



THE PROPERTY (RELATIONSHIPS) ACT AND YOUR ESTATE

How this Act can affect your will

The Property (Relationships) Act 2002 determines the way property is divided up when a relationship – either married or de facto, same sex or opposite sex – ends. It also sets out the way property gets divided when a spouse or partner dies.

So What Happens if Your Spouse or Partner Dies?

If your spouse or partner left a will, then this will determine how property is divided. If they did not have a will at the time of their death, then the Intestacy Act apply. This sets up rules about what happens when a person dies without leaving a will.

So How Does the Property (Relationships) Act Change Things?

Under the Property (Relationships) Act, the survivor has a choice – either to apply for his or her entitlement to property under the Act (option "A") or to take what has been left to him or her under the will or if there is no will, under the laws of intestacy (option "B").

How Do You Make the Choice?

There is a special form which is sent to the administrator of the estate

Is There Any Time Limited to Making the Choice?

Yes – you have six months from the date of death to choose between taking your share under the Act (option "A") or taking what has been left to you under the will (option "B").

What Happens if the Survivor Does Nothing?

If the survivor does nothing then he or she is presumed to have chosen option "B" (taking under the will or intestacy).

So What if the Survivor Didn't Know About the Choice or Made the Wrong Choice?

Either option may be set aside if the Court can be satisfied that it may be unjust to enforce this. It must also be satisfied that the choice is not freely made, or that the survivor did not fully understand the effect and implications of the choice, or that since the choice was made either information relevant to the choice has come to light or an application under the law reform (Testamentary Promises Act) or the Family Protection Act (see below) has been made.

What Does the Survivor Need to Do if They've Chosen Option "A"?

They need to start Court proceedings within in twelve months from the date of death seeking an order for the property to be divided and their share to be paid under the new Act.

The result will usually be that the surviving partner is entitled to half of the relationship property.

If the Survivor Doesn't Get Enough What Can They Do?

If choosing either option "A" or option "B" means that the survivor isn't going to get enough property, he or she can still apply under the Family Protection Act or the Law Reform (Testamentary Promises) Act,

The Family Protection Act provides that certain members of the deceased family can challenge the will on the basis that inadequate provision has been made for their proper maintenance and support. The people who can claim include a spouse, a de facto partner who was living in a de facto relationship with the deceased when they died (provided that the relationship has existed for a certain length of time.

Other people also include the children, grandchildren, stepchildren who were being maintained wholly or partly by the deceased and the parents of the deceased, subject to certain rules.

The Law Reform (Testamentary Promises) Act provides that where a person has provided work for or services to the deceased, who in turn promised to reward that person in his or her will, the claimant may enforce the promise. The Court has a wide discretion about the relief which can be given.

For more information, please contact one of our offices.

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Are Any Other Claims Available?

In some situations people may be able to apply for a share of the estate on the basis of constructive trust principals. The idea of a constructive trust was developed around de facto relationships. But it doesn't just apply to these. Siblings and parents, for example, may use this law to ensure that they get a fair share. To succeed the claimant will have to prove that he or she made contributions to the property in question and that there was a "reasonable expectation" that he or she would share in the property.

What About Undue Influence or Lack of Testamentary Capacity?

Wills are invalid if the person making them lacked "testamentary capacity" or was "unduly influenced" when signing the will. In other words, the person was not in a fit state of mind to make a will or someone else prevailed on them to make their will in a certain way.

Agreements to Make a Will in a Certain Way

If there was an agreement to leave property in a will in a certain way, an action to enforce the agreement may be brought.

Are Any Other Claims Available?

If the estate has been whittled away because property has been transferred while the person was alive claims against the estate may not be much help. Instead, an attempt may be made to bring the property back into the estate by having some or all of the transfers set aside for example, on the grounds of undue influence.

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