Law Reform Commission of Saskatchewan

Reform of *The Intestate Succession Act, 1996*

Final Report

March 2017

The Intestate Succession Act, 1996 determines how an estate is divided when there is not a valid will, or if there is a portion of an estate remaining after a will has been completely applied. The Commission has undertaken a comprehensive review of *The Intestate Succession Act, 1996*. This Final Report makes several recommendations for reform based on current estate planning practices that will ensure Saskatchewan's intestate estate distribution system remains relatively simple, certain, and efficient.

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in force in November, 1973. The Commission began functioning in February, 1974. Commissioners are appointed by Order in Council. The Commission's recommendations are independent, and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

The Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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This final report and other Law Reform Commission of Saskatchewan publications are available on our website: http://www.lawreformcommission.sk.ca

ISBN 978-0-921923-36-7 (print)
ISBN 978-0-921923-37-4 (PDF)

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SUMMARY OF RECOMMENDATIONS

The Intestate Succession Act, 1996 serves the important purpose of determining how an estate is to be divided when there is not a valid will, or if there is a portion of the estate remaining after a valid will has been completely applied. Since *The Intestate Succession Act, 1996* was enacted, the western Canadian provinces have all modified their intestate succession legislation to reflect the evolving ways families are being defined and created. The Law Reform Commission has made several recommendations to reform *The Intestate Succession Act, 1996* to ensure the estates of individuals who have died without a will are distributed in a way that the intestate would presumably have intended. The Commission's recommendations are based on current estate planning practices, and reflect the need to have the intestate estate distribution system be relatively simple, understandable, certain and efficient. The Commission's recommendations are as follows:

1. Increase the spousal preferential share from $100,000 to $200,000, or one-half of the estate, whichever is greater. The spouse will continue to receive one-half of the remainder if the intestate had one child, or one-third of the remainder if the intestate had more than one child.
2. Provide that if all the intestate's children are shared children with the spouse, the spouse will receive the entirety of the estate. In blended families (where the intestate has children born out of a relationship other than with his/her spouse), the spouse will receive the preferential share and the amounts the shared children would be entitled to.
3. Prescribe the amount of the preferential share in regulations.
4. Remove section 20 and set out a clear separation provision for married spouses. Married spouses should be considered separated if they have not been living together for at least two years because of a breakdown of the marital relationship.
5. Remove the doctrine of advancement in section 15.
6. Adopt the parentelic model of distribution of an intestate's estate, with no limit on the degrees of kinship that can inherit.
7. Specify that the laws of Saskatchewan apply to immovable property in Saskatchewan.
8. Codify the common law principle preventing an individual from benefitting from his or her crime by prescribing that an individual responsible for the death of an intestate is prohibited from inheriting.
9. Consider amending *The Dependants' Relief Act, 1996* to allow stepchildren and informally adopted children to bring an application as a dependant.
10. Consider amending *The Family Property Act* to allow amounts received under *The Intestate Succession Act, 1996* to be considered by the court when making a distribution of family property.

1. INTRODUCTION

The Intestate Succession Act, 1996[1] (the Act) determines how an estate is divided when there is not a valid will. It also applies to any portion of an estate that is left after a will has been completely applied. The main goal of intestate succession legislation is to distribute the intestate's property the way the intestate would have if they had prepared a will. This distribution is not, however, based on how a particular intestate would act. Instead, this distribution is based on what it is assumed intestates, considered as a group, would want. The aim of distributing an intestate's property the way they would have in a will must be balanced with the need to have a simple system that is understandable, certain, efficient, and does not lend itself to disputes. The second goal of intestate succession legislation is to provide for the family of the intestate.

This project was initiated by a suggestion of the Public Guardian and Trustee and a Saskatchewan lawyer in relation to several sections of the Act. The Law Reform Commission of Saskatchewan decided to undertake a review of the Act in its entirety. Every Saskatchewan resident could be affected by the law of intestacy at some point in their lives, or at death, so the Act should be current, comprehensive, and complete. In the twenty years since the Act was passed, the other Western provinces have all revised their intestate succession legislation.[2]

The importance of ensuring *The Intestate Succession Act, 1996* reflects modern estate planning practices is clear when one considers how common it is to not have a will. A 2012 survey of 2,000 Canadians by TitlePLUS, a title insurance company, found that 56% of Canadian adults do not have a signed will.[3] Younger adults are less likely to have a will: 88% of those responding who were between the ages of 27 and 34 did not have a will.[4] This pattern is also present in other countries. The AARP surveyed adults over

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[1] SS 1996, c I-13.1 [*1996 Act*].

[2] Intestate succession legislation has been a prolific subject area for Canadian law reform:

- Alberta Law Reform Institute, *Succession and Posthumously Conceived Children* (2012)
- Alberta Law Reform Institute, *Report on a Succession Consolidation Statute*, Report No 87 (2002)
- Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No 78 (1999)
- British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006)
- Law Reform Commission of British Columbia, *Report On Statutory Succession Rights* (1983)
- Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief: The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (2008)
- Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report No. 108 (2003)
- Manitoba Law Reform Commission, *Intestate Succession*, Report No. 61 (1985)
- Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters,* vol 2 (Toronto: Ontario Law Reform Commission, 1985)

There have also been numerous reports by law reform groups in the United Kingdom and Australia which are relevant to Canadian intestate succession law.

[3] LawPRO, *Survey: More than half of Canadians do not have a signed will*, online: LawPRO <https://www.lawpro.ca/news/pdf/Wills-POAsurvey.pdf>.

[4] *Ibid.*

50 in the United States in 1999,[5] and found that 60% of adults 50 and over had wills, leaving 40% without wills. Only 44% of adults aged 50 to 59 had wills, while 85% of adults 80 and over had wills.[6] The likelihood of having a will also increases with household income and higher education levels.[7] From these results it is clear that many adults do not have valid wills.

The *Consultation Paper*[8] was released in August 2016, and invited responses to the following questions:

1. Is the spousal preferential share in *The Intestate Succession Act, 1996* in need of reform?
2. Is the treatment of separated spouses under *The Intestate Succession Act, 1996* in need of reform?
3. Is the treatment of common-law spouses under *The Intestate Succession Act, 1996* in need of reform?
4. Should children conceived posthumously with the deceased's genetic material, stepchildren and informally adopted children be able to inherit from an intestate?
5. Should the doctrine of advancement be abolished or reformed?
6. Should next-of-kin be determined by the parentelic system of distribution?
7. Should *The Intestate Succession Act, 1996* contain provisions for determining which law applies to immovable property located in Saskatchewan if the intestate is domiciled outside of the province? If yes, what rule should be added?
8. Are there any cultural practices relating to intestate succession that should be incorporated or referenced in *The Intestate Succession Act, 1996*?

The *Consultation Paper* was sent directly to a number of individuals and organizations. The Commission received one written response, and six responses to an online survey based on the *Consultation Paper*. The Commission also consulted with lawyers who work in the areas of real estate, wills, and property, by attending two Canadian Bar Association section meetings to discuss the *Consultation Paper*, and by conducting two working group sessions with six lawyers each in Saskatoon and Regina.[9]

This Final Report draws on the responses to the *Consultation Paper* and the Commission's independent

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[5] AARP, *Where there is a will…Legal Documents among the 50+ Population: Finding from an AARP Survey*, (AARP Research Group, 2000), online: AARP < http://assets.aarp.org/rgcenter/econ/will.pdf>.

[6] *Ibid* at 1-2.

[7] For those with an income under $15,000, 50% had a will, while 74% of those with income at $50,000 per year or more had a will. Only 51% of individuals with an education of high school or less had a will, while 80% of individuals with a college degree or higher education had a will. *Ibid* at 3.

[8] Law Reform Commission of Saskatchewan, *Reform of* The Intestate Succession Act, 1996: *Consultation Paper* (August 2016) [*Consultation Paper*].

[9] The Commission would like to express its gratitude to the individuals who responded to the survey, submitted written comments, attended the CBA section meetings, and to the following lawyers who participated in the working groups: Rick Carlson, Carolyn Decker, Stew Demmans, Krista Evanisky, Destiny Gibney, Jordan Hardy, Bill Johnson, Q.C., Bob Millar, Q.C, Lindsay Oliver, Nikki Rudachyk, Doug Surtees, and Caitlin Turnbull.

research to recommend reform to *The Intestate Succession Act, 1996*.

2. POTENTIAL AREAS FOR REFORM

This section outlines several provisions of the current Act that can be problematic, and discusses the Commission's recommendations with respect to their reform.

2.1 Spouses

2.1.1. Preferential share

The preferential share is the amount of the estate the intestate's spouse receives before other amounts from the estate are distributed. The preferential share was identified as an issue in requests received by the Commission and has been reformed in the other Western provinces. The following issues caused by the current intestate distribution scheme in the Act were identified in the requests for reform: costs; the scheme does not follow typical estate planning; and the Public Guardian and Trustee must be involved when minor children are involved.

The changes in the other Western provinces can provide guidance on what changes could be beneficial in Saskatchewan.[10] In Manitoba and Alberta, if a person dies intestate leaving a spouse, and all the children of the deceased are from the relationship with that spouse, the spouse receives the entire estate. If the deceased has children from another relationship, in Alberta, the spouse receives a preferential share of the greater of $150,000 or one-half of the intestate's estate, and the children inherit the remainder of the estate. In Manitoba, if the deceased has children from another relationship, the spouse receives a preferential share of $50,000 or one-half of the intestate estate, whichever is greater, and one-half of any remainder of the estate after the initial allocation. The other one-half of the remainder of the estate after the initial allocation is divided among the children.

In British Columbia, if an intestate leaves a spouse and children, the household furnishings are first distributed to the spouse. The spouse then gets a preferential share, $300,000 if the intestate's children are all also the spouse's, or $150,000 if the children are not all shared, and one-half of the remainder. The British Columbia Ministry of Justice explains the change:

> Contemporary views in British Columbia favour generous treatment of a surviving spouse… The reason for the smaller spousal share in blended families is that it is assumed that the children of the spouse will be treated differently than those who are only the deceased's children. The smaller share increases the possibility that some assets will be

[10] England provides an additional example of the changing amounts of preferential shares. The Family Provision (Intestate Succession) Order 2009 (SI 2009/135) came into effect in England on February 1, 2009. It raised the statutory legacy for a surviving spouse from £125,000 to £250,000, and where there are no issue from £200,000 to £450,000. This is close to the general rate of inflation. Roger Kerridge, *Parry and Kerridge: The Law of Succession*, 12th ed (London: Sweet & Maxwell, 2009) at 2-62 [Kerridge].

available to the non-common children.[11]

The Commission considered three potential reforms in relation to the preferential share:

(a) Increasing the amount of the preferential share;
(b) Eliminating the preferential share (and thus passing the entire estate to the spouse) when all of the children of the intestate are also the children of the surviving spouse ("shared children"); and
(c) Prescribing the amount of the preferential share in regulations.

(a) Increasing the amount of the preferential share

Currently, the Act provides a preferential share of $100,000 to the spouse and one-half of the residue if the intestate had one child or one-third of the residue if the intestate had more than one child.[12] The Saskatchewan legislation is similar to the intestate succession legislation of most other common law Canadian provinces, although the value of the preferential share differs.

An understanding of what amounts will not be part of the estate is useful when contemplating changes to the spousal preferential share. An order under *The Family Property Act*[13] can distribute part of the assets to the spouse. In addition, under *The Dependants' Relief Act, 1996*,[14] the intestate's spouse, minor children or children over 18 years old with a disability may also receive part of the intestate's assets if these individuals were dependent on the intestate. Assets that are jointly owned by the intestate and spouse will be the property of the spouse and not form part of the estate.

Part VI of *The Family Property Act* considers division of property upon the death of a spouse. A surviving spouse may make or continue an application for division of family property after the death of the other spouse, or an application may be continued by the personal representative of the deceased spouse.[15] If the deceased spouse died intestate, the court may not consider the amount payable to the surviving spouse under *The Intestate Succession Act, 1996*, and no order made under *The Family Property Act* affects the rights of the surviving spouse on intestacy.[16] Any money paid or property transferred to a surviving spouse pursuant to a family property order is deemed to have never been part of the estate of the deceased spouse where a claim is made against the estate by a beneficiary pursuant to *The Intestate Succession Act, 1996* or a dependant under *The Dependants' Relief Act, 1996*.[17]

The Dependants' Relief Act, 1996 provides that where a person dies leaving a dependant (including a

[11] British Columbia Ministry of Justice, *The Wills, Estates and Succession Act Explained* (2013) at 14, online: <http://www.ag.gov.bc.ca> [British Columbia Ministry of Justice].
[12] *1996 Act*, *supra* note 1 at s 6.
[13] *The Family Property Act,* SS 1997, c F-6.3.
[14] *The Dependants' Relief Act, 1996,* SS 1996, c D-25.01.
[15] *The Family Property Act*, *supra* note 13 at s 30(1).
[16] *Ibid* at s 30(3).
[17] *Ibid* at s 35.

spouse), the dependant may apply to the court for an order to provide reasonable maintenance.[18] The court may make an order for support of the dependant if, in the court's opinion, "reasonable provision has not been made for the maintenance of the dependant to whom the application relates."[19] The court must consider several factors in making an order for maintenance under the legislation, including the nature of the property in the deceased's estate, the dependant's sources of capital and income, the conduct of the dependant in relation to the deceased, and the claims of any other dependants.[20] How *The Family Property Act* and *The Dependants' Relief Act, 1996* will affect a surviving spouse's entitlement to the intestate's estate is entirely fact dependent.[21]

The current preferential share ($100,000) was set in relation to the amount of equity that would be in the average spousal home. The last increase was in 1990. In addition to addressing the increase in the cost of living since 1990, a higher preferential share would help to secure the financial future of the surviving spouse and avoid the need for family property and dependant's relief applications. An increased preferential share amount may also better reflect the desire of the intestate, as in most cases where there is a will it transfers all or almost all property to a surviving spouse.

The majority of individuals consulted were in favour of increasing the preferential share to better reflect rising home prices and inflation.

The Commission recommends that the spousal preferential share be increased to $200,000, or one-half of the estate, whichever is greater. The spouse should also continue to receive one-half of the remainder if the intestate had one child, or one-third of the remainder if the intestate had more than one child.

During the consultation period, s. 30(3) of *The Family Property Act* was raised by an individual as a matter of potential law reform. Section 21(3)(l) of *The Family Property Act* allows a court to consider any benefit received or receivable by the surviving spouse as a result of the death of his or her spouse when distributing family property, subject to s 30(3). Section 30(3) of *The Family Property Act* prohibits a court from considering amounts payable under *The Intestate Succession Act, 1996* when making a distribution of family property. *The Family Property Act* thus treats amounts received from a testate individual differently than amounts received from an intestate individual when distributing family property. The Commission did not consult on this provision, or undertake any research on the issue. The Commission suggests that s 30(3) of *The Family Property Act* be subject to further review, as the reason for this distinction is not immediately apparent.

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[18] *The Dependants' Relief Act, 1996*, *supra* note 14 at s 3.

[19] *Ibid* at s 6(1); Gregory G Walen, QC and Sarah M Buhler, "Conjugal Succession Rights in Saskatchewan", 26 Est Tr & Pensions J 383 (2006-2007) at 390.

[20] *The Dependants' Relief Act, 1996*, *supra* note 14 at s 8. The court must employ a two-pronged analysis, considering both legal responsibilities and moral duties of the intestate, to determine what is an "adequate, just and equitable" provision for maintenance: *Tataryn et al. v Tataryn Estate*, [1994] 2 SCR 807 at 821-23.

[21] See e.g. *Zielenin-Sibley v Sibley Estate*, 2011 SKQB 336.

(b) Eliminating the preferential share where the children are shared

Passing the entire estate to the spouse where all the children are shared could provide several important benefits. First, where part of the estate passes to a minor child, the Public Guardian and Trustee must become involved and remains involved while the child is a minor regarding the use of the assets. In many cases this is not a good use of the Public Guardian and Trustee's time and resources. This also places oversight by a government institution on the surviving parent simply on the basis that their spouse died without a will. Second, passing the entire estate to the spouse would eliminate the need for the spouse to make applications under *The Family Property Act* and/or *The Dependants' Relief Act, 1996* to obtain a larger share of the estate. These applications can create significant costs for both the estate and the interested parties, particularly when there are minor children involved. Finally, passing the entire estate to the spouse would reflect typical current estate planning practices. Amending the Act in this manner may better fulfill the purposes of distributing an intestate's property in the way most intestates would have desired, and of creating a system of distribution that minimizes the need for court applications. .

Distinguishing between spouses who share all their children and spouses who do not, reflects that there are situations where the intestate is less likely to desire to leave their entire estate to their spouse. This could be because the intestate has other minor children they would plan to support, and could include children for whom child support payments were being made during the life of the intestate. Such a distinction might also be a benefit to blended families where the spouses married later in life when they both have adult children and would want to keep their estates separate so that the assets of each remain within those family lines.

The majority of those consulted indicated that typically in their estate planning practices, where the children are shared between the spouses, testators will leave the entire estate to the surviving spouse. There was general consensus during the consultations that the Act should reflect this practice. However, where one of the spouses has children from another relationship, those consulted indicated there is no typical or standard estate planning practice. Depending on the nature of the blended family, the will may still provide that the entire estate go to the spouse, or the will may carve out portions of the estate for the children (shared and/or non-shared).

The Commission recommends that if all the intestate's children are shared with the spouse, the spouse should receive the entirety of the estate (*i.e.* there would be no preferential share). In blended families (where the intestate has children born out of a relationship other than with his/her spouse), then the spouse would still receive the preferential share, however, the Commission is recommending that the spouse also receive the amounts the shared children would be entitled to under the Act. This recommendation is based on a desire to ensure that a spouse in a blended family scenario is not treated differently.

(c) Prescribing the amount of the preferential share in regulations

The last issue to be addressed in this section is whether the preferential share should be prescribed in the regulations rather than set out in the Act. Alberta has a prescribed amount and the current prescribed amount also has an end date. Considering the length of time since the preferential share was last changed in Saskatchewan, this may be a useful approach. Allowing for a prescribed amount does not mean that changes would necessarily happen more often. Another option would be to link the prescribed amount to inflation, but this would reduce control over the change in the share and would lack the clarity that now exists, where the specific amount of the share is stated and remains the same from year to year.

Prescribing the amount of the preferential share in the regulations received broad approval in the consultations.

The Commission recommends that the amount of the preferential share be prescribed in the regulations, in order to ensure it can be more readily amended as necessary.

2.1.2. Separation and multiple spouses

The Act was changed in 2001 to recognize common-law spouses as spouses. The current definition of spouse in section 2 is:

> (a) the legally married spouse of the intestate; or
> (b) if the intestate did not have a spouse within the meaning of clause (a) or had a spouse within the meaning of clause (a) to whom section 20 applies, a person who:
>
> > (i) cohabited with the intestate as spouses continuously for a period of not less than two years; and
> > (ii) at the time of the intestate's death was continuing to cohabit with the intestate or had ceased to cohabit with the intestate within the 24 months before the intestate's death.

The Act also defines when spouses are to be considered separated for the purposes of intestate succession. The separation provision in section 20 states:

> Where the spouse of an intestate has left the intestate and is cohabiting with another person in a spousal relationship at the time of the intestate's death, the spouse takes no part in the intestate's estate.

This section means that if married spouses are separated and the intestate has a common-law spouse, the common-law spouse is only able to inherit if the surviving married spouse is cohabiting with another person in a spousal relationship. This provision and its dependence on cohabitation as a legal criterion to end a relationship may not fit the current social context of Saskatchewan. It is also limited to situations where the spouse was the party to cohabit with another person, but not the situation where the intestate is the party to cohabit with another person and the spouse remains single. As a result, the intestate may have a common-law spouse who is not recognized by the Act because the intestate is still married and

section 20 does not apply. In this case, where the intestate has cohabited with someone for two years, the intestate may wish to pass property to that individual instead of to the intestate's married spouse.

While the common-law spouse can make a claim under *The Dependants' Relief Act*[22] and *The Family Property Act*,[23] it would be preferable for the common-law spouse to have a claim under the Act instead, in order to limit the applications involved in distributing the estate.

In addition, there may be situations where neither the intestate nor the married spouse has cohabited with another person, and the marriage is essentially over but a divorce has not been obtained. In this case the intestate may in some circumstances have wanted the estate to go to the spouse and in some cases would have preferred that it go to others.

The other western provinces can provide guidance on how to define separation. British Columbia's *Wills, Estates and Succession Act*[24] addresses this issue with its definition of spouses:

> 2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
>
> (a) they were married to each other, or
>
> (b) they had lived with each other in a marriage-like relationship for at least 2 years.
>
> (2) Two persons cease being spouses of each other for the purposes of this Act if,
>
> (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 *[Property Division]* of the *Family Law Act*, to arise, or
>
> (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
>
> (2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,
>
> (a) they begin to live together again and the primary purpose for doing so is to

[22] In *Dutertre v Oram Estate*, 2007 SKQB 382, this issue was not argued but assumed. The definition of dependant:

> 2(1)"dependant" means:
>
> (d) a person with whom a deceased cohabited as spouses:
>
> (i) continuously for a period of not less than two years; or
>
> (ii) in a relationship of some permanence, if they are the parents of a child;

[23] The definition of spouse under this Act is:

> 2(1) "spouse" means either of two persons who:
>
> (c) is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years;
>
> 30(3) Where the deceased spouse died intestate, no court, in making a distribution of family property pursuant to an application made or continued by a surviving spouse or continued by the personal representative of a deceased spouse, shall consider the amount payable to a spouse pursuant to *The Intestate Succession Act, 1996*, and no order made pursuant to this Act affects the rights of the surviving spouse on intestacy.

[24] *Wills, Estates and Succession Act,* SBC 2009, c 13.

> reconcile, and
>
> (b) they continue to live together for one or more periods, totalling at least 90 days.
>
> (3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

Section 63 of Alberta's *Wills and Succession Act*[25] is similar:

> 63(1) For the purposes of this Part and section 13(1)(b)(i) of the *Estate Administration Act*, the surviving spouse of an intestate is deemed to have predeceased the intestate if the intestate and the surviving spouse
>
> (a) had been living separate and apart for more than 2 years at the time of the intestate's death,
>
> (b) are parties to a declaration of irreconcilability under the *Family Law Act*, or
>
> (c) are parties to an agreement or order in respect of their property or other marital or family issues which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital break-up.
>
> (2) Subsection (1) 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.

In Manitoba, the relevant provision of *The Intestate Succession Act*, CCSM c I85, reads as follows:

> 3(1) If, at the time of the intestate's death, the intestate and his or her spouse were living separate and apart from one another, and one or both of the following conditions is satisfied:
>
> (a) during the period of separation, one or both of the spouses made an application for divorce or an accounting or equalization of assets under *The Family Property Act* and the application was pending or had been dealt with by way of final order at the time of the intestate's death;
>
> (b) before the intestate's death, the intestate and his or her spouse divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of their marriage breakdown;
>
> the surviving spouse shall be treated as if he or she had predeceased the intestate.[26]

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[25] *Wills and Succession Act,* SA 2010, c W-12.2.

[26] Subsection 3(2) deals with the separation of common-law partners and provides as follows:

If, at the time of the intestate's death, the intestate and his or her common-law partner were living separate and apart from one another, and one or more of the following conditions is satisfied:

> (a) where the common-law relationship was registered under section 13.1 of *The Vital Statistics Act*, the dissolution of the common-law relationship was registered under section 13.2 of *The Vital Statistics Act* before the death of the intestate;
>
> (b)where the common-law relationship was not registered under section 13.1 of *The Vital Statistics Act*, three years have passed from the day on which the common-law partners began living separate and apart;
>
> (c) during the period of separation, one or both of the common-law partners made an application for an accounting or equalization of assets under *The Family Property Act* and the application was pending or had

Each of these provisions not only uses family property legislation to define when a married spouse will no longer be considered a spouse for intestate succession but also allows for events outside of that legislation to establish the end of the relationship. Often, instead of establishing the end of the relationship, the alternative is to treat the married spouse as having predeceased the intestate.

All but one individual who responded to the survey were in favour of amending or repealing section 20 of the Act. Suggestions for determining the end of a spousal or common-law relationship included the following:

- Living separate and apart by reason of a breakdown in the marriage relationship for a period of 90 days or more;
- No longer cohabiting (so long as not by result of one spouse requiring medical care or other care in a facility);
- Refer to *The Family Property Act* to define when an individual is no longer a spouse of the intestate.

The Commission recommends that section 20 of the Act be removed, and the Act be amended to set out a clear separation provision for married spouses. Married spouses should be treated in the same manner as common-law spouses under the Act: they should be considered separated if they have not been living together for at least two years because of a breakdown of the marriage relationship. If a two-year period is used to define the breakdown of a marital relationship, then there is no need for the Act to recognize multiple spouses.

2.2 Parent and child

2.2.1. Language and other housekeeping

Section 9 of Act states:

> Where an intestate died leaving no spouse or issue, the estate goes to the intestate's father and mother in equal shares if both are living, but if either of them is dead, the estate goes to the survivor

The language of this section does not reflect current parentage law in Saskatchewan, which includes "mother", "father" and "other parent".[27]

Section 19 is no longer required in the Act. It states:

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been dealt with by way of final order at the time of the intestate's death;

(d) before the intestate's death, the intestate and his or her common-law partner divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of the breakdown of their common-law relationship;

the surviving common-law partner shall be treated as if he or she had predeceased the intestate.

[27] *The Vital Statistics Act, 2009*, SS 2009, c V-7.21.

> 19 Where, pursuant to section 24 of *The Marriage Act, 1996*, a court makes a declaration of presumption of death and the spouse of the person presumed to be dead marries again in accordance with that Act, then, notwithstanding that it is later found that the person presumed to be dead was alive when the marriage ceremony was performed, the children of that marriage have the same benefits pursuant to this Act that they would have had if the person presumed to be dead had in fact died before the marriage.

The section essentially legitimized children who were born of a marriage that was illegal because a previous spouse was declared to be dead, but was not actually dead. As children that would have been termed illegitimate are now treated in the same way as legitimate children, this section is no longer useful.

2.2.2. Posthumously conceived children

Canadian intestate succession legislation recognizes circumstances where children are conceived before, but born after, the death of one of the parents. Children who are *en ventre sa mere* (in utero) at the time of one parent's death are granted succession rights, including the right to inherit on intestacy. Section 14 of the Act states:

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

In general, Canadian legislation has not considered the topic of posthumously conceived children. Posthumously conceived children are children who are conceived using genetic material of an individual after they have died. As this situation is now occurring, it is important to consider what the rights of these children should be, including their rights to inherit on intestacy.[28] Currently, British Columbia is the only jurisdiction in Canada which provides intestate succession rights to children conceived posthumously.

Arguments in favour of allowing posthumously conceived children to inherit under intestate legislation are centered around the rights and best interests of the child. Children should not be treated differently based on the choices of their parents and an analogy can be drawn between children conceived posthumously and children born outside marriage. Moreover, the deceased individual is required to have consented to the posthumous use of his or her genetic material, and presumably they would have intended for all of their potential offspring to benefit from their estate. Arguments against allowing posthumously conceived children to inherit from an intestate are based on the need for orderly and timely estate administration and protecting the interests of other beneficiaries.

The Ontario Law Reform Commission has considered the inheritance rights of a child conceived posthumously with the sperm of the mother's husband or partner, recommending that the child:

[28] Christine E Doucet, "From *En Ventre sa Mere* to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada" (2013) 22 Dalhousie Journal of Legal Studies 1 at 2.

1. should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is *en ventre sa mere*, as if the child were conceived while the husband or partner was alive, and
2. should be entitled to inheritance rights where the child is born or is *en ventre sa mere* when the time for the ascertainment of possible beneficiaries arrives. [29]

It does not appear that the Commission considered the situation of a child conceived using a deceased woman's genetic material and subsequently carried to term via surrogate.

The Manitoba Law Reform Commission similarly recommended recognizing posthumously conceived children on intestacy because of the biological link between the parent and child, the discrimination inherent in leaving these children out, and the financial support that the surviving parent is likely to require.[30] However, the Manitoba Law Reform Commission went further than the Ontario Law Reform Commission's recommendation and did not agree with limiting the ability to inherit from an intestate to what was remaining in the estate at the time they are born or *en ventre sa mere*, stating:

> The Ontario Law Reform Commission model avoids the necessity of setting a time limit for delay of distribution, or of requiring notice to interested parties that posthumous conception is a possibility in the particular situation. On the other hand, it is shabby treatment of posthumously conceived children, awarding them whatever crumbs may happen to be left on the table when they come into existence, and not a full share by right. Also, distribution of the estate, depending upon who was in control of it, might be inordinately delayed or hastily concluded in consideration of a potential posthumous conception. Finally, no attention is paid to the deceased's wishes concerning post-mortem use of the banked gametic material for purposes of conception.

The Manitoba Law Reform Commission recommended the following conditions be imposed on the ability of a posthumously conceived child to inherit from his or her deceased parent and the estates of the parent's relatives:

1. Posthumously conceived children must be conceived within two years of the grant of administration of the estate;
2. Notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception, to the administrator of the estate and to persons whose interest in the estate may be affected, within six months of the grant of administration of the estate, subject to a judicial discretion to extend the notice period;
3. Proof of a biological link between a posthumously conceived child and the deceased parent must be provided;
4. There must be consent in writing, signed by the intestate, and dated, to the use of gametic

[29] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, vol 2 (Toronto: Ontario Law Reform Commission, 1985) at 278.

[30] Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief: The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (Winnipeg: Manitoba Law Reform Commission, 2008).

> material for the purpose of posthumous conception, and to the creation of inheritance rights for any posthumously conceived child(ren).[31]

The Manitoba legislature has not yet implemented the recommendations of the Manitoba Law Reform Commission.

British Columbia took a similar approach to that recommended by the Manitoba Law Reform Commission, amending its legislation in 2011 to allow a child conceived posthumously to inherit from an intestate.[32] British Columbia imposes two conditions on the right of a posthumously conceived child to inherit from an intestate. First, the spouse/potential parent must, within 180 days from the issue of a representation grant, give written notice to the deceased's personal representative, beneficiaries, and intestate successors that they may use the genetic material of the deceased to conceive a child through assisted reproduction. Second, the potential descendant must be born within two years after the deceased person's death. Also of importance is that the right of the descendant to inherit from relatives of the deceased only begins on the date the descendant is born. Thus, the estates of the child's other intestate relatives may be entirely disposed of before the child is entitled to claim any inheritance.

In contrast to the approach suggested by the Manitoba Law Reform Commission and implemented in British Columbia, the Alberta Law Reform Institute recommends an approach which allows the parentage of the posthumously conceived child to be established, but does not build into that recognition flexibility in timing to allow for intestacy or other similar rights. The Alberta Law Reform Institute's assessment is as follows:

> After careful analysis, [the Alberta Law Reform Institute] has concluded that identifying the deceased as a legal parent of an after-born child will have few implications in other areas of law.
>
> This conclusion is based on the well-established legal principle that a person does not have enforceable legal rights until they are born alive. An after-born child has no legal existence at the time of his or her parent's death; therefore, the child has no legal ability to claim property or compensation from his or her deceased parent's estate. To hold otherwise would bestow legal rights upon a non-legal entity. Further, providing rights to after-born children would subject the rights of living persons to the potential claims of children not yet in existence. In other words, recognizing legal rights of after-born children would be detrimental to the rights of persons who are living at the time of the deceased parent's death.
>
> If a parent wishes to provide for an after-born child, then he or she may do so by a carefully drafted will. However, in [the Alberta Law Reform Institute's] view, there is no basis for the law to be changed in order to provide succession rights or other benefits to

[31] *Ibid* at 31.

[32] See ss. 8.1 of the *Wills, Estates and Succession Act, supra* note 24.

an after-born child.[33]

The United Kingdom takes a similar approach to that recommended by the Alberta Law Reform Institute. Posthumously conceived children are able to have their parentage registered, however they do not have intestate succession rights, and they also cannot inherit under a will.[34] In addition, the New South Wales Law Reform Commission has taken a similar position as the Alberta Law Reform Institute and recommended posthumously conceived children be excluded from intestate succession rights, in order to prevent delays in the administration of estates.[35]

Four out of the six survey respondents would allow posthumously conceived children to be recognized as a child of the intestate for the purposes of the Act. However, both the Regina and Saskatoon working groups were of the opposite view, and did not recommend that the Act be amended to allow posthumously conceived children to inherit. One participant also noted that when parents are contemplating storing genetic material for future use, they are typically advised by clinics to address the use of their genetic material in a will. Another noted that while the two year limit in the British Columbia legislation is desirable to ensure that the distribution of the estate is not unduly delayed, there seems to be no theoretical justification for treating those born posthumously in the two years following the intestate's death differently from those born posthumously more than two years after the death, and thus it is more justifiable to exclude all posthumously conceived children from intestate succession rights. The participants also noted that the surviving spouse making posthumous use of the genetic material is making this choice knowing that they will not have the financial support of the deceased, and the posthumously conceived child will never have been a dependant of the deceased. Finally, both working groups noted that if the Act is amended so that the entire estate goes to the surviving spouse in the event all of the children are shared (or that the shared children's amounts go to the surviving spouse in the event the intestate had children with another partner), a posthumously conceived child would not be treated any differently than children conceived by the spouse and the intestate prior to the intestate's death, who also would not receive any portion of the estate.

The Commission is not recommending that the Act be amended to allow posthumously conceived children to inherit from an intestate as including these children will result in undesirable delays in administering the estate. Furthermore, it is difficult to conclude that intestates, as a group, would all want their posthumously conceived children to inherit, and the majority of parents contemplating storing their genetic material for future use will likely have been encouraged to have wills in place to deal with the potential future use of their genetic material.

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[33] Alberta Law Reform Institute, *Assisted Reproduction after Death: Parentage and Implications: Final Report* 106 (Alberta: Alberta Law Reform Institute, 2015) at vii [Alberta Law Reform Institute 2015].

[34] *Ibid* at 20.

[35] National Committee for Uniform Succession Laws, Uniform Succession Laws: Intestacy, New South Wales Law Reform Commission Report No 116 (2007) at 129.

2.2.3. Other types of parent-child relationships

Stepchildren are not currently recognized as issue for the purposes of intestate succession. However, stepfamilies play an important role in modern society and the relationship between stepparents and stepchildren can be just as important as relationships between parents and their other children. Further, there are a large number of stepfamilies in Saskatchewan. According to the census, there were 15,445 stepfamilies in Saskatchewan in 2011.[36] This included 8,365 families where all the children were the children of one spouse; the other 7,080 were classified as complex stepfamilies.[37] Similar considerations apply to families where children are treated as adopted but have not been formally adopted.

The potential unjustness that may arise from not recognizing step children for the purposes of intestate succession must be balanced against the arguments that can be made against allowing stepchildren to inherit from an intestate. Simply stated, not every step-relationship can be equated to a parent and child relationship. There may be instances where a stepparent would not want part of their estate to go to a stepchild. For instance, if two individuals with adult children marry, they may intend the remainder of their estate to go to their children and not their stepchildren.

A recent study based on American survey data confirms the foregoing, with the authors concluding: "Parents with both genetic children and stepchildren are substantially less likely to include all children in their wills than parents without stepchildren, and they are also considerably more likely to plan unequal bequests."[38] However, the study also determined that:

> [R]egardless of the age at which a child acquired the stepparent, the more years he/she spent with the stepparent the higher the likelihood of being included in the will: 9 years of stepchildhood completely eliminates the stepchild penalty. Moreover, a stepchild's probability of inclusion in the will goes up by about 6-8 percentage points if the stepparent reports providing care for the stepchild's child(ren) and by another 12-15 percentage points if the stepchild is the main recipient of inter vivos transfers. This may reflect trust and bonding, which are signaled and strengthened by repeated interactions over longer time periods.[39]

Thus, redefining issue to include stepchildren may not be an appropriate solution.

An alternative option to expanding the definition of issue in the Act, would be to allow a court to assess whether stepchildren in a particular case should be able to inherit from an intestate. However, such a

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[36] 2011 Census of Canada, "Saskatchewan Families and Households," online: (2012) Government of Saskatchewan <http://www.stats.gov.sk.ca/stats/pop/2011FamiliesHouseholds.pdf>.

[37] *Ibid.* Simple stepfamilies include families where the children are only from one spouse, complex stepfamilies are the remaining families.

[38] Marco Francesconi, Robert A. Pollak, & Domenico Tabasso, "Unequal bequests," online: (2014) at 15 <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ESPE2014&paper_id=300>.

[39] *Ibid* at 21.

process would complicate what is currently quite a clear piece of legislation. In addition to consuming resources and court time, adding stepchildren and informal adoptees as possible heirs could also lead to delays in the distribution of many estates, even when there is not a good claim.

The arguments against allowing stepchildren to inherit may be less persuasive in regards to minor stepchildren who were supported by the intestate. However, the fact that these children may need financial support does not necessarily mean that the intestate would have intended for those children to inherit. Thus, the ability for a court to provide support to children in these circumstances may be better based in *The Dependants' Relief Act, 1996*, which does not, however, allow stepchildren and informally adopted children to bring applications for relief.[40]

The Alberta Law Reform Institute considered whether stepchildren should be entitled to inherit from an intestate stepparent and concluded as follows:

> In some families, the only father or mother the children have known is the step-parent because, for whatever reason, there is no contact with one of the biological parents. In these situations, it may seem logical for the step-child to inherit from the step-parent. Although these situations do arise, the relationships between step-parents and step-children vary too much to support a generalization that the majority of step-parents would want their step-children to share in the estate. We, therefore, make no recommendation for change on this issue. Step-children will not share in the estate of an intestate step-parent.[41]

Similarly, when the Scottish Law Commission considered the issue, they determined that including stepchildren would over-complicate the law of intestate succession and produce uncertainty and practical difficulties.[42]

In contrast, California provides a limited ability for stepchildren to inherit under an intestacy. Terin Barbas

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[40] Section 3 of *The Dependants' Relief Act*, *supra* note 14 allows a "dependant" to bring an application for an order for reasonable maintenance. A dependant is defined in subsection 2(1) as follows:

> (a) the wife or husband of a deceased;
> (b) a child of a deceased who is under the age of 18 years at the time of the deceased's death;
> (c) a child of a deceased who is 18 years or older at the time of the deceased's death and who alleges or on whose behalf it is alleged that:
> (i) by reason of mental or physical disability, he or she is unable to earn a livelihood; or
> (ii) by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate than he or she is entitled to without an order; or
> (d) a person with whom a deceased cohabited as spouses:
> (i) continuously for a period of not less than two years; or
> (ii) in a relationship of some permanence, if they are the parents of a child.

[41] Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No 78 (1999) at 137 [Alberta Law Reform Institute 1999].

[42] Scottish Law Commission, *Report on Succession,* Report No 215 (Edinburgh: Scottish Law Commission, 2009) at paras 2.31-4.

Cremer describes the California approach as follows:

> In 1983, California enacted the first state statute to treat the stepparent-stepchild relationship as a parent-child relationship for purposes of intestate succession. The California statute looks to whether: (1) the relationship began during the child's minority and continued throughout the joint lifetimes of both the stepchild and stepparent, and (2) the stepchild has established by clear and convincing evidence that the stepparent would have adopted the stepchild but for a legal barrier.[43]

A final consideration is the federal *Indian Act*[44] - which governs distribution of an intestate's estate on reserve - defines "child" to include a child adopted according to First Nations custom.[45] Also of interest is paragraph 48(3)(a) of the *Indian Act* that allows the Minister to direct that all or any part of the estate that would otherwise go to the deceased's spouse go instead to the children of the deceased where the Minister is satisfied that any of children will not be adequately provided for.

Four out of the six survey respondents believed stepchildren and informally adopted children should not be included in the definition of issue. One respondent believed these individuals should be included in the definition of issue, but that the definition should be limited to minors. Four out of six survey respondents were also of the view that the Act should not be amended to allow stepchildren and informally adopted to make an application to the court to be treated as issue, with one respondent noting that this would "create excessive complexity" and that the Act "should have a clear and inviolable set of default rules, not try to be a replacement for a will." Both working groups agreed that the definition of issue in the Act should not be expanded to include stepchildren and informally adopted children. The majority of the Saskatoon working group would, however, amend the Act to allow these individuals to bring a claim under the Act. Conversely, the Regina working group was of the view that allowing these individuals to bring a claim under the Act would overcomplicate the administration of the estate, and suggested reforming *The Dependants' Relief Act, 1996* to expand the definition of dependant to include stepchildren and informally adopted children in order to allow these individuals to bring an application for maintenance. One lawyer who practices in the area of estate planning was of the view that stepchildren not be included in the definition of issue, and suggested in written comments provided to the Commission that the Act be amended to clarify that stepchildren are not included as issue:

> *In my experience, it is quite rare in second (or later) marriages for a spouse to provide any bequest or gift as part of an estate plan to step-children. The situation is different where the spouse has gone to the trouble of a legal adoption of the step-child, although this is often quite rare. Therefore, my suggestion is that step-children not be included within the rubric of the intestate succession legislation as potential claimants against an intestate's estate. In fact, I would suggest that step-children specifically be excluded to ensure clarity*

[43] Terin Barbas Cremer, "Reforming Intestate Inheritance for Stepchildren and Stepparents" (2011) 18(89) Cardozo Journal of Law & Gender 91 at 94 [footnotes omitted] [Cremer].
[44] RSC 1985, c I-5.
[45] *Ibid* at s 2(1).

on this point.

The Commission is not recommending that the Act be reformed to recognize stepchildren and informally adopted children. Allowing step-children and informally adopted children to inherit in every case would not necessarily be reflective of what intestates, as a group, would want. The alternative solution - allowing stepchildren and informally adopted children to bring a claim for a portion of an intestate's estate and requiring the court to decide whether this type a of parent-child relationship should be recognized in each specific case – would also complicate intestate succession and add uncertainty to the administration of an intestate's estate.

However, the Commission recognizes that there are circumstances where it would be unjust for a minor stepchild or informally adopted child to not receive any support from a deceased caregiver. Ensuring that an intestate's dependent stepchildren or informally adopted children are adequately supported would be more appropriately accomplished by way of an application under *The Dependants' Relief Act, 1996*. The Commission thus recommends that *The Dependants' Relief Act, 1996* be amended to allow stepchildren and informally adopted children to bring an application as a dependant.

2.2.4. Advancements

In Saskatchewan, advancements from a parent to a child reduce the amount of the estate a child inherits from their intestate parent. Subsection 15(1) of the Act states: "where a child of a person who has died wholly intestate has been advanced by the intestate by portion, that portion is to be considered as part of the estate of the intestate according to law." Note that pursuant to subsection 15(1), the doctrine of advancement does not apply to a partial intestacy, nor does it apply to payments made to family members other than children, such as grandchildren or nieces or nephews.

Advancements only cover specific types of payments and do not include the vast majority of payments that are made by a parent to a child. An advancement by portion has been defined as "something given by the parent to establish the child for life, or to make what is called a provision for him – not a mere casual payment of this kind…You may make it on putting him into a profession or business in a variety of ways…".[46] Advancement is what remains in the Act from the broader concept of hotchpot. The purpose of the inclusion of the concept is to account for the advance a child received and make the division of the estate fairer.

The Act refers to proving "that a child has been maintained or educated, or has been given money, with a view to a portion."[47] Except where the intestate has expressed the intention that the amount is an advancement or the child who received the amount has acknowledged in writing that the amount is an advancement, the onus is on the person claiming an advancement to prove it. The value of an

[46] *Taylor v Taylor* (1875), LR 20 Eq. 155.
[47] *1996 Act,* supra note 1 at s 16(2).

advancement is the value at the time of advancement, unless expressed by the intestate or acknowledged by the child who received it, in writing.[48]

Kerridge explains the move to abolish advancement provisions in intestate succession law:

> Generally, the hotchpot rules appear, during the latter part of the twentieth century, to have been regarded as complicated, and largely irrelevant, remnants from an earlier age. They seem to have had few supporters. But their reputation may have done them an injustice. …The main hotchpot rule – which applied on total or partial intestacy where there were lifetime advancements to children – was, it is submitted, a fundamentally sensible rule based on the intestate's presumed intention and on the maxim that "equality is equity". It is true that it would apply only where there were significant lifetime gifts (or gifts on marriage) followed by the donor's intestacy, and that donors who make significant lifetime gifts are not the kind of people who usually die intestate; but in the sorts of situation where it did apply, it was essentially fair. It was suspected in some circles that, at the time when it applied, many practitioners overlooked it. But the least good reason for abolishing the rule was that practitioners dealing with intestacies could not be bothered to make the relevant enquiries.[49]

A number of changes could be made to the advancement provision. One option would be to expand it to apply to partial intestacies. Section 15 only applies where a person has "died wholly intestate." The Manitoba Law Reform Commission recommended in its 2003 report that the sections governing advancements to children should also apply in cases of partial intestacy.[50] In contrast, the Alberta Law Reform Institute, in its 1999 report, found that the existing law, where the doctrine of advancement only applies where the entire estate passes by intestacy, is adequate:

> Early judicial interpretation of the Statutes of Distribution held that the doctrine of advancement only applied where the entire estate passed by intestacy. It did not apply in the case of partial intestacy. The courts of equity were concerned that the application of the doctrine to partial intestacies would lead to inequality, not equality. The problem was that, under the doctrine, gifts received under the will were not brought into account, only advancements made during the lifetime of the intestate. This unequal treatment of bequests and advancements could lead to unequal treatment of children.[51]

A second option would be to abolish the advancement provision, as was done in British Columbia. The British Columbia Law Reform Commission was of the view that intestacy rules should distribute the property of the intestate on death and not remedy any unequal treatment of children that may have

[48] *Ibid* at s 16(1).

[49] Kerridge*, supra* note 10 at 2-57.

[50] Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report #108 (Winnipeg: Manitoba Law Reform Commission, 2003) at 65.

[51] Alberta Law Reform Institute 1999, *supra* note 40 at 164.

occurred during the intestate's lifetime.[52]

When the Alberta Law Reform Commission considered this issue 15 years ago, according to lawyers who responded to their questionnaire, a significant number of individuals in Alberta wanted large amounts transferred to a child to be taken into account when their estate is divided.[53] There was a mixed response on whether the doctrine of advancement still served a useful purpose in Alberta.[54]

The survey respondents were evenly divided on whether the doctrine of advancement should be removed from the Act. One individual in favour of removing it explained: "What a person does during their life should have nothing to do with their estate unless they specifically make provisions for that, such as making a will." Both the Saskatoon and Regina working groups were in favour of abolishing advancement. In a written submission to the Commission, a lawyer set out the following reasons as justification for removing advancement from the Act:

> *(a) Most often, in estate planning situations, where parents have made gifts to a particular child or children during their lifetime, they are not requiring repayment or some accounting of those gifts. In other words, inter vivos gifts are just that; namely, a gift to a person which has no relevance on their ultimate inheritance or that of their siblings.*
> *(b) It should also be noted that the application of the existing rule to account for advances from parent to child in an intestacy situation often gives rise to practical problems. Usually, there is little in the way of cogent evidence to show the gifts are made. Most often, people do not keep good records of their financial dealings. This is all the more so when it comes to gifts. To place the obligation on the estate administrator in these circumstances to try to sort out the issues involving advancement can often put an onerous burden on those persons. Furthermore, these situations can lead to disputes within the family that could be avoided if there was no requirement to identify and track down advances made by the intestate during lifetime.*

The Commission agrees with the comments received during the consultation period and thus recommends removing the doctrine of advancement from the Act.

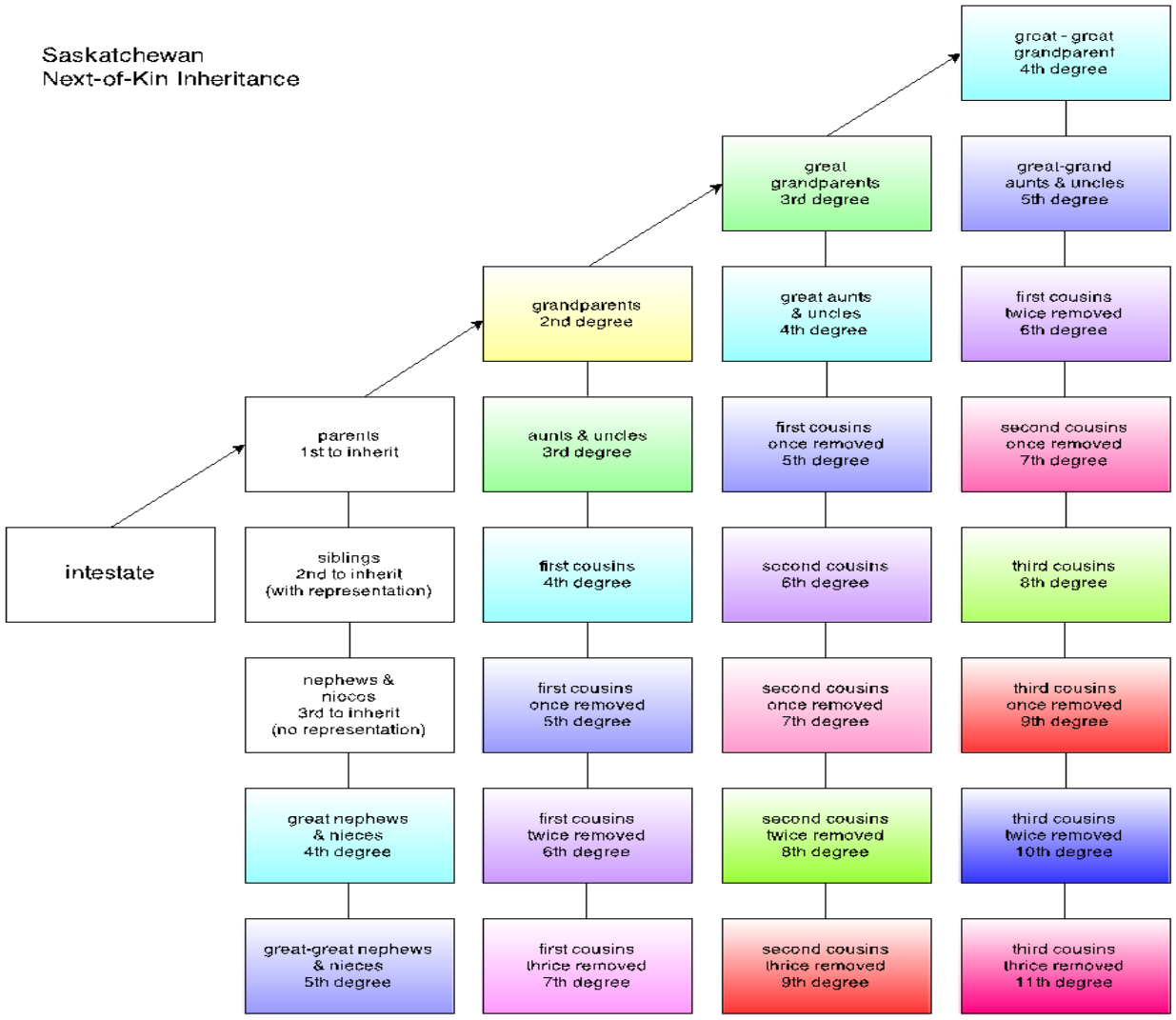
2.3. Next-of-kin

Under the Act, if an intestate has no spouse or issue, the estate passes to: (i) the parents of the intestate equally, or the surviving parent if one has died; (ii) if there are no surviving parents, to the siblings of the intestate with representation; (iii) if there are no surviving siblings, to the nieces and nephews of the intestate without representation; and lastly (iv) if there are no surviving nieces and nephews, to those

[52] Law Reform Commission of British Columbia, *Report On Statutory Succession Rights* (Vancouver: Law Reform Commission of British Columbia, 1983) at 39.
[53] Alberta Law Reform Institute 1999, *supra* note 40 at 168.
[54] *Ibid.*

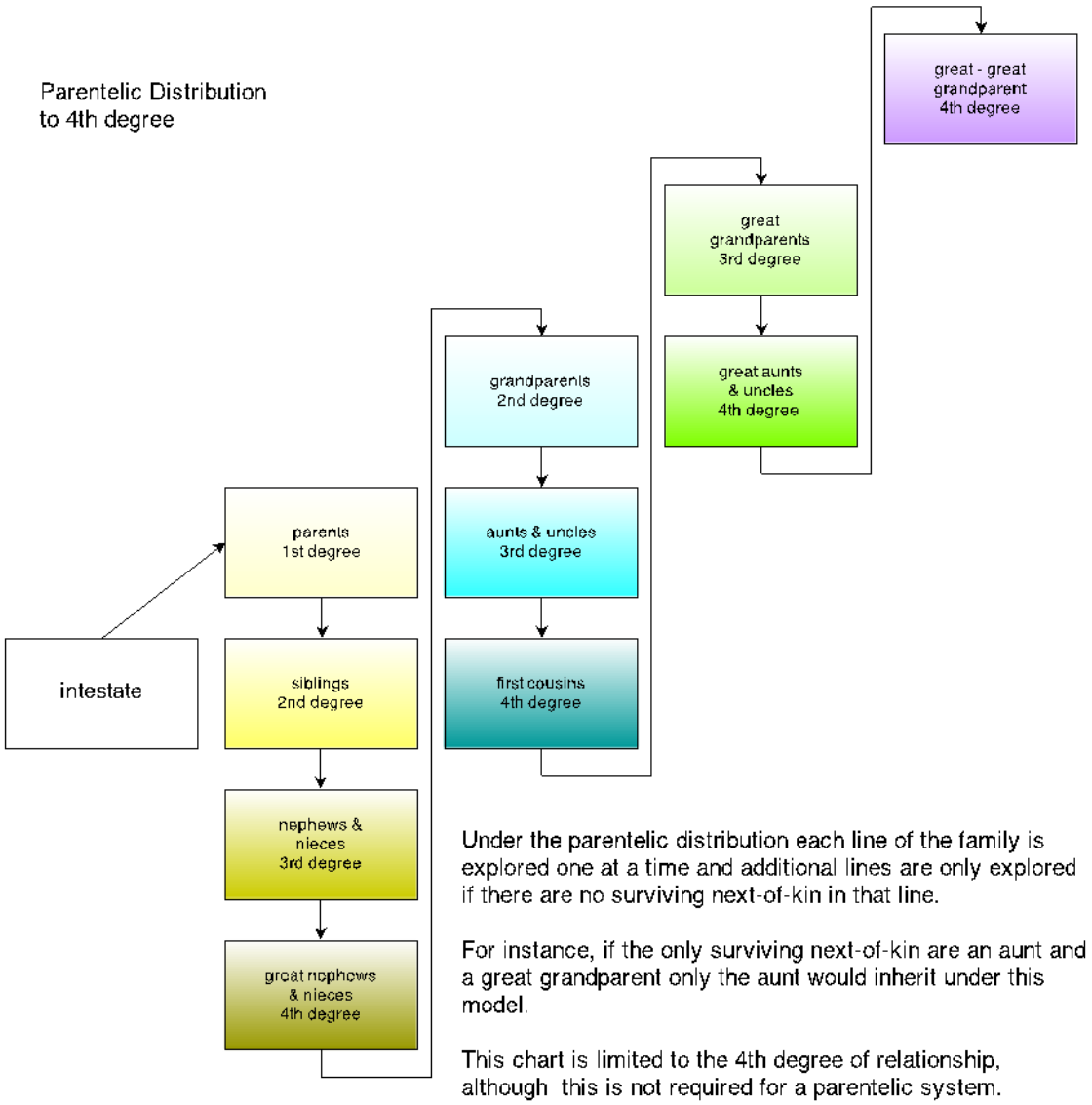
who share the highest degree of consanguinity without representation. All of the other western provinces have changed their legislation to use the parentelic system instead of degrees of consanguinity.

The following chart illustrates the current Saskatchewan system for determining inheritance. After parents, siblings, nieces and nephews, inheritance is by degrees of consanguinity. For instance, if the closest relatives were all the fourth degree of kinship, this could include a great niece, a first cousin, a great uncle and a great-great grandparent.



A parentelic system, instead of focusing on degrees of kinship, looks at each family line and does not consider a new family line until the first line is extinguished. First, the parents' lines are considered and only if there is no one to inherit in those lines are the next lines considered, such as those of the

grandparents. Within each line the relatives of the highest degree of kinship inherit. In this system, if there was a great niece, only the parents' lines would be investigated. If there were other relatives of the fourth degree of kinship that are not in the parents' lines, like a first cousin or great uncle, they would not share in the estate. The following chart illustrates the parentelic system (note that this chart only includes the fourth degree of relationship).



Changing the existing system would reduce the amount of work and cost involved in administering the estate where distant relatives are the ones to inherit. Under the parentelic system, if the closest relative is a great niece, the administrator will only need to identify and determine the status of the intestate's

parents, siblings, nieces, nephews, great nieces and great nephews to determine this is the relative to inherit. In contrast, the current Saskatchewan system in this scenario would require the administrator to identify and determine the status of the intestate's parents, siblings, nephews, nieces, great nieces, great nephews, grandparents, aunts, uncles, first cousins, great grandparents, great aunts, great uncles and great-great grandparents before it could be determined that the great niece is the relative to inherit.

British Columbia, Alberta, and Manitoba all follow a parentelic system of intestate distribution. Adoption of the parentelic system was recommended by the Manitoba Law Reform Commission,[55] the British Columbia Law Institute,[56] and the Alberta Law Reform Institute,[57] and is found in section 4 of the Uniform Law Conference of Canada *Uniform Intestate Succession Act, 1986*.[58] The parentelic system is also a feature of the United States *Uniform Probate Code*.[59]

In explaining its recommendation to change the system used, the British Columbia Law Institute stated:

> In most cases, the parentelic system will produce the same result as the degrees of consanguinity system. Differences emerge only where it is necessary to distribute among next of kin more remote than siblings of the intestate. Under the degrees of kinship system now used in B.C., it is possible for relatives closer and more remote to the intestate in terms of generations, age and ancestral lines to obtain equal shares. Under the parentelic system, relatives having a closer common ancestor with the intestate will always take before ones in more remote ancestral lines, and they are more likely to have had a closer connection with the intestate.[60]

The British Columbia Ministry of Justice provided two reasons to change from a degree of kinship to a parentelic system:

> 1. First, descendants of the nearest common ancestor will **always** take before descendants of a more remote ancestor. This is desirable as it can be very expensive to search for relatives of a deceased person and the expense usually rises with the level of remoteness involved.
>
> 2. Second, the parentelic system tends to divide the estate more evenly between the different branches of a deceased's family.[61]

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[55] Manitoba Law Reform Commission, *Intestate Succession*, Report No 61 (Winnipeg: Manitoba Law Reform Commission, 1985) [Manitoba Law Reform Commission 1985].

[56] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006) at 12 [British Columbia Law Institute 2006].

[57] Alberta Law Reform Institute 1999, *supra* note 40.

[58] Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 33 and 284.

[59] Nat'l Conf. of Commissioners on Unif. State Laws, *Uniform Probate Code*, 8 U.L.A. (St. Paul: West Group, 1998) ss. 2-101 - 2-108.

[60] British Columbia Law Institute 2006, *supra* note 56 at 10-11.

[61] British Columbia Ministry of Justice, *supra* note 11 at 15.

The Alberta Law Reform Institute noted that distant relatives may feel uncomfortable inheriting, and the Manitoba Law Reform Commission added that the intestate is more likely to be in a closer relationship with younger relatives.[62]

In addition to adopting the parentelic system of distribution, the Act could place a limit on which degrees of kinship can inherit. The British Columbia and Alberta legislation limit inheritance rights to the fourth degree of kinship under the parentelic system (cousins, grand-nieces and -nephews, grand-uncles and -aunts). The rationale for this limit is that it can be time consuming and costly to trace distant relatives. The limit avoids depletion of the estate by the costs involved in locating distant relatives of the deceased. The Alberta legislation and the British Columbia legislation exempt an intestate's descendants (children, grandchildren, etc.) from the fourth degree of kinship cut-off. Neither the Manitoba legislation, nor the Uniform Act, limits the distribution to a particular degree of kinship.

Four out of the six survey respondents and both working groups were in favour of adopting the parentelic system of distribution. In addition, four of the respondents and both working groups were not in favour of placing a limit on which degree of kinship can inherit. One of the four survey respondents opposed to placing a limit on which degree of kinship can inherit stated:

> *It is less difficult now to trace relatives. This may have been a valid concern prior to the internet, but should not be now. However, there should be some mechanism for the administrator to get sign-off on their efforts to locate remote kin, so no liability exists to that person if they have made reasonable efforts.*

One of the working group participants also made a similar suggestion regarding allowing an administrator to demonstrate they have made reasonable efforts to identify the kin.

The Commission recommends that the Act be reformed to the parentelic system of distribution, and that there be no limit placed on the degree of kinship that can inherit. The Commission recommends that the Act retain its restriction on representation at the niece or nephew level.

2.4. Conflict of laws

Conflict of laws governs what happens when an issue relates to more than one jurisdiction. It governs both the place where an action should be taken (jurisdiction) and the choice of law (the law of which province or state should apply). In relation to intestate succession, the primary issue that needs to be

[62] Alberta Law Reform Institute 1999, *supra* note 40 at 35; Manitoba Law Reform Commission 1985, *supra* note 55 at 32. Section 11 of Saskatchewan's Act provides that where an intestate dies with no surviving spouse, issue, parents, or siblings, the intestate's estate is to be divided among his or her nieces and nephews. The Act is ambiguous on whether distribution is limited to nieces and nephews by blood, or whether nieces and nephews by marriage are included. The courts have restricted distribution in this situation under similar legislation to blood relations only (*Re Dunbar Estate*, 1992 CarswellNS 108 (Prob Ct); *Re Butt* (1986), 53 OR (2d) 297 (Surr Ct). Adoption of the parentelic system of distribution would eliminate this ambiguity.

considered is choice of law.

There are limited circumstances in which this would be an issue, such as when the intestate is not domiciled in Saskatchewan at the time of the intestate's death but has immovable property in Saskatchewan. "Immovables" generally includes real estate or rights related to real estate. The general rule is that the law of the *lex situs* (the physical location) governs immovables and the law of the *lex domicilii* (the location of domicile at death) governs movables. As a result, when the intestate has real property or certain types of rights to real property in Saskatchewan, but lives and has other property outside of Saskatchewan, the estate is subject to two different sets of law: one for the real property in Saskatchewan and one for the rest of the estate which could include other property in Saskatchewan.

There are no reported Saskatchewan cases dealing with this issue. However, two Manitoba cases suggest that a clear provision may be useful when the intestate has land in Saskatchewan but is domiciled in another province.

The first Manitoba case is *Thom Estate v Thom* (*Thom*).[63] In this case the deceased was domiciled in Saskatchewan, had land and movables in Saskatchewan, but also had land in Manitoba. His estate was first administered in Saskatchewan where his spouse received her preferential share of $40,000 and also received one-third of the rest of the estate. The court in Manitoba was then asked to decide how the land in Manitoba would be divided. The spouse asked for the preferential share of $50,000 and one-half of the residue, as that is how the intestate legislation in Manitoba at the time would have divided the property. This would have meant that the spouse would have received two preferential shares amounting to $90,000, instead of the $40,000 intended by the Saskatchewan legislation or the $50,000 intended by the Manitoba legislation. The Manitoba court looked to *The Interpretation Act*,[64] which requires a "fair, large and liberal" interpretation be applied to best ensure that the object of the legislation is met. As a result, the widow received $10,000 plus one half of the residue of the value of the land in Manitoba.[65]

Manitoba (Public Trustee) v Dukelow (*Dukelow*)[66] followed a similar approach in relation to an intestate residing in Manitoba. In this case, the additional land was in Ontario. The Court applied the highest preferential share and divided the residue based on the law of the province where the intestate was habitually resident.[67] The goal was to avoid the double dipping allowed under the traditional approach.[68] Commentary on the case supported the more updated approach and also supported further change.[69]

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[63] *Thom Estate v Thom,* [1987 5 WWR 667] (Man QB).

[64] CCSM c I80.

[65] It should be noted that if this fact scenario occurred today, there could also be a family property division of the property before the land became part of the estate.

[66] (1994) 117 DLR (4th) 122 (Ont Ct J) [*Dukelow*].

[67] *Ibid* (WL) at para 41.

[68] *Ibid* (WL) at para 44.

[69] Vaughan Black, Annotation (WL) on *Dukelow.*

There are three approaches that could be taken in relation to the interprovincial conflict of laws. The first is to not make any changes to the legislation. If there is no provision in the legislation, it is not clear if the court would follow the traditional approach (i.e. allow "double dipping") or the approach of the Manitoba courts (i.e. prevent "double dipping"). The traditional approach is consistent with provisions in *The Wills Act, 1996*.[70] Section 38 of *The Wills Act* retains the distinction between movables and immovables:

> 38(1) In this section and sections 39 and 40:
>
> (a) "immovable property" includes real property and a leasehold or other interest in land;
>
> (b) "movable property" includes personal property other than a leasehold or other interest in land.
>
> (2) The manner of making, the validity of and the effect of a will, with respect to immovable property, are governed by the law of the place where the property is situated.
>
> (3) Subject to sections 39 and 40, the manner of making, the validity of and the effect of a will, with respect to movable property, are governed by the law of the place where the testator was domiciled at the time of his or her death.

A second option is one recommended by the Manitoba Law Reform Commission. They recommended having the law of the intestate's domicile determine how immovables in Manitoba are distributed. This is referred to as a single choice of law or a unitarist approach as the law of only one place applies. This recommendation was made in relation to both interprovincial and international matters. This recommendation was based on The Hague Convention on Private International Law (Hague Convention)[71] provisions which reflect the law in many states.[72] The relevant Hague Convention provisions are:

> Article 3
>
> (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
>
> (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

This provision could be used to model a provision for the Act. Under the Hague Convention, determination of which jurisdiction's laws apply follows a number of rules. The general rule is that if the intestate was

[70] SS 1996 c W-14.1.

[71] Convention on the Law Applicable to Succession to the Estates of Deceased Persons signed on the 20th of October 1988, 28 ILM 146 (1989) [Hague Convention].

[72] Donovan WM Waters, *Explanatory Report: Convention on the law applicable to succession to the estates of deceased persons, text adopted by the Sixteenth Session,* edited by Permanent Bureau of the Conference (The Hague: Hague Conference on Private International Law, 1990) [Waters].

the national of and habitually resident in one state (or province), then the law of that jurisdiction applies. If the first rule does not apply, the next rule is that, if the intestate was habitually resident in a state for five years immediately previous to death, the law of that state will apply, except in "exceptional circumstances" where the deceased "was manifestly more closely connected" with the state the intestate is a national of.[73] If neither of these apply, the test is one of "most closely connected."[74]

Returning to the case of *Thom*, if the Hague Convention provisions had been the law in Saskatchewan at the time, the whole estate would have been administered through one process and the spouse would have received a preferential share of $50,000 and half of the estate, instead of two processes with a $40,000 preferential share and one-third of the residue of the Saskatchewan property and a $10,000 preferential share and one-half of the residue of the Manitoba estate.

Donovan Waters points to another issue with the existing law, which is how easily property can be converted between the terms movable and immovable.[75] The single choice of law would be simple and clear once it is determined which jurisdiction's law applies, but could still be complicated because of the need to determine which law applies.

A third option would be to amend the Act to direct the courts to follow the approach taken by the Manitoba courts in order to prevent "double dipping." The Act could be amended to direct the court to award the spouse the highest preferential share and then divide the residue based on the law of the province where the intestate was habitually resident. If the estate has already been dealt with in another jurisdiction, the Act could direct the court to subtract the amount of the preferential share already received from that which would normally be awarded under the Act, and to divide the residue based on the law of the province where the intestate was habitually resident.

In summary, the three options to address the interprovincial context in regards to conflict of laws are: (i) leave the Act as it is and let the court determine what the law in Saskatchewan is, should the issue arise; (ii) follow the Hague Convention and allow the law of the intestate's domicile to determine how immovables in Saskatchewan are distributed; or (iii) direct the courts to apply the Act in a manner that prevents "double dipping."

The international context must also be considered when dealing with conflict of laws. The options here are the same. In this case, the main issue is whether there is a concern with the distribution law of another country being applied to Saskatchewan immovables.

The application in the matter of the estate of Tekla Wieckeski raises another issue. Wiekeski died intestate in Poland in 1981 and her only assets were the mineral rights to two quarter sections of land in

[73] Hague Convention, *supra* note 71 at Art 3(2).
[74] *Ibid* at Art 3.3; Waters, *supra* note 72 at para 53.
[75] *Ibid* at para 24.

Saskatchewan.[76] In 2008, the Public Guardian and Trustee of Saskatchewan was granted letters of administration for the estate and permission to lease the rights. When the Public Guardian and Trustee applied for directions in 2013, the value of the estate was approximately $2.5 million. In a situation like this, the single law approach may increase the amount of work required because Polish law would need to be applied instead of the more familiar Saskatchewan law. Conversely, a single choice of law may make this situation less likely to occur, at least when assets outside of Saskatchewan are also involved, as it would be less difficult for administrators in the domicile's state to distribute the entire estate.

Survey responses on this issue were mixed. Two respondents suggested the Act should be reformed to guide courts to follow the approach taken by the Manitoba courts. Two respondents proposed that Saskatchewan should follow the law of domicile, with one respondent stating that there is no reason in modern times to distinguish immovable from movable property. One respondent suggested the Act should adopt the Hague Convention's single choice of law approach. The Saskatoon working group suggested leaving the Act as it currently is, leaving it to the court to decide whether there will be "double dipping" in each particular case, should the issue arise.

The Commission recommends that the Act specify that the laws of Saskatchewan govern immovable property located in Saskatchewan, in manner similar to s. 38(2) of *The Wills Act, 1996*. The Commission is not recommending that any other conflict of laws related amendments be made to the Act, instead the Commission prefers the judiciary address any potential "double dipping issues" as necessary.

2.5. Other Recommendations

During the consultation period, one survey respondent suggested adding a provision to the Act restating the common law principle that a potential beneficiary who is responsible for the death of an individual should not benefit under that individual's will or life insurance policy. The Commission agrees with this suggestion and recommends that a provision codifying this principle be added to the Act.

3. RECOMMENDATIONS FOR REFORM

The importance of ensuring Saskatchewan's intestate succession legislation is aligned with current societal practices and expectation is clear given how many individuals do not have a will. The Commission's recommendations are based on the following principles:

- The main purpose of the Act is to distribute the intestate's property the way the intestate would have wanted. This goal must be balanced against the need for a system of distribution that is simple, understandable and certain;
- The legislation should minimize disagreements among family members as to how the property is distributed, and prevent the need for costly court applications to determine where the intestate's

[76] *In the Matter of the Estate of Tekla Wieckoski*, 2013 SKQB 297 at para 3.

property should go. This means that the legislation should be based on an objective determination of what intestates would want; and

- A secondary purpose of the Act is to provide financial support to spouses and children.

The Commission's recommendations are as follows:

1. Increase the spousal preferential share from $100,000 to $200,000, or one-half of the estate, whichever is greater. The spouse will continue to receive one-half of the remainder if the intestate had one child, or one-third of the remainder if the intestate had more than one child.
2. Provide that if all the intestate's children are shared children with the spouse, the spouse will receive the entirety of the estate. In blended families (where the intestate has children born out of a relationship other than with his/her spouse), the spouse will receive the preferential share and the amounts the shared children would be entitled to.
3. Prescribe the amount of the preferential share in regulations.
4. Remove section 20 and set out a clear separation provision for married spouses. Married spouses should be considered separated if they have not been living together for at least two years because of a breakdown of the marital relationship.
5. Remove the doctrine of advancement in section 15.
6. Adopt the parentelic model of distribution of an intestate's estate, with no limit on the degrees of kinship that can inherit.
7. Specify that the laws of Saskatchewan apply to immovable property in Saskatchewan.
8. Codify the common law principle preventing an individual from benefitting from his or her crime by prescribing that an individual responsible for the death of an intestate is prohibited from inheriting.
9. Consider amending *The Dependants' Relief Act, 1996* to allow stepchildren and informally adopted children to bring an application as a dependant.
10. Consider amending *The Family Property Act* to allow amounts received under *The Intestate Succession Act, 1996* to be considered by the court when making a distribution of family property.