ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

# REFORM OF THE INTESTATE SUCCESSION ACT

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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 intentions of intestates. 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. 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 other 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 reflect: a) the wishes of intestates as measured by the reasonable expectations of the community at large, and b) evolving social policy. Our proposed distribution scheme reflects this premise.

### Spousal share

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 commence divorce proceedings or proceedings seeking division of matrimonial property, or 2) both spouses divide the matrimonial property with the intent to separate and finalize their affairs in recognition of marriage breakdown.

### 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 conjugal relationship with the intestate
> (i) for at least three years immediately preceding the death of the intestate, or
> (ii) in a relationship of some permanence immediately preceding the death of the intestate if they are the natural or adoptive parents of a child.

This definition is designed to identify 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.

### Issue

If the intestate dies leaving issue but no surviving spouse, the estate should go to the issue to be distributed 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 144 to 146. 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 over a cousin and prefers a cousin over 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.

# 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, family relief, the effect of divorce upon wills[1] and the problem of the disinherited spouse. This report for discussion deals with the topic of reform of intestate succession. 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[2] is patterned after the Statute of Distribution (U.K.), which was enacted in 1670. 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 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,

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

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

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.[3] For the most part, each agency has addressed similar issues because the same problems arise in each jurisdiction. Those issues include:

- 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?
- 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

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[3] 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.

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 tentative recommendations for change. Draft legislation that incorporates the tentative 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.[4] The confusion and irregularity in respect of distribution of personal property upon intestacy necessitated the enactment of the Statute of Distribution, 1670[5] (which was amended in 1677, 1685 and 1890).[6] The dichotomy between succession to real property and personal property upon intestacy continued in England until the Administration of Estate Act, 1925 abolished primogeniture[7] 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:[8]

> *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".

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[4] 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 and 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, and H.A. Ford, *Wills and Intestacy in Australia and New Zealand*, 2d (Sydney: Law Book Company, 1989), Chapter 14.

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

[6] 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 and Bonehill, *supra*, note 4 at 35.

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

[8] Sherrin and Bonehill, *supra*, note 4 at 35.

*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,[9] Alberta in 1906.[10] After abolition of primogeniture, both real property and personal property were distributed under rules formerly used for personal property only.[11]

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

[10] See The Transfer and Descent of Land Act, S.A. 1906, c. 19, s. 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.

[11] *Ibid.*

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 descended to oldest male heir by the principle of primogeniture. 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 of the Northwest Territories enacted in 1901 respecting the Devolution of Estates.[12]

Within a year of Alberta becoming a province, the Alberta Legislature enacted An Act Respecting the Transfer and Descent of Land.[13] This Act did away with the rule of primogeniture that provided for inheritance of land by the oldest male heir upon intestacy. Section 2 of the 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.

In result, after the introduction of the 1906 Act, both land and personal property were distributed upon an intestacy according to the Statute of Distribution, 1670, as amended by the English statutes of 1677 and 1685 and by the 1901 Ordinance.

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.[14] This Act dealt with the distribution of real and personal property on intestacy. It borrowed heavily

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[12] 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).

[13] S.A. 1906, c. 19.

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

from the Statutes of Distribution[15] in that it divided the estate between the surviving spouse and issue. If there is no surviving spouse or issue it went 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,[16] and increased to $40,000 as of January 1, 1976.[17] As of November 1, 1991, "issue" as defined in the Act includes all lineal descendants, whether born within or outside marriage, of the ancestor.[18]

#### 4. Uniform Intestate Succession Act

The Uniform Law Conference (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, with some minor modifications. In 1985, the Uniform Law Conference 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

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[15] 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.

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

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

[18] 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.

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

### 1. Overview of legislative models

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, 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[19] and the Uniform Intestate Succession Act of Canada are distinct and fall into categories of their own.

#### *a. 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 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:

[19] 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.

| Province | Preferential Share | Eff. Date | Sub-category |
|---|---|---|---|
| Alberta | $40,000 | Jan. 1, 1976 | 1(a) |
| British Columbia | $65,000 | Oct. 1, 1983 | 1(a) |
| Ontario | $75,000 | March 31, 1978 | 1(a) |
| Saskatchewan | $100,000 | June 22, 1990 | 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) |
| 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
- to the nephews and nieces in equal shares and in no case shall representation[20] 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 statement must be qualified in respect of Ontario. In Ontario, representation among issue is still allowed, but the root generation[21] 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

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[20] 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.

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

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.

#### *b. 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, C.C.S.M. c. I-85, 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 remaining portion 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.[22] In addition, the Manitoba Act no longer refers to

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[22] 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

(continued...)

degrees of consanguinity. A parentelic system now determines the relatives who will inherit the estate if the intestate has no surviving spouse and no 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.[23] These concepts will be discussed in detail in Chapter 6.

#### *c. 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.

#### *d. 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. Hereafter, all references will be to Article II of the Uniform Probate Code.

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

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(...continued)
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.

[23] 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.]

- 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.

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.

The issue share on a per-capita-at-each-generation basis. If there is no surviving spouse or descendants, a parentelic system determines the relatives who will inherit the estate.

A greater number of variables are taken into account by the 1991 Act as compared to the Manitoba Act. The Manitoba Act is not concerned with whether the surviving spouse has issue from another relationship, whereas the 1991 Act is concerned with this. Also, the Manitoba Act extends the parentelic system to great-grandparents and their issue, whereas the 1991 Act 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.[24] Life expectancy for males who were born in 1971 was 69.62 years, for females 76.6 years. This had increased to 74.6 years for males born in 1991 and 81 years for females born in 1991.[25] 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.[26]

In 1991, the median age for male Albertans at time of death was 71.5 years; the median age for female Albertans was 76.7 years.[27] Of the 14,459 Albertans who died in 1991, 68.0% were 65 years of age or older, 27.5% were 18 to 64 years of age, and 4.4% were 17 years of age or younger.[28] Examined according to sex, 63.9% of the men who died were 65 years of age or older and 73.5% of the women who died were 65 years of age or older.[29] A similar result is observed in 1990.[30]

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[24] Statistics Canada. *Report on Demographic Situation in Canada, 1994*. Ottawa: Industry, Science and Technology, Canada, 1994. Cat. No. 91-209E Annual at 50-51, Table 17.

[25] *Ibid.*, see Tables 16 and 17.

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

[27] Statistics Canada. *Postcensal annual estimates by marital status, age, sex and components of growth for Canada, Provinces and Territories, June 1, 1992*. Ottawa: Industry, Science and Technology, Canada, 1992. Catalogue 92-210, Volume 10, at Table 12: Annual Number of Deaths by age and sex, Canada, Provinces and Territories, 1991-92.

[28] *Ibid.*

[29] *Ibid.*

[30] In 1990, 14,068 people died in Alberta. Of these, 68.8% were 65 years of age or older. Source: Canada Statistics. *Health Reports Supplement No. 15, 1992, Volume 4, No. 1*. Ottawa: Industry, Science and Technology, 1992. Cat. 82-003S15 at Table 3: Deaths by Single Year of Age and Sex, Canada and Provinces, 1990.

## 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,[31] 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")[32] 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.[33] Since then it has increased somewhat to 1.8 in 1991.[34] 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.[35] At the same time, the percentage of Canadians who are living alone has increased.[36]

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[31] 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.

[32] Vanier Institute, *supra*, note 31 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.

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

[34] Statistics Canada. *Fertility*. Ottawa: Industry, Science and Technology, Canada, 1993. 1991 Census of Canada. Catalogue No. 93-321, Table 2 at 16.

[35] Vanier Institute, *supra*, note 31, Table 1 at 29.

[36] *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.[37] Not only do the rites of marriage vary over time,[38] so does the number of people who marry,[39] the age at which they marry,[40] the rights and obligations associated with marriage, and the philosophy underlying marriage.[41] 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,[42] for our purposes we need only look back at the changes that have taken place in this century, and, more importantly, in the last 35 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.[43] The changes in the last 35 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 an all-time 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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[37] For an interesting history of marriage since the 1600s see Stephen Parker, *Informal Marriage, Cohabitation and the Law 1750-1989* (New York: St. Martin's Press, 1990).

[38] *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.

[39] Vanier Institute, *supra*, note 31 at Chart 16.

[40] *Ibid.* at Chart 19.

[41] 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.

[42] Parker, *supra*, note 37.

[43] 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 of 1990 is 7.1, which is very close to the marriage rate of the 1920s.[44]

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.[45] In fact, first marriage rates for teens and people in their early twenties has fallen dramatically.[46] As will be discussed later, common-law relationships have replaced marriage in the early conjugal years.

Since the divorce laws were liberalized in 1968, divorce has occurred with increasing frequency in Canadian society.[47] 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.[48] One can see the magnitude of change by comparing the numbers of divorce granted in 1968 and 1990: 11,000 in 1968 and 78,000 in 1990.[49] This is, of course, a crude method to measure the divorce rate but it emphasizes the magnitude of change experienced in Canada.

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[44] Vanier Institute, *supra*, note 31 at 36-37, Chart 16.

[45] Vanier Institute, *supra*, note 31 at Chart 19 and Jean Dumas and Yves Péron, *Marriage and Conjugal Life in Canada: Current Demographic Analysis* (Ottawa: Statistics Canada, 1992) at 23, Figure 3.

[46] Vanier Institute, *supra*, note 31 at Chart 20.

[47] 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.

[48] Dumas and Péron, *supra*, note 45 at 53.

[49] Vanier Institute, *supra*, note 31 at Chart 24 at 45.

There are many methods of measuring the divorce rate and many comparisons that can be made among those who divorce.[50] 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 1989 was 3,982.[51] 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.[52] 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.[53] Second, the risk of divorce is greater for early-in-life marriages and remarriages.[54]

Given the high divorce rate, remarriage is becoming increasingly common in Canadian society.[55] In 1967, 88% of marriages was the first marriage for both spouses and 12% was a remarriage for at least one of the spouses. In 1989, 67% of the marriages was the first marriage for both spouses and 33% was a remarriage for at least one of the spouses.[56] "While the number of all marriages increased, the number of first marriages for both spouses declined slightly and remarriages tripled. Marriages between two

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[50] 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 and Péron, *supra*, note 45 at Chapter 4. This is a very detailed look at divorce in Canada since 1969.

[51] Dumas and Péron, *supra*, note 45 at Table 18 and 54-65.

[52] For a detailed discussion see Dumas and Péron, *supra*, note 45 at 59-62.

[53] Beaujot, *supra*, note 43 at 239-40.

[54] For detailed information on this topic see Dumas and Péron, *supra*, note 45 at 56-58.

[55] 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 and Péron, *supra*, note 45 at 42-50.

[56] Vanier Institute, *supra*, note 31 at Chart 18.

previously-married persons almost quadrupled in number between 1967 and 1989."[57]

Despite the high divorce rate in Canada, the actual number of divorced persons in 1991 was only 4% of the Canadian population that is 15 years of age or over.[58] Although more than 4% of this group 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.[59] The trend is towards serial monogamy.

Many changes in society have given rise to this dramatic increase in the divorce rate.[60] 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.

## E. Cohabitants Outside Marriage

### 1. Research Paper No. 15: Survey of Adult Living Arrangements, A Technical Report

In the early 1980s, there was little information concerning cohabitation outside marriage.[61] Recognizing this, the Institute commissioned a study of adult living arrangements. This study elicited valuable information concerning the following:

- the prevalence of non-marital cohabitation,

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[57] Vanier Institute, *supra*, note 31 at 38.

[58] Vanier Institute, *supra*, note 31 at Chart 14.

[59] Dumas and Péron, *supra*, note 45 at 93-95.

[60] 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 31 at 48.

[61] Statistics Canada first asked questions about such relationships in the 1981 Census.

- the social and economic characteristics of cohabiting couples,
- living arrangement of cohabiting couples
- economic difficulties of cohabitation living arrangements
- reasons for cohabiting non-maritally and maritally
- attitudes concerning legal issues of non-marital cohabitation.

The results of the study were published in *Survey of Adult Living Arrangements, A Technical Report*. Attached as Appendix A is a summary of this study.

At the time, it was one of only a few sources that considered cohabitation outside marriage. Since then, Statistics Canada has published statistics that add to the knowledge of cohabitation outside marriage. The more recent research confirms the findings of the earlier study.

### 2. Statistics Canada

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: age, legal status, number of children, home ownership and duration of the relationship. This information will assist us in developing policy in respect of such relationships.

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.[62]

| | |
|---|---|
| 1981 | 713,215 |
| 1986 | 973,880 |
| 1991 | 1,451,905 |

Figure 1, produced below, shows the percentage of Canadians within a certain age category who lived in such unions in 1981, 1986 and 1991.[63] 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

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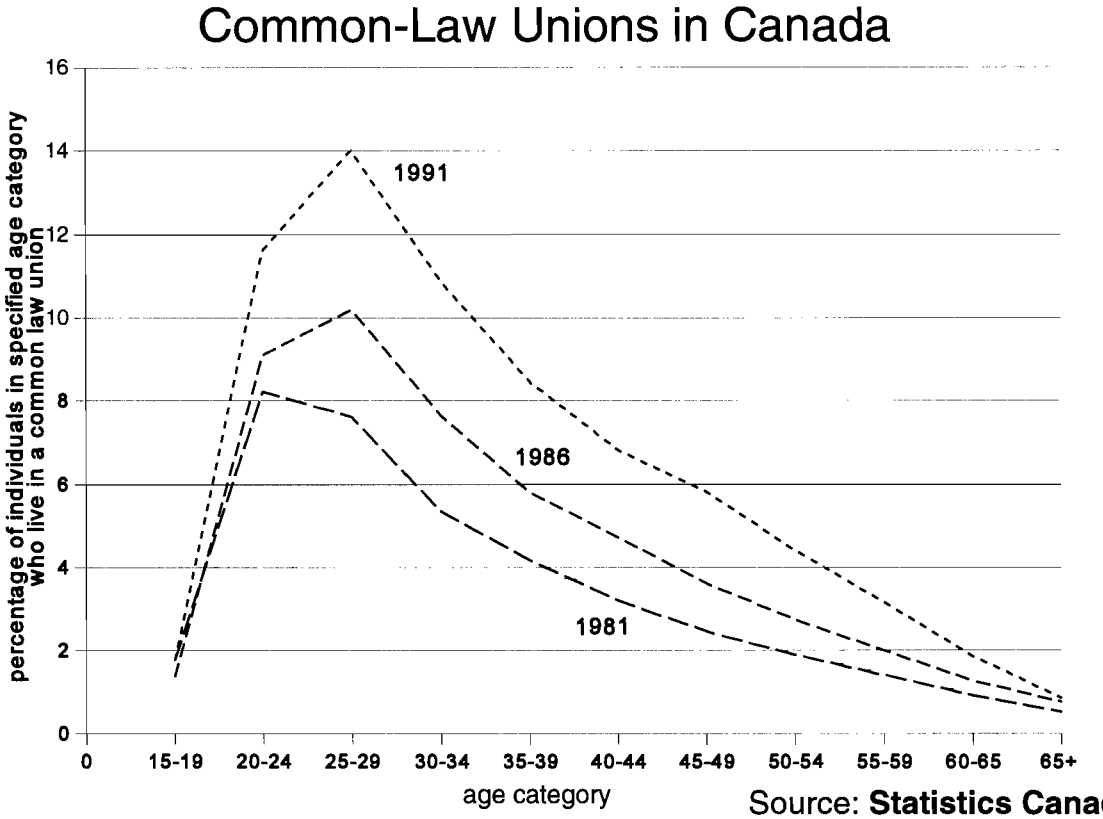
[62] *Population Dynamics in Canada, supra*, note 50, Table A.7 at 59.

[63] Source: *Ibid.*, Table A.1 & A.7.

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.[64]




Source: **Statistics Canada**, *Population Dynamics in Canada* Catalogue No. 96-305E Table A.1 + A.7

The same general age distribution is seen in Alberta. In 1991, there were 119,900 Albertans who were living in common-law unions.[65] Broken down into age categories, this becomes:[66]

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[64] *Ibid.*, 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%.

[65] Statistics Canada. *Age, Sex and Marital Status*. Ottawa: Supply and Services Canada, 1992. 1991 Census of Canada. Catalogue 93-310, Table 6 at 187.

[66] *Ibid.*

| | | | |
|---|---|---|---|
| 15-19 | 4,520 | 45-49 | 6,780 |
| 20-24 | 23,710 | 50-54 | 4,310 |
| 25-29 | 27,645 | 55-59 | 2,750 |
| 30-34 | 21,650 | 60-64 | 1,695 |
| 35-39 | 14,495 | 65+ | 2,160 |
| 40-44 | 10,185 | | |

In 1991, 10.2% of Alberta couples lived in common-law unions.[67] 64.6% of the Albertans who live in common-law unions had not reached their 35th birthday.

The Vanier Institute of the Family has examined the legal status of Canadians who live in common-law unions and concluded:[68]

> 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.

Given that individuals who are living in a common-law union are generally young and single, it is not surprising to learn that 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.[69] The age

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[67] Statistics Canada. *Families: Number, Type and Structure*. Ottawa: Supply and Services Canada, 1992. 1991 Census of Canada. Catalogue No. 93-312, Table 2 at 9. In 1991, there were 584,975 husband-wife families in Alberta. Of these 525,025 were families of now married couples and 59,950 were families of common-law couples.

[68] Vanier Institute, *supra*, note 31 at 43.

[69] 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.

of cohabitants is also reflected in home ownership statistics. The majority of common-law couples are renters.[70]

In the context of intestacy rules, the intention of the parties is key. Does the cohabitant wish to leave his or her estate to the partner of the common-law union? The answer depends upon the level of attachment and attitude towards the relationship. Is cohabitation a relationship that precedes marriage or is it an alternative to marriage? What signals the blending of two economic units: marriage, the common-law union or a certain period of cohabitation within a common-law union?

*Marriage and Conjugal Life in Canada: Current Demographic Analysis*[71] gives us some assistance in answering these questions. This is a publication of Statistics Canada that analyses 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".[72] The survey provided information on the interrelationship between common-law unions and first marriages. The key findings were as follows.

- Quite often, a common-law union between singles is a prelude to marriage. The common-law unions formed in 1970 resulted in marriage in half of the unions.[73]
- Most people who live in common-law unions either marry their first partner or someone else. "Singles stubbornly opposed to marriage

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[70] The Premier's Council in Support of Alberta Families reports on the frequency of home ownership in Alberta, In its publication, *Facts of Alberta Families, 1995 edition*, *supra*, note 26 at 9, the Council reports as follows:

> Married couples are much more likely to own their own homes than lone-parent families or common-law couples. About 74% of families live in homes they own, and 27% own their homes mortgage-free. The majority of married couples with our without children own their own homes (82% and 80% respectively).
> The majority of common-law couples with children (53%) and without children (59%) are renters. The majority of female lone-parent families are renters (60%) and the majority of male lone-parent families are home owners (58%).

[71] Dumas and Péron, *supra*, note 45.

[72] *Ibid.* at 103.

[73] *Ibid.* at 103.

remained a minority among those who began their conjugal life living common law."[74]

- Few single Canadians have lived in a common-law relationship with their first partner for very long. The authors wrote:[75]

> ... 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.

In their conclusion to chapter 6, the authors summarize the trends in marriage and common-law unions and looked into the future. They wrote as follows:[76]

> For the past two decades, the institution of marriage has been in turmoil. Marriage has been less and less a prerequisite to establishing a couple, and has tended to vanish from early conjugal life. Marriage also seems increasingly fragile, as marriage breakdown occurs more frequently and with increasing ease. Nevertheless, marriage still retains a certain appeal among those who had disputed its necessity and its permanency. The majority of singles who had lived common law married eventually and many divorced person remarried. For these two reasons, Canadians continue to marry, at rates greater than expected, and marriage remains an important part of the conjugal life of Canadian men and women.
>
> However, the situation could worsen during the coming years. Births outside of marriage account for an increasing proportion: from 11% in 1977 to 22% in 1988. This growth would indicate that having children is considered acceptable by more and more couples living common law. Now that the legal distinction between a legitimate and illegitimate child has been eliminated, the main obstacle to having children outside marriage has been removed. Furthermore, financial and social law until now often favoured unmarried couples over married couples. Under these circumstances, common-law unions may become a durable substitute for marriage.

The last paragraph is speculative. The problem is we need more time to see whether common-law unions will become an alternative to marriage as opposed to a prelude to marriage, which is the purpose they now usually serve.

## F. Conclusion

The information presented in this chapter concerning trends in Canadian society shows that there have been extensive changes to Canadian families

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[74] *Ibid.* at 103.

[75] *Ibid.* at 104.

[76] *Ibid.* at 104.

since 1970. Those changes are accurately summarized by Roderic Beaujot, author of *Population Change In Canada*,[77] as follows:[78]

> 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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[77] *Supra*, note 43.

[78] *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 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,[79] ("Dunham study"),
- An Empirical Study of the Illinois Statutory Estate Plan,[80] ("Illinois study"),
- Intestate Succession in New Jersey: Does It Conform to Popular Expectations?,[81] ("New Jersey study").
- A Comparison of Iowans' Dispositive Preference with Selected Provisions of the Iowa and Uniform Probate Codes,[82] ("Iowa study"),

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[79] A. Dunham, "The Method, Process and Frequency of Wealth Transmissions at Death" (1963) 30 U. Chi. L.R. 241. This study involved the examination of court records for 180 estates. The author also made use of a small number of questionnaires.

[80] M.L. Fellows, R.J. Simon, T.E. Snapp, and W.D. Snapp, "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.

[81] J. Glucksman, "Intestate Succession in New Jersey: Does It Conform to Popular Expectations?" (1976) 12 Columbia Journal of Law and Social Problems 253. This study examined 100 randomly selected court files and conducted a telephone survey of 50 individuals.

[82] "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

(continued...)

- Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States,[83] ("American study"),
- The Law Commission (England), *Distribution on Intestacy* (Report No. 187, 1989) Appendix C, Public Opinion Survey,[84] ("English study"),
- statistics provided by the Public Trustee of Alberta,
- survey of Alberta lawyers who are members of 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 of September of 1992. This sample will contain an over-representation of elderly Albertans and, therefore, we are unable to 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 B a summary of the information extracted from these files.

## B. Extent of Intestacy

Only the American study and the English study examined the extent of intestacy. In the American study, of the 750 people interviewed, 45% had a

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(...continued)
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.

[83] M.L. Fellows, R.J. Simon and 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).

[84] 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.

will. The likelihood of having a will increased as did family income,[85] years of education,[86] age[87] and size of the estate.[88] Those interviewed were also somewhat more likely to have a will if they had children.[89] Age and wealth seemed to have the most significant impact. The 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.

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[85] 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 |

[86] 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 |

[87] 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 |

[88] 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 |

[89] Table 4

| Family Status | With Will | No Will | Sample |
|---|---|---|---|
| No children | 10.9 | 89.1 | 55 |
| Some minor children | 32.2 | 67.8 | 401 |
| All adult children | 72.6 | 27.4 | 259 |

Also, people with larger estates are also more likely to have prepared a will.[90] 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".[91]

The two 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.[92] In both studies, people with adult children had wills more frequently than people without children.

## 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 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.[93] 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:[94]

| *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) | |

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[90] English study, *supra*, note 84 at Appendix C, paras. 1.1-1.2.

[91] English study, *supra*, note 84 at para. 5.

[92] English study, *supra*, note 84 at Appendix C, Table 1B.

[93] American study, *supra*, note 83 at 339.

[94] English study, *supra*, note 84 at Appendix C, para. 1.4.

## 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 authors concluded, therefore, that the citizens of that state do not intentionally rely on that statute to dispose of their property.[95] 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.[96] 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.[97]

## E. Profile of Estates Without Wills

The Dunham study,[98] the Illinois study,[99] Iowa study,[100] the American study,[101] the English study,[102] 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

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[95] Illinois study, *supra*, note 80 at 722-23.

[96] American study, *supra*, note 83 at 340.

[97] English study, *supra*, note 84 at Appendix C, para. 1.9.

[98] Dunham study, *supra*, note 79 at 249-51.

[99] Illinois study, *supra*, note 80 at fn. 3.

[100] Iowa study, *supra*, note 82 at 1076.

[101] American study, *supra*, note 83 at 337.

[102] English study, *supra*, note 84 at 2.

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 percentage of people who have never married die without making a will. In estates with wills, 9.75% of the testators had never married.[103] In estates without wills, 26.9—33.5% of the intestates had never married.[104]

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.[105] 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.

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[103] The calculation is 78 divided by 800.

[104] 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%).

[105] 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.

## 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[106] 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 both[107]: (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.[108]

### 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.

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

[107] For further detail see footnotes 79 to 84.

[108] Dunham study, *supra*, note 79 at 252-53; Illinois study, *supra*, note 80 at 725-26; Iowa study, *supra*, note 82 at 1097-1100; American study, *supra*, note 83 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.

### *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.[109] The size of the majority varied, but taken all together, the studies show that a significant majority of the respondents would give the entire estate to the surviving spouse in this situation.[110] 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.

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[109] Dunham study, *supra*, note 79 at 251-53, 260-61; Illinois study, *supra*, note 80 at 727-30; New Jersey study, *supra*, note 81 at 267-69; Iowa study, *supra*, note 82 at 1081-92; American study, *supra*, note 83 at 355-64; English study, *supra*, note 84 at Appendix C, paras. 2.7 to 2.12.

[110] See Dunham study, *supra*, note 79 at 252; Illinois study, *supra*, note 80 at 728, Table 7; Iowa study, *supra*, note 82 at 1085, Table 12; American study, *supra*, note 83 at 359, Tables 11 & 12; English study, *supra*, note 84 at Appendix C, paras. 2.7-2.8; and Alberta study at Appendix B of this Report, B-4 to B-5.

| 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% |
| 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% |
| | spouse and young children (house is part of estate) | 79% |
| | spouse and young children (family does not own house) | 79% |
| 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.[111] The authors who conducted the surveys offer a variety of explanations for this difference. One explanation is the profile of testators. At 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.[112] People with children are more likely to give the entire estate to the surviving spouse than people without children.[113] Older people are more likely to give the entire estate to the surviving spouse than younger people.[114] 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

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[111] Illinois study, *supra*, note 80 at 728-29; Iowa study, *supra*, note 82 at 1085-88; American study, *supra*, note 83 at 359.

[112] Iowa study, *supra*, note 82 at 1085, Table 12. See also English Study, *supra*, note 84 at Appendix C, Tables 4-6.

[113] Illinois study, *supra*, note 80 at 729; Iowa study, *supra*, note 82 at 1085, Table 12.

[114] *Ibid.*

married, and this, therefore, affects the results. Another explanation given for the observed difference is the consequences of legal advice.[115]

In the Alberta study, 260 testators were survived by both a spouse and children.[116] 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 | 100.0% |

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

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).[117] 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.[118] In the New Jersey study, the respondents expressed a similar opinion.[119]

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

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[115] Illinois study, *supra*, note 80 at 729; American study, *supra*, note 83 at 360.

[116] See Appendix B of this Report at B-4.

[117] Dunham study, *supra*, note 79 at 261.

[118] Iowa study, *supra*, note 82 at 1089.

[119] New Jersey study, *supra*, note 81 at 273-75.

income of respondents had no effect on how they wished their estate to be distributed.[120] 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.[121]

### *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.[122]

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:[123]

| Intestate survived by | Percentage of respondents who would give the entire estate to the surviving spouse | | | | |
|---|---|---|---|---|---|
| | Illinois study | Iowa study | American study | English study | Alberta study |
| Spouse and children of that marriage | 53.3% | 61% | 58.3% | 72-79% | 69.7% |
| Spouse and children, some or all of which are of former marriage | 16.8-18.8% | 29% | 23% | 27-34% | 29% |

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

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[120] American Study, *supra*, note 83 at 363.

[121] 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.

[122] See Illinois study, *supra*, note 80 at 728, 732, Table 7; Iowa study, *supra*, note 82 at 1094-97, Table 17; American study, *supra*, note 83 at 364-67, Table 18; English study, *supra*, note 84 at Appendix C, para. 2.14; and Alberta study.

[123] 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.

are born of the marriage as compared to situations in which the intestate also has children from a previous marriage.[124] 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.[125]

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 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.[126] Yet, the preliminary results support the findings in the other studies.[127]

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[124] Iowa study, *supra*, note 82 at 1094-95; Illinois study, *supra*, note 80 at 728, 732; American study, *supra*, note 83 at 364-67; English study, *supra*, note 84 at Appendix C, paras. 2.13-2.15.

[125] Iowa study, *supra*, note 82 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.

[126] 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 souse and children had survived the testator.

[127] 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:

(continued...)

### 3. Issue

Where the intestate is survived by children and there is no surviving spouse, most respondents would divide the estate equally among the children.[128] 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.[129] Most respondents also preferred giving the estate to the child of the intestate as opposed to the children of that child.[130]

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.[131]

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

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(...continued)

| | |
|---|---|
| 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.

[128] 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 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.

[129] Illinois study, *supra*, note 80 at 737, Tables 14 & 15; Iowa study, *supra*, note 82 at 1102, 1104; American study, *supra*, note 83 at 368-72.

[130] Illinois study, *supra*, note 80 at 738, Table 16; Iowa study, *supra*, note 82 at 1106; but compare with American study, *supra*, note 83 at 374-75 where respondents would often include grandchildren of living sons in their distribution.

[131] Illinois study, *supra*, note 80 at 739; Iowa study, *supra*, note 82 at 1106-07.

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.[132]

#### 4. 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."[133]

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.[134]

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,

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[132] This was the fact scenario used in the Illinois and Iowa studies. See Illinois study, *supra*, note 80 at 740-41, Tables 18 & 19; Iowa study, *supra*, note 82 at 1108-11, Table 19; American study, *supra*, note 83 at 382-83, Table 23.

[133] Dunham study, *supra*, note 79 at 254.

[134] Illinois study, *supra*, note 80 at 723-25.

brother and sister. Neither actual estate size nor family income appears to affect respondents' dispository patterns with respect to these situations.[135]

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.[136] 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.[137]

#### 5. 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.[138]

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.[139]

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

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[135] American study, *supra*, note 83 at 341-47 and Table 5 and 6 at 346.

[136] English study, *supra*, note 84 at Appendix C, para 2.18.

[137] English study, *supra*, note 84 at Appendix C, paras. 2.20-21.

[138] Dunham study, *supra*, note 79 at 255.

[139] New Jersey study, *supra*, note 81 at 275-76 and 294.

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.

# CHAPTER 5. PROPOSALS FOR REFORM: PART I

## A. What Purpose Should the Intestate Succession Act Serve?

The intestacy rules could be designed to serve several purposes:
(1) the wishes of intestates,
(2) the needs of the survivors,
(3) the contribution of the survivors to the accumulation of the intestate's estate,
(4) the status of certain relationships,
(5) or some combination of these.

In recent years, most law reform agencies that have addressed this topic have recommended that intestate succession laws reflect the wishes of intestates.[140] 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".[141] The goal of the Manitoba Law Reform Commission[142] 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".[143] The Uniform Probate Code's pattern of intestate succession is designed to provide suitable rules for persons of modest means.[144] The Law Reform Commission of Hong Kong also thought that intestate succession legislation should reflect

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[140] 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.

[141] 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.]

[142] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 7.

[143] *Ibid.*

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

the wishes of a hypothetical testator taking into account his or her circumstances and dependents.[145]

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.[146] 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 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.[147]

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 portion of the estate that is larger than can be justified on need alone. This suggests that the first goal incorporates the factors (2) to (4) listed above. This is a reasonable inference since most testators consider the age and income of the surviving spouse, the contribution of the spouse throughout the marriage and the fact marriage does create duties and obligations.

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[145] 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".

[146] See English study, *supra*, note 84 at paras. 24-27 and Queensland Law Reform Commission, *Intestacy Rules* (Report No. 42, 1993) at para. 2.5.

[147] *Ibid*. Note, however, that the Queensland recommendations would result in the entire estate going to the surviving spouse in most estates that would pass by way of intestacy.

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 the wishes of the majority of intestates, intestacy rules should reflect those wishes. We recommend that this be the goal served by the Intestate Succession Act.

**RECOMMENDATION 1**

**The design of the Intestate Succession Act should reflect:**

**(a) the wishes of intestates as measured by the reasonable expectations of the community at large, and**

**(b) evolving social policy.**

Given this recommendation, a reliable means of judging the 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.[148] Moreover, the information available to us suggests that the distribution preferences of intestates is similar to that of testators. First, there is no evidence that those who do not have wills deviate from those who do in terms of family ties, and it is these ties that determine how people choose to distribute their estate. Second, the distribution preferences of the public are similar to the distribution

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[148] The statistics are as follows:

- 27% of the 182 respondents in the Illinois study had wills (Illinois study, *supra*, note 80 at 718, n. 3)
- 49% of the 600 Iowans interviewed had wills, 51% did not have a will (Iowa study, *supra*, note 82 at 1070, Table 6)
- 45% of the 750 respondents interviewed in the American study had wills, 55% had no wills (American study, *supra*, note 83 at 337)
- 33% of the 1001 respondents interviewed in the English study had wills, 67% had no wills (English study, *supra*, note 84 at Appendix C, Table 1A).

preferences of testators.[149] Third, the mere fact an individual does not have a will does not mean that they have 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.[150]

We now turn to the policy analysis

## B. Spousal Share

### 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.[151] The present law is satisfactory and should be retained.

**RECOMMENDATION 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. 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.

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[149] 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.

[150] Chapter 4 at 35.

[151] See Chapter 4 at 37.

*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 specialize in this area and in the studies discussed in Chapter 4, including the Alberta study, the results of which are summarized as follows:[152]

- 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 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. Situations involved grown up children and house; young children and house; young children and no house.
- In the Alberta study, 69.7% of all testators who were survived by their first and only spouse 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.[153] 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.[154]

In contrast, the distribution pattern dictated by the Intestate Succession Act prefers the children of the deceased over the surviving spouse and does

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[152] See Chapter 4 at 38 for further details.

[153] *Ibid.*

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

not address any of the issues arising in our multi marriage society. Assume that the deceased dies without will, has an 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 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.[155]

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 Statutes of Distribution, 1670 (U.K.) 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.[156] Much has changed since then and the surviving spouse has now replaced the children as the primary beneficiary.[157] Moreover, the tendency to prefer the spouse has grown stronger with time.[158] 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.

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[155] In the Alberta study, 69.7% percent 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.

[156] Mary Ann 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.

[157] *Ibid.*

[158] 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.

*Needs of surviving spouse*

Most often, the surviving spouse will be of advanced years. For example, of the Albertans who died in 1991, 68% were 65 years of age or older, 27.5% were 18 to 64 years of age and 4.4% were 17 years of age and younger. In that year, the median age for male Albertans at the time of death was 71.5 years of age; the median age for female Albertans was 76.7 years of age.[159]

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.[160]

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 $109,811 dollars in 1994 dollars.[161] Moreover, of those provinces which give the surviving spouse a preferential

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[159] See Chapter 3 at 19.

[160] 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.

[161] This number is determined by using the Consumer Price Index.

$$\$109{,}811 = \frac{130.4 \text{ (Average CPI for Jan-Aug 1994)}}{47.5 \text{ (CPI for 1976)}} \bullet \$40{,}000$$

share plus a portion of the residue, Alberta has the lowest preferential share. The preferential share varies from $40,000 (Alberta) to $100,000 (Saskatchewan). Alberta's preferential share is also lower than those provinces that give the preferential share of $50,000 or the value of the home, whichever is greater.[162]

*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

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

maintenance and support" of the spouse. This is undesirable and unnecessary.

*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 3**

**In the situation where the intestate is survived by a spouse and issue, the spousal share under the existing Intestate Succession Act is inadequate.**

***b. Directions for reform***

Although there is agreement among law reform commissions that the surviving spouse should be preferred over children of the marriage, there is 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 the majority of statutes, the preferential share is a fixed sum dictated by statute.[163] In two statutes, the preferential share is the home or a fixed sum, whichever is greater in value.[164] In one statute, the preferential share is the intestate's interest in marital property, which includes the family home.[165] 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

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

| | | | |
|---|---|---|---|
| Alberta | $40,000 | effective | Jan. 1, 1976 |
| B.C. | $65,000 | | Oct. 1, 1983 |
| Ontario | $75,000 | | March 31, 1978 |
| Sask. | $100,000 | | June 22, 1990. |

[164] This is the preferential share of spouse in Nova Scotia and the Northwest Territories.

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

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 was necessary to protect the spouse given the peculiarities of that province's economy generally and the housing market in particular.[166]

*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 $109,811 in 1994 dollars.[167] If reform only addressed the effect of inflation, the preferential share should be increased to $110,000.

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.

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[166] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141 at 26.

[167] This number is determined by using the Consumer Price Index.

$$\$109{,}811 = \frac{130.4 \text{ (Average CPI for Jan-Aug 1994)}}{47.5 \text{ (CPI for 1976)}} \bullet \$40{,}000$$

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.

#### 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

#### A) THE MANITOBA VERSION

This method 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 method 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.[168]

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.[169] 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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[168] See Chapter 4 at 38.

[169] 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. So both children of the surviving spouse and children from a previous relationship share in the residue.

#### *B) THE ENGLISH VERSION*

The Law Commission (England) took this approach the farthest. It recommended an all-to-the-spouse rule 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.[170] After lengthy consideration, the Parliament (U.K.) 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.[171]

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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[170] Richard Hudson, "In Parliament" (June 26, 1992) New Law Journal at 899.

[171] 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 multimarriage 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.[172]

**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,[173] 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 Albertan 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.[174] Giving all to the spouse is not seen as

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[172] American study, *supra*, note 83 at 324.

[173] See Chapter 3 at 19.

[174] 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.)[175] 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.[176]

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.[177]

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 in dignity and 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

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[174](...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 43.

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

[176] See Chapter 4 at 38 and L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141, Appendixes F and G,

[177] 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.

avoids the difficulties of choosing a preferential share and adjusting it periodically to account for inflation.[178]

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.[179] 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 the all children alike, whether they were born within marriage or without and no matter what marriage they were born of.[180] 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 remarriage for persons in their 70s is remote.[181] Remarriage is more likely to occur when an individual loses their spouse earlier in life. Though even in

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[178] See earlier discussion in this chapter at 57.

[179] Iowa study, *supra*, note 82 at 731.

[180] See Chapter 4 at 43.

[181] In 1991, the median age of male Albertans who died was 71.5 years of age; the median age for female Albertans was 76.7 years of age. This means that half of the male Albertans who died in 1991 were 71.5 years of age or older and half of the female Albertans who died in 1991 were 76.7 years of age or older.

these situations,[182] 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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[182] 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 19.

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.[183] 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.[184] 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.[185]
- The average net value of estates without wills is significantly lower than estates with wills.[186]

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[183] a) In the Dunham study, *supra*, note 79, 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.

[184] See Chapter 4 at 32.

[185] 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%).

[186] See Chapter 4 at 35. 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

(continued...)

- 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.[187]

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 two-fold. 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.

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

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[186](...continued)
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.

[187] Chapter 4 at 35.

simple, appropriate and avoids some of the problems that arise with a preferential share regime.

### RECOMMENDATION 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?** The Uniform Probate Code does not give the surviving spouse the entire estate in every situation in which the children of the intestate are also children of the surviving spouse. The surviving spouse receives less when he or she has children from another relationship. In this circumstance, 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 the intestate's children protection against the claim of the surviving spouse's other children. It recognizes that when the surviving spouse later dies, the natural instinct is to treat all children equally. The same result comes about where there is no will because most intestacy statutes would provide equal shares to the children.

Although this is an interesting variation, it is not one we support. 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. The surviving spouse should be left to decide what is fair in the context of his or her family structure.

## RECOMMENDATION 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 on average a smaller portion of the estate.[188] 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 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.[189]
- 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.[190]
- American study: The respondents were asked how they would distribute an estate where the intestate is survived by a spouse and minor child of a previous marriage. The distribution pattern was as follows: 23% gave

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[188] See Illinois study, *supra*, note 80 at 728, 732; Iowa study, *supra*, note 82 at 1094-95; American study, *supra*, note 83 at 364-67; and English study, *supra*, note 84, Appendix C, at 29. The results of these studies are discussed in Chapter 4.

[189] Illinois study, *supra*, note 80 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.

[190] Iowa study, *supra*, note 82 at 1094-95.

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.[191]

- English study: Similar results were observed in the English study.[192]
- 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.[193]

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.[194] However, the longer the marriage, the more that is left to the surviving spouse.

In our opinion, intestacy rules should reflect the multi marriage society in which we live. The studies show that the public is concerned 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.

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 because of 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

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[191] American study, *supra*, note 83 at 364-67.

[192] English study, *supra*, note 84 at Appendix C, paras. 2.13-2.15.

[193] See Chapter 4, footnote 127.

[194] 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.

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.

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.[195] 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?** When choosing a preferential share for the surviving spouse in this situation, a balance must be struck between the needs of the spouse and the needs of the children. 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 former spouse agreed that such payments would bind the intestate's estate, these will be treated as a debt of the estate and be paid out before the

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[195] Iowa study, *supra*, note 82 at 1094-95.

estate is distributed.[196] 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.[197] 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 intestate 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, or
- $50,000 or half of the estate, whichever is greater.

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.

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

[197] Lawyers practising 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.

| Preferential share | $50,000 | | $75,000 | | Manitoba legislation | |
|---|---|---|---|---|---|---|
| Size of estate | Spouse | Children | Spouse | Children | Spouse | Children |
| 25,000 | 25,000 | 0 | 25,000 | 0 | 25,000 | 0 |
| 50,000 | 50,000 | 0 | 50,000 | 0 | 50,000 | 0 |
| 75,000 | 62,500 | 12,500 | 75,000 | 0 | 62,500 | 12,500 |
| 150,000 | 100,000 | 50,000 | 112,500 | 37,500 | 112,500 | 37,500 |
| 200,000 | 125,000 | 75,000 | 137,500 | 62,500 | 150,000 | 50,000 |
| 300,000 | 175,000 | 125,000 | 187,500 | 112,500 | 225,000 | 75,000 |

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 for distribution among children, be they adults or minors.[198] 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 tentatively 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

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

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.[199] 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 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.

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

### RECOMMENDATION 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.**

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

### 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.[200] Section 12 of the Intestate Succession Act[201] 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 spousal preferential share in the event of a partial intestacy.

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 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 spousal share in the event of a partial intestacy.[202] The preferential share that the surviving spouse is entitled to receive under the intestacy legislation

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

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

[202] See Intestate Succession Act, 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).

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 $100,000[203] plus one-half of the 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 not dealt with by the terms of the will. 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 spouse does not receive a "double" preferential share, one under the will and one under the intestacy distribution.[204]

#### *b. Law reform trends*

Law reform agencies have taken different approaches to this issue. The Uniform Intestate Succession Act adopted the 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.[205] The Uniform Probate Code has no special section dealing with the calculation of the spousal preferential share

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[203] 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 has a value of $200,000, so the spousal preferential share is $100,000. If the children of the intestate were also the children of the surviving spouse, the spouse would receive the entire estate.

[204] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 25.

[205] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141 at 44-45.

in the case of partial intestacy. The provisions dealing with advancement could apply in certain circumstances.

### *c. Analysis*

In our opinion, one must assume that the intention of the deceased in respect of the partial intestacy is the same as for the rest of the estate. We must again rely on studies of public opinion to see how testators generally deal with their estates. This will result in different treatment of spouses.

How does such an assumption affect the distribution of the portion of the estate that does not pass by the terms of the will? In the case of the partial intestacy, the entire portion going by way of intestacy should go to the surviving spouse where all the children of the testator are also children of the surviving spouse. Where, however, the testator is survived by a spouse and children, some or all of which are of another relationship, care should be taken to ensure that the expectations of those children are not defeated. If the surviving spouse receives a generous portion of the estate under the terms of the will, he or she should not also be able to claim the full preferential share for the portion of the estate passing under intestacy. The preferential share available to the surviving spouse should be reduced by the value of assets received under the will.[206] The Manitoba and Ontario model should be adopted.

In taking this position, we realize that this recommendation somewhat complicates the administration of estates. Lawyers advise 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 available to the surviving spouse. The result is that under the present Act the entire portion distributed by way of partial intestacy usually goes to the surviving spouse. If off-set is required, as we suggest, the surviving spouse will in some situations have to share these small amounts with the surviving children. This makes administration of the estate more complicated but produces a fairer result.

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[206] The following examples illustrate this concept. Assume that under the pertinent intestacy legislation the spouse is entitled to a preferential share of $75,000 and one half of the residue. The spouse received $60,000 under the terms of the will. Upon the distribution of the portion of the estate not distributed by the terms of the will, the spouse would be entitled to a preferential share of $15,000, plus one-half of the residue. If the spouse received $150,000 under the terms of the will, the spouse would not be entitled to a preferential share. The spouse would receive one half of the value of the assets passing by way of intestacy.

## RECOMMENDATION 7

**In the event of a partial intestacy, 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.**

### 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. This is a common term in a matrimonial property division agreement.

#### I. ADULTERY

Section 15 of the Intestate Succession Act provides:

> 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.

The predecessor to this section was interpreted in *Re Rudiak Estate*.[207] Justice Riley of the Alberta Supreme Court, Trial Division, considered when the conduct of a wife would prevent her from sharing in the intestate's estate. 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. Section 19 of the Intestate Succession Act, R.S.A. 1955, c. 161 was pertinent. This section was the same as section 15, quoted above, but it only applied to the adultery of the wife.

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

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[207] (1958), 25 W.W.R. (N.S.) 39 (Alta. S.C.T.D.), Riley J.

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."

### II. MATRIMONIAL PROPERTY SETTLEMENT

Two recent cases have considered whether a matrimonial property settlement bars a spouse from sharing in the intestate's estate. In *Re Cairns Estate*,[208] a long term marriage ended in divorce proceedings and minutes of settlement but did not proceed to divorce. The husband died intestate a few months after the couple executed the minutes of settlement. The value of the husband's estate was $30,000. The issue was whether the wife had surrendered her rights on intestacy by the terms of the minutes of settlement. The court held that the wife had released only her claim for a further division of property or equalization payment under s. 5 of the Family Law Act, 1986. To obtain the result argued for by the estate, the minutes of settlement must contain clear, direct and cogent words that show a spouse has surrendered his or her rights on intestacy.

This result shows how unwilling a court is to conclude that a spouse has surrendered his or her rights on intestacy. The wife could not seek an equalization payment on death but could succeed to the entire estate because the estate was smaller than the preferential share on intestacy.

The decision in *Leach* v. *Edgar*[209] approached the problem in a different manner. In this case, the husband and wife divorced and the wife received a matrimonial property settlement of $400,000. Less than a year after the divorce and within a month after the division of assets, the wife and two sons, aged 17 and 19, died in a boating accident. Since the order of death was unknown, the older is presumed to die sooner by virtue of the Survivorship and Presumption of Death Act. The result was that the wife was presumed to die first. Since she died intestate, her estate went to her sons. Their estate went to their father.

The wife's mother argued that it was against public policy to apply the presumption where the result is that the former spouse benefits from the

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[208] (1990), 37 E.T.R. 264 (Ont. H.C.)

[209] (1990), 70 D.L.R. (4th) 765 (B.C.C.A.)

wife's estate. The court rejected this argument. Public policy does not prohibit the estate of a deceased person from passing to a former spouse in the absence of issue, especially where the estate was acquired during the marriage.

### *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 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. New Brunswick, 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 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".[210]

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.[211]

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.[212]

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

[211] The Intestate Succession Act, C.C.S.M. c. I-85, s. 3(a).

[212] The Intestate Succession Act, C.C.S.M. c. I-85, s. 3(b).

The Uniform Probate Act 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 s. 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.

#### *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 re-examined 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,[213] 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 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

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[213] 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.).

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 except this position, it is still useful to review the arguments, which are as follows:[214]

> 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 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 point out that few people leave assets to their ex-spouse in their will.[215] 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 spouse does any of the following:

- commences divorce proceedings,
- brings an application for division of matrimonial property, or

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

[215] 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.

- divides 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.)

Section 3 of the Manitoba Act is, in our opinion, the best solution to this problem. This section reads as follows:

> **Rights of Separated spouse**
> 3. 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 one or both of the following conditions is satisfied:
>
> (a) during the period of separation, one or both of the 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 the intestate's death;
>
> (b) before the intestate's death, the intestate and his or her spouse divided their property 0in 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;
>
> the surviving spouse shall be treated as if he or she had predeceased the intestate.

This section reflects the second view, which we find more persuasive for the following reasons. First, property division and divorce happen in tandem so often that it is unreasonable to infer a different intention as to who should receive the property at those points in time. To leave the disentitlement to the time of divorce is to give the a surviving spouse who is a first and only spouse a large bonus just because of the untimely death of the deceased spouse. Second, it brings about the best result where a matrimonial property action has been brought. 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 would have to turn around and give all or a large portion of the assets to the surviving spouse by way of intestacy. The same argument can be made when a divorce petition is brought. These two actions are usually commenced at the same time. Third, those couples who choose to separate, but not sue for divorce or matrimonial property division, are those most likely to want the surviving spouse to share in their estate. They are content to leave their marital status as it is. 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.

We prefer the Manitoba solution over that of British Columbia because the Manitoba solution is triggered by more definitive events and will not invite litigation as to length of separation.

The spouse should not be disentitled just because an action could be brought under the Matrimonial Property Act immediately before the death of the spouse. To do this would be to force the surviving spouse to bring such an action even when the separated spouses intended that their property pass upon death to the surviving spouse. Therefore, disentitlement under the intestacy rules should occur only when the application for division is brought by either spouse.

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 division of property with the intention to separate and finalize their affairs or by the commencement of matrimonial property proceedings or divorce proceedings will signal marriage breakdown.

### RECOMMENDATION 8

**The surviving spouse should be treated as if he or she predeceased the intestate, if at the time of death, the spouses were living separate and apart, and**

**(i) during the period of separation, one or both spouses made an application for divorce or an accounting or equalization of assets under the Matrimonial Property Act and the application was pending or had been dealt with by way of final order at the time of death, or**

**(ii) before death, the spouses 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.**

## C. Cohabitants

### 1. Terminology

Many terms are used to describe a heterosexual unmarried couple, including: opposite-sex couple, unmarried couple, non-marital couple, and cohabitants. We use the term "cohabitants" because it is short and because we have used it in earlier reports. Different sources, however, use a variety of different terms and these will be defined, where appropriate.

### 2. Introduction

The increasing popularity of cohabitation outside marriage raises the question of whether rights and obligations imposed upon married persons should also be extended to cohabitants. This question was addressed in our Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, 1989. At that time, we took the position that marriage and cohabitation were different and should not be assimilated. We did, however, propose reforms that would remedy inequities and situations of hardship that arise when individuals cohabit outside marriage. One situation of hardship that we identified was intestate succession.

Given the lapse of time since this report was issued and the developments in Charter law,[216] it may be time to reconsider that report. In this report, we will reformulate our recommendation in the context of intestacy and approach the issue from the view point of intention of cohabitants. Although we again reach a similar recommendation, we refine our definition of "cohabitant" to take into account information that has become available since the issue of Report 53.

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[216] The major development is the Supreme Court of Canada decision in *Miron* v. *Trudel* [1995] 2 S.C.R. 418. This decision will be discussed in detail later in this chapter.

### 3. Should the intestate succession legislation extend rights to cohabitants?

To determine whether intestate succession legislation should extend rights to certain cohabitants, one has to examine the purpose of such legislation. Intestate succession legislation creates a default will for those people who, for whatever reason, die without making a will. Such legislation should be designed to reflect: (1) the wishes of intestates as measured by the reasonable expectations of the community at large, and (2) evolving social values.[217] Intestacy rules must of necessity reflect the opinion of the majority of society. It is also important that the rules are certain so that distribution of the estate can proceed without delay.

Most intestacy rules are designed to ensure that immediate relatives benefit from the estate in preference to more distant relatives. Preference is given to the surviving spouse, then children, then parents, then siblings and so on. The preference of immediate relatives reflects how people distribute their property in their wills and society's view that immediate surviving relatives are more deserving of support than distant relatives.[218] The trend in the last half of this century has been to bolster the position of the surviving spouse.

Those who would like to see cohabitants share in the intestate's estate argue that the cohabitant is the closest "relative" and should take the spousal share. This argument assumes that cohabitation outside marriage has the degree of financial and emotional commitment normally associated with marriage and, therefore, the majority of such intestates would want his or her cohabitant to receive a generous portion of the estate. While this assumption is true for certain cohabitants, it is not true for others. Cohabitants live in relationships that have different degrees of commitment.[219] The relationship can be: 1) short-lived with little or no

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[217] See Recommendation 1 and earlier discussion in this chapter as to the purpose that intestate succession law should serve.

[218] In this context, support is used to represent a general concept, as opposed to spousal support or child support.

[219] The difference in the type of relationship is often reflected in a cohabitant's characterization of the relationship. In the survey conducted for the Institute in 1983, there were 145 cohabitants. About half of these people referred to their relationship as a common-law marriage. Most of the remaining cohabitants described their relationship as a close personal relationship. The study also revealed that those cohabitants who described their

(continued...)

personal commitment,[220] 2) a trial marriage, 3) a relationship involving a lifelong commitment to the other partner, or 4) a relationship at some other point along the commitment continuum.[221]

The task becomes one of identifying the group of cohabitants in which the majority would want a generous portion of his or her estate to pass to the surviving cohabitant. Since the popularity of cohabitation outside marriage is a relatively new phenomena, we have little statistical evidence to assist us in judging the intention of cohabitants.[222] We must, therefore, infer intention from the degree of commitment to permanence in the relationship. The

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[219](...continued)
relationship as a common-law marriage "were, in some respects, more like married cohabitants in terms of their financial and property arrangements than were those who used the term "a close personal arrangement". See Alberta Law Reform Institute, *Survey of Adult Living Arrangements, A Technical Report* (Research Paper No. 15, 1984) at pages iv and 42.

[220] The best description of a temporary relationship that would fall under the first category is found in *Jansen* v. *Montgomery* (1982) 30 R.F.L. (2d) 332 (N.S. Co. Ct.). At page 235, Hall J.C.C. held:

> To "live together as husband and wife" connotes an element of permanence and commitment to each other by the parties to the relationship to a substantial degree. Certainly it should not be thought that every arrangement where a man and woman share the same living accommodations and engage in sexual activity to some extent should be regarded as living together as husband and wife. If these times men and women have a much more casual attitude toward sexual conduct than was prevalent even two decades ago. Now it is not unusual for a man and woman to live in the apartment sharing expenses and engaging in sexual activity with each other knowing full well that the relationship will not last for the rest of their lives and will likely end when another person comes along or circumstances change.

[221] At para. 99 of *Miron* v. *Trudel*, *supra*, note 216, L'Heureux-Dube J. stated that lawmakers cannot assume that the reason for cohabiting in the first place is the reason for maintaining the relationship. Even if a couple entered the relationship as a trial marriage, this may not explain why they have continued in the relationship for a long period.

[222] a) Of the 800 wills reviewed in the Alberta study, only 5 wills made mention of a common law spouse.

b) Of the studies discussed in Chapter 4, only the English study dealt with a situation in which the intestate was survived by a cohabitee. In that study, the respondents were asked how they would distribute the estate of a woman who died survived by her male cohabited and her sister. The couple was described as having lived together as man and wife for more than 10 years. At page 31 of Appendix C of the English study, the responses were summarized 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 were 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.

greater the commitment to permanence, the more likely the intestate would want the surviving cohabitant to receive a generous portion of the estate. In our opinion, the only group which would have such an intention are those who are in a relationship that is like marriage. By this we mean a relationship that has interdependence and a publicly acknowledged commitment to permanence.[223] Casual relationships and short-term trial marriages do not have the degree of commitment necessary for us to assume that the majority of such intestates would want the surviving cohabitant to be treated as a spouse.

### 4. How should "cohabitant" be defined?

#### *a. Introduction*

In this part, our task is to propose a definition that will include cohabitants living in relationships of publicly acknowledged permanence and interdependence and exclude those cohabitants living in casual relationships and short-term trial marriages.

#### *b. Statutory definitions*

Most definitions of "cohabitant" found in legislation identify cohabitants by way of public reputation, cohabitation for a period, birth of a child, or some combination of these factors. The following are examples of definitions that have been used in Alberta and elsewhere. This list is by no means exhaustive. Canadian statutes contain a wide variety of such definitions.

> EMPLOYMENT PENSIONS PLAN ACT , S.A. 1986, c. E-10.05
> 1(hh) "spouse" means, in relation to another person,
> (i) a person who at the relevant time was married to that other person and was not living separate and apart from him, or
> (ii) if there is no person to whom subclause (i) applies, a person of the opposite sex who lived with that other person for the 3-year period immediately preceding the relevant time and was during that period held out by that other person in the community in which they lived as his consort.
>
> 1(2) For the purposes of subsection 1(hh)(i) persons are living separate and apart
> (a) if they are living apart and either of them has the intention to live separate and apart from the other, or
> (b) if, before the relevant time
> (i) they had been living separate and apart for any period, and
> (ii) that period was interrupted or terminated by reason only that either of them became incapable of continuing to live separate and apart or of forming or having the intention to continue to live separate and apart of that person's own volition,

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[223] At para. 88 of *Miron* v. *Trudel*, *supra*, note 216, L'Heureux-Dube described cohabitation that is marriage-like as a relationship with "some degree of publicly acknowledged permanence and interdependence".

and the separation would probably have continued if that person had not become so incapable.

FATAL ACCIDENTS ACT, R.S.A. 1980, C. F-5, section 1(a.1)
1(a.1) "cohabitant" means a person of the opposite sex to the deceased who lived with the deceased for the 3-year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as the deceased's consort.

INSURANCE ACT, R.S.A. 1980, c. I-59, s. 313(10) and (11)
313 (10) In this section,

(a) "common law spouse" means any man or woman who although not legally married to a person lives and cohabits with that person as the spouse of that person and is known as such in the community in which they have lived.

. . .

(11) Where a deceased insured leaves no surviving spouse and it is established to the satisfaction of a court that:

(a) for the 5-year period immediately preceding his death the deceased insured cohabited with a common law spouse, or

(b) for the 2-year period immediately preceding his death the deceased insured cohabited with a common law spouse by whom he had one or more children,

the benefits to which a spouse would have been entitled under this section shall be paid to that common law spouse.

WORKERS' COMPENSATION ACT, S.A 1981, C. W-16, sections 1(3) and 1(1)(f)
1(3) For the purposes of the Act, "spouse" includes a common law spouse who cohabited with the worker for

(a) at least the 5 years immediately preceding the worker's death, or

(b) at least the 2 years immediately preceding the worker's death, if there is a child of the common law relationship,

but if at the time of the worker's death there is also a legal spouse of the worker, then

(c) if the legal spouse is a dependent legal spouse, that spouse is the dependent spouse for the purposes of a pension under section 64,

(d) if the legal spouse is not a dependent legal spouse, the common law spouse is the dependent spouse for the purposes of a pension under section 64, and

(e) nothing in this subsection affects the rights under this Act of dependent children of either relationship.

1(1)(f) defines dependent as follows:
"dependent" means a member of the family of a worker who was wholly or partially dependent on his earnings at the time of his death or who, but for the death or disability due to the accident would have been so dependent, but a person is not a partial dependent of another person unless he was partially dependent on contributions from that other person for the provision of the ordinary necessaries of life.

FAMILY LAW ACT, R.S.O. 1990, c. F.3 at s. 29.
1 "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

29 "spouse" means a spouse as defined in subsection 1(1) [married spouse], and in addition includes either of a man and woman who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence if they are the natural or adoptive parents of a child.

OLD AGE SECURITY ACT, R.S.C. 1985, c. o-9
"spouse" in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife;

### c. Analysis

In Report No. 53, *Toward Reform of the Law Relating to Cohabitation Outside Marriage*, we recommended that certain cohabitants be treated as spouses for the purposes of the Intestate Succession Act. The proposed definition was as follows:

1(d) "cohabitant" means,

(i) in relation to a man, a woman who is living or has lived with the man on a *bona fide* domestic basis although not married to him; and

(ii) in relation to a woman, a man who is living or has lived with the woman on a *bona fide* domestic basis although not married to him.

After reviewing the statistics now available,[224] we are concerned that this definition may include casual relationships and short-term trial marriages. A better definition is required.

The definition that we adopt should have two requirements: an element of public reputation that suggests that the relationship was publicly acknowledged as a family unit and a lengthy period of cohabitation. It is not necessary that the couple refer to each other as "spouse". There should, however, be some public indication that they see themselves as a family unit and have a commitment to permanence. Both public reputation and length of cohabitation are necessary to exclude casual relationships and those in which the parties do not view themselves as a family unit.

Public reputation is a common element of statutory definitions of "common law spouse" or "spouse" that extend benefits to cohabitants. Phrases used to describe this element include:

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[224] The statistics now available suggest that cohabitation among single Canadians leads quickly to separation or marriage. Only 12% of single women and 16% of single men who began their first common law union during 1980-84 were still living common law with their first partner in 1990. This suggests that cohabitation among single Canadians is often a trial marriage. For this group of cohabitants, marriage usually follows once a commitment to permanence develops. Separation is the result where such commitment does not materialize. See Chapter 3 at 29 for more details.

- living in a conjugal relationship outside marriage[225]
- living together as husband and wife
- held out by the deceased in the community in which they lived as the deceased's consort.[226]

The third phrase is part of the definition of cohabitant the Institute recommended for the Fatal Accidents Act. Many commentators have criticized use of the term "consort" because it is not understood by most Albertans. Use of the first or second phrase would eliminate that criticism. Of those two phrases, we prefer the first phrase. The second phrase could invite a court to conclude that they must call each other spouses in order to fall within the definition. This is not desirable because, in today's society, there is no need to introduce your cohabitant as a spouse and many cohabitants do not do this. The second phrase might exclude cohabitants who do not call themselves spouses but who live in a relationship of permanence and interdependence.

The length of habitation raises two questions: (1) What period of cohabitation should be required before the surviving cohabitant is treated as a spouse under the Intestate Succession Act? (2) Should this period be reduced where a child is born of the relationship? When determining the appropriate period, one must remember that the cohabitant will be treated as a spouse under the proposed Act. The cohabitant, as defined, will receive the entire estate where the intestate has no issue of another relationship. The cohabitant will receive a minimum of three-quarters of the estate where the intestate is survived by the cohabitant and issue of another relationship. It is, therefore, very important that we are comfortable in assuming that the majority of cohabitants in a relationship of a certain length would want the surviving cohabitant to be the primary beneficiary. The length of the period of cohabitation is critical because we are making assumptions based on conduct. The longer the relationship, the more the conduct suggests the necessary interdependence and commitment. The longer the period of

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[225] This is used frequently in Ontario statutes.

[226] This is the wording of definition of spouse found in Fatal Accidents Act and the Employment Pensions Act. Interestingly, the definition of "spouse" used in the Workers' Compensation Act does not use this wording. Instead, the Act defines "spouse" to include a common law spouse who cohabited with the worker for certain period. The requirement that they be a common law spouse incorporates the idea of a marriage-like relationship.

cohabitation, the more difficult it is to assume that the relationship is still one of "trial marriage".

At present, no Canadian intestate succession statute recognizes cohabitants. There are however, many provincial statutes that have extended protection to cohabitants in the area of support obligations,[227] family relief[228] and wrongful death.[229] Most definitions include a period of cohabitation, which ranges from one year to five years. The most commonly used period is three years. Of course, the period one chooses depends upon the purpose of the legislation in question.

In the context of intestacy, there must be a lengthy period before one can infer that the relationship is one of permanence and interdependence. The choice is between a 3-year period or a 5-year period. We tentatively recommend the 3-year period because we are concerned that the 5-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. We would appreciate hearing the opinion of as many Albertans as possible on this important point.

The next question is whether a shorter period would be acceptable where there is a child of the relationship. For most Albertans, the decision to have a child reflects a commitment to permanence because parents recognize that raising children is a lifetime obligation. We are of the opinion that as

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[227] Family Relations Act, R.S.B.C. 1979, c. 121., s. 57; Family Maintenance Act, R.S.M. 1987, c. F-21, s. 10; Family Services Act, S.N.B. 1994, 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, s. 33; Family Reform Act, S.P.E.I. 1995, c. F-3, s. 30; Family Property and Support Act, R.S.Y. 1986, c. 63, s. 35; An Act to Amend the Maintenance Act, S.N.W.T. 1995, c. 10, s. 2

[228] Estate Administration Act, R.S.B.C. 1979, c. 114, as am., ss 85-89; Dependents Relief Act, S.M. 1989-90, c. 42, s. 2(c); Provision for Dependants Act, R.S.N.B. 1973, c. P-22.3, as am., s. 1; Succession Law 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, R.S.S. 1978, c. D-25, as am., s. 2(1)(c)(iv); 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.

[229] Fatal Accidents Act, R.S.A. 1980, c. F-5, as am., s. 1(a.1); Family Compensation Act, R.S.B.C. 1979, c. 120 as am., s. 1(b); Fatal Accidents Act, R.S.N. 1987, c. F-50, s. 3(5); An Act to amend the Fatal Accidents Act, S.N.B. 1995, c. , s. 1; Fatal Injuries Act, R.S.N.S. 1970, c. 126 as am., s. 13; Family Law Act, R.S.O. 1990, c. F-3, ss 1(1) & 29; Fatal Accidents Act, R.S.P.E.I. 1988, c. F-5, s. 1(f).

long as the relationship is marriage-like and there is a child of the relationship, no specific time period is needed in the definition. A relationship of some permanence will be sufficient.

The remaining question is whether the cohabitants must be living together at the time of death. 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.[230] Separation with intent to end the relationship is for cohabitants the equivalent of divorce for married person. 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.

For these reasons, we make the following recommendation.

### RECOMMENDATION 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**

**For the purposes of this Act, "cohabitant" means a person of the opposite sex who is not married to the intestate and who continuously cohabited in a conjugal relationship with the intestate**

**(a) for at least 3 years immediately preceding the death of the intestate, or**

**(b) in a relationship of some permanence immediately preceding the intestate's death if there is a child of the relationship.**

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[230] Of course, separation will not prevent the surviving cohabitant from bringing a constructive trust action. It will only prevent the surviving cohabitant from sharing in the deceased's estate.

**5. How should the law deal with competing claims of a spouse and cohabitant?**

There will be situations in which the intestate is survived by both a spouse and a cohabitant. 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 there will be a competition between a surviving spouse and a cohabitant. Having said this, there will still be situations in which there is a competition between a spouse and cohabitant. How should the legislation balance these competing claims?

If the surviving spouse has lost his or her right to share in the estate, the cohabitant 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 an accounting under the Matrimonial Property Act or the spouses have divided their property in a manner that was intended to finalize their affairs in recognition of marriage breakdown.

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.[231] 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,

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[231] Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 11(2).

> (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, declaration of nullity or a judicial separation. The action must, however, be commenced no later that two years after the date of the decree nisi, declaration or judgment.[232] Actions brought under section 5(1)(c) and (e) must be commenced within two years of separation.[233] Actions brought under section 5(1)(d) must be commenced within two years of after separation or one year after dissipation of the assets, whichever is first.[234]

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. 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

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[232] *Ibid.* at s. 6(1)(a) & (b).

[233] *Ibid.* at s. 6(2).

[234] *Ibid.* at s. 6(3).

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.[235] Applying the second interpretation to these facts, the limitation period for bringing a matrimonial property action under 5(1)(c) would have expired and no action could be brought under 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 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, section 313 of the Insurance Act.
- 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 over the cohabitant.
- The surviving spouse will still have the right to bring a family relief action or a constructive trust action.

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[235] This problem was pointed out in two articles: P.J.M. Lown and 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.

In our opinion, the intent of the intestate should determine the issue. It is unlikely that the majority of intestates in this situation would prefer the spouse over 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.

### RECOMMENDATION 10

**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.**

#### 6. Will these proposals withstand a challenge under section 15(1) of the Canadian Charter of Rights and Freedoms?

All legislation, including the Intestate Succession Act, must conform to the principles of the Canadian Charter of Rights and Freedoms ("Charter"). In this part, we examine whether our proposals concerning cohabitants would offend the equality provisions of section 15(1) of the Charter. To accomplish this task, we must summarize the decision of the Supreme Court of Canada in *Miron* v. *Trudel*,[236] examine its significance and then determine if our proposals concerning cohabitants and the Intestate Succession Act would withstand a challenge of the type brought in *Miron* v. *Trudel*. Refer to pages 96 to 111 for the summary of the decision, pages 111 to 116 for the significance of the decision, and pages 116 to 119 for a discussion of whether our proposals would withstand a challenge under section 15(1) of the Charter.

##### *a. Miron v. Trudel*

*Miron* v. *Trudel* is the first case heard by the Supreme Court of Canada in which cohabitants argued that they were being denied equal protection of the law because they did not receive the same rights as those extended to married persons. This decision determines when, if ever, a legislature can deny cohabitants in marriage-like relationships rights that are given to

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[236] *Supra*, note 216.

married persons. It has the potential to significantly expand the rights now extended to cohabitants.

Members of the court were deeply divided in opinion in respect of the issues raised in this case, and this resulted in three written judgments. McLachlin J. wrote a judgment, which was agreed with by Sopinka, Cory and Iacobucci JJ. L'Heureux-Dubé J. wrote for herself. Although her judgment is unique in certain aspects, it generally adopts the approach of McLachlin J. The result is a majority position consisting of 5 judges. Gonthier J. wrote the dissenting judgment, which is supported by Major, Forest and Lamer JJ.

The majority and minority judgments differ on three key points: the approach to section 15(1) of the Charter, the significance of the decision not to marry, and the characterization of the purpose served by the legislation. Since there is a wide chasm between the various approaches to section 15(1) of the Charter, it is useful first to summarize the principles adopted in each judgment in respect of this section and then to discuss the actual analysis undertaken in each judgment. This technique will reveal the majority decision on each issue and the differences between the two (and sometimes three) approaches. Note the difference of opinion as to whether marriage is a matter of choice and whether the factor of choice justifies different treatment of married persons and cohabitants.

### I. THE FACTS

John Miron and Jocelyn Valliere had cohabited since 1983 and had two children of the relationship. They were not married, although the family functioned as an economic unit. In 1987, John Miron was injured in a motor vehicle accident while a passenger in a vehicle. The owner of the vehicle and the driver of the vehicle were not insured. John Miron made a claim under the automobile insurance policy of Jocelyn Valliere. That policy gave accident benefits and uninsured motorist coverage to the spouse of the insured. The insurance company denied coverage on the basis that John Miron was not married to Jocelyn Valliere and, therefore, he was not a spouse.

The Insurance Act (Ontario) and regulations enacted thereunder establish the terms of the Ontario Standard Automobile Policy. Jocelyn Valliere's policy was of this type. Therefore, the scope of the benefits provided by the policy comes within the operation of the Charter.

### II. RELEVANT CHARTER PROVISIONS

The equality provisions are conferred in section 15(1) of the Canadian Charter of Rights and Freedoms, which reads as follows:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The equality provisions, like all other rights protected by the Charter, are subject to section 1 of the Charter. Section 1 reads as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

### III. THE ISSUES

The first issue was whether "spouse" as used in the Insurance Act (Ontario) and the concomitant insurance policy included a common-law spouse. McLachlin J. and Gonthier J. concluded that in this statute "spouse" included married persons only.[237] The legislative history showed that when the Ontario Legislature wanted to extend certain insurance coverage to common-law spouses it would amend the definition of spouse. Since this was not done until 1990 for the type of coverage sought in this case, the court concluded that in 1987 spouse meant a married person.

The second issue was whether "the limitation of benefits to married persons violates the equality provisions of the Charter"?[238] In determining this issue, the court addressed the following sub-issues:

- What is the test for violation of section 15(1)?
- How does relevancy relate to a section 15(1) analysis?
- Is marital status an analogous ground?
- Is the limitation of benefits justifiable under section 1 of the Charter?

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[237] Both McLachlin and Gonthier came to the same conclusion on this issue. L'Heureux-Dubé assumed, without deciding, that this was the case.

[238] Miron v. Trudel, *supra*, note 216 at para. 121.

### IV. THE DIFFERING APPROACHES TO SECTION 15(1) OF THE CHARTER

Both Gonthier J. and McLachlin J. follow the approach to section 15(1) set out in *Andrews* v. *Law Society of British Columbia*[239] but differ as to how that approach should develop. L'Heureux-Dubé J. advocates a new approach to section 15(1).

In *Andrews*, the Supreme Court of Canada held that a claimant must establish the following factors before a legislative distinction will be found to contravene section 15(1) of the *Charter*:

- The legislation draws a distinction between the claimant and others.
- The distinction results in disadvantage.
  - Does the impugned law impose a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others? or
  - Does it deny them a benefit which it grants others?
- The distinction is based on a personal characteristic listed in s. 15(1) or on an analogous characteristic.

The key issue of disagreement between Gonthier J. and McLachlin J. is how the issue of relevancy affects the third step in the analysis. McLachlin J. held that a distinction made on the basis of an enumerated or analogous characteristic would be discriminatory, except in rare cases.[240] The fact that the distinction was relevant to the purpose of the legislation did not rebut a finding of discrimination.[241] Relevancy should be examined under section 1 of the Charter when the court determines whether the distinction is justifiable.[242]

Gonthier J. disagrees with this position. In his view, the *Andrews* approach does not make every distinction made on the basis of enumerated or analogous grounds discriminatory. Only distinctions based on an irrelevant personal characteristic listed in section 15(1) or one analogous thereto are

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[239] [1989] 1 S.C.R. 143.

[240] *Miron* v. *Trudel*, *supra*, note 216 at para. 132.

[241] *Ibid.* at para. 133.

[242] *Ibid.* at para. 137-38.

discriminatory.[243] A distinction that reflects an objective physical or biological reality, or fundamental value, is not discriminatory because it is not based on an irrelevant personal characteristic.[244] In his opinion:[245]

> . . . marital status is an example of a ground which, while analogous in certain respects, cannot be so with respect to those attributes and effects which serve to define marriage itself, which include the rights and obligations necessarily incident to the institution, and distinguish it from a state of absence of marriage. This is so, as marriage itself is not discriminatory as it is a matter of choice and a basic institution of society.

In her judgment, L'Heureux-Dubé abandoned the enumerated or analogous grounds approach to discrimination established in step three of *Andrews*, which is discussed above. She developed a new method of determining whether a legislative distinction is discriminatory. Using this method, a distinction is discriminatory under section 15(1) "where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration."[246] The discriminatory impact of legislation can only be assessed by looking to the nature of both the interest and group adversely affected.[247]

Although she does not discuss the relevancy issue in *Miron*, she did address the issue in *Egan and Nesbit* v. *Canada*.[248] It that case, she rejected Gonthier J.'s approach.

### V. COMPARISON OF THE JUDGMENTS GIVEN IN THIS CASE

#### *A) McLachlin, Sopinka, Cory, Iacobucci JJ.*

*Section 15(1) of the Charter*. McLachlin J. held that the legislation-based Ontario standard automobile policy denied to a person in an unmarried relationship benefits granted a similar person in a married relationship.

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[243] *Ibid*. at paras 19 and 23. See also the judgment of La Forest J. in *Egan and Nesbit* v. *Canada*, [1995] 2 S.C.R. 573, with which Gonthier J. concurs.

[244] *Ibid*. at paras 24-5.

[245] *Ibid*. at para. 26.

[246] *Ibid*. at para. 90.

[247] *Ibid*. at para 90.

[248] *Supra*, note 243.

She used the following test to determine whether marital status was an analogous ground under section 15(1) of the Charter. Can the characteristic serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition? May it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?

For the following reasons, McLachlin J. concluded that marital status is an analogous ground within section 15(1):

- Marital status touches the essential dignity and worth of individuals because it touches on the individual's freedom to live life with whom one chooses and in the fashion one chooses.
- Unmarried persons have historically been a disadvantaged group, although the disadvantage has, in recent years, greatly diminished.
- Marital status is not always a matter of choice. Marital status may lie beyond the individual's effective control because of the reluctance of one's partner to marry or because of financial, religious or social constraints.
- Discrimination on ground of marital status is akin to discrimination on the ground of religion, to the extent it stems from moral disapproval of all sexual unions except those sanctioned by church and state.
- Legislators and jurists throughout the country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current societal values or reality.

The next question was whether in this case the distinction made on the basis of marriage was discriminatory. The insurance company argued that marriage is a good and honourable state and, therefore, distinguishing on basis of marriage cannot be discriminatory. McLachlin J. rejected this argument. "The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance... [I]t is not anti-marriage to accord equal benefit of the law to non-traditional couples."[249]

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[249] *Miron v. Trudel, supra*, note 216 at para. 158.

She judged marital status as something akin to citizenship. While both define important relationships that are good for society, they may be used inappropriately. She held:[250]

> Similarly marriage, however sacred, may be inappropriately used to bar individuals not belonging to the married group from the protection of benefit of laws to which the status of legal marriage has little real relevance. This potential for denial of benefit based on stereotypical characteristics attributed (or not attributed) to a group rather than on the basis of characteristics of the individual makes marriage, like citizenship, an analogous ground.

She concluded that the legislation was discriminatory for the following reasons. There has been a denial of benefits to unmarried persons given to married persons in a similar relationship. Marital status is an analogous ground under section 15(1). This is not one of the exceptional cases in which a distinction drawn on the basis of an enumerated or analogous ground does NOT fall within the anti-discrimination guarantee of the Charter.

*Justification under Section 1 of the Charter*. To determine if the impugned distinction is "demonstrably justified in a free and democratic society," the Court uses a two-step analysis.[251] For the first step, it ascertains and examines the goal of the legislation to see if it is of pressing and substantial importance. McLachlin J. held that the goal of the legislation was to sustain families when one of their members is injured in a motor vehicle accident. The goal is to reduce the economic dislocation and hardship that can arise when an adult partner in a family unit is injured. She judged this goal to be of pressing and substantial importance.

For the second step, the court then carries out a proportionality analysis to balance the interest of society with those of individuals and groups. It is a three part analysis.

a) First, the court examines the connection between the goal and the discriminatory distinction and determines if it is rational.

b) Then, it asks whether the law impairs the right no more than is necessary to accomplish its objective?

c) If conditions (a) and (b) are met, the court weighs whether the effect of discrimination is proportionate to the benefit thereby achieved.

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[250] *Ibid*. at para. 159.

[251] *Ibid*. at para. 163.

She begins by analyzing how relevant the criteria must be to the legislative goal. Of necessity, laws use group criteria. Legislators must choose criteria that while serving the purpose of the legislation, minimize the existence of minor anomalies due to the variation of individuals within a group. The standard is one of reasonableness, not perfection. She wrote:[252]

> Provided the group marker chosen by the state is relevant to the legislative goal, the existence of minor anomalies due to the variation of individuals within the group will not render the marker violative. On the other hand, if the number of anomalies is so high that it significantly undermines the relevance of the group marker, or if more reasonable markers are available, the law may be invalid because it impairs the rights more than reasonably necessary to achieve the legislative goal.

The insurance company argued that marriage status is an indicator of stability which goes to the economic interdependence of the family unit and, therefore, is a reasonable marker given the goal of the legislation. McLachlin J. noted that to make this claim, the insurance company must show that stable, and thus economically interdependent, family units typically involve married partners, and conversely, that unmarried partners in stable relationships are but a minor anomaly. The insurance company would also has to prove that a better marker is unavailable. She concluded the insurance company did not establish either point.

McLachlin J. held that in this case marital status is not a reasonably relevant marker. First, the legislature failed to focus on which family units were so financially interdependent and stable as to warrant provision of the accident benefits in question. Instead, it wrongly focused on marital equivalence instead of trying to define the underlying functional values of the legislation. Second, alternative markers substantially less invasive of the Charter are available. It follows that there is no rational connection between the distinction and the goal of the legislation, and the distinction was not justifiable in a free and democratic society.

In determining the remedy, McLachlin J. decided to read in the definition of spouse adopted in 1990 by Ontario legislature. In effect, she made that amendment retroactive. By this definition, "spouse" includes:

- married persons

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[252] *Ibid.* at para. 167.

- unmarried persons who have cohabited for 3 years in a conjugal relationship
- unmarried persons who have cohabited in a relationship of some permanence and who have children.

She sent the matter back to trial to determine if Mr. Miron and Ms. Valliere fall within this definition of "spouse".

#### B) L'HEUREUX-DUBÉ

*Section 15(1) of the Charter.* Under her approach to section 15(1), the first step is to determine whether a distinction is made between married couples and unmarried couples. She assumed, but did not decide, that "spouse" as used in insurance policy is limited to married couples. Working under this assumption, she concluded that the legislation made a distinction between married couples and unmarried couples.

Before proceeding to the second step of her analysis she examined who should be compared for the purposes of deciding whether an equality right has been denied. "Comparison is only a fruitful exercise when carried out between groups that possess sufficient analogous qualities to make the exercise of comparison meaningful in respect of the distinction being examined".[253] She held that in this case the only useful comparison is between married persons and unmarried persons who are in a relationship analogous to marriage (ie. of some degree of publicly acknowledged permanence and interdependence). She did not want to define what constitutes a relationship analogous to marriage, but the relationship of John Miron and Jocelyn Valliere fall within that group.[254] The couple had lived together for 4 years and there were two children of the relationship.[255]

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[253] *Ibid.* at para. 88.

[254] *Ibid.* at para. 89.

[255] Contrast this to McLachlin's decision. McLachlin:
- compares married couples to "unmarried couples", "non-traditional couples", and "unmarried relationships",
- emphasizes the need to determine those family units which are so financially interdependent and stable to warrant provision of accident benefits, and
- indicated the Legislature erred when it focuses on marriage or marriage-like relationships. Instead, she said the Legislature should determine who should receive the benefits "on a basis that is relevant to the goal or functional values underlying the legislation" (para. 170).

The second step of her analysis is to determine whether the distinction withholds or limits access to opportunities, benefits and advantages available to others. She held that the Ontario no-fault accident benefits prescribed by legislation denied the couple equal benefit of the law on the basis that they are in a relationship analogous to marriage.

In determining whether the distinction was discriminatory, she focused on the group adversely affected by the distinction as well as on the nature of the interest affected. In evaluating the nature of the group affected by the impugned distinction, she looked at many of the criteria traditionally employed in the *Andrews* analysis to determine when a characteristic is an analogous ground. She held as follows:

- Unmarried couples are a disadvantaged group who have suffered, and continue to suffer, some disadvantage, disapproval and marginalization in society.
- They do NOT represent a discrete and insular minority or a politically powerless or vulnerable group.
- Marital status is a fundamental attribute of "personhood" or "humanness".

She disagreed with the dissent's view that marital status is a matter of personal choice and, therefore, is not sufficiently personal to be a basis for discrimination. In her opinion, the decision to marry or not to marry is one of the most personal decisions people make. All people living outside marriage are NOT exercising their free choice. To say that all people who live outside marriage are exercising their own free choice ignores those couples in which one person wants to marry and the other does not want to marry. In these relationships "the flip-side of one person's autonomy is often another's exploitation".[256]

She rejected the notion that unfettered choice is the only framework in which to analyze unmarried cohabitation. If the continuing individual autonomy was the only goal, then all the legislative amendments and development in trust law relating to unmarried couples would not have been necessary. She placed the obligation to act on those who wish to avoid the rights and obligations of marriage. They are free to do so by resorting to a

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[256] *Miron* v. *Trudel, supra*, note 216 at para. 96.

domestic contract. Also, one cannot assume that the reasons one starts to live together are necessarily the same reason one continues to live together. Although many couples initially cohabit as part of a trial relationship and may, therefore, initially agree not to marry, such mutual agreement may diminish over time as the length of cohabitation increases or after the birth of a child.

She then examined the nature of the interest affected by the impugned distinction. "The affected interest is the protection of family units from potentially disastrous financial consequences due to the injury of one of their members".[257] Protection of family is one of the most important interests in society. It is not sufficient to say John Miron can look to the Motor Vehicles Accident Claims Act. This process is more expensive and more time consuming.

The fact that the legislation ignores all couples in a relationship analogous to marriage sends the message that society does not consider this type of relationship worthy of equal protection.

She then assessed the interest affected and the nature of the group in light of each other and determines that the distinction is discriminatory. She held:[258]

> . . . I believe the impugned interest to be sufficiently pressing, the possible economic consequences to be sufficiently severe, and the manner of exclusion to be sufficiently complete to constitute a significant, though not overwhelming, discriminatory potential. I also concluded earlier that the group affected by the distinction (i.e. unmarried persons in a relationship analogous to marriage) is somewhat vulnerable and that, in a significant number of cases, persons within this group do not have meaningful control over their circumstances. I noted that the consequences of excluding unmarried persons from the benefits or protection of the law will generally be experienced more severely by the dependent spouse, who is still all to often female. Viewing all of these factors together, I conclude that the impugned distinction does, on the whole, have an impact that is discriminatory within the sense of s. 15 of the *Charter*. The impugned distinction is reasonably capable of either promoting or perpetuating a view amongst persons in relationships analogous to marriage that they are less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration. On this basis, I find the impugned distinction to be in violation of s.15(1) of the *Charter*.

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[257] *Ibid.* at para. 104.

[258] *Ibid.* at para. 107.

*Justification under section 1 of the Charter.* L'Heureux-Dubé J. applied the analysis set out by McLachlin J. in respect of section 1 of the Charter. She agreed with McLachlin J. as to the goal of the no-fault accident benefits. The object of these benefits is to protect stable family units by insuring against the economic consequences that flow from injury of one family member. Promotion of marriage is not the fundamental purpose of the legislation, but it may be an incidental effect of legislation.

She held that the government had not demonstrated that the impugned distinction is rationally connected to the objective of the legislation.[259] She noted that only one government intervenor had submitted argument on this point and, therefore, she was in the uncomfortable position of speculating as to the arguments that might have been raised.

She thought that one could argue the rational connection requirement is fulfilled because it is rational for a legislature to believe that marriages are longer lasting and more likely to engender relationships of interdependence than common-law relationships. Yet, no empirical evidence was introduced on this point.

Another possible argument was that the distinction related to a right or obligation flowing from a particular legal status. "In *Egan*, I also noted that unless the distinction relates to a right or obligation flowing from a particular legal status, it would be difficult to envision that the distinction is rationally connected to the legislative objective".[260]

If Ontario did NOT impose a support obligation upon unmarried couples, it could be argued that the standard automobile insurance policy is rationally connected to the objective of the legislation because the exclusion relates to absence of an obligation of mutual support between unmarried individuals. Yet, since Ontario does impose a support obligation, this argument cannot be made. It is not rational to exclude unmarried individuals who are subject to support obligations from legislation that is inextricably related to mutual support obligation and to the relationship of interdependence that gives rise to that obligation.

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[259] *Ibid.* at para. 115.

[260] *Ibid.* at para. 113.

She held that even if the rational connection test were found to be satisfied, the impugned distinction would not pass the minimal impairment test. Married persons, the unit the legislation is designed to serve, is under-inclusive for the purpose of the legislation. Married persons is not the only unit available. The unit could be defined in terms of length of relationship or the existence of children. She held:[261]

> Although deference should be had with respect to policy choices made by the legislature as to what duration of cohabitation is necessary to define such a relationship, courts should not feel obliged to be as deferential when the legislature has simply excluded other possibilities altogether, unless the government can demonstrate that this exclusion is, itself, the product of a reasonable attempt to balance competing social science or policy interests. In the present case, the government has once again not overcome that burden.

She agreed with McLachlin that the appropriate remedy is to read in the definition of spouse adopted by the Ontario legislature in 1990.

#### *c) Gonthier, Major, La Forest, Lamer JJ.*

The appellants argued that they were the same as married couples and should be treated the same. Therefore, before turning to section 15(1) of the Charter, Gonthier J. examined the concept of marriage and its place in society and some of the implications of the contractual basis of marriage. He reviewed the existing law that holds "marriage is both a basic social institution and a fundamental right which states can legitimately legislate to foster".[262] He then discussed the contractual nature of marriage. Marital status in Canadian society can only be acquired by the expression of the individual's personal, free choice, regardless of the reason for which status is assumed. Marriage rests upon a contractual basis to which the law attaches certain rights and obligations. While one may speculate that in many instances only one partner in a cohabiting couple may not wish to marry, this does not change the fact that the decision to marry is a matter of choice. "The decision to marry or not is, admittedly, a joint choice, but a choice nonetheless. Simply because one party prefers not to marry does not entitle a couple to all the benefits which the legislature uniquely attaches to marriage."[263]

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

[262] *Ibid.* at para. 45.

[263] *Ibid.* at para. 48.

In his opinion, the contractual nature of marriage and the freedom to choose to live within or without marriage dictated that certain distinctions made on the basis of marital status could not be discriminatory. "[W]here individuals choose not to marry, it would undermine the choice they have made if the state were to impose upon them the same burdens and benefits which it imposes upon married persons".[264] The reverse of this position is that people who choose not to marry cannot claim discrimination solely on the basis that their rights and obligations differ from those who have acquired such rights and obligations through the contract of marriage.[265] "[T]he attributes of marriage cannot give rise to discrimination as against those who are not married."[266]

*Section 15(1) of the Charter*. Gonthier J. then conducts his version of the section 15(1) analysis. Under this analysis, the first step is to determine whether the legislation makes a distinction on the basis of marital status. He concluded that it did because the legislation and corresponding automobile insurance policy treats married and unmarried couples differently. It gives benefits to spouses and not unmarried couples.

The next step is to determine whether prejudice results from the legislative distinction. Although the insurance policy does provide injury and income benefits to married couples and not unmarried couples, this distinction is not prejudicial when considered in the larger context of the rights and obligations attached to marriage. Unmarried couples do not have all the benefits of marriage, nor do they have the burdens of marriage. Their overall position is NOT one of disadvantage.

Yet, Gonthier J. does not dispose of action on this basis. He proceeds further and examines whether the distinction is made on the basis of an irrelevant personal characteristic listed in section 15(1) or one analogous thereto. To answer this question he begins by examining whether marital status is a personal characteristic which qualifies as an analogous ground. The following factors are considered.

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[264] *Ibid*. at para. 46.

[265] *Ibid*. at para 49.

[266] *Ibid*. at para 49.

- Marital status has several unique characteristics that distinguish it from the grounds enumerated in section 15(1) of Charter, namely:
  - marriage rests upon a consensual and contractual basis.
  - it is a status to which the Legislature, as a reflection of its social policy, attaches a bundle of rights and obligations. In none of the enumerated grounds do we find this characteristic.
  - marriage must be entered into freely and voluntarily, which is not the same for enumerated grounds such as sex or race.
- Presently, unmarried couples do not constitute a distinct group suffering from stereotypes and prejudices, although they have been subject to such prejudices in the past. The fostering of marriage as a social institution does not stigmatize unmarried couples nor subject them to stereotypes.
- Marital status should not be recognized as an analogous ground of discrimination in section 15(1) of the Charter just because provincial human rights legislation recognize marital status as a prohibited ground of discrimination. The human rights codes apply to the conduct of individuals; the Charter applies to conduct of the state. The two are different and caution should be used when importing grounds from human rights Code into Charter.

He concluded that marital status may be an analogous ground where it is an irrelevant basis of distinction but will not be an analogous ground where the distinction is related to the existence of marriage.[267]

He then examined whether the distinction made in the legislation and insurance policy is relevant to the institution of marriage. This involves an examination of the nature of benefits created by the legislation. In his opinion:[268]

> The benefits contained in the insurance policy fall within the scope of a mutual support obligation arising from marriage since they compensate for physical injury (medical and rehabilitation benefits) and material loss (income replacement benefits); without the insurance policy, a married spouse would have to provide this kind of support to his or her injured spouse. While the insurance policy clearly is concerned with economic interdependence, such interdependence is only relevant in so far as it relates to the institution of marriage.

Gonthier J. disagreed with McLachlin J.'s description of the functional value of the legislation. He held that there was no evidence to support a

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[267] *Ibid.* at paras. 61-2.

[268] *Ibid.* at para. 69.

determination that the functional value is the provision of support to families when one member is incapable of contributing to the family unit.

He also rejected the argument that economic interdependence, without further qualification, is a relevant consideration in concluding that John Miron should be covered under the insurance policy. If interdependence is the only relevant factor in determining the scope of policy coverage required by the Charter, then even those not cohabiting for the required time or those who ceased cohabiting could claim benefits under the Insurance Act.

The appellants argued that they were the same as a married couple and, therefore, should be treated the same. They also argued that Ontario Family Law Act treats married and unmarried individuals in the same manner with respect to support obligations. They, therefore, should have access to the means allowing them to fulfil their duty.

Gonthier J. rejected these arguments. As to first argument, unmarried couples are not in a situation identical to married couples in respect of support obligations. As to the second argument, just because the Family Law Act imposes support obligations in limited circumstances on some unmarried couples does not mean section 15(1) of Charter requires that all the provisions of the Insurance Act cover common-law spouses. Such an interpretation would give an advantage to unmarried couples over married spouses since they are not burdened with the same obligations.

The final step in his analysis is to determine the relevancy of the distinction drawn by the insurance legislation in respect to its functional values. He held:[269]

> ... the Legislature was primarily concerned with defining certain benefits attached to marriage. In some cases, these benefits are extended to unmarried couples, but that does not change the essential character of the benefits, which is to provide support for marital relationships. Indeed, as the *amicus curiae* emphasized in relation to the amendments of this legislation since 1971, the Legislator's search "was directed towards defining a 'marriage-like' conjugal relationship". Thus, the functional value of the benefits is not to provide support for <u>all</u> family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married, or, as in subsequent legislation, to assist certain prescribed couples who are in a "marriage-like relationship".

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[269] *Ibid*. at paras. 72 and 73.

> Furthermore, in my opinion it is clearly within the range of legitimate social policy for the Legislature to define the scope of a "marriage-like relationship". In other words, the functional value identified in this legislation, namely the support of marriage, is not itself discriminatory. Distinctions as to the scope of the institution and the benefits which attach thereto are properly the objects of legislative definition; assessing the legitimacy of those definitions must necessarily take into account the fundamental position of the institution of marriage in our society.

He also noted that there is no obligation on Legislature to extend all the attributes of marriage to unmarried couples. The Legislature may, as a matter of social policy, choose whether and under what circumstances to extend some or all of the attributes of marriage to unmarried couples without running afoul of section 15(1) of Charter. To impose all the rights and obligations of marriage on unmarried couples would interfere with an individual's freedom to choose to enter marriage or not.

"Barring evidence of a change in these values by a clear consensus that there should be a constitutional constraint on the powers of the state to legislate in relation to marriage, the matter must remain within the scope of legitimate legislative action."[270]

He concluded as follows:[271]

> ... the benefits the appellants claim under the insurance policy are most appropriately characterized as relating to the support obligations existing between married persons. In that context, marital status cannot be a ground of discrimination since the distinction pertains to an inherent aspect of marriage, namely support obligations, and the function of the impugned provisions of this legislation is relevant to that status. I would dismiss the appeal with costs.

***b. Significance of this decision***

The analysis of McLachlin J. suggests that legislation that gives benefits to married persons and NOT to unmarried persons in similar relationships is discriminatory. The legislation infringes section 15(1) of the Charter and will stand only if it is justifiable under section 1 of the Charter. The fact that couples choose or do not choose to marry does not justify the distinction.

The analysis of L'Heureux-Dubé suggests a benefit given to married persons and not unmarried persons in similar relationships will be

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[270] *Ibid.* at para. 77.

[271] *Ibid.* at para. 80.

discriminatory and offend section 15(1) of the Charter if a court finds that the benefit to be sufficiently pressing, the possible economic consequences to be sufficiently severe and the manner of exclusion to be sufficiently complete. Such a distinction will only stand if it is justifiable under section 1 of the Charter. The fact that couples choose or do not choose to marry does not justify the distinction.

Although these two approaches are different, in the context of unmarried couples they will likely give the same results because both McLachlin J. and L'Heureux-Dubé J. view cohabitants in the same light. When examining the nature of unmarried couples, L'Heureux-Dubé looked at all of the factors McLachlin J. considered when determining if marital status is an analogous ground and reached the same conclusions. As to what is discriminatory, McLachlin J. finds all distinctions made on the basis of marital status to be discriminatory, with rare exceptions. L'Heureux-Dubé would consider the nature of the group affected and nature of the right in light of each other. Yet, it is very unlikely that result will be much different given their similar approaches to the nature of unmarried couples. We, therefore, conclude that according to the majority, distinctions made on the basis of marital status will be discriminatory in all but the rare case.

The key question will be whether the distinction can be justified under section 1 of the Charter. In the analysis conducted under section 1, the pivotal issue will be the characterization of the functional value served by the legislation. Does the legislation create protection for family units or does it define the rights and obligations associated with marriage? If the purpose of the legislation is to protect economically interdependent family units or members of such a unit, it is discriminatory to exclude cohabitants in marriage-like relationships because the choice not to marry does not justify this discrimination. A better marker is available and, therefore, the discrimination is not justifiable. If the purpose of the legislation is to define the rights and obligations associated with marriage, the discrimination will likely be "reasonably justifiable" because marriage is a fundamental value of our society which government can promote by legislation.

Determining the functional value of legislation is itself a policy game. Little help can come from a historical review because much of today's family and succession law comes from legislative reform introduced when family and

marriage were synonymous.[272] The question becomes what should be the functional value of the legislation in today's society, a society in which cohabitation outside of marriage is increasingly popular. It is at this stage that policy considerations play their role. There is a risk that the policy debate that should take place may be hidden under the guise of determination of the functional value of the legislation. Those who do not see cohabitation as a threat to the institution of marriage will be more likely to view family and succession law as protecting family units. Those who are concerned about freedom of choice and the possibility that assimilation of cohabitation and marriage may discourage people from marrying, will be more likely to see the legislation as defining rights and obligations of marriage. This may account for the different characterization of the function value of the no-fault accident benefits seen in *Miron* v. *Trudel*.

Changing social norms within society will have the greatest effect on determination of functional value of legislation. Historically, if sufficient numbers of people have lived outside marriage, society has redefined marriage to include them.[273] This tendency is understandable for several reasons. First, in our society, the family unit is expected to support its members and where it is unable to do this the task falls to the state. Where the number of family units who fall outside support obligations becomes large, this can create a burden that is too much for the state. Second, the state does not wish to encourage large numbers of its citizens to live outside the protection of the law. This breeds disrespect for the law. Third, if ideas of fairness as between family members underpin certain areas of the law, there seems no justification (except, possibly, freedom of choice and religious doctrine) to exclude certain families from these principles. The question is whether our society has reached this point.

Both McLachlin J. and L'Heureux-Dubé J. proceed on the basis that present day society has overrun policies that were designed to serve a time

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[272] The Intestate Succession Act is patterned after English legislation enacted in the 1600s. The Fatal Accidents Act is patterned after Lord Campbell's Act, which was introduced in England in the late 1800s.

[273] At one time, English law only recognized marriages performed by the Church of England. Since many English citizens rejected the authority of this church and continued to be married in other churches, the marriage legislation was eventually amended to include ceremonies performed in other churches. For an interesting history of marriage in England see Parker, *supra*, note 37.

when family was synonymous with marriage. In their opinion, too many family units live outside of the protection and benefit of the law. The problem is that they cite no statistics to support their position and the statistics available to us suggest otherwise.[274] Those statistics suggest that for many Canadians, cohabitation may replace marriage in the early years of conjugal life, but only a small minority of those who cohabit actually reject marriage. Cohabitation usually leads quickly to either marriage or separation, which is an indication of a trial marriage. Long-term cohabitants are the exception. Nonetheless, the trend is towards increasing numbers of Canadians in all age groups cohabiting outside marriage.

Having stated this reservation, we are still of the opinion that *Miron* v. *Trudel*[275] will bring about significant change in the law relating to cohabitants. Although McLachlin did say that it was possible to make a distinction on the basis of marital status that would withstand a Charter challenge,[276] the task will be very difficult. The reason for this is simple. Most family and succession law has been designed to protect the husband and wife from the financial hardships that flow from the breakdown of the relationship[277] or the injury[278] or death of either the husband or the wife.[279] The same problems will arise for the same reasons in unmarried cohabitation which is a relationship of "publicly acknowledged permanence and interdependence" (ie. marriage-like). As society's concept of family expands, it is more likely that Canadian courts will view family and succession laws as serving the protection of family, as opposed to defining the institution of marriage. Since a more inclusive "marker" is always available to describe marriage-like relationships, marriage will always be an inappropriate

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[274] See Chapter 3 at 29.

[275] *Supra*, note 216.

[276] At para. 159, McLachlin J. stated:
Marriage and citizenship may be used as the basis to exclude people from protections and benefits conferred by law, provided the state can demonstrate under s. 1 that they are truly relevant to the goal and values underlying the legislative provision in question.

[277] See, for example, the Matrimonial Property Act and the Divorce Act (especially the spousal support awards).

[278] See, for example, the no-fault accident benefits and the Fatal Accidents Act.

[279] See, for example, the Intestate Succession Act and the Family Relief Act.

marker.[280] This may come close to redefining marriage. All rights that are now or hereafter given to married persons must be extended to unmarried persons who are in similar relationships.

Are we overstating the significance of this case? Time will tell. The facts of *Miron* v. *Trudel* provided some comfort to the Court—a stable cohabitation relationship with children. That backdrop may temper the significance of some of the comments found in the judgments. Having said this, it must be pointed out that the Supreme Court of Canada has been very consistent in its view that the law must be changed to assist cohabitants who live in marriage-like relationships. This approach is seen in its decisions concerning the development of constructive trust and in *Miron* v. *Trudel* itself.

The impact of this decision will be more immediate in those provinces that impose support obligations between cohabitants. In those provinces, the exclusion of cohabitants from the wrongful death legislation and the family relief legislation is likely to offend section 15(1) of the Charter. Both types of legislation are designed to sustain families when one of their members is dead. Both are designed to ensure that existing support obligations can be fulfilled after death.

Can an argument be made that the result should be different in those provinces that do not impose support obligations upon cohabitants? Perhaps. But the next question is why a province would not impose support obligations upon such relationships. Once the element of choice is rejected as a permissable ground of distinction, there seems little justification for treating similar couples differently on the basis of marital status. Why should adult members of a family unit who live outside marriage not be required to support each other upon the breakdown of the relationship? Does Alberta law discriminate on the basis of marital status? Can the Alberta law be challenged on this basis?

Determining whether the Matrimonial Property Act discriminates against cohabitants is more difficult. The Ontario Law Reform Commission thinks it is discriminatory to omit cohabitants from matrimonial property

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[280] Now the one exception to this will be the Divorce Act. By definition it cannot apply to unmarried couples because there is no marriage to dissolve.

laws of Ontario.[281] Those who view the development of constructive trust and unjust enrichment as judicial means of creating matrimonial property division for cohabitants will find it difficult to disagree with this position.

In the next part, we will examine whether our proposed Intestate Succession Act denies cohabitants equal protection and equal benefit of the law.

### *c. Analysis*

#### I. IS THE DISTINCTION DISCRIMINATORY?

Before one can determine whether a distinction is discriminatory so as to offend section 15(1), the nature of the distinction being made must be identified. In the case of heterosexual couples, the proposed intestate succession legislation assumes that the majority of spouses who have not suffered a marital breakdown and a majority of cohabitants in relationships with a substantial degree of publicly acknowledged permanence and interdependence would want the surviving spouse or cohabitant to receive all or a generous portion of the estate. The resulting distribution scheme gives preference to the surviving spouse or cohabitant over children, parents, siblings and other relatives.

In our opinion, this distinction reflects the commitment to permanence and stability experienced in such relationships, which itself shapes the intention of intestates in these circumstances. The distinction is not made on the basis of marital status because not all married persons will share in the estate of their deceased spouse and not all cohabitants will be excluded from sharing in the estate of their deceased cohabitant. A surviving spouse will be deemed to predecease the intestate in two situations. First, where the spouses had separated and either spouse had commenced an application for divorce or for the division of matrimonial property before death of the intestate. Second, where before the death of the intestate, they had divided their property in a manner intended to finalize their affairs in recognition of marriage breakdown. A surviving cohabitant will not share in the intestate's estate where the relationship: (1) had no commitment to permanence, (2) was in the early stages of a trial marriage, or (3) was a formerly committed

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[281] See Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993).

relationship that had broken down as witnessed by the separation of the parties.

In the final analysis, the proposed legislation makes a distinction vis a vis heterosexual couples on the basis of permanence and stability within a relationship. It does not distinguish on the basis of marital status. Therefore, under McLachlin J.'s analysis, it should not be discriminatory because a distinction is not made on the basis of an enumerated or analogous ground under section 15(1) of the Charter. Moreover, it should not be discriminatory under L'Heureux-Dubé J.'s analysis because by her analysis a comparison can only be made between married persons and unmarried persons in similar relationships. Our proposals treat both groups in the same manner.

#### II. IF SO, IS IT JUSTIFIABLE UNDER SECTION 1 OF CHARTER?

If a court should find, however, that the proposed Act makes a distinction on the basis of marital status and that the distinction is discriminatory, the question becomes whether it is justifiable under section 1 of the Charter. Under section 1, the first step is to ask whether the goal of the legislation is of pressing and substantial importance. In our opinion, the goal of the Intestate Succession Act is to distribute the property of persons who die without will. The distribution scheme should reflect the intentions of the majority of intestates who find themselves in certain situations. This goal is of pressing and substantial importance.

The next step is a proportionality analysis, which itself involves three stages. First, is there a rational connection between the goal of the legislation and the discriminatory distinction? In *Miron* v. *Trudel*,[282] McLachlin J. gave some insight as to how relevant a criterion must be in respect of the legislative goal. As she explains,[283] the law must of necessity use group criteria. The criteria chosen must serve the purpose of the legislation and at the same time minimize the existence of minor anomalies due to the variation of individuals within a group. The standard is one of reasonableness, not perfection.[284] "[A] good marker excludes most people who

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[282] *Supra*, note 216.

[283] *Ibid.* at para. 167.

[284] *Ibid.* at para. 167.

should be excluded given the goal of the legislation, and only a few who should not."[285]

In the context of intestacy, the goal of the legislation is to create a distribution scheme that reflects the intentions of the majority of intestates who find themselves in certain situations. We have empirical evidence and experience to help us judge how spouses wish to treat each other. We do not have such evidence or much experience as to the intentions of cohabitants. This forces us to judge intention from the conduct of cohabitants. We have assumed that the greater the degree of commitment between the individuals, the more likely they are to want to leave the surviving cohabitant all or a generous portion of their estate. The proposed definition strives to identify relationships outside marriage that have a substantial degree of commitment to permanence. Although it may exclude a few cohabitants who should not have been excluded, the definition properly excludes those cohabitants who would not want their surviving cohabitant to receive a generous portion of their estate. Into the latter category fall cohabitants in relationships of little commitment, cohabitants in the early stages of a trial marriage and cohabitants who have ended their relationship. We recognize that what begins as a trial marriage may change into something else over time. Nevertheless, it is highly unlikely that those experimenting with a relationship would in the early stages of the relationship want to trigger succession rights for the partner should one of them die. In our opinion, there is a rational connection between the goal of the legislation and the definition of cohabitants.

There are two other stages of the proportionality analysis. Does the law impair the equality rights no more than is necessary to accomplish this objective? Are the benefits achieved proportionate to the effect of the discrimination? In our opinion, both of these concerns are satisfied. The definition of cohabitant impairs the equality rights only so far as is necessary to ensure that temporary or experimental relationships do not trigger succession rights. This is required to accomplish the goal of the legislation. In addition, the benefits of ensuring that the Intestate Succession Act reflects the intention of all cohabitants, those in a relationship of permanence and

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[285] *Ibid.* at para. 167.

those in relationships that do not have a commitment to permanence, offsets the effect of any discrimination.

We conclude that even if the legislative definition is discriminatory, it is reasonably justifiable under section 1 of the Charter.

## D. Same-Sex Couples

In this report, we have discussed whether and when intestate succession legislation should apply in favour of the survivor of a heterosexual couple. The same questions, including similar Charter arguments,[286] could arise in connection with same-sex couples.

We do not propose to discuss the latter subject or to make recommendations with respect to it. We do not think that social policy is sufficiently well established for us to do so. We think that the subject should be left, at least for the time being, to the political process.

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[286] See *Egan and Nesbit* v. *Canada*, *supra*, note 243. In this case, the issue was whether it was discriminatory for the Old Age Security Act to exclude homosexual couples from spousal benefits awarded to married persons and common law spouses. Five members of the Court held that: sexual orientation was an analogous ground under section 15(1) of the Charter; the legislation made a distinction on that basis; the legislation was discriminatory. Four of these five judges held that the discrimination could not be justified under section 1 of the Charter. One thought that it could be justified and that Parliament should be given time to extend benefits to homosexual couples.

The remaining four judges also held that sexual orientation was an analogous ground under section 15(1) of the Charter. Yet, they saw the legislation as creating rights for married couples (or at least couples capable of bearing children) and, therefore, as not making a distinction on the basis of sexual orientation but on the basis of the social unit that has the unique ability to procreate children. Given the functional value of the legislation, the legislation can exclude everyone who is not a heterosexual couple capable of bearing children. Homosexuals cannot be distinguished from other members of the excluded group. The legislation is not discriminatory.

The result was that the legislation was upheld.

# CHAPTER 6. PROPOSALS FOR REFORM: PART II

## A. Issue of the Intestate

In this part, 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, the 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, 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. In this part, we examine how the estate should be distributed among the issue of the intestate.

### 1. Equal treatment of children

Studies undertaken in the late seventies revealed that the public wishes all children of an individual to be treated equally, regardless of age, sex or whether born within or without marriage.[287] This research prompted reform in many areas of the law, including succession law.

#### *a. Children born outside marriage*

The law regarding the rights of illegitimate children in the event of intestacy has undergone dramatic change in Canada since 1975. Many provinces have abolished the status of illegitimacy and treat all children alike. Alberta is the last province to undergo change, but late is still better than not at all. Although not abolishing the status of illegitimacy, Alberta has removed some of the disadvantages that were formerly associated with that status.

Historically, an illegitimate child was no one's child. This meant the child could not inherit from his or her biological parents and the parents could not inherit from the illegitimate child. In time, the various intestate succession statutes were amended so that the illegitimate child was treated as the legitimate child of the mother, but not the father.[288] Still later, the illegitimate child was given a prescribed right to share in the estate of his or

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[287] Illinois study, *supra*, note 80 at 737, Table 14; American study, *supra*, note 83, Table 20.

[288] See Intestate Succession Act, R.S.A. 1980, c. I-9, s. 13, which was repealed in 1991.

her father where the father had acknowledged the paternity of the illegitimate child.[289] But that did not work both ways. In *Pollock* v. *Marsden Kooler Transport Ltd.*,[290] it was held that the father was still not entitled to inherit from the illegitimate son because of section 17 of the Act.[291] The section provided that if an illegitimate child dies leaving no widow or issue, his estate should go to his mother, if living.

This treatment of illegitimate children continued in Alberta until 1991. As of November 1, 1991, "issue" is defined in the Intestate Succession Act (Alberta) to include all "lineal descendants, whether born within or outside marriage, of the ancestor". Sections 13 and 14 of the Act were repealed.[292] In situations of intestacy, children born within and outside marriage will inherit assets from the estates of their father or their mother.

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[289] 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.

[290] (1951), 3 W.W.R. (N.S.) 266 (Alta. S.C.).

[291] The Intestate Succession Act, R.S.A. 1955, c. 161, s. 17 read as follows:

> 17 If an intestate, being an illegitimate child, dies leaving no widow, or issue, his estate shall go to his mother if living, but if the mother is dead his estate shall go to the other children of the same mother in equal share, and if any child is dead the children of the deceased child shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased children of the mother, they shall take *per capita*.

On April 15, 1970, An Act to Amend The Intestate Succession Act, S.A. 1970, c. 60 came into force. This Act repealed sections 15 and 17 and replaced them with this section:

> 15 For the purposes of this Act, an illegitimate child shall be treated as if he were the legitimate child of his mother.

[292] These sections read as follows:

> 13 For the purpose of this Act, an illegitimate child shall be treated as if he were the legitimate child of his mother.
>
> 14(1) Where a male person who is survived by illegitimate children dies intestate with respect to the whole or any part of his estate, and leaves no widow or lawful issue, if the Court of Queen's Bench, on an application made by the executor, administrator or trustee or by a person claiming to be an illegitimate child, declares after due inquiry that
>
> (a) the intestate has acknowledged the paternity of the illegitimate children, or
>
> (b) the person has been declared to be the father by order made under any of the provisions of the Children of Unmarried Parents Act, a Child Welfare Act or Maintenance
>
> and Recovery Act,
>
> the illegitimate children and their issue shall inherit from the person so dying the estate in respect of which there is an intestacy as if they were his legitimate children.
>
> (2) For the purposes of this section, an intestate male person shall be deemed to have left no widow if she has left him and was at the time of his death living in adultery.

It is still unclear as to whether illegitimates can inherit through collaterals and vice versa. The amendments could 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 includes all lineal descendants, whether born within or outside marriage, this then defines the relationship between collaterals. Viewed in this fashion, illegitimate should be able to inherit from collaterals and vice versa. Furthermore, it makes no sense to have an illegitimate child inherit as a lineal descendant but not as a collateral. By the second view, the amendments only alter part of the previous law and should be restricted to inheritance of issue. It does not alter the law that illegitimate children cannot inherit from collaterals and vice versa.

We prefer the first interpretation which reflects the intention of the amendments and leads to a result that conforms to s. 15 of Canadian Charter of Rights and Freedoms. The second interpretation would infringe the equality rights of children protected by s. 15 of the Charter.[293] Given a choice between an interpretation of a statute that conforms to the Charter and one which does not, a court will interpret the statute to conform to the Charter. The statute, however, should make it clear that illegitimate children can inherit from collaterals and vice versa.

### RECOMMENDATION 11

**The legislation should make it clear that illegitimate children can inherit from collaterals and vice versa.**

#### *b. Effect of adoption*

Section 65 of the Child Welfare Act, S.A. 1984, c. C-8.1 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

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[293] See *Surette v. Estate of Allvin John Harris, Jr.* (1989), 91 N.S.R. (2d) & 233 A.P.R. 418 (N.S. S.C.T.D.) and *M.(R.H.) v. H.(S.S.)* (1994), 18 Alta. L.R. (3d) 308 (Alta. Q.B.).

> 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 adopting parent were the biological mother or biological father of the adopted child.
>
> (6)-(9) ...

An adoption effected in another jurisdiction has the effect in Alberta of an adoption order made under this Act.[294]

These sections apply for all purposes, including the operation of the Intestate Succession Act.[295] "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 child were the biological parent and that status does not change on the adopted child reaching the age of majority."[296] As a result of this section, 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.[297] Also, the adopted child cannot share in the estate of a 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.[298]

The existing law is adequate.

## RECOMMENDATION 12

**The existing law concerning rights of adopted children upon an intestacy is adequate.**

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[294] Child Welfare Act, S.A. 1984, c. C-8.1, as am., s. 65.1.

[295] *Re Matthews Estate* (1992), 1 Alta. L.R. (3d) 198 (Q.B.).

[296] *Ibid.* at 202.

[297] *Re Director of Child Welfare and H.; Re Director of Child Welfare and P.* (1992), 90 D.L.R. (4th) 752 (Alta. C.A.). This fact explains why in situations in which a step-parent wishes to adopt the child of his or her spouse, both the biological parent and his or her spouse apply to adopt the child.

[298] *Re Matthews Estate*, *supra*, note 295.

### *c. Step-children*

In *Re White Estate*,[299] 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 the a step-child 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 step-child to inherit from the step-parent. Although these situations do arise, the relationships between step-parents and step-children vary too much to support a generalization that the majority of step-parents would want their step-children to share in their estate. We, therefore, make no recommendation for change on this issue. Step-children will not share in the estate of an intestate step-parent.

In this situation, a step-parent who wishes to benefit his or her step-children should make a will. Intestate succession legislation cannot address all the permutations that need to be addressed in these situations. Like the situation of remarriage, a will is needed to deal with the specific situation.

**RECOMMENDATION 13**

**Step-children 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 which their deceased [ancestor] would have been entitled to, taking thus by their right of representing such ancestor, and not as so many individuals.

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[299] [1945] 1 W.W.R. 78 (Alta. S.C.).

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.[300]

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.[301] 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?[302]
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?[303]

Different answers to these key questions gives 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 indicates that that individual died before the intestate.]

Before proceeding further, terminology must be addressed. Academics have developed accurate, but very technical, terminology to describe the

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[300] *Per stirpes* representation will be considered in more detail later in this report.

[301] See Lawrence W. Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants" (1972) 66 Northwestern University Law Review 626; Illinois study, *supra*, note 80 at 739-42; Iowa study, *supra*, note 82 at 1108-16; American study, *supra*, note 83 at 376-84; M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 36-42.

[302] Iowa study, *supra* , note 82 at 1108.

[303] Iowa study, *supra* , note 82 at 1109.

various systems.[304] 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,[305] 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.[306] 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:[307]

> (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 full 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 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

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[304] 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 80 at 736-42 and the American study, *supra*, note 83 at 376-87.

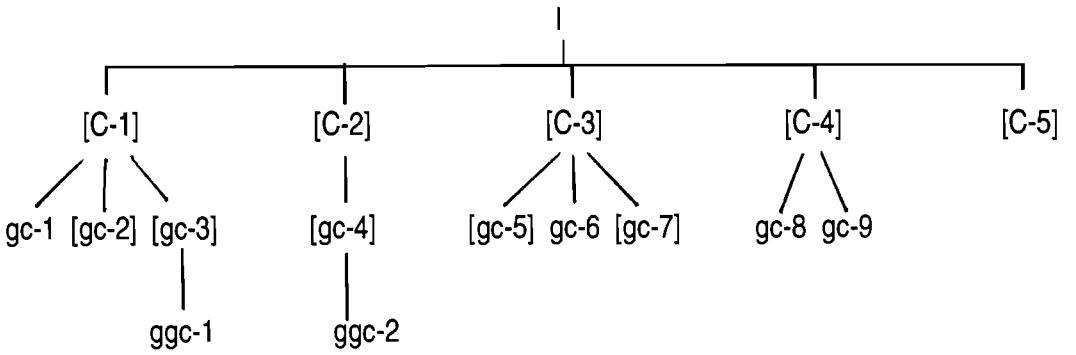
[305] Unfortunately, *per stirpes* has been given several definitions. This discussion uses *per stirpes* as it is most commonly defined.

[306] Waggoner, *supra*, note 301 at 638.

[307] Uniform Probate Code, s. 709(c) & s. 709(d).

generation unequally and a descendant of remoter degree may receive more than descendants of a closer degree.[308]

An example helps illustrate this system.[309]




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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[308] Waggoner, *supra*, note 301 at 628.

[309] This example was used in Waggoner, *supra*, note 301 at 629.

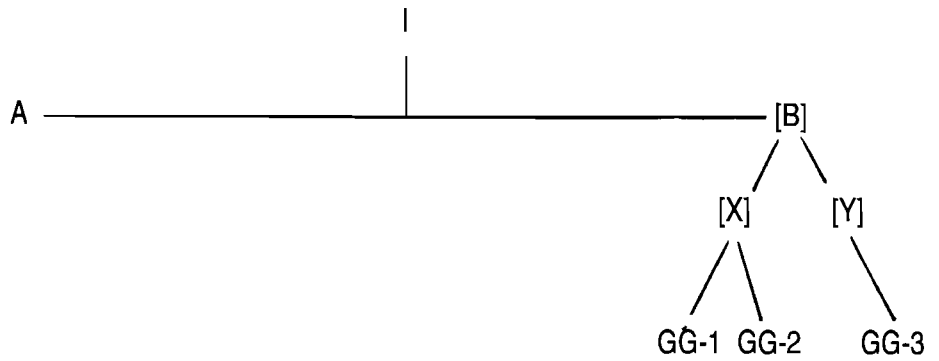
Unfortunately, in the American case law, this system has been referred to as "*per stirpes*" and "*per capita*". In this report, we refer to this system as the American hybrid. "*Per Stirpes*" and "*per capita*" are given defined meanings that do not include the American hybrid.

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.[310]

The following example illustrates the difference between (1) *per stirpes* and (2) the Ontario system.[311]




[310] Succession Law Reform Act, R.S.O. 1990, c. S-26, s. 47(1) & s. 47(2).

[311] This example in found in the Iowa study, *supra*, note 82 at Table 20.

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 |

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,[312] 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.[313] 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.[314]

Manitoba adopted the per-capita-at-each-generation system two years before the NCCUSL did. Section 5 of the Intestate Succession Act, C.C.S.M., c. I-85, which incorporates this system, reads as follows:

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[312] See Uniform Probate Code, 11th ed., Appendix VII, Pre-1990 Article II, s. 2-106.

[313] Waggoner, *supra*, note 301 at 631.

[314] See Raymond 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.

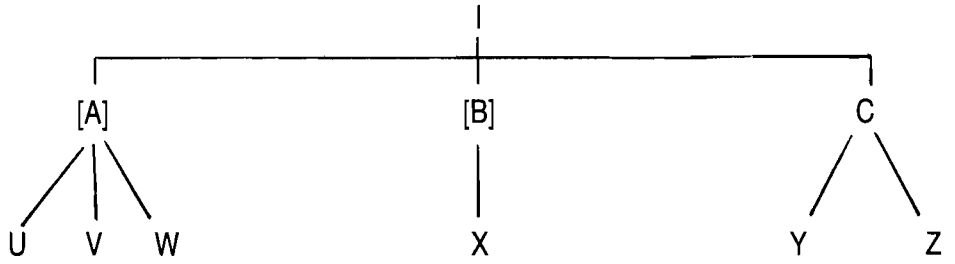
**Distribution to issue**

**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
(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.[315]




"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."[316] 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.[317] The example is somewhat unusual, but this is necessary in order to illustrate the differences of the four systems.

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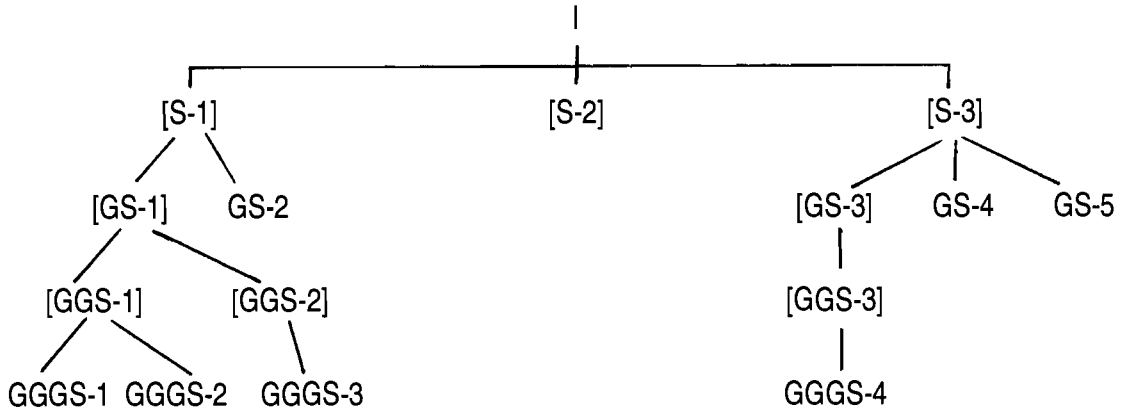
[315] See comment on s. 2-106.

[316] See Uniform Probate Code, 11th ed, 1983 text and comments, Comment on s. 2-106.

[317] American study, *supra*, note 83 at 381.

The fact is that each system gives the same result where all the children of the intestate survive the intestate's death.




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.[318] Several studies give weight to this argument because they show that, in the absence of legal advice, the public chooses to treat grandchildren equally

[318] Waggoner, *supra*, note 301 at 627 and Young, *supra*, note 314.

where all the children of the intestate die before the intestate does.[319] 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.[320]

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.[321] The same view was taken by The Law Commission (England), and the Hong Kong Law Reform Commission. The Uniform Law Commission declined to adopt the Ontario system[322] and the Uniform Intestate Succession Act, 1985 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 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 intestate. Second, this system results in equal treatment of members of the

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[319] See Chapter 4 at 43.

[320] *Ibid*. Note that this article uses different terminology to describe the results.

[321] LRCBC, *Report on Statutory Succession Rights*, *supra*, note 141 at 37-38.

[322] 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.

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.[323]

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.[324] 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" principle.

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 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. 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.[325]

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[323] MLRC, *Report of Intestate Succession*, *supra*, note 23 at 39-42 and Uniform Probate Code, 11th ed. 1983 Text and comments, Comment on s. 2-106 found at 50.

[324] See Chapter 4 at 43.

[325] 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.

**RECOMMENDATION 14**

**Representation among issue should be per-capita-at-each-generation.**

## B. Inheritance by Ancestors and Collaterals

### 1. The existing law

#### *a. Terminology*

The civil law recognized three lines of relatives: ascending, descending and collateral.[326] Ascendants included parents, grandparents, great-grandparents and so on. Descendants included children, grandchildren, great grandchildren and so on. Collaterals included all other blood relatives. Descendants are also known as issue.

#### *b. Inheritance where there is no surviving spouse or issue*

Presently, 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.[327] In a case where one parent has died before the intestate, the surviving parent receives the entire estate.[328] 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.[329] 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.[330]

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[326] *In re Cran Estate*, [1941] 1 W.W.R. 209 (Sask. C.A.) at 213 quoting *Stanley* v. *Stanley* (1739), 26 E.R. 289.

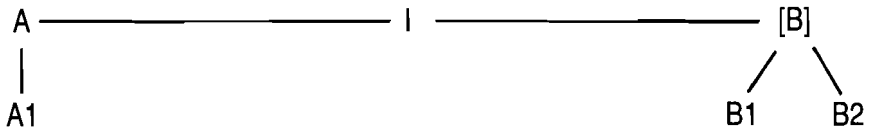
[327] Intestate Succession Act, R.S.A. 1980, c. I-9, s. 5.

[328] *Ibid.*

[329] *Ibid.* at s. 6.

[330] *Ibid.* at s. 7.

An example illustrates how these rules affect nephews and nieces.[331]




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.

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.[332] 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.[333] The results of this scheme are as follows:[334]

> 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.*

*[*The table is produced in its entirety on the following page.]*

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[331] The example is discussed by M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 27.

[332] *Ibid.* at s. 8.

[333] *Ibid.* at s. 9(1).

[334] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 28.

**TABLE OF CONSANGUINITY**
**Showing Degrees of Relationship**

| | | | | |
|---|---|---|---|---|
| | | | | 4<br>Great-great Grandparents |
| | | | 3<br>Great Grandparents | 5<br>Great-great Uncles / Aunts |
| | | 2<br>Grandparents | 4<br>Great Uncles / Aunts | 6<br>First Cousins Twice Removed |
| | 1<br>Parents | 3<br>Uncles / Aunts | 5<br>First Cousins Once Removed | 7<br>Second Cousins Once Removed |
| Person Deceased | 2<br>Brothers / Sisters | 4<br>First Cousins | 6<br>Second Cousins | 8<br>Third Cousins |
| 1<br>Children | 3<br>Nephews / Nieces | 5<br>First Cousins Once Removed | 7<br>Second Cousins Once Removed | 9<br>Third Cousins Once Removed |
| 2<br>Grand Children | 4<br>Grand Nephews / Nieces | 6<br>First Cousins Twice Removed | 8<br>Second Cousins Twice Removed | 10<br>Third Cousins Twice Removed |
| 3<br>Great-Grand Children | 5<br>Great-Grand Nephews Nieces | 7<br>First Cousins Thrice Removed | 9<br>Second Cousins Thrice Removed | 11<br>Third Cousins Thrice Removed |

*Numbers indicate degree of relationship.*

### *c. Representation among collaterals*

#### I. GENERAL PRINCIPLES

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.[335] Representation among issue was allowed because it was thought the intestate had an obligation to provide "for those who descend from his loins",[336] 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.[337] Limited representation among

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[335] The concept of representation is discussed earlier in this chapter.

[336] *Carter* v. *Crawley* (1681), Raym. 496, 83 E.R. 259 at 261.

[337] This history is discussed in detail in *Re Cran Estate*, [1941] 1 W.W.R. 209 (Sask. C.A.). See also *Canada Permanent Trust Company (Hind Estate)* v. *Canada Permanent Trust Company (McKinn Estate)*, [1938] 3 W.W.R. 657 (Sask. C.A.).

collaterals is designed to avoid confusion, protracted delays in settlement and a multiple fractioning of the estate.[338]

In *Carter* v. *Crawley*,[339] the court interpreted the Statute of Distribution, 1670, as codifying the civil law even though the statute contained language that seemed more extensive than the civil law.

Although most of the early language found in intestate succession statutes is similar to the English statute, the wording of section 10 of the 1925 Uniform Intestate Succession Act[340] often gave rise to the issue of whether the legislature had intended to expand the right of representation among collaterals. Many cases deal with this issue and all interpret the section as codifying the civil law. The meaning of the Act was to "exclude all collaterals who claim as legal representatives of other collaterals, excepting only nephews and nieces". This is the old law established in *Carter* v. *Crawley*.[341]

In 1952, the troublesome language of s. 10 was removed from the Alberta statute[342] and replaced with what are now sections 6-8. These sections make it clear that the civil law was what was intended. 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

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[338] *Canada Permanent Trust Company (Hind Estate)* v. *Canada Permanent Trust Company (McKinn Estate)*, *supra*, note 337.

[339] See *Carter* v. *Crawley*, *supra*, note 336, which is discussed in the Sask. C.A. cases cited above.

[340] Section 10 of the 1925 Uniform Intestate Succession Act provided:
10. In every case where the estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them; but in no case shall representation be admitted among collaterals after brothers' and sisters' children.

[341] *Supra*, note 336.

[342] An Act to amend The Intestate Succession Act, S.A. 1952, c. 41.

admitted, and, therefore, children of deceased nephews and nieces do not share in the estate.[343]

The recent decision of *Re Matthews Estate*[344] illustrates these principles. In that case 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.

### II. THE CASE LAW

The following cases illustrate how an estate is presently distributed among the next of kin:

*Re Emsley Estate* [1925] 1 W.W.R. 816 (Alta. S.C.): The Alberta statute under consideration allowed representation by children of a deceased brother or sister of the intestate. It was argued that children as used in this phrase also included grandchildren of the deceased brother or sister of the intestate. The court rejected this argument and held that child or children meant issue in the first generation only, to the exclusion of grandchildren or other remoter descendants. The grandchildren of a deceased sister of the intestate were not entitled to share in the share that the sister would have taken if she was alive.

*Re Kroesing Estate* [1928] 1 W.W.R. 224 (Alta. S.C.): 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 deceased uncles were one degree further removed from the intestate and did not take by representation their parent's share. "Descendants of deceased collateral relatives of the intestate other than children of brothers and sisters do not represent such collateral relatives under civil law".

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[343] See section 7.

[344] (1992), 1 Alta. L.R. (3d) 198 (Q.B.) McFadyen, J.

*Re Grant Estate* [1929] 3 W.W.R. 644 (B.C.C.A.): The intestate died leaving surviving a husband and nephews and nieces. The surviving spouse took $20,000 plus one half of the residue. The next of kin share the other half of the residue. The issue was whether the nephews and nieces took *per stirpes* or *per capita*. The court held that s. 116 of The Administration of Estates Act, R.S.B.C. 1924, c. 5 required that the distribution be *per capita* because no brother of sister of the intestate survived the intestate.

*Re Gall Estate* [1937] 3 W.W.R. 222 (Alta. S.C.): The intestate left surviving him a brother and a sister, a nephew and a niece and grandnephews and grandnieces. The issue was whether the grandnephew and grandniece could share by representation. The court held that by virtue of s. 10 of the Intestate Succession Act, S.A. 1928, c. 17, the grandnephews and grandnieces are not entitled to share in the estate. Section 10 provided: "but in no case shall representation be admitted among collaterals after brothers' and sisters' children".

*Canada Permanent Trust Company (Hind Estate)* v. *Canada Permanent Trust Company (McKinn Estate)* [1938] 3 W.W.R. 657 (Sask. C.A.): The intestate left surviving him the following:

- maternal uncle (3rd degree)
- children of aunts and uncles who predeceased the intestate (4th)
- grandchildren of aunts and uncles who predeceased the intestate (5th)
- great-grandchildren of an aunt who predeceased the intestate (6th)

The court had to decide whether any of the descendants of the deceased aunts and uncles could share in the estate. It decided that they could not. The entire estate went to the maternal uncle.

*Re Cran Estate* [1941] 1 W.W.R. 209 (Sask. C.A.): The intestate left surviving a maternal grandmother and a number of aunts and uncles on the paternal side of the family. The grandmother successfully claimed the entire estate as next of kin.

*Re Robinson Estate* [1941] 2 W.W.R. 86 (B.C.S.C.): In this case an intestate left surviving him an uncle (or perhaps an uncle and some aunts) and several children of deceased aunts and uncles. The court directed the administrator to distribute the estate among the surviving aunts and uncles to the exclusion of everyone else.

*Re Dixon Estates* [1948] 2 W.W.R. 108 (Man. K.B.): In this case a family of five died in a train wreck. The assets flowed down to the estate of the youngest child. Her next of kin were a grandparent and aunts and uncles on both sides of the family. The grandmother was entitled to the entire estate to the exclusion of the aunts and uncles.

*Re Haggart Estate* [1947] 1 W.W.R. 79 (Alta. S.C.): The intestate left surviving him only first cousins and children of first cousins. The court held that the estate goes to the first cousins to the exclusion of children of the deceased first cousins.

*Re Shaw* [1955] 4 D.L.R. 268 (Ont. H.C.): The intestate was survived by two maternal aunts and one maternal uncle, and by 15 paternal cousins and one maternal cousin. There was a partial intestacy under the estate and the issue arose as to who should receive this portion of the estate. The court interpreted s. 29 of Devolution of Estates Act, R.S.O. 1950, c. 103, which provided "but there shall be no representation admitted among collaterals after brothers' and sisters' children". The court held that the rearrangement of the words of the section in 1920 did not change the law. If the Legislature had intended to change a 300 year old rule it would have done so in more definite language. The residue must be divided equally among the two aunts and the uncle.

*Re Matthews Estate* (1992) 1 Alta. L.R. (3d) 198: See earlier discussion of this case.

### III. TIME TO DETERMINE WHO ARE THE NEXT OF KIN

In *Jardine Estate*,[345] the Alberta S.C.A.D. held that the persons entitled to take on an intestacy are to be determined at the date of death of the intestate and not at the time the property vests in the estate, which can be many years after the death of the intestate. This was affirmed by the same court in its later decision in *MacEachern and National Trust Company* v. *Mittledstadt and Waterston*.[346]

Section 10 of the Act deals specifically with situations involving posthumous birth. The section reads as follows:

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[345] (1956), 18 W.W.R. 445 (Alta. S.C.A.D.).

[346] (1963), 46 W.W.R. 359 (Alta. S.C.A.D.).

> Descendants and relatives of the intestate, conceived before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him.

### IV. THE ULTIMATE HEIR ACT: INHERITANCE WHEN THERE ARE NO NEXT OF KIN

Section 4 of the Ultimate Heir Act requires the personal representative of an intestate to pay the estate to the Crown (ie. Provincial Treasurer) if he or she has not learned of any kin within two years of the intestate's death.[347] The Crown holds the estate for a further four years. Any income earned from the estate during this period is paid to the Crown as management fees.[348] 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.[349] 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.[350]

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.[351]

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:

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[347] Ultimate Heir Act, R.S.A. 1980, c. U-1, s. 4.

[348] *Ibid.*, s. 6.1.

[349] *Ibid.*, ss 5, 6.

[350] *Ibid.*, s. 6.

[351] *Ibid.*, s. 8.

| 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.

### 2. The need for reform

The existing determination of those next of kin who will inherit the estate has several drawbacks. These include:

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.

2) In theory, the search for remote relatives can go on forever. This can give rise to inheritance by a relative that 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".[352]

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.

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[352] New Jersey study, *supra*, note 81 at 276.

4) Searches for distant relatives that may or may not exist adds delay and expense to the administration of the estate.

### 3. Options for reform

#### *a. What method should be used to determine the ancestors and collaterals who will inherit: degrees of consanguinity or a parentelic system?*

The next of kin who inherit can be determined by: (1) stated ancestors, followed by next of kin of equal degrees of consanguinity, or (2) a parentelic system. The first method is familiar because it is found in the existing law described above. The second method is of recent design, but is not without historic precedent. The rule of primogeniture, which was formerly used to determine how land would pass in the event of intestacy, is an example of a parentelic system.[353]

Inheritance by ancestors and collaterals does not occur unless the intestate dies leaving no spouse or issue surviving. This must be kept in mind when considering this issue.

#### I. DEGREES OF CONSANGUINITY

This system was described earlier in the chapter under the heading of existing law.

#### II. A PARENTELIC SYSTEM

In this part, we will describe, in detail, a parentelic system. We will 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.[354] 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

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[353] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 29, note 44.

[354] 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.

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 within a parentelic system. These systems were discussed in the context of inheritance by issue. 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 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 (ie. one-quarter of the estate) goes to the parents of your paternal grandfather,[355] 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 (ie. your great aunts and uncles in this family line and their issue) and representation is admitted. The other share (ie. 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. It is only when there are no issue on the paternal side[356] that these two

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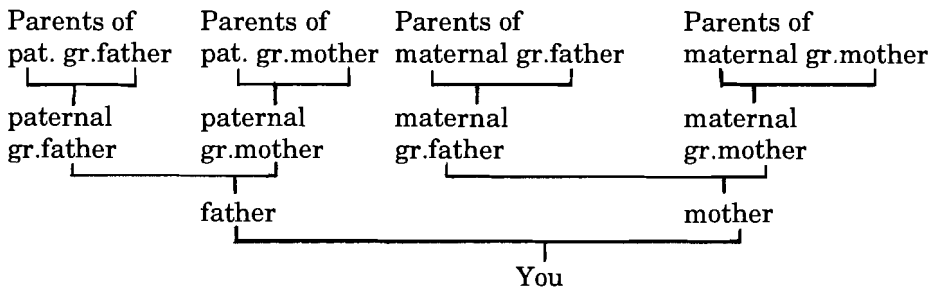
[355] The following chart will help you understand the discussion that follows. Pat. is an abbreviation for paternal. Gr.father and gr.mother are abbreviations for grandfather and grandmother.




[356] 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.

quarters are added to the moneys that are divided among those on the maternal side.

***b. Should representation be admitted among descendants of remote heirs?***

Representation is not admitted among collaterals (except for nieces and nephews) when degrees of consanguinity are used to determine the next of kin who will inherit the estate. Limited representation among collaterals is intended to avoid confusion, protracted delays in settlement and a multiple fractioning of the estate.[357]

Representation through stated ancestors is admitted in a parentelic system.[358] The system of representation can be any of the four systems 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. 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.

***c. Should limitations be placed on those who can inherit?***

The trend in law reform is to limit inheritance by collaterals, no matter what system is used to determine the next of kin who will inherit. The Law Commission (England), the Uniform Probate Code, and the Hong Kong Commission favour restricting inheritance by collaterals to descendants of the intestate's parents and grandparents. The Manitoba Commission and the Uniform Intestate Succession Act go as far as descendants of the great-grandparents. The British Columbia Commission proposed a restriction which would not allow next of kin beyond the 4th degree of consanguinity to inherit.

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[357] *Canada Permanent Trust Company (Hind Estate)* v. *Canada Permanent Trust Company (McKinn Estate)*, *supra*, note 337.

[358] In theory, the system would not have to allow representation. However, every law reform body that has proposed a parentelic system has admitted representation of some type.

Three reasons are usually given in support of limited inheritance.[359] The first is administrative convenience. It is rare for remote relatives to inherit because the intestate's spouse, issue, parents, brothers and sisters, or nephews and nieces usually inherit the estate. Where remote relatives do exist, they will not be easily found. In cases where remote relatives do not exist,[360] the money must be held for six years from the date of death before it escheats to the Crown by virtue of Ultimate Heir Act.[361] If inheritance was limited and it was known that there were no relatives within the required family lines, the money would escheat to the Crown immediately and not after six years. This should eliminate delay and also reduce the expense of searching for remote heirs who may or may not exist.

The second reason given is that the very remote relative will likely not even know the intestate. There is no clear choice between a "laughing heir" and escheat to the Crown. One could argue that it is just as reasonable to benefit the universities of this province as a remote relative who never knew the intestate.

The third reason given is that limited inheritance may reduce the number of wills which are contested. The argument is that testators without close relatives will leave the estate to close friends or charities. If the estate is large, heir hunters may search out distant relatives who would inherit in the event of an intestacy. These relatives may challenge the validity of the will, even when they have a doubtful claim.[362]

#### 4. Recommendations of law reform bodies

Both degrees of consanguinity and a parentelic system find support among law reform bodies. The Law Reform Commission of British Columbia

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[359] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 34-36; L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141 at 34-37; Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting at 228-29.

[360] There are situations in which the intestate has, in fact, no surviving next of kin. There would also be many situations in which the personal representative simply has no clues suggesting that such persons exist. These also fall into the category of "no next of kin". It really is a matter of how far it is possible to trace remote next of kin.

[361] R.S.A. 1980, c. U-1, s. 8.

[362] At first this rationale struck us as a bit fanciful. However, Alberta lawyers advise that heir hunters do exist.

concluded that the existing rules that determine which next of kin will inherit work well and reform is unnecessary.[363] The Manitoba Law Reform Commission, the Uniform Law Conference of Canada and the NCCUSL have recommended that a parentelic system replace degrees of consanguinity.

The Manitoba Intestate Succession Act, the Uniform Intestate Succession Act and the Uniform Probate Code have adopted a parentelic system. The acts do, however, differ as to how far the parentelic system extends and as to the method of representation used within the system. The Uniform Probate Code limits inheritance to descendants of the parents and grandparents. The Manitoba Intestate Succession Act and the Uniform Intestate Succession Act extend inheritance to descendants of great-grandparents. The Uniform Probate Code and the Manitoba act use the per-capita-at-each-generation system of representation.[364] The Uniform Intestate Succession Act retains the *per stirpes* system of representation.

The Manitoba Law Reform Commission and the Uniform Law Conference of Canada judge the parentelic system as superior to degrees of consanguinity for the following reasons.[365] First, a parentelic system will simplify proof of kinship. For example, if the intestate is survived by a cousin (4th degree) it will not be necessary to search for possible great-uncles and great-aunts, who although descended from great-grandparents, are also in the 4th degree of kinship. This should simplify administration of estates. Second, a parentelic system will divide the estate between the next of kin on the maternal and paternal sides of the family. The existing rules distribute the entire estate among the next of kin of the intestate in the nearest degree of consanguinity to the intestate and do not permit representation. This frequently results in the entire estate going to one side of the family even though there are kindred on both sides. A parentelic system divides the estate between both sides of the family and reflects the idea that the intestate would prefer a distribution which provides for equal distribution to the paternal and maternal kindred. Third, although the two systems will

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[363] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141 at 34. See also recommendation 5(a) at 37.

[364] This is known as the per capita at each generation method of representation.

[365] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 31-33 and Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, 1983 at 228-29.

produce the same result in most cases, there are some instances in which the parentelic system produces a preferable result. A parentelic system favours a grandnephew over the cousin. Since people are living longer it is likely the intestate will have developed a closer relationship to a grandnephew or grandniece that he or she has maintained with his or her cousins. Fourth, limiting inheritance can reduce will contests. Laughing heirs cannot challenge a will that leaves the estate to friends and charities.[366]

### 5. Recommendations for reform

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.[367]

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 over a cousin and prefers a cousin over 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.[368] Identifying and locating these relatives should pose no problems in the majority of cases. In addition, it

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[366] It is argued that heir hunters will search out next of kin who could benefit by challenging the testamentary capacity of a testator who left his or her estate to charities, instead of their only surviving next of kin they did not know well. Although this strikes us as a bit fanciful, Alberta lawyers advise that heir hunters do exist and so this is a possibility.

[367] See earlier discussion concerning procedure dictated by the Ultimate Heir Act.

[368] Please note that this discussion assumes that the intestate has no surviving spouse or issue.

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 failing 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.[369] 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 children per woman.[370] "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".[371]

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[369] 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.

[370] The Vanier Institute of the Family, *Canadian Families* (Ottawa: 1994) Chart 14, Average number of births per woman.

[371] *Ibid.* at 10.

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 leads 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.

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, and issue of grandparents. We do not support a system that extends inheritance to great-grandparents and their issue.

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 great-grandparents and their issue.
- 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.
- 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.[372] 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. Concern over escheat to the Crown does not justify spending tax dollars in this fashion.

We recognize that many lawyers specializing in the wills and estate field 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 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;**

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[372] See earlier discussion of Ultimate Heir Act.

**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).**

- **The system of representation chosen for issue should be the same as that chosen for collaterals.**

- **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. 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.[373] The doctrine embodies the equitable principle that a father intends to benefit his children equally.[374] 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[375], old English cases interpreting the statute

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[373] Marni M.K. Whitaker, "Hotchpot Clauses" 6 E.T.J. 7 at 11.

[374] Sherrin and Bonehill, *supra*, note 4 at 248; Hardingham, Neave and Ford, *supra*, note 4 at 432.

[375] 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

(continued...)

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*.[376] Jessel M.R. said:[377]

> I have always understood than 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 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*.[378] 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:

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(...continued)
consideration of the value of the land which he has be descent, or otherwise from the intestate.

[376] (1875), L.R. 20 Eq. 155.

[377] *Ibid.* at 157.

[378] (1887), 14 O.R. 557 (Ch.D.) at 559.

> 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.

### *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.[379] 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.[380]

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

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[379] Section 11(1).

[380] Section 11(4).

account for any advancement.[381] 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 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.[382] If the advancement exceeds the portion that the child was to receive, then the child receives nothing from the estate.[383] 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

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[381] Sherrin and Bonehill, *supra*, note 4 at 249; Hardingham, Neave & Ford, *supra*, note 4 at 433. But see a criticism of the law by John Cunningham, "The Position of the Widow in an Advancement of Portion" (1988-89) 9 E.T.J. 23.

[382] Intestate Succession Act, R.S.A. 1980, c. I-5, s. 11(3).

[383] *Ibid.* at s. 11(2). This situation occurred in *Blakeney* v. *Seed*, [1939] 1 W.W.R. 321 (B.C.S.C.).

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.

- 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".[384]
- 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.[385]
- In the remaining common-law provinces, the onus of proof can be satisfied by something not in writing.[386] 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.[387] 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".[388]

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[384] *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. Thomas Grozinger, "The Ontario Law of Advancement on an Intestacy" (1993) 12 E.T.J. 396 at 403.

[385] The Intestate Succession Act, C.C.S.M., c. I-85, s. 8(1).

[386] 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.

[387] 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.

[388] *Whitford* v. *Whitford*, [1942] S.C.R. 166; K. Thomas Grozinger, "The Ontario Law of Advancement on an Intestacy" (1993) 12 E.T.J. 396 at 403.

### 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.

The Law Commission (England) recommended repeal of the hotchpot rules for the following reasons.[389] 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.

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.[390]

The Uniform Law Conference of Canada accepts the premise that today most *inter vivos* transfers of property are not intended to be advancements.[391] 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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[389] English study, *supra*, note 84 at 12.

[390] L.R.C.B.C., *Report on Statutory Succession Rights*, *supra*, note 141 at 38-39.

[391] 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.[392]

The Uniform Probate Code contains a similar section. The NCCUSL believes that most *inter vivos* transfers are either absolute gifts or are part of an estate plan.[393] If an individual wishes for an *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".[394]

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.[395] 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.

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[392] *Ibid.*

[393] Uniform Act on Intestacy, Wills, and Donative Transfers, 1991, Comment on section 109 of Act.

[394] Uniform Probate Code, 11th ed., Official 1993 Text with Comments, at 54.

[395] M.L.R.C., *Report on Intestate Succession*, *supra*, note 23 at 50.

### 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 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[396] 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.

We conclude that some Albertans want *inter vivos* transfers of property to children to be taken into account upon the distribution of their estate, 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 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

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[396] 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.

concerning *inter vivos* transfers to other heirs.[397] 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 predecease 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.[398]

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 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.

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[397] 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 that 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.

[398] Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, Appendix J at 232-33.

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 Statutes of Distribution 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.[399] 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 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 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.[400] Injuries sustained in a common accident is usually, but not

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[399] Hardingham, Neave & Ford, *supra*, note 4 at 433-34.

[400] 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

(continued...)

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.[401] 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 Albertan's would want to have happen in this situation.

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.

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(...continued)
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.

[401] *Ibid.*

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

#### *a. Reform of the Survivorship Act*

These problems 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 Act[402] 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 5 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 5 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

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[402] R.S.A. 1980, c. S-31.

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.

***b. Statutory survivorship clause for intestate succession***

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.

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[403] and the Manitoba Intestate Succession Act[404] 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. 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

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[403] Section 5.

[404] Intestate Succession Act, C.C.S.M., c. I-85, s. 6(1).

succession.[405] All of the statutes provide that the section does not apply where its application would result in escheat to the Crown.

In the absence of reform of the Survivorship Act, we recommend that the intestacy rules contain the statutory equivalent of a survivorship clause. 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 will 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.

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 5 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 have chosen 15 days because it reflects what is done elsewhere in intestacy legislation. The 5 day period is more appropriate for reform of survivorship law which has more general application.

### RECOMMENDATION 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.**

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[405] Uniform Probate Code, Section 2-104.

## E. Relatives of the Half-Blood

Section 9(2) of the Intestate Succession Act provides:

> (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.

# PART III — LIST OF RECOMMENDATIONS

- 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).
- The system of representation chosen for issue should be the same as that chosen for collaterals.
- 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. . . . . 153-54

**RECOMMENDATION 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. . . . . 164

**RECOMMENDATION 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. . . . . 168

# PART IV — DRAFT LEGISLATION

## Proposed Intestate Succession Act

Definitions

**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 conjugal relationship with the intestate

(i) for at least three years immediately preceding the death of the intestate, or

(ii) in a relationship of some permanence 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.

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.

(3) The maximum entitlement set out in subclause (2)(a) shall be reduced by an amount equal to the value of any benefits received by the surviving spouse under a will of the deceased.

Rights of separated spouse

**4.**(1) 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 one or both of the following conditions is satisfied:

(a) during the period of separation, one or both of the spouses made an application for divorce or an accounting or a distribution of property under The Matrimonial Property Act and the application was pending or had been dealt with by way of final order at the time of the intestate's death;

(b) 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;

the surviving spouse shall be treated as if he or she had predeceased the intestate.

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 11.

(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 11.

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(1) 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 11.

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 9; 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).

System of representation

**11.**(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

**12.**(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 13.

No successors

**13.** 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

**14.** 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

**15.** 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

**16.**(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 as 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

**17.** 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.

Application of this Act

**18.** This Act applies in cases of death occurring on or after the day this Act comes into force.

Repeal

**19.**(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.

Appendix A

# Research Paper 15: Survey of Adult Living Arrangements, A Technical Report

## A. Introduction

In the early 1980s, there was little information concerning cohabitation outside marriage.[1] Recognizing this, the Institute commissioned a study of adult living arrangements. This study elicited valuable information concerning the following:

- the prevalence of nonmarital cohabitation,
- the social and economic characteristics of cohabiting couples,
- living arrangement of cohabiting couples,
- economic difficulties of cohabitation living arrangements,
- reasons for cohabiting nonmaritally and maritally,
- attitudes concerning legal issues of nonmarital cohabitation.

For the purpose of the study, nonmarital cohabitants are defined as:[2]

- two persons of the opposite sex,
- who are not legally married to each other,
- who are of the age of 16 years or more,
- who are not related within the degrees of consanguinity or affinity prohibited by law, and
- who have been sharing living quarters on a regular basis for not less than six months.

In addition, they must have one or more of the following characteristics:[3]

- the persons are sexually intimate with each other,
- there is a dependent child in the home,
- the persons share financial obligations,
- the persons hold property in common,
- one of the persons is providing either total or partial financial support for the other or for and child in the home, and/or
- the persons look to each other for emotional support.

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[1] Statistics Canada first asked questions about such relationships in the 1981 Census.

[2] Alberta Law Reform Institute, *Survey of Adult Living Arrangements, A Technical Report* (Research Paper No. 15, 1984) at 3-4. Herafter, we refer to this publication as Research Paper No. 15.

[3] *Ibid.* at 4.

### B. The survey

In the study, an 18-page questionnaire was mailed to randomly selected Albertans who lived in Edmonton and Calgary.[4] The survey was conducted during September through December, 1983. Of the 4000 surveys mailed:

- 496 were returned by the Post Office because the addressee had moved,
- 923 were received but not returned, and
- 2,581 were answered and returned to the Institute.

Of the 2,581 returned and completed surveys, 2,355 were usable. The others were unusable because major parts of the survey were not completed or the individual who completed the survey was under 16 years of age. The rate of return for the surveys that were delivered to the addressee is high for public surveys of this nature.

The sample was fairly evenly split between females and males and includes respondents from a broad range of age, education and income levels. The authors of the study judged the sample to be a good representation of the population of adult urban Albertans.[5]

There were 145 nonmarital cohabitants in the sample of 2,355 respondents.[6]

It is important to emphasize that the results are for the year 1983, or, where applicable, to the period up to that time. The following discussion summarizes the results of this survey.

### C. Prevalence of nonmarital cohabitation

As of 1983, 6.2% of all urban Albertans who are 16 years of age or older were then cohabiting nonmaritally and 8.8% of all urban Alberta *couples* were cohabiting nonmaritally.[7]

As of 1983, a total of 27.1% urban Albertans had at one time or another cohabited nonmaritally with an unrelated partner of the opposite sex for a period of six months or more. 20.7% of the "now married" respondents had cohabited with their spouse for more than six months before marriage. Among all respondents, 10.8% reported that they had cohabited outside

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[4] *Ibid.* at 10-11 describes the sampling process.

[5] *Ibid.* at 18.

[6] *Ibid.* at 20.

[7] *Ibid.* at 20.

marriage for a period of six months or more with someone of the opposite sex with whom they are no longer living.[8]

### D. Social and economic characteristics of cohabiting couples

Approximately three-quarters of the respondents who were nonmarital cohabitants were between 16 and 35 years of age. The majority of married respondents were over the age of 35. This suggests nonmarital cohabitation represents a modern version of courtship or is a newly accepted alternative to marriage.[9] The median duration of marital relationships was 13.33 years and of nonmarital relationships was 2.08 years.[10] Only half of the respondents who were cohabiting outside marriage (total of 145) described their relationship as a common-law marriage. The vast majority of the remainder described the relationship as a close personal relationship.[11]

Other findings of the study include:[12]

> 6. The education level of nonmarried respondents who had been cohabiting for 2 years or less was similar to that of their married counterparts. However, among those who had been cohabiting for more than 2 years, both male and female married respondents tended to be better educated than their nonmarried counterparts.
>
> 7. Among respondents cohabiting for similar periods of time, proportionally more nonmarried than married males were unemployed and more nonmarried than married females were employed. In addition, there were proportionally fewer full-time homemakers and slightly more students among nonmarried as opposed to marked female cohabitants.
>
> 8. Nonmarried cohabitants reported lower family incomes on average than did married couples who had been cohabiting for a similar period of time.
>
> 10. Approximately one-third of nonmarried cohabitants, in comparison to only one-tenth of married cohabitants, reported that they had been previously married.

### E. Living arrangements of cohabiting couples

#### *(1) Dependent children*

It is much more likely for married respondents to have dependent children than respondents who are nonmarital cohabitants.

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[8] *Ibid.* at 22.

[9] Later studies show that it is a contemporary version of courtship and over 60% of all non-marital cohabitants in Canada continue to be between 16 and 35 years of age.

[10] Research Paper No. 15 at 41.

[11] *Ibid.* at 42.

[12] *Ibid.* at ii-iii.

Of the 138 nonmarital cohabitants,[13] 101 had no dependent children living with them. 35 had dependent children and for two respondents there was no data. Of the 35 who had dependent children, 20 had children of the current relationship and 25 had children of another relationship. In percentage terms. 74.3 nonmarital cohabitants had no children, 25.8% had dependent children from that or another relationship living in the home, and for 1.4% there is no data. Of those nonmarital respondents with dependent children in the home, 57.1% of the respondents had children of the current relationship and 71.4% had children from another relationship.[14] [Some caution should be used in applying these figures because the sample contained only 35 nonmarital cohabitants with dependent children living with them.]

In contrast, of the 567 married respondents, 219 had no children living with them, 337 had dependent children living with them, and for 11 there was no data. In percentages, 39.4% had no dependent children living with them, 60.6% had dependent children living with them, and for 1.9% there is no data. Of those married respondents with dependent children living with them, 94.8% had children of the marriage and 24.6% had children of another relationship.[15]

***(2) Financial arrangements***

"Nonmarried cohabitants reported having separate bank accounts more often and joint bank accounts less often than did their married counterparts."[16] The difference is quite striking. For example, 80.85 of male nonmarital cohabitants who had lived with their partner for 2 to 10 years had separate bank accounts, whereas only 36.8% of their married counterparts did. 91.3% of married male respondents who had lived with their spouse for 2 to 10 years had a joint account. Of course, some respondents had both types of accounts.[17]

***(3) Property ownership***

"Home ownership was less common among nonmarried respondents than among married respondents who had been cohabiting for similar periods of

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[13] In other parts of the Research Paper No. 15, the figure used for non-marital cohabitants is 145. It is unclear why this part considers only 138 non-marital cohabitants. Perhaps some questionnaires were improperly filled out on this topic.

[14] Research Paper No. 15, Table 9 at 46.

[15] *Ibid.*, Table 9 at 46. It is unclear as to why this table only refers to 138 non-marital cohabitants where other tables have 145 respondents in this category.

[16] *Ibid.* at iii.

[17] *Ibid.*, Table 10 at 49.

time. Also, nonmarrieds who owned a home were less likely to claim joint ownership than were their married counterparts."[18] Table 11 of Research Paper No. 15 outlines home ownership for those relationships of 2 to 10 years. Of the 333 married respondents in this category who own a home, 312 (93.7%) own it as joint tenant. Of the 25 nonmarried respondents in this category who own a home, 13 (52%) own it as a joint tenant.

"Nonmarried cohabitants who described their relationship as a "common-law relationship" were, in some respects, more like married cohabitants in terms of their financial and property arrangements than were those who used the term "a close personal arrangement."[19]

### F. Economic difficulties of cohabitational living arrangements

Under this heading, the major findings were:[20]

> 17. Although the overall frequency of economic difficulties was low, nonmarried cohabitants reported proportionally more difficulties in getting government benefits and employee benefits than did their married counterparts.
>
> 18. In general, the break up of marriages was reported to cause more economic difficulties than the break up of nonmarital cohabitational living arrangement.

### G. Reasons for living nonmaritally and maritally

The key findings were as follows:[21]

> 20. For nonmarried cohabitants in general, avoiding the legal commitment of marriage was rated as a fairly important reasons for not marrying. About one-quarter of the nonmarried respondents also cited as important the fact that one or the other partner was not legally free to marry.
>
> 21. Married respondents, particulary females, reported that the legal commitment involved in marriage was a fairly important consideration for them.
>
> 22. Nonmarried cohabitants, as compared with their married counterparts, placed a higher degree of importance on economic reasons ("its less expensive to live together") and convenience ("its easier this way") as reasons for cohabiting with their partner. Nonmarried cohabitants were also more likely to indicate that their living arrangement wasn't planned.
>
> 23. Nonmarried cohabitants who described their living arrangement as a "common-law relationship" rated such considerations as convenience and avoiding the legal, personal and social commitments that marriage involves to be less important reasons for cohabiting that did those who used the term "a close personal relationship."

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[18] *Ibid.* at iii.

[19] *Ibid.* at iv.

[20] *Ibid.* at iv.

[21] *Ibid.* at iv.

### H. Attitudes concerning legal issues of nonmarital cohabitation

In the survey, the respondents were asked the following questions:[22]

> *C. Estate rights of the surviving partners:*
> When a married person dies without a will, the surviving spouse is entitled to a share of the estate. However, the surviving partner of a common-law union does not have those same rights to the estate of the deceased partner. Do you think the law should or should not be the same for married and unmarried couples in this situation?
>
> *E. Contesting the Estate*
> When a married person dies, with or without a will, the surviving spouse can make a claim to receive more of the estate if they think they haven't been properly provided for. Do you think an unmarried person should or should not be able to make a similar claim against the estate of the partner he or she has been living with?
>
> *F. Division of property*
> Do you think a man and woman who live together, but who are not married, should or should not have the same rights and responsibilities as married couples in dividing up property if the couple break up?

Each response was given a score ranging from -3 to +3. Those who thought they **should** have the same rights were given one of the following scores: +3 (very strongly), +2 (pretty strongly) and +1 (not too strongly). Those who thought they **should not** have the same rights were given a score of -3 (very strongly), -2 (pretty strongly) or -1 (not too strongly). Those without an opinion were given a score of 0.

The results showed little consensus in respect of these three issues.[23] The results are as follows:

| | |
|---|---|
| Question C: | Mean = 0.30; Median = +1 |
| Question E: | Mean = 0.36; Median = +1 |
| Question F: | Mean = 0.52; Median = +1 |

The graphic illustration of the results shows a polarization of opinion, with many people on both sides of the poles.[24]

Many of the respondents who did not express a firm opinion indicated that the duration of the relationship would influence their opinion. "In general, the argument was that nonmarried partners should not have the same rights and responsibilities as married partners if the nonmarried partners have not been cohabiting for some significant period of time."[25] Unfortunately, the survey did not examine what this significant period would be.

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[22] *Ibid.* at 77.

[23] *Ibid.* at 79-80, 89.

[24] *Ibid.* at 79-80.

[25] *Ibid.* at 78.

Appendix B

# 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 intestate was married only once is as follows:

| | |
|---|---|
| All to spouse[1] | 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

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[1] 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 formerspouse[ 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%.

estates, children received some part of the estate. In no estate did the testator disinherit both the spouse and the children.

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.[2]

### *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

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[2] 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.

children, 66 had no children or no surviving children, and 3 indicated they had a common-law spouse.

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.[3]

#### *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.

---

[3] 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*.[4] 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:

[4] 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.

## 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) 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.[5] 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".[6]

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

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[5] The Law Commission, No. 187, *Family Law - Distribution on Intestacy*, Appendix C beginning at page 25.

[6] *Ibid.*, Appendix C at para. 5.

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.[7] In estates without wills, 26.9 - 33.5% of the intestates had never married.[8]

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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[7] The calculation is 78 divided by 800.

[8] 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 | 20.00 |
| 0 - 4,999 | 29 | 44 | 73.00 |
| 5,000 - 9,999 | 26 | 14 | 40.00 |
| 10,000 - 14,999 | 21 | 15 | 37.00 |
| 15,000 - 19,999 | 22 | 12 | 34.00 |
| 20,000 - 29,999 | 52 | 12 | 64.00 |
| 30,000 - 39,999 | 56 | 12 | 68.00 |
| 40,000 - 59,999 | 77 | 19 | 96.00 |
| 60,000 - 79,999 | 79 | 13 | 92.00 |
| 80,000 - 99,999 | 71 | 6 | 77.00 |
| 100,000 - 119,999 | 45 | 3 | 47.00 |
| 120,000 - 139,999 | 55 | 5 | 60.00 |
| 140,000 - 159,999 | 44 | 4 | 48.00 |
| 160,000 - 179,999 | 31 | 2 | 33.00 |
| 180,000 - 199,999 | 22 | 2 | 24.00 |
| 200,000 - 249,999 | 42 | 6 | 48.00 |
| 250,000 - 299,999 | 33 | 5 | 38.00 |
| 300,000 - 349,999 | 22 | 3 | 25.00 |
| 350,000 - 399,999 | 15 | 1 | 16.00 |
| 400,000 - 449,000 | 5 | 1 | 6.00 |
| 450,000 - 499,000 | 13 | 0 | 13.00 |
| 500,000 - 749,999 | 22 | 1 | 23.00 |
| 750,000 - 999,999 | 6 | 3 | 9.00 |
| 1,000,000 + | 8 | 0 | 8.00 |
| **Total files** | **800.00** | **199.00** | **999.00** |