Reform of *The Intestate Succession Act, 1996*

Consultation Paper

August 2016

This consultation paper:

- Considers the content and history of *The Intestate Succession Act, 1996*
- Reviews the intestate succession rules in the western Canadian provinces
- Discusses the need for reform of *The Intestate Succession Act, 1996*; and
- Offers possible approaches to reform of *The Intestate Succession Act, 1996*

YOUR COMMENTS AND OPINIONS ARE WELCOME.
Reform of The Intestate Succession Act, 1996: Consultation Paper

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 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.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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*Reform of The Intestate Succession Act, 1996: Consultation Paper*
CALL FOR RESPONSES

The Law Reform Commission of Saskatchewan is interested in your response to this consultation paper. Your comments and opinions on the topic are welcome. Please allow the following questions to guide you in your response:

1. Is the spousal preferential share in The Intestate Succession Act, 1996 in need of reform? Why? (Refer to Part 3.1.1.)

2. Is the treatment of separated spouses under The Intestate Succession Act, 1996 in need of reform? Why? (Refer to Part 3.1.2.)

3. Is the treatment of common-law spouses under The Intestate Succession Act, 1996 in need of reform? Why? (Refer to Part 3.1.2)

4. Should children conceived posthumously with the deceased's genetic material, stepchildren and informally adopted children be able to inherit from an intestate? Why or why not? (Refer to Parts 3.2.2. and 3.2.3.)

5. Should the doctrine of advancement be abolished or reformed? Why? (Refer to Parts 3.2.4.)

6. Should next of kin be determined by the parentelic system of distribution? Why? (Refer to Part 3.3.)

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? (Refer to Part 3.4.)

8. Are there any cultural practices relating to intestate succession that should be incorporated or referenced in The Intestate Succession Act, 1996? (Refer to Part 3.5.)

How to Respond

Responses may be sent no later than October 31, 2016:

By email - director@lawreformcommission.sk.ca

By fax - (306) 966-5900

By survey - http://lawreformcommission.sk.ca/consultations/

By mail - Law Reform Commission of Saskatchewan

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1. INTRODUCTION

The Intestate Succession Act, 1996 (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.

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 has 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 20 years since the Act was passed, the other Western provinces have all revised their intestate succession legislation.

The history of intestate succession law goes back to the Statute of Distribution, 1670. The most pronounced societal change since 1670 has been the movement away from a system that focused on heirs and passing property down through the family, to a system that focuses on the intestate’s spouse instead.

This project considers how the Act should respond to the evolving ways families are defined and created. The Alberta Law Reform Institute summarized the need for change in intestate succession law in response to societal change as follows:

The existing distribution scheme was designed to serve a society in which wealth was transferred from one generation to another, inheritance between spouses was exceptional, divorce was rare and cohabitation outside marriage was viewed as sinful. The distribution scheme must be reconfigured to serve modern society. Ours is a society in which the surviving spouse has replaced the children as the primary beneficiary,

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2 Intestate succession legislation has been a prolific subject area for Canadian law reform:
   - Alberta Law Reform Institute, Succession and Posthumously Conceived Children (2012)

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 22 & 23 Car. 2, c 10.
divorce and remarriage is prevalent, cohabitation outside marriage is commonplace, and section 15 of the Canadian Charter of Rights and Freedoms has been interpreted to extend protection to those who cohabit outside marriage in relationships similar to marriage. As a result of societal changes, the existing distribution scheme no longer reflects how the majority of intestates in given situations would want their estate to be distributed. It has become a trap for the unwary.  

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. Thus, the Act should reflect what intestates, speaking generally, would want. The second goal of intestate succession legislation is to provide for the family of the intestate.

This consultation report is divided into three main parts. Part 2 provides background information and explains the current law in Saskatchewan and the other Western provinces. Part 2 also considers the purpose and importance of intestate succession law, and outlines the perspectives other law reform agencies have used to guide their reform processes.

Part 3 looks at areas of the Act that could be reformed. Part 3.1 focuses on spouses. Part 3.2 considers the parent and child relationship. Part 3.3 focuses on what happens to the intestate’s property when the intestate does not have a spouse or children. Part 3.4 examines conflict of laws issues that relate to how particular types of property in Saskatchewan are distributed when the intestate is resident in another province or country. Part 3.5 acknowledges the multicultural nature of Saskatchewan and requests comments on how the Act can better address the needs of Saskatchewan residents.

The primary aim of this consultation paper is to get feedback from a wide variety of individuals in order to determine, in general, what intestates would desire in regards to the distribution of their estate. This information will be used by the Commission in making its recommendations on reform of the Act.

Additional background material on the current intestate succession laws in British Columbia, Alberta, and Manitoba, as well as the approach taken on reserve land as set out in the Indian Act, can be found in the Appendix. The Appendix also contains additional background material on the history of Saskatchewan’s intestate succession legislation.

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2. BACKGROUND

This Part defines several terms appearing throughout the paper, explains the current intestate succession law in Saskatchewan, and contains a chart comparing the current Saskatchewan law to the more recently reformed intestate succession legislation in the other Western provinces.

2.1 Terminology

It may be useful to define several terms at the outset. An **intestate** is a person who dies without a will. **Intestate succession** refers to how the intestate’s property is distributed. **Intestacy** is defined as the state of dying without a will. **Issue** are all of the descendants of the intestate. **Ancestors** are those who came before the intestate: parents, grandparents, great-grandparents, etc. **Collaterals** are the remaining blood relatives of the intestate who are not issue or ancestors, including cousins, aunts, siblings, etc.

2.2 Saskatchewan law

The Act applies to the property of an individual who has died without a valid will. It also applies to any property that remains after a valid will has been applied.

The spousal preferential share is $100,000. The spousal preferential share is the amount that passes to the spouse before any other property is distributed from the estate. For instance, if the estate is worth $80,000, the whole estate would pass to the spouse. If the estate was worth $160,000, $100,000 would pass to the spouse, leaving $60,000 to be divided between the spouse and issue of the intestate. If the intestate has a spouse but no issue, the entire estate goes to the spouse. Where the intestate has a spouse and one child, half of the remainder of the estate goes to the spouse (in this example $30,000 for a total of $130,000) and the other half to the child ($30,000). Where there is more than one child, the spouse receives one-third of the remainder ($20,000 for a total of $120,000) and two-thirds are divided between the children ($40,000). When the intestate dies without a spouse, the entire estate is divided among the children of the intestate.

Any child who has died before the intestate is considered alive for the distribution of the property if the deceased child had issue who are still living. When there is more than one child, the remainder of the

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5 1996 Act, supra note 1 at s 6. Sections 4 and 5 provide lower amounts when the intestate died before June 22, 1990.
6 Ibid at s 6.
7 Ibid.
8 Ibid at s 7.
9 Ibid at s 6(4).
Reform of The Intestate Succession Act, 1996: Consultation Paper

The estate the children receive is divided per stirpes.\textsuperscript{10} This means that each branch of the family receives the same amount.\textsuperscript{11}

The estate contains both the personal and real property of the intestate situated inside and outside of Saskatchewan.\textsuperscript{12} The net value of the estate is the value of the property after charges against the estate, debts, funeral expenses and administrative costs are paid.\textsuperscript{13} However, often items owned by the intestate will pass to the spouse before the Act is applied. Most commonly this occurs because the items are jointly owned. For instance, most homes owned by spouses are held as joint tenants. When this is the case, the full ownership of the house goes to the spouse. In these situations, the home does not form part of the estate and is not considered in applying the Act. This can significantly reduce what might be presumed to be part of the estate.

In addition, there are two other ways the presumed estate may be reduced: (i) a spouse can make an application under The Family Property Act\textsuperscript{14} for division; and (ii) a spouse, child under age 18 or a child with a disability over age 18 who was financially dependent on the intestate can make an application under The Dependants’ Relief Act, 1996.\textsuperscript{15} Both of these can affect the size of the estate. The results of these applications do not affect how the estate is divided under the Act.

The Act applies to partial intestacy in the same way as it would where the whole estate was distributed; it does not take into account who received part of the estate under the will.\textsuperscript{16}

Only one spouse is eligible to inherit under the Act. The definition of spouse includes two kinds of spousal relationships.\textsuperscript{17} In the first, the intestate and the spouse are legally married. The second captures the circumstance in which a person is not legally married to the intestate, but: (a) has cohabited continuously with the intestate as spouses for not less than two years at the time of the intestate’s death; or (b) had cohabited continuously with the intestate for not less than two years but ceased to do so in the two years before the intestate’s death. A spouse described in the second part of the definition would be considered the spouse if there is no legally married spouse. No spouse can take

\begin{itemize}
\item \textsuperscript{10} Ibid at s 7. This is important when a child or the children of the intestate have predeceased the intestate. For instance, let us assume the intestate had four children: child 1, child 2, child 3 and child 4. Child 1 and 4 live longer than the intestate and from the $40,000 to be divided among the children each receives $10,000. Child 2 predeceased the intestate but has one living child, this child also receives $10,000 as the only issue in that branch of the family. Child 3 also predeceased the intestate leaving 2 children, each of whom would receive $5,000 so that branch of the family also receives the $10,000 share.
\item \textsuperscript{11} Ibid.
\item \textsuperscript{12} Ibid at s 2 “estate”.
\item \textsuperscript{13} Ibid at s 2 “net value”.
\item \textsuperscript{14} SS 1997 c F-6.3.
\item \textsuperscript{15} SS 1996 c D-25.01.
\item \textsuperscript{16} 1996 Act, supra note 1 at s 17.
\item \textsuperscript{17} Ibid at ss 2 “spouse” & 20.
\end{itemize}
Reform of The Intestate Succession Act, 1996: Consultation Paper

part in the estate if the spouse had left the intestate and was cohabiting with another person in a spousal relationship at the time of intestate’s death.  

Where there is no spouse or issue, the next in line are parents. The Act assumes the intestate has a mother and father (as opposed to a different family relationship). If both are alive, they inherit equal shares of the estate. If one is alive, that parent will inherit all of the estate. If neither parent is alive, the siblings of the intestate will receive the estate in equal shares. If one of the siblings has died before the intestate, the children of that sibling will divide their parent’s share equally (per stirpes). If there are no siblings to claim the estate, then it is to be divided among the intestate’s nieces and nephews in equal shares. There is no claim for the issue of any nieces or nephews (no representation is allowed). If there are no nieces or nephews, the estate is to be divided by the next of kin of equal degree of consanguinity (see chart on page 61). In the chart, the numbers in the boxes show the degree of kinship. For instance, grand nephews and nieces, first cousins, great uncles and aunts and great-great grandparents are all of the fourth degree of kinship. There are no claims for the issue of a person who is next of kin of equal degree (there is no representation). If there are no next of kin to inherit, the estate escheats to the Crown under The Escheats Act.

The share of the estate that the intestate’s child will receive may be reduced where there was an advancement to that child. An advancement is an amount provided to a child to help them establish themselves in a business or profession. If there was an advancement, that amount is considered to be part of the estate. If the advancement is larger than the share of the estate that child or that child’s issue would receive, that child or child’s issue are not entitled to any portion of the estate. If the portion advanced is smaller than the share, the child or child’s issue are entitled to the difference.

Historically, children born outside of marriage did not inherit through intestacy. Adopted children and children born outside of marriage are now treated in the same way under the Act as other issue. The Territories Real Property Act first recognized the right of inheritance of and from “illegitimate” children in Canada in 1886. Section 40(3) of The Children’s Law Act, 1997 now provides that there are no longer any distinctions between children born inside a marriage and those born outside of marriage. In

\[\]
addition, under The Adoption Act, 1998,28 adopted children are treated for all purposes of the law as if they were born to the adoptive parent, which in intestacy means they can inherit from their adoptive parents and kindred and they lose the right to inherit from their birth parents and kindred. The reverse is also true; the adopted child’s adoptive parents and kindred may inherit from the adoptive child, but the birth parents and kindred may no longer inherit from the adopted child. In order to inherit, an individual must survive the intestate by more than five days.29

2.3 Western Canadian law

The other Western provinces have reformed their intestate succession law more recently than Saskatchewan. The following chart summarizes the similarities and differences in succession law among the Western provinces.30

<table>
<thead>
<tr>
<th>NEXT OF KIN</th>
<th>SASKATCHEWAN</th>
<th>BRITISH COLUMBIA</th>
<th>ALBERTA</th>
<th>MANITOBA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distribution</td>
<td>To parents equally, if none, to siblings equally (with representation)</td>
<td>Parentelic system to 4th degree</td>
<td>Parentelic system to 4th degree with equal shares to different sides of the family</td>
<td>Parentelic system to line of great-grandparents, no other limitation on degree of relationship</td>
</tr>
<tr>
<td></td>
<td>- if no siblings and nephews (no representation)</td>
<td>Further degrees can claim under escheat legislation</td>
<td>Further degrees can claim under escheat legislation</td>
<td></td>
</tr>
<tr>
<td></td>
<td>if none then equal degree of consanguinity (no representation)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ADVANCEMENTS</th>
<th>SASKATCHEWAN</th>
<th>BRITISH COLUMBIA</th>
<th>ALBERTA</th>
<th>MANITOBA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advance reduces share</td>
<td>If advancement to intestate’s child considered part of the estate, child’s share reduced based on value when advanced or expressed by intestate and acknowledged by child in writing</td>
<td>No application of advancement</td>
<td>No presumption of advancement, but an application can be made to court to determine if advancement to a spouse, adult interdependent partner or descendant of intestate</td>
<td>Similar to Saskatchewan</td>
</tr>
<tr>
<td>Proof requirements</td>
<td>Onus is on person claiming to prove advancement unless expressed by intestate and acknowledged by child in writing</td>
<td>Court may consider oral statement of the intestate at time of transfer, written statement of intestate or any oral or written statement of person who received advance.</td>
<td></td>
<td>Similar to Saskatchewan</td>
</tr>
</tbody>
</table>

28 SS 1998 c A-5.2.
30 In British Columbia, the relevant legislation is the Wills, Estates and Succession Act, SBC 2009, c 13 [British Columbia Act]; in Alberta, the relevant legislation is the Wills and Succession Act, SA 2010, c W-12.2 [Alberta Act]; and in Manitoba, the relevant legislation is The Intestate Succession Act, CCSM c 185 [Manitoba Act].
### Reform of The Intestate Succession Act, 1996: Consultation Paper

#### Spouses

<table>
<thead>
<tr>
<th></th>
<th>Saskatchewan</th>
<th>British Columbia</th>
<th>Alberta</th>
<th>Manitoba</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Spousal preferential share</strong></td>
<td>$100,000</td>
<td>$300,000 if only shared children</td>
<td>Greater of $150,000 (prescribed amount expires 2017) or 1/2 of the estate</td>
<td>Greater of $50,000 or 1/2 of the estate Reduced if partial intestacy based on the will</td>
</tr>
<tr>
<td><strong>All to spouse if shared children</strong></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Spousal share of the remainder of the estate</strong></td>
<td>1/2 if one child 1/3 if more than one child</td>
<td>1/2</td>
<td>No additional amount</td>
<td>1/2</td>
</tr>
<tr>
<td><strong>Definition of spouse</strong></td>
<td>Legally married or 2 years cohabitating (within the last 2 years)</td>
<td>Spouse through marriage or marriage-like relationship for 2 years</td>
<td>Married spouse</td>
<td>Married spouses and common-law partners</td>
</tr>
<tr>
<td><strong>Other relationships entitled to spousal share</strong></td>
<td>No</td>
<td>No</td>
<td>Adult interdependent partner which includes common-law partners but also relationships of blood or adoption when entered into under an agreement</td>
<td>No</td>
</tr>
<tr>
<td><strong>End of spousal relationship</strong></td>
<td>If spouse left intestate and is co-habiting as spouses with another person at time of intestate’s death</td>
<td>If in marriage relationship, event occurs causing an interest in family assets to arise; in marriage-like relationship if relationship terminated</td>
<td>If living apart for 2 years, have declaration of irreconcilability or have agreement or order intended to end marital relationship, unless reconciled at time of death</td>
<td>If spouses living separately and: - application for divorce - accounting application, - division of property that appears intended to end the relationship If registered common-law spouses, registered a dissolution or apart for 3 years</td>
</tr>
<tr>
<td><strong>Multiple spouses</strong></td>
<td>No provision</td>
<td>Yes, may agree how to divide spousal share or have court determination</td>
<td>If a surviving spouse and surviving adult interdependent partner, each receive half of spousal share</td>
<td>Priority to most recent relationship, rights of either spouse under family property law reduce spousal preferential share</td>
</tr>
<tr>
<td><strong>Spousal home</strong></td>
<td>Consent or judicial approval to sell required under The Homesteads Act, 1996</td>
<td>Right to purchase home with notice and time requirements</td>
<td>Surviving married spouse has life estate in one homestead under The Dower Act</td>
<td>Spouse has life estate under homestead legislation</td>
</tr>
<tr>
<td><strong>No issue</strong></td>
<td>All to spouse</td>
<td>All to spouse</td>
<td>All to spouse</td>
<td>All to spouse</td>
</tr>
</tbody>
</table>

#### ISSUE (CHILDREN)

<table>
<thead>
<tr>
<th></th>
<th>Saskatchewan</th>
<th>British Columbia</th>
<th>Alberta</th>
<th>Manitoba</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No spouse</strong></td>
<td>All to issue</td>
<td>All to issue</td>
<td>All to issue</td>
<td>All to issue</td>
</tr>
<tr>
<td><strong>Distribution</strong></td>
<td><em>Per stirpes</em> (each branch equal share)</td>
<td><em>Per stirpes</em></td>
<td><em>Per stirpes</em></td>
<td><em>Per capita</em> (per person) based on number of persons in closest degree</td>
</tr>
<tr>
<td><strong>Posthumously conceived children</strong></td>
<td>Not addressed</td>
<td>Can inherit as issue</td>
<td>Not addressed</td>
<td>Not addressed</td>
</tr>
<tr>
<td><strong>Stepchildren</strong></td>
<td>Not included</td>
<td>Not included</td>
<td>Not included</td>
<td>Not included</td>
</tr>
</tbody>
</table>

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**Law Reform Commission of Saskatchewan**
3. AREAS OF POTENTIAL REFORM

There are a number of principles to consider when contemplating changes to the Act. The first is the main purpose of the legislation, which 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. Ideally, the Act should minimize disagreements among family members as to how the property is distributed, and prevent the use of estate assets to determine the distribution of the intestate’s property. This means that the Act should be based on an objective determination of what intestates would want as a broad group. It would be a difficult and costly exercise to try to determine in each case how a particular intestate would have wanted their estate distributed. Moreover, it must be remembered that an intestate did have the opportunity to make their particular wishes known through making a will. A secondary purpose is to provide financial support to spouses and children.

Considering how common it is to not have a will, the importance of revising the legislation becomes clear. A 2012 survey of 2000 Canadians by TitlePLUS, a title insurance company, found that 56% of Canadian adults do not have a signed will. 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. This pattern is also present in other countries. The AARP surveyed adults over 50 in the United States in 1999, 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. The likelihood of having a will also increases with household income and higher education levels. From these results it is clear that many adults, including older adults, do not have valid wills.

In order to determine what intestates would want to do with their property, it is useful to consider common practices in will drafting in Saskatchewan, and also how Saskatchewan residents who die without a will may differ, and how their plan for their property may differ, from those who have had wills drafted. This section discusses several provisions of the current Act that can be problematic and thus may need to be updated in order to more accurately reflect current practices and trends in estate planning.

32 Ibid.
34 Ibid at 1-2.
35 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.
3.1 Spouses

3.1.1. 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. A number of issues in practice caused by the current intestate distribution scheme in Saskatchewan were identified in the requests for reform: costs, that the scheme does not follow typical estate planning, and that the Public Guardian and Trustee must be involved when minor children are involved. The Manitoba model of distribution was suggested by one individual as desirable for Saskatchewan.

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.\(^{36}\) 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\(^ {37}\) can distribute part of the assets to the spouse. In addition, the intestate’s spouse, minor children or certain children over 18 with a disability may also receive part of the intestate’s assets if these individuals were dependent on the intestate. This requires an order under either or both of The Family Property Act or The Dependents’ Relief Act, 1996.\(^ {38}\) Assets that are jointly owned by the intestate and spouse will be the property of the spouse and not 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.\(^ {39}\) 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.\(^ {40}\) 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

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\(^{36}\) 1996 Act, supra note 1 at s 6.

\(^{37}\) The Family Property Act, supra note 14.

\(^{38}\) The Dependents’ Relief Act, supra note 15.

\(^{39}\) The Family Property Act, supra note 14 at s 30(1).

\(^{40}\) The Family Property Act, supra note 14 at s 30(3).
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*.\(^\text{41}\)

*The Dependants’ Relief Act, 1996* provides that where a person dies leaving a dependant (including a spouse), the dependant may apply to the court for an order to provide reasonable maintenance.\(^\text{42}\) 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.”\(^\text{43}\) 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.\(^\text{44}\) 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.\(^\text{45}\)

The changes in the other Western provinces can provide guidance on what changes could be beneficial in Saskatchewan.\(^\text{46}\) 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 takes 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:

\[^{41}\] *Ibid* at s 35.

\[^{42}\] *The Dependants’ Relief Act, 1996*, *supra* note 15 at s 3.


\[^{44}\] *The Dependants’ Relief Act, 1996*, *supra* note 15 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.

\[^{45}\] See e.g. Zielenin-Sibley v Sibley Estate, 2011 SKQB 336.

\[^{46}\] 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].
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 available to the non-common children.\textsuperscript{47}

The British Columbia Law Institute, in recommending this change, stated:

In light of typical estate values in British Columbia and contemporary social standards that favour a generous provision of an estate for the surviving spouse, the conclusion reached in this Project is that the spousal preferential share should be the first $300,000 of the net estate.\textsuperscript{48}

The current spousal amount ($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. Considering inflation over the last 25 years and particularly the increase in housing pricing in many locations in Saskatchewan, this amount could be updated. 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 introduction of a distinction between spouses who share all their children and spouses who do not, shows 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 desire to keep their estates separate so that the assets of each remain within those family lines.

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 remains 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.

\textsuperscript{47} British Columbia Ministry of Justice, \textit{The Wills, Estates and Succession Act Explained} (2013) at 14, online: \texttt{<http://www.ag.gov.bc.ca>} [British Columbia Ministry of Justice].

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 they are opposed.

The following examples illustrate why passing the entire estate to the spouse where all the children are shared could be beneficial:

1. A young husband and father who did not have a will died recently in a car accident. The family home was in the husband’s name. His wife obtained letters of administration in order to sell the home and move closer to her family. Due to the intestacy and the infant child, the Public Guardian and Trustee became involved in order to protect the interests of the child. The Public Guardian and Trustee requested that the child’s share of the sale proceeds of the house be set aside for the child, which meant that the wife would not have sufficient funds to buy a new home. The wife then had to commence a division of family property application and a dependant’s relief application. The Public Guardian and Trustee requested that the wife step down as administrator of the estate and appoint an administrator *ad litem*. The Public Guardian and Trustee subsequently amended its position on this request, and agreed to a split of $340,000 to the wife, and $60,000 to be held in trust for the child (as opposed to $250,000 to the wife and $150,000 to the child). It seems doubtful the deceased would have intended for the administration of his estate to be resolved in this manner and with this result.

2. In a more general sense, the current Act can have very serious consequences where farming or other family businesses are carried on through sole proprietorships or corporations. In both cases the business assets or the shares of the deceased spouse form part of the estate, and can be significant assets. If the children are minors, the Public Guardian and Trustee will require a payment of the children’s share of the assets or shares. If the estate lacks sufficient cash on hand, the spouse may be forced to borrow funds or dissolve farm or business operations in order to generate the funds necessary to pay the children’s share.

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 disputes.

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; the current prescribed amount also has an end date. Considering how long it has been since the preferential share has been...
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.

Consultation questions:

1. Should the preferential share for a spouse be different if all the children are the legal children of the intestate and spouse?

2. What amount should the preferential share be?

3. Should the Act allow for the preferential share to be prescribed in the regulations?

3.1.2. 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 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 provision was raised by the Public Guardian and Trustee as a matter for review. 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.

To this is added the ability of the common-law spouse to make a claim under The Dependants’ Relief
Act and The Family Property Act. An application under either may be important to provide for the
common-law spouse, but it may be preferable 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.

Failing to recognize the common-law spouse more fully may also lead to legal challenge. Although some
may argue that failing to recognize the common law spouse may be contrary to the Charter of Rights
and Freedoms, there is no case law deciding this issue in Saskatchewan. In Linder v Regina, the
plaintiff sought a declaration that the definition of spouse in The Pensions Benefits Act, 1992 was
discriminatory and in violation of section 15 of the Canadian Charter of Rights and Freedoms as it
prioritized legally married spouses over cohabiting spouses. The Court agreed that the differential
treatment was discriminatory, however, before the Court could make a determination as to whether the
discrimination was justifiable under s. 1 of the Charter, the matter was settled.

49 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;

50 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.

51 2006 SKQB 68.
52 SS 1992 c P-6.001.

Law Reform Commission of Saskatchewan
The Act could be changed so that the existence of a married spouse not within section 20 does not preclude the recognition of a common-law spouse. This could lead to the circumstance of having multiple spouses under the Act, which may better recognize the status of the parties involved. The definition of spouse provides an end-point for a common-law relationship; this could be altered or left as it is.

The other Western provinces can provide guidance on how to define separation. British Columbia’s *Wills, Estates and Succession Act*\(^{53}\) addresses this issue with its definition of spouses:

\[
2 \ (1) \text{Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and}
\]
\[(a) \text{they were married to each other, or}
\]
\[(b) \text{they had lived with each other in a marriage-like relationship for at least 2 years.}
\]

\[
(2) \text{Two persons cease being spouses of each other for the purposes of this Act if,}
\]
\[(a) \text{in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or}
\]
\[(b) \text{in the case of a marriage-like relationship, one or both persons terminate the relationship.}
\]

\[
(2.1) \text{For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,}
\]
\[(a) \text{they begin to live together again and the primary purpose for doing so is to reconcile, and}
\]
\[(b) \text{they continue to live together for one or more periods, totalling at least 90 days.}
\]

\[
(3) \text{A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.}
\]

Section 63 of Alberta’s *Wills and Succession Act*\(^{54}\) is similar:

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

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\(^{53}\) *British Columbia Act, supra note 30.*  
\(^{54}\) *Alberta Act, supra note 30.*
(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* 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.\(^5\)

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.

Depending on the changes made regarding the definitions of spouse and separation, the result could be situations where an intestate has multiple spouses. The Saskatchewan legislation does not currently allow for this in relation to intestate succession, although multiple spouses are possible for dependant’s relief applications and family property divisions. The other Western provinces all have provisions that

\(^5\) 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 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.
contemplate the possibility of multiple spouses even when, due to other provisions in their legislation, the possibility of having multiple spouses is remote.

The British Columbia provision may be useful. It provides the option that either an agreement between the parties or a court may determine the division:

22 (1) If 2 or more persons are entitled to a spousal share of an intestate estate, they share the spousal share in the portions to which they agree, or if they cannot agree, as determined by the court.
(2) If 2 or more persons are entitled to apply or have priority as a spouse under this Act in respect of an intestate estate, they may agree on who is to apply or who is to have priority, but if they do not, the court may make the decision.

In Alberta, when there is a spouse and an adult interdependent partner, each party receives half of the spousal share. This is a clear rule instead of a flexible one, as British Columbia has. The Manitoba provision favours the more recent spouse, giving them priority over other spouses but allows for other spouses to make a claim under family property legislation. If the earlier spouse received assets through that application, the recent spouse’s share of the estate is reduced by that same amount so that the spousal share does not use up a larger portion of the estate.

Consultation questions:

4. How should it be determined that a spousal or common-law relationship has ended for the purposes of the Act?
5. Should the Act recognize common-law spouses in situations where this would lead to there being multiple spouses?
6. Should there be specific provisions that address situations where there are multiple spouses?
7. If there are such provisions, should the Act: (i) allow for an agreement or court order for division of the spousal share, (ii) divide the spousal share in half or (iii) provide other instruction?

3.2 Parent and child

3.2.1. Language and other housekeeping

Section 9 of Act states:

56 Alberta Act, supra note 30 at s 62.
57 Manitoba Act, supra note 30 at s 3(3).
Reform of The Intestate Succession Act, 1996: Consultation Paper

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”.

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

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.

3.2.2. 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 touched on 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. Currently, British Columbia is the

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only jurisdiction in Canada which provides intestate succession rights to children conceived posthumously.

The use of genetic material is governed by the federal Assisted Human Reproduction Act. This allows for the use of a person’s genetic material after death for reproduction where there has been written consent, the requirements for which are set out in the regulations. The determination of parentage in Saskatchewan is dealt with in The Children’s Law Act, 1997. Note that this consultation project is focused solely on the ability of posthumously conceived children to inherit under the intestate succession rules; it does not address other rights or benefits that these children may or should be entitled to under various other provincial statutes, nor does it recommend any amendments to the parentage determination provisions in The Children’s Law Act.

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 importance of this issue can be seen in its review by numerous law reform commissions. The Ontario Law Reform Commission reported on this issue in 1985, the Manitoba Law Reform Commission in 2008, the British Columbia government brought in changes in response to this issue in 2011 and most recently, the Alberta Law Reform Institute released “Assisted Reproduction after Death: Parentage and Implications, Final Report” in 2015.

There are essentially three possible legislative options for addressing the rights of posthumously conceived children to inherit from an intestate. They were described as follows by the Uniform Law Conference of Canada Working Group on Assisted Human Reproduction:

1. Specifically exclude posthumously conceived children from taking under intestacy to create certainty. However, in a situation where a deceased specifically leaves estate to a posthumous child, this solution doesn’t address policy needs or consistency and frustrates the intention of the testator;
2. Allow posthumously conceived children to share in any portion of the undistributed estate. This might, however, lead to a hurried or overly delayed distribution to try to deal with the

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60 SC 2004 c 2.
61 Ibid at s 8; Assisted Human Reproductions (Section 8 Consent) Regulations, SOR/2007-137 at s 3-4.
62 These legislative amendments came into effect in 2013.
Reform of The Intestate Succession Act, 1996: Consultation Paper

consequences of posthumous birth. This could apply in intestacy and in will situations where the share of the unborn child is clear; or

3. Detail provisions that allow a child to take whether on intestacy or under a will...  

When the Ontario Law Reform Commission considered the inheritance rights of a child conceived posthumously with the sperm of the mother’s husband or partner, it recommended the second solution, concluding that the child:

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.

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. 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:

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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 material for the purpose of posthumous conception, and to the creation of inheritance rights for any posthumously conceived child(ren).66

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. The Family Law Act now sets out when the deceased person will be considered the parent of a child born as a result of assisted reproduction after death:67

28 (1) This section applies if
   (a) a child is conceived through assisted reproduction,
   (b) the person who provided the human reproductive material or embryo used in the child's conception
      (i) did so for that person's own reproductive use, and
      (ii) died before the child's conception, and
   (c) there is proof that the person
      (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
      (ii) gave written consent to be the parent of a child conceived after the person's death, and
      (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are
   (a) the deceased person, and
   (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married

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66 Ibid at 31.
67 SBC 2011, c 25.
to, or in a marriage-like relationship with, the deceased person when that person died.

Interestingly, the British Columbia legislature decided to include consent requirements in its legislation, even though the federal *Assisted Human Reproduction Act* requires consent to use an individual’s genetic material posthumously. While the requirement in section 28(1)(c)(i) of the British Columbia *Family Law Act* is similar to the requirement in section 3(a)(ii) of the *Assisted Human Reproduction (Section 8 Consent) Regulations*, the requirement in section 28(1)(c)(ii) – that the deceased gave consent to be the parent of a child conceived after the person’s death – is not contained in the federal regulations. This additional consent requirement is consistent with the division of powers between the federal and provincial governments, given that the British Columbia legislation is focused on determining the parentage of a posthumously conceived child (which would affect the rights of that child under various pieces of provincial legislation), whereas the federal legislation is focused solely on allowable uses of an individual’s genetic material.

In addition to defining the parentage of these children under the *Family Law Act*, British Columbia’s succession legislation was also amended to provide financially for the child.\(^6^8\)

8.1 (1) A descendant of a deceased person, conceived and born after the person’s death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:

(a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person’s personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;

(b) the descendant is born within 2 years after the deceased person’s death and lives for at least 5 days;

(c) the deceased person is the descendant’s parent under Part 3 of the *Family Law Act*.

(2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.

(3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

In order to address concerns in relation to the timely and orderly administration of estates, British Columbia has imposed two conditions on the right of a posthumously conceived child to inherit from an intestate. First, the spouse and potential parent must give notice that they may use the genetic material

\(^6^8\) *British Columbia Act*, supra note 30.
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:69

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 an after-born child.

The approach attempts to balance recognition of the relationship without extending the system to provide financial recovery. An example of this in the Alberta context would be the ability to use the deceased parent’s surname for the child, which cannot currently be done.70 This provides a link between the parent and child but does not delay the administration of the estate.

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.71 In addition, the New

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70 Ibid at 28-9.

71 Ibid at 20.
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.\textsuperscript{72}

\textbf{Consultation questions:}

8. \textit{Should a posthumously conceived child be recognized as a child of the intestate for the purposes of the Act? If yes, should any of the following conditions or restrictions be imposed:}

\begin{itemize}
\item[a.] \textit{Should a requirement be included in the Act for written consent on the part of the deceased for a posthumously conceived child to be considered an issue of the deceased for intestate purposes?}
\item[b.] \textit{Should there be a requirement that notice of intention to use genetic material for assisted human reproduction be given to the administrator and/or potential beneficiaries?}
\item[c.] \textit{Should there be a time limitation after which any child conceived posthumously will not inherit from their deceased parent?}
\item[d.] \textit{Should a posthumously conceived child only be able to share in any portion of the undistributed estate once they are either born or in utero?}
\item[e.] \textit{Should any limitations be placed on a posthumously conceived child’s ability to inherit through their deceased parent?}
\end{itemize}

3.2.3. Other types of parent-child relationships

Stepchildren are not recognized as issue for the purposes of intestate succession. Under section 2 of the Act, “issue” is defined as “all lawful lineal descendants of the ancestor.” Lineal descendants are not defined in the Act, but are defined in \textit{Black’s Law Dictionary}, 10\textsuperscript{th} edition as “a blood relative in the direct line of descent – children, grandchildren and great grandchildren are lineal descendants.” As stepchildren are not lineal descendants, they are not considered as issue under the Act. There is a historical reason for this, as it was intended that estates would pass through the bloodline.

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,\textsuperscript{72}

there were 15,445 stepfamilies in Saskatchewan in 2011.\(^{73}\) This included 8,365 families where all the children were the children of one spouse; the other 7,080 were classified as complex stepfamilies.\(^{74}\) Thus, it may be time to consider whether some step-relationships should be recognized for the purposes of intestate succession.

Similar considerations apply to families where children are treated as adopted but have not been formally adopted. The following two examples illustrate why it may be unjust to not recognize stepfamilies or informal adoptions for the purposes of intestate succession.

The first case comes from Alberta.\(^{75}\) In 1946 Margaret had a baby. She was not married at the time and her sister Julia took the new baby, Kathy, home from the hospital and raised her as her own child. Julia also had one biological child, Harry. Kathy grew up believing Julia was her biological mother and Harry was her biological brother. When she was 17 or 18 Kathy found out that Julia was not her birth mother, but they continued their relationship and Kathy visited and helped care for Julia as Julia grew older. Julia never formally adopted Kathy. When Julia died intestate, Kathy argued that it should be found that there had been a de facto adoption allowing her to inherit along with Harry. Instead, Harry inherited the whole estate because there had not been a formal adoption.

Since Kathy was raised as Julia’s child, this result may appear unjust. On the other hand, at the time of Julia’s death, Kathy had already inherited some of Margaret’s estate.\(^{76}\) It could be argued it would be unjust to Harry if Kathy inherited as a daughter from both Margaret and Julia, if he only inherited from Julia as her son.

The second case is also from Alberta.\(^{77}\) Lester and Ileen were married for 43 years. Their family included one biological child, a son, and four daughters who were Lester’s biological children and Ileen’s stepchildren. When Lester died, Lester and Ileen were in bankruptcy. One of the daughters contributed to concluding the bankruptcy proceedings. None of the children took their interest in the estate so that it could all pass to Ileen. There had been discussions between Ileen and the children about the distribution of her estate, but when she died, she died intestate. As Peter and Ileen were married for 43 years one would expect that Peter’s daughters would have been like daughters to Illeen, however, as

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\(^{74}\) Ibid. Simple stepfamilies include families where the children are only from one spouse, complex stepfamilies are the remaining families.

\(^{75}\) McNeil v MacDougal, 1999 ABQB 945.

\(^{76}\) It should also be noted that, at least in the Saskatchewan context, if there had been a formal adoption of Kathy by Julia, Margaret would no longer have legally been Kathy’s mother.

the four daughters were her stepdaughters, the entire estate went to her one biological son. In arriving at this decision, Jerke J. commented:78

This case is an example of the personal difficulties and harm to relationships which can occur when individuals do not have a will. The distribution of this modest estate has become an instrument with the potential to create, enhance or perpetuate ill will amongst five family members at a time when they should instead be benefiting from good memories of their mother and father. The Court encourages them to advance those purposes despite the legal outcome here.

The Court of Appeal dismissed the appeal, stating: “we can do no better than to repeat the words of the chambers judge: this case is an example of the personal difficulties and harm to relationships that can occur when an individual does not have a will.”79

The unjustness apparent in these examples 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. Thus it may not be suitable to simply redefine “issue” to include stepchildren, as it would be difficult to conclude that intestates, as a group, would want their stepchildren to inherit.

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.”80 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.81

78 Peters Estate (Re), ibid, at para 20.
81 Ibid at 21.
An alternative option 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 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 Dependents’ Relief Act, 1996*.

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.

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.

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

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84 Terin Barbas Cremer, “Reforming Intestate Inheritance for Stepchildren and Stepparents” (2011) 18(89) Cardozo Journal of Law & Gender 91 at 94 [footnotes omitted] [Cremer].
Court of Appeals first interpreted the meaning of a "relationship," as required in the first prong of the stepchild inheritance statute, in *In re Estate of Claffey*. The court reasoned that the legislative intent for inheritance of stepchildren was to provide for a relationship between a stepchild and stepparent that resembles that of natural parent and child in the sense of family relationship rather than just a stepparent-stepchild relationship. In other words, the relationship must "encompass something more than an exchange of wedding vows between a natural [parent] and a stranger."

While there is a general consensus among the California courts regarding the meaning of the first prong of the statute, the second prong fails to specify the timing and duration of the legal barrier requirement, which has caused a circuit split in the California Courts. The most common legal barrier in this context occurs when the legal parent who is not married to the stepparent refuses to allow the stepparent to adopt the child.

The second part of this test, determining whether there was a legal barrier to adoption, has caused problems in California courts and does not reflect the reality in most stepfamilies because stepparents often do not adopt their stepchildren. As an adoption of a step-child would end the parental status of the child’s parent who is not the spouse of the stepparent, in many cases adoption is not the best option for a blended family. Cremer points out that California has had fewer problems with the first part of this test, finding that the relationship is one that resembles that of a legal parent and child, not just a stepparent-stepchild relationship.

Cremer suggests that evaluating a stepfamily relationship would best be done by looking at all the factors of the relationship, including:

1. The age of the child at the time the stepparent entered the stepchild's life. Stepparents who enter into a stepchild's life after the stepchild has reached the age of majority are unlikely to have a parent child relationship.
2. The length of the marriage between the stepparent and legal parent.
3. Whether the decedent stepparent had any living legal children who survived the decedent, and how the stepchild and stepparent relationship compares to the legal child and stepparent relationship.
4. Whether the stepchild helped care for the stepparent as though he or she was a legal parent as the stepparent aged.
5. The frequency of contact between the stepparent and stepchild throughout their lives.
6. Whether the stepchild referred to the stepparent as "Mom" or "Dad" around the stepchild's friends.

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85 *Ibid* at 93-94.
86 *Ibid*.
87 *Ibid* at 97.
7. The stepparent would have adopted the stepchild but for a legal barrier during the stepchild’s childhood.
8. Following the death of a legal parent, the stepchild lived with the stepparent.
9. The stepchild lived with the stepparent following the divorce of the stepparent from the stepchild’s legal parent.
10. Whether the stepchild was a minor and primarily financially supported by the stepparent at the time of the stepparent’s death.

This test was specifically designed to address stepparent-stepchild relationships. An additional issue is whether this test would be appropriate for evaluating other types of parent-child relationships where there is not a formal parent-child relationship, but an informal adoption.

Cremer’s factors were developed in the United States. If a test were to be developed in Saskatchewan to allow certain non-formal types of parent-child relationships to be recognized under intestate succession, it may be best to look to the provincial and federal law that applies in Saskatchewan to stepfamilies. This includes the Divorce Act and The Family Maintenance Act, 1997, where a stepparent is considered to be a parent when there is a settled intention, demonstrated by the stepparent, to treat a child as a child of his or her family. The latter is used in relation to child support where spouses are not also divorcing. Factors that may be considered by a court in determining the nature of the relationship include:

- Whether the child participates in the extended family in the same way as would a legal child;
- Whether the person provides financially for the child (depending on ability to pay);
- Whether the person disciplines the child as a parent;
- Whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; and
- The nature or existence of the child’s relationship with the absent legal parent.

An advantage to using the provincial and federal test would be that the legal community would be familiar with the factors to be considered. However, the factors set out by Cremer may be a better test as they were specifically designed to address intestacy.

88 RSC 1985 c 3 (2ndSupp).
89 SS 1997 c F-6.2
90 Section 2 of The Family Maintenance Act, 1997 defines a parent as a biological parent, an adoptive parent, or a person who has “demonstrated a settled intention to treat a child as a child of his or her family”.
91 Where there is a divorce the federal Divorce Act applies, and the issue is if the stepparent stands “in loco parentis” which is similar to the provincial test.
A final consideration is the federal Indian Act – which governs distribution of an intestate’s estate on reserve - defines “child” to include a child adopted according to First Nations custom. Also of interest is section 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.

Consultation questions:

9. Should stepchildren and informally adopted children be included in the definition of issue? Should this be limited to minors?

10. Should the Act be amended to allow a court to decide on an application whether stepchildren or informally adopted children should be treated as issue? Should this be limited to minors?

   a. If yes, should the Act set out factors to be considered by the court in deciding such an application, and if so, what factors?

3.2.4. 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...”. The 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.

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93 RSC 1985, c I-5.
94 Ibid at s 2(1).
95 Taylor v Taylor (1875), LR 20 Eq. 155.
The Act refers to proving “that a child has been maintained or educated, or has been given money, with a view to a portion.”96 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 advancement is the value at the time of advancement, unless expressed by the intestate or acknowledged by the child who received it, in writing.97

Kerridge explains the move to abolish advancement provisions in intestate succession law:98

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.

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.99 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:100

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

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96 1996 Act, supra note 1 at s 16(2).
97 Ibid at s 16(1).
98 Kerridge, supra note 47 at 2-57.
100 Alberta Law Reform Institute 1999, supra note 4 at 164.
account, only advancements made during the lifetime of the intestate. This unequal treatment of bequests and advancements could lead to unequal treatment of children.

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 occurred during the intestate’s lifetime.¹⁰¹

However, the inclusion of this provision may still prove useful in limited circumstances. Kerridge suggests that the advancement provision was always intended to be used in only a small number of cases, but that in those cases it makes the division of the estate more equitable. The issue is, when there are large payments which could be classified as advancements to only some children, is it likely that the intestate would have intended to account for these when dividing the intestate’s estate? 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.¹⁰² There was a mixed response on whether the doctrine of advancement still served a useful purpose in Alberta.¹⁰³ One reason to maintain the Saskatchewan provision is that it is a very limited provision and so unlikely to cause unnecessary problems. The lack of any reported cases on this issue in Saskatchewan suggests that it has not been problematic.

The proof requirement in the Act also limits the problems that could occur in relation to the advancement provision. The onus of proving an advancement is on the person asserting the advancement, unless it has been expressed in writing by the intestate or acknowledged in writing by the recipient to be an advancement. The relevant provisions state:

Value of portion and onus of proof
16(1) For the purposes of section 15, the value of a portion advanced is the value of the portion when advanced unless a value has been expressed by the intestate or acknowledged by the child in writing.
(2) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion is on the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

If these provisions are retained, it may be wise to clarify them, as it is not clear if the written requirement applies both to the intestate and child or just the child. The commas around “or

¹⁰² Alberta Law Reform Institute 1999, supra note 4 at 168.
¹⁰³ Ibid.
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acknowledged by the child“ in subsection 16(2) but not in subsection 16(1) suggest that the second subsection may have a meaning that differs from the first.

Consultation questions:

11. Should the doctrine of advancement be abolished?

12. If the doctrine of advancement is retained in the Act, should it be modified?

3.3. Next of kin

This Part relates to what happens to the intestate’s property if the intestate has no spouse or issue. 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 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 chart on page 61 shows 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 benefit of changing the existing system is it 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 have to identify and determine the status of the intestate’s parents, siblings, nieces, nephews, great nieces and great nephews to determine this. 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
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and great-great grandparents before it could be determined that the great niece is the relative to inherit.

The matter of changing the system to the parentelic system was raised by the Public Guardian and Trustee. 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,\textsuperscript{104} the British Columbia Law Institute,\textsuperscript{105} and the Alberta Law Reform Institute,\textsuperscript{106} and is found in section 4 of the Uniform Law Conference of Canada \textit{Uniform Intestate Succession Act, 1986}.\textsuperscript{107} The parentelic system is also a feature of the United States \textit{Uniform Probate Code}.\textsuperscript{108}

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.\textsuperscript{109}

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 \textbf{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.\textsuperscript{110}

\begin{thebibliography}{9}
\bibitem{105} British Columbia Law Institute 2006, \textit{supra} note 49 at 12.
\bibitem{106} Alberta Law Reform Institute 1999, \textit{supra} note 4.
\bibitem{109} British Columbia Law Institute 2006, \textit{supra} note 49 at 10-11.
\bibitem{110} British Columbia Ministry of Justice, \textit{supra} note 48 at 15.
\end{thebibliography}
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.¹¹¹

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. However, Cameron Harvey has suggested that, because the Manitoba legislation only deals expressly with succession up to and including great-grandparents and their issue, people more remotely related to the intestate are implicitly barred.¹¹² If the Act limits the degree of kinship, it could allow those of further degrees of kinship to inherit, but do so in a way that places the obligation on the relative to prove their claim, instead of placing the obligation on the administrator to identify that person.

One more option is to include a provision requiring that if there are no relatives in a parent’s line, both sides of the family are considered separately and receive half of the estate, if there is a living relative on each side of the family. This could increase the work required of the administrator but may also produce a result that appears more fair.

**Consultation question:**

13. Should next of kin be determined by the parentelic system of distribution instead of the current system in order to simplify the process of determining next of kin?

14. Should the Act place a limit on which degree of kinship can inherit?

¹¹¹ Alberta Law Reform Institute 1999, *supra* note 4 at 35; Manitoba Law Reform Commission 1985, *supra* note 105 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.

¹¹² Cameron Harvey “Wills and Succession, 1989-90” (1990) 19 Man LJ 630 at 632-33 [Harvey].
3.4. 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 considered is choice of law. There are two different contexts in which to consider this: interprovincial and international. On an interprovincial level, the law in each province is likely to be similar, but under a traditional approach, the result would be the spouse receiving a preferential share twice.

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).\(^\text{113}\) 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,\(^\text{114}\) 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.\(^\text{115}\)

\(^{113}\) Thom Estate v Thom, [1987 5 WWR 667] (Man QB).
\(^{114}\) CCSM c I80.
\(^{115}\) 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.
Manitoba (Public Trustee) v Dukelow (Dukelow)\textsuperscript{116} 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.\textsuperscript{117} The goal was to avoid the double dipping allowed under the traditional approach.\textsuperscript{118} Commentary on the case supported the more updated approach and also supported further change.\textsuperscript{119}

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 \textit{The Wills Act, 1996}.\textsuperscript{120} Section 38 of \textit{The Wills Act} retains the distinction between movables and immovables:

\begin{quote}
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.
\end{quote}

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 \textit{The Hague Convention on Private International Law (Hague Convention)}\textsuperscript{121} provisions which reflect the law in many states.\textsuperscript{122} The relevant Hague Convention provisions are:

\begin{quote}
\textsuperscript{116} (1994) 117 DLR (4th) 122 (Ont Ct J) [Dukelow].
\textsuperscript{117} \textit{iid} (WL) at para 41.
\textsuperscript{118} \textit{iid} (WL) at para 44.
\textsuperscript{119} Vaughan Black, Annotation (WL) on Dukelow.
\textsuperscript{120} SS 1996 c W-14.1.
\textsuperscript{121} Convention on the Law Applicable to Succession to the Estates of Deceased Persons signed on the 20\textsuperscript{th} of October 1988, 28 ILM 146 (1989) [Hague Convention].
\end{quote}
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 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.\(^1\) If neither of these apply, the test is one of “most closely connected.”\(^2\)

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.\(^3\) 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

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123 Hague Convention, *supra* note 122 at Art 3(2).
124 *Ibid* at Art 3.3; Waters, *supra* note 123 at para 53.
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. Wieckeski died intestate in Poland in 1981 and her only assets were the mineral rights to two quarter sections of land in Saskatchewan.126 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.

Considering the interprovincial and international contexts together, the following are the Commission’s consultation questions on this issue.

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<th>Consultation questions:</th>
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<td>15. Should the Act address immovables in Saskatchewan where the intestate is domiciled in another province or country?</td>
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<tr>
<td>16. If it does, should it adopt the Hague Convention’s single choice of law approach? Or should it guide the courts to follow the approach taken by the Manitoba courts?</td>
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126 In the Matter of the Estate of Tekla Wieckoski, 2013 SKQB 297 at para 3.
3.5. General Succession Preferences of Intestates

As the Act is intended to reflect the succession desires of intestates in general, the Commission would appreciate hearing about your (or your clients) succession preferences.

Consultation request:

17. Are there any other reforms that could be made to the Act in order for it to better represent the succession desires of intestates? Are there any cultural practices relating to intestate succession that should be incorporated or referenced in the Act?
4. Summary of Consultation Questions and Request for Comment

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 Law Reform Commission of Saskatchewan is seeking input from the community on the questions discussed in this paper. When responding to these questions, it is important to consider 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 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.

Consultation Questions

3.1 Spouses

3.1.1. Preferential share

1. Should the preferential share for a spouse be different if all the children are the legal children of the intestate and spouse?
2. What amount should the preferential share be?
3. Should the Act allow for the preferential share to be prescribed in the regulations?

3.1.2. Separation and multiple spouses

4. How should it be determined that a spousal or common-law relationship has ended for the purposes of the Act?
5. Should the Act recognize common-law spouses in situations where this would lead to there being multiple spouses?
6. Should there be specific provisions that address situations where there are multiple spouses?
7. If there are such provisions, should the Act: (i) allow for an agreement or court order for division of the spousal share, (ii) divide the spousal share in half or (iii) provide other instruction?
3.2 Parent and child

3.2.2. Posthumously conceived children

8. Should a posthumously conceived child be recognized as a child of the intestate for the purposes of the Act? If yes, should any of the following conditions or restrictions be imposed:
   a. Should a requirement be included in the Act for written consent on the part of the deceased for a posthumously conceived child to be considered an issue of the deceased for intestate purposes?
   b. Should there be a requirement that notice of intention to use genetic material for assisted human reproduction be given to the administrator and/or potential beneficiaries?
   c. Should there be a time limitation after which any child posthumously conceived will not inherit from their deceased parent?
   d. Should a posthumously conceived child only be able to share in any portion of the undistributed estate once they are either born or in utero?
   e. Should there be any limitations placed on a posthumously conceived child’s ability to inherit through their deceased parent?

3.2.3. Other types of parent-child relationships

9. Should stepchildren and informally adopted children be included in the definition of issue? Should this be limited to minors?
10. Should the Act be amended to allow a court to decide on an application whether stepchildren or informally adopted children should be treated as issue? Should this be limited to minors?
   a. If yes, should the Act set out factors to be considered by the court in deciding such an application, and if so, what factors?

3.2.4. Advancements

11. Should the doctrine of advancement be abolished?
12. If the doctrine of advancement is retained in the Act, should it be modified?

3.3. Next of kin

13. Should next of kin be determined by the parentelic system of distribution instead of the current system in order to simplify the process of determining next of kin?
14. Should the Act place a limit on which degree of kinship can inherit?

3.4 Conflict of laws

15. Should the Act address immovables in Saskatchewan where the intestate is domiciled in another province or country?
16. If it does, should it adopt the Hague Convention’s single choice of law approach? Or should it guide the courts to follow the approach taken by the Manitoba courts?

3.5. General Succession Preferences of Intestates

17. Are there any other reforms that could be made to the Act in order for it to better represent the succession desires of intestates? Are there any cultural practices relating to intestate succession that should be incorporated or referenced in the Act?

Written responses can be emailed to the Commission at director@lawreformcommission.sk.ca. Alternatively, online responses can be provided via a survey located on the Commission’s website: http://lawreformcommission.sk.ca/consultations/.
A1. History of Saskatchewan legislation

A1.1. Origins

The rules of succession were first given statutory foundation in the *Statute of Distribution, 1670.* Prior to the statute, succession was governed by ecclesiastical law. The decline of the ecclesiastical courts in the 16th century rendered this state of affairs unsatisfactory; it appears that a large part of the estates of intestates were appropriated by administrators appointed by the ecclesiastical courts. The *Undisposed of Residues Act, 1830* extended the operation of the *Statute of Distribution* to partial intestacies. Otherwise, there was no substantial change in the law of succession prior to 1870.

The first succession legislation in what is now Saskatchewan was contained in a Territorial Ordinance, and in 1907, the *Provincial Devolution of Estates Act* was adopted. Both those enactments were closely modelled on the *Statute of Distribution.* The 1907 Act also incorporated the substance of the *Undisposed Residues Act.* In the result, the English law of succession has been wholly superseded in Saskatchewan.

Following *The Devolution of Estates Act,* Saskatchewan enacted its first *Intestate Succession Act* in 1928. The 1928 intestate succession legislation was based on the *Model Intestate Succession Act*.

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128 22 & 23 Cha 2, c 10. The statutory scheme was amended without much change in substance by two subsequent Statutes of Distribution (1684), 29 Cha 2, c 3, and (1685), 1 Jac 2, c 17.
129 Personalty of an intestate was divided into three parts - "the widow’s part," "the bairn’s part" (for the children), and "the dead’s part." Prior to the decline of the ecclesiastical courts, the dead’s part was applied by the administrator under the supervision of the Ordinary to relief of the poor, often primarily poor relations of the deceased. It was this that was later appropriated by administrators.
130 11 Geo 4, and 1 Will 4, c 40.
131 ONWT 1901, c 13. The *Statute of Distribution* was probably in force prior to the Ordinance; it was held to be in force in Alberta in 1899 in *Re Jensen* [1926] 3 WWR 737 (SC).
132 SS 1907, c 16.
133 Section 20 provided that "all property, real and personal, that is not devised by will shall be distributed as if the testator had died intestate." The Act also differed from its English counterpart in providing that the entire estate of a deceased with no issue would go to his widow, rather than the half stipulated by the English Act. This change was probably inspired by a post-reception English enactment, *The Intestate’s Act, 1890.*
134 The Intestate Succession Act, 1928, SS 1928, c 28 at s 20 [1928 Act]. *The Devolution of Estates Act* was reproduced in RSS 1909, c 43, with the exception of section 21. The 1909 Act was included in a much expanded
recommended by the Commissioners on Uniformity of Legislation in Canada in 1925. The scheme for intestate distribution in the 1925 *Model Act*, and therefore Saskatchewan’s 1928 *Act*, was modified from the *Statute of Distribution, 1670*. 

**A.1.2. Amendments**

The first amendment to *The Intestate Succession Act, 1928* was in 1944, when section 15a was added to provide benefits to children of a marriage based on a declaration of presumption of death of the earlier spouse of one of the parties to the marriage. This amendment was made with amendments to *The Marriage Act*, which allowed parties to marry if the Court of King’s Bench declared the earlier spouse of one of the parties to be presumed dead.

The legislation was further amended in 1949, when section 3, which previously had provided that the Act would only apply to deaths after the Act’s commencement, was repealed and replaced with:

3 The provisions of this Act are subject to any order affecting the estate of an intestate made by the Court of King’s Bench under the authority of *The Dependents’ Relief Act*.

This amendment was required to address the inclusion of dependants of an intestate in *The Dependents’ Relief Act*. Section 3 of the current *Intestate Succession Act* is still the same in substance.

The legislation was next amended in 1952, apparently to clarify the sections dealing with succession to brothers and sisters, nieces and nephews, and next of kin. The amendments clarified that representation was not to be admitted when all of the intestate’s estate was distributed among his or her nieces and nephews. Although the language has changed, the amendments are the same in substance as sections 10, 11, and 12 in the current version of the legislation.

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137 *Supra* note 3; British Columbia Law Institute 2006, *supra* note 49 at 5.
138 An Act to amend *The Intestate Succession Act*, SS 1944, c 25. Although *The Intestate Succession Act* was reprinted in the 1930 Act and *The Intestate Succession Act*, RSS 1940, c 109 at s 20 [1940 Act]; no changes were made to the content of the 1928 Act, *supra* note 135.
139 An Act to amend *The Marriage Act*, SS 1944, c 70.
140 An Act to amend *The Intestate Succession Act*, SS 1949, c 36 at s 1.
141 An Act to amend *The Dependents’ Relief Act*, SS 1949, c 38.
142 An Act to amend *The Intestate Succession Act*, SS 1952, c 43.
A.1.2.1. Preferential share

Prior to 1960, if an intestate died leaving a spouse and one child, one-half of the intestate’s estate went to the spouse. If the intestate left a spouse and children, one-third of the estate went to the spouse. This was also the case if a child of the intestate had died leaving issue alive at the date of the intestate’s death. In 1960, the Act was amended to provide the surviving spouse with a preferential share of the estate, with the remainder after payment of the preferential share to be divided as previously described. The preferential share was set at $10,000, which meant that if the estate had a net value of less than $10,000, the entire estate would go to the spouse. If the estate was valued over $10,000, the spouse had a charge on the estate for that sum, with interest from the death of the intestate. The $10,000 appears to have been set on the understanding that most estates valued at or under that amount would usually comprise a house or the equity in a house, and such a preferential share would allow the surviving spouse to remain in the family home without having to apply to the court.

The preferential share was increased to $40,000 on January 12, 1978 with respect to the estates of persons who died intestate after that date in the “spirit of keeping up with the obvious costs of living and the inflationary costs that have taken place in Canada since 1960.” In 1990, the share was further increased to $100,000 with respect to the estates of persons who died intestate on or after June 22, 1990, to address inflation since the 1978 increase. The $100,000 figure was based on a tentative proposal by the Law Reform Commission of Saskatchewan “intended to cover the equity in the family home in the ordinary case... [with] the advantage of making matrimonial property and dependants’ relief applications unnecessary in most cases of intestacy.”

143 The Intestate Succession Act, RSS 1953 c 119 [1953 Act]. This division began in the 1928 Act, supra note 135 at s 4.
144 An Act to amend The Intestate Succession Act, SS 1960, c 42 at s 3.
145 Defined, ibid at s 2, as “the value of the estate wherever situated, both within and outside Saskatchewan, after payment of the charges thereon and the debts, funeral expenses, expenses of administration and succession duty.”
146 Debates and Proceedings of the Legislative Assembly of Saskatchewan, 13th Leg, 4th Sess (3 March 1960) at 36-38 (Hon Mr Walker).
147 An Act to amend The Intestate Succession Act, SS 1977-78, c 19 and RSS 1978 (Supp), c 34; Debates and Proceedings of the Legislative Assembly of Saskatchewan, 18th Leg, 4th Sess (8 March 1977) at 752 (Hon Mr Romanow).
148 An Act to amend The Intestate Succession Act, SS 1990, c 19; Debates and Proceedings of the Legislative Assembly of Saskatchewan, 21st Leg, 4th Sess (11 June 1990) (Hon Mr Lane).
A.1.2.2. Children born outside marriage

From the beginning of intestate succession legislation in Saskatchewan, children born to a woman and a man not legally married were called "illegitimate".150 "Illegitimate" children were entitled to inherit from and through their mothers as if they were legitimate, and if an “illegitimate” child died intestate leaving no spouse or children, his or her estate would go to his or her mother or the other children of the mother (or her grandchildren) if the mother was deceased.151 In 1971, amendments were made to allow for distribution of the intestate “illegitimate” child’s estate to next of kin through the mother, removing the limit to distribution no further than nieces and nephews.152

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

However, this section was narrowed in the version of the legislation included in the 1978 Revised Statutes of Saskatchewan, which provided only that an “illegitimate” child could share in the intestate mother’s estate as though the child were “legitimate”.153

A 1974 amendment allowed a child born outside marriage to share in the estate of a deceased male person as a child would born to married parents,154

if a court of competent jurisdiction is satisfied:
(a) that during the lifetime of the intestate, the intestate publicly or otherwise acknowledged that he was the father of the child; or
(b) that at the time of the birth of the child the intestate was living with the mother of the child as her husband and that after the birth of the child the intestate seemed to have accepted the child as his own.

If the estate of a child born outside marriage would otherwise escheat to the Crown, the estate could pass to the intestate’s father if the same test was met.155

Reference to illegitimacy was removed from The Intestate Succession Act by The Children’s Law Act in 1990.156 The Children’s Law Act abolished the distinction between the status of children born inside and outside marriage, and amended legislation which treated them differently.157

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150 Ferguson v Armbrust, 2001 SKCA 122 at para 15 [Ferguson].
151 1928 Act, supra note 135, s 16-17 through The Intestate Succession Act, RSS 1965, c 126 at ss 17-18 [1965 Act].
152 An Act to amend The Intestate Succession Act, SS 1971, c 18.
153 The Intestate Succession Act, RSS 1978, c I-13, s 17(1) [1978 Act].
154 An Act to amend The Intestate Succession Act, SS 1973-74, c 51.
155 ibid.
A.1.2.3. 1996 Act

The Intestate Succession Act, 1996, came into effect on November 1, 1996, replacing the 1978 Act. The Court of Appeal for Saskatchewan commented on the changes contained in the 1996 Act:

Apart from increasing the value of the benefits to which a spouse is entitled (occasioned primarily by the change in the value of currency since 1978), making slight changes to some of the wording (to conform to the style of contemporary draftsmanship), and deleting all reference to "illegitimate" children, the 1996 statute is virtually the same as the 1978 statute. (The reference to "illegitimate" children would have been redundant given s. 40 of The Children's Law Act, S.S. 1990-91, c.C-8.1, whereby all distinctions between the status of a child born inside marriage and a child born outside marriage were abolished.)

A change not noted by the Court was that the Act was enacted in French and English for the first time. In 1999, subsection 4(1) of the 1996 Act was amended to clarify that the subsection applied specifically to the period from July 1, 1960 to January 12, 1978. This amendment was largely a housekeeping measure: when the Act was amended in 1978 to increase the spouse's preferential share, it did not reflect that entitlement to the preferential share before 1978 was limited in time to those who died intestate after July 1, 1960, when the preferential share was first introduced.

The 1996 Act was further amended in 2001 to include the definition of “spouse” now found in section 2, and to amend section 20 from “living in adultery” to “cohabiting with another person in a spousal relationship.” These amendments, with amendments to many other enactments, were made in response to the Supreme Court of Canada’s decision in M v H, which held that exclusion of same-sex couples from spousal maintenance obligations violates the equality rights enshrined in section 15 of the

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157 Ibid at s 40; Debates and Proceedings of the Legislative Assembly of Saskatchewan, 21st Leg, 4th Sess (25 April 1990) (Hon Mr Lane).
158 1996 Act, supra note 1. The Act was renamed (by adding “, 1996”) and was re-enacted in a bilingual version.
159 1978 Act, supra note 148.
160 Ferguson, supra note 151 at para 18.
161 The Intestate Succession Amendment Act, 1999, SS 1999, c 5.
162 Debates and Proceedings of the Legislative Assembly of Saskatchewan, 23rd Leg, 4th Sess (25 March 1999) at 259 (Hon Mr Nilson).
163 The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2), SS 2001, c 51, s 6 [Domestic Relations Amendment Act (No 2)]. The term “spouse” was first found in the 1978 Act, supra note 148, when the term replaced most instances of “widow” and “wife.” The exception was section 15, where “spouse” replaced “widow,” but the terms “husband” and “wife” remained. This resulted in an awkward construction which was corrected in the 1996 Act, supra note 1 at s 18.
164 The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001, SS 2001, c 50; Domestic Relations Amendment Act (No 2), supra note 164.
Reform of The Intestate Succession Act, 1996: Consultation Paper

Charter. At the time of the amendment, the Saskatchewan Department of Justice had already been served with two challenges to the Act claiming the Act discriminated against people on the basis of marital status. The Court of Appeal for Saskatchewan relied on the 2001 amendments to "read up" the 1996 Act in Ferguson v Armbrust and affirm the Court of Queen’s Bench decision that a common law spouse is included in the definition of "spouse".

A.2. Western Canadian intestate succession legislation

A.2.1. British Columbia

The Wills, Estates and Succession Act was passed on September 24, 2009 and has been in force since March 31, 2014. In both British Columbia and Alberta the intestate provisions have been brought into their general succession legislation. This was done to decrease the number of Acts that apply to succession and to try to simplify the area of law.

British Columbia allows for more than one spouse to inherit. Where there is more than one spouse entitled to the spousal share of the estate, they may agree between themselves how to apportion the spousal share of the estate or have a court determine how to apportion the share. It is considered unlikely that, under British Columbia’s definition of spouse, there will be more than one spouse. There are two kinds of spouse in British Columbia. Spouses through legal marriage will cease to be spouses once separated. The second type of spouse occurs where the couple have been in a marriage-like relationship for at least two years. For this kind of spouse, when the relationship is terminated by either or both spouses, they are no longer spouses. Spouses are not considered separated where they have reconciled within one year of separation and have lived together for at least 90 days.

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167 4 June 2001 Debates, ibid at 1561 (Hon Mr Axworthy).
168 Ferguson, supra note 151 at para 38. The Court of Queen’s Bench found that “spouse” in the 1996 Act could be interpreted to include common law spouses: Ferguson v Armbrust, 2000 SKQB 219 at para 44. The Court of Appeal disagreed, but found that the limited definition of “spouse” violated section 15 of the Charter, and so relied on the 2001 amendments as the “best possible evidence of what the legislature would have done had it been forced to face the problem the appellants raise” and so “read up” the Act to include common-law spouses: Ferguson, supra note 151 at para 38.
172 British Columbia Act, supra note 30 at s 2(2.1).
Where there is a spouse but no issue, the estate goes to the spouse. Where there are both spouse and issue, the spousal share depends on whether all of the children of the intestate are also the children of the spouse. If all of the children are also the children of the intestate’s spouse, the preferential share is $300,000; if they are not, it is reduced to $150,000. The legislation allows for a prescribed amount to replace these amounts so that they can be increased without changing the legislation. In addition to the preferential share, all of the household furnishings go to the spouse. The residue of the estate is divided with one-half going to the spouse and the other to the intestate’s issue. When there is a distribution to the issue it is done per stirpes. Where there is no spouse or issue, the distribution of the estate follows the parentelic system. This means that each line must be exhausted before a new line is considered. Distribution is limited to those who are in fourth degree of kinship or less to the intestate, although individuals of a higher degree may have a right to inherit under British Columbia’s escheat legislation. British Columbia is unique in providing rights to the spousal home under their succession legislation.

A.2.2. Alberta

The Wills and Succession Act came into force on February 1, 2012. The spousal provision in Alberta allows either a spouse (undefined in this legislation) or an adult interdependent partner under the Adult Interdependent Relationship Act to receive what would usually be the spousal share. The definition of “adult interdependent partner” includes specific common-law relationships but is also broader because it allows those who are related by blood or adoption to enter into this type of relationship under an agreement. An individual can only have one adult interdependent partner and a married individual cannot enter into a partnership while living with his or her spouse.

If the intestate leaves no issue, the whole estate goes to the spouse or adult interdependent partner. If all of the intestate’s issue are also the issue of the surviving spouse or partner, the entire estate goes to the spouse or partner. Where not all of the issue are shared, the spouse or partner...
receives the greater of a prescribed amount or half of the estate.\textsuperscript{186} The prescribed amount is $150,000. Where there is both a spouse and a partner, each receives half of the spousal share.\textsuperscript{187} Separated spouses do not inherit (they are deemed predeceased) in the situation where they have been living apart for two years, have a declaration of irreconcilability or have an agreement or order that appears to have been intended to end their marital relationship.\textsuperscript{188} The exception to this is where the spouses have reconciled at the time of the intestate’s death.

The distribution to issue is \textit{per stirpes}.\textsuperscript{189} Where there is no surviving issue the distribution is parentelic and is similar to the British Columbia provisions.\textsuperscript{190} It provides for an equal share to different sides of the family and is only to the 4\textsuperscript{th} degree of kinship. Where there are only relationships beyond the 4\textsuperscript{th} degree of kinship, those relatives are able to claim the estate under a separate Act before it escheats to the Crown.\textsuperscript{191}

\textbf{A.2.3. Manitoba}

\textit{The Intestate Succession Act},\textsuperscript{192} which came into force on July 1, 1990, significantly changed the intestate succession law in Manitoba.\textsuperscript{193}

Manitoba provides the spousal share of an intestate’s estate to spouses and common-law partners. The spouse does not inherit where the spouse was living separately from the intestate and there was an application for divorce or accounting under family property legislation or where the intestate and spouse had divided their property in such a way that it appears they intended to separate and finalize the breakdown of their marriage.\textsuperscript{194} A common-law partner will not inherit where: the couple are living separately and an application was made for accounting under family property law; the couple divided their property in a way that it appears they intended to end the relationship; or if the relationship was registered, the couple registered a dissolution or they have been apart for three years.\textsuperscript{195} Where there is a spouse and one or more common-law partners of the intestate who would be entitled to inherit, the priority goes to the most recent relationship.\textsuperscript{196} Any rights of an earlier spouse or common-law partner under family property legislation will have priority over the rights of the most recent spouse or partner.

\textsuperscript{186} \textit{Ibid} at s 61(1)(b).  
\textsuperscript{187} \textit{Ibid} at s 62.  
\textsuperscript{188} \textit{Ibid} at s 63.  
\textsuperscript{189} \textit{Ibid} at s 66.  
\textsuperscript{190} \textit{Ibid} at s 67.  
\textsuperscript{191} \textit{Ibid} at s 69.  
\textsuperscript{192} \textit{Manitoba Act}, supra note 30.  
\textsuperscript{193} Harvey, supra note 113 at 631.  
\textsuperscript{194} \textit{Manitoba Act}, supra note 30 at s 3(1).  
\textsuperscript{195} \textit{Ibid} at s 3(2).  
\textsuperscript{196} \textit{Ibid} at s 3(3).
Reform of The Intestate Succession Act, 1996: Consultation Paper

under the intestacy legislation. Additionally, the preferential share that goes to the spouse or partner under this legislation is reduced by the amount that is due to an earlier spouse under family property legislation.

Where there are no issue, the entire estate goes to the spouse or common-law partner. If all of the issue of the intestate are also the issue of the spouse or partner, the entire estate goes to the spouse or partner. Where not all of the issue are shared, the spouse or partner receives the greater of $50,000 and half of the estate. Where there is a partial intestacy, this amount is reduced by the amount received under the will. The spouse or partner also receives half of the residue; this amount is not dependent on any distribution that occurred under the will.

Manitoba also follows the parentelic system up to the line of great-grandparents. There is no limitation to being in a fourth degree or less relationship. Where there is a distribution to issue or other kin, it is done on a per capita basis. This is the only jurisdiction of the four considered here that has a per capita distribution instead of a per stirpes distribution.

Manitoba also has a provision that brings advancements into account. An advancement will not reduce the share of the issue, unless there is a specific declaration or acknowledgement providing that it will. Similar to Saskatchewan, the onus of proving the advancement is on the person claiming there was one unless it was declared by the intestate or acknowledged by the recipient in writing. The value of the advancement is the value at the time of the advancement unless, the declaration or acknowledgement provides otherwise.

The spousal home is protected under homestead legislation, which provides the spouse a life interest in the home.

A.3. Federal law

The exclusive legislative authority over “Indians, and lands reserved for the Indians” is assigned to the Parliament of Canada by section 91(24) of the Constitution Act, 1867. Further to this authority,

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197 Ibid at s 3(3)(a).
198 Ibid at s 3(3)(b).
199 Ibid at s 2(1).
200 Ibid at s 2(2).
201 Ibid at s 2(3).
202 Ibid at s 2(4).
203 Ibid at s 4(4)-(6).
204 Ibid at ss 4(2) & 5.
205 Ibid at s 8.
206 Ibid at s 8(3).
207 Ibid at s 8(5).
208 Ibid at s 10.
Parliament enacted the *Indian Act*,\(^{210}\) of which sections 42 to 52, along with the *Indian Estates Regulations*,\(^{211}\) govern the testamentary matters of Indians ordinarily resident on a reserve and of those living on designated lands.\(^{212}\) If an Indian does not live on reserve land, the laws of the province where he or she lives will apply to his or her estate. However, the Minister of Indian and Northern Affairs Canada (the “Minister”) may order that the *Indian Act* applies to an Indian not ordinarily resident on the reserve in certain circumstances.\(^{213}\)

The *Indian Act* provides a self-contained code for testamentary matters that replaces provincial legislation dealing with succession.\(^{214}\) It vests all jurisdiction in relation to “matters and causes testamentary” of deceased Indians in the Minister of Indian Affairs and Northern Development.\(^{215}\) An appeal from the Minister’s decision lies only to the Federal Court.\(^{216}\) Non-status band members are treated as Indians for the purposes of sections 51 and 52, which deal, respectively, with the estates of those who are mentally incompetent and the estates of Indian children who are minors.\(^{217}\)

If an Indian dies intestate, or if his or her will is declared invalid, the estate will be distributed among the deceased’s family in accordance with the rules set out in section 48 of the *Indian Act*.\(^{218}\) Distribution is similar to *The Intestate Succession Act, 1996*, although restrictions exist respecting distribution of reserve land,\(^{219}\) and a “child” includes a child adopted according to First Nations custom.\(^{220}\)

The nature of the distribution of property on intestacy depends on the net value of the estate. The

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\(^{209}\) *Constitution Act, 1867* (UK), c 3, s 91(24).

\(^{210}\) *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

\(^{211}\) *Indian Estates Regulations*, CRC 1978, c 954.

\(^{212}\) *Indian Act*, supra note 211 s 2(1); Zandra L Wilson, “Wills and Estates of Indians: The Indian Act In Review” (1993-1994) 13 Est & Tr J 129 at 129 [Wilson]. This article is based in part on an article previously written by the author entitled “Wills and Estates of Indians” Legal Information Service Report 1981, No. 3 (Saskatoon, Native Law Centre, University of Saskatchewan, 1981).

\(^{213}\) *Indian Act*, supra note 211 at s 4(3). Such an order is rare, and occurs only if the heirs or beneficiaries request federal jurisdiction and if other specific criteria are met: Roger D Lee, “Aboriginal Practice Points Wills for First Nation Persons”, (April 1, 2007), online: The Continuing Legal Education Society of British Columbia <http://www.cle.bc.ca/PracticePoints> [Lee].

\(^{214}\) Wilson, supra note 213 at 129; *Re Bernard* (1986), 29 DLR (4th) 133 (NBQB); *Leonard v Canada (Minister of Indian and Northern Affairs)* (2004), 8 ETR (3d) 61, 2004 FC 665.

\(^{215}\) A H Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Carswell, 2011) at 20 [Oosterhoff].


\(^{217}\) Oosterhoff, supra note 216 at 20.

\(^{218}\) Ibid at 21.

\(^{219}\) *Indian Act*, supra note 211, s 49-50.

\(^{220}\) Ibid at s 2 (1). There must be a finding of adoption by custom before that child can inherit: Lee, supra note 214.
Indian Act does not recognize the Indian inheritance customs with respect to division of assets.\textsuperscript{221} A spouse’s preferential share is $75,000 (increased from $2,000 in 1988). If the Minister concludes that the value of the estate does not exceed $75,000 or such amount determined by order of the Governor in Council,\textsuperscript{222} the surviving spouse will receive the entire estate if there are no children.\textsuperscript{223} Where the net value of the estate, in the opinion of the Minister, exceeds $75,000, the surviving spouse will receive $75,000\textsuperscript{224} and, if the intestate left no issue, the remainder will go to the surviving spouse.\textsuperscript{225} If the intestate left one child, the surviving spouse will receive the first $75,000 and will share the remainder equally with the child.\textsuperscript{226} If there is more than one child, the surviving spouse will receive one-third of the remainder, with the remaining two-thirds divided equally among the children.\textsuperscript{227}

If the intestate dies leaving no spouse but only children, the estate is divided equally among them.\textsuperscript{228} If any of the children have predeceased the intestate but left children of their own (grandchildren of the intestate) alive at the date of the intestate’s death, the grandchildren will share equally the amount to which their parent would have been entitled.\textsuperscript{229} Other than the value of the preferential share, the proportionate division above is similar to that under The Intestate Succession Act, 1996.

Where a person dies intestate leaving no spouse, children or other descendants such as grandchildren, the estate is divided equally between the intestate’s mother and father. If either the mother or father has predeceased the intestate, the entire estate goes to the surviving parent.\textsuperscript{230} Should neither parent be living, the estate is distributed in equal shares among the deceased’s brothers and sisters. If any brother or sister is deceased but has left children, those children will share equally the amount to which the parent would have been entitled.\textsuperscript{231} If the only survivors are nieces and nephews of the intestate, the estate is divided equally among them. Should there be no living nieces and nephews, the estate is distributed equally among the next of kin of equal blood relationship to the intestate, and to those who legally represent them.\textsuperscript{232} The division set out above is the same as that under The Intestate Succession

\begin{itemize}
\item \textsuperscript{221} For example, writing of wills is not common among Indians, because oral tradition and informal record keeping characterize many of the Indian societies. Indian and Northern Affairs Canada, Lands, Revenues and Trusts Review, Phase II Report (Ottawa, 1990), at 70 indicates that only about 10% of Indian people have a will.
\item \textsuperscript{222} From this point on, reference in this Part to $75,000 will implicitly include “or such other amount as may be fixed by order of the Governor in Council.”
\item \textsuperscript{223} Indian Act, supra note 211 s 48(1).
\item \textsuperscript{224} Ibid at s 48(2).
\item \textsuperscript{225} Ibid at s 48(2)(a).
\item \textsuperscript{226} Ibid at s 48(2)(b).
\item \textsuperscript{227} Ibid at s 48(2)(c).
\item \textsuperscript{228} Ibid at s 48(4).
\item \textsuperscript{229} Ibid at s 48(2).
\item \textsuperscript{230} Ibid at s 48(5).
\item \textsuperscript{231} Ibid at s 48(6).
\item \textsuperscript{232} Ibid at s 48(7).
\end{itemize}
Act, 1996, however, the position of Indian and Northern Affairs Canada is that nieces and nephews may not receive an interest in reserve land through an intestate succession. 233

Section 48(3)(a) of the Indian Act allows the Minister, if he or she is “satisfied that any children of the deceased will not be adequately provided for,” to direct that all or part of the estate to which the surviving spouse is entitled go to the children. 234 Section 48(3)(b) provides that the Minister may direct that the surviving spouse has the right to occupy the reserve lands that were occupied by the intestate at the time of his or her death. 235 While this provision enables the surviving spouse to enjoy and benefit from the right of occupancy, it delays any distribution of the estate to the children of the intestate. 236

To ensure that reserves set aside for Indian bands are kept intact, a statutory land holding system is provided for in sections 20 to 29 of the Indian Act. Reserve land cannot be owned. 237 The Indian Act places restrictions on the possession of reserve land, including restrictions on the passing of land by devise or descent. 238 Section 48(8) provides that any interest in land will vest in the Crown if the nearest next of kin of the intestate is more remote than a brother or sister. 239 Under section 49, no right to possession or occupation of reserve lands based upon intestate succession exists until the Minister approves it. 240 Where a person who is not entitled to live on the reserve would be entitled by intestate succession to possession or occupation of reserve lands, the right of possession or occupation will be offered for sale to the highest bidder among individuals who are entitled to live on the reserve. Proceeds of the sale are paid to the descendent. 241 The federal law does not apply to all Indian intestates. The provincial intestate law applies to those who do not have status.

233 Lee, supra note 214.
234 Indian Act, supra note 211 at s 48(3)(a).
235 Ibid at s 48(3)(b).
236 Wilson, supra note 213 at 140.
237 Ibid at 141.
238 Ibid at 141.
239 Indian Act, supra note 211 at s 48(8). See Okanagan Indian Band v. Bonneau, 2003 BCCA 299, where the court required the intestate’s interest in land to revert to the Crown, as his nearest next of kin were nieces and nephews.
240 Indian Act, supra note 211 at s 49. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until the Minister approves it: s 24.
241 Indian Act, supra note 211 at s 50(2). This applies equally to Indians who are not members of the same reserve as the deceased: “A Guide to Wills and Estates On the Reserve”, (January 2011), online: Legal Services Society, British Columbia < http://resources.lss.bc.ca/pdfs/pubs/A-Guide-to-Wills-and-Estates-on-Reserve-eng.pdf >.
A.4. Parentelic Distribution Chart

Under a parentelic distribution, each line of the family is fully explored prior to considering the next. In other words, if the intestate has nephews and nieces, they inherit the estate and the next lines are not considered. Note that this chart only includes the fourth degree of relationship.
A.5. Next of kin chart

All individuals of the closest degree of next of kin inherit together, equally. The colours show who would inherit together.