

# Succession Amendment (Intestacy) Act 2009 No 29

[2009-29]



New South Wales

## Status Information

### Currency of version

Repealed version for 9 June 2009 to 1 March 2010 (accessed 12 July 2024 at 8:18)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Repeal**

The Act was repealed by sec 30C of the [Interpretation Act 1987 No 15](#) with effect from 2.3.2010.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Succession Amendment (Intestacy) Act 2009 No 29



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# Succession Amendment (Intestacy) Act 2009 No 29



New South Wales

An Act to amend the *Succession Act 2006* and the *Probate and Administration Act 1898* to revise and re-state the rules for distribution on intestacy; and for other purposes.

## 1 Name of Act

This Act is the *Succession Amendment (Intestacy) Act 2009*.

## 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

## 3 Repeal of *Inheritance Act of 1901 No 19*

The *Inheritance Act of 1901* is repealed.

## Schedule 1 Amendment of *Succession Act 2006 No 80*

### [1] Long title

Insert “to make provision for the distribution of intestate estates;” after “deceased person;”.

### [2] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

***intestate*** is defined in section 102.

### [3] Section 3 (2)

Omit “en ventre sa mere at the death of the person, provided such child or issue is born alive and remains alive for a period of 30 days”.

Insert instead “who is born after the person’s death after a period of gestation in the uterus that commenced before the person’s death and survives the person for at least 30 days after birth”.

## [4] Chapter 4

Insert after section 100 and renumber existing Chapter 4 as Chapter 5 and sections 101–106 as appropriate:

### Chapter 4 Intestacy

#### Part 4.1 Preliminary

##### 101 Definitions

In this Chapter:

**brother or sister**—a person is the **brother or sister** of another if they have one or both parents in common.

**deceased person**—a **deceased person** is one who did not survive the intestate.

**domestic partnership**—see section 105.

**eligible relative** means a relative of the intestate who is entitled to share in the distribution of the intestate estate under Part 4.3.

**entitlement to the whole of the intestate estate**—see section 103.

**Indigenous person** is a person who:

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

**intestate estate** means:

- (a) in the case of an intestate who leaves a will—property that is not effectively disposed of by will, and
- (b) in any other case—all the property left by the intestate.

**leave**—a person **leaves** another if the person dies and is survived by the other.

**personal effects** of an intestate means the intestate's tangible personal property except the following:

- (a) property used exclusively for business purposes,
- (b) banknotes or coins (unless forming a collection made in pursuit of a hobby or for

some other non-commercial purpose),

(c) property held as a pledge or other form of security,

(d) property (such as gold bullion or uncut diamonds):

(i) in which the intestate has invested as a hedge against inflation or adverse currency movements, and

(ii) which is not an object of household, or personal, use, decoration or adornment,

(e) an interest in land (whether freehold or leasehold).

**predecease**—a person is taken to **predecease** the intestate if the person does not survive the intestate.

**presumptive share** of an intestate estate of a deceased eligible relative of the intestate means the entitlement the relative would have had if he or she had survived the intestate.

**registered valuer** has the same meaning as it has in the [Valuers Act 2003](#).

**spouse**—see section 104.

**statutory legacy** for a spouse—see section 106.

**survive**—see section 107.

## 102 Intestate

An intestate is 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.

## 103 Entitlement to the whole of the intestate estate

A reference in this Chapter to an entitlement to the whole of the intestate estate is a reference to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate.

## 104 Spouse

A spouse of an intestate is a person:

(a) who was married to the intestate immediately before the intestate's death, or

(b) who was a party to a domestic partnership with the intestate immediately before the intestate's death.

### 105 Domestic partnership

A domestic partnership is a relationship (other than marriage) between the intestate and another person:

- (a) that is a de facto relationship, and
- (b) that:
  - (i) has been in existence for a continuous period of at least 2 years, or
  - (ii) has resulted in the birth of a child.

### 106 Spouse's statutory legacy

- (1) The statutory legacy for a spouse consists of:
  - (a) the CPI adjusted legacy, and
  - (b) if the statutory legacy is not paid, or not paid in full, within 1 year after the intestate's death—interest at the relevant rate on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full.

- (2) The **CPI adjusted legacy** is to be determined in accordance with the following formula:

$$R = A \times \frac{C}{D}$$

where:

**R** represents the CPI adjusted legacy.

**A** is \$350,000.

**C** represents the Consumer Price Index number for the last quarter for which such a number was published before the date on which the intestate died.

**D** represents the Consumer Price Index number for the December 2005 quarter.

- (3) If, however, a spouse is entitled to a statutory legacy under this Act and under the law of another Australian jurisdiction or jurisdictions:
  - (a) the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including this Act), but
  - (b) the following qualifications apply:
    - (i) amounts received by the spouse, by way of statutory legacy, under any

of the other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under this Act,

- (ii) if any of the relevant laws contain no provision corresponding to subparagraph (i), no amount is payable by way of statutory legacy under this Act until the spouse's entitlement under that law is satisfied, or the spouse renounces the spouse's entitlement to payment, or further payment, by way of statutory legacy, under that law.
- (4) If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or statutory legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate ratably.
  - (5) The **relevant rate** of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.
  - (6) If the Australian Statistician publishes a Consumer Price Index number in respect of a particular quarter in substitution for a Consumer Price Index number previously published in respect of that quarter:
    - (a) except as provided by paragraph (b)—the publication of the later Index number is to be disregarded, or
    - (b) if the Minister so directs—regard is to be had to the later and not to the earlier Index number.
  - (7) If the reference base for the Consumer Price Index is changed, regard is to be had only to Index numbers published in terms of the new reference base or to Index numbers converted to the new reference base in accordance with an arithmetical conversion factor specified by the Australian Statistician.
  - (8) An adjustment under subsection (3) is to be made to the nearest whole dollar.
  - (9) In this section:

**Consumer Price Index number**, for a quarter, means the All Groups Consumer Price index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.

## 107 Survivorship

- (1) A person will not be regarded as having survived an intestate unless:
  - (a) the person is born before the intestate's death and survives the intestate by at least 30 days, or

(b) the person is born after the intestate's death after a period of gestation in the uterus that commenced before the intestate's death and survives the intestate for at least 30 days after birth.

(2) The rules stated in subsection (1) are not to be applied if, as a result of their application, the intestate estate would pass to the State.

### **108 General limitation of non-spousal entitlements**

(1) A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.

(2) A reference in this Act to a child, issue, relative, or issue of a relative, of an intestate is limited to a person of the relevant description whose entitlement to share in the distribution of the intestate estate is not excluded under subsection (1).

### **109 Adoption**

An adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents and:

(a) the child's family relationships are to be determined accordingly, and

(b) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

## **Part 4.2 Spouse's entitlements**

### **Note—**

In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

## **Division 1 Entitlement of surviving spouse**

### **110 Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

### **111 Spouse's entitlement where no issue**

If an intestate leaves a spouse but no issue, the spouse is entitled to the whole of the intestate estate.

### **112 Spouse's entitlement where issue are also issue of the spouse**

If an intestate leaves a spouse and issue and the issue are all also issue of the

spouse, the spouse is entitled to the whole of the intestate estate.

### **113 Spouse's entitlement where any issue are not issue of the spouse**

If an intestate leaves a spouse and any issue who are not issue of the spouse, the spouse is entitled to:

- (a) the intestate's personal effects, and
- (b) a statutory legacy, and
- (c) one-half of the remainder (if any) of the intestate estate.

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

### **114 Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

### **115 Spouse's right of election**

- (1) A spouse is entitled to elect to acquire property from an intestate estate.
- (2) A spouse's election to acquire property from an intestate estate requires the Court's authorisation if:
  - (a) the property forms part of a larger aggregate, and
  - (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.

**Note—**

For example:

- (a) The acquisition of a single item from a group of items might substantially diminish the value of the remainder of the group or make it substantially more difficult to dispose of the remainder of the group.
  - (b) The acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder of the farming property or make it substantially more difficult to dispose of it.
- (3) The Court may grant an authorisation under subsection (2) and may impose such conditions as it considers just and equitable to address the matters referred to in that subsection, including a condition that the spouse pay compensation to the estate in addition to consideration to be given for the property under this Division and a condition as to costs.
  - (4) The Court must refuse authorisation if it considers that the matters referred to in

subsection (2) cannot be adequately addressed by granting an authorisation subject to such conditions.

- (5) A spouse is not entitled to elect to acquire property from an intestate estate if the transfer or conveyance by the personal representative to the spouse of the interest of the intestate in the property would require compliance with the mandatory provisions unless those provisions would be complied with and the costs of complying with the provisions are paid by the spouse.
- (6) A spouse who is a personal representative of the intestate is not prevented from making an election to acquire property from the intestate estate by the fact that the spouse is a trustee of the intestate estate.
- (7) Nothing in this section confers on a spouse any right against a person who in good faith purchased for value from the personal representative of the intestate any property of the intestate.
- (8) In this section:

***mandatory provisions*** means the following:

- (a) the *Environmental Planning and Assessment Act 1979*, the *Conveyancing Act 1919* and any other Act with respect to the manner of dividing land into parts, and with respect to any requirement incidental to the manner of dividing land into parts,
- (b) the *Strata Schemes (Freehold Development) Act 1973* with respect to the manner of subdividing land within the meaning of section 7 (1) of that Act or of any lot within the meaning of section 5 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot,
- (c) the *Strata Schemes (Leasehold Development) Act 1986*, with respect to the manner of subdividing land within the meaning of section 6 (1) of that Act or of any lot within the meaning of section 4 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot.

## **116 Notice to be given to spouse of right of election**

- (1) An intestate's personal representative must, within one month of the grant of administration of the intestate estate, give notice to the intestate's spouse of the spouse's right of election stating:
  - (a) how the right is to be exercised, and
  - (b) the fact that the election may be subject to the Court's authorisation and the circumstances in which such an authorisation is required, and

(c) that the right must be exercised within 3 months (or a longer period allowed by the Court) after the date of the notice.

(2) Notice is not required under this section if the spouse is the personal representative, or one of the personal representatives, of the intestate.

### **117 Time for making election**

(1) The election must be made:

(a) if the spouse is entitled to notice of the right of election—within 3 months after the date of the notice, or

(b) if the spouse is the intestate's personal representative (or one of the personal representatives)—within 3 months after the grant of administration of the intestate estate.

(2) The Court may, however, if it considers there is sufficient cause for doing so, extend the time for making the election.

#### **Note—**

The Court might, for example, extend the period for making an election if the Court's authorisation for making the election is required or if a question remains unresolved regarding the existence, or the nature, of a person's interest in the intestate estate.

(3) The Court may extend the time for making the election whether or not the time for making the election has passed, but not after the administration of the estate has been completed.

### **118 How election to be made**

(1) A spouse's election is made by written notice identifying, with reasonable particularity, the property the spouse elects to acquire.

(2) Except as provided by subsection (3), the notice of election must be given:

(a) to each person, apart from the spouse, who is a personal representative of the intestate, and

(b) to each person, apart from the spouse, who is entitled to share in the intestate estate.

(3) The Court may direct that any of the persons referred to in subsection (2) need not be given the notice of election if it considers that giving the notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

(4) A spouse who has not reached the age of majority may make an election as validly and effectively as an adult.

(5) A spouse may revoke his or her election at any time before the transfer of the

property to the spouse.

- (6) A revocation is made by written notice of revocation given to the same persons as the notice of election.

### **119 Basis of the election**

- (1) The price for which a spouse may elect to acquire property from the intestate estate (the **exercise price**) is the market value of the property as at the date of the intestate's death.
- (2) If, however, the spouse and the holder of a mortgage, charge or encumbrance over property that the spouse has elected to acquire agree to the assumption by the spouse of the liability secured by the mortgage, charge or encumbrance the exercise price is to be reduced by the amount of the liability (as at the date of transfer) secured by the mortgage, charge or encumbrance, but:
- (a) the spouse takes the property subject to the mortgage, charge or encumbrance, and
- (b) on the transfer of the property, the liability passes to the spouse and the estate is exonerated from it.
- (3) The personal representative of an intestate must obtain a valuation from a registered valuer of property forming part of the intestate estate if:
- (a) a spouse elects to acquire the property, or
- (b) a spouse asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it.
- (4) The personal representative must give a copy of the valuation to the spouse and to the other beneficiaries entitled to share in the intestate estate.
- (5) The requirement for a personal representative to obtain a valuation under subsection (3) may be waived with the consent of all the beneficiaries entitled to share in the intestate estate.

### **120 Exercise price—how satisfied**

If a spouse elects to acquire property from the intestate estate, the exercise price is to be satisfied:

- (a) first from money to which the spouse is entitled from the intestate estate, and
- (b) if that is insufficient, from money paid by the spouse to the estate on or before the date of transfer.

### **121 Restriction on disposal of property from intestate estate**

- (1) The personal representative of an intestate must not dispose of property from the intestate estate (except to a spouse who has elected to acquire it) unless:
  - (a) the personal representative is the spouse entitled to make the election, or
  - (b) the time for exercising the election has elapsed and no election has been made, or
  - (c) the election requires the Court's authorisation but:
    - (i) the necessary authorisation has been refused, or
    - (ii) the application for authorisation has been withdrawn, or
  - (d) the spouse has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate, or
  - (e) sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate, or
  - (f) the property is perishable or likely to decrease rapidly in value.
- (2) A transaction entered into contrary to this section is not invalid.

## **Division 3 Multiple spouses**

### **122 Spouses' entitlement where there are more than one spouse but no issue**

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 this Division.

### **123 Spouses' entitlement where issue are also issue of one or more of the spouses**

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 this Division.

### **124 Spouses' entitlement where any issue are not issue of a surviving spouse**

If an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse:

- (a) the spouses are entitled to share the intestate's personal effects in accordance with this Division, and
- (b) each spouse is entitled to share the statutory legacy that would be payable if the intestate had left only one surviving spouse, and
- (c) the spouses are entitled to share one-half of the remainder (if any) of the intestate estate in accordance with this Division.

### **125 Sharing between spouses**

- (1) If property is to be shared between spouses under this Division, the property is to be shared:
  - (a) in accordance with a written agreement between the spouses (a ***distribution agreement***), or
  - (b) in accordance with an order of the Court (a ***distribution order***), or
  - (c) if the conditions prescribed by subsection (2) are satisfied—in equal shares.
- (2) The following conditions must be satisfied if the personal representative is to make an equal division of property between spouses under subsection (1) (c):
  - (a) the personal representative has given each spouse a notice in writing stating that the personal representative may distribute the property equally between the spouses unless, within 3 months after the date of the notice:
    - (i) they enter into a distribution agreement and submit the agreement to the personal representative, or
    - (ii) at least one of the spouses applies to the Court for a distribution order,
  - (b) at least 3 months have elapsed since the giving of the notices and:
    - (i) the personal representative has not received a distribution agreement or notice of an application for a distribution order, or
    - (ii) an application for a distribution order has been made but the application has been dismissed or discontinued.
- (3) If a spouse asks the personal representative to initiate the process for making an equal division of property under subsection (1) (c), the personal representative must, as soon as practicable:
  - (a) give the notices required under subsection (2) (a), or
  - (b) make an application to the Court for a distribution order.

## **126 Distribution orders**

- (1) An intestate's spouse or personal representative may apply to the Court for a distribution order.
- (2) If, however, the personal representative has given written notice under section 125 (3), the application cannot (unless the Court otherwise allows) be made more than 3 months after the date of the notice.
- (3) On an application under this section, the Court may order that the property be distributed between the spouses in any way it considers just and equitable.
- (4) If the Court considers it just and equitable to do so, it may allocate the whole of the property to one of the spouses to the exclusion of the other or others.
- (5) A distribution order may include conditions.

## **Part 4.3 Distribution among relatives**

### **Note—**

In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

## **127 Entitlement of children**

- (1) If an intestate leaves no spouse but leaves issue, the intestate's children are entitled to the whole of the intestate estate.
- (2) If:
  - (a) an intestate leaves:
    - (i) a spouse or spouses, and
    - (ii) any issue who are not also issue of a surviving spouse, and
  - (b) a part of the estate remains after satisfying the spouse's entitlement, or the spouses' entitlements,the intestate's children are entitled to the remaining part of the intestate estate.
- (3) If no child predeceased the intestate leaving issue who survived the intestate, then:
  - (a) if there is only one surviving child—the entitlement vests in the child, or
  - (b) if there are 2 or more surviving children—the entitlement vests in them in equal shares.

- (4) If one or more of the intestate's children predeceased the intestate leaving issue who survived the intestate:
  - (a) allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child, and
  - (b) the presumptive share of any such deceased child is to be divided between that child's children and, if any of these grandchildren (of the intestate) predeceased the intestate leaving issue who survived the intestate, the deceased grandchild's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.

### **128 Parents**

- (1) The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue.
- (2) If there is only one surviving parent, the entitlement vests in the parent and, if both survive, it vests in equal shares.

### **129 Brothers and sisters**

- (1) The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue, and
  - (c) no parent.
- (2) If no brother or sister predeceased the intestate leaving issue who survived the intestate, then:
  - (a) if only one survives—the entitlement vests in the surviving brother or sister, or
  - (b) if 2 or more survive—the entitlement vests in them in equal shares.
- (3) If a brother or sister predeceased the intestate leaving issue who survived the intestate:
  - (a) allowance must be made in the division of the estate between brothers and sisters for the presumptive share of any such deceased brother or sister, and

- (b) the presumptive share of any such deceased brother or sister is to be divided between the brother's or sister's children and, if any of these children predeceased the intestate leaving issue who survived the intestate, the deceased child's presumptive share is to be divided between the child's children (again allowing for the presumptive share of a grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.

### **130 Grandparents**

- (1) The grandparents of an intestate are entitled to the whole of an intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue, and
  - (c) no parent, and
  - (d) no brother or sister, or issue of a deceased brother or sister.
- (2) If there is only one surviving grandparent, the entitlement vests in the grandparent and, if 2 or more survive, it vests in them in equal shares.

### **131 Aunts and uncles**

- (1) The brothers and sisters of each of an intestate's parents are entitled to the whole of the intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue, and
  - (c) no parent, and
  - (d) no brother or sister, or issue of a deceased brother or sister, and
  - (e) no grandparent.
- (2) If no brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, then:
  - (a) if only one survives—the entitlement vests in the surviving brother or sister, or
  - (b) if 2 or more survive—the entitlement vests in them in equal shares.
- (3) If a brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, the child is entitled to the deceased parent's presumptive share and, if there are 2 or more children, they share

equally.

### **132 Entitlement to take in separate capacities**

A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

**Note—**

For example, suppose that an intestate dies leaving no spouse and no surviving relatives except children of a deceased maternal aunt and paternal uncle who had a child in common as well as children of other unions. In this case, the child of the union between the maternal aunt and the paternal uncle would be entitled to participate in the estate both as representative of the maternal aunt and as representative of the paternal uncle.

## **Part 4.4 Indigenous persons' estates**

### **133 Application for distribution order**

- (1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.
- (2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.
- (3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.
- (4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:
  - (a) the application has been determined, or
  - (b) the Court authorises the distribution.

### **134 Distribution orders**

- (1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.
- (2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no

distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).

**Note—**

For example, a distribution may have been made under section 92A of the *Probate and Administration Act 1898* or section 94 of this Act.

- (3) In formulating an order under this Part, the Court must have regard to:
  - (a) the scheme for distribution submitted by the applicant, and
  - (b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.
- (4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.

**135 Effect of distribution order under this Part**

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

**Part 4.5 Absence of persons entitled**

**136 Intestate leaving no persons entitled**

If an intestate dies leaving no person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate.

**137 State has discretion to make provision out of property to which it becomes entitled**

- (1) If the State is entitled to an intestate estate under this Part, the Minister may, on application in accordance with subsection (3) for a waiver of the State's rights, waive the State's rights in whole or part in favour of:
  - (a) dependants of the intestate, or
  - (b) any persons who have, in the Minister's opinion, a just or moral claim on the intestate, or
  - (c) any organisation or person for whom the intestate might reasonably be expected to have made provision, or
  - (d) the trustees for any person or organisation mentioned in paragraph (a), (b) or (c).
- (2) The Minister may grant a waiver under this section on conditions the Minister

considers appropriate.

- (3) Application for a waiver of the State's rights to an intestate estate under this Part is to be made in writing to the Crown Solicitor.

## **Part 4.6 Miscellaneous**

### **138 Non-deferral of the interest of a minor**

The entitlement of a minor to an interest in an intestate estate vests immediately (that is, it is not deferred until the minor reaches majority or marries).

### **139 Effect of disclaimer etc**

For the purposes of the distribution of an intestate estate, a person will be treated as having predeceased the intestate if the person:

- (a) disclaims an interest, to which he or she would otherwise be entitled, in the intestate estate, or
- (b) is disqualified from taking an interest in the intestate estate for any reason.

**Note—**

It follows that, if the person has issue, they may be entitled to take the person's presumptive share of the intestate estate by representation.

### **140 Effect of testamentary and other gifts**

The distribution of an intestate estate is not affected by gifts made by the intestate to persons entitled:

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

### **[5] Existing section 102 Rules of Court**

Insert at the end of section 102 (2):

- (h) the making of elections by the spouses of intestates under Chapter 4.

### **[6] Schedule 1 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Succession Amendment (Intestacy) Act 2009*

**[7] Schedule 1, clause 2, definition of “repealed provisions”**

Insert “to this Act (as in force immediately before Schedule 2 was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2008*)” after “Schedule 2”.

**[8] Schedule 1, Part 3**

Insert in appropriate order at the end of clause 9:

**the 1916 provisions** means Part 2 of the *Testator’s Family Maintenance and Guardianship of Infants Act 1916* as in force before its repeal by the *Succession Amendment (Intestacy) Act 2009*.

**[9] Schedule 1, Part 3**

Insert after clause 11 (4):

- (5) The 1916 provisions continue to apply in relation to any estate of a person who died before the repeal of the provisions to which those provisions would have applied but for the repeal.

**[10] Schedule 1, Part 4**

Insert after clause 11:

## **Part 4 Provisions consequent on enactment of *Succession Amendment (Intestacy) Act 2009***

### **12 Definition**

In this Part:

**amending Act** means the *Succession Amendment (Intestacy) Act 2009*.

### **13 Transitional provision—intestacy**

- (1) Chapter 4 (Intestacy) applies to the distribution of the intestate estate of a person who dies intestate on or after the commencement of this clause.
- (2) The distribution of the intestate estate of a person who died intestate before the commencement of this clause is governed by the law of this State as in force at the date of death.

## **Schedule 2 Amendment of other Acts**

### **2.1 Adoption Act 2000 No 75**

#### **[1] Section 95 General effect of adoption orders**

Insert at the end of section 95 (2):

**Note—**

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

#### **[2] Section 97 Effect of orders as regards property**

Omit section 97 (2) and the note to the subsection.

#### **[3] Section 99 Relationship of adopted child to other children of the adopter**

Omit "*Probate and Administration Act 1898*" from section 99 (1) (a).

Insert instead "*Succession Act 2006*".

#### **[4] Schedule 3 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Succession Amendment (Intestacy) Act 2009*, to the extent that it amends this Act

#### **[5] Schedule 3, Part 5**

Insert after Part 4:

## **Part 5 Provision consequent on enactment of *Succession Amendment (Intestacy) Act 2009***

### **23 Persons dying wholly or partially intestate before commencement of *Succession Amendment (Intestacy) Act 2009***

The repeal of section 97 (2) by the *Succession Amendment (Intestacy) Act 2009* does not apply to or in respect of the estate of a person who died wholly or partially intestate before that repeal, and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.

## 2.2 Conveyancing Act 1919 No 6

### [1] Section 33 Meaning of heir, next of kin, or statutory next of kin of any person

Omit “Division 2A of Part 2 of the *Probate and Administration Act 1898* (as in force after that commencement)” from section 33 (1).

Insert instead “the applicable intestacy rules”.

### [2] Section 33 (4)

Insert after section 33 (3):

(4) In subsection (1):

***applicable intestacy rules*** means:

- (a) for a will coming into operation, or an instrument made, before the repeal of Division 2A of Part 2 of the *Probate and Administration Act 1898*—that Division as in force immediately before its repeal, and
- (b) for a will coming into operation, or an instrument made, after the repeal of that Division—Chapter 4 (Intestacy) of the *Succession Act 2006*.

## 2.3 District Court Act 1973 No 9

### Section 134 Jurisdiction in equity proceedings

Insert “(as in force immediately before that Act was amended by the *Succession Amendment (Intestacy) Act 2009*)” after “1916” wherever occurring.

## 2.4 Powers of Attorney Act 2003 No 53

### [1] Section 24 Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy

Omit the section.

### [2] Schedule 5 Savings, transitional and other provisions

Insert after Part 2:

## Part 3 Provision consequent on Succession Amendment (Intestacy) Act 2009

### 4 Effect of disposal of home shared by spouses under enduring power of

## **attorney**

Section 24, as in force immediately before its repeal by the *Succession Amendment (Intestacy) Act 2009*, continues to apply to a spouse of a principal under an enduring power of attorney who dies intestate before the repeal and to whom it would have applied before the repeal as if it had not been repealed.

## **2.5 Probate and Administration Act 1898 No 13**

### **[1] Section 32G Interpretation**

Omit the definition of ***de facto spouse*** from section 32G (1). Insert instead:

***de facto spouse***, in relation to a person dying wholly or partly intestate, means someone who was a partner in a de facto relationship with the person.

### **[2] Section 40A Evidence or presumption of death**

Omit “*Testator’s Family Maintenance and*” from section 40A (2).

### **[3] Section 40A**

Omit “Chapter 3 of” from section 40A (2).

### **[4] Section 53 Value to be accepted instead of partition**

Omit “in a dwelling-house in respect of which the spouse has exercised the right conferred by section 61D”.

Insert instead “in real estate the spouse has elected to acquire under section 115 (Spouse’s right of election) of the *Succession Act 2006*”.

### **[5] Part 2, Division 2A Distribution of intestate estates**

Omit the Division.

### **[6] Section 62 Practice as to granting administration of real and personal estate of intestate**

Insert “or Chapter 4 of the *Succession Act 2006*” after “rules”.

### **[7] Section 62 (2)**

Insert at the end of section 62:

- (2) Without limiting subsection (1), if a person dies wholly intestate the real and personal estate of the person is to be distributed or held in trust in accordance with Chapter 4 of the *Succession Act 2006*, and the real estate of that person is to be

held as if it were devised to the persons for whom it is held in trust.

**[8] Section 84A Interest on legacies and annuities**

Omit “6 per cent per year” from section 84A (1). Insert instead “the relevant rate”.

**[9] Section 84A (3)**

Insert after section 84A (2):

(3) In this section, **relevant rate** of interest means the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

**[10] Section 92 Distribution of assets after notice given by executor or administrator**

Insert “or section 125 (Sharing between spouses) or 126 (Distribution orders) or Part 4.4 (Indigenous persons’ estates)” after “rectified” in section 92 (2).

**[11] Fourth Schedule Rights of surviving spouse of intestate with respect to acquisition of the shared home**

Omit the Schedule.

**[12] Fifth Schedule Savings and transitional provisions arising from amendments to this Act**

Insert after Part 2:

## **Part 3 Provision consequent on enactment of [Succession Amendment \(Intestacy\) Act 2009](#)**

### **9 Persons dying wholly or partially intestate before commencement of [Succession Amendment \(Intestacy\) Act 2009](#)**

The amendments made to this Act by the [Succession Amendment \(Intestacy\) Act 2009](#) do not apply to or in respect of the estate of a person who died wholly or partially intestate before the commencement of those amendments, and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.

## **2.6 Testator’s Family Maintenance and Guardianship of Infants Act 1916 No 41**

**[1] Section 1 Name of Act**

Omit “*Testator’s Family Maintenance and*”.

**[2] Part 2 Testator's family maintenance**

Omit the Part.