

Estate planning review vital after changes in relationships: expert

By Keeli Cambourn, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Whenever there is a significant change in a personal relationship, best practice dictates that there be an immediate review of all estate planning arrangements, a leading legal expert has said.

Matthew Burgess, director of View Legal, said the case of *Blyth v Wilken* [2015] WASC 486 is a stark reminder of this principle.

He said this case involved a willmaker who left a final will giving the majority of his estate to his “de facto wife”.

“The relationship between the willmaker and his de facto ended after the will was made and around three years before he died. No updated will was prepared,” Burgess said.

“In deciding that the former de facto wife was not entitled to receive anything under the will, the court essentially applied the same principles that would have been relevant had the couple been married and subsequently divorced.”

The court decided that the gift was made solely because of the de facto relationship.

“Once that relationship ceased, the court determined it would have been the will maker’s intention that the gift should also fail.”

“In most respects, the decision here contradicts the generally accepted position and arguably leads to a conclusion that if the willmaker had simply referred to his spouse by her name and had not mentioned ‘de facto wife’, then the gift would have in fact stood.”

Burgess said the conservative approach is to always update estate planning documentation as soon as it is clear that there is either a new relationship that is evolving towards de facto status or marriage, or a previous relationship that has no real prospect of a reconciliation following an initial separation.

“This said, it can be important to understand the broad rules that apply in the event of marriage and divorce on both wills and enduring powers of attorney.”

“Unfortunately, the rules are inconsistent across each Australian jurisdiction and also as between the situation for wills and EPAs.”

The general position is that neither the commencement nor ending of a de facto relationship has any impact on estate planning documentation. However, some jurisdictions are evolving the rules for this as well.

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For example, on the ending of a de facto relationship in Queensland, the position is now largely the same as for the ending of a marriage.

Burgess said generally on marriage, wills in all jurisdictions are at least partially revoked, and unless they are made in contemplation of marriage and following divorce, an ex-spouse is automatically excluded from receiving direct benefits under the will.

“Most states and territories allow a will maker to make gifts, following divorce, directly to an ex-spouse where that intention is expressly stated in the will. If this is the case the disposition will still be valid.”

“Western Australia is the only jurisdiction where all dispositions to ex-spouses following divorce are automatically revoked.”