

This newsletter is produced by Brookfields' Trusts and Management Services Team to keep you up to date on recent cases and information in the fields of trusts management and asset planning.

Your Will and Relationships

Wills are documents that need to be changed as you go through life and your life changes. This issue of TrustLaw covers some of the key aspects of the impact of personal relationships on estate planning.

Whether you are entering or leaving a relationship consideration must be given to the estate planning arrangements that you had in place prior to the relationship, during the relationship and after the relationship. This will include whether you were married, in a civil union or in a de facto relationship.

De Facto Relationship

What is or isn't a de facto relationship is not straightforward. The Property (Relationships) Act 1976 sets out nine criteria which a Court will take into account in deciding whether you are or are not in a de facto relationship. As there is no absolute definition – a couple does not even necessarily have to be living together for it to be deemed a de facto relationship – it is often difficult to determine the exact beginning and end of such a relationship.

Entering and finishing a de facto relationship has no effect on your will and in particular the gifts you may have made to a de facto partner.

Therefore if you have been in a de facto relationship and you have made provision for your de facto partner in your will, your will should be revised. This is highlighted in circumstances where the partners are engaged in long and sometimes acrimonious negotiations about the division of the relationship assets. Consider a scenario where your current will provides that your de facto partner is to receive the whole of your estate. You have not signed a new will or entered into an agreement as to the division of your relationship assets. You are killed in an accident. Your former partner will receive the whole of your estate as set out in the will.

This in fact recently happened in a UK case (where the law relating to wills is very similar to ours) in relation to a £30m estate. Understandably the family of the deceased were upset to see the whole of the estate go to a former partner.

Marriage and Civil Union

An existing will is revoked automatically when you enter into a marriage or civil union unless the will specifies it has been made in contemplation of the marriage or civil union.



If a new will is not signed and you die you will die intestate and the intestacy provisions of the Administration Act 1969 will apply. The intestacy provisions divide the estate among those who survive you but this may not be what you want. For example, if you are married with no children and have parents still living your estate will be split between your partner and your parents. Your spouse receives all the chattels and the first (currently) \$155,000 of the estate and the remainder is divided 2/3 to your spouse and 1/3 to your parents.

If you separate your will continues in force until a new will is signed. The gifts that you have made to your spouse or civil union partner may be affected by the terms of any agreement you have entered into with your partner but if you have not signed such an agreement gifts under the will remain. Entering into an agreement as to the division of your relationship property will normally provide that the agreement will apply on death – so the terms of the agreement will override the will. The will will be read as if the partner had predeceased you. But often it takes time to get the relationship property agreement signed. So unless you want your former partner to receive under your will it is vital that a new will is signed as one of the first steps you take after separating.

Upon a dissolution of marriage the provisions relating to a former partner are read as if the former partner was dead. For example, if you have left everything to your partner on the proviso that your partner survives you and if your partner does not survive you give everything to your children. If at the time of your death you had not signed a new will but your marriage or civil union had been dissolved the will would be read as if your partner had not survived you and in this case your children would inherit everything. However, check who the gift in substitution for the spouse/partner is. There has been a case in recent years where the ex-mother in law received the entire estate in a similar situation.

Note, this discussion on wills does not include the possibility of a partner exercising his/her rights under the Property (Relationships) Act 1976. Under this Act a partner has the right either to elect to take under the Act or under the will. This possibility should also be considered when a will is drafted.

Conclusion

If you have any questions in relation to your current wills and the impact of your relationships, on arrangements you already have in place, particularly if your relationship(s) has changed or may change, please do not hesitate to contact either your existing Brookfields advisor or Alison Gilbert. The whole area of testamentary dispositions has become more complex and can be fraught with difficulties. Upon your death your family and loved ones may be left in a situation that you had never contemplated, which with proper planning and legal arrangements in place can be avoided.

Talk to us for advice on any of these matters.

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