

7. The parent – child relationship

- Establishing parentage
- Children not yet born (en ventre sa mere)
- Step-children
- Step-parent adoptions

7.1 In intestacy, establishing the parent-child relationship is chiefly concerned with identifying the descendants of the intestate, that is, children, grandchildren, great grandchildren and so on. However, it is also relevant to identifying the ancestors of an intestate, that is, parents, grandparents and so on, as well as the children of collaterals, such as nieces and nephews and cousins.

ESTABLISHING PARENTAGE

7.2 The issue of a person are that person's lineal descendants: his or her children, grandchildren, great grandchildren, and so on. In most cases, there will be no difficulty establishing the relevant relationship. Children who are adopted will be treated as children of their adopting parents and, at the same time, cease to be children of their natural parents.¹ Further, the fact that a person's parents were not married to each other will not affect whether a person will be identified as issue in the distribution of an intestate estate.² In a few cases, however, parentage will be established by presumption.

Presumptions of parentage

7.3 Presumptions of parentage may arise from a number of circumstances depending on the relevant provisions in each jurisdiction. Parentage may be presumed from:

- marriage;³
- cohabitation when the parents are not married;⁴

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1. *Adoption of Children Act 1964* (Qld) s 28(1); *Adoption Act 1993* (ACT) s 43; *Adoption Act 2000* (NSW) s 95; *Adoption of Children Act 1994* (NT) s 45; *Adoption Act 1988* (SA) s 9; *Adoption Act 1988* (Tas) s 50; *Adoption Act 1984* (Vic) s 53(1); and *Adoption Act 1994* (WA) s 75. See also *Adoption Act 1955* (NZ) s 16(2); and *Adoption Act 1976* (Eng) s 39.
 2. *Status of Children Act 1978* (Qld) s 3(1); *Parentage Act 2004* (ACT) s 38(2); *Status of Children Act 1979* (NT) s 4; *Status of Children Act 1996* (NSW) s 5(1); *Family Relationships Act 1975* (SA) s 6(1); *Status of Children Act 1974* (Tas) s 3(1); *Status of Children Act 1974* (Vic) s 3; and *Administration Act 1903* (WA) s 12A. See also *Family Law Reform Act 1987* (Eng) s 1(1); and *Status of Children Act 1969* (NZ) s 3(1).
 3. *Status of Children Act 1996* (NSW) s 9; *Parentage Act 2004* (ACT) s 7; *Status of Children Act 1978* (Qld) s 18A; *Status of Children Act 1974* (Tas) s 5; *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; and *Status of Children Act 1979* (NT) s 4A. See also *Status of Children Act 1969* (NZ) s 5(1), s 7(1)(a); *Family Law Act 1975* (Cth) s 69P; and *Family Court Act 1997* (WA) s 188.
 4. *Parentage Act 2004* (ACT) s 8; *Status of Children Act 1996* (NSW) s 10; *Status of Children Act 1978* (Qld) s 18E; *Status of Children Act 1974* (Tas)

- use of artificial fertilisation procedures;⁵
- birth registration;⁶
- court findings;⁷ and
- acknowledgement of paternity.⁸

In each jurisdiction, these presumptions are contained in legislation that is separate from the provisions that deal with intestacy. Apart from the use of artificial fertilisation procedures, all the above categories of presumption are contained in the *Family Law Act 1975* (Cth).⁹

7.4 Court findings, or determinations of parentage, may be made following DNA testing procedures. Since DNA tests only produce a probability of parentage, they cannot conclusively prove a relationship, although they can conclusively disprove one.¹⁰ This means that, in the context of succession law, DNA tests can either give rise to a presumption of paternity (resulting in a court order) or rule out the possibility. There are currently no provisions directly or

s 8; *Status of Children Act 1979* (NT) s 5. See also *Family Law Act 1975* (Cth) s 69Q; and *Family Court Act 1997* (WA) s 189.

5. *Parentage Act 2004* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 3; *Status of Children Act 1974* (Vic) Part 2; *Status of Children Act 1978* (Qld) s 14-17; *Family Relationships Act 1975* (SA) s 10c, s 10d; *Status of Children Act 1979* (NT) Part 3A. See para 7.21-7.32 below.
6. *Status of Children Act 1978* (Qld) s 18B; *Status of Children Act 1974* (Tas) s 8A; *Status of Children Act 1979* (NT) s 9; *Status of Children Act 1996* (NSW) s 11; *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1974* (Vic) s 8(1). See also *Status of Children Act 1969* (NZ) s 8(1); *Family Law Act 1975* (Cth) s 69R; and *Family Court Act 1997* (WA) s 190.
7. *Status of Children Act 1978* (Qld) s 18C; *Status of Children Act 1974* (Tas) s 8B; *Status of Children Act 1979* (NT) s 9B; *Status of Children Act 1996* (NSW) s 12; *Parentage Act 2004* (ACT) s 10; and *Family Relationships Act 1975* (SA) s 7(c). See also *Status of Children Act 1969* (NZ) s 8(3); *Family Law Act 1975* (Cth) s 69S; and *Family Court Act 1997* (WA) s 191. Court findings are rules of law rather than presumptions.
8. *Status of Children Act 1996* (NSW) s 13; *Status of Children Act 1978* (Qld) s 18D; *Status of Children Act 1979* (NT) s 9A; *Family Relationships Act 1975* (SA) s 7(b); *Status of Children Act 1974* (Tas) s 8C; and *Status of Children Act 1974* (Vic) s 8(2). See also *Status of Children Act 1969* (NZ) s 7(1)(b); *Family Law Act 1975* (Cth) s 69T; and *Family Court Act 1997* (WA) s 192.
9. *Family Law Act 1975* (Cth) s 69P-s 69T. See also *Family Court Act 1997* (WA) s 188-192.
10. See Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2003) at para 35.17-35.19.

indirectly regulating the use of DNA tests to determine entitlements on intestacy.¹¹

7.5 Some jurisdictions have specific provisions that deal with presumptions of parentage in the context of intestacy. In the ACT, any presumption arising from registration of the birth will only operate in intestacy if the registration takes place before the death of the intestate.¹² In WA and Victoria, in circumstances where parents of the intestate are entitled to a benefit, the parents must have admitted parentage, or had the presumption established against them, in the intestate's lifetime.¹³

7.6 There was some support in consultations and submissions for including the presumptions of parentage among the provisions relating to intestacy.¹⁴ Another submission considered that the presumptions were best left to other enactments in the individual jurisdictions.¹⁵

Artificially conceived children

7.7 When a child is artificially conceived, the child's mother and her husband are presumed to be the parents of the child.¹⁶ Paternity will not be imposed unless the procedure was conducted with the husband's consent.¹⁷ The couple need not be married; it is sufficient that they be living together on a *bona fide* domestic basis. In the ACT, NT and WA, the law expressly applies to heterosexual and same-sex

11. See Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2003) at para 35.55-35.57. See also P Farnell, *Submission*.

12. *Administration and Probate Act 1929* (ACT) s 49E.

13. *Administration Act 1903* (WA) s 12A(2); and *Status of Children Act 1974* (Vic) s 7(1)(b). See also *Status of Children Act 1969* (NZ) s 7(1)(b).

14. Trustee Corporations Association of Australia, *Submission* at 12; Public Trustee NSW, *Submission* at 10; J North, *Submission* at 4.

15. Law Society of Tasmania, *Submission* at 11.

16. *Family Provision Act 1969* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 23; *Status of Children Act 1974* (Vic) Part 2; *Family Relationships Act 1975* (SA) s 10c, s 10d; and *Status of Children Act 1978* (Qld) s 14-17. See also *Status of Children Act 1969* (NZ) s 18; and *Family Law Act 1975* (Cth) s 60H.

17. *Status of Children Act 1978* (Qld) s 15(2); *Status of Children Act 1979* (NT) s 5D; *Status of Children Act 1974* (Vic) s 10C(2); *Status of Children Act 1996* (NSW) s 14(1)(a); *Family Provision Act 1969* (ACT) s 11(4); *Status of Children Act 1974* (Tas) s 10C(1); and *Artificial Conception Act 1985* (WA) s 6. See also *Status of Children Act 1969* (NZ) s 18(1)(c); and *Human Fertilisation and Embryology Act 1990* (Eng) s 28(2)(b). The requirement of consent may lead to confusion since it would seem that a man will not be the child's father if he does not consent to his wife undergoing the procedure.

couples alike.¹⁸ In the latter case, the law can only apply to lesbian relationships.

7.8 Situations of surrogacy may also need to be taken into account, where a woman carries a child to term, on behalf of another woman, under an arrangement made before the child's birth which sees the assignment of her parental rights to that woman and that woman's partner (who may or may not be the father).¹⁹ The law can experience difficulty in responding to such recent practices.²⁰ As with artificial conception, it would seem preferable for the intestacy provision to adopt a general approach, leaving the specifics to each jurisdiction.

National Committee's conclusion

7.9 There is a danger that any general provisions relating to parentage may, over time, become inconsistent with the various other State and Commonwealth provisions. The Committee, therefore, considers that the provisions relating to presumptions of parentage do not need to be included in the model laws.

CHILDREN NOT YET BORN (EN VENTRE SA MERE)

7.10 A child *en ventre sa mere* is a child that, although conceived or implanted in its mother's uterus, has not yet been born at the relevant time, namely the death of the deceased.

Rights of children not yet born

7.11 At common law, a child *en ventre sa mere* when the intestate dies, once born, is entitled to take his or her share of the estate.²¹ The issue of children *en ventre sa mere* is relevant not only to children of the intestate, but applies also to more distant descendants of an intestate, such as grandchildren and great grandchildren and also, conceivably, to collateral relatives such as siblings, cousins and even

18. *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1979* (NT) s 5DA; and *Artificial Conception Act 1985* (WA) s 6A.

19. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 56.

20. See the comments by Bryson J concerning the making of an adoption order in relation to a child who had been born as the result of a surrogacy arrangement: *Re A and B* (2000) 26 FamLR 317 at 321.

21. *Ball v Smith* (1698) 2 Freeman 230; 22 ER 1178; *Wallis v Hodson* (1740) 2 Atk 114; 26 ER 472; *Burnet v Mann* (1748) 1 Ves Sen 156; 27 ER 953.

aunts and uncles,²² who may have been conceived but not yet born at the time the intestate died.

7.12 Allowing children *en ventre sa mere* to take on intestacy can be justified, at least in relation to children of the intestate, on the grounds that a parent owes all of his or her children a duty, including those conceived but not born. (Note this argument is strictly irrelevant to most cases under our proposals since the surviving spouse will receive everything, unless there are children of another relationship.)

7.13 Posthumous children can also be included on the basis that such a person must be born within the executor's year and, therefore, will not unduly delay the administration of the estate.²³

7.14 Some jurisdictions have restated the common law position. For example, NSW provides that references "to a child or issue living at the date of death of any person shall be construed as including references to any child or issue who has been conceived and not born at that date but who is subsequently born alive".²⁴ Victoria provides that "references to a child or issue living at the death of any person include a child or issue *en ventre sa mere* at the death".²⁵ Tasmania makes similar provision,²⁶ while Queensland adds that the child *en ventre sa mere* at the death of the intestate must remain alive for a period of 30 days.²⁷

7.15 Another version is that adopted by the Uniform Law Conference of Canada:

kindred of the intestate conceived before his death but born thereafter inherit as if they had been born in the lifetime of the intestate.²⁸

7.16 The Law Reform Committee of South Australia considered that it was necessary to restate the law in relation to posthumous children in case a court were to construe "the new Act as a code on intestacy"

22. Notwithstanding that the intestate does not owe a "debt of nature" to his or her collateral relatives: see *Wallis v Hodson* (1740) 2 Atk 114 at 116; 26 ER 472 at 473.

23. A H Oosterhoff, *Succession Law Reform in Ontario* (Canada Law Book Ltd, Toronto, 1979) at 12. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 419.

24. *Wills, Probate and Administration Act 1898* (NSW) s 61A(3).

25. *Administration and Probate Act 1958* (Vic) s 5(2).

26. *Administration and Probate Act 1935* (Tas) s 3(2).

27. *Succession Act 1981* (Qld) s 5A. On the 30 day survivorship rule, see ch 11.

28. Uniform Intestate Succession Act, s 1(4)(b) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 284.

and “might think that an omission to restate this rule was intentional”.²⁹

7.17 The above position is problematic in the case of some artificial reproductive techniques which may result in children who have not yet been conceived or who have been conceived before death but not implanted until some time afterwards. This issue is discussed below.³⁰

National Committee’s conclusion

7.18 The National Committee considers that, for the sake of clarity, the law relating to rights of children *en ventre sa mere* at the death of the intestate, and who are subsequently born, should be restated in the model laws.

Recommendation 24

Persons conceived before the death of the intestate but born after should inherit as if they had been born in the intestate’s lifetime.

See Intestacy Bill 2006 cl 4(2)(b), cl 9.

Presumptions of parentage

7.19 While the law establishes the rights of a child that is born posthumously, it is also necessary to establish the parentage of a child so born. This is generally achieved in the Australian jurisdictions by relevant sections of the status of children legislation.

7.20 Children will be presumed to be the issue of the intestate husband if the wife gives birth within a period ranging from 10 months³¹ to 44 weeks³² after the husband’s death (in the absence of evidence to the contrary). These time limits have been used, traditionally, to ensure that the issue is indeed that of the relevant person. Today, more reliable means of testing paternity can be employed where necessary.

29. Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 10.

30. See para 7.21-7.32.

31. *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; *Status of Children Act 1969* (NZ) s 5(1).

32. *Status of Children Act 1978* (Qld) s 18A(2); *Status of Children Act 1996* (NSW) s 9(2); *Status of Children Act 1974* (Tas) s 5(2)(b); *Status of Children Act 1979* (NT) s 4A(2); and *Family Provision Act 1969* (ACT) s 7.

Delayed conception and suspended gestation

7.21 Advances in human artificial reproductive technology have rendered current provisions for children *en ventre sa mere* inadequate to deal with all the possible situations where a child of the deceased is born after the deceased's death. These situations include cases where, for example, the sperm of the deceased has been removed and stored either before or after his death³³ and inseminated after death (posthumous or post mortem conception) or where insemination has already taken place before death but the resulting zygote or embryo is frozen and only placed in the uterus after death.

7.22 An example of such a situation may be found in a 1996 Tasmanian case in which a husband died intestate leaving two frozen embryos which had been produced by him and his wife as part of an *in vitro* fertilisation program. The deceased was survived by his wife and four children. The embryos were fertilised ova that had been frozen before they began to divide into cells (zygotes). The questions before the Court were whether the zygotes were living issue at the date of the intestate's death, and whether they became issue on being born alive. The judge held that zygotes were not actually living at the date of the deceased's death. The rights that attach to the unborn zygotes are contingent on being born alive. The Court held that a zygote would become a child of the deceased on being born alive. No reason could be seen for differentiating between zygotes and children *en ventre sa mere*.³⁴

7.23 Legislation and codes of practice in various jurisdictions may have an impact on whether children can be conceived after the death of a parent. For example, in Victoria, the use by a surviving spouse or partner of gametes from the deceased or the transfer of embryos formed from the gametes of the deceased may not be possible on account of consent requirements and the requirement that the couple be living together at the time the procedure is carried out.³⁵ Various codes of practice also prevent the use of artificial reproductive technologies in certain circumstances where one partner has died:

Directions under the Western Australian Act state that no consent given by a gamete provider may include a consent for the

33. For examples of applications for post mortem removal of reproductive material, see *Re Denman* [2004] 2 QdR 595; and *Y v Austin Health* (2005) 13 VR 363.

34. *Re the Estate of the Late K* (1996) 5 Tas R 365 (Slicer J). See also D Clark, "En ventre sa frigidaire: Zygotes as children" (1996) *Alternative Law Journal* 165.

35. *Infertility Treatment Act 1995* (Vic) s 8, s 12. See, eg, *Y v Austin Health* (2005) 13 VR 363.

posthumous use of the gametes. A person must not knowingly use gametes in an artificial fertilisation procedure after the death of the gamete provider. The South Australian Code of Practice states that a licensee must dispose of an embryo that is kept in storage for future use of a couple if either member of the couple dies, unless the storage consent specifies how an embryo is to be dealt with or disposed of in the event of death, in which case the licensee must deal with the embryo or dispose of it in accordance with those conditions.³⁶

7.24 On the other hand, in the United Kingdom, a recent enactment has allowed that a man may be treated as the father of a child conceived or implanted as an embryo after his death provided he has previously consented in writing to such procedures being carried out after his death.³⁷

Law reform developments

7.25 In 1986, the New South Wales Law Reform Commission considered the question of posthumous conception in so far as it affected the rules of distribution on intestacy.³⁸ The Commission noted the practical difficulty that could arise where the deceased parent's estate was either wholly or partly distributed after the date of conception or birth of the artificially conceived child. It therefore recommended that any child so conceived should not be entitled to participate in the distribution of the deceased parent's estate. It was considered that this would remove the need for the personal representative to enquire into the "possibility of the subsequent birth of persons who... will be regarded as children of the deceased".³⁹ The Commission, however, also recommended that any children born as a result of such procedures should be entitled to make an application for family provision on the basis that the complexity of such an application (involving tracing to beneficiaries) was outweighed by the rarity of such cases.

7.26 A United Kingdom Committee of Inquiry into Human Fertilisation and Embryology which reported in 1984 recommended that any child born by artificial conception who was not *in utero* at the date of death of his or her father should be "disregarded for the

36. NSW Department of Health, *Review of the Human Tissue Act 1983 - Discussion Paper: Assisted Reproductive Technologies* (1998) at para 6.5.

37. *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK) s 1.

38. NSW Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.6-12.12.

39. NSW Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.9.

purposes of succession to and inheritance from the latter”.⁴⁰ The Committee also considered that posthumous conception was a practice that ought to be “actively discouraged”.

7.27 The Ontario Law Reform Commission, on the other hand, preferred to give the posthumously conceived child, so far as possible, the same rights of inheritance as though the child were conceived in the deceased’s lifetime. The Commission did not consider it practical to allow for the postponement of distribution or the upsetting of distributions already made but instead recommended that:

a posthumously conceived child of a husband should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is *en ventre sa mere*, as if the child were conceived while the husband was alive.⁴¹

Arguments for and against

7.28 The above position is problematic in the case of some artificial reproductive techniques. These may have the effect of delaying birth (or, indeed, further births) well beyond the period of 10 months from the death of the intestate. This could lead to delays and complexity in the administration of a deceased estate, especially when the number of people in a generation have to be determined for the purposes of *per stirpes* distribution. The problem could be compounded further when dealing with collateral kin of the intestate.

7.29 It may, therefore, be preferable to adopt the simple approach of disregarding for the purposes of intestate succession any child born by means of artificial reproductive technologies where the child was not *en ventre sa mere* at the death of the intestate.

7.30 In any case, it can be argued that the giving of the whole of the intestate estate to the surviving spouse or partner will, in the normal course of events, ensure that any child so born is adequately provided for.⁴²

Submissions

7.31 Some submissions considered it important that personal representatives be able to complete the administration of the estate and so proposed that a fairly short time limit be incorporated into the

40. United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) at para 10.9.

41. Ontario Law Reform Commission, *Human Artificial Reproduction and Related Matters* (Report, 1985) vol 2 at 182.

42. See Trustee Corporations Association of Australia, *Submission* at 13.

rules. One proposed a 10 month/44 week period⁴³ while some proposed a period of no more than 12 months.⁴⁴ This would effectively mean that the child would need to have been in the uterus at the date of the death of the intestate or shortly thereafter.

National Committee's conclusion

7.32 Options for dealing with the problem of children born more than 10 months after the death of the intestate include:

- giving no express recognition to the problem (and leaving it to judges to deal with on an *ad hoc* basis);⁴⁵
- making no provision other than to provide for an ultimate limit of a fixed period after the death of the intestate, for example, one or two years;
- disregarding such children when distributing an intestate estate.

The National Committee considers that the simplest answer is to exclude them, by requiring that they be in the uterus at the intestate's death.

Recommendation 25

The model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy.

See Intestacy Bill 2006 cl 9(1)(b).

STEP-CHILDREN

7.33 The following paragraphs deal with step-children of the intestate. Children of another relationship of the intestate, that is, step-children of the surviving spouse or partner, are considered in the context of the surviving spouse's share.⁴⁶ Step-children who have been adopted by their step-parent are considered later in this chapter.⁴⁷

7.34 At common law, with the exception of the spouse of an intestate, a person related only by marriage is not entitled to share in the estate of the intestate.⁴⁸ Step-children of the intestate, therefore, are not

43. Trustee Corporations Association of Australia, *Submission* at 13.

44. Public Trustee of Queensland, *Submission* at 3; Public Trustee NSW, *Submission* at 11.

45. See *Sydney Consultation 1*.

46. See para 3.53-3.63.

47. See para 7.47-7.59.

48. S Toller, *The Law of Executors and Administrators* (3rd ed, J Butterworth and Son, London, 1814) at 385.

entitled to a share in the intestate's estate.⁴⁹ It was therefore the case, before the introduction of adequate family provision legislation, that:

if a man accepted full responsibility for his wife's children by a previous marriage without a formal adoption, those children had no rights against his estate.⁵⁰

7.35 It should also be noted that, at common law, step-children cease to be step-children of the step-parent upon the death of the natural parent.⁵¹ This means that if the natural parent dies, the child ceases to be a step-child of the surviving spouse, even if the child continues to be part of the surviving spouse's domestic arrangements.

Arguments for and against

7.36 It can be argued that the number of step-children in the general community has increased with the higher incidence of parents divorcing and subsequently remarrying, and that:

the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their biological parents.⁵²

It may, therefore, be considered unfair that step-children are excluded from intestacy provisions when natural children are included.⁵³

7.37 However, in considering the question of step-children, it must be borne in mind that step-children of an intestate may well have two living natural parents. Some of the discussions around this point assume that one natural parent has died or otherwise removed themselves entirely from any responsibility for his or her offspring and the step-parent has chosen to be at least partly responsible for the upbringing of the step-child. An equally, if not more likely scenario,

49. *Re Leach (deceased)* [1985] 2 All ER 754 at 759.

50. *Re Leach (deceased)* [1985] 2 All ER 754 at 759. See also K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23. A child adopted by a husband and wife is, in the event of divorce and the wife remarrying, a step-child of the wife's second husband: *Re O'Malley (dec'd)* [1981] Qd R 202.

51. See *Re Burt* [1988] 1 QdR 23. See also M Wall, "Who is a step-child?" (2005) 17(1) *Australian Superannuation Law Bulletin* 1 at 1; K Mackie, "Stepchildren and succession" (1997) 16 *University of Tasmania Law Review* 22 at 35-36.

52. K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23.

53. See *Melbourne Consultation*.

however, is that a person will become a step-child upon the remarriage of a parent after divorce.

7.38 Any attempt to limit the category of step-children to those who are dependent upon the step-parent, or who are under 18 years of age, would be undesirable. It could be seen as arbitrary on the basis of age. It may also require investigations as to whether the step-children were in fact dependent upon the step-parent or whether the step-children had been treated as children of the deceased. This would lead to greater uncertainty in the administration of intestate estates.⁵⁴

7.39 If there is a dependency, it is more appropriately addressed in an application for family provision rather than allowing it to confuse unnecessarily distributions upon intestacy.⁵⁵ This is recognised in some jurisdictions in so far as step-children may now bring proceedings for family provision.⁵⁶ The National Committee's proposed *Family Provision Bill 2004* expressly states that a non-adult child of the deceased, for the purposes of automatic eligibility for family provision, "does not include a step-child of the deceased person",⁵⁷ but leaves a step-child, whether under the age of 18 or not, to apply as a person to whom the deceased person "owed a responsibility to provide maintenance, education or advancement in life".⁵⁸

54. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 49; England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 24.

55. See Trustee Corporations Association of Australia, *Submission* at 12. See other arguments relating to dependency, at para 3.64-3.66.

56. *Succession Act 1981* (Qld) s 40, s 40A; *Family Provision Act 1969* (ACT) s 7; *Family Provision Act 1970* (NT) s 7; *Testator's Family Maintenance Act 1912* (Tas) s 2(1) paragraph (b) to the definition of "child", s 3A; *Family Protection Act 1955* (NZ) s 3; and *Administration and Probate Act 1958* (Vic) s 91(1), as "a person for whom the deceased had responsibility to make provision". See also M Wall, "Who is a step-child?" (2005) 17(1) *Australian Superannuation Law Bulletin* 1 at 2; R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 74. In NSW some step-children may make application as persons who were "at any particular time, wholly or partly dependent upon the deceased person, and ... was a that particular time or at any other time, a member of the household of which the deceased person was a member": *Family Provision Act 1982* (NSW) s 6. See, eg, *Marshall v Public Trustee* [2006] NSWSC 402.

57. Family Provision Bill 2004 cl 6(2) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

58. Family Provision Bill 2004 cl 7(1) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing*

7.40 There are other considerations to be taken into account. First, if step-children were to be entitled in intestacy, in some cases they could be seen as benefiting from a form of “double dipping”. This is because, in addition to receiving a share of the intestate’s estate, they could potentially be beneficiaries under each natural parent’s will, or entitled to take upon their intestacy, and also potentially entitled, upon intestacy, to a share from the estate of any further spouses of their natural parents. Secondly, it is possible that a step-parent may be estranged from or never even have met his or her step-child, especially if the marriage has taken place after the step-child has become an adult.

Law Reform developments

7.41 The English Law Commission considered expanding the definition of issue to include “children of the family” but rejected any provision on the grounds of “double dipping” and complexity.⁵⁹

7.42 The Law Reform Commission of Tasmania in 1985 considered that a scheme of family provision was the more appropriate way to ensure that dependants of an intestate were adequately provided for.⁶⁰

7.43 The Alberta Law Reform Institute, while acknowledging the position of step-children who may know of no other father or mother than their step-parent, concluded “the relationships between step-parents and step-children vary too much to support a generalization that the majority of step-parents would want their stepchildren to share in their estate”.⁶¹ The Institute also observed that intestacy provisions “cannot address all the permutations that need to be addressed” in such cases.⁶²

Committee of Attorneys General (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

59. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 49.

60. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 17.

61. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 137.

62. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion 16, 1996) at 125.

Submissions and consultations

7.44 Opinions expressed in submissions and consultations generally rejected any idea of providing for step-children of an intestate by way of distribution on intestacy.⁶³

National Committee's conclusion

7.45 There should be no recognition for step-children of the intestate for reasons of simplicity and certainty.

7.46 If the more general approach of allowing the whole estate of an intestate to go to the surviving spouse even when there are issue surviving is adopted,⁶⁴ the step-children of the intestate would most likely be cared for by the surviving spouse, usually their natural parent.

Recommendation 26

Step-children of the intestate should not be recognised for the purposes of intestacy.

STEP-PARENT ADOPTIONS

7.47 In Australia, the effect of adoption is generally that the adopted child becomes a full member of the adopting parents' family and that, in the eyes of the law, all prior familial relationships cease to exist. In most jurisdictions, this effect applies equally to intestacy as it does to all other circumstances, so that adopted children are not entitled to take a share of a biological relative's estate upon intestacy.⁶⁵

7.48 However, NSW and SA make special provision for situations where a biological parent has died and the surviving parent establishes a new relationship with a person who then agrees to adopt the child of the previous relationship. In these cases, the property of any next of kin of the deceased parent can devolve on the child as if the adoption had never taken place.⁶⁶

63. Probate Committee, Law Society of SA, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 12; Public Trustee NSW, *Submission* at 10; W V Windeyer, *Submission* at 4; *Melbourne Consultation*. But see *Melbourne Consultation*.

64. See para 3.73-3.76 and Recommendation 4.

65. See, eg, *Adoption Act 1984* (Vic) s 53(1); *Adoption of Children Act 1964* (Qld) s 28.

66. *Adoption Act 2000* (NSW) s 97; *Adoption of Children Act 1966* (SA) s 30(3).

7.49 The current arrangements in NSW and SA, contained as they are in adoption of children legislation, will produce an anomalous result in any national intestacy regime. Children who are subject to a “step-adoption” will be able to take on the intestacy of next of kin of their deceased parent in some jurisdictions, but not in others.

7.50 Step-adoptions, although not common, and decreasing in number, continue to occur in Australia.⁶⁷ In 2002-2003, 72 step-parents adopted their step-children. However, it is not clear how many of these step-parent adoptions arose from the death of one of the natural parents. Three of the step-children were aged 1-4 years, 28 (39%) were aged 5-9, 25 (35%) were aged 10-14, and 16 (22%) were over 15. The number of step-adoptions is decreasing steadily. In 1998-1999, there were 116 step-adoptions. Figures for “relative” adoptions (which includes other relatives as well as step-parents) show that there were 605 relative adoptions in 1987-1988 but only 154 in 1997-1998.⁶⁸ Some of the more recent decline is probably due to the fact that NSW now restricts step adoptions to children who are at least five years old and with whom the step-parent has lived for at least three years.⁶⁹

Law reform developments

7.51 This situation has not often been considered in the context of the law of intestacy. The Uniform Law Conference of Canada considered and adopted a proposal that “the adoption of a child by a spouse of a natural parent does not terminate the relationship of parent and child between the child and either natural parent for purposes of succession”.⁷⁰ American States that have adopted the Uniform Probate Code also have a provision that preserves the familial relationships of an adopted child in the case of step-adoption, at least so far as the adopted child’s ability to inherit from his or her natural parents:⁷¹

An adopted individual is the child of an adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on ... the right of

67. Australian Institute of Health and Welfare, *Adoptions Australia 2002-2003* (Child Welfare Series No 33) at 20-22.

68. The 1987-1988 figures should be larger since before 1994-1995, NSW data excluded step-parent adoptions.

69. *Adoption Act 2000* (NSW) s 30.

70. Uniform Intestate Succession Act s 1(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 214. See also Uniform Intestate Succession Act s 1(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 284.

71. The natural parents and their families, however, do not have a right to inherit from the adopted child: Uniform Probate Code s 2-114 (comment).

the child or a descendant of the child to inherit from or through the other natural parent.⁷²

It should be noted that these North American examples go further than their Australian counterparts in that the death of a natural parent is not required. The adoption by the step-parent can take place in the context of the previous relationship having ended for other reasons, such as divorce or separation.

7.52 In contrast, the Alberta Law Reform Institute considered Alberta's existing law, which denies any connection with the person's biological family,⁷³ to be "adequate", finding that there appeared to be no problem.⁷⁴

Arguments for and against

7.53 Step-parent adoption provisions would appear to have arisen because of the greater potential for children to retain or re-establish some form of social contact with the family of their other natural parent.⁷⁵ For example, upon the death of a parent, a child may well be of an age to have established a relationship with his or her grandparents and this relationship may continue, notwithstanding the surviving natural parent's new relationship.⁷⁶ On the other hand, not all adopted children in such circumstances will remain in contact with their former parent's family. This may be even less likely in the case of divorce or separation of the natural parents. Retaining intestacy rights with respect to prior family relationships may lead to unnecessary complications in some deceased estates where personal representatives must locate persons who have been adopted out of the family.⁷⁷

72. *Montana Code Annotated 2005* s 72-2-124(2). See Uniform Probate Code s 2-114(b). See also J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 730-731.

73. See *Re Matthews Estate* (1992) 1 Alta LR (3d) 198.

74. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 136.

75. See Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting* (1983) at 214-217. On the issues surrounding step-parent adoption, see also NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at para 4.23-4.88.

76. See J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 729-731.

77. J E Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why" (1984) 37 *Vanderbilt Law Review* 711 at 730.

7.54 Provisions of the type outlined above may also lead to “double dipping” with a person becoming entitled to inherit from the estates of family of both the former parent and the new adoptive parent.⁷⁸

7.55 It has also been suggested that the question of inheritance in such cases is best dealt with in the context of the adoption process. In 1997, the NSW Law Reform Commission observed:

In considering securing the right to benefit automatically from the step-parent’s estate, the loss of rights to benefit from the relinquishing parent’s estate, and possibly the estates of other members of the relinquishing parent’s family, has to be taken into account. The adults involved should attend carefully to the consequences of this for the child and, where appropriate, the child should be counselled on these consequences.⁷⁹

National Committee’s conclusion

7.56 There are two broad options available. First, leave the law as it is in the majority of Australian jurisdictions, that is, the previous family relationships should have no recognition at law. Secondly, include a provision along the lines of those contained in the NSW and SA adoption legislation, or even the North American models.

7.57 Desirable though the second option may be in that it recognises what may well be a continuing social connection with the family of the child’s deceased parent, this approach leads to other problems.

7.58 As already noted, step-parent adoptions, while not frequent, do occur in Australia. However, the National Committee considers that the consequences of such adoptions are best considered and dealt with in the individual cases in the context of the adoption process itself. This approach is preferable to trying to frame a provision for the intestacy rules that will meet even the majority of such cases.

7.59 The National Committee considers that, in the case of adoption (including a step-parent adoption), the previous family relationships should have no recognition at law for the purposes of inheritance on intestacy. For the sake of uniformity across all Australian jurisdictions, an express provision to this effect should be included in the model provisions.

78. J E Rein, “Relatives by Blood, Adoption, and Association: Who Should Get What and Why” (1984) 37 *Vanderbilt Law Review* 711 at 725.

79. NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at para 4.66.

Recommendation 27

Where a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy.

See Intestacy Bill 2006 cl 10.

Intestacy