

2. Spouse or partner – preliminary issues

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INTRODUCTION

2.1 The next five chapters deal with the entitlements of the intestate's surviving spouse or partner. The National Committee will recommend that the whole of the intestate estate should be given to the surviving spouse or partner except where the intestate is also survived by issue of another relationship. In these cases, the surviving spouse will be entitled to:

- the personal effects of the intestate;
- a statutory legacy;
- a portion of the residue; and
- the right to elect to obtain particular items of property in the intestate estate.

The following chapters will deal with these issues. The remainder of this chapter will consider the important question of identifying the spouse or partner who will be entitled on intestacy.

WHO IS A SPOUSE OR PARTNER?

2.2 As spouses and partners are the first parties considered when distributing an intestate estate, it is important to know who is considered a spouse or partner and how broadly the term is to be construed.

Spouses

2.3 A person will be a spouse of another when the two marry in Australia in accordance with the *Marriage Act 1961* (Cth) or, when a person is married overseas, that marriage is recognised in Australia under Part 5A of the *Marriage Act*.

2.4 In Queensland, SA, Victoria and NSW, the term "spouse" is now taken to include not only husband or wife but also de facto partner or other equivalent terms such as putative spouse or domestic partner.¹ The ACT includes "spouse" together with "domestic partner" within the term "partner".² Other jurisdictions specifically make reference to

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1. *Succession Act 1981* (Qld) s 5AA; *Administration and Probate Act 1919* (SA) s 4; *Administration and Probate Act 1958* (Vic) s 3(1); and *Wills, Probate and Administration Act 1898* (NSW) s 32G.
 2. *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner" and "partner").

the intestate's husband or wife rather than spouse.³ Issues relating to the identification of domestic partners are dealt with below.⁴

2.5 The NT is the only jurisdiction which specifically includes in its definition of spouse Aboriginal or Torres Strait Islander people who marry in accordance with the customs and traditions of the particular community of Aboriginal or Torres Strait Islander people with which either person identifies.⁵

Domestic partnerships

2.6 For the purposes of this Report, the term “domestic partner” has been adopted with the intention of encompassing the variety of terms used to describe such a person – de facto spouse, putative spouse, partner or domestic partner.

2.7 The domestic partner of the intestate will usually be entitled to take the spouse's share of the deceased's estate. The possible extent of the entitlement means it is important that such partners be identified and distinguished from, for example, mere cohabitantes, close friends or carers.

2.8 Domestic partners are included in intestacy provisions in all Australian jurisdictions. Each jurisdiction sets out requirements that must be met before a domestic relationship will be recognised in law. There are also further requirements that domestic partners must meet in order to become entitled in intestacy, such as specified time frames.

Requirements for recognition as a domestic partner

2.9 Generally, a domestic partner is either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family. In all jurisdictions except SA, a domestic partner may be of the same gender as the intestate.⁶

3. *Administration Act 1903* (WA) s 14; *Administration and Probate Act 1935* (Tas) s 44(9).

4. See para 2.6-2.18.

5. See *Interpretation Act 1978* (NT) s 19A(1) and para 14.10.

6. *Succession Act 1981* (Qld) s 5AA(1)(b); *Acts Interpretation Act 1954* (Qld) s 32DA(5)(a); *Administration and Probate Act 1929* (ACT) s 44(1); *Legislation Act 2001* (ACT) s 169(2); *Wills, Probate and Administration Act 1898* (NSW) s 32G; *Property (Relationships) Act 1984* (NSW) s 4(1); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2-3; *De Facto Relationships Act 1991* (NT) s 3A(3)(a); *Relationships Act 2003* (Tas) s 4(1); *Administration and Probate Act 1958* (Vic) s 3(1); *Administration Act 1903* (WA) s 15; *Interpretation Act 1984* (WA) s 13A(3)(a).

2.10 The indicia of a domestic partnership, which are identified in other statutes, include the nature and extent of the couple's common residence; the length of their relationship; whether or not a sexual relationship exists or existed; the degree of financial dependence or interdependence, and any arrangement for financial support; their ownership, use and acquisition of property; the degree of mutual commitment to a shared life, including the care and support of each other and of children; the performance of household tasks; and the reputation and public aspects of their relationship.⁷

2.11 For the purposes of determining entitlement on intestacy, most jurisdictions recognise a domestic partner only if the relationship has existed continuously for a certain period before the death of the intestate or if a child has been born to the relationship.⁸ SA requires either five continuous years or a five year aggregate over a six year period.⁹ The ACT, NT, Queensland Tasmania, Victoria and WA require two years.¹⁰

2.12 In the ACT and Victoria, the requirement that a child be born to the relationship is subject to an additional requirement that the child must be under 18 years at the intestate's death if the surviving partner is to be eligible to take on intestacy without having to prove the relationship existed for a continuous period immediately before the intestate's death.¹¹

2.13 In NSW and Tasmania, where the intestate is survived by a domestic partner and issue (not being issue of the domestic partner),

7. *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Administration and Probate Act 1958* (Vic) s 3(3); *Property Law Act 1958* (Vic) s 275(2); *Legislation Act 2001* (ACT) s 169(2); *De Facto Relationships Act 1991* (NT) s 3A; *Relationships Act 2003* (Tas) s 4; *Interpretation Act 1984* (WA) s 13A(2); *Property (Relationships) Act 1976* (NZ) s 2D(2); and *Property (Relationships) Act 1984* (NSW) s 4(2).

8. *Family Relationships Act 1975* (SA) s 11(1); *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner"); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Administration and Probate Act 1935* (Tas) s 44(3A) and s 44(3B); *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).

9. *Family Relationships Act 1975* (SA) s 11(1)(a).

10. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(i) to the definition of "eligible partner"; *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Succession Act 1981* (Qld) s 5AA(2)(b)(ii); *Administration and Probate Act 1935* (Tas) s 44(3A) and (3B); *Administration and Probate Act 1958* (Vic) s 3(1) paragraph (b)(i) of the definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).

11. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(ii) to the definition of "eligible partner"; *Administration and Probate Act 1958* (Vic) s 3(1) para (b)(ii) to the definition of "domestic partner".

the partner will not be entitled to anything if the relationship has existed for less than two years.¹² However, in NSW, there is no time period required where the intestate has had no marriage and no children.¹³ (This outcome is thought to have been unintended.¹⁴)

2.14 In SA, a person must apply to the court for a declaration of his or her status as a domestic partner.¹⁵ Such a claim will not be entertained unless it is supported by credible corroborative evidence.

2.15 In its Supplementary Report on Family Provision, the National Committee for Uniform Succession Laws, in considering how to identify a de facto relationship for the purposes of family provision, noted that, while the various jurisdictions enjoyed a degree of consistency in their definitions, each jurisdiction had slightly different provisions for determining whether two people had been in a de facto relationship, and that there were also differences in the qualifying period necessary to establish a relationship for the purposes of family provision. The Committee noted that the differences in each jurisdiction were necessary “to achieve consistency across the range of legislation within [each] individual jurisdiction concerning the rights or obligations of de facto partners”.¹⁶ The Committee, therefore, decided that the uniform legislation should not attempt a uniform definition of de facto partner but rather that a de facto partner should be identified “according to the relevant legislation in the enacting jurisdiction”.¹⁷ A similar approach could be taken to identifying domestic partners for the purposes of distribution on intestacy.

2.16 There are significant problems involved in identifying when some domestic relationships begin and end.¹⁸ This is particularly the case when young people die intestate.¹⁹ Some opinions expressed in submissions and consultations generally supported the imposition of

12. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3B); *Administration and Probate Act 1935* (Tas) s 44(3B).

13. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3B).

14. *Sydney Consultation 1*.

15. *Family Relationships Act 1975* (SA) s 11(2).

16. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.21.

17. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.22 and cl 3(1) of the *Family Provision Bill* in Appendix 2.

18. *Sydney Consultation 1*; *Sydney Consultation 2*; Succession Law Section, Queensland Law Society, *Consultation*; W V Windeyer, *Submission* at 3; J North, *Submission* at 1.

19. S Samek, *Consultation*.

some form of minimum time requirement for the existence of a domestic partnership.²⁰ Others considered that any time limit would be arbitrary, with one drawing attention to a clear de facto relationship of six months that was cut tragically short.²¹ It was suggested that parties to relationships that fall outside of the time limit could resort to a family provision claim.²² Another submission suggested that the two-year limit could be reduced by the court in appropriate circumstances.²³

National Committee's conclusion

2.17 The National Committee considers that model legislation should not attempt a uniform definition of domestic partner but should adopt the definition relevant to each jurisdiction. The National Committee therefore suggests that a domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

- (a) it has been registered under a relevant law of the jurisdiction;²⁴ or
- (b) a child has been born to the relationship; or
- (c) it has been in existence for two years.

2.18 The Committee is of the view that the relationship, absent registration or children, should have been in existence for at least two years before it can be recognised for the purposes of intestacy. Such a provision is necessary because of the serious consequences to the intestate estate of a short-term or temporary relationship coming to be regarded as a domestic relationship.

20. Probate Committee, Law Society of SA, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 4; Public Trustee NSW, *Submission* at 3; *Sydney Consultation 1*; W V Windeyer, *Submission* at 3; *Melbourne Consultation*; Law Society of Tasmania, *Submission* at 4.

21. *Sydney Consultation 2*.

22. Probate Committee, Law Society of SA, *Consultation*; *Sydney Consultation 2*; W V Windeyer, *Submission* at 3; *Melbourne Consultation*.

23. Law Society of Tasmania, *Submission* at 4.

24. For example, in NSW, the statute would read "a de facto relationship under the *Property (Relationships) Act 1984*".

Recommendation 1

A domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

- (a) it has been in existence for two years;
- (b) a child has been born to the relationship; or
- (c) it has been registered under a law of the jurisdiction that deals with the registration of domestic partnerships.

See Intestacy Bill 2006 cl 7.

SPOUSES TO BE TREATED AS SEPARATE PERSONS

2.19 In Australia, a woman's property does not become that of her husband upon marriage. Married women have the same powers to deal with their interests in property that single women (and men, married or not) enjoy.²⁵ Nevertheless, five jurisdictions state that spouses are to be treated as separate persons for the purposes of distribution under intestacy.²⁶ The issue of spouses being treated as separate persons arises, for example, where parents, grandparents or married cousins are entitled to distribution on intestacy. It goes without saying that each partner ought to be able to take the share to which they are entitled. It is surprising to find this expressly stated in modern statutes since the proposition is so obviously part of the general law today.

2.20 In Queensland, the rule that spouses are to be treated as separate persons applies generally to the "acquisition of any interest in property".²⁷ Property law statutes might be an appropriate place for those jurisdictions who feel that the statement needs to be preserved in some form.

25. *Property Law Act 1974* (Qld) s 15; *Married Persons' Property Act 1986* (ACT) s 3(1); *Married Persons (Equality of Status) Act 1996* (NSW) s 4(1); *Married Persons (Equality of Status) Act 1989* (NT) s 3(1); *Law of Property Act 1936* (SA) s 92, s 93; *Married Women's Property Act 1935* (Tas) s 3(1); *Marriage Act 1958* (Vic) s 156(1)(a), s 157; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 2.

26. *Wills, Probate and Administration Act 1898* (NSW) s 61B(9); *Administration and Probate Act 1969* (NT) s 61(2)(a); *Administration and Probate Act 1929* (ACT) s 44(2)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(viii); and *Administration and Probate Act 1935* (Tas) s 44(8). See also *Administration of Estates Act 1925* (Eng) s 46(2); and *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

27. *Property Law Act 1974* (Qld) s 15. See also *Law of Property Act 1925* (Eng) s 37.

2.21 Some submissions considered that such a provision was not necessary.²⁸ Other submissions felt that an express statement was preferable for the sake of certainty.²⁹

National Committee's conclusion

2.22 There would appear to be no need, in this modern age, to state that spouses are to be treated as separate persons.

2.23 The National Committee recognises that particular problems arise in relation to cousins of the intestate who are married and have issue, and maternal and paternal aunts and uncles of the intestate who marry and have children. These are dealt with elsewhere in this report.³⁰

Recommendation 2

There should be no provision stating that spouses should be treated as separate persons.

28. Trustee Corporations Association of Australia, *Submission* at 4; J North, *Submission* at 2.

29. Public Trustee NSW, *Submission* at 4. See also Law Society of Tasmania, *Submission* at 5.

30. See para 8.36.