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DISTRIBUTION ON INTESTACY IN ONTARIO

By P. W. HOGG*

Source of Law

The purpose of this article is to describe Ontario's scheme of distribution of the estate of a person who dies intestate.¹ The scheme is mainly contained in the Devolution of Estates Act (the D.E.A.), which preserves for Ontario most of the rules laid down by the English Statutes of Distribution of 1670² and 1685.³ These rules, which in England applied only to personalty, are made applicable to realty as well in Ontario by s. 2 of the D.E.A. In the United Kingdom these rules were replaced by a different scheme in 1925.⁴ The need for a simpler scheme in Ontario will become apparent as we work through the rules.

There is no detailed text on the law of intestacy in Ontario.⁵ On some questions it is still necessary to turn to the digests or to old editions of English property texts. The current editions of English property texts often include an account of the pre-1925 law. However there are significant differences between the Ontario D.E.A. and the old English Statutes of Distribution, so that English texts, whether current or not, must be used with caution.

The Desirability of a Will

The D.E.A. applies only to property which is undisposed of by will. If a will effectively disposes of the deceased's entire estate, resort to the Act

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¹ Under the rules governing conflict of laws, Ontario's law of succession on intestacy applies to (a) the "movables" wherever situated of a person dying intestate domiciled in Ontario, and (b) the "immovables" situated in Ontario of a person dying intestate wherever domiciled: J.-G. Castel, *Conflicts of Lawes* (2d ed., 1968), ch. 11; *Widdifield on Executors' Accounts* (5th ed., 1967) at 199-202.

² 22 & 23 Car. 2, c. 10 (U.K.).

³ 1 Jac. 2, c. 17 (U.K.).

⁴ Administration of Estates Act, 1925 (U.K.).

⁵ There are short accounts in the Canadian Encyclopedic Digest, vol. 5 at 602-630; *Widdifield on Executors' Accounts* (5th ed., 1967) at 170-79; Macdonell, Sheard and Hull, *Probate Practice* (2nd ed., 1972) at 191-97. The most complete account is in the Study prepared by the Family Law Project for the Ontario Law Reform Commission, 1967, vol. 3 at 433-56 (hereinafter referred to as *Family Law Study*). E. D. Armour, *Essays on the Devolution of Land* (1903) concentrates on the problems related to land, and is out of date. There is a "Table of Intestate Succession in Ontario" and "Table of Consanguinity" by H. Allan Leal in the National Trust *Solicitor's Desk Book* (Toronto, 1966) at 469, and in *Widdifield* at 173. There are also Tables of Distribution and Consanguinity in *Macdonell*, 194 and 520 and in the *Ontario Estates Manual* (Toronto: York Publishers, 1970) at 140. Blackstone's Table of Consanguinity is reproduced in *Ingram's Surrogate Guide* (1966) at 97.

is obviously unnecessary. It is worth saying at the outset that in most cases it is desirable for a person to make a will.

Occasionally a person's desires as to the disposition of his estate on his death are precisely met by the provisions of the Act. Even in this case it is arguable that he should make a will. In a will he can appoint the executor who will administer the estate; if he makes no will he cannot appoint the administrator who will administer his estate, and so he cannot be certain that letters of administration will be granted to a person in whom he has confidence. Furthermore, the task of administration on intestacy is somewhat more difficult and expensive than it is where a will has been left. We shall see how complex the provisions of the D.E.A. are in certain estates, and the application for letters of administration requires more documentation than the application for probate. Also, an executor's power to act derives from the will and in a case of urgency can be exercised even before probate has been granted; an administrator's power derives from the letters of administration and cannot be exercised before the grant. On the death of a sole or last surviving executor, the executor's own executor assumes the office and can continue to administer the estate; on the death of a sole or last surviving administrator, the office is not transmitted and a new grant of letters of administration has to be obtained.

But of course the overwhelming advantage of making a will is that, subject to the Dependents' Relief Act,⁶ a will enables a person to dispose of his property on death as he sees fit. He can give vent to his personal preferences and to his own judgment as to the needs of persons or causes close to him. He can benefit persons outside the scheme of the Act, such as relatives by marriage, relatives who are not the next-of-kin, friends, or charities. He can benefit persons inside the scheme of the Act but in different shares from those which the Act would have conferred.

With the use of a will, flexible and sophisticated estate plans can be created. A trust can be established under which a wide variety of arrangements is possible. For example, a widow can be given a life interest, with or without a power to encroach on capital, and the children can be given the remainder. The interests of the children or of other beneficiaries can be postponed until they have reached what the testator regards as a mature age. A protective trust (which preserves the fund from creditors) may be created in favour of an improvident beneficiary. Many other possibilities are open under the flexible device of the trust. There are various ways in which tax savings can be accomplished, and the tax which is payable can be charged to a particular part of the estate. In the view of some testators it is also a significant advantage that the management of his investments after his death should be entrusted to experienced trustees of his own choosing.

⁶ R.S.O. 1970, c. 126.

Despite these various advantages a significant minority of people die wholly⁷ or partially intestate. It is to the distribution of their estates that this note is addressed.

History

(a) *Realty and Personalty:*

Before 1925 in England on intestacy realty and personalty passed differently: realty "descended" to the intestate person's "heir"; personalty was "distributed" to the intestate person's "next-of-kin". For example, if a widower died intestate leaving seven children, three sons and four daughters, the realty would descend directly (without vesting in the personal representative) to the eldest son (for he would be the heir), and the personalty would vest in the personal representative who, after paying the debts, would distribute it among all seven children (for they would be the next-of-kin).⁸ The rules for ascertaining the heir were partly common law and partly statutory. The general principle was primogeniture, or succession by the eldest son, but the detailed rules were very complicated.⁹ Under those rules the surviving spouse of a deceased person was seldom the heir of the deceased. This could occur only if the two spouses were related by blood to each other and if there was no eligible son. And so the law of succession gave to the surviving spouse certain rights prior to the rights of the heir. The widow was entitled to "dower" (discussed below), and the widower was entitled to "curtesy" (discussed below). Personalty did not, as we have noticed, descend to the heir; nor was it subject to dower and curtesy. Descent to a single heir was designed to preserve landed estates intact; there was no such policy in regard to personalty. Personalty passed to the personal representative, who distributed it according to rules laid down by the Statutes of Distribution of 1670 and 1685.¹⁰ In England the Administration of Estates Act, 1925, substituted a common set of rules applicable to realty and personalty alike. The concept of the heir is no longer relevant, and dower and curtesy are abolished.¹¹

In Ontario the history of the legislation may be briefly summarized as follows. It will be recalled that in 1792 the first statute enacted by the legislature of the new province of Upper Canada in effect repealed all the prior colonial laws applicable in the province and provided that "in all matters of

⁷In York County, Ontario, the figures for 1965 (the last year in which these details were recorded in gross figures):

Probate	4968
Letters of Administration with will annexed	252
Letters of Administration	1377

⁸R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (3rd ed., 1966) at 516. The Land Transfer Act, 1897 (U.K.) altered the common law by vesting realty as well as personalty in the personal representative; on intestacy, however, the realty still vested in the heir until an administrator was appointed: *Id.*, at 545.

⁹*Id.*

¹⁰There were other statutory provisions as well: *Id.*, at 528.

¹¹*Id.*, at 532.

controversy relative to property and civil rights, resort shall be had to the Laws of England as the rule for the decision of the same".¹² This adoption of the English law of 1792 included of course the English law concerning succession on death. These laws continued in force in Canada West after the Union Act, 1840¹³ had created the united province of Canada; and they continued in force in Ontario after confederation in 1867. Of course such laws were amendable by the colonial legislature. So far as the distribution of estates on intestacy is concerned, the first really important reform occurred in Ontario when the Devolution of Estates Act, 1886 assimilated realty and personalty by providing that both "shall be distributed as personalty".¹⁴ The same Act included several provisions concerning the rules of distribution, but the bulk of these rules remained in the English Statutes of Distribution of 1670 and 1685. It was not until 1902 that Ontario eliminated the need to resort to the English law by taking the rules of distribution from the English Statutes of Distribution, and enacting them as Ontario law. This was done in the Statute of Distribution which was included in the Revised Statutes of Ontario of 1897,¹⁵ but which did not come into force until 1902.¹⁶ In 1910 the provisions of this statute and the provisions of the 1886 statute were re-enacted in one statute, the Devolution of Estates Act, 1910,¹⁷ which is the ancestor of the current D.E.A. The 1910 statute was essentially a consolidation into one statute of the rules previously contained in the two earlier statutes. There was however some redrafting. One section of the 1886 statute was re-worked and inserted as an interpolation in the middle of the main distributive provision; the effect (if any) of that interpolation is still a matter of controversy, as we shall see.¹⁸

The 1910 statute has been regularly re-enacted and occasionally amended, but its rules constitute most of the basis of the current D.E.A. The current D.E.A., like its predecessors, provides a set of rules of distribution applicable to realty as well as personalty (s. 2). The concept of the heir is no longer

¹² 32 Geo. III, c. 1 (Upper Canada); later replaced by the Property and Civil Rights Act, R.S.O. 1877, c. 92. For an account of the history of Ontario's law, see W. R. Jackett, "Foundations of Canadian Law in History and Theory" in O.E. Lang ed., *Contemporary Problems of Public Law in Canada* (1968) at 3.

¹³ 3 & 4 Vict., c. 35 (U.K.).

¹⁴ Devolution of Estates Act, 1886, 49 Vict., c. 22 (Ont.), s. 4. See now Devolution of Estates Act, R.S.O. 1970, c. 129, s. 2. Before 1886 there was an important reform which is no longer of modern significance: the Inheritance Act, 1851, 14 & 15 Vic., c. 6 (Province of Canada, applicable only in Upper Canada) abolished primogeniture and provided for the equal division of the intestate's land among his children.

¹⁵ Chapter 335.

¹⁶ Imperial Statutes Act, S.O. 1902 (2 Edw. 7), c. 13.

¹⁷ S.O. 1910 (10 Edw. 7), c. 56.

¹⁸ The original provision is Devolution of Estates Act, 1886, s. 6; interpreted in *Re Colquhoun* (1895), 26 O.R. 104; *Walker v. Allen* (1897), 24 O.A.R. 336; *In re Wagner* (1903), 6 O.L.R. 680. The interpolation is in Devolution of Estates Act, 1910, s. 30 ("and for the purpose of this section the father and the mother and the brothers and the sisters of the intestate shall be deemed of equal degree"). For controversy as to the effect of this interpolation, see notes 56 and 67, *infra*.

relevant. For some strange reason dower and curtesy have never been abolished, although we shall see that the Act makes provisions for election with respect to each right.

(b) *Dower*:

The widow was entitled at common law to her "dower", which was a life estate in an undivided one-third of the legal freeholds of inheritance of which her deceased husband was seized at any time during "coverture", i.e., the marriage.¹⁹ At common law dower was not defeated by the husband disposing of the land either inter vivos or by will: a purchaser or devisee took subject to the wife's right to dower. In England the Dower Act, 1833, made dower defeasible by the husband disposing of the land either inter vivos or by will. In Ontario, however, the 1833 reform has never been the law. Ontario's Dower Act,²⁰ by s.1, states that the widow's right to dower applies to "the third part of all the lands of her husband whereof he was seized *at any time* during coverture". Dower is not defeated by a conveyance inter vivos unless the wife joins in the conveyance.²¹ Nor is dower defeated by a disposition of the land by will, although the wife may be forced to elect between her dower and benefits given to her by the will (see below).

The wife had no dower in freeholds of inheritance of which her husband held only an equitable estate until the English Dower Act, 1833, which extended the wife's dower to equitable estates. This extension was adopted by Ontario, and the current Ontario Dower Act, by s. 3, provides that "where a husband dies beneficially entitled" to an equitable freehold of inheritance, "his widow is entitled to dower out of such land". Equitable dower under this provision, unlike legal dower under s. 1, may be defeated by the husband conveying the land inter vivos without the wife joining in the conveyance. This is because the statute does not confer dower unless the husband "dies beneficially entitled".

Neither legal nor equitable dower is defeated by a disposition of the land by will. Nor is dower defeated simply because the husband in his will makes other provision for his wife. The general rule is that she is entitled to dower as well as her provision under the will. But if the husband in his will gives to the wife benefits which are expressly declared to be in lieu of dower,²² or which are inconsistent with dower (this is a question of interpretation), then the widow has to elect between the benefits under the will and dower.

An order under the Dependents' Relief Act (a D.R.A. order) in favour of the wife will not disentitle her to dower. If however the D.R.A. order is expressly declared to be in lieu of dower or is inconsistent with dower, then the wife has to elect against dower in order to take the benefit of the order. Because the Dependents' Relief Act, by s. 10, provides that the value of a

¹⁹ See the *Family Law Study*, vol. 1, ch. 4, for a detailed account of the law.

²⁰ R.S.O. 1970, c. 135.

²¹ *Id.*, s. 19.

²² See precedent clause in T. Sheard and R. Hull, *Canadian Forms of Wills* (3rd ed., 1970) at 36.

D.R.A. order taken together with the value of any benefits given by the will may not exceed "the amount to which the person in whose favour the order is made would have been entitled if the testator had died intestate", it seems that a D.R.A. order will be deemed inconsistent with dower whenever the value of the order, plus the value of any benefits given to the wife by the will, plus the value of dower, would total more than the wife would have been entitled to if her husband had died intestate and she had elected to take her interest under the D.E.A. (election under the D.E.A. is explained below). In that case she has to elect against dower in order to take the benefit of the D.R.A. order.²³

On the intestacy of the husband in Ontario the D.E.A. preserves the wife's right to dower, but, by s. 8, she is permitted to elect to take her interest under the Act in her husband's undisposed-of real property in lieu of dower. This is explained in more detail below.

In practice in Ontario nowadays, dower is not of much value to the great majority of widows. It does not exist at all in the estate of a husband who has never owned land, or who acquired land by one of the conveyancing devices available to avoid dower, or who obtained a release or bar of dower from his wife during his lifetime.²⁴ In an estate where dower does exist it is rarely very valuable, being only a life interest in only one-third of the dowerable land. A husband's professionally drawn will which gives benefits to the wife will nearly always put the wife to her election, and then it will usually be advantageous for her to elect against dower. A wife whose husband's will has left her nothing (or not enough) will seldom be able to live on her dower; her remedy is to apply to the court under the Dependents' Relief Act for an allowance out of the estate which will be adequate for her future maintenance. And where a husband has died intestate we shall see that it is usually advantageous to the wife to elect against dower. Probably the main modern advantage of dower lies outside the law of succession: dower protects the matrimonial home by preventing the husband from selling it (except subject to dower) without the consent of the wife. The general tenor of the recommendations of the Ontario Law Reform Commission's *Family Law Study*²⁵ was in favour of removing dower altogether from the law of succession, and protecting the matrimonial home by statute. The *Study* does not however make any specific recommendations.

(c) *Curtesy*:

The widower was entitled at common law to "curtesy", which was a life estate in the whole of the freeholds of inheritance of which his wife was seized at her death. There are a number of important differences between curtesy and dower. First, curtesy extends to the whole of the curtesiable land, and not just to one-third. Secondly, equity followed the law in the matter of curtesy, and allowed curtesy in equitable freeholds of inheritance. Thirdly,

²³ *Re Neiman*, [1954] O.W.N. 527; *Re Greisman*, [1954] O.W.N. 793.

²⁴ On bar, release and avoidance of dower, see *Family Law Study*, vol. 1 at 112-117.

²⁵ Volume 1 at 143-149.

the right to curtesy only arose if there had been born alive issue of the marriage capable of inheriting the curtesiable land. Fourthly, curtesy is defeated by the wife alone conveying the land *inter vivos*; it provides no protection for the husband against the wife selling any home which she owns. Fifthly, curtesy is defeated by the wife disposing of the land in her will.

For practical purposes, therefore, curtesy is a right which arises only on the intestacy of a married woman, and then only if the foregoing rules have been satisfied. It is expressly preserved in Ontario by the Conveyancing and Law of Property Act.²⁶ The D.E.A. makes an exhaustive distribution of the real and personal property of a married woman in respect of which she dies intestate. But s. 30(2) permits the widower who would have been entitled at common law to curtesy to elect to take, in lieu of his interest under the Act, "such interest in the real and personal property of his wife as he would have taken if this Act had not been passed". The meaning of this cryptic provision is considered below.

The *Family Law Study* contains a useful chapter on curtesy,²⁷ and reaches this conclusion:²⁸ "There is no good reason for retaining curtesy in the law of Ontario and it is difficult to see why it was not abolished long ago, as it has been almost everywhere else".

(d) *Current Law of Ontario*

What follows is an account of the current law of Ontario.

The Wife

(a) *Rights under D.E.A.:*

The D.E.A. provides that a surviving wife is entitled to (1) her "preferential share" under s. 11, and (2) her "distributive share" under s. 31.

(b) *Preferential Share:*

The wife's preferential share has gradually been increased from its original figure of \$1,000 until it is now \$50,000 (s. 11 as amended in 1973).^{28a} The preferential share in effect comes off the top. The first step is to calculate the "net value" of the intestate's estate. The net value means the value after debts, funeral and administrative expenses and taxes have been paid (s. 11(5)). Where the net value of the estate does not exceed \$50,000, the wife is entitled to the entire estate (s. 11(1)). Where the net value of the estate does exceed \$50,000, the wife is entitled to the first \$50,000 (s. 11(2)) *and* to her distributive share of the residue under s. 31.

²⁶ R.S.O. 1970, c. 85, s. 29.

²⁷ Volume 1, ch. 5.

²⁸ *Id.*, 168.

^{28a} S.O. 1973, c. 18, s. 1, coming into force on 1 July 1973.

(c) Distributive Share:

The residue of the estate (both realty and personalty: s. 2) remaining after payment of the wife's preferential share is distributed under s. 31. The wife's distributive share under s. 31 is:

- (i) if there are two or more children or representatives of children (representation is explained below), *one-third*, the children or representatives taking two-thirds;
- (ii) if there is only one child or the representatives of only one child, *one-half*, the child or representatives taking the other half;
- (iii) if there are no children or representatives of children, *two-thirds*, the next-of-kin (defined below) taking one-third.

(d) Partial Intestacy:

The wife is entitled to her preferential share only in the case of total intestacy. In the case of partial intestacy she is entitled only to her distributive share. This was decided, as a matter of construction of the Intestates' Estates Act, 1890 (U.K.), which introduced the wife's preferential share into English law, in *Re Twigg's Estate* (1892),²⁹ a case in which the wife took no benefit under the will. The rule was applied to the essentially similar language of Ontario's D.E.A. in *Re Harrison* (1901).³⁰

(e) Infant Children By a Former Marriage:

Section 13 provides that where the intestate husband has infant children by a former marriage the wife is not entitled to her preferential share. She is entitled only to her distributive share.

(f) Dower:

It will be recalled that under the Dower Act the wife is entitled to her dower, which is a life estate in one-third of her husband's realty. The D.E.A. permits a wife who is entitled to dower out of her intestate husband's realty to elect to take an interest under the D.E.A. in her husband's realty in lieu of dower (s. 8). If she makes this election then she loses all dower rights (including rights over realty disposed of inter vivos or by will). The distribution of the intestate husband's entire estate, realty as well as personalty, is governed by the D.E.A. The wife obtains her preferential share and her distributive share as explained above.

A wife who is entitled to dower out of her intestate husband's realty, and who fails to elect against dower, is entitled to her dower in the husband's realty. She is entitled to nothing more out of her husband's realty (s. 8(1)). She is not entitled to a preferential share of her husband's personalty (s. 11(4)). All that she is entitled to is her distributive share under s. 31 of her husband's personalty.

²⁹ [1892] 1 Ch. 579.

³⁰ (1901), 2 O.L.R. 217.

It has been held that a wife who has completely released her dower in the lifetime of her husband (as commonly occurs in a separation agreement, for example) is deprived of any right to dower on his death.³¹ Furthermore, a wife who has so released her dower (or become disentitled to dower for some other reason such as adultery)³² is thereby deprived of the right to elect against dower, so that she cannot become entitled under s. 8 to a distributive share of the realty; nor can she become entitled under s. 11 to a preferential share of either realty or personalty.³³ In other words a wife who cannot elect is in the same position as a wife who does not elect: she is entitled under the D.E.A. only to her distributive share of her husband's personalty.

In the ordinary case a wife who has a right of election is better off electing against dower.³⁴ That way she obtains her preferential share of \$50,000 and her distributive share of the realty as well as the personalty. In order to obtain these benefits she must make a positive election against dower "by deed or instrument in writing, attested by at least one witness" (s. 8(1)). The personal representative of the deceased husband may, by notice in writing, require the wife to make her election; if she fails to do so within six months of receiving the notice she is deemed to have taken her dower (s. 8(2)). If no notice is given to the wife, then election is not subject to any time limit, except that it must take place during the wife's lifetime.³⁵ If she dies without making an election she is deemed to have taken her dower; her personal representative cannot elect for her so as to secure the preferential share and the distributive share of realty for the beneficiaries of her estate.³⁶ It is therefore important for a surviving wife to be advised of her right to elect and of the consequences of failing to exercise the right.

The Husband

(a) *Rights under D.E.A.:*

The D.E.A. provides that a surviving husband is entitled to (1) his preferential share under s. 12, and (2) his distributive share under s. 30.

³¹ *Re Knoll*, [1938] O.W.N. 282; cf. *Re Wiggins*, [1952] O.W.N. 66.

³² *MacWilliams v. MacWilliams and Ray* (1962), 32 D.L.R. (2d) 481.

³³ *Re Dalton*, [1934] O.W.N. 691; *Re Knoll*, [1938] O.W.N. 282; *Re Schop*, [1948] O.W.N. 338.

³⁴ The wife's right to dower may be more valuable than the benefits under the Act where the husband's estate is heavily burdened with debts. Unless the debts are charged on the realty and the wife has barred her dower for the purpose of the charges, the dower interest is not subject to the husband's debts.

³⁵ An election by the wife in her will has been held sufficient, on the basis that the will is an "instrument in writing, attested by at least one witness"; as to the election, the will speaks from the time of its execution, and not from the time of death: *Re Ingolsby* (1890), 19 O.R. 283.

³⁶ *Re Oliphant* (1921), 51 O.L.R. 284; *Re Case* [1973] 3 O.R. 50.

(b) *Preferential Share:*

The husband, who before 1960 was entitled only to his distributive share, has since then also been entitled to a preferential share, which is now \$50,000 (s. 12 as amended in 1973).^{36a} It is calculated in the same way as the wife's preferential share.

(c) *Distributive Share:*

In addition to his preferential share of \$50,000, the husband is entitled to a distributive share of the residue (if any) of his wife's estate remaining after payment of the preferential share. His distributive share under s. 30 is:

- (i) if there is one child, or more than one child, or the representatives of a child or children, *one-third*, the child or children or representatives taking two-thirds;
- (ii) if there are no children or representatives of children, *one-half*, the next-of-kin taking the other half.

(d) *Partial Intestacy:*

The husband is entitled to his preferential share only in the case of total intestacy. In the case of partial intestacy he is entitled only to his distributive share.³⁷

(e) *Infant Children By a Former Marriage:*

Section 13 provides that where the intestate wife has infant children by a former marriage the husband is not entitled to his preferential share. He is entitled only to his distributive share.

(f) *Curtesy:*

Where a husband would apart from the D.E.A. have been entitled to curtesy, which is a life estate in all of his wife's realty, he may under s. 30(2) "elect to take such interest in the real and personal property of his wife as he would have taken if this Act had not been passed." If he makes this election, his interest in his wife's realty is a life estate (the curtesy). His interest in his wife's personalty is not quite so clear. The conventional view is that he takes all of it absolutely.³⁸ This view has been questioned by J. W. Morden, who argues that the husband who elects to take his curtesy takes all of his wife's personal property only if there are no children; if a child or children survive then he takes only one-third, the child or children taking two-thirds.³⁹

^{36a} S.O. 1973, c. 18, s.2, coming into force on 1 July 1973.

³⁷ This does not seem actually to have been decided, but the language of s. 12 is so similar to s. 11 that there could be no difference on this point.

³⁸ H. Allan Leal, "Table of Intestate Succession", note 2, published in *National Trust Solicitor's Desk Book* (Toronto, 1966) at 472 and in *Widdifield on Executors' Accounts* (5th ed., 1967) at 178; *Family Law Study*, vol. 1 at 164, which goes on to say enigmatically that this "anomalous result" is "not likely in practice" (169); cf. Laskin, *Cases and Notes on Land Law* (rev. ed., 1964) at 72.

³⁹ Comment (1966), 44 Can. B. R. 346.

The husband who elects to take his curtesy receives no interest under the D.E.A. His rights are not governed by the D.E.A. at all, but by the common law (or according to Morden, by the statutory law which the first D.E.A. superseded). He must make an election within six months of his wife's death (s. 30(2)). If he fails to make an election within six months, then his rights are wholly governed by the D.E.A.⁴⁰ This is the reverse of the position with respect to dower; in order to be wholly governed by the D.E.A. the wife has to positively elect against dower.

Descendants

(a) *Children and More Remote Issue:*

We have seen that when children or the representatives of children survive they share in the estate even when a spouse also survives, except when the spouse's preferential share exhausts the estate. When no spouse survives then the estate (both realty and personalty: s. 2) is distributed equally among the children or representatives (s. 31).

The concept of representation is discussed below. At the moment it is sufficient to note that all of an intestate's issue (or lineal descendants) who are entitled to share in the estate will be either children (if they are of the first degree) or representatives of children (if they are grandchildren or great-grandchildren or even more remote issue). In other words the provisions of the D.E.A. conferring rights on children take care of all lineal descendants.

(b) *Advancement:*

If a child of an intestate has been "advanced" by the intestate during the intestate's lifetime, and the advancement has been expressed by the intestate in writing or acknowledged by the child in writing, then the amount of the advancement must be brought into hotchpot, i.e., it must be brought into account in reckoning the shares of the other children and it must be debited to the share of the advanced child. These and some subsidiary rules as to advancement are set out in s. 29 of the D.E.A. An advancement in this context is a gift of property by a parent to a child which is intended to be an anticipation of the share to which the child will be entitled under the D.E.A. on the death of the parent. Most gifts by a parent to a child are of course intended to be absolute and not in lieu of the child's share on intestacy.

Ascendants and Collaterals

(a) *Next-of-kin's Rights under D.E.A.:*

We have seen that the D.E.A. makes special provision for a surviving spouse, and for all descendants. This leaves two classes of relations, namely, ascendants and collaterals. These two classes are the relatives included in the

⁴⁰ *Chevalier v. Trepannier* (1902), 1 O.W.R. 847.

term "next of kindred" (referred to herein as next-of-kin) in the Act.⁴¹ When a spouse survives, but no children or representatives of children, the next-of-kin share in the estate to the extent that has already been explained, unless the estate is exhausted by the spouse's preferential share. Where neither spouse nor children or representatives survive, then the estate (both realty and personalty: s. 2) is distributed equally among the next-of-kin (s. 31).

(b) *Ascertainment of Next-of-kin:*

The next-of-kin is that relative or class of relatives in the closest degree of relationship to the intestate. The existence of any relative of a particular degree excludes all relatives of more remote degree. If there are several next-of-kin of equal degree they share equally.

The degrees of relationship are ascertained by counting the number of "steps" between the intestate and the relative in question. In the case of an ascendant (or descendant) one counts from the intestate directly to the ascendant (or descendant) in question. In the case of a collateral one counts from the intestate up to the first common ancestor and then down again to the collateral in question. Thus, the intestate's father (and son) is a relative of the first degree. The intestate's grandfather and brother (and grandson) are relatives of the second degree. The intestate's great-grandfather, nephew and uncle (and great-grandson) are relatives of the third degree. And so on.

The general rule that next-of-kin of equal degree share equally is subject to many exceptions and qualifications. The fact that children and remoter issue are not classified as next-of-kin in the D.E.A., and have a preferred position over ascendants and collaterals who are of equal or closer degree, is itself a major exception to the rule. The spouse, of course, had to be provided for specially, because he or she will not usually be a blood relative.

Before proceeding to the exceptions and qualifications to the general rule it is desirable to deal with certain special cases.

Special Cases

(a) *Blood:*

The next-of-kin include only blood relatives, not relatives by marriage (or affinity). A step-mother or mother-in-law or cousin by marriage cannot inherit under the Act. Relatives of the half blood (who are always collaterals), however, rank equally with relatives of the whole blood.⁴²

(b) *Legitimacy:*

Children and relatives can inherit under the D.E.A. only if they are legitimate. This rule is laid down in s. 28(1), subject to subsections (2) and

⁴¹ *Re Natt* (1888), 37 Ch. D. 517. In other contexts, e.g., in a will, the term next-of-kin or next of kindred will usually be apt to include descendants: see *Re Fasken*, [1953] 2 S.C.R. 10.

⁴² *Re Wagner* (1903), 6 O.L.R. 680; *Re Adams* (1903), 6 O.L.R. 697.

TABLE OF CONSANGUINITY

Direct Line		Collaterals		
Ascendants	3 Great grandparent			4 Great Uncle
	2 Grandparent		3 Uncle or Aunt	5 First cousin once removed
	1 Parent	2 Brother or sister	4 First cousin (Cousin German)	6 Second cousin
	[Deceased]			
Descendants	Child	3 Nephew or Niece	5 First cousin once removed	7 Second cousin once removed
	Grandchild	4 Great Nephew	6 First cousin twice removed	8 Second cousin twice removed.

(3). The Legitimacy Act⁴³ provides that a child born illegitimate is legitimated by the subsequent intermarriage of his parents, and is then deemed to be "legitimate from birth for all purposes of the law of Ontario". The children of some void or voidable marriages are also deemed to be legitimate by the Legitimacy Act.

⁴³ R.S.O. 1907, c. 242, s. 1.

(c) *Adoption:*

A child adopted under the Child Welfare Act or under the law of another province becomes "for all purposes" the child of the adopting parents.⁴⁴ A child "adopted" by agreement or in some other manner less formal than a court order under the Child Welfare Act has no rights under the D.E.A.

(d) *Posthumous Relatives:*

Posthumous children, and other posthumous relatives who are in embryo at the time of the intestate's death, are treated as if they were in being at the time of death. This does not cause any administrative difficulty because the child will be born before the expiry of the year which is allowed for the administration of the estate (D.E.A., s. 33).⁴⁵

(e) *Criminals:*

The old rule of the common law was that a criminal who committed treason or a felony lost his property: in the case of treason his property was forfeited to the Crown; in the case of a felony his land escheated to the feudal overlord and his goods were forfeited to the Crown. Forfeiture and escheat for treason or felony were abolished in England in 1870,⁴⁶ and in Canada in 1892.⁴⁷ However, a person who kills another by a criminal act cannot share in the deceased's estate, whether the deceased dies testate or intestate. This rule is not regarded as a vestigial "forfeiture" for crime, but as an application of the public policy that no person shall benefit from his own wrong.⁴⁸ Thus a murderer is not entitled to inherit property from his victim. This is so even if the inheritance was no part of the murderer's motive. On the other hand, where the killer was insane at the time of the act, he is not precluded from inheriting, for he has not committed any crime.⁴⁹ Between these two clear cases the law is not well settled. It does seem to be established that manslaughter will also suffice to preclude the killer from inheriting;⁵⁰ and in one Canadian case counselling or procuring the commis-

⁴⁴ Child Welfare Act, R.S.O. 1970, c. 64, ss. 83, 85. See also s. 84; as to the extent to which s. 84 is retrospective, see *Re Maulson*, [1972] 3 O.R. 897; *Re Barthelmes*, [1973] 1 O.R. 752; T. Sheard, "Adopted Children" (1973), 21 Chitty's L.J. 150.

⁴⁵ See *Family Law Study*, vol. 3 at 440.

⁴⁶ Forfeiture Act, 1870 (U.K.), 33 & 34 Vict., c. 23, s. 1.

⁴⁷ Criminal Code, 1892 (Can.), 55 & 56 Vict., c. 29.

⁴⁸ *Re Charlton* (1968), 3 D.L.R. (3d) 623.

⁴⁹ *Re Mason*, [1917] 1 W.W.R. 329; *Re Pitts*, [1931] 1 Ch. 546; *Nordstrom v. Baumann*, [1962] S.C.R. 147.

⁵⁰ *Lundy v. Lundy* (1895), 24 S.C.R. 650; *Re Giles*, [1972] 1 Ch. 544; *Re Charlton* (1968), 3 D.L.R. (3d) 623; see also note by G. Miller in (1972), 35 Mod. L.R. 426, suggesting that a distinction should be drawn between deliberate killing which is reduced to manslaughter, e.g., by provocation, and manslaughter by criminal negligence. T.G. Yondan, "Acquisitions of Property by Killing" (1973), 89 L.Q.R. 235 at 240 suggests that the killer should be deprived only when he did "a dangerous act intending harm to the person whose death occasions his acquisition".

sion of suicide was held sufficient.⁵¹ This last decision is wrong if the rule applies only to culpable homicide (murder or manslaughter), as is often assumed. It does not seem reasonable that the rule should apply to every criminal act which causes death. Perhaps the scope of the rule is confined not merely to culpable homicide but to those offences causing death which would have been felonies at common law. If so, then the suicide decision is right, but statutory offences, such as impaired driving which results in death (assuming that the driving does not amount to manslaughter), would not make the rule applicable.

What happens to the property which the killer would have inherited? One possibility would be to vest his share in the Crown as bona vacantia, but this solution has not been accepted, perhaps because it is too reminiscent of the old forfeiture for felony.⁵² The solution adopted by the courts is to distribute the estate of the victim as if the killer had predeceased the victim. Sometimes the killer kills himself after the victim. In that case the normal distribution of the victim's estate would obviously provide no benefit to the killer. But it seems that the victim's estate is still distributed as if the killer had predeceased the victim. In other words the rule precludes from inheritance not only the killer, but also those claiming through him.⁵³

Representation

(a) Issue:

The rule of "representation" is an important qualification to the rules concerning children and next-of-kin.

Representation to any degree is allowed among the intestate's issue (s. 31). What this means is that if a child of the intestate has predeceased him leaving issue of any degree surviving, then the child's issue stand in the shoes of the child and take the share which the child would have taken had

⁵¹ *Whitelaw v. Wilson*, [1934] 3 D.L.R. 554; cf *Nordstrom v. Baumann*, [1962] S.C.R. 147 at 150 where it was admitted by the parties that the crime of arson would make the rule applicable. On the facts, however, the killer if sane would probably also have been guilty of murder or manslaughter.

⁵² See note, (1972), 35 Mod. L. R. 426 at 430.

⁵³ See *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147 at 155, 159; *Re Mason*, [1917] 1 W.W.R. 329 at 330-31. Probably, if the murderer was a child of the deceased, or a brother or sister, and if the murderer left issue surviving, those issue would not be permitted to inherit by representation. This would follow from the rule that representatives stand in the shoes of the person whom they represent and have no stronger claim than him: see note 54, *infra*. The same issue might be next-of-kin in their own right of the deceased victim, and if so it is submitted that they should be permitted to take in that capacity. In *Re Missirlis* (1970), 15 D.L.R. (3d) 257, however, where a child murdered by her father was deemed to have survived the father, Colter, Surr. Ct. J., held that the next-of-kin of the father were not entitled to share in the daughter's estate, even though they were not claiming through the father but as the daughter's next-of-kin in their own right. There seems to be no authority for this holding. It is contrary to the dicta cited at the beginning of this note, which did not exclude "alternative or independent rights", and it is difficult to justify on grounds of policy.

he survived. The child's issue are said to "represent" their parent. Representatives take only the share which their parent (or grandparent) would have taken.⁵⁴

Representatives take per stirpes, or "through the stocks of descent". Distribution per stirpes is a distribution of equal shares to each stock or family which is entitled to participate in the distribution. The share of each stock or family is then divided equally per stirpes among the members of the family. On a distribution per stirpes the only persons who take are those who have no ascendants alive and capable of taking. Distribution per stirpes is to be contrasted with distribution per capita. Under a distribution per capita each individual who is entitled to take takes an equal share. Under the D.E.A., when all the persons entitled to an intestate's estate are entitled in their own right and not as representatives, distribution is per capita. When some or all of the persons entitled are entitled as representatives, distribution is per stirpes.

Example (1):

Intestate had five children in his lifetime, C1, C2, C3, C4 and C5. Intestate is predeceased by his wife and by C1, C4 and C5. C1 leaves no issue surviving. C2 has no children. C3 has two children, G1 and G2. C4 is survived by two children, G3 and G4. C5 had three children in his lifetime, G5, G6 and G7. G5 predeceased Intestate leaving two children, GG1 and GG2. G6 has no children, G7 has one child, GG3.

C1, C4 and C5 have each predeceased Intestate. But the shares of C4 and C5, who have left issue surviving, are taken by their representatives. Where any of the claimants are representatives, distribution is per stirpes (or through the stocks of descent) not per capita. Each of Intestate's children who survives or leaves issue surviving forms a stock of descent (or family). In this case there are four stocks of descent or families, namely, those of C2, C3, C4 and C5. One quarter share is allocated to each family. Each family's one-quarter share is then distributed per stirpes to the members of the family.

C1 is dead and cannot therefore share in the distribution of Intestate's estate. Furthermore he has left no issue surviving who can "represent" him. His stock of descent, or family, is extinct.

C2 takes his one-quarter share of Intestate's estate as a child in his own right,

C3 also takes his one-quarter share in his own right. His children G1 and G2 take nothing, for two reasons: (1) they cannot "represent" a living father, and (2) they have an ascendant (their father) alive and capable of taking and are therefore excluded from a distribution per stirpes.

C4 is dead, but, because he left issue surviving, his share is taken by his representatives, who are G3 and G4. However they do not share per capita with C2 and C3. They take only the share which their father, C4, would have taken had he survived. C4's share of one-quarter is divided equally between G3 and G4, who therefore each take one-eighth.

⁵⁴ If the intestate had "advanced" a child who had predeceased the intestate leaving issue, then the advancement would have to be brought into hotchpot in determining the share which would be payable to the child's representatives. Similarly, if the deceased child had during his lifetime made an agreement with the intestate which precluded the child from sharing in the intestate's estate, then the child's representatives would also be precluded. Both these results follow from the rule that representatives take only the share which the person whom they are representing would have taken had he survived: *Re Lewis Estate* (1898), 29 O.R. 609. See also previous note.

C5 is dead, but, because he left issue surviving, his share is taken by his representatives. His representatives are those of his issue who will be entitled to take under a distribution per stirpes. Within C5's family are three sub-families, namely, those of G5, G6 and G7. One-third of C5's share is allocated to each of these families. The share of G5's family is then divided equally between GG1 and GG2, who therefore each take one-twentyfourth of Intestate's estate. G6 and G7 each take one-third of the share C5 would have taken, and they therefore each take one-twelfth of Intestate's estate. GG3 takes nothing, because his father, G7, is alive: GG3 therefore has an ascendant alive and capable of taking and is excluded from a distribution per stirpes.

We have already noticed that the descendants of an intestate are not deemed to be next-of-kin within s. 31. The reason should now be clear. Because representation is allowed to any degree among issue, descendants take as the representatives of children.⁵⁵ This has two practical consequences: (1) a descendant will exclude an ascendant or collateral of equal or closer degree, and (2) descendants always take per stirpes not per capita.

Example (2):

Intestate is survived by a father, F, and four grand-children. G1 is the child of deceased child C1. G2, G3 and G4 are the children of deceased child C2. Intestate's estate is taken by the grand-children, as representatives of C1 and C2. This is so despite the fact that F is a relative of the first degree, and the grand-children are relatives of the second degree. Since the grandchildren take as representatives of children, distribution is per stirpes. G1 takes the entire share of C1's family, namely, one-half of Intestate's estate. G2, G3 and G4 each have to be content with one-third of the share of C2's family, namely, one-sixth of Intestate's estate.

(b) *Collaterals*:

Representation is allowed among collaterals only to this extent: the children of a deceased brother or sister represent their parent and take his or her share (s. 31). This right of representation was held in *Lloyd v. Tench* (1751)⁵⁶ to be limited to the case where there is at least one brother or sister living. In other words, the children of a deceased brother or sister (the intestate's nephews and nieces) are entitled to represent their parent only when they are competing with a living brother or sister of the intestate. When they are competing with other relatives their claim is merely as relatives of the third degree in their own right: they are therefore excluded by a grand-father or grandmother, who is a relative of the second degree; they share equally with uncles and aunts, who are also relatives of the third degree;⁵⁷ and when they are among the next-of-kin distribution among them is per capita and not per stirpes.⁵⁸

⁵⁵ *Re Natt* (1888), 37 Ch. D. 517.

⁵⁶ (1751), 2 Ves. Sen. 213; 28 E.R. 138. It has been argued that in Ontario since 1910 the right of representation exists when there is brother or sister or parent living: *Family Law Study*, vol. 3 at 449-51; for criticism, see note 67, *infra*.

⁵⁷ *Re Bailey*, [1948] 2 D.L.R. 367; *Re Hunter*, [1954] O.R. 809; [1954] 4 D.L.R. 796; G. D. Kennedy, Comment (1948), 26 Can. B.R. 1251 at 1254.

⁵⁸ *Re Smith* (1919), 48 D.L.R. 434; *Re McCabe* (1921), 61 D.L.R. 362.

Example (3):

Intestate leaves a brother, B (2nd degree), the three children of a deceased brother, N1, N2 and N3 (3rd degree), and an uncle, U (3rd degree). The next-of-kin is B (2nd degree). But N1, N2 and N3 are entitled to take by representation, i.e., they are entitled to the share which their father would have taken had he survived. The uncle, U, is excluded because he is a relative of the 3rd degree. When any of the claimants are representatives, distribution is per stirpes. Therefore B takes one-half, and N1, N2 and N3 each take one-sixth.

Example (4):

Intestate leaves the same persons surviving him as in Example (3), above, except that B predeceases him, leaving one child, N4. Since there is no brother or sister alive, the cases decide that the nephews and nieces do not take as representatives. Their claim to take is that they are relatives of the third degree in their own right. But the uncle, U, is also a relative of the third degree so that he has an equal claim with the nephews and nieces. When none of the claimants are representatives, distribution is per capita. Therefore N1, N2, N3, N4 and U each take 1/5th.

The right to represent a deceased brother or sister is limited to the children of the deceased brother or sister: grandchildren or more remote issue do not under any circumstances take by representation. This is because s. 31 does not allow representation "among collaterals after brothers' and sisters' children".⁵⁹ For the same reason there is no representation whatsoever of collaterals more remote than brother or sister. Thus the children of a deceased aunt or uncle or cousin are not entitled to represent the parent and take the share to which he or she would have been entitled.⁶⁰ In these cases where no representation is allowed the general rule applies that the next-of-kin of equal degree share per capita; any relative of one degree excludes all relatives of remoter degrees.

Example (5):

Intestate leaves great-grandfather (3rd degree), aunt (3rd degree) and cousin (4th degree). The great-grandfather and the aunt each take one half. The cousin is excluded.

(c) Legal Representative and Personal Representative:

Do not confuse the term "representative" (or "legal representative") in this context with the term "personal representative". The representatives of a deceased child in this context are his or her children or more remote issue; the representatives of a deceased brother or sister are his or her children.⁶¹ The personal representatives of a deceased person are his executors or administrators, who do not take the deceased's estate beneficially but as trustees (in effect) to distribute it to the persons entitled under the deceased's will or intestacy. When a child (or more remote issue) takes the share which his deceased parent would have taken under the D.E.A., the child takes the share beneficially, even if he is not the sole beneficiary of his parent's estate.

⁵⁹ *Crowther v. Cawthra* (1882), 1 O.R. 128; *Re McEachern* (1905), 10 O.L.R. 499.

⁶⁰ *Re Hale* (1916), 10 O.W.N. 376

⁶¹ *Re MacKenzie* (1927), 61 O.L.R. 230.

Example (6):

Intestate has three children in his lifetime, C1, C2 and C3. C1 predeceases Intestate, leaving a wife, W1, and two children, G1 and G2. C2 dies one week after Intestate, leaving a wife, W2, and two children, G3 and G4. C3 survives. The administrator of Intestate's estate is ready to distribute his property one year after Intestate's death (see D.E.A., s. 33). C1 and C2 each made a will, appointing his wife as executrix of his estate, and leaving all his property to his wife. Probate of each will has been granted to the wife. To whom and in what shares should Intestate's administrator distribute Intestate's estate?

Since Intestate leaves no wife his children are entitled to his estate in equal shares (s. 31). C1's children are entitled to represent C1 and take the share to which he would have been entitled had he survived. Where there are representatives distribution is per stirpes. There are three stocks of descent. Therefore C1's children, G1 and G2, take a one-third share between them: they each take one-sixth. W1, although she is C1's personal representative (his executrix), and the sole beneficiary of his estate, has no claim to a share in Intestate's estate. Only G1 and G2 are C1's representatives under the D.E.A.

C2 survived Intestate, although he died before the estate was ready to be distributed. Interests under the Act vest in the persons who were entitled at the time of the intestate's death. Therefore C2's children do not take his share as his representatives. His share forms part of his general estate. Intestate's administrator must pay C2's one-third share to W2 as executor of C2's estate. She will add it to C2's other assets and after payment of debts, taxes, funeral and administration expenses, she will distribute the property to herself. Therefore, in the end, W2 will take a one-third share in Intestate's estate.

C3 takes a one-third share in Intestate's estate.

Father, Mother, Brother, Sister

The complexity of the position is increased by two further provisions of the Act. Embedded in the dense prose of s. 31 is a provision which was not part of the original Statutes of Distribution, but was interpolated by amendment in Ontario in 1910.⁶² It provides that "for the purpose of this section the father and the mother and the brothers and the sisters of the intestate shall be deemed of equal degree". Section 32 provides that when there is a mother and a brother or a sister or the representative of a brother or sister, but no father, widow or issue, then "every brother and sister and the representatives of them shall have an equal share with her [the mother] anything in section 31 to the contrary notwithstanding". It may well be asked why s. 32 was retained after 1910, since s. 31, as amended in 1910, by itself will nearly always produce exactly the result dictated by s. 32.⁶³

It seems that the only situation in which s. 32 produces a result different from the one which s. 31 would have produced is where there is a mother and the children of a deceased brother or sister but no living brother or sister. It will be recalled that s. 31 (as interpreted in *Lloyd v. Tench*) does not allow the children of deceased brothers or sisters to take by representation where there is no living brother or sister. In *Stanley v. Stanley* (1739)⁶⁴ Lord

⁶² See text accompanying note 18, *supra*.

⁶³ For the original reason for s. 32, which dates from the Statute of Distribution, 1685, 1 Jac. 2, c. 17 (U.K.), see *Family Law Study*, vol. 3 at 437.

⁶⁴ (1739), 1 Atk. 455; 26 E.R. 289.

Hardwicke, L.C., decided that under the predecessor of s. 32 (which was a section of the Statute of Distribution, 1685) the children of a deceased brother or sister were entitled to take by representation even where there was no living brother or sister: "the word 'and' immediately preceding the words 'the representatives', must be construed in the disjunctive".⁶⁵ (The general rule laid down in the main distributive provision, which is now s. 31, that representation may not be carried to grandchildren or more remote issue of deceased brothers and sisters was however also applied to representation under what is now s. 32.)⁶⁶ The difference between ss. 31 and 32 comes down to this. Where an intestate dies without father, wife or issue, leaving a mother and the children of a deceased brother or sister, but no living brother or sister, s. 32 directs distribution to the nephews and nieces as well as the mother, the nephews and nieces taking per stirpes as representatives. If there were no s. 32, then s. 31 would not have allowed the nephews and nieces to take as representatives because there is no living brother or sister; and so s. 31 would have directed distribution to the mother (1st degree) to the exclusion of the nephews and nieces (3rd degree).⁶⁷

Example (7):

Intestate leaves father (1st degree), mother (1st degree), grandfather (2nd degree), brother (2nd degree) and two nieces (3rd degree), the nieces being the daughters of a deceased brother. Section 31 deems the father, mother and brother to be of equal degree, and allows the nieces to represent the deceased brother. Therefore the father, mother and brother each take one-quarter and the nieces each take one-eighth. The grandfather is excluded. Section 32 does not apply because of the existence of the father.

Example (8):

Intestate leaves mother (1st degree), grandfather (2nd degree), brother (2nd degree) and two nieces (3rd degree), the nieces being the daughters of a deceased brother. Section 32 applies, directing distribution among the mother, brother and nieces who take per stirpes as representatives of the deceased brother. Therefore the mother and brother each take one-third and the nieces each take one-sixth. The grandfather is excluded. Section 31 is inapplicable because of the closing words of s.32, but if s.31 were applicable it would have produced the same result: see example (7), above.

⁶⁵ *Id.*, Atk. 457; E.R. 291.

⁶⁶ *Id.*

⁶⁷ This conclusion would not be accepted by the authors of the *Family Law Study*, who in vol. 3 at 449-451, interpret the 1910 interpolation in s. 31 (see note 18, *supra*) as extending the old rule in *Lloyd v. Tench* (1751), 2 Ves. Sen. 213; 28 E.R. 138 (see text accompanying note 56, *supra*) so that the children of brothers or sisters take by representation after 1910 when there is a living brother or sister *or father or mother*. On this basis, s. 32 will never produce a different result from the one produced by s. 31. The *Study's* view finds little support in the language of the interpolation which simply says that parents shall be deemed "of equal degree" with brothers and sisters; it does not equate parents with brothers and sisters for all purposes. The *Study* cites no authority for its view. The only authority I have been able to find is opposed to the *Study's* view: per MacKay J. A. for the Ont. C.A. in *Re Hunter*, [1954] O.R. 809 at 813: "I think *full effect* can be given to these words [the interpolation] by interpreting the statute to mean that parents shall not take to the exclusion of brothers and sisters" (my italics). Accord, G. D. Kennedy, Comment (1948), 26 Can. B.R. 1251 at 1254.

Example (9):

Intestate leaves a mother (1st degree), grandfather (2nd degree) and two nieces (3rd degree), the nieces being the daughters of a deceased brother. Section 32 applies, directing equal distribution among the mother and the nieces who take per stirpes as representatives of the deceased brother. Therefore the mother takes one-half and the nieces each take one-quarter. The grandfather is excluded. Section 31 is inapplicable because of the closing words of s. 32, but if s. 31 were applicable it would have produced a different result: see example (10), below.

Example (10):

Intestate leaves a grandfather (2nd degree), and two nieces (3rd degree), the nieces being the daughters of a deceased brother. Section 31 applies, directing distribution among the next-of-kin. The closest relative is the grandfather (2nd degree), and his existence excludes the nieces who are relatives of the 3rd degree. The grandfather therefore takes all. The nieces cannot take per stirpes as representatives of the deceased brother because there is no living brother or sister: see above. Therefore they can only claim to take per capita in their own right as relatives of the third degree; and that claim is defeated by the existence of a closer relative. Section 32 is inapplicable because there is no living mother.

Example (11):

Intestate leaves three nieces, two of them being the daughters of one deceased sister, and the other being the daughter of another deceased sister. The nieces, as relatives of the third degree, are the next-of-kin. They take per capita, and therefore take one-third each. If they took as representatives they would take per stirpes which would yield two shares of one-quarter and one share of one-half. But nephews and nieces cannot take as representatives unless there is at least one living brother or sister, and there is not in this example. Section 32 does not apply because the mother is not living.

Brother, Sister, Grandparent

When an intestate is survived by one or more brothers or sisters and by one or more grandparents one would expect the brothers, sisters and grandparents to share equally per capita, since they are all relatives of the second degree. In *Earl of Winchelsea v. Norcliff* (1686)⁶⁸ it was held that under the predecessor of s. 31 in the Statute of Distribution, 1670, the brothers and sisters take in priority to the grandparents. There was nothing in the Statute to indicate this result; the Statute did not even include the provision deeming the father, mother, brothers and sisters to be of equal degree, because that provision is the interpolation which was added in Ontario in 1910.⁶⁹ The interpolation does not govern the case now under consideration, for it is silent about grandparents, but it could be regarded as reinforcing the *Winchelsea* rule.⁷⁰ In any event the *Winchelsea* rule, like the other judicial glosses on the Statutes of Distribution which have been noticed, is presumably good law in Ontario.

⁶⁸ (1686), 2 Freem. 95; 22 E.R. 1080; and see *Family Law Study*, vol. 3 at 438.

⁶⁹ See *supra*, notes 18 and 67.

⁷⁰ The Devolution of Estates Act, 1886, s. 6, stated expressly that grandparents were not entitled to share in competition with father, mother, brothers or sisters. This provision was left out of the Devolution of Estates Act, 1910, when the interpolation was inserted.

No Next-of-kin

If an intestate has no known relatives, so that there is no next-of-kin, then the intestate's estate vests in the Crown. In the case of realty this result is accomplished by the doctrine of escheat. In the case of personalty this result is accomplished by the doctrine that the Crown is entitled to bona vacantia (goods without an owner). The Escheats Act⁷¹ empowers the Public Trustee to take possession of any property to which the Crown has become entitled in this way. And the Act gives power to the Crown (inter alia) to transfer or restore the property "to a person having a legal or moral claim upon the person to whom it had belonged". This covers the case where next-of-kin are subsequently discovered, and it can also be used to benefit persons outside the statutory scheme, such as a de facto spouse or illegitimate child.

When there is a surviving spouse and no next-of-kin, it seems absurd that part of the intestate's estate in excess of the preferential share should go to the Crown. In 1973 an attempt was made to vest the entire estate in the spouse in these circumstances. A new s.31a was added to the D.E.A. providing that, where there is a surviving spouse, "the spouse is entitled to any [intestate] property to which, but for this section, the Crown would become entitled by *escheat* for lack of lawful heirs".⁷² I have underlined the words "by *escheat*" because they probably confine the operation of the provision to realty. This seems to be a drafting slip, because there is no doubt that the intention of the government was to vest all personalty as well as all realty in the spouse of an intestate who leaves a spouse but no next-of-kin. The point may have taxation consequences. In other respects the point may have little practical significance, since the Crown is unlikely to assert any claim to the personalty. However, in order to make a spouse's title to the personalty perfectly secure, the Crown should formally transfer the personalty to the spouse under the discretionary power described above. And, at some convenient time, it would be wise for the Ontario legislature to enact an amendment of the new s. 31a to make certain that it covers personalty as well as realty.

Reform

The D.E.A. is a patchwork of provisions which have developed over several centuries. Many of its complexities and obscurities could be and should be removed by re-drafting. The *Family Law Study* commissioned by the Ontario Law Reform Commission made certain recommendations with respect to succession on death.⁷³ It did not in its recommendations address itself to matters of detail. What it did recommend may be summarized as follows:

- (1) The surviving spouse of an intestate should receive the entire estate, and

⁷¹ R.S.O. 1970, c. 149.

⁷² S.O. 1973, c. 18, s. 3.

⁷³ Vol. 3 at 562-566.

not merely a preferential share. If this recommendation were not found acceptable, the *Study* recommended as an alternative that the preferential share be increased from its then figure of \$20,000 to "the amount of the present succession duty exemptions" (then \$75,000), and (semble) kept at the same figure (which is now \$500,000). Other suggestions were that the surviving spouse should receive the entire estate where there were no issue, or where there were no issue, parents, brothers, sisters, nephews or nieces.

(2) Issue should inherit as they now do, except that where they are all of the same kindred (e.g., all grandchildren) they should share per capita and not per stirpes.

(3) Next-of-kin should inherit as they now do, except that nephews and nieces should be preferred to grandparents, uncles and aunts.

In 1967, when the *Family Law Study* was written, the provision for the spouse was definitely unsatisfactory. The preferential share was only \$20,000, and in small estates which were worth more than \$20,000 it must often have been a serious embarrassment for the spouse to have to set aside several thousand for the children. The 1973 increase in the preferential share to \$50,000 is a highly desirable reform.

There is obviously a case for the *Family Law Study's* tentative recommendation that a surviving spouse should receive the entire estate. Such a rule would have the virtue of simplicity and it would often accord with the deceased spouse's wishes. Where there are children who are still dependent upon the surviving spouse the case becomes very strong indeed. On the other hand, in most estates the children are adult and independent, and they arguably have a claim to some of the deceased's property without waiting for their surviving parent to die. Where the surviving spouse and children are estranged, the children may never receive the property even after the death of the surviving spouse. Where there are no children (or more remote issue), if the spouse takes all, the deceased's property may eventually end up in the spouse's family rather than in the deceased's own family; in a large estate the deceased's parents, brothers or sisters may be aggrieved at this result. The attraction of the preferential share is that, if it is high enough, it ensures that the wife receives all of a small estate, while it forces some distribution of a large estate. The intestacy rules apply for the most part no doubt to small estates, but they should also be appropriate to estates in the six-figure category because a person of modest means can easily leave such an estate as the result of inflation, insurance and various forms of death benefits.

In short, there is a good deal to be said on both sides of the question whether the spouse should continue to receive preferential and distributive shares or should simply receive the entire estate. I think that a change in the scheme should await a study of the size of those intestate estates which have been left in Ontario over the last few years, and of other information which would help to predict the kinds of estates which are likely to be intestate in the future. A study of the schemes in effect in other jurisdictions of comparable mores and wealth might also be interesting. Studies along these lines could be done quickly and cheaply from probate and administration records and from material available in law libraries.

Whatever is eventually decided about the reform of the scheme of distribution on intestacy in Ontario, the rules must of necessity be addressed to the typical estate. It may be, however, that the hard case can be accommodated through a complementary reform of the Dependants' Relief Act.⁷⁴ At present that Act permits a "dependant" (a term which is very narrowly defined) to apply for an allowance out of an estate only if the deceased left a will, and the maximum amount of the allowance is the amount which the applicant dependant would have received if the deceased had died intestate. Both these limitations on the scope of the Act should be removed. The Act should permit a "dependant" (defined more broadly than at present) to apply for an allowance out of an intestate estate as well as a testate estate, and there should be no arbitrary limit on the amount which the court could award. If the Dependants' Relief Act were opened up in this way, the Surrogate Court would, in effect, have the power to vary the scheme of distribution on intestacy in order to make special provision for special cases. It seems obvious to me that this power of variation would be a great improvement in a scheme which is now totally inflexible.

⁷⁴ R.S.O. 1970, c. 126.