

RECENT AMENDMENTS TO THE SUCCESSION LAWS IN NEW SOUTH WALES

PHILLIP MCGOWAN¹

INTRODUCTION

Since 2008, the law relating to wills and estates in New South Wales has undergone significant changes. Primarily, the enactment of the Succession Act 2006 (NSW) commencing on 1 March 2008 was the start of a process of revising, updating and “harmonizing” the legislation in this area of law.

To date, the change has been in 3 stages.

Stage 1 Law of wills. The first stage of the amendments was the enactment of the Succession Act 2006 (NSW) which commenced on 1 March 2008. Initially, the SA dealt only with the law in relation to wills.

Stage 2 Family Provision. On 1 March 2009, the second stage of the amendments was enacted, the law in relation to Family Provision. The law was “moved” from the FPA Act into the SA – in order to consolidate the governing legislation into one Act. Two major changes were implemented:

The time limit for the commencement of a FPA was shortened from 18 months from the date of death to 12 months from the date of death where the death occurred post 1 March 2009.

The SA was amended to include a category of persons eligible to commence a FPA if they were in a ‘close personal relationship’ with the deceased.

Stage 3 The Intestacy Rules. The next stage in the legislative reform process was the law relating to intestate estates. The Succession Amendment (Intestacy) Act 2009 commenced on 1 March 2010. The new rules will apply to the distribution of the intestate estate of a person who dies on or after 1 March 2010.

BACKGROUND TO THE RECENT LEGISLATIVE CHANGES

In 1995, the Standing Committee of Attorneys General in Australia identified a need to review the existing state laws relating to succession and to propose model national uniform laws. As a result, the National Committee of Uniform Succession Laws (“the national committee”) was formed. As a member of the national committee, the New South Wales (“NSW”) Law Reform Commission was responsible for examining intestacy laws in Australia and for making recommendations for the proposed model national uniform laws.

In April 2005, the NSW Law Reform Commission published an issues paper on the law relating to intestacy in all Australian jurisdictions. It invited submissions on these issues and any related matters to assist in the making a national model bill on intestacy. In response to the submissions received, the NSW Law Reform Commission made conclusions and recommendations, particularly in relation to the concept of a “domestic partner”.

In 2007, the NSW Law Reform Commission issued a report “Uniform Succession Laws: Intestacy” (“The LRC Report”).² The LRC Report examined the intestacy laws and made numerous

¹ Phillip McGowan is a partner at de Groot's Wills and Estate Lawyers and an adjunct at the School of Law at the University of Western Sydney. Please refer to the Glossary at the end of this article. I gratefully acknowledge the contributions of my colleagues, Ms Hannah Avenell and Ms Kristina Ngweso, in the preparation of this paper. The opinions expressed in this paper are those of the author. Practitioners should carefully review in their entirety the provisions of the new legislation and form their own views as to the meaning and effect of those provisions.

² New South Wales Law Reform Commission, Report 116: *Uniform Succession Laws: Intestacy* (New South Wales Law Reform Commission, Sydney, 2007) 15.

recommendations. As a result of the LRC Report, the intestacy laws were amended by the recent commencement of the provisions.

The next section of this paper looks at key aspects of the LRC Report. Then follows a discussion of the new legislation as it effects “domestic partners” and “de facto spouses”.

THE LRC REPORT

The LRC Report considered that the following issues were matters of importance:

- ensuring that a surviving spouse or partner received the personal chattels of the intestate;
- whether a spouse or partner should receive a statutory legacy or a share of the remainder of the estate; and
- the manner of sharing the intestate’s estate where the intestate was survived by more than one spouse or partner.

The NSW Law Reform Commission considered aspects of unfairness, demographic changes and community expectations acting as catalysts for change to the intestacy laws.

Requirements for recognition as a domestic partner

The LRC Report discussed the definition of a domestic partner in various jurisdictions throughout Australia and remarked that in all jurisdictions except for South Australia, a domestic partner may be of the same gender as the intestate.³

The LRC Report referred to the indicia of a domestic partnership identified in other statutes and noted that they included:

- the nature and extent of the couple’s common residence;
- the length of their relationship;
- whether or not a sexual relationship exists or existed;
- the degree of financial dependence or inter-dependence, arrangements for financial support;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life, including the care and support of each other and of children;
- the performance of household tasks; and
- the reputation and public aspects of their relationship.⁴

The LRC Report acknowledged that most jurisdictions recognised a domestic partner only if the relationship had existed continuously for a certain period of time before the death of the intestate or if a child had been born of the relationship. In South Australia, the relationship must have existed for either 5 continuous years or a 5 year aggregate over a 6 year period. The ACT, Northern Territory, Queensland, Tasmania, Victoria and Western Australia require the partnership to have been for 2 years duration.

The LRC Report contained observations that there could be significant problems in identifying when a domestic relationship commenced and ended. It was also acknowledged that a party to a relationship that did not meet the time limit requirement might have resort to a Family Provision claim to detain some benefit from the estate.

³ Ibid, 23

⁴ Ibid, 24

The LRC Report proposed that a domestic partnership should be one recognised as such under the relevant law of the jurisdiction if:

- it had been registered under a relevant law of the jurisdiction; or
- a child had been born to the relationship; or
- it had been in existence for 2 years.

The LRC Report cited the serious consequences that might arise if a short term or temporary relationship was regarded as a domestic relationship.⁵

The recent amendments in NSW adopted part (b) and (c) of this suggestion but did not include (a). To date, only Victoria, the ACT and Tasmania have registers to record the existence of a relationship.

Whether to provide only for the surviving spouse

The LRC Report considered that legislation allocating part of the estate to members of the intestate's family might have been justified in the past by the belief that a widow, who might remarry, could take the whole of the intestate's estate in preference to consanguine relatives of the intestate. It noted that as the surviving spouse will most probably be a retired woman in the 75 to 80 year age group, it seems inequitable today that the surviving spouse should have to share the estate with anyone other than the issue of the intestate. A further consideration was the argument that if the intestate estate was large, the deceased's wishes would have been for other close relatives to share in the estate. However, this was not borne out by the empirical study of wills admitted to probate in NSW in 2004. Also the argument that elderly parents could be dependent on the intestate can now be dealt with by the fact that the parents could have recourse to a Family Provision claim.

The LRC Report concluded that the surviving spouse or partner should receive the whole of the intestate estate where there are no surviving issue. It noted that the availability of Family Provision legislation to provide for dependent family members meant that intestacy provisions recognising family members other than spouses or partners was unwarranted.

Surviving spouse and surviving issue

The NSW Law Reform Commission noted that the surviving spouse was entitled generally to some combination of:

- a statutory legacy (of a fixed amount);
- an interest in the family home;
- the personal chattels of the deceased; and
- a share of the residue.⁶

The LRC Report considered that provision in these terms for the spouse of an intestate was inadequate as it did not reflect the current demographic makeup of early 21st century Australia and community expectations (as evidenced by wills that are actually made, the intentions of those who do not make wills and the results of Family Provision applications). The LRC Report addressed the issue of complexity, saying that the current regime involves a degree of unwanted complexity for administrators of intestate estates.⁷ It also said that problems could arise when the shared home is the principal asset and there are surviving dependent children. In such cases, the surviving partner might only receive a share of the home and the remaining share would pass to the issue of the deceased.

⁵ Ibid, 26

⁶ Ibid, 35

⁷ Ibid

Providing for the partner and surviving issue

Unfairness

The NSW Law Reform Commission said that the regime might be unfair in cases where the estate consists almost entirely of the family home, especially where there has been a marriage of longstanding and independent adult children who have also survived the intestate. In such cases, the shared home might have to be sold to satisfy the entitlements of the surviving children.

Demographic changes

The LRC Report noted that the legislation benefited the children of the intestate at the expense of the surviving spouse or partner. This was a product of the society in which the Statute of Distributions was enacted in England over 330 years ago. Yet given current life expectancies, most surviving spouses are going to be elderly and their children independent adults. The NSW Law Reform Commission contrasted current trends with that which applied when the legislation was first established. In 1670, the average life expectancy at birth was something in the order of 38.1 years for men and 36.3 years for women. Those who made it to 25 years of age could expect to live, on average, until 55. In Australia in 2001 to 2003, the average life expectancy at birth was 77.8 years for men and 82.8 years for women.⁸

Community expectations

The LRC Report referred to the fact that, as the intestacy provisions produce a default rule, it would be unreasonable to stray too far from community expectations. The data gathered about dispositions made in wills tended to show that where there is a surviving spouse and surviving children, will makers gave the entire estate to the surviving spouse.

In survey of 548 wills admitted to probate proved in the NSW Probate Registry in 2004, approximately 75% of will makers with a spouse and children chose to leave the entire residue of the estate to the spouse, about 2% shared the residue between spouse and children, and about 19% gave the residue to the children (subject to life estates in favour of the spouse in a few cases). The LRC Report also referred to a survey of 800 wills in Alberta, Canada in 1992. In the 260 cases where a spouse and children survived, approximately 64% gave the whole estate to the spouse.

In cases where the intestacy rules did not make adequate provision for the surviving spouse, the LRC Report referred to the ability of a surviving spouse to apply for Family Provision. It could be argued that a surviving spouse should not have to make a Family Provision application in order to ensure adequate provision. From a practical perspective, Family Provision applications would delay the estate administration, reduce the size of the estate and cause unnecessary stress for the surviving spouse.⁹

Possible approaches

The LRC Report bore in mind the desirability of producing a clear and simple scheme of distribution and said that much complexity had been caused by the need to apportion the share for the surviving spouse or partner in order to accommodate other relatives who were also entitled to share in the estate (usually the surviving issue of the intestate). A simpler plan may be for the intestate estate to devolve in entirety to the surviving spouse or partner(s) in preference to other relatives.

Questions had been raised from time to time concerning the desirability of preferring the surviving spouse or partner to the issue of the intestate. In the 1967 Family Law Project of the Ontario Law

⁸ Ibid, 36

⁹ Ibid, 38

Reform Commission, it was proposed that the whole estate should pass to the surviving spouse. Yet the Ontario Commission rejected this in 1974. The national committee referred to the 1989 recommendation by the Royal Commission of England and Wales that the surviving spouse should receive the whole estate irrespective of the other relatives who survived the intestate.

The LRC Report mentioned that the recommendation made by the Royal Commission of England and Wales was the subject of some controversy and was ultimately not implemented. It was in danger of being too generous to the surviving spouse or partner in the case of large estates and that under the proposed changes:

- insufficient attention might be paid to the legitimate expectations of issue;
- there would be cases where the legitimate expectations of issue would not be met, especially where the issue were not also the issue of the surviving spouse;
- the unscrupulous might be more able to take advantage of the elderly and mentally frail by marrying them in order to inherit the whole of an estate;
- the law should not be designed for the rich who have sufficient property to distribute and who can afford to take legal advice and draw up wills but rather should be designed for the average family.

The LRC Report said that while these objections had some support, the submissions they received suggested that community expectations were often that the whole estate will pass to the surviving spouse. They said this approach can be justified on the following grounds:

- It removes the need to retain provisions relating to the family home.
- In most cases the surviving (usually elderly) spouse would have greater need of the estate than the issue who are usually mature (rather than infants or young adults) and who are not financially dependent on the deceased.
- The surviving spouse or partner would be expected in the normal course of events to look after the needs of children of the intestate who are in their minority or otherwise still dependent on their parents.
- It would eliminate the need for statutory trusts for minor issue.
- The practical result of raising the statutory legacy to a level sufficient to ensure adequate provision for the surviving spouse would result in the vast majority of cases the surviving spouse would receive the whole estate anyway.

These debates ultimately resulted in the amendments to the New South Wales legislation.

The relevant provisions of the current legislation are now considered.

THE CURRENT INTESTACY PROVISIONS – AN OVERVIEW

PART 4.1 PRELIMINARY

Section 101 Definitions

Some of the notable definitions are:

'Brother' and *'sister'* are now defined as 'a person is the brother or sister of another if they have one or both parents in common'. The distinction of 'full blood' and 'half blood' has been abolished.

'Personal effects' is defined to mean the intestate's tangible personal property except for:

- property used exclusively for business purposes;
- bank notes or coins (unless forming a collection made in pursuit of a hobby or for some other non-commercial purpose);
- property held as a pledge or other form of security;

- property (such as gold bullion or uncut diamonds):
 - in which the intestate has invested as a hedge against inflation or adverse currency movements, and
 - which is not an object of household, or personal, use, decoration or adornment;
- an interest in land (whether freehold or leasehold).

Section 104 Spouse

A spouse of an intestate person is a person:

- who was married to the intestate immediately before the intestate's death, or
- who was a party to a domestic partnership with the intestate immediately before the intestate's death¹⁰.

Section 105 Domestic partnership

Under the PAA, if a person dies without a legal spouse or children and is living with a person at the date of death, notwithstanding the length of the relationship, the de facto spouse is regarded as equivalent to a legal spouse in the distribution of the estate.

Under the new legislation, a person in a domestic partnership with the deceased must have been living together with the deceased for not less than 2 years as at the date of death. If the relationship was for less than 2 years it must have resulted in the birth of a child.

If a domestic partner was in a relationship with the intestate for less than 2 years then they will have to commence an FPA against the estate in order to receive a benefit.

Section 106 Spouse's statutory legacy

The statutory legacy has now been increased from \$200,000.00 to \$350,000.00 indexed to the December 2005 quarter.

In the new legislation there is an emphasis on the primacy of the spouse and providing that person with the greatest provision. In practice, this will mean that in small estates, even if there are issue of the deceased, the spouse will take the whole of the estate.

The statutory legacy for a spouse consists of:

- the CPI adjusted statutory legacy, and
- if the statutory legacy is not paid, or not paid in full, within one year after the date of death – interest at the relevant rate¹¹ on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full¹².

The CPI adjusted statutory legacy is to be determined in accordance with the following formula:

$$R = A \times (C \div D)$$

Where:

R represents the CPI adjusted legacy

A is \$350,000.00

C represents the Consumer Price Index number for the last quarter for which such a number was published before the date on which the intestate died. The Consumer Price Index number, for a quarter, means the All Groups Consumer Price index number, being the weighted average of the 8

¹⁰ SA s 104.

¹¹ The relevant rate of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue (SA s 106(5)).

¹² SA s 106(1).

capital cities, published by the Australian Statistician in respect of that quarter. These CPI numbers can be found at the website:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=6401.0&vtitle=Consumer%20Price%20Index,%20Australia~Sep%202007~Previous~24/10/2007&&tabname=Past%20Future%20Issues&prodno=6401.0&issue=Sep%202007&num=&view> by selecting the appropriate period and then selecting the Capital Cities Comparison¹³

D represents the Consumer Price Index number for the December 2005 quarter. This CPI number is 150.6.¹⁴

Example

If the intestate died on 1 February 2011 and assume the CPI number for the last quarter, being December 2010, was 166.0. This is the number that is *C*.

Therefore, the formula is as follows:

$$R = \$350,000 \times (166 \div 150.6)$$

Therefore, **R** = \$385,790.16 (the statutory legacy payable).

SPOUSE'S ENTITLEMENT IN MULTIPLE JURISDICTIONS

If a spouse is entitled to a statutory legacy under the law of another Australian jurisdiction(s), then the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including the SA)¹⁵. However, the following qualifications will apply:

- amounts received by the spouse, by way of statutory legacy, under any of the other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under the SA¹⁶,
- if any of the relevant laws contain no provision corresponding to a statutory legacy, no amount is payable by way of statutory legacy under the SA until the spouse's entitlement under that law is satisfied, or the spouse renounces the spouse's entitlement to payment, or further payment, by way of statutory legacy, under that law¹⁷.

An adjustment is to be made to the nearest whole dollar¹⁸.

STATUTORY LEGACY WHEN THE VALUE OF THE INTESTATE ESTATE IS INSUFFICIENT

If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate rateably¹⁹.

Section 107 Survivorship

A person will not be regarded as having survived an intestate unless:

- the person is born before the intestate's death and survives the intestate by at least 30 days, or
- the person is born after the intestate's death after a period of gestation in the uterus that commenced before the intestate's death and survives the intestate for at least 30 days after birth²⁰.

¹³ SA s 106(2), (6), (7), (9).

¹⁴ SA s 106(2).

¹⁵ SA s 106(3)(a).

¹⁶ SA s 106(3)(b)(i).

¹⁷ SA s 106(3)(b)(ii).

¹⁸ SA s 106(8).

¹⁹ SA s 106(4).

These rules are not to be applied if, as a result of their application, the intestate estate would pass to the State²¹.

Section 109 Adoption

The new legislation clarifies the position that an adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents.

PART 4.2 SPOUSE'S ENTITLEMENTS

Division 1 Entitlement of surviving spouse

These sections deal with the situation where the intestate leaves only one spouse²².

If an intestate leaves a spouse but no issue, the spouse is entitled to the whole of the intestate's estate.²³

If an intestate leaves a spouse and issue (who are also issue of the spouse), the spouse is entitled to the whole of the estate.²⁴

If an intestate leaves a spouse and issue (who **are not** issue of the spouse), the spouse is entitled to:

- the intestate's personal effects;
- the statutory legacy (\$350,000.00), and
- one-half of the residue of the estate.

The issue share equally in the remaining one-half of the residue.

Division 2 Spouse's preferential right to acquire property from the estate

These rules apply in the situation where the intestate leaves only one spouse²⁵.

Section 115 Spouse's right of election

Under the PAA, a spouse has the right to take the intestate's interest in a residence which is occupied by the spouse (whether with or without the intestate) as the spouse's only or principle residence. Under the new legislation, this right will be replaced by a right to acquire any property from the estate at its market value as at the date of death, subject to certain conditions.

Section 115 SA enables the spouse to elect to acquire property from the estate²⁶. This election needs to be authorised by the Supreme Court if the property which the spouse elects to acquire is part of a larger aggregate and the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate more difficult²⁷.

Example

The examples given by the legislation are:

- the acquisition of a single item from a group of items might substantially diminish the value of the remainder of the group or make it substantially more difficult to dispose of the remainder of the group.
- the acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder of the farming property or make it substantially more difficult to dispose of it.

²⁰ SA s 107(1).

²¹ SA s 107(2).

²² SA s 110.

²³ SA s 111.

²⁴ SA s 112.

²⁵ SA s 114.

²⁶ SA s 115.

²⁷ SA s 115(2).

The Court may impose conditions which can include requiring the spouse to pay compensation to the estate in addition to consideration to be given for the property and the Court may impose a condition in respect of costs²⁸.

The Court also has the power to refuse authorisation if it considers that the matters requiring authorisation cannot adequately be addressed by conditions²⁹.

If the acquisition of the property by the spouse would result in having to comply with legislation regarding the subdivision of land then these provisions will be at the expense of the spouse³⁰.

A spouse who is a PR can exercise their right of election. However, where the spouse is not the PR, the spouse does not have any right against a purchaser in good faith for value of any property of the intestate from the PR³¹. What recourse a spouse may have is unclear.

The legislation does not specify who the appropriate person is to make the application, who bears the onus of establishing that the requirement for authorisation arises, the facts the Court is to consider when imposing conditions or how the cost of such an application is to be borne.

As the spouse now has a right to purchase property rather than being entitled to the shared residence, it appears that the stamp duty exemption will not apply to this situation.

Section 116 Notice to be given to spouse of right of election

The PR must give notice to the spouse of the right of election within one month after the grant of administration has been issued by the Court.³² The notice must include details as to how the right is to be exercised, the fact that the election may be subject to Court authorisation and the circumstances in which Court authorisation may be required and that the right must be exercised within 3 months after the date of the notice³³.

Notice will not be required if the spouse is the PR or one of the PRs³⁴.

The form of notice to be used has not been prescribed by the legislation.

Section 117 Time for making election

The election must be made by the spouse within 3 months after the date of the notice or, if the spouse is the PR or one of the PRs, within 3 months after the grant of administration³⁵.

The Court has the power to extend the time for making the election, if it considers there is sufficient cause for doing so³⁶. The note to the section suggests that this extension may be granted if the Court's authorisation is required or if there is an unresolved question regarding the existence or nature of a person's interest in the estate.

The time for making the election can be extended before or after the prescribed time has expired but an election cannot be made after the estate administration is complete³⁷.

Section 118 How election to be made

The spouse must give notice of their election in writing.³⁸ The election must:

- identify the property to be acquired³⁹;

²⁸ SA s 115(3).

²⁹ SA s 115(4).

³⁰ SA ss 115(5),(8).

³¹ SA s 115(6).

³² SA s 116(1).

³³ SA s 116(1).

³⁴ SA s 116(2).

³⁵ SA s 117(1).

³⁶ SA s 117(2).

³⁷ SA s 117(3).

³⁸ SA s 118(1).

³⁹ SA s 118(1).

- the notice must be given to each person who is a personal representative or entitled to a share of the estate⁴⁰.

The Court has the power to direct that the notice does not need to be given to any of those persons if the Court considers it is unnecessary, unreasonable or impracticable to do so in the circumstances⁴¹. A spouse under the age of 18 years can give a valid and effective election⁴².

A spouse can revoke an election by giving notice in writing to the same persons as were given the original notice of election at any time before the transfer of the property to the spouse⁴³.

The form of notice of election to be used has not been prescribed by the legislation.

Section 119 Basis of the election

The spouse may acquire the property for the market value of the property at the date of death⁴⁴.

If the spouse elects to acquire a property which is secured by a mortgage, charge or encumbrance over that property then the spouse takes the property subject to those liabilities and the estate is exonerated. Practically, this will be subject to the consent of any mortgagee. If the mortgagee does not consent, then the liability may have to be paid before the spouse can acquire the property. If the spouse takes the property subject to such a liability then the 'purchase' price is reduced by the amount of that liability.⁴⁵

The PR will need to obtain a valuation from a registered valuer of the property the spouse has elected to acquire⁴⁶. Further, the spouse can request the PR to obtain a valuation to assist them to decide whether or not they wish to acquire it⁴⁷. A copy of the valuation must be given to the spouse and also to the other beneficiaries of the estate⁴⁸.

The obligation on the PR to obtain a valuation of a property by a registered valuer can be waived with the consent of all beneficiaries of the estate⁴⁹.

The legislation does not state what is to happen in the event of a dispute over the value of the property.

Section 120 Exercise price – how satisfied

If a spouse elects to acquire property from the estate then the exercise price is to be satisfied, firstly, from money to which the spouse is entitled from the estate (i.e. the statutory legacy and one-half of the residue of the estate if there are issue)⁵⁰ and, secondly, by payment of the balance by the spouse to the estate on or before the date of the transfer⁵¹.

Section 121 Restriction on disposal of property from intestate estate

The PR is restricted from disposing of property of the estate (except to a spouse who has elected to acquire it) unless:

- the PR is the spouse entitled to make the election⁵²;
- the time for exercising the election has elapsed and no election has been made⁵³;
- the election requires the Court's authorisation but:

⁴⁰ SA s 118(2).

⁴¹ SA s 118(3).

⁴² SA s 118(4).

⁴³ SA ss 118(5) and (6).

⁴⁴ SA s 119(1).

⁴⁵ SA s 119(2).

⁴⁶ SA s 119(3)(a).

⁴⁷ SA s 119(3)(b).

⁴⁸ SA s 119(4).

⁴⁹ SA s 119(5).

⁵⁰ SA s 120(a).

⁵¹ SA s 120(b).

⁵² SA s 121(1)(a).

⁵³ SA s 121(1)(b).

- the necessary authorisation has been refused⁵⁴; or
- the application for authorisation has been withdrawn⁵⁵;
- the spouse has notified the PR, in writing, that he or she does not propose to exercise the right to acquire property from the estate⁵⁶;
- the sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate⁵⁷; or
- the property is perishable or likely to decrease rapidly in value⁵⁸.

A transaction that is entered into contrary to this section is not invalid⁵⁹. What recourse a spouse may have is unclear.

DIVISION 3 MULTIPLE SPOUSES

Sections 122 to 126 deal with the entitlement of multiple spouses where, for example, the intestate is married and also has one or more domestic partners.

Section 122 Spouses' entitlement where there are more than one spouse but no issue

If the intestate leaves two spouses, then the PR must follow a complicated process which is contained in ss 125 and 126 ("the sharing provisions").

Section 123 Spouses' entitlement where issue are also issue of one or more of the spouses

Where an intestate dies leaving a spouse and/or a domestic partner and a child or children of those relationships, the child/ren receive no interest in the estate. The spouse and domestic partner are entitled to the whole of the estate, subject to the sharing provisions.

Section 124 Spouses' entitlement where any issue are not issue of a surviving spouse

The new legislation also provides for the situation where the intestate has a child who is not the issue of the spouse or the domestic partner.

In this situation:

- the spouses are entitled to share in the personal effects in accordance with the sharing provisions⁶⁰;
- each spouse is entitled to share the statutory legacy⁶¹; and
- the spouses are entitled to share one-half of the remainder in accordance with the sharing provisions⁶².

The section does not state if the statutory legacy is to be shared equally or if the statutory legacy is subject to the sharing provisions.

Section 125 Sharing between spouses

If the property is to be shared between the spouses, the property is to be shared:

- in accordance with a written agreement between the spouses (a distribution agreement)⁶³, or
- in accordance with an order of the Court (a distribution order)⁶⁴, or

⁵⁴ SA s 121(1)(c)(i).

⁵⁵ SA s 121(1)(c)(ii).

⁵⁶ SA s 121(1)(d).

⁵⁷ SA s 121(1)(e).

⁵⁸ SA s 121(1)(f).

⁵⁹ SA s 121(2).

⁶⁰ SA s 124(a).

⁶¹ SA s 124(b).

⁶² SA s 124(c).

⁶³ SA s 125(1)(a).

- if the conditions prescribed by subsection 2 are satisfied – in equal shares⁶⁵.

If the PR is to make an equal division of property between the spouses then the PR must:

- give each spouse a notice in writing stating that the PR may distribute the property equally between the spouses unless, within 3 months after the date of the notice, the spouses enter into a distribution agreement and submit the agreement to the PR⁶⁶ or at least one of the spouses applies to the Court for a distribution order⁶⁷
- wait for 3 months to elapse from date of notice and if the PR has not received a distribution agreement or a notice of an application for a distribution order⁶⁸, or if an application for a distribution order has been made but the application has been dismissed or discontinued⁶⁹, then the PR may make an equal distribution of the property between the two spouses.

If a spouse asks the PR to initiate the process for making an equal division of property, the PR must, as soon as practicable, give the notices required as discussed above or make an application to the Court for a distribution order⁷⁰.

The person entitled to be the PR of the intestate estate is the person with priority to a grant⁷¹. Under s 63 PAA, the spouse of the deceased has priority. If there are two spouses, then the question arises: who has priority to obtain a grant? If two spouses are unable to agree about who is to act as the PR, then the next option is to attempt to agree upon an independent third party, such as a trustee company or the NSW Trustee and Guardian, to undertake this role. If a professional trustee company or the NSW Trustee and Guardian is engaged, this will incur cost to the estate.

If the spouses are unable to agree upon an independent administrator, it will be necessary to make an application to the Court to decide the distribution order. It follows that whichever spouse is entitled to the majority of the estate, will also act as the PR.

Section 126 Distribution orders

A spouse or the intestate's PR may apply to the Court for a distribution order⁷². The application cannot be made more than 3 months after the date of the notice given by the PR under s 125(3) (unless the Court allows otherwise)⁷³.

The Court may:

- order that the property be distributed between the spouses in any way it considers is just and equitable⁷⁴.
- allocate the whole of the property to one of the spouses to the exclusion of the other/s⁷⁵.
- include conditions in the order⁷⁶.

The legislation provides no indication as to how the costs of such an application should be paid or what role the PR is to undertake in the proceedings.

PART 4.3 DISTRIBUTION AMONG RELATIVES

⁶⁴ SA s 125(1)(b).

⁶⁵ SA s 125(1)(c).

⁶⁶ SA s 125(2)(a)(i).

⁶⁷ SA s 125(2)(a)(ii).

⁶⁸ SA s 125(2)(b)(i).

⁶⁹ SA s 125(2)(b)(ii).

⁷⁰ SA s 125(3).

⁷¹ PAA s 63.

⁷² SA s 126(1).

⁷³ SA s 126(2).

⁷⁴ SA s 126(3).

⁷⁵ SA s 126(4).

⁷⁶ SA s 126(5).

These provisions are subject to exclusion and modification by a distribution order under Part 4.4 in relation to Indigenous person's estates.

The order of priority to an intestate estate is the same, except for the extension of the class or aunts and uncles so that now cousins can benefit in the event their parent does not survive the intestate.

Section 127 Entitlement of children

If an intestate leaves no spouse but leaves issue, the intestate's children are entitled to the whole of the estate.⁷⁷

If an intestate leaves a spouse/s and any issue who are not also issue of a surviving spouse and a part of the estate remains after satisfying the spouses' entitlement/s, the intestate's children are entitled to the residue of the estate.⁷⁸

If no child predeceased the intestate leaving issue who survived the intestate then:

- if there is only one surviving child – the entitlement vests in that child⁷⁹, or
- if there are two or more surviving children – the entitlement vests in them in equal shares.⁸⁰

If one or more of the intestate's children predeceased the intestate leaving issue who survive the intestate:

- allowance must be made in the division of the entitlement between children for the presumptive share⁸¹ of any such deceased child⁸², and
- the presumptive share of any such deceased child is to be divided between that deceased child's children and, if any of these children (of the deceased child) predeceased the intestate leaving issue who survive the intestate, the deceased child's deceased's child's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great-grandchild who predeceased the intestate leaving issue who survive the intestate), and so on until the entitlement is exhausted.⁸³

Section 128 Parents

If the intestate leaves no spouse and no issue then the parents of the intestate are entitled to the whole of the estate⁸⁴. If there is only one surviving parent then the entitlement vests in that parent and if both survive, it vests in equal shares⁸⁵.

Section 129 Brothers and sisters

Under the PAA there was a distinction between brothers and sisters of the 'whole blood' or of the 'half blood'. This distinction does not exist in the new legislation. In s 101 a 'brother or sister' is defined as a person who is the brother or sister of another if they have one or both parents in common.

The brothers and sisters of an intestate are entitled to the whole of the estate if there is no spouse, issue or parents⁸⁶.

The entitlement to the share of a deceased brother or sister will follow the same process provided for in s 127⁸⁷.

⁷⁷ SA s 127(1).

⁷⁸ SA s 127(2).

⁷⁹ SA s 127(3)(a).

⁸⁰ SA s 127(3)(b).

⁸¹ 'Presumptive share' is defined in s 101 SA to mean the entitlement the relative would have had if he or she had survived the intestate.

⁸² SA s 127(4)(a).

⁸³ SA s 127(4)(b).

⁸⁴ SA s 128(1).

⁸⁵ SA s 128(2).

⁸⁶ SA s 129(1).

Section 130 Grandparents

The grandparents of an intestate are entitled to the whole of the estate if there is no spouse, issue, parent, brother, sister or issue of a deceased brother or sister⁸⁸.

The entitlement will vest in both grandparents or the sole surviving grandparent⁸⁹.

Section 131 Aunts and uncles

The brothers and sisters of each of an intestate's parents are entitled to the whole of the estate if there is no spouse, issue, parent, brother, sister, issue of deceased brother or sister or grandparent⁹⁰.

Again, the succession occurs as in previous sections⁹¹. This results in cousins now being able to benefit from another cousin's estate.

Section 132 Entitlement to take in separate capacities

A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

Example

The example provided in the legislation is as follows:

Suppose that an intestate dies leaving no spouse and no surviving relatives except children of a deceased maternal aunt and paternal uncle who had a child in common as well as children of other unions. In this case, the child of the union between the maternal aunt and the paternal uncle would be entitled to participate in the estate both as representative of the maternal aunt and as representative of the paternal uncle.

PART 4.4 INDIGENOUS PERSONS' ESTATES

The new laws make provision for the recognition of Indigenous culture's concept of "family". The provisions are based on the Northern Territory *Administration & Probate Act*. Practitioners should refer to Northern Territory case law for guidance on how the provisions may be interpreted.

Section 133 Application for distribution order

Section 101 defines an 'Indigenous person' as a person who:

- is of Aboriginal or Torres Strait Islander descent, and
- identifies as an Aboriginal or Torres Strait Islander, and
- is accepted as such by an Aboriginal or Torres Strait Islander community.

An application for a distribution order of an Indigenous intestate's estate can be made by the PR or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which the intestate Indigenous person belonged.⁹²

An application must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate Indigenous person belonged.⁹³ It will be necessary for the applicant to put on evidence regarding the laws, customs, traditions and practices of the community to which the deceased belonged. The publication "The Succession Amendment (Intestacy) Act 2009: A Commentary"⁹⁴ suggests that this information can be obtained from the Aboriginal Land Councils.

⁸⁷ SA ss 129(2) and (3).

⁸⁸ SA s 130(1).

⁸⁹ SA s 130(2).

⁹⁰ SA s 131(1).

⁹¹ SA ss 131(2) and (3).

⁹² SA s 133(1).

⁹³ SA s 133(2).

⁹⁴ The Law Society of New South Wales, July 2009, page 16.

The application must be made within 12 months of the grant of administration or a longer period allowed by the Court. An application cannot be made after the estate has been fully distributed.⁹⁵

A PR is prevented from making a distribution of estate property if a PR makes or has received notice of an application. A distribution may take place once the application has been determined or if the Court authorises the distribution.⁹⁶

Section 134 Distribution orders

The Court may order that the whole or part of the estate of the Indigenous person, be distributed in accordance with the terms of the order.⁹⁷

The Court may order a person to whom property was distributed before the date of the application to return the property to the PR for distribution in accordance with the terms of the order. However, a distribution that has been, or is to be, used for the maintenance, education or advancement of life of the person who was totally or partially dependent on the intestate immediately before the intestate's death cannot be disturbed⁹⁸. This will include a distribution that may have been made pursuant to s 92A PAA or s 94 SA⁹⁹.

The Court must have regard to:

- the scheme for distribution submitted by the applicant, and
- the laws, customs, traditions and practices of the Indigenous community or group to which the deceased belonged¹⁰⁰.

The Court may not make an order unless it is satisfied that the terms of the order are, in all the circumstances, just and equitable.¹⁰¹

Section 135 Effective distribution order under this Part

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

PART 4.5 ABSENCE OF PERSONS ENTITLED

This Part allow for a charity or community organisation with which the deceased had a close association with to make an application for a benefit from an intestate estate, in the situation where the State is entitled to the estate.

Section 136 Intestate leaving no persons entitled

If an intestate dies leaving no person who is entitle to the estate, the State is entitled to the whole of the estate.

Section 137 State has discretion to make provision out of property to which it becomes entitled

An application can be made to the Minister for a waiver of the State's rights in whole or part of the estate in favour of:

- dependants of the intestate; or
- any persons who have, in the Minister's opinion, a just or moral claim on the intestate; or
- any organisation or person for whom the intestate might reasonably be expected to have made provision, or
- the trustees for any person or organisation mentioned in the above paragraphs¹⁰².

⁹⁵ SA s 133(3).

⁹⁶ SA s 133(4).

⁹⁷ SA s 134(1).

⁹⁸ SA s 134(2).

⁹⁹ Note to s 134(2).

¹⁰⁰ SA s 134(3).

¹⁰¹ SA s 134(4).

¹⁰² SA s 137(1).

The Minister may grant a waiver on conditions that the Minister considers appropriate¹⁰³. Such an application for a waiver is to be made in writing to the Crown Solicitor¹⁰⁴.

PART 4.6 MISCELLANEOUS

Practitioners should be familiar with this Part. The notable sections are as follows.

Section 138 Non-deferral of the interest of a minor

The entitlement of a minor to an interest in an intestate estate vests immediately (i.e. it is not deferred until the minor reaches majority or marries).

Section 139 Effect of disclaimer etc

For the purposes of the distribution of an intestate estate, a person will be treated as having predeceased the intestate if the person:

- disclaims an interest, to which he or she would otherwise be entitled, in the intestate estate, or
- is disqualified from taking an interest in the intestate estate for any reason.

The note to the section says:

It follows that, if the person has issue, they may be entitled to take the person's presumptive share of the intestate estate by representation.

Before advising a client who is receiving a Centrelink benefit on whether or not to disclaim an interest in an intestate estate, practitioners should be aware of Centrelink's attitude towards disclaimers.

Section 140 Effect of testamentary and other gifts

The distribution of an intestate estate is not affected by gifts made by the intestate to persons entitled:

- during the intestate's lifetime; or
- in the case of a partial intestacy – by will.

These sections make it clear that assets falling under these categories do not form part of the estate to be distributed in accordance with the intestacy laws.

However, they may be considered 'notional estate' for the purposes of a Family Provision order.

Schedule 1, Part 4, Section 13 Transitional provisions – intestacy

The transitional provisions provide that the new intestacy provisions will apply to the distribution of an intestate estate of a person who dies on or after the commencement of the SA (i.e. on or after 1 March 2010).

The new laws do not apply to the distribution of an intestate estate of a person who dies before the commencement on 1 March 2010, and the law in force at the date of death will apply.

Schedule 2 Amendment of other Acts

Practitioners should note that the *Succession Amendment (Intestacy) Act 2009* also makes amendments to the following Acts:

- Adoption Act 2000;
- Conveyancing Act 1919;
- District Court Act 1973;
- Powers of Attorney Act 2003;
- Probate & Administration Act 1898; and

¹⁰³ SA s 137(2).

¹⁰⁴ SA s 137(3).

- Testator's Family Maintenance & Guardianship of Infants Act 1916.

Generally, these amendments are to references to the new provisions. Some of the notable amendments are:

Adoption Act 2000

The Adoption Act is amended to include the following at the end of section 95(2):

Note. For example, for the purposes of a distribution on intestacy, an adopted child is regarded as a child of the adoptive parent or parents and the child's family relationships are determined accordingly. See section 109 of the Succession Act 2006.

Power of Attorney Act 2003

Section 24 of this Act has been repealed.

A new section 4 of the Act has been inserted into the Act:

4 Effect of disposal of home shared by spouses under enduring power of attorney

Section 24, as in force immediately before its repeal by the Succession Amendment (Intestacy) Act 2009, continues to apply to a spouse of a principal under an enduring power of attorney who dies intestate before the repeal and to whom it would have applied before the repeal as if it had not been repealed.

CONCLUSION

Practitioners will note there are a number of issues that are yet to be clarified, such as the forms of particular notices to be given and how the Court will determine who has priority to a grant in the event there are two spouses. It will be interesting to see the attitude of the Court and the registry to the first applications for a grant where there are two spouses.

GLOSSARY

In this paper, unless otherwise stated:

"FPA" means Family Provision application

"FPA Act" means Family Provision Act 1982 (NSW)

"PAA" means the Probate and Administration Act 1898 (NSW)

"PR" means personal representative

"SA" means Succession Act 2006 (NSW).