LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT
ON
INTESTATE SUCCESSION

March 25, 1985

Report #61

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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Canadian Cataloguing in Publication Data

Manitoba. Law Reform Commission.

Report on intestate succession

(Report ; 61)

Includes bibliographical references.
ISBN 0-7711-0093-0

1. Manitoba. Devolution of Estates Act. 2. Inheritance and succession -- Manitoba. 3. Distribution of decedents' estates -- Manitoba. I. Title. II. Title: Intestate succession. III. Series: Report (Manitoba. Law Reform Commission) ; 61.

KEM247.A72L38 1985 346.712705'2 C85-097306-6

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In its recent *Report on An Examination of "The Dower Act"* the Commission reviewed and recommended reform in one area of the law relating to succession, namely spousal property rights on death. We suggested that the existing fixed share provisions of *"The Dower Act"*, C.C.S.M. c. D100, be replaced by a deferred sharing regime operative on death. Such a regime would provide a right in the surviving spouse to an equal share of marital property on the death of the other spouse.

In our study of *"The Dower Act"* we considered the interrelation of that Act with two other statutes which govern the surviving spouse's rights in the deceased's estate. These are *"The Devolution of Estates Act"*, C.C.S.M. c. D70, and *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50. A full consideration of these statutes was beyond the scope of the *Report on "The Dower Act"*, concerned as it was with only one aspect of spousal succession rights. It was our view that the larger issues addressed by these two Acts were properly the focus of a separate study. It is the purpose of this Report to assess whether statutory reform of *"The Devolution of Estates Act"* is called for, and, if so, to propose recommendations for its reform. The Commission intends to consider *"The Testators Family Maintenance Act"* in a separate report to be issued later this year.

CHAPTER I

INTRODUCTION

A person is said to die "intestate" when (s)he does not leave a will disposing of his/her property at death. The absence of a will means that after the payment of debts, expenses and other liabilities, the deceased's property will be distributed according to statutory rules. In Manitoba, the rules governing the distribution of an intestate estate are embodied in *"The Devolution of Estates Act"*, C.C.S.M. c. D70, a statutory scheme of "intestate succession". The Act is designed not only for the case of a person who dies without a will, but also for the person who leaves a will which fails to dispose of all of his/her property. In the event of such a "partial intestacy", the property not disposed of by will is distributed in accordance with the statutory scheme.

The statutory rules come into play in a variety of circumstances. A person may choose to die intestate, thereby adopting the statutory scheme, because of the cost and inconvenience of executing a will. In other cases a person may die intestate because (s)he has left a will which is ineffective. For example, a will may be improperly executed,[1] or inadvertently revoked by a subsequent marriage.[2] Similarly, a partial intestacy may result when a will has not been properly drafted and fails to contain a residuary clause.[3]

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[1]*See "The Wills Act"*, C.C.S.M. c. W150, s. 4. It is to be noted, however, that section 23 of *"The Wills Act"* allows the Court of Queen's Bench to order that a will is fully effective even if it has not been executed in compliance with all of the formal requirements if the Court is satisfied that the document in question embodies the testamentary intentions of the deceased.

[2]*"The Wills Act"*, C.C.S.M. c. W150, s. 17.

[3]If legatees have predeceased the testator and the legacies lapse, a partial intestacy will occur unless the will contains a residuary clause. Section 34 of *"The Wills Act"* does provide, however, that in certain cases a gift to a person who is a child or other issue, or a brother or sister of a testator will not lapse if that person leaves issue any of whom is living at the time of the testator's death. In such an event, the gift takes effect as if it had been made directly to those entitled to inherit the person's estate had (s)he died intestate.

The general pattern of distribution set out in *"The Devolution of Estates Act"* is based, as is the equivalent legislation in all of the common law provinces, upon the English *Statute of Distribution, 1670*.[4] That statute provided a comprehensive code for the distribution of personal property on intestacy. It was not, however, concerned with the succession of real property, which passed directly to the intestate's heir in accordance with long established common law principles. In 1925, a new system applicable to both real and personal property of persons dying intestate was enacted in England.[5] A similar development has occurred in Manitoba: *"The Devolution of Estates Act"* governs the devolution on intestacy of both realty and personalty.

The distributive pattern set out in *"The Devolution of Estates Act"* attempts to reflect the wishes of the average person and is essentially "the law's answer to the question 'how would the deceased have distributed his property if he had made a will?'".[6] A principal purpose of the Act is thus to provide suitable rules for the average property owner who relies on the estate plan provided by law. The statutory pattern is also intended to reflect community views respecting what would constitute a fair distribution of the deceased's property. Changes in societal values have thus brought corresponding changes in the statutory scheme. The most striking example of this in the last century is the extension of the rights of the surviving spouse at the expense of the deceased's children.[7]

The very nature of a statutory scheme of fixed rules is that it will at times produce arbitrary, and unfair, results in individual cases. Most people are advised to make a will in order to plan their estate effectively,

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[4]*Statute of Distribution, 1670*, 22 & 23 Car. 2, c. 10.

[5]*Administration of Estates Act, 1925*, 15 Geo. 5, c. 23.

[6]Ontario Law Reform Commission, *Report on Family Law, Part IV: Family Property Law* (1974) at 163.

[7]*See* J. Gareth Miller, *The Machinery of Succession* (1977) at 96.

to transfer specific assets to particular individuals, to benefit individuals who are outside the statutory scheme, and to take into account the differing needs of one's spouse, issue and next-of-kin.

Present Scheme of Distribution

Manitoba's scheme of intestate succession is found in the following sections of *"The Devolution of Estates Act"*:

Estates of $50,000 or less.

6(1) Where the estate of an intestate who dies leaving a widow and issue does not exceed the value of $50,000, the whole of his estate shall go to the widow.

Estates over $50,000.

6(2) Where the estate of an intestate who dies leaving a widow and issue exceeds the value of $50,000, the widow is entitled

(a) to $50,000, and has a charge upon the estate for that amount, without interest; and
(b) to one-half of the residue remaining after deducting the $50,000.

Issue of deceased child.

6(3) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the widow shall take the same share of the estate as if the child had been living at that date.

Distribution among issue.

6(4) If an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the widow, if any, per stirpes among the issue.

Widow, but not issue.

7 If an intestate dies leaving a widow, but no issue, his estate shall go to his widow.

Neither widow nor issue.

8(1) If an intestate dies leaving no widow or issue, his estate shall go to his father and mother in equal shares if both are living; but if either of them is dead the estate shall go to the survivor.

No widow, issue, father, or mother.

8(2) If an intestate dies leaving no widow, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living.

No widow, issue, parents, brothers, or sisters.

8(3) If an intestate dies leaving no widow, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares and in no case shall representation be admitted.

Distribution covering next-of-kin.

9 If an intestate dies leaving no widow, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted.

Kindred and half-blood.

10 For the purposes of this Act, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative; and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

Posthumous births.

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

As with all intestacy statutes, *"The Devolution of Estates Act"* calls for the deceased's estate to be distributed among his relatives. Such distributions are made only out of the net estate, that is, after all debts, liabilities, and funeral expenses are paid.[8]

Provision is made first for the surviving spouse who is given a specific priority over all other classes of relatives. The spouse's entitlement to a "preferential share" of $50,000 ensures that (s)he will receive most, if not all, of the small or moderately sized estate; where the estate is large, the deceased's children will also be entitled to a share. If a child of the intestate has died, the child's issue, that is the child's lineal descendants, take the child's portion. No distinction is made between children born in or out of marriage,[9] and adopted children are treated as children of the adopting parents for purposes of succession and cease to be children of the natural parents.[10]

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[8] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 4.

[9] At common law, an illegitimate child was *nullius filius* (no one's child), and did not have the right to inherit from his parents on an intestacy. This position was moderated by former sections 15 and 16 of *"The Devolution of Estates Act"* (now repealed), which allowed an illegitimate child to inherit through his mother and she, and her children, to inherit through him. The distinction between children born in and out of marriage has been entirely abolished in Manitoba by section 11.2(4) of Part II: Child Status of *"The Family Maintenance Act"*, C.C.S.M. c. F20.

[10] *"The Child Welfare Act"*, C.C.S.M. c. C80, s. 96(1). *See Re Purpur* (1984), 9 D.L.R. (4th) 387 (Man. Q.B.); aff'd Man. C.A. unreported, Nov. 27, 1984. Subsection 96(1) was amended in 1981 in response to the decision of the Court of Appeal in *Re Podolsky's Estate* (1980), 3 Man. R. (3d) 251 where it was held that children were entitled to inherit their natural father's intestate estate despite the fact that they had been adopted, following the Podolskys' divorce, by their mother and her second husband. For a discussion of the case and the issues it raises *see* C. Harvey, "Intestate Succession Rights of Adopted Children in Manitoba" (1981), 2 Man. L.J. 201; A. Bolton, "*Podolsky* v. *Podolsky* - A Further Comment" (1981), 2 Man. L.J. 207.

If the deceased is not survived by either spouse or children, the Act prescribes the specific classes of relatives whose members are entitled to take. The deceased's parents are next in line, followed by brothers and sisters and the nephews and nieces of the deceased. If the deceased is not survived by parents or brothers and sisters, nieces or nephews, the next-of-kin "of equal degree of consanguinity to the intestate" are entitled. In the absence of any relatives entitled to claim on intestacy, the deceased's real property escheats to the Crown,[11] and personal property passes to the Crown as *bona vacantia* (unclaimed or ownerless goods).

In the next chapter we shall examine in detail the rules governing the entitlement of the deceased's next-of-kin to succeed on an intestacy. We shall consider both the specific classes of relatives, and whether the portions allocated to them are appropriate. Our recommendations for reform are summarized in Chapter 3.

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[11] "*The Escheats Act*", C.C.S.M. c. E140.

CHAPTER 2

REFORM OF THE LAW OF INTESTATE SUCCESSION

In formulating the recommendations contained in this Chapter, the Commission has pursued four primary objectives:

(1) the modernization of intestate succession law so as to ensure that the law is compatible with the wishes of the average property owner as well as present social values;

(2) the simplification of the legislation for the convenience of the public and the legal profession;

(3) the harmonization of the rules of intestate succession with the provisions of *"The Dower Act"*, *"The Marital Property Act"*, and *"The Testators Family Maintenance Act"*, so that the interaction of these statutes is logically formulated and organized; and

(4) the uniformity of Manitoba law with succession legislation in other Canadian jurisdictions, where that is desirable.

Two of these objectives deserve special comment. The first is with respect to modernization. We have said that a primary purpose of intestate succession law is to provide for the distribution of estates in a way that intestate decedents would themselves have chosen if they had made a will. If this is a true objective of the law, then prevailing patterns in wills and empirical research into how the average person wishes to dispose of his/her property at death are relevant in formulating appropriate intestacy

provisions.[1] Very little research of this kind has been done in Canada;[2] there are, however, several well-known American studies.[3] Where we believe that the information contained in these studies can be useful in determining the direction of effective reform, their findings will be referred to in the discussion which follows.

The fourth goal, that of the uniformity of Manitoba's succession law with that of other Canadian provinces deserves special note as well. In Canada, intestate succession has been the subject of uniform legislation. In 1925, the Commissioners on Uniformity of Legislation in Canada adopted a uniform Act. That Act has been the subject of periodic revision, the last

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[1]Such research generally takes one of two forms. In the first, a sample of wills in a probate register is examined in order to ascertain the wishes of a majority of testators. For example, such an approach was taken in England in 1925 and again in 1951, prior to reform of the intestate succession law, in order to infer what individuals who do not have wills would be most likely to want. The expressed wishes of testators were thus used to predict the wishes of intestates. See *Report of the Committee on the Law of Intestate Succession*, England, Cmd. No. 8310 (1951).

An approach used more recently in the United States is that of a survey conducted of the residents of a certain district to determine their opinions about distributive patterns in hypothetical survivor situations. The approach is sometimes combined with an examination of estates selected from probate records. *See generally*, "A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes" (1978), 63 Iowa L. Rev. 1041; M. Fellows, R. Simon, T. Snapp and W. Snapp, "An Empirical Study of the Illinois Statutory Estate Plan" (1976), 3 U. of Ill. L.F. 717; Note, "Intestate Succession in New Jersey: Does It Conform to Popular Expectations?" (1976), 2 Col. J. Law & Soc. Problems 265.

[2]Some statistical research has been done in British Columbia. *See* Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983), Appendices F and G.

[3]*Supra* n. 1. *See also*, A. Dunham, "The Method, Process and Frequency of Wealth Transmission at Death" (1963), 30 U. Chi. L. Rev. 241; M. Sussman, J. Cates, and D. Smith, *The Family and Inheritance* (1970).

having taken place in 1963. Manitoba's legislation, amended several times since that date, is now quite dissimilar to the uniform Act. The Uniform Law Conference has, however, recently adopted in principle a new proposed Uniform Intestate Succession Act (a copy of which is reproduced in the Appendix), based largely on the American *Uniform Probate Code*.[4] We intend to examine the provisions of the proposed Uniform Intestate Succession Act with a view to making recommendations for their implementation in Manitoba, where appropriate.

A. THE INTESTATE SHARE OF THE SURVIVING SPOUSE[5]

The appropriate intestate share for the surviving spouse must be determined for each of a number of different survivor situations. The spousal share can be increased or decreased depending upon whether

(i) the spouse survives but there are no surviving children,[6]

(ii) the spouse survives in addition to children of the marriage, and

(iii) the spouse survives in addition to children of the deceased from a prior marriage.

The spousal share may depend, too, on the status of the spouse, that is, (s)he may have been legally married to the deceased, a separated spouse or a spouse in a *de facto* relationship. Also of relevance in determining the amount of the spousal share may be whether, in the case of a partial intestacy, the spouse has already received benefits under the deceased's will.

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[4]*Uniform Probate Code*, s. 2 (1969).

[5]In addition to intestacy benefits under *"The Devolution of Estates Act"*, the surviving spouse is also entitled to a life estate in the homestead by virtue of section 14 of *"The Dower Act"*, C.C.S.M. c. D100. *See In Re Sysiuk Estate*, [1947] 2 W.W.R. 897 (Man. C.A.).

[6]Throughout the following discussion, the words "child" and "children" are used in such a way as to mean issue generally and would thus include grandchildren, great-grandchildren, etc.

1. The Preferential Share

(i) Only the spouse of the intestate survives

"The Devolution of Estates Act" gives all of an intestate estate to a surviving spouse when the deceased spouse leaves no surviving children (or issue). The provision is based on the fact that testators of small and moderately sized estates usually will their entire estate to the surviving spouse if there are no children,[7] and that intestate succession legislation should reflect this preference. We propose no change here.

(ii) The spouse and children of the intestate survive

Where the deceased is survived by both spouse and children (or issue), *"The Devolution of Estates Act"* provides that the spouse is to have a preferential share of $50,000, and a "distributive share" of one-half of the remainder. The other one-half goes to the deceased's children; issue of a deceased child take the portion that child would have received. The amount of $50,000 was last amended in 1978; prior to that date the preferential share was $10,000.

The preferential share represents the law's attempt to achieve an appropriate balance between the interests of the surviving spouse and those of the deceased's children. In Manitoba, these competing claims have been substantially resolved in favour of the surviving spouse. Through the provision of a guaranteed minimum dollar amount, the surviving spouse is ensured of receiving the bulk of the deceased's property where the estate is not a large one. Surviving children, on the other hand, inherit only in those cases where the estate is perceived to be of sufficient size to provide for them without undue prejudice to the interests of the surviving spouse.

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[7] *See* Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983), Appendices F and G.

There are a number of policy arguments which support the allocation of a major portion of intestate property to the surviving spouse when children of the intestate also survive. First, the surviving spouse has generally made substantial contributions to the accumulation of the deceased spouse's property. This can occur directly through actual monetary contributions made by a spouse who has worked outside the home, or through the less quantifiable contribution made to the family unit by a homemaker spouse. In either case, the survivor generally would expect this contribution to be recognized through the provision of an equitable portion of the intestate estate. Surviving children, on the other hand, generally have not played a significant role in the acquisition of property by their parents.

Second, we think it fair to state that the needs of the surviving spouse are generally greater than those of the children. In most cases the surviving spouse is at an age where the need for support is great because of restricted income earning abilities; consequently, the survivor will usually require the bulk of the deceased's estate for his or her maintenance and support. Certainly the surviving spouse's needs are greater than those of children who, for the most part, are self-supporting adults at the time of a parent's death. Even where the spouse is younger and able to earn an income, (s)he will still need a large share of a deceased spouse's estate in order to provide properly for dependent children.

A third consideration that favours a large allocation of an estate to the surviving spouse is that in most cases the children of the marriage will eventually receive a portion of the deceased's estate in any case. This occurs because the heirs of the surviving spouse will generally be the deceased's children.

In addition to the strong policy arguments which support a substantial allocation of a deceased's property to the surviving spouse when children of the intestate and that spouse also survive, empirical evidence suggests that such a distribution fulfils the probable desires of most intestates. In British Columbia, for instance, information gathered through government sources in 1977 and 1981 disclosed that in almost 80% of those cases where a deceased made a will and was survived by both spouse and children, everything was left to the surviving spouse.[8] In the United States, too, research indicates that most individuals prefer to leave the bulk of their property to a surviving spouse when both spouse and children survive.[9]

It is our view that the immediate requirements of the surviving spouse will generally override the interests of the deceased's children, and that the law's intestacy provisions should therefore reflect a strong preference for the spouse. There are two ways in which this preference can be expressed. The most simple and straightforward approach is to distribute 100% of the intestate estate to the surviving spouse and exclude other survivors altogether.[10] Certainly the statistical surveys indicate that such a rule

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[8] *Ibid.*

[9] In the 1978 Iowa study, *supra* n. 1 at 1085, 61% of the survey respondents allocated all of the estate to the surviving spouse and excluded the children entirely. The mean percentage figure indicated an average allocation of 79% of the estate to the surviving spouse and only 21% to the children. Two American studies involving probate records also reveal a strong preference for the spouse. *See* M. Sussman, J. Cates and D. Smith, *supra* n. 3 at 133 (of 57 testators survived by a spouse and minor children, 55 willed their entire estates to their spouses); Dunham, *supra* n. 3 at 252-53 (100% of testators survived by a spouse and children left all their property to the surviving spouse).

[10] No Canadian jurisdiction takes this approach. As of 1978, two American states have provided for an allocation of 100% of an intestate's estate to the surviving spouse if all surviving issue are also issue of the surviving spouse. *See* Ariz. Rev. Stat. s. 14-2102 (1975); Mont. Rev. Codes Ann. s. 91A-2-102 (Supp. 1977) cited by "A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1092, n. 249. Many American commentators have also suggested an allocation of 100% of an intestate estate to the surviving spouse. *See* Sussman, Cates and Smith, *supra* n. 3 at 299; Fellows, Simon, Snapp & Snapp, *supra* n. 1 at 731-2; "A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1091-2.

would often accord with the deceased spouse's wishes. Where there are young children of the marriage who are dependent on the surviving spouse, an "all-to-spouse" rule appears highly desirable. Such a rule would also avoid the need to adjust a statutory minimum share in order to maintain that share's economic value over time.

The second way in which the law can provide the surviving spouse with the major portion of an intestate estate is to allow the survivor a preferential share. This is the approach now taken in Manitoba. We have said that the purpose of the preferential share is to ensure that the surviving spouse receives most if not all of the small or moderately sized estate, while forcing some further distribution of a large estate. Arguably, the preferential share is more complex than an "all-to-spouse" provision. In order to make the necessary allocations to both spouse and children, questions of valuation will arise in some estates, and decisions as to what property should be sold or distributed *in specie* may be required. The important advantage of the preferential share over an all-to-spouse rule, however, is that it recognizes that a large estate can be distributed so as to ensure that the surviving spouse's requirements are met without disinheriting children of the marriage.

Statistical surveys done in the United States indicate that estate size is an important factor in determining the appropriate spousal share. In response to hypothetical survivor situations, survey participants in three American studies expressed a preference for a deceased's children to be allocated a share of intestate property when the estate was a large one.[11] The preferential share approach can achieve this result if the share is set at a realistic level.

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[11]In the Chicago study, *supra* n. 3 at 261, where the estate was small ($36,000) 85% of respondents allocated all to the surviving spouse; where the estate was large ($180,000) only 40% of respondents favoured distribution of all of the estate to the surviving spouse. In the Iowa study, *supra* n. 1 at 1089, the average percentage of the estate allocated by respondents to the surviving spouse decreased as the size of the estate increased, dropping from 83% of a $10,000 estate to 72% of a $500,000 estate. *See also* Glucksman, *supra* n. 1 at 273-75.

We have concluded that although the all-to-spouse rule is an attractive alternative, the preferential share approach is the more appropriate. We believe that the law should allow for as many variables as possible, provided that to do so will not result in overly complex provisions. The preferential share is able to take into account the important variable of estate size, ensuring a share for the deceased's children in the case of a large estate while at the same time providing the surviving spouse with a generous portion of the estate. Although not as administratively simple as the all-to-spouse rule, the preferential share approach is also not, in our view, particularly complex. In addition, statistical research indicates that the public prefers that an intestate's children receive a portion of a large estate. Finally, the proposed Uniform Intestate Succession Act has adopted the preferential share approach (setting the amount of $100,000), and we believe that Manitoba law should follow that Act wherever possible.

Having determined that the purpose of a preferential share is to ensure that a surviving spouse will receive all of the smaller estate and a generous portion of a larger estate, it remains to decide what the amount of the preferential share must be if this objective is to be achieved. The Uniform Law Conference has chosen a figure of $100,000 in order for intestate succession to conform to the pattern of testate succession in relatively small estates.[12] It was the view of the drafters of the Act that such a figure would "probably cover the great majority of intestate estates when one considers the typical assets of an intestate of relatively modest means".[13] In most families, major assets such as the home, bank accounts and stocks will be held in joint tenancy by the spouses and will therefore not form part of the intestate estate. Insurance proceeds and pension benefits will also

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[12] *See* Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983), Report on the Proposed Uniform Intestate Succession Act, at 220.

[13] *Id.* at 220-221.

usually be paid directly to the surviving spouse. For most spouses of modest means, then, the substantial assets will not even form part of the deceased spouse's intestate estate. It was the conclusion of the Uniform Law Conference that setting the preferential share at $100,000 would ensure a generous priority to the surviving spouse.

No intestate succession Act in Canada today provides a preferential share as high as $100,000. As of 1978, the Ontario *Succession Law Reform Act* has provided the most generous preferential share of $75,000.[14] The Law Reform Commission of British Columbia, however, in its recent *Report on Statutory Succession Rights*,[15] has suggested a preferential share of $200,000, and the Law Reform Commission of Saskatchewan has tentatively recommended a preferential share of $100,000.[16] Certainly Manitoba's current preferential share of $50,000 has not maintained its economic value. Given that the last increase took effect in July, 1978, the share would now have to be set at $83,067 in order to have the same value that it had in 1978.[17]

We said at the outset of this chapter that one of the goals of reforming intestate succession law is to achieve uniformity among the Canadian provinces. We have found the reasoning put forward by the Uniform Law Conference with respect to the setting of the proposed uniform Act's preferential share at $100,000 to be sound. Accordingly, it is our view that Manitoba's preferential share should also now be set at $100,000. In addition, a means of ensuring that the economic value of the preferential

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[14]R.S.O. 1980 c. 488, s. 45.

[15]*Supra* n. 2 at 28.

[16]Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of The Matrimonial Property Act* (1984) at 82.

[17]This is computed by using the Consumer Price Index:

$$\frac{\text{CPI Jan. 1985 (124.6)}}{\text{CPI July 1978 (75.0)}} \times \$50{,}000 = \$83{,}067$$

share is maintained is desirable: we believe that the Legislature should regularly review the adequacy of the spousal preferential share.

The Commission recommends:

RECOMMENDATION 1

That, subject to Recommendation 3, "The Devolution of Estates Act" be amended to provide that the surviving spouse's preferential share be $100,000.

RECOMMENDATION 2

That the Legislature regularly review the adequacy of the spouse's preferential share in order that the share's economic value be maintained.

(iii) The spouse and the intestate's children of a prior marriage survive[18]

A further issue which must be addressed with respect to the preferential share is whether or not the surviving spouse should be entitled to that share when the deceased is also survived by children of a prior marriage. The last several years have seen a dramatic increase in divorce and remarriage and a substantial number of intestates will leave a surviving spouse as well as children from an earlier marriage. Such cases create difficult distribution problems because of the possible conflict between the needs of two separate families.

Manitoba's current intestacy rules take no account of whether the surviving children of the intestate are also the children of the surviving spouse: the preferential share is paid to the spouse regardless of the status of the children. This is also the case under the proposed Uniform Intestate Succession Act, where the preferential share of $100,000 is to be paid to the surviving spouse whether or not children of a prior marriage also survive.

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[18]It is assumed here that the children of the prior marriage have not been adopted by the surviving spouse. If the children have been so adopted, they become, for purposes of intestate succession, the issue of the spouse.

The American *Uniform Probate Code*, on the other hand, grants a preferential share only when a surviving spouse is the parent of *all* surviving children; a surviving spouse who is not the parent of one or more of the intestate's surviving children receives only one-half of the estate, with no guaranteed minimum dollar amount.[19] The provision has the effect of providing a measure of equality between the two families.

Determining the appropriate share for the surviving spouse when the deceased is also survived by children from a prior marriage is not an easy task.[20] Both types of surviving spouse (the one who is the parent of all of the deceased's children, and the other who is not) generally have limited income producing potential and can demonstrate greater need for the estate than can typical surviving adult children. The second spouse will usually need the security of the capital provided by the preferential share in the same way as the first spouse. The spouse who is not the parent of surviving adult children will also be less likely than a parent to receive support from such children.[21]

Although the need of a surviving spouse for the intestate estate may be the same whether or not (s)he is the parent of all of the deceased's children, the potential for disinheritance of the deceased's children is much greater when the surviving spouse is not the parent. It is presumed that when the surviving spouse is the parent, that spouse will accept responsibility for the care and support of the deceased's minor children, and when the spouse

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[19] *Uniform Probate Code*, s. 2-102.

[20] For an excellent discussion of the policy considerations raised by this issue, *see* "A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1092-97.

[21] *Id.* at 1094.

dies, those children will likely inherit. If the spouse is not the parent, however, the eventual passage of the deceased's assets through that spouse to all of the deceased's children is less certain. This is especially true if that spouse has children of his or her own who are more likely to inherit the spouse's estate than are the deceased's children.

Although no Canadian data is available, empirical research done in the United States is helpful in determining the public's preference when asked to respond to a situation involving a spouse and a child or children of a prior marriage. In a recent major American study, the respondents' average allocation to a surviving spouse when a child or children of a prior marriage also survive was 58% of the deceased's estate. This was in clear contrast to the average allocation of 79% of the estate when the surviving spouse was the parent of all of the intestate's surviving children.[22] While still favouring the surviving spouse, survey respondents clearly desired some protection from disinheritance for the deceased's children who were not also children of the surviving spouse.

The policy considerations respecting the needs of the typical surviving spouse, and the American statistical surveys, lead to certain conclusions about appropriate distribution when an intestate is survived by a spouse who is not the parent of all of the intestate's surviving children. We said earlier that a preferential share of $100,000 would ensure that a surviving spouse was allocated most, if not all, of the average intestate estate, and we considered this to be a desirable result given the need of the typical spouse. We have now said that the need of the second spouse is generally equivalent to that of the first. What is required, in our view, is an allocation scheme which will provide sufficient estate assets for the

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[22]"A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1095. These findings coincide with those of other American studies: *see* Fellows, Simon and Snapp, *supra* n. 1 at 728-29, 732; Sussman, Cates and Smith, *supra* n. 3 at 91-95, 128-31.

spouse, while at the same time protecting the deceased's children from disinheritance. A preferential share of $100,000 will achieve the first objective but not the second: most estates will not be large enough to ensure that the children will receive a share. Accordingly, we are not prepared to follow the proposed Uniform Intestate Succession Act (which allows a preferential share of $100,000) on this point.

There appear to be two alternative approaches: the first is the approach taken by the American *Uniform Probate Code*, which is to divide the estate into two portions with the spouse and the children each receiving an equal share. The second is to provide the surviving spouse with a reduced preferential share, perhaps one-half of the share provided the spouse who is the parent of all of the deceased's children. We consider the second of these alternatives to be preferable. A reduced preferential share can ensure that the spouse receives a minimum capital sum, while forcing distribution among the children when the estate is of a certain size.

We recognize that *any* preferential share may be prejudicial to the deceased's children simply because the estate must be larger than the amount of the preferential share before they will be entitled to take. In essence, the problem is that unless the estate is a large one, it may be impossible for the financial responsibilities of two marriages to be met. We believe, however, that the requirements of the surviving spouse are of paramount importance, and that the law should ensure that (s)he is provided for before distribution of any portion of the estate to other survivors.[23] In our view, a reduced preferential share of $50,000 is appropriate when the deceased is survived by both a spouse and children of a prior marriage.

The Commission recommends:

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[23]The intestate's children, as well as other dependants, are entitled to apply for an order of provision for maintenance and support under *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50. This right will help to alleviate hardship in situations where *"The Devolution of Estates Act"* provides an inappropriate distribution.

RECOMMENDATION 3

That "The Devolution of Estates Act" be amended to provide that the surviving spouse's preferential share be $50,000 when there are surviving issue of the intestate, one or more of whom are not issue of the surviving spouse.

2. The Separated Spouse

The Commission has considered whether the surviving spouse should be entitled to intestacy benefits when the spouses were living separate and apart at the time of death but had not obtained a divorce.[24] At present *"The Devolution of Estates Act"* draws no distinction between the separated spouse and the spouse who was cohabiting with the deceased as of the date of death: both are entitled to the preferential share, and a distributive share of one-half the remainder of the estate. The separated spouse is entitled to intestacy benefits regardless of whether or not the spouses had effected a marital property settlement during their joint lives.[25]

It is our view that the policy of the Act at present ignores the usual intention of separated spouses, namely, that separation should bring an end to their rights and obligations respecting each other at the death of one of them. Certainly where the spouses have effected a division of marital property during their joint lives, they generally wish to effect a final settlement of their affairs and therefore do not contemplate the survivor receiving an additional share in the event of intestacy. We think that the parties to a marriage should be able to rely on the finality of an earlier

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[24]A divorced spouse is not a "spouse" under the Act and is therefore not entitled to an intestate share.

[25]It is of note that in 1977 the Manitoba Legislature enacted a family law reform package of legislation which included *"An Act to Amend Various Acts Relating to Marital Property"*, S.M. 1977, c. 53. That Act, never proclaimed in force, contained a provision which would have required a separated surviving spouse to charge against his/her preferential share the value of property already received by the survivor through an allocation of marital property.

property division.[26]

The proposed Uniform Intestate Succession Act now provides that where spouses have during life made a property division with the intention of finalizing their affairs, "the surviving spouse shall be treated as if he had predeceased the intestate".[27] This has the effect of barring the separated spouse from taking on an intestacy in those cases where there has been a marital property division. In taking this approach, the Uniform Law Conference has adopted the position of the *Uniform Probate Code*,[28] and a recommendation of the Law Reform Commission of British Columbia to the same effect.[29]

At the beginning of this chapter, we said that one of the objectives of reform of succession law was the harmonization of that law with other Manitoba legislation respecting family rights and obligations. One of our goals was the logical interaction of spousal rights during the parties' joint lives with rights at death. In our view, the existing provisions of *"The Devolution of Estates Act"*, which permit a separated spouse to take an intestate share, are not in harmony with the legal arrangements respecting property made by separated spouses during life. We believe that the proposed Uniform Intestate Succession Act and the *Uniform Probate Code* provisions recognize the proper interaction of succession law and marital property law in respect of the separated spouse.

Therefore, the Commission has concluded that a complete property settlement entered into after or in anticipation of separation should operate as a bar to the survivor taking an intestate share.[30] If there has been

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[26]A separated surviving spouse is nevertheless able to apply under *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, for an order of provision for his or her proper maintenance and support.

[27]Appendix, s. 3(3).

[28]*Uniform Probate Code*, s. 2-204.

[29]*Supra* n. 2 at 117.

[30]This conclusion is in accord with the Commission's recommendation in its *Report on an Examination of "The Dower Act"* at p. 91, that the deferred sharing regime not apply to permit an application by a surviving spouse where the spouses had effected a complete property settlement during their joint lives.

no earlier division of property, either by agreement or court order, the surviving spouse's entitlement should remain: a surviving spouse should not be disqualified by reason of separation alone. Where there has been a separation and an earlier property settlement but the parties have resumed cohabitation, the survivor should be entitled to an intestate share. Accordingly, we recommend:

RECOMMENDATION 4

That where there has been a complete property settlement by way of court order or separation agreement, and there is an intestacy, the deceased's property should be distributed as if the surviving spouse predeceased the deceased unless the spouses have resumed cohabitation after the property settlement was made and the reconciliation is subsisting at the time of the deceased's death.

3. The *De Facto* Spouse

The Commission has examined whether a *de facto* spouse should be entitled to an intestate share of a deceased partner's estate. By *de facto* spouse we mean a man or woman in a relationship in which the partners are not legally married to each other but live together as husband and wife. A *de facto* spouse now has no right to an intestate share of the deceased partner's estate; nor is that spouse entitled to apply for an order of maintenance and support under *"The Testators Family Maintenance Act"*.

The Commission has concluded that it would not be appropriate to extend the entitlement to a spousal intestate share to the *de facto* spouse. The underlying assumption of the legally married spouse's entitlement to an intestate share is that the deceased would have wished to provide for that spouse. In our view, however, it is unsafe for the law to presume that the parties to a *de facto* relationship intend to share property or to provide fully for one another at death. The *de facto* marriage will often not have the degree of permanence and stability of the legal marriage, and the parties may have chosen to live together outside marriage for the very reason that they wish to avoid the legal rights and obligations of married people.

The Commission is of the view that a *de facto* spouse's entitlement to a share of a deceased partner's estate can best be determined, not by the fixed rights provided by *"The Devolution of Estates Act"*, but through a court's exercise of judicial discretion. At present, depending upon the circumstances of the case, the *de facto* spouse may have an equitable remedy available in order to seek a share in the deceased's estate. Through the doctrines of constructive and resulting trust, the court can use its discretionary power to determine a *de facto* spouse's entitlement to a share of the deceased's property when the survivor has contributed, either directly or indirectly, to the acquisition of the estate assets.[31]

We recognize, however, that trust doctrines are available only for the purpose of dividing property between individuals who have contributed to the acquisition of the property. Consequently, they will not always sufficiently protect the surviving *de facto* spouse who has made neither a direct or indirect contribution. Additional discretionary protection may be necessary.

Manitoba law has long recognized the need for a safety net designed to operate when the deceased's will, or the intestacy rules, fail to make adequate provision for the surviving family. This safety net is found in the provisions of *"The Testators Family Maintenance Act"*. The Act allows the court to make an order that provision be made out of the deceased's estate for the maintenance and support of the surviving family. The wide discretion

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[31] *Pettkus* v. *Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.). *See also Beauchamp* v. *Badali Estate* (1983), 22 Man. R. (2d) 43 (Q.B.) where the surviving *de facto* spouse was awarded the balance of the estate remaining after providing $1,000 to each of the deceased's siblings. The total estate was worth approximately $37,200 and by his will the deceased had split his estate in five equal shares and given one share to his common law wife and the others to his three sisters and his brother.

which can be exercized by the court under this Act can take into account matters such as the length and closeness of a relationship, the need of the applicant and the claims of other relatives. If a further discretionary power is required to protect the surviving *de facto* spouse, it is the Commission's belief that it should be contained within *"The Testators Family Maintenance Act"*.[32] We shall consider whether that Act should be amended to permit an application by a *de facto* spouse in a report on the Act to be issued by the Commission later this year. At that time, we shall also consider the related problem of the surviving spouse of a void marriage.[33] For the moment, in accord with our conclusion that a *de facto* spouse's entitlement to a share in a deceased partner's estate should be determined, not by fixed intestacy rules, but through the exercise of judicial discretion, we recommend:

RECOMMENDATION 5

That a de facto spouse not be entitled to a share of the deceased spouse's estate on an intestacy.

4. Partial Intestacy

In the rare case where a deceased's will does not effectively dispose of all of his/her estate,[34] that portion not governed by the will passes according to the rules of intestate succession. Section 13 provides:

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[32]Dependants relief legislation in Ontario, British Columbia and Prince Edward Island permits, in certain prescribed circumstances, an application by a common law or *de facto* spouse. *See Succession Law Reform Act*, R.S.O. 1980 c. 488, s. 57(b); *Part V, Estate Administration Act*, R.S.B.C. 1979 c. 114, s. 86, which section, however, applies only in cases of intestacy; *The Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1974 c. D-6, s. 1(d).

[33]A void marriage most often arises when one of the parties is already married to another. It is not possible to define "spouse" under *"The Devolution of Estates Act"* to include a survivor of a void marriage because to do so might result in an intestate having two surviving "spouses" competing for the spousal share.

[34]Partial intestacies occur infrequently and are seldom intended. They usually arise when a will fails to contain a residuary clause. If legatees have predeceased the testator and the legacies lapse, a partial intestacy will occur unless the will contains such a clause.

Estate undisposed of by will

13 All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

There is one important exception to this rule, having to do with the surviving spouse's entitlement to a preferential share. Subsection 14(1) of the Act provides that in cases of partial intestacy, the widow's preferential share is to be reduced by the value of any property left to her under the deceased's will.[35] In practice, the section would operate in the following way. Assume a testator leaves a wife and two children. He disposes of one-half of his estate by will, giving his wife $40,000 and each of his children $25,000. The remaining $90,000 will be distributed according to the provisions of *"The Devolution of Estates Act"*. By virtue of subsection 14(1), the wife must account for the $40,000 received under the will against the preferential share entitlement of $50,000. She thus receives a reduced preferential share of $10,000 in addition to one-half of the remaining $80,000, that is to say, a further $40,000.

The purpose underlying subsection 14(1) is to prohibit the surviving spouse from receiving a double preferential share, one under the will and the other under the intestacy rules. In keeping with this policy, only the spouse's entitlement to a preference over and above other beneficiaries is affected by subsection 14(1); the entitlement to a distributive share remains.

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[35]It is unclear whether the section applies to widowers as well as to widows. Section 17 of the Act, which is a general interpretive section, provides that "the estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man so dying . . .". Presumably the intent is that men and women be treated in the same manner; however, section 17 contains a list of the sections to which the rule applies and section 14 is not included among them.

A provision similar to subsection 14(1) is to be found in the proposed Uniform Intestate Succession Act,[36] and in the Ontario *Succession Law Reform Act*.[37] The Commission is in agreement with the policy of the section and accordingly we propose no change in its substance.

B. SHARES OF HEIRS OTHER THAN THE SURVIVING SPOUSE

1. The Present Law

The part of the intestate estate that does not pass to the surviving spouse passes to the deceased's issue,[38] that is, the lineal descendants of the deceased which includes his/her children, grandchildren, great-grandchildren, etc. Where a spouse survives the intestate, the balance of the estate remaining after payment of the preferential share is distributed equally between the spouse and the intestate's children (or issue).

Where there is no surviving spouse, the entire estate passes to the children. If a child of the intestate has died leaving issue, the issue take the portion the child would have taken if living.[39] Issue, no matter how remote from the deceased in terms of kinship, are always preferred to ascendants, that is, those persons with whom one is related in the ascending line, such as parents and grandparents, and to collaterals, such as uncles and aunts, nieces and nephews and cousins.[40]

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[36]Appendix, s. 3(2).

[37]*Succession Law Reform Act*, R.S.O. 1980 c. 488, s. 45(3).

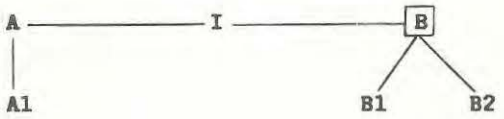
[38]"*The Devolution of Estates Act*", C.C.S.M. c. D70, s. 6(4).

[39]"*The Devolution of Estates Act*", C.C.S.M. c. D70, s. 6(4).

[40]1 Feeney, *The Canadian Law of Wills* (2nd ed. 1982) at 153, n. 126, gives the following example: ". . . for instance, a great-grandchild who is the only surviving issue, though of the third degree, takes the whole estate to the exclusion of all others including parents (first degree) and brothers and sisters (second degree) and of course all relatives of the third degree".

If the deceased is survived by neither spouse nor issue, the estate goes to the parents, or the surviving parent. If no parents survive, the deceased's brothers and sisters take the estate. In the case where any brother or sister is dead, the children of the deceased brother or sister share *per stirpes*, that is, they take the share their parent would have taken if living.[41] However, where *all* of the brothers and sisters of the intestate are deceased, the estate passes to the nieces and nephews *per capita*, that is, each takes an equal share.[42]

The operation of the rules respecting nieces and nephews may be illustrated by the following example. An intestate has two brothers, A and B, who have children as follows: A has one child A1, and B has two children, B1 and B2. B has predeceased the intestate.



The estate will be divided into two shares. A will receive one half, and B1 and B2 will share the portion that B would have taken if living, each receiving one-quarter of the estate. Where, however, A has also predeceased the intestate, A1, B1 and B2 will share the estate equally, each receiving one-third of the estate.

Lastly, the law provides for more distant relatives to take the estate in those situations where the deceased is not survived by any relatives in the specified classes. Distribution is made "equally among the next-of-kin of equal degree of consanguinity to the intestate. . . ".[43] The Act sets

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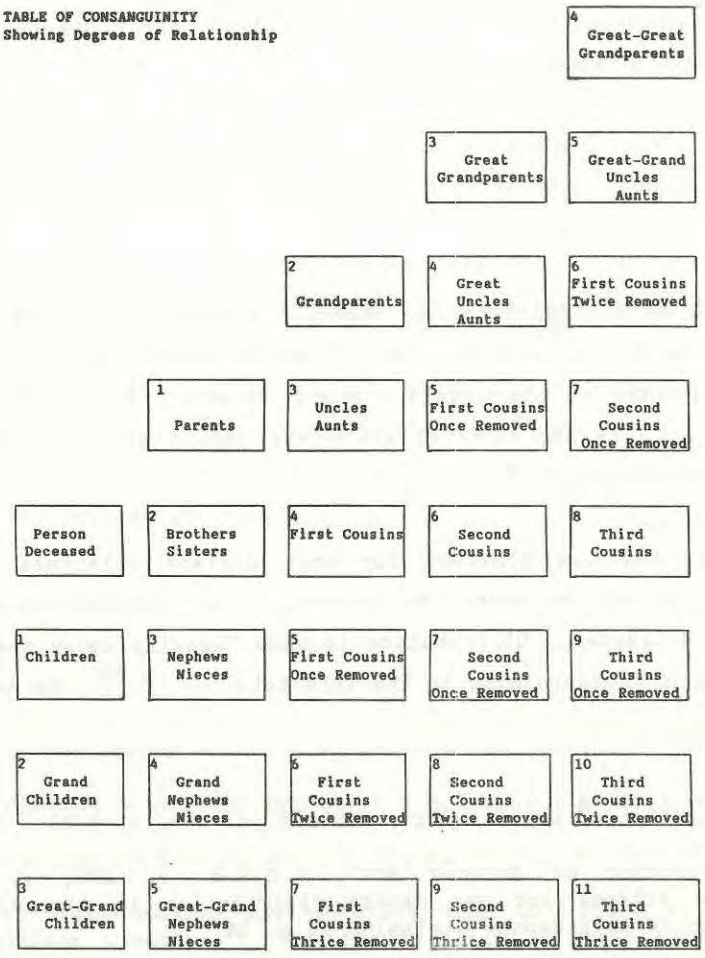
[41] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 8(2).

[42] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 8(3). The subject of *per stirpes* and *per capita* distribution is discussed fully in the next section of this Report beginning at p. 36.

[43] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 9.

forth the method of counting degrees, a method traditionally determined according to the civil law by counting upwards from the deceased to the nearest common ancestor and then downwards to the issue. Consequently, after the specified classes, grandparents are next in line because they are of the second degree; followed by uncles and aunts in the third degree; and then other collaterals such as grandnephews and grandnieces. Next-of-kin of equal degree take an equal share. For example, if the intestate is survived by only a grandniece, in the fourth degree, and two great-uncles, also in the fourth degree, the estate would be divided into three equal shares. A surviving relative in the fifth or sixth degree would take nothing in such a case. A table of consanguinity setting forth the degrees is found below.

TABLE OF CONSANGUINITY
Showing Degrees of Relationship



Numbers indicate degree of relationship

2. Reform

The Commission has considered whether the present law with respect to the intestate share for heirs other than the surviving spouse is in need of reform. We have examined three inter-related areas, all of which have been considered by the Uniform Law Conference. First, we explore whether existing provisions should be simplified and improved by a new method for determining next-of-kin. The second area of possible reform has to do with whether the deceased's more remote relatives should be prevented from taking a share of the intestate estate. Finally, it must be determined whether new rules are desirable respecting the *per stirpes* distribution of an estate, i.e. inheritance by representation.

(i) The method for determining next-of-kin

The Uniform Law Conference has recommended that the method for determining the next-of-kin by counting degrees of consanguinity be replaced by what might be called a parentelic system[44] based on representation through stated ancestors. Under this system the part of the intestate estate that does not pass to a surviving spouse passes first to the issue of the intestate, second to parents of the intestate and their issue,and then to grandparents and their issue. The legislation does not refer to

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[44]A parentelic system exhausts the line of the closest common ancestor of the intestate and a claimant before allowing other relatives related through a more remote line to take a share of the estate. Historically, English common law employed a parentelic system for determining the descent of land, which was modified by the *Inheritance Act, 1833*, 3 & 4 Wm. IV, c. 106. Only with respect to personalty, under the *Statute of Distribution, 1670*, was the civil law method of counting degrees of relationship used. *See generally*, Atkinson, *Handbook of the Law of Wills* (2nd ed. 1953) at 37-45; 2 Pollock & Maitland, *The History of English Law* (2nd ed. 1898) at 294 ff.

"brothers and sisters", "nieces and nephews", etc., and it eliminates the need to count degrees of consanguinity for the more remote next-of-kin. The system will produce the same result as existing law in most intestacy situations; substantive change occurs only with respect to the shares of the more distant relatives. The system is adopted from the American *Uniform Probate Code* which provides:

> Section 2-103.
>
> The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
>
> (2) if there is no surviving issue, to his parent or parents equally;
>
> (3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;
>
> (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

"Issue" under the *Code* is defined as all of a person's lineal descendants at all generations.[45] First priority for receiving the intestate estate is given to the deceased's issue, which means the deceased's children, grandchildren,

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[45]*Uniform Probate Code*, s. 1-201(21).

great-grandchildren, etc. Where no issue survive, the deceased's parents, or the survivor of them, take the estate; if neither is living, the issue of the parents is entitled. Issue of the parents would include the deceased's brothers and sisters, nephews and nieces, grandnephews and grandnieces, etc. If there is no surviving issue, parent or issue of a parent, but the grandparents or their issue survive, one-half of the estate passes to the paternal grandparents or the survivor of them, or their issue where both are deceased; the other one-half passes to the maternal grandparents or their issue in the same manner. Issue of grandparents would include the deceased's uncles and aunts, first cousins, first cousins once removed, etc.

The Code's distributive pattern can be seen graphically from the Table on page 28. Persons in the first column (issue of the intestate) take first, in descending order of priority; if no one in the first column survives, those in the second column (parents and their issue) are entitled; if no one in the first or second column survives, persons in the third column (grandparents and their issue) are then entitled.

The same scheme has been recommended by the Uniform Law Conference, with one change. If the deceased is not survived by any next-of-kin in the classes referred to in the preceding paragraph, the proposed Uniform Intestate Succession Act permits great-grandparents and their issue (the fourth column in the Table) to share in the same manner as may grandparents and issue. In other respects, the proposed Uniform Intestate Succession Act follows the *Uniform Probate Code*.

It is the Commission's view that the method for determining next-of-kin used by the *Uniform Probate Code* is simpler and more straightforward than Manitoba's current provisions. The drafting style is less awkward and repetitive, and, more important, the personal representative is able to determine those persons entitled to take the estate without the use of the more difficult and archaic counting of degrees of consanguinity.

Although the method will in most cases not produce a different result than that obtained under the present law, there are some instances in which it will produce what is, in the Commission's view, a more appropriate outcome. For example, under section 9 of the present Act, a grandnephew who is in the fourth degree of kinship,[46] will share equally with a cousin, also in the fourth degree. The provisions of *Uniform Probate Code* and the proposed Uniform Intestate Succession Act will favour the grandnephew over the cousin because the grandnephew, as issue of a parent, takes priority over a cousin who is issue of a grandparent. We consider this to be a better result for the following reason expressed by the drafters of the proposed Uniform Intestate Succession Act:[47]

> Because of the increase in longevity of persons in recent years, decedents of present generations are older than were those of prior generations. [The new section] is based on the conclusion that, because of age, a decedent today is likely to have developed a closer relationship with young grandnephews and grandnieces than he has maintained with cousins of his own generation, and that he would prefer to bestow his wealth on the former class.

The Commission also favours the division of the intestate estate between next-of-kin on the paternal and maternal sides in those cases where the deceased is survived by the more remote "issue of grandparents or great-grandparents". The present law gives the estate in equal shares to the next-of-kin by counting degrees of consanguinity; consequently it will often give the entire estate to next-of-kin on only one side, even if there is next-of-kin on both sides. For example, a maternal aunt in the third degree will take the entire estate even if a paternal cousin of the fourth degree

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[46]Subsection 8(3) of *"The Devolution of Estates Act"*, C.C.S.M. c. D70, does not permit the grandnephew or grandniece to take by representation; consequently, his or her rights are determined under section 9. *See In Re McLea Estate*, [1948] 2 W.W.R. 12 (Man. K.B.); *In Re Budd Estate; Harmon* v. *Furber*, [1934] 2 W.W.R. 182 (Man. C.A.).

[47]Uniform Law Conference of Canada, *supra* n. 12 at 228.

also survives. We prefer the provisions of the *Uniform Probate Code* and the proposed Uniform Intestate Succession Act which divide the estate into two portions so as to provide an equal sharing for the deceased's maternal and paternal kindred. The Commission therefore recommends:

RECOMMENDATION 6

That subsection 6(3) to section 9 inclusive of "The Devolution of Estates Act" be repealed and the Act be amended to provide that where the intestate is not survived by a spouse, the following take in the order named in the absence of persons in the preceding classes:

(i) the issue of the intestate;

(ii) the parents of the intestate in equal shares or the surviving parent absolutely, but where neither parent survives, the issue of the parents;

(iii) as to one-half of the estate, the paternal grandparents, or the surviving grandparent, or their issue if both are deceased; as to the other one-half, the maternal grandparents, or the surviving grandparent, or their issue in the same manner;

(iv) as to one-half of the estate, the paternal great-grandparents, or the survivor, or their issue if all are deceased; as to the other one-half, the maternal great-grandparents, or the survivor, or their issue in the same manner.

(ii) Should the deceased's remote relatives be prevented from taking an intestate share?

Present Manitoba law contains no inheritance limitation; *"The Devolution of Estates Act"* is framed in such a way as to allow claims by relatives of *any* degree of kinship to take priority over the Crown's claim by way of escheat or *bona vacantia*. Presumably, the Act is based on the assumption that most people regard escheat to the Crown as so repugnant that they would prefer inheritance by a remote heir.

In contrast, the American *Uniform Probate Code* has incorporated a limiting provision by permitting inheritance by the intestate's grandparents or their issue, but prohibiting inheritance by more remote next-of-kin. A similar limitation is used in England.[48] The proposed Uniform Intestate Succession Act also contains a cut-off point beyond which more remote relatives are prohibited from inheriting. It is considerably less stringent than its American model, however, in that it prohibits inheritance by next-of-kin more remote than great-grandparents and their issue. An inheritance limitation has also been proposed by the Law Reform Commission of British Columbia.[49]

Three reasons are usually advanced in support of an inheritance limitation. First, it is rare that an intestate will be survived by only remote relatives, and in those cases when it does occur, the next-of-kin will likely not be easily located. In terms of simplifying proof of heirship, and administrative convenience, an inheritance limitation may therefore be desirable. Secondly, in our mobile and urban society most intestates are now unlikely to know, let alone have a familial relationship with, the more remote relatives. The remote relative who takes an intestate share is sometimes called "the laughing heir", described by one writer 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".[50] Finally, an inheritance limitation can reduce the number of cases in

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[48]*Administration of Estates Act, 1925*, s. 46.

[49]The Law Reform Commission of British Columbia, *supra* n. 2 at 37, has recommended that next-of-kin more distant than the fourth degree of consanguinity to the deceased not be permitted to share in an intestate estate. Because of our preference for the drafting style of the proposed Uniform Intestate Succession Act, which is incompatible with a system which utilizes degrees of consanguinity, we do not discuss further the British Columbia Commission's proposal.

[50]"Intestate Succession in New Jersey", *supra* n. 1 at 276.

which wills are contested. If a decedent has no close next-of-kin (s)he will usually die testate and will leave his/her estate to friends and to charity. Since any remote relative has standing to challenge the validity of the will, allowing such relatives to benefit on an intestacy can increase will contests. This, in turn, can mean delay and expense in settling the estate.

The available research is inconclusive in determining what direction law reform should take with respect to an inheritance limitation. There is no Canadian data available. Of the American research, the Iowa study concluded that the limitation used in the *Uniform Probate Code* was desirable both for reasons of policy, and because survey respondents indicated "lack of a strong allocative preference in favor of . . . distant relatives . . . ."[51] This conclusion can be contrasted with a study conducted in New Jersey where a small majority of respondents, 54%, awarded "laughing heirs" intestate property rather than have the property escheat to the state or go to charity.[52] Also of interest is an American study which indicates that distant relatives who had received intestacy benefits often felt undeserving and uncomfortable in taking estate assets.[53]

The Commission has concluded that *"The Devolution of Estates Act"* should contain the inheritance limitation recommended by the Uniform Law Conference, which would mean that next-of-kin more remote than great-grandparents and their issue would be prevented from taking an intestate share. A limitation of this type will rarely produce any alteration in the actual distribution of an estate, and will rarely cause an escheat in circumstances where existing law would not. This is because the "limitation" is much less restricted than its *Uniform Probate Code* counterpart; by extending intestacy benefits as far as great-grandparents and their issue, few remote relatives will be disentitled.

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[51]"A Comparison of Iowans' Dispostive Preferences", *supra* n. 1 at 1129.

[52]"Intestate Succession in New Jersey", *supra* n. 1 at 276.

[53]*See generally*, Sussman, Cates & Smith, *supra* n. 3.

While we are sensitive to the policy considerations which favour a narrower limitation, it is our view that Manitoba law should follow the proposed Uniform Intestate Succession Act where possible. Accordingly, the Commission recommends:

RECOMMENDATION 7

That "The Devolution of Estates Act" be amended to provide that next-of-kin more distant than great-grandparents and their issue should not be permitted to share in the deceased's estate upon an intestacy.

(iii) Inheritance by representation

"The Devolution of Estates Act" now provides that in certain instances the children or issue of a deceased relative may take the share to which that relative would have been entitled had (s)he survived. This is the doctrine of representation or *per stirpes* (by roots or stocks) distribution. There are two general principles:

1. With respect to issue in the same stock, that is, descendants of a common ancestor, remote issue cannot take an intestate share if a more closely related ancestor can take. For example, a grandchild is not entitled to take when his/her parent, the intestate's child, survives.

2. Where an ancestor is deceased, the ancestor's issue can take the ancestor's intestate share even if there are other issue of the intestate surviving who are of closer degree. Thus, if an intestate had two children, A (deceased) and B (surviving), each with a child A1 and B1, A1 can take his/her deceased parent's share despite the fact that B survives and is of a closer degree. This is the doctrine of representation, or *per stirpes* distribution.

The Act specifically provides that the deceased's own issue, that is grandchildren, great-grandchildren, etc. may take by representation.[54]

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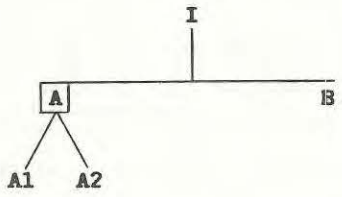
[54] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 6(4).

With respect to collateral next-of-kin, however, it has long been settled that no collaterals other than nieces and nephews can take by representation. Thus, while the intestate's nieces and nephews are entitled to take their deceased parents' share of an estate, the children of deceased nieces and nephews may not,[55] nor may the children or issue of other more remote relatives.[56]

An understanding of the concept of representation, however, will not always make for an easy determination of those entitled to an intestate share. This is because it is not always clear which is to be considered the root generation for the purpose of determining the shares of the more remote relatives who may represent their ancestors. The most commonly held view of the *per stirpes* system is that the root generation is the generation closest in relationship to the intestate, i.e. the children generation, regardless of whether or not there is any person of that generation alive and able to take. The number of shares in the estate is determined by adding together the number of living members in the root generation, if any, and the number of deceased members in the root generation who have left issue.

Consider the following example. The intestate has two children, A and B. A has predeceased the intestate leaving two surviving grandchildren, A1 and A2.



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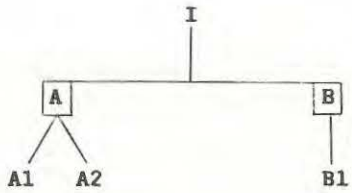
[55] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 8(3).

[56] *"The Devolution of Estates Act"*, C.C.S.M. c. D70, s. 9.

The root generation is that of the intestate's children, and their number will determine the number of stocks or shares. The estate is therefore divided into two portions: B taking one-half, and A1 and A2 taking A's share by representation, that is, one-quarter each. If B has also predeceased the intestate leaving a surviving grandchild B1,



B1 would take B's share by representation and would be entitled to one-half of the estate. Although the three grandchildren A1, A2 and B1, are all of the same degree, they will not take equal shares. This result follows because the root generation remains that of the two children, A and B, despite the fact that neither of them is alive at the date of the intestate's death.

The drafters of both the *Uniform Probate Code* and the proposed Uniform Intestate Succession Act were of the view that where the intestate is not survived by children but is survived by grandchildren, the grandchildren should share the estate equally, that is, *per capita*, rather than *per stirpes*. This result was legislatively accomplished in both the *Code* and the proposed Uniform Intestate Succession Act by dividing the estate with reference to a generation that includes one or more living members: the root generation is specifically designated as the generation nearest to the intestate in which at least one member survives. Using the second example set forth in the preceding paragraph, the grandchildren will not represent their predeceased parents because no member of the child generation has survived. The root generation will therefore be that of the grandchildren. The estate is thus divided into three portions, each grandchild, A1, A2 and B1, taking an

equal share. The same system applies under the *Code* and the proposed Uniform Intestate Succession Act to all cases of inheritance by issue, whether the issue are the intestate's or issue of parents, grandparents, etc.

Although no Canadian data is available, statistical surveys in the United States support this approach. In the Iowa study,[57] survey participants were asked how they would distribute their estate if their two adult children were deceased, but the adult child A left one child, and the adult child B left three children. Eighty-seven percent of respondents followed the *per capita* approach, dividing the estate equally among the four grandchildren. In the Illinois study,[58] the percentages were even higher, with 95% of respondents favouring an equal distribution among the four grandchildren.

The Commission favours an intestacy scheme which provides for the initial division of an intestate estate to be made at the nearest generation to the decedent that contains at least one living member. Such an approach will ensure the equal treatment of grandchildren when no children of the intestate survive, and will achieve a result likely supported by a majority of Manitobans.

Problems with respect to representative distribution do not end here, however. American commentators[59] have pointed out that there is a second issue to be addressed. It concerns the manner of representation *after* the number of initial shares are determined. Under the *Uniform Probate Code*, as

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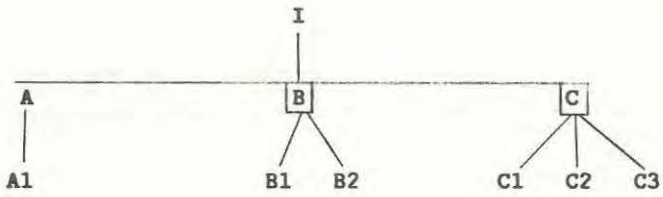
[57]"A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1111.

[58]Fellows, Simon, Snapp & Snapp, *supra* n. 1 at 741.

[59]*See* Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants" (1971), 66 Nw. U.L. Rev. 626; "A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1108-1116; Fellows, Simon, Snapp and Snapp, supra n. 1 at 739-742.

well as the proposed Uniform Intestate Succession Act modelled after it, what most often occurs is a *per stirpes* distribution after the initial shares are determined on a *per capita* basis. This can result in an unequal treatment of members of the same generation, and had prompted commentators to suggest an alternative to the *Code* provision, usually referred to as the "*per capita* at each generation" approach. It attempts to carry the principle of equal division among those of equal degree of kinship to the intestate further than does the *Code*.[60]

The *Code* approach and the "*per capita* at each generation" system can be best illustrated by a hypothetical survivor situation. Suppose the intestate has three children, A, B and C, and that each of them has children as follows: A has one child, A1; B has two children, B1 and B2; and C has three children, C1, C2 and C3. B and C have predeceased the intestate who is survived by A, A1, B1, B2, C1, C2 and C3. How will the estate be distributed?



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[60]The "*per capita* at each generation" system is included in the 1975 technical amendments to the *Uniform Probate Code* as an optional provision. Although favoured by a majority of the *Code*'s Editorial Board, no alteration was made in the *Code* itself because "a change in this basic section would weaken the case for uniformity of probate law in all states": R. Wellman (ed.), 1 *Uniform Probate Code Practice Manual* (2nd ed. 1977) at 37.

UNIFORM PROBATE CODE[61]	PER CAPITA AT EACH GENERATION
A will take one-third of the estate; B1 and B2 will divide one-third with each taking one-sixth of the estate; and C1, C2 and C3 will divide one-third with each taking one-ninth of the estate.	A will take one-third of the estate; B1 and B2, C1, C2 and C3 will each receive one-fifth of the remaining two-thirds or two-fifteenths of the estate.

Like the *Code* system, the "*per capita* at each generation" approach provides for the initial division of the estate at the generation closest to the intestate having at least one living member. However, after the living members of that generation receive their portion, the "*per capita* at each generation" approach, unlike the *Code*, requires that the remainder of the estate, *as a whole*, be divided at the next generation containing a living member. That division is made in the same way that it was made initially, that is, each living member receives a share, and the shares of any predeceased members go, *as a whole*, to the next generation. This system will always result in equal treatment for members of the same generation.

The "*per capita* at each generation" approach also ensures that members of a more remote generation will never take a larger share of an intestate estate than a member of a closer generation. This is a result not always achieved by the *Uniform Probate Code* scheme. The following example,[62] is illustrative. Assume the intestate has four children, A, B, C and D and that each has children as follows: A has two children A1 and A2; B has one child, B1; C has one child, C1; and D has no children. C1 has a child CC1, the intestate's great-grandchild. A, B, C and C1 have predeceased the intestate.

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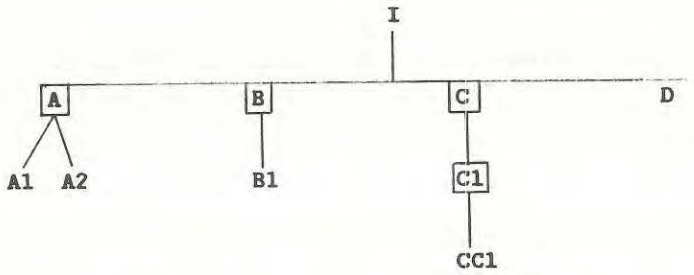
[61]The result which occurs under the *Uniform Probate Code* in this example is the same as occurs under a traditional *per stirpes* distribution. This is because A survives and the root generation is therefore that of the children. If A were deceased, however, the *Uniform Probate Code* would provide equal shares to the grandchildren, whereas the *per stirpes* method would not.

[62]This example is taken from "A Comparison of Iowans' Dispositive Preferences", *supra* n. 1 at 1115.



The estate will be distributed as follows:

Uniform Probate Code	Per capita at each generation
D will take one-quarter of the estate; A1 and A2 will divide one-quarter with each taking one-eighth; B1 will take one-quarter; CC1 will take one-quarter of the estate.	D will take one-quarter of the estate; A1, A2 and B1 will divide nine-sixteenths with each taking three-sixteenths of the estate; CC1 will take the remaining three-sixteenths of the estate.

The important policy argument in favour of the "*per capita* at each generation" approach is that it is a more consistent application of the *Uniform Probate Code*'s basic representation principle. If one accepts that persons of the same generation should receive equal treatment, then it would seem to follow that equal treatment should continue to apply through *all* generations. The "*per capita* at each generation" scheme has the added benefit of ensuring that a relative of a more remote generation will never be entitled to a larger share than a member of a generation closer to the intestate.

For these reasons the Commission is of the view that the "*per capita* at each generation" approach will produce the best, and most logically consistent, result in most survivor situations. Therefore, we are not prepared to follow the representation approach employed by the proposed Uniform Intestate Succession Act. The Commission recommends:

RECOMMENDATION 8

That "The Devolution of Estates Act" be amended so as to implement a "per capita at each generation" approach for the distribution of an intestate estate among the intestate's issue and the issue of more remote heirs.

RECOMMENDATION 9

That legislation to implement Recommendations 6,7, and 8 should read as follows:

(1) The part of the intestate estate not included in the share of the surviving spouse, or the entire estate if there is no surviving spouse, shall be distributed as follows:

(a) to the issue of the intestate to be distributed per capita at each generation as provided in subsections (2) and (3);

(b) if there is no surviving issue, to the parents of the intestate in equal shares or to the survivor of them;

(c) if there is no surviving issue or parent, to the issue of the parents or either of them to be distributed per capita at each generation as provided in subsections (2) and (3);

(d) if there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(i) one half of the estate 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 subsections (2) and (3);

(ii) one half of the estate to the maternal grandparents or their issue in the same manner as provided in subclause (i),

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i);

(e) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the intestate is survived by one or more great-grandparents or issue of great-grandparents,

(i) one half of the estate to the paternal great-grandparents or their issue in two equal shares, as follows:

(A) one share to the parents of the paternal grandfather in equal shares or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either of them to be distributed per capita at each generation as provided in subsections (2) and (3); and

(B) one share to the parents of the paternal grandmother or their issue in the same manner as provided in paragraph (A),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one half of the estate to the kindred on that side in the same manner as provided in paragraph (A), and

(ii) one half of the estate to the maternal great-grandparents or their issue in the same manner as provided in subclause (i)

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i).

(2) When a distribution is to be made to the issue of a person, the estate or the part thereof which is to be so distributed shall be divided into as many shares as there are surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors, and deceased persons in the same degree who left issue surviving the intestate.

(3) Each surviving successor in the nearest degree which contains any surviving successor shall receive one share, and the remainder of the intestate estate is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

C. ADVANCEMENTS BY PORTION

1. The present law

An advancement is an irrevocable gift of money or property by a parent to a child made in anticipation of the interest or portion of the estate to which the child would be entitled after the parent's death.[63] The amount advanced to the child must be deducted from the child's interest in the intestacy. Section 12 of *"The Devolution of Estates Act"* provides:

> **Advances to children.**
>
> 12(1) If any child of a person who has died wholly intestate has been advanced by the intestate 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; and, if the advancement is equal to or greater than the share of the estate which the child would be entitled to receive as above reckoned, the child and his descendants shall be excluded from any share in the estate; but if the advancement is not equal to the share, the child and his descendants shall be 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 advancement equal as nearly as can be estimated.
>
> **Valuation of advance.**
>
> 12(2) The value of any portion advanced shall be deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value is the value of the portion when advanced.

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[63] It is to be noted that the term "advancement" occurs in a number of contexts in the law. One is the rebuttable "presumption of advancement" arising in favour of a wife or child, by which money or property is presumed to be a gift, instead of being presumed held upon a resulting trust for the donor. The term is also used in the law of wills with respect to the equitable doctrine of satisfaction (or the rule against double portions) whereby a gift under the will may be adeemed, that is, taken away or revoked, by a subsequent portion or advancement. The term also arises on an intestacy where statutory provisions require a child to bring into account money or property which (s)he has received from the intestate *inter vivos* by way of advancement. In this Report, we are concerned only with this last use of the term, as it applies to the distribution of an intestate estate.

Onus of proof of advance.

12(3) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion, shall be upon the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

The premise underlying these provisions is that a just parent would want to provide for all of his/her children equally. Section 12 brings about such equality when the parent who has died totally intestate has given one or more of the children gifts by way of anticipation of inheritance. The operation of the section is limited to children; *inter vivos* gifts made to other relatives, such as grandchildren or nieces and nephews, are not brought into account. However, when a child in receipt of an advancement has predeceased the intestate, the advancement is charged against the share the predeceased child's issue receive by representation.

The operation of section 12 can be seen from the following example. Assume that an intestate has three children, Andrew, John and Mary. Mary has predeceased the intestate leaving two children, Robert and Joan. During life the intestate advanced the sum of $30,000 to John and $10,000 to Mary. The intestate estate is $50,000. It will be distributed in the following way:

Intestate Estate	$50,000
Add:	
1) Advancement to John	30,000
2) Advancement to Mary	10,000
	90,000

Andrew's share	John's share	Mary's issue	
$30,000	$30,000	$30,000	
	less 30,000	less 10,000	
	0	20,000	
		Robert	Joan
		$10,000	$10,000

Whether or not a transfer by a parent to a child is to be considered in law an advancement depends primarily on the donor's intent. If the donor intended that the child should account for the value of the gift against his/her intestate share, then the transfer is an advancement. Where, however, the donor desires to make an absolute gift to the child, it is not.[64] The question of the donor's intent has caused the courts difficulty because generally the donor will not have indicated, during life, the precise nature of the transfer, and it is usually not an easy task to determine subjective intent after death.

Where there is no direct evidence of the deceased's intention in respect of an *inter vivos* gift to a child, it is well established that the case is to be determined in accordance with certain presumptions. The best known statement of the operation of these presumptions was made by Sir George Jessel in *Taylor* v. *Taylor*:[65]

> I have always understood that an advancement by way of portion is something given by the parent to establish the child in life or to make what is called a provision for him - not a mere casual payment . . . 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 shew the purpose . . . [But the sum must be paid for] a special purpose with a view to the establishment of the child in life.

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[64]Similarly, where the donor intended to make the child a loan, the transfer is not in the nature of an advancement. Like an advancement, a loan is deducted from the child's intestate share, but unlike the advancement, the child can be obliged to repay the loan if it exceeds the amount of his intestate share.

[65](1875) L.R. 20 Eq. 155 at 157-158.

Taylor v. *Taylor* makes it clear that if a gift is made by a parent with a view to establishing the child in life, it is presumed to be an advancement. In this regard, the size of the gift, the purpose for which it was given, and the age of the recipient are all relevant factors.[66] Although subsection 12(3) of *"The Devolution of Estates Act"* states that the onus of proof of an advancement is on the person asserting it, it has been decided that it is sufficient to make out a *prima facie* case, and that in so doing the size and nature of the gift may be called in aid.[67]

2. Reform

The Commission has considered whether the present law with respect to advancements is in need of reform. We examine in this part of the Report (i) whether advancements should be accounted for in cases of partial intestacy, (ii) whether advancements should be defined so as to require clear evidence of the deceased's intentions, (iii) in what circumstances an advancement to a child who predeceases the intestate should be accounted for by the child's issue, and (iv) whether the law should allow advancements to be made to prospective heirs other than children.

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[66]The recent case of *Re Evashuk's Estate* (1983), 23 Man. R. (2d) 208 (Surr. Ct.) is illustrative. Jewers, Surr. Ct. J., was required to determine whether certain *inter vivos* transfers made by the deceased to her 3 children were advancements within the meaning of section 12 of *"The Devolution of Estates Act"*. There was no evidence as to the deceased's intentions. It was held that a $1000 gift to a child to buy furniture had to be brought into account, as did a $2000 gift to another child to set up a photography business. The mother had also forgiven $8,000 in mortgage payments owed to her by a third child which was also held to be accountable despite the fact that the third son and his wife had looked after the deceased prior to her death. *See also*, *In Re Lama Estate*, [1941] 3 W.W.R. 34 (Man. K.B.)

[67]*Re Evashuk's Estate*, *id.* at 214; *see also*, *Blakeney* v. *Seed*, [1939] 1 W.W.R. 321 (B.C.S.C.).

The first area of concern has to do with partial intestacies. At present, section 12 requires that a child bring an advancement into account only when the deceased parent died "wholly intestate". In the case of a partial intestacy, which occurs because the deceased has left a will which does not dispose of his/her entire estate, section 12 does not apply.[68] The Commission believes that the present law operates fairly and should not be changed. It is our view that where there is a partial intestacy, the deceased's wishes respecting *inter vivos* transfers will most often be embodied in his/her will; to require an accounting of them may well upset the deceased's estate plan.[69]

The Commission has also considered whether *"The Devolution of Estates Act"* should be amended to require that an advancement be expressed as

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[68]No other Canadian jurisdiction extends the requirement of accounting for advancements to partial intestacies. Section 6 of the proposed Uniform Intestate Succession Act is also limited to cases of total intestacy, as is section 2-110 of the *Uniform Probate Code*. In England, however, where the law goes much further in an attempt to ensure that children are treated equally, advancements must be accounted for on a partial intestacy, as must gifts received by issue under the deceased's will. *See Administration of Estates Act, 1925*, s. 47(1)(iii) and s. 49(1)(a).

[69]Two simple examples illustrate this. Assume a testator has advanced a large sum to one of his two sons, and given that son a lesser share under his will in order to provide both sons, overall, with an equal share. If there is a partial intestacy and the son in receipt of the advancement must account for it, he will receive a lesser intestate share than his brother. Overall, they will not be treated equally. To take another example, assume the testator has advanced a large sum of money to the first son and none to the second. Many years later, the testator makes a will leaving the two sons equal shares and makes no mention of the advancement. If the advancement rule were to apply on a partial intestacy, the first son would be required to account for his advancement, the second son thereby receiving the larger share of the intestate estate. This would occur despite the fact that it can reasonably be assumed that when making his will the testator took the advancement into consideration when determining the sons' shares, and intended to cancel any obligation to account for the advancement.

such in writing, or so acknowledged in writing by the child. Such a change has been proposed by the Uniform Law Conference. It was the view of the drafters of the proposed Uniform Intestate Succession Act that most *inter vivos* transfers today are intended by the donor as absolute gifts and not as advancements. Consequently, the proposed Uniform Intestate Succession Act requires written evidence of the intent that a gift is an advancement, in the form of either a declaration by the deceased or an acknowledgment by the recipient. Such a change would significantly restrict the application of the doctrine, and would alleviate the evidentiary problem of determining a donor's intent.

We agree with the conclusion of the Uniform Law Conference that the present law on advancements should be reformed so as to limit its application to cases where it is clearly intended by the donor. The Commission questions, however, the Uniform Law Conference solution of prescribing writing as the only means of proof of intention. We think it unlikely that many parents who die intestate will have the foresight to record in writing the precise nature of *inter vivos* transfers to their children. It is our view, therefore, that proof of an intestate's intention that property transferred to a child be an advancement should be able to take the form of either (i) an oral, or (ii) a written expression of intent.[70] The Commission believes that extending the

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[70]Because of the hearsay rule, written and oral statements made by a deceased are not admissible for the purpose of establishing the truth of what is contained in the statements; however, it is settled that they are admissible to shed light on the deceased's state of mind: *see*, for example, *Re Grant Estate,* [1971] 1 W.W.R. 555 (B.C.S.C.). Two exceptions to the hearsay rule may also permit statements of a deceased's intentions to be admitted into evidence. The first is a category comprising statements indicating an existing mental or emotional condition, or state of mind, or intention. If such statements are made in a natural manner and not under suspicious circumstances, they are admissible. Secondly, statements made in the course of an ambiguous transaction which shed light on the nature of the transaction are admissible. In many cases, an *inter vivos* transfer by a parent to child would be such a transaction. With respect to the hearsay rule and its exceptions, *see generally*, Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974).

It is clearly established in the United States that oral expressions of a deceased's intentions upon the question of advancements are admissible. *See* 3 *Am. Jur.* 2d. at s. 85, p. 59 ff; Atkinson, *Law of Wills* (2d ed.) at 719.

In England, oral declarations of a testator are admissible to rebut the presumption against double portions. *See Theobald on Wills* (14th ed.) at 757.

means of proof of the intestate's intentions to oral expressions will achieve a fairer result in many cases than will the strict writing requirement of the proposed Uniform Intestate Succession Act.

The Commission recommends:

RECOMMENDATION 10

That section 12 of "The Devolution of Estates Act" be amended to provide that property which an intestate gave in his/her lifetime to a child shall be treated as an advancement if it is shown that either

(a) the intestate had expressed an intention orally or in writing; or
(b) the child had acknowledged, orally or in writing,

that the property was to be an advancement.

We turn now to consider whether an advancement made to a child who predeceases the intestate should be accounted for by the child's issue. The Uniform Law Conference has recommended that an advancement to a prospective heir who predeceases the intestate should not affect the share of the heir's issue unless the written declaration of the donor or the acknowledgment by the recipient so provides.

We have chosen not to follow the proposed uniform Act with respect to writing generally, and it is therefore not appropriate, in our view, to require written evidence of the deceased's intentions respecting the share of a predeceased child's issue. Ordinarily, a parent making an advancement will not address his/her mind as to how that advancement should affect the share of the child's issue. There will therefore rarely be any evidence of intention, either oral or written. Rather than providing that the donor's intention be the governing factor, we think that the law should provide a clear rule to apply in all cases where an advancement has been made. On balance, we favour the existing law which provides that an advancement made to a child who predeceases the intestate should be accounted for by the child's issue. At page 46 we set forth an example of how the present law operates with respect to issue of a predeceased child. In our view, the result obtained in that example is a fair one. If issue are not required to account, the

intestate estate available for the deceased's other children and their issue may be substantially reduced, producing an unfair result. Accordingly, the Commission favours the retention of the existing law on this point. We recommend:

RECOMMENDATION 11

That section 12 of "The Devolution of Estates Act" continue to provide that an advancement made to a child who predeceases the intestate, shall be treated as an advancement against the share of any issue of that child.

The final area for consideration is whether the law should provide for advancements to be made to prospective heirs other than children. The Uniform Law Conference has recommended that the advancement doctrine apply not only to a donor's children, but to all heirs, including a surviving spouse and collateral relatives. This change is based on the conclusion that the present limitation to children is arbitrary, and that donors should be able to make advancements to any prospective heir. For example, a grandparent may wish to make an advancement to a grandchild, or an aunt may wish to make an advancement to a niece or nephew.

After careful consideration, we have decided that it would be inappropriate to extend the law in this way. The premise underlying existing law is a simple one: where a parent dies intestate, advancements made to a child or children should be taken into account so as to make the shares of all of the *children* equal. We do not consider it a necessary or proper function of the law respecting advancements to take into account *inter vivos* transfers to heirs other than children. In our view, a person who wishes to have such transfers accounted for should be obliged to make a will.

D. SURVIVORSHIP

In order to inherit an intestate share of the deceased's estate, an heir must survive the deceased. The common law, however, did not require that survival be for any specific length of time, and conceivably one or two

seconds was sufficient. When the question of whether a person or persons survived the deceased materially affects the distribution of the estate, the timing of death becomes a difficult issue.

To alleviate this difficulty, Manitoba has enacted *"The Survivorship Act"*, C.C.S.M. c. S250, which provides that where two or more persons die at the same time, or in circumstances rendering it uncertain who died first, the property of each will be disposed of as if each had survived the other or others.[71] Thus, where a husband and wife die intestate, their separate property will go to their issue or, if there is no issue, separately to their respective next-of-kin.

"The Survivorship Act" is only a partial solution to the problem, however, because it implies that if the order of deaths *can* be determined, then the property of the decedents will not be distributed separately. A "surviving" heir, no matter for how short a period of time, will be entitled to an intestate share. The following example is illustrative. A husband and wife are injured in a car accident; he dies immediately; she dies five days later; there is no issue. Despite the fact that the wife survived the husband for only a few days, she inherits her intestate share from his estate which, in the average situation, will be the bulk of his estate. It will therefore be *her* next-of-kin and not the husband's who will inherit his estate.

The proposed Uniform Intestate Succession Act has a provision which will eliminate this problem in the vast majority of cases. The Act requires that an heir survive the intestate by 15 days in order to succeed to the deceased's intestate property. A similar provision is routinely included in wills. The purpose of the requirement is to avoid multiple estate administration when both the intestate and the "survivor" die within a short time of each other, and to prevent property from passing to persons not desired by the intestate.

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[71] *"The Survivorship Act"*, C.C.S.M. c. S250, s. 1.

The Commission is of the view that the survivorship clause recommended by the Uniform Law Conference will coincide with the preferences of most decedents. Accordingly, we recommend:

RECOMMENDATION 12

That "The Devolution of Estates Act" contain a provision which will require that a person survive the intestate for fifteen days in order to qualify as an heir.

E. TRANSITION

The Commission favours the inclusion of a specified transition period. We think that new intestate succession legislation should contain a provision that limits its application to deaths occurring on or after a specified date. We therefore recommend:

RECOMMENDATION 13

That amendments to "The Devolution of Estates Act" should apply to estates of persons who die on or after the date the amendments come into force.

F. THE REFORMING LEGISLATION

At the outset of this Report, the Commission stated its intention to examine the proposed Uniform Intestate Sucession Act with a view to making recommendations for its implementation in Manitoba. Although we have not adopted the approach of the proposed Uniform Intestate Succession Act on some issues (of note are Recommendations 3, 8 and 10), our recommendations do, on the whole, follow that Act. We consider the Act to be well drafted, and in our view the required amendments to *"The Devolution of Estates Act"* should be modelled after it. We recommend:

RECOMMENDATION 14

That amendments to "The Devolution of Estates Act" should take a form similar to the provisions of the proposed Uniform Intestate Succession Act.

We wish to draw attention to two deficiencies with current legislation to which we have not previously referred. Both concern changes to legislation other than *"The Devolution of Estates Act"*, and they should be given consideration when amendments are made to that "Act". The first pertains to adopted children. Presently *"The Devolution of Estates Act"* makes no specific reference to adopted children, although section 96 of *"The Child Welfare Act"* makes it clear that such children are to be considered the children of their adoptive parents for purposes of intestate succession, and lose their right to inherit from their natural parents. What the legislation does not make clear is whether adopted children lose their right to inherit from their natural kindred apart from parents. In our view, *"The Child Welfare Act"* should contain a provision making it clear that adoption severs all links between adopted children and their natural kindred, and not simply the link with natural parents. The Commission therefore recommends:

RECOMMENDATION 15

That section 96 of "The Child Welfare Act" be amended to provide that adoption should sever the relationship between the adopted child and all of the child's natural kindred for purposes of inheritance under "The Devolution of Estates Act".

Secondly, in this Report we have considered all of the sections of *"The Devolution of Estates Act"* respecting the distribution of an intestate estate, with the exception of subsection 14(2). That subsection states that where a surviving spouse becomes entitled to an intestate share of the deceased spouses's estate by virtue of section 34 of *"The Wills Act"*[72] the surviving spouse's entitlement to a preferential share is to be reduced by the amount (s)he has already received out of the deceased's estate either under the deceased's will or by virtue of *"The Devolution of Estates Act"*.

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[72]Section 34 of *"The Wills Act"* is an anti-lapse provision. It prohibits the lapse of a gift by will to a person who is a child or other issue or a brother or sister of the testator when that person leaves issue any of whom is living at the testator's death. The gift takes effect as if the person had died intestate immediately after the death of the testator.

Like subsection 14(1), which provides that the surviving spouse's entitlement to a preferential share is to be reduced by the amount of any benefits received under the deceased's will, subsection 14(2) is designed to prohibit a double recovery by the survivor. We agree with the policy of the provision; however, it is awkwardly expressed, and we question whether it is properly located in *"The Devolution of Estates Act"*. In substance the provision concerns the distribution of property left by will, and in our view, *"The Wills Act"* itself should state how the distribution of a testate estate is to be effected once the requirements of section 34 of that Act are met.[73] The Commission therefore recommends:

RECOMMENDATION 16

That subsection 14(2) of "The Devolution of Estates Act" be repealed and section 34 of "The Wills Act" be amended to provide that a surviving spouses's entitlement to a preferential share by virtue of the operation of section 34 should be reduced by the amount (s)he has received out of the deceased's estate either under the deceased's will or by virtue of "The Devolution of Estates Act".

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[73]Such an approach is, for example, taken in Ontario. See *"Succession Law Reform Act"*, R.S.O. 1980 c.488, s. 31.

CHAPTER 3

SUMMARY OF RECOMMENDATIONS

1. That, subject to Recommendation 3, *"The Devolution of Estates Act"* be amended to provide that the surviving spouse's preferential share be $100,000.

2. That the Legislature regularly review the adequacy of the spouse's preferential share in order that the share's economic value be maintained.

3. That *"The Devolution of Estates Act"* be amended to provide that the surviving spouse's preferential share be $50,000 when there are surviving issue of the intestate, one or more of whom are not issue of the surviving spouse.

4. That where there has been a complete property settlement by way of court order or separation agreement, and there is an intestacy, the deceased's property should be distributed as if the surviving spouse predeceased the deceased unless the spouses have resumed cohabitation after the property settlement was made and the reconciliation is subsisting at the time of the deceased's death.

5. That a *de facto* spouse not be entitled to a share of the deceased spouse's estate on an intestacy.

6. That subsection 6(3) to section 9 inclusive of *"The Devolution of Estates Act"* be repealed and the Act be amended to provide that where the intestate is not survived by a spouse, the following take in the order named in the absence of persons in the preceding classes:

   (i) the issue of the intestate;

   (ii) the parents of the intestate in equal shares or the surviving parent absolutely, but where neither parent survives, the issue of the parents;

   (iii) as to one-half of the estate, the paternal grandparents, or the surviving grandparent, or their issue if both are deceased; as to the other one-half, the maternal grandparents, or the surviving grandparent, or their issue in the same manner;

   (iv) as to one-half of the estate, the paternal great-grandparents, or the survivor, or their issue if all are deceased; as to the other one-half, the maternal great-grandparents, or the survivor, or their issue in the same manner.

7. That *"The Devolution of Estates Act"* be amended to provide that next-of-kin more distant than great-grandparents and their issue should not be permitted to share in the deceased's estate upon an intestacy.

8. That *"The Devolution of Estates Act"* be amended so as to implement a "per capita at each generation" approach for the distribution of an intestate estate among the intestate's issue and the issue of more remote heirs.

9. That legislation to implement Recommendations 6,7, and 8 should read as follows:

(1) The part of the intestate estate not included in the share of the surviving spouse, or the entire estate if there is no surviving spouse, shall be distributed as follows:

(a) to the issue of the intestate to be distributed per capita at each generation as provided in subsections (2) and (3);

(b) if there is no surviving issue, to the parents of the intestate in equal shares or to the survivor of them;

(c) if there is no surviving issue or parent, to the issue of the parents or either of them to be distributed per capita at each generation as provided in subsections (2) and (3);

(d) if there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(i) one half of the estate 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 subsections (2) and (3);

(ii) one half of the estate to the maternal grandparents or their issue in the same manner as provided in subclause (i),

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i)

(e) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the intestate is survived by one or more great-grandparents or issue of great-grandparents,

(i) one half of the estate to the paternal great-grandparents or their issue in two equal shares, as follows:

(A) one share to the parents of the paternal grandfather in equal shares or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either of them to be distributed per capita at each generation as provided in subsections (2) and (3); and

(B) one share to the parents of the paternal grandmother or their issue in the same manner as provided in paragraph (A),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one half of the estate to the kindred on that side in the same manner as provided in paragraph (A), and

(ii) one half of the estate to the maternal great-grandparents or their issue in the same manner as provided in subclause (i)

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i).

(2) When a distribution is to be made to the issue of a person, the estate or the part thereof which is to be so distributed shall be divided into as many shares as there are surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors, and deceased persons in the same degree who left issue surviving the intestate.

(3) Each surviving successor in the nearest degree which contains any surviving successor shall receive one share, and the remainder of the intestate estate is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

10. That section 12 of *"The Devolution of Estates Act"* be amended to provide that property which an intestate gave in his/her lifetime to a child shall be treated as an advancement if it is shown that either

(a) the intestate had expressed an intention orally or in writing; or
(b) the child had acknowledged, orally or in writing,

that the property was to be an advancement.

11. That section 12 of *"The Devolution of Estates Act"* continue to provide that an advancement made to a child who predeceases the intestate, shall be treated as an advancement against the share of any issue of that child.

12. That *"The Devolution of Estates Act"* contain a provision which will require that a person survive the intestate for fifteen days in order to qualify as an heir.

13. That amendments to *"The Devolution of Estates Act"* should apply to estates of persons who die on or after the date the amendments come into force.

14. That amendments to *"The Devolution of Estates Act"* should take a form similar to the provisions of the proposed Uniform Intestate Succession Act.

15. That s. 96 of *"The Child Welfare Act"* be amended to provide that adoption should sever the relationship between the adopted child and all of the child's natural kindred for purposes of inheritance under *"The Devolution of Estates Act"*.

16. That subsection 14(2) of *"The Devolution of Estates Act"* be repealed and section 34 of *"The Wills Act"* be amended to provide that a surviving spouses's entitlement to a preferential share by virtue of the operation of section 34 should be reduced by the amount (s)he has received out of the deceased's estate either under the deceased's will or by virtue of *"The Devolution of Estates Act"*.

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"*, dated this 25th day of March, 1985.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

George H. Lockwood, Commissioners

Lee Gibson, Commissioner

John C. Irvine, Commissioner

APPENDIX

[Proposed] Uniform Intestate Succession Act

[Interpretation]

1(1) In this Act,

"estate" includes both real and personal property;

"issue" means all lineal descendants of a person through all generations;

"successors" means those persons who are entitled to the estate of an intestate through succession under this Act.

(2) If the relationship of parent and child must be established at any generation to determine succession by, through or from a person under this Act, that relationship shall be established, insofar as it is applicable, under either

(a) the Uniform Child Status Act; or

(b) subject to subsection (3), the Uniform Effect of Adoption Act.

(3) The adoption of a child by the spouse of a parent does not terminate the relationship of parent and child between the child and that parent for purposes of succession under this Act.

(4) Under this Act,

(a) kindred of the half blood inherit equally with kindred of the whole blood of the same degree of kinship to the intestate; and

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

[Application]

2(1) This Act applies only in cases of death occurring after its commencement.

(2) Any part of the estate of a deceased not disposed of by will shall be distributed under this Act.

[Share of spouse]

3(1) The share of the surviving spouse is as follows:

(a) if there is no surviving issue of the intestate, the entire intestate estate;

(b) if there are surviving issue of the intestate,

(i) all of the intestate estate to a maximum entitlement, subject to subsection (2), of [$100,000], and

(ii) one half of any remainder of the intestate estate after allocation of the share provided by subclause (i).

(2) The maximum entitlement set out in subclause (1)(b)(i) shall be reduced by an amount equal to the value of any benefits received by the surviving spouse under a will of the deceased.

(3) 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 Act or any similar Act], or the intestate made a property division in favor of the surviving spouse, the surviving spouse shall be treated as if he had predeceased the intestate.

(Note. Jurisdictions should insure that their matrimonial property legislation does not conflict with this subsection.)

(4) In subsection (3), "property division" means an arrangement between the spouses concerning the division of their property which is intended by them, or which appears to have been intended by them, to separate and finalize their affairs in recognition of their marital break-up.

(5) Subsection (3) does not apply to a surviving spouse who reconciled with the intestate if the reconciliation was subsisting at the time of the intestate's death.

[Share of kindred]

4(1) The part of the intestate estate not included in the share of the surviving spouse, or the entire estate if there is no surviving spouse, shall be distributed as follows:

(a) to the issue of the intestate as provided in subsections (2) and (3) with representation;

(b) if there is no surviving issue, to the parents of the intestate in equal shares or to the survivor of them;

(c) if there is no surviving issue or parent, to the issue of the parents or either of them as provided in subsections (2) and (3) with representation;

(d) if there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(i) one half of the estate 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 as provided in subsections (2) and (3) with representation, and

(ii) one half of the estate to the maternal grandparents or their issue in the same manner as provided in subclause (i),

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i).

(e) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the intestate is survived by one or more great-grandparents or issue of great-grandparents,

(i) one half of the estate to the paternal great-grandparents or their issue in two equal shares, as follows:

(A) one share to the parents of the paternal grandfather in equal shares or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either of them as provided in subsections (2) and (3) with representation, and

(B) one share to the parents of the paternal grandmother or their issue in the same manner as provided in paragraph (A),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one half of the estate to the kindred on that side in the same manner as provided in paragraph (A), and

(ii) one half of the estate to the maternal great-grandparents or their issue in the same manner as provided in subclause (i).

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i).

(2) When a distribution is to be made to the issue of a person, the estate or the part thereof which is to be so distributed shall be divided into as many shares as there are surviving successors in the nearest degree of kinship to the intestate and deceased persons, if any, in the same degree who left issue surviving the intestate.

(3) Each surviving successor in the nearest degree shall receive one share, and the share of each deceased person in the same degree, if any, shall be divided among his issue in the same manner as provided in subsection (2) and this subsection.

[Survival for fifteen days]

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].

[Advancements]

6(1) If a person dies intestate as to all of his estate, property which he gave in his lifetime to a prospective successor shall be treated as an advancement against that successor's share of the estate only if the property was either

(a) declared in a contemporaneous writing by the intestate, or

(b) acknowledged in writing by the recipient,

to be an advancement.

(2) Property advanced shall be valued as declared by the intestate in writing, otherwise the property advanced shall be valued as of the time of the advancement.

(3) If the recipient of the property advanced fails to survive the intestate, the property advanced shall not be treated as an advancement against the share of the estate of the recipient's issue unless the declaration or acknowledgment of the advancement so provides.

(4) Under this section, the shares of the successors shall be determined as if the property advanced were part of the estate available for distribution, and if the value of the property advanced equals or exceeds the share of the estate of the successor who received the advancement, that successor shall be excluded from any share of the estate, but if the value of the property advanced is less than the share of the estate of the successor who received the advancement, that successor shall receive as much of the estate as is required, when added to the value of the property advanced, to give him his share of the estate.

[Dower and curtesy abolished]

7 Subject to [the Dower Act or any similar Act] the common law estates of dower and curtesy are abolished.

[No successors]

8 If there is otherwise no successor under this Act, the intestate estate shall be distributed [to the Province].