of items and further observed:

> If money and securities for money were included in the definition of "personal property", one might as well recommend that the spouse take the entire estate.[30]

Heirlooms

4.17 In 1988, the English Law Commission raised the particular question of whether heirlooms should be included, observing that "there is no provision to enable other members of the family to claim that property should have come to them because it originally belonged to their branch of the family".[31] This was seen to be a particular problem in cases where the intestate had been married more than once.[32] It was noted that Scotland specifically excluded heirlooms. The question, however, was not traversed in the Commission's report.

4.18 The Scottish provision, in defining "furniture and plenishing", sets out the usual exclusions, such as items used for business purposes, and money or securities for money, and adds "any heirloom".[33] An heirloom is defined as "any article which has

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28. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 20.
29. *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (d) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (d) to the definition of "personal chattels".
30. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 41.
31. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.
32. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.
33. *Succession (Scotland) Act 1964* (Scot) s 8(6)(b).

associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate".[34]

4.19 In one consultation, it was noted that there can sometimes be a problem with children getting particular items of the intestate's property. In particular, access to family photographs can, sometimes, be subject to dispute in the administration of deceased estates, even if only for the purposes of copying.[35] However, the majority view was that this was not a significant problem.[36]

Law reform developments

4.20 In its working paper, the English Law Commission considered the question of personal effects, noting that a very wide definition could give rise to problems.[37] The question, however, was not traversed in the Commission's report.

4.21 The Law Reform Commission of Tasmania suggested a definition of personal effects along the lines of that in New Zealand.[38] This recommendation has not been implemented.

4.22 The Queensland Law Reform Commission, in 1993, considered that it would be more appropriate to adopt an "open definition" of personal property so as to exclude "items which would not ordinarily be treated as personal property, rather than to devise a definition which attempts to list all possible items of property which should be treated as personal property".[39] The Commission, therefore, proposed the following definition:

> An intestate's 'personal property' is all of the intestate's property excluding the following:
>
> (a) any interest in land;
>
> (b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);
>
> (c) stock, shares and debentures;

34. *Succession (Scotland) Act 1964* (Scot) s 8(6)(c).
35. See, eg, *Longworth v Allen* [2005] SASC 469.
36. WA, Succession Law Implementation Committee, *Consultation*.
37. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 19.
38. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 12.
39. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 40.

(d) property that was used exclusively for business purposes at the time of the intestate's death.[40]

4.23 The outcome of this definition is that the intestate's personal property would include items such as motor vehicles, works of art, collections and other valuable items. The Commission observed that:

> A spouse should not have to suffer the anxiety of wondering whether a brooch or a neckchain given to the deceased spouse as a wedding anniversary present is or is not "jewellery". Even if a person has established an extremely valuable collection of articles, such as paintings, then the Commission considers that if its owner fails to make a will it is reasonable to assume that he or she intended his or her spouse to have it.[41]

The Queensland recommendation has not been implemented.

Submissions and consultations

4.24 Submissions generally supported provisions giving the personal effects of the intestate to the surviving partner.[42] One reason was that such assets are closely linked to the "personal relationship" between the couple.[43]

4.25 Some submissions supported making reference merely to "items of personal or household use or adornment".[44] Others supported lists of items,[45] including the current Queensland definition.[46] One submission raised the issue of marine vessels and associated equipment. These were seen as a particular problem in Tasmania because of the high level of ownership of such items in that State.[47] One submission also supported having a list of exclusions from this category, namely collectibles.[48]

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40. Proposed s 35J of the draft *Succession (Intestacy) Amendment Bill 1993* in Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) Chapter 9 at 12.
41. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 39.
42. K Mackie, *Consultation*; Law Society of Tasmania, *Submission* at 5; J North, *Submission* at 2.
43. Public Trustee NSW, *Submission* at 4.
44. Trustee Corporations Association of Australia, *Submission* at 5; J North, *Submission* at 2.
45. Law Society of Tasmania, *Submission* at 6.
46. Public Trustee of Queensland, *Submission* at 2.
47. Law Society of Tasmania, *Submission* at 6.
48. J North, *Submission* at 2.

National Committee's conclusion

4.26 The surviving spouse or partner, where he or she does not get the whole of the intestate's estate, should be entitled to the personal effects of the deceased. This approach is desirable to avoid undue delay and conflict in the administration of intestate estates.

4.27 The open definition, listing only exclusions, as proposed by the Queensland Commission, has much to recommend it for certainty and simplicity. The exceptional cases where, for example, an intestate leaves a large and valuable art collection or collection of jewellery or an expensive maritime vessel, should not influence the definition of personal chattels. The listing of such exceptions, unless carefully done, will only cause confusion and give rise to doubt about, for example, small items of personal adornment, or relatively inexpensive art works that are used to decorate a family home. Even if the exceptions are carefully defined by reference to value or the reason the intestate obtained them, there will be many grey areas and borderline cases involving arbitrary distinctions. In some cases, for example, a surviving spouse could be left with the shared home devoid of any of its familiar decorations.

4.28 There are still some items of personal property that should be considered part of the estate available for distribution in addition to those proposed by the Queensland Commission. For example, the exceptions may not cover interests the intestate may have had under trusts, in deceased estates or in the results of litigation. They may also not cover interests in intellectual property such as an interest in a design which is yet to be commercially exploited, or copyright in an unpublished manuscript. The solution to this problem is to state that the surviving spouse or partner is to be entitled to the intestate's "tangible" personal property and then list only those exceptions that can be identified as tangible. Such exceptions would include:

- property used exclusively for business purposes;
- banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
- property held as a pledge or other form of security; and
- property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds.

With regard to the last category of property, the National Committee does not intend to exclude property which, while it may act as a hedge against inflation or adverse currency movements, is also an object of household, or personal, use, decoration or adornment.

4.29 The term "tangible" has been adopted to distinguish the property included from choses in action, which are also classed as personal property but which are not intended to be included among the "personal effects" of the deceased. Tangible, or corporeal, personal property is synonymous with "choses in possession", whereas intangible, or incorporeal, personal property is synonymous with "choses in action" and includes all personal chattels that are not in possession including shares, and various forms of intellectual property. [49] For the avoidance of doubt, it should also be made clear that tangible personal property does not include any interest in real property.

4.30 Bearing in mind that the question of the spouse receiving the personal chattels of the intestate as a separate allocation will now only arise in situations where there are issue of another relationship, the question arises as to whether "heirlooms" should be included in the list of exclusions. Including "heirloom" may, however, lead to a degree of uncertainty, especially as formulated in the Scottish provision. The National Committee does not recommend the inclusion of "heirlooms" in the list of exceptions. The question of ownership of "heirlooms" is best negotiated, where possible, between the surviving spouse or partner and the surviving issue.

Recommendation 5

Where the intestate is survived by a spouse or partner and issue from another relationship, the spouse or partner should be entitled to all of the tangible personal property of the intestate except for:

(a) property used exclusively for business purposes;
(b) banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
(c) property held as a pledge or other form of security;
(d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds; and
(e) any interest in land.

See Intestacy Bill 2006 cl 4(1) definition of "personal effects"; cl 14(a).

49. B A Helmore, *Commercial Law and Personal Property in New South Wales* (10th ed, Law Book Company, Sydney, 1992) at 4-5.

THE STATUTORY LEGACY

4.31 In most Australian jurisdictions, the spouse or partner is entitled to a statutory legacy[50] in addition to the household or personal effects.[51] Although there is limited correspondence, there is no uniformity and the amount differs between jurisdictions.

4.32 The prescribed amount of the statutory legacy is either included in legislation or fixed by regulation. The NT and NSW set the legacy by regulation.[52] In NSW, the amount is $200,000.[53] Legislation provides that the amount is $150,000 in Queensland and the ACT, $100,000 in Victoria, $50,000 in Tasmania and WA, and $10,000 in SA.[54]

Justification of the statutory legacy

4.33 The statutory legacy can be justified on a number of grounds. First, it can be said that it is intended to remove financial hardship and ensure that the spouse can continue living in the manner to which he or she has become accustomed.[55] For example, the spouse might be able substantially to reduce any mortgage to which the shared home may be subject. If the estate is only small, the entitlement to a legacy means the spouse may avoid severe financial hardship and the

50. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(b); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B); *Administration Act 1903* (WA) s 14(1) Table It 2(b) and It 3(b); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2 and It 3. See also *Administration Act 1969* (NZ) s 77 It 2 and It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.
51. See para 4.2-4.30.
52. *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1), It 3(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.
53. *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Wills, Probate and Administration Regulation 2003* (NSW) cl 5(2).
54. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration Act 1903* (WA) s 14(1) Table It 2; *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B).
55. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 28 November 1977 at 10326.

associated "expense and domestic unpleasantness" of a family provision application.[56]

4.34 It was also intended that the presence of a fixed legacy should take pressure off the surviving spouse to sell essential assets so that their proceeds may be distributed to the intestate's children.[57]

The amount of the statutory legacy

4.35 The amount of the statutory legacy has been the subject of some controversy, both with regards to its size and the method of determining and adjusting it.

Size of the statutory legacy

4.36 Views expressed in consultations were generally that the amounts in each jurisdiction were too low.[58] For some time now, there has been support among law reform agencies for a reasonably large statutory legacy. The Queensland Law Reform Commission in 1993 observed that:

> the main purpose of giving a statutory legacy of a reasonably substantial amount is that it makes easy the administration of all estates of less than the amount of the statutory legacy plus the personal property. There can be no doubt as to who will inherit. This is particularly important in the case of very small estates.[59]

4.37 A recent review of the size of the statutory legacy in England and Wales showed that, while in 1925 98% of intestate estates were within the original limit of £1,000, now only 59% of intestate estates fit within the current statutory legacy of £125,000. However, any alterations to the current limits would need to take into account substantial changes over the past 80 years, including increases in the

56. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363.
57. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.
58. Succession Law Section, Queensland Law Society, *Consultation*; *Melbourne Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Probate Committee, Law Society of SA, *Consultation*; S Samek, *Consultation*.
59. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 41.

levels of home ownership and the increasing incidence of joint ownership of property.[60]

4.38 One commentator in the UK has opposed a large house price-related statutory legacy on the grounds that many intestates do not own their own homes and that shared homes are now more frequently owned by partners as joint tenants. It is claimed that such people do not need so large a legacy because they do not need it to obtain the shared home.[61]

4.39 Another reason for a comparatively large statutory legacy is that, if the estate includes the intestate's interest in a family business, and the business is the surviving spouse or partner's source of livelihood, the surviving spouse or partner may be unable to continue to operate the business if a substantial share of it has to be removed to meet the entitlements of other beneficiaries.

4.40 In 1985, the Law Reform Commission of Tasmania was not satisfied with that State's relatively low figure:

> It seems that the original purpose of the legacy was to enable the spouse to remain in the matrimonial home if he or she so desired and, to assist in his or her day to day maintenance. The sum of $50 000 is widely acknowledged as being insufficient for these purposes.[62]

On the other hand, in 1974, the Law Reform Committee of South Australia supported a small legacy for the surviving spouse considering it was a problem that:

> [t]he amount is the same whether the wife is the first wife or second wife, whether she has been married for one year, five years or thirty years, whether any of the husband's assets came from the use of money provided by the wife or the wife's relatives or by her co-operation in a business, whether the relationship between the husband and wife was good or ill, whether she remarries speedily, and many other permutations and combinations of facts.[63]

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60. England and Wales, Department for Constitutional Affairs, *Administration of Estates: Review of the Statutory Legacy* (CP 11/05, 2005). See also N Preston, "A lasting legacy" (2005) 155 *New Law Journal* 1594.
61. A Jack, "Intestacy and the statutory legacy" (2005) 155 *New Law Journal* 993 at 993.
62. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.
63. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.

4.41 The Alberta Law Reform Institute, in 1999, considered the provision that should be made for a surviving spouse or partner when there are issue of another relationship:

> Much depends upon the length of the subsequent marriage, the number and age of children born to that marriage, the number and age of children of the deceased from another relationship, the assets accumulated due to the joint efforts of the spouses, the assets owned by either spouse before the marriage, the existence of insurance and so on. The best compromise is to share the estate between the spouse and the children but give a generous preferential share to the spouse. This share cannot be too large because it would defeat the intention of sharing the estate among the surviving spouse and children in all but very large estates.[64]

Fixing and adjusting the statutory legacy

4.42 There are a number of options available for setting the statutory legacy:

- fix a specific sum in legislation without any mechanism for adjustment;
- fix a specific sum in legislation and include a mechanism to adjust it for inflation;
- fix it by reference to specific proportions of the estate;
- fix it in regulations and review it on a regular basis

4.43 Fixing a specific sum in legislation has proved unsuccessful in many jurisdictions. It has been suggested that changes have not been made in Victoria, SA and WA simply because of the difficulty involved in amending legislation.[65] The Law Reform Commission of WA observed this problem in 1973, noting that the Parliament had adjusted the statutory legacy on only three occasions in the previous 25 years.[66]

4.44 One view expressed in consultations and submissions was that the statutory legacy ought to be indexed in some way.[67] Suggestions included linking the legacy to the median price of housing in each

64. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 82.
65. WA, Succession Law Implementation Committee, *Consultation*; *Melbourne Consultation*; Probate Committee, Law Society of South Australia, *Consultation*.
66. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34 Pt 1, Report, 1973) at 7.
67. Probate Committee, Law Society of South Australia, *Consultation*; J North, *Submission* at 2; Trustee Corporations Association of Australia, *Submission* at 5.

jurisdiction[68] or to the consumer price index.[69] However, a mechanism for annual adjustment of the amount may prove difficult to implement. For example, indexing the sum according to the Consumer Price Index might fail to take into account increases in property prices in different parts of each jurisdiction.[70] Changes in interest rates will also have an impact on the ability of a lump sum payment to generate income for the surviving spouse.[71] The Law Commission of England and Wales was unable to find an agreed method of calculating any automatic annual increase to the statutory legacy.[72]

4.45 An example of a scheme which sets the amount by reference to a proportion of the estate may be found in Manitoba. However, this example only applies where there are surviving issue of the deceased, one or more of which are not also issue of the surviving spouse. The Manitoba provisions entitle the surviving spouse to a statutory legacy of $50,000 or half the estate, whichever is greater, and then gives the surviving spouse a further half share of the residue of the estate.[73]

4.46 In England and Wales, the Law Commission floated the possibility of a system of "graduated lump sums" whereby the surviving spouse would receive a large initial statutory legacy and then additional lump sums according to the size of the estate.[74] This proposal was not pursued in the Commission's final recommendations.

4.47 Opinions expressed in many submissions and consultations supported setting the statutory legacy in regulations rather than in legislation.[75]

4.48 The Law Reform Commission of Tasmania suggested that the legacy should be altered by regulation to allow for easier adjustments to take place in a climate of fluctuating property values.[76]

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68. Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5.
69. Probate Committee, Law Society of South Australia, *Consultation*.
70. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31
71. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31.
72. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 31.
73. *Intestate Succession Act* CCSM c I85 s 2(3).
74. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(vi).
75. WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5; Law Society of Tasmania, *Submission* at 6.

A uniform amount for all jurisdictions?

4.49 It is important to bear in mind that property values differ according to location as well as over time. The Law Commission of England and Wales observed that, if the purpose of the statutory legacy is to allow the surviving spouse to purchase the intestate's share of their shared home, a legacy which allows for the purchase of a London house will provide a spouse who lives elsewhere with a substantial surplus.[77]

4.50 There was some support for allowing the prescribed amount to be fixed on a jurisdiction by jurisdiction basis to take into account differences in property prices across Australia.[78] Some submissions recognised that there may need to be local variations in the statutory legacy between the jurisdictions.[79] Others had no objection to a uniform sum.[80] One submission suggested that the statutory legacy should be sufficient to cope with real estate prices in Australia's most expensive city.[81]

Interest on the statutory legacy

4.51 When the spouse or partner is entitled to a statutory legacy, he or she is also entitled to interest on it in ACT, NSW, Tasmania, Victoria and WA. The interest is calculated from the date of death of the intestate until the prescribed amount is paid.[82] The interest is payable from the intestate estate. Currently, where the rate is set by subordinate legislation, it is 9.5% in Victoria[83] and 6% in New South

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76. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.
77. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 5.
78. Public Trustee NSW, *Submission* at 5; Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 6; Law Society of NSW, *Submission* at 1; *Sydney Consultation 2*; W V Windeyer, *Submission* at 3.
79. Law Society of NSW, *Submission* at 1.
80. J North, *Submission* at 2; Succession Law Section, Queensland Law Society, *Consultation*.
81. J North, *Submission* at 2.
82. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(ii); *Administration Act 1903* (WA) s 14(4); *Administration and Probate Act 1935* (Tas) s 44(3). See also *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.
83. The Attorney-General under *Penalty Interest Rates Act 1983* (Vic) s 2 (less 2.5%).

Wales.[84] The rate is fixed by legislation at 8% in the Australian Capital Territory,[85] 5% in Western Australia and 4% in Tasmania.[86]

4.52 Queensland, the Northern Territory and South Australia make no provision for interest on the statutory legacy.

4.53 Provisions of this sort are said to be statutory recognition of the common law principle that "pecuniary legacies carry interest unless the contrary is indicated in the will or instrument of their creation".[87] However, the position at common law was strictly that if a legacy was charged out of land, the legacy carried interest from the date of death of the deceased, but if a legacy was given out of personal estate, the legacy carried interest only from the year after the death of the deceased, unless other provision was made in the will.[88]

4.54 Charging interest on the statutory legacy can be said to reflect the general objective of the law "that estates should be distributed as soon as may be".[89] However, this can really only affect the speed of an administration when the other beneficiaries whose interests are likely to be reduced (that is, the children of the intestate) either are, or have some influence with, the administrator. Even if the administrator is one of the children, he or she will still have a direct interest in the speedy administration of the estate even without the charging of interest on the statutory legacy. A more likely reason for the charging of interest on the statutory legacy may be that it acts as a form of compensation to the spouse or partner for any delays in the administration and to make up for any loss in value of the statutory legacy as the result of inflation.

4.55 The Law Reform Commission of WA provided no reason when recommending, in 1973, that the spouse should continue to be entitled to interest on the statutory legacy.[90] The NSW provisions were

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84. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Wills, Probate and Administration Regulation 2003* (NSW) cl 6(2).
85. *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b).
86. *Administration and Probate Act 1935* (Tas) s 44(3).
87. NSW, *Parliamentary Debates (Hansard*) Legislative Assembly, 25 October 1977, Second Reading at 8994. See, eg, *Succession Act 1981* (Qld) s 52(1)(e) and s 52(1A).
88. *Maxwell v Wettenhall* (1722) 2 P Wms 26; 24 ER 628. See also *Bird v Lockey* (1716) 2 Vern 743; 23 ER 1086; and F Jordan, *Administration of the Estates of Deceased Persons* (3rd ed, 1948) at 34-36.
89. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 131. See also NSW Law Reform Commission, *Uniform Succession Laws: Administration of estates of deceased persons* (Discussion Paper 42, 1999) at para 8.19.
90. Law Reform Commission of Western Australia, *Report on Distribution on Intestacy* (Project No 34, Part 1, 1973) at para 25.

included in 1977 at the same time that the right to interest on legacies was given a statutory basis.

4.56 Some submissions supported the payment of interest on the spouse or partner's statutory legacy.[91]

4.57 One submission suggested that the interest rate should be set by regulation based on the Reserve Bank interest rates for the previous quarter or year.[92]

National Committee's conclusion

4.58 The option of substantially increasing the statutory legacy presents itself as a reasonable approach to providing for a spouse or partner in cases where there are also children of another relationship. This will effectively ensure that the surviving spouse or partner will get the whole estate in the majority of cases while at the same time ensuring that the issue of the intestate get something when the estate can bear it.

4.59 While there would appear to be support for setting the amount of the statutory legacy by regulation on a jurisdiction by jurisdiction basis, it should be noted that there are vast variations in property prices within states, as well as between them (for example, Broken Hill as opposed to Sydney), and that lower sums in some jurisdictions might reduce mobility for the surviving spouse or partner within Australia. Having a single figure for the whole of Australia will also reduce the potential for "forum shopping" for statutory legacies where real property is held in more than one jurisdiction.

4.60 The National Committee considers that a sum of $350,000 would be appropriate for all jurisdictions. The National Committee further considers that there should be a mechanism to increase the amount on a regular basis. Accordingly, the National Committee proposes that the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate.

4.61 While it is desirable to charge interest in order to look after the interests of the surviving spouse where there may be delays in the administration of an intestate estate, the National Committee considers the statutory legacy should be treated as a general legacy and that, therefore, interest should only be calculated one year after

91. Trustee Corporations Association of Australia, *Submission* at 6; Public Trustee NSW, *Submission* at 5; Law Society of Tasmania, *Submission* at 6; J North, *Submission* at 2.
92. Trustee Corporations Association of Australia, *Submission* at 6.

the intestate's death at a rate set in accordance with the provisions that relate to general legacies. The National Committee will be proposing that the interest on general legacies should be 2% above "the last cash rate published by the Reserve Bank of Australia before the close of business on the last day of business in the preceding calendar year".[93]

Recommendation 6

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to a statutory legacy.
The statutory legacy should be set at $350,000 for all jurisdictions.
The amount of the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate. The spouse or partner should also be entitled to interest in addition to the legacy, with the interest calculated in accordance with the provisions that will apply to general legacies, namely 2% above the last cash rate published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

See Intestacy Bill 2006 cl 8(1), (4); cl 14(b).

STATUTORY LEGACY AND CONFLICT OF LAWS

4.62 There is a potential problem with the allocation of statutory legacies where real property is held in more than one Australian jurisdiction. An example given in one consultation was of a person domiciled in Nauru who died intestate with land in Victoria and Queensland. She left a husband and adult daughter. The surviving husband was entitled to the statutory legacies in both States to the detriment of the daughter.[94] This outcome was consistent with the traditional approach to such circumstances, which is to apply the law of the place where the immoveable property is located.[95]

93. The wording comes from *Supreme Court Rules 2000* (Tas) r 5A(a).
94. *Melbourne Consultation*.
95. See *In re Rea* [1902] 1 IR ChD 451 where a domiciled Irishman died intestate in Ireland but also held property in Victoria. It was held that his widow was entitled to a statutory legacy of £500 out of the Irish estate as well as the statutory legacy of £1000 out of the Victorian estate. This judgment was followed in *Queensland Trustees Ltd v Nightingale* (1904) 4 SR (NSW) 751. See also A A Preece, "Intestacy law reform in Queensland" (2000) 20 *Queensland Lawyer* 180 at 186.

4.63 Options for dealing with this problem include:

- barring the surviving spouse from claiming the statutory legacy in one jurisdiction when he or she has already obtained the statutory legacy in another jurisdiction;
- establishing a regime whereby the surviving spouse can receive statutory legacies to a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled;
- allowing the surviving spouse only the statutory legacy in the jurisdiction with which they were most closely connected at death, for example, by domicile or habitual residence.

4.64 The second option was the approach chosen by the Court of Queen's Bench in Manitoba in 1987. In that case, the intestate held real property in Saskatchewan and Manitoba. The widow received a statutory legacy of C$40,000 in Saskatchewan and claimed a further statutory legacy of C$50,000 from Manitoba. The Court considered the question whether the widow was entitled to the statutory legacy under Manitoba law, having already received the statutory legacy under Saskatchewan law. The Court treated the Manitoba provisions as remedial and found that the "equitable distribution of the estate" would not allow the widow to claim the full benefit of the statutory legacies in more than one province. The Court found that the widow was entitled to no more than the C$50,000 prescribed by Manitoba and, accordingly, ordered that she receive C$10,000 from the estate in Manitoba, having already received C$40,000 in Saskatchewan.[96] Subsequent decisions have held that the surviving spouse is entitled to the highest preferential share.[97]

4.65 This approach would achieve much the same result as the first option. However, it has the benefit of accounting for any property that is subsequently discovered in another jurisdiction after the estate has been wound up in the other jurisdictions and the decision as to the statutory legacy already made.

4.66 The third option was proposed by the Manitoba Law Reform Commission, which considered that the adoption of a "single choice of law rule" was the best way of dealing with the problem.[98]

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96. *Thom v Thom* (1987) 40 DLR (4th) 184 (Man QB).
97. *Manitoba (Public Trustee) v Dukelow* (1994) 117 DLR (4th) 122 at para 20-46. See also A A Preece, "Intestacy law reform in Queensland" (2000) 20 *Queensland Lawyer* 180 at 186.
98. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 70.

National Committee's conclusion

4.67 The surviving spouse should not be able to claim statutory legacies in more than one jurisdiction simply because real property is held in each. This could result in a substantial windfall for the surviving spouse to the detriment of surviving issue.

4.68 The Committee prefers the second option, which results in the surviving spouse receiving statutory legacies to a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled. The third option is unacceptable because there will be exceptional circumstances where domicile or habitual residence will not be obvious, and a determination of such will be productive of expense and delay the administration.

Recommendation 7

In cases where the surviving spouse or partner is entitled to claim statutory legacies in more than one jurisdiction, he or she should receive legacies of a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled.

See Intestacy Bill 2006 cl 8(2).

APPORTIONING THE RESIDUE BETWEEN SURVIVING PARTNER AND ISSUE

4.69 If any of the intestate estate remains after the distribution of personal or household chattels and the statutory legacy to the surviving spouse, the estate is then divided between the surviving spouse and issue. There are currently two approaches to this exercise.

4.70 In some jurisdictions, the spouse or partner is entitled to the same proportion of the remainder no matter how many children or issue of the intestate survive. In Tasmania, Victoria and WA, the entitlement is one-third of the remainder,[99] and in NSW and SA the entitlement is one-half.[100]

4.71 Other jurisdictions make different provisions for situations where there is only one child of the intestate and situations where

99. *Administration and Probate Act 1935* (Tas) s 44(3)(a); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(iii), s 52(1)(a); and *Administration Act 1903* (WA) s 14(1) Table It 2(b). See also *Administration Act 1969* (NZ) s 77 It 2.
100. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(c); and *Administration and Probate Act 1919* (SA) s 72G(b). See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.

there is more than one child of the intestate. So, in Queensland, ACT and NT, if only one child survives the intestate, the spouse is entitled to the prescribed amount and one-half of the remaining intestate estate. If more than one of the intestate's children has survived, the spouse is entitled to the prescribed legacy and one-third of the remaining estate.[101] This approach dates back at least as far as the Statute of Distributions of 1670. In more modern times, it can be treated as a compromise between the jurisdictions that offer the spouse one-third of the residue and those that offer one-half in all circumstances.[102]

Law reform developments

4.72 In 1985, the Law Reform Commission of Tasmania recommended a change to that State's allocation of one-third to the surviving spouse or partner, so that the spouse would receive one-half where there was one surviving child and one-third where there was more than one surviving child. The Commission considered that this was likely to achieve a fairer result, apparently on the basis that, if there was more than one surviving child, it was more likely that he or she would not be able to rely on the surviving spouse for assistance.[103] The Law Reform Committee of South Australia recommended a similar change in 1974, but without giving reasons.[104] These recommendations were not adopted in either jurisdiction, although SA now gives the surviving spouse a one-half share of the estate in all cases.

4.73 NSW moved to giving the spouse one-half of the estate in all cases in 1977.

4.74 In 1974, the Ontario Law Reform Commission saw no reason to change the arrangements in that province whereby a spouse with one child received one-half of the residue and a spouse with more than one child received one-third of the residue.[105]

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101. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(b)(ii) and It 2(2)(b)(ii); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(c); and *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1)(b)(ii).
102. See W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at para 5.36.
103. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.
104. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.
105. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

4.75 The British Columbia Law Reform Commission considered that a one-half allocation in all cases was more in accord with community expectations.[106] The Uniform Law Conference of Canada also supported a one-half allocation, noting that there appeared to be no basis for the assumption that deceased persons would generally prefer to leave more of their estates to their issue where they had more than one child than they would if they had only one child.[107] The Alberta Law Reform Institute in 1999 supported giving the spouse a half-share in all cases, observing that the spouse or partner's "need for support remains constant, no matter how many children may survive the intestate".[108]

Submissions and consultations

4.76 Some submissions supported giving a half-share to the surviving spouse or partner regardless of the number of issue of the intestate.[109] Reasons given for supporting this position include simplicity,[110] and the paramountcy of the interests of the surviving spouse or partner.[111]

4.77 Two submissions supported giving a half-share to the spouse or partner when there is one surviving child or one-third if there are two or more children.[112] Another submission supported giving the surviving spouse or partner one-third of the remaining estate.[113]

National Committee's conclusion

4.78 In light of the preference for supporting the surviving spouse or partner, a one-third share is too small regardless of whether there are one or more surviving issue. A one-half share is, therefore, to be preferred in all cases.

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106. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 26-27.
107. Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 219.
108. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 71.
109. Trustee Corporations Association of Australia, *Submission* at 6; Public Trustee NSW, *Submission* at 5; W V Windeyer, *Submission* at 4.
110. Trustee Corporations Association of Australia, *Submission* at 6.
111. W V Windeyer, *Submission* at 4.
112. Public Trustee of Queensland, *Submission* at 2; J North, *Submission* at 2.
113. Law Society of Tasmania, *Submission* at 7.

Recommendation 8

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to one-half of the residue of the intestate estate after he or she has received the personal effects of the intestate and the statutory legacy (with interest). The issue of the intestate should be entitled to the remaining half-share *per stirpes*.

See Intestacy Bill 2006 cl 14(c), cl 28(2).