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REFORM OF THE INTESTATE SUCCESSION ACT

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGEMENTS

The Institute wishes to acknowledge and to thank those persons who have made a significant contribution to the completion of this Report on intestate succession.

The Report is one discrete area in a cluster of topics in succession which the Institute has undertaken. We have previously issued Reports for Discussion on intestate succession and the division of matrimonial property on death. This final Report adds to our Report No. 72 dealing with the effect of divorce on wills. First, we acknowledge the work of the Project Committee which worked assiduously on the preparation of the Report for Discussion which helped clarify the issues that are represented by our final recommendations. The members of that Committee were:

Anne de Villars, Q.C.	de Villars Jones
Robert G. Drew	formerly of the Office of the Public Trustee
Janice Henderson-Lypkie	ALRI
Peter J.M. Lown, Q.C.	Director, ALRI
Suzanne C. McAfee	The Office of the Public Trustee
Justice Bonnie L. Rawlins	Court of Queen's Bench
Phil Renaud	Duncan & Craig
Dino M. McLaughlin	Field Atkinson

Our access to court files in Edmonton, Calgary and Vegreville was important in that it revealed trends in Alberta consistent with those which had been identified in a number of other jurisdictions. We acknowledge the assistance of Court Services in those three centres in allowing us access to the file information.

A number of people provided written comments on our Report for Discussion and we thank them for their input. The comments are recorded throughout the Report.

Finally, it is essential to acknowledge the work of the Institute Counsel, Janice Henderson-Lypkie, who has carried this project through to completion. What once might have been thought of as black letter law, now raises complex Charter issues and those in turn raise very sensitive and live political issues. Steering the project through the developing jurisprudence and emerging issues has been a challenging task, but one that has been met. Ms. Henderson-Lypkie's expertise in this area and her facility with both the law and the issues has greatly assisted the Board in reaching the policy decisions that this Report recommends.

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PART I — EXECUTIVE SUMMARY

SCOPE OF THIS REPORT

The estate of a person who dies without a will is distributed according to the Intestate Succession Act, which is patterned after the *Statute of Distribution, 1670* (U.K.), as amended. It comes as no surprise that a distribution scheme developed in 1670 fails to meet the needs of modern society. This report examines the existing law of intestate succession and proposes a new distribution scheme designed to reflect the views of Albertans and serve modern society.

In reforming this area of the law, we have been guided by the presumed intentions of intestates. It is not a matter of determining the actual intention of the deceased, but of examining a group with similar familial circumstances and equating the 'presumed intention' of an individual with the intention of the majority of individuals in the group. To learn of such intentions, we have relied upon information provided by Alberta lawyers who specialize in this area, studies of public opinion conducted in England and the United States, and a study of 999 files of the Surrogate Court of Alberta conducted in 1992. Each of these sources identified the same trends in public opinion concerning distribution of estates and, therefore, together offer significant direction for reform. We have also relied on statistics published by Statistics Canada to determine general trends in Canadian society concerning lifespan, family size, marriage, divorce, and cohabitation outside marriage.

THE EXISTING LAW OF INTESTATE SUCCESSION

Under the present Intestate Succession Act, if the intestate dies leaving a surviving spouse but no issue, the entire estate goes to the surviving spouse. Where the intestate is survived by a spouse and issue, the spouse's share depends upon the number of issue that survive the intestate. If there is only one child, the spouse gets $40,000 plus one-half of the residue. The child gets the other half of the residue. Where there are two or more children, the spouse gets $40,000 plus one-third of the residue. The children share the remaining two-thirds of the residue. If there is no surviving spouse or issue, the estate is distributed to the nearest relatives in the following order: parents, then brothers and sisters, then nephews and niece, and finally next of kin. The closest relatives take to the exclusion of remoter relatives.

THE NEED FOR REFORM

The existing distribution scheme was designed to serve a society in which wealth was transferred from one generation to another, inheritance between spouses was exceptional, divorce was rare and cohabitation outside marriage was viewed as sinful. The distribution scheme must be reconfigured to serve modern society. Ours is a society in which the surviving spouse has replaced the children as the primary beneficiary, divorce and remarriage is prevalent, cohabitation outside marriage is commonplace, and section 15 of the *Canadian Charter of Rights and Freedoms* has been interpreted to extend protection to those who cohabit outside marriage in relationships similar to marriage.

As a result of societal changes, the existing distribution scheme no longer reflects how the majority of intestates in given situations would want their estate to be distributed. It has become a trap for the unwary.

PROPOSED DISTRIBUTION SCHEME

In our opinion, the distribution scheme created by the *Intestate Succession Act* should: a) reflect the presumed intention of intestates as measured by the reasonable expectations of the community at large, and b) create a clear and orderly scheme of distribution. Our proposed distribution scheme reflects this premise.

Spouses

Studies show that the majority of spouses who are survived by a spouse and children of that marriage wish to leave their entire estate to the surviving spouse. Those spouses who are survived by a spouse and children, all or some of whom are of another relationship, are less likely to want their entire estate to pass to the surviving spouse. Nevertheless, the majority of spouses with children from another relationship still wish to treat the surviving spouse more generously than does the existing law.

The proposed distribution scheme would treat the surviving spouse as follows:

- If an intestate dies leaving a surviving spouse but no issue, the entire estate should go to the spouse.

- If an intestate dies leaving a surviving spouse and issue and all of the issue are also issue of the surviving spouse, the entire estate should go to the spouse.
- If an intestate dies leaving a surviving spouse and issue and one or more of the issue are not also issue of the surviving spouse, the share of the surviving spouse should be:
  - $50,000, or one-half of the estate, whichever is greater, and
  - one-half of the remainder of the estate.
- All the issue of the intestate would share equally the remaining half of the remainder of the estate.

A spouse would lose the right to share in the estate of his or her spouse where: 1) one or both of the spouses made an application for divorce or commenced an action under the *Matrimonial Property Act*, and 2) at the time of death, the application or action was pending or had been dealt with by way of final order.

Cohabitants

The proposed distribution scheme treats certain cohabitants as spouses of each other. Cohabitant is defined as follows:

> "cohabitant" means a person of the opposite sex who, while not married to the intestate, continuously cohabited in a marriage-like relationship with the intestate
>
> (i) for at least three years immediately preceding the death of the intestate, or
>
> (ii) immediately preceding the death of the intestate if they are the natural or adoptive parents of a child.

The court would consider certain factors in determining if a relationship is marriage-like. This definition of cohabitant is designed to identify those cohabitants whose relationship is one of interdependence and a publicly acknowledged commitment to permanence.

In certain situations, the intestate may be living separate and apart from his or her spouse and be residing at the time of death with a cohabitant, as defined. In this situation, the surviving spouse is deemed to predecease the intestate, and the cohabitant takes the spouse's share under the proposed act. The separated spouse would be left to his or her rights under the *Matrimonial Property Act* and *Family Relief Act*. As previously recommended in Report for Discussion No. 17, *Division of Matrimonial Property on Death*, every surviving spouse should be entitled to seek division of matrimonial property on death of the deceased spouse.

Issue

If the intestate dies leaving issue but no surviving spouse or cohabitant, the estate should be distributed among the issue per capita at each generation. This is a new system of representation that replaces the *per stirpes* method of representation. The advantages of the new system of representation are as follows:

- The initial division of the estate is made at the nearest generation to the intestate that contains at least one living member. This ensures that equal treatment of grandchildren when no children of the intestate survive the intestate.
- Members of the same generation are always treated equally.
- Members of a remoter generation never take a larger share than members of a closer generation.

Next of kin

The proposed distribution scheme would replace degrees of consanguinity with a parentelic system. See explanation at pages 147 to 160. The advantages of such a system are as follows:

- A parentelic system ensures that those who are closest to the intestate will receive the estate. For example, under the existing law, a grandnephew, a cousin, and a great-aunt are all of the 4th degree of consanguinity and would share equally. A parentelic system prefers a grandnephew to a cousin and prefers a cousin to a great-aunt.
- It will be easier and less costly to determine those who will inherit the estate
- A parentelic system divides the estate between both sides of the family.

Other

The proposed distribution scheme retains the doctrine of advancement. It also contains a survivorship clause that requires any potential beneficiary to survive the intestate by 15 days. In addition, kindred of the half-blood will inherit equally with those of the whole-blood in the same degree.

The proposals represent a clear and certain distribution scheme that will adequately serve Albertans for many decades to come.

PART II — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 8 - Disentitlement of Surviving Spouse
The surviving spouse should be treated as if he or she predeceased the intestate, if the following circumstances exist:

(i) at the time of death, the spouses were living separate and apart,
(ii) during the period of separation, one or both spouses made an application for divorce or commenced an action under the Matrimonial Property Act, and
(iii) at the time of death, the application or action was pending or had been dealt with by way of final order. 98

RECOMMENDATION No. 9 - Cohabitants
A cohabitant who falls within the following definition should be treated as a spouse of the intestate under the *Intestate Succession Act*:

PROPOSED DEFINITION
(1) For the purposes of this Act, 'cohabitant' means a person of the opposite sex who is not married to the intestate and who cohabited continuously in a marriage-like relationship with the intestate
(a) for at least three years immediately preceding the death of the intestate, or
(b) immediately preceding the death of the intestate, if there is a child of the relationship.
(2) For the purposes of subsection (1), the period of cohabitation is not considered to have been interrupted or terminated by reason only that the cohabitants have lived separate and apart during a period, or periods totalling, not more than ninety days if at the time of death the cohabitants are cohabiting with each other.
(3) For the purposes of subsection (1), "marriage-like relationship" is a relationship that corresponds to the relationship between marital partners, in which two individuals have consented to share one another's lives in a long-term, intimate, and committed relationship of mutual caring.
(4) Although no single factor or factors determines whether a relationship qualifies as marriage-like, the court should consider the following factors in determining this issue:

- the purpose, duration, constancy, and degree of exclusivity of the relationship,
- the conduct and habits of the parties in respect of domestic services;
- the degree to which the parties intermingle their finances such as by maintaining joint checking accounts, credit card or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they live or on other property, or titling the household in which they lived or other property in joint tenancy;
- the extent to which direct and indirect contributions have been made by either party to the other or the mutual well-being of the parties;

- If there is no surviving spouse, issue or parent, the estate should go to the issue of the parents of the intestate or either of them to be distributed by representation.
- If there is no surviving spouse, issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,
  a) one-half of the estate should go to the paternal grandparents or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either of them to be distributed by representation;
  b) one-half of the estate goes to the maternal grandparents or their issue in the same manner as provided in clause (a);

  but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).
- If there is no surviving spouse, issue, parent or issue of parents, grandparent or issue of grandparents, but the intestate is survived by one or more great-grandparents,
  a) one-half of the estate goes to the paternal great-grandparents, in equal shares, or to the survivor of them, and
  b) one-half of the estate goes to the maternal great-grandparents, in equal shares, or to the survivor of them;

  but if there is only one or more surviving great-grandparents on either the paternal or maternal side, the entire estate goes to the great-grandparents on that side in equal shares. Issue of great-grandparents will not take any share of the estate, and representation is not admitted among issue of great-grandparents.
- Paternal great-grandparents are the parents of the paternal grandfather of the intestate and parents of the paternal grandmother of the intestate. Maternal great-grandparents are the parents of the maternal grandfather of the intestate and parents of the maternal grandmother of the intestate.
- The system of representation chosen for collaterals should be the same as that chosen for issue.
- The *Ultimate Heir Act* should be amended to allow for an estate to escheat to the Crown as soon as it is known that all the family members within the required family lines died before the intestate. 159

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PART III — REPORT

CHAPTER 1. INTRODUCTION

A. History and Scope of Project

The Alberta Law Reform Institute is in the process of consolidating all of the existing statutory law that governs the administration of estates. The end product, an omnibus statute, will include legislation now found in the *Wills Act*, *Intestate Succession Act*, *Family Relief Act*, *Administration of Estates Act*, *Trustees Act* and many other relevant statutes. Much of the work involves reorganizing existing statutory provisions. Several areas, however, will be reconsidered in more detail. These areas include intestate succession, the effect of divorce upon wills,[1] division of matrimonial property upon death of a spouse,[2] and possibly, some aspects of family relief. This report deals with the topic of reform of intestate succession and was preceded by a report for discussion on the same topic.[3] The law of intestate succession governs the distribution of a deceased person's property where that person dies without a will.

The *Intestate Succession Act*[4] is patterned after the *Statute of Distribution, 1670* (U.K.).[5] It comes as no surprise that a distribution scheme developed in 1670 often fails to meet the needs of modern society. Our task is to design a statute that reflects the views of Albertans and serves modern society.

If this was a time when funding was readily available, we would have commissioned a public opinion survey as to how Albertans would want their

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[1] See Alberta Law Reform Institute, *Effect of Divorce on Wills* (Report No. 72, 1994).

[2] See Alberta Law Reform Institute, *Division of Matrimonial Property on Death* (Report for Discussion No. 17, 1998) [hereinafter RFD No. 17].

[3] See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion No. 16, 1996) [hereinafter RFD No. 16].

[4] R.S.A. 1980, c. I-9.

[5] *An Act for the Better Settling of Intestates Estates*, 22 & 23 Charles II, c. 10 [hereinafter *Statute of Distribution, 1670*].

property to be distributed upon their death in given fact situations. Since funding in the 1990s is anything but readily available, we have had to use other devices to determine public opinion. We have relied upon information provided by Alberta lawyers who specialize in this area, studies conducted in England and the United States, and a study of 999 files of the Surrogate Court of Alberta conducted in 1992. Each of these sources identified the same trends in public opinion. This information will be discussed in detail in the report. We have also relied on statistics published by Statistics Canada to determine general trends in Canadian society concerning lifespan, marriage, divorce and family size. All of this is useful information in the reform of intestacy rules.

Seven law reform agencies have addressed the inadequacy of their intestate succession laws in the past ten years.[6] For the most part, each agency has addressed similar issues because the same problems arise in each jurisdiction. Those issues include the following:

- What purpose should be served by the *Intestate Succession Act*?
- What is adequate provision for the spouse in these situations:
    - intestate survived by spouse and children of marriage
    - intestate survived by spouse and children from a previous marriage
    - intestate survived by spouse from whom intestate was separated at time of death
- In the event of a partial intestacy, should the spouse receive less if he or she has received assets under the terms of the will?
- Should provision be made for unmarried cohabitants? If so, how should this be done?
- How should the estate be distributed among the issue of the intestate?
- How should the law determine which next of kin should inherit the estate?

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[6] The law reform agencies that have dealt with this topic include: British Columbia Law Reform Commission, Manitoba Law Reform Commission, The Law Reform Commission (England), Queensland Law Reform Commission, Hong Kong Law Reform Commission, Uniform Law Conference of Canada, and the National Conference of Commissioners on Uniform State Laws.

- Should the Act contain a survivorship clause deeming the surviving beneficiary to predecease the intestate where the beneficiary does not outlive the intestate by a certain period, say 15 days?
- Does the doctrine of advancement serve a useful purpose today?

This report will address each of these issues.

B. Terminology

Although lawyers will be familiar with many of the terms used in this report, non-lawyers will not be familiar with them. It is, therefore, useful to define key terms used throughout this report. The first group of terms deals with intestacy and succession. *Intestacy* is the state or condition of dying without having made a will. *Intestate* is a term that has two meanings. An individual who dies intestate is one who dies without a will. Such an individual is sometimes referred to as an intestate. *Succession* describes the process whereby one comes to property previously enjoyed by another. *Intestate succession* involves succession of property where the deceased person has left no will instructing how the property should be distributed. *Intestacy rules* are those rules that determine how the intestate's property is to be distributed upon death. These rules are created by statute.

Other terms used in this report describe the relationship of the intestate to certain blood relatives. *Issue* includes all those who descend from the intestate, being children, grandchildren, great-grandchildren and so on. *Descendants* is another term used to describe issue. *Ancestors* are those who came before the intestate, being the intestate's parents, grandparents and so on. *Collaterals* are all the blood relatives of the intestate who are not issue or ancestors. This group includes brothers, sisters, aunts, uncles, cousins, and so on of the intestate.

Several other technical terms are used in the report that are unique to this area of law, such as *per stirpes*, per capita at each generation, degrees of consanguinity, and parentelic system. These terms will be defined in Chapter 6 where they are discussed in detail.

C. Outline of Report

Chapter 2 provides a historical sketch and overview of Canadian law. Chapter 3 summarizes the trends in Canadian society and Chapter 4 discusses public opinion as to reform of intestate succession law. Chapters 5 and 6 develop our final recommendations for change. Draft legislation that incorporates the recommendations constitutes Part IV of this report.

CHAPTER 2. HISTORICAL SKETCH AND OVERVIEW OF CANADIAN INTESTACY LEGISLATION

A. History of Intestate Succession

1. England

By the early 1600s, the English courts had developed rules for succession of property in the event of an intestacy. Personal property was distributed according to rules of local custom, which led to uncertainty and irregularity, and land descended to the oldest male heir by the principle of primogeniture.[7] The confusion and irregularity in respect of distribution of personal property upon intestacy necessitated the enactment of the *Statute of Distribution, 1670*[8] (which was amended in 1677, 1685 and 1890).[9] The dichotomy between succession to real property and personal property upon intestacy continued in England until the *Administration of Estate Act, 1925* abolished primogeniture[10] and created one set of rules dealing with the succession of real and personal property upon an intestacy.

The *Statute of Distribution, 1670* as amended in 1677 and 1685 distributed the personal property of intestates as follows:[11]

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[7] It was possible for women to inherit land in the event of an intestacy, but male issue were preferred to female, and the eldest male heir took in priority to younger males. See C.H. Sherrin & R. C. Bonehill, *The Law and Practice of Intestate Succession* (London: Sweet & Maxwell, 1987) at 24-27. For a more detailed discussion of historical developments of English intestate succession law see L.J. Hardingham, M.A. Neave & H.A. Ford, *Wills and Intestacy in Australia and New Zealand*, 2d (Sydney: Law Book Company, 1989) c. 14.

[8] *An Act for the Better Settling of Intestates Estates*, 22 & 23 Charles II, c. 10.

[9] The *Statute of Distribution, 1670* was amended by the *Statute of Frauds, 1677* and by the *Statute of Distribution, 1685*. The 1670 and 1685 statutes are known collectively as the *Statutes of Distribution*. The *Statute of Frauds, 1677* made it clear that the husband was entitled to all of the wife's personal property. The *Statute of Distribution, 1685* provided that the brothers and sisters of an intestate shared equally with the intestate's mother. See Sherrin & Bonehill, *supra*, note 7 at 35.

[10] See *Administration of Estates Act, 1925* (U.K.), 1925, c. 23, Part IV.

[11] Sherrin & Bonehill, *supra*, note 7 at 35.

Widow and widower. A widower was entitled to the whole of his wife's personalty to the exclusion of other relatives. A widow was entitled to one-third of the personal estate where there were surviving issue, and to one-half if there were no issue. After 1890 the widow was additionally entitled to a "statutory legacy of 500 pounds".

Issue. Subject to the rights of a surviving spouse the issue were primarily entitled with children of deceased children taking their parents' share *per stirpes*. Males were entitled equally with females and there was no preference for the eldest child. Advancements by way of portion made by a father to his children had to be brought into account.

Next of kin. Where the intestate left a widow but no issue, then the next of kin were entitled to a half share in the estate. In the absence of a surviving spouse or issue the relatives were then entitled in order, according, in theory at least, to their degrees of relationship to the deceased. The degree of relationship was ascertained by counting the number of steps that the relative was removed from the deceased, counting the generations down in the case of descendants and computing up to the common ancestor and then down in the case of other relatives. Relatives more closely connected were entitled as a class in priority to relatives more remotely connected. However, this formula was not always followed strictly since policy considerations tended to overrule strict logic. Thus a father was a person primarily entitled to the whole estate in the absence of a spouse and issue and excluded, rather than took equally with, the mother. In the absence of a father then the mother shared equally with brothers and sisters and children of deceased brothers and sisters were equally entitled to their parents' share.

It could be that relatives of the first degree (mother), second degree (brothers and sisters) and third degree (nephews and nieces) were all equally entitled. In the absence of a spouse, issue or parents the persons entitled were the brothers and sisters, including children of deceased brothers and sisters, but if **all** the brothers and sisters had predeceased the intestate, then their children took in their own right as relatives of the third degree *per capita*. Grandparents came after brothers and sisters followed by uncles and aunts. Relatives of the fourth degree, e.g. first cousins etc., then took and so on, subject to two overriding rules that a relative more closely connected to the deceased excluded a relative more remotely connected and that within equal degrees of relationship the relatives took equally. In the absence of ascertainable relatives the Crown was entitled to personalty as *bona vacantia*.

The *Statute of Distribution, 1670* as amended is the progenitor of most Canadian intestate succession legislation; however, amendments have been made to the Canadian legislation to improve the position of the spouse.

2. Canada

The early English law was transported to the British colonies established in what is now Canada. Canadians, being the enlightened people they are,

abolished the right of primogeniture much sooner than did the English. Upper Canada did so in 1851,[12] the North West Territories (which at that time included Alberta and Saskatchewan) in 1887.[13] After abolition of primogeniture, both real property and personal property were distributed under rules formerly used for personal property only.[14] Later in this chapter, we will examine the existing Canadian legislation in detail.

3. Alberta

In 1905, when Alberta became a province, intestate succession was determined by the English law of July 15, 1870 as amended by a 1901 Ordinance of the Northwest Territories that dealt with distribution of personal property. Land was dealt with and distributed as personal property.[15] Personal property was distributed according to the *Statute of Distribution, 1670* as amended by the English statutes of 1677 and 1685 and as amended by *An Ordinance respecting the Devolution of Estates*[16] enacted in 1901.

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[12] Statutes (Province of Canada) 14 & 15 Vict., c. 6 (1851).

[13] See *The Land Titles Act, 1894*, 57-58 Vict., c. 28 (Canada), s. 3 and *An Act to amend the Land Titles Act, 1894*, 63-64 Vict., c. 21 (Canada), s. 5. Please note that the Report for Discussion, No. 16 is inaccurate if it suggests that the rule of primogeniture was not repealed until shortly after Alberta became a province. In fact, the federal government changed the law for the Northwest Territories, including what became Alberta, in 1887. Section 2 of *An Act Respecting the Transfer and Descent of Land*, S.A. 1906, c. 19 confirmed the existing law.

[14] Section 5 of 63-63 Vict., c. 21 (Canada) provides:

> It is hereby declared to have been the intention of the Acts known as *The Territories Real Property Acts* . . . as well as that of *The Land Titles Act*, chapter 28 of the statutes of 1894, . . . that land in the Territories devolving upon the personal representatives of a deceased owner thereof should be dealt with and distributed as personal estate, and that shall be taken and held to have been the law and the true intent and meaning of the said Acts from . . . the first day of January, 1887.

[15] See authorities cited in two previous footnotes. Within a year of Alberta becoming a province, the Alberta Legislature enacted *An Act Respecting the Transfer and Descent of Land*, S.A. 1906, c. 19. Section 2 of that Act provided that:

> 2. Land in the Province shall go to the personal representatives of the deceased owner thereof and shall be dealt with and distributed as personal estate.

[16] Ordinances of the N.W.T. 1901, c. 13. This Ordinance gave the entire personal estate to a man's widow where the intestate had no issue (s.1). This was a marked departure from the *Statutes of Distribution* which divided the man's estate between his widow and his next of kin. The Ordinance also allowed the mother to take the entire estate (to the exclusion of the intestate's brothers and sisters) where the intestate died without wife, child or father (s.2). It also treated illegitimate children of a woman as the legitimate children of the woman (s.4).

This piecemeal legislation must have proved unsatisfactory because in 1920 the Alberta Legislative Assembly enacted *An Act to Consolidate and Amend the Law Relating to Intestate Succession*.[17] This Act dealt with the distribution of real and personal property on intestacy. It borrowed heavily from the *Statute of Distribution, 1670* as amended in that it divided the estate between the surviving spouse and issue.[18] If there was no surviving spouse or issue, the estate was distributed to the parents equally, or the survivor thereof; failing this, brothers and sisters (and nephews and nieces can take by representation); failing this, next of kin. Husband and wives were treated equally, as were mothers and fathers.

In 1928, Alberta repealed the 1920 Act and replaced it with *The Intestate Succession Act, 1928*, which was patterned after the *Uniform Intestate Succession Act, 1925*. The 1928 Act, although based on the Uniform Act, contained many provisions already found in the 1920 Alberta Act. This 1928 Act has survived, with certain amendments, up to this day. The amendments have improved the position of the surviving spouse and illegitimate children. A preferential share for the surviving spouse was first introduced on April 1, 1964 at $20,000,[19] and increased to $40,000 as of January 1, 1976.[20] As of November 1, 1991, "issue" as defined in the Act includes all lineal descendants, whether born within or outside marriage, of the ancestor.[21]

4. Uniform Intestate Succession Act

The Uniform Law Conference of Canada (previously known as the Conference of Commissioners on Uniformity of Legislation in Canada) adopted a *Uniform Intestate Succession Act* in 1925, 1958 and 1985. Until 1985, the Uniform Acts were patterned after the *Statute of Distribution, 1670*, as amended with

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[17] S.A. 1920, c. 11.

[18] The 1920 Act rejected the old principle of primogeniture; it treated all children equally regardless of sex or order of birth. The land became part of the estate which was distributed among the spouse and children.

[19] S.A. 1964, c. 37, ss 3, 4.

[20] S.A. 1975 (2), c. 43, s. 2(2).

[21] This amendment came about because of Canada's desire to ratify the United Nation's *Convention on the Rights of the Child*. See Alberta Law Reform Institute, *Status of Children: Revised Report, 1991* (Report No. 60, 1991) at 1-2.

some minor modifications. In 1985, the Uniform Law Conference of Canada recommended adoption of a revised Uniform Act that adopts a distribution scheme based on American reform. The 1985 Uniform Act will be discussed in more detail later in this chapter.

Alberta intestate succession legislation has been more generous to the surviving spouse than has the Uniform Acts. Alberta legislation has always given the entire estate to the surviving spouse where the intestate dies leaving no issue. By contrast, the Uniform Acts have, until 1985, distributed the estate to the surviving spouse and the intestate's parents when the estate exceeded $20,000. Also, Alberta introduced a preferential share for the surviving spouse in 1964, whereas the Uniform Act did not do so until 1985.

B. Comparison of Canadian Legislation and the Uniform Acts

Canadian legislation and the uniform Acts of Canada and United States fall into four categories. The first category, into which fall all the intestate succession statutes of the common-law provinces except Manitoba,[22] is based for the most part on the *Statute of Distribution, 1670*, as amended. The Manitoba legislation, the *Uniform Probate Code* of the United States[23] and the *Uniform Intestate Succession Act* of Canada are distinct and fall into categories of their own.

1. Category 1: Canadian mainstream

This category of distribution scheme gives the entire estate to the spouse if there are no surviving issue of the intestate. Where there are issue of the intestate, the spouse's share depends upon the number of issue that survive the intestate. If there is only one child, the spouse gets a preferential share plus one-half of the residue. The child gets the other half of the residue. Where there are two or more children, the spouse gets a preferential share

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[22] *Intestate Succession Act*, R.S.A. 1980, c. I-9; *Estate Administration Act*, R.S.B.C. 1996, c. 122, Part 10; *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, Part II; *Intestate Succession Act*, R.S.N. 1990 c. I-21; *Intestate Succession Act*, R.S.N.S. 1989, c. 236; *Succession Law Reform Act*, R.S.O. 1990, c. S-26, Part II; *Probate Act*, R.S.P.E.I. 1988, c. P-21, Part IV; *Intestate Succession Act*, S.S. 1996, c. I-13.1; *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10; *Nunavut Act*, S.C. 1993, c. 26, as am. by S.C. 1998, c. 15, s. 4; *Intestate Succession Act*, R.S.Y. 1986, c. 95.

[23] The National Conference of Commissioners on Uniform State Laws issues uniform acts in the United States. It is the American equivalent of the Uniform Law Conference of Canada.

plus one-third of the residue. The children share the other two-thirds of the residue.

The size of the preferential share varies considerably, as illustrated in this chart:

Province	Preferential Share	Eff. Date	Sub-category
Alberta	$40,000	Jan. 1, 1976	1(a)
British Columbia	$65,000	Oct. 1, 1983	1(a)
Saskatchewan	$100,000	June 22, 1990	1(a)
Ontario	$200,000	April 1, 1995	1(a)
New Brunswick	any interest of intestate in property that is marital property of intestate and spouse	May 9, 1991	1(b)
Nova Scotia	election between $50,000 or home, whichever is greater in valuable	Dec. 13, 1975	1(c)
Northwest Territories	election between $50,000 or home, whichever is greater in value	March 9, 1983	1(c)
Nunavut[24]	election between $50,000 or home, whichever is greater in value	March 9, 1983	1(c)
Newfoundland	$0		1(d)
Prince Edward Island	$0		1(d)
Yukon	$0 (with court discretion to give spouse entire estate)		1(e)

Subject to the interest of the spouse, the estate is distributed as follows:

- *per stirpes* among the issue, failing this
- the father and mother take in equal shares if both are living, or all to the survivor, failing this
- brothers and sisters in equal shares and if any brother or sister has predeceased the intestate, the children of that brother or sister take their parent's share, failing this

[24] Nunavut became the third territory of Canada as of April 1, 1999. It adopts the law of the N.W.T. as in force on that date. See s. 29 of the *Nunavut Act*, S.C. 1993, c. 26, as amended by S.C. 1998, c. 15, s. 4.

- to the nephews and nieces in equal shares and in no case shall representation[25] be admitted, failing this
- equally among the next of kin of equal degrees of consanguinity to the intestate and in no case shall representation be admitted.

This general description of the law must be qualified in respect of Ontario, and the Northwest Territories and Nunavut. In Ontario, representation among issue is still allowed, but the root generation[26] is the closest generation to the intestate in which there is at least one member surviving at the time of death. The other provinces use a *per stirpes* system of representation. Under this system, the root generation is the generation consisting of the children of the intestate, regardless of whether there are children who survive the intestate. Systems of representation will be discussed in detail in Chapter 6.

In all the Canadian mainstream statutes except that of the Northwest Territories and Nunavut, the legislation uses the term "spouse" but does not define it. In such a context, "spouse" is interpreted as referring to married persons only. The two territories differ by defining spouse to include married persons and certain couples who cohabit outside marriage. By definition, "spouse" includes a person of the opposite sex who immediately before the death was cohabiting outside marriage with the intestate if they had cohabited for a period of at least two years, or had cohabited in a relationship of some permanence if there was a child of the relationship by birth or adoption.[27] "Cohabit" means to live together in a conjugal relationship, whether within or without marriage.[28] This definition applies to all intestates who die on or after November 1, 1998.[29] In all other aspects, the intestacy legislation of the Northwest Territories and Nunavut is the same as the other Canadian mainstream statutes described above.

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[25] Generally speaking, representation allows children to take the share their parent would have taken had that parent survived the intestate. In Chapter 6, we examine this concept in depth.

[26] This is the generation at which the initial division of the estate takes place.

[27] *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 1(1).

[28] *Ibid*.

[29] *Ibid*. at s. 1(2).

2. Category 2: Manitoba

In 1985, the Manitoba Law Reform Commission made recommendations for reform of Manitoba's intestacy legislation in its *Report on Intestate Succession*. Most of these recommendations were incorporated into the *Intestate Succession Act*,[30] which came into force on July 1, 1990.

The Manitoba Legislature rejected the Commission's recommendation that the spouse should receive a generous preferential share plus one-half of the residue in situations in which the intestate is survived by a spouse and issue. Instead, it chose to give the surviving spouse the entire estate in situations in which:

- there are no surviving issue of the intestate, or
- the issue of the intestate are also issue of the surviving spouse.

If the intestate has children from another relationship, the surviving spouse gets a preferential share plus one-half of the residue. The preferential share is $50,000 or one-half the value of the estate, whichever is greater. The result is that the spouse receives a minimum of three-quarters of the estate, and a larger percentage of the estate when the value of the estate is less than $100,000. The balance of the residue goes to the intestate's issue from all relationships.

The Manitoba Act no longer uses a *per stirpes* distribution among the issue. This has been replaced with a type of representation known as per capita at each generation.[31] In addition, the Manitoba Act no longer refers to degrees of consanguinity. A parentelic system now determines the relatives who will inherit the estate if the intestate has no surviving spouse and no

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[30] S.M. 1989-90, c. 43, C.C.S.M. c. I-85.

[31] Section 2-709(b) of the Uniform Probate Code, 11th ed. defines "per capita at each generation" as follows:

> (b) [... Per Capita at Each Generation] If an applicable statute or a governing instrument calls for property to be distributed ... "per capita at each generation", the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants (ii) and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

surviving issue. Under a parentelic system, the lineal descendants of the closest ancestor of the intestate inherit in preference to the lineal descendants of more remote ancestors.[32] These concepts will be discussed in detail in Chapter 6.

3. Category 3: Uniform Intestate Succession Act

The 1985 *Uniform Intestate Succession Act* is a marked departure from its predecessors. This Act gives the entire estate to the surviving spouse where there are no surviving issue of the intestate. Where the intestate is survived by a spouse and issue, the spouse receives $100,000 plus one-half of the residue. The child or children receive the other one-half of the residue. The portion of the estate going to the issue is still distributed *per stirpes*, although this term is no longer used in the Act. Where there is no surviving spouse or issue, the estate is distributed among the relatives of the intestate according to a parentelic system.

4. Category 4: Uniform Probate Code (U.S.)

Article II of the *Uniform Probate Code* (U.S.) deals with intestacy, wills and donative transfers. In 1991, the National Conference of Commissioners on Uniform State Laws introduced a freestanding version of Article II of the *Uniform Probate Code* entitled the *Uniform Act on Intestacy, Wills and Donative Transfers*. This Act was reintroduced in this form with the hope that states that objected to other articles in the *Uniform Probate Code* could adopt Article II. In 1993, the provisions of Article II that dealt with the spouse's elective share were substantially revised. Hereafter, all references will be to Article II of the *Uniform Probate Code* as amended in 1993.

The intestacy rules of the *Uniform Probate Code* give all to the surviving spouse in these circumstances:

- where there are no surviving descendants or parents of the intestate, or
- where the intestate's surviving descendants are also descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the intestate.

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[32] Manitoba Law Reform Commission, *Report on Intestate Succession* (Report No. 61, 1985) fn. 44. [In later footnotes, Manitoba Law Reform Commission will be abbreviated as M.L.R.C.]

If the intestate has no surviving descendants but has a surviving spouse and a parent or parents, the surviving spouse receives $200,000 plus three-quarters of the residue. The surviving parents or parent receive the remaining one-quarter of the residue. If all of the descendants of the intestate are also descendants of the surviving spouse and the surviving spouse has descendants from another relationship, the surviving spouse receives $150,000 plus one-half of the residue. The descendants of the intestate (i.e. the joint children) share the other one-half of the residue. If one or more of the intestate's descendants are from another relationship, then the surviving spouse receives $100,000 plus one-half of the residue. The descendants of the intestate share the other half of the residue. When the descendants receive a portion of the estate, they share on a per-capita-at-each-generation basis.

If the intestate has no surviving spouse but has surviving descendants, the entire estate goes to the descendants. If the intestate has no surviving spouse or descendants, a parentelic system determines which relatives will inherit the estate.

A greater number of variables are taken into account by Article II of the *Uniform Probate Code* as compared to the Manitoba Act. The Manitoba Act is not concerned with whether the surviving spouse has issue from another relationship, whereas Article II is concerned with this. Also, the Manitoba Act extends the parentelic system to great-grandparents and their issue, whereas Article II only extends the parentelic system to grandparents and their issue.

CHAPTER 3. TRENDS IN CANADIAN SOCIETY

A. Introduction

In this chapter, we look at lifespan, family size, marriage, divorce and cohabitation outside marriage to get a general picture of our ever changing society. These trends influence the course of reform.

B. Lifespan

Life expectancy has increased over time.[33] Life expectancy for males who were born in 1971 was 69.6 years, for females 76.6 years. This had increased to 75.7 years for males born in 1996 and 81.5 years for females born in 1996.[34] This trend is likely to continue. By 2016, life expectancy in Alberta is anticipated to increase to 78.5 years for males and 83.7 years for females.[35]

In 1995, the median age for male Albertans at time of death was 72 years; the median age for female Albertans was 79 years.[36] Of the 15,895 Albertans who died in 1995, 72.6% were 65 years of age or older, 24.1% were 18 to 64 years of age, and 3.3% were 17 years of age or younger.[37] Examined according to sex, 67.1% of the men who died were 65 years of age or older and 79.1% of the women who died were 65 years of age or older.[38] A similar result is observed in 1994.[39]

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[33] Statistics Canada, *Report on the Demographic the Situation in Canada, 1997* (Ottawa: Industry, Science and Technology, Canada, 1998) Cat. No. 91-209-XPE at 77, Table 20.

[34] *Ibid*.

[35] Premier's Council in Support of Alberta Families, *Facts of Alberta Families* (1995 ed.) at 9.

[36] Statistics Canada, *Births and Deaths, 1995* (Ottawa: Industry, Science and Technology, Canada, 1997) Cat. No. 84-210-XMB, Table 4.3 and calculations of author.

[37] *Ibid*.

[38] *Ibid*.

[39] In 1994, 15,613 people died in Alberta. Of these, 71.1% were 65 years of age or older. Source: *supra*, note 36 at Table 4.4 and calculations by the author.

C. Family Size

Most Canadians are aware of the trend towards smaller families. They do not, however, recognize that this has been a trend since 1871,[40] with the baby boom (1945-1960) being a temporary reversal in a long-term trend towards smaller families. In 1871 the fertility rate ("the number of children a woman would have during her lifetime if she were to follow the fertility patterns of the time")[41] was 6.8 and, with the exception of the baby boom, has continue to fall ever since. Since 1972 the fertility rate has been below the replacement rate of 2.1, reaching an all-time low of 1.65 in 1987.[42] Since then it has increased somewhat to 1.8 in 1991 and then declined during the years 1992 to 1995.[43] This means there will be fewer brothers and sisters, fewer aunts and uncles, fewer cousins than in past generations, and fewer guests at family reunions.

Although the trend is to smaller families, the actual number of families has increased over time.[44] At the same time, the percentage of Canadians who are living alone has increased.[45]

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[40] See The Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa: Vanier Institute, 1994), Chart 33. The trend from 1921 to 1990 is summarized at 13, Statistics Canada, Catalogue 82-553, Selected Birth and Fertility Statistics, 1921-1990, as follows:

> Between 1921 and 1937, the total fertility rate declined 25% from 3.54 in 1921 to 2.64 in 1937. During the 1940s and baby boom period of the 1950s, the rate increased 49% from 2.64 in 1937 to 3.93 in 1959. Since 1959 the fertility rate has declined for 27 out of 31 years. In 1972, for the first time since 1921, the fertility rate of 2.02 was below the replacement level of 2.10. Between 1972 and 1986 it declined another 18.4% to 1.65 then increased in each of the next four years reaching 1.86 in 1990.

[41] Vanier Institute, *ibid*. at 54. The statistics usually measure this as births per 1000 women who are 15 years of age or older. It is also described as the average number of children per woman who is 15 years of age or older. In 1991, there were 1,815 children born per 1,000 Canadian women 15 years of age or over. This equates to a fertility rate of 1.8 which measures the average number of children born to one woman.

[42] Statistics Canada, *Selected Birth and Fertility Statistics, Canada, 1921-1990* (Ottawa: Industry, Science and Technology, Canada, 1993) Catalogue No. 82-553 at 12-13.

[43] Statistics Canada, *Fertility* (Ottawa: Industry, Science and Technology, Canada, 1993) 1991 Census of Canada, Catalogue No. 93-321, Table 2 at 16. There is some difference in the calculation of fertility rates, although the same trend is seen. Compare with *Report on the Demographic Situation in Canada, 1997, supra*, note 33 at 122-23, Table A5 which gives total fertility rates for Canada from 1982-1995. This publication shows a low of 1.58 in 1987, a high of 1.71 in 1990 and 1.70 in 1991, and a return to 1.64 in 1995.

[44] Vanier Institute, *supra*, note 40 at 29, Table 1.

[45] *Ibid*.

D. Marriage and Divorce

Lack of a historical perspective sometimes lulls people into thinking marriage is an unchanging institution. This, of course, is not true. Marriage, like all other institutions, is affected by economic and social circumstances and changes with times.[46] Not only do the rites of marriage vary over time,[47] so does the number of people who marry,[48] the age at which they marry,[49] the rights and obligations associated with marriage, and the philosophy underlying marriage.[50] These changes, however, have never defeated the institution's popularity and marriage remains a fundamental institution in our society.

Although the history of marriage is fascinating,[51] for our purposes we need only look back at the changes that have taken place in this century, and, more importantly, in the last 40 years. Since the 1960s, the following trends have been observed: marriage is happening with less frequency (in fact more people are choosing not to marry at all), is occurring later in life, and is more often ending in divorce.[52] The changes in the last 40 years in respect of marriage and divorce are nothing short of remarkable.

The marriage rate, measured as marriages per 1,000 population, has varied over the last 70 years. It reached a low of 5.9 marriages per 1,000 population in 1932 when Canadians put off marriage because of the lack of jobs in the Great Depression. It rebounded to a high of 10.9 during the

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[46] For an interesting history of marriage since the 1600s see S. Parker, *Informal Marriage, Cohabitation and the Law 1750-1989* (New York: St. Martin's Press, 1990).

[47] *Ibid*. In the 1600s, most English citizens were not married in a church. A marriage began by the exchange of promises to marry before witnesses followed by cohabitation. It was not until Lord Hardwicke's Act, 1753 that the law recognized only those marriages that were performed in a church or public chapel of The Church of England. The ceremony had to be preceded by the obtaining of a license or the publication of banns in the parish of the couple. In time, ceremonies performed in other churches were recognized, as well as civil ceremonies.

[48] Vanier Institute, *supra*, note 40 at Chart 16.

[49] *Ibid*. at Chart 19.

[50] In the 1800s, the concept of duty to family prevailed over the notion of romantic love. In time the latter became the more prevalent concept and remains so to this day.

[51] Parker, *supra*, note 46.

[52] R. Beaujot, *Population Change in Canada* (Toronto: McLelland & Stewart, 1991) at 239-42.

Conscription Crisis of 1942. The fact single men were drafted before married men contributed to this high level. It reached this level again upon the return of the veterans from World War II. Since the mid-1940s, the marriage rate has declined, with the exception of a brief rally in the early 1970s. The marriage rate for 1990 was 7.1, which is very close to the marriage rate of the 1920s.[53] This trend has continued in the nineties although there have been year-to-year fluctuations.[54]

The average age at first marriage has also varied over time. From 1921 until 1940 the average age of males at first marriage was near 28 and for females was near 24.5. From 1940 until 1960, the average age at first marriage for both sexes fell to 25.4 and 22.6 respectively. Since 1960 the average age at first marriage has steadily risen so that in 1990 the average age at first marriage for males was 27.9 and for females was 26.[55] In fact, first marriage rates for teens and people in their early twenties has fallen dramatically.[56] As will be discussed later, common-law relationships often replace marriage in the early conjugal years.

Since the divorce laws were liberalized in 1968, divorce has occurred with increasing frequency in Canadian society.[57] A small portion of the increase is attributable to the growth in the number of married couples. Most of the increase results from Canadians' growing propensity to divorce and the ease of obtaining a divorce.[58] One can see the magnitude of change by comparing the numbers of divorce granted in 1968 and 1996: 11,000 in 1968

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[53] Vanier Institute, *supra*, note 40 at Chart 19; J. Dumas & Y. Péron, *Marriage and Conjugal Life in Canada: Current Demographic Analysis* (Ottawa: Statistics Canada, 1992) at 23, Figure 3.

[54] *Report on the Demographic Situation in Canada, 1997*, *supra*, note 33 at 25-31.

[55] Vanier Institute, *supra*, note 40 at Chart 19; Dumas & Péron, *supra*, note 53 at 23, Figure 3.

[56] Vanier Institute, *supra*, note 40 at Chart 20.

[57] Canada is not alone in its experience. Most industrialized nations experience a similar trend. Canada, however, has gone from having one of the lowest divorce rates of an industrialized country to having one of the highest divorce rates.

[58] Dumas & Péron, *supra*, note 53 at 53.

and 71,528 in 1996.[59] This is, of course, a crude method to measure the divorce rate but it emphasizes the magnitude of change experienced in Canada.

There are many methods of measuring the divorce rate and many comparisons that can be made among those who divorce.[60] Each measure shows that the divorce rate has increased dramatically since 1968 and the trend does not seem to be abating. For example, the total divorce rate per 10,000 marriages for 1969 was 1,367. The total divorce rate per 10,000 marriages in 1996 was 3,463.[61] Comparisons of different groups provide interesting information. First, the likelihood of divorce is not the same for all age groups. Divorce rates for older Canadians are lower than for younger Canadians.[62] Some authors have estimated that 15.4% of all 1961-62 marriages will end in divorce, 26.7% of all 1971-72 marriages will end in divorce, and 28% of all 1984-86 divorce rates will end in divorce.[63] Second, the risk of divorce is greater for early-in-life marriages and remarriages.[64]

Given the high divorce rate, remarriage is becoming increasingly common in Canadian society.[65] In 1967, 88% of marriages were the first marriage for both spouses and 12% were a remarriage for at least one of the spouses. In 1989, 67% of the marriages were the first marriage for both

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[59] Vanier Institute, *supra*, note 40 at 45, Chart 24; *Report on the Demographic Situation in Canada, 1977*, *supra*, note 33 at 33.

[60] See: 1) Statistics Canada, *Population Dynamics in Canada* (Ottawa: Prentice Hall, 1994) Catalogue 96-305E, Table A.6, Divorced persons per 1,000 married persons (with spouse present) by age group.
2) Statistics Canada, *Families in Canada* (Ottawa: Prentice Hall, 1994) 1991 Census of Canada, Catalogue 96-307E at Table A.2, Divorces and Rates for Selected Years, Canada.
3) Dumas & Péron, *supra*, note 53, c. 4. This is a very detailed look at divorce in Canada since 1969.

[61] Dumas & Péron, *supra*, note 53 at Table 18 and 54-65; *Report on the Demographic Situation in Canada, 1997*, *supra*, note 33 at 34-35, Table 8. Table 8 shows that for the years 1990 until 1995, the divorce rate fluctuated between 3700 to 3850. For reasons not yet well understood, it dropped to 3,463 in 1996.

[62] For a detailed discussion see Dumas & Péron, *supra*, note 53 at 59-62.

[63] Beaujot, *supra*, note 52 at 239-40.

[64] For detailed information on this topic see Dumas & Péron, *supra*, note 53 at 56-58.

[65] It is interesting to note that while the number of remarriages has increased the actual rate of remarriage among divorced people is falling. See Dumas & Péron, *supra*, note 53 at 42-50.

spouses and 33% were a remarriage for at least one of the spouses.[66] "While the number of all marriages increased, the number of first marriages for both spouses declined slightly and remarriages tripled. Marriages between two previously-married persons almost quadrupled in number between 1967 and 1989."[67]

Despite the high divorce rate in Canada, the actual number of divorced persons in 1996 was only 5.1% of the Canadian population that is 15 years of age or over.[68] Although more than 5.1% of this population have been divorced, remarriage keeps the actual number of divorced persons relatively low. Remarriage also accounts for the fact that even with the high divorce rate, most Canadians will still be married for a large portion of their life. The difference will be that in the future Canadians are less likely to have only one marriage.[69] The trend is towards serial monogamy.

Many changes in society have given rise to this dramatic increase in the divorce rate.[70] For our purposes, the underlying causes are not as important as the resulting consequence. The increase in divorce and remarriage brings about increasing numbers of blended families. Reform of succession law should take this development into account.

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[66] Vanier Institute, *supra*, note 40 at Chart 18. By 1996, this figure had risen to 34.1%. See *Report on the Demographic Situation in Canada, 1997*, *supra*, note 33 at 26, Table 4.

[67] Vanier Institute, *supra*, note 40 at 38.

[68] Statistics Canada, *Population 15 Years and Older by Marital Status*, 1996 Census, http://www.statcan.ca/english/census96/Oct14/mar1.htm. This figure has grown from 4% in 1991. See Vanier Institute, *supra*, note 40 at Chart 14.

[69] Dumas & Péron, *supra*, note 53 at 93-95.

[70] Reasons given to explain the rising divorce rate include:

- greater social mobility
- increased participation of women in the labour force
- more liberal attitudes regarding sex
- decreasing influence of organized religion
- changing views about relationships
- movement for equal rights of women
- lower birth rates.

See Vanier Institute, *supra*, note 40 at 48.

E. Cohabitants Outside Marriage

In 1981, Statistics Canada began examining cohabitation outside marriage. Since then, there has been an ever expanding quantity of data concerning such relationships. Under this heading, we examine what is known of such relationships under the following categories: prevalence generally and according to various age categories, legal status, fertility, duration of the relationship, and type of relationship. This information will assist us in developing policy in respect of such relationships.

1. Prevalence of non-marital cohabitation

Common-law unions are increasingly popular in Canada. The following lists the number of Canadians 15 years of age and older who lived in a common-law union in the years in question.[71]

1981	713,215
1986	973,880
1991	1,451,905
1996	1,828,700

Figure 1, produced below, shows the percentage of Canadians within a certain age category who lived in such unions in 1981, 1986, 1991 and 1996.[72] The graph shows that while common-law unions are becoming more frequent in all age categories, the majority of Canadians who live in such unions are people who have not reached their 35th birthday. In 1991, 60% of all Canadians who were in common-law unions were less than 35 years of age.[73] In 1996, this percentage had dropped to 51.8% reflecting the increasing popularity of this type of relationship among older Canadians.

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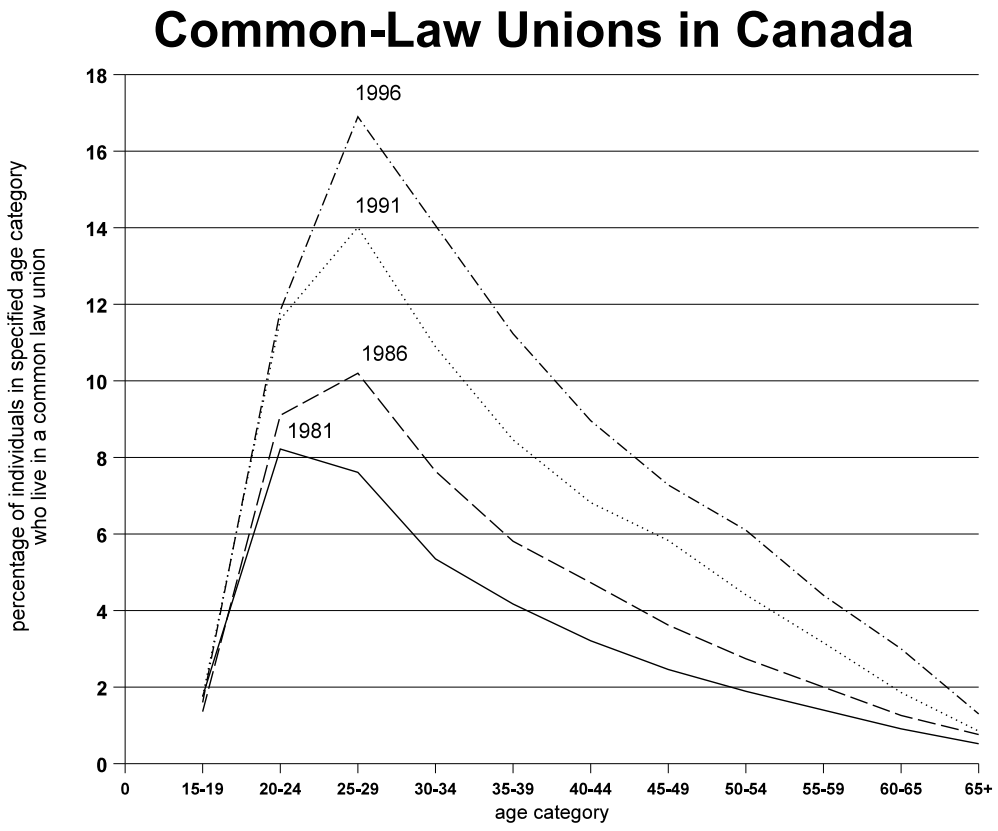
[71] *Population Dynamics in Canada*, *supra*, note 60 at 59, Table A.7 and statistics obtained from the 1996 National Tables.

[72] Source: *Ibid*. at Table A.1 & A.7.

[73] *Ibid*. at Table A.7. The total number of persons in common-law unions in 1991 is 1,451,905. The number who are between the ages of 15 and 34 is 864,595. The ratio of people in that age group to total is 59.5%.



Source: **Statistics Canada**,
(1) *Population Dynamics in Canada*
Catalogoue No. 96-305E
Table A.1 + A.7
(2) 1996 Census Charts

The same general age distribution is seen in Alberta. There were 119,900 Albertans who were living in common-law unions in 1991 and 143,225 in 1996.[74] Broken down into age categories, this becomes:[75]

Age	1991	1996
15-19	4520	4240
20-24	23710	24195
25-29	27645	28130
30-34	21650	25100

[74] Statistics Canada, *Age, Sex and Marital Status* (Ottawa: Supply and Services Canada, 1992) 1991 Census of Canada, Catalogue 93-310 at 187, Table 6 and statistics gathered from 1996 National Tables.

[75] *Ibid.*

Age	1991	1996
35-39	14495	20675
40-44	10185	14910
45-49	6780	10295
50-54	4310	6640
55-59	2750	3960
60-64	1695	2360
65+	2160	2715

In 1991, 10.2% of Alberta couples lived in common-law unions, and 64.6% of these Albertans had not reached their 35th birthday. In 1996, 13.3% of Alberta couples lived in a common-law union, and 57% of these Albertans had not reached their 35th birthday.

According to the 1995 General Social Survey, more than six million Canadians have been or are still living in a common-law union. This represents over one-quarter of the Canadian population that is 15 years of age or older. But this information hides the difference between Canadians living in Quebec and Canadians living in the rest of Canada. In Quebec, there were two million Canadians who had lived in a common-law union at some time, and 905,000 who were presently living in a common-law union. This means that 35% of the Quebec population that is 15 years of age or older has lived in or still is living in a common-law union. In the rest of Canada, there were 4.1 million Canadians who had lived in a common-law union at some time, and 1.2 million who were then living in a common-law union. As such, 23% of the population in the rest of Canada that is 15 years of age or older had lived in or were still living in a common-law union. In Quebec, those living in common-law unions made up 44.3% of the number of people who had ever lived in common-law unions. In the rest of Canada, the percentage was 29.2%. From this and other indicators, Jean Dumas and Alain Belanger have concluded that the common-law union is replacing marriage in Quebec, whereas in the rest of Canada it remains an intermediary stage between the parental home and legal marriage.[76]

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[76] Statistics Canada, *Report on the Demographic Situation in Canada, 1996* (Ottawa:

(continued...)

As of 1995, "while nearly six million Canadians have had at least one common-law relationship, more than three-quarters of them (77%) have had only one, about one-fifth (19%) have had two, and fewer than one-twentieth (4%) have had three or more."[77] In Alberta, 23% of those who have ever lived in a common-law union have had more than one such union.[78]

2. Legal status of cohabitants

The Vanier Institute of the Family has examined the legal status of Canadians who live in common-law unions and concluded:[79]

> People under the age of 35 who are living common-law typically have never been married. Between the ages of 35 and 64, most people living common-law are legally separated or divorced, whereas most seniors in common-law relationships are widowed. From examining the patterns, we see that among people in common-law relationships, the never-marrieds decrease with age, the widowed increase with age, and the divorced and separated component peaks in the middle of the age scale.

3. Premarital cohabitation among married persons

As time goes on, a period of premarital cohabitation precedes more and more marriages. For example, the 1995 General Social Survey shows that 40% of marriages outside Quebec that took place since 1990 were preceded by a period of non-marital cohabitation. The percentage was only 12% for marriages in the period 1970-79. In Quebec, two-thirds of recent marriages (since 1990) were preceded by a period of cohabitation.[80]

Common-law unions that end in the marriage of the partners do not usually last very long. Over half of such unions end in marriage within two years of the establishment of the relationship.[81] The average duration is three years, but this is exaggerated by a few long-term common-law unions that

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[76] (...continued)
Industry, Science and Technology, Canada, 1997) Cat. No. 91-209-XPE at 136-39.

[77] *Ibid*. at 144.

[78] *Ibid*. at 145.

[79] Vanier Institute, *supra*, note 40 at 43.

[80] *Report on the Demographic Situation in Canada, 1996, supra*, note 76 at 142-43 and Tables 5 and 6.

[81] *Ibid*. at 143, Table 6 and accompanying discussion.

end in marriage. Over time, however, the period of cohabitation is increasing somewhat. For marriages entered into during 1970-79, the median period of pre-marital cohabitation was 1.5 years. For marriages entered into after 1989, the median period was 2.0 years.

4. Fertility of common-law unions

Presently, the majority of common-law couples have no children living at home and the majority of common-law couples without children living at home are childless.[82] Moreover, couples living outside marriage are less interested in having children and the fertility rate for women in common-law relationships is much lower than for those who are or have been married.[83] In Quebec, the percentage of childless persons who are 35 years of age or older and living in a common-law union is two and a half times greater than that of married persons in the same age group. The ratio is three to one in the rest of Canada.[84] Moreover, in Canada, the fertility rate for married women is nearly double that of women who have spent their entire fertile life in a common-law union. [85]

This picture may change in the future as increasing numbers of cohabitants are choosing to give birth to children outside marriage. In 1980, 14% of the children born in Quebec and 13% of the children born in the rest of Canada were born outside marriage. By 1994, these percentages had changed to 48% (Quebec) and 24% (rest of Canada). Since there has been little increase in the number of births to lone-parent mothers, this increase is accounted for by common-law unions.[86]

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[82] Statistics Canada, *A Portrait of Families in Canada* (Ottawa: Industry, Science and Technology, Canada, 1993) 1991 Census of Canada, Cat. No. 89-523E at 10 and Tables 1.11 & 1.12. In 1991, 41.6% of common-law couples had children living at home and 58.4% were without children. Of the common-law couples without children living at home, 23.6 % were empty nesters and 76.4% were childless. In comparison, 62% of married couples had children living at home and 38% did not have children living at home. Of the married couples without children living at home, 66.5% were empty nesters and 33.4% were childless.

[83] For a detailed discussion see *Report on the Demographic Situation in Canada, 1996*, *supra*, note 76 at 154-165.

[84] *Ibid*. at 157-58.

[85] *Ibid*. at 163.

[86] *Ibid*. at 155.

5. Duration of common-law unions

Many studies show that common-law unions are much less stable than marriages. This flows from the fact that most common-law unions lead quickly to either separation or marriage. Two Canadian studies make this point clearly. *Marriage and Conjugal Life in Canada: Current Demographic Analysis*[87] is a publication of Statistics Canada that analyzes information obtained in the 1990 General Social Survey. This survey provides a realistic view of marriage among singles who "began their conjugal life with a common-law union during the 1970s and the 1980s".[88] The survey provided information on the interrelationship between common-law unions and first marriages. The key findings were as follows.

- The common-law union is merely a prelude to marriage. The common-law unions formed in 1970 resulted in marriage in half of the unions.
- Most people who live in common-law unions marry their first partner or someone else. "Singles stubbornly opposed to marriage remained a minority among those who began their conjugal life living common law."[89]
- Few Canadians live in a common-law relationship for very long. The author wrote:

> ... among those who entered their first union during 1980-84, only 12% of women and 16% of men were still living common law with their first partner when the survey was taken in 1990. The corresponding proportions were even lower among first unions formed before 1980. In fact, until now, most first common-law unions between singles led quite rapidly to either marriage or separation.

A more recent Statistics Canada publication, *Report on the Demographic Situation in Canada, 1997*,[90] also looked in detail at the duration of marriage and common-law unions and reached the same conclusion. Using the information gathered from the 1995 General Social Survey, the authors concluded that "within 5 years of their formation, half of all common-law unions that did not lead to marriage of the two partners dissolved, whereas

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87 Statistics Canada, Catalogue 91-534E Occasional (1992).

88 *Ibid*. at 103.

89 *Ibid*. at 103.

90 *Supra*, note 33.

only 5 % of marriages not preceded by cohabitation of the two partners failed."[91] In fact, marriages preceded by cohabitation, while more stable than common-law unions, are less stable than marriages not preceded by cohabitation.[92] For unions formed between 1970 and 1974, twenty years later there were:[93]

- 225 separations for every 1000 marriages without prior cohabitation,
- 310 separations for every 1000 marriages preceded by a period of cohabitation, regardless of its length, and
- separations for every 1,000 common-law unions that did not lead to marriage.

The instability of common-law unions is also seen in more recent relationships. Jean Dumas and Alain Belanger compared the longevity of common-law unions formed between 1975-84 and 1985-95. The results are summarized as follows:[94]

> Common-law unions appears to be a temporary state. They are quickly dissolved or converted into marriage. The proportion of intact common-law unions has changed little over time. Less than a third (32%) of common-law marriages formed in each period described above are still common-law marriages five years after they were formed. Ten years after formation, only about 15% remain.
>
> By contrast, the proportion of common-law unions that became legal marriages declined slightly between the two periods. Five years after moving in together without being married, 38% of couples from the 1975-1984 period were married, compared with 32% from the 1985-1995 period. Ten years after formation, the gap remains the same: the proportion of married couples is 40% for the older group and 33 % for the more recent group.
>
> Hence, dissolution is more frequent among common-law marriages formed in the 1985-1995 period than among those formed 10 years earlier. This conclusion is based on the fact that common-law unions formed in the second period were converted less often into marriages and, to a lesser extent, on the fact that the risk of separation for marriages with prenuptial cohabitation is slightly higher in the more recent period.

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91 *Ibid*. at 401-41.

92 *Ibid*. at 41-43.

93 *Ibid*. at 45.

94 *Ibid*. at 46.

6. Distribution of common-law unions by type

Using information gathered from the 1995 General Social Survey, Jean Dumas and Alain Belanger examined all common-law unions formed before 1992 and grouped these unions according to classifications developed by Catherine Villeneuve-Gokalp. She has developed six categories of union based on the conjugal and fertility history of each respondent, which are as follows:[95]

> (1) *prelude to marriage*- These are unions where the couple lives together before marriage and marry within one year of setting up household. No children are born to the couple until after marriage or no more than six months prior to it.
> (2) *trial marriage*- These are unions where the couples live together before marriage for a period exceeding one year but less than three years. No children are born to the couple until after marriage or no more than six months prior to it. It is presumed that at the commencement of the relationship there was uncertainty as to whether marriage would result.
> (3) *unstable unions*- These are common-law unions that end within three years without producing a child.
> (4) *stable unions, but without commitment*- These are unions that last more than three years but do not produce a child.
> (5) *substitutes for marriage*- These are unions of couples who produce a child within three years of the establishment of the union and remain unmarried for at least six months following the birth of the child.
> (6) *other*- This category includes: "couples who converted their common-law relationship into legal marriage within three years, but who had a child more than six months before marriage, and couples whose union ended within three years without marriage, but who had a child before the relationship ended."[96]

The use of the 3-year period is arbitrary. This criterion was chosen because it allowed the authors to use information from common-law unions formed as recently as 1992. It also happens to be close to the average period of prenuptial cohabitation among married people in the survey. It is also

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[95] *Report on the Demographic Situation in Canada, 1996, supra*, note 76 at 148.

[96] *Ibid*. at 148.

important to note that the term "stable union, without commitment" does not actually describe the personal commitment of the individuals in such unions to each other. Given that the authors did not have information as to the commitment of the individuals in the relationship, they grouped the relationships according to duration. Perhaps the phrase "without commitment" suggests a lack of commitment to marriage.

This typology of common-law unions allows the authors to follow changes in such relationships over time and to compare preferences for such unions according to age and province. This analysis revealed the following information. The most common type of common-law union is a stable union without commitment (36%), followed by unstable unions (18%), trial marriages (16%), substitute for marriage (15%), prelude to marriage (11%), and other (4%).[97] Half of common-law unions last longer than three years.[98] As history progresses, common-law unions are not as quickly converted to marriage and more cohabitants live together with no immediate intention of marrying. In Quebec, the popularity of common-law unions exceeds that in the rest of Canada.[99] The older people are at the time they establish their common-law union, the more likely the union will be one that is stable without commitment. [100]

Care must be taken in drawing conclusions from a societal phenomenon that is in the process of development. While it is true that marriage is not as common as it once was, it is too soon to conclude that common-law unions have become an alternative to marriage or will eventually replace marriage. What can be said at this stage is that for many Albertans a common-law union is an intermediary stage between their parents home and marriage.

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[97] *Ibid*. at 149.

[98] *Ibid*. But many of these do not last more than 5 years. See earlier discussion of duration of common-law unions.

[99] *Ibid*. at 151-52. For common-law unions established in 1989-1991, 26% of the common-law unions outside Quebec were converted to marriages within three years compared with only 12% in Quebec. See Table 11 at 152.

[100] *Ibid*. at 153 where the authors noted:

> Among 20-24 year olds, the proportion of such unions is 30% in Quebec and 26% in the rest of Canada. It increases steadily from one age group to the next, reaching 62% in both regions among those who begin their union after the age of 35.

For a small minority, a common-law union is seen as an alternative to marriage.

F. Conclusion

The information presented in this chapter concerning trends in Canadian society shows that there have been extensive changes to Canadian families since 1970. Those changes are accurately summarized by Roderic Beaujot, author of *Population Change In Canada*,[101] as follows:[102]

> Family trends have changed rather extensively in the past twenty years: lower marriage rates, more common-law unions, older ages at first marriage, higher divorce rates, lower remarriage rates, and lower levels of childbearing. At the level of the structure of households and families, more people are living alone and there are more single-parent families. Among two-parent families there is a strong increase in the two-earner category.

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[101] *Supra*, note 52.

[102] *Ibid*. at 16.

CHAPTER 4. WHAT DO WE KNOW ABOUT INTESTATES AND THEIR ESTATES?

A. Introduction

Before considering the policy issues, it is useful to examine what we know about intestates and their estates and to determine public opinion as to reform of intestate succession law. Why do people not have wills? Do people know how their property will be distributed if they die without a will? Are people knowingly using the intestacy rules as a default will? What is the average value of an estate without a will? What is the public's opinion as to how an estate should be distributed in different situations? The answers to these questions will assist us in developing the best rules for distribution of an estate in the event of intestacy.

A survey designed to determine how Albertans think their property should be distributed upon death would be ideal. The cost of such a survey has forced us to look to other sources to determine public opinion. These sources include:

- The Method, Process and Frequency of Wealth Transmissions at Death,[103] ("Dunham study"),
- An Empirical Study of the Illinois Statutory Estate Plan,[104] ("Illinois study"),
- Intestate Succession in New Jersey: Does It Conform to Popular Expectations?,[105] ("New Jersey study").

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[103] A. Dunham, "The Method, Process and Frequency of Wealth Transmissions at Death" (1963) 30 U. Chi. L.R. 240. This study involved the examination of court records for 180 estates. The author also made use of a small number of questionnaires.

[104] M.L. Fellows et al., "An Empirical Study of the Illinois Statutory Estate Plan" (1976) U. Ill. L. Forum 717. This study used a survey of 182 people as the basis of its information.

[105] J. Glucksman, "Intestate Succession in New Jersey: Does It Conform to Popular Expectations?" (1976) 12 Colum. J.L. & Soc. Prob. 253. This study examined 100 randomly selected court files and conducted a telephone survey of 50 individuals.

- A Comparison of Iowans' Dispositive Preference with Selected Provisions of the Iowa and Uniform Probate Codes,[106] ("Iowa study"),
- Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States,[107] ("American study"),
- The Law Commission (England), *Distribution on Intestacy* (Report No. 187, 1989) Appendix C, Public Opinion Survey,[108] ("English study"),
- Committed Partners and Inheritance: An Empirical Study,[109] ("Committed Partner Study"),
- a national public opinion survey conducted on behalf of the Canadian Bar Association - Ontario,[110] ("CBA survey"),
- statistics provided by the Public Trustee of Alberta,
- survey of Alberta lawyers who are members of the Wills & Estates section (Northern and Southern) of the Canadian Bar Association, and
- a review of 999 estates filed in 1992 with the Surrogate Court of Alberta ("Alberta study").

The Institute, through two summer students, has conducted a review of 999 estates filed with the Surrogate Court. They examined 564 estates in Edmonton, 201 estates in Calgary, and 234 estates in Vegreville. Each estate was filed with the Surrogate Court of Alberta in those judicial districts during January, April and September of 1992. This sample will contain an over-representation of elderly Albertans and, therefore, we are unable to

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[106] Contemporary Studies Project (student authors), "A Comparison of Iowans' Dispositive Preference with Selected Provisions of the Iowa and Uniform Probate Codes" (1978) 63 Iowa L. Rev. 1041. This study was the most complete in that it used three research methods. Students examined 300 probate records, conducted a survey of 150 people who inherited property under a statutory intestate distribution, and conducted personal interviews of a representative sample of 600 Iowans.

[107] M.L. Fellows, R.J. Simon & W. Rau, "Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States" (1978) Am. Bar Foundation Res. J. 321. This study interviewed 150 people from each of five states (750 total).

[108] This study involved the interview of 1001 people in late 1988 and early 1989. The questionnaire was developed in conjunction with the Law Commission and amended in light of 25 pilot interviews.

[109] M.L. Fellows et al., "Committed Partners and Inheritance: An Empirical Study" (1998) 16 Law and Inequality 1. This study involved telephone surveys of 256 Minnesota residents.

[110] A Decima Research Report to the Canadian Bar Association, "Making a Will Week Tracking Research," September 1998. This survey involved an interview of 2000 Canadians in September of 1998 in respect of matters relating to the making of wills. The group surveyed included 200 Albertans.

conclude that the results are representative of adult Albertans. We note, however, that the results obtained from a review of these files confirm findings in the studies listed above and information provided to us by Alberta lawyers who specialize in this area. With these cautions in mind, we attach as Appendix A a summary of the information extracted from these files.

B. Extent of Intestacy

Only the American study, the English study and the CBA survey examined the extent of intestacy. In the American study, of the 750 people interviewed, 45% had a will. The likelihood of having a will increased as did family income,[111] years of education,[112] age[113] and size of the estate.[114] Those interviewed were also somewhat more likely to have a will if they had children.[115] Age and wealth seemed to have the most significant impact. The

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[111] Table 4—[Family income expressed in 1977 U.S. dollars]

Family income	Have will	No will
Under $8,000	38.8	61.2
$8,000-13,999	33.5	66.5
$14,000-19,999	47.0	53.0
$20,000-24,999	55.0	45.0
$25,000 and over	65.4	34.6

[112] Table 4

Education:	Have Will	No will
Less than high school diploma	36.7	63.3
High school diploma	43.9	56.1
College less than bach. deg.	42.8	57.2
Bachelor's degree	53.3	46.7
Advanced degree	60.0	40.0

[113] Table 4

Age:	Have Will	No Will
17-24	7.8	92.2
25-30	14.4	85.6
31-45	34.6	65.4
46-54	60.7	39.3
55-64	63.4	36.6
65 and over	84.6	15.4

[114] Table 4—Estate size expressed in terms of 1977 U.S. dollars

Estate Size:	With Will	No Will
$0-12,999	14.7	85.3
$13,000-24,999	23.6	76.4
$25,000-49,999	38.8	61.2
$50,000-99,999	50.2	49.8
$100,000-500,000	69.0	31.0

[115] Table 4

Family Status	With Will	No Will	Sample

(continued...)

authors concluded that intestate succession statutes have their greatest effect on persons with moderate-sized estates. This conclusion was consistent with prior American studies.

The English study showed that of the 1001 people interviewed, 33% had a will, 40% intended to prepare a will, and the rest had not thought about it or thought it unnecessary. The likelihood of preparing a will increases in age with 6 of 10 people who are 60 years of age or older having prepared wills. Also, people with larger estates are also more likely to have prepared a will.[116] The Law Commission (England) concluded that generally speaking "intestacy rules provide a safety-net for those who have, or think they have, little to leave, or who have not thought about it, or who die prematurely".[117]

The CBA survey showed that of the 2000 Canadians interviewed, 50% had a will and 47% did not have a will. (Albertans were somewhat above the national average with 57% of respondents in Alberta having a will.) The likelihood of having a will increased with age,[118] household income,[119] and home ownership.[120] Family circumstances also influenced whether the respondents had a will. Single people are less likely to have a will than individuals who are widowed, married or living in a common-law union, or divorced.[121]

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[115] (...continued)

No children	10.9	89.1	55
Some minor children	32.2	67.8	401
All adult children	72.6	27.4	259

[116] English study, *supra*, note 108 at Appendix C, paras. 1.1-1.2.

[117] *Ibid*. at para. 5.

[118] See CBA survey, *supra*, note 110 at 8. The percentage of people in given age categories who had prepared wills was as follows:

* 85% of respondents who were 60 years of age or older,
* 63% of respondents who were 40-59 years of age, and
* 23% of respondents who were 18-39 years of age.

[119] *Ibid*. "Those with wills are also significantly more likely to have higher household incomes, with 62% earning $80K or more and 59% earning $60K-$79K reporting they have wills."

[120] *Ibid*. Sixty percent of homeowners had wills, whereas only 30% of renters had wills.

[121] *Ibid*."Additionally, respondents who are widowed (88%), married/living in common law (59%), or divorced/separated (53%) are more likely to have a will than are respondents who

(continued...)

The three studies have similar results as to why people do and do not make wills. The one difference was how the factor of children influenced whether the individual made a will. In the American study, people with minor children had wills more frequently than did those without children. In the English study this was not true.[122] In both studies, people with adult children had wills more frequently than people without children. The CBA survey did not specifically examine this factor.

C. Rationale for Not Making a Will

In the American study, 385 of the 750 individuals interviewed did not have a will. When answering why they did not have a will, 63.6% cited laziness as the main reason, 15% said that they had never thought about it before, and 15% said they did not need a will because they had no assets or were young and without children.[123] No one indicated that they had adopted the state intestate succession legislation as their default will.

In the English poll, 60% of those who had not made a will indicated they intended to do so, and 37% of those who had not made a will indicated this was unnecessary. Several reasons were given by those who thought they did not need a will. The main reasons were:[124]

Main reasons for not making a will	
Nothing to leave/no property/no money	35%
Never thought about it	17%
Youthful/too young to need it	15%
Spouse will get what is left automatically	12%
Base: All not intending to make a will (251)	

D. Knowledge of Current Law

In the Illinois study, the results suggested that an overwhelming majority of the citizens of that state were not aware of the existing pattern of distribution provided under the state's intestate succession legislation. The

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[121] (...continued)
are single (22%)."

[122] English study, *supra*, note 108 at Appendix C, Table 1B.

[123] American study, *supra*, note 107 at 339.

[124] English study, *supra*, note 108 at Appendix C, para. 1.4.

authors concluded, therefore, that the citizens of that state do not intentionally rely on that statute to dispose of their property.[125] In the American study, 70% of those interviewed indicated they knew how their property would be distributed if they died without a will. Yet, only 44.6% could correctly identify the people who would receive their own estate under the relevant intestacy rules.[126] In the English poll, 75% indicated that they had some knowledge of intestacy rules. Their answers suggested that they did not have an accurate knowledge. Many thought their spouse would receive the estate if they died when married, when, in fact, the spouse and children would share in the estate.[127]

E. Profile of Estates Without Wills

The Dunham study,[128] the Illinois study,[129] Iowa study,[130] the American study,[131] the English study,[132] the Alberta study, and the information provided by the Public Trustee confirm that intestate succession legislation has the most effect on estates of moderate size.

In the Alberta study, the 999 files included 199 estates without wills and 800 estates with wills. The data suggests that Albertans with assets are more likely to have a will. The average net value of estates with wills is $162,491 compared to the average net value of estates without wills (excluding guardianship and originating notices) of $67,977. The average net value of the 177 files with letters of administration or resealing of such letters is $74,362. In the case of estates without wills, 62.8% of estates have a net value **less** than $40,000 and 81.9% of estates have a net value less than $100,000. In the case of estates with wills, 26.3% have a net value less than $40,000 and 54.6% have a net value less than $100,000. Also, a higher

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[125] Illinois study, *supra*, note 104 at 722-23.

[126] American study, *supra*, note 107 at 340.

[127] English study, *supra*, note 108 at Appendix C, para. 1.9.

[128] Dunham study, *supra*, note 103 at 249-51.

[129] Illinois study, *supra*, note 104 at fn. 3.

[130] Iowa study, *supra*, note 106 at 1076.

[131] American study, *supra*, note 107 at 337.

[132] English study, *supra*, note 108 at 2.

percentage of people who have never married die without making a will. In estates with wills, 9.75% of the testators had never married.[133] In estates without wills, 26.9—33.5% of the intestates had never married.[134]

Additional information concerning the size of estates without wills was provided by the office of the Public Trustee. As of January 12, 1993 the Public Trustee was handling 310 estates without wills in which letters of administration had been granted or the Public Trustee had made an election under section 23 of the Public Trustee Act.[135] The average net value of these estates was $44,172.54. Of these 310 estates, 65 had a net value of less than $7,000.

Size of the estate is only one part of the picture. There may be other assets that pass to surviving family members that do not form part of the estate. Such assets typically include life insurance and assets held in joint tenancy. We do not have any information on how often major assets pass to surviving family members outside the estate. As will be discussed later, this lack of information forces reformers to make assumptions as to the existence of such assets, and reform depends, to a certain degree, upon the assumptions made on this point.

F. Public Opinion as to How Estates Should be Distributed in the Event of an Intestacy

As noted earlier, similar trends are suggested by the studies[136] concerning public opinion as to how estates should be distributed in the event of an intestacy. These studies used one of two research techniques, and sometimes

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[133] The calculation is 78 divided by 800.

[134] If you just look at those files where marital status is known, the calculation is 53 divided by 197 (26.9%). For 13 intestacies, marital status is unknown and the value of the estate was less than $1,000. If you assume that these people never married, then the calculation is 66 divided by 197 (33.5%).

[135] The Public Trustee's office was handling other estates without wills at this time but they are not included in these statistics. The omitted estates include estates with a net value worth less than $1000 (section 21 of the Public Trustee Act) and estates in which the grant of letters of administration had not then been obtained.

[136] These studies are listed at the beginning of this chapter.

both[137]: (1) review of probated wills and (2) surveys. Each technique allows the researcher to determine how a respondent would distribute an estate in a given fact situation.

In this part, we summarize the results of the studies according to the various fact situations addressed in the studies. Those situations are defined according to who survives the deceased person. The studies show that testators and those interviewed in the surveys (hereafter together referred to as "respondents") always treat the surviving spouse more generously than does the existing intestate succession legislation of that jurisdiction.

1. Spouse and parents

A healthy majority of respondents would give the entire estate to the surviving spouse where the intestate has no children and is survived by his or her spouse and parents.[138]

2. Spouse and issue

The preferred distribution pattern of the respondents depends upon whether the children of the intestate are also children of the surviving spouse or from another relationship. Therefore, we look at these two scenarios separately.

a. Spouse and children of that relationship

The majority of respondents would give the entire estate to the surviving spouse where the intestate is survived by the spouse and children of that relationship.[139] The size of the majority varied, but taken all together, the studies show that a significant majority of the respondents would give the

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[137] For further detail see footnotes 103 to 108.

[138] Dunham study, *supra*, note 103 at 252-53; Illinois study, *supra*, note 104 at 725-26; Iowa study, *supra*, note 106 at 1097-1100; American study, *supra*, note 107 at 348-54. In the Alberta study, 31 testators were survived by a spouse, but not by children. Of these testators, 83.9% gave the entire estate to the surviving spouse, 13% gave some of the estate, but not all, to the surviving spouse, and 6.5% gave nothing to the surviving spouse. Eighty-seven percent of these testators gave more than 90% of the estate to the surviving spouse.

[139] Dunham study, *supra*, note 103 at 251-53, 260-61; Illinois study, *supra*, note 104 at 727-30; New Jersey study, *supra*, note 105 at 267-69; Iowa study, *supra*, note 106 at 1081-92; American study, *supra*, note 107 at 355-64; English study, *supra*, note 108 at Appendix C, paras. 2.7 to 2.12.

entire estate to the surviving spouse in this situation.[140] This conclusion is confirmed by Alberta lawyers to whom we have spoken. They advise that in situations in which a testator is survived by a spouse and children of that marriage, the majority of testators leave the entire estate to the surviving spouse.

The results of the studies are presented in the following table. In each fact scenario, the intestate is survived by a spouse and children of the marriage and has no children from another relationship. The third column shows the percentage of respondents who would give the entire estate to the surviving spouse in this situation. Except for the Alberta study, which is a wills study, the results were obtained from surveys in which the sample was representative of the population being surveyed.

Study	Intestate survived by:	Percentage of respondents who gave all to the spouse
Illinois study	spouse and children	53.3%
Iowa study	spouse and minor children	61.0%
American study	spouse and minor children	58.3%
	spouse and adult children	51.6%
English study	spouse and grown-up children (house is part of estate)	72.0%
	spouse and young children (house is part of estate)	79.0%
	spouse and young children (family does not own house)	79.0%
Alberta study	spouse and children	69.7%

It is interesting to note that the percentage of testators who left the entire estate to the spouse is greater in wills studies than is indicated by surveys.[141] The authors who conducted the surveys offer a variety of explanations for this difference. One explanation is the profile of testators. At

[140] See Dunham study, *supra*, note 103 at 252; Illinois study, *supra*, note 104 at 728, Table 7; Iowa study, *supra*, note 106 at 1085, Table 12; American study, *supra*, note 107 at 359, Tables 11 & 12; English study, *supra*, note 108 at Appendix C, paras. 2.7-2.8; and Alberta study at Appendix A of this report, at 192.

[141] Illinois study, *supra*, note 104 at 728-29; Iowa study, *supra*, note 106 at 1085-88; American study, *supra*, note 107 at 359.

the time of death, most testators will have married, had children and reached advanced years. Each of these factors affects distribution preferences. In the various surveys, those interviewed were asked how they would distribute an estate if the deceased was survived by a spouse and children of that relationship. Certain characteristics of those interviewed affects the response to the question. Married persons are more likely to give the entire estate to the surviving spouse than are unmarried people.[142] People with children are more likely to give the entire estate to the surviving spouse than people without children.[143] Older people are more likely to give the entire estate to the surviving spouse than younger people.[144] Given these trends, it is logical that more testators would leave the entire estate to the surviving spouse. Surveys include a larger number of younger people and those who are not married, and this, therefore, affects the results. Another explanation given for the observed difference is the consequences of legal advice.[145]

In the Alberta study, 260 testators were survived by both a spouse and children.[146] Of those testators, 208 had been married only once during their lifetime. In the 208 estates involving a testator who had been married only once, the distribution was as follows:

All to spouse	69.7%
All to children	5.8%
Some to spouse and some to children	20.2%
None to spouse, other	1.9%
Some to spouse, other	2.4%
TOTAL	100.00

Further calculation shows that the surviving spouse received more than 90% of the estate in 73.1% of these 208 estates.

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[142] Iowa study, *supra*, note 106 at 1085, Table 12. See also English Study, *supra*, note 108 at Appendix C, Tables 4-6.

[143] Illinois study, *supra*, note 104 at 729; Iowa study, *supra*, note 106 at 1085, Table 12.

[144] *Ibid*.

[145] Illinois study, *supra*, note 104 at 729; American study, *supra*, note 107 at 360.

[146] See Appendix A of this report at 192.

Several of the studies examined whether the size of the estate affected the distribution pattern. The studies, however, did not all reach the same conclusion on this point. In the Dunham study, 85% of respondents allocated all to the surviving spouse where the estate was small ($36,000 in 1962 dollars), and only 40% allocated all of the estate to the surviving spouse when the estate was large ($180,000 in 1962 dollars).[147] In the Iowa study, 68% of respondents gave the entire estate to the surviving spouse when the estate was $10,000 (1978 dollar) and only 44% of the respondents gave the entire estate to the surviving spouse when the estate was $500,000 (1978 dollars). On average, the surviving spouse was allocated 83% of a $10,000 estate and only 72% of a $500,000 estate.[148] In the New Jersey study, the respondents expressed a similar opinion.[149]

Different results were obtained in the American study and the Alberta study. The American study found that the size of the estate and the family income of respondents had no effect on how they wished their estate to be distributed.[150] Wealthier individuals were no more likely to want to distribute a portion of the intestate estate to children than were those who had smaller incomes. The same result was reached in the Alberta study. There was no difference in distribution pattern depending on the size of the estate.[151]

b. Spouse and children of another relationship

The studies reveal that respondents are less likely to give the entire estate to the surviving spouse where the deceased is survived by a spouse and children from another relationship. Although most respondents still gave a generous portion of the estate to the surviving spouse, significantly fewer respondents gave the entire estate to the surviving spouse in this situation.[152]

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[147] Dunham study, *supra*, note 103 at 261.

[148] Iowa study, *supra*, note 106 at 1089.

[149] New Jersey study, *supra*, note 105 at 273-75.

[150] American Study, *supra*, note 107 at 363.

[151] If one reviews those estates where the testator is survived by a first and only spouse and children of the marriage, the average net value of estates is the same for those estates where the spouse received it all and for those estates where the spouse shared it with others. The average net values are $191,749 and $192,409 respectively.

[152] See Illinois study, *supra*, note 104 at 728, 732, Table 7; Iowa study, *supra*, note 106 at

(continued...)

The difference in the distribution pattern between situations in which the intestate is survived by (1) a spouse and children of that marriage or (2) a spouse and children of a previous relationship, can be summarized as follows:[153]

Intestate survived by:	***Percentage of respondents who would give the entire estate to the surviving spouse***			
	Illinois study	Iowa study	American study	English study
Spouse and children of that marriage	53.3%	61%	58.3%	72-79%
Spouse and children, some or all of which are of former marriage	16.8-18.8%	29%	23.0%	27-34%

The studies also showed that, on average, the respondents allocated a larger portion of the estate to the spouse where all of the intestate's children are born of the marriage as compared to situations in which the intestate also has children from a previous marriage.[154] For example, in the Iowa study, the respondents distributed on average 79% of the estate to the surviving spouse where the children were born of that marriage. When the intestate is survived by a spouse and a child from a previous marriage and a child from the present marriage, respondents distributed on average 58% of the estate to the surviving spouse and 21% to each of the two children.[155]

The authors of the Iowa study concluded that the distribution preferences of Iowans show that they thought the stepchild would need protection from disinheritance by the surviving spouse (i.e. step-parent). The

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(...continued)
1094-97, Table 17; American study, *supra*, note 107 at 364-67, Table 18; English study, *supra*, note 108 at Appendix C, para. 2.14; and Alberta study.

[153] Of course not all of the fact scenarios used in the studies are the same. Each study did, however, use examples designed to measure whether distribution patterns would change when the intestate had children from another relationship.

[154] Iowa study, *supra*, note 106 at 1094-95; Illinois study, *supra*, note 104 at 728, 732; American study, *supra*, note 107 at 364-67; English study, *supra*, note 108 at Appendix C, paras. 2.13-2.15.

[155] Iowa study, *supra*, note 106 at 1094-95, Table 7. In the second scenario, the intestate was survived by child of first marriage and child of second marriage. The researchers expected the respondents to give more to the child of the first marriage because this child was unlikely to inherit anything from surviving second spouse. Yet, the respondents chose to treat each child equally with regard to each other. The concern that the child of the first marriage should not be slighted in the distribution of the estate did not overcome the propensity to treat all of the intestate's adult children equally. See discussion at 1095.

authors of the American study concluded that a statute that provides a second or subsequent spouse with 60-70% of the decedent's estate with the residue being shared equally by the decedent's children or their issue would mirror most intestate decedent's preferences and best accommodate societal needs. By this distributive pattern self-sufficiency of the spouse can be assured in estates of moderate size.

In the Alberta study, the number of estates involving second marriages and children is too small to draw definitive conclusions.[156] Yet, the preliminary results support the findings in the other studies.[157]

3. Cohabitant

Given the relatively recent popularity of cohabitation outside marriage, few studies have examined public opinion as to how an intestate's estate should be distributed if the intestate is survived by his or her cohabitant. The Committed Partner Study is the most extensive examination of this issue to

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[156] The data base includes many more multi-marriage situations. These testators, however, were not married at the time of their death and, therefore, the data base does not indicate how they would have distributed their estate if both spouse and children had survived the testator.

[157] In the Alberta study, there were only 260 testators survived by both a spouse and children. Of these 260 testators, 31 testators had a former spouse, either deceased or divorced. The distribution of these 31 estates was as follows:

All to the spouse	29.0%
All to children	29.0%
Some to spouse and some to children	25.8%
None to spouse, other	9.7%
Some to spouse, other	6.5%
TOTAL	100.0%

Further calculation shows that the second spouse received more than 90% of the estate in 38.7% of the 31 estates.

date.[158] Some information is also found in the English study[159] and in two reports published by the Scottish Law Commission, Discussion Paper No. 86, *The Effects of Cohabitation in Private Law*[160] and Report No. 135, *Report on Family Law*.[161] These studies show that there is considerable support for

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[158] The key findings of this study are as follows. A substantial majority of all three samples--general public, opposite-sex couples, and same-sex couples--indicated that the committed partner should share in the estate of the intestate. The majority of all three samples consistently preferred to treat committed partners of the opposite sex and of the same sex in the same fashion for the purposes of intestacy law. While the majority of all three samples indicated that the committed partner should share in the estate of the deceased partner, the majority does not support treating the committed partner as generously as a surviving spouse. Nevertheless, respondents with the same-sex partners were consistently more generous to the committed partner in the various scenarios than were respondents from the general public sample or respondents with opposite-sex partners. There was no clear consensus on how much the committed partner should receive.

[159] English Study, *supra*, note 108, Appendix C at 31. In this study, the respondents were asked how they would distribute the estate of a woman who died survived by her male cohabitant and her sister. The woman was described as having lived with the man as his wife for more than 10 years. The response to this question was reported at page 31 as follows:

> Half of all respondents thought the man should get the whole estate. This proportion rose to 60% or just above among respondents who were currently co-habiting, or had remarried or divorced. (Table 13). One in ten took a diametrically opposite view, saying that everything should go to the sister. Among the 26% of respondents who selected a fixed share to the man option, equal proportions said it should be 50% or thereabouts and 75% or more.

[160] Scottish Law Commission, *Effects of Cohabitation In Private Law* (1990, Discussion Paper No. 86). In 1981, the Scottish Law Commission commissioned a survey, and one of the questions sought views on how a man's estate should be distributed on death if he died without a will and his wife or cohabitant and a brother survived him. Para. 6.3 reports the results as follows:

> . . . In the case of the surviving wife, 89% of respondents thought that the whole estate should go to the wife, 8% thought it should go to the wife and brother equally, and the rest though the result should depend on the circumstances. In the case of the surviving cohabitant, 56% thought that the whole estate should go to the cohabitant, 29% thought that it should be shared equally, 8% thought that it should go to the brother, and the rest thought the result should depend on the circumstances or gave other answers. Respondents were not asked what should happen if a person died intestate survived by a cohabitant and children, or by a cohabitant and an estranged spouse.

[161] Scottish Law Commission, *Report on Family Law* (1992, Report No. 35) at paras. 16.25-26, which read as follows:

> 16.25 Respondents to the public opinion survey were also asked about possible rights of intestate succession for cohabitants. The first question was as follows:
>
> "A man and a woman have cohabited for more than 10 years and have two children. The man has now died suddenly without leaving a will. He is not survived by a wife or any other relatives. His property is worth £20,000 in all. Should the property go to the cohabitee, to the children or to the cohabitee and the children?"

(continued...)

allowing a surviving cohabitant to share in the estate of the deceased cohabitant where the relationship is one of commitment and significant duration. Beyond this, no clear pattern emerges as to the share of the surviving cohabitant.

4. Issue

Where the intestate is survived by children and there is no surviving spouse, most respondents would divide the estate equally among the children.[162]

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[161] (...continued)

Over two-thirds of all respondents (68%) believed that the property should go to the cohabitant and the children, 17% thought it should go to the cohabitant and 13% thought it should go to the children. 2% claimed to be undecided. Where the same hypothetical couple had been cohabiting for only 3 years when the man died, 64% of respondents thought that the property should go to the cohabitant and children---not a significantly lower number than when the period of cohabitation was 10 years---15% thought it should go to the cohabitant and 18% thought it should go to the children. Respondents were also asked about a situation involving no children but a surviving spouse.

> "A man and a woman have cohabited for more than 10 years. They have no children. The man was married to someone else, when the couple started cohabiting and he has never obtained a divorce. The man has now died suddenly without leaving a will. He is survived by his cohabitee and his wife, but not by any other relatives. His property is worth £20,000 in all. Should his property go to the wife, the cohabitee or to the wife and the cohabitee?"

Almost half of all respondents (47%) favoured an even division between the wife and cohabitant, 27% thought the property should go to the cohabitant and 19% thought it should go to the wife. 7% expressed no opinion. A further question dealt with the situation where there was a surviving cohabitant and an adult son of the deceased by a former marriage (now ended in divorce). The preferred solution in this case was for a division between the cohabitant and the adult son. The shorter the period of cohabitation, the more support there was for the property going to the son alone.

16.26 It is clear from the results of our consultation and public opinion survey that there is considerable support for giving cohabitants some succession rights on intestacy. Beyond that, however, no clear pattern emerges. In some common situations the preferred response of members of the public would appear to be that the cohabitant should take a share of the estate along with other claimants, such as a surviving spouse or children, but not the whole of the estate.

[162] This trend is seen in the Alberta study. Of the 358 estates involving an unmarried testator who had previously been married and who was survived by children, the distribution is as follows:

All to children	76.5%
None to the children	1.4%
Some to the children, but not all	22.1%
TOTAL	100.0%

Where children receive some, but not all, of the estate, they usually share it with the grandchildren. In 85.2% of the estates, the children receive more than 90% of the estate. If

(continued...)

Equal treatment is the rule, no matter whether the child was legitimate or illegitimate and no matter whether the child was living with the intestate or not.[163] Most respondents also preferred giving the estate to the child of the intestate as opposed to the children of that child.[164]

When the intestate is survived by children and the off-spring of a deceased child, most respondents wanted the off-spring of the deceased child to share in the estate.[165]

Where all the children of the intestate have predeceased the intestate, most respondents prefer to treat the grandchildren equally and not on the basis of family lines. For example, assume that the intestate had two children, A and B, both of whom died during the lifetime of the intestate. A had one child and B had three children. Most respondents prefer to treat all the grandchildren equally, instead of giving one-half of the estate to A's child and the other half of the estate to B's children.[166]

5. Parents and siblings

In the Dunham study, 54% of those survived by siblings only, died with a will. Of these, 89% treated their siblings unequally by the terms of their will. "In the sample, 10 of the 15 charitable gifts appeared in estates in which brothers and sisters were the closest relatives of the deceased."[167]

(...continued)
one just looks at unmarried testators whose former marriage ended in divorce, children receive the entire estate in 68.6% of the estates. In the case of the unmarried testators whose former spouse died, children receive the entire estate in 78.2% of the estates.

[163] Illinois study, *supra*, note 104 at 737, Tables 14 & 15; Iowa study, *supra*, note 106 at 1102, 1104; American study, *supra*, note 107 at 368-72.

[164] Illinois study, *supra*, note 104 at 738, Table 16; Iowa study, *supra*, note 106 at 1106; but compare with American study, *supra*, note 107 at 374-75 where respondents would often include grandchildren of living sons in their distribution.

[165] Illinois study, *supra*, note 104 at 739; Iowa study, *supra*, note 106 at 1106-07.

[166] This was the fact scenario used in the Illinois and Iowa studies. See Illinois study, *supra*, note 104 at 740-41, Tables 18 & 19; Iowa study, *supra*, note 106 at 1108-11, Table 19; American study, *supra*, note 107 at 382-83, Table 23.

[167] Dunham study, *supra*, note 103 at 254.

In the Illinois study, the respondents were asked this question: What percent of your estate would you wish to give each survivor, if you were survived only by your father, your mother, your adult brother and an adult sister? Approximately one-half of the respondents left it all to the parents and, of these, most divided it equally between the parents. Of those who chose to share their estate with their siblings, the most common preference was to give an equal share to the four survivors.[168]

In the American study, the respondents were asked how they would distribute their estate if they were survived by a father and a brother and a sister. They were also asked how they would distribute their estate if they were survived by both their parents and a brother and a sister. Contrary to the majority of intestacy statutes, respondents preferred that both parents and siblings share in the estate. In the first fact scenario, only 30% of respondents favoured giving the entire estate to the father in the father/brother/sister relation set, whereas, 37% favoured an equal division among the three. In the second fact scenario, 31.9% of the respondents would divide the estate between the parents and give nothing to the brother or sister, whereas, 40.3% favoured equal division among the mother, father, brother and sister. Neither actual estate size nor family income appears to affect respondents' dispository patterns with respect to these situations.[169]

In the English study, the respondents were asked to distribute the estate where the intestate was survived by a mother, brother and sister. In this situation, two of three thought it should be divided equally among the mother, brother and sister. One in four thought it should all go to the mother.[170] In another question, the intestate was survived by a brother, a half-sister and a step sister. The response to this scenario was varied. Forty percent thought it should all go to the brother. Thirty four percent would divide it equally among all three. Nine percent would divide it equally between the brother and half-sister.[171]

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[168] Illinois study, *supra*, note 104 at 723-25.

[169] American study, *supra*, note 107 at 341-47 and Table 5 and 6 at 346.

[170] English study, *supra*, note 108 at Appendix C, para 2.18.

[171] *Ibid*. at paras. 2.20-21.

6. Next of kin

Only a few studies examine how the public would distribute an estate where the intestate has no surviving spouse, issue, parents or siblings. In the Dunham study, the author examined estates in which the survivor was more distant than brothers and sisters and their descendants. In those estates, almost all of the testators left a substantial portion of the estate to friends and charities. None of these estates conformed to the statutory scheme of distribution then in effect.[172]

In the New Jersey study, 68% of those interviewed approved of inheritance by distant family members where the intestate has no surviving parents, spouse, children or grandchildren. A small minority favoured a relative whom the deceased had never heard of before over escheat of the estate to the government.[173]

In the Alberta study, there were 77 testators who had never married. Relatives received the entire estate in 72.7% of these estates and received a portion of the estate in 88.3% of these estates. The beneficiary was someone other than a relative in 10.4% of these estates. Two of these testators acknowledge in the will that they had a common-law spouse. One gave the entire estate to the common-law spouse; the other gave a portion of the estate to the common-law spouse.

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[172] Dunham study, *supra*, note 103 at 255.

[173] New Jersey study, *supra*, note 105 at 275-76 and 294.

CHAPTER 5. PROPOSALS FOR REFORM: PART I

A. What Purpose Should the Intestate Succession Act Serve?

The intestacy rules could be designed to serve one or more purposes, including:

(1) to reflect the presumed intention of those who die without a will,
(2) to meet the needs of the survivors,
(3) to recognize the contribution of the survivors to the accumulation of the intestate's estate,
(4) to promote or encourage the institution of the nuclear family,[174]
(4) to produce a pattern of distribution that is seen as fair by potential beneficiaries and that does not produce disharmony or disdain for the legal system,[175] or
(5) some combination of these.

In recent years, most law reform agencies that have addressed this topic have recommended that intestate succession laws reflect the presumed intention of those who die without a will.[176] It is not a matter of determining the actual intention of the deceased, but of examining a group with similar familial circumstances and equating the "presumed intention" of an individual with the intention of the majority of the individuals in the group. Although each of the following agencies described the idea somewhat differently, the concept is the same. The Law Reform Commission of British Columbia stated that the purpose of intestate succession laws was to distribute the estate of the deceased person according to "the collective view of the community as to what is fair and equitable in the circumstances".[177]

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[174] Committed Partner Study, *supra*, note 109 at 8, 11-15.

[175] *Ibid*.

[176] The Law Reform Commission of British Columbia conducted a review of probate records to determine how testators distribute their estate. The Law Commission (England) commissioned an extensive public opinion poll to learn the views of the public. Both the Manitoba Law Reform Commission and the drafters of the *Uniform Probate Code* (U.S.) looked to studies of public opinion on how an intestate's estate should be distributed.

[177] Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (Report No. 70, 1983) at 3. [In later footnotes, Law Reform Commission of British Columbia will be abbreviated as L.R.C.B.C.]

The goal of the Manitoba Law Reform Commission[178] was to modernize intestate succession law so that the law "is compatible with the wishes of the average property owner as well as present social values".[179] The *Uniform Probate Code*'s pattern of intestate succession is designed to provide suitable rules for persons of modest means.[180] The Law Reform Commission of Hong Kong also thought that intestate succession legislation should reflect the wishes of a hypothetical testator taking into account his or her circumstances and dependents.[181]

The Law Commission (England) and the Queensland Law Reform Commission, however, have taken a different approach to the purpose that should be served by intestacy rules.[182] The Law Commission (England) found no agreement among commentators as to which single purpose should be served by intestacy rules. All commentators, however, agreed on two fundamental points: a) the rules should be certain, clear and simple both to understand and operate; and b) there is a need to ensure that the surviving spouse receives adequate provision. Adequate provision means that, whenever possible, the surviving spouse should be entitled to remain in the matrimonial home and receive sufficient income to support himself or herself in the home. The Law Commission (England) thought that it was wrong to force a spouse to sue under the English equivalent of the *Family Relief Act*[183] to achieve this result. The Commission framed its recommendations with these two points in mind. The Queensland Law Reform Commission also looked at the minimum needs of the surviving spouse when designing its proposed intestacy rules.[184]

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[178] M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 7.

[179] *Ibid*.

[180] *Uniform Probate Code*, 11th ed., Official 1993 text with comments at 43.

[181] The Law Reform Commission of Hong Kong, *Report on Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants* (Topic No. 15, 1990) at para. 7.6. The Commission "attempted to formulate the law as if standing in the shoes of a reasonable testator living in Hong Kong in the 1980s".

[182] See English study, *supra*, note 108 at paras. 24-27 and Queensland Law Reform Commission, *Intestacy Rules* (Report No. 42, 1993) at para. 2.5.

[183] R.S.A. 1980, c. F-2.

[184] *Ibid*. Note, however, that the Queensland recommendations would result in the entire

(continued...)

As discussed in Chapter 3, several studies have been conducted to determine how members of the public would distribute their estate in given situations. Most of the studies originate in the United States, although the Law Reform Commission (England) conducted the most recent one. The studies show that the public thinks that the surviving spouse should receive a share of the estate that is larger than can be justified on need alone. This suggests that the first goal incorporates factors (2) to (5) listed above. This is a reasonable inference given the fact that when deciding how to distribute their estate, most testators consider the age and income of the surviving spouse, the contribution of the spouse throughout the marriage, the importance of the nuclear family and the fact marriage does create duties and obligations.

In determining the purpose to be served by the statute, one should not lose sight of the fact that intestate succession law does create a default will for many people. It seems unreasonable that the scheme of distribution created by the legislature should stray very far from community expectations because the law affects so many members of the community. Unless some compelling social policy requires deviation from how most intestates in similar familial circumstances would want to distribute their estate, intestacy rules should reflect those wishes. We recommend that this be the goal served by the *Intestate Succession Act*.[185] In addition, it is important that the *Intestate Succession Act* create a clear and orderly scheme of distribution to give certainty as to the disposition of property and to allow for the ease of administration.[186]

RECOMMENDATION No. 1
The design of the *Intestate Succession Act* should:
(i) reflect the presumed intention of intestates as measured by the reasonable expectations of the community at large, and
(ii) create a clear and orderly scheme of distribution.

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[184] (...continued)
estate going to the surviving spouse in most estates that would pass by way of intestacy.

[185] The four commentators who commented on this point supported Recommendation 1 of RFD No. 16.

[186] Legislative Review Committee, May 10, 1996.

Given this recommendation, a reliable means of judging the presumed intention of intestates is needed. In our opinion, such intention is best measured by reference to studies of public opinion and the conduct of testators. Public opinion expresses the views of both testators and intestates, and for many of the studies that we considered in Chapter 4, the number of respondents without wills exceeded the number with wills.[187] Therefore, studies of public opinion are a good measure of the reasonable expectations of the community at large, as well as the reasonable expectations of individuals without a will. Wills studies also provide useful information because the distribution preferences of intestates are similar to those of testators.[188] This is not surprising given that there is no evidence that those who do not have wills deviate from those who do in terms of familial ties, and it is these ties that determine how people choose to distribute their estate. In addition, the mere fact an individual does not have a will does not mean that they have knowingly adopted the intestacy rules as a default will. The most common reasons given for not having a will are procrastination, youth or lack of wealth. No one says they are relying on the intestacy rules. The fact is few non-lawyers know how their property would be distributed if they died without a will.[189]

We now turn to the policy analysis.

B. Spousal Share

Under this heading we look at the how an estate should be distributed when the intestate is survived by a spouse. The discussion focuses on situations in which the intestate is survived by: (1) a spouse but no issue, (2) a spouse and

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[187] The statistics are as follows:

- 27% of the 182 respondents in the Illinois study had wills (Illinois study, *supra*, note 104 at 718, n. 3)
- 49% of the 600 Iowans interviewed had wills, 51% did not have a will (Iowa study, *supra*, note 106 at 1070, Table 6)
- 45% of the 750 respondents interviewed in the American study had wills, 55% had no wills (American study, *supra*, note 107 at 337)
- 33% of the 1001 respondents interviewed in the English study had wills, 67% had no wills (English study, *supra*, note 108 at Appendix C, Table 1A).

[188] As discussed in Chapter 4, a higher percentage of testators give the entire estate to the surviving spouse when the children are all of that marriage. The majority of those interviewed also prefer this distribution, although the percentage of the majority is somewhat less. Reasons for this difference are discussed in Chapter 4.

[189] See Chapter 4 at 45.

issue of that relationship, and (3) a spouse and issue, some or all of whom are of another relationship. In establishing the spousal share in each of these circumstances, it is assumed that the spouses are residing together at the time of death. Whether separation of the spouses should affect the spousal share is addressed at the end of this part. Special attention is also given to the spousal share in the context of partial intestacies.

1. Spouse and no issue of the intestate

Presently, where an individual dies without a will and leaves a surviving spouse, but no issue, all goes to the surviving spouse. This reflects how Albertans distribute their property in their wills.[190] The present law is satisfactory and should be retained.

> **RECOMMENDATION No. 2**
> **If an intestate dies leaving a surviving spouse but no issue, the entire estate should go to the spouse.**

2. Spouse and issue of the intestate

a. The need for reform

In this part, we ask whether the existing spousal share is adequate in situations in which the intestate is survived by a spouse and issue. We judge adequacy on the basis of whether the spousal share reflects the intention of most intestates. To determine this intention, we look to studies of public opinion, information provided by lawyers and factors that would affect such intention, namely, the needs of the surviving spouse, the deserts of the surviving spouse and the status of marriage. We conclude that the spousal share is inadequate.

Wishes of intestates

The distribution preference of most individuals differs dramatically from that prescribed by the *Intestate Succession Act* in the situation in which the deceased is survived by a spouse and children. Where it is a first and only marriage, most spouses would leave the entire estate to their surviving spouse even though there are children of the marriage who also survive them. This fact is reflected in the experience of Alberta lawyers who

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[190] *Ibid*. at 48.

specialize in this area and in the studies discussed in Chapter 4, including the Alberta study, the results of which are summarized as follows:[191]

- Dunham study: 100% of the 22 testators survived by a spouse and children left the entire estate to the spouse.
- Illinois study: 53.3% of the respondents would give the entire estate to the surviving spouse where the intestate survived by a spouse and children.
- Iowa study: 61% of respondents would give the entire estate to the surviving spouse where intestate survived by spouse and minor children.
- American study: 58.3% of the respondents would give all to the spouse where intestate survived by spouse and minor children. 51.6% would give all to the spouse where the intestate survived by spouse and adult children.
- English study: 72-79% of respondents would give all to the spouse in a variety of situations. The situations involved adult children and a house; young children and a house; young children and no house.
- In the Alberta study, 69.7% of all testators who were survived by their first and only spouses and children left the entire estate to the spouse. In 73.1% of these estates, the surviving spouse received more than 90% of the estate.

The surviving spouse is less likely to receive the entire estate if the deceased has children of another relationship, but is still treated generously.[192] In most of the studies that consider this scenario, roughly three-quarters of the respondents would give 50% of the estate or more to the surviving spouse.[193]

In contrast, the distribution pattern dictated by the *Intestate Succession Act* prefers the children of the deceased over the surviving spouse and does not address any of the issues arising in our multiple-marriage society. Assume that the deceased dies without will, has a net estate worth $160,000, and is survived by a spouse and two children of the marriage. Under the Intestate Succession Act, the surviving spouse would receive $40,000 plus

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[191] *Ibid*. for further details.

[192] *Ibid*.

[193] This will be discussed in detail later in this chapter.

one-third of the residue, for a total of $80,000. The children share $80,000, being two-thirds of the residue. If a home was part of the estate, the spouse's share would likely be less than the value of the home and would be insufficient to maintain the spouse in the home. This does not reflect the distribution preferences of Albertans.[194]

This divergence between the distribution pattern of the *Intestate Succession Act* and the distribution preferences of Albertans is not surprising given the history of the Act. The Act is patterned after the *Statute of Distribution, 1670* as amended. In the 1600s, divorce was a rare event and English society thought wealth should be transferred from one generation to another. Inheritance between spouses was exceptional.[195] Much has changed since then and the surviving spouse has now replaced the children as the primary beneficiary.[196] Moreover, the tendency to prefer the spouse has grown stronger with time.[197] The intestacy rules should be altered so that they reflect the realities and beliefs of present day Canadian society. If this is not done, the Act becomes a trap for the ignorant and the unwary.

Treatment of the surviving spouse in situations in which the intestate is survived by a spouse and issue is the one area in which the present distribution scheme differs significantly from what Albertans in fact do with their estates.

Needs of surviving spouses

Most often, the surviving spouse will be of advanced years. For example, of the Albertans who died in 1995, 72.6% were 65 years of age or older, 24.1% were 18 to 64 years of age and 3.3% were 17 years of age and younger. In

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[194] In the Alberta study, 69.7% of the testators who died leaving a surviving spouse and children (and no former spouse) left the entire estate to the spouse. In 73.1% of such estates, the surviving spouse received more than 90% of the estate. On these facts, 90% of the estate equals $144,000.

[195] M.A. Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989) at 239. This treatise provides a comprehensive review of the development in family law and succession law brought on by our changing society.

[196] *Ibid*.

[197] This can be seen by comparing the results of the empirical studies summarized in Chapter 4. In the 1970s, 50-60% of respondents gave the entire estate to the surviving spouse. By the 1990s, this percentage had grown to 70-79% of respondents.

that year, the median age for male Albertans at the time of death was 72 years of age; the median age for female Albertans was 79 years of age.[198]

The elderly surviving spouse will usually be out of the work force and will need the estate for his or her support in old age. The children, for the most part, will be self-supporting adults at the time of the parent's death. In these circumstances, the needs of the surviving elderly spouse will be greater than the needs of the independent adult children. The problem will be the most acute in a traditional marriage in which the intestate held title to all of the assets including the matrimonial home. In such a case, the homemaker may not receive sufficient assets to remain in the home after the death of the intestate.[199]

The needs of a young spouse who must raise the surviving children are also great. It is likely that the estate of the intestate will be smaller in these situations and that the surviving spouse will require most of the estate to support himself or herself and the minor children. It is questionable whether it benefits children to reduce the money available for support of the young family just so that the children can inherit money when they turn 18 years of age.

The inadequacy of the spousal share can also be seen by examining the effect of inflation and comparing the existing preferential share to that of other provinces. Over time, inflation has eroded the value of the preferential share. The preferential share of $40,000 which came into force in Alberta on January 1, 1976 is equivalent to $116,981 dollars in 1998 dollars.[200] Moreover, of those provinces which give the surviving spouse a preferential share plus a portion of the residue, Alberta has the lowest preferential share. The preferential share varies from $40,000 (Alberta) to $200,000 (Ontario). Alberta's preferential share is also lower than those provinces that give the

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[198] See Chapter 3 at 25.

[199] The homemaker will not usually receive sufficient assets with which to purchase the matrimonial home and to reside in it. The homemaker could exercise her dower right and live in the home until her death as a life-tenant.

[200] This number is determined by using the Consumer Price Index (1992=100)

$$\$116{,}981 = \frac{108.5 \text{ (CPI for 1998)}}{37.1 \text{ (CPI for 1976)}} \bullet \$40{,}000$$

preferential share of $50,000 or the value of the home, whichever is greater.[201]

Contribution of surviving spouse

Another argument justifying an increased spousal share is the contribution of the surviving spouse to the marriage. In this day and age, where dual-income families are the norm, both spouses will have contributed to the accumulation of assets. Children, for the most part, will not have done so. In fact, many parents spend significant portions of their time and income raising and educating their children. It seems unfair that after making such sacrifices, a parent's financial security in old age should be seen as less important than the financial position of the children.

Status of marriage

Marriage is given a special status in our society. This status is given expression in many areas of the law including pensions and benefits, income tax, matrimonial property and succession. In the area of succession law, although a testator is free to disinherit an adult independent child, the testator is not free to disinherit a surviving spouse. A spouse who is disinherited by the terms of a will is able to bring an application under the *Family Relief Act* and obtain an order that diverts to the surviving spouse that portion of the estate needed for the "proper maintenance and support" of the spouse. Such an order is also available in the event of intestacy if the spousal share under the *Intestate Succession Act* is inadequate. It makes no sense to have a spousal share that is so small that it encourages applications under the *Family Relief Act*. Such an application only delays administration of the estate, causes unnecessary worry for the surviving spouse and depletes the estate by the size of the legal fees.

We are of the opinion that the existing spousal share is so low that, in moderately sized estates, it compels the surviving spouse to bring a family relief action to obtain the additional assets needed for the "proper maintenance and support" of the spouse. This is undesirable and unnecessary.

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[201] For a more detailed comparison of existing provincial intestate succession statutes see Chapter 2.

Conclusion

We are of the view that the spousal share under the existing intestacy rules is inadequate because it no longer reflects the intention of Albertans; it does not adequately meet the needs or recognize the contributions of the surviving spouse; and it does not adequately recognize the status of marriage. We join the growing number of law reform agencies that call for an increase in the spousal share under the intestacy rules.

RECOMMENDATION No. 3
In the situation where the intestate is survived by a spouse and issue, the spousal share under the existing *Intestate Succession Act* should be increased.

b. Directions for reform

Although there is agreement among law reform commissions that the surviving spouse should be preferred to children of the marriage, there is a difference of opinion on how this should be done. There is also a difference of opinion on whether second marriages should be treated differently if the intestate has children from another relationship. In this section, we address these issues.

There are two competing methods used to improve the position of the spouse: 1) revising the existing legislation, and 2) adopting an all-to-the-spouse rule. The first option was the choice of the Uniform Law Conference of Canada, the Law Reform Commission of British Columbia and the Manitoba Law Reform Commission. The second option is the choice of the Manitoba Legislature, the Law Commission (England), the *Uniform Probate Code*, and Arthur Close's dissent in *Report on Statutory Succession Rights* released by the Law Reform Commission of British Columbia. We will now examine these options in detail.

i. Revising the existing legislation

Revising the existing legislation involves increasing the size of the preferential share and increasing the portion of the residue received by the spouse.

(a) Preferential share

Canadian statutes use three different methods to establish the preferential share of the spouse. In four statutes, the preferential share is a fixed sum dictated by statute.[202] In three statutes, the preferential share is the home or a fixed sum, whichever is greater in value.[203] In one statute, the preferential share is the intestate's interest in marital property, which includes the family home.[204] Each method is used to enable the surviving spouse to live in the family home after the death of the intestate.

The choice of the fixed sum depends upon the prevalence of joint ownership of homes, the price of housing, and inflation. Each of these factors has influenced the choice of various law reform agencies:

Joint ownership of homes: The Manitoba Commission and the Uniform Law Conference suggest a preferential share of $100,000. They assume that in most families, the spouses own major assets, such as the home and bank accounts, as joint tenants. On death of one of the spouses, these assets pass to the survivor by right of survivorship. The preferential share is designed to augment these assets and ensure that a generous portion is given to the spouse. (Of course, this will not be the result if there is no home or the home is not held in joint tenancy.)

Price of housing: Other law reform agencies operated under the assumption that the intestate exclusively owned the home, if any, and the home forms part of the estate. The Hong Kong Law Reform Commission recommended that the spousal share be H.K. $500,000 (which is the price of a small condominium in Hong Kong) and personal chattels of the deceased. The Law Reform Commission of British Columbia considers $100,000 insufficient to ensure that the spouse receives the bulk of the estate, including the family home. It thought that a preferential share of $200,000

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[202] Four provinces use this method. The fixed shares are:

Alberta	$ 40,000	effective	Jan. 1, 1976
B.C.	$ 65,000		Oct. 1, 1983
Sask.	$100,000		June 22, 1990
Ont.	$200,000		April 1, 1995

[203] This is the preferential share for a spouse in Nova Scotia, the Northwest Territories and Nunavut.

[204] This is the preferential share of New Brunswick.

was necessary to protect the spouse given the peculiarities of that province's economy generally and the housing market in particular.[205]

Inflation: Saskatchewan updated its preferential share in 1990 to bring the share from $40,000 established on January 12, 1978 to $100,000. This increase overcomes the result of inflation. A similar increase would have the same effect in Alberta. The Alberta preferential share of $40,000, which came into force on January 1, 1976, becomes $116,981 in 1998 dollars.[206] If reform only addressed the effect of inflation, the preferential share should be increased to $117,000.

Under the preferential share model, it is difficult to choose a preferential share that is appropriate for a majority of cases and which is not diminished in value by the effects of inflation. Most law reform commissions strive to give the surviving spouse sufficient assets to allow him or her to live in the matrimonial home. This leads to some difficulties when establishing the preferential share because the prevalence of joint ownership varies among age groups, being less common among the elderly. Should the legislature assume that the home is owned jointly or assume that the home forms part of the estate? An assumption of joint ownership will produce a much lower share of the estate for the surviving spouse where, in fact, the deceased owned the home in his or her own name. This problem can be avoided by making the preferential share the home or a set amount, whichever is greater. This, however, treats people differently depending upon the value of their home, if any. Also, should the legislature take into account the difference in housing prices and cost of living within a province, and, if so, how should this be done?

Even if these problems are adequately addressed, the effect of inflation is an ever-present problem and government inaction aggravates the problem. Legislatures have shown a reluctance to adjust the sum periodically to offset the effects of inflation. In Alberta, the spouse's share has declined steadily since 1976 because of the declining purchasing power of $40,000.

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[205] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 177 at 26.

[206] This number is determined by using the Consumer Price Index (1992=100).

$$\$116{,}981 = \frac{108.5 \text{ (CPI for 1998)}}{37.1 \text{ (CPI for 1976)}} \bullet \$40{,}000$$

(b) Portion of residue given to spouse

In Alberta, the spouse's share of the residue depends upon the number of children of the intestate. The spouse receives one-half of the residue if there is only one child. The spouse receives one-third of the residue if there are two or more children. The criticism of this scheme is that the spouse's need for support remains constant, no matter how many children may survive the intestate. Therefore, most commissions that recommend revision of the existing legislative scheme also recommend that the spouse receive a generous preferential share and one-half of the residue. The other half of the residue goes to the child or children of the intestate.

ii. All-to-the-spouse rule

The all-to-the-spouse model gives the entire estate to the surviving spouse in certain situations. Two versions of this model will be discussed which differ as to the circumstances in which the surviving spouse receives the entire estate.

(a) The Manitoba model

The Manitoba model gives the entire estate to the surviving spouse when all the issue of the intestate are also issue of the surviving spouse. The surviving spouse receives something less where the intestate is also survived by children from another relationship. This model is based on studies that suggest that this scheme of distribution best reflects how the majority of the public would want their estate distributed in these situations.[207]

The Manitoba *Intestate Succession Act* and the *Uniform Probate Code* ("UPC") are examples of this type of reform. In Manitoba, the entire estate goes to the surviving spouse if all the issue of the intestate are also issue of the surviving spouse. So in a first and only marriage, the surviving spouse receives everything and has the responsibility of raising minor children.[208] The same is true for a second or later marriage when the intestate had no children from the previous marriages. If the intestate has children from a previous relationship, the surviving spouse receives one-half of the estate or $50,000, whichever is greater, plus one-half of the residue. This means that in estates worth more than $100,000, the second (or later) spouse receives

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[207] See Chapter 4 at 48.

[208] Of course, if there is some risk that the parent will not perform that function, the family relief legislation is available for the benefit of that child.

75% of the estate. In estates worth less than $100,000, the spouse receives a greater percentage of the estate. The Manitoba legislation creates a generous share for second spouses in small estates and guards against disinheritance of children from a former relationship in larger estates.

The UPC is similar, but adds a few refinements. Under the UPC, the surviving spouse receives the entire estate if the intestate's issue are also the issue of the surviving spouse and the surviving spouse has no other issue from another relationship. The spouse receives $150,000 plus one-half of the residue if all the issue of the intestate are also issue of the surviving spouse and the surviving spouse has issue from another relationship. The surviving spouse receives $100,000 plus one-half of the residue where one or more of the intestate's issue are not issue of the surviving spouse.

In both the Manitoba legislation and the UPC, all the children of the intestate are treated equally with the result that the intestate's children from all relationships share in the residue.

(b) The English version

The Law Commission (England) took the all-to-the-spouse rule the farthest. It recommended this approach whenever the intestate was survived by a spouse. This recommendation met resistance in Parliament because of concern over the effect of the rule on children from a previous marriage.[209] After lengthy consideration, the English Parliament rejected the recommendation in favour of increasing the existing preferential share. Effective December 1, 1993, the preferential share for the surviving spouse was increased from £75,000 to £125,000 in situations in which the intestate is survived by a spouse and children.[210]

An all-to-the-spouse rule such as that proposed by the Law Commission would likely meet the same response in Alberta. For this reason, we examine the Manitoba and UPC model as the second option for reform.

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[209] R. Hudson, "In Parliament" (June 26, 1992) N.L.J. at 899.

[210] *Family Provision (Intestate Succession) Order* (U.K.), 1993.

(c) Recommendations for reform

Should all surviving spouses be treated in the same fashion? Intestacy rules must be developed so that they produce sensible results in a multiple-marriage society. The concept of family has changed dramatically in the last half of this century and this has put pressure on laws based on the traditional concept of family. Intestacy rules should reflect marital reality and should distinguish between different marital situations. The demarcation is not one between first and second marriages. It is one between situations in which the intestate's children are all children of the surviving spouse and where they are not. Both options for reform are inadequate if they treat every marital situation in the same manner. A combination of the options produces the best result.

We must also remember the importance of making intestacy rules that reflect public opinion. Intestacy rules that run contrary to public opinion become a trap for the unwary and ignorant.[211]

Should the surviving spouse receive the entire estate when 1) all the issue of the intestate are also issue of the surviving spouse, and 2) the spouses are living with each other at the time of death? For now we consider a married couple who have had children together and who do not have any children from other relationships. They are living with each other at the time of death. Since most intestates die late in life,[212] this situation will usually involve a person who dies leaving surviving an elderly spouse of many years and adult children.

In this circumstance, an all-to-the-spouse rule is most appropriate because it will reflect the intentions of the majority of Alberta intestates. Since most couples view marriage as a partnership, they expect the assets accumulated during the course of the marriage by their joint efforts to be available for the support of the couple (or the surviving spouse) in old age. The surviving spouse is expected to leave all the remaining assets to the children of the marriage upon death.[213] Giving all to the spouse is not seen as

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[211] American study, *supra*, note 107 at 324.

[212] See Chapter 3 at 25.

[213] The Alberta study showed that unmarried testators overwhelmingly leave their estate to

(continued...)

a disinheritance of children because the remaining wealth will go to the children upon the death of the surviving parent. (This is known as the conduit theory.)[214] Public opinion supports an all-to-the-spouse rule in this circumstance. In the Alberta study, 70% of testators survived by children and their one and only spouse gave everything to the spouse. Similar results were obtained in studies conducted in England, the United States, and British Columbia.[215]

The family farm might be a situation in which the testator would more often distribute the estate among the surviving spouse and children, especially if one or more of the children assisted in the farming operation. We found this not to be the case in the Alberta study. In fact, a slightly larger percentage of farmers gave all of the estate to the surviving spouse to the exclusion of the children.[216]

The all-to-the-spouse rule recognizes the contribution of the surviving spouse to the accumulation of assets and allows the surviving spouse to live with such financial independence as the size of the estate allows. There will be no need to ask the court to exercise its discretion under the *Family Relief Act* to provide the spouse with sufficient assets for adequate support. The rule is simple and is one the public can learn and remember. (In fact, they may think that this is the law already!) It also avoids the difficulties of

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[213] (...continued)
their children. See Appendix B of this report at B-5 to B-6. This distribution preference is seen in other studies. See Chapter 4 at 55.

[214] L. W. Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 Iowa L.R. 223 at 232.

[215] See Chapter 4 at 48 and L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 177, Appendixes F and G,

[216] In the Alberta study, 100 testators were described as farmers or retired farmers and 19 testators, although not described as such, had assets under the farm category. Of these 119 farmers, 101 had wills. Of the 101 farmers with wills, 55 were married and 46 were unmarried. Of the 55 married farmers with wills, 53 were survived by a spouse and children. Of these 53 farmers:

- 73.6% gave the entire estate to the spouse,
- 24.5% distributed the estate among the spouse and children, and
- 1.9% disinherited the spouse.

choosing a preferential share and adjusting it periodically to account for inflation.[217]

But will such a rule harm minor children or adult children of the marriage? Opponents of the all-to-the-spouse rule make two arguments on behalf of children of the marriage. First, the surviving spouse could disinherit the children. Second, the surviving spouse might mismanage the wealth and consequently deprive the children of all or some of their eventual inheritance. These risks are eliminated if the children share in the estate of the parent who dies first.

The problem with the risk of disinheritance argument is that it has little basis in fact.[218] If the surviving spouse does not remarry, the surviving spouse usually divides the estate equally among the children of the marriage. This is the experience of Alberta lawyers who specialize in this area and is also confirmed by the studies discussed in Chapter 4. There is a strong tendency in this situation for respondents to treat all children alike, whether they were born within marriage or without and no matter what marriage they were born of.[219] This tendency is also seen in the Alberta study. In that study there were 236 unmarried testators whose former spouse had died and who were survived by children. The children received the entire estate in 78.2% of the estates. The children received more than 90% of the estate in 85.2% of the estates. Where children receive some, but not all, of the estate, they usually shared it with grandchildren. There is little risk of disinheritance in this circumstance.

The risk of disinheritance may increase if the surviving spouse remarries. Yet, most surviving spouses are elderly and the likelihood of a remarriage for persons in their 70s is remote.[220] A remarriage is more likely to occur when an individual loses their spouse earlier in life. Though even in

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[217] See earlier discussion in this chapter at 70.

[218] Iowa study, *supra*, note 106 at 731.

[219] See Chapter 4 at 55.

[220] In 1995, the median age of male Albertans who died was 72 years of age; the median age for female Albertans was 79 years of age. This means that half of the male Albertans who died in 1995 were 72 years of age or older and half of the female Albertans who died in 1995 were 79 years of age or older.

these situations,[221] the likelihood of disinheritance of children from the first marriage is not large. Albertans in second marriages are aware of the risk of disinheritance of their children from their first marriage and often distribute their estate between the surviving spouse and children of the first marriage.

The more telling measure of the risk of disinheritance is the view of Albertans. If Albertans were concerned with the risk of disinheritance, they would not leave their entire estate to the surviving spouse as often as they do now.

We conclude that the risk of disinheritance of children is small and is not sufficient reason to reject the all-to-the-spouse rule in the situation in which the intestate is survived by a spouse and children of that marriage.

The risk of mismanagement argument ignores the fact that the risk of a parent's mismanagement exists both before and after death and that both spouses worked to accumulate these assets. Their needs should come before those of independent adult children. One can also speculate that this argument has its roots in distant times when the surviving spouse, usually the wife, had little experience with money management. This certainly is not the norm in Alberta today.

Can it be argued that minor children require a share of the estate for their support? In our opinion, minor children will be best cared for by the surviving caring parent who has the assets needed to support them. If, in the rare case, the surviving spouse does not fit into this category, the Public Trustee can make an application under the *Family Relief Act* for adequate provision for the minor children. The situation will be as it now is for wills that leave all to the spouse and nothing to minor children. Presently, the Public Trustee only makes an application under the *Family Relief Act* if there is a risk that the children will not be supported by the surviving parent who receives the entire estate by the terms of the will. This is a rare event where the children are of the marriage, although an application is routinely made on behalf of minor children from a previous relationship.

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[221] These will be the minority of surviving spouses. In 1991, only 27.5% of Albertans who died were 18 to 64 years of age. 68% were 65 years of age or older. See Chapter 3 at 25.

The other advantage of giving everything to the surviving spouse where there are minor children is that the surviving spouse does not have to deal with the Public Trustee in the raising of the children. A caring parent should have the responsibility of raising the children and should not have to submit budgets and get the approval of the Trustee as to how the children will be raised.

Some argue that adult children of the intestate should be entitled to share in the estate if it is sufficiently large. Some studies support this, but not all.[222] Even if one assumes that adult children should be entitled to share in very large estates, does the number of large estates that would call for such a distribution justify deviation from a simple and straightforward rule of all-to-the-spouse? The answer depends upon the profile of estates that go by way of intestacy. The information we have suggests that the number of very large estates does not justify deviation from the all-to-the-spouse rule. That information is as follows:

- The likelihood of having a will increases with wealth.[223] From this we infer that the percentage of large estates where there is no will is a small proportion of the total number of large estates.[224]

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[222] a) In the Dunham study, *supra*, note 103, 85% of respondents allocated all to the surviving spouse where the estate was small ($36,000 in 1962 dollars), and only 40% allocated all of the estate to the surviving spouse when the estate was large ($180,000 in 1962 dollars). In the Iowa study, 68% of respondents gave the entire estate to the surviving spouse when the estate was $10,000 (1978 dollar) and only 44% gave the entire estate to the surviving spouse when the estate was $500,000. On average the surviving spouse was allocated 83% of a $10,000 estate and only 72% of a $500,000 estate. In the New Jersey study, a similar opinion was expressed by the respondents.

b) Different results were obtained in the American study and the Alberta study. The American study found that the size of the estate and the family income of respondents had no effect on how they wished their estate to be distributed. Wealthier individuals were no more likely to want to distribute a portion of the intestate estate to children than were those who had smaller incomes. The same result was reached in the Alberta study. There was no difference in distribution pattern depending on the size of the estate.

[223] See Chapter 4 at 43.

[224] In the Alberta study, there were 186 estates that had a net value of $200,000 or greater. Of these estates, 166 involved individuals who died with a will (89%) and 20 involved individuals who died without a will (11%).

- The average net value of estates without wills is significantly lower than estates with wills.[225]
- In the Alberta study there were 199 estates without wills. The distribution of these estates according to net value is as follows:

insolvent to $99,999	163
$100,000-199,999	16
$200,000-299,999	11
$300,000-999,999	9

- All the studies show that intestacy rules have the most impact on estates of moderate size.[226]

In our opinion, the number of very large estates does not justify deviation from the all-to-the-spouse rule. The simplicity of such a rule is desirable and those people with large estates who prefer a different distribution have the means to have a will drafted to reflect those wishes.

Some lawyers have questioned the all-to-the-spouse rule along similar lines. Many intestates will have assets that are held in joint tenancy with the surviving spouse, such as the home and bank account. These pass to the surviving spouse upon death and do not form part of the estate. These lawyers question why children should not be able to share in the remaining assets that flow through the estate. The response to this is twofold. First, those people who hold their major assets in joint tenancy with their spouse are also those most likely to leave their entire estate to their surviving spouse even when there are children of that marriage. Although the very wealthy, and here we are talking about millionaires, may be more inclined to leave some of their property to their children, these estates do not pass by way of intestacy!! Second, not all spouses own their homes in joint tenancy and not all spouses own homes. If the preferential share is not adequate to meet the basic needs of such spouses, they will face poverty in their old age. Poverty of the elderly is a growing problem in Canada and should be recognized.

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[225] See Chapter 4 at 46. In the Alberta study, the average net value of the 177 files with letters of administration or resealing of such letters is $74,362. The average net value of estates with wills was $162,491. As of January 1993, the Public Trustee was handling 310 estates without wills and these had an average net value of $44,173.

[226] See Chapter 4 at 46.

In summary, the intestacy rules create a default will for many Albertans. The rules should reflect the distribution preferences of Albertans. Where the intestate is survived by spouse and children of that marriage, an all-to-the-spouse rule is the choice of the majority of Albertans. This rule is simple, appropriate and avoids some of the problems that arise with a preferential share regime. It also received strong support among those who commented on Report for Discussion No. 16.[227]

RECOMMENDATION No. 4
The surviving spouse should receive the entire estate where all the children of the intestate are also children of the surviving spouse and the spouses were residing together at the time of death. (The case of the separated spouse will be dealt with later.)

Should the surviving spouse receive less than the entire estate when he or she also has children of a different relationship? We now consider a situation involving a married couple who have a blended family in which all of the intestate's children are born of the marriage, but the surviving spouse also has children from a previous relationship. Should the surviving spouse receive less than the entire estate when he or she also has children of a previous relationship? This question has been answered differently in various statutes and proposals. Under the Manitoba Intestate Succession Act, the surviving spouse receives the entire estate in this situation because the intestate has no children from another relationship. Under the *Uniform Probate Code*, however, the surviving spouse receives $150,000 plus one-half of the residue of the estate and the intestate's children receive the other half of the residue. This is intended to give intestates' children protection against the natural tendency of surviving parents to treat all of their children, including those of the intestate and those of another relationship, equally in their will. The same result comes about where there is no will of the surviving parent because most intestacy statutes would provide equal shares to the children.

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[227] Eight individuals and the Legislative Review Committee of the Wills and Estates Section (Northern) of the Canadian Bar Association, Alberta commented on RFD No. 16. Although two individuals expressed no opinion on Recommendation 4, the balance of the commentators supported the recommendation, and only one commentator qualified that support.

Although this is an interesting variation, it is not one we support and it is not one that received any support from those who commented on Report for Discussion No. 16.[228] Our main objection to it is that children of the same parent will be treated differently. This may be acceptable where the surviving spouse does not live with his or her children of the previous relationship. It would, however, create serious problems for blended families. In our opinion, the standard of living for each member of a blended family should be the same. One should not encourage situations in which more money is available for certain children, but not others, within a family. This can only lead to resentment and encourage bitterness. For this reason, it should be rejected. A surviving spouse should receive the entire estate and be left to decide how to distribute his or her estate upon death in the context of this family.

RECOMMENDATION No. 5
The rule in Recommendation 4 should apply even where the surviving spouse has children from another relationship. The *Uniform Probate Code* refinement should not be adopted.

Should the surviving spouse receive the entire estate where the intestate has children from another relationship? Although an all-to-the-spouse rule for all situations would create simplicity, it would not create a distribution scheme that reflects the wishes of most intestates who are survived by a spouse and children of another relationship. The studies show that while respondents still favour the surviving spouse in this situation, they are more concerned with the possibility of disinheritance of children from the prior marriage. As a result, the spouse is much less likely to receive the entire estate in this circumstance and usually receives a smaller portion of the estate.[229] The results were as follows:

- Illinois study: The respondents were asked how they would distribute their estate if they were survived by a spouse and child of a previous

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[228] Only three commentators spoke to this issue, and those that did rejected the UPC approach and voiced support for Recommendation 5.

[229] See Illinois study, *supra*, note 104 at 728, 732; Iowa study, *supra*, note 106 at 1094-95; American study, *supra*, note 107 at 364-67; and English study, *supra*, note 108 at Appendix C, page 29. The results of these studies are discussed in Chapter 4.

marriage who lived with them. The distribution pattern was as follows: 18.8% gave the entire estate to the spouse, 6.6% gave 51-99% to the spouse and the rest to the child, 46.4% split the estate evenly between the spouse and the child and 28.2% gave 0-49% to the spouse and the rest to the child.[230]

- Iowa study: The respondents were asked how they would distribute their estate if they were survived by a spouse, a child of that marriage and a child from a previous marriage. On average, the respondents gave 58% of the estate to the spouse and 21% to each child.[231]
- American study: The respondents were asked how they would distribute an estate where the intestate is survived by a spouse and a minor child of a previous marriage. The distribution pattern was as follows: 23% gave all to the spouse; 28.9% gave 51-99% to the spouse and the rest to the child; 37.2% split the estate equally between the spouse and the child; 11% gave 0-49% of the estate to the spouse and the rest to the child.[232]
- English study: Similar results were observed in the English study.[233]
- Alberta study: The number of estate involving second marriages and children in the Alberta study is too small to draw definitive conclusions. Yet, the preliminary results support the findings in the other studies.[234]

The Alberta lawyers we have spoken to also confirm this trend. They indicate that where the spouses both enter the second (or later) marriage with assets, they often leave their own assets to their children of an earlier marriage.[235] However, the longer the marriage, the more that is left to the surviving spouse.

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[230] Illinois study, *supra*, note 104 at 728, 732. When the facts were changed so that the child lived with the ex-spouse, the distribution pattern was similar. 16.8% gave the entire estate to the spouse, 24.6% gave 51-99% of the estate to the spouse and the rest to the child, 39.7% split the estate evenly between the spouse and child and 19% gave 0-49% to the spouse and the rest to the child.

[231] Iowa study, *supra*, note 106 at 1094-95.

[232] American study, *supra*, note 107 at 364-67.

[233] English study, *supra*, note 108 at Appendix C, paras. 2.13-2.15.

[234] See Chapter 4, note 157.

[235] In this situation, the testators may wish to ensure that the assets acquired through the efforts of the deceased former spouse go to the children of that spouse as opposed to the subsequent spouse.

In our opinion, intestacy rules should reflect the multiple-marriage society in which we live. The studies show that the public is concerned with the possibility that a surviving spouse who receives all of the intestate's estate would disinherit the intestate's children from another relationship. This risk is significant and, for this reason, such children should share in the estate where the estate is large enough. The surviving spouse should still receive a generous share of the estate because the surviving spouse is likely to be elderly and in need of support in his or her old age. This approach received support in our consultations, but there was disagreement as to the appropriate share of the surviving spouse in this situation.[236]

The intestacy rules could give one-half of the residue only to the intestate's children from another relationship and assume that the surviving spouse will pass on any remaining wealth to the children of their marriage. In the alternative, the intestacy rules could give the half of the residue to all of the intestate's children. The studies show that people prefer the second alternative because it gives equal treatment to all children of the intestate.[237] For this reason, the residue of the estate should be shared by all children of the intestate and not just children of the intestate from another relationship.

What should the preferential share for the spouse be where intestate is survived by a spouse and children, some or all of whom are of a previous relationship? In this circumstance, it is much harder to generalize as to how the deceased would distribute the property. Much depends upon the length of the subsequent marriage, the number and age of children born to that marriage, the number and age of children of the deceased from another relationship, the assets accumulated due to the joint efforts of the spouses, the assets owned by either spouse before the marriage, the existence of insurance and so on. The best compromise is to share the estate between the spouse and the children but give a generous preferential share to the spouse. This share cannot be too large because it would defeat the intention of sharing the estate among the surviving spouse and children in all but very large estates.

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[236] Of the six commentators that expressed an opinion on this issue, five support this approach and one argues in favour of an all-to-the-spouse rule in every situation, including situations in which the intestate is survived by a spouse and children of another relationship.

[237] Iowa study, *supra*, note 106 at 1094-95.

The other important consideration when choosing the preferential share is whether the surviving spouse will have a claim for division of matrimonial property upon the death of the intestate. Currently a spouse who is living with the deceased at the time of death does not have such a claim. However, in Report for Discussion No. 17, *Division of Matrimonial Property on Death*, we recommended that every surviving spouse should have the right to seek division of matrimonial property on death. Not knowing whether the recommendations in Report for Discussion No. 17 will be adopted by the government, we will now propose a preferential share for two possible scenarios: (1) the *Matrimonial Property Act*[238] remains as is, and (2) the *Matrimonial Property Act* is amended as proposed in Report for Discussion No. 17.

Let us begin by proposing a preferential share that would apply when the surviving spouse does not have a claim for division of matrimonial property on death of the intestate. When choosing a preferential share for the surviving spouse in this situation, a balance must be struck between the contribution of the surviving spouse to the marriage and the needs of the spouse versus the intestate's desire to benefit his or her children on death. To determine where this balance lies, we must look at two separate situations. In the first situation, the intestate is survived by an elderly second spouse and independent adult children, some or all of whom are from a different relationship. Where the estate is small, the surviving spouse will usually require the entire estate for his or her support. The needs of the elderly spouse are greater than the needs of the independent adult children. Where the estate is larger, there will be sufficient property to meet the needs of the surviving spouse and the expectations of the independent adult children. Yet, the preferential share of the surviving spouse should not be so low as to invite successful applications by the spouse under the Family Relief Act.

In the second situation, the intestate is survived by his second (or later) spouse and minor children, some or all of whom are from a different relationship. The portion of the estate distributed to the minor children will depend upon the extant intestacy rules and whether the child support payments to the first family bind the estate of the intestate. If the intestate and his or her former spouse agreed that such payments would bind the

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[238] R.S.A. 1980, c. M-9.

intestate's estate, these will be treated as a debt of the estate and be paid out before the estate is distributed.[239] The net estate is then distributed according to the intestacy rules. The children's needs would be met by the child support payments and any inheritance upon intestacy is of much less importance.

As desirable as such an agreement may be for minor children, practitioners advise that many divorcing spouses do not agree to such a term.[240] Where the child support obligations do not bind the estate of the intestate, the minor children will receive no child support after the death of the deceased parent. The children's needs that were formerly being met by the child support payments would then have to be satisfied by the surviving parent or from whatever the children inherit under the intestacy rules. In the case of a very small estate, there may be conflicting needs of minor children and the surviving spouse. Where the estate is larger, it will be easier to meet the needs of both parties.

Having discussed these two different scenarios, we must emphasize that simplicity in intestacy rules is also important. Can we propose one rule that reasonably accommodates all such situations? Several options for the preferential share are available, including:

- $ 50,000,
- $ 60,000,
- $ 75,000,
- $100,000,
- $ 50,000 or half of the estate, whichever is greater, or
- $100,000 or half of the estate, whichever is greater.

Two commentators supported a preferential share of $50,000 or one-half of the estate, whichever is greater.[241] Another commentator thought that the $50,000 minimum was inadequate to meet the needs of the surviving spouse

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[239] A prudent parent might buy an insurance policy to cover the child support payments that must be made after the death of the parent.

[240] Lawyers practicing in this area advise that many parents required to pay child support object to such obligations binding their estate. They view child support as a benefit to the custodial parent, not the children. Having such a support obligation bind their estate conflicts with their desire to have a clean break from the ex-spouse.

[241] Alexander S. Romanchuk, March 14, 1995 and Gordon Peterson, Q.C., July 11, 1996. Gordon Peterson did not support a preferential share of $100,000 or half of the estate, whichever is greater, because in his experience such a preferential share would amount to a substantial portion of the estate and leave very little for any other beneficiaries.

and suggested a preferential share of $100,000 or one-half of the estate, whichever is greater.[242] Another commentator criticized the proposed preferential share as too generous to the surviving spouse and not reflecting the intention of Albertans who find themselves in these familial circumstances. He suggested a preferential share of $50,000.[243] Although the commentators disagreed on the quantum of the preferential share, all agreed that the surviving spouse should receive a preferential share plus one-half of the residue.

To illustrate the difference among the various schemes it is useful to compare the distribution of an estate using three different preferential shares. In each scenario, the spouse receives the preferential share plus one-half of the residue. Under the Manitoba legislation the preferential share is the greater of $50,000 or half of the estate. Under the two other schemes the preferential share is $50,000 and $75,000, respectively. The children of the intestate receive the other half of the residue, if any.

Preferential share	$50,000		$75,000		Manitoba legislation	
Size of estate	Spouse	Children	Spouse	Children	Spouse	Children
25000	25000	0	25000	0	25000	0
50000	50000	0	50000	0	50000	0
75000	62500	12500	75000	0	62500	12500
150000	100000	50000	112500	37500	112500	37500
200000	125000	75000	137500	62500	150000	50000
300000	175000	125000	187500	112500	225000	75000

The choice is between a fixed-sum preferential share that is modest and a sliding preferential share of the type used in the Manitoba Intestate Succession Act. If the preferential share is too small, the legislation invites successful applications by the spouse under the Family Relief Act. If the preferential share is too large, there will be no moneys left in modest estates

[242] Legislative Review Committee, May 10, 1996.

[243] Gary Romanchuk, May 17, 1996.

for distribution among children, be they adults or minors.[244] Minor children in need may bring an application under the Family Relief Act, but adult children will be unable to do so.

We favour a sliding preferential share over a fixed-sum preferential share because the sliding share grows with the size of the estate. It ensures that the surviving spouse always receives a generous portion of the estate, no matter what the size of the estate. It should also ensure that all of a very small estate goes to the surviving spouse and remove the need for a surviving spouse to bring an application under the *Family Relief Act* where the estate is large.

We recommend that the preferential share of the surviving spouse be $50,000 or one-half of the estate, whichever is greater, plus one-half of the residue. All children of the intestate would share in the half of the residue, if any. This regime gives the entire estate to the surviving spouse in estates worth $50,000 or less. It distributes the estate among the surviving spouse and all the children of the intestate if the estate is worth $50,000 or more. If the estate is worth $100,000 or more, the spouse will receive 75% of the estate. If the estate is worth less than $100,000, the spousal share will be greater than 75% of the estate.

We recognize that there may be situations in which the needs of the minor children of another relationship are greater than those of the surviving spouse. In this case, the minor children will be able to bring an application under the *Family Relief Act*. The court discretion available under that Act is needed to balance the competing needs of the surviving spouse and minor children from another relationship. It is impossible for the *Intestate Succession Act* to deal with all the factors that might arise in such situations.

In our view, it is best to minimize the number of applications that are brought under the *Family Relief Act*.[245] By giving a generous portion to the spouse, the number of applications brought by the surviving spouse under the *Family Relief Act* should be reduced. The onus of bringing an application

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[244] In the Alberta study, 163 of the 199 estates without wills had a value of less than $100,000.

[245] Litigation of this type depletes the estate and postpones the distribution of the estate.

under that Act falls on minor children from another relationship. They will be fewer in number than surviving spouses and will have the assistance of the Public Trustee's Office and the surviving parent.

We now examine whether the spousal share should be different if the surviving spouse also has a right to seek division of matrimonial property upon the death of the intestate, as is proposed in Report for Discussion No. 17. If the law is amended as proposed, the surviving spouse could bring an application to seek division of matrimonial property. Of course, this would be done only where the deceased owned more than his or her share of matrimonial property. What is left to be distributed in the estate would be the matrimonial property of the deceased plus assets that are exempt for the purpose of matrimonial property division. How would a spouse want to distribute their estate in this situation?

In our opinion, the intention of most intestates would not change even if the surviving spouse has the right to seek division of matrimonial property on death of the intestate. The deceased will still want to treat the spouse generously in recognition of the close relationship of the couple. If the marriage is of short duration and the matrimonial property entitlement of the surviving spouse is small, then the deceased would want to meet the needs of the surviving spouse. If the marriage is of lengthy duration and the matrimonial property claim is substantial, then the deceased will want to treat the surviving spouse generously because of the length of the relationship. If the recommendations in Report for Discussion No. 17 are accepted, the surviving spouse should be entitled to seek division of matrimonial property as well as share in the distribution of the intestate's estate. Where the intestate has children of another relationship, the surviving spouse should receive $50,000 or one-half of the estate,[246] whichever is greater, plus one-half of the residue.

When considering this situation, it quickly becomes apparent that people who have remarried and have children from another relationship should prepare a will. The *Intestate Succession Act* cannot give fair treatment to each of these situations because too many factors come into play. Our goal

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[246] Estate in this context actually refers to the net estate, which is what is left after satisfaction of debts and the matrimonial property claim.

is to propose legislation that will give a fair result in the majority of these situations.

RECOMMENDATION No. 6
Where the intestate has children from another relationship, the surviving spouse should receive $50,000 or one-half of the estate, whichever is greater, plus one-half of the residue. All the children of the intestate should share equally the other half of the residue, if any. This recommendation should apply even if the surviving spouse has a right to seek division of matrimonial property.

3. Partial intestacy

a. The existing law

If a will does not dispose of the entire estate, the portion of the estate not dealt with by the terms of the will goes by way of intestacy.[247] Section 12 of the *Intestate Succession Act*[248] provides:

> 12 So much of the estate of a person dying partially intestate as is not disposed of by his will shall be distributed as if he had died intestate and had left no other estate.

A similar section is found in the intestacy legislation of all the other Canadian common-law provinces except Manitoba and Ontario. In Manitoba and Ontario, the portion of the estate that is not disposed of by will also goes by way of intestacy. There are, however, certain rules dealing with the calculation of the preferential share of the spouse in the event of partial intestacies.

It is useful to compare the law of Alberta and the law of Manitoba and Ontario. In Alberta, the share of the surviving spouse that is received because of the partial intestacy is not reduced by the value of property left to him or her under the will. Assume that the value of the testator's estate is $200,000. A second spouse and a child from another relationship survive the

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[247] Partial intestacies are rare. They only occur when the will does not contain a residue clause or where a particular gift has lapsed.

[248] R.S.A. 1980, c. I-9.

testator. The will leaves $100,000 to the surviving spouse and $50,000 to the child from another relationship. The remaining $50,000 of the estate would be distributed according to the Intestate Succession Act. Under the existing Act, the surviving spouse would receive $40,000 plus one-half of $10,000, for a total of $45,000. The child would receive $5,000 under the Act. The portion that the surviving spouse receives under the *Intestate Succession Act* is not reduced by the value of property received under the will. As a result of the will and partial intestacy, the surviving spouse would receive $145,000 and the child would receive $55,000.

In Manitoba and Ontario, a special rule deals with the calculation of the preferential share of the spouse in the event of partial intestacies.[249] The preferential share that the surviving spouse is entitled to receive under the intestacy legislation is reduced by the value of assets received under the terms of the will. If the value of the assets received under the terms of the will is larger than the spousal preferential share, the spouse does not receive a preferential share but can still share in the residue. For example, in Manitoba the surviving spouse in the above-mentioned example would be entitled to a preferential share of $50,000,[250] plus one-half of any residue. Yet, since the spouse has already received $100,000 under the terms of the will, he or she is not entitled to any preferential share upon distribution of the portion of the estate that passes by way of intestacy. The $50,000 that is distributed under the *Intestate Succession Act* would be divided equally between the spouse and the child. Each would receive $25,000 under the Act. As a result of the will and partial intestacy, the surviving spouse would receive $125,000 and the child would receive $75,000.

The rule of set-off adopted in Manitoba and Ontario is designed to ensure that the surviving spouse does not receive the entire portion that passes by way of intestacy if the spouse has already received a generous share under the will. This goal is accomplished by ensuring the surviving

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[249] See *Intestate Succession Act*, S.M. 1989-90, c. 43, C.C.S.M. C. I-85, s. 2(4), and *Succession Law Reform Act*, 1990 R.S.O., c. S-26, s. 45(3).

[250] In Manitoba, where the intestate is survived by a spouse and children from another relationship the preferential share is $50,000 or half of the value of the estate, whichever is greater. In this case the estate that passes by way of intestacy has a value of $50,000, so the spousal preferential share is $50,000. If the children of the intestate were also the children of the surviving spouse, the spouse would receive the entire estate.

spouse does not receive a "double" preferential share, one under the will and one under the intestacy distribution.[251]

b. Law reform trends

Law reform agencies have taken different approaches to this issue. The *Uniform Intestate Succession Act* adopted the Manitoba and Ontario approach. The Law Reform Commission of British Columbia adopted the Alberta approach. This Commission sees no reason to limit the spousal share in the event of partial intestacy because most spouses intend to prefer the surviving spouse. Moreover, if the will does not make adequate provision for the spouse, eliminating the preferential share for the portion of the estate that goes by way of intestacy may cause problems.[252] The *Uniform Probate Code* has no special section dealing with the calculation of the spousal preferential share in the case of partial intestacy.

c. Analysis

In Report for Discussion No. 16, we adopted the approach of Manitoba and Ontario because we were concerned with the situation in which a partial intestacy arose where the deceased was survived by spouse and children, some or all of whom are of another relationship. If the surviving spouse is entitled to the full preferential share, it is unlikely that the children from another relationship would share in the assets that pass by way of partial intestacy because the value of such assets usually does not exceed the existing $40,000 preferential share.[253] In our opinion, this would not conform to what most intestates in this circumstance would want. Therefore, we tentatively recommended that in the event of partial intestacies, the preferential share of the surviving spouse should be reduced by an amount equal to the value of any benefits received under a will of the deceased.

The main response to this recommendation was that a partial intestacy under a will occurs so infrequently that legislative treatment is

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[251] M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 25.

[252] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 177 at 44-5.

[253] Lawyers we have consulted with indicated that the value of assets that pass by way of partial intestacy is usually small and in most cases does not exceed the $40,000 preferential share now available to the surviving spouse.

unwarranted.[254] One commentator argued that it was wrong to assume that in the event of a partial intestacy that the intestate would want the preferential share of the surviving spouse to be reduced.[255] Another commentator thought that set-off would only complicate the administration of estates.[256] After considering these comments, we are of the view that legislative treatment is unwarranted given the infrequency of partial intestacies. Therefore, we recommend that in the event of a partial intestacy, the surviving spouse should receive the preferential share without any reduction for the value of any benefits received under a will of the deceased.

RECOMMENDATION No. 7
In the event of a partial intestacy, the surviving spouse should receive the preferential share without reduction for the value of any benefits received under a will of the deceased.

4. Conduct disentitling the surviving spouse from sharing in the estate

a. The existing law

At present, the only conduct that can disentitle a spouse from sharing in the estate upon intestacy is adultery. Long periods of separation do not disentitle the surviving spouse, nor does division of matrimonial property. It is, however, possible for the surviving spouse to surrender his or her rights on intestacy by clear wording in an agreement.[257] This is a common term in a matrimonial property division agreement.

Section 15 of the *Intestate Succession Act* provides:

> 15 A surviving spouse who had left the intestate and was living in adultery at the time of the intestate's death shall take no part in the intestate's estate.

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[254] Legislative Review Committee, May 10, 1996. For this reason, lawyers in the Wills and Estates Section, CBA in Edmonton and Wills and Trusts Section, CBA in Calgary had little interest in Recommendation 7 of RFD No. 16.

[255] Alexander S. Romanchuk, March 14, 1996.

[256] Legislative Review Committee, May 10, 1996.

[257] For example, see *Re Cairns Estate* (1990), 37 E.T.R. 264 (Ont. H.C.).

The predecessor to this section[258] was interpreted in *Re Rudiak Estate*.[259] That section was the same as section 15, but it only applied to the adultery of the wife. In that case, the husband had abandoned his wife and two children in 1942. Three years later the wife and children moved in with another man. Both the husband and the wife were living in adulterous relationships at the time of the husband's death, which happened many years later.

Justice Riley held that the wife is deprived of her interest in her husband's estate **only** if both facts exist: 1) she has left her husband, and 2) she is living in adultery. The wife was not deprived of her share in her husband's estate in this case because, although she was living in adultery at the time of his death, she did not leave her husband. He left her. The words "at the time of her death" qualify "living in adultery", not the words "has left her husband."

b. The law in other jurisdictions

The intestate succession legislation of the nine common-law provinces differs considerably as to what conduct, if any, will disentitle the surviving spouse from sharing in the estate of the deceased spouse. Conduct is irrelevant in Ontario, New Brunswick and Newfoundland. If the couple is still married at the time of death, the surviving spouse can share in the intestate's estate as long as there is no agreement to the contrary. Nova Scotia, Prince Edward Island and Saskatchewan have a section similar to section 15 of the Alberta Act. British Columbia has a section that disentitles the surviving spouse where there has been a prescribed period of separation. The Manitoba section focuses on the commencement of divorce proceedings or application for or actual division of matrimonial property as the fact that disentitles a spouse.

In British Columbia the surviving spouse cannot share in the estate if the spouses had, "immediately preceding the death of one spouse, separated for not less than one year with the intention of living separate and apart, and had not during that period lived together with the intention of resuming cohabitation, unless the court, on application, otherwise orders".[260]

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[258] Section 19 of the *Intestate Succession Act*, R.S.A. 1955, c. 161.

[259] (1958), 25 W.W.R. (N.S.) 39 (Alta. S.C.T.D.), Riley J.

[260] *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 111.

In Manitoba, the surviving spouse cannot share in the estate if at the time of death, the spouses are living separate and apart, and one of two conditions are met. The first condition is that during the separation:

> one or both spouses made an application for divorce or an accounting or equalization of assets under the Marital Property Act and the application was pending or had been dealt with by way of final order at the time of death.[261]

The second condition is that:

> before the intestate's death, the intestate and his or her spouse divided their property in a manner that was intended by them or appears to have been intended by them, to separate and finalize their affairs in recognition of their marriage breakdown.[262]

The *Uniform Probate Code* does not contain a section that deals with separated spouses. Each spouse takes on the intestacy of the other, no matter how long the separation. The drafters of the Code thought that the probable intention of most intestates in this situation is too uncertain to justify special treatment. This argument was rejected by the Uniform Law Conference of Canada, which included a provision in the *Uniform Intestate Succession Act* that deals with separated spouses. By section 3(3) of the Uniform Act, the surviving spouse does not share in the estate if "before the death of the intestate, the surviving spouse became entitled to an interest in any property of the intestate under the [matrimonial property legislation]" or if "the intestate made a property division in favour of the surviving spouse".

c. The need for reform

In a time when separation or divorce was a rare event, intestacy rules could safely ignore this issue. This can no longer be the case, given the current incidences of divorce. Of course, in these situations people should make a will and state their own preferences. Still for those who do not, the intestacy rules must dispose of their property for them. The intestacy rules should be designed to give the best result in the most cases, for of course, it is impossible, by statute, to provide the best result in every case.

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[261] *The Intestate Succession Act*, S.M. 1989-90, c. 43, C.C.S.M. c. I-85, s. 3(a).

[262] *Ibid.* at s. 3(b).

d. Analysis

Adultery is an archaic ground for disentitlement in a time of no-fault divorce. The question of disentitlement due to conduct should be reexamined in the present day context. Assume that a couple is still married but they are living separate and apart. Is there some point during the marriage breakdown, but before divorce,[263] where it must be assumed that the average intestate would not want his or her property to pass to the separated spouse?

There are two divergent views on this issue, both of which are expressed in Canadian intestate succession legislation and advocated by some of the Alberta lawyers whom we have consulted with on this issue. One view is that it is too difficult to know the intentions of people in this situation. Since no generalization can be made, it is argued, conduct of the surviving spouse should not prevent him or her from sharing in the estate of the intestate. The arguments in support of this position were expressed in a discussion paper presented to the Uniform Law Conference of Canada. Although the Conference did not accept this position, it is still useful to review the arguments, which are as follows:[264]

> 3.5 This Act contains no provision ... which disinherits a surviving spouse who has left the decedent and who is living in adultery at the time of the decedent's death ...
>
> It must be presumed that spouses know that unless they leave wills providing to the contrary, the survivor will take an intestate share of the estate of the first to die. This presumption would certainly not have less probity when the spouses remain married after marital breakdown. Spouses may remain married for various reasons. Religion is a frequent reason; elderly persons may be indifferent with respect to their legal status; and some spouses may remain married in order to preserve benefits for the survivor through pensions and various welfare systems. After marital breakdown, if a decedent does not leave a will disinheriting his spouse, should it nevertheless be presumed that most decedents in this situation would still not want the surviving spouse to take an intestate share? Many separated spouses retain feelings of mutual obligation, and some even of mutual affection. The fact that some spouses remain married with the designed object of preserving benefits for the survivor, which could be a mutually beneficial gamble, has been mentioned. A decedent may want his surviving spouse to take a substantial share of his estate, marital breakdown notwithstanding, in order to provide for minor children for which the survivor will

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[263] Of course, divorce terminates the marriage and the ex-spouse cannot share in the estate of the intestate: *Re Plummer*, [1941] 3 W.W.R. 788 (Alta. S.C.A.D.).

[264] Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, 1983, at 222.

> be responsible, or to provide support for the survivor. This [draft] Act is based on the conclusion that the probable intention of most decedents in this situation is too uncertain to justify specific treatment.

Those who take the opposite view emphasize that few people leave assets to their ex-spouse in their will.[265] This preference, it is argued, can be extrapolated back to an earlier point in the marriage breakdown. That point would be when either or both spouses do any of the following:

- commence divorce proceedings,
- bring an application for division of matrimonial property, or
- divide the matrimonial property with the intent to separate and finalize their affairs in recognition of marriage breakdown.

(Some go further and argue the extrapolation should go back to a lengthy period of separation.)

We find the second view more persuasive for the following reasons. First, divorce proceedings are commenced with the purpose of ending a marriage and severing the ties with the other spouse. It is unreasonable to assume that the majority of spouses involved in divorce proceedings would want their spouse to be the primary beneficiary of their estate should they die before a divorce judgment is granted. Once the decision to end the marriage has been made and acted upon with the commencement of divorce proceedings, most spouses will no longer want their spouse to receive a share of their estate in the event of their death. To leave disentitlement to the time of divorce is to give the surviving spouse a large bonus just because of the untimely death of the deceased spouse. Second, property division and divorce occur in tandem so often that it is fair to infer that the commencement of

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[265] a) In the Alberta studies, there were 97 individuals who died unmarried but who had divorced their former spouse. Of these, 77 had died with a will and 20 had died without a will. Of those with a will, only 5 had left property to a former spouse. Two prepared a will after the divorce naming the ex-spouse as a beneficiary. One of these testators was living with his ex-spouse at the time of death and was in the process of divorcing his second spouse. Two were pre-divorce wills and for one it is not known when it was prepared. In these three cases, it is unknown whether the deceased made a conscious decision to benefit the ex-spouse or whether it happened through error. In any event, fewer than 10% of divorced testators chose to leave property to their ex-spouse.

b) One divorce lawyer indicated that clients are advised of the need to revise their will in the wake of separation. Yet, most clients do not do this until the litigation has gone on for one or two years and the end is not in sight.

matrimonial property proceedings also signals a change in attitude vis a vis the other spouse. Even when the matrimonial property proceedings are brought without divorce proceedings, it is unlikely that spouses would bargain as hard as they do in such proceedings and then decide that upon their death the surviving spouse should receive all or a large part of their estate. Third, it brings about the best result where a matrimonial property action has been brought before the death of the intestate. Assume that the plaintiff in a matrimonial property action dies without a will before the matter is brought to trial or settled. Section 16 of the *Matrimonial Property Act* allows the estate of the plaintiff to continue with the action. There would be no purpose in pursuing division of property if the estate had to turn around and give all or a large portion of the assets to the surviving spouse by way of intestacy. Fourth, people who pursue divorce or matrimonial property litigation will have the benefit of legal counsel and should address the issue of succession rights at that time. Those spouses who wish to benefit a separated spouse can do so by preparing the appropriate will. Since these spouses will be in the minority, the need for action should be put upon them and not on the majority of spouses who do not wish to benefit their separated spouse.

The task becomes one of identifying conduct which signals the point in a marriage breakdown after which the majority of separated spouses would no longer want their assets to pass to the surviving spouse upon death. Should a long period of separation by itself be a ground for altering the spouse's entitlement? We are not convinced that separation alone is sufficient reason to assume that most intestates in such a situation would no longer want their assets to pass to their surviving spouse. There are many reasons that spouses separate but do not choose to terminate their relationship or divide the matrimonial property.[266] Religious beliefs often account for this behaviour. Some elderly spouses may wish to retain benefits for the survivor through pensions and government schemes. Others may retain feelings of mutual obligation. Separation by itself is not sufficient evidence of an intention that the deceased would no longer want the surviving spouse to share in the estate. Those spouses who choose to separate, but not sue for divorce or matrimonial property division, are also the ones most likely to want the

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[266] These reasons are discussed more fully at Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, 1983.

surviving spouse to share in their estate because they are content to leave their marital status intact.

The real question that must be answered is whether most intestates who are in the process of a divorce or a division of matrimonial property, or who have already concluded matrimonial property proceedings, would want the surviving spouse to be the primary beneficiary of their estate? In our opinion, most, but not all, would choose to leave their estate to someone other than the spouse in those circumstances. This is why the estate should be distributed to others and this is why the spouse should lose his or her entire interest in the estate and not receive a smaller portion of the estate. Although one could point to preliminary applications for support as evidence of marriage breakdown, we prefer to use the commencement of divorce proceedings or matrimonial property proceedings as the reference point. These reference points will be easy to establish and, therefore, will create certainty in the administration of the estate.

Initially, we thought that a similar result should flow where the spouses did not bring divorce or matrimonial property proceedings but did divide their property in a manner that was intended by them or appears to have been intended by them to separate and finalize their affairs in recognition of their marriage breakdown.[267] Several commentators suggested that this proposal introduced too much uncertainty into the context of intestacy. After further consideration, we are persuaded to this view. Certainty in administration is desirable and should be our guide in this situation.

In summary, the rights of a spouse to share in the estate of the intestate should end when the conduct of the spouses points irrefutably to marriage breakdown. Separation by itself is insufficient to suggest marriage breakdown. However, separation coupled with the commencement of matrimonial property proceedings or divorce proceedings does signal marriage breakdown. These proceedings would have to be ongoing at the time of death, or, in the case of matrimonial property proceedings, have resulted in a final order. Of course, a divorce judgment means that the ex-spouse is no longer a spouse of the intestate and the issue does not arise.

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[267] This is done in Manitoba. See *Intestate Succession Act*, S.M. 1989-90, c. 43, C.C.S.M. I-85, s. 3.

RECOMMENDATION No. 8

The surviving spouse should be treated as if he or she predeceased the intestate, if the following circumstances exist:

(i) at the time of death, the spouses were living separate and apart,

(ii) during the period of separation, one or both spouses made an application for divorce or commenced an action under the Matrimonial Property Act, and

(iii) at the time of death, the application or action was pending or had been dealt with by way of final order.

C. Cohabitants

1. Introduction and terminology

In this part, we examine the question of whether cohabitants should share in the estate of their deceased partners who die without a will. The discussion is a reexamination of the issue in light of comments received in response to Report for Discussion No. 16 and new statistics and legal developments that have become available since the issue of that report. This discussion focuses on opposite-sex unmarried couples, although the same issue arises in connection with same-sex couples, including similar Charter arguments.[268] The rights of same-sex couples raise pressing issues of social policy and are deserving of a more comprehensive consideration than can be accommodated in a report concerning reform of intestate succession. For this reason, we do not propose to deal with the rights of same-sex couples upon intestacy in this report.[269]

Many terms are used to describe heterosexual unmarried couples, including:

- opposite-sex couples
- unmarried couples
- non-marital cohabitants
- cohabitants
- common-law relationships

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[268] See *Egan and Nesbit* v. *Canada* [1995] 2 S.C.R. 513; *Vriend* v. *Alberta* [1998] 1 S.C.R. 493; *M.* v. *H.*, [1997] S.C.J. No. 23 (Q.L.).

[269] One commentator strongly criticized RFD No. 16 because we had excluded committed same-sex partners from the recommendations concerning cohabitants.

- common-law unions
- common-law spouses
- de facto spouses
- putative spouses
- committed partners

This list is by no means exhaustive. Other terms or combination of terms can be used. Where possible, in this report we use the term "cohabitants" to describe heterosexual unmarried couples. We choose this term because it is short, it is the term that was used in Report for Discussion No. 16 and Report 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, and it covers the full gamut of cohabitation relationships and not just those that are marriage-like. Different sources, however, use a variety of terms and these will be defined, where appropriate.

2. Should cohabitants inherit upon the intestacy of their deceased partner?

Should cohabitants inherit upon the intestacy of their deceased partner? In the past, this was not a question that was asked because few people cohabited outside marriage and such conduct was seen as immoral.[270] Much has changed since then. It is now contrary to the *Canadian Charter of Rights and Freedoms*[271] to make distinctions on the basis of marital status,[272] and as of 1996, there were 1,828,700 Canadians who were cohabiting outside marriage. Government is now required to examine the purpose of the legislation it is designing and to take into account all people who should be served by that legislation, whether they be married or not. Marriage is no longer the exclusive marker for stable, committed family units.

So what does this mean for those who wish to design intestacy rules that serve present-day Canadian society? One must begin with the purpose of the legislation. We have recommended that the design of the *Intestate Succession Act* should: (i) reflect the presumed intention of intestates as measured by the reasonable expectations of the community at large, and (ii)

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[270] Eugene Kush, Q.C. remains of the view that cohabitation outside marriage is immoral and believes the law should not recognize such relationships for this reason.

[271] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[272] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418. See RFD No. 16 at pages 95-111 for a detailed discussion of this decision.

create a clear and orderly scheme of distribution. This means that the intentions of cohabitants must be examined and a clear and orderly scheme designed to reflect that intention of the majority of cohabitants, or possibly the majority of those in particular classes. If certain cohabitants have testamentary preferences similar to married persons, the intestacy legislation should be designed to reflect those intentions. If other cohabitants have different preferences, then the legislation should be designed to reflect those intentions. But it is a matter of intention and legislators are no longer able to ignore committed relationships that exist outside marriage simply because of their marital status. Cohabitants are entitled to equal protection and equal benefit of the law without discrimination on the basis of marital status.

One commentator[273] suggests that cohabitants be given the right to seek relief under the Family Relief Act, but NOT be given the right to share upon the intestacy of their deceased cohabitant. In its opinion, allowing cohabitants to share upon the intestacy of the deceased cohabitant creates too much uncertainty in the administration of intestate estates, and this, it suggests, justifies excluding cohabitants from the statute. While we recognize that our recommendations concerning cohabitants will increase the complexity of the administration of estates, we do not accept that it will do so unduly. Clearly in other areas of the law, such as pension benefits, spousal support claims, and fatal accidents, it is possible to determine if a particular person falls into the class of cohabitant who is entitled to certain benefits or obligations. This will also be the case under our proposals. Moreover, increased complexity in the law will rarely be a reason in itself for denying parties equal protection and equal benefit of the law which is guaranteed by section 15(1) of the Charter.[274]

It must be recognized that families do exist outside marriage and that the existence of these families will influence the distributive preferences of individuals within those families.[275] The task becomes one of identifying the

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[273] Legislative Review Committee, May 10, 1996.

[274] *M.* v. *H.*, *supra*, note 268 at para. 311, Bastarache J.

[275] The response to Recommendation 9 of the RFD No. 16 was divided. Four commentators rejected the recommendation, three supported it and one criticized it as not going far enough and including same-sex couples. The majority of lawyers we spoke to at the various CBA

(continued...)

group of cohabitants in which the majority would want a generous portion of his or her estate to pass to the surviving cohabitant. To assist us in this task we look at the law in other jurisdictions that have recognized cohabitants in intestacy legislation and then turn to the issues that must be addressed in creating such a definition.

3. Law in other jurisdictions

The recognition of cohabitants for the purpose of intestacy laws is a recent development. The Northwest Territories, the only Canadian jurisdiction to allow cohabitants to share upon the intestacy of their deceased partner, did so on November 1, 1998. Only two American states that have abolished common-law marriage allow cohabitants to inherit upon the intestacy of their deceased spouse.[276] Australia is the country that has gone the farthest in recognizing cohabitants in intestacy legislation with five states allowing certain cohabitants to share in the estate of the deceased partner. Another recent development is the 1995 Waggoner Working Draft. This is a proposed amendment to the *Uniform Probate Code* that, while not accepted by the Editorial Board of the *Uniform Probate Code*, remains an interesting approach to law reform in this area. Each will be reviewed in turn.

a. American law

i. New Hampshire

Section 457:39 of the *Marriages Act* of New Hampshire reads as follows:

> 457:39 Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall be deemed to have been legally married.

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[275] (...continued)
sections supported the recommendation. Those who opposed the recommendation generally did so on the basis that cohabitants do not wish to give their surviving spouse any part of their estate upon death. We will examine this question in more detail later in this chapter.

[276] This statement refers only to recognition of heterosexual unmarried couples. In 1997, Hawaii enacted legislation that allows same-sex couples to register as reciprocal beneficiaries. Such a registration allows the surviving reciprocal beneficiary to share upon the intestacy of the deceased reciprocal beneficiary. Opposite-sex unmarried couples cannot register as reciprocal beneficiaries, and therefore, they cannot inherit upon the intestacy of their deceased partner.

New Hampshire does not recognize the validity of common-law marriage, except to the extent of this section.[277] This section ensures that a common-law spouse can share upon the intestacy of the deceased spouse where the requirements of the section are met. It does not, however, validate a polygamous marriage[278] and it only applies to persons who are competent to marry each other.[279] This means it does not extend to same-sex couples or to opposite-sex couples where one is married to someone else.

ii. Oregon

In 1992, Section 112.017 of the *Intestate, Succession and Wills Act*[280] of Oregon came into force. It reads as follows:

> 112.017 *Person considered spouse for purposes of ORS 12.017 to 112.045*
>
> For purposes of ORS 112.,017 to 112.045, a person shall be considered the surviving spouse of a decedent under either of the following circumstances:
> (1) The person was legally married to the decedent at the time of the decedent's death.
> (2) The person and the decedent, although not married but capable of entering into a valid contract of marriage under ORS chapter 106, cohabited for a period of at least 10 years, the period ended not earlier than two years before the death of the decedent, and:
> (a) During the 10-year period, the person and the decedent mutually assumed marital rights, duties and obligations;
> (b) During the 10-year period, the person and the decedent held themselves out as husband and wife, and acquired a uniform and general reputation as a husband and wife;
> (c) During at least the last two years of the 10-year period, the person and the decedent were domiciled in this state; and
> (d) Neither the person nor the decedent was legally married to another person at the time of the decedent's death.

This definition ensures that a cohabitant cannot be in competition with the surviving legal spouse.

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[277] Annotation to section found in New Hampshire Statutes Annotated.

[278] *Hilliard* v. *Baldwin* (1911), 76 N.W. 142, 80 A. 139.

[279] *Emerson* v. *Shaw* (1876), 56 N.H. 418.

[280] 1997 O.R.S., tit. 12 c. 112.

b. 1995 Waggoner Working Draft

Professor Lawrence Waggoner[281] has prepared the 1995 Waggoner Working Draft, which is a proposed amendment to the *Uniform Probate Code*. Unlike New Hampshire and Oregon, he does not suggest that committed partners be treated the same as legally married spouses. He proposes that they receive something less than would a legally married spouse. This approach encourages people to marry and avoids the criticism that his proposal does nothing more than recognize common-law marriage, which has been abolished in 35 American states. The other major differences are that his definition of a committed partner includes cohabitants and same-sex couples and does not include a specified period of cohabitation.

He considered including a minimum period of cohabitation in the definition but eventually rejected that option because it can be both under-inclusive and over-inclusive. There will be committed same-sex couples where one of the partners is dying of AIDS who have not cohabited for the required period. There will also be people who have cohabited for a long period but who are NOT living in a marriage-like relationship. The result could be deserving relationships of short duration that were excluded and undeserving relationships of long duration that were included. In his opinion, it is better to deal with the period of cohabitation by raising a presumption based on that period of cohabitation.

His proposal is as follows:

> **SECTION [Insert Appropriate Number]. INTESTATE SHARE OF COMMITTED PARTNER.**
>
> **(a) [Amount.]** If an unmarried, adult decedent dies without a valid will and leaves a surviving committed partner, the decedent's surviving committed partner is entitled to:
>
> (1) the first [$50,000], plus one-half of any balance of the intestate estate, if:
>
> (i) no descendant or parent of the decedent survives the decedent, or;
>
> (ii) all of the decedent's surviving descendants are also descendants of the surviving committed partner and there is no other descendant of the surviving committed partner who survives the decedent.

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[281] Lawrence Waggoner is a Professor of Law at the University of Michigan and the Director of Research and Chief Reporter, Joint Editorial Board for the *Uniform Probate Code*.

(2) one-half of the intestate estate, in cases not covered by paragraph (1).

(b) [Committed Partner; Requirements.] To be the decedent's committed partner, the individual must, at the decedent's death: (I) have been an unmarried adult; (ii) not have been prohibited from marrying the decedent under the law of this state by reasons of a blood relationship to the decedent; and (iii) have been sharing a common household with the decedent in a marriage-like relationship. Only one individual can qualify as the decedent's committed partner for purposes of this section.

(c) [Common Household.] For purposes of subsections (b) and (e), "sharing a common household" or "shared a common household" means that the decedent and the individual shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's death. The right to occupy the common household need not have been in both of their names.

(d) [Marriage-like Relationship; Factors.] For purposes of subsection (b), a "marriage-like relationship" is a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring. Although no single factor or set of factors determines whether a relationship qualifies as marriage-like, the following factors are among those to be considered:

(1) the purpose, duration, constancy, and degree of exclusivity of the relationship;

(2) the degree to which the parties intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived or other property in joint tenancy;

(3) the degree to which the parties formalized legal obligations, intentions, and responsibilities to one another, such as by one or both naming the other as primary beneficiary of life insurance or employee benefit plans or as agent to make health care decisions;

(4) whether the couple shared in co-parenting a child and the degree of joint care and support given the child;

(5) whether the couple joined in a marriage or a commitment ceremony, even if the ceremony was not a type giving rise to a presumption under subsection (e)(3); and

(6) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

(e) [Presumption.] An individual's relationship with the decedent is presumed to be marriage-like if:

(1) during the [six] year period next preceding the decedent's death, the decedent and the individual shared a common household for periods totaling at least [five] years;

(2) the decedent or the individual registered or designated the other as his [or her] domestic partner with and under procedures

> established by an organization and neither partner executed a document terminating or purporting to terminate the registration or designation;
>
> (3) the decedent and the individual joined in a marriage or a commitment ceremony conducted and contemporaneously certified in writing by an organization; or
>
> (4) the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent regarding a child, and if, in either case, the child lived before the age of 18 in the common household of the decedent and the individual.
>
> **(f) [Force of the Presumption.]** If a presumption arises under subsection (e) because only one of the listed factors is established, the presumption is rebuttable by a preponderance of the evidence. If more than one of the listed factors is established, the presumption can only be rebutted by clear and convincing evidence.

At present, he thinks the ideal approach is a combination of the legislation proposed in the Working Draft and a registration system of the type established in Hawaii for same-sex couples.[282] The registration system that he has in mind, however, would extend to both same-sex couples and opposite-sex couples.

The Committed Partner Study[283] lends support to the factors listed in the Waggoner Working draft. The authors made the following findings:[284]

> Apart from the question of whether committed relationships should be defined the same for same-sex and opposite-sex couples, the findings support the approach adopted in the Waggoner Working Draft for defining a committed relationship. Observable factors closely correspond to self-definitions of a committed relationship and can be associated with a preference for having a committed partner inherit. A comparison of the factors found in the Waggoner Working Draft and those generated from this study show a substantial correspondence. Most notably, the findings support the Draft's use of shared debt and shared ownership of assets as well as the naming of a partner as a beneficiary of life insurance or as health care decision maker as factors to be considered in finding a committed relationship. They also support raising a presumption in favor of finding a committed relationship if it is shown that the decedent and the individual shared a common household for at least five years. The study supports modifying the Draft to include more examples of observable symbols of partners' feelings of commitment, such as joint gifts to charity or an

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[282] See *An Act Relating to Unmarried Couples*, 1997 Hawaii Laws, Act 383 which contained a series of amendments including the addition of a new part to the *Marriage Act* entitled Reciprocal Beneficiaries.

[283] *Supra*, note 109.

[284] *Ibid*. at 63.

> exchange of a symbol of the relationship. The findings also support adding one or more of these indicators to the list of those raising a presumption in favour of finding a committed relationship.

c. Australia

Australia has a number of states that have amended their intestacy legislation to recognize cohabitants. In this part, we compare the terminology and accompanying definition used in each statute.

i. New South Wales

In New South Wales, the intestacy legislation recognizes de facto relationships.[285] Section 32G of the *Wills, Probate and Administration Act* 1898[286] defines the relevant terms as follows:

> 'De facto Relationship' means the relationship of a man and a woman living together as husband and wife on a bona fide domestic basis although not married to each other.
> 'De facto wife', in relation to a man dying wholly or partially intestate, means a woman who, at the time of death of the man:
>
> (a) was the sole partner in a de facto relationship with the man; and
> (b) was not a partner in any other *de facto* relationship.

De facto husband is then defined in a similar fashion.

New South Wales does not treat de facto relationships in exactly the same fashion as a legal spouse. If the intestate leaves a legal spouse or a de facto spouse but no issue, the survivor receives the entire estate. If the intestate leaves a legal spouse and issue, the legal spouse receives the household chattels, $150,000, plus one-half of the residue.[287] If the intestate leaves a de facto spouse and issue of another relationship, the de facto spouse receives the spousal share only if the de facto spouse was the de facto spouse of the intestate for a continuous period of not less than two years prior to the

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[285] The intestacy rules are found in Division 2A of Part 2 of the *Wills, Probate and Administration Act* 1898 (NSW).

[286] *Wills, Probate and Administration Act* 1898 (NSW).

[287] *Ibid*. at section 61B(3). The section refers to issue, which will include issue of the marriage and issue of previous relationships. The prescribed amount is set by the *Wills, Probate and Administration Regulation* 1998 which came into force on September 1, 1998.

death of the intestate;[288] otherwise, the entire estate passes to the issue. Where, however, all of the issue of the intestate are also issue of the de facto spouse, the de facto spouse receives the spousal share and there is no minimum period of cohabitation required.[289]

If the intestate is survived by both a legal spouse and a de facto spouse, the legal spouse will receive the spousal share unless two conditions are met. First, the de facto spouse must have been the de facto spouse of the intestate for a continuous period of not less than two years prior to death. Second, the intestate must not, during the whole or any part of that period, live with the legal spouse. If the two conditions are met, the de facto spouse will take the spousal share; otherwise the legal spouse receives the spousal share.[290]

ii. South Australia

Section 4 of the *Administration and Probate Act* 1919[291] of South Australia defines spouse to include a putative spouse. A putative spouse is defined in section 11 of the *Family Relationships Act* 1975 [292] as follows:

> 11(1) A person is, on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife *de facto* of that other person and---
>
> (a) he---
>
> (I) has so cohabited with that other person continuously for the period of five years immediately preceding that date; or
>
> (ii) has during the period of six years immediately preceding that date so cohabited with that other person for periods aggregating not less than five years; or
>
> (b) a child, of which he and that other person are the parents, has been born (whether or not the child is still living at the date referred to above).

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288 *Ibid*. at s. 61B (3b).

289 *Ibid*. at s. 61B (3B)(b)(ii). See L. Willmott, *De Facto Relationships Law* (Sydney: LBC Information Services, 1996) at 295-97.

290 *Ibid*. at s. 61B (3A).

291 *Administration and Probate Act* 1919 (SA).

292 *Family Relationships Act* 1975 (SA) as am. by *Family Relationships Act Amendment Act* 1984 (SA).

The surviving cohabitant must be a putative spouse as of the date of death if he or she is to share upon the intestacy of the deceased partner.[293]

A putative spouse is treated in the same fashion as a legal spouse. The surviving putative spouse receives the entire estate if the deceased had no surviving issue.[294] If the deceased is also survived by issue, the putative spouse receives the personal chattels of the intestate, $10,000 plus one-half of the balance.[295] If the deceased is survived by both a legal spouse and a putative spouse, the spousal share is divided equally between the two spouses.[296]

iii. Northern Territory

Section 6(1) of the *Administration and Probate Act*[297] of the Northern Territory defines de facto partner as follows:

> 'de facto partner', in relation to a deceased person means,
>
> (a) where the deceased was a man–a woman who, immediately before the man's death, was living with him as his wife on a bona fide domestic basis although not married to him; and
> (b) where the deceased was a woman–a man who, immediately before the woman's death, was living with her as her husband on a bona fide domestic basis although not married to her.

The Northern Territory does not treat the de facto partner in the same fashion as a legal spouse.[298] If the intestate is not survived by issue but is survived by a legal spouse and parents, siblings, or issue of siblings, the legal

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[293] Section 4, *The Administration and Probate Act* 1919 (SA) defines 'putative spouse' in relation to a deceased person, to mean " a person adjudged under the Family Relationship Act, 1975 to have been a putative spouse of that person as at the date of his death."

[294] *Ibid*. at s. 72g.

[295] *Ibid* at ss 72g and 72h.

[296] *Ibid*. at 72h.

[297] *The Administration and Probate Act* comprises the *Administration and Probate Ordinance* 1969 as amended by numerous ordinances and acts enacted thereafter. For amendments relating to de facto partners, see *Administration and Probate Amendment (De Facto Relationship) Act* 1991 (NT).

[298] *Administration and Probate Act, ibid*. at ss. 66 and 67 and Schedule 6, Parts I - III.

spouse receives the personal chattels of the intestate,[299] $500,000 plus one-half of the balance.[300] If the intestate is survived by a legal spouse and issue, the legal spouse receives $120,000 plus one-half of the balance if there is one child or one-third of the balance if there are two or more children.

If there is a de facto partner but no spouse, the de facto partner will be treated like a legal spouse if the intestate is not survived by issue. Where, however, the intestate is survived by a de facto partner and issue, the de facto spouse will only receive the spousal share in two circumstances:

> (1) if all or some of the issue of the intestate are also issue of the de facto spouse, or
> (2) the de facto partner was the de facto partner of the intestate for a continuous period of not less than two years immediately preceding the intestate's death.

The issue will receive the entire estate, however, if neither circumstance is satisfied.

Where the intestate is survived by both a legal spouse and a de facto partner, special rules apply.[301] The legal spouse will take the spousal share unless one of two circumstances exist:[302]

> (1) the de facto partner was the de facto partner of the intestate for a continuous period of not less than two years immediately preceding the intestate's death and the intestate did not at any time during that period live with the person to whom he or she was married; or
> (2) the intestate is also survived by issue of the intestate and de facto partner.

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[299] *Administration and Probate Act, ibid.* and the *Administration and Probate Regulations* which comprise Regulations 1983, No. 35 as am. by Regulations 1998, No. 48.

[300] *Administration and Probate Act, ibid.*

[301] *Ibid.* at s. 67.

[302] *Ibid.* at Schedule 6, Part III, s. 1.

If these circumstances exist, the de facto spouse takes the spousal share in its entirety. In all other circumstances, the legal spouse receives the spousal share.

iv. Australian Capital Territory

For the purposes of the intestacy provisions, section 44(1) of the *Administration and Probate Act* 1929 of the Australian Capital Territory defines spouse to mean: (a) the legal spouse of the intestate, or (2) the eligible partner of the intestate. 'Eligible partner' is defined as follows:[303]

> "eligible partner", in relation to an intestate, means a person other than the intestate's legal spouse who--
> (a) whether or not of the same gender as the intestate--was living with the intestate immediately prior to the death of the intestate as a member of a couple on a genuine domestic basis; and
> (b) either:
> (I) had lived with the intestate in that manner for 2 or more years continuously prior to the death of the intestate; or
> (ii) is the parent of a child of the intestate who had not attained the age of 18 years at the date of death of the intestate.

The intestacy rules of the Australian Capital Territory treat a legal spouse and an eligible partner in the same fashion. If the intestate is not survived by issue, the surviving legal spouse or eligible partner receives the entire estate.[304] If the intestate is survived by issue, the surviving legal spouse or eligible partner receives the personal chattels of the intestate, $150,000, plus one-half of the balance if there is one child, and one-third of the balance if there are two or more children.[305] The issue take the rest of the estate.

Special rules govern if the intestate is survived by both a legal spouse and an eligible partner.[306] If the eligible partner has lived as the eligible partner of the intestate continuously for a period of less than five years immediately before the intestate's death, the spousal share is to be divided equally between the legal spouse and the eligible partner. If, however, the

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[303] *Administration and Probate Act* 1929 (ACT) s. 44(1).

[304] *Ibid*. at ss. 49, 49A and the Sixth Schedule.

[305] *Ibid*.

[306] *Ibid*. at s. 45A.

eligible partner has lived as the eligible partner of the intestate continuously for a period of five years or more immediately before the intestate's death, the eligible partner receives the spousal share exclusively.

v. Queensland

In 1997, the *Succession Act* 1981[307] of Queensland was amended to allow de facto spouses to share upon the intestacy of their deceased partner.[308] Section 1 of the Act defines de facto spouse as follows:

> "**de facto spouse"**, of a deceased person, means a person who--
> (a) has lived in a comubial relationship with the deceased person for a continuous period of at least 5 years ending on the death of the deceased person; or
> (b) within the period of 6 years ending on the death of the deceased person, has lived in a connubial relationship with the deceased person for periods totaling at least 5 years that include a period ending on the death of the deceased person.

In Queensland, a de facto spouse is treated in the same fashion as a legal spouse. If the deceased is survived by a de facto spouse but no issue, the de facto spouse receives the entire estate. If the deceased is survived by the de facto spouse and issue, the de facto spouse receives the household chattels, $150,000 plus one-half of the balance if there is one child or one-third of the balance if there are two or more children.

In situations in which the deceased is survived by both a legal spouse and a de facto spouse, section 36 establishes a set of rules that determine how the spousal share will be distributed between the spouse and the de facto spouse. According to this section, the spousal share will be distributed:

> (a) according to distribution agreement entered into by the surviving spouse and the surviving de facto spouse, or
> (b) according to a distribution order,
> - the court may distribute the entitlement in the way it considers just and equitable,
> - no assumption is to be made in favour of an equal distribution as a starting point or otherwise, and

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[307] *Succession Act* 1981 (Qld).

[308] *Succession Amendment Act* 1997 (Qld).

- a court may distribute the entitlement solely to a spouse or solely to a de facto spouse.

(c) in equal shares if at the time of distribution both spouses had been given notice of their right to obtain a distribution agreement or obtain a court distribution order and have not entered into an agreement or made application within the three months after notice is served.

d. Northwest Territories

For persons who die intestate in the Northwest Territories after November 1, 1998, the definition of spouse has been expanded to include certain cohabitants. The definition of spouse is as follows:[309]

> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;
>
> "spouse" means a man, where the person who died intestate was a woman, and a woman, where the person who died intestate was a man, who, immediately before the death, . . .
>
> (c) was cohabiting, outside marriage, with the person who died intestate, if they
>
> (i) had cohabited for a period of at least two years, or
>
> (ii) had cohabited in a relationship of some permanence and were together the natural or adoptive parents of a child.

The Northwest Territories treats a surviving cohabitant who falls within the definition of spouse in the same fashion as a legally married spouse. Where, however, the intestate is survived by both a married spouse and a cohabitant who falls within the definition of spouse, the spousal share passes to the cohabitant and not the married spouse.[310]

4. How should "cohabitant" be defined?

a. What degree of commitment suggests that the deceased would want his or her surviving cohabitant to share in the estate?

Few researchers have asked how cohabitants would want their estate distributed upon death. The studies that have been conducted show that there is support for allowing a surviving cohabitant to share in the estate of the deceased cohabitant where the relationship is one of commitment and significant duration. Beyond this, no pattern emerges as to the share of the

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[309] *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 1.

[310] *Ibid*. at s. 13(1)(d).

surviving cohabitant.[311] Given the lack of statistical evidence, we are left to infer intention from the degree of commitment to permanence evidenced in the relationship. The challenge with cohabitants is that they live in relationships that have varying degrees of commitment. The relationship can be one of the following: 1) short-lived with little or no personal commitment, 2) a prelude to marriage,[312] 3) a trial marriage, 4) a stable union but with no intention that the parties have any responsibility to each other should they separate or should one of them die, 5) a relationship involving a lifelong commitment to the other partner, or 6) a relationship at some other point along the commitment continuum. We are forced to rely on the inference that the greater the commitment to permanence, the more likely the intestate would want the surviving cohabitant to receive a generous portion of the estate. [313]

But what degree of commitment suggests that the deceased would want the surviving cohabitant to share in the estate? In our opinion, the only cohabitants who would have such an intention are those who cohabit in marriage-like relationships.[314] By this we mean a relationship that has interdependence and a publicly acknowledged commitment to permanence. Casual relationships, short term trial marriages, and stable unions with no evidence of commitment to the other partner do NOT have the degree of

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[311] See discussion in Chapter 4 at 53-55.

[312] A relationship is a prelude to marriage when they are married within one year of when they started to cohabit.

[313] This approach is supported by the Committed Partner Study, *supra*, note 109.

[314] There are authors who think it ironic to describe common-law unions as being marriage-like. For example, see S. A. James, "As if They Were Husband and Wife, A Critique of De Factor Relationship Property Law in Victoria" (1997) 15:1 Law in Cont. 53. At page 60-61, he writes:

> It is ironic, considering that de facto relationship legislation could be seen as a necessary acknowledgment of the diversity of relationships (and in *some* cases of a conscious eschewal of marriage, its legal trappings and values, by the partners), that the de facto relationship is described in terms of living or having lived together *as if they were husband and wife*. How then, does one fit diverse, alternative relationships within a legal framework by inference from conduct without a high degree of artificiality at best, distortion at worst. In any case, what does, 'living *as if* they were husband and wife' mean? The phrase seems to imply a monolithic experience which glosses over diversity even *within* heterosexual marriage. What does it mean to live as if one were a 'wife'? Might this not consolidate traditional models of femininity? There seems, for instance, to be a silent requirement that there be a continuing possessive, hetero-*sexual*, quasi-'contractual' element, since companionship and other non-sexual relationships are seemingly excluded.

commitment necessary to infer that majority of such intestates would want the surviving cohabitant to share in the estate. Nor should a relationship that is a prelude to marriage[315] be taken into account. People in such relationships are no different from people who are engaged to be married in the near future, and marriage should trigger rights of such couples.

One commentator criticized our approach in determining intention of cohabitants.[316] In his opinion, cohabitants live together because they consciously choose not to get married and they do not want the rights and obligations of married persons imposed upon themselves. While they might feel affection for their companion, their primary goal is to ensure security for their own children. We recognize that such cohabitants exist,[317] but we do not accept the proposition that all cohabitants act in this manner. As indicated above, there are a variety of different levels of commitment exhibited by those who cohabit. Our task is to identify those who wish their surviving cohabitant to share in their estate.

b. How do we describe such a relationship?

At present, no Canadian intestate succession statute other than that of the Northwest Territories recognizes cohabitants and only a few American and Australian states do so. Many provincial statutes in Canada, however, have extended protection to cohabitants in the area of support obligations,[318] family relief,[319] and wrongful death.[320] Most definitions require that the

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[315] According to the classifications discussed in Chapter 3, a common-law union that is a prelude to marriage is a union where two persons live together before marriage and marry within one year of setting up the household. See Chapter 3 at 38.

[316] Mark Johnson, April 4, and April 18, 1996.

[317] In the classes of cohabitants described above, such a relationship would be a stable unions with no evidence of commitment to the other partner.

[318] *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 16.1; *Family Relations Act*, R.S.B.C. 1996, c. 128., s. 89; *Family Maintenance Act*, R.S.M. 1987, c. F-20, ss 4(3)) and 10; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss 112(1) & 112(3); *Family Law Act*, R.S.N. 1990, c. F-2, s. 39; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 3; *Family Law Act*, R.S.O. 1990, c. F-3, ss 29-30; *Family Law Act*, S.P.E.I. 1995, c. 12, ss 29-30; *The Family Maintenance Act*, S.S. 1990-91.c. F-6.1, s. 4; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 35; *Family Law Act*, S.N.W.T. 1997, c. 18, s. 15; *Nunavut Act*, S.C. 1993, c. 28, s. 29(1) as am. by S.C. 1998, c. 15, s.4.

[319] *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 76; *Dependents Relief Act*, S.M. 1989-90, c. 42, s. 2(1); *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, s. 1; *Succession Law*

(continued...)

relationship be marriage-like for a specified period. The period of cohabitation in Canada varies from one to five years, with the most common period being three years. The phrase used to describe a marriage-like relationship also varies and includes:

- cohabited in a marriage-like relationship[321]
- live together in a conjugal relationship, whether within or outside marriage[322]
- living together as husband and wife
- held out by the deceased in the community in which they lived as the deceased's consort[323]
- lived in a connubial relationship with the deceased person[324]
- held themselves out as husband and wife

Definitions of this type leave it to the judge to define what is a marriage-like relationship. For example, *Molodowich* v. *Penttinen*[325] establishes the generally accepted characteristics of a conjugal (i.e., marriage-like) relationship.

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[319] (...continued)
Reform Act, R.S.O. 1990, c. S-26, s. 57; *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, s. 1; *The Dependants' Relief Act*, 1996, S.S. 1996, c. D-25.01, s. 2; *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s. 1; *Dependants Relief Act*, R.S.Y. 1986, c. 44, s. 1; *Nunavut Act*, S.C. 1993, c. 28, s. 29(1) as am. by S.C. 1998, c. 15, s. 14.

[320] *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 1(a.1); *Family Compensation Act*, R.S.B.C. 1996, c. 126 , s. 1; *Fatal Accidents Act*, R.S.M. 1987, c. F-50, s. 3(5); *Fatal Accidents Act*, R.S.N.B. 1973, c. F-3 as am. by *An Act to amend the Fatal Accidents Act*, S.N.B. 1995, c. 36, s. 1; *Fatal Injuries Act*, R.S.N.S. 1989, c. 163., s. 13; *Family Law Act*, R.S.O. 1990, c. F-3, ss 1(1), 29, 61; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, s. 1(f).

[321] This wording forms part of the definition of spouse in the recent amendments to the *Domestic Relations Act*. See *Domestic Relations Amendment Act, 1999*, S.A. 1999.

[322] *Family Law Act*, R.S.O. 1990, c. F-3. The definition of cohabit found in s. 1 is incorporated into definition of spouse found in s. 29 of the Act.

[323] *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 1(a.1).

[324] *Succession Act* 1981 (Qld).

[325] (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). This case has been cited by the SCC in *M.* v. *H.*, *supra*, note 268 at para. 59 as setting out the generally accepted characteristics of a conjugal relationship.

The 1995 Waggoner Working Draft differs from the Canadian approach in two key aspects. First, it defines a marriage-like relationship as "a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring." Then it sets out a non-exhaustive list of factors the court is to consider when determining if a relationship qualifies as marriage-like. These factors are similar to the ones some Canadian judges consider in determining if a relationship is marriage-like under the other definitions.[326]

In choosing the appropriate description of the relationship, we eliminate any definition that requires the couple to hold each other out as husband and wife. This is undesirable because in today's society there is no need to introduce your cohabitant as a spouse and many committed cohabitants do not do this. In choosing between the remaining terms, it is best to choose a term that will be clearly understood by most Albertans. For this reason, we prefer the term "marriage-like" over "conjugal" or "connubial". We do, however, think that the definition of marriage-like used in the Waggoner Working Draft would add increased certainty and recommend the adoption of his definition of the term.

The remaining question is whether the legislation should contain a non-exhaustive list of factors a court should consider to determine if the relationship is marriage-like. The advantages of listing the factors in the legislation are as follows: (1) increased court direction, and (2) a reduction in the risk that a court would just concentrate on one aspect of the relationship, such as how the couple intertwine their finances. The down side is that the resulting definition becomes very lengthy and complex and may be unnecessary given the existing case law, which is not, however, uniform in its approach. After further consideration, we think a list of factors would be useful direction for the court and litigants and we recommend the adoption of such a list of factors.

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[326] For example, compare the list of factors considered by the judge in *Molodowich* v. *Penttinen*, *ibid*. at 380 with the list of factors set out in the 1995 Waggoner Working Draft.

Creating such a list of factors is not a difficult task because it has been done well by others. In *Molodowich* v. *Penttinen*,[327] the judge had to determine if a couple had lived in a conjugal relationship outside marriage. The judge concluded that "marriage involves a complex group of human relationships---conjugal, sexual, familial and social as well as economic"[328] and then developed a list of factors to consider when deciding if a couple was living in a conjugal (i.e., marriage-like) relationship outside marriage. The list of factors included the following:[329]

1. Shelter
   (a) Did the parties live under the same roof?
   (b) What were the sleeping arrangements?
   (c) Did anyone else occupy or share the available accommodation?

2. *Sexual and Personal Behaviour*
   (a) Did the parties have sexual relations? If not, why not?
   (b) Did they maintain an attitude of fidelity to each other?
   (c) What were their feelings toward each other?
   (d) Did they communicate on a personal level?
   (e) Did they eat their meals together?
   (f) What, if anything, did they do to assist each other with problems or during illness?
   (g) Did they buy gifts for each other on special occasions?

3. *Services:*
   What was the conduct and habit of the parties in relation to:
   (a) preparation of meals;
   (b) washing and mending clothes;
   (c) shopping;
   (d) household and maintenance; and
   (e) any other domestic service?

4. *Social:*
   (a) Did they participate together or separately in neighbourhood and community activities?
   (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

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[327] *Supra*, note 325.

[328] *Ibid*. at 380 quoting from Blair J. A. in *Warwick* v. *Minister of Community and Social Services* (1978), 5 R.F.L. (2d) 325 at 336 (Ont. C.A.).

[329] *Ibid*. at 381-82.

5. *Societal:*
   What was the attitude and conduct of the community toward each of them and as a couple?

6. *Support (economic):*
   (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)?
   (b) What were the arrangements concerning the acquisition and ownership of property?
   (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. *Children*
   What was the attitude and conduct of the parties concerning children?

On close scrutiny, it becomes apparent that this list of factors is very similar to the factors listed by Waggoner.

We propose a list of factors that is a blend of those found in *Molodowich* v. *Penttinen* and the 1995 Waggoner Working Draft.[330] Therefore, we recommend that the court should consider the following factors when determining if a relationship is marriage-like:

- the purpose, duration, constancy, and degree of exclusivity of the relationship;
- the conduct and habits of the parties in respect of domestic services;
- the degree to which the parties intermingled their finances, such as by maintaining joint checking, credit card or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived or other property in joint tenancy;
- the extent to which direct or indirect contributions have been made by either party to the other or to the mutual well-being of the parties;[331]
- whether the couple shared in co-parenting a child and the degree of joint care and support given the child;

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[330] Note that the result obtained is similar to the list of factors proposed by the British Columbia Law Institute in its report entitled *Report on Recognition of Spousal and Family Status* (1998) at page 38.

[331] This factor was one of the factors proposed by the British Columbia Law Institute, *Report on the Recognition of Spousal and Family Status*, *ibid.*

- the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

We stress that no single factor or set of factors determines whether a relationship is marriage-like and it will always be a question of fact.

c. Should a minimum period of cohabitation be required? If so, what should be that period?

Most Canadian definitions impose a minimum period of cohabitation. In contrast, the Waggoner model uses a presumption instead of a minimum period. This means that a court is directed to presume the relationship is marriage-like if "during the [six] year period next preceding the decedent's death, the decedent and the individual shared a common household for periods totaling at least [five] years." The presumption is rebuttable. The advantage with this model is that short-term committed relationships will not be excluded. The disadvantage with this model is that it invites litigation and makes the administration of estates that more complicated.

The choice is between the 1995 Waggoner Working Draft, which does not impose a minimum period of cohabitation, and the Canadian-style definition, which does do this. While the use of the presumption by Waggoner is ingenious, it still invites litigation. No doubt, in time, judicial practice would establish some minimum period that would be required before a court would consider the relationship marriage-like. Yet, this is best done in the statute itself. The fact is that cohabitation relationships are much more unstable than marriage relationships, with less than one-third of such relationships still common-law relationships five years after they were formed. Only about 15% remain as common-law relationships ten years after formation.[332] This shows the importance of evaluating the relationship over some minimum period. It is just too difficult, if not impossible, to determine if a relationship is marriage-like unless one has a significant period of conduct upon which to base this judgment. The reason for this is that the daily life of couples living within marriage or outside marriage is similar. What differs is

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[332] Statistics Canada, *Report on the Demographic Situation in Canada, 1997, supra*, note 33 at 43-48, especially page 46. Common-law relationships usually end with marriage or separation. Separation is more frequent among common-law relationships formed in the 1985-1995 period than those formed ten years earlier. See Figure 13 at page 47.

the commitment to the permanence of the relationship[333] and this can only be judged with time.

Furthermore, we should not lose sight of the fact that like most relationships, stable common-law unions will change over time. One can expect that cohabitants would be very independent at the beginning of the relationship, evidenced by separate bank accounts and purchases, and that this would begin to change as the commitment to the relationship develops and the couple comes to think of themselves more as a family unit, as opposed to two single people. This change in thinking is often evidenced by joint bank accounts and joint purchases of assets. It is these family units that we seek to identify and these will take time to come into existence.

In Report for Discussion No. 16, we suggested that the choice was between three years and five years. We tentatively recommended the three-year period because we were "concerned that the five-year period would exclude too many committed relationships in which the intestate would want the surviving cohabitant to be treated as his or her spouse for the purposes of intestacy."[334] This recommendation drew mixed reaction. One commentator supported the three-year period on the basis that it was the same period used in some of the pension rules.[335] Others thought this period was too short and preferred the five-year period.[336] Others rejected the period outright and

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[333] S.L. Nock, "A Comparison of Marriages and Cohabiting Relationships" (1995) J. Fam. Issues 53. This article compared the nature and quality of the two types of relationships. The author concluded as follows:

> This research takes us one step closer toward understanding the nature of the difference between cohabitation and marriage. Married and cohabiting individuals describe their relationships differently. Specifically, cohabitors report lower levels of happiness with their partnerships, express lower degrees of commitment to their relationships, and have poorer quality relationships with their parents. These differences are consistent with the sociological processes hypothesized to produce them: the lack of formal legal or normative structure for cohabitation and the enforced intimacy of marriage. One interpretation of such findings is that cohabitation and marriage do not differ so much in terms of the ordinary, everyday partnerships as they do with respect to long-term concerns and relationships with people beyond the immediate dyad.

[334] RFD No. 16 at 90.

[335] Gordon Peterson, Q.C., July 11, 1996.

[336] Tim Rattenbury, April 25, 1997 and the Legislative Review Committee. May 10, 1996.

insisted whatever period is chosen be supported by the opinion of Albertans.[337]

We remain of the view that the three-year period is the appropriate period. A shorter period is likely to catch casual relationships and trial marriages and in such relationships, it is unlikely the deceased would want the surviving cohabitant to share in the estate.[338] The relationships we are trying to identify are those which are stable and have a commitment to permanence. A minimum period of cohabitation is required to evidence these characteristics. While the five-year period provides a further degree of certainty that the relationship is stable and the parties have a commitment to permanence, we see it as unnecessarily restrictive and as excluding too many committed relationships. The three-year period along with the requirement that the relationship be marriage-like will be a sufficient marker of the type of relationships in which the deceased would want the surviving cohabitant to share in his or her estate.

Many definitions allow for a shorter period of cohabitation when the couple are the natural and adoptive parents of a child. Therefore, in Report for Discussion No. 16, we recommended that if there is a child born of the relationship or a child who is adopted, cohabitant should include a person of the opposite sex who is not married to the intestate and who continuously cohabited in a conjugal relationship with the intestate in a relationship of some permanence immediately preceding the intestate's death. Two commentators[339] criticized the use of the term "of some permanence" as being too uncertain. Both preferred a minimum period of cohabitation of two years for those couples who had children of the relationship. Although we agree that the words "of some permanence" may create too much uncertainty, we think the solution is to delete these words and not impose a minimum period of cohabitation. In our opinion, the majority of cohabitants who are living together in a marriage-like relationship and who have decided to have

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[337] Mark Johnson, April 4, 1996 and April 18, 1996.

[338] Common-law unions that end in the marriage of the partners do not usually last very long. Over half of such unions end in marriage within two years of the establishment of the relationship. See Chapter 3 at 34-35.

[339] Legislative Review Committee, May 10, 1996 and Gordon Peterson, Q.C., July 11, 1996.

children will want the surviving cohabitant to receive a generous portion of their estate.

d. Must the period of cohabitation be continuous?

Most Canadian definitions that impose a period of cohabitation also require that the cohabitation be continuous. Yet all periods of separation will not terminate the period of cohabitation. The courts look to the surrounding circumstances to see if these breaks are periods of non-cohabitation or periods of cooling off.[340] Some definitions, such as those of Queensland, Oregon, and the Waggoner proposal, allow for some period of separation. For example, under the Waggoner proposal, the presumption that the relationship is marriage-like arises if during the six-year period preceding the partner's death, the partner and the individual shared a common household for periods totaling at least five years. In addition, the couple must be living together at the time of death.

We think it prudent to require a continuous period of cohabitation but to make it clear that short periods of "cooling-off" do not interrupt or terminate the required period of cohabitation. The period of cohabitation should not be considered to have been interrupted or terminated by reason only that the cohabitants separated during a period, or periods totaling, not more than ninety days during the required period of cohabitation.

e. Must the couple be living together at the time of death?

The remaining consideration is whether the cohabitants must be living together at the time of death. In Report for Discussion No. 16, we reasoned as follows:[341]

> In our opinion, this must be the case because it makes no sense to assume that the deceased cohabitant would want his or her estate to go to the separated cohabitant after the relationship has come to an end. Separation with intent to end the relationship is for cohabitants the equivalent of divorce for married persons. Some cohabitants will see this as harsh and others will see it as a benefit, but it is a consequence of cohabiting outside marriage. The definition should require that the couple be living together at the time of death.

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[340] See for example, *Sanderson* v. *Russel* (1979), 9 R.F.L. (2d) 81 (Ont.C.A.) at 87-88.

[341] RFD No. 16 at 91.

New Hampshire, the five Australian states and the Waggoner proposal also require that the cohabitant be living with the deceased at the time of death in order to share upon intestacy. Oregon, which requires a ten-year period of cohabitation, allows a separated partner to inherit as long as the period of cohabitation did not end earlier than two years before the death of the intestate. We do not adopt the Oregon approach because we are not comfortable in assuming that couples who have separate for such a lengthy period would want the surviving cohabitant to share in their estate. In our opinion, one cannot infer such an intention unless the couple are residing together at the time of death.

5. Should the surviving cohabitant receive the spousal share?

One commentator[342] has criticized our recommendations as jumping too quickly to the conclusion that the cohabitant should receive the spousal share. He asks: Does one give no weight at all to the fact that the parties have chosen NOT to get married? He notes that common-law relationships cover a wide range of different situations and expectations and for this reason he is uncomfortable with the notion that the surviving cohabitant will receive the spousal share after three years, or even five years, of cohabitation. He argues in favour of a system in which the surviving cohabitant receives something less than the surviving married spouse.

He is correct to say that cohabitation covers a wide range of relationships. But it is not every cohabitant who will share upon the intestacy of his or her deceased partner. It is only those who have lived in a marriage-like relationship with the deceased. It is this requirement that will eliminate those who do not have a commitment to permanence and judges must be diligent in maintaining this standard or the purpose of the reform will be defeated. But once you are comparing couples with a commitment to permanence, whether inside or outside marriage, we would expect them to treat their surviving partner or spouse generously. Now this is not to say that there will not be competing loyalties to the surviving cohabitant and children of another relationship, but this exists for persons who are married as well. Perhaps this leads us back to the definition of cohabitant. It must be one that truly defines those relationships in which the majority would want their surviving cohabitant to receive a generous share of the estate.

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[342] Tim Rattenbury, April 25, 1997.

In addition, we should recognize that intention of cohabitants may vary with age. The reason for living outside marriage may differ for those who are widowers as compared with those who are forming their first union. The fact that older people may be living in relationships in which they do not wish to benefit their surviving cohabitant on death does not mean that this is true for all couples, especially younger couples. If the couples first and only union is outside marriage and lasts a lifetime, they will likely act like married people when it comes to distributing their estate. The number of such relationships can only increase with the increasing popularity of cohabitation outside marriage.

To justify treating surviving cohabitants differently from surviving spouses we must have empirical studies that show the class of cohabitants we have identified do not wish to treat their surviving partner as generously as they would treat a surviving spouse. At this time, there is insufficient evidence to support this position. Without that evidence, there is no justification for giving all cohabitants who live in a marriage-like relationship something less than married persons. Without justification, the legislation would not meet the demands of section 15 of the Charter as interpreted in *Miron* v. *Trudel*.[343] Cohabitants who fall within the proposed definition should receive the same share of the estate as would a surviving spouse.

Taking all of these matters into consideration, we make the following recommendation.

RECOMMENDATION No. 9
A cohabitant who falls within the following definition should be treated as a spouse of the intestate under the *Intestate Succession Act*:

PROPOSED DEFINITION
(1) For the purposes of this Act, 'cohabitant' means a person of the opposite sex who is not married to the intestate and who cohabited continuously in a marriage-like relationship with the intestate

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[343] *Supra*, note 272.

(a) for at least three years immediately preceding the death of the intestate, or
(b) immediately preceding the death of the intestate, if there is a child of the relationship.

(2) For the purposes of subsection (1), the period of cohabitation is not considered to have been interrupted or terminated by reason only that the cohabitants have lived separate and apart during a period, or periods totaling, not more than ninety days if at the time of death the cohabitants are cohabiting with each other.

(3) For the purposes of subsection (1), "marriage-like relationship" is a relationship that corresponds to the relationship between marital partners, in which two individuals have consented to share one another's lives in a long-term, intimate, and committed relationship of mutual caring.

(4) Although no single factor or factors determines whether a relationship qualifies as marriage-like, the court should consider the following factors in determining this issue:

- **the purpose, duration, constancy, and degree of exclusivity of the relationship,**
- **the conduct and habits of the parties in respect of domestic services;**
- **the degree to which the parties intermingle their finances such as by maintaining joint checking accounts, credit card or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they live or on other property, or titling the household in which they lived or other property in joint tenancy;**
- **the extent to which direct and indirect contributions have been made by either party to the other or the mutual well-being of the parties;**
- **whether the couple shared in co-parenting a child and the degree of joint care and support given the child;**

- **the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.**

6. How should the intestacy rules deal with competing claims of a surviving spouse and a surviving cohabitant?

There will be situations in which both a spouse and a cohabitant survive the intestate. These situations will occur infrequently because in today's society separation of spouses is usually followed by divorce within a few years. In addition, the longer the period of cohabitation required by the definition of "cohabitant", the greater the likelihood the divorce will be finalized and the smaller the likelihood that there will be a competition between a surviving spouse and a cohabitant. Having said this, competition between a spouse and a cohabitant will occur. How should the legislation balance these competing claims?

If the surviving spouse has lost his or her right to share in the estate, the cohabitants should be entitled to the spousal share. Under the proposed regime, this happens when one or both of the spouses have brought an application for divorce or commenced an action under the *Matrimonial Property Act*.

The more difficult question is whether the spouse should lose his or her right to share in the estate where a matrimonial property division has not taken place and there is a cohabitant. This would be acceptable if the surviving spouse would still be able to bring an application under the *Matrimonial Property Act*. This, however, may not be possible where the spouses have been separated for many years because the limitation period for commencing a matrimonial property action may have expired.

Let us examine the limitation periods in more detail. The *Matrimonial Property Act* determines when an action can be commenced and the limitation periods for bringing such an action. A surviving spouse can bring such an action against the estate of the deceased if the action could have been

brought immediately before the death of the other spouse.[344] Section 5 determines when an action can be commenced. It reads as follows:

> 5(1) A matrimonial property order may only be made
> (a) if
>
> (i) a decree nisi of divorce has been granted, or
>
> (ii) a declaration of nullity or marriage has been made with respect to the marriage,
>
> (b) if one of the spouses has been granted a judgement of judicial separation
>
> (c) if the Court is satisfied that the spouses have been living separate and apart
>
> (i) for a continuous period of at least one year immediately prior to the commencement of an application, or
> (ii) for a period of less than one year immediately prior to the commencement of an application if, in the opinion of the Court, there is no possibility of the reconciliation of the spouses
>
> (d) if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse
> (i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchase for value, or
> (ii) has made or intends to make a substantial gift of property to a third party,
>
> with the intention of defeating a claim to property a spouse may have under this Part, or
>
> (e) if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.

Actions brought under section 5(1)(a) and (b) may be commenced **at or after** the date proceedings are commenced for a decree nisi of divorce,[345] declaration of nullity or a judicial separation. The action must, however, be commenced no later than two years after the date of the decree nisi, declaration or judgment.[346] Actions brought under section 5(1)(c) and (e) must be

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[344] *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 11(2); *Saxby* v. *Richardson Estate* (1994) 164 A.R. 196 (Q.B.).

[345] Since the enactment of this section, procedure followed in divorce proceedings has changed. The court now only grants a divorce judgment and not a decree nisi of divorce, so this section must be read in reference to a divorce judgment.

[346] *Ibid*. at s. 6(1)(a) & (b).

commenced within two years of separation.[347] Actions brought under section 5(1)(d) must be commenced within two years of separation or one year after the property is transferred or given, whichever occurs first.[348]

What happens if a married couple has been separated for more than two years and neither spouse has, for whatever reason, commenced divorce proceedings or a matrimonial property action before the death of one of the spouses? On the day before the death, an action cannot be brought under section 5(1)(c) because they have been separated for more than two years.[349] Could an action have been commenced under section 5(1)(a)? This depends upon how a court will interpret section 11 of the Act. What does it mean to say the surviving spouse can bring an action in the event of death if an action could have been commenced on the day before death? Does it mean that since the surviving spouse could have commenced a divorce proceeding and a matrimonial property action on the day before death, the action can be commenced? Or does it mean that the surviving spouse could only have commenced a matrimonial property action on that day if in fact either spouse had already commenced divorce proceedings? We think the second interpretation makes more sense because the first interpretation would effectively eliminate any limitation period and defeat the purpose of imposing them in the first place.[350] Applying the second interpretation to these facts, the limitation period for bringing a matrimonial property action under section 5(1)(c) would have expired and no action could be brought under section 5(1)(a) where divorce proceedings had not been initiated.

What happens when the intestate and his or her spouse have been separated for many years and the intestate is also survived by a cohabitant? If the forgoing analysis is correct, the spouse will no longer have any claim under the *Matrimonial Property Act* because the spouses will have been separated for more than two years. As between the surviving spouse and the

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[347] *Ibid*. at s. 6(2).

[348] *Ibid*. at s. 6(3).

[349] *Weicker* v. *Weicker* (1985), 46 R.F.L. (2d) 243 (Alta. C.A.).

[350] This problem was pointed out in two articles: P.J.M. Lown & F. Bendiak, "The Matrimonial Property Act—The New Regime" (1979) 17 Alta. L.Rev. 372; P.J.M. Lown, "The Matrimonial Property Regime—One Year Later" (1980) 18 Alta. L.Rev. 317.

cohabitant, who should receive the benefit of the *Intestate Succession Act* and who must bring a constructive trust action or family relief action?

The following arguments support giving the spouse the benefit of the *Intestate Succession Act* and leaving the cohabitant with a constructive trust action:

- Most Alberta statutes do not give rights to a cohabitant where a spouse also exists. See, for example, the Automobile Accident Insurance Regulations[351] enacted pursuant to section 313 of the *Insurance Act*.[352]
- It would lead to a simple rule. Cohabitants would have no rights under the *Intestate Succession Act* where a surviving spouse was still entitled to share in the estate.

The arguments favouring the displacement of the spouse in favour of the cohabitant are as follows:

- It is unlikely that the intestate would want to prefer his spouse to the cohabitant.
- The surviving spouse will still have the right to bring a family relief action or a constructive trust action.

In Report for Discussion No. 16, the intention of intestates was our guide. We reasoned that it would be unlikely that the majority of intestates in this situation would prefer the spouse to the cohabitant when the intestate is residing with the cohabitant and not the spouse. The surviving spouse would have his or her remedies under the *Family Relief Act* or constructive trust or both, and the balance of the estate should pass by way of intestacy and the surviving cohabitant should be treated as the spouse for the purposes of that distribution.

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[351] Alta. Reg. 352/72 as am. by Alta. Regs. 233/78; 12/81; 273/82; 409/87; 171/88; 178/89; 306/91; 114/95; 4/98; 36/98. The amendment relating to common law spouses is found in Alta. Reg. 114/95. This introduces definitions that were formerly contained in section 313 of the *Insurance Act*, R.S.A. 1980, c. I-5.

[352] R.S.A. 1980, c. I-5.

One commentator[353] did not approve of this approach. It preferred a situation in which the married spouse would receive the spousal share under the *Intestate Succession Act* and the cohabitant would have a claim under the *Family Relief Act*. It cautioned that our approach should only be implemented if the separated spouse always had a right to seek division of matrimonial property on death. In contrast, another commentator[354] supported the recommendation but with the proviso that it is made certain that the surviving spouse has rights under the *Matrimonial Property Act* and the *Family Relief Act*.

We remain of the view that the intent of the intestate should determine the issue. It is unlikely that the majority of intestates in this situation would prefer the spouse to the cohabitant when the intestate is residing with the cohabitant and not the spouse. We do, however, agree that it would be best if the surviving spouse had rights under the *Matrimonial Property Act*, as well as rights under the *Family Relief Act* and the law of trust. This will be accomplished if our recommendation in Report for Discussion No. 17, *Division of Matrimonial Property on Death* is implemented. In that report, we recommended that all surviving spouses have the right to seek a matrimonial property division on death.

RECOMMENDATION No. 10

(1) If at the time of the intestate's death, the intestate and his or her spouse are living separate and apart and the intestate was living with a cohabitant, the surviving spouse shall be treated as if he or she had predeceased the intestate.

(2) The surviving spouse should continue to have the right to seek family relief and enforce any other remedies available under the general law.

(3) The surviving spouse should be given a right to seek division of matrimonial property on death if this is not currently available under the existing law. As previously recommended in

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[353] Legislative Review Committee, May 10, 1996.

[354] Gordon Peterson, Q.C., July 11, 1996.

Report for Discussion No. 17, every surviving spouse should be able to seek division of matrimonial property on death of the deceased spouse.

CHAPTER 6. PROPOSALS FOR REFORM: PART II

A. Issue

Under this heading, we examine how the intestate's estate should be distributed when he or she is survived by issue but no spouse or cohabitant. In this situation, Canadian mainstream intestate succession statutes divide the estate *per stirpes* among the issue of the intestate. The studies of public opinion indicate that where there is no surviving spouse or cohabitant, the majority of respondents choose to divide the estate equally among their surviving children. These studies do, however, cast some doubt on whether the *per stirpes* system of representation is the appropriate method of division among the issue.

1. Children

Studies undertaken in the late seventies revealed that the public wanted all children of an individual to be treated equally, regardless of age, sex or whether born within or without marriage.[355] This prompted reform in many areas of the law including succession law.

a. Children born outside marriage

Historically, a child born outside marriage was no one's child. This meant that the child could not inherit from his or her biological parents and the parents could not inherit from the child. In time, the intestacy legislation of Alberta was amended so that the child born outside marriage was treated as the legitimate child of the mother, but not the father.[356] Still later, a child born outside marriage was given a prescribed right to share in the estate of his or her father where the father had acknowledged the paternity of that child.[357] But it did not work both ways. In *Pollock* v. *Marsden Kooler*

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[355] Illinois study, *supra*, note 104 at 737; American study, *supra*, note 107 at 368-372.

[356] See *An Ordinance respecting the Devolution of Estates*, Ordinances of the N.W.T. 1901, c. 13, ss 3 and 4 and the *Intestate Succession Act*, R.S.A. 1980, c. I-9, s. 13, which was repealed in 1991.

[357] See *An Act to Amend The Intestate Succession Act*, 1928, S.A. 1939, c. 76 and ss 13-14 of the *Intestate Succession Act*, R.S.A. 1980, c. I-9 which was repealed as of November 1, 1991.

Transport Ltd.,[358] it was held that the father was still not entitled to inherit from his son born outside marriage because of section 17 of the *Intestate Succession Act* (Alberta). That section provided that if a child born outside marriage dies leaving no widow or issue, the estate should go to the mother, if living.

This treatment of children born outside marriage continued in Alberta until 1991. In that year, sections 13 and 14 of the Act were repealed and the definition of "issue" was amended to include all "lineal descendants, whether born within or without marriage, of the ancestor". These amendments came into force as of November 1, 1991. The result is that in estates that pass by way of intestacy, children born within and outside marriage will share equally in the estate of their father or mother. Moreover, the father and mother can share upon the intestacy of the child born outside marriage.

It is still unclear as to whether children born outside marriage can inherit through collaterals and vice versa. The amendments can be interpreted in one of two ways. By the first interpretation, the amendments were intended to eliminate the consequences of the status of illegitimacy in intestacy. Once issue is defined to include all lineal descendants, whether born within or without marriage, this then defines the relationship between collaterals. Viewed in this fashion, children who are born outside marriage should be able to inherit from collaterals and vice versa. By the second interpretation, the amendments only alter the law in respect of inheritance by issue. It does not alter the law that children born outside marriage cannot inherit from collaterals and vice versa.

We prefer the first interpretation because it reflects the intention of the 1991 amendments and leads to a result that conforms to section 15 of the *Canadian Charter of Rights and Freedoms*. The second interpretation would infringe the equality rights of children protected by section 15 of the Charter.[359] Given a choice between an interpretation of a statute that

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[358] (1951), 3 W.W.R. (N.S.) 266 (Alta. S.C.).

[359] For legislation that has been struck down on the basis that it discriminates against children born outside marriage see: *Surette* v. *Estate of Allvin John Harris, Jr.* (1989), N.S.R. (2d) & 233 A.P.R. 418 (N.S.S.C.T.D.); *M. (R.H.)* v. *H.(S.S.)* (1994), 18 Alta. L.R. (3d) 308 (Alta. Q.B.), *M. et al* v. *H., Attorney-General of Alberta, Intervenor* (1994), 112 D.L.R. (4th) 220 (Alta. Q.B.); *Tighe (Guardian ad Litem of)* v. *McGillivray Estate* (1994), 112 D.L.R. (4th) 201

(continued...)

conforms to the Charter and to one which does not, a court will interpret the statute in accordance with the Charter. We recommend, however, that the statute make it clear that children born outside marriage can inherit from collaterals and vice versa. Our consultation revealed that there is strong support for this position.

RECOMMENDATION No. 11

It should be made clear that for the purposes of the *Intestate Succession Act*, the status of illegitimacy is abolished and that children born outside marriage should be able to inherit from descendants, ancestors and collaterals, and vice versa. A descendant is a child, grandchild, great-grandchild and so on. An ascendant is a parent, grandparent, great-grandparent and so on. A collateral is any blood relative who is not a descendant or ascendant.

b. Adopted children

Section 65 of the *Child Welfare Act*[360] establishes the effect of an adoption order. It reads as follows:

> 65(1) For all purposes, when an adoption order is made, the adopted child is the child of the adopting parent and the adopting parent is the parent and guardian of the adopted child as if the child had been born to that parent in lawful wedlock.
>
> (2) Subject to subsection (3), for all purposes when an adoption order is made the adopted child ceases to be the child of his previous parents, whether his biological mother and biological father or his adopting parents under a previous adoption order, and his previous parents cease to be his parents and guardians.
>
> (3) If a person adopts the child of his spouse, the child does not cease to be the child of that spouse and that spouse does not cease to be the parent and guardian of the child.
>
> (4) . . .
>
> (5) For all purposes, when an adoption order is made, the relationship between the adopted child and any other person is the same as it would have been if the

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[359] (...continued)
(N.S.C.A.); *Rath* v. *Kemp, Attorney-General of Alberta, Intervenor* (1996) 141 D.L.R. (4th) 25 (Alta.C.A.)

[360] S.A. 1984, c. C-8.1, as am. by S.A. 1988, c. 15, s. 35.

> adopting parent were the biological mother or biological father of the adopted child.

An adoption order obtained in another jurisdiction has the effect in Alberta of an adoption order made under the Act.[361] Our statute, like most modern adoption statutes, is designed to serve the well-being of the adopted child. Section 65 reflects the view that it is in the child's interest to make him or her a full-fledged member of the adoptive family.[362]

This section applies for all purposes including the operation of the *Intestate Succession Act*.[363] "Upon the granting of an adoption order, the relationship between the adopting parent and the child and any other person is as if the adopting parent were the biological parent and that status does not change on the adopted child reaching the age of majority."[364] As a result of section 65, an adopted child cannot share in the estate of his or her biological parent where that parent dies intestate after the adoption order is made.[365] Also, the adopted child cannot share in the estate of the relative of the biological parent after the adoption order is made. This is so even if the adopted child has re-established contact with the biological family.[366]

We are of the view that the existing law is adequate and there is no need for reform. The respondents who commented on this issue were in agreement with us and no one indicated there was a problem with the existing law on this point.

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[361] *Ibid*., s. 65.1.

[362] For a short historical perspective on the goals of adoption see J.E. Rein, "Relatives by Blood, Adoption, and Association: Who Should Get What and Why?" (1984) 37 Van. L. Rev. 711 at 714-17.

[363] *Re Matthews Estate* (1992), 1 Alta. L.R. (3d) 198 (Q.B.).

[364] *Ibid*. at 202.

[365] *Re Director of Child Welfare and H.; Re Director of Child Welfare and P.* (1992), 90 D.L.R. (4th) 752 (Alta. C.A.). See also *Re Oliphant Estate*(1990), 84 Sask. R. 44 (Surr. Crt.)

[366] *Re Matthews Estate, supra,* note 363. See also *Beck* v. *Hewitt*, [1997] N.J. No. 136 (SCTD) (Q.L.).

RECOMMENDATION No. 12
The existing law concerning the rights of adopted children upon an intestacy should be retained.

c. Step-children

In *Re White Estate*,[367] the Alberta Supreme Court held that "issue" as used in the *Intestate Succession Act* does not include a stepson who has not been adopted by the intestate.

We have considered the question of whether a stepchild should be able to inherit upon the intestacy of a step-parent. In some families, the only father or mother the children have known is the step-parent because, for whatever reason, there is no contact with one of the biological parents. In these situations, it may seem logical for the stepchild to inherit from the step-parent. Although these situations do arise, the relationships between step-parents and stepchildren vary too much to support a generalization that the majority of step-parents would want their stepchildren to share in their estate. We, therefore, make no recommendation for change on this issue. Stepchildren will not share in the estate of an intestate step-parent.[368]

RECOMMENDATION No. 13
Stepchildren should not inherit upon the intestacy of the step-parent or vice versa.

2. Inheritance by representation

Per stirpes is a Latin term defined in Black's Law Dictionary, 6th ed., as follows:

> By roots or stocks; by representation. This term, derived from the civil law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share

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[367] [1945] 1 W.W.R. 78 (Alta. S.C.). For a more recent case that reaches a similar result in New Brunswick see *Saunders* v. *MacMichael*, (1996) 12 E.T.R. (2d) 15 (N.B.C.A.). Stepchildren are also not recognized as relatives of the step-parent's kin: *Marcy* v. *Young Estate*, [1998] 6 W.W.R. 68 (Man.Q.B.).

[368] This recommendation met with the approval of the Legislative Review Committee, Justice Stevenson, Gordon Peterson Q.C., Alexander Romanchuk, and Tim Rattenbury. No one argued against it.

> which their deceased [ancestor] would have been entitled to, taking thus by their right of representing such ancestor, and not as so many individuals.

Representation among issue was part of the civil law and became part of the *Statute of Distribution, 1670* and Canadian intestacy legislation. The principle is based on the notion that the intestate has an obligation to provide "for those who descend from his loins," be they remote or not. Where there are surviving issue, the Canadian mainstream intestate succession statutes distribute the estate, subject to the rights of the surviving spouse, *per stirpes* among the issue.[369]

Although the principle of representation has long been accepted, there is growing debate about the method that should be used to determine the share that the issue will receive.[370] There are two questions that must be answered in designing a system of representation.

1. Should the initial division of an intestate's estate be made at the children generation level regardless of whether or not any of the intestate's children survived the intestate, or should the initial division of the intestate estate be made at the first generation level that contains at least one member who survives the intestate?[371]

2. What is the most appropriate method for the subdivision and secondary distribution of those shares of members of the initial division generation who predeceased the intestate?[372]

Different answers to these key questions give rise to different systems of representation. It is useful to look at each system in turn. [Please note that in the following examples, square brackets around the symbol for an individual indicate that that individual died before the intestate.]

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[369] *Per stirpes* representation will be considered in more detail later in this report.

[370] See L.W. Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants" (1972) 66 N.W.U.L Rev. 626; Illinois study, *supra*, note 104 at 739-42; Iowa study, *supra*, note 106 at 1108-16; American study, *supra*, note 107 at 376-84; M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 36-42.

[371] Iowa study, *supra*, note 106 at 1108.

[372] *Ibid*. at 1109.

Before proceeding further, terminology must be addressed. Academics have developed accurate, but very technical, terminology to describe the various systems.[373] We find this terminology confusing and have not adopted it in this report. Instead, we label the four different systems of representation according to a jurisdiction that now uses that system.

a. Canadian mainstream: per stirpes

With a *per stirpes* system,[374] the initial division of an intestate's estate is made at the children generation, regardless of whether any of the children survive the intestate. The number of primary shares is the number of living children of the intestate plus the number of deceased children who themselves have living descendants.[375] The secondary distribution is done in the same fashion as the initial division until the closest living descendants of the intestate receive the estate.

The *Uniform Probate Code* defines *per stirpes* as follows:[376]

> (c) [per stirpes] If a governing instrument calls for property to be distributed "per stirpes," the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.
>
> (d) [Deceased Descendant With No Surviving Descendant Disregarded] For the purpose of subsection (b) and (c), an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to share.

A possible rationale for this system is that if each child of the intestate had survived the intestate, and each child of the intestate had distributed

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[373] The most accurate, and technical, terminology describes the systems as: 1) per stirpes with per stirpes representation; 2) per capita with per stirpes representation; 3) per capita with per capita representation; and 4) per capita at each generation. For a detailed examination of these systems, see the Illinois study, *supra*, note 104 at 736-42 and the American study, *supra*, note 107 at 376-87.

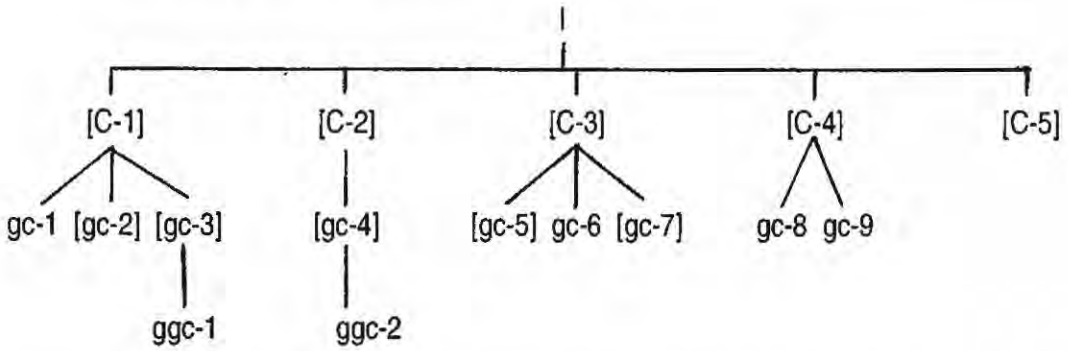
[374] Unfortunately, *per stirpes* has been given several definitions. This discussion uses *per stirpes* as it is most commonly defined.

[375] Waggoner, *supra*, note 370 at 638.

[376] *Uniform Probate Code*, section 2-709(c) & (d).

their estate equally among their children and so on down the family tree, the end result would be that produced by the *per stirpes* system of representation. The disadvantage of this system is that it treats people of the same generation unequally and a descendant of remoter degree may receive more than descendants of a closer degree.[377]

An example helps illustrate this system.[378]



Since C-1 to C-4 left surviving descendants, the estate is divided into four primary shares. C-1's share is divided into two because gc-1 is surviving and gc-3 has died leaving issue. GC-1 gets one-eighth and the issue of gc-3 share one-eighth. Since gc-3 had only one child, that child (ggc-1) takes the entire one-eighth portion. C-2's share passed down to ggc-2, who takes a quarter of the estate. C-3's share goes to gc-6. C-4's share is split equally between gc-8 and gc-9. With this system, one counts branches, not heads. The result is that those grandchildren that share in the estate are treated unequally and some great-grandchildren receive more than a grandchild.

b. American hybrid

This system divides the estate initially at the generation closest to the intestate that has one member surviving. The number of primary shares will be the number of surviving descendants of that generation plus the number of descendants of that generation who have predeceased the intestate but who have surviving descendants. The secondary shares are distributed *per stirpes*. This means a generation is not skipped even if all the members of a generation have predeceased the intestate.

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[377] Waggoner, *supra*, note 370 at 628.

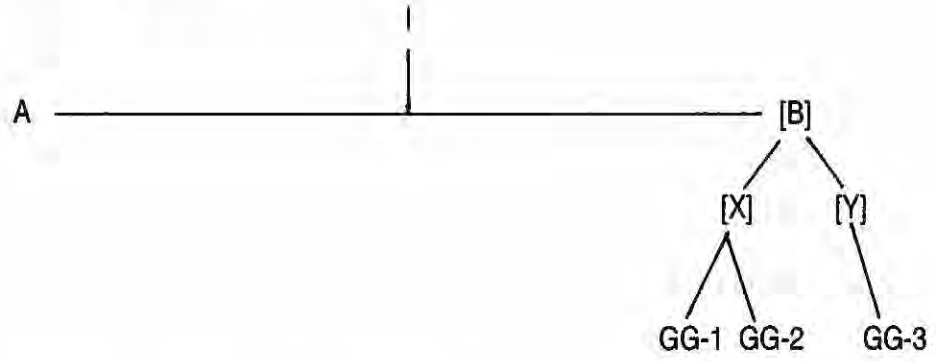
[378] This example was used in Waggoner, *ibid.* at 629.

Unfortunately, in the American case law, this system has been referred to as "*per stirpes*" and "*per capita*". In this report, we refer to this system as the American hybrid. "*Per Stirpes*" and "*per capita*" are given defined meanings that do not include the American hybrid. This method is one of many systems of representation used in the United States. We only refer to it as the American hybrid because it is American case law that has interpreted "*per stirpes*" in this fashion.

c. Ontario: per capita representation

With this system, the estate is initially divided at the generation closest to the intestate that has one surviving member. The number of primary shares will be the number of surviving descendants of that generation plus the number of descendants of that generation who have predeceased the intestate but who have surviving descendants. The secondary distribution is done in the same fashion as the initial division until the closest living descendants of the intestate receive the estate. This means that any generation that does not have a living member will be skipped. Ontario uses this system of representation.[379]

The following example illustrates the difference between (1) *per stirpes* and (2) the Ontario system.[380]



If the issue inherit *per stirpes*, the distribution is as follows:

A	one-half
GG-1	one-eighth
GG-2	one-eighth
GG-3	one-quarter

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[379] *Succession Law Reform Act*, R.S.O. 1990, c. S-26, ss 47(1) & 47(2).

[380] This example in found in the Iowa study, *supra*, note 106 at Table 20.

If they inherit under the Ontario system, the distribution is as follows:

A	one-half
GG-1	one-sixth
GG-2	one-sixth
GG-3	one-sixth

d. Manitoba: per capita at each generation

In 1969, the National Conference of Commissioners on Uniform State Law ("NCCUSL") adopted the first *Uniform Probate Code*. This code used a per capita system of representation,[381] which was implemented in Ontario in 1978. This system is criticized on the same basis as the *per stirpes* system. Under both systems, members of the same generation are frequently treated unequally, and there still will be instances in which a remote descendant receives more than a descendant in a closer generation.[382] In 1990, the NCCUSL revised the *Uniform Probate Code* on this point and adopted a per-capita-at-each-generation system of representation. The NCCUSL chose this system for two reasons. First, it always provides equal shares to those equally related. Second, individuals from a remoter generation will always receive less than individuals from a generation closer to the intestate. In doing so, the NCCUSL relied upon a recent survey of client preferences conducted by Fellow of the American College of Trust and Estate Counsel. Most of the clients surveyed preferred the per-capita-at-each-generation system of representation.[383]

Manitoba adopted the per-capita-at-each-generation system two years before the NCCUSL did so. Section 5 of the *Intestate Succession Act*,[384] which incorporates this system, reads as follows:

> **Distribution to issue**
> **5(1)** When a distribution is to be made to the issue of a person, the estate or the part of the estate which is to be so distributed shall be divided into as many shares as there are

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[381] See *Uniform Probate Code*, 11th ed., Appendix VII, Pre-1990 Article II, s. 2-106.

[382] Waggoner, *supra*, note 370 at 631.

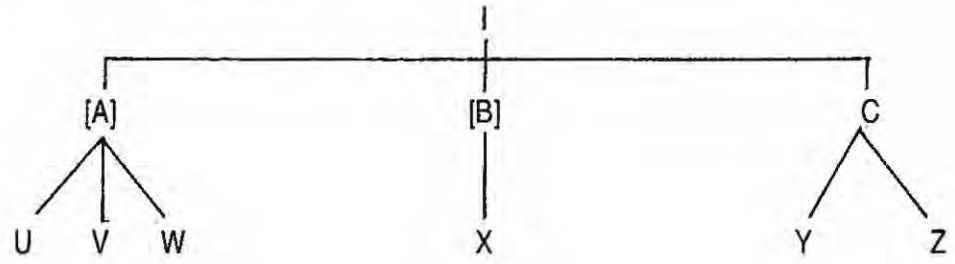
[383] See R. H. Young, "Meaning of Issue and Descendants" (1988) 13 Probate Notes 225 referred to in the comment on s. 2-106, *Uniform Probate Code*, 11th ed., Official 1993 Text with comments.

[384] C.C.S.M., c. I-85.

> (a) surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors; and
> (b) deceased persons in the same degree who left issue surviving the intestate.
>
> **5(2)** Each surviving successor in the nearest degree which contains any surviving successor shall receive one share, and the remainder of the intestate estate, if any, is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

Section 2-106 (b) of the *Uniform Probate Code* creates the same system, but the language of that section is more confusing than that used in the Manitoba statute.

The following example illustrates how this system works. It is taken from a comment on the *Uniform Probate Code*.[385]



"Under the per-capita-at-each-generation system, C takes one-third and the other two (one-third) shares are combined into a single share (amounting to two-thirds of the estate) and distributed as if C, Y and Z had predeceased G; the result is that U, V, W, and X take one-sixth."[386] Under a *per stirpes* system, C receives one-third, X receives one-third and U, V, and W each receive one-ninth.

e. Comparison of the four systems of representation

Examples are the easiest way of understanding how these systems work. We will use an example discussed in the American study to illustrate the differences between these four systems.[387] The example is somewhat unusual, but this is necessary in order to illustrate the differences of the four systems. The fact is that each system gives the same result where all the children of the intestate survive the intestate's death.

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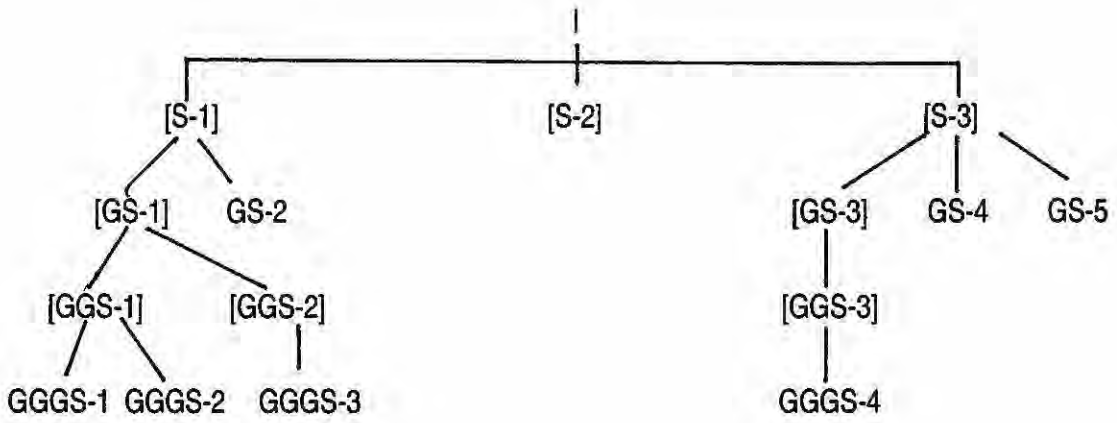
[385] See comment on s. 2-106.

[386] See *Uniform Probate Code*, 11th ed, 1983 text and comments, Comment on s. 2-106.

[387] American study, *supra*, note 107 at 381.



The following table tabulates the results using the different systems. The Canadian mainstream system is the *per stirpes* system of representation now used in Alberta.

Descendant	Canadian Mainstream	American Hybrid	Ontario	Manitoba
GS-2	one-quarter	one-fifth	one-fifth	one-fifth
GS-4	one-sixth	one-fifth	one-fifth	one-fifth
GS-5	one-sixth	one-fifth	one-fifth	one-fifth
GGGS-1	one-sixteenth	one-twentieth	one-fifteenth	one-tenth
GGGS-2	one-sixteenth	one-twentieth	one-fifteenth	one-tenth
GGGS-3	one-eight	one-tenth	one-fifteenth	one-tenth
GGGS-4	one-sixth	one-fifth	one-fifth	one-tenth

f. Analysis

There is no public policy argument favouring one system over another. Each jurisdiction must choose the system that reflects the views of the majority of its citizens. For sometime there has been an ongoing debate as to what in fact is the view of the public. Lawyers often say that their clients prefer a *per stirpes* distribution. Some academics argue that clients prefer what their lawyers suggest and lawyers suggest that with which they are familiar.[388] Several studies give weight to this argument because they show that, in the

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[388] Waggoner, *supra*, note 370 at 627 and Young, *supra*, note 383. After reading RFD No. 16, Mark Johnson questioned a few clients as to their preferences between the *per stirpes* approach and the per-capita-at-each-generation approach. He discovered that his clients preferred the per capita approach. He considered this surprising until he realized that he had never suggested such a scheme so why would clients consider it.

absence of legal advice, the public chooses to treat grandchildren equally where all the children of the intestate die before the intestate does.[389] Unfortunately, these studies do not examine how far the public would extend the principle of equality.

One recent study suggests that the respondents in that study preferred the Manitoba system over the Canadian mainstream system. Of the 761 responses, 145 (19.1%) chose the Canadian mainstream system (*per stirpes*), 70 (9.2%) chose the American hybrid system, and 541 (71.1%) chose the Manitoba system.[390]

The various law reform agencies have taken different positions on this issue. The Law Reform Commission of British Columbia Law considered whether the *per stirpes* system should be replaced with the Ontario system. Response on the issue was divided and the Commission concluded that there was no need to change the current law.[391] The same view was taken by The Law Commission (England), and the Hong Kong Law Reform Commission. The Uniform Law Conference of Canada declined to adopt the Ontario system[392] with the result that the *Uniform Intestate Succession Act* retains *per stirpes* representation. The Act, however, no longer uses the terms "*per stirpes*". Instead, it describes the mechanics of such a system.

The Manitoba Law Reform Commission recommended that the estate be distributed to the issue per capita at each generation. This recommendation was adopted by the Manitoba Legislature. The 1990 amendments to the *Uniform Probate Code* also introduced this system. Both the Commission and the NCCUSL recommended this system for the same reasons. First, the initial division of the estate should be made at the nearest generation to the decedent that contains at least one living member. This ensures equal treatment of grandchildren when no children of the intestate survive the

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389 See Chapter 4 at 55.

390 Young, *supra*, note 383. Note that this article uses different terminology to describe the results.

391 LRCBC, *Report on Statutory Succession Rights*, *supra*, note 177 at 37-38.

392 A working group recommended this system in its initial report. See Uniform Law Conference of Canada, Proceedings of the 65th Conference, 1983 at 226. The working group wanted all grandchildren to be treated equally where all the intestate's children predecease the intestate.

intestate. Second, this system results in equal treatment of members of the same generation. Third, it ensures that members of a remoter generation will never take a larger share of an intestate estate than members of a closer generation. The "equally near, equally dear" principle is best served by this system of representation. In the opinion of these two bodies, this system produces the best and most logically consistent result in most situations.[393] Of the commentators who expressed an opinion on this issue, most preferred this approach.[394]

Although it certainly would be better if more empirical evidence was available to show how far the principles of equality among members of a generation should proceed, we must proceed on basis of what is known at this stage. We support an initial division of the estate at the closest generation where there is a living member. Such a division is preferable because the studies conducted so far show that most respondents prefer to treat their grandchildren equally where all their children die before they do.[395] Of the three systems that have such an initial division, we prefer the Manitoba system for the same reasons given by the Manitoba Law Reform Commission. It ensures equal treatment of members of the same generation and ensures that members of a remoter generation do not take a larger share than members of a closer generation. We prefer the "equally near, equally dear" approach. The *per stirpes* system of representation depends too much upon the relationship of the intestate to the deceased children. Once all the children of the deceased have died, the intention of the intestate will be formed by the relationship with the grandchildren and not the deceased children.

We must emphasize that this new system will not bring about major change. Most intestates are survived by all of their children and in each of

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[393] MLRC, *Report on Intestate Succession*, *supra*, note 32 at 39-42; *Uniform Probate Code*, 11th ed. 1983 Text and comments, Comment on s. 2-106 found at 50.

[394] Alexander Romanchuk, Mark Johnson, Gordon Peterson, Q.C., and the Legislative Review Committee support this approach, although the Committee sees no compelling reason for change and is concerned that a new system of representation may cause difficulty for practitioners. Tim Rattenbury does not support this approach. He agrees that the per-capita-at-each-generation system of representation would provide a better result in certain circumstances. He does not find this sufficient reason, however, to change from the existing system of representation.

[395] See Chapter 4 at 55.

these systems those children would share equally in the estate. The changes proposed would only come in those situations in which two or more children die before the intestate. Some may ask why we are making a recommendation that deviates from something that is well known just to bring about a minor change in result.[396] The answer is that we seek to design a system that represents what most people would want to do in a given situation. This recommendation brings us closer to that goal. We note that it is working well in Manitoba and has caused no difficulties for practitioners, outside of the usual irritation of learning new law.[397]

RECOMMENDATION No. 14
If an intestate dies leaving issue but no surviving spouse or cohabitant, the entire estate should go to the issue of the intestate and representation should be permitted. The estate should be distributed to the issue per capita at each generation.

B. Inheritance by Ancestors and Collaterals

1. Terminology

The civil law recognized three lines of relatives: ascending, descending and collateral.[398] Ascendants included parents, grandparents, great-grandparents and so on. Descendants included children, grandchildren, great-grandchildren and so on. Issue is a synonym of "descendants". Collaterals included all other blood relatives.

2. Two competing systems

At present, there are two methods of determining how an estate is distributed if the intestate has no surviving spouse or issue. The first method, degrees of consanguinity, is ancient and traces its roots to the civil law. The second method, the parentelic system, is of more recent origin and

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[396] Tim Rattenbury agrees that the new system of representation would provide a better result in certain situations. He doe not, however, support our recommendation because in his opinion the situations are so limited and the argument of fairness is not so compelling that the current law must be changed.

[397] We have gathered this information by speaking to lawyers with the Public Trustee's Office of Manitoba and members of the Manitoba bar who specialize in this area.

[398] *Re Cran Estate*, [1941] 1 W.W.R. 209 (Sask.C.A.) at 213 quoting from *Stanley* v. *Stanley* (1739), 26 E.R. 289.

was designed to overcome some of the deficiencies that arise with the use of the first method. Degrees of consanguinity is the choice of all the Canadian mainstream intestacy statutes, including Alberta. The parentelic system is the choice of Manitoba, the *Uniform Intestate Succession Act* and the *Uniform Probate Code*. Each method will be examined in detail in this part.

a. Degrees of consanguinity with no representation among collaterals

Under the existing law of Alberta, when an intestate dies leaving no surviving spouse or issue, the estate is distributed to his or her father and mother in equal shares, if both are living.[399] In a case where one parent has died before the intestate, the surviving parent receives the entire estate.[400] If both parents have died before the intestate, the estate is distributed among the brothers and sisters. If any brother or sister is dead, the children of that brother or sister can take the share their parent would have taken if living.[401] Where all of the brothers and sisters have predeceased the intestate, the estate goes to the nephews and nieces in equal shares and representation is not admitted.[402]

An example illustrates how these rules affect nephews and nieces.[403]

In this example, A will receive one-half of the estate and B1 and B2 will take the share that B would have received had their parent been alive. B1 and B2 would each receive one-quarter of the estate. If, however, both A and B had died before the intestate, then A1, B1 and B2 would each take one-third of the estate. Representation is not admitted in this situation.

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399 *Intestate Succession Act*, R.S.A. 1980, c. I-9, s. 5.

400 *Ibid.*

401 *Ibid.* at s. 6.

402 *Ibid.* at s. 7.

403 The example is discussed by M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 27.

If an intestate dies leaving no surviving spouse, issue, father, mother, brother, sister, nephew or niece, the estate is distributed equally among the next of kin of equal degree of consanguinity to the intestate and in no case is representation admitted.[404] The Act also provides that degrees of kindred are to be computed by counting upward from the intestate to the nearest common ancestor and then down to the relative.[405] The results of this scheme are as follows:[406]

> Consequently, after the specified classes, grandparents are next in line because they are of the second degree; followed by uncles and aunts in the third degree; and then other collaterals such as grandnephews and grandnieces. Next-of-kin of equal degree take an equal share. For example, if the intestate is survived by only a grandniece, in the fourth degree, and two great-uncles, also in the fourth degree, the estate would be divided into three equal shares. A surviving relative in the fifth or sixth degree would take nothing in such a case. A table of consanguinity setting forth the degrees is found below.

TABLE OF CONSANGUINITY[407]
Showing Degrees of Relationship

				4 Great-great Grandparents
			3 Great Grandparents	5 Great-great Uncles / Aunts
		2 Grandparents	4 Great Uncles / Aunts	6 First Cousins Twice Removed
	1 Parents	3 Uncles / Aunts	5 First Cousins Once Removed	7 Second Cousins Once Removed
Person Deceased	2 Brothers / Sisters	4 First Cousins	6 Second Cousins	8 Third Cousins
1 Children	3 Nephews / Nieces	5 First Cousins Once Removed	7 Second Cousins Once Removed	9 Third Cousins Once Removed
2 Grand Children	4 Grand Nephews / Nieces	6 First Cousins Twice Removed	8 Second Cousins Twice Removed	10 Third Cousins Twice Removed
3 Great-Grand Children	5 Great-Grand Nephews Nieces	7 First Cousins Thrice Removed	9 Second Cousins Thrice Removed	11 Third Cousins Thrice Removed

Numbers indicate degree of relationship.

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404 *Ibid*. at s. 8.

405 *Ibid*. at s. 9(1).

406 M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 28.

407 Degrees of consanguinity can be presented in a variety of ways. We attach as Appendix B another chart displaying this information. It contains the same information as that presented on this page but it may be an easier source of information for some readers.

Before the enactment of the *Statute of Distribution, 1670*, the civil law admitted representation among issue, but no representation among collaterals except in the case of brothers' and sisters' children.[408] Representation among issue was allowed because it was thought the intestate had an obligation to provide "for those who descend from his loins",[409] be they remote or not. Representation was extended to include representation among brothers' and sisters' children for two reasons. First, the intestate was a kind of parent to the brothers' and sisters' children in that marriage was prohibited. Also, there was no danger that the estate would be subdivided into too many portions.[410] Limited representation among collaterals is designed to avoid confusion, protracted delays in settlement and a multiple fractioning of the estate.[411]

This continues to be the law of Alberta. Sections 4 and 6-8 of the *Intestate Succession Act* make it clear that representation is only allowed in the case of issue of the intestate and in the case of children of the brothers and sisters of the intestate where some, but not all, of the brothers and sisters die before the intestate. If all the brothers and sisters died before the intestate, the estate goes, in equal shares, to the nephews and nieces who are alive at the date of death. Representation is not admitted, and, therefore, children of deceased nephews and nieces do not share in the estate.[412] Beyond children of brothers and sisters, representation among collaterals is not allowed.[413]

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[408] The concept of representation is discussed earlier in this chapter.

[409] *Carter* v. *Crawley* (1681), Raym. 496; 83 E.R. 259 at 261.

[410] This history is discussed in detail in *Re Cran Estate*, *supra*, note 398. See also *Canada Permanent Trust Company (Hind Estate)* v. *Canada Permanent Trust Company (McKinn Estate)*, [1938] 3 W.W.R. 657 (Sask. C.A.) [hereinafter *Hind Estate*].

[411] *Hind Estate*, *ibid.*

[412] See section 7.

[413] *Re Kroesing Estate*, [1928] 1 W.W.R. 224 (Alta. S.C.); *Hind Estate*, *supra*, note 410; *Re Cran Estate*, *supra*, note 398; *Re Robinson Estate*, [1941] 2 W.W.R. 86 (B.C.S.C.); *Re Haggart Estate*, [1947] 1 W.W.R. 79 (Alta. S.C.); *Re Shaw*, [1955] 4 D.L.R. 268 (Ont. H.C.)

Two decisions illustrate these principles. In the recent decision of *Re Matthews Estate,*[414] George Matthews died intestate in 1990. He was survived by two brothers, several nieces and nephews whose parents had died before George Matthews, and children of a deceased niece. His sister Annie had predeceased George. Annie had a daughter, Kay, who also died before George did, but Kay's children were alive at the time of his death. Kay's children sought a share in the estate. The court held that they had no right to share in the estate. Section 6 of the *Intestate Succession Act* governed distribution of the estate. By this section, only the brothers and sisters and the children of the deceased brothers and sisters have a right to share in the estate. Children of a deceased niece or nephew have no right of inheritance under the section. In *Re Kroesing Estate,*[415] the intestate died leaving him surviving one uncle and children of two deceased uncles. In this case the entire estate went to the uncle, since the children of the deceased uncles were one degree further removed from the intestate and did not take by representation their parent's share.

b. A parentelic system with representation among collaterals

In this part, we will describe, in detail, a parentelic system. We begin by outlining the general principles that define the system and then describe a parentelic system in more detail.

General principles. To understand how a parentelic system operates, one must understand three general principles that underlie the system. First, living descendants of the closest ancestor take to the exclusion of living descendants of a remoter ancestor.[416] This means descendants of your parents will take before descendants of your grandparents. Degrees of consanguinity are irrelevant. So, for example, if the intestate is survived by a grandniece and several aunts, uncles and cousins, the grandniece receives the entire estate. Second, in a parentelic system, representation is admitted among next of kin. In fact, one of several systems of representation can be chosen to work

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[414] (1992), 1 Alta. L.R. (3d) 198 (Q.B.), McFadyen, J. The court came to the same conclusion in the interpretation of earlier Alberta intestacy legislation. See *Re Emsley Estate,* [1925] 1 W.W.R. 816 (Alta. S.C.) and *Re Gall Estate,* [1937] 3 W.W.R. 222 (Alta. S.C.).

[415] [1928] 1 W.W.R. 224 (Alta. S.C.T.D.).

[416] The intestate's ancestors include his or her parents, grandparents, great-grandparents and so on. A grandparent is a more remote ancestor than a parent.

within a parentelic system.[417] These systems were discussed in the context of inheritance by issue. The system of representation chosen for the issue is also chosen for representation among next of kin. Third, not every surviving member in the family line of the closest ancestor will share in the estate. If the intestate is survived by both parents, all of his or her siblings and several nieces and nephews, the parents share the estate in equal shares to the exclusion of the siblings and the nephews and nieces. It is a fundamental principle of representation that those farther down the family line cannot share in the estate if their ancestors are still alive.

The specifics. Assume that you have died intestate and you have no surviving spouse or issue. In a parentelic system, your estate is divided between your mother and father, or the survivor thereof, if they are alive when you pass on. If your parents have died before you, the estate is distributed among the issue of your parents and representation is admitted. This means that if all your brothers and sisters survive you, they share the estate in equal shares and their children receive nothing. Should some of your siblings die before you, their children or, possibly, grandchildren will also be entitled to share in the estate. The system of representation chosen will determine how these shares are calculated.

If you have no surviving parents, siblings, nieces, nephews, or grandnieces or grandnephews, the estate is divided into two portions. One portion is distributed to relatives on your mother's side of the family and the other portion goes to relatives on your father's side of the family. One portion goes to your father's parents, or survivor thereof. If your paternal grandparents do not survive you, this portion is divided among the issue of the paternal grandparents and representation is admitted. This means this portion will go to your father's brothers and sisters in equal shares if they all survive you. If one or all of them die before you do, some of the estate will go to their children, or, possibly, grandchildren. Again the system of representation determines how each share is calculated. The other portion is divided in the same fashion on your mother's side of the family. If one side of

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[417] In Manitoba, when the estate goes to the issue it is distributed per capita at each generation. The same method of representation is also used for distribution among the descendants of parents, grandparents or great-grandparents. Under the *Uniform Intestate Succession Act*, when the estate goes to the issue it is distributed *per stirpes*. The same method of representation is used for distribution of the estate among descendants of parents, grandparents or great-grandparents.

the family has no surviving members, the entire estate goes to the side of the family with surviving members.

Some parentelic systems stop at this point. The estate escheats to the Crown if the intestate is not survived by a spouse, issue, parents, issue of the parents, grandparents, or issue of the grandparents.

Other systems go further and apply the same principles to great-grandparents and their issue. In these systems, if you die intestate with no surviving spouse, issue, parents, issue of parents, grandparents, or issue of grandparents, the estate is divided into two portions. Each portion is divided into two equal shares. One of these shares (i.e., one-quarter of the estate) goes to the parents of your paternal grandfather,[418] in equal shares, or the survivor thereof. If neither of them survive you, which will likely be the case, the share is distributed among the issue of the parents of your paternal grandfather (i.e., your great aunts and uncles in this family line and their issue) and representation is admitted. The other share (i.e., one-quarter of the estate) is distributed in the same way to the parents of your paternal grandmother and their issue. One half of the estate goes in similar fashion to the parents of your maternal grandfather and their issue and parents of your maternal grandmother and their issue.

There are additional rules that determine how the estate is distributed if there are no surviving members in one or more family lines descending from the great-grandparents. If the parents of the paternal grandfather and their issue die before the intestate, that quarter of the estate is added to the quarter that is distributed to the parents of the paternal grandmother or their issue. The other two quarters would be distributed as described above.

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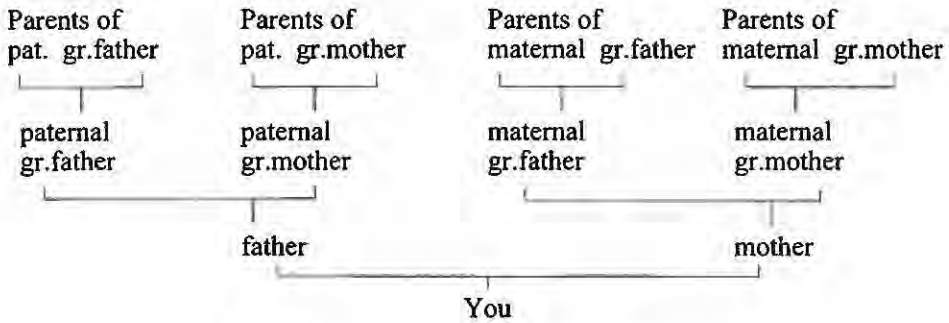
[418] The following chart will help you understand the discussion that follows. Pat. is an abbreviation for paternal. Gr.father and gr.mother are abbreviations for grandfather and grandmother.



It is only when there are no issue on the paternal side[419] that these two quarters are added to the moneys that are divided among those on the maternal side.

3. The need for reform

The existing determination of those next of kin who will inherit the estate has several drawbacks. These include the following:

1) The present law often results in the entire estate going to one side of the family even though there are relatives on the other side. For example, a maternal uncle receives the entire estate over the paternal relatives of remoter degree.[420]

2) In theory, the search for remote relatives can go on forever. This can give rise to inheritance by a relative who does not know the intestate. The literature refers to this relative as a laughing heir. One author defines a laughing heir as "one who is so distantly related to the deceased that his grief over losing a relative is more than outweighed by his joy over unexpectedly receiving the property".[421]

3) Sometimes next of kin who know the intestate must share the estate with those who do not. For example, if the estate is shared by next of kin of the fourth degree, the estate is divided equally among any grand nephews and nieces, cousins, great aunts or uncles, and great-great grandparents who survive the intestate. It is likely that the grandnephews and nieces and cousins will know the intestate better than the great aunts or uncles.

4) Searches for distant relatives that may or may not exist adds delay and expense to the administration of the estate.

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[419] This means the intestate was not survived by the parents of the paternal grandfather or their issue or by the parents of the paternal grandmother or their issue.

[420] For several cases that illustrate this point see *Hind Estate, supra,* note 410; *Re Cran Estate, supra,* note 398; *Re Dixon Estates* [1948] 2 W.W.R. 108 (Man. K.B.);

[421] New Jersey study, *supra*, note 105 at 276.

4. Analysis

a. Which method is best?

Our consultation revealed that there is support for both methods of determining the next of kin who will share in the estate upon intestacy.[422] The present law, although archaic, is clearly understood by lawyers and does not cause problems in identifying the next of kin who will inherit the estate. In most intestacies where there is no spouse or issue, the parents, brothers and sisters, or nephews and nieces inherit the estate. It is only in cases where more distant relatives inherit that the matter gets complicated. Even these situations do not seem to cause a problem except for situations in which the administrator cannot identify any next of kin who survive the intestate. In these cases, the estate must be held for six years before it escheats to the Crown under the *Ultimate Heir Act*.[423]

Even though the existing system is functional, it becomes more archaic with each passing day and suffers from several deficiencies. We view a parentelic system as superior to the existing law, for the following reasons:

- A parentelic system ensures that those who are closest to the intestate will receive the estate. It prefers those closest to the intestate to those more remote. For example, under the existing law a grandnephew, a cousin, and a great-aunt are all of the 4th degree and would share equally. A parentelic system prefers a grandnephew to a cousin and prefers a cousin to a great-aunt.
- It will be easier and less costly to determine those who will inherit the estate. Usually, it will be the intestate's parents or issue of those parents who inherit the estate.[424] Identifying and locating these

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[422] Justice Stevenson, Alexander Romanchuk, Gordon Peterson Q.C. and the majority of lawyers at the Edmonton Wills and Estates Section, CBA support a parentelic system. The Legislative Review Committee and Tim Rattenbury prefer degrees of consanguinity because it is understood and there is no compelling reason for change.

[423] R.S.A. 1980, c. U-1, s. 4. Section 4 requires the personal representative of an intestate to pay the estate to the Crown (i.e. Provincial Treasurer) if he or she has not learned of any next of kin within two years of the intestate's death. The Crown holds the estate for a further four years. Any next of kin may apply to the Crown within six years of the death to recover that portion of the estate that they are entitled to receive. If, however, no claim is made within this period, the Crown is deemed to be the heir of the intestate and claims by any next of kin are barred (s. 6).

[424] Please note that this discussion assumes that the intestate has no surviving spouse or

(continued...)

relatives should pose no problems in the majority of cases. In addition, it reduces the need to search for distant relatives where issue of the intestate's parent survive the intestate. For example, assume the intestate is survived by a grandnephew, several cousins and some great aunts and uncles. Under the existing law, they all share equally in the estate because they are all of the 4th degree of consanguinity. Before distribution can take place, the personal representative must identify all the cousins and great aunts and uncles and determine who survived the intestate. This is not necessary in a parentelic system because the grandnephew, being issue of the intestate's parents, takes the entire estate.

- One shortcoming of degrees of consanguinity is that it does not divide the estate between relatives on both sides of the family. A parentelic system remedies this deficiency. Division between both sides of the family would likely be the intention of "average Albertans" who find themselves in that situation.

The strongest argument that can be made against a parentelic system is that it will divide the estate between more parties and cause a fractioning of the estate. Instead of having the only surviving aunt take the entire estate, the estate will be distributed among that aunt and the issue of the deceased aunts and uncles.

The fear of fractioning of estates caused by a parentelic system with representation arises in the context of large families. This will become of much less concern in the future because the size of Canadian families is much smaller than it used to be. The average number of persons per family was 3.7 in 1971 and fell to 3.1 in 1991.[425] The reduction in family size is also reflected in the average number of births per woman. This figure has fallen from near 4 births per woman in 1960 to less than two births per woman in 1970. The Canadian birth rate is now below the replacement rate of 2.1

(...continued)
issue.

[425] Statistics Canada, *Basic Facts on Families in Canada, Past and Present* (Ottawa: Industry, Science and Technology, Canada, 1993) Catalogue No. 89-516 at 13, Chart 2.1 Average family size, Canada, 1971-1991.

children per woman.[426] "Canada's low birth rate has brought changes in families that include: more people with fewer siblings, more only children, more people with few cousins, aunts and uncles—in short, fewer relatives".[427]

Although we recognize that, in certain fact situations, a parentelic system will result in more relatives sharing in the estate, we do not find this sufficient reason to retain the existing law. The risk of fractioning of estates will decrease over time and a parentelic system produces a fairer result in more estates than does degrees of consanguinity. (Large numbers of surviving aunts in the existing system also lead to "fractioning" of the estate.)

If a parentelic system is chosen, we must also adopt a method of representation that will be used within the system. The method of representation for inheritance by next of kin must be the same as that used for issue. Consequently, the system of representation we propose would be that now used in Manitoba, the per-capita-at-each-generation system.

b. Should limitations be placed on those who can inherit?

We also recommend the adoption of a restricted parentelic system. The estate of the intestate should escheat to the Crown under the *Ultimate Heir Act* if the intestate is not survived by a spouse, issue, parents, issue of parents, grandparents, issue of grandparents, or great-grandparents. We do not support a system that extends inheritance to issue of great-grandparents.

We make this recommendation for the following reasons:

- Searching for remote relatives is both time consuming and expensive. A limited parentelic system should quicken administration of estates and decrease costs by eliminating the need and cost of searching for issue of great-grandparents.

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[426] The Vanier Institute of the Family, *Canadian Families* (Ottawa: 1994) Chart 14, Average number of births per woman.

[427] *Ibid*. at 10.

- There is no strong allocative preference in favour of laughing heirs over the universities of Alberta, which benefit by virtue of the *Ultimate Heir Act*.[428]
- In the experience of the Alberta lawyers we have spoken with, very few intestacies result in distribution to issue of the great-grandparents. Therefore, we do not anticipate that a parentelic system will significantly increase the number of estates that pass to the Crown under the *Ultimate Heir Act*. It should, however, reduce the time the estate must be held before it escheats to the Crown. There will be no need to hold the estate for six years if it is known that the intestate has no surviving relatives within the required family lines.
- Estates that escheat to the Crown under the existing system are usually small and do not justify the cost of an extensive search for distant relatives.[429] For too many of these estates, the cost of searching for distant relatives would consume the estate. Since many of these estates are originally administered by the Public Trustee's Office, there being no relatives to take on this task, the cost of searching for remote relatives is paid for by that office. This, of course, represents an expenditure of tax dollars that, we submit, is a poor use of public funds.

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[428] All money and property in an estate that passes to the Crown as ultimate heir is held in trust and the annual income is paid to the universities under the Universities Act in those portions the Minister of Advanced Education considers fair and equitable: *Ultimate Heir Act*, R.S.A. 1980, c. U-1, s. 8.

[429] In the Alberta Gazette, the Deputy Provincial Treasurer publishes a list of the estates which comprise the Ultimate Heir Trust "A" fund as at March 31 of a given year. This is a list of estates that will shortly escheat to the Crown under the *Ultimate Heir Act*. As of March 31, 1994, the estates which comprise the Ultimate Heir Trust "A" fund were as follows:

Name of Deceased	Date of Death	Net amount of estate
Brislan, C.W.	October 10, 1988	63,336.83
Miller, Benjamin	August 8, 1989	26,212.76
Giardin, Leo	December 5, 1989	1,377.76
Murphy, Sidney	January 2, 1990	34,495.70
Bastien, Gerald	January 4, 1990	8,508.45
McClutchy, Henry	July 31, 1990	13,071.04
Laine, Edward W.	September 24, 1990	13,558.80
Lamarche, Rolland J.G.	February 1, 1991	2,259.52
Fong, Yee	April 25, 1991	27,706.22

The lists published in the years 1984 to 1993 exhibit a similar profile. This confirms information given to us by practitioners. The lawyers we consulted advise that few estates pass to the Crown under the *Ultimate Heir Act*, and those that do are usually small in value.

Concern over escheat to the Crown does not justify spending tax dollars in this fashion.

This recommendation is the same as our tentative recommendation in Report for Discussion No. 16 except that great-grandparents (but not their issue) have been added to the list of eligible next of kin. While it will be infrequent for a great-grandparent to survive the intestate, those that do will likely be known by the intestate and should inherit the estate. This is preferable to the estate passing to the Crown under the *Ultimate Heir Act* where there is a surviving great-grandparent.

We recognize that some lawyers object strongly to escheat to the Crown in any situation. They will favour an extended parentelic system of the type found in the Manitoba *Intestate Succession Act* and the *Uniform Intestate Succession Act*. We think that this aversion to escheat to the Crown is more an emotional reaction than one rooted in fact and logic. We can only respond to this reaction by emphasizing two points: (1) the risk of escheat in a limited parentelic system is small, and (2) the size of the estates that will escheat to the Crown does not justify the cost of searching for very remote relatives who will not know the intestate in most cases.

RECOMMENDATION No. 15

- **If there is no surviving spouse or issue, the estate should go to the parents of the intestate in equal shares or to the survivor of them.**

- **If there is no surviving spouse, issue or parent, the estate should go to the issue of the parents of the intestate or either of them to be distributed by representation.**

- **If there is no surviving spouse, issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,**
  - **a) one-half of the estate should go to the paternal grandparents or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either of them to be distributed by representation;**

b) one-half of the estate goes to the maternal grandparents or their issue in the same manner as provided in clause (a);

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).

- If there is no surviving spouse, issue, parent or issue of parents, grandparent or issue of grandparents, but the intestate is survived by one or more great-grandparents,
  a) one-half of the estate goes to the paternal great-grandparents, in equal shares, or to the survivor of them, and
  b) one-half of the estate goes to the maternal great-grandparents, in equal shares, or to the survivor of them;

  but if there is only one or more surviving great-grandparents on either the paternal or maternal side, the entire estate goes to the great-grandparents on that side in equal shares. Issue of great-grandparents will not take any share of the estate, and representation is not admitted among issue of great-grandparents.

- Paternal great-grandparents are the parents of the paternal grandfather of the intestate and parents of the paternal grandmother of the intestate. Maternal great-grandparents are the parents of the maternal grandfather of the intestate and parents of the maternal grandmother of the intestate.

- The system of representation chosen for collaterals should be the same as that chosen for issue.

- The *Ultimate Heir Act* should be amended to allow for an estate to escheat to the Crown as soon as it is known that all the family members within the required family lines died before the intestate.

C. Doctrine of Advancement

1. The existing law

The doctrine of advancement requires a child who has received an advancement to account for the advancement upon the death of the intestate. This doctrine was introduced in the *Statute of Distribution, 1670* and is, in effect, a statutory hotchpot clause.[430] The doctrine embodies the equitable principle that a father intends to benefit his children equally.[431] It remains a part of the law of intestacy in Alberta because of section 11 of the *Intestate Succession Act*. Since the wording of section 11 patterns itself after the *Statute of Distribution, 1670*[432], old English cases interpreting the statute still influence the interpretation of section 11. Before considering section 11, the concept of advancement will be examined.

a. What is an advancement?

One of the clearest definitions of an advancement by way of portion appears in two judgments given by Jessel J. in *Taylor* v. *Taylor*.[433] Jessel M.R. said:[434]

> I have always understood that an advancement by way of portion is something given by the parent to establish the child for life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock in trade; all these things I understand to be portions or provisions. Again, if

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[430] M.M.K. Whitaker, "Hotchpot Clauses" 6 E.T.J. 7 at 11.

[431] Sherrin & Bonehill, *supra*, note 7 at 248; Hardingham, Neave & Ford, *supra*, note 7 at 432.

[432] The *Statute of Distribution, 1670* provided:

> ... in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated. But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he has be descent, or otherwise from the intestate.

[433] (1875), L.R. 20 Eq. 155.

[434] *Ibid*. at 157.

> in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose. But I do not think that these words "by portion" are to be disregarded, nor is the word "advancement" to be disregarded. It is not every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case which I have been referred there has either been a settlement itself, or the purpose for which the payment has been made has been shown to be that which everyone would recognize as being for establishing the child or making a provision for the child.

In the second judgment given in that action, Jessel M.R. held:

> ... nothing could be more productive of misery in families than if he were to hold that every member of the family must account strictly for every sum received from a parent. According to his view, nothing was an advancement unless it were given on marriage, or to establish the child in life. Prima facie, an advancement must be made in early life; but any sum given by way of making a permanent provision for the child would come within the term establishing for life.

The definition of an advancement found in Canadian authority that is most often cited is found in *Re Hall*.[435] It reads as follows:

> Under our law an advancement is neither a loan or a debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for purposes of equal distribution.

Widdifield on Executors' Accounts (5th ed, 1967) cites this definition and then at page 182 explains:

> The word "advancement" standing by itself has a narrow and restricted meaning, and is a word appropriate to an early period in life. It may not be easy to define with precision what is meant by "advancement in life", since the meaning may depend, to a greater or less degree, on circumstances; but it seems to point to some occasion out of every day course, when the beneficiary has in mind some act or undertaking which calls for pecuniary outlay, and which, if properly conducted, holds out a prospect of something beyond a mere transient benefit or employment. Thus, if the beneficiary were going to enter into business, or to get married, or to build a dwelling-house, or to make some unusual repairs or renovation, it would be a proper occasion for a trustee to use his discretion: Bailey v. Bailey (1888) 14 Atl. R. 917, approved of in Brooke v. Brooke, 3 O.W.N. 52.

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[435] (1887), 14 O.R. 557 (Ch.D.) at 559.

b. Doctrine of advancement

The doctrine of advancement finds its present form in section 11 of the *Intestate Succession Act*, which reads as follows:

> **11**(1) If a child of a person who has died wholly intestate has been advanced by that person by portion, the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law.
>
> (2) If the advancement is equal to or greater than the share of the estate that the child would be entitled to receive under the previous sections of this Act, the child and his descendants shall be excluded from any share in the estate.
>
> (3) If the portion by which the child was advanced is less than that share, the child and his descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and the advancement as nearly equal as possible.
>
> (4) The value of any portion so advanced shall be deemed to be the value as expressed by the intestate, or acknowledged by the child, in writing; otherwise the value shall be deemed to be the value of the portion when advanced.
>
> (5) Unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing, the onus of proving that a child has, with a view to a portion, been maintained or educated, or been given money, is on the person so asserting.

The section applies only when there is no will; it does not apply to a partial intestacy.[436] The value of the portion so advanced shall be deemed to be the value as stated by the intestate or acknowledged by the child if the declaration or acknowledgement is in writing. Otherwise, the value is the value of the portion when advanced.[437]

The doctrine benefits only the children of the intestate. Therefore, the spouse's share is not increased by the doctrine and an only child need not account for any advancement.[438] Moreover, the doctrine applies only to children. Other heirs, such as grandchildren or nephews and nieces do not have to account for advancements made to them. The descendants of a child who received an advancement, do, however, have to account for the advancement made to that child. In result, a grandchild does not have to

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[436] Section 11(1).

[437] Section 11(4).

[438] Sherrin & Bonehill, *supra*, note 7 at 249; Hardingham, Neave & Ford, *supra*, note 7 at 433. But see a criticism of the law by J. Cunningham, "The Position of the Widow in an Advancement of Portion" (1988-89) 9 E.T.J. 23.

account for an advancement made directly to the grandchild, but does have to account for an advancement made to the grandchild's parent.

The court must carry out a two-step calculation when there has been an advancement. First, the amount of the advancement is added to the portion of the estate available for the issue and then the portions are determined. If the advancement does not exceed the portion the child is to receive, the estate will pay the difference between the portion less the value of the advancement already received.[439] If the advancement exceeds the portion that the child was to receive, then the child receives nothing from the estate.[440] The calculation is then redone using the actual portion of the estate available for distribution to the issue and assuming the child predeceased the intestate and died without issue.

An example will show how the calculation works. Assume the intestate dies leaving two children, C1 and C2. The net value of the estate is $50,000. During her lifetime, the intestate made an advancement of $10,000 to C1 to help in the purchase of a business. The $10,000 is added to the value of the estate, and the $60,000 is divided into two portions. C1 receives $20,000 from the estate and C2 receives $30,000. The result is that both receive $30,000 from the intestate but C1 received this amount as an advance and as an inheritance. If C1 had predeceased the intestate, her children GC1 and GC2 would have to account for the $10,000 advancement received by C1. GC1 and GC2 would each receive $10,000. The grandchildren, however, would not have to account for any advancement made directly to them. So, if the intestate had made an advancement of $10,000 to C1 and $20,000 to GC1 and C1 died before the intestate, GC1 would still receive $10,000 from the estate.

c. Onus and burden of proof

Those asserting that there was an advancement have the onus to prove the transfer of property to the child was an advancement. Statutes do differ as to the evidence that will satisfy this onus.

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[439] *Intestate Succession Act*, R.S.A. 1980, c. I-5, s. 11(3).

[440] *Ibid* at s. 11(2). This situation occurred in *Blakeney* v. *Seed*, [1939] 1 W.W.R. 321 (B.C.S.C.).

- Ontario legislation has since the 1860s required that "a child advanced is bound to bring into hotchpot that wherewith he has been advanced, be it real or personal estate, only where it is so expressed in writing".[441]
- Manitoba does not treat an *inter vivos* transfer of property to a successor as an advancement unless the intestate declares that it is an advancement or the recipient acknowledges that it is an advancement. The declaration by the intestate can be oral or in writing but must be given at the time the gift was made. The acknowledgement of the recipient can be oral or in writing and can be given at any time.[442]
- In the remaining common-law provinces, the onus of proof can be satisfied by something not in writing.[443] Since intestates do not often make their intentions known, evidentiary presumptions play a significant role. It is usually sufficient for a person asserting an advancement to make a prima facie case and then the onus, in the sense of introducing evidence, shifts. A prima facie case is often made out by evidence of payment of a large sum of money.[444] Yet, the presumption that a large sum of money is an advancement cannot operate where the statute requires that the advancement be proven by an acknowledgement in writing or "by evidence taken under oath before a court of justice and not otherwise".[445]

2. Law reform trends on the issue of advancement

The law reform bodies that have considered the doctrine of advancement either recommend repeal of the doctrine or recommend restriction of its application.

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[441] *Filman* v. *Filman* (1869), 15 Grant's Ch. Rep. 643 at 648. The doctrine of advancement is still part of the Ontario law. See *Estates Administration Act*, R.S.O. 1990, c. E22, s. 25 and K.T. Grozinger, "The Ontario Law of Advancement on an Intestacy" (1993) 12 E.T.J. 396 at 403.

[442] *The Intestate Succession Act*, C.C.S.M., c. I-85, s. 8(1).

[443] The legislation in the remaining common law provinces is either identical or similar to section 11 of the *Intestate Succession Act*, R.S.A. 1980, c. I-5.

[444] See *Blakeney* v. *Seed*, [1939] 1 W.W.R. 321 (B.C.S.C.) and *Re Evaschuk* (1983), 15 E.T.R. 56 (Man. Surr. Crt.), which both follow *Taylor* v. *Taylor* (1875), L.R. 20 Eq 155. This old English case held that if a parent gives a large sum to a child in one payment, there is a presumption it was intended to start him in life.

[445] *Whitford* v. *Whitford*, [1942] S.C.R. 166; Grozinger, *supra*, note 441.

The Law Commission (England) recommended repeal of the hotchpot rules for the following reasons.[446] First, the English hotchpot rules are complicated and difficult to administer. Second, they are unjust because the rules only apply to children. Third, the doctrine can operate to defeat intentions of the intestate. The intestate rarely indicates his intention and, therefore, an advancement is usually proven using assumptions. This may, in fact, defeat the intentions of the intestate. Last, it is difficult to provide for all the benefits received during the lifetime and at the death of the intestate. Acting on this recommendation, the English Parliament repealed the hotchpot rules in respect of all intestates that died on or after January 1, 1996.[447]

The British Columbia Commission thought the intestacy rules should distribute the property of the intestate on death and not remedy any unequal treatment of children that may have occurred during the intestate's lifetime.[448]

The Uniform Law Conference of Canada accepts the premise that today most *inter vivos* transfers of property are not intended to be advancements.[449] In order to protect the recipients of such transfers and to reduce acrimonious litigation, the *Uniform Intestate Succession Act* requires written evidence of the advancement, either from the intestate or recipient of the property. An *inter vivos* transfer of property to a child is not treated as an advancement unless the intestate declares in writing that it is an advancement or the child acknowledges in writing that it is an advancement. The written declaration of the intestate must be made at the time the gift was made; the written acknowledgement of the recipient can be given at any time. The result is a very restricted application of the doctrine. The Uniform Law Conference of Canada, however, did not go as far as recommending repeal of the doctrine of

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[446] English study, *supra*, note 108 at 12.

[447] *Law Reform (Succession) Act, 1995* (U.K.) 1995 c. 41, s. 1.

[448] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 177 at 38-39.

[449] Uniform Law Conference, Proceedings of the 65th Annual Meeting, Appendix J at 232-33.

advancement. It did make the new rule apply to all respective heirs, instead of to children only.[450]

The *Uniform Probate Code* contains a similar section. The NCCUSL believes that most *inter vivos* transfers are either absolute gifts or part of an estate plan.[451] If an individual wants the *inter vivos* transfer to be taken into account upon death, the individual can make a will or charge the gift as an advance by declaring in writing that this is the case. Section 109 of the *Uniform Probate Code* applies to advances made to the intestate's spouse, descendants and collaterals. If the individual who has received the advancement dies before the intestate, the issue of that individual do not have to account for the advancement unless the declaration of the intestate states that this should happen. "The rational is that there is no guarantee that the recipient's descendants received the advanced property or its value from the recipient's estate".[452]

The Manitoba Commission also agrees with the premise accepted by the *Uniform Intestate Succession Act* and the *Uniform Probate Code*. In its opinion, however, the requirement of a written declaration is too restrictive because it is unlikely that those people who die intestate will have the foresight to prepare such a declaration.[453] It recommended that the doctrine of advancement apply only in situations where 1) the intestate had expressed an intention, orally or in writing, that the property was to be an advancement, or 2) the child had acknowledged orally or in writing that the property was to be an advancement. The Manitoba legislature accepted this recommendation. The Manitoba Commission recommended that the doctrine continue to apply only to children of the intestate.

3. Analysis

a. Does the doctrine serve a useful purpose in today's society?

Underlying the trend of restriction (or abolition) of the doctrine of advancement is the notion that most *inter vivos* transfers of property to

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[450] *Ibid*.

[451] *Uniform Act on Intestacy, Wills, and Donative Transfers, 1991*, Comment on section 109 of Act.

[452] *Uniform Probate Code*, 11th ed., Official 1993 Text with Comments, at 54.

[453] M.L.R.C., *Report on Intestate Succession*, *supra*, note 32 at 50.

children are meant to be absolute gifts, and not advancements. To test this premise, we questioned Alberta lawyers who practice in this area. The experience of the lawyers who responded to our questionnaire[454] was that while many *inter vivos* transfers are intended as absolute gifts, a significant number of Albertans want large inter vivos transfers to children to be taken into account upon the distribution of their estate. In our consultation on Report for Discussion No. 16, there was also a difference of opinion as to whether the doctrine of advancement continued to serve a useful function in the present day.[455]

We conclude that some Albertans want *inter vivos* transfers of property to children to be taken into account upon the distribution of their estate and others do not. This division of opinion makes it difficult to design law based on the intention of most Albertans. Nevertheless, the doctrine of advancement serves the principle of equal treatment of children. This is a fundamental principle guiding our proposals for reform in this area. If we must err as to what the intent of most Albertans is concerning *inter vivos* transfers, we prefer to err on the side of equal treatment of children.

b. Should others, besides children, be made to account for an advancement?

When should an heir have to account for a gift transferred to the heir during the lifetime of the intestate? Historically, the answer was that all children who received a gift that was intended to advance them in life should account for that gift for the benefit of all the intestate's children. The modern trend is

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[454] Of the 11 lawyers who responded to the questionnaire, 9 lawyers thought most *inter vivos* transfers were intended by the donor to be an absolute gift. Two lawyers thought this was not the case. One lawyer indicated that of his clients who had transferred property worth more than $10,000 to children, about half wanted this transfer to be adjusted in the will so that each child eventually receives the same amount of property. The other half intended an absolute gift. Five of these lawyers, however, are of the opinion that the doctrine of advancement still serves a useful purpose in today's society. Four lawyers hold the contrary opinion. None of the lawyers had experienced a situation in which the doctrine had operated to defeat the intention of the intestate. Several of the lawyers indicated that the issue does not arise that often in intestacies.

[455] Three commentators view it as no longer serving a useful function and two view it as still being of relevance. The Legislative Review Committee, Gordon Peterson Q.C., and Tim Rattenbury argue for repeal of the doctrine of advancement in the context of intestacy. Gordon Peterson noted that it is difficult to know when a gift was intended to be made or when an advancement was made such that it must be brought into consideration in an intestacy. In his experience, many parents have good reason for gifting more to one child than the others receive. Alexander Romanchuk expressed support for the recommendation in RFD No. 16 and Justice Stevenson argued in favour of an updated doctrine of advancement.

to make any heir account for the gift when the intestate declares orally or in writing that this should be done.

The doctrine of advancement cannot operate outside the presumption of equal treatment of children without strict evidentiary requirements concerning *inter vivos* transfers to other heirs.[456] But these same evidentiary requirements work against equal treatment of children. Those who die without a will are unlikely to declare orally or in writing that an *inter vivos* transfer of property to a child is to be treated as an advance. Nevertheless, there will be many parents who die intestate who will have this intention. Extending the doctrine to all heirs and imposing stricter evidentiary requirements makes the doctrine useless because this course of action fails to serve the principle of equal treatment of children and does little else. We see no benefit in extending the doctrine beyond its existing scope.

c. Should a child's issue have to account for advances made to a child who predeceases the intestate?

Section 6(3) of the *Uniform Intestate Succession Act* deals with when those taking the share of their deceased parent need account for property advanced to that parent. The section states that such an advancement need only be accounted for where the declaration or acknowledgment so provides. The recommendation continues the policy of limiting the doctrine of advancement to cases in which it is clearly intended.[457]

The Manitoba Law Reform Commission took another approach to this issue. It thought reform could not proceed on the basis of intention of the average intestate because few parents give any thought as to how an advancement to a child should affect a grandchild. Instead, it suggested that a clear rule govern all situations of advancement. It thought the existing rule

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[456] Why is this? It flows from the fact that the presumption of equality works well for children, but not for competitions between all of the intestate's potential heirs. For example, one cannot assume that the intestate wished to treat his or her spouse and children equally. Information available to us shows that spouses treat their spouses more generously than their issue. In a first marriage, the majority of testators give their entire estate to their spouse to the exclusion of children of the marriage. Since the evidentiary presumptions used to prove an advancement would not apply outside of context of children, one is left with looming evidentiary problems in proving an advancement.

[457] Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, Appendix J at 232-33.

that a grandchild must account for an advancement given to his or her parent produced a fair result. The commission made no recommendations for change. The child's issue should account for an advancement made to a child who predeceased the intestate.

In our opinion, the answer to this question depends upon the system of representation chosen. If a *per stirpes* method is adopted, it is logical for children of the deceased child to account for any advancement made to that child. These children are stepping into the shoes of their parent and should be in no better position. Where, however, the children of the deceased child share in the estate in their own right, such as with the Manitoba system of representation, then it becomes less clear whether the children should account for advances received by their deceased parent. If the children take in their own right, their share should only be reduced by an advancement received by their parent where that property was eventually received by them. Yet, one cannot assume that the children received the money advanced to their deceased parent.

The ultimate decision should depend upon the type of representation adopted in the proposed intestacy rules. Since we have recommended adoption of the Manitoba system of representation, we also recommend that grandchildren not have to account for an advance made to their parent.

d. Must the intestate declare the transfer of property to be an advancement? Must the recipient acknowledge in writing that the property received was an advancement?

In most cases, the intention of the intestate will not be known by those who survive the intestate. This fact combined with the evidentiary presumptions will result in *inter vivos* transfers of valuable property being brought into account. This leads to equal treatment of children and eliminates the family tensions that arise when children perceive their parents have treated them unequally. This seems preferable unless this is not intended by a large majority of intestates. At this point in our consultation, we are of the opinion that the number of Albertans who would want a child to account for *inter vivos* gifts of significant value justifies retention of the existing evidentiary requirements of proof of an advancement.

e. At what point in time should the advancement be valued?

Subsection 11(4) provides that "the value of any portion so advanced shall be deemed to be the value as expressed by the intestate, or acknowledged by the child, in writing; otherwise the value shall be deemed to be the value of the portion when advanced". This produces a fair result and avoids the problem of valuation that arises in cases of assets of fluctuating value. No change to the existing law is needed.

f. Should the doctrine of advancement apply to partial intestacy?

Early judicial interpretation of the *Statute of Distribution, 1670* held that the doctrine of advancement only applied where the entire estate passed by intestacy. It did not apply in the case of partial intestacy. The courts of equity were concerned that the application of the doctrine to partial intestacies would lead to inequality, not equality. The problem was that, under the doctrine, gifts received under the will were not brought into account, only advancements made during the lifetime of the intestate. This unequal treatment of bequests and advancements could lead to unequal treatment of children.[458] For this reason, section 11 of the Alberta *Intestate Succession Act* restricts the doctrine of advancement to situations in which the "person has died wholly intestate".

The existing law is adequate. The doctrine should not apply to partial intestacies.

RECOMMENDATION No. 16
The doctrine of advancement should continue to operate in the new regime but it should be limited to children of the intestate. Grandchildren of the intestate should not have to account for advancements received by their parents.

D. Survivorship

1. The need for reform

Underlying all intestacy rules is the assumption that those who receive the estate will survive the intestate for the duration of their natural lifetimes. This assumption can lead to difficulties when, in fact, the intestate and one

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[458] Hardingham, Neave & Ford, *supra*, note 7 at 433-34.

or more beneficiaries die at the same time, or within a short time of each other, or in circumstances rendering it uncertain which of them survived the other or others.[459] Injuries sustained in a common accident are usually, but not always, the cause of such simultaneous or successive deaths. Unrelated natural causes can create the same situation. In this part, we consider whether special rules for distribution of the estate are needed when, in fact, the intestate and beneficiary die at the same time, or within a short time of each other, or in circumstances rendering it uncertain as to which of them survived the other or others.

Two problems arise when a beneficiary dies a short time after the intestate or is deemed to die after the intestate.[460] First, the intestate's estate is eventually distributed to the beneficiary's heirs as opposed to the intestate's living heirs. Second, the situation can give rise to increased costs of administering the estates. The following examples illustrate these problems. Assume a husband and wife are injured in a motor vehicle accident. The wife dies at the scene of the accident and the husband dies two days later. Neither left a will. The husband and wife have no children, but their parents survive them. Presently, the wife's estate passes on to the husband because he survived her. This property along with any property owned by the husband is distributed to the husband's parents. The wife's parents receive nothing. We do not believe that this is what most Albertans would want to happen in this situation.

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[459] The *Survivorship Act*, R.S.A. 1980, c. S-31, dictates special rules as to order of death when deaths occur simultaneously or in circumstances rendering it uncertain which person survived the other or others. Section 1 of the Act provides:

> 1. If 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the deaths are, subject to sections 2 and 3, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.

The recent decision of the Alberta Court of Appeal in *Mandin Estate* v. *Willey* (1998), 160 D.L.R. (4th) 36 reveals that this section has limited application in intestacies. In that case, the Court of Appeal held that in a situation in which the order of death is uncertain, the potential beneficiary under the *Intestate Succession Act* is deemed to predecease the intestate. This case will be discussed in more detail later. In the context of intestacies, section 1 will probably only determine who is the surviving joint-tenant of property that was owned jointly by persons who died at the same time or in circumstances that make it impossible to know the order of death.

[460] *Ibid*.

A variation of this example illustrates the same problem but in the context of a second marriage. Assume the wife had a child from a previous relationship. If the husband did not survive the wife, the wife would likely want her entire estate to go to that child. Under the existing law, the husband (and through his estate, his parents) would receive $40,000 plus one-half of the residue of the wife's estate. The child would receive the other half of the residue. It is unlikely that the average Albertan would want this result.

The existing law also gives rise to needless administration costs where a husband and wife are killed in a common accident and are survived by their issue. Assume the couple die as described above, but they are survived by their three children. Neither had a will and neither had children from another relationship. Presently, the wife's estate would be probated, some going to the husband and some to the children. The husband's estate would then be distributed among the children. If the intestacy rules contained a survivorship provision, the costs of transferring a portion of the wife's estate to the husband would be eliminated. Both estates would be distributed directly to the children. If the wife had title to all the property acquired during the marriage, then there would be no need to administer the estate of the husband. The actual savings will depend upon which spouse holds title to which assets.

2. Possible solutions

There are several ways of minimizing or eliminating the two problems discussed above. Let us look at each in turn. One of these potential solutions, being the Alberta Court of Appeal decision in *Mandin Estate* v. *Willey*,[461] is of recent origin and came into existence after issue of Report for Discussion No. 16.

a. Recent developments in the interpretation of the Survivorship Act

The recent decision in the *Mandin Estate* v. *Willey*[462] minimizes the number of situations in which a beneficiary is deemed to die after the intestate, and therefore, has the effect of ensuring that the intestate's property passes to living beneficiaries. In that case, a boy murdered his mother, two sisters and

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[461] *Supra*, note 459.

[462] *Ibid*.

his stepfather in circumstances in which the order of death was unknown. By order of the Surrogate Court, the boy was barred from receiving any interest from his mother's estate. The question arose as to who would inherit the mother's estate. If the two daughters were deemed to have survived the mother, the assets would pass to the daughters' estates and then, by way of intestacy, to their father, Ian MacLean. He was the ex-husband of the deceased mother. If the daughters were deemed to have died before their mother, the assets would pass to her surviving parent, Hilda Willey. Since the personal representatives of the deceased husband relinquished any claim the husband may have had in the estate of his wife, there was no issue as to whether the husband was deemed to outlive the wife.

The relevant sections of the *Survivorship Act*[463] are as follows:

> 1. If 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the deaths are, subject to sections 2 and 3, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.
>
> 2. When a statute or an instrument contains a provision for the disposition of property operative if a person designated in the statute or instrument
>
> (a) dies before another person,
>
> (b) dies at the same time as another person, or
>
> (c) dies in circumstances rendering it uncertain which of them survived the other,
>
> and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purposes of that disposition, the case for which the statute or instrument provides is deemed to have occurred.

Ian MacLean argued that section 1 governed the case and this meant the daughters were deemed to survive the mother. The reference to "statute" in section 2 should be restricted to statutes, such as the *Insurance Act*, which have other presumptions as to the order of death. Hilda Willey argued that the *Intestate Succession Act* is a statute that provides for the distribution of the estate if the daughters predeceased the intestate, and therefore, by virtue of section 2 this is deemed to have occurred and the presumption in section 1 does not apply.

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[463] R.S.A. 1980, c. S-31.

The Court of Appeal accepted the arguments put forth on behalf of Hilda Willey. In coming to its decision, it declined to follow a body of case law that considered the interplay of competing presumptions as to order of death found in section 1 of the *Survivorship Act* and the *Insurance Act*. Instead, it interpreted *Re Gupta Estate*,[464] a decision of Egbert J., as having accepted a similar argument as that presented by Hilda Willey.[465] The problem with the *Gupta* case is that it is not clear that this argument was made, although the resulting decision can be explained on that basis. In coming to its decision, the Court of Appeal also accepted the reasoning of the trial judge. One of the reasons the trial judge gave for accepting Hilda Willey's argument was that:[466]

> That interpretation permits the object of the [Survivorship] Act to be carried out. It seems to me equally improbable to find a reasonable intention in a donor or a statutory purpose in legislation to make a gift to a person who died at the same time as the donor as to one who predeceased the donor.

This and other parts of the judgment suggest that the trial judge viewed section 2 of the *Survivorship Act* as ensuring that assets of the deceased passed to his or her living heirs as opposed to heirs of the deceased beneficiary.

The decision in *Mandin Estate* v. *Willey* should reduce the number of situations in which the intestate's estate is distributed to a beneficiary who died at the same time as the intestate or in circumstances making the order of death unknown. This decision will not, however, prevent the intestate's estate from passing to a beneficiary who survives the intestate by only a few days. So there will still be situations in which the property of the intestate passes to the beneficiary's heirs as opposed to the intestate's living heirs.

b. Reform of the Survivorship Act

The problems discussed above would not arise if our recommendations in Report No. 47, *Survivorship* were implemented. In that report, we recommended that the seniority rule set out in section 1 of the *Survivorship*

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[464] (1985), 38 Alta. L.R. (2d) 110, 19 E.T.R. 106 (Surr. Crt.).

[465] On this point, the Court of Appeal disagreed with the trial judge in his interpretation of the *Gupta* decision. It did, however, agree with the other decisions of the trial judge.

[466] *Mandin Estate* v. *Willey and MacLean* (1996) 194 A.R. 22 (Q.B.) at para. 20.

Act[467] be replaced with a lapse rule. The lapse rule would provide that for all purposes affecting legal or beneficial ownership of property, a person who is not proved to have survived a decedent owner by five days shall be deemed to have predeceased him or her. From this general rule, we carved certain exceptions that are unrelated to intestate succession. We also recommended that if all of the joint tenants of property failed to survive their co-tenants by five days, each shall be deemed to have an equal share in the property.

The recommendation concerning co-tenants is essential to bringing about a fair result in these situations. Let us go back to the first example where the couple without children die within a short time of each other. Assume the couple owned a home and a bank account as joint tenants and that these were their only assets. In this situation, a lapse rule, by itself, does not solve the problem. The major assets will pass outside of the wife's estate, by right of survivorship, to the husband who died a few days after the wife. There would be nothing in the wife's estate to be distributed to her parents. A lapse rule plus a deemed severance of the joint tenancies, however, will ensure that one-half of the assets goes to the wife's parents and one-half to the husband's parents.

Although we still are of the opinion that this is the better method of reform, we will also provide an alternative recommendation that is restricted to the area of intestate succession. Reform within the *Intestate Succession Act* will go a long way to solving the above-mentioned problems, but the problem of assets held in joint tenancy will remain. Jointly held assets will not form part of the estate of the joint tenant who dies first.

c. Statutory survivorship clause

These same problems present themselves for people who prepare a will. When drafting the will, lawyers solve these problems by including a clause that provides that if a certain beneficiary does not survive the testator by a certain period, the portion of the estate designated for that beneficiary will be distributed to other beneficiaries. Such a clause is known as a survivorship clause. The purpose of such a clause is twofold: (1) to ensure that the estate goes to the testator's living beneficiaries as opposed to the heirs of the deceased beneficiary and (2) to eliminate needless administration costs.

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[467] R.S.A. 1980, c. S-31.

Since most law reform agencies are of the opinion that an intestate would want the estate to go to his or her living beneficiaries, as opposed to the heir's of the deceased beneficiary, they have recommended the adoption of the statutory equivalent of a survivorship clause. Both the *Uniform Intestate Succession Act*[468] and the Manitoba *Intestate Succession Act*[469] contain the following provision:

> Any person who fails to survive the intestate for 15 days, excluding the dates of death of the intestate and of the person, shall be treated as if he had predeceased the intestate for the purpose of succession under this Act.

The Law Commission (England) recommended that a spouse should only inherit if he or she survives for a period of 14 days, but the resulting legislation used a period of 28 days.[470] Under the *Uniform Probate Code*, an individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purposes of intestate succession.[471] All of the statutes provide that the section does not apply where its application would result in escheat to the Crown.

3. Recommendation

We recommend that, in the absence of reform of the Survivorship Act, the intestacy rules should contain the statutory equivalent of a survivorship clause.[472] The provision should deal with all persons who fail to survive the intestate for a required period and not just to the spouse. The required period should not be so long as to interfere significantly with the administration of estates but should be long enough to deal with deaths arising from a common accident. The 15-day period used in the *Uniform Intestate Succession Act* and the Manitoba *Intestate Succession Act* is acceptable. Using this period also contributes to uniformity of legislation. The rule should not apply where its application would result in escheat of the estate to the Crown.

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[468] Section 5.

[469] *Intestate Succession Act*, S.M. 1989-90, c. 43, C.C.S.M., c. I-85, s. 6(1).

[470] *Law Reform (Succession) Act, 1995* (U.K.) (1995 c. 41), s. 1.

[471] *Uniform Probate Code*, Section 2-104.

[472] Our recommendation concerning survivorship received little comment. It received support from the Legislative Review Committee, Alexander Romanchuk and Gordon Peterson. No one argued against the recommendation.

The provision should read like that of s. 5 of the *Uniform Intestate Succession Act*, which is as follows:

> 5(1) Any person who fails to survive the intestate for fifteen days, excluding the dates of death of the intestate and of the person, shall be treated as if he had predeceased the intestate for purposes of succession under this Act.
>
> (2) If the death of a person who would otherwise be a successor has been established, but it cannot be established that that person survived the intestate for the period required by subsection (1), that person shall be treated as if he had failed to survive the intestate for the required period.
>
> (3) This section is not applicable when its application would result in a distribution of the intestate estate by escheat.

We have considered whether we should adopt the five-day period proposed in Report No. 47, *Survivorship* or the 15 days usually used in intestacy legislation. Since this reform proposal only relates to intestate succession, we chose 15 days because it reflects what is done elsewhere in intestacy legislation. The five- day period is more appropriate for reform of survivorship law which has more general application.

This recommendation is still of value even in the aftermath of *Mandin Estate* v. *Willey*. The proposed survivorship provision will eliminate the type of litigation seen in *Mandin*, which involved trying to determine who lived the longest after being shot, and will address the problem more completely. While *Mandin* reduces the number of situations in which the intestate's property passes to the beneficiary's heirs as opposed to the intestate's living heirs, it does not apply where the order of death is known. A survivorship clause in the *Intestate Succession Act* is still needed to deal with the situation in which the beneficiary dies a few days after the intestate and to eliminate the investigation as to order of death where people die within minutes or hours or days of each other.

RECOMMENDATION No. 17
If the *Survivorship Act* is not amended as recommended in Report 47, the *Intestate Succession Act* should contain the statutory equivalent of a survivorship clause.

E. Relatives of the Half-Blood

Section 9(2) of the *Intestate Succession Act* provides:

> 9(2) Kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

We do not propose any change to the existing law because nothing suggests that it causes a problem. Section 9(2) should continue to be the law of Alberta.

RECOMMENDATION No. 18
Kindred of the half-blood should inherit equally with those of the whole-blood in the same degree.

F. Conclusion

The existing intestacy scheme was designed to serve a society in which wealth was transferred from one generation to another, inheritance between spouses was exceptional, divorce was rare and cohabitation outside marriage was viewed as sinful. Since this is no longer the society in which we live, the existing intestacy scheme produces undesirable results in today's society. There is a need for creation of an intestacy scheme that serves modern society.

Ours is a society in which the surviving spouse has replaced children as the primary beneficiary, divorce and remarriage is prevalent, cohabitation outside marriage is commonplace, and section 15 of the *Canadian Charter of Rights and Freedoms* has been interpreted to extend protection to those who cohabit outside marriage in relationships similar to marriage. In designing a new intestacy scheme we have recognized the trends in family life in Alberta and have been guided by the intention of intestates. Whenever possible, we have made recommendations that would reflect what the majority of persons in a given familial situation would want to happen to their property on death. It is our hope that this scheme will adequately serve Albertans for many decades to come.

PART IV — DRAFT LEGISLATION

Proposed Intestate Succession Act

Definitions

1.(1) In this Act,

(a) "estate" includes both real and personal property and means the net estate after payment of the charges thereon and the debts, funeral expenses, and expenses of administration;

(b) "cohabitant" means a person of the opposite sex who, while not married to the intestate, continuously cohabited in a marriage-like relationship with the intestate

(i) for at least three years immediately preceding the death of the intestate, or

(ii) immediately preceding the death of the intestate if they are the natural or adoptive parents of a child;

(c) "issue" includes all lineal descendants, whether born within or outside marriage, of the ancestor;

(d) "successors" means the persons who are entitled to the estate of an intestate through succession under this Act.

(2) Although no single factor or factors determines whether a relationship qualifies as marriage-like, the court should consider the following factors in determining if the claimant's relationship with the intestate was marriage-like:

(a) the purpose, duration, constancy and degree of exclusivity of the relationship,

(b) the conduct and habits of the parties in respect of domestic services,

(c) the degree to which the parties intermingle their finances such as by maintaining joint checking, credit card or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they live or on other property, or titling the household in which they live or other property in joint tenancy,

(d) the extent to which direct and indirect contributions have been made by either party to the other or the mutual well-being of the parties,

(e) whether the couple shared in co-parenting a child and the degree of joint care and support given the child; and

(f) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

Spouse and no issue

2. If an intestate dies leaving a surviving spouse but no issue, the entire estate goes to the spouse.

Spouse's share

3.(1) If an intestate dies leaving a surviving spouse and issue, and all of the issue are also issue of the surviving spouse, the entire estate goes to the spouse.

(2) If an intestate dies leaving a surviving spouse and issue, and one or more of the issue are not also issue of the surviving spouse, the share of the surviving spouse is

(a) $50,000, or one-half of the estate, whichever is greater; and

(b) one-half of any remainder of the estate.

Rights of separated spouse

4. The surviving spouse shall be treated as if he or she had predeceased the intestate if:

(a) at the time of the intestate's death, the intestate and his or her spouse were living separate and apart from one another,

(b) during the period of separation, one or both of the spouses made an application for divorce or commenced an action under The Matrimonial Property Act, and

(c) at the time of death, the proceedings were pending or had been dealt with by way of final order.

Shares of issue

5.(1) If an intestate dies leaving a spouse and issue, and one or more of the issue are not also issue of the surviving spouse, and there remains a portion of the estate after satisfaction of the spouse's share, then the remaining portion of the estate goes to the issue to be distributed per capita at each generation as provided in section 12.

(2) If an intestate dies leaving issue but no spouse, the estate goes to the issue to be distributed per capita at each generation as provided in section 12.

Rights of cohabitants

6.(1) Subject to subclauses (2) and (3), if an intestate dies leaving no surviving spouse but dies leaving a surviving cohabitant, the cohabitant shall be treated for the purposes of this Act as if he or she were the surviving spouse of the intestate.

(2) Once the cohabitant and the intestate separate with the intention of living separate and apart, that person ceases to be a cohabitant and has no rights under this Act in respect of the intestate's estate.

(3) Section 4 does not apply to a cohabitant.

Cohabitant and separated spouse

7. If, at the time of the intestate's death, the intestate and his or her spouse were living separate and apart from one another and the intestate was cohabiting with a cohabitant, the surviving spouse shall be treated as if he or she had predeceased the intestate and the cohabitant shall be treated as if he or she was the surviving spouse of the intestate.

Neither spouse, cohabitant or issue

8. If an intestate dies leaving no surviving spouse, cohabitant or issue, the estate goes to the parents of the intestate in equal shares or the survivor of them.

No spouse, cohabitant, issue or parents

9. If an intestate dies leaving no surviving spouse, cohabitant, issue or parent, the estate goes to the issue of the parents of the intestate or either of them to be distributed per capita at each generation as provided in section 12.

No spouse, cohabitant, issue, parent, or issue of parent

10. If an intestate dies leaving no surviving spouse, cohabitant, issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(a) one-half of the estate goes to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either of them to be distributed per capita at each generation as provided in section 12; and

(b) one-half of the estate goes to the maternal grandparents or their issue in the same manner as provided in subclause (a);

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in subclause (a).

No spouse, cohabitant, issue, parent, issue of parent, grandparent or issue of grandparent

11. (1) If an intestate dies leaving no surviving spouse, cohabitant, issue, parent or issue of a parent, grandparent or issue of a grandparent, but the intestate is survived by one or more great-grandparents,

(a) one-half of the estate goes to the paternal great-grandparents, in equal shares, or to the survivor of them, and

(b) one-half of the estate goes to the maternal great-grandparents, in equal shares, or to the survivor of them;

but if there is only one or more surviving great-grandparents on either the paternal or maternal side, the entire estate goes to the great-grandparents on that side in equal shares.

(2) Issue of great-grandparents will not take any share of the estate, and representation is not admitted among issue of great-grandparents.

(3) For the purpose of this section,

(a) paternal great-grandparents means the parents of the paternal grandfather of the intestate and parents of the paternal grandmother of the intestate, and

(b) maternal great-grandparents means the parents of the maternal grandfather of the intestate and parents of the maternal grandmother of the intestate.

System of Representation

12.(1) When a distribution is to be made to the issue of a person, the estate or the part of the estate which is to be so distributed shall be divided into as many shares as there are

(a) surviving successors in the nearest generation to that person which contains any surviving successors; and

(b) the deceased persons in the same generation who left issue surviving the intestate.

(2) Each surviving successor in the nearest generation which contains any surviving successor shall receive one share, and the remainder of the intestate estate, if any, is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

Survival for 15 days

13.(1) A person who fails to survive the intestate for 15 days, excluding the day of death of the intestate and of the person, shall be treated as if he or she had predeceased the intestate for purposes of succession under this Act.

(2) If the death of a person who would otherwise be a successor has been established, but it cannot be established that that person survived the intestate for the period required by subclause (1), that person shall be treated as if he or she had failed to survive the intestate for the required period.

(3) This section does not apply where its application would result in a distribution of the intestate estate to the Crown under section 14.

No successors

14. If there is no successor under this Act, the estate shall go to the Crown in right of Alberta as the ultimate heir.

Kindred of half-blood

15. Kindred of the half-blood shall inherit equally with those of the whole-blood of the same degree of kinship to the intestate.

Kindred born after death of intestate

16. Kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate and had survived him or her.

Advances to children

17.(1) If a child of a person who has died wholly intestate has been advanced by that person by portion, the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law.

(2) If the advancement is equal to or greater than the share of the estate that the child would be entitled to receive under the previous sections of this Act, the child shall be excluded from any share in the estate.

(3) If the portion by which the child was advanced is less than that share, the child is entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and the advancement as nearly as equal as possible.

(4) If the child who received the portion fails to survive the intestate, the property advanced shall not be treated as an advancement against the share of the estate of the child's issue.

(5) The value of any portion so advanced shall be deemed to be the value as expressed by the intestate, or acknowledged by the child, in writing; otherwise the value shall be deemed to be the value of the portion when advanced.

(6) Unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing, the onus of proving that a child has, with a view to a portion, been maintained or educated, or been given money, is on the person so asserting.

Estate undisposed of by will

18. So much of the estate of a person dying partially intestate as is not disposed of by will shall be distributed as if he or she had died intestate and had left no other estate.

Abolition of status of illegitimacy

19. For the purposes of this Act, the status of illegitimacy is abolished.

Application of this Act

20. This Act applies in cases of death occurring on or after the day this Act comes into force.

Repeal

21.(1) Subject to subsection (2), the Intestate Succession Act, R.S.A. 1980, C. I-5 is repealed.

(2) The Intestate Succession Act, R.S.A. 1980, c. I-5 continues in force as if unrepealed in cases of death occurring before this Act comes into force.

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June 1999

APPENDIX A
Review of Surrogate Court Files

I. Introduction

In designing an Intestate Succession Act, it is useful to know how Albertans distribute their estates upon death. The Institute, by way of two summer students, has conducted a review of 999 estates filed with the Surrogate Court. They examined 564 estates in Edmonton, 201 estates in Calgary, and 234 estates in Vegreville. Each estate was filed with the Surrogate Court in those judicial districts during January, April or September of 1992.

Key information from each file was placed in a database. This memorandum will summarize the information that was extracted from the database.

II. An Overview

The database includes 800 estates that have wills and 199 estates without wills. The details are as follows:

750	applications for probate
12	applications for resealing probate
2	ancillary grants of probate
36	applications for administration with will annexed
TOTAL 800	

176	application for letters of administration
1	application for resealing letters of administration
TOTAL 177	

14	election of the public trustee
2	originating notice of motion
3	applications for guardianship
2	applications under section 21 of the *Public Trustee Act*
1	ministerial order
TOTAL 22	

Of the 999 deceased, 348 were married at the time of death and 633 were unmarried. Marital status is not indicated in 15 estates and the information was omitted from the database in 3 estates. Unmarried testators significantly outnumber married testators. This may be explained by the fact that where the estate is composed of jointly held assets there is no need to probate an estate when the first spouse dies.

The average net value of all the estates is $143,420. The average net value of estates with wills is $162,491, and the average net value of estates

without wills (excluding guardianship applications and originating notices) is $67,977. Of the 199 estates without wills, 125 have a net value less than $40,000 and 74 have a net value of $40,000 or more. Only 36 estates without wills have a value of $100,000 or more. Attached is a chart grouping the estates according to net value.

III. Estates with Wills

A. The Raw Data

The database includes 800 estates with wills. From these estates we gain some insight into how Albertans distribute their estates. The following chart summarizes the distribution of these estates and defines the distribution codes. UT is an abbreviation for unmarried testator.

Distribution of estates with Wills

Deceased survived by	Distribution	Code	Total	Total	Total
Spouse and children	All to spouse, none to children	ASNC	164	260	291
	None to spouse, all to children	NSAC	24		
	Distributed among spouse and children	DSAC	58		
	None to spouse, other	NSO	7		
	Some to spouse, other	SSO	7		
Spouse, no children	All to spouse	AS	26	31	
	None to spouse	NS	2		
	Some to spouse	SS	3		
	Other	SO			
UT and children	All to children	UTAC	276	360	509
	None to children	UTNC	5		
	Some to children	UTSC	79		
UT and C/L spouse	All to common-law spouse	ACL	1	5	
	Some to common-law spouse	SCL	4		
UT and no children	All to close relatives	UTR	38	66	
	Other	UTO	28		
Never married	All to close relatives	NMAR	58	78	
	Other	NMO	20		
				TOTAL	**800**

The database also tracks marital status and the existence of former spouses. This enables us to determine whether the pattern of distribution in first and second marriages differs. The raw data is as follows:

Cross tabulation of marital status & distribution — Will files

Classification	ASNC	NSAC	DSAC	NSO	SSO	NS	SS	AS	Total
Married, former spouse divorced	5	0	6	2	1	0	1	2	17
Married, former spouse deceased	4	9	2	1	1	0	0	2	19
Married, former spouse none	145	12	42	*4	+5	2	2	18	230
Married, former spouse unknown	10	3	8	0	0	0	0	4	25
TOTALS	**164**	**24**	**58**	**7**	**7**	**2**	**3**	**26**	**291**

* Children are beneficiaries in each of these 4 NSO files. More than 90% of the estate goes to children in three of these files.

\+ In these 5 SSO files, two testators gave some to children and three gave nothing to the children. In two of these estates the spouse received more than 90% of the estate and the children received nothing.

In result, the total number of testators married at the time of death was 291. Of this 291, 260 were survived by a spouse and children and 31 were survived by a spouse, but not by children. Of this 291, 230 had been married once during their life and 36 had been married more than once. For 25 testators, it is not known if the testator had a former spouse.

Classification	UTAC	UTNC	UTSC	UTR	UTO	ACL	SCL	NMAR	NMO	
Unmarried, former spouse divorced	38	4	14	5	8	0	3	-	-	72
Unmarried, former spouse deceased	239	1	67	34	20	0	0	-	-	361
Unmarried, former spouse divorced and deceased	-3	0	-2	-1	0	0	0	-	-	-6
Unmarried, former spouse none	0	0	0	0	0	1	1	56	19	77
Unmarried, former spouse unknown	2	0	0	0	0	0	0	2	1	5
TOTALS	**276**	**5**	**79**	**38**	**28**	**1**	**4**	**58**	**20**	**509**

There were 509 testators who were unmarried at the time of death. Of these 509, 427 had been married at sometime during their life, 77 had never married, and the previous marital status, if any, of 5 testators is unknown. Of this 509 testators, 360 were survived by children, 66 were not survived by children, 5 were in a common-law relationship at the time of their death, and 75 had never been married. For 3 testators, it is not known if they had a previous spouse, but they were not survived by children.

B. Analysis of Data

1. Married testators

Using this raw data, it is possible to compare distribution patterns between first marriages and second (or later) marriages.

Of the 31 testators who were survived by a spouse, but not by children, 83.9% gave the entire estate to the surviving spouse, 13% gave some of the estate, but not all, to the surviving spouse, and 6.5% gave nothing to the surviving spouse. Eighty-seven percent (87%) of these testators gave more than 90% of the estate to the surviving spouse.

Of the 291 testators who were married at the time of death, 65.3% gave the entire estate to the surviving spouse, 11.3% gave nothing to the surviving spouse and 23.4% gave some, but not all, of the estate to the surviving spouse. Eleven of the 33 surviving spouses who received nothing from the testator were living separate from the testator at the time of death.

260 testators were survived by both a spouse and children. Of these 260 testators:

- 208 had been married only once during their lifetime
- 21 were married but it is not known if there was a former spouse
- 31 were married but had former spouse, dead or divorced

The distribution of the 208 estates in which the testator was married only once is as follows:

All to spouse[473]	69.7%
All to children	5.8%
Some to spouse and some to children	20.2%
None to spouse, other	1.9%
Some to spouse, other	2.4%
TOTAL	100.0%

Further calculation shows that the spouse received more than 90% of the estate in 73.1% of the 208 estates and received nothing in 7.7% of these estates. In 71.2% of the estates, children receive nothing and in 28.8% of estates, children received some part of the estate. In no estate did the testator disinherit both the spouse and the children.

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[473] James Thorkalsen was the summer student who did the research in both Edmonton and Vegreville. In his opinion, more than 69.7% of the wills gave the entire estate to the spouse. He noted that the estates with a distribution code of UTAC and (none) in former spouse[field often had wills giving everything to the spouse. Only if the spouse predeceased would the children take. If you assume that for such estates the will would have given everything to the spouse, the percentage of testators who were married only once who gave the entire estate to the spouse rises to 74.9%.

Is there a greater tendency, in first marriage situations, to share the estate among the spouse and children as the size of the estate increases? To answer this question, one can compare estates in which the distribution code is either ASNC or DSAC and the testator was married at the time of death and had no former spouse. The net value of the 145 such estates with ASNC codes is $191,749. The net value of the 42 such estates with DSAC codes is $192,409.22. This information suggests that in a first marriage situation, the size of the estate does not influence a testators decision to leave some of the estate to the children.

Of the 260 testators survived by both a spouse and children, 31 estates involved a testator who had a former spouse, either deceased or divorced. Of these 31 estates, the distribution is as follows:

All to the spouse	29.0%
All to children	29.0%
Some to spouse and some to children	25.8%
None to spouse, other	9.7%
Some to spouse, other	6.5%
TOTAL	100.0%

Further calculation shows that the second spouse received more than 90% of the estate in 38.7% of the 31 estates.

It is clear that the distribution patterns in a first marriage situation are different than those in a second marriage situation. This confirms the impression given to us by lawyers who specialize in this area.

The charts show only 36 testators who were married to their second spouse at the time of death. Nevertheless, the database includes many more multi-marriage situations. These testators, however, were not married at the time of their death and, therefore, the database does not indicate how they would have distributed their estate if both spouse and children survived.[474]

2. Unmarried testators

There were 509 testators who were unmarried at the time of their death. Of these 509, 427 had been previously married, 77 had never been married, and, for 5 testators, it is unknown if there was a previous marriage. Of the 427 unmarried testators who had previously been married, 358 were survived by children, 66 had no children or no surviving children, and 3 indicated they had a common-law spouse.

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[474] When the testator is described as unmarried, former spouse divorced, this can mean there are two former divorced spouses. The same is true for former spouse deceased. We had to determine the number of testators who had both a deceased and divorced former spouse. This was necessary to ensure we did not count these estates twice, once as former spouse divorced and again as former spouse deceased.

Of the 358 estates involving an unmarried testator who had previously been married and who was survived by children, the distribution is as follows:

All to children	76.5%
None to the children	1.4%
Some to the children, but not all	22.1%
TOTAL	100.0%

Where children receive some, but not all, of the estate, they usually share it with the grandchildren. In 85.2% of the estates, the children receive more than 90% of the estate. If one just looks at unmarried testators whose former marriage ended in divorce, children receive the entire estate in 68.6% of the estates. In the case of the unmarried testators whose former spouse died, children receive the entire estate in 78.2% of the estates.

3. Never married testators

The database includes 77 files in which the testator had never married during his or her lifetime. Of these 77 testators, two were living with a common-law spouse at the time of death. Relatives received the entire estate in 72.7% of the estates and received some portion of the estate in 88.3% of the estates. In 10.4% of the estates the beneficiary was someone other than relatives. Of the two testators involved in a common-law relationship, the common-law spouse received all of one estate and some of the other.[475]

4. Testators who own farms

It is possible that the family farm is one situation in which the testator might pass the farm to the children, and not to the spouse. To test this hypothesis, we examined the estates of farmers and retired farmers.

One hundred testators were described as farmers or retired farmers and 19 testators, although not described as such, had assets under the farm category. Of these 119 farmers, 101 had wills. Of the 101 farmers with wills, 55 were married and 46 were unmarried. Of the 55 married farmers with wills, 53 were survived by a spouse and children. Of these 53 farmers:

- 73.6% gave the entire estate to the spouse,
- 24.5% distributed the estate among the spouse and children, and
- 1.9% disinherited the spouse.

The results suggest that testators with farm assets tend to distribute their estates in the same fashion as testators as a whole.

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[475] We characterize a file as ACL or SCL only if the will acknowledges the beneficiary to be a common law spouse.

IV. Estates Without Wills

The Public Trustee's office and the database provide information concerning estates without wills.

A. Information from the Public Trustee

The Public Trustee will administer an estate of an intestate if there are no relatives in Alberta. The result is that the average intestate represented by the Public Trustee is a single person with no adult relatives living in Alberta. As of January 12, 1993 the Public Trustee was handling 310 estates without wills in which letters of administration had been granted or the Public Trustee had made an election under section 23 of the *Public Trustee Act*.[476] The average net value of these estates is $44, 172.54. Sixty-five (65) of these estates have a net value of less than $7,000.

B. The Institute Database

The Institute database contains 199 estates without wills. The average net value of these estates (excluding guardianship applications and originating notices) is $67,977. The marital status of these intestates is summarized as follows:

Marital Status — Estates with no Wills

Application	Letters of Admin*	Election of Public Trustee	Section 21	Others	Total
Married, former spouse divorced	6	0	0		
Married, former spouse deceased	6	0	0		
Married, former spouse none	34	0	0		
Married, former spouse unknown	10	0	0		
Unmarried, former spouse divorced	227	0	0		
Unmarried, former spouse deceased	38	0	0		
Unmarried, former spouse none	53	0	1		
Unmarried, former spouse unknown	1	1	0		
Marital status unknown	0	13	1		
TOTALS	**175+**	**14**	**2**	**6**	**197**

* This category includes letters of administration and resealing of letters of administration.

\+ There are, in fact, 177 files involving letters of administration or resealing of such letters. This chart shows 175 of these files. The two omitted files lack certain information and, therefore, could not be included in the chart. In one estate (96995)

[476] The Public Trustee's office was handling other estates without wills at this time but they are not included in these statistics. The omitted estates include estates with a net value worth less than $1000 (section 21 of the *Public Trustee Act*) and estates in which the grant of letters of administration had not then been obtained.

there is no information on whether the intestate is married. In the other estate (14352), there is no information as to whether a former spouse exists.

V. Comparison of Estates With and Without Wills

In 1988-89, The Law Commission (England) commissioned a public opinion survey of 1001 individuals on matters concerning intestacy. This survey revealed the following information. One in three of the persons interviewed had made a will. The younger the individual, the less likelihood of a will. The older the person, the greater the likelihood of a will. Of those who were 60 years of age or older, 6 of 10 had a will. Those that have the most to leave are more likely to have a will. Those who were single, or cohabiting, or who were married with children were less likely to have made a will.[477] The Law Commission concluded that generally speaking "intestacy rules provide a safety-net for those who have, or think they have, little to leave, or who have not thought about it, or who die prematurely".[478]

The Institute database shows similar trends in two areas. First, Albertans with assets are more likely to have a will. The average net value of estates with wills is $162,491 compared to the average net value of estates without wills (excluding guardianship and originating notices) of $67,977. The average net value of the 177 files with letters of administration or resealing of such letters is $74,362. In the case of estates without wills, 62.8% of estates have a net value **less** than $40,000 and 81.9% of estates have a net value less than $100,000. In the case of estates with wills, 26.3% have a net value less than $40,000 and 54.6% have a net value worth less than $100,000. Second, a higher percentage of people who have never married die without making a will. In estates with wills, 9.75% of the testators had never married.[479] In estates without wills, 26.9 - 33.5% of the intestates had never married.[480]

The database cannot give us information connecting age with the likelihood of a will because most estate files show only if the testator or intestate is a minor or 18 years of age or older.

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[477] The Law Commission, No. 187, *Family Law - Distribution on Intestacy*, Appendix C beginning at page 25.

[478] *Ibid.*, Appendix C at para. 5.

[479] The calculation is 78 divided by 800.

[480] If you just look at those files were the marital status is known, the calculation is 53 divided by 197 (26.9%). For 13 intestacies, the marital status is unknown and the value of the estate was less than $1,000. If you assume that these people never married, then the calculation is 66 divided by 197 (33.5%).

Net Value of Estates

Value $	Estates with Wills	Estates without Wills	Total Number of estates
Insolvent	4	16	20
0 - 4,999	29	44	73
5,000 - 9,999	26	14	40
10,000 - 14,999	21	15	36
15,000 - 19,999	22	12	34
20,000 - 29,999	52	12	64
30,000 - 39,999	56	12	68
40,000 - 59,999	77	19	96
60,000 - 79,999	79	13	92
80,000 - 99,999	71	6	77
100,000 - 119,999	45	3	48
120,000 - 139,999	55	5	60
140,000 - 159,999	44	4	48
160,000 - 179,999	31	2	33
180,000 - 199,999	22	2	24
200,000 - 249,999	42	6	48
250,000 - 299,999	33	5	38
300,000 - 349,999	22	3	25
350,000 - 399,999	15	1	16
400,000 - 449,000	5	1	6
450,000 - 499,000	13	0	13
500,000 - 749,999	22	1	23
750,000 - 999,999	6	3	9
1,000,000 +	8	0	8
Total files	**800**	**199**	**999**

APPENDIX B
Degrees of Consanguinity