

6. Multiple partners

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INTESTATE LEAVES A SPOUSE AND A DE FACTO PARTNER

6.1 When an intestate is survived by a spouse, that spouse will be entitled to a share in the intestate's estate. When the intestate is survived by a spouse and a de facto partner, the spouse's entitlement will sometimes be divided between them. There are a number of ways by which the spouse's entitlement can be divided between them.

Distribution in Queensland

6.2 Queensland, unlike the other jurisdictions, does not use the length of the relationship to allocate shares between de facto partners and spouses. It allows the parties to divide the spouse's entitlement by three different methods.¹

6.3 The first is for the spouse and de facto partner to produce a distribution agreement. They reach agreement between themselves as to how the spouse's entitlement is to be divided and put it in writing.²

6.4 The second method involves a partner or the personal representative applying to the court for a distribution order. The granting of such an order may be conditional. It may require that the entitlement be distributed in a way the court considers just and equitable – in so requiring it makes no assumption in favour of an equal distribution as a starting point or otherwise; it may find one partner to be solely entitled. The conditions for the granting of a court order are that there is no distribution agreement and that the personal representative has not commenced distribution of the estate.³

6.5 The third approach allows the personal representative to divide the estate into equal shares to distribute to the partners. This will be subject to the presence of surviving issue. Where issue exist, the statutory legacy must be equally split between the partners. Three conditions must be met for distribution to occur in this manner:

- the partners must have three months notice (given as soon as practicable) of the distribution;
- the personal representative must have no notice of a distribution agreement; and
- the personal representative must:
 - have no notice of an application for a distribution order, or

1. See *Succession Act 1981* (Qld) s 36.

2. *Succession Act 1981* (Qld) s 36(1)(a).

3. *Succession Act 1981* (Qld) s 36(6).

- have a copy of a court order striking out or discontinuing an application for a distribution order, or
- have been notified that the partners agree that the estate should be equally distributed by the personal representative (despite any prior application for a distribution order).⁴

Distribution in other Australian jurisdictions

When the whole entitlement goes to the de facto partner

6.6 In many jurisdictions, the de facto partner of an intestate will take the spouse's entitlement exclusively if a number of conditions are met. The de facto relationship must have existed for a specified period before the intestate's death. In NSW, NT and Tasmania, the relevant period is at least two years;⁵ at least five years in WA⁶ and ACT;⁷ and six years or more in Victoria.⁸

6.7 Some jurisdictions require that the relationship should have existed continuously for the period specified.⁹ In some of these jurisdictions, the period must also have been immediately before the intestate's death.¹⁰ Another condition is added in some jurisdictions that the intestate must not have lived with his or her lawful spouse (or lived as the spouse of his or her lawful spouse¹¹) at any time during that period.¹²

6.8 In NT and Victoria, the de facto partner will take the spouse's share regardless of the above conditions, where the intestate is survived by issue¹³ of the intestate and the de facto partner.

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4. *Succession Act 1981* (Qld) s 36(1)(c).
 5. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A); and *Administration and Probate Act 1935* (Tas) s 44(3A).
 6. *Administration Act 1903* (WA) s 15(3).
 7. *Administration and Probate Act 1929* (ACT) s 45(1)(b).
 8. *Administration and Probate Act 1958* (Vic) s 51A(1).
 9. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration and Probate Act 1958* (Vic) s 51A(1); *Administration and Probate Act 1929* (ACT) s 45A(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
 10. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration Act 1903* (WA) s 15(3)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
 11. *Administration Act 1903* (WA) s 15(3)(b).
 12. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
 13. In Victoria, the issue must have been under 18 years at the intestate's death.

When the whole entitlement goes to the spouse

6.9 In NT, NSW and Tasmania, if the applicable conditions are not met by the surviving de facto partner, the spouse will be entitled to the spouse's share exclusively.¹⁴ In Victoria, this will be the case if the de facto partner has not lived with the intestate continuously for at least two years immediately before the intestate's death and if the intestate was not survived by issue of the intestate and de facto partner, or such issue was not under 18 at the intestate's death.¹⁵ A similar position applies in ACT.¹⁶

When the entitlement is apportioned between the spouse and the de facto partner

6.10 In SA, the spouse and each de facto partner will be entitled to an equal share in the spouse's entitlement regardless of the length, or nature of, the relationships involved.¹⁷ One submission suggested that some people held the view that this approach had the benefit of being "equitable and simple".¹⁸

6.11 In a number of jurisdictions, the spouse's share will be divided equally between the spouse and de facto partner provided certain conditions are met. For example, the de facto relationship must have existed for a specified period before the intestate's death. This means at least two years but less than five years in the ACT and WA.¹⁹ Additionally, in WA, the relevant period is that immediately before the death of the intestate, and the intestate must not have lived as the spouse of his or her lawful spouse during that period.²⁰ Victoria and the ACT require the period to have been continuous.²¹

6.12 It is also possible to apportion entitlements according to the duration of the relationships involved. In Victoria, if the de facto relationship has existed for at least two years but less than four years before the death of the intestate, the spouse will be entitled to two-

14. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1; *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(b); and *Administration and Probate Act 1935* (Tas) s 44(3A)(b).

15. *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner".

16. *Administration and Probate Act 1929* (ACT) s 44(1) definition of "eligible partner".

17. *Administration and Probate Act 1919* (SA) s 72H(2). See also *Administration Act 1969* (NZ) s 77C.

18. Trustee Corporations Association of Australia, *Submission* at 7.

19. *Administration and Probate Act 1929* (ACT) s 45A(1)(a); and *Administration Act 1903* (WA) s 15(2)(a).

20. *Administration Act 1903* (WA) s 15(2).

21. *Administration and Probate Act 1929* (ACT) s 45(1)(a); *Administration and Probate Act 1958* (Vic) s 51A(1).

thirds and the de facto partner one-third of the spouse's entitlement. Where the de facto relationship has existed for at least four years but less than five, the spouse's entitlement is one half and where the de facto relationship has existed for at least five years, but less than six, the spouse's entitlement is one-third, while that of the de facto partner is two-thirds.²²

INTESTATE LEAVES MORE THAN ONE PARTNER

6.13 The situation is less clear where more than one de facto partner survives the intestate. In NSW a de facto partner will only be entitled to the spouse's share of an intestate estate if he or she was the sole partner in a de facto relationship with the deceased and was not a partner in any other de facto relationship.²³ Western Australia provides that, where an intestate has been survived by two or more de facto partners, they are entitled to equal shares in the de facto partner's entitlement.²⁴ This is also the position in New Zealand.²⁵

6.14 In the ACT it can be argued that the definitions of "spouse" and "domestic partner" are such that there can only be one eligible partner (in addition to a spouse).²⁶ "Domestic partnership" is defined as "the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis". This is similar to the position in Queensland where the rules provide for the distribution of the spouse's entitlement if more than one "spouse" survives the intestate.²⁷ Since "spouse" is defined to include de facto partners, it appears that the spouse's entitlement may be apportioned when the intestate is survived by more than one de facto partner. However, Queensland defines "de facto partner" in much the same way as the ACT as being "either 1 of 2 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".²⁸

6.15 In SA, the question of multiple putative spouses arguably cannot arise since a putative spouse is required to be living with the deceased "as the husband or wife de facto".²⁹ It can be argued that the reference

22. *Administration and Probate Act 1958* (Vic) s 51A(1).

23. *Wills, Probate and Administration Act 1898* (NSW) s 32G(1).

24. *Administration Act 1903* (WA) s 15(4).

25. *Administration Act 1969* (NZ) s 77C.

26. "Domestic partnership" is defined as "the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis": *Legislation Act 2001* (ACT) s 169(2).

27. *Succession Act 1981* (Qld) s 36. See para 6.2-6.5.

28. *Acts Interpretation Act 1954* (Qld) s 32DA(1).

29. *Family Relationships Act 1975* (SA) s 11.

to “husband or wife” imports the idea of a relationship that is like marriage and, thus, is monogamous.

6.16 While the NT provides that a couple will be in a de facto relationship “if they are not married but have a marriage-like relationship”,³⁰ in determining whether such a relationship exists it is expressly irrelevant that “either of the persons is in another de facto relationship”.³¹ Western Australia also requires the relationship to be “marriage-like”,³² but makes it irrelevant that either of the persons is in another de facto relationship.³³

6.17 The other Australian jurisdictions also do not appear to import the idea of monogamy into the concept of de facto relationships.

6.18 Envisaging the impracticalities of addressing the intestacy of “the itinerant with a ‘wife in every port’; or the open polygamist, perhaps with many children,” the Queensland Law Reform Commission in its 1993 Report suggested that, where the intestate was survived by more than one de facto, none should be entitled to the spouse’s share.³⁴

6.19 No clear view on this has come out of consultations. In consultations in Victoria, it was said that there have not yet been any cases of multiple domestic partners. It was felt that the Victorian provisions would not be able to cope with such an eventuality.³⁵

BIGAMOUS UNIONS

6.20 A question may arise as to the status of a surviving spouse who finds that the deceased entered into a bigamous union with that “spouse”. Where a deceased man, for example, underwent a marriage ceremony in Australia at the time he had a valid subsisting marriage to another woman, what is the position of the more recent wife? Can she claim to be the deceased’s spouse for the purposes of intestate distribution?³⁶

30. *De Facto Relationships Act 1991* (NT) s 3A(1).

31. *De Facto Relationships Act 1991* (NT) s 3A(3)(c).

32. *Interpretation Act 1984* (WA) s 13A(1).

33. *Interpretation Act 1984* (WA) s 13A(3)(b).

34. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 27.

35. *Melbourne Consultation*.

36. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 59.

6.21 In *Re Milanovic*,³⁷ the deceased had been married in Serbia. During the Second World War, he was separated from his wife and did not return to her. Some years later he “went through a form of marriage” with a second woman, who had no knowledge of his previous marriage. Despite the unwitting nature of this bigamous union (at least on the second wife’s part), the Court held that the second wife was not entitled to make an application for testator’s family maintenance. It held that the nature of this second marriage meant that, “[s]he is thus not the widow of the testator, and not in the class of persons who may make application for provision out of the testator’s estate”.³⁸

6.22 This situation may now be addressed by the provisions that most jurisdictions use to deal with situations where the deceased is married and also has a de facto partner.³⁹ So, although not married, a bigamist’s second or subsequent partners may be entitled to a share of an intestate estate if they are found to be in a de facto relationship with the deceased.⁴⁰

PERSONAL EFFECTS

6.23 The distribution of personal effects of the intestate is a particular problem where there is more than one surviving spouse and/or partner. Special provisions are sometimes made for the distribution of these items.

6.24 SA provides that, where an intestate is survived by a lawful spouse and a putative spouse, they shall both be entitled to equal shares in the property (including personal effects).⁴¹ Where any dispute arises between the two as to the division of any items, the administrator may sell them and distribute the proceeds of the sale equally.⁴²

6.25 In the NT, where the intestate is survived by both a spouse and a de facto partner – (a) the de facto partner is entitled to the personal effects absolutely if – (i) he or she was the de facto partner of the intestate for a continuous period of not less than two years

37. *Re Milanovic* [1973] Qd R 205.

38. *Re Milanovic* [1973] Qd R 205 at 206 (Douglas J).

39. See also Trustee Corporations Association of Australia, *Submission* at 3; Public Trustee NSW, *Submission* at 3.

40. See the recommendations relating to spouse and partners of an intestate: para 6.28-6.35, below. The criminal law would deal with a person who was knowingly a party to the bigamy.

41. *Administration and Probate Act 1919* (SA) s 72H(2).

42. *Administration and Probate Act 1919* (SA) s 72H(3).

immediately preceding the intestate's death, and the intestate did not at any time during that period live with the person to whom he or she was married; or (ii) the intestate is also survived by issue of the intestate and the de facto partner; and (b) except where paragraph (a) applies, the spouse is entitled to the personal effects absolutely.⁴³

6.26 One submission suggested that personal effects in the custody of each person should remain with that individual or, alternatively, that they should be distributed to the spouse or partner depending on whether they were obtained during the relevant relationship.⁴⁴ However, some items will almost always be contested in such circumstances.

SUBMISSIONS AND CONSULTATIONS

6.27 Some submissions supported the Queensland provisions.⁴⁵ Another submission supported a provision along the lines of that in NSW, noting that each situation is different and a partner who is not entitled can always apply for family provision.⁴⁶

NATIONAL COMMITTEE'S CONCLUSION

6.28 The Queensland provisions should be adopted as being sufficiently flexible to deal with most eventualities. For example, they will allow the question of distribution of the intestate's personal effects to be negotiated or imposed by the Court. They also provide a framework for negotiation of any dispute. The Committee notes that negotiated outcomes are not unknown in other jurisdictions. For example, alternative dispute resolution procedures are generally used in Tasmania in cases where there is a surviving spouse and a surviving de facto partner.⁴⁷

6.29 The National Committee has considered whether there should be a limit on the number of de facto partners who may share in the intestate estate. The Committee can think of no good reason to place a limit on the number of de facto partners, so long as they meet the definitional requirements. This is especially so in cases where there are children of the various partnerships and a limit on the number of de facto partners may lead to the parents of some children not being provided for.

43. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3.

44. Trustee Corporations Association of Australia, *Submission* at 7.

45. Public Trustee of Queensland, *Submission* at 2; Law Society of Tasmania, *Submission* at 7.

46. Public Trustee NSW, *Submission* at 5.

47. K McQueenie, *Consultation*.

6.30 The Committee, therefore, recommends that where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate. There will be no rights to personal effects, statutory legacies, or rights of election. However, the distribution of items from the estate can be subject to negotiation between the parties in accordance with the Queensland provisions.

6.31 The Committee further recommends that, where there is more than one spouse or partner and descendants of the intestate from at least one other relationship, each spouse or partner and each child (or representative) of the intestate should share in the estate. Each spouse or partner should be entitled to a statutory legacy and a share of half the residue of the estate. If there are insufficient funds for a full statutory legacy for each spouse, the amount that is available should be shared rateably. Each child (or representative) of the intestate should be entitled to an equal share of the remaining half. Rights of election and the distribution of the personal effects of the intestate can be negotiated in accordance with the Queensland provisions.

Where there are also surviving issue

6.32 Consideration needs to be given to the impact of surviving issue on the above proposal. The presence of a child will always mean that there is a child who is also not the child of at least one of the surviving spouses or partners. There are essentially three scenarios:

- where there is a surviving spouse or partner and another surviving spouse or partner with at least one child;
- where there are two surviving spouses or partners with at least one child each;
- where there are two surviving spouses or partners with or without children, and at least one child from at least one other relationship.

6.33 In the first two cases, the surviving spouses and/or partners should be entitled to share the entire estate without the need to take account of their children. This follows the proposals that a spouse or partner should take the whole estate to the exclusion of children where those children are also the children of the surviving spouse or partner. This can be justified on the grounds that each child in this situation will, if a minor, continue to be cared for by his or her parent and, if an adult, can expect, in the normal course of events, ultimately to inherit from his or her surviving parent.

6.34 In the third case, the spouses and/or partners should share in the spouse's entitlement and the surviving children should be entitled to their share of the residue in the same way they would be if the intestate had died leaving only one surviving spouse or partner and at least one child from another relationship.

6.35 The model provisions relating to distribution where the intestate is survived by multiple spouses and/or partners should be drafted to ensure that issue of the intestate only participate in the distribution when at least one descendant is the issue of another relationship.

Recommendation 23

Where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate.

Where there is more than one spouse or partner and descendants of the intestate from at least one other relationship:

- (a) each spouse or partner should be entitled to a statutory legacy (rateably if there are insufficient funds) and a share of half the residue of the estate; and
- (b) each child (or representative) of the intestate should be entitled to an equal share of the remaining half.

The Queensland provisions for distributing an intestate estate where there are multiple spouses and/or partners should be adopted.

See Intestacy Bill 2006 **Part 2 division 3, cl 8(3)**.