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BLENDED FAMILIES, SECOND MARRIAGES, FAMILY BREAKDOWN, DE FACTO AND SAME SEX RELATIONSHIPS

ESTATE PLANNING ADVICE FOR NON-TRADITIONAL FAMILIES

Just as not all families are the same, there is no one estate planning solution which can be applied for every client. Family breakdown, re-partnering, blended families and same sex relationships all add layers of complexity to the estate planning process.

In recent times there have been some important legislative changes which have an impact on how we advise our clients, especially those whose family structures do not fit the traditional mould.

This paper looks first at some of these legislative changes, and then at three aspects of estate planning advice which are of particular relevance for non-traditional families – intestacy, family provision and superannuation death benefits – before concluding with some suggested strategies and practice tips.

Overview of New Legislation

This paper has been prepared for presentations at conferences in Victoria and New South Wales. For that reason, the focus is on new legislation in those States as well as at a federal level. It is recognised that there has also been legislative change in other jurisdictions.

New definition of "de facto relationship" (Commonwealth)

From 4 December 2008, pursuant to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*, a new definition of "de facto relationship" has been inserted in the Commonwealth *Acts Interpretation Act* at s. 22C (set out in full in the appendix to this paper).

The definition includes same sex couples, with a de facto relationship existing where two persons who are not legally married and are not related by family have a relationship as a couple living together on a genuine domestic basis.

All the circumstances of the relationship are to be taken into in determining whether a de facto relationship exists, and s. 22C(2) sets out a number of factors which may be relevant, including the duration of the relationship, the nature and extent of their common residence, whether a sexual relationship exists, the degree of financial dependence or interdependence, the ownership, use and acquisition of their property, the degree of mutual commitment to a shared life, the care and support of children and the reputation and public aspects of the relationship.

The definition is consistent with the new[1] definition of "de facto relationship" set out in s. 4AA of the *Family Law Act 1975.* That definition specifically provides[2] that for the purposes of the *Family Law Act:*

(a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

In the context of estate planning, the new definition is relevant for those areas of law governed by Commonwealth legislation, including superannuation, tax, social security and family law.

Financial matters related to de facto relationships (Commonwealth)

A new Part VIIIAB of the *Family Law Act 1975* has been added by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (No. 115, 2008) and commenced on 1 March 2009.

The new Part gives the Family Court power to deal with financial matters related to de facto relationships (including same-sex relationships) and relies on the referral of power from participating States.

The Family Court will be able to make similar orders regarding de facto relationships as it can regarding marriages including orders as to maintenance, declarations of property interests and alteration of property interests. Parties to a current or past de facto relationship will also be able to make binding financial agreements.

Importantly, the wide Family Court powers to bind third parties must now be considered for clients in de facto relationships. In an estate planning context, the power to make orders binding on trustees should be borne in mind when advising clients in relation to testamentary trusts.

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[1] Commenced 21 November 2008, inserted by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*

[2] See s. 4AA(5)

The Family Court will also have power to make flagging and splitting orders in relation to the superannuation interests of a person in a de facto relationship. This will be relevant when taking estate planning instructions, as it will be necessary to enquire about former de facto relationships and whether any orders concerning superannuation have been made.

New SIS definitions of "child" and "spouse" (Commonwealth)

The definitions of "child" and "spouse in s. 10 of the *Superannuation Industry (Supervision) Act 1993* have been amended to recognise both same-sex relationships and relationships which are registered under State legislation.

For the purposes of payment of death benefits it will no longer be necessary for same-sex partners to rely on fitting the category of "person in an interdependency relationship" to be treated as a dependant.

As children of a spouse are also dependants, a child of one of the partners in a same-sex relationship can be a dependant of the other partner for the purposes of payment of superannuation death benefits.

Relationships Act 2008 (Victoria)

The Victorian *Relationships Act 2008* commenced on 1 December 2008.

It provides a mechanism for domestic partners (including same sex partners) to register their relationship.

Registration of the relationship will have an effect on the legal treatment of the relationship in a number of contexts, including intestacy (see below) guardianship matters and superannuation, and will remove the need to produce other evidence of the existence of a domestic relationship.

The Act also provides for the resolution of property matters between parties to a domestic relationship and the making of binding relationship agreements.

Succession Amendment (Family Provision) Act 2008 (NSW)

Chapter 3 of the *Succession Act 2006* dealing with family provision commenced on 1 March 2009.

There are a number of significant changes to the previous *Family Provision Act 1982* regime, including changes to the time for making applications, but for advisers of non-traditional families the most significant change is in the expansion of the categories of eligible applicants for family provision.

As well as spouses, domestic partners (including same sex partners), children (but not step-children), former spouses (but not former domestic partners), dependant grandchildren and dependant household members there is a new category of eligible person, being a person with whom the deceased person was in a close personal relationship at the time of the deceased person's death.

A close personal relationship is one between two adult persons who are not married or in a de facto relationship but who may be related by family, who are living together, one or each of whom provides the other with domestic support and personal care. A close personal relationship will not exist if the domestic support and personal care are provided for fee and reward or on behalf of another person or organisation such as a government agency or charity.

In relation to the "child" category of eligible persons, it should be noted that since 22 September 2008[3] a parent-child relationship can exist between a child and the female partner of a child's birth mother, if the partner consented to the fertilisation procedure whereby the birth mother became pregnant with the child.

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[3] See s. 14 *Status of Children Act 1996*, as amended by the *Miscellaneous Acts Amendments (Same Sex Relationships) Act 2008*

Intestacy

The laws of intestacy attempt to reflect society's view of what constitutes acceptable succession for most people in most circumstances. Unusual family circumstances tend not to be accommodated by the intestacy schemes, and making sure that a well-drafted will is in place at all times is critical. Clients are particularly vulnerable after marriage or divorce when prior wills may be wholly or partly revoked[4], or after the death of a residuary beneficiary, when the failure of a gift may result in an intestacy.

And although the trend has been for new legislation to confer on de facto partners, including same sex partners, the same status and rights as are enjoyed by married spouses, intestate succession remains an area where a marriage certificate can make a huge difference.

Case Study[5]

> Peter was in a de facto relationship with Bev for 27 years. They had two children together, and Bev's son from her previous marriage also lived with them. Eighteen months before Peter's death, he and Bev split up and Peter later moved in with Julie, to whom he was engaged but not married at the time of his death. Peter's last will failed to effectively dispose of his assets and his estate therefore had to be administered in accordance with the Victorian intestacy scheme.
>
> Neither Bev nor Julie were entitled to anything on intestacy. What would the outcome have been if at Peter's death:
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> - Bev & Peter were married, separated but not yet divorced?
> - Julie & Peter were married?
> - Julie & Peter had been living together for two years?
> - Bev's & Peter's relationship had been registered?
> - Julie's & Peter's relationship had been registered?

It is worth noting that where a person leaves both a spouse (or in Victoria, a registered domestic partner) and a de facto partner the intestacy schemes provide that the entitlement of the de facto partner will depend on the length of the de facto relationship. In NSW the de facto partner will be entitled to the spouse's share if the relationship endured for at least two years prior to the death[6]. In Victoria, the de facto partner will be entitled to one third if the relationship was of less than four years duration, one half if it was between four and five years, two thirds if it was between five and six years and the whole of the spouse's share if the relationship was of more than six years duration[7].

Family Provision Claims

Not surprisingly, a large proportion of family provision cases in our Court systems spring from situations where there are competing claims between a new partner and

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[4] See ss. 13 & 14, *Wills Act 1997* (Victoria) and ss. 12 & 13, *Succession Act 2006* (NSW)
[5] See *Estate of Peter Geoffrey Brock; Chambers v Dowker & Anor [2007] VSC 415*
[6] S.61B(3A)*Probate & Administration Act 1898* (NSW)
[7] S. 51A *Administration Act 1958* (Victoria)

children from a previous relationship or other non-traditional family or household relationships exist.
Notwithstanding the so-called "uniform" succession law reforms there is very little uniformity among the States' statutory family provision regimes.

In particular, there are significant differences in terms of who is eligible to apply for provision, and in what assets are available to meet a claim.

Eligible Applicants - Victoria
Unlike every other jurisdiction in Australia, in Victoria there are no prescribed categories of eligible claimants (such as spouses, children, dependants, etc…).
The existence of a moral obligation on the part of the deceased to make provision for the claimant's maintenance and support will be looked at in each case in the light of a number of factors set out in Section 91 of the Act, including the relationship of the claimant to the deceased.
As well as the traditional categories of spouses and children, in Victoria successful claims have been made by, for example, a foster daughter of the deceased[8], a niece by marriage of the deceased[9], and an adult brother of the deceased[10].

Eligible Applicants - New South Wales
In New South Wales the categories of eligible applicants for family provision are set out in s. 57 of the *Succession Act 2006* (as amended). The categories are:
(a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,
(b) a person with whom the deceased person was living in a de facto relationship (including a same sex relationship) at the time of the deceased person's death,
(c) a child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the *Property (Relationships) Act 1984*, a child of that relationship (note this does not include a stepchild or foster child),
(d) a former wife or husband of the deceased person,
(e) a person:
    (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
    ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

A "close personal relationship" is defined[11] as a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.
In New South Wales, a step-child is only eligible to apply for provision if he or she fits into one of the other categories of applicant, eg. as a person who was dependant on the deceased and a member of the deceased's household.

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[8] *Sellers v Hyde* [2005] VSC 382
[9] *Iwasivska v State Trustees Limited* [2005] VSC 323
[10] *Marshall v Spillane* [2001] VSC 371
[11] S. 3(3) *Succession Act 2006* (NSW) as amended

Assets available to meet a claim - Victoria

In Victoria, the assets available to make provision for a claimant are confined, to the estate of the deceased. This means that assets of the following types will be unavailable to meet family provision claims:

1. Jointly held assets. These do not form part of the deceased's estate as they pass by survivorship to the other joint tenant;
2. Assets held in trusts or companies. Assets of a discretionary trust, whether controlled by the deceased prior to death or not, will not form part of the estate of the deceased. While assets of a unit trust or company will not form part of the deceased's estate, units or shares owned by the deceased will fall into the estate.
3. Superannuation death benefits not paid to the estate. At the discretion of the trustee of the fund or in accordance with a binding nomination made by the deceased, superannuation death benefits may be paid either directly to one or more dependants of the deceased, or to the legal personal representative of the deceased. Only in the latter case will the death benefits form part of the deceased's estate.
4. Assets transferred to third parties during the lifetime of the deceased.

Assets available to meet a claim - NSW

In New South Wales, as well as having access to the estate of the deceased, the concept of notional estate enables the Court to make orders affecting certain property which does not form part of the deceased's estate, namely property which has been the subject of a "relevant property transaction" which either:

(a) took effect within the 3 years prior to death and was entered into with the intention of denying or limiting provision for the eligible person;
(b) took effect within 1 year prior to death at a time when the deceased had a moral obligation to make provision for an eligible person; or
(c) took effect on or after the death of the deceased.

Sections 75 and 76 of the *Succession Act 2006* (NSW) as amended sets out what constitutes a relevant property transaction. Relevant property transactions are transactions made for less than full valuable consideration resulting in assets being owned by another person or subject to a trust. Significantly, relevant property transactions cover omissions as well as positive acts. This means, for example, that a failure to sever a joint tenancy immediately prior to death may be a prescribed transaction[12], as may a failure to ensure that superannuation death benefits are paid to the legal personal representative of the estate[13].

> **Example**
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> James has an adult child Ben from his first marriage and is married to his second wife Rosanna. James dies and his will leaves his whole estate to Rosanna. Rosanna then dies and leaves all her estate to her second cousin.
>
> Can Ben make a claim on Rosanna's estate? If the estate is in Victoria the answer is yes. If the estate is in New South Wales the

[12] S. 76(2)(b) *Succession Act2006* (NSW) as amended. See also, for an example under the previous legislation, *Karayannis v Smith* [2004] NSWSC 667

[13] S. 76(2)(e) *Succession Act2006* (NSW) as amended.

answer is no, unless Ben was at some time a member of Rosanna's household and dependant on her, or was in a close personal relationship with Rosanna.

In all jurisdictions Ben could have made a claim on James' estate, but the Court would have weighed Ben's financial circumstances and needs against Rosanna's in determining what, if any, provision should be made for Ben.

If, in the example given, James wanted to make sure that Ben would not make a successful claim on his estate, what could he do?

In Victoria, where there is presently no power to designate notional estate, James could prevent a successful claim by holding all his assets jointly with Rosanna so everything would pass by survivorship and there would be no estate on which Ben could make a claim. In relation to superannuation James could make a binding nomination that his death benefit be paid directly to Rosanna and not pass through his estate.

In New South Wales, however, notional estate provisions mean that jointly held assets (or half their value, at least) can be available to meet claims[14]. Similarly the Court has power to designate superannuation death benefits as notional estate[15].

Superannuation Death Benefits

Superannuation death benefits often represent a large proportion of a person's overall wealth, and the regime which governs succession to superannuation funds is distinctly different to that which applies to a person's own assets. Giving the right advice about succession to superannuation is critical, particularly for non-traditional families.

There are a number of issues to be aware of with superannuation death benefits, including the limitations on the persons to whom death benefits may be paid (unless they are paid to the estate and pass in accordance with the person's will), the extent to which the member can influence or determine who will receive the death benefits, the pros and cons of binding death benefit nominations, and the extent to which the death benefits will be subject to tax. It is also important to be aware of the advantages and dangers of using self managed superannuation funds as estate planning tools.

Who can receive superannuation death benefits?

Superannuation death benefits can only be paid to one or more of the deceased member's dependants or to his legal personal representative. Dependants are spouses (including de facto and same sex partners), children (including step-children) of any age, persons who are financially dependant on the deceased member and persons who are in an interdependency relationship with the deceased.

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[14] S. 76(2)(b) *Succession Act2006* (NSW) as amended. See also *Karayannis v Smith* [2004] NSWSC 667

[15] S. 76(2)(e) *Succession Act2006* (NSW) as amended.

If a client wants to ensure that death benefits are paid other than to a dependant, eg. to a non-dependant niece, or to a charity, then the death benefits will need to be paid to the legal personal representative and dealt with under the client's will.

Can the member determine who will receive the death benefits?

In the absence of a binding death benefit nomination, the trustee of the fund will determine who receives the death benefit, subject to the terms of the super fund's deed. Most, but not all, superannuation funds allow for a member to make a binding death benefit nomination requiring the trustee to pay the death benefits in a particular way. Regulation 6.17A of the *Superannuation Industry (Supervision) Regulations* specifies that binding nominations will lapse after 3 years unless renewed. Aside from the problem of forgetting to renew a binding nomination, difficulties arise if a member loses capacity. It is far from clear whether an attorney or financial manager of an incapable member can or ought to make, renew or revoke a binding nomination.

With a self managed superannuation fund there is no requirement for nominations to lapse every 3 years (although, frustratingly often, the deed itself specifies that they will lapse) and a non-lapsing nomination can be made with changes to the deed, if required. If nominations are not made, members of a self managed superannuation fund need to be mindful that the determination as to payment of the death benefits will be made by the surviving trustees (or surviving directors of the corporate trustee) or by the member's legal personal representative if it was a single member fund. Care needs to be taken to ensure that decision making power is not left with someone who will exercise it in a manner contrary to the member's wishes[16].

Because of the potential for lack of control over who receives the death benefits it is important to ensure that a person's will contains an appropriate adjustment clause in case death benefits are not paid in the manner expected.

Will the death benefit be subject to tax?

If the death benefits are paid either directly or via the will to persons who fit the definition of "death benefit dependant" as set out in section 302-195 of the *Income Tax Assessment Act 1997* no tax will be payable. That definition covers spouses (including de facto and same sex partners), children (including step-children) under the age of 18 years, persons who are financially dependant on the deceased member and persons who are in an interdependency relationship with the deceased. Children over 18 are not covered by the definition, and if death benefits are paid to children over 18 or via the will to other persons who do not fit the definition then tax will be payable on the taxable component of the death benefits. Depending on the circumstances the rate of tax to be applied will be 15% or 30%.

With blended families it often seems logical to provide for children of a prior relationship through life insurance, as it will not require realisation of other assets which are intended for the current spouse. It is important to understand that if the life insurance is held within superannuation then paying the proceeds to adult children will give rise to a significant tax liability. It may be better to structure things so that the superannuation death benefits, including the life insurance proceeds, are paid to the spouse, and provide for legacies to adult children in the will of which the wife is residuary beneficiary. Alternatively, it may be better to hold life insurance policies for the benefit of adult children outside superannuation.

[16] See *Katz v Grossman* [2005] NSWSC 934

Strategies and Practice Tips for Estate Planning Professionals

Avoid conflicts and undue influence. Arranging wills is an exercise that many couples choose to do together. In nearly every couple, there will be one who does most of the talking and one who does most of the nodding and agreeing. It is important when giving estate planning advice in this situation to make it clear that each person should feel free to obtain separate advice and should have an opportunity to raise issues privately with the solicitor.

Take thorough instructions. As advice is only as good as the information on which it is based, it is vital to take thorough instructions about current and past relationships, family circumstances and asset structures. Now that property determinations for de facto relationships will be able to be made in the Family Court, enquiries should be made as to past de facto relationships as well as marriages and whether superannuation entitlements have been affected by financial agreements or Court orders.

Check documents. Check deeds carefully, especially for definitions of "spouse" and "child" where the inclusion or exclusion of family members may be an issue. Don't assume, for example, that because a broad definition is now included in the superannuation legislation that a broad definition will also apply in the self managed superannuation fund deed.

Advise on registering or documenting evidence of relationship. In Victoria now it is possible to register a domestic relationship, and registration can affect how the partners will be treated on death or incapacity of one of them. Registration of the relationship will remove the need too put forward evidence to prove the existence of a domestic relationship. If, as in New South Wales, registration is not an option it may be worthwhile to have both partners make a statement or declaration as evidence that their relationship is a de facto relationship. And, of course, there may be instances where a client wishes to document the fact that a particular relationship is **not** a de facto relationship.

Advise on binding financial agreements. De facto partners can already make agreements in relation to their property under the *Relationships Act 2008* in Victoria and under the *Property (Relationships) Act 1984* in New South Wales. From May 2009, de facto couples as well as married or divorced couples will have the option to enter into a *Family Law Act 1975* binding financial agreement setting out each of the parties' rights and obligations as to property division in the event of marriage breakdown[17].

Binding financial agreements can be entered into before or during a marriage or de facto relationship or after separation or divorce. The subject matter of a binding financial agreement can be confined to a particular asset, such as an inheritance which has been received or is anticipated to be received by one party. To be binding, certain formal requirements must be met, including certificates that each party has received independent legal advice.

There are some circumstances in which the Family Court may set aside a binding financial agreement[18] (eg. if the purpose of the agreement is to defraud creditors, or

[17] *Family Law Act 1975* (Commonwealth), Part VIIIA and new Part VIIIAB

[18] *Family Law Act 1975* (Commonwealth), s. 90K

if the ability to care for children is compromised), but except in those circumstances the Family Court cannot interfere with the subject-matter of the binding financial agreement.

Assess the potential for family provision claims. Take full instructions to identify possible claimants and the extent of the assets which would be likely to be available to meet claims, and advise the clients accordingly. Strategies for dealing with potential claims may depend on whether notional estate provisions exist in the relevant State.

If little or no provision is to be made for a potential claimant it is a good idea to document the reasons (eg. because gifts were made to the beneficiary during the client's lifetime, or because the needs of another beneficiary are more pressing). While it may be appropriate in some circumstances to document reasons within the will itself, my preferred option is for the willmaker to set out reasons in a separate document, possibly in the form of a letter to the executor.

If clients are serious about disinheriting a person who would be a potential claimant, they should consider taking steps during their lifetime to place assets outside the reach of the family provision legislation. As mentioned previously, in Victoria assets which do not form part of a deceased's estate will not be available to meet a family provision claim. To reduce the value of their estate, clients may consider a number of possible transactions during their lifetimes, including transferring assets to a beneficiary, transferring an interest as a joint tenant, transferring assets to a discretionary trust or transferring assets to superannuation and making binding nominations to prevent death benefits passing to the estate. The advantages of taking the assets out of the estate need to be weighed against the disadvantages of transfer costs such as stamp duty and Capital Gains Tax and the potential loss of control over the assets during the person's lifetime.

As set out above the family provision legislation in New South Wales uses the concept of notional estate to claw back certain property which does not form part of the deceased's estate. The effectiveness of inter vivos transfers in keeping assets out of the reach of family provision claims may depend on whether they are made more than three years before death. Interests as a joint tenant and superannuation are in any event able to be designated as notional estate

Balance beneficiary interests. Perhaps the most obvious strategy to minimise the risk of a family provision claim against an estate is to attempt to make adequate provision for all possible claimants. Most clients in blended family situations want to do just that – ie. look after both the current spouse and the children from the previous relationship. If the estate is large enough, it becomes easier to make provision for several people, and long-term trusts may be a viable option. Where the estate is small it can be difficult to find a balance between the competing claims. It may be possible for the client to take out life insurance for the purpose of making provision for family members on death. Ironically, the larger the estate the more likelihood there is of a beneficiary bringing a claim in an attempt to increase his or her share.

Pay attention to superannuation. In balancing beneficiary interests particular attention needs to be paid to superannuation. It is important to understand the tax consequences of the payment of super death benefits to a non-tax dependant. Include adjustment provisions in the will in case death benefits are not paid in the expected manner. Where there is a self managed super fund ensure that trustee

control will pass to the appropriate person. It may be appropriate to have two funds with control passing to different family members on death.

APPENDIX – Excerpts from legislation

Acts Interpretation Act 1901 (Commonwealth)

22A References to de facto partners

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the ***de facto partner*** of another person (whether of the same sex or a different sex) if:

(a) the person is in a registered relationship with the other person under section 22B; or

(b) the person is in a de facto relationship with the other person under section 22C.

22B Registered relationships

For the purposes of paragraph 22A(a), a person is in a ***registered relationship*** with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship.

22C De facto relationships

(1) For the purposes of paragraph 22A(b), a person is in a ***de facto relationship*** with another person if the persons:

(a) are not legally married to each other; and

(b) are not related by family (see subsection (6)); and

(c) have a relationship as a couple living together on a genuine domestic basis.

(2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance mentioned in subsection (2) is necessary in determining whether 2 persons have a relationship as a couple for the purposes of paragraph (1)(c).

(4) For the purposes of paragraph (1)(c), the persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of:

(a) a temporary absence from each other; or

(b) illness or infirmity of either or both of them.

(5) For the purposes of subsection (1), a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship (within the meaning of section 22B) with someone else or is in another de facto relationship.

(6) For the purposes of paragraph (1)(b), 2 persons are ***related by family*** if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

(7) For the purposes of subsection (6), ***adopted*** means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

See also s. 4AA Family Law Act 1975

Superannuation Industry (Supervision) Act 1993 (Commonwealth)

10 Definitions

(1) In this Act, unless the contrary intention appears:

…

child, in relation to a person, includes:

(a) an adopted child, a stepchild or an ex-nuptial child of the person; and

(b) a child of the person's spouse; and

(c) someone who is a child of the person within the meaning of the *Family Law Act 1975*.

…

spouse of a person includes:

(a) another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and

(b) another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

Income Tax Assessment Act 1997 (Commonwealth)

302-195 Meaning of *death benefits dependant*

(1) A ***death benefits dependant***, of a person who has died, is:

(a) the deceased person's spouse or former spouse; or

(b) the deceased person's child, aged less than 18; or

(c) any other person with whom the deceased person had an interdependency relationship under section 302-200 just before he or she died; or

(d) any other person who was a dependant of the deceased person just before he or she died.

(2) For the purposes of this Division, treat an individual who receives a superannuation lump sum because of the death of another person as a ***death benefits dependant*** of the deceased person in relation to the lump sum if the deceased person died in the line of duty (see subsection (3)) as:

(a) a member of the Defence Force; or

(b) a member of the Australian Federal Police or the police force of a State or Territory; or

(c) a protective service officer (within the meaning of the *Australian Federal Police Act 1979*).

(3) For the purposes of subsection (2), a person ***died in the line of duty*** if the person died in the circumstances specified in the regulations.

302-200 What is an *interdependency relationship*?

(1) Two persons (whether or not related by family) have an ***interdependency relationship*** under this section if:

(a) they have a close personal relationship; and

(b) they live together; and

(c) one or each of them provides the other with financial support; and

(d) one or each of them provides the other with domestic support and personal care.

(2) In addition, 2 persons (whether or not related by family) also have an ***interdependency relationship*** under this section if:

(a) they have a close personal relationship; and

(b) they do not satisfy one or more of the requirements of an interdependency relationship mentioned in paragraphs (1)(b), (c) and (d); and

(c) the reason they do not satisfy those requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability.

(3) The regulations may specify:

(a) matters that are, or are not, to be taken into account in determining under subsection (1) or (2) whether 2 persons have an ***interdependency relationship*** under this section; and

(b) circumstances in which 2 persons have, or do not have, an ***interdependency relationship*** under this section.

Relationships Act 2008 (Victoria)

PART 3.2—RELATIONSHIP AGREEMENTS

35 Definitions

(1) In this Part—

domestic partner of a person means—

(a) a person with whom the person is or has been in a domestic relationship; or

(b) a person with whom the person is contemplating entering into a domestic relationship;

domestic relationship means—

(a) a registered relationship; or

(b) a relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender); or

(c) the relationship between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person—

(i) for fee or reward; or

(ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

financial matters means matters relating to any one or more of the following—

(a) the maintenance of one or both of the domestic partners;

(b) the income or property of one or both of the domestic partners;

(c) the financial resources of one or both of the domestic partners;

financial resources includes—

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided; and

(b) property that, under a discretionary trust, may become used for the purposes of or vested in one or both of the domestic partners; and

(c) property, the alienation or disposition of which is wholly or partly under the control of one or both of the domestic partners and that is lawfully capable of being used for the purposes of one or both of the domestic partners; and

(d) an indexed pension; and

(e) any other valuable benefit;

property includes—

(a) real and personal property; and

(b) any estate or interest in real or personal property; and

(c) money and any debt; and

(d) any cause of action for damages (including damages for personal injury); and

(e) any other thing in action; and

(f) any right with respect to property;

relationship agreement means an agreement, or a variation of an agreement, between two persons, whether or not there are other parties to the agreement—

(a) that is made before, on or after the commencement of this Act—

  (i) in contemplation of their entering into a domestic relationship; or

  (ii) during the existence of their domestic relationship; or

  (iii) in contemplation of the termination of their domestic relationship; or

  (iv) after the termination of their domestic relationship; and

(b) that provides for financial matters, whether or not it provides for other matters.

(2) In determining whether a domestic relationship (other than a registered relationship) exists or has existed, all the circumstances of the relationship are to be taken into account, including any one or more of the following matters as may be relevant in a particular case—

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

(3) For the purposes of this Part, a person is not a domestic partner of another person only because they are co-tenants.

36 Agreements subject to law of contract

A relationship agreement is subject to, and enforceable in accordance with, the law of contract.

37 Varying or setting aside agreements

(1) A court may vary or set aside a relationship agreement or any term of a relationship agreement if, in the court's opinion, the circumstances of the partners have so changed since the agreement was entered into that it would lead to serious injustice if the agreement or term (as the case requires) were enforced.

(2) A court may vary or set aside a relationship agreement or any term of a relationship agreement—

(a) if the court is of the opinion that the agreement was entered into under duress or by fraud; or

(b) on any other ground that would allow a contract to be varied or set aside.

(3) A court may vary or set aside a relationship agreement or a term of a relationship agreement under subsection (1) or (2) despite any provision of the agreement to the contrary.

(4) This section applies in any proceeding in a court, whether under Part 3.3 or otherwise.

38 Effect of death of partner

(1) The terms of a relationship agreement requiring a domestic partner to pay periodic maintenance to the other partner are—

(a) on the death of the first-mentioned partner, unenforceable against his or her estate, unless the agreement provides otherwise; and

(b) on the death of the second-mentioned partner, unenforceable by his or her estate.

(2) Subsection (1) does not affect the recovery of arrears of periodic maintenance due and payable under a relationship agreement at the date of death of either partner.

(3) Unless a relationship agreement provides otherwise, the terms of the agreement entered into by domestic partners relating to property and lump sum payments are, on the death of one of the partners, enforceable on behalf of, or against, the estate of the deceased partner.

Administration and Probate Act 1958 (Victoria)

3 Definitions

(1) In this Act unless inconsistent with the context or subject-matter—

domestic partner of a person who dies means a registered domestic partner or an unregistered domestic partner of that person;

partner of a person who dies means the person's spouse or domestic partner;

registered domestic partner of a person who dies means a person who, at the time of the person's death, was in a registered relationship with the person within the meaning of the **Relationships Act 2008**;

unregistered domestic partner of a person who dies means a person (other than a registered domestic partner of the person) who, although not married to the person—

(a) was living with the person at the time of the person's death as a couple on a genuine domestic basis (irrespective of gender); and

(b) either—

(i) had lived with the person in that manner continuously for a period of at least 2 years immediately before the person's death; or

(ii) is the parent of a child of the person, being a child who was under 18 years of age at the time of the person's death.

37A Partner may obtain intestate's interest in shared home[i]

(1) In this section—

residuary estate has the same meaning as in section 38(4);

shared home means a residence that was the principal place of residence of an intestate and the intestate's partner at the time of the intestate's death.

(2) Despite anything to the contrary in this Act, if a person dies intestate as to an interest in the person's shared home, the person's partner may elect to acquire the interest at its value at the date of the person's death.

(3) The election must be made—

(a) if the partner is a personal representative—within 3 months of the grant of administration; or

(b) if the partner is not a personal representative—within 3 months of the partner being given notice under subsection (4).

(4) If—

(a) a person dies intestate as to an interest in his or her shared home; and

(b) his or her partner is not the person's personal representative—

the personal representative must, within 30 days of the grant of administration, give the partner a written notice informing the partner of his or her rights under this section.

(5) An election must be given in writing—

(a) if the partner is a personal representative—to the registrar; and

(b) if the partner is not a personal representative—to the personal representative who sent the partner the notice requiring the election.

(6) If an intestate is also survived by a child or other issue—

(a) any notice under subsection (4); and

(b) any election under subsection (5)(a)—

must show the sworn value of the intestate's interest in the shared home at the time of the intestate's death as fixed by a valuer.

(7) If the partner elects to acquire the intestate's interest in the shared home—

(a) his or her share of the residuary estate is to be reduced by the value of the interest; and

(b) if the value of the interest is more than the amount of his or her share of the residuary estate, the partner must pay the difference into the intestate's estate—

(i) before the distribution of the residuary estate; or

(ii) within 12 months of the making of the election—

whichever occurs first.

(8) If the partner elects to acquire the intestate's interest in the shared home, the personal representative—

(a) must transfer the interest to the partner within a reasonable time—

(i) of receiving notice of the election; or

(ii) if subsection (7)(b) applies, of the partner paying the amount of the difference into the estate; and

(b) in any event, must transfer the interest before the distribution of the residuary estate.

(9) A partner may acquire an interest under this section even though—

(a) he or she is a trustee; or

(b) he or she is a minor.

(10) If a shared home is part of a larger property and the intestate's interest in the shared home cannot be severed from the intestate's interest in the larger property without subdividing that property, a reference to the shared home in this section is to be read as a reference to that property.

(11) Despite subsection (10), if a shared home is part of a farm, a reference to the shared home in this section is to be read as a reference to the entire farm.

51 Distribution if intestate leaves a partner

(1) The partner of an intestate who does not leave any child (or other issue) is entitled to the intestate's residuary estate.

(2) The partner of an intestate who leaves a child (or other issue) is entitled—

(a) to the personal chattels of the intestate; and

(b) if the intestate's residuary estate is worth not more than $100 000, to the whole of the estate; and

(c) if the intestate's residuary estate is worth more than $100 000, to—

(i) $100 000; and

(ii) interest on that amount calculated at the rate set out in subsection (3) from the date of the death of the intestate to the date of payment of that amount; and

(iii) one third of the balance of the estate.

(3) The rate of interest is the rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** less 2½%.

51A Distribution if more than one partner

(1) If an intestate leaves both a spouse or registered domestic partner and an unregistered domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

TABLE

Period that unregistered domestic partner has lived as domestic partner of intestate continuously before intestate's death	*Spouse or registered domestic partner's entitlement to partner's share*	*Unregistered domestic partner's entitlement to partner's share*
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	half	half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	none	all

Note

There is a minimum requirement that the unregistered domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death—see definition of ***unregistered domestic partner*** in section 3(1).

(2) In this section—

partner's share of an intestate's residuary estate means the share of the estate to which the partner of the intestate is entitled under this Division.

52 Distribution on intestacy

(1) Where a person in respect of his or her residuary estate dies intestate then subject to the provisions of section 51 and 51A the following provisions shall have effect with respect to such estate:

(a) If the intestate leaves a partner she or he shall be entitled if the intestate leaves any issue to one-third of such estate;

(b) If the intestate leaves a father and a mother but no partner or issue such estate shall be distributed equally between the father and the mother;

(e) If the intestate leaves a father but no partner or issue or mother the father shall be entitled to such estate;

(ea) If the intestate leaves a mother but no partner or issue or father the mother shall be entitled to such estate;

(f) Subject to the above-mentioned rights such estate or the portion thereof to which these rights do not extend shall be distributed in equal shares among the children of the intestate living at his or her decease and the representatives then living of any children who predeceased the intestate or if there are no such children or representatives among the next of kin of the intestate who are in equal degree and their representatives: Provided as follows:

(i) Where a child has any property real or personal or any estate or interest therein by settlement of the intestate or was advanced by the intestate in his or her lifetime that child or his or her representative shall bring such property estate interest or advance into account in estimating the share (if any) to be taken by him, her or them in the distribution;

(ii) Except as hereinafter provided the children of any person who died before the intestate shall take only the share which that person would have taken if living at the death of the intestate and if more than one shall take the same in equal shares;

(iii) No representation shall be admitted among collaterals after brothers' and sisters' children;

(v) Brothers or sisters or when they take as representatives brothers' or sisters' children shall take in priority to grandparents;

(vi) Where brothers' or sisters' children are entitled and all the brothers or sisters of the intestate have died before him or her such children shall not take as representatives and all such children shall take in equal shares;

(vii) There shall be no difference between males and females or between relationship of the whole blood and of the half blood;

(viii) A husband and wife shall for all purposes of distribution and division be treated as two persons.

Succession Amendment (Family Provision) Act 2008 (NSW)

3 Definitions

…

(3) For the purposes of this Act, a ***close personal relationship*** is a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(4) For the purposes of subsection (3), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
  (a) for fee and reward, or
  (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

57 Eligible persons

(cf FPA 6 (1), definition of "eligible person")

The following are ***eligible persons*** who may apply to the Court for a family provision order in respect of the estate of a deceased person:

(a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,
(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,
(c) a child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the *Property (Relationships) Act 1984*, a child of that relationship,

Note. A stepchild or foster child is not a child of a domestic relationship—see section 5 (3) of the *Property (Relationships) Act 1984*.

(d) a former wife or husband of the deceased person,
(e) a person:
  (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
  (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

Property (Relationships) Act 1984 (NSW)

5 Domestic relationships

(1) For the purposes of this Act, a domestic relationship is:
  (a) a de facto relationship, or
  (b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of subsection (1) (b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
  (a) for fee or reward, or
  (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

(3) A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:
- (a) a child born as a result of sexual relations between the parties,
- (b) a child adopted by both parties,
- (c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:
  - (i) of whom the man is the father, or
  - (ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted,
- (c1) where the domestic relationship is a de facto relationship between two women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996*,
- (d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

(4) Except as provided by section 6, a reference in this Act to a party to a domestic relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.

Probate and Administration Act 1898 (NSW)

61B Succession to real and personal property on intestacy

(1) Where a person dies wholly intestate, the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate, be distributed or held in trust in the manner specified in this section, and the real estate of that person shall be held as if it had been devised to the persons for whom it is held in trust under this section.

(2) If the intestate leaves a spouse but no issue, the estate shall be held in trust for the spouse absolutely.

(3) If the intestate leaves a spouse and also leaves issue, then if the value of the estate (excluding any household chattels) does not exceed the prescribed amount, the whole estate shall be held in trust for the spouse, but if the value of the estate (excluding any household chattels) exceeds the prescribed amount, then:
- (a) the household chattels (if any),
- (b) the prescribed amount, and
- (c) one-half of the estate (excluding any household chattels and the prescribed amount),

shall be held in trust for the spouse and the residue of the estate shall be held in statutory trust for the issue of the intestate.

(3A) Notwithstanding subsections (2) and (3), if the intestate leaves a spouse and a de facto spouse, the whole or, as the case may be, such part of the estate of the intestate as is required to be held in trust for the spouse of the intestate shall be held in trust for:
- (a) where the de facto spouse was the de facto spouse of the intestate for a continuous period of not less than 2 years prior to the death of the intestate and the intestate did not, during the whole or any part of that period, live with the person to whom the intestate was married—the de facto spouse, or

(b) in any other case—the spouse.

(3B) Notwithstanding subsection (3), if the intestate leaves a de facto spouse and also leaves issue but no spouse, the whole or, as the case may be, such part of the estate of the intestate as would, if the intestate had left a spouse, be required to be held in trust for the spouse of the intestate shall be held in trust for:

(a) where the de facto spouse was the de facto spouse of the intestate for a continuous period of not less than 2 years prior to the death of the intestate—the de facto spouse, or

(b) in any other case:

(i) except as provided by subparagraph (ii)—the issue as if the intestate left no spouse, or

(ii) where the intestate leaves no issue being children of the intestate or where such of the issue as are children of the intestate are issue also of the de facto spouse—the de facto spouse.

(4) If the intestate leaves issue but no spouse, the estate shall be held in statutory trust for the issue of the intestate.

(5) If the intestate leaves no spouse and no issue but one or both of the intestate's parents, the estate shall be held:

(a) where both parents survive the intestate, in trust for those parents in equal shares, or

(b) where only one parent survives the intestate, in trust for that parent absolutely.

(6) If the intestate leaves no spouse, no issue and no parents, the estate shall be held for the following persons living at the death of the intestate and in the following order and manner:

(a) firstly, in statutory trust for the brothers and sisters of the whole blood of the intestate; but if there are no such brothers or sisters, then

(b) secondly, in statutory trust for the brothers and sisters of the half blood of the intestate; but if there are no such brothers or sisters, then

(c) thirdly, in trust for the grandparents of the intestate and, if more than one of them survive the intestate, in equal shares; but if there are no such grandparents, then

(d) fourthly, in trust for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate) and, if more than one of them survive the intestate, in equal shares; but if there are no such uncles or aunts, then

(e) fifthly, in trust for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate) and, if more than one of them survive the intestate, in equal shares.

(7) In default of any person taking an interest under subsections (2) to (6), the estate shall belong to the Crown as bona vacantia, and in place of any right to escheat.

(8) The Crown, without prejudice to any other powers, may, out of the whole or any part of the property devolving on it as bona vacantia, provide for dependants, whether kindred or not, of the intestate and any other persons for whom the intestate might reasonably have been expected to make provision.

(9) Spouses shall for all purposes of distribution under this section be treated as separate persons.

(10) Where household chattels referred to in subsection (3) (a) are subject to a hire-purchase agreement within the meaning of subsection (1) of section 2 of the *Hire-Purchase Act 1960* or within the meaning of any enactment of another State, or of a Territory, of the Commonwealth corresponding to that subsection, the surviving spouse, as referred to in subsection (3), shall be entitled to those chattels but subject to the rights of the owner under the agreement and under the provisions of the *Hire-Purchase Act 1960* or, as the case may be, of the enactment of that other State or that Territory corresponding to that Act.

(11) Subsection (3) (a) has effect subject to section 145 of the *Conveyancing Act 1919*.

(12) Where the prescribed amount is held in trust for a spouse of an intestate under subsection (3), the spouse is entitled, in addition to the spouse's entitlement under that subsection, to interest on that amount at the rate prescribed for the purposes of section 84A from the date of death of the intestate until that amount is paid or appropriated to the spouse.

(13) Notwithstanding subsection (3), where the interest of an intestate in a shared home is, under section 61D, held in trust for a surviving spouse of the intestate, the share of the intestate's estate to which the spouse would, but for this subsection, have been entitled under subsection (3) (b) and (c) shall:

- (a) where the value of that interest is equal to or exceeds the value of that share, be deemed to be fully satisfied and, if the value of that interest exceeds the value of that share, the share of the issue under subsection (3) shall be reduced by the amount of the excess, or
- (b) where the value of that interest is less than the value of that share, be deemed to be satisfied to the extent of the value of that interest.

(14) This section has effect subject to the provisions of section 24 Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy) of the *Powers of Attorney Act 2003*.

61C Statutory trusts in favour of issue and other classes of relatives of intestate

(1) Where under this Division the estate, or any part of the estate, of an intestate is directed to be held in statutory trust for the issue of the intestate, that estate or part shall be held in trust:

- (a) for any child of the intestate, or if more than one, for any children of the intestate in equal shares, living at the death of the intestate, and
- (b) subject to subsection (2), for all or any issue living at the death of the intestate of any child of the intestate who predeceases the intestate but so that no issue shall take whose parent is living at the death of the intestate and is capable of so taking.

(2) The issue referred to in subsection (1) (b) shall take through all degrees, according to their stocks, in equal shares if more than one, the share which their parents would have taken if living at the death of the intestate.

(3) Where under this Act the estate, or any part of the estate, of an intestate is directed to be held in statutory trust for any class of relatives of the intestate other than the intestate's issue, that estate or part shall be held in trust corresponding to the statutory trust for the issue of the intestate as if that trust were repeated with the substitution of references to the members

or member of that class for references to the children or child of the intestate.

61D Rights of surviving spouse with respect to shared home

(1) Subject to the Fourth Schedule, where:

(a) an intestate dies leaving a spouse and issue,

(b) the value of the estate of the intestate (excluding any household chattels) exceeds the prescribed amount,

(c) the intestate, at the time of the intestate's death, held an interest in a dwelling-house which is situated in New South Wales, and

(d) that dwelling-house was, at that time, occupied by the intestate and the intestate's spouse or by the intestate's spouse as their, or as the spouse's, only or principal residence,

the spouse may require the administrator to hold that interest in trust for the spouse, and on being so required, the administrator shall hold that interest accordingly.

(2) A reference in subsection (1) to the spouse of an intestate is, where the intestate dies leaving a spouse and a de facto spouse, a reference to the spouse or de facto spouse for whom part of the estate is required to be held in trust under section 61B (3), (3A) or (3B).

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[i] S. 37A: See note 1.