

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The New South Wales Law Reform Commission Report 116 Uniform succession laws: intestacy was endorsed by the National Committee for Uniform Succession Laws (the National Committee) and submitted to the Standing Committee of Attorneys-General in April 2007. The report sets out draft model laws to implement the recommendations of the National Committee. The model laws provide for the distribution of the property of deceased persons who have not executed a will or who have failed to execute a will that disposes of some or all of their property effectively.

The objects of this Bill are:

- (a) to amend the Succession Act 2006 (the 2006 Act) to enact, with some modifications, the model provisions as a new Chapter 4 of that Act, and
- (b) to repeal those provisions of the Probate and Administration Act 1898 which currently provide for intestate succession (the 1898 Act intestacy provisions), and
- (c) to make various provisions of a savings, transitional or consequential nature.

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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 repeals the Inheritance Act of 1901. The provisions of that Act identify the heir at common law for the purposes of succession to land and are unnecessary (see section 33 of the Conveyancing Act 1919).

Schedule 1 Amendment of Succession Act 2006

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Schedule 1 [4] inserts a new Chapter 4 into the 2006 Act and makes a consequential amendment to existing Chapter 4 to renumber it (and the sections it contains) as Chapter 5 and sections 141–145, respectively. Schedule 1 [2] inserts an interpretation provision into section 3 of the 2006 Act for the purposes of the new Chapter 4.

Proposed new Chapter 4 contains the following provisions:

Part 4.1 Preliminary

New section 101 inserts definitions for the purposes of the new Chapter 4.

Definitions inserted include a definition of personal effects. The surviving spouse of an intestate is entitled to these items. Section 61A (2) of the 1898 Act intestacy provisions currently define these as household chattels. They are essentially articles of household or personal use.

New section 102 defines intestate as a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property. The 1898 Act intestacy provisions do not define intestate.

New section 103 makes it clear that references in the new Chapter 4 to an entitlement to the whole of an intestate's estate are references to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate. The provision is based on section 61B of the 1898 Act intestacy provisions.

New sections 104 and 105 define the meaning of spouse and domestic partnership, respectively, in the new Chapter 4. A spouse is a person who was married to the intestate, or was a party to a domestic relationship with the intestate, immediately before the intestate's death. A domestic relationship is a de facto relationship that has been in existence for a continuous period of at least 2 years or has resulted in the birth

of a child. Unlike section 61B (9) of the 1898 Act intestacy provisions, the new Chapter does not state that spouses should be treated as separate persons. The National Committee recommended that there is no need to make such a statement.
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New section 106 sets out the method for determining and adjusting the spouse's statutory legacy. This is the amount that a spouse (as defined) is entitled to in addition to the household or personal effects.

New sections 107 and 108 set out the rules relating to survivorship for intestate succession. A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.

New section 109 describes the effect of adoption for the purposes of distribution on intestacy.

Part 4.2 Spouse's entitlements

Part 4.2 sets out the entitlements of the intestate's surviving spouse (as defined).

Division 1 Entitlement of surviving spouse

New section 110 states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

New section 111 provides that a surviving spouse should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

New sections 112 and 113 provide that where the intestate is survived by a spouse and issue, the spouse is entitled to the whole intestate estate except in cases where some of the issue are issue of the intestate from another relationship. In the latter case the intestate estate is to be shared between the surviving spouse and the issue (see also new section 127 (2)).

Division 2 Spouse's preferential right to acquire property from the estate

New section 114 states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

New section 115 gives the spouse (as defined) an entitlement to elect to obtain any property (subject to some restrictions) in the intestate's estate. The election will require Supreme Court authorisation if the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult. This replaces sections 61A (2), 61B (13), 61D and 61E of, and the Fourth Schedule to, the 1898 Act intestacy provisions. Under these provisions surviving spouses are currently given a conditional right to obtain the intestate's interest in the home they shared with the intestate before the intestate's death.

New section 116 requires the intestate's personal representative to give a spouse of the intestate notice of the right of election conferred by new section 115 and how it may be exercised.

New section 117 specifies the time in which a spouse of the intestate must exercise the right of election and enables the Supreme Court to extend it.

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New section 118 sets out the procedural requirements for making an election, including requiring notice of the election to be given to other persons entitled to a share in the intestate estate.

New section 119 sets the price for which a spouse may elect to acquire property as the market value of the property as at the date of the intestate's death (reduced by any liability secured by a mortgage, charge or encumbrance on the property assumed by the spouse) (the exercise price). It also requires the personal representative to obtain

a valuation of the property from a registered valuer unless all the beneficiaries entitled to a share in the intestate estate waive this requirement.

New section 120 sets out the way in which a spouse who elects to acquire property can satisfy the exercise price. The spouse is able to provide satisfaction by relying on the share of the intestate estate to which the spouse is entitled and, if the share is insufficient to cover the value, by paying the difference from other resources available to the spouse. The latter aspect differs from section 61B (13) of the 1898 Act intestacy provisions which enable the difference to be met from the share of the estate to which any issue of the intestate are entitled.

New section 121 places certain restrictions on the personal representative's power to dispose of property (except to a spouse who has elected to acquire it). In particular it restricts the power to do so before the time for making an election by the spouse has elapsed. It is similar in this respect to the relevant 1898 Act intestacy provisions.

Division 3 Multiple spouses

New Division 3 provides for the division of entitlement to shares in an intestate estate when an intestate is survived by more than one spouse. For example, where the intestate is married and also has a de facto partner. This differs from section 61B (3A) of the 1898 Act intestacy provisions under which a de facto partner of at least 2 years will take the spouse's entitlement exclusively (subject to certain conditions).

New section 122 provides that if an intestate leaves more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

New section 123 provides that if an intestate leaves more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

New section 124 provides that if an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse, the spouses are entitled to share the personal effects, the statutory legacy and half of the residue in accordance with the new Division and the issue of the intestate are entitled to an equal share of the remaining residue.

New section 125 sets out the ways in which property may be shared between spouses under the new Division. The property may be shared equally or in accordance with a distribution agreement between the spouses or a distribution order made by the Supreme Court.

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New section 126 provides for the making of distribution orders by the Supreme Court.

Part 4.3 Distribution among relatives

New section 127 sets out the entitlements of children to an intestate estate.

New section 128 sets out the entitlements of parents to an intestate estate.

New section 129 sets out the entitlements of brothers and sisters to an intestate estate.

New section 130 sets out the entitlements of grandparents to an intestate estate.

New section 131 sets out the entitlements of aunts and uncles to an intestate estate.

New section 132 provides for a person entitled to take in more than one capacity to take in each capacity.

Part 4.4 Indigenous persons' estates

New sections 133–135 make special provision for the distribution of the estates of intestate persons of Aboriginal or Torres Strait Islander descent. This recognises the broader concepts of family relationships that apply in some Aboriginal and Torres Strait Islander communities.

Part 4.5 Absence of persons entitled

New sections 136 and 137 provide for the situation where an intestate dies leaving no person entitled to the intestate estate. They provide for a bona vacantia estate to vest in the State but enable the Minister to waive the rights of the State in favour of dependants of the intestate and certain other specified persons and organisations for whom the intestate might reasonably have been expected to make provision. This discretion is similar to that currently contained in section 61B (8) of the 1898 Act intestacy provisions.

Part 4.6 Miscellaneous

New section 138 provides for the immediate vesting of the entitlement of a minor in an intestate's estate.

New section 139 provides for the disclaimer of an interest in an intestate estate. It treats the person who disclaims an interest as being deceased. This means his or her issue will be able to take their share in the interest by representation.

New section 140 reflects the current position in New South Wales that there is no account to be taken of benefits given by the intestate before his or her death. (This rule, known as the Hotchpot rule, was abolished in New South Wales in 1977).

Schedule 1 [1] makes a consequential amendment to the long title of the 2006 Act and Schedule 1 [3] amends section 3 (2) for consistency with proposed new section 107. The definition encompasses persons who are born as a result of in vitro fertilisation after a period of gestation in the uterus that commenced before a person's death and who survive the person for at least 30 days after birth.

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Schedule 1 [5] amends the power to make rules of court in the 2006 Act.

Schedule 1 [6] and [10] amend Schedule 1 to the 2006 Act to enable the making of savings and transitional regulations and to insert a savings provisions consequent on the repeal of the 1898 Act intestacy provisions.

Schedule 1 [7], [8] and [9] amend Schedule 1 to the 2006 Act to clarify the effect of savings provisions in the light of the repeal of Schedule 2.

Schedule 2 Amendment of other Acts

Schedule 2 makes consequential amendments to various Acts and the amendments described below.

Schedule 2.5 contains the repeals of the 1898 Act intestacy provisions described in the Overview. Schedule 2.5 [9] amends section 84A of the Probate and Administration Act 1898 to make the rates of interest payable on legacies and annuities prescribed by that section consistent with the rates contained in proposed new section 106 (5) of the 2006 Act.