

5. Spouse or partner – election to obtain any property

- The right to the shared home
- A new approach
- The spouse or partner's entitlement
- Power of the personal representative to dispose of property

5.1 In most Australian and other common law jurisdictions, the question of the spouse or partner's share would also involve consideration of the surviving spouse or partner's right to the home he or she shared with the intestate. Following the recommendation in chapter 3, such provisions will be relevant only in cases where the intestate is survived by a spouse or partner and at least one child from another relationship.

THE RIGHT TO THE SHARED HOME

Current provisions

5.2 All Australian jurisdictions except Tasmania extend to surviving spouses or partners a conditional right to obtain the intestate's (undisposed) interest in the home they shared until the intestate's death.¹ While, the nature of this right differs among the jurisdictions, each will usually have relatively complex provisions for identifying the shared home. These include a definition of the shared home, an identification of the land associated with the shared home and residential requirements, as well as provisions that outline the spouse or partner's right to elect to obtain the home, establish the home's value, and the means by which the value of the home may be satisfied.

General arguments

5.3 There is general support for giving the surviving spouse or partner some form of right to obtain an interest in the shared home.

5.4 The Law Reform Commission of Tasmania has suggested that:

Wherever possible, if the surviving spouse so desires, he/she should be able to remain in the matrimonial home. To be forced to leave the home after the partner's death, and after possibly years of home life there, could be a most traumatic experience.²

5.5 Hardingham, Neave and Ford support the spouse's ability to acquire the intestate's interest in the matrimonial home for the same reasons they are in favour of the spouse's entitlement to the

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1. *Succession Act 1981* (Qld) s 34B, Part 3 Div 3; *Administration and Probate Act 1929* (ACT) s 49F-49M; *Wills, Probate and Administration Act 1898* (NSW) s 61A(2), s 61B(13), s 61D, s 61E, Sch 4; *Administration and Probate Act 1969* (NT) s 72-79; *Administration and Probate Act 1919* (SA) s 72B(1), s 72L; *Administration and Probate Act 1958* (Vic) s 37A; and *Administration Act 1903* (WA) s 14(6), Sch 4. See also *Intestates' Estates Act 1952* (Eng) s 5, Sch 2.
 2. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.

household, or personal, chattels. That is, such provision will help minimise the disruption caused by the intestate's death and will "produce some continuity of lifestyle for the spouse and any surviving children".³

5.6 The Law Reform Commission of British Columbia supported a right of election to obtain the shared home on the grounds that "it ensures that the surviving spouse is involved in resolving questions which are of paramount concern to his or her future". The Commission further noted that it would significantly ease problems of allocating assets to satisfy the interests of those who are also entitled to share in the estate.⁴ The Victorian provisions, which were introduced in 1994, were intended to overcome situations where the family home had to be sold to enable the distribution of estate assets to those entitled.⁵

5.7 The Tasmanian Law Reform Commission concluded that the option of allowing the surviving spouse to purchase the intestate's entitlement to the shared home from the statutory legacy was the "fairest option".⁶ The English Committee on the Law of Intestate Succession came to a similar conclusion in 1951, considering that giving the surviving spouse the option to purchase the shared home maintained the "balance of interests" between the surviving spouse and issue of the intestate.⁷

5.8 Other law reform agencies have supported allowing the surviving spouse or partner to obtain the family home using, at least in part, the other entitlements from the intestate estate such as the statutory legacy and the spouse's share of the residue.⁸

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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. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.
 5. See R Cook, "Wills and Probate Law: The new rules" (1995) 69 *Law Institute Journal* 784 at 784.
 6. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.
 7. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 9.
 8. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42-43; Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34 Part 1, Report, 1973) at 7.

5.9 Submissions also supported giving the spouse or partner the right to obtain the intestate's interest in the shared home.⁹

5.10 The National Committee generally agrees with the above positions. However, for reasons identified later in this chapter, the National Committee considers that, while the right to obtain the shared home should be available, it ought to be incorporated in a wider right for the surviving spouse or partner to elect to obtain any items of real property, or items of intangible personal property from the intestate estate.

Alternative approaches

5.11 The alternative approaches, outlined below, are not acceptable because they fail to achieve the appropriate balance between the surviving spouse or partner and the issue of the intestate.

Giving the shared home to the spouse or partner

5.12 Giving the shared home to the spouse or partner, in addition to any other entitlements, including the statutory legacy, is another approach to ensuring that the spouse or partner's living arrangements are not disrupted.

5.13 Such approaches have not proved popular for a number of reasons, including:

- it would lead to unequal treatment between those whose deceased spouse or partner owned a home and those whose spouse or partner did not;¹⁰
- it would be particularly unfair in situations where the intestate had previously sold his or her interest in the shared home, for example, to fund the couple's entrance to a retirement facility;¹¹
- the intestate's children from another relationship could receive nothing from the estate.¹²

9. Trustee Corporations Association of Australia, *Submission* at 8; Public Trustee of Queensland, *Submission* at 2; Public Trustee NSW, *Submission* at 6; K McQueenie, *Consultation*; J North, *Submission* at 3.

10. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32; England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 9.

11. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32. See also W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 17.

12. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.

5.14 The Queensland Law Reform Commission framed a proposal that would overcome at least some of the objections outlined above. The Commission proposed that the surviving spouse should be entitled to the intestate's interest in the shared home absolutely or, if there was no shared home or the spouse chose not to take it, to an additional legacy of \$150,000.¹³ On the other hand, one commentator in the UK has suggested that giving the shared home outright to the surviving partner could justify a much smaller statutory legacy on the grounds that the legacy was no longer required to obtain the shared home.¹⁴

5.15 The option of giving the shared home to the surviving spouse or partner has been specifically rejected by a number of law reform agencies.¹⁵ It was also specifically rejected in one consultation.¹⁶

A life estate

5.16 Another approach to the issue of the shared home has been to grant the surviving spouse a life estate in the home. Life estates are still used by testators in some cases. The survey of NSW Probate files revealed provisions establishing life estates in 28 wills, or 5.1% of all testate cases. However, the spouse benefited from the life estate in only 35.7% of cases, the bulk of life estates going to children and siblings.¹⁷ It is possible the use of life estates may become more common with the higher incidence of second and subsequent marriages.¹⁸

5.17 There are a number of reasons why life estates are no longer desirable. The chief among them are that

- they are more expensive to administer and prolong the administration, sometimes for substantial periods;¹⁹
- they give rise to problems of meeting maintenance costs and other expenses (such as rates), especially in cases where the funds at

13. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 44-45.

14. A Jack, "Intestacy and the statutory legacy" (2005) 155 *New Law Journal* 993 at 993.

15. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32.

16. *Melbourne Consultation*.

17. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.28.

18. *Melbourne Consultation*.

19. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 32; Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 45.

the disposal of the surviving spouse or partner are insufficient to maintain the property;²⁰

- they give rise to problems if the property needs to be sold and another purchased in its place;²¹ and
- the shared home that is subject to a life estate may prevent the sale of a larger estate of land of which it is only part.²²

5.18 When mentioned in consultations, life estates were generally not supported.²³ Life estates have also been specifically rejected by a number of law reform agencies.²⁴

A NEW APPROACH

5.19 The National Committee has already indicated its support for allowing surviving spouses and partners the option of obtaining the shared home. However, the National Committee has come to the view that the restriction of this right to the intestate's interest in the shared home is productive of unnecessary complexity in the administration of intestate estates, especially in relation to the identification of the shared home and some of the restrictions that have been imposed where shared homes are tied up in larger estates or commercial ventures.

5.20 The National Committee has already recommended that the surviving spouse or partner be entitled to receive all of the intestate's personal effects. This leaves a range of types of property to be distributed between the spouse or partner and the intestate's surviving issue, including property used exclusively for business purposes, real estate, shares and intellectual property rights. It is

20. *Melbourne Consultation*; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 39; England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

21. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 39-40.

22. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14. See also W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 17-18.

23. *Melbourne Consultation*.

24. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 35; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 41. But see R Kerridge, "Distribution on intestacy, the Law Commission's report (1989)" [1990] *Conveyancer and Property Lawyer* 358 at 366-369.

easy to envisage situations where the surviving spouse or partner may have an interest in obtaining such items of property for the sake of continuity of lifestyle or because of other personal interests. For example, the surviving spouse or partner might choose to obtain the holiday home which he or she shared with the intestate in addition to, or instead of the property that meets the strict requirements for a shared home. He or she might also, for example, wish to continue managing a portfolio of shares that the intestate owned, carry on a business venture or continue a publishing venture in relation to material over which the deceased held copyright.

5.21 The National Committee sees no reason why surviving spouses or partners should not be entitled to elect to obtain any part of the intestate's estate, so long as they can provide satisfaction for its value. The only group which could conceivably be opposed to such a proposal would be the issue of the intestate. In such cases, the preservation of particular items of property claimed by individuals has always been a point for negotiation between the parties. The Law Reform Commission of British Columbia, for example, observed that the position at common law would appear to be that the spouse may elect to take particular items as part of his or her entitlement, and the administrator could also elect to satisfy the spouse's share with particular items. However, both rights were considered to be subject to the rights of other entitled persons to insist that the estate be liquidated.²⁵ Assuming this position to be correct, while issue are not strictly losing any pre-existing rights to insist on particular items of property in satisfaction of their share, it may be that they will be losing the right to insist that an estate be liquidated.

5.22 There is also a danger that a surviving spouse or partner could deliberately cause damage to the economic value of the remaining estate by electing to obtain items of property that are necessary to the functioning of the remaining assets. For example, the surviving spouse or partner could elect to obtain the stock in trade of a business, but not the premises. The Law Reform Commission of British Columbia considered the possibility that the right to elect could be used to affect the value of an estate significantly and prejudice the interests of other persons who are entitled. After consultation, the Commission concluded that there was no need for a legislative response.²⁶

25. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.

26. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42.

5.23 The potential for the right of election to affect the economic value of the remaining estate has been addressed in current Australian provisions relating to the shared home whereby the court can prevent the exercise of the right in certain circumstances. While it is the case that such acts would most likely be motivated by spite, it should be noted that the person would still have to provide value for the items that he or she has elected to obtain. The surviving issue would still be entitled to receive their share of the value of the estate. The National Committee will make recommendations later in this chapter to deal with the rare circumstances where the exercise of the right to elect will adversely affect the remaining estate.²⁷

5.24 It should also be noted that extending the right of election to all property in the estate solves a number of problems that arise when dealing only with the shared home, for example:

- **Defining the shared home.** The home is generally stated to be a building²⁸, or part of a building, designed to be used principally²⁹ as a separate³⁰ residence for one family or person.³¹ In Western Australia, reference is made to a “dwelling house that... was ordinarily used by the surviving husband or wife as his or her ordinary place of residence”.³² However, in Queensland, for example, it also includes caravans and manufactured homes.³³ Some submissions suggested that the NSW definition should include caravans and manufactured homes.³⁴ All types of residence, including caravans and manufactured homes will now be included in the broader scheme.
- **Identifying the land associated with the shared home.** Most jurisdictions include in the interest that the spouse or partner has the right to obtain as much land as is necessary for

27. See para 5.82.

28. A “unit or building lot:” in NT; and apartment or flat in NSW.

29. Or “solely” in SA and NT.

30. “and permanent” in the NT.

31. *Succession Act 1981* (Qld) s 34B(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (a) of the definition of “dwellinghouse”; *Administration and Probate Act 1969* (NT) s 72(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).

32. *Administration Act 1903* (WA) Sch 4 cl 1(1)(b).

33. *Succession Act 1981* (Qld) s 34B(2).

34. Public Trustee NSW, *Submission* at 6; J North, *Submission* at 3; Trustee Corporations Association of Australia, *Submission* at 8. See also Law Society of Tasmania, *Submission* at 7.

the use and enjoyment of the home.³⁵ The provisions sometimes involve drawing a line as to the area allowed and, in NSW for example, if any question arises as to the curtilage of the shared house, the court may make an order on the issue which it considers to be just, on the application of the administrator (or any person beneficially interested in the estate).³⁶ Under the new proposals, the surviving spouse or partner can elect to obtain as much land as he or she can afford, subject to the right of issue to challenge the election when it adversely affects the remaining estate or makes it more difficult to administer.³⁷

- **The residential requirement.** The current position is generally that the spouse or partner must be living in the shared home at the date of death of the intestate.³⁸ NSW requires that the spouse or partner and/or the intestate must have occupied the home at the time, as their only or principal residence.³⁹ In Victoria, it must have been the principal residence of both parties.⁴⁰ There are a number of reasons why a couple may not be living together and it is unfair in many cases for this fact to have an impact on the survivor's ability to elect to obtain the shared home.⁴¹ For example, one or both could be being cared for elsewhere, either privately by family members or in an aged care facility. The surviving spouse or partner may have needed accommodation near to the

35. *Administration and Probate Act 1929* (ACT) s 49F paragraph (a) to the definition of "dwelling house"; *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) of the definition of "dwellinghouse"; *Administration Act 1903* (WA) Sch 4 cl 1(4). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 7(1).

36. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 4.

37. See below, para 5.78-5.82. Such a provision would also be subject to any restrictions on subdivision under general law.

38. *Succession Act 1981* (Qld) s 39A(1)(b); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1919* (SA) s 72L(1); and *Administration Act 1903* (WA) Sch 4 cl 1(1)(b). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).

39. *Wills, Probate and Administration Act 1898* (NSW) s 61D(1). For a definition of "principal residence" see *Laspitis v Laspitis* [2001] NSWSC 749 (Master Macready).

40. *Administration and Probate Act 1958* (Vic) s 37A(1).

41. While one submission supported the current position (see J North, *Submission* at 3), others supported alternative provisions such as allowing that only one member of the relationship need reside in the shared home at the death of the intestate: Trustee Corporations Association of Australia, *Submission* at 8; Public Trustee of Queensland, *Submission* at 2; Public Trustee NSW, *Submission* at 6; *Sydney Consultation 1*.

intestate's aged care facility, or have gone to live with family during the final stages of the intestate's illness. The surviving spouse or partner may also have had to live interstate or in another region for work purposes. It may also be the case that the intestate and the surviving spouse or partner may have been separated at the time of the intestate's death.⁴² Under the new proposals, there is no need to establish a period of residence for either partner in the relationship.

5.25 The National Committee, therefore, prefers the option of giving the surviving spouse or partner the option of purchasing any property in the intestate estate. This allows greater flexibility for surviving spouses or partners to determine which parts of the intestate estate they can keep and creates a simpler regime, while still achieving the most appropriate balance between the interests of the surviving spouse or partner and the issue of the intestate in the limited range of circumstances to which the provisions will apply.

5.26 The question of how the spouse or partner meets the expense of obtaining the items will be dealt with below.

Recommendation 9

The surviving spouse or partner should be able to elect to obtain any property in the intestate's estate.

See Intestacy Bill 2006 cl 16(1).

THE SPOUSE OR PARTNER'S ENTITLEMENT

Election

5.27 The jurisdictions that give the surviving spouse some right to the shared home achieve this by allowing the surviving spouse to elect to obtain the intestate's interest in the shared home.⁴³ Submissions

42. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 43.

43. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G; *Wills, Probate and Administration Act 1898* (NSW) s 61D(1); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1919* (SA) s 72L; *Administration and Probate Act 1958* (Vic) s 37A(2); *Administration Act 1903* (WA) Sch 4 cl 1(1). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).

generally supported this right.⁴⁴ The National Committee agrees that the right of election should be retained, but applied to all property in the intestate estate, not just the shared home.

Procedural requirements for personal representatives

5.28 Victoria provides that, where the surviving spouse or partner is not the personal representative, the personal representative must, within 30 days of the grant of administration, provide written notice to the spouse or partner advising of his or her right to make an election.⁴⁵

5.29 In Queensland and SA, the personal representative must also give notice to the surviving spouse or partner, but there is no time limit.⁴⁶ Queensland also requires the notice to state that the spouse must obtain a court order before they can make an election if any restrictions apply to the home.⁴⁷

5.30 For the right to elect to have any meaning, it is important that the spouse or partner be made aware that they can exercise it.⁴⁸ The Law Reform Commission of British Columbia considered it important to give the surviving spouse notice of the right to elect. The Commission therefore proposed that the notice should be given with the application for letters of administration.⁴⁹

5.31 Given the importance of the right of election to the surviving spouse or partner, requiring that the personal representatives give notice of it before they can administer the estate is the most effective way of ensuring that the notice is in fact given. This also eliminates the need to establish a separate period during which the personal representative must give the notice. In order to accommodate the possibility of informal administration, the model provision should state that a person may not apply for administration or distribute an estate until they have given the surviving spouse or partner notice of the right to election. The notice should include advice about the relevant time limits for exercising the right to elect.⁵⁰

44. *Sydney Consultation 2*; Public Trustee NSW, *Submission* at 7; Law Society of Tasmania, *Submission* at 8.

45. *Administration and Probate Act 1958* (Vic) s 37A(4).

46. *Succession Act 1981* (Qld) s 39A(3)(b); *Administration and Probate Act 1919* (SA) s 72L(2).

47. *Succession Act 1981* (Qld) s 39A(3)(b)(ii).

48. *Sydney Consultation 2*.

49. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 43.

50. See para 5.38-5.46.

Recommendation 10

Anyone (who is not the surviving spouse or partner) who seeks to apply for letters of administration or distribute an intestate estate must give the surviving spouse or partner written notice advising of his or her right to make an election before they apply or distribute (as the case may be). The notice should indicate the requirements for exercising the right to election including relevant time limits.

See Intestacy Bill 2006 cl 17.

Procedural requirements for the spouse

5.32 There are a number of procedural requirements that must be met by the surviving spouse or partner in order for an election to be effective.

5.33 *To whom the election must be made.* In all jurisdictions except Victoria, the election must be communicated to different people in different circumstances. If the spouse is not the personal representative, election must be given to the personal representative.⁵¹ If the spouse is one of two or more representatives, then election must be given to each other representative.⁵² If the spouse is the sole representative, election must be given to the Registrar,⁵³ except in South Australia, where the election must be given to the Public Trustee if the spouse is an administrator.⁵⁴

5.34 In Victoria,⁵⁵ if the partner is not a personal representative, the election must be given to the personal representative who sent the

51. *Succession Act 1981* (Qld) s 39A(4)(a); *Administration and Probate Act 1929* (ACT) s 49G(4)(a); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(a); *Administration and Probate Act 1969* (NT) s 73(4)(a); *Administration and Probate Act 1919* (SA) s 72L(3)(a); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(a). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

52. *Succession Act 1981* (Qld) s 39A(4)(b); *Administration and Probate Act 1929* (ACT) s 49G(4)(b); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(b); *Administration and Probate Act 1969* (NT) s 73(4)(b); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(b). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

53. *Succession Act 1981* (Qld) s 39A(4)(c); *Administration and Probate Act 1929* (ACT) s 49G(4)(c); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(c); *Administration and Probate Act 1969* (NT) s 73(4)(c); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(c).

54. *Administration and Probate Act 1919* (SA) s 72L(3)(b).

55. *Administration and Probate Act 1958* (Vic) s 37A(5)(b).

notice advising of the spouse's right to make an election and, if the partner is a representative, election must be given to the Registrar.⁵⁶

5.35 The Law Reform Commission of British Columbia proposed that the notice should be given to the administrator and to the issue of the intestate who are entitled to share in the intestacy. This would get around the problems associated with situations where the surviving spouse or partner is also the administrator of the estate.⁵⁷

5.36 The requirements of giving notice to various public officials are invoked only in situations where the surviving spouse or partner is a personal representative of the intestate estate. The intention would appear to be to protect the interests of the others who are entitled to share in the estate. This approach, however, does not guarantee that the interests of others will be protected. Different officers will also have to be identified in different jurisdictions. The British Columbian proposal would appear to deal with this issue more effectively by requiring notice be given to the issue of the intestate who are entitled to share in the estate. The National Committee recommends accordingly.

Recommendation 11

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she should give notice of his or her election to the people who gave the notice advising of the right and to the issue of the intestate.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she should give notice to the other personal representatives and to the issue of the intestate.

See Intestacy Bill 2006 cl 19(2).

5.37 *Election must be in writing.* All jurisdictions expressly require

56. *Administration and Probate Act 1958* (Vic) s 37A(5)(a).

57. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 43

that the election must be in writing.⁵⁸ Submissions generally agreed that the election should be in writing.⁵⁹

Recommendation 12

The surviving spouse or partner should give notice of his or her election in writing.

See Intestacy Bill 2006 cl 19(1).

5.38 *Time for making the election.* The spouse is generally required to make an election within a certain time.

5.39 In Victoria, SA and Queensland, if the spouse is the personal representative, election must be made within three months of the representative's appointment (or from the grant of administration).⁶⁰ If the spouse is not the representative, election must be made within three months of the representative giving written notice.⁶¹

5.40 In the ACT, NT, WA and NSW, the time limit is one year from the grant of representation or administration subject to the court's power to extend it.⁶² This accords with the original recommendation of the English Committee on the Law of Intestate Succession in 1951,⁶³ which was also adopted in England in 1952.⁶⁴

5.41 In the ACT and NT, the extension may be granted where probate of the intestate's will has been revoked because the will was invalid;

58. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G(4); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1); *Administration and Probate Act 1969* (NT) s 73(4); *Administration and Probate Act 1919* (SA) s 72L(3); *Administration Act 1903* (WA) Sch 4 cl 4(1); and *Administration and Probate Act 1958* (Vic) s 37A(5). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).

59. Trustee Corporations Association of Australia, *Submission* at 9; Public Trustee NSW, *Submission* at 7; Law Society of Tasmania, *Submission* at 8; J North, *Submission* at 3.

60. *Succession Act 1981* (Qld) s 39A(3); *Administration and Probate Act 1919* (SA) s 72L(2); and *Administration and Probate Act 1958* (Vic) s 37A(3)(a). The period may be extended at the discretion of the Court in South Australia.

61. *Succession Act 1981* (Qld) s 39A(3)(b)(i); *Administration and Probate Act 1958* (Vic) s 37A(3)(b); and *Administration and Probate Act 1919* (SA) s 72L(2)(b).

62. *Administration and Probate Act 1929* (ACT) s 49G(2); *Administration and Probate Act 1969* (NT) s 73(2); *Administration Act 1903* (WA) Sch 4 cl 3; and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1)(b).

63. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

64. *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(a).

where a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when administration of the estate was first granted; or for any other reason affecting the administration or distribution of the estate, where the court considers it proper to do so.⁶⁵

5.42 The Law Reform Commission of British Columbia supported a 12-month period from the date of death of the deceased on the grounds that estates in that jurisdiction could not be distributed before the end of this period.⁶⁶ The English Committee on the Law of Intestate Succession concluded that a period of 12 months from the grant of administration was sufficient to satisfy the requirement that, “wherever possible there should be no delay in completing the administration of the estate of a deceased person”.⁶⁷

5.43 If the surviving spouse or partner is not notified of his or her right to elect to obtain the shared home until immediately before the filing of the application for administration or the commencement of distribution, then a period that commences at the death of the intestate may be too short, or may even have expired. It is preferable to require that the period commence once the surviving spouse or partner has received notice of the right of election.

5.44 Some submissions supported a period of three months from when the spouse or partner received written notice from a personal representative.⁶⁸ One submission supported a six-month period from the date of grant,⁶⁹ while another supported a 12-month period from the date that the survivor is notified of the entitlement.⁷⁰

5.45 Under the current regimes which deal only with the entitlement to the shared home, a period of three, or even six, months may be considered too soon after the death of the intestate for the spouse to make a decision about his or her future living arrangements. However, in light of the recommendation that the spouse or partner should be entitled to elect to obtain any property in the estate, a period of 12 months might be considered too long to freeze the whole of the estate pending the spouse or partner's decisions. The National

65. *Administration and Probate Act 1929* (ACT) s 49G(3); *Administration and Probate Act 1969* (NT) s 73(3).

66. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 42-43.

67. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10.

68. Trustee Corporations Association of Australia, *Submission* at 9; Public Trustee NSW, *Submission* at 7.

69. Law Society of Tasmania, *Submission* at 8.

70. J North, *Submission* at 3.

Committee, therefore, prefers a period of three months from when the surviving spouse or partner has received notice of the right of election.

5.46 The court should have the power to extend this period when it considers it proper to do so, especially where a person's status as a spouse or partner of the deceased is only established some time after the commencement of the distribution.

Recommendation 13

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of receiving notice of the right of election.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of applying for the letters of administration or of commencing the distribution of the estate as the case may be.

The court should have the power to extend this period when it considers it proper to do so for any reason affecting the administration or distribution of the estate, including when a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when administration of the estate was first granted or the distribution first commenced.

See Intestacy Bill 2006 cl 18.

Minor's power to make an election

5.47 Victoria, NSW, NT, ACT and WA include a specific provision concerning the power of a surviving spouse who is also a minor to make a valid requirement, election or consent where necessary. In these jurisdictions, a requirement or consent made or given concerning the acquisition of a shared home by a surviving spouse who is a minor is as valid and effective as it would be if the spouse had attained majority.⁷¹

5.48 No general provisions appear to have been made in the law relating to the capacity of minors who are also married. It is not clear what the position is in Queensland and SA.

71. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 6; *Administration and Probate Act 1969* (NT) s 79(2); *Administration and Probate Act 1929* (ACT) s 49N(2); *Administration and Probate Act 1958* (Vic) s 37A(9)(b); and *Administration Act 1903* (WA) Sch 4 cl 8(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(2).

5.49 Some submissions supported allowing spouses who are minors to make an election to acquire the shared home.⁷²

5.50 Such a provision would appear to be necessary. The National Committee recommends accordingly.

Recommendation 14

A requirement or consent made or given concerning election by a surviving spouse who is a minor should be as valid and effective as it would be if the spouse had attained majority.

See Intestacy Bill 2006 cl 19(3).

People with a mental disability

5.51 In the ACT, NT and WA, where the surviving spouse or partner has a mental disability, a requirement or consent concerning the spouse's right to the shared home may be validly made or given on his or behalf. In ACT, this may be done by his or her committee,⁷³ in NT by the guardian,⁷⁴ and in WA by a person who has the care and management of the estate.⁷⁵ If there are no such carers, the court may itself act.

5.52 One submission observed that, in the ordinary course of events, the manager under the *Protected Estates Act* or an attorney under an enduring power would make the election.⁷⁶

5.53 The National Committee is of the view that it is preferable to allow the situation regarding such spouses or partners to be governed by the laws relating to persons who are under a disability in the management of their affairs.⁷⁷

72. Law Society of Tasmania, *Submission* at 9; Trustee Corporations Association of Australia, *Submission* at 10; Public Trustee NSW, *Submission* at 8; J North, *Submission* at 3.

73. *Administration and Probate Act 1929* (ACT) s 49N(1). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(1).

74. *Administration and Probate Act 1969* (NT) s 79(1).

75. *Administration Act 1903* (WA) Sch 4 cl 8(1).

76. W V Windeyer, *Submission* at 4.

77. See, eg, *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 2000* (Qld); *Guardianship and Management of Property Act 1991* (ACT); *Aged and Infirm Persons' Property Act* (NT); *Guardianship and Administration Act 1990* (WA).

Revocation

5.54 Once made, an election in some jurisdictions may only be revoked with consent. In ACT, WA and NT, the consent is that of the personal representatives.⁷⁸ In Queensland, the consent of the personal representative must be in writing⁷⁹ and in NSW the consent of the court is required.⁸⁰

5.55 Some submissions considered that the requirement of consent from the court “may be unduly onerous”.⁸¹ Another considered that the surviving spouse or partner ought to be able to revoke the election by giving notice to the personal representatives in writing.⁸² One submission, however, supported requiring either the consent of the personal representatives or the court.⁸³

5.56 The National Committee cannot conceive of a situation where a personal representative or the court could validly withhold consent to the revocation of a notice of election by the surviving spouse or partner before the settlement of the administration. The Committee is also not aware of any instances of consent to a revocation being refused. The Committee accordingly recommends that a spouse or partner should be able to revoke the election without the need for consent by any other person.

Recommendation 15

The surviving spouse or partner should be able to revoke his or her election at any time before the transfer of the relevant property without the need for consent by any other person.

See Intestacy Bill 2006 cl 19(4), (5).

Valuing the intestate’s interest in the relevant property

Spouse may require valuation

5.57 Prior to making an election, the spouse may request that the personal representative obtain the value of the intestate’s interest

78. *Administration and Probate Act 1929* (ACT) s 49G(5); *Administration Act 1903* (WA) Sch 4 cl 4(2); *Administration and Probate Act 1969* (NT) s 73(5).

See also *Intestates’ Estates Act 1952* (Eng) Sch 2 para 3(2).

79. *Succession Act 1981* (Qld) s 39A(7).

80. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(2).

81. Trustee Corporations Association of Australia, *Submission* at 10; Public Trustee NSW, *Submission* at 8.

82. J North, *Submission* at 3.

83. Law Society of Tasmania, *Submission* at 9.

from a qualified valuer and inform the spouse.⁸⁴ In Queensland, the personal representative must promptly comply with such a request and provide a copy of the valuation once obtained.

5.58 In Victoria, there is no provision for the surviving spouse to request a valuation. This is because the personal representative is positively obliged to obtain a valuation of the home in cases where the intestate is survived by a child or other issue.⁸⁵

5.59 The National Committee considers it reasonable for the spouse or partner to require the personal representative to obtain a valuation from a qualified valuer. Such a valuation is necessary in order to determine what proportion of the relevant property satisfies the spouse or partner's entitlements on intestacy. It is also appropriate that the estate bear the costs of obtaining the valuation.

Recommendation 16

The spouse or partner should be able to require that the personal representative obtain a valuation of the relevant property from a qualified valuer.

See Intestacy Bill 2006 cl 20(3).

Fixing the value of the interest

5.60 ***The value.*** In Queensland, ACT, NT, WA and Victoria, the value of the intestate's interest in the shared home is the market value of the intestate's interest,⁸⁶ but in SA and Victoria, it is given no more elaboration than "value".⁸⁷ Where the spouse is entitled to acquire the intestate's interest, Queensland provides that it shall be acquired for its "transfer value" at the intestate's death. As in NSW, this is held to mean the market value of the interest, less any amount needed to discharge any mortgage, charge, encumbrance or lien to

84. *Succession Act 1981* (Qld) s 39A(5); *Administration and Probate Act 1929* (ACT) s 49G(6) and s 49H; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(3); *Administration and Probate Act 1969* (NT) s 73(6) and s 74; and *Administration Act 1903* (WA) Sch 4 cl 4(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(2) and *Administration of Estates Act 1925* (Eng) s 41(3).

85. *Administration and Probate Act 1958* (Vic) s 37A(6).

86. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1929* (ACT) s 49G(6); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3)(a); *Administration and Probate Act 1969* (NT) s 74; and *Administration Act 1903* (WA) Sch 4 cl 5.

87. *Administration and Probate Act 1919* (SA) s 72L(1); *Administration and Probate Act 1958* (Vic) s 37A(2); and *Administration of Estates Act 1925* (Eng) s 41(3).

which the interest may be subject at the time of transfer.⁸⁸ Some submissions supported this approach.⁸⁹ The National Committee prefers to make it clear that the value of the intestate's interest in the property does not include any part of the value that is still subject to a mortgage or other encumbrance.

5.61 *Liability for any mortgage, charge or encumbrance.* The question of the discharge or continuance of any mortgage or other charge over the property which the surviving spouse or partner elects to obtain is a question for negotiation between the lender and the surviving spouse or partner. If, for example, the lender requires the discharge of the mortgage and the surviving spouse or partner is unable to arrange another loan, then the property will no longer be available. It is sometimes assumed that appropriate arrangements will be made in cases where the surviving spouse or partner is in a position to meet the obligations for him or her to take over the debt and exonerate the estate. The National Committee prefers to make express provision to ensure the liability passes to the spouse and the estate is exonerated in situations where the spouse and the holder of the mortgage or other charge agree to the spouse assuming the liability. Such a provision will ensure the protection of the rights and interests of mortgagees and other beneficiaries of the estate.

5.62 *Date of the valuation.* In Queensland, SA, Victoria and NSW, the value will be calculated as at the death of the intestate.⁹⁰ The alternative is to determine the value as at the date when the spouse exercises his or her right.⁹¹ This is the case in NSW, if the spouse or partner exercises his or her right more than 12 months after the death of the intestate.⁹² Some submissions supported the NSW position.⁹³

88. *Succession Act 1981* (Qld) s 34B(4); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3).

89. Public Trustee NSW, *Submission* at 7; Trustee Corporations Association of Australia, *Submission* at 9; Law Society of Tasmania, *Submission* at 8; J North, *Submission* at 3.

90. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1919* (SA) s 72B(1); and *Administration and Probate Act 1958* (Vic) s 37A(2). In NSW, this is the case where the spouse exercises his or her right within 12 months of the intestate's death: *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(i) to the definition of "value".

91. In England, see *Robinson v Collins* [1975] 1 All ER 321.

92. *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(ii) to the definition of "value".

93. Public Trustee NSW, *Submission* at 7; Trustee Corporations Association of Australia, *Submission* at 9.

Another submission supported the valuation being taken at the date of death without any further qualification.⁹⁴

5.63 Given the rapid increases that can occur in the price of real estate, the time of its valuation can make a great difference to the value of the property. This was seen in *Robinson v Collins*,⁹⁵ where “the matrimonial home was appropriated at £8,000, its value at the date of appropriation, and not £4,200, its value at the date of death of the deceased”.⁹⁶ This case was cited by the Law Commission of England and Wales to support its argument that:

[i]n the interval between the intestate’s death and the time of appropriation, house prices will often have risen quite sharply so that the statutory legacy will no longer be sufficient to enable the surviving spouse to remain in the matrimonial home.⁹⁷

5.64 The National Committee agrees that the value should be calculated at the death of the intestate. The NSW provision that takes effect when the election is made more than 12 months after the death of the intestate can be seen as unfairly prejudicial to the surviving spouse or partner, especially if the delay not of his or her making. The Committee accordingly recommends that the value of the intestate’s interest in the relevant property should be the value at the date of death.

Recommendation 17

When the spouse wishes to obtain property that is subject to a charge (being a mortgage, other charge, encumbrance or lien) at the time of the transfer and the holder of that charge agrees to the spouse assuming the liability, the value of the interest in the relevant property should be the market value of the property, less any amount needed to discharge the liability and, on the transfer of the property, the liability should pass to the spouse and the estate be exonerated from it.

The value should be the value calculated at the death of the intestate.

See Intestacy Bill 2006 cl 20(1), (2).

94. J North, *Submission* at 3.

95. *Robinson v Collins* [1975] 1 All ER 321.

96. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 35.

97. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 9. See also England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 10. See also R Atherton, “Valuations and intestacy: surviving spouse v issue” (1984) 22 *Law Society Journal* 169 at 171-172.

5.65 **The valuer.** In Victoria, the professional engaged to value the interest is a “valuer”,⁹⁸ in Queensland a “registered valuer”,⁹⁹ in ACT and WA a “qualified valuer”,¹⁰⁰ in NSW a “duly qualified agent”,¹⁰¹ and in NT a Fellow or an associate member of the Australian Institute of Valuers Incorporated, and includes a person who, in the opinion of the Minister, possesses equivalent qualifications.¹⁰² The NT and Queensland provisions define valuer by reference to another statute that deals with the professional regulation of valuers.

5.66 Valuations produced by qualified valuers may sometimes differ substantially but still be in “good faith”. Under the NSW model, a substantial overvaluation of the home could benefit the surviving spouse or partner, while under the models where the spouse must meet the difference, a substantial overvaluation of the home could benefit the surviving issue. A substantial undervaluation would be to the benefit of the surviving spouse or partner, especially if it brought the value of the estate under the threshold of the statutory legacy. The personal representative’s choice of valuer is therefore crucial. This may be problematic where the personal representative has an interest in the administration of the estate as either the surviving spouse or partner or as issue. It has, therefore, been suggested that “it would appear eminently desirable to provide for the valuer to be an independent valuer, one that is not appointed by any of the persons interested in the estate”.¹⁰³

5.67 While it is desirable to appoint a valuer who is appropriately registered and qualified, the National Committee does not consider it necessary that the valuer be independently appointed. There would appear to be insufficient evidence of any real concerns regarding the appointment of valuers to justify the additional administrative expense that would be incurred in setting up a system for independent appointment. The Committee notes that such a system would merely remove the outcome from the control of the personal representative rather than eliminate the occurrence of overvaluations. The Committee is satisfied that professional regulation will be enough to

98. *Administration and Probate Act 1958* (Vic) s 37A(6).

99. Registered under the *Valuers Registration Act 1992* (Qld) as defined in *Valuation of Land Act 1944* (Qld) s 2.

100. *Administration and Probate Act 1929* (ACT) s 49H; and *Administration Act 1903* (WA) Sch 4 cl 5.

101. *Wills, Probate and Administration Act 1898* (NSW) s 61E(1). A duly qualified agent is one qualified under the *Valuers Act 2003* (NSW).

102. *Administration and Probate Act 1969* (NT) s 74; and *Valuation of Land Act 1963* (NT) s 4.

103. R Atherton, “Valuations and Intestacy: Surviving Spouse v Issue” (1984) 22 *Law Society Journal* 169 at 170.

ensure that an objective value is determined in most cases and, therefore, recommends that the valuer be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

Recommendation 18

The valuer who determines the value of the property should be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

See Intestacy Bill 2006 cl 20(3), cl 4(1) definition of “registered valuer”.

Satisfying the value of the interest

5.68 As already noted, the jurisdictions that give the surviving spouse some right to the shared home achieve this by allowing the surviving spouse to elect to obtain the intestate’s interest in the shared home. However, there are several different ways in which the surviving spouse or partner can make satisfaction for the value of the intestate’s interest in the shared home. Most jurisdictions allow the value of the interest to be met in part from the surviving spouse or partner’s share of the estate.

5.69 In SA, Victoria, WA and Queensland, the surviving spouse or partner can provide satisfaction for the interest in the shared home, first by relying on any share of the intestate estate to which they are entitled on distribution and, then, if his or her share is insufficient to cover the value of the intestate’s interest in the shared home, by paying the difference from his or her own resources.¹⁰⁴

5.70 In NSW, the surviving spouse or partner can provide satisfaction for the shared home, first by relying on any share of the intestate estate to which he or she is entitled on distribution, but, if the value of the intestate’s interest in the shared home exceeds the surviving spouse or partner’s entitlement, any difference is then met from the share of the estate to which any issue of the intestate are entitled.¹⁰⁵

5.71 Finally, the NT and ACT provide that the surviving spouse or partner may elect to use the shared home in satisfaction of any

104. *Administration and Probate Act 1919* (SA) s 72L(1) and s 72L(4); *Administration and Probate Act 1958* (Vic) s 37A(2) and s 37A(7); *Administration Act 1903* (WA) Sch 4 cl 1(1) and cl 7(2); and *Succession Act 1981* (Qld) s 39C(2), s 39C(4). See also *Intestates’ Estates Act 1952* (Eng) Sch 2 para 1 and para 5(2).

105. *Wills, Probate and Administration Act 1898* (NSW) s 61B(13). This has particular implications for the administration of the intestate estate: see para 5.80 below.

entitlement the surviving spouse or partner may have in a share of the intestate estate.¹⁰⁶ However, these jurisdictions appear to make no provision to cover any difference that may arise if the value of the intestate's interest in the shared home exceeds the value of the survivor's share in the intestate estate.

5.72 Each of the above scenarios could potentially leave a surviving spouse with only the shared home and no other assets from the estate, assuming the value of the shared home is equal to, or greater than, any share in the estate to which the surviving spouse or partner may be entitled on distribution. In some jurisdictions, the surviving spouse or partner may also end up substantially out of pocket if he or she wishes to continue living in the shared home. While it may be considered that a home's "value is not purely monetary, but extends to the emotional investment and the sense of wellbeing and security that comes with long-term home ownership",¹⁰⁷ the continued right to the shared home may be meaningless if there are no other assets available to the surviving spouse or partner.

5.73 It may be argued that ensuring that the surviving spouse can obtain the shared home with little difficulty is desirable because it will help lessen the disruption caused by the intestate's death and will ensure some continuity of lifestyle for the spouse and any surviving dependent children.

5.74 However, while many supported an increase in the statutory legacy, there was considerably less support in other jurisdictions for the NSW option of using the issues' share in some cases to satisfy the value of the shared home. Requiring the surviving spouse or partner to meet the difference between his or her entitlement and the value of the home can be seen as protecting the interests of the issue of the intestate.¹⁰⁸ However, some submissions preferred the interests of the surviving spouse or partner and supported the NSW provision on the grounds that ensuring accommodation for the surviving partner is paramount.¹⁰⁹

5.75 It has been argued, in relation to the NSW position, that the intestate's interest in the shared home cannot be seen as going towards, or as satisfying, the partner's share if its value exceeds the

106. *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1969* (NT) s 73(1).

107. Queensland, *Parliamentary Debates (Hansard)*, 7 October 1997, Succession Amendment Bill, Second Reading at 3632.

108. N Crago, "The rights of an intestate's surviving spouse to the matrimonial home" (2000) 29 *Western Australian Law Review* 197 at 202.

109. Public Trustee NSW, *Submission* at 6; Trustee Corporations Association of Australia, *Submission* at 8.

value of that share. It has been suggested that, “[o]ne does not ... properly speak of the ‘satisfaction’ of a surviving spouse’s entitlement to receive, say, \$250,000 by the transfer to him or her of property worth \$600,000, especially when that would mean that other close family members ... would be deprived of an entitlement to \$350,000”. The better alternative may be to have the surviving partner pay any excess into the intestate estate to be distributed.¹¹⁰ One submission suggested that, if the estate has no assets other than the shared home, the surviving spouse or partner may be living beyond his or her needs. In such cases, it is submitted that the expensive house could be sold in order to pay for a more modest house and still have some funds left over.¹¹¹

5.76 There are a number of other problems with the NSW option. First, under its provisions, a surviving spouse or partner may receive a greater sum than a survivor would where the intestate did not own a home. This may be a particular problem where the family home sits on a large property, or is part of a farm or other business.

National Committee’s conclusion

5.77 In light of the National Committee’s recommendation that the right to election be extended to all property in the estate, it is clearly appropriate that the surviving spouse or partner should only be able to exercise the election in cases where he or she can afford to purchase the intestate’s interest in the relevant property, either from the value of his or her entitlement or from other available resources. This will mean that, in some cases, the surviving spouse or partner may not be able to obtain the intestate’s interest in the shared home if the value of the property is too great in proportion to the rest of the estate. Notwithstanding the general preference for benefiting the surviving partner, the circumstances in which these provisions come into play are those in which the National Committee has decided the surviving children ought to receive something if the estate can bear it. This will clearly not be achieved if a surviving spouse can obtain a greater share by electing to purchase the home using part of the issue’s share and then selling the property later. The National Committee considers that it is inappropriate to give the surviving partner an excessive benefit in cases where the shared home is of substantial value. At least in the case of small estates, there will be no question of leaving the surviving spouse “on the street” in order to meet the issue’s share. This will be achieved by setting the statutory legacy at a sufficient level to cover most estates. The National Committee, therefore,

110. N Crago, “The Rights of An Intestate’s Surviving Spouse to the Matrimonial Home” (2000) 29 *Western Australian Law Review* 197 at 199.

111. J North, *Submission* at 3.

recommends that the surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of the intestate estate to which they are entitled and, then, if the share is insufficient to cover the value, by paying the difference from other available resources. In the interests of clarity, the manner in which any shortfall is made up should be expressly stated in the legislation.

Recommendation 19

The surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of the intestate estate to which they are entitled and, then, if his or her share is insufficient to cover the value, by paying the difference from other resources that are available to him or her.

See Intestacy Bill 2006 cl 21.

Restrictions on the right to acquire property

5.78 In Queensland, ACT, WA, NT, and NSW, there are a number of situations in which the current intestacy rules will restrict the surviving spouse's right to elect to acquire the shared home.¹¹² They are generally concerned with maintaining the administrator's ability to sell or dispose of the rest of the intestate's estate. These situations generally concern shared homes forming part:

- of a building in which the intestate has an interest in the whole building;
- of a registered or registrable interest in land (in which the intestate has an interest in the whole of that interest) used (either solely or partly) for agricultural purposes;
- of a building used as a hotel, motel, boarding house or hostel at the date of the intestate's death; or
- where part of the shared home was used for purposes other than domestic purposes at the date of the intestate's death.¹¹³

Should any of these situations apply, the surviving spouse will only be entitled to elect to acquire the shared home if the court makes an

112. These restrictions are apart from any restrictions in general law such as, for example, planning restrictions on the subdivision of certain types of land.

113. *Succession Act 1981* (Qld) s 39B(1); *Administration and Probate Act 1929* (ACT) s 49K(a)-(d); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(a)-(d); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.

order to that effect. Such an order will only be made if the court is satisfied that the acquisition would not be likely to diminish the assets of the intestate or make the disposal of the assets substantially more difficult.¹¹⁴

5.79 Of the above jurisdictions, ACT, WA and NT also restrict the spouse's right if the interest in a shared house is a tenancy that will determine within two years after the intestate's death, or if the landlord would be entitled to determine the lease within that period.¹¹⁵

5.80 In NSW, 12 months after the date on which letters of administration are first taken out in respect of the intestate's estate, the spouse will lose his or her right to acquire the shared home in a number of circumstances (in addition to those above). These circumstances will arise:

- when the administrator requires the intestate's interest in the shared home to meet funeral and administration expenses, debts and other liabilities payable out of the estate of the intestate, or
- in any case when the administrator's transfer or conveyance of the interest of the intestate in the shared home to the spouse would require compliance with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW), *Conveyancing Act 1919* (NSW), *Strata Schemes (Freehold Development) Act 1973* (NSW) and *Strata Schemes (Leasehold Development) Act 1986* (NSW) – all of which concern the division of land.¹¹⁶

The former provision is necessary in NSW in light of the fact that the value of the intestate's interest in the shared home can also be met from the share of the estate to which the issue are otherwise entitled.¹¹⁷

5.81 In Victoria land that cannot be severed from the shared home is taken to be part of the shared home and express provision is made so

114. *Succession Act 1981* (Qld) s 39B(5); *Administration and Probate Act 1929* (ACT) s 49K(e), (f); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(e), (f); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.

115. *Administration and Probate Act 1929* (ACT) s 49J; *Administration Act 1903* (WA) Sch 4 cl 1(2); and *Administration and Probate Act 1969* (NT) s 75. See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(2).

116. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1).

117. See para 5.70.

that farmland (even if technically severable) cannot be severed from the shared home.¹¹⁸ This latter provision would appear to be aimed at preserving the economic value of farmland.

National Committee's conclusion

5.82 The general provisions outlined above, so far as they relate specifically to the shared home, are no longer relevant to the broader scheme proposed by the National Committee. However, the question remains whether there should be a right to challenge a spouse or partner's election where that election results in the diminution of the remaining assets of the estate or makes the disposal of assets substantially more difficult. The National Committee considers that, given the breadth of the right given to the surviving spouse, the issue who are also entitled to share in the estate should have the right to challenge an election that adversely affects the intestate estate. For the sake of convenience, personal representatives should also have the right to challenge a spouse's election in Court.

Recommendation 20

The surviving issue or personal representative should be able to apply to the court to restrict the surviving spouse or partner's right to elect to acquire any property in the estate in situations where the acquisition would be likely to diminish the assets of the intestate or make the administration of the estate substantially more difficult.

See Intestacy Bill 2006 cl 16(2), (3).

POWER OF THE PERSONAL REPRESENTATIVE TO DISPOSE OF PROPERTY

5.83 Most jurisdictions limit a personal representative's powers concerning the disposal of an intestate's interest in a shared home in two situations:

- when the surviving spouse's election is pending; and
- when the election has been made to acquire the interest.

The current law

5.84 In Queensland, WA, ACT, NT and NSW, the intestate's interest in a shared home is not to be sold, or otherwise disposed of, if the time within which an election may be made has not expired, or if to do so

118. *Administration and Probate Act 1958* (Vic) s 37A(10) and (11), inserted by *Administration and Probate (Amendment) Act 1994* (Vic) s 8.

would be contrary to an election. This restriction does not, however, stop a personal representative from disposing of such an interest as a last resort should the proceeds be needed to satisfy any of the intestate's liabilities.¹¹⁹ In the ACT and NT, this restriction also will not apply if the surviving spouse is the personal representative (or one of them).¹²⁰ In the ACT and NT, it is expressly stated that the restriction will not affect the validity of the sale of any of the intestate's estate¹²¹ and in Queensland, it will not affect the validity of the sale of the intestate's interest in the shared home.¹²²

5.85 In NSW and the NT, the intestate's interest in the shared home may be disposed of before the expiration of the period within which election may be made, if the court rejects the application of a surviving spouse to acquire the shared home.¹²³

5.86 In SA, the surviving spouse or partner is entitled to continue to live in the shared house until the expiration of the period in which he or she can elect to acquire the house. However, the administrator (personal representative) may sell the intestate's interest in a shared house before the period within which an election may be made has expired, if the spouse or partner has ceased to live there.¹²⁴

National Committee's conclusion

5.87 The National Committee is of the view that there should be a general limitation on the power of a personal representative to dispose of property in the estate that is or may be subject to the right of election. Subject to the following paragraphs, most of the provisions described above have some utility and should be adopted in a form that applies to the more general scheme now proposed.

119. *Succession Act 1981* (Qld) s 39D(3); *Administration Act 1903* (WA) Sch 4 cl 6(2); *Administration and Probate Act 1929* (ACT) s 49L(1); *Administration and Probate Act 1969* (NT) s 77(1); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(1).

120. *Administration and Probate Act 1929* (ACT) s 49L(3); and *Administration and Probate Act 1969* (NT) s 77(3). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(4).

121. *Administration and Probate Act 1929* (ACT) s 49L(4); and *Administration and Probate Act 1969* (NT) s 77(4).

122. *Succession Act 1981* (Qld) s 39D(4). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(5).

123. *Administration and Probate Act 1969* (NT) s 77(2); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(4).

124. *Administration and Probate Act 1919* (SA) s 72M.

5.88 Given the extension of the provisions to cover property other than the shared home, a provision should be inserted which allows a personal representative to dispose of property, other than land, that is perishable or likely to deteriorate or decrease in value. Such a provision is necessary to avoid loss to the estate during the albeit relatively brief period when the surviving spouse or partner is deciding whether to exercise his or her right of election.

5.89 A provision that allows property to be disposed of before the expiration of the period within which election may be made if the court rejects the surviving spouse's application may unnecessarily restrict the exception to cases where there has been a hearing on the merits. The National Committee, therefore, considers that the provision should also encompass the situation where an application has been withdrawn prior to determination by the court.

5.90 The National Committee is further of the view that the removal of the restrictions in cases where the spouse or partner is only one of the personal representatives should not be included since it is conceivable that the personal representatives, as a group, could act against the wishes of the spouse or partner.

5.91 The National Committee also considers that provisions should be made for cases where the spouse or partner chooses not to exercise the right to elect. In such cases, notification to the personal representatives in writing should be sufficient to allow them to dispose of assets in the estate if required.

Recommendation 21

The personal representatives should not sell or otherwise dispose of the property in the estate when:

- (a) the surviving spouse or partner's election is pending; or
- (b) the surviving spouse or partner has elected to acquire the interest, except where:
 - (c) the proceeds of such a sale are needed as a last resort to satisfy any of the intestate's liabilities;
 - (d) the property is perishable or likely to decrease rapidly in value;
 - (e) the surviving spouse or partner is also the sole personal representative of the estate;
 - (f) the election requires the court's authorisation and an application of the surviving spouse or partner to acquire the relevant property has been refused or the application has been withdrawn; or
 - (g) the surviving spouse or partner has notified the personal representatives in writing that he or she will not elect to obtain any property.

These restrictions should not affect the validity of the sale of any of the intestate's estate.

See Intestacy Bill 2006 cl 22.

Where the spouse is a trustee

5.92 When the deceased has died intestate, the surviving spouse or partner may be the intestate's personal representative and, as such, the trustee of the intestate estate for those entitled. In all jurisdictions, where the spouse or partner is a trustee, express provision is made that he or she may acquire the intestate's interest in the shared home notwithstanding his or her role as trustee.¹²⁵ Law reform agencies that have considered this question have also proposed similar provisions.¹²⁶

5.93 If the spouse, as trustee, is not entitled to acquire the intestate's interest in the shared home, that interest will remain part of the

125. *Succession Act 1981* (Qld) s 39C(5); *Administration and Probate Act 1929* (ACT) s 49M; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 7(2); *Administration and Probate Act 1969* (NT) s 78; *Administration and Probate Act 1919* (SA) s 72L(5); *Administration and Probate Act 1958* (Vic) s 37A(9)(a); and *Administration Act 1903* (WA) Sch 4 cl 7(1). See also *Intestates' Estates Act 1952* (Eng) Sch 2 para 5(1).

126. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 44.

intestate estate to be divided and distributed in accordance with the rules, potentially leaving the spouse without a residence.

5.94 Some submissions supported an express provision that the surviving spouse or partner should be able to acquire the intestate's interest in the shared home notwithstanding any role as trustee.¹²⁷

5.95 The National Committee accordingly recommends that, where the spouse or partner is a trustee, he or she should be able to acquire property from the estate notwithstanding his or her role as trustee.

Recommendation 22

Where the spouse or partner is a trustee, express provision should be made that he or she may acquire property from the estate notwithstanding his or her role as trustee.

See Intestacy Bill 2006 cl 16(4).

127. Law Society of Tasmania, *Submission* at 10; Public Trustee NSW, *Submission* at 9; Trustee Corporations Association of Australia, *Submission* at 11; J North, *Submission* at 3.