12. Vesting of entitlements

- Vesting of minors' shares
- Inheritance by representation and the "predecease" requirement

12.1 Upon the grant of administration, the estate vests in the administrator from the death of the intestate to distribute to those who are entitled according to the relevant distribution regime. Each person who is entitled to share in the estate is then said to have a "vested interest" in their share. Most people in these circumstances attain an "absolutely vested interest" which means that, subject to survivorship,[1] disclaimer,[2] and the general requirements of administration, they are entitled to take their share immediately without the need to satisfy any other conditions.

12.2 This chapter considers whether a share of the estate should or should not absolutely vest in particular people in particular circumstances, for example, where people are under 18, or where they have disclaimed or forfeited their rights to inherit.

VESTING OF MINORS' SHARES

12.3 In some jurisdictions, special provision is made so that a minor's share will not vest absolutely in the minor unless he or she has turned 18 or marries. The result is that the share of a minor who dies before meeting the necessary conditions must be distributed among the others who are also entitled to share in the estate. A minor's interest in these circumstances is sometimes referred to as being "contingent". Other jurisdictions make no such provision, with the result that the general provisions apply and a minor's share vests immediately whether or not he or she has turned 18 or married. We are dealing here with children or minors whether they are issue of the deceased or not (for example, they could also be collateral relatives or the issue of collateral relatives).

Contingent vesting

12.4 The ACT, NT and Tasmania make separate provision for those who have not yet attained the age of 18 and are otherwise entitled to receive a share of an intestate estate.

12.5 First, if people who are entitled on intestacy are not yet 18 years old and are not (or have not been)[3] married, the share will vest absolutely in them only when they turn 18 or marry.[4] Tasmania adds

1. See para 11.1.
2. See para 12.29-12.32.
3. The Tasmanian provision refers to people who "marry under" the age of 18. This, unlike the ACT and NT provisions, would include persons who have been widowed before the death of the intestate.
4. *Administration and Probate Act 1929* (ACT) s 46(1); *Administration and Probate Act 1969* (NT) s 63(1); and *Administration and Probate Act 1935*

that minors who have married before they turn 18 shall "be entitled to give valid receipts for the income" of their share or interest.[5]

12.6 Secondly, these jurisdictions make provision for circumstances where the minor dies who would otherwise be entitled to a share on distribution. The NT and ACT provide that if the person otherwise entitled dies unmarried before he or she turns 18, then the intestacy provisions take effect as if the person had died before the intestate.[6] In Tasmania, the same effect is achieved by stating that the estate is held in trust for any children "who attain the age of 18 years or marry".[7]

12.7 Thirdly, the relevant provisions state that they do not affect any law that authorises expenditure for the maintenance, advancement or benefit of a minor out of property held on trust for him or her.[8] The ACT and NT both add that any amount expended from the estate for the maintenance, advancement or benefit of a minor shall be deemed, upon the death of that minor before he or she marries or turns 18, to have reduced the amount of the intestate estate available for distribution by the amount expended.[9]

Use and enjoyment of chattels

12.8 In Tasmania, a specific provision states that the administrator may permit a minor who has a vested or contingent interest in any personal chattels to have the use and enjoyment of them in such a manner and subject to such conditions, if any, as the administrator may consider reasonable, and without being liable to account for any consequential loss.[10]

(Tas) s 46(1)(a) and (3). See also *Administration Act 1969* (NZ) s 78(1); and *Administration of Estates Act 1925* (Eng) s 47.

5. *Administration and Probate Act 1935* (Tas) s 46(1)(b). See also *Administration Act 1969* (NZ) s 78(1)(b); and *Administration of Estates Act 1925* (Eng) s 47(1)(ii).
6. *Administration and Probate Act 1929* (ACT) s 46(2); *Administration and Probate Act 1969* (NT) s 63(2). See also *Administration Act 1969* (NZ) s 78(2).
7. *Administration and Probate Act 1935* (Tas) s 46(1)(a); *Administration of Estates Act 1925* (Eng) s 47. New Zealand uses "attain full age or marry under that age": *Administration Act 1969* (NZ) s 78(1)(a).
8. *Administration and Probate Act 1935* (Tas) s 46(1)(b); *Administration of Estates Act 1925* (Eng) s 47(1)(ii); *Administration and Probate Act 1929* (ACT) s 46(3); *Administration and Probate Act 1969* (NT) s 63(3).
9. *Administration and Probate Act 1929* (ACT) s 46(3); and *Administration and Probate Act 1969* (NT) s 63(3).
10. *Administration and Probate Act 1935* (Tas) s 46(1)(d). See also *Administration Act 1969* (NZ) s 78(1)(c); and *Administration of Estates Act 1925* (Eng) s 47(1)(iv).

Absolute vesting

12.9 Queensland, NSW, SA, WA and Victoria do not limit the vesting of a minor's share in an intestate estate. However, any property that vests absolutely in a minor is held and managed on the minor's behalf until he or she turns 18 or marries.[11]

Special provisions

12.10 Some jurisdictions make some special arrangements in some circumstances for dealing with the minor's share while it is being held on his or her behalf.

12.11 In WA, when an infant is entitled on distribution to a share worth less than $10,000, that infant, or a person on his or her behalf, may apply to the Court to authorise the executor or administrator to expend all or part of the share for the infant's "maintenance, advancement or education". This provision is stated to be in addition to any power the executor or administrator may otherwise have to undertake expenditure on behalf of an infant.[12]

12.12 In Victoria, if only a child or children have survived the intestate (there being no surviving spouse or partner) and the estate that remains to be distributed is less than $1,000, the administrator may pay the entitlement of any of the children to "any person having the care and control of such child or children without seeing to the application thereof and without incurring any liability in respect of such payment".[13]

12.13 In Queensland, where administration is granted to a trustee company and the estate or part of it is employed in a business or undertaking, and one or more of those entitled on intestacy is a minor, the trustee company may (subject to the court's approval) postpone the sale and conversion of the property into money and the trustee company may carry on the business during the minority of the person so entitled.[14]

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11. See para 12.25 below.
12. *Administration Act 1903* (WA) s 17. This provision will be dealt with in the National Committee's final report on the administration of estates of deceased persons.
13. *Administration and Probate Act 1958* (Vic) s 54.
14. *Trustee Companies Act 1968* (Qld) s 29(1).

Law reform developments

Australia

12.14 In 1972, the Law Reform Committee of Western Australia considered contingent vesting provisions to be unnecessary.[15] In 1974, the Law Reform Committee of South Australia considered the question purely in the context of providing for issue of the deceased. The Committee stated that it considered preventing persons from inheriting before they reached a specified age was "sensible, provided that the provisions of the Trustee Act enabling an administrator to apply the income or part of the capital of a putative share of a child who does not reach eighteen for that child's maintenance education advance or benefit applies equally under this Act".[16] The relevant provision was, however, repealed in SA in 1984.[17] The reason for the repeal was that amendments made to the *Income Tax Assessment Act 1936* (Cth) in 1979[18] severely penalised trusts in relation to property held on behalf of minors who do not immediately obtain a vested interest in the property.[19] These tax amendments are still in force.[20]

England and Wales

12.15 The Law Commission of England and Wales, in its review of intestacy in 1989, made no comment on the adequacy or otherwise of the vesting provisions that are still contained in the English legislation.[21] However, the Law Commission has had reason to review some of the law relating to the vesting of minors' shares in the context of its review of the forfeiture rule and the law of succession.[22]

New Zealand

12.16 The New Zealand provisions which delay absolute vesting until a person turns 18[23] were first introduced in 1944.[24] The 1944 provisions replaced a system of absolute vesting upon the death of the

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15. WA Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6. The issue was not dealt with in the WALRC's final report.
16. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.
17. *Administration and Probate Act Amendment Act (No 2) 1984* (SA) s 4.
18. See *Income Tax Assessment Amendment Act 1979* (Cth) s 5.
19. SA, *Parliamentary Debates (Hansard)* Legislative Council, 29 August 1984 at 604.
20. *Income Tax Assessment Act 1936* (Cth) s 26(b).
21. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 12.
22. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.30-4.34.
23. *Administration Act 1969* (NZ) s 78.
24. *Administration Amendment Act 1944* (NZ) s 6 and s 7.

intestate. They were modelled on the English system of statutory trusts for issue. At the time it was noted that the English system had been "widely approved" and had "the real advantage of placing the administrator-trustee upon a proper basis in dealing with the shares of an infant beneficiary".[25]

Arguments for and against

12.17 An advantage of a provision preventing the absolute vesting of a share is that, should an entitled person die unmarried before they turn 18, his or her share will pass to a blood relative of the intestate, rather than to a surviving parent of the minor who may have no familial relationship to the original intestate.[26] However, omitting such provisions would mean that vesting can occur as soon as the intestate dies, allowing vested interests to be quickly identified and complexity avoided.[27]

12.18 References to "married" in some of the statutes may not be adequate in all cases. For example, the formulations in the NT and ACT both exclude persons who had been married, but were widowed by the time of the death of the intestate.[28] Also, while allowance is sometimes made for children to take their share if they marry before they turn 18, no consideration has been given to allowing children to take their share before they turn 18 where they have not married but have, nevertheless, parented children of their own. If the parent dies after the intestate but before reaching the age of 18, the children will not be able to inherit because their deceased parent's share did not vest absolutely. This latter situation was considered recently by the English Law Commission in the context of a grandchild of the intestate whose parent died unmarried under the age of 18 but after the deceased.[29] It has been suggested that, since the problem would not arise if the child of the intestate was married, the law still

25. Explanatory Memorandum to *Administration Amendment Bill 1944* (NZ) at 3.
26. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363; Public Trustee NSW, *Submission* at 15.
27. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363; Trustee Corporations Association of Australia, *Submission* at 2; Public Trustee NSW, *Submission* at 2.
28. Compare with the old SA provisions which used the words "married or widowed": *Administration and Probate Act 1919* (SA) s 72d(1), repealed by *Administration and Probate Act Amendment Act (No 2) 1984* (SA) s 4.
29. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 1.16(2) and para 4.30-4.34.

effectively discriminates against illegitimate grandchildren.[30] The Law Commission's solution to the problem is to deem the person who died after the intestate without having reached the age of majority to have died immediately before the intestate.[31]

12.19 There has also been some questioning of the age at which a person's entitlement will vest absolutely, the argument generally being that people are too inexperienced to be given complete control of large sums of money when they are only 18.[32] It has been suggested that few testators allow their principal beneficiaries to take absolutely at so young an age.[33] However, this question has a much broader reach than just the rules of intestacy, extending to contract and trust law. It is not an appropriate question to be determined in this review.

Submissions and consultations

12.20 One submission considered that minors should not be able to take their share of an estate unconditionally.[34] In other submissions and consultations, however, it was agreed that minors' interests should vest immediately.[35]

12.21 Some submissions also considered that it should be possible to allow payment of a minor's share that is less than a certain sum to a parent or guardian.[36] The Public Trustee of Queensland supported allowing this in cases where the share is less than $2,000, noting that the Public Trustee has already adopted an administrative practice of paying such small amounts.[37] Another submission considered that such questions would be better dealt with by the trustee acts rather than the intestacy rules.[38]

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30. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 4.30.
31. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) para 4.34.
32. See, eg, H Tavroges, "Will supermarkets supersede solicitors?" (2005) 155 *New Law Journal* 1576 at 1576; Law Society of Tasmania, *Submission* at 3.
33. Law Society of Tasmania, *Submission* at 3. Some wills precedents leave open the option of specifying an age greater than 18, for example, 21: C Rowland, G Tamsitt, *Hutley's Australian Wills Precedents* (5th edition, Butterworths, Sydney, 1994) at 240.
34. Law Society of Tasmania, *Submission* at 3.
35. Trustee Corporations Association of Australia, *Submission* at 2; Public Trustee NSW, *Submission* at 2; *Sydney Consultation 2*; W V Windeyer, *Submission* at 2; J North, *Submission* at 1.
36. Public Trustee NSW, *Submission* at 2 (suggesting a sum of $1,000).
37. Public Trustee of Queensland, *Submission* at 1.
38. W V Windeyer, *Submission* at 2. See, eg, *Trustee Act 1925* (NSW) s 43 and s 44.

National Committee's conclusion

12.22 For reasons of certainty and simplicity, a person's share in an intestate estate should vest immediately and should not have to wait for the person to turn 18 or marry. This will ensure that children of an unmarried minor who dies after the intestate but before he or she turns 18 or marries, will be entitled, by representation, to the share of the deceased parent. This recommendation will also remove any need to deem the young person to have died before the intestate.[39]

12.23 The special provisions employed by Tasmania, WA, Victoria and Queensland[40] are not necessary to the administration of an intestate estate, and should not be enacted in the model legislation.

Recommendation 41

A minor's share in an intestate estate should not be contingent but vest immediately.

See Intestacy Bill 2006 cl 39.

Trusts for minors' shares

12.24 As already noted, some jurisdictions make special provision to deal with the management of parts of an estate to which a minor is entitled.[41]

12.25 Once a share has vested in a minor, the question of managing that share is best dealt with under the general law relating to trusts. For example, the Law Reform Commission of Tasmania considered that the obligations in relation to the maintenance of children of an intestate should be based on the trustee provisions in general law. It was claimed that "this would help ensure the efficient and effective management of the intestate's property which could only benefit the children".[42] One submission agreed that no special provision was necessary so long as each jurisdiction has the equivalent of s 43 of the *Trustee Act 1925* (NSW).[43] The National Committee agrees that no special provision should be made for the management of a minor's share in intestacy.

39. See para 12.46 below.
40. See para 12.10-12.13.
41. See para 12.4-12.7.
42. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 14.
43. W V Windeyer, *Submission* at 2.

INHERITANCE BY REPRESENTATION AND THE "PREDECEASE" REQUIREMENT

12.26 In order for any relatives of an intestate to take by representation, all of their ancestors who are entitled to share in the estate must have predeceased the intestate.[44] This requirement for a person to die before representation to their descendants can operate causes some problems when a person is prevented from inheriting for reasons other than death. The issue of this person are then prevented from taking by representation the share he or she would have received otherwise.

12.27 The relevant circumstances that may prevent a person from inheriting upon intestacy include:

- where the person has disclaimed his or her interest;
- where the forfeiture rule operates against the person because he or she has killed the intestate; and
- where the person has failed to attain a vested interest because he or she dies after the intestate but before turning 18 or marrying.

The recommendation above in relation to the automatic vesting of minors' shares[45] has dealt with the third point in this list. The following paragraphs will, therefore, consider only the cases of disclaimed interests and forfeiture.

Disclaimed interests

12.28 A question arises about what happens if a person entitled to take in intestacy disclaims, or rather, refuses to accept, the benefit.

The position in Australia

12.29 There is no statutory provision that deals with disclaimed interests in Australia. The common law position has been explained as follows:

> Disclaimer is a refusal to accept an interest. As the old Years Books had it, nobody can put an estate into another in spite of his teeth … Now what effect does that [disclaimer] have? It seems to me that it leaves the executor of the will still holding the interest attempted to be disposed of under the statute, and still holding it as part of the estate of the deceased.[46]

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44. See para 8.4.
45. See para 12.22-12.23 above.
46. *Re Scott (deceased); Widdows v Friends of the Clergy Corporation* [1975] 1 WLR 1260 at 1271 (Walton J).

12.30 If a person disclaims an interest in an intestate estate, the estate will be distributed as though that person did not exist. His or her interest will not pass to the Crown by *bona vacantia* unless no other entitled people can be ascertained. This is because the intestate estate does not automatically vest in those who are entitled to a share in it. Rather, the estate vests in the administrator and an entitled party may disclaim their interest before any distribution has been made.

12.31 This has been followed in NSW[47] and in SA[48], where Justice Legoe said:

> the interest does not go to the Crown *bona vacantia*, but devolves upon other members of that beneficiary class as if the … disclaiming person were non-existent.[49]

By declaring the person to be "non-existent" rather than deeming him or her to have died before the intestate, the law, in effect, prevents the person's descendants from taking by representation.

12.32 A person will usually disclaim an interest on intestacy for taxation or welfare-related reasons.[50] While the National Committee makes no comment on these reasons, it should be noted that disclaimed interests in an intestate estate may amount to "deprived assets" and may be counted as assets of the person disclaiming for the purpose of determining his or her eligibility for Commonwealth social security benefits.[51] A person may also disclaim an interest if it involved taking property that was "so expensive to maintain that owning it would be a burden rather than a benefit".[52]

Other jurisdictions

12.33 In New Zealand, successors on intestacy have a statutory right to disclaim their entitlement. The successor must have reached majority and be of sound mind to exercise the right. The disclaimer must relate to the whole of the successor's entitlement and must be made within one year of the date on which administration of the intestate estate is first granted. The successor cannot have enjoyed or disposed of any part of his or her interest, accepted valuable consideration for the disclaimer, provide who is to be entitled to the disclaimed interest, nor be bankrupt when the disclaimer is made. The

47. *Rex v Skinner* [1972] 1 NSWLR 307.
48. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1.
49. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 at 14 (Legoe J).
50. Succession Law Section, Queensland Law Society, *Consultation*.
51. See *Social Security Act 1991* (Cth) s 9(4) and Part 3.12 Div 2.
52. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 2.19.

effect of a valid disclaimer is as if the successor had died immediately before the intestate, survived by as many issue as were alive at the time of the intestate's death.[53] The advantage of this provision over the common law is that it clarifies the position of the issue of the person disclaiming.

12.34 American States that have adopted the Uniform Probate Code allow for heirs on intestacy to renounce their share. The effect of the renunciation is that the share devolves as if the disclaimant had predeceased the intestate and passes, by representation, to the disclaimant's descendants.[54]

Arguments for and against

12.35 It can be argued that children should not miss out on an entitlement simply because of a decision of their parent. However, children miss out on potential inheritances all the time because of their parents' financial decisions (for example, bad investments or giving property to other people), without any opportunity for redress.[55]

12.36 It can be argued, more convincingly, that not allowing descendants to take by representation where a person has disclaimed his or her interest goes against the distribution patterns currently established for intestate estates. For example, if the only child of an intestate were to disclaim his or her interest, it could go to the brothers and sisters of the intestate or remoter relatives, rather than the intestate's grandchildren. The distribution patterns on intestacy clearly prefer the intestate's grandchildren to the intestate's siblings or remoter relatives. There would appear to be no reason why this order should be disturbed simply because a beneficiary chooses to disclaim his or her interest.[56]

12.37 The current result in Australia is also, arguably, not what the intestate would have wanted if, for example, the grandchildren were to miss out because the intestate's child refused to accept the benefit.[57]

Forfeiture

12.38 The forfeiture rule is a rule of law that prevents a person from inheriting from the estate of a deceased person when he or she is

53. *Administration Act 1969* (NZ) s 81.
54. See, eg, *Montana Code Annotated 2005* s 72-2-811(4)(a).
55. See England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 3.15 and para 4.17.
56. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.17 and para 4.19.
57. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 4.18.

criminally responsible for that person's death. The rule is governed by the common law in most Australian jurisdictions and there is a degree of uncertainty about the application of the rule in some cases.[58] Two jurisdictions, NSW and ACT, have enacted forfeiture acts which provide for some exceptions to the rule.[59]

12.39 The application of the forfeiture rule to particular cases is not the concern of this report. However, the effect of the forfeiture rule, once applied, is of relevance. The effect of the rule in situations of intestacy has arisen in a recent English case where a person killed both his parents. The Court of Appeal held that not only could he not inherit but his son, the murder victims' grandchild, was also excluded from inheriting, since his father had not predeceased the intestate.[60]

12.40 An alternative to forfeiture, at least in the case of testate estates, is to establish a constructive trust in relation to the killer's share in order to avoid unconscionability. Under such a model, the Court, having taken into account evidence of the testator's intention, could impose a number of solutions, including treating the killer as if he or she had died before the testator, or imposing a distribution according the intestacy rules.[61]

Arguments for and against

12.41 The Law Commission of England and Wales has noted three general criticisms of this outcome of excluding a killer's descendants from inheritance by representation:

> First, the grandchildren should not be punished for the sins of their parent. Secondly, it is more likely that the deceased would have wished to benefit the grandchildren than the other relatives. Thirdly, the general policy of intestacy law is to prefer descendants to siblings and other relatives. To make an exception in the forfeiture case is inconsistent with that policy.[62]

12.42 Other arguments against this outcome include that it is inconsistent in that relatives who take in their own right are not excluded even when their parent has killed the intestate. For example, if a spouse were to kill the intestate, his or her children, if also the children of the intestate, would still be able to take their share.

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58. See Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper 5, 2003).
59. *Forfeiture Act 1995* (NSW); and *Forfeiture Act 1991* (ACT). See also *Forfeiture Act 1982* (UK).
60. *Re DWS (Deceased)* [2001] Ch 568 (CA).
61. See *Public Trustee v Hayles* (1993) 33 NSWLR 154.
62. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 1.8.

12.43 It can be argued that public policy should not allow children to benefit from the wrongdoing of their parents, especially if those parents could stand to receive essentially the same benefit by way of inheritance (or even gift) from their children. However, such arguments, if taken to one extreme, might suggest that no-one should stand to inherit when a near relative kills another near relative. Why, for example, should the position be different when brothers and sisters stand to benefit when one of their number kills a parent?

Law reform developments

12.44 The Law Commission of England and Wales, having considered numerous arguments surrounding these three basic points, recommended that "there should be a statutory rule that, where a person forfeits the right to inherit from an intestate through having killed that intestate, the rules of intestate succession... should be applied as if the killer had died immediately before the intestate".[63] This recommendation is consistent with recommendations made in New Zealand by the Property Law and Equity Reform Committee in 1976,[64] and by the Law Commission in 1997.[65] The New Zealand proposals have not been implemented, although the 1976 proposals were included in a bill that was not enacted in 1979.[66]

National Committee's conclusion

12.45 There are a number of reasons for making express provision, when a person who disclaims or forfeits his or her interest in an intestate estate, for his or her descendants to take their share in that interest by representation:

- it will provide certainty in an otherwise uncertain area of the law;
- it will be consistent with the general policy of intestacy rules that descendants should take before siblings or ancestors;
- it will not be seen as punishing people for the misdeeds or bad decisions of their parents;
- it will result in consistent treatment between different groups of intestacy beneficiaries so that, for example, children of the killer

63. England and Wales, Law Commission, *The Forfeiture Rule and the Law of Succession* (Report 295, 2005) at para 3.33.
64. New Zealand, Property Law and Equity Reform Committee, *The Effect of Culpable Homicide on Rights of Succession* (Report to the Minister of Justice, 1976) at 14 and 20. See also *Re Lentjes* [1990] 3 NZLR 193.
65. New Zealand, Law Commission, *Succession Law: Homicidal Heirs* (Report 38, 1997) at 11 and 24-25.
66. *Administration Amendment Bill 1979* (NZ) cl 68A(1)(a).

will be in the same position regardless of whether one parent kills their grandparent or their other parent.

The option of extending constructive trusts to these situations would not be productive of certainty, which is one of the aims of the proposed intestacy rules.

12.46 The National Committee, therefore considers that the desired result of consistency, certainty and simplicity in the context of intestacy can best be achieved by deeming a person to have died before the intestate in the following circumstances:

- where the forfeiture rule prevents him or her from sharing in the intestate estate; or
- where he or she has disclaimed the share to which he or she is otherwise entitled.

Recommendation 42

Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate.

See Intestacy Bill 2006 cl 40.