

TAKING THE LAW INTO YOUR OWN HANDS

OVERVIEW

Inheritance law, or (who gets what when you die), has changed dramatically in recent times.

The most significant change has been the introduction of the Property (Relationships) Act 1976 ("PRA") which came into force on 1 February 2002. The PRA amends the law regarding property division between couples.

The PRA made important amendments to other legislation which governs how estates are to be divided, namely the Administration Act, which applies if you die without leaving a will, and the Family Protection Act which applies if you fail to make adequate provision under your will for those that you are required to do so by law.

The effect of the changes generally is that it has expanded the pool of people for whom you must provide when you die, or if you fail to do so, may be able to claim successfully against your estate.

The net effect is that the Courts, and not you, may ultimately determine what happens with your worldly goods. The result may be very different from that which you intended.

With adequate forethought, and good legal advice, you are more likely to have your wishes carried into effect, rather than have the Courts decide for you or your family what happens to your assets.

CHALLENGES TO YOUR WILL

Challenges to your will may be made under the PRA, Family Protection Act, the Law Reform (Testamentary) Promises Act, and a range of other legislation. Claims can also be made under the common law regarding the validity of a will (on the grounds of incapacity, fraud, duress etc), and challenges to what the estate comprises (a claim that there is actually more in the estate). Challenges can also be made in terms of the

TAKING THE LAW INTO YOUR OWN HANDS

will where it is alleged that you have entered into a contract to leave property by will to another and you fail to do so. This paper will deal mainly with the recent changes to the legislation brought about by the PRA. However, a good will drafter should always take into account all of the possible avenues of attack on your will and your estate. Failure to do so is negligence.

PRA

The PRA radically changed property rights of married, de facto and same sex couples whose relationship ends on death. For the first time de facto and same sex partners have now been given legislative rights to claim against their partner's estate where these rights previously did not exist.

The PRA provides for equal sharing of relationship property between partners when a relationship ends by death or otherwise. In some cases, a partner may be entitled to more than 50% of the relationship property.

The PRA applies to marriages of less than 3 years but interestingly does not apply to de facto relationships of less than 3 years unless:

- There is a child of the de facto relationship (including step children);
- The survivor made a substantial contribution to the relationship; and
- You can satisfy a Court that it is seriously unjust if a Court failed to make an order.
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On death, the PRA gives the surviving partner a right to choose whether to apply for a division of property under the PRA or to inherit from the deceased partner. This choice is called an election. This requires receiving competent advice as to which is the more favourable option. Legal advice should be sought on what will be the likely division of relationship property under the Act (and remember this can in certain cases be more than 50% of the property) and whether it is more advantageous simply to inherit under the will or under an intestacy.

The surviving partner is not entitled to claim under the PRA and to inherit under the will unless the deceased has expressed a contrary intention in the will, or the Court permits the survivor to take the property share as well as some or all of the inheritance to avoid injustice. There are strict time limits for making an election and if an election is not made within the prescribed time limit, the surviving partner is deemed to have accepted the inheritance.

The election is irrevocable and can only be changed by a Court in very limited circumstances.

A claim under the PRA does not prevent the claimant from making further claim to the estate under the Family Protection Act or the Testamentary Promises Act.

ADMINISTRATION ACT 1969

This Act provides who receives what when the deceased dies without a will (intestate).

The Administration Act ("AA") was amended in 2001 to include de facto partners in the range of persons who receive a share of the estate. The de facto partner must be living with the deceased at the date of death and the de facto partner cannot inherit on intestacy if the de facto relationship is less than 3 years unless the same provisions as under the PRA apply.

In contrast, a marriage partner need not be living with the deceased at the time of death and the short duration marriage provisions do not apply.

The deceased may conceivably be survived by more than one partner. In that case the surviving partners share equally the personal chattels, the prescribed sum under the AA (currently \$121,500) and the portion of the residue. In other words, they are treated as if only one partner survived the deceased. This might be quite unfair and

TAKING THE LAW INTO YOUR OWN HANDS

could lead to surviving partners making further claims to the estate under the PRA or other legislation.

FAMILY PROTECTION ACT

This Act ("FPA") is commonly used as a means of claiming against the deceased's estate. It therefore represents a major restriction on the ability of the will maker to determine who gets what.

The PRA has amended the FPA to include partners and children of de facto relationships (including step children) as eligible claimants. The de facto partner must be living in a de facto relationship at the date of death.

The step children of the deceased must have been maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before death.

I would suggest that this expansion to the pool of potential claimants radically reforms the law and makes significant inroads into the ability of the deceased to provide for his or her own family as opposed to his or her partner's family.

CONSEQUENCES

The above changes impact upon the way that wills and other legal documents are now drafted.

No longer will it be sufficient (if it ever was) to complete a will in "standard" format or in a "fill in the gap" format. Failure to consider all of the relevant claimants is almost certainly going to mean that there will be a challenge to the estate.

Steps should be taken during the lifetime of the deceased to set up the legal structures which make it more difficult to challenge and more likely that the deceased's wishes will be carried out. These include:

TAKING THE LAW INTO YOUR OWN HANDS

- Legal ownership – should a property be owned as tenants in common with life interest wills;
- Discretionary Family Trust structure;
- Tenants in common in unequal shares with a property agreement;
- Several Family Trusts (with different beneficiaries) acquiring separate interests in a property or shares in a company;
- Pre or post nuptial agreements contracting out of the PRA and clearly recording separate property.
- Property agreements between children, parents or parents-in-law.

The point here is that there is no “standard one size fits all” solution for every situation. Each situation needs to be looked at carefully and appropriate advice given depending on the circumstances and wishes of the individual. No longer are wills to be regarded as a document prepared in isolation to other legal structures and consideration of the protection of assets. Various documents now need to be considered and advice given on trusts, property agreements, enduring powers of attorney, wills and memoranda of understanding.

HOW TO MINIMISE CLAIMS

A well crafted will addressing all possible existing and future claimants is the starting point. Regular reviews ensure that the will is kept current with changing circumstances. Full consideration should be given to all assets, and ownership structures.

Between married or de facto partners property agreements are useful to:

- Set out what is separate property and what is relationship property (i.e. what is to be shared and what is not);
- Provide certainty to the property situation between the partners;
- Ensure that the wishes of the individual partners are carried out, rather than the legislation providing a solution.

TAKING THE LAW INTO YOUR OWN HANDS

Trusts are useful to:

- Take property out of the relationship property pool;
- Protect assets for the benefit of one's own family as opposed to step children;
- Acquire assets for the benefit of those nominated under the trust as beneficiaries.

SUMMARY

If you want to take control over what happens to your assets, rather than have the law do it for you, then you need to put in place the appropriate legal structures to ensure that it happens. You should seek the appropriate advice from your legal adviser. LawWorks specialises in putting in place appropriate structures to address not only inheritance claims, but also to protect assets during your lifetime.

For more information, contact LawWorks at the below address.