

**THE  
FACTS**

Of all areas of law, issues around end of capacity or end of life seem the most controversial. Many stories exist in the GLBTI community, of long lost relatives exercising decision making powers for a person without honouring their partner's wishes, of hospitals refusing entry to partners at the end of a person's life, of children contesting Wills.

The law is now clear around these issues – and recognises the right of a GLBTI partner as paramount in these situations.

Despite these changes to the law, it is important to plan ahead. This means thinking about these issues before you or your partner loses the capacity to make decisions. It makes things a lot easier.

### Plan ahead

It is critical to plan ahead, to avoid unexpected legal outcomes.

Things that you can do to plan ahead are:

- ✓ **Make an Enduring Power of Attorney** – appoint your partner to manage your financial affairs for if or when you lose capacity.
- ✓ **Make a Guardianship Document** – appoint someone to make decisions for you about your personal health care and residence if you are unable to make those decisions for yourself.
- ✓ **Make an Advance Health Directive** – this is a way, in a document, to direct what health care you would like in end of life or serious illness situations.
- ✓ **Make a Will** – make clear what you want to happen to your estate in a document that is binding.
- ✓ **Write it down** – your reasons for distributing your estate are important, especially if you are in a long term de facto relationship, and are planning to give something to your partner when others might feel "entitled" to more. A Statutory Declaration detailing why you have made the gifts in your Will might assist in any further family provision claim under the *Succession Act*.
- ✓ **Plan how you purchase property** – real estate held under a joint tenancy has a right of survivorship to the surviving joint tenant. This means that if one joint tenant dies, the other joint tenant receives the property by operation of law – the real estate never falls into the estate, and is not affected by the terms of a Will.
- ✓ **Review, review, review** – you should revise all of the documents listed above every 5 years, and make sure that they are kept in a safe place, and that someone who you trust knows where those documents may be found (most Law Firms and the NSW Trustee and Guardian offer a safe custody service for documents prepared by them).

### What happens if my partner loses the capacity to make their own decisions?

Until a person loses the capacity to make their own decisions, they are able to appoint someone to become their Guardian. Guardians have the ability to make decisions about the person's personal health care and residential arrangements, only after the person loses capacity to make those types of decisions for themselves. A Guardian cannot make decisions about ending the person's life.

It is excellent forward planning to appoint a Guardian. In addition, if a person wishes to make directions about end of life medical care, then the person should make an Advance Health Directive.

The law prescribes who makes decisions for a person who has lost capacity to make their own decisions (in order):

1. the person's appointed Guardian (usually appointed under an Enduring Guardianship Document);
2. the person's spouse or de facto partner (see below);
3. someone who 'has care' of the person;
4. a 'close friend or relative'.

De facto partners (same sex or heterosexual) fit position 2 above, and can make decisions without a formal Guardianship Document, as long as they had a 'close, continuing relationship' with the person who has lost capacity. Partners do not need to have lived together for any particular length of time, as long as the relationship is ongoing and close.

**Disclaimer:** This information is a general guide to the law. It should not be relied on as legal advice. If you have a specific legal problem you should consult a lawyer. It applies to people who live in, or are affected by, the law as it applies in NSW, Australia. The information contained in this publication is current at 1 July 2013.

### Case Study

Jason and Ian had been in a relationship for 12 months, and had been living together for 8 months. Jason was injured in a car accident, and after a period of time in hospital, was moved to a nursing home facility to complete rehabilitation. Jason did not have a Guardianship Document.

Jason's health started to deteriorate, and discussion began about whether Jason should be moved back to a hospital. Jason's children, Leanne and Robert thought that Jason should stay in the nursing home. Ian was not convinced, and wanted to follow the doctor's recommendation about moving Ian back to the hospital.

Ian discussed this with a nurse at the hospital. The nurse was sympathetic, and thought that it was sad that "what Ian had to say did not matter".

LAW: As Ian and Jason had been in a close, continuing relationship, he was considered to be Jason's de facto partner. Ian's point of view was important, as he was the person who could make decisions about Jason's care (see ranking above).

### My partner has died – what can I do?

De facto partners (same sex or heterosexual) have the legal right to make decisions about:

- Organ donation;
- Whether to seek a post mortem or a coronial inquest; and
- Funeral arrangements (in the case where their deceased partner has not made a Will).

### What happens next – how are my deceased partner's assets and debts dealt with?

The processes in sorting out an estate depend on the answer to this question: Does the deceased have a valid Will?

#### A Will...

If your partner has a valid Will, then the Will should appoint an **Executor**. The Executor is a person who has important roles and responsibilities in the Estate. The Executor must:

- Arrange for the funeral;
- Identify and take control of all of the Deceased's debts (for example: pharmaceutical bills, telephone bills, electricity bills, rates, mortgage repayments etc.); and
- Identify and take control of, and insure, all of the Deceased's assets (for example: their personal jewellery, personal home furnishings, car, their house, shares, etc.).

Then, the Executor should apply for a grant of probate of the Will. The only circumstances in which it is not necessary to apply for a grant of probate ("a grant") are if:

1. There is no real estate (land, house, townhouse) registered in the Deceased's name; and
2. The value of the assets of the estate is less than \$50,000.00 in total.

However, obtaining a grant can protect the Executor of the Estate, as it involves formal notification procedures that can assist the Executor in identifying the assets and liabilities of the estate. It may be a good idea for the Executor to seek a grant in all of the circumstances. For example, some banks or building societies will not release monies held in an account for the Deceased without a Grant. The Executor should get legal advice before deciding whether to obtain a grant (See the "Getting Help" fact sheet).

#### No Will...

If the Deceased did not leave a valid Will, (called "dying intestate") then someone will need to apply for a Grant of Letters of Administration. Usually, the de facto partner of the deceased is able to apply for a Grant of Letters of Administration ("Letters").

To apply for Letters, someone must apply to the Supreme Court of NSW, after formally placing a notice in the newspaper that circulates in the area that the Deceased normally lived before his/her death.

If a person dies without a Will, then their estate will be distributed according to the following legal principles, called the **Laws of Intestacy**.

To understand the laws of intestacy, you need to understand the following terms:

**Spouse** means:

- The person married to the deceased; or
- The domestic partner of the deceased. "Domestic Partner" is a de facto partnership of at least 2 years duration **or** one that has resulted in the birth of a child. A domestic partner can be someone of the same or opposite sex.

**NOTE:** It is possible for a person to have more than one ("multiple") spouses at the date of their death.

**Issue** means the deceased's children or other descendants such as grandchildren and great-grandchildren. While a child or children are alive, issue refers only to them, but if all of the children of the Deceased have died then the next generation are considered to be issue and so on.

Children jointly born by lesbian couples through assisted conception, adopted by same-sex couples or recognised under a surrogacy parentage order are recognised as a child.

**Survivorship:** To benefit in an intestate estate a relative/spouse must survive the deceased by 30 days.

### **What happens if?**

Remember, these rules only apply if a person dies without a valid Will.

#### ***Spouse/s no issue***

If a person dies leaving a spouse/s and no issue – ***the spouse/s inherit the whole intestate estate.***

#### ***Spouse/s and issue of spouse/s***

If a person dies leaving a spouse/s and issue of a spouse/s then ***the spouse/s inherits the whole intestate estate.***

#### ***Spouse/s and issue of another relationship***

If there are children of another relationship other than the spouse/s (remember spouse/s includes domestic partner/s) – the estate is divided according to a formula as follows:

1. One spouse receives or spouses share between them:
  - a legacy of \$350,000 (as adjusted by the CPI yearly);
  - the intestate's personal effects;
  - one-half of the remainder of the intestate's estate.
2. All children including those of the other relationship as well as children of the spouse/s receive remaining part of the estate.

#### ***Sharing between multiple spouses***

Where multiple spouses (remember spouse can mean a domestic partner) survive the intestate their entitlement is shared:

- in accordance with a written agreement they make between themselves and submit to the administrator of the estate; or
- in accordance with an order of the Supreme Court; or
- equally between them.

#### ***Single spouse's right to purchase any property***

If there is one spouse, that spouse has the right to purchase any of the property (for example: real estate or personal estate such as a car, boat or shares) that belonged to the deceased. The purchase price paid for the property is firstly paid from the spouse's entitlement in the intestate estate and if insufficient then from his/her own monies or borrowings.

#### ***Issue only survive (issue means descendants e.g. children, grandchildren, great grandchildren etc.)***

Where the deceased leaves no spouse only issue, the share that each of the issue take will depend on their family relationships. For example:

- If the deceased is survived by 3 children, the children will all share in the estate equally.
- If any of the deceased's children died before the deceased, or do not survive the deceased by 30 days, but that child died leaving children of their own (grandchildren), those children will share the portion of the estate that their parent would have received.

Common examples of how this will apply are as follows:

- If there is one surviving child, he/she will receive the whole estate.
- If there are 2 surviving children, they will share the estate half each.
- If there is 1 surviving child and 1 child died before the deceased leaving no children of their own, the 1 surviving child will receive the whole estate.
- If there is 1 surviving child, and 1 child who has died before the deceased leaving children of their own, then:
  - the surviving child receives half the estate;
  - the children of the deceased child will share half the estate. If any of those grandchildren had themselves died before the deceased leaving issue then their children will share what would have gone to their parent.

#### ***Other Relatives***

If the intestate dies without a spouse/s or issue then the estate is distributed to:

1. parents;
2. brothers and sisters (there is no difference between brothers and sisters sharing just one or both parents);
3. if one or more of the brothers and sisters has died then their share will pass to their children;
4. grandparents;
5. aunts and uncles (there is no distinction between sharing just one or both ancestor);
6. first cousins.

If there are no relatives at all in this list, then the deceased's estate is distributed to the Government.

The laws of intestacy do not allow for distributions to be made to friends or charities or a pet. It is possible for a Charity with whom the deceased had a connection, to petition the Government for a share of the estate at this stage. It is possible though to make gifts to friends, charities or to benefit a pet set out in a Will.

### **Dealing with Deceased Estates under a Will or Letters of Administration**

If the Deceased died leaving a Will, then who benefits from the estate ("the beneficiary") and what the beneficiary gets is as written in the Will. If the Deceased died without leaving a Will, then the Deceased's assets are distributed in accordance with the laws of Intestacy (see above).

It is only after the grant of Probate or grant of Letters of Administration that the executor/administrator can pay the deceased's debts (except for funeral expenses which can usually be paid before the grant or letters are issued), and distribute the estate in accordance with the deceased's wishes in their Will (if the deceased left a valid Will) or the laws of intestacy (if the deceased died without a valid Will). However, before the estate can be distributed the executor/administrator must formally place a notice of intention to distribute in the newspaper that circulates in the place that the deceased normally lived before their death.

The executor cannot distribute the estate until:

1. 6 months after the date of Death of the Deceased; and
2. 30 days after the notice has been published in the newspaper.

Being an Executor or Administrator is a serious responsibility. Executors and Administrators have many fiduciary duties (duties of good faith – for example, to keep their own interests and the interests of the estate separate, to act in the best interests of the estate, to protect and preserve the estate).

To give effect to these duties and properly administer an estate, the Executor or Administrator should:

1. Set up a bank account for the estate (a trust account), and put all monies that belonged to the deceased, or proceeds of sale of the deceased's assets into the trust account, keeping good and accurate records of what monies come in to and go out of the bank account;
2. Write to banks or other financial institutions, and any businesses that the Deceased dealt with, to notify them of the death of the Deceased, and ask about any assets they might hold (for example money in bank accounts or goods in safe custody) or debts that the Deceased owed (unpaid accounts). Also, it is a good idea to notify in writing the need to cut off any services such as power supply, gas supply or telephone;
3. Insure all assets of the estate (like a house, car etc.) to make sure that if the assets are damaged or destroyed that the estate still receives value for those assets (otherwise, the Executor may be required to pay back to the estate the value of any asset lost or destroyed);
4. Obtain an estate Tax File Number from the Australian Taxation Office ("ATO"), and lodge a tax return for the Estate, and pay any tax owing by the estate to the ATO.

### **What if you are left out of your deceased partner's Will or Intestate Estate?**

If partners have not lived together for 2 years or did not have a child, the surviving partner may still be able to make a claim against their deceased partner's estate under the *Succession Act*. The Court makes its decision based on the merits of the case and the financial need of the person applying to the Court and any other beneficiaries.

A surviving spouse or de facto partner can apply for a share of the deceased's estate under this law.

Children can also apply for a share of the deceased's estate under this law. "Children" include those:

- jointly conceived using an assisted conception procedure by a lesbian couple;
- adopted by same-sex couples;
- recognised under a surrogacy parentage order; or
- for whose long-term welfare the deceased had 'parental responsibility'

**NOTE:** a person may still bring a claim if they can show that they were dependent upon the deceased and were a member of their household.

### **Case Study**

Janine and Maree had been in a relationship for almost 30 years. Janine was a doctor working on a contract in a remote community, and Maree was a teacher. About a year before she died Janine had moved to take up her contract, and Maree had remained in town because of work and also to care for her elderly mother. Regardless, they were still in a close and caring relationship – Janine came back home as often as she was able, and Maree travelled to see Janine regularly. Janine had not reviewed her will for many years (it was made about 40 years before her death), and she had left her estate to Charity.

Janine also had a son, Mike, who she had not seen in many years. Mike had not wanted to see his mother at all after Janine and Maree had started living together.

Janine died suddenly in an accident. Maree made a claim under the family provision law in the *Succession Act*, and so did Mike. After mediation all parties agreed that Maree received the bulk of Janine's estate, Mike received a small proportion and the Charity received the rest.