15. Miscellaneous provisions

- Legislative definition of “intestate”
- Beneficially interested personal representative
- References to statutes of distribution, heirs and next of kin
- Abolition of courtesy and right of dower

LEGISLATIVE DEFINITION OF "INTESTATE"

15.1 Not all jurisdictions include a definition of intestacy in their relevant statutes. WA and NSW have no definition at all. Queensland, SA, ACT and NT define "intestate" as:

> a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.[1]

15.2 Tasmania and Victoria provide that an "intestate" *includes*:

> a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.[2]

15.3 In NT, the *Trustee Act 1893* (NT) deems a person to have died intestate in respect of a "beneficial interest in real estate or land" where that interest is "owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of".[3]

15.4 Other possible approaches include that adopted by the Uniform Law Conference of Canada in its Uniform Succession Act, which merely states that "any part of the estate of a deceased not disposed of by will shall be distributed under this Act".[4]

15.5 Some submissions supported a legislative definition of an "intestate" along the lines of those definitions adopted by Queensland, SA, ACT and NT.[5]

15.6 One view is that intestacy appears to have an accepted meaning.[6] A legislative definition may, therefore, be unnecessary. However, it can also be argued that a definition may be of assistance,

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1. *Succession Act 1981* (Qld) s 5; *Administration and Probate Act 1919* (SA) s 72B(1); *Administration and Probate Act 1969* (NT) s 61(1); and *Administration and Probate Act 1929* (ACT) s 44(1).
2. *Administration and Probate Act 1935* (Tas) s 3(1); and *Administration and Probate Act 1958* (Vic) s 5(1). See also *Administration Act 1969* (NZ) s 2(1); and *Administration of Estates Act 1925* (Eng) s 55(1).
3. *Trustee Act 1893* (NT) s 75.
4. Uniform Intestate Succession Act s 2(2) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 284. This differs from the 1962 consolidation which stated: "All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate": Conference of Commissioners on Uniformity of Legislation in Canada, *Model Acts Recommended from 1918 to 1961 Inclusive* (1962) at 167.
5. Trustee Corporations Association of Australia, *Submission* at 1; Public Trustee NSW, *Submission* at 1; Law Society of Tasmania, *Submission* at 2.
6. See J North, *Submission* at 1.

particularly to lay people who may have to administer an estate, in understanding what intestacy is. To this end, the definition employed by Queensland, SA, ACT and NT, is better suited to explaining what an intestate is. The National Committee, therefore, recommends that such a definition be adopted.

Recommendation 46

> An "intestate" should be defined as a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.

See Intestacy Bill 2006 **cl 5**.

BENEFICIALLY INTERESTED PERSONAL REPRESENTATIVE

15.7 NSW, Tasmania, Victoria and WA make special provision in relation to beneficially interested personal representatives.[7] In Tasmania, for example, the relevant provision states that:

> **The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.[8]**

15.8 Queensland had a similar provision,[9] which was not carried over into the *Succession Act 1981* (Qld). The Queensland Law Reform Commission recommended the removal of the provision in 1978 on the grounds that it "might be construed as meaning that where the spouse or issue of an intestate happen to be his executor they cannot take benefit under a partial intestacy".[10] The provision was originally intended to deal with the historical position that an executor was entitled at law to such personal property of the testator that was undisposed of by will. Equity, however, took the view that an executor would be entitled to the testator's personal property that was not expressly disposed of, unless a contrary intention could be found on the part of the testator to exclude the executor from the benefit. In such cases, the personal property went to those entitled upon

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7. *Wills, Probate and Administration Act 1898* (NSW) s 61F(3); *Administration and Probate Act 1935* (Tas) s 47(b); *Administration and Probate Act 1958* (Vic) s 53(b); *Administration Act 1903* (WA) s 13(2). See also *Administration of Estates Act 1925* (Eng) s 49(1)(b).
8. *Administration and Probate Act 1935* (Tas) s 47(b).
9. *Succession Act 1867* (Qld) s 34(2).
10. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.

intestacy.[11] The English *Executors Act of 1830*,[12] upon which the former Queensland provision was based, shifted the burden of proof in such circumstances in favour of those entitled to take on intestacy. The executor was, therefore, deemed to hold personal property that had not been disposed of for the persons entitled to take on intestacy, unless an express statement could be found in the will that the executor was intended to take the residue beneficially. The Queensland Law Reform Commission concluded that:

> It is quite clear that the only persons who may take on intestacy in Queensland are those persons designated by [the intestacy provisions] and, therefore, there is no need to retain what is, in effect, an archaic amendment to an even more archaic rule.[13]

The National Committee agrees with this conclusion.

15.9 Submissions that considered this issue also agreed that there is no need for a special provision negating the statutory trusts where the personal representative takes the intestate estate beneficially.[14]

Recommendation 47

> There should not be a provision relating to beneficially interested personal representatives.

REFERENCES TO STATUTES OF DISTRIBUTION, HEIRS AND NEXT OF KIN

15.10 A number of jurisdictions include provisions dealing with the use of superseded legal terminology relating to the distribution of estates and other transfers of property.

15.11 For example, both Queensland and Victoria provide that references made to any statutes of distribution in wills or other instruments shall be construed as references to the current intestacy rules.[15] Queensland also adds that references to an "heir or heir at law or next of kin of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take

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11. W A Lee, "Queensland Intestacy Rules 1968" (1970) 7 *University of Queensland Law Journal* 74 at 83.
12. 11 George IV and 1 William IV c 40.
13. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23-24.
14. Trustee Corporations Association of Australia, *Submission* at 1; Public Trustee NSW, *Submission* at 1; Law Society of Tasmania, *Submission* at 2.
15. *Succession Act 1981* (Qld) s 39; and *Administration and Probate Act 1958* (Vic) s 56.

beneficially on the intestacy of that person".[16] Lee suggests that the Queensland provision is one of a number of construction provisions "designed to remedy comparatively common problems arising from inappropriate use of terminology in wills".[17]

15.12 In this context, the word "heir" may have a specific (historical) legal meaning which is different to the current understanding of the word by ordinary people. Historically, land could not be disposed of by will, but was transmitted by inheritance to the deceased's heir. The system came under the jurisdiction of the courts of common law. A system of primogeniture was used to identify the heir, whereby the land devolved to the eldest son. A complex series of rules was developed to identify heirs at law if there was no eldest son available to inherit. After 1540, it became possible to transmit land by will but, upon intestacy, the land passed directly to the heir, subject ultimately to rights of courtesy and dower.[18] On intestacy, real estate, like personalty, is now distributed according to the intestacy rules in each jurisdiction. There is now no need to identify the heir at common law for the purposes of succession to land.

15.13 Notwithstanding this, there are some provisions still in force in Australia that deal with the identification of the common law heir-at-law, based in part on an English Act of 1833.[19] For example, the *Inheritance Act 1901* (NSW)[20] and *Property Law Act 1958* (Vic) Part 5 are such provisions. In 1893, a Judge of the Supreme Court of NSW asked of such provisions, "can it really be said that there exists such a person as an heir at law in this colony?"[21] However, in 1901, the NSW Commissioner for the Consolidation of the Statute Law considered that, notwithstanding such doubts, the provisions contained in the *Inheritance Act* could not "yet be treated as entirely unnecessary". In Victoria, the Scrutiny of Acts and Regulations Committee has recommended the repeal of the equivalent provisions in Victoria.[22]

16. *Succession Act 1981* (Qld) s 39.
17. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173; see also 225 and 230.
18. See 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 para 1404. On courtesy and dower, see para 15.19-15.21 below.
19. 3&4 William IV c 106 *Inheritance Act of 1833* (Eng).
20. The provisions were originally contained in the English Act, 3&4 William IV c 106 (as adopted by 7 William IV No 8 (NSW)) and 26 Vic No 12 (NSW).
21. *Morrice v Morrice* (1893) 14 LR(NSW) Eq 211 at 213.
22. Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under s 207 of the Equal Opportunity Act 1995* (Final Report, 2005) at 22-23.

15.14 NSW applies the current intestacy rules to any gifts made in a will or other instrument that are expressed to vest in an “heir” or “next of kin” or “next of kin of a person to be determined in accordance with the Wills, Probate and Administration Act 1898”.[23] However, this *prima facie* position is subject to the expression of a “contrary or other intention” in the instrument.[24] This exception leaves open the possibility, for example, that the use of the term “heir” could still be construed as the heir at common law. In 1944, Chief Justice Jordan considered that terms such as “heir at law”, “right heir” and even “heir” could still be construed as referring to the heir at common law. This was notwithstanding the view that it was “inherently unlikely” that most people, in referring to an “heir”, would intend to “revive what has become a piece of legal antiquarianism”.[25] The Victorian Supreme Court did not follow the NSW approach in 1956 when it decided that a gift to “heirs and assigns” of a testatrix passed to her next of kin. However, the Court there left open the possibility that the term “heir at law” could still be intended to refer to the heir at common law.[26] It should be noted that Victoria does not have an equivalent provision relating to the use of the term “heir”. Victoria merely provides that references to “statutory next of kin or to the like effect” shall be taken as referring to those beneficially entitled on an intestacy.[27]

15.15 The Queensland provisions, referring to “heir” and “heir at law”, were included following a recommendation of the Queensland Law Reform Commission in 1978. The Commission considered that, since heirship had been abolished in 1877, it was “virtually inconceivable that any person would use the word “heir” to mean heir at law in accordance with the exceedingly complex rules of the common law”.[28] The use of the term “heir at law” in Queensland makes this position clearer than it is in NSW, which does not refer to the “heir at law”, using only the term “heir”.

15.16 Neither England nor New Zealand includes “heir” or “heir at law” in their equivalent provisions.[29]

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23. *Conveyancing Act 1919* (NSW) s 33(1).
24. *Conveyancing Act 1919* (NSW) s 33(2).
25. See *Ex parte Price* (1944) 45 SR(NSW) 53 at 58-59.
26. *In re Kane; Carmody v Kane* [1956] VLR 292 at 294.
27. *Succession Act 1981* (Qld) s 39; and *Administration and Probate Act 1958* (Vic) s 56.
28. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 24.
29. See also *Administration Act 1969* (NZ) s 80(1); and *Administration of Estates Act 1925* (Eng) s 50(1).

15.17 Some submissions supported the retention of these provisions.[30] Others preferred that they not be included in the model laws.[31]

National Committee's conclusion

15.18 Despite the fact that the Queensland and Victorian provisions are contained in the parts of their statutes that deal with intestacy, these provisions can have no impact upon the distribution of an intestate estate. This is because they apply to the vesting of property under a will or other instrument. They are, therefore, more appropriately contained in legislation dealing with the law of property. The NSW provisions, for example, are contained in the *Conveyancing Act 1919* (NSW).

ABOLITION OF COURTESY AND RIGHT OF DOWER

15.19 Estate by courtesy (or curtesy) and the right of dower both concern real property.

15.20 Estate by courtesy was a husband's right to a life estate in all of his wife's land on her death. The right was only exercisable if the wife:

- could dispose of her title by will;
- had possession of the land before her death;
- had not already disposed of the land,

and if no child capable of inheriting the land had been born to the marriage.

15.21 The right of dower was a wife's right to a life estate in a third of all her husband's land (including that which he had alienated) on his death. This right was again only exercisable if the husband's title in the land could be disposed of by him through his will, and if the husband had possession of the land before his death. Although the right could still have been exercised if a child had been born to the marriage, it could not if the dower had been "barred".

15.22 Courtesy and right of dower have become irrelevant in light of the modern rights on intestacy of the surviving spouse or partner.[32]

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30. Public Trustee NSW, *Submission* at 16; Trustee Corporations Association of Australia, *Submission* at 22; J North, *Submission* at 5.
31. Law Society of Tasmania, *Submission* at 16.
32. See ch 2-6.

15.23 All jurisdictions have abolished courtesy and the right of dower. The majority have included the abolition in their current provisions relating to intestacy, in the case of ACT, NT and WA,[33] or at least administration of estates, in the cases of SA and NSW.[34] Queensland, Tasmania and Victoria abolished dower and courtesy in other statutes during the 19th century.[35]

15.24 Some submissions supported the removal of such provisions so long as the rights have been expressly abolished in all Australian jurisdictions.[36]

National Committee's conclusion

15.25 Courtesy and right of dower have been expressly abolished in all Australian jurisdictions. There would, therefore, appear to be no reason why such a provision should be included in any future legislation relating to intestacy.

33. *Administration and Probate Act 1929* (ACT) s 48; *Administration and Probate Act 1969* (NT) s 65; and *Administration Act 1903* (WA) s 16. See also *Administration of Estates Act 1925* (Eng) s 45(1)(c) and (d).
34. *Administration and Probate Act 1919* (SA) s 46(3); *Wills, Probate and Administration Act 1898* (NSW) s 52.
35. *Intestacy Act 1877* (Qld) s 28; *Conveyancing and Law of Property Act 1884* (Tas) s 89; *Dower Abolition Act 1880* (Vic); *Married Women's Property Act 1884* (Vic) s 25. See also *Married Women's Property Act 1952* (NZ) s 4. On the effect of a repeal of a provision repealing the right of dower, see *Marshall v Smith* (1907) 4 CLR 1617; and in Queensland, see *Acts Interpretation Act 1954* (Qld) s 20 whereby a repeal of the Act will not revive the interests.
36. Trustee Corporations Association of Australia, *Submission* at 22; Public Trustee NSW, *Submission* at 15. See also Law Society of Tasmania, *Submission* at 16; J North, *Submission* at 5.