

## 9. Next of kin – general order of distribution

- Issue
- Parents
- Brothers and sisters
- Descendants of brothers and sisters
- Maternal and paternal branches of the family
- Grandparents
- Aunts and uncles
- Setting a limit

9.1 When an intestate is not survived by a spouse or partner, each jurisdiction makes provision for the distribution of the intestate estate to the next of kin, that is the nearest relatives of the deceased and, in some degree, their issue. Each jurisdiction has adopted the following broad order of those relatives of the intestate who are entitled to take:

- children and their descendants; then
- parents; then
- brothers and sisters; then
- grandparents; and then
- aunts and uncles.

9.2 While the above applies as a general scheme, each jurisdiction makes different provision with respect to each of the categories. So, for example, there is some difference among the jurisdictions about the extent, if any, to which descendants of siblings or aunts and uncles should be entitled to take. Also there is some debate as to whether recognition should be given to both maternal and paternal sides of an intestate's family where grandparents and aunts and uncles are entitled to take.

9.3 This order is broadly reflective of all schemes that have departed from the system of inheritance by degrees of relationship established by the old *Statute of Distributions*. The *Statute of Distributions* established an order whereby those next of kin in closest relationship to the intestate were entitled to take in preference to relatives of remoter degree. So, for example, parents were entitled as relatives of the first degree, brothers and sisters were entitled together with grandparents as relatives of the second degree and nephews and nieces, aunts and uncles and great grandparents were entitled as relatives of the third degree and so on. It is generally felt that the modern provisions, which give prominence to those who are "closer" in relationship to the intestate, would accord more with the presumed intentions of those who die intestate.<sup>1</sup>

9.4 Submissions supported the general order of distribution outlined above, subject to some variation in detail.<sup>2</sup>

- 
1. See A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 72.
  2. Public Trustee NSW, *Submission* at 12; J North, *Submission* at 4; Law Society of Tasmania, *Submission* at 13.

9.5 Subject to the following recommendations, the National Committee considers that the general order of distribution outlined above should be preserved.

## ISSUE

9.6 Where an intestate has been survived by issue but not by a spouse or partner, all the jurisdictions provide means for the intestate's estate to flow to the intestate's issue or to be divided amongst the issue on a *per stirpes* basis where more than one survive.<sup>3</sup> There is no reason to change this arrangement.

### Recommendation 31

Where an intestate is not survived by a spouse or partner, the issue of the intestate should take their share *per stirpes*.

See Intestacy Bill 2006 cl 28.

## PARENTS

9.7 If the intestate is not survived by a spouse or de facto partner, nor by any issue, all jurisdictions provide that the intestate's surviving parent, or parents, will be next entitled. In all jurisdictions except WA, the surviving parent is entitled to the whole of the intestate's estate unless both parents survive, in which case the estate is to be divided equally between them.<sup>4</sup>

9.8 However, in WA, if the intestate dies without spouse or partner and without issue, but leaves a parent or parents and brothers and/or sisters and/or children of a deceased brother or sister, the surviving

3. *Succession Act 1981* (Qld) s 35, s 36A, Sch 2 Pt 2 It 1; *Administration and Probate Act 1929* (ACT) s 49(1), s 49B, Sch 6 Pt 6.2 It 1; *Wills, Probate and Administration Act 1898* (NSW) s 61B(1), (4), s 61C; *Administration and Probate Act 1969* (NT) s 66(1), s 68; Sch 6 Pt 4 It 1; *Administration and Probate Act 1919* (SA) s 72G(c), s 72I; *Administration and Probate Act 1935* (Tas) s 44(5), s 46(1); *Administration and Probate Act 1958* (Vic) s 52(1)(b)-(ea), s 52(1)(f); and *Administration Act 1903* (WA) s 14(1) Table It 5, s 14(2a), (2b). See also *Administration Act 1969* (NZ) s 77 It 4, s 78(1), (2); *Administration of Estates Act 1925* (Eng) s 46(1)(ii).
4. *Succession Act 1981* (Qld) s 35 and Sch 2 Pt 2 It 2; *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.2 It 2; *Wills, Probate and Administration Act 1898* (NSW) s 61B(5); *Administration and Probate Act 1969* (NT) Sch 6 Pt 4 It 2; *Administration and Probate Act 1919* (SA) s 72J(a); *Administration and Probate Act 1935* (Tas) s 44(6); *Administration and Probate Act 1958* (Vic) s 52(1)(b)-(ea); and *Administration Act 1903* (WA) s 14(1) Table It 7. See also *Administration Act 1969* (NZ) s 77 It 5; and *Administration of Estates Act 1925* (Eng) s 46(1)(iii) and (iv).

parents are entitled to the first \$6,000 of the estate and, in relation to any amount in excess of the first \$6,000, the parents will be entitled to half of the remaining estate (in equal shares if both parents survive), and the surviving brothers and sisters or the children of deceased brothers and sisters will be entitled to the other half.<sup>5</sup>

9.9 In 1973, the Law Reform Commission of Western Australia preferred the approach taken by all other Australian jurisdictions of giving the whole estate to the surviving parent or parents of the intestate.<sup>6</sup> This recommendation has not been implemented.

9.10 Submissions generally agreed that parents should be entitled next after issue.<sup>7</sup> One submission added that no other relatives should be entitled to take together with the parents of the intestate on the basis that the degree of consanguinity should be a test of the fairness of a distribution. Parents would, therefore, rank ahead of siblings of the intestate.<sup>8</sup> Other submissions, however, supported allowing siblings to share in the distribution where parent also survived.<sup>9</sup>

9.11 There would appear to be no reason to depart from the position adopted by the vast majority of Australian jurisdictions.

---

#### Recommendation 32

---

Where an intestate is not survived by a spouse or partner, or issue, the surviving parents should be entitled to take in equal shares.

See Intestacy Bill 2006 cl 29.

## BROTHERS AND SISTERS

9.12 In each jurisdiction, if the intestate is not survived by a spouse or partner, issue or parents, the brothers and sisters of the intestate who survive are entitled to take.<sup>10</sup>

- 
5. *Administration Act 1903* (WA) s 14(1) Table It 6.
  6. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at 9.
  7. Trustee Corporations Association of Australia, *Submission* at 15; Public Trustee NSW, *Submission* at 11.
  8. Trustee Corporations Association of Australia, *Submission* at 15.
  9. Law Society of Tasmania, *Submission* at 12; J North, *Submission* at 4.
  10. *Succession Act 1981* (Qld) s 37(1)(a); *Administration and Probate Act 1929* (ACT) s 49C(1)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b); *Administration and Probate Act 1969* (NT) s 69(1)(a); *Administration and Probate Act 1919* (SA) s 72J(b); *Administration and Probate Act 1935* (Tas) s 44(7)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v)-(vi); *Administration Act 1903* (WA) s 14(1) Table It 8. See also

9.13 One view expressed in consultations is that there is now a stronger preference among testators for benefiting nephews and nieces instead of brothers and sisters.<sup>11</sup> However, the survey of wills in the NSW Probate Registry found that in cases where the deceased had no spouse or children, the majority of testators provided for brothers and sisters (33.3%) and their children, being the testators' nephews and nieces (24.6%).<sup>12</sup>

9.14 There is no compelling reason to change the current arrangement, especially since nephews and nieces will usually either inherit when their parents die or become entitled as children of deceased brothers and sisters.

---

#### Recommendation 33

Where an intestate is not survived by a spouse or partner, or issue or parents, the brothers and sisters should be entitled to take.

See Intestacy Bill 2006 cl 30(1), (2).

## DESCENDANTS OF BROTHERS AND SISTERS

9.15 Each jurisdiction makes different provision when a brother or sister predeceases the intestate.

- Queensland, Victoria and WA allow the children of the deceased brother or sister (that is, the intestate's nieces and nephews) to take their parent's entitlement in equal shares.<sup>13</sup> Victoria provides two exceptions: first, when all of the siblings have predeceased the intestate, the surviving nephews and nieces take in equal shares, without reference to their parents' entitlement;<sup>14</sup> and, secondly, grand-nephews and grand-nieces may take after aunts and uncles as relatives of the fourth degree.<sup>15</sup>

---

*Administration Act 1969* (NZ) s 77 It 6, s 78(3); *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3).

11. K McQueenie, *Consultation*.

12. 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 3.22.

13. *Succession Act 1981* (Qld) s 37(1)(a), s 37(2)(a); *Administration Act 1903* (WA) s 14(1) Table It 8, s 14(3a); *Administration and Probate Act 1958* (Vic) s 52(1)(f). See also 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 369-370.

14. See para 8.6-8.7.

15. See para 9.37, below.

- NT, Tasmania, SA, NSW and ACT allow the issue (that is, the intestate's nieces, nephews, grand-nieces, grand-nephews, etc) to take *per stirpes*.<sup>16</sup> However, in SA, there is a limited form of *per capita* distribution. When all the brothers and sisters predecease the intestate, their surviving issue are treated as if they were issue of the intestate.<sup>17</sup>

9.16 One reason for limiting the distribution to children of brothers and sisters is historical. The *Statute of Distributions* originally allowed the children of deceased siblings to take their parent's share but admitted "no representations... among collaterals after brothers' and sisters' children". Representation is said to have been allowed among the issue of brothers and sisters because the intestate stood in a quasi-parental position to nieces and nephews since marriage between them was prohibited.<sup>18</sup>

9.17 Limiting the descendants of brothers and sisters can be justified on the grounds that an "unrestrained succession might... lead to confusion, to protracted delays in settlement, and to a multiple fractioning of the estate".<sup>19</sup> Such concerns, in particular the fractioning of estates, will diminish if current population trends continue.<sup>20</sup> For example, the fertility rate for Australia in 2002 was 1.76 children per woman. The fertility rate at the turn of the last century was estimated to be 3.93. The rate dropped below the replacement level of 2.1 children in 1976.<sup>21</sup> This means that, in general, most people will have fewer siblings and these siblings will have fewer descendants than was often previously the case.

9.18 It could be argued that grand-nephews and grand-nieces are too remote from the intestate. However, this was not the view of the

---

16. *Administration and Probate Act 1969* (NT) s 69(1)(a) and s 69(2); *Administration and Probate Act 1935* (Tas) s 44(7)(a), s 46(3); *Administration and Probate Act 1919* (SA) s 72J(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b), s 61C(3); and *Administration and Probate Act 1929* (ACT) s 49C(1)(a). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v) and s 47(3); and *Administration Act 1969* (NZ) s 77 It 6, s 78(3).

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

18. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 150.

19. *Canada Permanent Trust Company (Hind Estate) v Canada Permanent Trust Company (McKim Estate)* [1938] 3 WWR 657 at 659. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 138.

20. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 151.

21. See Australian Bureau of Statistics, *Year Book Australia* (No 87, ABS Catalogue No 1301.0, 2005) at 114-116.

Manitoba Law Reform Commission in 1985 when it favoured the *Uniform Probate Code* approach of preferring grand-nephews and grand-nieces (as issue of the intestate's parent) over first cousins (as children of the intestate's grandparents).<sup>22</sup> The Manitoba Commission adopted the reasoning of the Uniform Law Conference of Canada which said that the inclusion of grand-nieces and grand-nephews:

is based on the conclusion that, because of age, a decedent today is likely to have developed a closer relationship with young grandnephews and grandnieces than he has maintained with cousins of his own generation, and that he would prefer to bestow his wealth on the former class.<sup>23</sup>

9.19 Some would also say that there is an appearance of injustice where the children of deceased nephews and nieces miss out on a share.<sup>24</sup> This would seem to be the more so if cousins (who, like grand-nieces and grand-nephews, were relatives of the fourth degree under the old Statute of Distributions) are entitled to take as children of deceased aunts and uncles of the intestate.

9.20 Some submissions supported distributing shares to the issue of any deceased siblings as the fairest outcome.<sup>25</sup>

#### National Committee's conclusion

9.21 Given the diminishing size of most families, the view an intestate is likely to have developed a reasonably close relationship with grandnephews and nieces, and the fact that the majority of jurisdictions already extend to issue of brothers and sisters, the National Committee recommends that the uniform legislation should allow the issue of deceased siblings of the intestate to take the share their parent would otherwise have taken.

---

22. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32.

23. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 228, quoted in Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32.

24. Confidential, *Submission*.

25. Trustee Corporations Association of Australia, *Submission* at 16; Public Trustee NSW, *Submission* at 13; Law Society of Tasmania, *Submission* at 13; Confidential, *Submission*.

#### Recommendation 34

The issue of deceased brothers and sisters should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

See Intestacy Bill 2006 cl 30(3).

## MATERNAL AND PATERNAL BRANCHES OF THE FAMILY

**9.22** A question arises in the context of the intestate's surviving grandparents and aunts and uncles of recognising maternal and paternal branches of the intestate's family.

**9.23** In Australia, each jurisdiction provides that surviving grandparents are the next category entitled to take on intestacy<sup>26</sup> and, if no grandparents survive, then aunts and uncles of the intestate. This means that in some cases, for example, where both maternal grandparents have predeceased the intestate, the whole of the estate will devolve to a single branch of the intestate's family.

**9.24** New Zealand, however, treats the maternal and paternal families separately.<sup>27</sup> Half of the intestate estate is made available to the surviving maternal grandparents and, if neither of them has survived, their half devolves to their children, that is, the maternal aunts and uncles of the intestate. Likewise, the other half of the estate is made available to the surviving paternal grandparents and, if neither of them has survived, their half devolves to their children, that is, the paternal aunts and uncles of the intestate. It is only if no one from the paternal side of the family has survived that their half then goes to the maternal side, and vice versa.

**9.25** This result is not achieved in Australia, where the estate will only go to the surviving aunts and uncles of the intestate if the grandparents of both branches of the family have died before the intestate. This means that, in some cases, the whole of the intestate estate will devolve to a single branch of the intestate's family. The Alberta Law Reform Institute identified this as a deficiency in their

---

26. *Succession Act 1981* (Qld) s 37(1)(b); *Administration and Probate Act 1929* (ACT) s 49C(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(c); *Administration and Probate Act 1969* (NT) s 69(1)(b); *Administration and Probate Act 1919* (SA) s 72J(c); *Administration and Probate Act 1935* (Tas) s 44(7)(b); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v); *Administration Act 1903* (WA) s 14(1) Table It 9. See also *Administration of Estates Act 1925* (Eng) s 46(1)(v).

27. *Administration Act 1969* (NZ) s 77 It 7.

existing system, noting that “division between both sides of the family would likely be the intention of “average Albertans” who find themselves in that situation”.<sup>28</sup> The Manitoba Law Reform Commission also preferred a system which shared the estate between the intestate’s maternal and paternal branches, to avoid situations where, for example, a maternal aunt would take the whole of an estate even where a paternal first cousin had also survived.<sup>29</sup> A report to the Uniform Law Conference of Canada in 1983 also proposed a method of distribution that ensured maternal and paternal branches of the intestate’s family each received a share. This was achieved by allowing “universal representation” from grandparents, thereby picking up surviving aunts and uncles and first cousins, where appropriate.<sup>30</sup> This was not the view of the Ontario Law Reform Commission’s Family Law Project which noted, in 1967, that where an intestate was married but had no children, “the spouse who neglected to make a will would usually want the survivor to have the whole estate and not share it with his [or her] relatives”.<sup>31</sup>

9.26 In 1985, the Law Reform Commission of Tasmania proposed a system of distribution which recognised the maternal and paternal branches so that one half of the residuary should be shared between the grandparents and aunts and uncles (or, if they predecease the intestate, their issue *per stirpes*) on the maternal side and the other half to the same categories on the paternal side. If there were no paternal relatives, their half would go to the maternal side, and *vice versa*. The Tasmanian Commission argued that such a division was desirable on the grounds that an estate could not be distributed *per stirpes* to aunts and uncles unless the whereabouts of both branches of the family were known:

It has happened, for example, that contact with one line of a family was completely lost when the other line migrated to Australia.<sup>32</sup>

- 
28. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 156.
  29. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 32-33.
  30. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 228-229. This proposal was adopted in 1985: Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 285-286.
  31. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 582 (rev). The proposals were rejected in the Commission’s final report: Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165-166.
  32. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 44.

The Tasmanian proposals would allow for an immediate distribution of at least half of the estate in such circumstances. This approach and the reasons for it were supported by one submission.<sup>33</sup>

9.27 An alternative explanation for such provisions would appear to lie in the old idea of people deriving their wealth from family. The English Committee on the Law of Intestate Succession observed in 1951:

It often happens that a large portion of the intestate's estate has been derived from his family and it seems just, therefore, that the family should have an opportunity of sharing in it after the intestate's death.<sup>34</sup>

These comments were made in the context of the intestate leaving a spouse and no issue, but other next of kin, but could equally be applied to branches of the intestate's family in the more limited situation considered here. However, it is unlikely that the average Australian intestate, in modern times, would need to consider the idea of family derived wealth being "returned" to the "correct branch" of the family.

9.28 One submission supported the general Australian position.<sup>35</sup> Others supported a provision along the lines of the New Zealand model.<sup>36</sup>

#### National Committee's conclusion

9.29 The National Committee rejects any model that attempts to distinguish between paternal and maternal branches of the intestate's family, for the following reasons:

- while it might make the administration of estates easier in certain limited cases where the intestate has lost touch with an entire branch of his or her family, it would generally introduce an unjustifiable complexity into the administration of deceased estates;
- no Australian jurisdiction currently seeks to ensure an equitable distribution between the maternal and paternal branches of an intestate's family; and
- the National Committee is not convinced that the average person, faced with being survived only by one or more grandparents on one side of the family and only by aunts and uncles on the other,

---

33. Public Trustee of Queensland, *Submission* at 3.

34. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 12-13.

35. Public Trustee NSW, *Submission* at 13.

36. J North, *Submission* at 5; Public Trustee of Queensland, *Submission* at 3.

would actually consider benefiting both maternal and paternal sides of the family.

## GRANDPARENTS

9.30 Each jurisdiction provides that surviving grandparents are the next category entitled to take on intestacy.<sup>37</sup>

9.31 Although it is unlikely that grandparents will inherit in this way, one circumstance where this could conceivably occur is where a child is orphaned and subsequently cared for by his or her grandparents. The child will likely have inherited from his or her parents' estates and will, barring exceptional circumstances, be unable to execute a will during his or her minority.<sup>38</sup> This means that if the child were to die the estate would normally be distributed according to the rules of intestacy. In such cases the most desirable outcome would be for the surviving grandparents to inherit the estate.

9.32 Submissions supported grandparents inheriting after siblings of the intestate.<sup>39</sup>

9.33 The National Committee agrees that grandparents should inherit after siblings of the intestate.

---

37. *Succession Act 1981* (Qld) s 37(1)(b); *Administration and Probate Act 1929* (ACT) s 49C(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(c); *Administration and Probate Act 1969* (NT) s 69(1)(b); *Administration and Probate Act 1919* (SA) s 72J(c); *Administration and Probate Act 1935* (Tas) s 44(7)(b); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(v); and *Administration Act 1903* (WA) s 14(1) Table It 9. See also *Administration Act 1969* (NZ) s 77 It 7; *Administration of Estates Act 1925* (Eng) s 46(1)(v).

38. See, eg, *Wills, Probate and Administration Act 1898* (NSW) s 6A, *Succession Act 2006* (NSW) s 16; *Wills Act 2000* (NT) s 18; *Wills Act 1997* (Vic) s 20; *Succession Act 1981* (Qld) s 19-20. See also NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 5.1-5.11.

39. Trustee Corporations Association of Australia, *Submission* at 17; Public Trustee NSW, *Submission* at 13.

---

**Recommendation 35**

---

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, the surviving grandparents should be entitled to take in equal shares.

See Intestacy Bill 2006 cl 31.

## **AUNTS AND UNCLES**

**9.34** The terms “aunt” and “uncle”, in this context, refer only to the siblings of the intestate’s parents and not also to their respective spouses. All jurisdictions provide that surviving aunts and uncles of the intestate are the category of next of kin next entitled to take on intestacy after grandparents.<sup>40</sup> There is no reason to change this arrangement.

---

**Recommendation 36**

---

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, or grandparents, the aunts and uncles should be entitled to take.

See Intestacy Bill 2006 cl 32(1), (2).

## **SETTING A LIMIT**

**9.35** The question now arises of placing a limit on the categories of next of kin who are entitled to take after aunts and uncles of the intestate. There are generally two approaches to the question of establishing the point beyond which an intestate’s estate cannot be distributed. One is to allow an unlimited number of degrees of kin who are entitled to take so long as they can be determined. The other is to impose a limit on the degrees of kin who are entitled to take on intestacy. In both cases, provisions need to be made for *bona vacantia* to deal with situations where no eligible relatives can be identified.<sup>41</sup>

---

40. *Succession Act 1981* (Qld) s 37(1)(c); *Administration and Probate Act 1929* (ACT) s 49C(1)(c); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d), (e); *Administration and Probate Act 1969* (NT) s 69(1)(c); *Administration and Probate Act 1919* (SA) s 72J(d); *Administration and Probate Act 1935* (Tas) s 44(7)(c); *Administration and Probate Act 1958* (Vic) s 52(1)(f); *Administration Act 1903* (WA) s 14(1) Table It 10. See also *Administration Act 1969* (NZ) s 77 It 7; *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3).

41. See ch 10.

9.36 The majority of Australian jurisdictions have a limitation. This is fixed at aunts and uncles of the intestate in NSW,<sup>42</sup> their children (that is, first cousins of the intestate) in Queensland and WA,<sup>43</sup> and their issue in NT, SA and ACT (that is, first cousins once removed, etc).<sup>44</sup> These jurisdictions allow the descendants of deceased aunts and uncles to take *per stirpes*. However, SA has a limited form of *per capita* distribution, so that when all the aunts and uncles predecease the intestate, their surviving issue are treated as if they were issue of the intestate.<sup>45</sup>

9.37 Victoria and Tasmania are different. After allowing the issue of aunts and uncles to take,<sup>46</sup> they allow next of kin to take according to the old civil law (that is, Roman law) rules of distribution so that an intestate's estate will be distributed equally among the "next of kin of equal degree of consanguinity" and without representation after nieces and nephews of the intestate.

9.38 In Canada, most provinces have retained the old civil law rules of distribution.<sup>47</sup> There are also some examples of lists that place a limit at the intestate's great grandparents or their issue (that is, the intestate's second cousins and their issue). These include Manitoba,<sup>48</sup> and the Uniform Law Conference of Canada's *Uniform Intestate Succession Act*.<sup>49</sup> Such limits are still subject to debate.<sup>50</sup>

---

42. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d) and (e), s 61C(3).

43. *Succession Act 1981* (Qld) s 37(1)(c); *Administration Act 1903* (WA) s 14(1) Table It 10, s 14(3a).

44. *Administration and Probate Act 1969* (NT) s 69(1)(c) and s 69(2); *Administration and Probate Act 1919* (SA) s 72J(d); and *Administration and Probate Act 1929* (ACT) s 49C(1)(c). See also *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3); and *Administration Act 1969* (NZ) s 77 It 7, s 78(3).

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

46. *Administration and Probate Act 1935* (Tas) s 44(7)(c), s 46(3); *Administration and Probate Act 1958* (Vic) s 52(1)(f).

47. *Intestate Succession Act* RSA 2000 c I-10 s 8; *Estate Administration Act* RSBC 1996 c 122 s 89; *Devolution of Estates Act* RSNB 1973 c D-9 s 28; *Intestate Succession Act* RSNL 1990 c I-21 s 10; *Intestate Succession Act* RSNS 1989 c 236 s 10; *Intestate Succession Act* RSNWT 1988 c I-10 s 8; *Succession Law Reform Act* RSO 1990 c S-26 s 47(6); *Probate Act* RSPEI 1988 c P-21 s 93; *Intestate Succession Act* SS 1996 c I-13.1 s 12; *Estate Administration Act* RSY 2002 c 77 s 86.

48. See, eg, *Intestate Succession Act* CCSM c I85 s 2-4.

49. *Uniform Intestate Succession Act* s 4(1)(e) in Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 286-287.

50. See, eg, Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 157-159.

## Should there be a limit?

9.39 Some law reform agencies have opposed the limiting of degrees of inheritance. For example, the Law Reform Committee of South Australia considered that any proposals to limit the degree of inheritance involved “purely arbitrary “cut-off” points which do not have any compelling logic to support them”.<sup>51</sup>

9.40 “Unlimited” schemes may be justified on the grounds that most people would prefer a distant relative to inherit rather than the government, even though the relative may be unknown to them.<sup>52</sup> However, it has also been suggested that an aversion to the government inheriting in preference to remote relatives is “more an emotional reaction than one rooted in fact and logic”.<sup>53</sup> It has also been suggested that people with such an aversion should make sure they write a will. Indeed, a study conducted in Illinois concluded the question of whether distant relatives or the state should inherit as follows:

It would appear here that decedents in this category are likely to have a will when they want to provide for deserving friends and charities, and in other cases they simply do not care what happens to their property.<sup>54</sup>

9.41 Other American studies have found there is no strong preference in favour of distant relatives.<sup>55</sup> There is also some evidence from another American study that “indicates that distant relatives who had received intestacy benefits often felt undeserving and uncomfortable in taking estate assets”.<sup>56</sup>

9.42 The expense and delay caused by tracing remote relatives is the strongest argument in favour of a limit.<sup>57</sup> It will be especially difficult

---

51. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8.

52. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 33.

53. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 159.

54. A Dunham, “The Method, Process and Frequency of Wealth Transmission at Death” (1962) 30 *University of Chicago Law Review* 241 at 263.

55. See list in Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 35.

56. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 35. See M B Sussman, J N Cates, and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 138-142.

57. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1811; Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14; Manitoba Law Reform Commission, *Intestate Succession* (Report 61,

to trace distant relatives in a migrant society<sup>58</sup> where cousins in some families may have stayed in the homeland while others may have gone, for example, to US, NZ, Canada and/or UK. In such cases, these distant relatives may be utterly unknown to the deceased, notwithstanding today's greater ease of communication. The Manitoba Law Reform Commission has observed that "in our mobile and urban society most intestates are now unlikely to know, let alone have a familial relationship with, the more remote relatives".<sup>59</sup> A particular problem has arisen in recent years with identifying relatives of survivors of the Holocaust and other refugees from Eastern Europe.

9.43 Some of the problems involved in tracing relatives more remote than first cousins may be illustrated by a 1998 NSW case. A 76-year-old testator died leaving no issue, parents, siblings, grandparents, aunts or uncles who survived him. If not for a valid will, the testator's estate would have gone to *bona vacantia*. He gave the bulk of his estate to be distributed, in equal shares, among those of the issue of his grandparents (that is, first cousins, first cousins once removed, and so on) who survived him. The executor engaged a genealogist who, after two years of searching, identified no fewer than 1,675 beneficiaries.<sup>60</sup>

9.44 While tracing relatives can be carried out quite efficiently, usually by relying on family members or professional genealogists<sup>61</sup> - for example, State Trustees in Victoria have a genealogical research department - it can be argued that the expense of tracing remote relatives cannot be justified, especially in the case of relatively small estates. It has also been observed that applications to the courts to exclude possible future claimants likewise involve time and money.<sup>62</sup>

9.45 The Law Reform Commission of British Columbia concluded that, although "probably most people" would lean in favour of benefiting distant relatives, practical considerations should limit the extent to which distant relatives are sought out by an administrator,

---

1985) at 34; S Samek, *Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.

58. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63; *Melbourne Consultation*.

59. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 34.

60. *West v Weston* (1998) 44 NSWLR 657.

61. See Tasmania, Office of the Public Trustee, *Consultation*; K McQueenie, *Consultation*; R Walker, *Consultation*.

62. Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 7.

“particularly when it seems probable that the deceased simply did not care what happened to his property”.<sup>63</sup>

9.46 Although shares in the intestate’s estate may be distributed to known beneficiaries while some remain unknown, the presence of undiscovered beneficiaries would require the setting up of a trust.

9.47 It is also possible that allowing distant relatives to inherit on intestacy may increase the number of challenges to the validity of wills where testators with no close relatives choose to leave their estate to a combination of friends and charities.<sup>64</sup> The persons entitled to take on intestacy would clearly have a lot to gain from challenging the validity of such a will. A report to the Uniform Law Conference of Canada suggested that “allegations that a testator lacked testamentary capacity, or that a will was procured through duress or fraud, are frequently enough to extort the settlement of a spurious will contest”.<sup>65</sup> The Alberta Law Reform Institute initially considered this scenario fanciful, but received advice from Alberta lawyers that “heir hunters” do exist.<sup>66</sup>

9.48 Studies conducted in the US prior to 1985 showed no clear support for distant relatives inheriting an estate in preference to the government.

9.49 There was some support in consultations and submissions for a limit to be imposed.<sup>67</sup>

What should the limit be?

9.50 A limit will only affect a small minority of cases. For example, in NSW, which has the strictest limit and highest number of estates in Australia, it is estimated that there are no more than 30 *bona vacantia* cases established in any one year.

9.51 It has been suggested that first cousins were removed from the list in NSW in the 1950s because, at that time, there were often too

---

63. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 35.

64. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 34.

65. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 229.

66. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 148.

67. Probate Committee, Law Society of South Australia, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 15-16; S Samek, *Consultation*. But see R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 14.

many cousins and they were difficult to find, especially where the family had migrated.<sup>68</sup> While such arguments still have some force, they are said by some not to carry so much weight. Several submissions noted the increasing efficiency with which the tracing of family members can be carried out. One submission suggested that, in 1998, a search for cousins took one trust company 100 working hours but that today the time taken is approaching 30 working hours even where the bulk of the research is overseas.<sup>69</sup>

9.52 In NSW, the provisions which give the State the discretion to distribute property from *bona vacantia* estates<sup>70</sup> are used in 10-15 cases each year. It is usually cousins that benefit from this procedure.<sup>71</sup> This eliminates the need to seek a court declaration if cousins can't be located and the need to provide proof of family relationships.

### ***Law reform developments***

9.53 The Law Reform Commission of Western Australia, in 1973, considered that the claims of grandchildren and further issue of uncles and aunts were “strong enough to warrant their inclusion notwithstanding possible difficulties in tracing”.<sup>72</sup>

9.54 The most recent Australian law reform agency to consider the question was the Queensland Law Reform Commission in 1993. They suggested “there seems to be no reason to make this list shorter, for example, by excluding cousins, or to make it longer, by including great-grandparents, great uncles and aunts or their issue”.<sup>73</sup>

9.55 In Canada, some consideration has been given to the claims of great grandparents and their issue. The Alberta Law Reform Institute recently recommended that great grandparents should be entitled to take on intestacy, but not their issue. The Institute considered that, while it will be infrequent for a great grandparent to be the only ancestor to survive the intestate, “those that do will likely be known by the intestate and should inherit the estate”. The same, apparently, could not be said for their issue, that is, great aunts and uncles and

---

68. Views in some submission still support this view: Trustee Corporations Association of Australia, *Submission* at 17.

69. Trustee Corporations Association of Australia, *Submission* at 19.

70. *Wills, Probate and Administration Act 1898* (NSW) s 61B(8).

71. See para 10.25, 10.27.

72. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at 10.

73. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63.

second cousins.<sup>74</sup> The Institute observed that limiting representation among collaterals (for example, allowing children of aunts or uncles to inherit, but not their issue) is “intended to avoid confusion, protracted delays in settlement and a multiple fractioning of the estate”.<sup>75</sup>

***Submissions and consultations***

9.56 Opinions expressed in submissions and consultations have been divided on where to set the limit. A view expressed in one submission, for example, considered that the limit should be aunts and uncles, since cousins were seen as “too far removed” from the intestate “to be entitled as of right”.<sup>76</sup> One supported limiting the list to nieces and nephews.<sup>77</sup> Others supported first cousins only,<sup>78</sup> or the children of first cousins (that is, the intestate’s first cousins once removed).<sup>79</sup> Others preferred more distant relationships.<sup>80</sup> One view was that distribution should extend at least as far as second cousins on the basis that it is extremely rare for a case to proceed to second cousins let alone beyond.<sup>81</sup> One submission was equivocal, noting that first cousins once removed and second cousins may be viewed by some communities as too distant and by others as close family.<sup>82</sup>

9.57 Participants in NSW consultations reported that members of the public were sometimes surprised to learn that first cousins are not entitled in that State, notwithstanding the problems of identifying them.<sup>83</sup> Some supported extending the limit beyond aunts and uncles so that fewer estates would then pass to *bona vacantia*.<sup>84</sup>

- 
- 74. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 159.
  - 75. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 138. See also *Canada Permanent Trust Company (Hind Estate) v Canada Permanent Trust Company (McKim Estate)* [1938] 3 WWR 657 at 659.
  - 76. Trustee Corporations Association of Australia, *Submission* at 15, 17-18; Public Trustee NSW, *Submission* at 13.
  - 77. Tasmania, Office of the Public Trustee, *Consultation*.
  - 78. Probate Committee, Law Society of South Australia, *Consultation*; Public Trustee of Queensland, *Submission* at 3; Succession Law Section, Queensland Law Society, *Consultation*; W V Windeyer, *Submission* at 4; *Melbourne Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.
  - 79. Law Society of NSW, *Submission* at 2.
  - 80. P Worrall, *Consultation*
  - 81. Trustee Corporations Association of Australia, *Submission* at 16.
  - 82. Trustee Corporations Association of Australia, *Submission* at 18.
  - 83. *Sydney Consultation 1*; *Sydney Consultation 2*.
  - 84. See also G L Certoma, “Intestacy in New South Wales: the 1977 statutory amendments” (1979) 53 *Australian Law Journal* 77 at 82-83.

## The National Committee’s conclusion

**9.58** There should be a limit to avoid complexity, delay and expense in the administration of intestate estates. If the list of distribution is too thorough and expansive, it runs the risk of confusing those who must interpret the Act’s operation. For example, the provisions in NSW before the list was limited to the aunts and uncles of the intestate were considered “forbidding”.<sup>85</sup>

**9.59** The limit should be set at children of aunts and uncles, that is, first cousins of the intestate. This follows the position in Queensland and WA, and represents a compromise between the narrower limit in NSW and the wider limits in SA, NT and ACT. Consultations in Victoria disclosed no serious objection to fixing the limit at first cousins.

**9.60** Issue of first cousins are clearly of a different order of remoteness compared with the issue of nephews and nieces. (In the old civil system, first cousins are relatives of the fourth degree, as are grand-nieces and grand-nephews, who will already be entitled as issue of brothers and sisters of the intestate.) More distant relatives, if “deserving”, may still apply to the Crown to receive part of the estate under provisions proposed in the next chapter.<sup>86</sup>

---

### Recommendation 37

The children of deceased aunts and uncles should be entitled to take, by representation, their deceased parent’s share of the intestate’s estate. No further categories of relative should be entitled beyond the children of deceased aunts and uncles.

See draft Intestacy Bill 2006 cl 32(3).

---

**85.** NSW, *Parliamentary Debates (Hansard)* Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1815.

**86.** See para 10.38-10.40.

