

INTESTATE SUCCESSION IN BRITISH COLUMBIA AND WASHINGTON STATE



Introduction

1. This work will have a narrow focus. The intestate succession regimes of interest are those which apply in

- Washington State, USA and
- British Columbia, Canada.

2. The Scottish Government is looking for

- details of the operation of each of the regimes,
- what (in detail) preceded them,
- why and when the law was reformed in each of these jurisdictions,
- how each regime is perceived i.e. does it deliver outcomes that those affected by the law would expect,
- details and the outcome of any court cases which have considered the individual regimes,
- details and the conclusions of any articles/research papers analysing these intestate succession regimes and their operation.

3. The information available on intestate succession in those two states was rather limited and mostly for the following reasons:

- There is scarce case law on intestate succession in the two jurisdictions. There are significant authorities on wills, but there is dearth of detailed judicial discussions, even obiter, of statutory provisions in the law of intestacy. Most of the cases we located turned on different issues and referred to the relevant provisions only in passing.
- In respect of the law of British Columbia, the statute is relatively novel and it has not produced much case law as of yet.
- The academic commentary, including the critical academic commentary, is exceptionally limited. Much of the academic commentary we located through electronic databases (Westlaw and HeinOnline) was merely descriptive. There are some exceptions which are referenced in the report but they seem to be the minority view, as confirmed by the practitioners we talked to (for instance, in respect of stepchildren or fictive kins). Among other people, we talked to the person responsible for drafting the new statute in British Columbia and he was not aware of any critical commentary apart from what we used.
- We asked open-ended questions to the specialists from both jurisdictions about the way that the law is perceived in both jurisdictions and they considered that the intestate succession worked well in practice and there

was no appetite for further changes (for instance, in respect of mixed families).

British Columbia

I. History

4. The issues of succession in British Columbia are governed by the Wills, Estates and Succession Act ('Act' or WESA). The Act is in force since 31 March 2014. The Act consolidates the existing law but also makes some significant changes to the law of succession in British Columbia.¹ It repeals and consolidates the following legislative acts:

- Estate Administration Act, 1996, c. 122
- Probate Recognition Act, 1996, c. 376
- Wills Act, 1996, c. 489
- Wills Variation Act, 1996, c. 490
- Law and Equity Act, 1996, c. 253, s. 46, 49, 50 & 51
- Survivorship and Presumption of Death Act, 1996, c. 444, s. 2

5. Apart from the consolidation of various legislative acts, the Act introduced the following principal changes to the law of intestate succession in British Columbia:

- The Act recognised the rights of a **common-law spouse** and recognised that the deceased may have **two spouses**, as described below (§9). Until then, only married couples could inherit from their deceased spouse.
- Under the previous legislation, the preferential share of the surviving spouse in the estate succession was \$65,000. That amount increased to \$300,000, as described below (§17).
- Further, under the old regime, where the deceased owned the matrimonial home, the surviving spouse had a life interest to reside therein. With the adoption of the Act, the survivor may only purchase the home outright, and pay with cash and/or other entitlements under the statute (§16). To counteract this change, the legislation increased the preferential share of the spouse.
- The Act also changed the methodology of determining the relatives entitled to the share of the deceased's estate. The Act shifted from the system of consanguinity to the parentelic system, as described below (§§ 26-27). Survivorship rules also changed.
- Lastly, the Act changed the position in respect of simultaneous death (see below §§ 12-13).

¹ On the history of the Act, see Gregory Blue, 'A Concise Survey of the Wills, Estates and Succession Act of British Columbia' (2014) 33 Est. Tr. & Pensions J. 327.

II. Current Law

Definition of spouse

6. The law of British Columbia provides a very wide definition of the spouse in intestate successions. Under s.2 of the Act, two persons are treated as spouses of each other if they were both alive immediately before a relevant time and:

- a. they were married to each other, or
- b. they had lived with each other in a marriage-like relationship for at least 2 years.

7. Under this statutory provision, 'spouse' encompasses not only persons legally married to each other but also those who had lived with each other in a marriage-like relationship for at least 2 years. While it was correct to say that person who was not legally divorced did not have legal capacity to enter into common-law marriage, such capacity is not pre-requisite for statutorily contemplated "marriage-like relationship" referred to in s. 2(1)(b) of the Act.²

8. Further, the Canadian courts have held that the fact that the couple did not live together and kept separate finances was not decisive. Other factors might still support the finding of "marriage-like relationship": having loving and intimate relationship for more than 20 years, evidence to support the claim that the deceased would have liked to share home with the claimant, but was unable to do so because of her hoarding illness, assisting each other financially, and so on.³

9. Canadian case law recognises that the duality enshrined in s.2(1)(b) may lead to a person having two spouses: first, the person to whom he/she is legally married, and second, the person with whom he/she had lived in a marriage-like relationship.⁴ S.22 of the Act deals with the succession of two or more spouses. Thus, if 2 or more persons are entitled to a spousal share of an intestate estate, they share the spousal share in the portions to which they agree, or if they cannot agree, as determined by the court. The division of the property between the two spouses does not affect the share of the deceased's children. We were unable to locate any case law on the exercise of judicial discretion when the spouses are unable to reach an agreement. The reason could be that the married spouse does not inherit intestate since upon separation the spousal relationship is considered to be terminated, with the effect that the only spouse remaining is very often the cohabitor (see §10 below).

10. Under s.2(2) of the Act, two persons cease being spouses when:

- a. In the case of marriage, an event occurs that causes an interest in family assets to arise. This essentially means that the couple has separated. The legislation did not adopt an alternative test whereby the spousal

² Connor Estate, 2017 BCSC 978, 2017.

³ Connor Estate, 2017 BCSC 978, 2017.

⁴ Connor Estate, 2017 BCSC 978, 2017.

relationship ceases after two years of separation.⁵ But note that spouses are not considered to have separated if, within one year after separation:

- (i) they begin to live together again and the primary purpose for doing so is to reconcile, and
- (ii) they continue to live together for one or more periods, totalling at least 90 days.

b. In the case of a marriage-like relationship, one or both persons may terminate the relationship.

11. This provision was introduced into the Act to accommodate for the changes made to the Family Law Act which recognised separation as giving rise to the separation of spousal property.⁶

Simultaneous deaths

12. S.5 of the Act deals with the situations where the spouses die simultaneously. If two or more persons die at the same time or in circumstances that make it uncertain which of them survived the other or others, unless a contrary intention appears in a will, rights to property must be determined as if each had survived the other or others. The benefit of this is that the estate of a person will go to his/her family or by will; otherwise it may go to the spouse and then pass on to spouse's family or even a stranger designated in the spouse's will.

13. The position under the previous legislation was that the older of the two spouses was presumed to die first. This meant that all jointly held estates would become entirely the property of the spouse presumed to die last (the younger spouse) and would be disposed of according to that will or intestate succession rules. In a blended family situation, the former regime gave rise to a scenario where the heirs of the older spouse who were not related to the younger spouse, could potentially be disinherited.

Spousal share

14. In intestate succession, the spouse of the deceased receives the lion's share of the deceased's estate. The precise calculations of the spousal share will depend on whether there are descendants or not. If a person dies without a will leaving a spouse but no surviving descendant, the intestate estate must entirely be distributed to the spouse (s.20 of the Act).

15. If, however, the deceased is survived by descendants, different rules apply. The spouse receives the following from the intestate estate:

⁵ Gregory Blue, 'A Concise Survey of the Wills, Estates and Succession Act of British Columbia' (2014) 33 Est. Tr. & Pensions J. 327, 332.

⁶ Ibid., 331.

- a. the household furnishings, defined as the personal property usually associated with the enjoyment by the spouses of the spousal home (s.21(1));
- b. a preferential share of the net intestate estate as described below.

16. Ss.26-35 of the Act provide special rules on the inheritance of the spousal home. In essence, the surviving spouse may acquire the spousal home to satisfy, in whole or in part, its interest in the estate (s.26(2)). That is to say, that the share of the spouse may be calculated and used to buy out the spousal home, either in whole or in part. The details of the process for buying out the spousal home are set out in ss 27-35 of the Act.

17. The size of the preferential share will depend on the descendants of the intestate. If all descendants are descendants of both the intestate and the surviving spouse, the preferential share of the spouse is \$300,000 (s.21(3)). By contrast, there is a smaller spousal share (\$150,000) where all the children of the deceased are not also children of the spouse (s.21(4)).

18. The rationale for the rule is that in blended families the common children may be treated more favourably than those who are only the intestate's children. By reducing the share of the spouse, a bigger pot is left to the children of the intestate.

19. All of this is subject to the caveat that if the net value of an intestate estate is less than the spouse's preferential share (either \$300,00 or \$150,000 as per above), the intestate estate must entirely be distributed to the spouse (s.21(5) of the Act).

20. All the disbursements are made from the net value of the intestate estate which is calculated pursuant to s.21(1). It includes the value of an intestate estate after deducting from its fair market value, both inside and outside British Columbia, the following:

- a. the value of household furnishings distributed to a spouse under s21, and
- b. charges, debts, funeral and administration expenses, and fees under the *Probate Fee Act*, payable from the estate.

21. S.23 caters for the situation where a person dies without leaving a surviving spouse. In that situation, the intestate estate must be distributed in the following order:

- “(a) to the intestate's descendants,
- (b) if there is no surviving descendant, to the intestate's parents in equal shares or to the intestate's surviving parent,
- (c) if there is no surviving descendant or parent, to the descendants of the intestate's parents or parent,
- (d) if there is no surviving descendant, parent or descendant of a parent, but the intestate is survived by one or more grandparents or descendants of grandparents, then the following applies:



- (i) an equal part goes to the surviving parents or parent of each of the intestate's parents, in equal shares, but if a parent of the intestate has no surviving parents, that part goes to the descendants of those deceased grandparents, and
- (ii) for the purpose of subparagraph (i), a part is determined by dividing the estate by the number of parents of the intestate:
 - who have a surviving parent, or
 - who do not have a surviving parent but whose deceased parents have a surviving descendant;
- (e) if there is no surviving descendant, parent, descendant of a parent, grandparent or descendant of a grandparent, but the intestate is survived by one or more great-grandparents or descendants of great-grandparents,
 - (i) an equal part goes to the surviving grandparents or grandparent of each of the intestate's parents, in equal shares, but if a grandparent of the intestate has no surviving parents, that part to the descendants of those deceased great-grandparents, and
 - (ii) for the purpose of subparagraph (i), a part is determined by dividing the estate by the number of parents of the intestate
 - who have a surviving grandparent, or
 - who do not have a surviving grandparent but whose deceased grandparents have a surviving descendant, or
- (f) if there is no person who is entitled under paragraphs (a) to (e), the whole intestate estate passes to the government..."

22. Under 24(1), when a distribution is to be made to the descendants of a person, the property that is to be so distributed must be divided into a number of equal shares equivalent to the number of

- a. surviving descendants, and
- b. deceased descendants who have left descendants surviving the person, in the generation nearest to the person that contains one or more surviving members.

23. S.24(2) stipulates that each surviving member of the generation nearest to the person that contains one or more surviving members must receive one share, and the share that would have been distributed to each deceased member if surviving must be divided among that member's descendants in the same manner as under subsection (1) and this subsection. This essentially means that the share that the deceased member of the generation is supposed to receive will be divided accordingly among his descendants.

24. In 2014, s.24(3) was repealed which stipulated that only the first generation of deceased descendants can form part of distribution. S24(3) prohibited 'taking by representation' (i.e., taking by more remote relatives of the deceased) beyond the level of the deceased member of the generation inhering the estate. Since then, the children of the person entitled to a share of estate may take by representation.⁷

⁷ Gregory Blue, 'A Concise Survey of the Wills, Estates and Succession Act of British Columbia' (2014) 33 Est. Tr. & Pensions J. 327, 343.

25. S.23(3) cuts off relatives of the 5th degree of kinship out of inheritance (e.g., grand-nieces and -nephews, grand-uncles and –aunts), subject of course to the power to nominate a distant relative of the 5th degree of kinship or even more distant in the will. An exemption is provided for the descendants of the intestate who are of the 5th degree of kinship (s23(4)). This means that in the situation where the intestate was only survived by a great-great-great grandchild (or even a more remote grandchild), that descendant would inherit the deceased's estate.

26. Prior to the introduction of the Act, the intestate inheritance in British Columbia was based on the system of kinship/consanguinity. A major change in this area was the shift from the kinship/consanguinity system of inheritance to the parentelic system. Under the parentelic system, the line of the closest common ancestor must be exhausted before other relatives will share in the estate.⁸ The system of consanguinity instead decides the order of inheritance on the basis of the degrees of relatedness.

27. An example will explain: assume that the closest living relatives of an intestate are an uncle and a nephew. Under the consanguinity system, an uncle (descendant of a grandparent) and a nephew (descendant of the intestate's parent) would take the same size of share because they are both relatives of the third degree. Under the parentelic system, the nephew would take ahead of the uncle because the intestate and the nephew have a closer common ancestor (the intestate's parent) than do the uncle and the intestate.⁹

Descendants

28. "Descendant" is defined in the Act to refer to all lineal descendants through all generations (s1). As mentioned above, the exclusion of relatives of the 5th or greater degrees relatedness does not apply to the descendants of the deceased (s23(3)).

29. In respect of posthumous birth, descendants and relatives of an intestate, conceived before the intestate's death but born after the intestate's death and living for at least 5 days, inherit as if they had been born in the lifetime of the intestate and had survived the intestate (s.8 of the Act).

30. Special rules are provided for posthumous births if the child was conceived after death of the intestate. Under 8.1(1) of the Act, a descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person, assuming all of the following conditions are satisfied:

- a. a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice to the

⁸ Wills, Estates and Succession: A Modern Legal Framework: A Report prepared for the British Columbia Law Institute by the Members of the Succession Law Reform Project (2006), p. 10

⁹ Wills, Estates and Succession: A Modern Legal Framework: A Report prepared for the British Columbia Law Institute by the Members of the Succession Law Reform Project (2006) p. 11

- deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;
- b. the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
 - c. the deceased person is the descendant's parent.

31. Adopted children are treated as the natural children of the intestate. However, the adopted child is not entitled to inherit the estate of his or her own pre-adoption parent except through the will of the pre-adoption parent (s.3(2) of the Act). Similarly, the pre-adoption parent of the child is not entitled to the estate of the child except through the will of the child.¹⁰ S.3(3) clarifies that the adoption of a child by the spouse of a pre-adoption parent does not terminate the relationship of parent and child between the child and the pre-adoption parent under the Act.

Mixed families

32. The Act contains no separate provisions for stepchildren. They are not treated as heirs of the deceased unless they are legally adopted. Equally, unlike the position in Washington State, in British Columbia no distinction is made between kindred of the half blood and those of the whole blood within the same degree of kinship.¹¹ Some of the practitioners we contacted indicated that there does not seem to be any appetite for the recognition of unadopted stepchildren and fictive kin as successors in intestacy under the generally applicable common law-based legal culture.

Advancement

33. The law of intestate successions may in principle recognise the reality that a person may advance large sums of money while he/she is still alive. The question then is whether such advancements are treated as disbursements of the share of his/her estate following death. Unlike the law of Washington State, the law of British Columbia does not treat such advancements as relevant to the distribution of the estate. Gifts take effect on their own terms.

34. The rationale given is that 'the function of intestacy was to distribute what was left of the intestate's property at death, and not to redress inequalities existing in the intestate's lifetime'. Further, 'if a parent seriously desired that advances made to a child during life be set off in the distribution of the parent's estate, this intention would probably be expressed through a clause in a will.'¹²

35. Other Canadian states (for instance, Saskatchewan) do recognise advancements as reducing the share of the heir (ss. 15-16 of the Intestate Succession Act, 1996).

¹⁰ See also *Boer v. Mikaloff Estate*, 2017 BCSC 21, 2017

¹¹ Bulcroft, Johnson, *op. cit.*, p. 27

¹² Wills, Estates and Succession: A Modern Legal Framework: A Report prepared for the British Columbia Law Institute by the Members of the Succession Law Reform Project (2006), p. 18



Washington State

I. History

36. Probate was and is regulated by Title 11 of the Revised Washington Code ('RCW') on Probate and Trust Law ('Law'). Significant changes to the law were made in 1960's when the law of Washington State was brought in line with the US Model Probate Code. Underlying this was the desire to simplify procedures and eliminate unnecessary steps and archaic provisions of the existing legislation.¹³

37. Historically, in the law of Washington State upon the death of a decedent, a one-half share of the community property passed to the surviving spouse, and the other one-half share passed either in accordance with a testamentary disposition of the decedent or, in the absence thereof, in accordance with the statutory ladder (§11.02.070). However, by adopting the Model Probate Code, the law of Washington State was amended to pass all community estate to the surviving spouse (§11.04.015).

38. Further, the position under the previous regime in Washington was that if there were one or two grand-parents on one side but no grandparent on the other, the living grandparents take all, to the exclusion of living descendants of grandparents on the other side. The reformed legislation allows representational taking if on either side the respective grandparents have both predeceased the intestate, i.e., if there are surviving grandparents on one side, but not on the other side, then the issue of the grandparents who did not survive take by representation (instead of the deceased grandparents). If there is neither grandparent nor issue of grandparent on any one side, the entire estate goes to the other side. The law was reformed since the old position was unfair in that it disinherited an entire line of grandparent progeny by the fortuitous survival of one out of four grandparents.¹⁴

39. The Probate Model Code of 1946 treated adopted children as "heirs" and a later the change in the code introduced a new section, stating that "a lawfully adopted child shall not be considered an heir of his natural parents for purposes of this title".¹⁵

40. The illegitimate child was considered "nullius filius" (i.e., son of nobody) and incapable of inheriting and transmitting any estate, including that of his/her maternal kindred. The law of Washington State was later reformed to treat an illegitimate child in the same manner as if he were a legitimate child.

¹³ Robert Stewart, John Richard Steincipher, 'Probate Reform in Washington' (1964) 39. Wash. L. Rev. 873, 874.

¹⁴ Robert Fletcher, 'Adapting the Uniform Probate Code to Washington Marital Property Law' (1972) 7 Gonz. L. Rev. 261, 265

¹⁵ 1965 c 145 § 11.04.085.

II. Current law

Definition of spouse

41. In Washington, only married persons or registered partners are treated as spouses for intestate succession. The law of Washington does not treat couples living together as spouses for the purposes of intestate inheritance. The law of Washington State was adopted to recognise state registered domestic partnerships.¹⁶ However, the law has not gone so far as to recognise cohabitation.

42. The explanation put forward is that common law relationships are more likely to be casual and occasional, and the couple is not presumed to support each other.¹⁷ Bulcroft and Jonhson have raised concerns about the failure to recognise cohabitation as giving rise to the spousal inheritance rights:

'Yet, as the number and length of cohabiting relationships increases, support between the couple is more likely. Concomitantly, the presumption of support cannot be assumed for today's legally married couples, many of whom maintain separate economic identities and who will terminate the marital contract with some rapidity.'¹⁸

43. The discussions with practitioners from the Washington State indicated that at the moment there does not seem to be appetite for recognising common-law marriages (cohabitation) as giving rise to a spousal relationship and entitling the surviving spouse inherit property upon the death of its spouse. Now that the law of Washington recognises same sex and domestic partnerships, there is unlikely a move to recognise the cohabitor as a spouse, if there has not been one of these opportunities to become legal partners. In addition, if the cohabitor can show a valid financial consideration given, that could entitle him/her to an ownership interest in the property of the deceased.

44. Similarly, spouses, factually separated but still legally married, do not cease being spouses for the purposes of inheritance (§11.02.005(17)). Spouse's inheritance rights are only terminated upon the termination, dissolution, or invalidation of the marriage (§11.02.005(17)). This stands in contrast to the position in British Columbia where a separated spouse cannot inherit the decedent's estate, assuming the spouses live separately and with no intention of resuming cohabitation.

¹⁶ Domestic partnerships were introduced to allow couples, one of whom is at least 62 years old, to register their relationship. Marriage was not necessarily the effective way of registering their relationship since marrying could have affected the pension or social security rights of the either of the persons. Domestic partnerships were without prejudice to pension or social security rights. Both heterosexual and homosexual couples could register a domestic partnership (RRCW 26.60.010).

¹⁷ Law Reform Commission of British Columbia, 1982

¹⁸ Kris Bulcroft, Phyllis Johnson, 'A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics' (2000) 2 J.L. & Fam. Stud. 1, 26

45. In respect of simultaneous deaths, the law of Washington State considers that the person has survived its spouse if he/she survived him by 120 hours (§11.05A.020).

Spousal share

46. The spouse or state registered domestic partner is entitled to the following from the net estate (§11.04.015(1)):

- a. All of the decedent's share of the net community estate;¹⁹ and
- b. One-half of the net separate estate²⁰ if the intestate is survived by issue; or
- c. Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents, or by one or more of the issue of one or more of his or her parents; or
- d. All of the net separate estate, if there is no surviving issue, nor parent, nor issue of the parent.

47. It has been argued that:

'[B]ecause legislators perceived the removal of wealth from the decedent's blood relatives (in this case, the parents) is undesirable, the surviving spouse who has no children must share a portion of her/his estate with the decedent's parents. In practice, surviving spouses without issue who find themselves in intestate situations are more likely to be younger persons who may well depend on the decedent's estate. But authors of the statutes on succession seem reluctant in Washington State to permit the surviving spouse to inherit the entire estate, in part due to the fear that he/she may remarry and transfer the estate to ancestral lines other than the decedent's. ... In British Columbia, however, it is through the statute of consanguinity that parents of the decedent can inherit in cases in which there are no surviving children or grandchildren. Thus, the statutory standards are comparable in terms of the order of succession, with only minor modifications with regard to the portion of spousal share.'²¹

48. "Net estate" is defined as the real and personal property of a decedent after satisfying the claims against and debts of the deceased. Certain items of property are protected from the claims against the net estate and are thus excluded from the net estate: homestead rights, exempt property and the family support (§§ 11.02.005(9) and 11.04.250).

- Homestead rights (§6.13.070). Homestead is defined as:

¹⁹ Community property is the property acquired in the course of the marriage (including the family house, salaries).

²⁰ Separate property is the property acquired by one spouse prior to marriage, or acquired over the course of marriage by gift or inheritance to the individual spouse, and the rents, issues, and profits of separate property (§26.16.010).

²¹ Bulcroft, Johnson, op. cit., pp. 24-25.



'The homestead consists of real or personal property that the owner uses as a residence. In the case of a dwelling house or mobile home, the homestead consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated and by which the same are surrounded, or improved or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. A mobile home may be exempted under this chapter whether or not it is permanently affixed to the underlying land and whether or not the mobile home is placed upon a lot owned by the mobile home owner. Property included in the homestead must be actually intended or used as the principal home for the owner.' (§6.13.010)

The homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount of \$125,000 (§6.13.030). There is a caveat: this exemption does not apply when the homestead is being seised for the satisfaction of tax claims (§6.13.030).

- Exempt property which includes :
 - i. All wearing apparel of every individual and family, but not to exceed three thousand five hundred dollars in value in furs, jewellery, and personal ornaments for any individual.
 - ii. All private libraries including electronic media, which includes audiovisual, entertainment, or reference media in digital or analogue format, of every individual, but not to exceed three thousand five hundred dollars in value, and all family pictures and keepsakes.
 - iii. Household goods, appliances, furniture, and home and yard equipment, not to exceed six thousand five hundred dollars in value for the individual or thirteen thousand dollars for the community, no single item to exceed seven hundred fifty dollars, said amount to include provisions and fuel for the comfortable maintenance of the individual or community;
 - iv. Other personal property, except personal earnings, not to exceed three thousand dollars in value (§6.15.010).
- Family support (§11.54). The surviving spouse may request from court an award of family support payments (§11.54.010). Such an award is exempt from all debts, judgments and liens (§11.54.070). However, if the decedent is survived by children of the decedent who are not also the children of the surviving spouse, on petition of such a child the court may divide the award between the surviving spouse and all or any of such children as the court deems appropriate (§11.54.010(1)).

The practitioners from the Washington States have informed that family support awards are very rarely seen. The personal representative is usually a family member, often the primary or sole beneficiary, so there is no need for such awards in the great bulk of cases. The personal representative enjoys great powers in the management of the estate, and they can use the estate property for assisting the family if need be. If not, then personal

representative may make an advance, rather than go through the courts to claim family support, unless a contest is foreseen.

49. Washington's statutory regulations seem more generous in their treatment of the surviving spouse. However, in a number of areas the rights of the surviving spouse are curtailed by the rights of the surviving in-laws and stepchildren of the decedent, for instance, in the area of family support (see §48).

50. No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent (§11.84.020).

Children

51. "Parent," as used in intestate succession statute, means "legal parent," and not "biological parent." Accordingly, it was held that the order terminating a biological mother's parental rights when she surrendered her child to charitable society for adoption placement in 1947 divested the mother of her right to intestate inheritance from the child, even though the child was never adopted. Pursuant to that order, the mother was no longer the child's legal parent, and "parent," as used in intestate succession statute in effect upon child's death in 1996, meant "legal parent," and not "biological parent."²²

52. Beyond that, the following issues arise in the law of Washington:

- **Biological children:** under §11.04.081, the child will inherit irrespective of whether the parents are married. This was not always the case historically.²³
- **Adopted children:** the law of Washington recognises that an adopted individual is a lineal descendant of each of his or her adoptive parents and of all individuals with regard to which each adoptive parent is a lineal descendant (§11.02.005(8)).
- **Foster children, fictive kins and stepchildren** are treated as children for the purposes of intestate succession only if they are adopted by the intestate. They are not treated as children even if brought up by the deceased and mentioned as 'children' in his will.²⁴ Academic commentary argues that this is a problem as they are not considered to be descendants even though a parent-like relationship might have arisen between the intestate and the child.²⁵ The discussions with practitioners indicated that there is no appetite in the State to recognise stepchildren as being entitled to succession rights.
- **Biological children adopted by someone else:** upon adoption by someone else, the biological children are no longer entitled to receive their share of the biological intestate (§11.04.085).

²² In re Estate of Fleming (2001) 143 Wash.2d 412.

²³ In re Gand's Estate (1962) 61 Wash.2d 135, 377 P.2d 262.

²⁴ In re Smith's Estate, 49 Wash.2d 229 (WASH. 1956)

²⁵ Bulcroft, Johnson, op. cit., p. 30.

- **Posthumous children:** a child conceived prior to the death of a parent but born after the death of the deceased parent is considered to be the surviving issue of the deceased parent (§11.02.005(8)).
- **Grandchildren** will receive a share only if their parent (decedent's issue) is no longer alive.

53. According to §11.04.015(2), the shares not distributed to the surviving spouse shall descend and be distributed as follows:

- To the issue (children) of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation. This essentially means that if a child is not alive, his children will take in his stead.
- If the intestate is not survived by issue, then to the parent or parents who survive the intestate.
- If the intestate is not survived by issue or by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation.
- If the intestate is not survived by issue or by either parent, or by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate; if both maternal and paternal grandparents survive the intestate, the maternal grandparent or grandparents shall take one-half and the paternal grandparent or grandparents shall take one-half.
- If the intestate is not survived by issue or by either parent, or by any issue of the parent or parents or by any grandparent or grandparents, then to those issue of any grandparent or grandparents who survive the intestate; taken as a group, the issue of the maternal grandparent or grandparents shall share equally with the issue of the paternal grandparent or grandparents, also taken as a group; within each such group, all members share equally if they are all in the same degree of kinship to the intestate, or, if some be of unequal degree, then those of more remote degree shall take by representation.

Mixed families

54. As explained above, stepchildren, fictive kins and foster children are not recognised by the intestate succession regime. The law of Washington State is largely silent on the legal status of stepchildren, assuming they are not adopted.

55. The only relevant provision is contained in §11.04.095 which governs the situation where the parent dies leaving property to his/her surviving spouse who is his second wife/husband but also leaves children from his/her marriage who are stepchildren to the second wife/husband. If later the second wife/husband dies without leaving surviving children of his/her own, then the stepchildren can inherit the portion of the stepparent's estate that was obtained from their inheritance of the biological parent's estate. If, by contrast, the second wife/husband has children or spouse, the property will pass to them. This provision is designed to



avoid escheat (passing of the property to the State) but recognises some, albeit limited, rights to stepchildren. The provision does not apply to the remaining property of the second wife/husband which the latter did not receive from his/her earlier deceased spouse. Such property will revert to the state. The position is different in some other US States (Ohio, Maryland, etc.) and used to be different in Washington State until 1967 whereby, under §11.08.010, the stepchildren inherited the entire estate of the stepparent without any descent, and not only part of the estate inherited earlier from the deceased natural parent.²⁶

56. In Washington, the succession to half blood relatives is inspired by the desire to preserve the ancestral estate. Under §11.04.035, half blood kindred can in principle inherit as whole blood, unless the inheritance comes to the intestate by descent, devise, or gift from one of the ancestors of the deceased, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance. This insures transmission of wealth along blood ties rather than kinship order.

57. There were legislative bills to eliminate this 'anachronistic' doctrine of ancestral property and provide for equal treatment of half blood relatives.²⁷ However, the difference in treatment of half blood relatives is still good law in Washington.

58. Proposals have been made to treat stepchildren as rightful heirs in certain circumstances:

'Under existing intestacy statutes all of the categories of heirs are too broad in that the heirs may inherit from a decedent with whom they shared no meaningful relationship and whose clear intent was to disinherit them. Nevertheless, lawmakers have correctly assumed that inclusion of spouses, natural children, adopted children, siblings and parents as heirs will reach the right result in most cases. In the stepfamily setting, on the other hand, legislatures have assumed that exclusion in all cases would accomplish the right result in most cases. A complete reversal, whereby the stepmarriage alone would create inheritance rights between stepparents and stepchildren, would be too sweeping. The likelihood of no genuine family ties is greater in the stepfamily context than in the natural family. Thus, a more refined test for making heirship determinations is appropriate.

The standard for inheritance by stepparents and stepchildren must involve proof of the stepmarriage plus proof of the de facto family relationship between the nonparent spouse and the children of the other spouse. The standard for stepfamily inheritance must be designed to identify cases in which inheritance would accomplish the wishes

²⁶ Margaret Mahoney, 'Stepfamilies In The Law Of Intestate Succession And Wills' (1989) 22 U.C. Davis L. Rev. 917, 920.

²⁷ Robert Stewart, John Richard Steincipher, 'Probate Reform in Washington' (1964) 39. Wash. L. Rev. 873, 878-879.

of most intestate property owners, and provide guidance to courts making the heirship determinations.²⁸

Advancement

59. The law of Washington State provides in §11.04.041 that if the deceased gave property in his or her lifetime as an advancement to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his or her estate, then that property shall be counted toward the advancee's intestate share.

60. An example of an advancement may be an extravagant gift made to the advancee. §11.04.041 stipulates that gratuitous inter vivos transfers are deemed to be absolute gifts and not advancements unless shown to be advancements. The onus of proof lies with the person seeking to characterise the gift as an advancement. He or she would have to rebut the presumption that such a large sum was a gift.

61. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs.

62. Having said that, the advancement is a rare scenario in Washington. The area where such transfers occur and are contested is in case of an intervivos gift where the donee is also a fiduciary and/or there is good evidence of undue influence.

²⁸ Margaret Mahoney, 'Stepfamilies In The Law Of Intestate Succession And Wills' (1989) 22 U.C. Davis L. Rev. 917, 929.

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