

# RIGHTS OF FORMER SPOUSES AND DOMESTIC PARTNERS TO DECEASED ESTATES

15 March 2018

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## Introduction

1. There are several ways that former spouses and domestic partners might be entitled to a share in the estate of their deceased former partner:
  - a. by will;
  - b. on an intestacy;
  - c. by bringing a claim for provision.
  
2. I consider each of these below.

## Terminology

3. The term “spouse” is simple to understand. However, different definitions of de facto relationships and domestic relationships appear in a myriad of legislative provisions. The definitions vary in different contexts depending on the governing Act and the purpose of the legislation. Some favour the term “de facto” (eg. Family Law Act) while most Acts in Victoria tend to use the term “domestic partner”. Some definitions include a minimum duration while others provide no such condition. Some provide for exclusivity while others recognise that there may be more than one relationship at the same time. Some
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definitions include a caring relationship while other legislation deals with caring relationship separately or not at all.

4. As such, before considering the topics referred to above, it is important to clarify the definitions of “spouse” and “domestic partner” as applied in estate law.
5. “Spouse” is defined as a person who was married to the deceased at the time of the deceased’s death. As such, a person retains the status of spouse despite estrangement until the marriage is ended by divorce.
6. “Domestic partner” is defined as the registered or unregistered domestic partner of the deceased.
  - a. “Registered domestic partner” is a person who, at the time of the deceased’s death, was in a registered domestic relationship with the deceased within the meaning of the Relationships Act 2008.
  - b. “Unregistered domestic partner” is a person (other than a registered domestic partner) who was living with the deceased at the time of death as a couple on a genuine domestic basis and either:
    - i. had lived with the deceased in such manner continuously for at least 2 years immediately before the deceased’s death; or
    - ii. is the parent of a minor child of the deceased.

## **Wills**

7. A will is revoked on marriage, unless made in contemplation of marriage. However, any appointment of the spouse as executor and any gift in the Will to the spouse will still be valid after marriage. That means that your testamentary wishes as stated in your will may not be followed if you marry after making a will. See s 13, Wills Act 1997.

8. A will is not revoked by divorce. However, the effect of divorce on a will that the former spouse is treated as though they predeceased the testator. The former spouse would not, therefore, be appointed executor and would not receive any gift from your estate despite what is provided for in the will. There is an exception if it appears that the deceased intended that the provisions stand despite the divorce. However, the appointment of the former spouse as trustee of a testamentary trust which includes the children of the former spouse will not be revoked upon divorce. See s 14, Wills Act 1997. Mutual wills are not necessarily revoked by reason of dissolution of the marriage: eg. *Berk v Berk* [2012] NSWSC 1589.
9. Separation does not revoke a will. Therefore, an estranged spouse can inherit under a valid will made during a marriage that has not been formally ended through divorce, irrespective of the length of separation or even if the estranged spouse has re-partnered. That is, an estranged spouse will be treated just the same as a happily married spouse.
10. A will is not affected by the testator entering into or ending a domestic relationship. An old will made prior to the commencement of a domestic relationship may entirely exclude a long-term domestic partner but still remain valid. On the other side of the equation, a former domestic party might receive the whole estate under a will made during the relationship, even if the relationship ended many years prior to the deceased's death. The will remains valid during and after a domestic relationship until such time as it is revoked by the testator.
11. A spouse or domestic partner who kills the testator may forfeit his or her rights under the will, even if the killing was a result of a history domestic violence in the relationship and culpability for the crime was low: eg. *Edwards v State Trustees Limited* [2016] VSCA 28. The forfeiture rule applies also to the partner's rights under an intestacy: eg. *Re Kumar* [2017] VSC 81. Each case will be determined on its own facts.

## **Intestacy**

12. If there is no valid will, the laws of intestacy will apply. Note that new intestacy provision commenced on 1 November 2017. The changes include greater provision for spouses and domestic partners of the deceased in preference to children of the deceased.
13. Former spouses and domestic partners are not entitled under the statutory scheme, even if they remained financially dependent on the deceased at the date of death.
14. However, if a marriage has not been formally dissolved by divorce, the spouse retains their rights under an intestacy despite an estrangement such that the marital bonds are permanently broken, regardless of how long the separation lasted or whether they have re-partnered. However, the fact of the estrangement may weaken any defence against a family provision claim if the estranged spouse received the estate. For example, in *Mears v Salier* [2014] NSWSC 934 the estranged wife was entitled to the estate but the whole of estate was awarded to plaintiff who was a child of the deceased. The wife and deceased had only cohabited for a few days despite still being married at the date of death. The wife could not be located despite efforts by the deceased and subsequently the plaintiff. They had been separated for over 12 years at the date of death.
15. In the case of an estranged spouse, the entitlement is likely to be challenged if there are eligible persons who can bring a family provision claim. The strength of such defence will depend on the length of estrangement, the permanency of the separation, the ongoing relationship between the spouses, the financial position of the spouse, any ongoing financial dependency and whether there had been any finalised property division between them, as well as the strength of the competing claim brought.

### **Family provision claims**

16. In relation to deaths on or after 1 January 2015, an application in Victoria under the Administration and Probate Act 1958 (**the APA**) for a “family provision order” out of a deceased estate may only be made by an “eligible person”.

17. The court may on application order that provision be made out of the estate “for the proper maintenance and support of an eligible person”.
18. The list of “eligible persons” include current and former spouses and domestic partners.
19. Former spouses or domestic partners are only eligible if at the time of death they:
  - a. would have been able to take proceedings under the Family Law Act 1975; *and*
  - b. have either not taken those proceedings or not finalised those proceedings; *and*
  - c. are now prevented from taking or finalising those proceedings because of the deceased’s death.
20. There are no cases in Victoria regarding a claim by a former spouse or domestic partner since the eligibility criteria was introduced in 2015 and therefore the boundaries of the eligibility criteria have not been tested.
21. I note that even prior to the amendments, the fact of a final property settlement between the parties was always strong evidence that the moral obligation of the testator to the former spouse/domestic partner had come to an end.
22. A person who has entered into a final property settlement might arguably still be an eligible person in Victoria if the court is satisfied that the property settlement was reached by fraud or duress. The case of *Galvin v Semkiw* [2013] VSC 142, per Emerton J, is instructive even though it was a decision made prior to the amendments to the APA. In that case the ex-wife sought an extension of time to bring a claim for further provision despite having entered into a final property settlement with the deceased many years earlier. The application was brought on the basis that property settlement was entered into under duress as she was frightened of the deceased and the settlement did not reflect her significant contributions. The property settlement in 1978 and deceased died in 2007. The plaintiff was legally represented in family law proceedings and the plaintiff’s fear of the deceased was not made known to the court or her solicitors at the time the

agreement was approved by the court. The court was satisfied that there was an arguable case in the circumstances and allowed the extension of time. See also *Draskovic v Bogicevic* [2007] VSC 36 and *Armstrong v Sloan* [2002] VSC 229.

23. Even though a claimant may be an “eligible person” because there was no final property settlement between them, the claim might not succeed. For example, in *Michael v Public Trustee* [2009] NSWSC 744, a claim was brought by a former wife who separated from the deceased in 1990 or 1992. They divorced in 1993 and the deceased died 2006. The whole estate passed to the deceased’s widow of four years. The reason that there was no property settlement was that there no assets at the time they divorced. The claim was dismissed.
24. An informal property settlement is relevant to any claim brought, as it might bring an end to the moral obligation of the deceased to the former/estranged partner. On the other hand, a partial settlement might mean that the plaintiff still has a claim to the estate but that the moral obligation is reduced. For example, in *McKenzie v Lucas* [2011] NSWSC 1012, a claim was brought by the estranged wife with whom the deceased had not lived for 18 years. He had seen her only on only two family occasions after separation. There had been an informal division of property at time of separation but no final property settlement orders or agreement. The deceased had had a defacto spouse for last 18 years and the estranged wife had re-partnered. Net estate \$5.8m with \$4m remaining after payment of costs, executor’s commission and settlement other claims. Although the marital bond had come to an end and an amicable informal property settlement entered into, there was evidence that the deceased recognised that there was scope for considering that financial dealings had not been finally resolved. Orders made for the forgiveness of debts owed to estate of \$238,700.
25. The court can recognise obligations owed to a spouse/former spouse and a current partner in a family provision claim. For example, in *Morgan v Bohm* [2013] NSWSC 145, a family provision claim was brought by the current de facto spouse (as they are defined

in NSW). The estate (including notional estate) was valued at \$1,025,000, less costs of approximately \$250,000. The Deceased was married for 50 years and whole estate passed to his wife. A legacy of \$225,000 was awarded to de facto spouse. The deceased and his wife were living separately since about 2001 until the deceased's death in 2010 but they continued to run a business together, socialise together, eat meals together and combine their financial affairs. The wife was aware of and consented to the deceased having relationships with other women as she was unable to perform sexually for medical reasons. Their marriage was found to continue until the deceased's death.

26. For a recent Victorian example of a claim brought by an estranged husband, see *Re Saric; Saric v Vukasovic* [2017] VSC 759.

27. In assessing quantum of a claim, the court will consider the various factors set out in under s. 91A(2) of the Act. In short, the Court may consider the relationship between the deceased and claimant, the competing obligations, the size and nature of the estate, the financial needs and resources of the claimant and beneficiaries, health factors relating to the claimant and beneficiaries, the claimant's age, financial and non-financial contributions, previous benefits received by the claimant and beneficiaries, whether the claimant was dependent on the deceased, liability of others to maintain the claimant, character and conduct of the claimant or any other person, and any other relevant matter.

28. The general measure for assessing the claim of a spouse/domestic partner is to consider their need for secure accommodation, a nest egg for contingencies and an income stream. Such provision is not always appropriate due to factors such as the length of the relationship, the size of the estate, the claimant's own financial resources and the claimant's age.

29. In family provision claims, the competing claims of the will beneficiaries or those entitled on an intestacy will be a relevant consideration for any award made, unlike in family

court proceedings where third parties (other than creditors) are generally irrelevant. Section 91A(2)(l) of the APA specifically states that the court may take into account the effect a family provision order would have on the amounts received from the deceased's estate by other beneficiaries.

30. Unlike family law proceedings where either party can be ordered to pay money to the other, in a family provision claim the claimant's assets remain their own. No adjustment order can be made in favour of the estate in the event that it were to be determined that the former partner has already received more than their fair share.

31. A family provision claim can only be made from the deceased estate. In Victoria (unlike NSW) there are no notional estate provisions. Therefore, the estate does not encompass superannuation (unless by reason of a binding nomination or a superannuation trustee determination it is paid into the estate), family trust or property that has passed by way of survivorship. Any assets that the deceased has gifted prior to death cannot be clawed back into the estate, unless the gift was a result of undue influence, duress or unconscionable conduct.

32. As such, the pool of assets available to meet a family provision claim may be smaller than the pool available in a family law dispute. However, in relation to property received by the former partner by survivorship, the estate may successfully argue that the joint tenancy has been severed in equity during unresolved family property negotiations. See for example, *Chapman v Chapman* [2014] NSWSC 1140, *Hillman v Box (No 4)* [2014] ACTSC 107, *Scott v Scott* [2009] NSWSC 567.

**Can a step-child bring a claim against the estate of a former spouse or domestic partner of their natural parent?**

33. There is no definition of stepchild under the Act. However, a person cannot bring a claim as a "stepchild" if the relationship between their natural parent and the former spouse or domestic partner ended before the death of the natural parent, other than by the

death of the former partner: See *Scott-Mackenzie v Bail* [2017] VSCA 108 and *Bail v Scott-Mackenzie* [2016] VSC 563.

### **Conclusion**

34. The moral of the story is that a person should update their will when they marry, divorce or separate if that want to ensure their testamentary wishes are given effect. As to whether they should seek to finalise their affairs through a final property settlement prior to death, that is a more complex question. This will require considerations of the pros and cons of the different jurisdictions of family law and estate law, how various assets are held and whether the particular court will have jurisdiction to deal with a particular asset.