

INTESTACY LAW IN AUSTRALIA, ENGLAND AND SINGAPORE—ANOTHER AID TO SOCIAL SUSTAINABILITY IN AN AGEING POPULATION?

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Intestacy law is an important area of property and succession law because some people do not make valid wills. The values and expectations of a society will generally influence the framing of intestacy rules. The intestacy schemes presently operating in Australia, England and Singapore are no exception. This article describes how the law in each of these jurisdictions has changed since the 19th century. It compares and contrasts the major elements of the intestacy schemes in Australia, England and Singapore. It is argued that in Australia and England an important priority is the protection of the economic well-being of the surviving spouse (broadly defined). In recent decades, law reformers in both jurisdictions have articulated an emerging priority for intestacy law: the enhancement of the economic well-being of the aged surviving spouse. Singapore's statutory intestacy regime has remained stable since its implementation in 1967. It evidences the concern that not only the spouse, but also that in certain circumstances, lineal descendants and ascendants ought to inherit from the intestate. Therefore, the concept of immediate family not only includes the spouse, but the issue and parents of the intestate.

I. INTRODUCTION

Intestacy law is a significant area of property law because a proportion of individuals do not make valid wills for a variety of diverse reasons.¹ In the absence of a valid will, the state assumes the responsibility for framing a generic set of rules to apply to intestate estates. This can be a difficult task, because the individual circumstances of each intestate will be different and the application of intestacy rules can cause friction amongst family members. Nevertheless, the technical and practical effect of rules can reflect social expectations and priorities.

The law of intestacy has been subject to ongoing law reform proposals and legislative change in Australia and England in order to deal with a variety of issues: the rights of women to inherit property; the needs of spouses; variations in property ownership and ongoing changes in relationships and how such changes are perceived. Law reformers and legislatures have attempted to explain or rationalise

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¹ England, The Law Commission, *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Consultation Paper No. 191) (London, 2009) at para. 1.7 [2009 England Law Commission Consultation Paper].

changes to intestacy schemes. As new schemes have been created or recommended, it is arguable that the theoretical and policy determinants have changed. One of the emerging justifications for recent patterns of intestacy distribution is ageing—the interest and well-being of the aged spouse and to a lesser extent, the aged parent.

Singaporean intestacy law stands in contrast to Australian and English law. Like Australia, it was a colony of the United Kingdom for a significant period of time and English law was formally introduced into the colony.² However, unlike Australia and England, Singapore has accommodated Muslim law in regard to the apportionment of assets between family members, as well as having the *Intestate Succession Act*³ which is applicable to non-Muslims. For the purpose of this article, comments will be solely directed to the *ISA* which was introduced in 1967. Moreover, the scheme of intestacy distribution is different from and has not been as subject to change as that operating in Australia and to a lesser extent, England. Nevertheless, it is arguable the law of intestacy has been subject to indirect influences and potentially indirect reforms which have been informed by expectations that family members bear responsibilities to and for the aged.

The paper is divided into three parts. The first part will describe briefly intestacy distribution in England and Australia (with special attention to the law of New South Wales (“NSW”) in the 19th and 20th centuries and emerging challenges at the beginning of the 21st century. It will be argued that changes in the intestacy law since the 19th century have been radical, resulting in a 180 degree adjustment: from rules favouring youth and the collateral family to rules which give preferentiality to the aged spouse as the immediate family. The second part will briefly outline intestate distribution in Singapore in the 19th and early 20th centuries; the 1967 *ISA*; and how intestacy law appears to be indirectly shaped by concerns for the aged in Singaporean society. In the final part, some brief concluding comparisons and contrasts between the changes (and further proposed changes) in Australian and English law on the one hand and Singaporean law on the other will be made.

II. ENGLISH AND AUSTRALIAN INTESTACY LAW

A. *Sources of English and Australian Law in the 19th century*

The law of intestacy succession in England and Australia (as a former colony of England) was to a significant degree, grounded in mediaeval law and informed by how property was owned in previous centuries. For the purposes of this article, there were three characteristics.

1. *Separate treatment of realty and personalty*

Where no valid will had been left by the intestate, how the property was distributed depended upon whether what the intestate left was realty, personalty or a combination of both. Realty and personalty were treated and distributed separately according to different rules.

² See Andrew Phang, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990) at 37-39 [Phang].

³ (Cap. 146, 1985 Rev. Ed. Sing.), [ISA].

Realty passed to the heir who was established by the strict rules of *parentelic calculus* which ensured as much as practicable, that blood relatives inherited.⁴ The principal heir was the first born son of the deceased,⁵ followed by other sons, daughters and other more remote (generally) male descendants and collateral heirs.⁶ When no heir could be found, the land passed back to the Crown.⁷

Originally, widows had no right to inherit their spouse's realty. However, later under the law of dower, a widow was entitled to a one-third life interest in her husband's freehold land. In contrast, a widower acquired a life interest in the whole of his wife's land under the doctrine of curtesy.⁸ By the 19th century, dower and curtesy had been abolished, returning widows to a vulnerable situation with regard to the inheritance of realty.⁹

The *Statute of Distribution, 1670*¹⁰ governed the distribution of personalty, responding to the economic needs of close relatives such as widows and daughters.¹¹ For example, a widow inherited one-half of the intestate's personalty for herself if there were no surviving issue; and the next of kin (determined by a graduated counting of grades or steps)¹² were entitled to one-half. A widow inherited one-third of the personalty when there were surviving issue; and the issue took two-thirds in accordance with *per stirpes* distribution.¹³ However, a widower inherited his wife's entire personalty.¹⁴ The next of kin inherited the entire personalty when there was neither a surviving spouse nor issue.¹⁵ Parents were the first next of kin entitled to inherit the personalty when there was neither a spouse nor issue. If there was no surviving spouse, issue or next of kin, the Crown would be entitled to the personalty.¹⁶

2. Maintaining the property within the family

The intestacy rules were primarily focused on maintaining property within the family. This was achieved in several ways. Major assets or the bulk of assets (depending on the asset mix) were inherited by blood relatives of the deceased, rather than widows who may later decide to remarry and effectively transfer their assets to their

⁴ John Hamilton Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002) at 266-268; Christopher H. Sherrin & Roger C. Bonehill, *The Law and Practice of Intestate Succession*, 3rd ed. (London: Thomson/Sweet & Maxwell, 2004) at paras. 2-002-2-003.

⁵ Note the discussion in Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford: Basil Blackwell, 1978) at 109-117; Sherrin & Bonehill, *supra* note 4 at para. 2-003.

⁶ Baker, *supra* note 4 at 267; Sherrin & Bonehill, *supra* note 4 at para. 2-003.

⁷ Sherrin & Bonehill, *supra* note 4 at para. 2-003.

⁸ *Ibid.*, at para. 2-004.

⁹ Sherrin and Bonehill, *supra* note 4 at para. 2-004.

¹⁰ (U.K.), 22 & 23 Car. II, c.10 [*Statute of Distribution 1670*].

¹¹ Sir William Holdsworth, *A History of English Law*, 3rd ed., vol. III (London: Methuen and Co Ltd, 1923) at 556-562. See Holdsworth, at 561: there was an additional *Statute of Distribution, 1685* 1 Ja. II, c. 7, which made a further specific amendment permitting brothers and sisters of the deceased to share equally with the intestate's mother.

¹² Sherrin and Bonehill, *supra* note 4 at para. 2-015.

¹³ *Ibid.*, at para. 2-014.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at para. 2-015.

¹⁶ *Ibid.*

new husband and family. In the case of realty, there was only one designated heir. The definition of entitled family members was wide so that in the event that lineal descendants or ascendants were not able to inherit assets, remote collateral relatives could do so.

3. *Preferential treatment of certain categories*

The intestacy scheme also contained certain preferential categories of entitlement. First, males were often the preferred inheritors. The first born son was the primary inheritor of realty and widowers inherited a greater share of their wife's estate than widows did with regard to their husband's estate. Second, children often inherited a greater share of their parent's estate than the surviving spouse or other relatives. Third, the scheme favoured the intestate's immediate younger relatives in preference to older members of the family. Lineal descendants were favoured over lineal ascendants in regard to realty. In relation to personalty, children and other issue were favoured over widows and next of kin because the children generally acquired a greater share of the assets.

B. *England in the 20th and 21st Centuries*

In the first quarter of the 20th century, the United Kingdom Parliament swept away centuries of well-honed intestacy law and implemented the *Administration of Estates Act, 1925*.¹⁷ The English legislation was the result of complex social changes in England over many centuries and became the foundation for further legislative change.

1. *The Administration of Estates Act 1925*

It is not possible to detail all the features of the legislation. However, several features stand in marked contrast to the earlier intestacy regime.

(a) *General and unified treatment of realty and personalty*: The separate rules for realty and personalty were abandoned and both forms of property were held and dealt with under common rule.¹⁸ The legislation adopted the general scheme of distribution in the *Statute of Distribution 1670 i.e.*, widows obtained a share of the estate and the next of kin were determined by a graduated system.

(b) *Gender equality*: For the first time in intestacy succession, the gender of prospective beneficiaries was entirely irrelevant. Widows and widowers were treated alike¹⁹ and the male and female lines were accorded the same treatment. The issue of the intestate had equal rights to inherit the estate: the principle of primogeniture no longer determined who acquired and sons and daughters acquired equal shares of the estate.²⁰

¹⁷ (U.K.), 15 & 16 Geo. V, c. 23 [*Administration of Estates Act 1925*].

¹⁸ *Ibid.*, ss. 32, 33(1).

¹⁹ *Ibid.*, s. 46(1). The doctrines of dower and curtesy were abolished: *Ibid.*, ss. 45(1)(b), (c).

²⁰ *Ibid.*, s. 46.

(c) *A re-balancing of the entitlement of issue and the spouse*: Previously, the distribution of the estate generally favoured children and other issue. Under the legislation, there was (and is) greater provision for the surviving spouse. For example, when both a spouse and issue survived the intestate, the spouse became absolutely entitled to certain assets: the intestate's personal chattels²¹ and a substantial statutory legacy with interest (both of which have been subject to change since their implementation).²² The spouse also became entitled to a life interest in one-half of the balance of the estate (assuming that there were any further assets to distribute) subject to a statutory trust.²³ The children acquired the other half of the balance of the estate under a statutory trust.²⁴ The effect of the new statutory regime was that the spouse, rather than the children, became entitled to the entire or bulk of the estate when the intestate's estate was small or modest in value.

(d) *A re-definition of the family for intestacy purposes*: The concept of remote entitlement was abolished.²⁵ Instead, the statutory definition of 'next of kin' was a truncated version of that used under the *Statute of Distribution 1670*.²⁶ The relatives entitled under the statutory scheme are (and remain in general order) parents, brothers and sisters, grandparents, uncles and aunts.²⁷ However, a reliance on blood relationships remained, so that relatives of the whole-blood took (and still take) priority over relatives of the half-blood.²⁸

(e) *An incremental preference for age over youth*: The new statutory scheme laid the basis for a distributional preference in favour of older members of the family. First, the specific and prior consideration of the spouse (particularly where there were surviving issue, but also where there were surviving next of kin) meant that a person older than the deceased's issue or some of the deceased's next of kin first acquired assets (and possibly the bulk of the assets) in the estate.

Second, in the event that there was a surviving spouse but there were no surviving issue²⁹ or there was neither a spouse nor issue, the statutory next of kin would be entitled to inherit part or whole of the estate. Older members of the next of kin prevailed (and still prevail) over younger members of the next of kin. For example, the intestate's parents prevail over the intestate's siblings and the intestate's grandparents prevail over the intestate's uncles and aunts.

2. Subsequent changes further favouring spouses

The legislation has been amended to give the spouse further entitlements and additional choices in the way that the final distribution occurs. Therefore, if the intestate is survived by a spouse and children, the spouse may elect to redeem the statutory

²¹ *Ibid.*, ss. 46(1)(i) Table (2), 55(1)(x).

²² *Ibid.*, s. 46(1)(i), Table (2).

²³ *Ibid.*, s. 46(1)(i) Table (2)(a).

²⁴ *Ibid.*, ss. 46(1)(i) Table (2)(b), 47.

²⁵ Sherrin and Bonehill, *supra* note 4 at para. 2-021.

²⁶ *Administration of Estates Act 1925*, *supra* note 17, ss. 46 (1)(ii)-(v).

²⁷ *Ibid.*

²⁸ *Ibid.*, s. 46(1)(v); Sherrin & Bonehill, *supra* note 4 at para. 2-021.

²⁹ *Administration of Estates Act 1925*, *supra* note 17, s. 46(1)(i) Table (3).

life interest and receive it from the personal representatives.³⁰ When the intestate is survived by a spouse and statutorily entitled relatives only, the spouse is not only entitled to the personal chattels, and the statutory legacy, but also one-half of the balance absolutely.³¹ Reflecting concerns about the surviving spouse's entitlement to remain in the family home, the spouse also has the option to purchase the intestate's interest in the family home³² in satisfaction or partial satisfaction of the statutory legacy.³³ In contrast, the doctrine of hotchpot has been abolished, reflecting the fact that children no longer inherit automatically or regularly.³⁴

3. *Subsequent changes to the definitions of family members*

Although the designated family members have generally retained their entitlements under the legislation since 1925, the definitions of persons who are considered to be family members have undergone significant transformation. The definition of 'spouse' for succession matters has been extended to include same-sex partners who register their partnerships.³⁵ However, cohabitants have not yet acquired intestate succession rights.³⁶

In light of who may be regarded as and entitled to inherit as a child or issue of the intestate have been expanded to include adopted children,³⁷ legitimated children,³⁸ ex-nuptial or illegitimate children³⁹ and artificially conceived children.⁴⁰ Step-children remain not entitled to inherit under the intestacy scheme.⁴¹

4. *Law Reform*

During the period under review, there have been two important law reform commission reports which have indicated the possible future direction of English intestacy law.

³⁰ *Ibid.*, s. 47A. However, generally surviving spouses have not taken the opportunity to utilise this option: U.K. The Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com. No. 331) (London: The Stationery Office, 2011) at para. 2.85 [2011 *Law Commission Intestacy and Family Provision Claims on Death Report*].

³¹ Roger Kerridge & Alastair H.R. Brierley, *Parry and Kerridge: The Law of Succession*, 12th ed. (London: Sweet & Maxwell/Thomson Reuters, 2009) at para. 2-19.

³² U.K., H.C., *Report of the Committee on the Law of Intestate Succession*, Cmd 8310 in *Sessional Papers*, (London: The Stationery Office, 1951) at para. 23.

³³ *Administration of Estates Act 1925*, *supra* note 17, ss. 46(1)(i) & 47(2)(a)-(c); Sherrin & Bonehill, *supra* note 4 at para. 2-025; Kerridge & Brierley, *supra* note 31 at paras. 2-21-2-27; and the *Intestates' Estates Act, 1952* (U.K.), 15 & 16 Geo VI, c. 64, Second Schedule.

³⁴ *Law Reform (Succession) Act 1995* (U.K.), 1995, c. 41, s. 1(2) in relation to deaths after 1 January 1996.

³⁵ *Civil Partnership Act 2004* (U.K.), 2004, c. 33, s. 71 & Schedule 4 [*Civil Partnership Act 2004*]. The legislation came into force on 5 December 2005: Kerridge & Brierley, *supra* note 31 at para. 2-06.

³⁶ Sherrin & Bonehill, *supra* note 4 at para. 10-005.

³⁷ *Adoption and Children Act 2002* (U.K.), 2002, c. 38, ss. 67, 144(4); Sherrin & Bonehill, *supra* note 4 at para. 10-029.

³⁸ *Legitimacy Act 1976* (U.K.), 1976, c. 3, ss. 5(1)-(4), 10(1) [*Legitimacy Act 1976*].

³⁹ *Family Law Reform Act 1987* (U.K.), 1987, c. 42, s. 18.

⁴⁰ *Ibid.*, s 27; *Human Fertilisation and Embryology Act 2008* (U.K.), 2008, c. 22.

⁴¹ Sherrin & Bonehill, *supra* note 4 at para. 10-018.

(a) *The Law Commission Report on Family Law Distribution on Intestacy*: In 1989, the Law Commission released a report on *Family Law Distribution on Intestacy*,⁴² in which its main recommendation was that the surviving spouse of the deceased ought to inherit the entire estate, excluding all other members of the family including the intestate's children and issue.⁴³ The Commission preferred a simple scheme—one which ensured that the spouse inherited the entire estate. The Commission was concerned that the statutory legacy could be insufficient to ensure that the spouse is able to continue to reside in the matrimonial home; and the rules did not take into account how the home was owned. Yet the difference between ownership as joint tenants or tenants in common could be crucial in determining what the surviving spouse ultimately inherited.⁴⁴ The kind of 'family' structure which operated in the background of the Commission's recommendations was essentially a limited or 'nuclear' family in which the primary relationship was between the surviving spouse and the intestate, followed by the relationship of children with their parents. Indeed, the intestate and the spouse implicitly constituted a family in their own right.

The Commission recognised demographic change. While the Commission acknowledged that there would be cases where the surviving children of the intestate would be young, the more likely situation would be that the surviving children (broadly defined) would be independent adults. In light of the limited family model, the children (rather than the spouse) would no longer form part of the immediate family of the intestate. Therefore, they would not be entitled to the estate of their parent in preference to their surviving parent. The Commission explicitly stated that adult, middle-aged children would be unlikely to need financial provision from the deceased parent.⁴⁵ On the other hand, aged spouses would benefit from inheriting the intestate's entire estate and their entitlement would be based on matters such as economic need.⁴⁶

This central recommendation of the report was controversial and not implemented. It is arguable that contrasting notions of what constitutes the 'family' for the purposes of intestacy law lay at the heart of different responses to the recommendation. For the Commission, the appropriate family setting was a limited family with the surviving spouse at the centre. Reliance on this model was strengthened by the perceived relevance of demographic concerns—the needs of an aged spouse and the concern that the present rules transfer assets from the retired spouse to the working population namely, the issue of the intestate.⁴⁷ For the opponents of the recommendation, a broader and traditional notion of family, which included children (particularly children from intestate's previous relationships) and to a lesser extent collateral relatives, remained the appropriate model.⁴⁸ It was important to take into account the possibility that children from the intestate's previous relationships (who were not related

⁴² U.K., The Law Commission, *The Law Commission Report on Family Law, Distribution on Intestacy* (Law Com. No. 187) (London: Her Majesty's Stationery Office, 1989) [*1989 Law Commission Report*].

⁴³ *Ibid.*, at para. 28.

⁴⁴ *Ibid.*, at paras. 19–20.

⁴⁵ *Ibid.*, at para. 42.

⁴⁶ *Ibid.*, at paras. 23, 26, 42.

⁴⁷ *Ibid.*, at para. 23.

⁴⁸ See Roger Kerridge, "Distribution on Intestacy, the Law Commission's Report (1989)" [1990] *The Conveyancer and Property Lawyer* 358; Roger Kerridge, "Reform of the Law of Succession: The Need for Change, Not Piecemeal Tinkering" [2007] *The Conveyancer and Property Lawyer* 47.

to the surviving spouse) may not inherit anything from the surviving spouse, unless specifically entitled to do so under the intestacy rules.

(b) *Intestacy and Family Provision Claims on Death*: In 2011, the Commission released another report which dealt with intestacy law. After the controversy which surrounded the 1989 report, the Commission shied away from making the same central recommendation. However, the model of the surviving spouse's (broadly defined) primary (if not sole) entitlement, remained the backdrop to the recommendations. Instead of recommending an 'all to spouse' entitlement, the Commission proposed that the components of the spousal inheritance be reconfigured to ensure that the spouse inherited sufficient assets to be able to live comfortably. Each of the categories of inheritance were reviewed with the aim of ensuring that the surviving spouse obtained ample (if not all) assets from the intestate. Four examples are illustrative. First, the Commission proposed the re-definition of personal chattels so that they constituted all of the intestate's assets except money (and securities for money) and assets held for business and investment purposes.⁴⁹ Therefore, high-valued personalty could fall within personal chattels inherited by the surviving spouse. Second, the Commission recommended that the statutory legacy be regularly updated in line with the Retail Price Index.⁵⁰ Third, the Commission proposed that the spouse would acquire an immediate outright share in one-half of any remaining balance of the estate.⁵¹ Fourth, the Commission recommended that in certain circumstances, cohabitants could inherit the intestate's estate⁵² and have the same entitlement under the intestacy rules as a spouse.⁵³ Finally (and controversially), the Commission decided that children from the intestate's previous relationships ought not to be given any special treatment under the rules.⁵⁴ The Commission considered that to do otherwise would unduly complicate the law of intestacy.⁵⁵ While the proposed scheme would not preclude any issue of the intestate inheriting a portion of the estate (subject to the surviving spouse inheriting the intestate's personal chattels, statutory legacy and half of anything else that remains),⁵⁶ children (including those from previous relationships of the intestate) would only inherit if the value of the estate was sufficiently high for this to occur. It also ought to be noted that the Commission did not recommend that minors ought to be entitled to inherit a portion of their intestate parent's estate—even though it is arguable that minors are a vulnerable category of family members.

Therefore, the issue or the next of kin would be able to inherit the entire estate only when there was no surviving spouse (broadly defined). Interestingly, in the event that there was neither a surviving spouse nor issue, the Commission considered that parents (due to their age) ought to be entitled to inherit in preference to the intestate's siblings.⁵⁷

⁴⁹ 2011 Law Commission *Intestacy and Family Provision Claims on Death Report*, *supra* note 30 at para. 2.111; Recommendation 9.3.

⁵⁰ *Ibid.*, at paras. 2.127, 2.128; Recommendation 9.4.

⁵¹ *Ibid.*, at paras. 2.58, 2.59, 2.62; Recommendation 9.2

⁵² *Ibid.*, at Part 8. Recommendations 9.26-9.32.

⁵³ *Ibid.*, at para. 8.119; Recommendation 9.31.

⁵⁴ *Ibid.*, at paras. 2.67-2.82.

⁵⁵ *Ibid.*, at para. 2.78.

⁵⁶ *Ibid.*, at para. 2.154.

⁵⁷ *Ibid.*, at para. 3.12.

5. Ageing and Law Reform

In light of the controversy over the 1989 recommendations, the proposals in the 2011 report are adroit. While the Commission acknowledged traditional notions of the family (including the entitlement of the surviving spouse, issue and collateral relatives to inherit the intestate's estate), the reality is that the Commission has made recommendations which are grounded in the notion of a limited family and which best serve the interests and well-being of the 'typical' surviving spouse. The Commission pointed out that the present provisions in the *Administration of Estates Act 1925*, which regulate the distribution of the intestate's estate apply in a practical way to favour the surviving spouse, because in most cases the surviving spouse inherits the entire estate (as the value of the assets (after the exclusion of the personal chattels) do not exceed the presently prescribed value of the statutory legacy).⁵⁸ The Commission's proposals would appear to enhance this trend. Intestacy distribution has been about providing for the surviving spouse and increasingly, in light of the demographic changes over the 20th and 21st centuries, the aged spouse.

C. Australia in the 20th and 21st Centuries

Upon European settlement in Australia, the Australian colonies adopted the English intestacy law.⁵⁹ As the colonies obtained some degree of self-determination in the 19th century, they were able to pass their own legislation in relation to intestacy. It is neither possible nor desirable to describe this legislation or all the subsequent 20th century legislation. Rather, three initial points need to be made. First, Australian intestacy law is complicated by the fact that Australia operates a federal system and the law of succession is the remit of the state and territory governments. Second, the pace of reform in the various states and territories has differed and continues to differ markedly.⁶⁰ Third, most of the states and territories have a system of intestate distribution which is similar (in general structure) to that operating in England, in the sense that the spouse will be entitled to certain assets, a statutory legacy and a proportion of the residue. Thereafter, the issue or collateral relatives will be entitled to any remaining assets, in the event that the intestate estate is a sufficiently large one.⁶¹

1. NSW prior to the presently operating Succession Act 2006 (NSW)

However, in order to understand the direction of intestacy law in Australia and its potential future direction, it is appropriate to review the law in NSW as a litmus test for reform and to describe briefly the major recommendations of the uniform succession laws project.⁶² Prior to the implementation of the *Succession Act 2006*

⁵⁸ *Ibid.*, at para. 2.6.

⁵⁹ *Australian Courts Act, 1828* (U.K.), 9 Geo. IV, c. 83.

⁶⁰ Rosalind F. Croucher & Prue Vines, *Succession: Families, Property and Death*, 3rd ed. (New South Wales: LexisNexis Butterworths, 2009) at C. 5.

⁶¹ *Ibid.*, at paras. 5.9-5.38.

⁶² Austl., NSW, Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No.116) (Sydney, 2007) [*NSW Law Reform Commission Report*].

(NSW)⁶³, the law of intestate succession in NSW had already achieved the general characteristics identified in the *Administration of Estates Act 1925*, namely: a general and unified treatment of realty and personalty;⁶⁴ gender equality; a rebalancing of the entitlements in favour of the spouse; a re-definition of the family to encompass immediate lineal and collateral relatives and an incremental preference of age over youth.⁶⁵ Like England, NSW progressively re-defined entitled family members for the purpose of intestacy succession. Throughout the 20th century, those persons regarded as the intestate's child or issue were extended⁶⁶ to include adopted children,⁶⁷ legitimated children,⁶⁸ ex-nuptial (or illegitimate) children⁶⁹ and artificially conceived children.⁷⁰ Step-children were not entitled to inherit under the prevailing intestacy scheme. However, unlike England, when a *de facto* relationship had existed for a continuous period of not less than two years prior to the death of the intestate and the intestate did not, during the whole or any part of that period, live with the person to whom he or she was married, the *de facto* spouse was entitled to inherit the spousal share.⁷¹

2. Succession Act 2006 (NSW)⁷²

In an ongoing program reforming the law of succession, NSW began the process by implementing the *Succession Act 2006* which dealt initially with wills only. Subsequently, the legislation has been amended to include provisions on family provision⁷³ and intestacy.⁷⁴ The intestacy provisions followed the recommendations of the NSW Law Reform Commission in the report, *Uniform Succession Laws: Intestacy*⁷⁵ which will be discussed below. The legislation radically changed the rules governing intestate succession.

The legislation operates in the light of a very broad definition of 'spouse.' In addition to spouses who are married, the concept of spouse covers two other relationships. It is now possible for persons who are in a relationship as a couple (regardless of their sex) to register the relationship and they will be treated as a spouse for the purposes of intestate succession.⁷⁶ Persons who are in a *de facto* relationship (which is an unmarried and unregistered relationship) will be entitled to take the spousal share of

⁶³ *Succession Act 2006* (NSW) [*Succession Act 2006*].

⁶⁴ *Real Estate of Intestates Distribution Act 1862* (NSW).

⁶⁵ *Wills, Probate and Administration Act 1898* (NSW) amended by the *Administration of Estates Act 1954* (NSW) and the *Wills, Probate and Administration (Amendment) Act 1977* (NSW). For a helpful discussion and summary of the 1977 legislation, see G.L. Certoma, "Intestacy in New South Wales: The 1977 Statutory Amendments" (1979) 53 *The Australian Law Journal* 77.

⁶⁶ Croucher & Vines, *supra* note 60 at C. 2.

⁶⁷ *Adoption of Children Act 1965* (NSW) later repealed and followed in this regard by the *Adoption Act 2000* (NSW), s. 95.

⁶⁸ *Marriage Act 1961* (Cth.) ss. 89-90, 91.

⁶⁹ *Status of Children Act 1996* (NSW) ss. 5, 8.

⁷⁰ In regard to artificial insemination: *Status of Children Act 1996* (NSW), s. 14.

⁷¹ *Wills, Probate and Administration Act 1898* (NSW), ss. 61A(2), 61B(3A), 61B(3B).

⁷² Tasmania has implemented similar intestacy provisions: *Intestacy Act 2010* (Tas.).

⁷³ *Succession Amendment (Family Provision) Act 2008* (NSW).

⁷⁴ The intestacy provisions were introduced by the *Succession Amendment (Intestacy) Act 2009* (NSW).

⁷⁵ *NSW Law Reform Commission Report*, *supra* note 62.

⁷⁶ *Relationships Register Act 2010* (NSW), ss. 3-6. Note also the *Succession Act 2006*, *supra* note 63, s. 105.

the intestate's estate if it can be proven that the relationship was in existence for a continuous period of at least two years prior to the intestate's death or resulted in the birth of a child.⁷⁷

The position of spouses has been significantly strengthened, whereas the interests of blood relatives including the intestate's issue have been correspondingly weakened. A surviving spouse (broadly defined) takes priority over all other classes of otherwise eligible persons, including the intestate's issue. When there is a surviving spouse, but no issue of the intestate, then the spouse is entitled to the whole of the estate.⁷⁸ When the intestate is survived by a spouse and issue (who are related to the spouse and intestate), the spouse will be entitled to the entire estate.⁷⁹ In the event that the intestate is survived by issue but not a spouse, then the issue will be entitled to the whole of the estate; and when there is more than one, they will take equally.⁸⁰

The legislation also implemented several other innovations. First, the legislation takes into account the possibility that there may be multiple spouses because the concept of 'spouse' is broadly defined. For example, the intestate may have remained married, but also lived in a *de facto* relationship prior to his or her death. The multiple surviving 'spouses' take the estate in equal shares, unless they have entered into a distribution agreement or the court has made a distribution order.⁸¹ Importantly, when there are surviving issue of the intestate and surviving multiple spouses, such issue are not entitled to a share of the intestate's estate.⁸²

Second, in the event that there are surviving issue of the intestate who are not the issue of the intestate and the surviving spouse (or the multiple spouses), then such issue are entitled to a portion of the intestate's estate depending upon the size of the estate. Therefore, a spouse will be entitled to the intestate's personal effects (but, for example, not property used exclusively for business purpose and interests in land),⁸³ a statutory legacy (which is \$350,000 adjusted under a complex formula relying on the consumer price index)⁸⁴ and one half of the remainder (if any) of the estate.⁸⁵ The spouse has the right to elect to acquire specific property from the estate.⁸⁶

Third, the legislation takes into account that the pattern of distribution for indigenous Australians may be different from the prescribed scheme.⁸⁷

In the event that there are no surviving spouses or issue, then the intestate estate will be distributed in accordance with a list of relatives which are determined by their proximity to the intestate. The list commences with the intestate's parents,⁸⁸ then the intestate's siblings (including their children on a *per stirpes* basis),⁸⁹ the intestate's

⁷⁷ *Succession Act 2006*, *supra* note 63, s. 105.

⁷⁸ *Ibid.*, s. 111.

⁷⁹ *Ibid.*, s. 112.

⁸⁰ *Ibid.*, ss. 127(1) & 127(3).

⁸¹ *Ibid.*, s. 125.

⁸² *Ibid.*, s. 123.

⁸³ *Ibid.*, s. 101.

⁸⁴ *Ibid.*, s. 106.

⁸⁵ *Ibid.*, s. 113.

⁸⁶ *Ibid.*, ss. 115, 121.

⁸⁷ *Ibid.*, Part 4.4. This will not be further discussed as the legislation requires evidence and consideration of the practices of the individual community or group to which the indigenous intestate belonged.

⁸⁸ *Ibid.*, s. 128.

⁸⁹ *Ibid.*, s. 129.

grandparents⁹⁰ and the intestate's aunts and uncles (including their children who would take on a *per stirpes* basis, but no remoter issue).⁹¹ There is no distinction made between relationships of the whole and half-blood (for the purpose of siblings and aunts and uncles).⁹² The doctrine of hotchpot remains abolished⁹³ having been abolished by earlier legislation.⁹⁴

3. *Law Reform: NSW Law Reform Commission, Uniform Succession Laws: Intestacy*⁹⁵

One of the potential weaknesses of Australian intestate succession is that the states and territories (rather than the Commonwealth) have jurisdiction over this area. In order to address this, there has been an ongoing uniform succession law project. The law reform report issued by the NSW Law Reform Commission formed part of this Australia-wide project. The reforms in the *Succession Act 2006* are based on this report and do not simply represent the informed decision-making of the NSW Parliament. The Report is the culmination of a thorough review of intestacy law and embodies at a high level the desired direction of intestacy law in Australia.

In this regard, there are three important points. First, the Report generally adopted what was the central proposition of the English Law Commission's 1989 Report: a spouse-focused or 'all to spouse' scheme.⁹⁶ The backdrop to the NSW Law Reform Commission's Report was the view that the pivotal family relationship was that between the spouse (broadly defined) and the intestate. It was only when there was no surviving spouse, that issue or collateral relatives would be entitled to the intestate estate. Indeed, the inheritance of children and issue under the intestacy rules in NSW are considered in the context of collateral relatives.⁹⁷

Second, unlike the English Law Commission in 1989, the NSW Law Reform Commission made some concessions to any of the intestate's issue who were not also the issue of the surviving spouse. The general concern was (and remains) that in an 'all to spouse' scheme the surviving spouse will not give property to persons who are the issue of the intestate, but who are not related to the surviving spouse.⁹⁸ As these persons would not be defined as the children or issue of the surviving spouse for intestacy purposes, it is possible that they would not inherit any assets on the death of the surviving spouse. Accordingly, the Commission modified the 'all to spouse' scheme. The spouse would be entitled to all of the intestate's tangible property or personal effects (except, for example, those which existed for business purposes or were interests in land);⁹⁹ a statutory legacy (\$350,000

⁹⁰ *Ibid.*, s. 130.

⁹¹ *Ibid.*, s. 131.

⁹² *Ibid.*, s. 101.

⁹³ *Ibid.*, s. 140.

⁹⁴ *Wills, Probate and Administration (Amendment) Act 1977* (NSW).

⁹⁵ *NSW Law Reform Commission Report*, *supra* note 62.

⁹⁶ *Ibid.*, at paras. 3.73-3.74; Recommendation 4.

⁹⁷ *Succession Act 2006*, *supra* note 63, Part 4.3, in which the entitlement of children is under the heading "Distribution among Relatives".

⁹⁸ *2011 Law Commission Intestacy and Family Provision Claims on Death Report*, *supra* note 30 at para. 2.67; *NSW Law Reform Commission Report*, *supra* note 62 at para. 3.74.

⁹⁹ *NSW Law Reform Commission Report*, *ibid.* at paras. 4.1-4.30; Recommendation 5.

subject to a complicated formula for indexation) and interest¹⁰⁰ and one-half of the remaining estate absolutely.¹⁰¹ Similar to the present English law and English Law Commission's later proposals,¹⁰² after the spouse had been accorded his or her entitlement, such issue would be entitled to any remaining portion of the intestate estate, if the estate was sufficiently large.¹⁰³

Third, for the NSW Law Reform Commission, the surviving spouse is entitled to special claims to the estate because of a number of factors,¹⁰⁴ including demographic developments.¹⁰⁵ The typical intestate would be a person who was likely to be older and it was probable that the typical surviving spouse would be an older woman who would need the assets from the relationship to cover the costs of retirement and aged care¹⁰⁶ (subject to any obligations which the intestate may have had to the children from other relationships).¹⁰⁷ In contrast, the children of the relationship (who would be likely to be independent adults) would probably have no immediate financial needs from the estate, but could have an entitlement when the surviving parent died.

Notwithstanding the differences between recent English and Australian law reform proposals, it is clear that the spousal relationship (broadly defined) is the primary familial relationship for intestacy purposes and that in light of the ageing of the population, law reformers have considered it appropriate that ageing spouses acquire the entire or an ample share of the intestate estate for retirement expenses and aged care.

III. SINGAPOREAN INTESTACY LAW

In order to compare and contrast the intestacy law in England and Australia with that operating in Singapore, several introductory observations will be made, followed by a description of the *ISA*.

A. Initial Observations and Early Colonial History

1. A Bifurcated System

Singapore has a bifurcated intestate succession law based on religious beliefs. There are the *ISA* (which will be discussed in this article) and the Muslim law of succession which operates in Singapore and is recognised under the statute.¹⁰⁸ The Muslim law has its own tradition and inherent policy which will not be considered here.¹⁰⁹

¹⁰⁰ *Ibid.*, at paras. 4.31-4.61; Recommendation 6.

¹⁰¹ *Ibid.*, Recommendation 8.

¹⁰² *2011 Law Commission Intestacy and Family Provision Claims on Death Report*, *supra* note 30 at para. 2.154.

¹⁰³ *Ibid.*, at paras. 3.73-3.78, 4.69-4.73; Recommendation 8.

¹⁰⁴ *Ibid.*, at paras. 1.40, 3.35.

¹⁰⁵ *Ibid.*, at para. 1.37.

¹⁰⁶ *Ibid.*, at paras. 3.23-3.25.

¹⁰⁷ *Ibid.*, at paras. 3.47-3.66, 3.73-3.76.

¹⁰⁸ *ISA*, *supra* note 3, s. 2.

¹⁰⁹ Mahinder Singh Sidhu, *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* (Kuala Lumpur: International Law Book Services, 1998) at C. 25, particularly 298-303; 307-313.

England does not have a bifurcated system of intestate succession, although the United Kingdom does, because the Scots have their own intestacy law which is very different from the English scheme.¹¹⁰ In Australia, there is not only the different state and territory laws, but there has also been an attempt to take into account the requirements of indigenous Australians. NSW has special provisions in relation to the intestate estate of indigenous Australians¹¹¹ and other states have implemented special provisions.¹¹²

2. Intestate Succession prior to the ISA

In order to appreciate the *ISA*, it is necessary to review briefly the law of intestate succession during the British colonial period. Although the extent and nature of the reception of English law into the colony of Singapore has been the subject of debate,¹¹³ it was definitively settled that the English law of intestacy applied in Singapore. Initially, it was held that the distinctive common law rules applicable to the inheritance of realty applied.¹¹⁴ However, these rules were replaced by the *Statute of Distributions 1670*¹¹⁵ which the courts applied to realty and personalty equally.¹¹⁶ Therefore, the colonial law of intestacy achieved by the first-half of the 19th century, what English law would only accomplish in 1925: the unified operation of intestacy rules to realty and personalty.

Although the relevance of the *Statute of Distributions 1670* was not in doubt, how it was applied became an important issue in the colony's jurisprudence. Judges had to administer the English law in the context of Chinese legal customs. From 1836, the Chinese formed the majority of the population in Singapore¹¹⁷ and their approach to inheritance was different from that in the *Statute of Distributions 1670*. For the purposes of this discussion, there were several important principles in the Chinese system. Women and girls were excluded from the line of succession,¹¹⁸ although they were provided for within the family.¹¹⁹ Instead, the Chinese practised a form of polygamy and adoption in order to ensure that the family continued through the succession of a male head of household. The eldest son of the principal wife inherited first, receiving an additional share for the perpetuation of ancestor worship.

¹¹⁰ *Succession (Scotland) Act 1964* (U.K.), 1964, c. 41.

¹¹¹ *Succession Act 2006*, *supra* note 63, Part 4.4.

¹¹² Croucher & Vines, *supra* note 60 at para. 5.15.

¹¹³ Michael F. Rutter, *The Applicable Law in Singapore and Malaysia* (Singapore: Malayan Law Journal Pte Ltd, 1989) at 1-17; Phang, *supra* note 2 at 34-51; George Wells Bartholomew, "English Statutes in Singapore Courts" (1991) 3 Sing. Ac. L.J.

¹¹⁴ *Moraiss and Others v. De Souza* (1838) 1 Kyshe Reports 27 and *Chia Keng Siew v. Chia Ann Siew and Others* [1889] 1 Straits Law Journal 146.

¹¹⁵ Part II (A)(1).

¹¹⁶ *The Indian Act XX* of 1837 (which applied to Singapore at the time) provided that all immoveable property owned by an intestate would be treated as chattels real rather than as freehold. While the *Indian Act XX* was repealed by the *Conveyancing and Law of Property Ordinance VI* of 1886, the Ordinance replicated in substance the earlier effect of the Act: Roland St John Braddell, *The Law of the Straits Settlements: A Commentary* (Kuala Lumpur: Oxford University Press, 1982) at 32-33; William Napier, "An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements" (1974) 16 Malaya Law Review 4 at 33-34.

¹¹⁷ Phang, *supra* note 2 at 29.

¹¹⁸ Paula Aronowitz, "Chinese Succession Laws: An Historical Survey" (1966-1967) 2 Portia Law Journal 265 at 269.

¹¹⁹ *Ibid.*, at 276.

Other sons received equal shares.¹²⁰ However, even when the principal wife did not produce a son, it is likely that the husband would have had one or more concubines. In the event that there was more than one concubine, then the sons would inherit in accordance to their order of birth.¹²¹ Even an illegitimate son (that is a son who did not form part of the household) was entitled to succeed and inherit when there were no legitimate or adopted sons.¹²² When there were no male heirs through the wife or concubines, it was necessary for a son to be adopted in order to continue the male line and ultimately, the family.¹²³ Another important feature of Chinese custom was the strong deference to parents and elders. For example, although a widow would not inherit any portion of the deceased husband's estate, she was accorded respect and had considerable influence in decision-making regarding the family and its property.¹²⁴ In contrast, the earlier English system of intestacy inheritance allowed widows and other female members to inherit a portion of intestate's estate (usually personalty), although the notion of family was more strictly tied to blood relatives, so that adopted and illegitimate children (born out of wedlock) were not entitled to inherit from the estate. However, as discussed above,¹²⁵ this has changed in modern English law.

During the British colonial period, the English law and values prevailed notwithstanding the ethnic group involved,¹²⁶ although there was some accommodation of the ethnic and religious values of minorities.¹²⁷ In relation to the Chinese majority, the courts held that the *Statute of Distributions 1670* was the only scheme recognised for the distribution of intestate estates.¹²⁸ Widows¹²⁹ and other female relatives were entitled to a share of the intestate's estate. Moreover, the Chinese custom of adoption was not recognised for intestacy purposes¹³⁰ (notwithstanding the expressed dissatisfaction of the Chinese community)¹³¹ and illegitimate children were not entitled to inherit.¹³² Nevertheless, the Chinese custom of polygamy was recognised.¹³³ Widows and concubines were entitled to inherit equally a portion of the widow's share.¹³⁴ It has been suggested that as matter of smooth administration, it made sense to recognise polygamy because it affected a large portion of the Chinese population, whereas the modification of Chinese custom by the application of the *Statute*

¹²⁰ Maurice Freedman, "Colonial Law and Chinese Society" (1950) 80 *Journal of the Royal Anthropological Institute* 97 at 115.

¹²¹ Aronowitz, *supra* note 118 at 269-270.

¹²² *Ibid.*, at 276.

¹²³ *Ibid.*, at 270-272. As to the distribution between blood related and adopted sons see: Freedman, *supra* note 120 at 115.

¹²⁴ Aronowitz, *supra* note 118 at 272, 278.

¹²⁵ In Part II (B)(3).

¹²⁶ For the Islamic religious tradition, note *Tengah Chee Nachiar v. Nacodah Merican* (1887) 4 Ky 265.

¹²⁷ *Ibid.* In relation to the Parsees: *Parsee Intestate Succession Ordinance* of 1865; and Braddell, *supra* note 116 at 96.

¹²⁸ *Lee Joo Neo v. Lee Eng Swee* (1887) 4 Ky 325.

¹²⁹ *In the Goods of Lao Leong Ann* (1867) 1 S.S.L.R. 1.

¹³⁰ *In Re Chu Sian Long's Estate* (1843) WOC 11; *Khoo Tiang Bee v Tan Beng Guat* (1877) 1 Ky 413; Braddell, *supra* note 116 at 86-87.

¹³¹ Kenneth K.S. Wee, "English and Chinese Family Custom in Singapore: The Problem of Fairness and Adjudication" (1974) 16 M.L.R. 52 at 71-74; Freedman, *supra* note 120 at 98 & 112.

¹³² Freedman, *supra* note 120 at 115.

¹³³ *Choo Ang Chee v. Neo Chau Neo* (1908) 12 S.S.L.R. 120.

¹³⁴ *In the Goods of Lao Leong Ann* (1867) 1 S.S.L.R. 1; *Lee Joo Neo v. Lee Eng Swee* (1887) 4 Ky 325; *Choo Ang Chee v. Neo Chau Neo* (1908) 12 S.S.L.R. 120; Braddell, *supra* note 116 at 86-87.

of *Distributions 1670* had an impact on only a tiny minority of the Chinese population who were wealthy.¹³⁵

3. *The History of the ISA*

The present Singaporean legislation, the *ISA* was implemented on 2nd June 1967. The law reform which led to the *ISA* appears to have been uncontroversial. The *Report of the Select Committee on the Intestate Succession Bill*, observed that although the public had been invited to make comments on the Bill, no written representations were received.¹³⁶ The Committee did not recommend amendments to the Bill and the recorded comments of the Committee shed no light on its policy goals or assumptions.¹³⁷ However, this is not to say that the *ISA* does not contain some inherent assumptions and attitudes about how family relationships and intestacy ought to work. Indeed, it will be suggested that there are links between Singapore's colonial intestacy law and the present *ISA*.¹³⁸ The *ISA* is short and succinct, contained in a little over 2 ½ pages; while the intestacy provisions of the *Succession Act 2006* (NSW) are about 10 ½ pages long.

4. *Law Reform?*

From the public sources available, there appears to have been no amendments to the Act since 1967. It appears that in contrast to England and Australia, the question of reforming intestacy law has not received much ongoing consideration in Singapore. Academic commentary on intestacy in Singapore appears to be rather scarce. Moreover, the commentary that exists appears to be descriptive, rather than a critical analysis of the law.¹³⁹ Finally, to the extent that the legislation has been subject to litigation, it appears that the main contentious areas have been the eligibility of potential relatives, particularly illegitimate and foster children,¹⁴⁰ and the entitlement of relatives of the half-blood.¹⁴¹

B. *The ISA*

1. *The Scheme of the ISA*

The *ISA* contains nine rules for distributing the intestate estate and some general provisions which will be applicable whatever particular rule applies. For the purposes

¹³⁵ Phang, *supra* note 2 at 56-57.

¹³⁶ *Report of the Select Committee on the Intestate Succession Bill* (7 March 1967) paras. 1, 2.

¹³⁷ *Ibid.*, Minutes of Proceedings of the Select Committee on the Intestate Succession Bill, A1-2.

¹³⁸ See Part III (B) (2).

¹³⁹ Sidhu, *supra* note 109 at 297-298, 305-307.

¹⁴⁰ *Lim Weipin v. Lim Boh Chuan* [2010] 3 S.L.R. 423 [*Lim Weipin*]. For the *Inheritance (Family Provision) Act* (Cap. 138, 1985 Rev. Ed. Sing.) [*IFPA*], note *AAG v. Estate of AAH, deceased* [2010] 1 S.L.R. 769 [*Estate of AAH*].

¹⁴¹ *Chng Heng Tee (alias Cheng Kim Tee) v. Estate & Trust Agencies (1927) Ltd (Ho Hong Bee Christina (executrix of the estate of Kog Tek Heng, deceased), intervener)* [2010] 1 S.L.R. 681 [*Chng Heng Tee*].

of this article, the salient rules for distribution are:

First, if the intestate dies leaving a spouse, no issue and no parent, the spouse is entitled to the entire estate.¹⁴²

Second, if the intestate dies leaving a surviving spouse and issue, the spouse is entitled to one-half of the estate.¹⁴³ The distribution between the issue is by equal portions *per stirpes*;¹⁴⁴ as is the distribution between remoter issue standing in the place of their parent.¹⁴⁵

Third if the intestate dies leaving a surviving spouse and no issue but a parent or parents, the spouse is entitled to one-half of the estate and the parent(s) are entitled to the other half of the estate.¹⁴⁶

Fourth, if there is neither surviving issue nor a surviving spouse, then the surviving parent(s) will take the estate and if more than one parent survives, they will take in equal shares.¹⁴⁷

Fifth, if there is no surviving spouse, issue or parent, then the siblings of the intestate will share the estate in equal portions and the children of the deceased siblings will take according to their stocks (*per stirpes*) the share which the deceased sibling would have taken.¹⁴⁸

Sixth, if there is no surviving spouse, issue, parents, siblings or children of the siblings, then the grandparents will take the estate in equal portions.¹⁴⁹ If there are no grandparents, then the intestate's uncles or aunts will take the estate in equal portions.¹⁵⁰

Finally, if there are no surviving relatives according to the truncated scheme, then the Government is entitled to the whole of the estate.¹⁵¹

One apparent oversight in the explicit statement of inheritance is: what is the situation when there is no surviving spouse, but there are surviving issue? Reading Rule 3, it appears that the surviving issue inherit the estate, subject to rights of the surviving spouse. Accordingly, when there is no surviving spouse, the issue inherit the entire estate *per stirpes*. Moreover, on a reading of Rules 3 and 5, if there are only issue and parents surviving the intestate, the issue inherit the entire estate.

The ISA provides that there will be no distinction between persons who are related to the deceased through his (or her) father or mother.¹⁵² Those related by half-blood will rank immediately (in priority)¹⁵³ after those of the whole blood related to the intestate by the same degree.¹⁵⁴ The doctrine of hotchpot is effectively abolished¹⁵⁵ and children who were only conceived in the womb at the intestate's death will

¹⁴² ISA, *supra* note 3, s. 7, r. 1.

¹⁴³ *Ibid.*, s. 7, r. 2.

¹⁴⁴ *Ibid.*, s. 7, r. 3.

¹⁴⁵ *Ibid.*, s. 7, r. 3, proviso no. 2.

¹⁴⁶ *Ibid.*, s. 7, r. 4.

¹⁴⁷ *Ibid.*, s. 7, r. 5. This is the effect of r. 5 which is stated to be subject to r. 4.

¹⁴⁸ *Ibid.*, s. 7, r. 6.

¹⁴⁹ *Ibid.*, s. 7, r. 7.

¹⁵⁰ *Ibid.*, s. 7, r. 8.

¹⁵¹ *Ibid.*, s. 7, r. 9.

¹⁵² *Ibid.*, s. 6(a).

¹⁵³ *Chng Heng Tee*, *supra* note 141.

¹⁵⁴ ISA, *supra* note 3, s. 6(b); *Re Fenton* [1993] 3 S.L.R.(R.) 812.

¹⁵⁵ ISA, *supra* note 3, s. 9.

also be entitled to inherit from the estate.¹⁵⁶ While the Act entitles legitimate and adopted¹⁵⁷ children to inherit,¹⁵⁸ foster children and illegitimate children are not entitled to inherit under the Act.¹⁵⁹

In addition, the *Legitimacy Act*, gives rights to legitimated persons and their issue in regard to their intestate parent's estate.¹⁶⁰

A child who remains illegitimate is entitled to the intestate estate of his or her mother in the event that the mother does not leave any legitimate children. The illegitimate child takes the estate as if he or she were the legitimate child of the mother.¹⁶¹

When an intestate leaves more than one wife, the surviving wives share equally the portion to which the wife of the intestate would have been entitled, if the intestate had left only one wife.¹⁶²

2. Influences and values

As stated previously, the *Report of the Select Committee on the Intestate Succession Bill* sheds no light on the influences and values behind the framing of the *ISA*. Nevertheless, in light of the previous history of intestacy in Singapore, it is arguable that several trends are apparent.

In 1967, the *ISA* represented a significant break from the colonial past and the development of an autochthonous legal system sensitive to Singapore's cultural and social heritage and economic needs.¹⁶³ The *Statute of Distributions 1670* and the English approach were no longer appropriate and were replaced by a bifurcated system which applied the Muslim law of inheritance to Muslims and the *ISA* to non-Muslims.

As the *ISA* dealt with the intestate succession of non-Muslims, the Committee framed rules which apportioned the estate taking into account the traditional custom of the Chinese majority. In particular, three features stand out. One is that there is a specific provision which recognises and deals with polygamy, particularly as polygamy remained an important Chinese custom when the Act was implemented.¹⁶⁴ Another is the recognition of the interests of older members of the family and a child's duty to his or her parents. The *ISA* provides for a parent's entitlement to a portion of the estate in the event that there is neither a surviving spouse nor a surviving child. Accordingly, the most important members of an intestate's family are not only the immediate lineal descendants, but also the immediate lineal ascendants. Finally, adopted children are accorded the same rights as children related by blood, although it ought to be noted that by 1967, English law also recognised the entitlements of

¹⁵⁶ *Ibid.*, s. 6(a).

¹⁵⁷ See *Adoption of Children Act* (Cap. 4, 2012 Rev. Ed. Sing.).

¹⁵⁸ *ISA*, *supra* note 3, s. 3.

¹⁵⁹ *Lim Weipin*, *supra* note 140. For the *IFPA*, see *Estate of AAH*, *supra* note 140.

¹⁶⁰ *Legitimacy Act* (Cap. 162, 1985 Rev. Ed. Sing.), ss. 5, 6 [*Legitimacy Act*].

¹⁶¹ *Ibid.*, s. 10.

¹⁶² *ISA*, *supra* note 3, s. 8. Sidhu, *supra* note 109 at 297-298, points out that a person married in the Christian religion is unable to marry a second wife.

¹⁶³ Andrew Phang, "Of Generality and Specificity: A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System" (1989) 1 Sing. Ac. L.J. 68; Phang, *supra* note 2 at 41, 91-96.

¹⁶⁴ Phang, *supra* note 2 at 278-279.

adopted children in intestacy (for the purpose of recognising the equality of children rather than simply as a means of finding a legal heir to the family assets).

An issue is the extent to which the *Statute of Distributions 1670* made a mark on the modern Singaporean system of intestate succession without undermining the desire to create an autochthonous legal system. While the Committee did not comment on the influence of the *Statute*, some of the features of the modern system are consistent with the colonial application of the *Statute* and were arguably examples of the westernisation of Singaporean law. Realty and personalty are distributed under the same rules. Widows and other female relatives are entitled to inherit under the *ISA*. When there are a surviving spouse and children, the *ISA* provides that both groups will take a share of the estate. When there are any traditional polygamous relationships, the surviving wives will be entitled to an equal share of the widow's portion of the intestate estate. Finally, illegitimate children are not entitled to inherit a portion of the estate (in contrast to the modern approach to illegitimate or ex-nuptial children in English and Australian law).¹⁶⁵

However, modern Singaporean intestacy law was also arguably influenced by other modernising influences, particularly the changes in Chinese law. By the time the Select Committee framed the *ISA*, Chinese intestacy law had markedly changed, so that traditional practices such as polygamy (which was still evident in Singapore in 1967)¹⁶⁶ were no longer recognised in China.¹⁶⁷ Nevertheless, the reform of Singaporean intestate succession was broadly consistent with the shift in China from the system of traditional inheritance to a system in which females inherited equally with male counterparts and the spouse held the dominant position as inheritor, but would share the intestate estate with other specifically designated family members, such as the intestate's children and parent(s).¹⁶⁸

C. A Contrast and Comparison of Singaporean, English and Australian Intestacy Law

There are some similarities of approach between the three intestacy schemes which have been considered in this article. One is that there is (as a general rule) a unified treatment of realty and personalty. Another is that the potential beneficiaries are treated equally whatever their gender, subject to polygamy.¹⁶⁹ In all three jurisdictions, hotchpot has been abolished, although it still operates in several Australian states.¹⁷⁰

However, there are also some marked differences between Singaporean law and English and Australian law.

¹⁶⁵ See *Lim Weipin*, *supra* note 140 and *Estate of AAH* *supra* note 140.

¹⁶⁶ Phang, *supra* note 2 at 279. Although beyond the scope of this article, it is important to note the importance of the *Women's Charter* (Cap. 353, 2009 Rev. Ed. Sing.): The Charter introduced a system of monogamous marriage and modern divorce.

¹⁶⁷ See Phang, *supra* note 2 at 281-282.

¹⁶⁸ Freedman, *supra* note 120 at 115; Aronowitz, *supra* note 118 at 284-285.

¹⁶⁹ *ISA*, *supra* note 3, s. 8.

¹⁷⁰ Ken Mackie, *Principles of Australian Succession Law* (Sydney: LexisNexis Butterworths, 2007) at para. 9.15.

First, in Australia it is possible for *de facto* spouses,¹⁷¹ (and in some cases same-sex couples)¹⁷² and illegitimate (or ex-nuptial) children¹⁷³ to be eligible for a distribution from the intestate estate. In England, registered same-sex couples are entitled to the spouse's share in intestacy distribution,¹⁷⁴ and the entitlement of *de facto* spouses (or cohabitants) has been proposed.¹⁷⁵ The intestate's illegitimate children are entitled to share in the intestate estate.¹⁷⁶ In Singapore, neither *de facto* spouses nor same-sex couples are entitled to a share of an intestate estate; and it has been held that illegitimate children have no standing in the distribution of an intestate estate.¹⁷⁷

Second, in contrast to Australian law,¹⁷⁸ Singaporean law does differentiate, for the purposes of priority, between the intestate's full-blood and half-blood relatives.

Third, unlike England or a number of states and territories in Australia, there is no fragmentation of assets (particularly in favour of the spouse) in the Singaporean scheme. In Singapore, the beneficiaries are entitled to a portion of the assets and the *ISA* does not provide a right to make an application to the court for a special entitlement to parts of the intestate estate.

Fourth, in contrast to England and Australia, it could not be said that the Singaporean scheme was 'spouse-focused.' On the other hand, it could not be argued that the interests of the spouse are ignored. The surviving spouse will acquire one-half of the estate when the deceased's issue or parents survive the intestate. However, the interests and well-being of the spouse is not given the same practical prominence and protection as in England and Australia. The spouse does not have a prior claim to certain assets of the intestate and the spouse does not automatically acquire certain assets from the estate up to a prescribed statutory value. Instead, the spouse's entitlement will be solely determined by the full value of the estate. Moreover, unlike England or Australia, when the intestate's issue or parents survive, the surviving spouse will never be able (in both legal and practical terms) to inherit the entire estate.

Fifth, the interests of other close lineal relatives are given greater prominence than in the English and Australian schemes, particularly the NSW scheme. In England, lineal descendants are entitled to inherit. However, the practical effect of the English scheme is that when there is a surviving spouse, it is less likely that surviving children will inherit anything from the estate (unless the intestate estate is a sufficiently large one). Parents will inherit from the intestate estate when there is neither a surviving spouse nor a surviving child. In NSW, when the intestate is survived by a spouse (broadly defined), the issue and parents of the intestate will not inherit from the estate. The one exception is when the issue of the intestate are not the issue of the surviving spouse—but even here it is less likely that such issue will inherit unless the estate

¹⁷¹ *Ibid.*, at para. 9.3.

¹⁷² In NSW, the legislation is the *Relationships Register Act 2010* (NSW). Note that there is also the recognition of same-sex couples in the *Civil Unions Act 2012* (A.C.T.).

¹⁷³ In relation to ex-nuptial children: Mackie, *supra* note 170 at para. 9.9.

¹⁷⁴ *Civil Partnership Act 2004*, *supra* note 35, s. 71 & Schedule 4.

¹⁷⁵ *2011 Law Commission Intestacy and Family Provision Claims on Death Report*, *supra* note 30 at Part 8; Recommendations 9.26-9.32.

¹⁷⁶ *Legitimacy Act 1976*, *supra* note 38, ss. 5(1)-(4), 10(1).

¹⁷⁷ *Lim Weipin*, *supra* note 140.

¹⁷⁸ The difference between full-blood and half-blood relatives was finally abolished in NSW under the *Succession Act 2006*, s. 101. For a consideration of the other states: Croucher & Vines, *supra* note 60 at para. 5.39.

is a relatively large one. Under the Singapore scheme, the interests of immediate descendants and ascendants are given great weight. When there are a spouse and surviving issue, the surviving issue will automatically inherit one-half of the estate so long as the issue are legitimate, legitimated or adopted. When there are a spouse and a surviving parent, the surviving parent will automatically inherit one-half of the estate, presumably so long as the relationship is legitimate, legitimated or the intestate was adopted.

Sixth, Singaporean law accords parents significant entitlements, compared to the English and NSW schemes. In Singapore, when the intestate is survived by a spouse and issue, the parents do not appear to inherit any assets from the estate. However, in the event that the intestate is survived by a spouse and parents, then the parents will be entitled to one-half of the estate. When there is no surviving spouse or issue, the surviving parent or parents will inherit the entire estate. In contrast for example, in NSW when there are a surviving spouse and a surviving parent, the spouse will generally inherit the entire estate unless the estate is a large one and there are surviving issue from relationships other than that between the intestate and the spouse. When the intestate is survived by issue (but not a spouse), the issue will inherit the entire estate: they rank ahead of the parents in the scheme of distribution.¹⁷⁹ However, when there is neither a surviving spouse nor issue, the parents will inherit the intestate estate.¹⁸⁰ In this regard, the practical outcome of the NSW and Singaporean schemes would be the same.

Finally in light of the distribution between spouses, descendants and parents in the Singaporean scheme, it is likely that there would be some family disputes about how and what assets are to be distributed to family members. In terms of proportions, the assets and values would be easily ascertained (subject to whether there were disputes about jointly owned assets or superannuation). However, as none of the assets would be protected for various members of a certain status within the family, this could mean for example, that the family home could have to be sold to pay out the children their share in the estate. In contrast, one of the concerns of the English and Australian law reformers has been the creation of relatively simple distribution schemes and the protection of the family home in the hands of the spouse—so that the spouse is not pressured into selling the home to pay out the children's share of the estate.¹⁸¹

D. Ageing and the Singaporean ISA

In contrast to the evolving English and Australian schemes, it is arguable that the Singaporean scheme was not implemented with the ageing of the population in mind. Certainly, it could not be said that the aged spouse has been accorded any special status or entitlement compared to the intestate's issue or parents. Nevertheless, it is arguable that Singapore tackles the ageing issue in a way which is different from that evident in Australia and England. It is submitted that this is grounded in the different kind of family relationships upon which the Singaporean scheme is based.

¹⁷⁹ *Succession Act 2006*, *supra* note 63, s. 127.

¹⁸⁰ *Ibid.*, s. 128.

¹⁸¹ *2009 England Law Commission Consultation Paper*, *supra* note 1 at paras. 3.22-3.28.

Immediate lineal relatives have a special place in the intestacy scheme, because they appear to be intrinsic to the notion of the immediate family.

There can be no doubt that the intestate owes obligations to the spouse. Therefore, when there is neither issue nor parents, the spouse inherits the entire estate. The Singaporean scheme acknowledges the entitlement of the spouse and the legitimate, legitimated and adopted descendants. In so doing, it recognises the ongoing obligation of the intestate to both the spouse and his or her issue—a notion which is significantly reduced in the English scheme where children only inherit in practical terms when there is no spouse (broadly defined) or the value of the estate is large, and almost lost in NSW unless there is no surviving spouse or the surviving issue are children from relationships other than that of the surviving spouse and the intestate. Moreover, unlike the English and Australian schemes, the Singaporean scheme is infused with the Chinese sense of obligation and responsibility to parents. Therefore, the *ISA* also acknowledges the obligations of the intestate to his or her parents much earlier in the distribution chain. When there is a spouse, but no issue, half of the intestate estate devolves to the surviving parent(s). Therefore, the aged members of the family inherit from the estate: an ageing spouse and an aged parent would be entitled to the intestate's assets. In short, the Singaporean scheme acknowledges two predominant aged groups early in the distribution scheme.

In the event that an intestate is survived by a spouse and issue, then the spouse can only inherit one-half of the estate: the issue inherit the other half of the estate. Therefore, generally the issue acquire assets from the deceased parent earlier than their counterparts in England and Australia. Moreover, the issue in England and Australia will be dependent upon the surviving spouse making a gift in their favour in a will or the intestacy rules operating in their favour in light of the value of the estate. However, it is arguable that the issue in Singapore who inherit one-half of the estate do so subject to important obligations to their surviving parent (who is the spouse of the intestate). These obligations are given legislative effect in the *Maintenance of Parents Act*.¹⁸² Under this legislation a parent domiciled and resident in Singapore who is or above 60 years of age and who is unable to maintain himself or herself adequately may apply to the Tribunal for the Maintenance of Parents for an order that one or more of his or her children pay him or her a monthly allowance or any other periodical payment or a lump sum for his or her maintenance.¹⁸³ Under the legislation, the concept of 'child' includes an illegitimate, adopted and step-child.¹⁸⁴ While the range of children who are liable under the scheme are broader than those entitled under the intestacy scheme, it is arguable that there is a correlation between the obligation of the parent to the child enshrined in intestacy distribution on the one hand; and the obligation of the child to the parent (particularly the surviving parent) preserved in the *MPA*. It is interesting to observe that in countries such as England and Australia where the surviving issue of the intestate are less likely to inherit any part of the intestate estate (unless the value of the estate is significant) there is no comparable legislation to the *MPA*.¹⁸⁵

¹⁸² (Cap. 167B, 1996 Rev. Ed. Sing.) [*MPA*].

¹⁸³ *Ibid.*, s 3(1). The legislation has been used: Locknie Hsu, "The Law and the Elderly in Singapore—The Law on Income and Maintenance for the Elderly" (2003) Sing. J.L.S. 398 at 416 fn 63.

¹⁸⁴ *MPA*, *supra* note 182, s 2.

¹⁸⁵ Another factor which would be important in determining the need for and level of parental care and maintenance would be the availability of a publicly funded pension scheme, such as that presently available in Australia. This paper will not consider this issue.

It possible that under the Singaporean scheme, the parents will not inherit any portion of the estate: when the intestate leaves a surviving spouse and issue or simply issue. It is only when the intestate dies leaving a surviving spouse and no issue or when there are no issue and no surviving spouse, that the parents respectively inherit half or the entire estate.¹⁸⁶ Accordingly, the question is whether the parent who does not inherit under the *ISA* could have recourse to the *Inheritance (Family Provision) Act*.¹⁸⁷ The short answer is ‘no’. Only spouses or children in certain circumstances are able to make an application for family provision.¹⁸⁸ Parents are not presently within the category of eligible applicants. However, it is understood that the list of eligible dependants is presently under review¹⁸⁹ and that the question of whether elderly parents ought to be entitled to make an application for provision from a deceased child’s estate, is being considered.¹⁹⁰ There are three possibilities open to the Singaporean legislature. One is to retain the present law—although it probably does not accord with social change and financial inter-dependencies. Another is to include parents as an automatic category of eligible applicants. If parents (for example, those aged 60 years or above) were entitled to make an application for family provision, this would be an indirect review and amendment of the present law of intestate succession because it would theoretically improve the inheritance prospects of older Singaporeans. Finally, parents could be entitled to make an application if they could demonstrate that they were dependent upon the intestate.¹⁹¹ This would be a two stage process: the court would have to be satisfied that the applicant was the parent of the intestate by way of biological ties or adoption and that the parent was financially dependent upon the intestate.

In contrast, two broad observations can be made about English and NSW family provision legislation and the aged in the context of intestacy law. First, parents have not been included as specific eligible applicants in the family provision schemes of England¹⁹² or NSW. However, the categories have been broadly drawn to include not only persons having certain status relationships with the deceased (such as a spouse or child) but also persons who are dependent upon the deceased. For example, in NSW, a person who was at any particular time ‘wholly or partly dependent on the deceased’¹⁹³ and was at the time of the deceased’s death ‘or at any other time, a member of the household of which the deceased was a member’,¹⁹⁴ or ‘a person with whom the deceased person was living in a close personal relationship at the time of

¹⁸⁶ *ISA*, *supra* note 3, s. 7 r. 4, 5.

¹⁸⁷ *IFPA*, *supra* note 140.

¹⁸⁸ *Ibid.*, s 3.

¹⁸⁹ The law review will be undertaken by the Singapore Law Reform Committee which is part of the Singapore Academy of Law. The website <http://www.sal.org.sg/content/LK_law_reform.aspx> states that there will be review of the *IFPA*; and that: “A sub-committee has been formed to examine the status and rights of illegitimate children, and the possible amendment of the *Inheritance (Family Provision) Act* to provide not only for the rights of illegitimate children but also the rights of other dependents of the deceased.” At the time of writing, the report had not been made publicly available.

¹⁹⁰ Email correspondence with the Singapore Academy of Law dated 6 January 2012.

¹⁹¹ According to the website statement of the Singapore Law Reform Committee, *supra* note 189, the assumed criterion would be dependency as it refers to “the rights of other dependents of the deceased”.

¹⁹² See generally, the *Inheritance (Provision for Family and Dependants) Act 1975* (U.K.), 1975, c. 63, s 1. For a discussion of the legislative provisions and the criteria applied in England see: Sherrin & Bonehill, *supra* note 4 at paras. 18-020-18-023, 18-032-18-038.

¹⁹³ *Succession Act 2006*, *supra* note 63, s. 57(1)(e).

¹⁹⁴ *Ibid.*

the deceased person's death¹⁹⁵ would qualify to make an application. Therefore, a parent who was financially dependent on the deceased or was living with the deceased in circumstances where there was provision of domestic support and personal care¹⁹⁶ would be able to make an application for family provision. However, the parental relationship itself would not suffice. Second, the question of whether parents ought to be able to make an application under family provision has not featured prominently in law commission reports: instead, the opposite issue has been whether adult children ought to be able to make a successful application against the estate of their elderly parent.¹⁹⁷ Therefore, the fact that the question of the entitlement of parents under family provision has arisen in the context of Singaporean law reform indicates that the interests of ascendant lineal relatives continues to pre-figure more highly in Singapore than in England or Australia.

IV. CONCLUSION

Framing an intestacy scheme is fraught with difficulties and dangers because the scheme must balance the likely choices of the intestate with the needs and desires of a society. In the 19th century, Australian and English law reformers realised that the old law neither assisted the intestates' 'nearest and dearest' nor reflected the expectations of the society.

In the 20th and 21st centuries, both England and Australia have reviewed their intestacy law a number of times. Each time, proposals for change have been suggested: some proposals have gained legislative endorsement, while others have been ignored. Nevertheless, the progress of intestacy reform and change in these two jurisdictions has been towards the protection of the surviving spouse and the enhancement of his or her well-being as the primary family member entitled to intestacy distribution based on his or her economic needs. Indeed, the surviving spouse and the intestate are a family unit in themselves. In light of the ageing population, another emerging reason for spouse-focused intestacy has arisen and the reformers have fortified their preference for the surviving spouse, by observing that the surviving children (and other collateral relatives) would generally be adults and independent of the intestate. In short, the aged spouse is the *persona* who is the primary family member entitled to the intestate's assets and the person in an ageing society who needs the protection of and resources distributed by intestacy schemes most.

In Singapore, the intestacy scheme operates differently. Although spouses are recognised as appropriate inheritors of the intestate's estate, they will only inherit the entire estate when there are no issue and parents surviving the intestate. The nature of the immediate family is assumed to be wider than in England and Australia, so that the intestate has obligations to immediate lineal descendants and ascendants. This has an effect upon how the aged are treated under the Singaporean scheme. A surviving aged spouse will always inherit at least a portion of the estate. However, aged parents will also be entitled to a portion of the estate even when there is a surviving and ageing spouse. Therefore, the aged '*personae*' which best encapsulate

¹⁹⁵ *Ibid.*, ss. 3, 57(1)(f).

¹⁹⁶ *Ibid.*, s. 3.

¹⁹⁷ 2011 Law Commission Intestacy and Family Provision Claims on Death Report, *supra* note 30 at paras. 6.19-6.26.

the persons who need the protection and resources distributed under the intestacy scheme are the intestate's spouse followed by the intestate's parents. However, it appears that the aged parents will not inherit when the intestate is survived by issue whose entitlements are only subject to the rights of the surviving spouse. Assuming that Singapore also experiences the same kind of demographic ageing as England and Australia, this aspect of the intestacy scheme may be subject to criticism because older, frailer and dependent members of the broader family may not be entitled to any assets under the intestacy scheme. Therefore, it is not surprising that the eligibility of parents to make an application for family provision is subject to review in Singapore.