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Same-sex marriage – wills and estate planning

The recent amendment to the definition of marriage, which legalises same-sex marriage, has consequences for the validity of wills and for estate planning.

Change in the concept of marriage

The relationship between the legal concept of marriage and inheritance law is not new. Back in the early 1790s, Governor Arthur Phillip spoke authoritatively against the common convict belief that marriages at Sydney Cove were not binding. Phillip warned his charges that such a concept was a danger to the laws of inheritance. And now 227 years later, we find that a change in the legal meaning of marriage again brings into view consequences for the laws of inheritance.

On 9 December 2017, the new wording of the definition of marriage (s 5, Marriage Act 1961 (Cth)) became law: the wording defining marriage was changed from 'a union of man and wife' to 'a union of two people'. This change in Commonwealth law has consequences for the State and Territory laws of succession. The relevant dates of the amendment made under the Marriage Amendment (Definition and Religious Freedoms) Act 2017 are: 7 December 2017 – the legislation is passed; 8 December 2017 – Royal assent is granted; 9 December 2017 – the legislation commences.

Marriage revokes a will

An obvious and fundamental effect of the amendment is that a same-sex spouse is subject to exactly the same succession laws as a heterosexual spouse. Under State and Territory laws, marriage revokes – makes invalid – a will made before a marriage. Exceptions, variously expressed in State and Territory laws, include:

1. Where the will was made in contemplation of marriage; and
2. A gift in a will to the person to whom the testator was married at the date of the testator's death.

The message for same-sex couples who marry is clear. If a will was made before 9 December 2017, the respective wills of the couple should be revisited. A new will may be necessary to avoid the risk of intestacy when a person dies without a valid will.

Overseas marriage

As from the commencement of the new law on 9 December 2017, lawful same-sex marriages, which had been celebrated overseas or in international diplomatic posts in Australia, were recognised by Australian law.

Superannuation

Superannuation benefits are not, as a matter of course, included in the assets of a deceased's estate for the purposes of its administration; the trustee of a superannuation fund has a duty to distribute the benefits in accordance with the terms of the trust deed or a Binding Death Benefit Nomination (BDBN). However, a superannuation deed may contain a provision that marriage revokes a BDBN made before the marriage. Accordingly, the superannuation deed should be reviewed to ensure that a BDBN made before marriage is not revoked and also to check whether the BDBN is one which lapses after three years, and if so, the date of its renewal.

Powers of Attorney

A same-sex spouse should review his or her power of attorney. Some jurisdictions, for example Queensland, provide that marriage revokes the appointment of the attorney of an Enduring Power of Attorney, unless the spouse is the appointed attorney.

Finally, although Governor Phillip would not have envisaged same-sex marriage, his awareness that marriage has consequences for inheritance laws is a salutary reminder that marriage may have a detrimental effect on wills and estate planning. Vigilance and review is the prudent course – and that applies to all spouses.

In brief

Rectification of will. The testator, who owned a relocatable home but no real property, left by his will 'Any real property owned by me at the date of my death' to his daughter. On the evidence, the court found that the will did not give effect to the testator's instructions (s 33(1)(b), Succession Act) and rectified the will by replacing the clause by the words 'My house'. The proper construction of 'My house' was a building in which one can reside even though not residing there at the time of death. The relocatable home passed to the daughter: In the Will of Thomas Henry Finch (dec'd) [2018] QSC 16.

Statutory will. The court approved a proposed will made for a 7-year-old boy who was incapacitated and who had received a significant personal injury compensation award. The court did not accept the inclusion of testamentary trusts and complex management structures stating that the guiding principle for statutory wills was the incapacitated person's benefit and interests. The court approved the amended will that conferred benefits on the boy's mother, grandparents and others within his personal sphere. To ensure that the will remained relevant, a provision was also included that, if circumstances changed, the will be reviewed on the boy turning 18 or on his mother's death, whichever occurs earlier: Re K's Statutory Will [2017] NSWSC 1711.

Informal will. The deceased typed a document as his last will on his computer a few hours before he took his own life. Evidence found that he had taken drugs and alcohol at the time. The court found that the deceased had testamentary capacity at the time he made the will, the contents of which showed that he 'rationally and methodically' considered the disposition of his estate and created an informal will to dispose of it. It was found that he intended the electronic document to be his last will: Re White; Montgomery v Taylor [2018] VSC 16.

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