



THE LAW SOCIETY
OF NEW SOUTH WALES

The Succession Amendment (Intestacy) Act 2009

A Commentary

July 2009



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PUBLISHED BY

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170 Phillip Street, Sydney NSW 2000
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Preface



A project of the Law Society's Elder Law & Succession Committee chaired by Councillor Pamela Suttor to deliver education to New South Wales practitioners on a regional basis on changes to intestacy laws after the commencement of the Succession Amendment (Intestacy) Act 2009, and their practical implications. The project was made possible with the assistance of the Law Society of New South Wales and its senior management.

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The assistance of Ruth Pollard, Principal Legal Officer, and Caroline Gage, Senior Legal Officer Genealogy, of the Public Trustee of New South Wales (now NSW Trustee and Guardian) is gratefully acknowledged. Entitlement List and PowerPoint presentation prepared by the Public Trustee of New South Wales (June 2009) (now NSW Trustee and Guardian) and reproduced with permission.

1. Introduction



The Uniform Succession Laws Project is well under way. The project fits in well with the concept of a national legal profession and, of course, with client interest with widespread internal migration in Australia. Practitioners should be starting to be familiar with changes to the law of wills operative from 1 March 2008 (the *Succession Act 2006*). The Family Provision changes commenced on 1 March 2009 (the *Succession Amendment (Family Provisions) Act 2008*).

The third stage of the reform is intestacy. The *Succession Amendment (Intestacy) Act 2009* (the Act) received assent on 9 June 2009. It is expected to come into effect in early 2010.

The final stage of the Project is a review of the administration of estates, with the Queensland Law Reform Commission recently releasing the report for the National Committee for Uniform Succession Laws (*Administration of Estates: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General QLRC Report 65*). It is anticipated that serious work on this reform will start in late 2009, although the Supreme Court has already brought in procedural changes in relation to the form of probate and the passing of accounts.

What follows is an overview of the Act, with a useful Glossary of Terms and an analysis of the intestacy changes. Examples of entitlement are provided at Appendix 1, with a copy of the Act as passed at Appendix 2.

The changes effect a very real revolution of intestacy law as we know it. They emphasise the primacy of the spouse. The contents of the Act reflect Government's significant reliance on the conclusions of the New South Wales Law Reform Commission Report 116, *Uniform Succession Laws: Intestacy* (Report 116). Whether those changes accurately reflect changing community expectation is something which may be worked out in future litigation, particularly in Family Provision applications.

Glossary of Terms

Succession Amendment (Intestacy) Act 2009

TERM	DEFINITION
brother or sister	a person is the brother or sister of another if they have one or both parents in common
deceased person	a deceased person is one who did not survive the intestate
domestic partnership	a domestic partnership is a relationship (other than marriage) between the intestate and another person: (a) that is a de facto relationship, and (b) that: (i) has been in existence for a continuous period of at least two years, or (ii) has resulted in the birth of a child. (section 105)
eligible relative	means a relative of the deceased who is entitled to share in the distribution of the intestate under part 4.3
entitlement to the whole of the intestate estate	a reference to an entitlement to the whole of the intestate estate is a reference to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate. (section 103)
Indigenous person	is a person who: (a) is of Aboriginal or Torres Strait Islander descent, and (b) identifies as an Aboriginal person or Torres Strait Islander, and (c) is accepted as an Aboriginal person by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community
Intestate estate	means: (a) in the case of an intestate who leaves a will – property that is not effectively disposed of by will, and (b) in any other case – all the property left by the intestate
leave	A person leaves another if the person dies and is survived by the other
Personal effects	Means the intestate's tangible personal property except the following: (a) property used exclusively for business purposes, (b) bank notes or coins (unless forming a collection made in pursuit of a hobby or for some other non-commercial purpose), (c) property held as a pledge or other form of security,



TERM	DEFINITION
Personal effects (continued)	(d) property (such as gold bullion or uncut diamonds): <ul style="list-style-type: none"> (i) in which the intestate has invested as a hedge against inflation or adverse currency movements, and (ii) which is not an object of household, or personal use, decoration or adornment, (e) an interest in land (whether freehold or leasehold)
predecease	a person is taken to predecease the intestate if the person does not survive the intestate
Presumptive share	Of an intestate estate of a deceased eligible relative of the intestate means the entitlement the relative would have had if he or she had survived the intestate
Registered valuer	Has the same meaning as it has in the Valuers Act 2003.
Spouse	A spouse of an intestate is a person: <ul style="list-style-type: none"> (a) who is married to the intestate immediately before the intestate's death, or (b) who was a party to a domestic partnership with the intestate immediately before the intestate's death. (section 104)
Statutory legacy for a spouse	(1) The statutory legacy for a spouse consists of: <ul style="list-style-type: none"> (a) the CPI adjusted legacy, and (b) if the statutory legacy is not paid, or not paid in full, within one year after the intestate's death – interest at the relevant rate on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full. (2) The CPI adjusted legacy is to be determined in accordance with the following formula: $R = A \times \frac{C}{D}$ Where: R represents the CPI adjusted legacy. A is \$350,000. C represents the Consumer Price Index number for the last quarter for which such a number was published before the date on which the intestate died D represents the Consumer Price Index number for the December 2005 quarter.

TERM	DEFINITION
<p>Statutory legacy for a spouse (continued)</p>	<p>(3) If, however, a spouse is entitled to a statutory legacy under this Act and under the law of another Australian jurisdiction or jurisdictions:</p> <p>(a) the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including this Act), but</p> <p>(b) the following qualifications apply:</p> <p>(i) amounts received by the spouse, by way of statutory legacy, under any of the other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under this Act,</p> <p>(ii) if any of the relevant laws contain no provision corresponding to sub-paragraph (i), no amount is payable by way of statutory legacy under this Act until the spouse's entitlement under that law is satisfied, or the spouse renounces the spouse's entitlement to payment, or further payment, by way of statutory legacy, under that law.</p> <p>(4) If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or statutory legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate rateably.</p> <p>(5) The relevant rate of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.</p> <p>(6) If the Australian Statistician publishes a Consumer Price Index number in respect of a particular quarter in substitution for a Consumer Price Index number previously published in respect of that quarter:</p> <p>(a) except as provided by paragraph (b) – the publication of the later index number is to be disregarded, or</p> <p>(a) if the Minister so directs – regard is to be had to the later and not to the earlier index number.</p> <p>(7) If the reference base for the Consumer Price Index is changed, regard is to be had only to index numbers published in terms of the new reference base or to index numbers converted to the new reference base in accordance with an arithmetical conversion factor specified by the Australian Statistician.</p>



TERM	DEFINITION
Statutory legacy for a spouse (continued)	(8) An adjustment under sub-section (3) is to be made to the nearest whole dollar. (9) In this section: Consumer Price Index number, for a quarter, means the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter. (section 106)
Surviving spouse statutory entitlement	This term applies where the intestate leaves a spouse (but not more than one spouse) (a) if an intestate leaves a spouse but no issue, the spouse is entitled to the whole of the intestate estate, (b) if an intestate leaves a spouse and issue and the issue are all also issue of the spouse, the spouse is entitled to the whole of the intestate estate, (c) if an intestate leaves a spouse and any issue who are not issue of the spouse, the spouse is entitled to: (i) the intestate's personal effects, and (ii) a statutory legacy, and (iii) one half of the remainder (if any) of the intestate estate. (sections 110 – 113 (inclusive))
Survive	(1) A person will not be regarded as having survived an intestate unless: (a) the person is born before the intestate's death and survives the intestate by at least 30 days, or (b) the person is born after the intestate's death after a period of gestation in the uterus that commenced before the intestate's death and survives the intestate for at least 30 days after birth. (2) The rules stated in subsection (1) are not to be applied if, as a result of their application, the intestate estate would pass to the State. (section 107)

2. Spouse and Domestic Partnership

Sections 104 and 105

While a person in a domestic partnership must be living with the intestate at death, the loophole in the existing legislation where the de facto spouse is equated with the legal spouse where there is neither legal spouse nor children, notwithstanding the length of the relationship, is taken away.

The Act provides that a person in a domestic partnership must not only be living with the intestate at death but that they must have been living together for not less than 2 years. If the partnership was for less than that period it must have resulted in the birth of a child.

The domestic partner with a shorter period of relationship is thrown back on his or her Family Provision remedies.

3. Spouse's Statutory Legacy

Section 106

The increased CPI adjusted spouse legacy of \$350,000, indexed to the December 2005 quarter, is consonant with the underlying philosophy of greater recognition of the spouse.

Where the estate is shared with issue other than those of the spouse, the spouse receives the statutory legacy together with defined personal effects and one half of the remainder of the estate. Effectively, the size of the statutory legacy means that in small estates, even where there are issue who may otherwise be entitled, the spouse will take the whole estate.

4. Spouse's Statutory Entitlements and Limitation of Children's Entitlements

Part 4.2, Division 1, Sections 110 - 113

Appendix 1 to this paper is a table setting out examples of entitlements for various relationships. The table is complex and reflects the significant changes to the law.

A sole surviving spouse is entitled to the whole of the estate where there are no surviving issue. Similarly, if there is a domestic partner and no spouse and no issue, the domestic partner is entitled to the whole of the estate (see entitlements examples 1 and 2).

It is where there is issue that the changes become more controversial. Issue do not take unless they are issue of another relationship of the intestate (see entitlements examples 10, 11 and 12). In such cases, the entitlement of the spouse/domestic partner is limited to the personal effects, the CPI adjusted statutory legacy and one half of the remainder of the estate (see Section 113). All children of the intestate share in the remainder one half of the residue.

5. Spouse's Preferential Right to Acquire Property from the Estate

Part 4.2, Division 2, Sections 114 - 121

5.1 An important change

The right of the spouse of an intestate to have the intestate's interest in a residence occupied by the spouse, with or without the intestate, as the spouse's only or principal residence will be replaced by a right to acquire any property from the estate at its market value at the date of the intestate's death, subject to certain conditions.



5.2 Existing law – Probate & Administration Act 1898

Section 61D and the Fourth Schedule confer upon the spouse of an intestate the right, exercisable within 12 months after the grant of administration of the estate, to require the administrator of the intestate's estate to hold in trust for the spouse the intestate's interest in a dwelling house which is situated in New South Wales and which was, at the time of the intestate's death, occupied by the intestate and the intestate's spouse, or by the intestate's spouse only, as their, or the spouse's, only or principal residence.

The right of the spouse with respect to the shared home only arises where the intestate is survived by issue as well as a spouse, as otherwise the spouse will be entitled to the whole of the intestate's estate.

Where the intestate is survived by a legal spouse and also by a de facto spouse, then the right to the shared home will only be exercisable by the de facto spouse if the de facto relationship had subsisted for a continuous period of at least two years prior to the death of the intestate, as otherwise the de facto spouse does not have any of the rights of the spouse for the purposes of the distribution of the intestate's estate (section 61B3(A)). However, where there is a legal spouse and a de facto spouse of less than the required two years duration, the right under section 61D will not be exercisable by the legal spouse unless the dwelling in which the intestate had an interest was occupied by the spouse at the time of the intestate's death.

The right of the spouse under section 61D is exercisable regardless of whether the value of the intestate's interest in the shared home is greater or less than the value of the spouse's entitlements in the intestate's estate, apart from the right to the shared home. If the value of the interest in the shared home is less than the value of the spouse's entitlements, then the spouse takes that interest as part of the spouse's entitlements in the estate. If the value of the interest in the shared home is greater than the value of the spouse's entitlements in the estate, then the entitlements of the issue of the intestate will be reduced by the amount of the excess.

The Fourth Schedule contains provisions as to the manner in which the right of the spouse under section 61D is to be exercised and which limit or prevent exercise of the right. This may occur where the interest in the shared home is required to meet funeral and administration expenses, debts and other liabilities payable out of the estate, or where legislation relating to the subdivision of land would not be complied with, or unless the Supreme Court declares itself to be satisfied that exercise of the right will not diminish the value of assets in the estate or make their disposal more difficult where the shared home is part of a building in which the estate has an interest, or is held with land used for agricultural, pastoral or horticultural purposes, or was used, wholly or partly, as a hotel or lodging house, or was partly used for non-residential purposes.

5.3 New law – Succession Amendment (Intestacy) Act 2009

Sections 114 to 121 confer upon the spouse of an intestate the right to acquire property from the intestate's estate.

Section 114 provides that the spouse's rights under Part 4.2, Division 2 only arise where the intestate is survived by only one spouse.

Section 115 confers the right of the spouse to elect to acquire property from the intestate's estate. The election requires the Supreme Court's authorisation if the property which the spouse elects to acquire is part of a larger aggregate (for example, one of a group of items or part of a larger property) and the proposed acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult. In granting authorisation the Court may impose conditions, including requiring the spouse to pay compensation to the estate. The Court must refuse authorisation if it considers that the matters requiring authorisation cannot be adequately addressed by conditions.

Section 115 does not specify whether the application is to be made, or may be made, by the spouse, the personal representative or the issue of the intestate (that is, who are not the issue of the spouse – being the other persons entitled in the estate where the right arises). Nor does the section address matters such as who bears the onus of establishing that the requirement for authorisation arises, or the factors to be taken into account by the Court in imposing conditions, or how the costs of the application are to be borne.

Section 115 further provides that the spouse is not entitled to elect to acquire property if the acquisition would require compliance with legislation relating to the subdivision of land (including land subject to strata schemes) (referred to as the “mandatory provisions”) unless those provisions are to be complied with at the expense of the spouse.

Section 115 also provides that the spouse’s right of election is exercisable by a spouse who is a personal representative of the intestate, and makes it clear that a spouse does not have any right against a purchaser in good faith for value of any property of the intestate from the personal representative.

Section 116 requires the personal representative to give notice to the spouse of the right of election within one month after the grant of administration. No form of notice is prescribed, but the notice must state how the right is to be exercised, the fact that the election may be subject to Court authorisation and the circumstances in which that may be required, and that the right must be exercised within three months after the date of the notice. Notice is not required if the spouse is the personal representative or one of the personal representatives.

Section 117 provides that the election must be made by the spouse within 3 months after the date of the notice under section 116 or within 3 months after the grant of administration if the spouse is the personal representative, or one of the personal representatives. The Court has power to extend the time for making the election. A note to the section suggests that this might be done if the Court’s authorisation is required or if there is an unresolved question regarding the existence or nature of a person’s interest in the intestate’s estate. The time for making the election may be extended before or after the time has passed, but not after the administration of the estate has been completed.

Section 118 describes how the election must be made. Notice in writing of the election which identifies the property to be acquired must be given to each person, apart from the spouse, who is a personal representative or who is entitled to share in the estate. The Court may direct that notice need not be given to any of those persons if the Court considers that it is unnecessary, unreasonable or impracticable to do so. A valid and effective election may be made by a spouse who has not reached the age of majority. A spouse may revoke an election, by notice in writing given to the same persons as the notice of election, at any time before transfer of the property to the spouse. Again, no form of notice is prescribed.

Section 119 provides that the price at which a spouse may elect to acquire property from the intestate’s estate is the market value of the property as at the date of the intestate’s death. However, if the spouse assumes any liability secured by a mortgage, charge or encumbrance over the property, with the agreement of the mortgagee, charge or encumbrance, then the exercise price is reduced by the amount of that liability. The spouse takes the property subject to the mortgage, charge or encumbrance and the estate is exonerated from that liability.

Section 119 further requires the personal representative to obtain a valuation from a registered valuer of property forming part of the estate if a spouse elects to acquire the property or asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it. A copy of the valuation must be given to the spouse and to the other beneficiaries entitled to share in the estate. The requirement for a personal representative to obtain a valuation may be waived with the consent of all beneficiaries entitled to share in the estate.

Section 120 provides that if a spouse elects to acquire property from the estate then the exercise price is to be satisfied, firstly, from money to which the spouse is entitled from the



estate and, secondly, by payment from the spouse to the estate on or before the date of transfer.

Section 121 provides that the personal representative must not dispose of property from the estate, except to a spouse who has elected to acquire it, unless:

- the personal representative is the spouse; or
- the time for exercising an election has passed and no election has been made; or
- the Court's authorisation is required but has been refused or the application for authorisation has been withdrawn; or
- the spouse has notified the personal representative in writing that he or she does not propose to exercise the right to acquire property; or
- sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate; or
- the property is perishable or likely to decrease rapidly in value,

but a transaction contrary to this section is not invalid. As noted above, under section 115 the spouse has no remedy against a person who, in good faith for value, purchases any property of the intestate from the personal representative. Quite what recourse may be available to the spouse where there has been a disposition contrary to section 121 is not clear.

5.4 Further comments on new law

The spouse's rights under Part 4.2, Division 2 only arise where the intestate leaves a spouse. By the definition of "leave" in section 101 and as a result of section 107, this means that the spouse must have survived the intestate by at least 30 days in order to exercise the right.

No provision has been made for the duty consequences of a spouse's election or a transfer of property pursuant to a spouse's election. Section 63 (1) and (2) *Duties Act 1997* provides:

- "(1) Duty of \$50 is chargeable in respect of:
- (a) a transfer of dutiable property by the legal personal representative of a deceased person to a beneficiary, being:
 - (i) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy, or
 - (ii) a transfer of property the subject of a trust for sale contained in the will of the deceased person, or
 - (iii) an appropriation of the property of the deceased person (as referred to in section 46 of the *Trustee Act 1925*) in or towards satisfaction of the beneficiary's entitlement under the trusts contained in the will of the deceased person or arising on intestacy, and
 - (b) a consent by a legal personal representative of a deceased person to a transmission application by a beneficiary, and
 - (c) a transmission application to a devisee who is also the sole legal personal representative.
- (2) If a transfer of dutiable property is made by a legal personal representative of a deceased person to a beneficiary under an agreement (whether or not in writing) between the beneficiary and one or more other beneficiaries to vary the trusts contained in a will of the deceased person or arising on intestacy, the dutiable value of the dutiable property is to be reduced by the portion of the dutiable value that is referable to the dutiable property to which the beneficiary had an entitlement arising under the trusts contained in the will or arising on intestacy."

The exercise by a spouse of the right in respect of the shared home under section 61D of the *Probate and Administration Act 1898* results in the intestate's interest in that home being held in trust for the spouse. As this is a trust arising on an intestacy, the subsequent transfer of that interest to the spouse is charged with \$50 duty under section 63(1)(a)(i) *Duties Act*.

The exercise by a spouse of the right to elect to acquire property from the intestate's estate under section 114 et seq. *Succession Amendment (Intestacy) Act* results in the transfer of that

property to the spouse on satisfaction of the exercise price. Such a transfer does not appear to be made under or in conformity with a trust arising on an intestacy, nor does it appear to be a transfer of property subject to a trust for sale, or an appropriation under section 46 *Trustee Act 1925*, or a transfer made pursuant to an agreement between the spouse and one or more other beneficiaries to vary the trusts arising on an intestacy. Practitioners will have to consider whether a transfer upon exercise of the spouse's right to elect to acquire property comes within any of the provisions of section 63 *Duties Act*. If it does not, then it appears that the transfer will be liable for full *ad valorem* duty on the exercise price (being the market value at the date of death) or the value of the property at the date of the transfer, whichever is the greater.

In order to avoid that duty consequence, personal representatives and spouses should consider having recourse to the power of a personal representative to appropriate property in or towards satisfaction of the spouse's entitlements under section 46 *Trustee Act 1925*, to the extent of the spouse's entitlements in the estate, before exercise of the spouse's right to elect to acquire property outside that entitlement. The new provisions do not oust the power of a personal representative to appropriate property under section 46, and a transfer of property by way of an appropriation under the section is expressly within section 63(1)(a)(iii) *Duties Act*.

Another revenue issue to be considered will be the capital gains tax consequences, for the spouse and for the estate, of a transfer upon exercise of the spouse's right to elect to acquire property from the estate.

An effect of the new provisions is that exercise of the spouse's right will not diminish the value of the interests of any other beneficiaries on intestacy. As noted above, under the existing section 61D if the value of the intestate's interest in the shared home is greater than the value of the spouse's entitlements in the estate then the entitlements of the issue of the intestate will be reduced by the amount of the excess.

Given that the spouse's right to acquire property from the estate only arises where the intestate is survived by only one spouse, the right will only be exercisable where there are issue of the intestate surviving who are not issue of the spouse.

Section 119 defines the exercise price as the market value of the property at the date of the intestate's death and requires the personal representative to obtain a valuation of the property from a registered valuer. However, the valuation so obtained is not binding on the persons interested in the estate (unlike under existing section 61E(2)) and no provision is made for resolving disputes about value. It seems that any such dispute will have to be resolved by an application to the Court.

Work done by a solicitor for a personal representative in complying with the requirements of Part 4.2, Division 2 does not appear to come within the scale costs of obtaining a grant of administration under the *Legal Profession Regulation 2005* Schedule 4.

6. Multiple Spouses

Part 4.2, Division 3, Sections 122 – 126

6.1 Introduction

Part 4.2, Division 3 deals with the entitlement of multiple spouses as defined by sections 104 and 105 where, for example, the intestate is married and also has a domestic partner. This differs from section 61B (3A) of the 1898 Act – intestacy provisions, under which a de facto partner of at least two years will take the spouse's entitlement exclusively (subject to certain conditions).

Currently, when an intestate dies leaving children and a spousal partner, the spousal partner is entitled to a statutory legacy, the deceased's personal effects and half the residue of the estate. In addition, the intestate's child or children are entitled to the remainder unless it is required to secure an interest in the shared home for the spouse or partner.



6.2 Entitlement of Spouse and Domestic Partner (Spouse) – With Issue

The provisions of sections 122 and 123 of the Act are a significant change. Where an intestate dies leaving a spouse and/or a domestic partner and a child or children of those relationships, the child or children receive no interest in the estate of the intestate. Therefore, the spouse and the domestic partner are entitled (subject to certain conditions) to the whole of the estate.

The expressed rationale for this change is that:

- It will make the administration of the estate easier.
- It reflects community standards on the issue.
- It is assumed that the children of the intestate's spouse and/or domestic partner will inherit from their parent in due course.

6.3 Entitlement of Spouse and/or Domestic Partner and Other Issue

Another significant change is provided by section 124, where the entitlement of the spouse and/or the domestic partner and their children is affected if the intestate has other issue, who are not issue of the spouse or the domestic partner (the spouses).

This could occur, for example, if the intestate had a child from a casual or brief encounter.

In these circumstances, the entitlement of the spouses is such that they share:

- (a) the intestate's personal effects;
- (b) the statutory legacy (at present \$350,000) subject to CPI adjustment; and
- (c) one-half of the remainder.

In these circumstances, all the children of the intestate share equally in the remainder.

6.4 Sharing Between Spouses

Again, this is a new concept set out in section 125. If the property of the intestate is to be shared between the spouses, there is a process to be followed between the spouses which could be quite complicated and imposes considerable responsibilities on the personal representative.

6.5 Equal division

In these circumstances, the personal representative is required to give each spouse a notice in writing, stating that the personal representative may distribute the property equally between the spouses, unless, within 3 months after the date of the notice:

- (a) the spouses enter into a written "distribution agreement" and submit the agreement to the personal representative, or
- (b) at least one of the spouses applies to the Court for a "distribution order".

If, however, at least 3 months has elapsed since the notices were given and either:

- (a) the personal representative has not received a "distribution agreement", or

- (b) an application for a “distribution order” has been made and been dismissed or discontinued,

then the personal representative can proceed with an equal sharing of the property.

However, if a spouse asks the personal representative to make an equal division of property, the personal representative must:

- (a) give the notices as soon as practicable; or
- (b) make an application to the Court for a “distribution order”.

6.6 Distribution Orders

These are Court orders, based upon justice and equity, distributing the property between the spouses, even to the extent one spouse may receive the whole of the property.

Instead of following the procedure set out in section 125 relating to equal sharing or a “distribution agreement” or a “distribution order”, section 126 allows either a spouse or the personal representative to apply to the Court for “a distribution order”.

If the personal representative has given written notice, unless the Court otherwise allows an application for a “distribution order” cannot be made more than 3 months after the date of the notice.

7. Distribution Among Relatives

Part 4.3, Sections 127 - 132

7.1 Introduction

Effectively, except for the extension of the spouse’s entitlements and the extension to first cousins, the distribution remains as before.

7.2 Survivorship - Posthumous Children

Section 107

The concept of 30 day survivorship is familiar to practitioners from the *Succession Act 2006*. As already noted above it has been imported into this Act, which also freezes out the unused frozen embryo. A posthumous child is defined as a person “who is born after the person’s death after a period of gestation in the uterus that commenced before the person’s death and survives the person for at least 30 days after birth”.

7.3. Brothers and Sisters

Section 129

The distinction between brothers and sisters of the whole blood or the half blood is abolished. Section 101 defines a brother or sister of the other if they have one or both parents in common.



7.4 Extension of Persons entitled

Section 131(3)

The distribution chain now stops with a child or children of deceased aunts and uncles, that is first cousins will be able to take (entitlements example 23). This is an improvement in that it may prevent a number of intestate estates otherwise passing to the State.

8. Indigenous Persons' Estates

Part 4.4, Sections 133 - 135

8.1 Introduction

Aboriginal people, not surprisingly, have the lowest rate of will-making in Australia. Many indigenous people believe they need large estates to benefit from making a will. Other contributing factors to the low rate of will-making include literacy problems, mobility, and attitudes towards death that may mean indigenous people are unwilling to record how they wish to leave their property on their death.

However, without a will, indigenous people are not adequately served by our intestacy laws. This is because intestate distribution of property is based on English or Western concepts of family relationships where family is thought of in terms of the lineal family and relationships of blood.

The indigenous concept of family or kinship is broader and more complex than that of Anglo-Europeans. One reason for this is what is referred to as the equivalence of same-sex siblings. So, for example, if one of two brothers has a child, that child refers to both his biological father and uncle as “father” and likewise two sisters both with children will be mother to the children of both. Therefore as these uncles and aunts are considered parents their children will be referred to as brothers and sister and not cousins.

In recognition of the inadequacy of the intestacy regime to Aboriginal people, provision has been made for indigenous notions of kinship in the new intestacy laws. The new Act's provisions relating to indigenous persons' estates are modelled on Part 4A of the *Northern Territory Administration and Probate Act*.

8.2 Definition of “indigenous person”

Section 101 defines an indigenous person as a person who:

- (a) is of Aboriginal or Torres Strait Islander descent, and
- (b) identifies as an Aboriginal or Torres Strait Islander, and
- (c) is accepted as such by an Aboriginal or Torres Strait Islander community.

This means that even if a person has only a small degree of Aboriginal or Torres Strait Islander descent they will meet the criteria in paragraph (a) but they must also identify as and be accepted by the community.

This definition is used by both state and federal governments and is used in other pieces of legislation.

8.3 Distribution orders and scheme for distribution

Section 133 provides for the Court to make a distribution order on application by either:

- The personal representative of an indigenous intestate, or
- A person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the indigenous community to which the indigenous intestate belonged.

The provisions, while allowing that somebody may claim to be entitled to a distribution under laws, customs, traditions and practices of an indigenous community, also allow distribution to be made according to the general rules of intestacy, which may be applied in most cases due to the costs of making a Court application.

As required by section 133(2), the application must be accompanied by a scheme for distribution of the estate that follows the laws, customs, traditions and practices of the community to which the intestate belonged.

An example of such a scheme for distribution may be found in the case of *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52, a judgment of the Northern Territory Supreme Court. This case was about avoidance of *bona vacantia*:

- [3] The estate comprises cash only in the hands of the Public Trustee amounting to approximately \$28,700.
- [4] The affidavit evidence of each of three deponents, senior members of clan groups making out the Jawoyn people, asserts that she or he is qualified and authorised by Jawoyn tradition to say who is entitled to take an interest in the estate under the customs and traditions of the Jawoyn. That evidence is consistent in showing that the intestate was the last member of another clan, that he was “grown up” by the late Gerry Mumbin who has three living children, Kevin, Kathleen and Lisa. Those children, in classificatory terms, were the “wives” and “brother-in-law” of the intestate. As the deceased had no children, the Mumbin siblings were his close family. The evidence also shows that Kevin, Kathleen and Lisa Mumbin succeeded to the non Aboriginal estate of the intestate in accordance with the customs and traditions of the Jawoyn and are entitled in equal shares. A letter to the Public Trustee from the Executive Director of the Jawoyn Association confirms that evidence. ...
- [6] The plan of distribution proposes that the estate be divided into three parts (I assume equal parts) and that one of each part be distributed to Kevin, Kathleen and Lisa Mumbin.
- [7] I am satisfied that in all the circumstances it would be just to order that the estate be distributed in accordance with the plan and order accordingly.”

The Public Trustee in the Northern Territory administers the majority of indigenous estates and reports that the intestacy provisions are rarely used. The Northern Territory Public Trustee usually distributes indigenous estates according to the general intestacy rules which seems, in most cases, to be acceptable to indigenous families.

Preparing a scheme for distribution of the estate will require the assistance of elders of the clan to which the deceased belonged. To ensure that the information required is given by elders or people the indigenous community accept as authoritative, contact should be made with the Aboriginal Land Councils.

Section 133(3) stipulates that the application must be made within 12 months of the grant of administration, or any longer period allowed by the Court. However, no application can be made after the estate has been fully distributed.



Under section 133(4), after making or receiving notice of an application, the personal representative must not distribute or continue distribution of the estate until:

- (a) The application has been determined, or
- (b) The Court authorises distribution.

Part 4.4 of the Act is silent on what constitutes “notice of an application”, how it is given and to whom. Section 71D of the *Northern Territory Administration and Probate Act* provides that the applicant for an order for distribution must serve notice on each person who is an administrator of the estate and the Court may order that notice be served on such persons it thinks fit.

The Court may order that the whole or part of the estate be distributed in a specified manner.

An order may require a person to whom property was distributed before application was made to return the property to the personal representative for distribution in accordance with the terms of the order. However any distribution made for maintenance, education or advancement in life of a person who was partly or totally dependent on the intestate immediately before death does not have to be returned. For example a distribution made under section 92A of the *Probate and Administration Act 1898* or section 94 will not be returned.

In formulating an order the Court must take into account the following matters:

- (a) The scheme submitted by the applicant, and
- (b) The laws, customs, traditions and practices of the indigenous community to which the intestate belonged.

The Court can only make an order if it is satisfied the terms are just and equitable to do so.

8.4 Effect of distribution order

A distribution order operates to the exclusion of all other provisions relating to distribution of intestate estates.

9. Absence of Persons Entitled

Part 4.5 Sections 136 and 137

9.1 The Need for Change

Bona vacantia is the Crown’s statutory right to the property of an intestate, when no relatives are entitled.

Report 116 noted the suggestion that the incidence of *bona vacantia* estates in NSW was increasing. The reasons suggested for this include that people are having fewer children. Report 116 also referred to some statistics on *bona vacantia* estates in NSW. In the period 2001-2005 the Public Trustee paid \$24,289,946.86 to the State of NSW from 92 estates where there were no relatives closer than cousins.

It was against this background that Report 116 examined the existing law and various proposals about what should happen with *bona vacantia* estates. Report 116 proposed that the existing law be restated with some changes concerning who can apply for waiver of the State’s rights to a *bona vacantia* estate.

9.2 Existing Law – Probate and Administration Act 1898

The existing law is contained in sections 61B(7) and 61B(8) of the *Probate and Administration Act 1898*. It provides in section 61B(7) that, where no statutory relatives are entitled, the estate belongs to the Crown as bona vacantia. Section 61B(8) provides that the Crown may, out of a bona vacantia estate, provide for dependents, whether kindred or not, of the intestate and any other persons for whom the intestate might reasonably have been expected to make provision.

9.3 New Law – Succession Amendment (Intestacy) Act 2009

Section 136 provides that the State is entitled to the whole of the intestate estate where the intestate dies leaving no person entitled to the estate.

Section 137(3) provides that written applications can be made to the Crown Solicitor for the waiver of the State’s rights to an intestate estate. The present procedure for such applications is at paragraph 5206 of the *Succession Law and Practice New South Wales* published by LexisNexis Butterworths.

Sections 137(1) and (2) provide that the Minister (State) may upon appropriate conditions waive the State’s rights in whole or part to an Intestate estate in favour of:

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

It is now possible for a charity or community organisation that had a close association with the deceased to make an application for provision out of that deceased intestate’s estate.

10. Miscellaneous Provisions

Part 4.6, Sections 138 – 140, Schedule 1[5]-[10]

10.1 Non-Deferral of a Minor’s Interest

Section 138 provides that the entitlement of a minor to an interest in an Intestate estate vests immediately, and is not deferred until they reach majority or marry.

There is no definition of minor in the *Succession Act*. The definition of minor is found in section 21 of the *Interpretation Act 1987* which states that a minor means “an individual who is under the age of 18 years”.

10.2 Effect of Disclaimer/Disqualification

Section 139 provides that a person who disclaims their share of the intestate estate or is disqualified from taking an interest in an intestate estate will be treated as if they predeceased the intestate. Practitioners should note Centrelink limitations on disclaimers.

A person may be disqualified from taking an interest by operation of the forfeiture rule. The forfeiture rule is a rule of law that prevents a person from inheriting from the estate of a deceased person when he or she is criminally responsible for that person’s death. In New

South Wales, the operation of the forfeiture rule has been modified by the provisions of the Forfeiture Act 1995.

The note at the foot of section 139 indicates that if the person has issue, they may be entitled to take that person's presumptive share in the Intestate estate.



10.3 Effect of Testamentary and Other Gifts

Section 140 provides that the distribution of an intestate estate is not affected by gifts made by the intestate to persons entitled:

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

10.4 Rules of Court

Existing section 102 *Succession Act 2006* has been amended by the insertion of subsection (h) in section 102(2) to allow for rules of court to be made relating to the making of elections by the spouses of intestates under Chapter 4.

10.5 Transitional Provisions – Part 4 of Schedule 1

A new Part 4 has been inserted in Schedule 1 to the *Succession Act 2006* titled “Part 4 Provisions consequent on enactment of *Succession Amendment (Intestacy) Act 2009*”.

The new Part 4 deals with the transitional provisions (clauses 12 and 13).

Clause 13 of Part 4 of Schedule 1 provides that Chapter 4 of the *Succession Act*, the intestacy provisions:

- (1) apply to the distribution of an intestate estate of a person who *dies on or after* the commencement of Chapter 4;
- (2) do not apply to the distribution of an intestate estate of a person who dies before the commencement of Chapter 4, and the law in force at the date of death will apply.

11. Amendment of Other Acts

Schedule 2, Clauses 2.1-2.6

11.1 Introduction

Schedule 2 makes consequential amendments to the following New South Wales Acts:

- *Adoption Act 2000*
- *Conveyancing Act 1919*
- *District Court Act 1973*
- *Powers of Attorney Act 2003*
- *Probate and Administration Act 1898*
- *Testator's Family Maintenance and Guardianship of Infants Act 1916*.

11.2 Adoption Act 2000

One of the consequential amendments to the *Adoption Act* is to section 95, which deals with the general effect of adoption orders. The following will be inserted at the end of section 95(2):

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

11.3 Conveyancing Act 1919

Section 33 of the *Conveyancing Act* will make reference to “the applicable intestacy rules” which will be defined in the new section 33(4).

11.4 District Court Act 1973

A minor consequential amendment has been made to section 134 of the *District Court Act*.

11.5 Powers of Attorney Act 2003

Section 24 of the *Powers of Attorney Act* will no longer apply to the intestate estate of a person who dies after the commencement of the intestacy law in Chapter 4. This is because the new Chapter 4 of the Succession Act does not give the spouse the right to only elect to take the matrimonial home – section 115 of the Act gives the spouse the right to elect to acquire any property from the intestate’s estate.

11.6 Probate and Administration Act 1898

The consequential amendments made to the *Probate and Administration Act* include the insertion of the new definition of de facto spouse in section 32G(1), the omission of Division 2A which dealt with the distribution of intestate estates under the *Probate and Administration Act* and the omission of the Fourth Schedule to that Act, which dealt with the rights of the surviving spouse of the intestate with respect to the acquisition of the shared home.

Section 92(2) of the *Probate and Administration Act* will also be amended so that an executor or administrator does not receive legal protection on distribution after giving the requisite notice of intended distribution if the distribution was not made in the circumstances described in section 125 (Sharing between spouses) or section 126 (Distribution orders) or Part 4.4 (Indigenous persons’ estates) of the Succession Act.

11.7 Testator’s Family Maintenance and Guardianship of Infants Act 1916

The consequential amendments to the *Testator’s Family Maintenance and Guardianship of Infants Act* will result in the name of the Act becoming the *Guardianship of Infants Act 1916*. Part 2 of the Act dealing with testator’s family maintenance will be omitted.



Intestacy Laws after the commencement of the Succession Amendment (Intestacy) Act 2009

	Situation	Entitlement
s104	spouse	for the purposes of this paper "spouse" refers to a person who immediately before the intestate's death was either married to the intestate or a party to a domestic partnership with the intestate.
s105	domestic partner	a relationship (other than marriage) of the Intestate and another person that is a de facto relationship AND has been in existence for a continuous period of at least two years immediately before death OR has resulted in the birth of a child
s111	spouse and no issue	if the spouse survives 30 days after the death of the deceased then he/she receives the whole estate
s111	domestic partner and no issue	if the domestic partner survives 30 days after the death of the deceased then he/she receives the whole estate
s122	spouse and domestic partner and no issue	if the spouse and domestic partner survive 30 days after the death of the deceased then they will share the whole of the estate either a) in equal shares (conditions apply) b) under a distribution agreement c) under a distribution order
s122	spouse and more than one domestic partner and no issue	if the spouse and domestic partners survive 30 days after the death of the deceased then they will share the whole of the estate either a) in equal shares (conditions apply) b) under a distribution agreement c) under a distribution order
s112	spouse and issue of the deceased and the spouse	if the spouse survives 30 days after the death of the deceased then he/she receives the whole estate. Issue receive nothing.
s112	domestic partner and issue of the deceased and the domestic partner	if the domestic partner survives 30 days after the death of the deceased then he/she receives the whole estate
s123	spouse and one or more domestic partners and issue of the spouse and the deceased	if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share the whole of the estate either a) in equal shares (conditions apply) b) under a distribution agreement c) under a distribution order



Intestacy Laws after the commencement of the Succession Amendment (Intestacy) Act 2009

s123	spouse and one or more domestic partners and issue of the domestic partner and the deceased	if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share the whole of the estate either a) in equal shares (conditions apply) b) under a distribution agreement c) under a distribution order
s123	spouse and one or more domestic partners and issue of spouse and the deceased, and issue of domestic partner and the deceased	if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share the whole of the estate either a) in equal shares (conditions apply) b) under a distribution agreement c) under a distribution order
s124	spouse and one or more domestic partner/s and issue of the deceased and another relationship, not the spouse or the domestic partner	if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share a) the statutory legacy \$350,000 b) CPI adjustment from Dec 2005 c) Interest on the legacy, if outstanding 1 year after the death of the deceased, on the amount due from the 1 year anniversary d) personal effects e) one half of the residue, if any spouse and domestic partner/s share either I. in equal shares (conditions apply) II. under a distribution agreement III. under a distribution order If the issue survive 30 days after the death of the deceased they will all share the remaining one half of the residue, if any. A presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them
s124	spouse and one or more domestic partner/s and issue of the spouse and the deceased and issue of the deceased and another relationship, not the spouse or the domestic partner	if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share a) the statutory legacy \$350,000 b) CPI adjustment from Dec 2005 c) Interest on the legacy, if outstanding 1 year after the death of the deceased, on the amount due from the 1 year anniversary d) personal effects e) one half of the residue, if any spouse and domestic partner/s share either I. in equal shares (conditions apply) II. under a distribution agreement III. under a distribution order If the issue survive 30 days after the death of the deceased they will



Intestacy Laws after the commencement of the Succession Amendment (Intestacy) Act 2009

		<p>all share the remaining one half of the residue, if any.</p> <p>A presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them</p>
s124	<p>spouse and one or more domestic partners and issue of spouse and the deceased, and issue of domestic partner and the deceased, and issue of the deceased and another relationship</p>	<p>if the spouse and domestic partner/s survive 30 days after the death of the deceased then they will share</p> <ul style="list-style-type: none">a) the statutory legacy \$350,000b) CPI adjustment from Dec 2005c) Interest on the legacy, if outstanding 1 year after the death of the deceased, on the amount due from the 1 year anniversaryd) personal effectse) one half of the residue, if any <p>spouse and domestic partner/s share either</p> <ul style="list-style-type: none">I. in equal shares (conditions apply)II. under a distribution agreementIII. under a distribution order <p>If the issue survive 30 days after the death of the deceased they will all share the remaining one half of the residue, if any.</p> <p>A presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them</p>
s127	<p>no spouse no domestic partner but issue of spouse</p>	<p>If issue survive 30 days after the death of the deceased they will all share the whole of the residue EQUALLY BETWEEN THEM</p> <p>a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them</p>
s127	<p>no spouse no domestic partner but issue of domestic partner</p>	<p>If issue survive 30 days after the death of the deceased they will all share the whole of the residue EQUALLY BETWEEN THEM</p> <p>a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them</p>
s127	<p>no spouse no domestic partner but issue of spouse and issue of domestic partner</p>	<p>If issue survive 30 days after the death of the deceased they will all share the whole of the residue EQUALLY BETWEEN THEM</p> <p>a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them</p>



Intestacy Laws after the commencement of the Succession Amendment (Intestacy) Act 2009

s127	no spouse no domestic partner but issue of another relationship not the spouse or domestic partner	If issue survive 30 days after the death of the deceased they will all share the whole of the residue. a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them
s127	no spouse no domestic partner but issue of spouse and issue of domestic partner/s and issue of another relationship	If issue survive 30 days after the death of the deceased they will all share the whole of the residue. a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them
s127	no spouse no domestic partner and one child of spouse and one child in utero of domestic partner	If the child of the spouse survives 30 days after the death of the deceased he/she will be entitled to a half of the estate. If the child in utero was conceived before the death of the deceased and survives 30 days after birth then he/she will be entitled to the other half share of the estate a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them
s107	no spouse no domestic partner and one child of spouse and one child conceived by IVF after the death of the deceased	A child of the deceased must be "in utero" before the death of the deceased. If the deceased is survived by one child who survives 30 days after the death of the deceased he/she will be entitled to share the whole estate equally between them a presumptive share is held for the issue of any child etc who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them
s128	no spouse no domestic partner no issue but parents	If parents survive 30 days after the death of the deceased they will be entitled to share the estate equally between them. If only one parent survives the deceased by 30 days then the estate will pass wholly to the surviving parent
s129	no spouse no domestic partner no issue no parent but brothers and sisters	If brothers and sisters survive 30 days after the death of the deceased they will be entitled to share the estate equally between them. a presumptive share is held for the issue of any brother or sister who predeceases the deceased leaving issue who survive 30 days after the death of the deceased and is divided equally between them no distinction between whole and half blood brothers and sisters



Intestacy Laws after the commencement of the Succession Amendment (Intestacy) Act 2009

s130	no spouse no domestic partner no issue no parents no brothers or sister no issue of brothers and sisters but grandparents	If grandparents survive 30 days after the death of the deceased they will be entitled to share the estate equally between them. if only three grandparents survives the deceased by 30 days then the surviving grandparents will share the estate equally between them
s131	no spouse no domestic partner no issue no parent no brothers or sister no issue of brothers and sisters no grandparents but aunts and uncles	If aunts and uncles survive 30 days after the death of the deceased they will be entitled to share the estate equally between them. no distinction between whole and half blood aunts and uncles a presumptive share is held for the children of any aunt or uncle (FIRST COUSINS of the deceased) who predeceases the deceased leaving issue who survive 30 days after the death of the deceased cousins does not include second or more distant cousins
s136	no spouse no domestic partner no issue no parent no brothers or sister no issue of brothers and sisters no grandparents no aunts and uncles no cousins	Whole estate passes bona vacantia to the crown