

Inheritance rights when relationships end

De facto partners sometimes suffered considerable injustice if one of them died without making a will. Because they were not married, they could only inherit their partners' property if it was left to them by will.

Since the Property (Relationships) Act came into force in 2002, de facto partners (including same sex partners) have the same rights as married couples when their partners die. They can receive half of the relationship property on their partner's death when no will has been made. The Act usually applies to them only if they have lived together for three years. If they have lived together for less than three years the survivor can inherit the dead partner's property if there is a child of the relationship, or if the survivor made a "substantial contribution" to the relationship.

Partners in civil unions will be treated in exactly the same way as married couples as soon as the clumsily-named Relationships Statutory References Bill becomes an Act.

When partners, whether married or in de facto relationships that satisfy the above conditions, die surviving partners can take the property left to them by will or make a claim to the Family Court for half of the relationship property. Surviving partners have only six months after the Court makes a grant of administration to choose one of these two options and give written notice of their choice. They need to seek legal advice quickly to avoid missing out on their entitlements and to make sure they follow the procedure required by the law.

The Court can let a surviving partner make a claim under the Act and receive a legacy under the will as well. If a survivor decides to apply to the Court, the law states that he or she takes preference to other beneficiaries of the will. It also says that the court is to assume that all the property is relationship property and that the survivor will get half. It is up to the beneficiaries or the trustees of the will to prove that some of the property is not relationship property.

Relationship property usually comprises the family home, furniture, cars used by the family, bank accounts, superannuation and life insurance. Separate property (owned by one partner only) is usually property that was owned before the relationship or marriage, inherited after it, a gift from a third person, or received from a trust set up by a third person.

The Administration Act sets out the way people's property is to be divided if they die without making a will. It gives surviving partners part of their dead partners' property. A partner's share will depend on whether the dead partner is survived by parents, children, or another partner. There is even the possibility of a dead partner having a spouse or de facto partner the survivor knew nothing about.

So partners (including husbands and wives) need to make wills. Often they will own a house jointly, so (like all jointly owned property) it will go to the survivor. But if there are children of their relationship and there is no will, two thirds of the dead partner's property that is not jointly owned would go to the children.

Partners can still contest dead partners' wills under other aspects of the law. If they think the will did not provide for them well enough they can make a claim under the Family Protection Act. Partners who believe that dead partners did not to keep promises to leave them certain property may apply to the Court under the Law Reform (Testamentary Promises) Act.

What should you do if you have children of an earlier relationship and you want to see that they get a fair share of your property? Partners often sign an agreement to say what will happen to their property, not only if they separate, but also when they die. They should make a will at the same time. Even if the survivor makes a claim under the Act, the court will enforce the agreement (unless it finds it to be void or thinks that enforcing it would cause serious injustice – which would be very unusual).

What should you do if there is not a lot of property – when you and your partner own one house in equal shares and leaving your share to your children would make your partner homeless? The best answer is to make a will leaving a life interest in your share to your partner, but saying that when your partner dies your share will go to your children. You should check that the house is not owned jointly. Regardless of what your will says, jointly owned property goes to the survivor.

The aim of the relationship property law is to be fair to all people who are in relationships, to recognise the equal contribution of both partners and to see that their property is divided fairly when relationships end by death or separation.

If you have any concerns in this area or would like to know more, contact your solicitor.

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