

### 3. Spouse or partner – general distribution

- Surviving spouse but no surviving issue
- Surviving spouse and surviving issue

3.1 This chapter deals with the broad issue of distribution to a surviving spouse or partner in two situations. First, where there are no surviving issue of the intestate and, secondly, where there are also surviving issue of the intestate.

## SURVIVING SPOUSE BUT NO SURVIVING ISSUE

3.2 In Queensland, NSW, ACT, SA, Tasmania and Victoria, the surviving spouse or partner is entitled to the whole of the intestate's estate in the absence of surviving issue.<sup>1</sup>

3.3 However, in WA and the NT, the surviving spouse or partner is only so entitled when the intestate has not been survived by any issue, parents nor siblings (nor the issue of siblings).<sup>2</sup> In the case of these jurisdictions, if the intestate is survived by a parent or brother or sister (or the issue of a sibling), the spouse or partner is only entitled to the whole of the intestate's estate if its value is below a prescribed amount - \$75,000 in Western Australia. If the value is greater than the prescribed amount, the spouse or partner is entitled to the threshold amount (plus interest calculated from the date of the death of the intestate until the date of payment<sup>3</sup>) and half of the intestate estate remaining.<sup>4</sup> The spouse or partner's absolute right to the personal (household) chattels<sup>5</sup> remains untouched.<sup>6</sup> A similar situation applied in Queensland before recommendations of the Queensland Law Reform Commission were adopted in 1997.

3.4 In New Zealand, in the absence of surviving issue, only the presence of a parent will affect the surviving spouse's right to the whole of the estate.<sup>7</sup> The rules in England still make provision for parents and siblings when the intestate is survived by a spouse or

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1. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 1(1); *Wills, Probate and Administration Act 1898* (NSW) s 61B(2); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 1; *Administration and Probate Act 1919* (SA) s 72G(a); *Administration and Probate Act 1935* (Tas) s 44(2)(b); and *Administration and Probate Act 1958* (Vic) s 51(1).
  2. *Administration Act 1903* (WA) s 14(1) Table It 4; and *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 3. See also *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 1.
  3. See para 3.52.
  4. *Administration Act 1903* (WA) s 14(1) Table It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
  5. See para 3.36-3.44.
  6. *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1969* (NT) s 66(2), s 67(1) and (2); and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
  7. *Administration Act 1969* (NZ) s 77 It 3.

partner but no issue.<sup>8</sup> However, in the United States, the Uniform Probate Code provides that a spouse is entitled to the whole estate if no descendants and no parents survive the intestate.<sup>9</sup>

## Law reform developments

### *England and Wales*

3.5 In England in 1951, the Committee on the Law of Intestate Succession considered proposals that, in cases where the intestate was not survived by issue, the spouse should get the whole estate, to be “rather... striking”. The Committee considered that in the case of a large estate, an intestate would have wished that “close relatives, such as parents or brothers and sisters, should take some benefit from the estate, subject always to adequate provision being made for the spouse”.<sup>10</sup> The Committee accordingly recommended a vastly increased statutory legacy be given to the surviving spouse in situations where the intestate was survived by no issue but by parents or brothers and sisters.<sup>11</sup> The Law Commission considered this question again in 1988,<sup>12</sup> and its recommendation in 1989, that the surviving spouse should receive the whole estate, operated to exclude other family members as well as issue of the intestate.<sup>13</sup> The Law Commission’s recommendations have not been adopted.

### *Australia*

3.6 In 1972, only Victoria and Tasmania allowed the surviving spouse, in absence of descendants, to take everything whether or not there were other surviving relatives of the intestate.<sup>14</sup> In 1973, the Western Australian Law Reform Commission decided to follow the lead of these two jurisdictions and recommended that, in the absence of issue of the intestate, the whole estate should go to the spouse.<sup>15</sup>

8. *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.

9. Uniform Probate Code s 2-102.

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

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

12. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.

13. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) para 28-46.

14. See Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6.

15. Law Reform Commission of Western Australia, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 29. See also Western Australia Law Reform Committee, *Distribution on Intestacy* (Project No 34, Part 1, Working Paper, 1972) at 6.

3.7 In 1993, the Queensland Law Reform Commission recommended that a surviving spouse or partner should have to share only with the issue of the intestate.<sup>16</sup> The recommendation was adopted in 1997.<sup>17</sup>

### ***Canada***

3.8 In 1974, the Ontario Law Reform Commission recommended that, when an intestate dies leaving a spouse but no issue, the surviving spouse should be entitled to the whole estate.<sup>18</sup> The recommendation was adopted in 1978.<sup>19</sup>

3.9 In 1999, the Alberta Law Reform Institute recommended the retention of the scheme whereby the estate goes wholly to the surviving spouse or partner.<sup>20</sup>

### **Arguments for and against**

3.10 Provisions allocating part of the estate to members of the intestate's family might have been justified in the past by the belief that it would be unreasonable that a widow, who might remarry, could carry off the whole of the intestate's estate in preference to consanguine relatives of the intestate.<sup>21</sup> In 1993, the Queensland Law Reform Commission observed that the "relatively ungenerous provisions which intestacy rules make for surviving spouses" possibly reflected such concerns, "as may the fact that a significant majority of surviving spouses are women, who have traditionally been discriminated against in succession law".<sup>22</sup>

3.11 Concerns about the transmission of family wealth may have some relevance in cases where the estate can be said to have been derived from the family of the intestate. An argument could be made, at least in the case of relatively younger intestates, that their parents may have supported them either directly or indirectly in the building up of any estate and it is, therefore, right that some of it revert to the

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16. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at para 4.2.

17. *Succession Amendment Act 1997* (Qld) s 15(1)-(2).

18. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.

19. See A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 61.

20. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 63.

21. Law Society of Tasmania, *Submission* at 5. See an analogous argument in *Blackborough v Davis* (1701) P Wms 41 at 49; 24 ER 285 at 288.

22. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 36-37.

family.<sup>23</sup> However, such intestacies will be relatively rare. Certainly not all people who die childless will die young.<sup>24</sup> If, as it has been said in Queensland, the surviving spouse “will most probably be a retired woman in the 75 to 80 year age group”,<sup>25</sup> it seems inequitable today that he or she should have to share the estate with anyone other than the issue of the intestate. Where the estate is only small, the unfairness of any forced division will be even more apparent.

3.12 Whatever views about the protection of family wealth were commonly held in the past, they are certainly not commonly held today. The argument that at least intestates with large estates would wish other close relatives to share in the estate<sup>26</sup> is not borne out by the empirical study of some wills admitted to probate in NSW in 2004.<sup>27</sup>

3.13 Another argument has been made in the past that some near family, for example, elderly parents, could be dependent on the intestate.<sup>28</sup> Such an argument can be rejected on the grounds that family provision regimes now apply to intestate estates and are usually sufficiently broad to cover the dependency of near relatives.<sup>29</sup> The Ontario Law Reform Commission concluded:

there will be no necessity for having intestate succession laws on assumed need of near relatives. Provision can be made for actual need.<sup>30</sup>

3.14 Other law reform agencies have concluded that next of kin should not be allowed to share with the surviving spouse in the distribution of an intestate estate. Reasons given include that such a provision is “unnecessary, if not directly counter to common

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23. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.

24. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 49.

25. Queensland, *Parliamentary Debates (Hansard)*, 20 August 1997, Succession Amendment Bill, Second Reading at 3017.

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

27. 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 3.8.

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

29. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.

30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166. See also A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 62.

expectations”.<sup>31</sup> The Alberta Law Reform Institute observed that benefiting only the spouse or partner reflected how Albertans distribute their property in their wills.<sup>32</sup>

3.15 One member of the NSW Parliament in 1977 observed “the plight of widows of intestate spouses, whose immediate personal tragedy has too often been compounded by their being told that they will have to share the estate with their children or, in extreme cases, with distant relatives, such as aunts and uncles of their husbands”.<sup>33</sup>

## Submissions

3.16 Submissions that considered this issue were generally supportive of the position in the majority of Australian jurisdictions.<sup>34</sup>

## National Committee’s conclusion

3.17 The surviving spouse or partner should get the whole of the intestate estate where there are no surviving issue.

3.18 There is no warrant for a provision that recognises family members other than the spouse or partner in situations where there are no issue who have survived the intestate. This is especially so given the availability of family provision legislation to provide for other family members who are also dependants. There is also no justification for introducing further situations where spousal shares and entitlements must be calculated.<sup>35</sup> The majority of Australian jurisdictions have abandoned such provisions.

## Recommendation 3

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The surviving spouse or partner should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

See Intestacy Bill 2006 cl 12.

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31. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 28.

32. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 63.

33. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 28 November 1977, at 10325.

34. Public Trustee NSW, *Submission* at 4; Trustee Corporations Association of Australia, *Submission* at 4; Public Trustee NSW, *Submission* at 4; J North, *Submission* at 2. But see Law Society of Tasmania, *Submission* at 5.

35. See para 3.21, ch 4 and ch 5.

## SURVIVING SPOUSE AND SURVIVING ISSUE

3.19 Presently, in all jurisdictions where there is a surviving spouse and surviving issue of the intestate, the surviving spouse generally takes:

- a statutory legacy (fixed amount);
- an interest in the family home (met in various ways; except in Tasmania);
- the personal chattels of the deceased; and
- a share of the residue.

The issue of the intestate take the remaining share of the residue. The remainder of this chapter focuses on the question of whether the surviving spouse should have to share the estate with the issue of the intestate. Special circumstances that arise in cases where the estate has to be apportioned between the spouse or partner and issue are dealt with in chapters 4, 5 and 6.

### Problems with the current position

3.20 Arguably, the current arrangements are inadequate where there is a surviving partner and issue. They do not necessarily reflect the current demographic make-up of early 21st century Australia, community expectations (as evidenced by wills that are actually made, the intentions of those who do not make wills and the results of family provision applications), and other factors.

#### *Complexity*

3.21 The current regime involves a degree of unwanted complexity for administrators of intestate estates. For example, questions will arise concerning valuations, and what property should be sold or distributed in satisfaction of various entitlements.<sup>36</sup> Problems may also arise where the shared home is the principal asset and there are surviving dependent children. In such cases, the surviving partner may get only a share of the home, and the remaining share is controlled by trustees.<sup>37</sup> Each child will then be entitled to his or her share of the asset upon reaching the age of 18.<sup>38</sup>

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36. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

37. *Melbourne Consultation*.

38. P Worrall, *Consultation*.

### ***Unfairness***

3.22 The current regime may be unfair in cases where the estate consists almost entirely of the family home, especially where there has been a marriage of long standing and independent adult children have also survived the intestate. In such cases, the shared home may have to be sold to satisfy the entitlements of the surviving children. Consultations in Victoria suggested that it has been difficult in some cases to get the approvals for compromise agreements to allow the surviving partner to continue to live in the shared home.<sup>39</sup>

### ***Demographic changes***

3.23 The current schemes benefit the children of the deceased at the expense of the surviving spouse or partner. This is a product of the society in which the Statute of Distributions was enacted in England, over 330 years ago.<sup>40</sup>

3.24 Given current life expectancies, most surviving spouses are going to be elderly and their children independent adults. This is a completely different situation to that which applied when the current regime was first established. In 1670, the average life expectancy at birth was something in the order of 38.1 years for men and 36.3 years for women.<sup>41</sup> Those who made it to 25 years of age could expect to live, on average, until just after they turned 55.<sup>42</sup> In Australia in 2001-2003 the average life expectancy at birth was 77.8 years for men and 82.8 years for women.<sup>43</sup>

3.25 It can be argued that an elderly surviving spouse clearly has greater needs than relatively younger, independent, adult children.<sup>44</sup> The Law Commission of England and Wales suggested that “the effect of the present rules can be to transfer resources from the retired to the

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39. *Melbourne Consultation*.

40. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 65.

41. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 308.

42. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 282.

43. Australian Bureau of Statistics, *Deaths 2003* (3302.0) at 6.

44. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 66; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11 (although the MLRC considered that their current scheme adequately met those needs).



working population at just the time when the former need them most”.<sup>45</sup>

### ***Community expectations***

3.26 As intestacy rules essentially produce a “default will”, it would be unreasonable for them to stray too far from community expectations.<sup>46</sup>

3.27 The protection of the spouse in intestacy is seen generally as an acceptable development.<sup>47</sup> In fact, some have suggested that community expectations are often that everything will go to the surviving spouse.<sup>48</sup>

3.28 Some studies (albeit conducted a number of years ago and in other common law jurisdictions) have shown that the public thinks the surviving spouse should receive a larger share of the estate than can be justified by need alone.<sup>49</sup> The Law Commission of England and Wales conducted a survey of members of the public which showed that 79% of respondents believed that the spouse should be entitled to the whole estate where there were dependent children of the relationship, and 72% believed that the spouse should be entitled to the whole estate where there were independent adult children of the intestate.<sup>50</sup>

3.29 Data gathered about dispositions made in wills also tends to show that, where there is a surviving spouse and surviving children, testators give the entire estate to the surviving spouse. A survey of 548 wills proved in the NSW Probate Registry in 2004 revealed that approximately 75% of testators with a spouse and children choose to give the entire residue of their estate to their spouse, only about 2% share the residue between spouse and children, and about 19% give the residue to the children (subject to life estates in a few cases).<sup>51</sup>

3.30 These figures are supported by data from other jurisdictions. For example, data gathered from government sources in British Columbia

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45. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 23.

46. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

47. *Sydney Consultation 1*. See also S M Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77 at 79-86.

48. *Sydney Consultation 2*.

49. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

50. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 29.

51. 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 3.9.

in 1977 and 1981 showed that the deceased left everything to the surviving spouse in almost 80% of cases where the deceased was survived by both his or her spouse and at least one child.<sup>52</sup>

3.31 A survey of 800 wills in Alberta in 1992 showed that, in the 260 cases where a spouse and children survived, approximately 64% gave all to the spouse, 24% shared the estate between spouse and children, and 9% gave all to the children.<sup>53</sup>

3.32 In the United States, the National Conference of Commissioners on Uniform State Laws, in favouring an increased spousal share, was influenced by findings that people with smaller estates tend to give the entire estate to the surviving spouse.<sup>54</sup>

3.33 A study of estates in Ohio published in 1970 found that, in a significant number of cases, the surviving spouse received more than his or her share of the intestate estate because the surviving issue signed over their entitlements.<sup>55</sup>

3.34 In cases where the current intestacy rules do not make adequate provision for the surviving spouse, the surviving spouse can apply for family provision. The needs of the surviving spouse will generally be preferred over independent adult children. It can be argued that a surviving spouse should not have to apply in order to ensure adequate provision.<sup>56</sup> This is not only on moral grounds, but also on the practical grounds that family provision applications will delay administration, reduce the size of the estate, and cause unnecessary stress for surviving spouses.<sup>57</sup>

#### ***Taking contributions to family into account***

3.35 Arguably, some of the current Australian regimes do not adequately take into account the surviving spouse's contribution to the family. The surviving spouse will, in most cases, have contributed significantly to the acquisition and maintenance of the property, and the raising of the children of the relationship. Such a contribution

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52. See Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) Appendix F and Appendix G.

53. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 190.

54. Uniform Probate Code s 2-102 (comment).

55. M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 126.

56. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 26. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 60.

57. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 67.

would have been recognised, for example, if the couple had divorced under the *Family Law Act 1975* (Cth), or separated under the relevant de facto relationships legislation. The Alberta Law Reform Institute has suggested that it is unfair that, after making sacrifices on behalf of their children, a parent’s “financial security in old age should be seen as less important than the financial position of the children”.<sup>58</sup> Other law reform agencies have made similar observations concerning the contribution of the surviving spouse to the family.<sup>59</sup>

### Possible approaches

3.36 In determining an approach to this issue, the National Committee bears in mind the desirability of producing a clear and simple scheme of distribution. Other law reform agencies have also advocated this approach. The Alberta Law Reform Institute, for example, expressly recommended that their Intestate Succession Act should “create a clear and orderly scheme of distribution” which would promote certainty and make administration of estates easy.<sup>60</sup> The Manitoba Law Reform Commission aimed to simplify its legislation “for the convenience of the public and the legal profession”.<sup>61</sup> Any scheme should also reflect the reasonable expectations of the community.<sup>62</sup>

3.37 It is often suggested that shortcomings of each of the possible approaches can be resolved by way of an application for family provision. As a default regime, the scheme of distribution on intestacy should aim to reduce the number of family provision applications if possible, while still achieving its other aims. The use of family provision applications ought to be avoided for a number of reasons, including:

- the expense involved in such applications;
- the detriment to family relationships which can result from such applications;

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58. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 67.

59. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11 (although in this case the MLRC considered that their current regime adequately took this into account).

60. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 61.

61. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7.

62. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7 (“ensure that the law is compatible with the wishes of the average property owner as well as present social values”).

- the unwillingness of many family members to litigate.

***Keep the current system (with some amendments)***

3.38 A number of submissions supported the retention of the current system, subject to any necessary increases in the statutory legacy.<sup>63</sup> Some of them noted that family provision applications have always been available for surviving partners who are dissatisfied with their allocation.<sup>64</sup>

***Give everything to the surviving partner***

3.39 Much complexity has been caused by the need to apportion a share for the surviving spouse or partner in order to accommodate other relatives who are also entitled to take, usually the surviving issue of the intestate. A simpler plan may be for the intestate estate to devolve in its entirety to the surviving spouse or partner, regardless of the presence of other relatives.

3.40 Questions have been raised from time to time concerning the desirability of preferring the surviving spouse or partner to the issue of the intestate.

3.41 In 1967, the family law project of the Ontario Law Reform Commission proposed that everything should be given to the surviving spouse as a way of ensuring that the needs of intestate's family are taken care of.<sup>65</sup> The Ontario Commission ultimately rejected this proposal in 1974.<sup>66</sup>

3.42 In 1989, the Law Commission of England and Wales recommended that the surviving spouse should receive the whole estate no matter what other relatives remain.<sup>67</sup> The Commission's view was stated as follows:

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63. J North, *Submission* at 2; Probate Committee, Law Society of South Australia, *Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 5; Public Trustee NSW, *Submission* at 4; W V Windeyer, *Submission* at 3; Melbourne *Consultation*; Law Society of Tasmania, *Submission* at 5; P Worrall, *Consultation*.

64. *Sydney Consultation 1*; Public Trustee NSW, *Submission* at 4; Trustee Corporations Association of Australia, *Submission* at 5; Public Trustee NSW, *Submission* at 4; W V Windeyer, *Submission* at 3.

65. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).

66. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

67. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 28-46.

Given that, on any view, there would be very few intestate estates which did not all go to the surviving spouse, and that of the remainder there would be many where this was still the right result, it does not seem to us that the disadvantages entailed in the alternative solutions can be justified by any advantage.<sup>68</sup>

The Law Commission's recommendation was the subject of some controversy and was ultimately not implemented.<sup>69</sup>

#### 3.43 Objections to such an approach include:

- it might be too generous to the surviving spouse or partner in the case of large estates;
- it pays insufficient attention to the “legitimate expectations” of issue;
- there will be cases where “legitimate expectations” will not be met, especially where the issue are not also the issue of the surviving spouse, or where a surviving spouse remarries;
- it could provide a means for the “unscrupulous to take advantage of the elderly and mentally frail” by marrying them in order to inherit the whole of the estate;<sup>70</sup>
- the law should not be designed for the rich (who have sufficient property to distribute, and who can afford to take legal advice and draw up wills) but should be designed for the average family.<sup>71</sup>

3.44 This position has some support,<sup>72</sup> with submissions suggesting that community expectations are often that everything will go to the surviving spouse.<sup>73</sup> This approach can be justified on the following grounds:

- it removes the need to retain provisions for obtaining the family home;<sup>74</sup>

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68. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 33.

69. See G Miller, “Intestacy, divorce and wills” (1995) 145 *New Law Journal* 1693; S M Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77 at 77.

70. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(v).

71. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165. See also Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 581 (rev).

72. Probate Committee, Law Society of South Australia, *Consultation*; Tasmania, Office of the Public Trustee, *Consultation*; S Samek, *Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.

73. *Sydney Consultation 2*.

74. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 34.

- in many cases the surviving (usually elderly) spouse will have greater need of the estate than the issue, who are usually mature, rather than mere infants or young adults, and not financially dependent on the deceased;<sup>75</sup>
- the surviving spouse or partner would be expected, in the normal course of events, to look after the needs of children of the intestate who were in their minority or otherwise still dependent on their parents;
- it eliminates the need for statutory trusts for minor issue;<sup>76</sup>
- the practical result of raising the statutory legacy to a level which is sufficient to ensure adequate provision for the surviving spouse (see below), will have the practical result that, in the vast majority of cases, the surviving spouse will receive the whole estate anyway;
- the “legitimate expectations” of issue will usually be met on the eventual death of the surviving partner;
- it ensures that the surviving spouse or partner is not the one who has to fight for a sufficient allocation by bringing a family provision application;<sup>77</sup>
- it recognises the co-dependency of the couple;<sup>78</sup>

3.45 Keeping money in trust until dependent children turn 18 may also not be the best way to meet the needs of the surviving spouse and the surviving family as a whole.<sup>79</sup> It has been suggested that the interests of minor children are “normally best served by their surviving parent being adequately provided for”.<sup>80</sup> For example, it has been suggested that the surviving partner should not be hampered by continually having to apply for funds from trustees.<sup>81</sup>

3.46 There is also some limited evidence of compromises being reached in favour of the surviving spouse or partner, at least in the case of uncomplicated estates. One Tasmanian practitioner suggested

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75. *Sydney Consultation 2*.

76. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 36; *Sydney Consultation 2*.

77. It should be noted that in many family provision cases the interests of the surviving spouse or partner will be preferred over that of surviving adult children of the intestate.

78. *Sydney Consultation 2*.

79. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 66.

80. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 37. See also *Sydney Consultation 2*; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

81. *Sydney Consultation 2*.

that there were few problems with the statutory legacy in his experience because, in most cases, the children of the intestate have let the surviving spouse take everything.<sup>82</sup> The literature occasionally refers to the fact that families will sometimes enter such agreements,<sup>83</sup> although the actual extent of the practice is not known.

**3.47 *The problem of issue of another relationship.*** One of the chief reasons why this proposal has not proved popular in other jurisdictions is that it fails to take into account the position of children of the intestate's other relationships.<sup>84</sup> Some views in consultations agreed that such outcomes do not reflect community expectations that property should ultimately devolve to issue of the intestate.<sup>85</sup>

**3.48** The basic problem is that the children would have expected, in the normal course of events, to receive something of the estate upon the death of the surviving spouse, so long as the surviving spouse was their parent.<sup>86</sup> Such an expectation is unlikely to be fulfilled on the death of the surviving spouse who is only a step-parent.<sup>87</sup> This is because people are less likely to leave anything in their wills to step-children, especially those step-children who attained their status when they were independent adults. Also, step-children are currently not recognised in any intestacy regime in Australia and only in some family provision regimes.

**3.49** The English Law Commission considered that making provision for the children of earlier relationships went against the primary aim of ensuring that the surviving spouse receives adequate provision.<sup>88</sup> One view is that the surviving partner's needs will remain the same

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82. S Samek, *Consultation*.

83. See, eg, W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at para 5.19; M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 126-133; N Preston, "A lasting legacy" (2005) 155 *New Law Journal* 1594 at 1596.

84. See R Hudson, "No will to implement" (1992) 142 *New Law Journal* 899; R Kerridge, "Distribution on intestacy, the Law Commission's report (1989)" [1990] *Conveyancer and Property Lawyer* 358.

85. *Sydney Consultation 2*; W V Windeyer, *Submission* at 3.

86. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 11; R Kerridge, "Distribution on intestacy, the Law Commission's report (1989)" [1990] *Conveyancer and Property Lawyer* 358 at 364.

87. See L W Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 *Iowa Law Review* 223 at 233.

88. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 42.

regardless of the presence of children of any earlier relationships.<sup>89</sup> However, it can also be said that giving the whole estate to a subsequent spouse is “unfair in that children of former marriages could end up inheriting none of what was originally their parents’ property”.<sup>90</sup> This is especially so where the former spouse or partner has predeceased the intestate. In such cases it is possible that the surviving spouse or partner will inherit property that was substantially derived from the deceased former spouse or partner. It can be argued that the children of the former relationship would have a greater sense of entitlement to at least some of this property.<sup>91</sup>

3.50 A series of US studies conducted before 1985 revealed that respondents were prepared to give a lesser entitlement to second or subsequent spouses where there were also issue from a previous relationship than they were prepared to give to a spouse where the only surviving issue were those of that relationship.<sup>92</sup> The Law Reform Commission of Tasmania also considered the situation where the intestate is survived by children of another relationship and these children cannot rely on the surviving spouse for support.<sup>93</sup>

3.51 In Australia, some courts have noted community attitudes to making adequate provision for a surviving spouse when there are also children of another relationship. For the most part, at least in the case of small estates, the courts are likely to give the whole of the estate to the surviving spouse as the only way to ensure adequate provision.<sup>94</sup> (Although there are instances of life estates being granted in these circumstances.<sup>95</sup>) However, in the case of larger estates, considerations may be slightly different, depending on the facts of the case, in

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89. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 17.

90. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 41. See also Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 17.

91. R Kerridge, “Distribution on intestacy, the Law Commission’s report (1989)” [1990] *Conveyancer and Property Lawyer* 358 at 364. See also *Strojczyk v Kopycinski* [2006] NSWSC 588 at para 48.

92. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 18.

93. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 13.

94. See, eg, *Woolnough v Public Trustee* [2005] TASSC 50 where the surviving spouse was granted the whole estate in preference to her receiving a life estate with the remainder going both to the surviving issue of the testator and the surviving spouse and to the issue of a previous marriage. See also *McDougall v Roger* [2006] NSWSC 484 at para 48-49.

95. *Strojczyk v Kopycinski* [2006] NSWSC 589.



particular the size of the estate. In 2004, Justice Nettle of the Victorian Supreme Court observed:

Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a first marriage; although of course it is always a question of fact. But equally, upon the death of the widow, and as it were in the event of a surplus, most would surely say that the children of the first marriage should rank for their fair share.<sup>96</sup>

However, even if there is a “surplus”, the courts will also consider such factors as the extent to which the estate of the natural parent contributed to the deceased step-parent’s estate and how much of the natural parent’s estate passed to the children.<sup>97</sup>

3.52 There is some authority for the suggestion that upon the death of the surviving partner, most would expect some part of the surplus of the estate to go to the children of the earlier relationship. This approach would leave the determination of the rights of the surviving children of the deceased to family provision proceedings following the death of the surviving spouse (on the assumption that the surviving spouse did not make adequate provision for his or her step-children). Because the definition of “child” does not always encompass “step-child”, this outcome would not currently be possible in some Australian jurisdictions and there would, therefore, be a need either:

- to adopt the category of “responsibility” currently in force for family provision applications in Victoria<sup>98</sup> and proposed by the National Committee for Uniform Succession Laws;<sup>99</sup> or
- to alter the definition of “child” to include “step-child” as is the case in some other jurisdictions.<sup>100</sup>

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96. *McKenzie v Topp* [2004] VSC 90 at para 58. See also *James v Day* [2004] VSC 290 and *Keets v Marks* [2005] VSC 172 at para 26-30; *Powell v Monteath* [2006] QSC 24 at para 40-46.

97. See *Freeman v Jaques* [2005] 1 QdR 318.

98. *Administration and Probate Act 1958* (Vic) s 91(1).

99. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission Miscellaneous Paper 28, December 1997) at 20-24.

100. *Family Provision Act 1969* (ACT) s 7(1)(d) and s 7(2); *Family Provision Act 1970* (NT) s 7(1)(d) and s 7(2)(b); *Succession Act 1981* (Qld) s 40 (definition of “child”); *Inheritance (Family Provision) Act 1972* (SA) s 6(g); *Testator’s Family Maintenance Act 1912* (Tas) s 2(1).

***Special provisions where there are issue of another relationship***

3.53 This option involves giving greater recognition to surviving issue of other relationships. Such situations are more common now with a higher incidence of re-marriage following divorce, and of people living together in de facto relationships following the breakdown of a previous relationship.<sup>101</sup>

3.54 Approaches to this situation include:

- generally giving the whole estate to the surviving spouse but allocating a share to issue of the deceased where some of those issue are not also issue of the surviving spouse;
- giving a share of the estate to the surviving spouse but allocating a greater share to issue of the deceased where some of those issue are not also issue of the surviving spouse.

3.55 For example, in 1992 the Queensland Law Reform Commission proposed, on a preliminary basis, that where an intestate is survived by a spouse or partner and issue of the relationship, the surviving spouse or partner should take the entire estate to the exclusion of all others. This proposal envisaged that where the surviving spouse or partner was a step-parent to the intestate's children, the surviving spouse or partner would be entitled to a generous statutory legacy of \$500,000 and half the residue of the estate. The other half of the residue would then go to the surviving issue of the intestate who were also not the issue of the surviving spouse or partner.<sup>102</sup>

3.56 In Manitoba, the whole of the intestate estate goes to the surviving spouse or partner where the surviving issue are also issue of that relationship.<sup>103</sup> In cases where one or more of the issue are issue of another relationship, the share of the surviving spouse is C\$50,000 or one half of the intestate estate (whichever is greater) and one half of the residue.<sup>104</sup>

3.57 The Manitoba Law Reform Commission in 1985 recommended that the surviving spouse should be given a C\$100,000 statutory legacy in situations where the surviving issue were also issue of the surviving spouse. However, in cases where some of the surviving issue

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101. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 16; L W Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 *Iowa Law Review* 223.

102. Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 14.

103. *Intestate Succession Act* CCSM c I85 s 2(2).

104. *Intestate Succession Act* CCSM c I85 s 2(3).

were not issue of the surviving spouse, the Commission recommended that the surviving spouse should receive a C\$50,000 statutory legacy.<sup>105</sup>

3.58 Another example may be seen in Montana (a US State that has adopted the Uniform Probate Code)<sup>106</sup> where the surviving spouse is entitled to:

- the entire estate if all of the surviving issue are issue of the current relationship;
- US\$200,000 and three-quarters of the residue if the deceased is survived by no issue but by at least one parent;
- US\$150,000 and one-half of the residue if the deceased is survived by issue who are also issue of the surviving spouse and also by issue of the surviving spouse who are not issue of the deceased;
- US\$100,000 and one-half of the residue if one or more of the deceased's issue are from another relationship.

3.59 A provision was introduced in Ontario in 1966 which denied the surviving spouse his or her preferential share if there was one or more surviving infant of a previous marriage.<sup>107</sup> The Ontario Law Reform Commission rejected this approach on the grounds that it could apply equally to marriages of 17 years duration as it would to marriages of one or two years; there was no guarantee that the surviving spouse would not look after the infant children of the previous marriage; and family provision legislation was available to make further provision for any infant children if necessary.<sup>108</sup> The provision is not contained in the current statute which was enacted in 1990.<sup>109</sup>

3.60 The English Law Commission suggested that children who were not also children of the surviving spouse could seek remedies elsewhere if they were not being adequately cared for by their step-parent,<sup>110</sup> an approach which one commentator described as “oversimplistic” and as presupposing “an ability and willingness to litigate” and not taking into account “the detriment to family

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105. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 15-16, 19-20.

106. *Montana Code Annotated 2003* s 72-2-112. See also Uniform Probate Code s 2-102 and L W Waggoner, “The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code” (1991) 76 *Iowa Law Review* 223 at 229-235.

107. *Devolution of Estates Act* RSO 1970 c 129 s 13.

108. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 165.

109. *Succession Law Reform Act* RSO 1990 c S-26.

110. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 46.

relationships which could result from any such application to the court”.<sup>111</sup> One commentator has noted that there are serious drawbacks in relying on a family provision regime in such cases, pointing to the unpredictability of outcomes and the cost of defending claims.<sup>112</sup> In one consultation, it was suggested that the law should try to avoid creating grounds for litigation between the surviving spouse and the issue of another relationship.<sup>113</sup>

3.61 A view expressed in one consultation was that a separate arrangement where the surviving issue were from another relationship would better reflect community expectations.<sup>114</sup> Some submissions expressly supported such an arrangement.<sup>115</sup> Others, however, vigorously rejected this and supported the current system with an increase in the statutory legacy if required.<sup>116</sup>

3.62 The Uniform Law Conference of Canada has observed that parties to a later relationship will generally have commenced that relationship at a relatively older age and the surviving spouse or partner is likely to have been “self-supporting” for a significant period. This arguably equalises the deceased’s obligations as between his or her issue and spouse or partner.<sup>117</sup>

3.63 The survey of wills in the NSW Probate registry revealed 16 estates where the testator had a surviving spouse or partner and children from another relationship. Of these, seven (43%) gave the residue all to the spouse; two (12.5%) shared the residue between spouse and children; five (31%) gave everything to the children; and two (12.5%) shared everything between their children and others, but not the spouse.<sup>118</sup>

### ***Recognition of dependency***

3.64 Some proposals for the recognition of dependants have been raised from time to time, albeit unsuccessfully. For example, the Law

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111. R Hudson, “No will to implement” (1992) 142 *New Law Journal* 899.

112. S M Cretney, “Reform of intestacy: the best we can do?” (1995) 111 *Law Quarterly Review* 77 at 97.

113. R Walker, *Consultation*.

114. *Sydney Consultation 2*.

115. *Sydney Consultation 2*; Law Society of NSW, *Submission* at 1; Law Society of NSW, *Submission* at 1; K McQueenie, *Consultation*; K Mackie, *Consultation*; R Walker, *Consultation*.

116. Succession Law Section, Queensland Law Society, *Consultation*.

117. Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 221-222.

118. 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 3.14.

Commission for England and Wales raised the possibility of minor children receiving a greater share than adult children.<sup>119</sup>

3.65 The recognition of dependency was also mooted in some consultations.<sup>120</sup> In one consultation, it was proposed that dependency be recognised so that step-children of the intestate could be included in a distribution.<sup>121</sup> Such an approach would be particularly desirable, for example, in cases where the step-child had been brought up alongside the children of the more recent relationship.

3.66 Some submissions rejected any approach that distinguished dependent from non-dependent issue.<sup>122</sup> One submission expressly rejected the idea of making separate provision for dependent children principally on the grounds of equality and because the cut-off was seen as arbitrary.<sup>123</sup>

***Substantially increase the statutory legacy***

3.67 Another option is to increase the statutory legacy to ensure that it is enough for the surviving spouse or partner to purchase a home and continue to live comfortably.

3.68 The practical result of substantially increasing the statutory legacy in most cases will be that the surviving spouse will be entitled to the whole of the estate.<sup>124</sup> In this context, it has been suggested that an adequate statutory legacy is to be preferred to options such as giving the whole of the estate to the surviving spouse because it recognises “that a large estate can be distributed so as to ensure that the surviving spouse’s requirements are met without disinheriting children of the marriage”.<sup>125</sup>

3.69 Some US studies have suggested that people will support the issue receiving a share of an intestate estate where the estate is a large one.<sup>126</sup>

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119. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.5(vii) and para 5.8.

120. P Worrall, *Consultation; Melbourne Consultation*.

121. *Melbourne Consultation*.

122. Public Trustee NSW, *Submission* at 5; W V Windeyer, *Submission* at 4; Law Society of Tasmania, *Submission* at 7.

123. J North, *Submission* at 2.

124. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

125. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

126. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 13.

3.70 While there will obviously be some estates that are so large that only a small share will be needed to ensure adequate provision for a surviving spouse, it has been argued that these should not exercise a strong influence on the final form of intestacy rules.<sup>127</sup> The principle reason is their comparative rarity. Another reason is that such estates will have sufficient resources to meet any family provision applications that independent adult children should decide to make.<sup>128</sup> In any case, even a substantial increase to the statutory legacy may not necessarily guarantee that the surviving spouse will continue to live in the family home, especially if that home is located in a market characterised by high property values.

3.71 There was some support in consultations for a substantial increase in the statutory legacy. This was particularly so in Victoria, WA and SA, where the statutory legacies (\$100,000, \$50,000 and \$10,000 respectively) are widely regarded as too low.<sup>129</sup>

3.72 The most recent Australian law reform agency to consider this question was the Queensland Law Reform Commission in 1993. The QLRC recommended a generous provision for the surviving spouse or partner, including the personal property of the intestate, a statutory legacy of \$100,000, the matrimonial home, a sum of up to \$150,000 sufficient to discharge any mortgage on the matrimonial home, and one-half of the intestate estate remaining.<sup>130</sup> The QLRC considered that making such provision was consistent “with the discernible policy of the courts in dealing with ‘usual’ family provision applications and of the practice of many spouses who do make wills”.<sup>131</sup>

### National Committee’s conclusion

3.73 The option of giving everything to the surviving spouse in all cases has some attractions, principally on the grounds of simplicity, and conforms with practice in the majority of testate estates. However, there is some genuine concern about the position of children of other relationships.

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127. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

128. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.

129. *Melbourne Consultation*; WA, Succession Law Implementation Committee, *Consultation*; Probate Committee, Law Society of SA, *Consultation*.

130. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 37-38.

131. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 35.

3.74 The National Committee considers that the surviving spouse should take everything unless the intestate is also survived by issue of another relationship. This option eliminates the need to make special arrangements for the surviving spouse or partner in most cases. The survey of 548 wills proved in the NSW Probate Registry in September 2004 revealed only 16 estates (3%) where there was a surviving spouse or partner and children of another relationship.<sup>132</sup>

3.75 It is still necessary to make special provision for the surviving spouse in cases where there are issue of another relationship. Reasons for adopting this approach include:

- that the underlying assumption that issue will ultimately receive a share of the intestate's estate through the surviving spouse does not apply in such cases;
- the second or subsequent spouse or partner, generally having entered the relationship at an older age, is likely to have other resources at his or her disposal;
- the second or subsequent spouse or partner is less likely to look after the interests of dependent children of an earlier relationship; and
- a trend is evident among testators to make provision for children of an earlier relationship even where their current spouse or partner also survives them.

The special provisions where there are issue of another relationship are dealt with in the following chapters.

3.76 It can be argued that only the issue of the other relationship should be entitled to a share on the basis that the children of the surviving spouse could still expect to inherit from their surviving parent. However, there was a concern about the disharmony this might cause in some families. While it is not desirable to make avoiding family provision applications an aim of intestacy law, excluding the natural children of the surviving spouse in these circumstances could well lead to an increase in family provision applications.

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132. 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 3.14.

**Recommendation 4**

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Where the intestate is survived by a spouse or partner and issue, the spouse or partner should be entitled to the whole intestate estate except in cases where some of the issue are issue of the intestate from another relationship. In cases where some of the issue are issue of the intestate from another relationship, the intestate estate should be shared between the surviving spouse and all surviving issue.

See Intestacy Bill 2006 cl 13, cl 28(2).