8. Next of kin – preliminary issues

- Per stirpes or per capita distribution?
- Persons entitled in more than one capacity
- Relationships between siblings

8.1 This chapter considers a number of issues that are generally relevant to the distribution of an intestate's estate to the next of kin.

PER STIRPES OR PER CAPITA DISTRIBUTION?

8.2 If some people within a group of those who are entitled to take on intestacy die, their descendants are sometimes entitled to take their share. The situations in which this can occur differ from jurisdiction to jurisdiction. Mostly, this will occur where there are surviving issue of deceased children of the intestate or where there are surviving children or issue of siblings or aunts and uncles of the intestate.

8.3 There are two ways in which the distribution to descendants can be managed. The distribution can be either *per stirpes* (by stock) or *per capita* (by head). Intestate distribution is generally *per stirpes*.

8.4 *Per stirpes* distribution means that the entitlement of descendants will be determined by the entitlement of those who have predeceased them and would otherwise have been entitled to take. For example, the grandchildren of an intestate will only take proportionately among themselves the share that their deceased parent would have taken if he or she were alive.

8.5 On the other hand *per capita* distribution gives each person an equal share regardless of the degree of his or her descent. For example, the grandchildren of an intestate whose parent has predeceased the intestate will take in equal shares together with the other surviving children of the intestate.

Current Australian provisions

8.6 Currently, where representation among descendants is permitted, distribution is generally *per stirpes*, with *per capita* distribution permitted in SA and Victoria in certain limited circumstances:

- In SA, the nephews and nieces of the intestate take as if they were issue of the intestate if all the intestate's siblings are dead, and the first cousins of the intestate take as if they were issue of the intestate if all the intestate's aunts and uncles are dead.[1] This is effectively a *per capita* distribution, so long as none of the nieces and nephews or cousins have died leaving issue.

1. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).

- In Victoria, the nephews and nieces of the intestate take *per capita* if all the intestate's siblings are dead.[2]

8.7 The Victorian and SA variations are an attempt to achieve a more equitable distribution where the people entitled to take on intestacy are the nearest surviving generation to the intestate. For example, one sibling may have one child but another sibling may have three children. If both siblings die before the intestate, a *per stirpes* distribution would give one half to the single child and the other half to be shared equally between the other three children. This means that some nieces and nephews of the intestate will receive more than others, even though they are all of the nearest surviving generation to the intestate. A limited *per capita* distribution among the surviving nephews and nieces ensures a more equitable distribution, with each one receiving a one-quarter share.

8.8 The current Australian provisions appear illogical in only allowing the descendants of collaterals to take *per capita*. Some would argue that there is no reason in principle why the issue of the intestate should not also take *per capita* if, for example, all the intestate's children were to die leaving only grandchildren.

Law reform developments

Queensland

8.9 In 1978, the Queensland Law Reform Commission recommended the adoption of *per capita* distribution in situations where all the persons entitled were of the same degree of relationship.[3] In making this recommendation, Queensland was following recommendations made by the Ontario Law Reform Commission in 1974[4] and the text of the US *Uniform Probate Code*.[5] The Queensland recommendations were enacted in 1981.[6] However, problems were encountered, particularly in identifying all persons within the same degree of relationship.[7] The provisions were repealed in 1997[8] following further recommendations by the Queensland Law Reform Commission.[9]

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2. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi). This was also the case in Manitoba: See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 27; and Alberta: See *Intestate Succession Act* RSA 1980 c I-9 s 7.
3. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
4. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 167-168.
5. *Uniform Probate Code* s 2-103 (as at 1985).
6. See *Succession Act 1981* (Qld) s 36 (repealed).
7. Succession Law Section, Queensland Law Society, *Consultation*.

England and Wales

8.10 The Law Commission of England and Wales in 1989 made no recommendation for the introduction of *per capita* distribution, observing that there was "little public call for change in the method of distribution".[10]

Canada

8.11 Some law reform agencies in Canada have proposed amendments to the system of *per stirpes* distribution. In 1967, the Ontario Law Reform Commission floated the possibility that issue, where they are of the "same kindred" (for example, all grandchildren) should take their shares *per capita*.[11] The Commission, in its 1974 report, adopted this proposal and extended it to apply *per capita* distribution where the surviving collateral relatives were all of the same degree.[12] This recommendation was adopted in 1978 so that, in Ontario, the estate is now divided initially at the generation closest to the intestate that has at least one surviving member.[13]

8.12 On the other hand, the Law Reform Commission of British Columbia, in 1983, concluded that amendment of the current law was "not called for", on the basis that arguments for and against limited *per capita* distribution were "equally balanced, and preference is largely a subjective matter".[14]

8.13 In more recent times, some have considered even more complex "*per capita* at each generation" schemes, whereby the shares of any predeceased persons in one generation are combined and shared *per capita* amongst their survivors in the next generation.[15] The aim is, first, to achieve equality between those entitled to take in each generation and, secondly, to avoid a person from a more remote generation to the intestate becoming entitled to a greater share than a

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8. *Succession Amendment Act 1997* (Qld) s 9.
9. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 58.
10. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 48. See also England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 3.17 and para 5.8.
11. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 581 (rev).
12. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 168.
13. See *Succession Law Reform Act* RSO 1990 c S-26 s 47(1) and s 47(2).
14. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38.
15. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 39-42.

person from a closer generation. So, for example, a surviving great grandchild of the intestate cannot take more than any grandchild of the intestate who is also entitled.

8.14 Manitoba adopted this system in 1988.[16] A limited system of *per capita* distribution was already in place in Manitoba in 1985 so that nephews and nieces of the intestate took *per capita* when all the intestate's brothers and sisters had predeceased him or her.[17] The Manitoba Law Reform Commission proposed further amendments to the system so as to "ensure the equal treatment of grandchildren when no children of the intestate survive" and to "achieve a result likely supported by a majority of Manitobans".[18] The Manitoba Commission finally recommended the employment of a "*per capita* at each generation" scheme so as to "produce the best, and most logically consistent, result in most survivor situations".[19]

United States Uniform Probate Code

8.15 In 1990, the National Conference of Commissioners on Uniform State Law adopted a similar system of *per capita* distribution at each generation in their revised *Uniform Probate Code*.[20] The Commissioners observed that this system "is more responsive to the underlying premise of the original UPC system, in that it always provides equal shares to those equally related".[21]

Arguments for and against

8.16 There are many models available for implementing *per capita* and *per stirpes* distribution schemes. The Alberta Law Reform Institute has suggested that "there is no public policy argument favouring one system over another" and preferred to adopt the model that best reflected the "views of the majority of its citizens".[22] As noted above, some law reform agencies have concluded that no change from *per stirpes* distribution is warranted.

16. *Intestate Succession Act* CCSM c I-85 s 5.
17. *Devolution of Estates Act* CCSM c D-70 s 8(3). See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 27.
18. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 39.
19. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 42.
20. Uniform Probate Code s 2-106(b).
21. Uniform Probate Code s 2-106 (Comment).
22. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 144.

Per stirpes distribution

8.17 In general, *per stirpes* distribution of an estate can be justified on the grounds that it would replicate the distribution that would generally occur if the person entitled had died after the intestate. That is, the estate would most likely go to his or her surviving children, and so on.[23] It can also be justified on the grounds of convenience of administration,[24] particularly since it allows the personal representatives to reserve the shares of "missing" relatives and to make interim distributions to relatives who are known.[25]

8.18 However, there are also said to be some problems with *per stirpes* distribution. First, it treats people of the same generation unequally, depending upon the number of siblings they have.[26] So, for example, a grandchild of the intestate who is the only child of his or her deceased parent will receive a greater share than another grandchild whose parent is dead but who also has surviving siblings.[27] Some trustee companies have reported receiving queries from people who have inherited less than their cousins from the same estate.[28] Secondly, a descendant of remoter degree may potentially receive more than a descendant of closer degree. For example, a surviving great grandchild of the intestate who is the only child of an only child would receive more than a surviving grandchild of the intestate who has three living siblings.[29]

Per capita distributions

8.19 *Per capita* distributions include limited *per capita* distributions, for example, where all of one generation are dead and have left issue who can take, as well as more extensive schemes, for example, *per capita* distribution at each generation.

8.20 Such schemes are generally seen as a way of removing the unequal distribution that is said to result in some cases from a strict *per stirpes* distribution.

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23. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 139-140.
24. G Clarke, "Succession - Amendments to the Intestacy Rules Including De Facto Recognition" (1997) 17(11) *Proctor* 18 at 19. See also para 8.24-8.25 below.
25. Trustee Corporations Association of Australia, *Submission* at 14.
26. See, eg, G Clarke, "Succession - Amendments to the Intestacy Rules Including De Facto Recognition" (1997) 17(11) *Proctor* 18 at 19.
27. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 140.
28. Trustee Corporations Association of Australia, *Submission* at 14.
29. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 140.

8.21 It can be argued, for example, that where a person is survived only by grandchildren, that person would most likely want to distribute the estate in equal shares, that is *per capita*, rather than *per stirpes*.[30] In 1987, the joint editorial board of the Uniform Probate Code conducted a survey of clients of members of the American College of Probate Counsel. The majority of those surveyed (71/1%) preferred a system of *per capita* distribution at each generation. The survey also found that there was a "striking difference between what lawyers believe their clients want..., and what the clients themselves want". Responses from the lawyers themselves indicated a preference for advising clients to use a traditional *per stripes* method to distribute their estate.[31] Based on this survey and other surveys in North America,[32] the Alberta Law Reform Institute has recently argued that most Albertans would prefer a *per capita* distribution at each generation.[33] The Alberta proposals for *per capita* distribution at each generation were said to bring that province closer to the goal of a "system that represents what most people would want to do in a given situation".[34]

8.22 If all of one generation have predeceased the intestate, there would appear to be no valid reason why some of their children should receive less if they are from a family with more siblings than some of the others. In 1978, the Queensland Law Reform Commission considered that the unequal distribution arising from a *per stirpes* distribution in such circumstances was "unwarranted".[35]

8.23 On the other hand, provisions such as those in Victoria and South Australia may be seen as arbitrary. For example, it can be argued that there is no reason why the share of a grandchild of the deceased should depend on whether any of that grandchild's aunts or uncles are still alive.[36] Even if one were to accept that *per stirpes*

30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 168.
31. R H Young, "Meaning of 'Issue' and 'Descendants'" (1988) 13 *Probate Notes* 225.
32. See, eg, "Iowans' Dispositive Preferences" (1978) 63 *Iowa Law Review* 1041 at 1111 and 1146; and M L Fellows, R J Simon, T E Snapp and W D Snapp, "An Empirical Study of the Illinois Statutory Estate Plan" [1976]) *University of Illinois Law Review* 717 at 741.
33. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 145.
34. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 147.
35. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
36. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38.

distribution is unfair where all of the nearest generation have predeceased the intestate, it is arguably equally unfair when, for example, someone in the nearest generation survives and there is still an unbalanced distribution among the children of his or her deceased siblings.

8.24 It is possible that any system involving *per capita* distribution may be productive of extra expense and delay in the administration of estates.[37] For example, distribution may be delayed if the administrator is unable to trace the descendants of one branch of a family. This is because *per capita* distribution requires the identification of all members of a class before distribution can take place.[38] The problem is likely to be exacerbated the more distant the family connections become.[39]

8.25 Indeed, schemes that seek to go further by imposing *per capita* distribution at each generation would introduce an unwarranted level of complexity and delay beyond that already involved in an ordinary *per stirpes* distribution. This is especially so in cases where some potential beneficiaries cannot be traced immediately.

8.26 Some would argue that schemes such as that in Manitoba should not be adopted because they involve such a minor change of result in such a limited range of circumstances that the "argument of fairness is not so compelling".[40]

Submissions and consultations

8.27 Some submissions addressed the question of *per stirpes* or *per capita* distribution in the context of distribution to siblings and their descendants. One of these supported the issue taking *per stirpes* their parent's entitlement, preferring *per stirpes* to *per capita* distribution for reasons of equitable distribution.[41] Others, however, supported the idea of the children of deceased brothers and sisters taking *per capita* the interest of all deceased brothers and sisters.[42]

37. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 48.
38. See Succession Law Section, Queensland Law Society, *Consultation*.
39. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 57-58.
40. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 147 n 396.
41. Public Trustee NSW, *Submission* at 12.
42. J North, *Submission* at 4-5; Law Society of Tasmania, *Submission* at 12.

8.28 Other submissions considered that *per capita* distribution ought to be employed where cousins of the intestate stand to inherit.[43]

8.29 One submission expressed a variety of views but tended towards applying *per stirpes* distribution to all intestacies on the grounds of simplicity.[44] Other submissions supported *per stirpes* distribution for reasons of "equitable distribution"[45] or because it allows interim distributions to take place when known family members cannot be traced immediately.[46]

National Committee's conclusion

8.30 The current variations in Victoria and SA are illogical in that they only extend to the descendants of some collateral relatives and not to descendants of the children of the intestate.

8.31 Even if the provisions were to extend to all cases of representation, the application of *per capita* distribution only when the whole of one generation has predeceased the intestate appears to be arbitrary. Inequitable results can be achieved in cases where only some of the elder generation are dead.

8.32 The National Committee acknowledges that a majority of people would probably prefer the equality achieved by a system of *per capita* distribution at each generation. However, it should be noted that substantial differences are only likely to arise where the whole of one generation predeceases the intestate. Attempts to ameliorate unequal treatment between members of more remote generations and those of closer generations are arguably unnecessary as being likely to occur in only an insignificant proportion of cases. Such cases would involve, for example, at least one great grandchild of the intestate being the only surviving member of one branch of the family.

8.33 Any *per capita* system of distribution will also involve a degree of complexity and delay. For example, attempts to achieve equality among the different generations will only be productive of greater complexity in the administration of intestate estates. *Per capita* distribution will only delay the administration of some estates where difficulty is encountered tracing the members of some classes, for example, where the deceased has lost touch with an estranged child

43. Tasmania, Office of the Public Trustee, *Consultation*; J North, *Submission* at 5.
44. Trustee Corporations Association of Australia, *Submission* at 14.
45. Public Trustee NSW, *Submission* at 11.
46. Public Trustee of Queensland, *Submission* at 3.

who may or may not still be alive and who may or may not have produced issue.

8.34 The National Committee concludes that *per stirpes* distribution should be employed in all cases. It is important to note here that the system the National Committee is proposing is a default system. People who feel strongly about achieving the equality that results from a *per capita* system of distribution should order their affairs accordingly and execute a will.

Recommendation 28

Distribution to relatives of the intestate should be *per stirpes* in all cases.

See Intestacy Bill 2006 cl 28(4), cl 30(3), cl 32(3).

PERSONS ENTITLED IN MORE THAN ONE CAPACITY

8.35 Most of the intestacy provisions in Australia state that spouses are to be treated as separate persons for the purposes of distribution under intestacy.[47] The National Committee has already observed that the question of spouses being treated as separate persons should go without saying, for example, where parents, grandparents or married cousins are entitled to distribution.[48]

8.36 However, a particular issue arises where, for example, an intestate has nieces and nephews from different siblings and some of these nephews and nieces (being cousins) have married each other. If those nephews and nieces predecease the intestate but are survived by children, these children will represent each of their parents and be entitled to take twice as much as they would be entitled to if only one parent were entitled. The same would apply where, for example, a maternal uncle and a paternal aunt marry and have children.

8.37 The law is uncertain as to the result in these cases. The only reported Australian decisions were delivered under old provisions which followed the Statute of Distributions more closely. So, in Victoria in 1945 (where surviving spouses had to share with the nearest next of kin), the Supreme Court held that the wife of the

47. *Wills, Probate and Administration Act 1898* (NSW) s 61B(9); *Administration and Probate Act 1969* (NT) s 61(2)(a); *Administration and Probate Act 1929* (ACT) s 44(2)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(viii); and *Administration and Probate Act 1935* (Tas) s 44(8). See also *Administration of Estates Act 1925* (Eng) s 46(2); and *Law of Property Act 1925* (Eng) s 37. In Queensland *Property Law Act 1974* (Qld) s 15 applies generally to the "acquisition of any interest in property".
48. See para 2.19-2.23.

intestate could take as both wife and first cousin.[49] However, Justice Zelling of the South Australian Supreme Court held, in 1976, that first cousins who were entitled as children of both the intestate's paternal aunt and the intestate's maternal brother, could only take one share each equally with the other first cousins of the intestate.[50] The South Australian decision can be distinguished on the grounds that the former distribution regimes permitted no representation beyond the issue of brothers and sisters of the intestate, so each first cousin took *per capita* as a first cousin, without reference to his or her deceased parents.[51] Today, first cousins of the intestate, except in NSW, take the share that their deceased parent would otherwise have taken. It is possible, therefore, that a first cousin could take the share of each deceased parent and, thereby, receive a double share.

Law reform developments

8.38 American States that follow the Uniform Probate Code have adopted a provision that entitles a person who is related to the intestate through two lines of relationship to "only a single share based on the relationship that would entitle the individual to the larger share".[52] This provision, however, may have been included in order to deal with the situation that is possible under the Uniform Probate Code that persons who have been adopted by other relatives, such as grandparents, uncles or siblings, retain both their pre-adoption and post-adoption rights on intestacy.[53]

Submissions

8.39 Submissions generally supported spouses being treated as separate persons in this context.[54]

8.40 One submission suggested that such perceived "double dipping" should be allowed since people who are entitled in more than one capacity will have "fewer members in their extended family (thus less

49. See, eg *In re Morrison; Trustees Executors and Agency Co Ltd v Comport* [1945] VLR 123, noted at (1945) 19 ALJ 78.
50. *In the Estate of Cullen* (1976) 14 SASR 456.
51. See also *Re Adams* (1903) 6 OLR 697 (HC).
52. See, eg, *Montana Code Annotated 2005* s 72-2-123.
53. *Montana Code Annotated 2005* s 72-2-124(2). See also Uniform Probate Code s 2-113 and comment; J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 730 n 77 and 725-727.
54. Public Trustee NSW, *Submission* at 13; J North, *Submission* at 5.

chance to inherit from other relatives) and [share] more genetic material with the intestate".[55]

8.41 The National Committee considers that it is entirely appropriate that intestacy beneficiaries should be able to receive each of their deceased parents' shares by representation. To allow otherwise would effectively achieve the same outcome as would have been achieved before the married women's property reforms of the 19th century and override the provisions stating that spouses are to be treated as separate persons. The provisions that spouses are to be treated as separate persons had their origins in the English *Administration of Estates Act 1925* (Eng) which stated that "a husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons".[56] This was to overcome the effect of the law before the married women's property reforms whereby a gift to a husband, his wife and another person was taken to be a gift of a one-half share to the husband (and wife) and a one-half share to the other person. It was not, in absence of contrary intention, taken to be a gift of a one-third share to the husband, a one-third share to the wife and a one-third share to the other person.[57] To require that the children of deceased parents who were each entitled to a share from the intestate estate receive only one share, rather than two, would effectively be treating the parents as if they were one person. This clearly runs counter to the intent of the provisions which state that spouses are to be treated as separate persons.

8.42 There are also practical problems with trying to limit such beneficiaries to a single share each, especially when distribution is *per stirpes*. Assume you have a maternal aunt and a paternal uncle of the intestate who marry and have three children. The intestate dies with no surviving issue, siblings, parents or grandparents. Consider how a *per stirpes* distribution could be managed in the following cases if the beneficiaries were limited to a single share:

1. The maternal aunt has died but the paternal uncle has not.
2. The maternal aunt has died, survived by three other siblings, and the paternal uncle has died, survived by four other siblings.

55. Trustee Corporations Association of Australia, *Submission* at 17.
56. *Administration of Estates Act 1925* (Eng) s 46(2).
57. See, eg, *Gordon v Whieldon* (1848) 11 Beav 170; 50 ER 782. See also *Halsbury's Laws of England* (2nd edition, Butterworth & Co, 1935) Vol 16 at para 964.

3. The maternal aunt and paternal uncle have both died but are survived only by their three children and one child of the maternal aunt's previous marriage.

For the sake of simplicity, the National Committee considers that persons should not be limited to a single share if they are entitled to more than one.

Recommendation 29

Persons entitled to take in more than one capacity ought to be entitled to take in each capacity.

See Intestacy Bill 2006 cl 33.

RELATIONSHIPS BETWEEN SIBLINGS

8.43 Two of the general categories, namely the intestate's brothers and sisters and brothers and sisters of the intestate's parents (that is, aunts and uncles), raise the question of what are traditionally referred to as relationships of the whole and half blood. Siblings who share both parents are relatives of the whole blood and siblings who have only one parent in common are relatives of the half blood (also referred to as half-brothers or half-sisters).

8.44 Most jurisdictions state that the distinction between whole and half blood is immaterial for the purposes of determining entitlement,[58] so that siblings with only one parent in common are entitled to take together with siblings who have both parents in common. (Siblings with only one parent in common may, therefore, benefit by the possibility of inheriting from two family groupings instead of one.) Such provisions are said to codify the common law position.[59]

8.45 However, NSW draws a distinction between siblings of the whole blood and siblings of the half blood, so that siblings with both parents in common and their issue are entitled to take before siblings with only one parent in common and their issue.[60] The NSW provision

58. *Succession Act 1981* (Qld) s 34(2); *Administration Act 1903* (WA) s 12B; *Administration and Probate Act 1929* (ACT) s 44(2)(b); *Administration and Probate Act 1969* (NT) s 61(2)(b); *Administration and Probate Act 1919* (SA) s 72B(2); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vii); and *Administration and Probate Act 1935* (Tas) s 44(7)(a) and (c). See also *Administration Act 1969* (NZ) s 77 It 6 and It 7 and Uniform Probate Code s 2-107.
59. See Law Reform Commission of British Columbia, *Statutory Succession Rights* (Working Paper 35, 1982) at 28.
60. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v).

reversed a decision of the House of Lords in 1690.[61] That decision held that collaterals of the half blood ranked equally with collaterals of the whole blood in taking on intestacy.

8.46 The distinction between relatives of the whole and half blood was also employed under the old English law relating to the inheritance of land under primogenitor. In such cases, for example, brothers of the half blood could only inherit after sisters of the whole blood, and so on.[62] This and other such distinctions in the old law of heirship were described in 1881 as "precious absurdities in the English law of real property".[63]

Law reform developments

Australia

8.47 The Law Reform Committee of South Australia observed in 1974:

> There are many families in which the half blood and the whole blood live together perfectly happily and it has been the experience of at least one member of this Committee that when distinctions between the whole and the half blood have been made by will, they have been productive of great unhappiness.[64]

The Law Reform Committee of South Australia recommended against the incorporation of such a distinction.[65]

Canada

8.48 In Canada, it would appear that provisions mostly codified the common law position that siblings of the half blood could take equally with siblings of the whole blood. The Law Reform Commission of British Columbia noted an old provision whereby "ancestral property" could only be inherited by next of kin of the whole blood. This provision was repealed in 1925 to bring the rules relating to real property into line with those that already applied to personal property.[66]

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61. *Watts v Crooke* (1690) Shower PC 108; 1 ER 74.
62. Inheritance Act of 1833 (3&4 William IV c 106) s 9.
63. *In re Goodman's Trusts* (1881) 17 ChD 266 at 299 (James LJ).
64. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7.
65. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7.
66. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 16.

8.49 In 1999, the Alberta Law Reform Institute concluded that there was nothing wrong with the current Alberta provision which ranks kindred of the half blood equally with kindred of the whole blood.[67]

Submissions and consultations

8.50 Most submissions supported making the distinction between whole blood and half blood relatives immaterial in intestacy.[68] Reasons in support of this view included:

- uniformity with the majority of Australian jurisdictions;[69]
- the distinction was not in line with community expectations;[70] and
- the distinction merely added complexity.[71]

An example was given at one consultation of half-brothers and sisters looking after a sibling with a disability. When that sibling died, in NSW, only the siblings of full blood would be entitled, those of half blood would not be.[72]

8.51 However, another submission raised the possibility of a half-sibling inheriting who had absolutely no connection with the deceased. The example was given of an elderly person dying intestate leaving two siblings who were unaware of the existence of siblings from an earlier relationship of their father which had taken place over 75 years ago. These previously unknown half-siblings and their descendants would, under the provisions in most jurisdictions, be able to share in the distribution.[73]

The National Committee's view

8.52 In reaching its conclusion, the National Committee has had to weigh up the different scenarios that may arise in relation to half-siblings. A distribution scheme for intestate estates should be a default mechanism that serves the majority of likely cases. Given the

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67. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 179.
68. J North, *Submission* at 4; Public Trustee NSW, *Submission* at 12; *Sydney Consultation 2*; Trustee Corporations Association of Australia, *Submission* at 16; Law Society of Tasmania, *Submission* at 13.
69. Public Trustee NSW, *Submission* at 12
70. *Sydney Consultation 2*.
71. *Sydney Consultation 2*.
72. *Sydney Consultation 2*.
73. See L Reid, *Submission*.

modern acceptance of relationship breakdown and the prevalence of melded families, it is more likely that people will have been raised with, or at least know, their half-siblings. The Committee considers that the scenario of a previously unknown half-sibling is rather less likely to occur.

8.53 The National Committee therefore agrees with the views in the majority of submissions and consultations. In tracing family relationships for the purposes of distribution on intestacy it should be immaterial whether siblings have one parent or both parents in common.

Recommendation 30

The distinction between siblings who have one parent in common and those who have both parents in common should be immaterial for determining entitlements on intestacy.

See Intestacy Bill 2006 cl 4(1) definition of "brother/sister".