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INTESTACY

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It is said that a "statutory will" imposes itself to govern the administration of an estate when the deceased has failed to dispose fully of their assets by a valid will. The rules that govern intestate estates, in both the civil law and the common law, are statutory in nature. Relevant Canadian provincial or territorial estates legislation applies unless the deceased was an Indigenous person ordinarily living on a reserve, in which case the federal *Indian Act* governs. These statutory intestacy regimes are anchored to the idea that, should the deceased have failed to plan for their own succession through valid testamentary dispositions, the business of estate distribution falls to the state.

It is true the state always has a role in the governance of estates, even those governed by will or will substitutes. In civilian systems, the state's presence in estate administration is prominently felt through statutory limitations on testamentary freedom. Yet while public oversight of estates is pervasive, in intestacy contexts the state alone determines the distribution of estates, leaving no space for private actors to decide or influence the distribution of estate assets.

Legislative schemes for administering intestate estates are highly technical and mathematical, and there is little deviation from one Western jurisdiction to the next. Where variations exist, they are not especially striking. Parallels across regimes extend most obviously to the categories of persons whom the law privileges as intestate heirs. Married spouses and blood-related and adopted children always qualify. In certain circumstances, heirship also will be extended to the deceased's more extended kin.

Beyond these obvious resemblances, two more latent themes cut transversally across law's regulation of intestate estates. First, legislation governing intestacy operates in a direct and blunt manner, leaving negligible room for judges to exercise discretion. Subject to the civil law's doc-

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trine of unworthiness, discussed below, factors such as means, needs, merit, and morality essentially have no bearing on whether someone qualifies as an heir and, if so, the size of their share in an estate. Second, intestacy law rests on distinct suppositions about where the affections of the deceased would have, or should have, lain during their lifetime. In this way, the laws of intestacy telegraph a normative message about family structures, relationships, and loyalties that is particularly notable in the law's treatment of a survivor spouse.

Judicial Discretion and Bright Line Rules

Intestacy regimes are characterized by fixed formulae for determining heirship and for carving up shares in an intestate estate. Hence, who will take, and in what proportion, are uncontroversial questions promptly decided by the application of relevant statutory rules. These rules leave minimal room for deviation. For better or for worse, an individual's past conduct or relationship with the deceased will not affect determinations about whether or how much they inherit.

Accordingly, courts have consistently decided that all heirs in the same degree of consanguinity benefit from an estate in equal shares. Considerations about the nature of an heir's relationship with the deceased during the latter's lifetime generally afford courts no leeway to depart from this bright line rule. This is true whether the deceased made no will, or made a will that was later deemed invalid. Intestacy rules are subject to the same strict application even when the deceased lacked legal capacity to make a will. Such restrictions on judicial interpretation stand in contrast to the court's role when faced with assessing a valid will. The latter context allows judges to exercise broad discretion in drawing on rules of interpretation and evidence to discern testamentary intent. That discretion does not exist, however, when the deceased's intentions are conveyed other than through a will that is valid in form and substance.

Consequently, in *Baumann v. Miller*, a court had no discretion to accept arguments contesting the inheritance of a grandfather who was, with two other grandparents, the next of kin of an infant child who tragically died with her own parents in a motor vehicle accident. The grandfather's stake in his infant granddaughter's estate was unsuccessfully challenged on the basis that he had severed ties with his own daughter (the infant's mother), and had never even met the infant. Likewise, in *Leach v. Egar*, an appeal to "public policy" failed to support the claim of a grieving mother whose daughter and two grandchildren were lost at sea. Under survivorship rules (which exist under a separate regime from the rules on intestacy), the daughter was deemed to have predeceased her own children, and so the former's estate passed to the latter. The children's respective estates then passed to their father on their intestacy. These parents had,

however, divorced just before the fateful cruise, allowing the mother's estate to pass via her children to her ex-spouse. While the applicant argued that following the survivorship and intestacy rules would in this case yield an inequitable result, the British Columbia Court of Appeal insisted on their application.

At common law, a narrow exception to the general "zero discretion" approach to intestate successions emerges in the so-called "slayer rule." The rule posits that a person culpably responsible for another's death forfeits any entitlement to inherit from the latter. Given that the rule requires such an extreme act of immorality, however, it is unsurprising that it has been minimally applied in Canadian law.

Quebec civil law offers more discretion than exists in common law provinces to allow judges to evaluate an heir's past conduct in determining the entitlement to inherit. In Book 3 ("Successions"), the *Civil Code of Québec* sets out the qualities required to inherit, and specifies circumstances in which an heir will be deemed "unworthy" of benefiting from an estate. Two circumstances operate as a matter of law to deem a person unworthy of inheritance. These situations do not amplify judicial discretion but instead direct a court to exclude from sharing in an estate—whether testate or intestate—an individual convicted of making an attempt on the deceased's life or who, if the estate belongs to a child, has been deprived of parental authority over that child (article 620). A court does, however, have jurisdiction in regard to disinheriting a person on the basis of unworthiness in other circumstances. Notably, a person guilty of cruelty or who has otherwise behaved in a "seriously reprehensible manner" toward the deceased, a person who has in bad faith concealed, altered, or destroyed the deceased's will, or someone who has hindered the deceased in drafting, amending, or revoking a will, "may" be deemed unworthy and thus disinherited (article 621). Note that while the *Code* allows for judicial evaluation of an heir's past conduct and relationship with the deceased through the doctrine of unworthiness, this inquiry is relevant only to ascertaining whether an inheritance entitlement exists. It has no bearing on the size of an inheritance, whether set by a will or by the intestacy rules.

Finally, it is worth signaling that successions legislation typically includes provisions to allow a deceased's dependants to bring support claims against an estate, and this may affect the final distribution of assets within an intestate estate. It should remain clear, however, that such dependants' relief claims do not alter intestacy rules' operation: the heirs and their respective initial shares remain the same. Ultimately, though, the scope of heirs' entitlements might be diminished to satisfy the entitlements of dependants, as would be true of any other successful claims advanced by an estate's legitimate creditors.

Presumed Spousal Affections and Loyalties

Intestacy regimes establish hierarchies in the relationships of the deceased. They prioritize spouses and immediate descendants, creating room for more distant kin to inherit only if the deceased did not leave a surviving spouse or children. In this way, intestacy rules appear to rest on normative presumptions about the deceased's most important relationships and intentions. These rules further reflect assumptions about the deceased's interest in preserving family wealth through intergenerational transfer, regardless of their affective life. Concomitantly, intestacy regimes also convey a policy choice to privilege spouses and children, ensuring material protection for family members who might otherwise claim for alimentary support against the estate.

Although historically intestacy law recognized only those heirs who were related to a deceased by blood, contemporary intestacy regimes accord spouses particularly revered treatment. Modern legislation provides that a husband or wife who survives the deceased will benefit from at least a third of an intestate estate. Some laws (e.g., Ontario's *Succession Law Reform Act* and the federal *Indian Act*) even conserve a "preferential share" for survivor spouses, the amount of which is determined by regulation. It is only after this share is paid to a spouse that the balance of the estate will be divided between that spouse and the deceased's children. Accordingly, a survivor spouse will be the sole heir of a small estate valued at or less than the preferential share amount.

This privileged status for spouses—seen also in other successions law doctrines, such as those governing testamentary lapse and revocation—suggests that intestacy law presumes that a spouse was the most central person in the deceased's life, and the person to whom the deceased owed the most obvious economic obligation. These presumptions tend to focus on formalized spousal relationships. Spouses whose unions are registered, whether by marriage or by civil union in Quebec, clearly qualify as heirs. The definition of "spouse" in some (but not all) jurisdictions' estates statutes include unmarried partners. To establish one's self as a spouse when there was no marriage to the deceased, an applicant must demonstrate that they cohabited and otherwise maintained a marriage-like relationship with the deceased over a certain time.

Intestacy law's efforts to locate a relationship akin to marriage in determining whether an unmarried partner is a spouse for the purposes of inheritance emerges prominently in Justice Sissons's 1961 judgment in *Re Noah Estate*. The case called for a characterization of the relationship between the deceased and his surviving partner, requiring the court to assess whether a union celebrated by Indigenous, particularly Innu, custom was more properly viewed as a "marriage" or "concubinage." Justice Sissons's analysis, which ultimately recognized the deceased's spouse

as such, integrated a forensic evaluation of all aspects of the spousal relationship. In concluding that "custom marriage" is not a "morally loose affair," Justice Sissons underscored its parallels with key elements of marriage under English law: notably, mutual consent and exclusivity.

The pre-eminent importance of formal status—or, under some statutes, of a status that strongly resembles a formalized marriage—is evident also in the nearly absolute nature of the spousal inheritance entitlement on intestacy. A person who qualifies for a spousal inheritance will benefit on intestacy even if their relationship with the deceased was brief or marked by discord. It is only once the relationship and spousal status terminate that the inheritance entitlement disappears. Exceptions exist in some jurisdictions to deprive spouses of their inheritance when they lived in adultery, inflicted cruelty toward the deceased, or were separated for a certain time. Interestingly, these are all legal bases for marriage termination under the federal *Divorce Act*. The presumption, therefore, is that spouses intend for one another to benefit from their respective estates as long as the marriage subsists or until legal grounds exist for the formal termination of the spousal bond.

Ultimately, then, while estates scholars have tended to write about intestacy in a manner that focuses on the legal rules of devolution, these rules and their application offer probative insights that bear relevance across legal traditions and areas of law. A study of intestacy regimes illuminates the pre-eminent role of legislative rules that bind judges even in cases where intestacy law yields inopportune results. This is true in both the common law and the civil law although, as noted, the *Civil Code of Québec* affords judges some leeway to account for such factors when evaluating claims of "unworthiness." Moreover, regimes governing *ab intestat* estates, through their privileging of married or married-like spouses, foreground estates law's normative appreciation of spousal relationships. In this way, the law of intestacy bears connections to the law of the family, which has also valorized formalized spousal relationships and recognized informal unions to the extent that these resemble or track marriage. This conclusion draws to mind the way in which the law of successions, like the law of the family, distinguishes between obligations related to alimentary support and property division. While assessments of support entitlements are always discretionary and fact-driven, property sharing for spouses is rule-based and rigid, based on status rather than means or need. This is coherent with intestacy regimes that, as shown here, focus exclusively on formal status and relationships, to the exclusion of considerations regarding parties' circumstances.

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