Bateman Battersby
LAWYERS

Can a former spouse or de facto partner contest your Will after you die?

In NSW the answer is yes - BUT only if the former spouse can overcome some significant hurdles.

Section 57(1)(d) of the Succession Act 2006 (NSW) provides that a former spouse or de facto partner of a deceased person can make a family provision claim against the deceased's estate regardless of the written intentions in the deceased's Will. The fact that the parties may have previously had a final financial settlement under the Family Law Act does not, of itself, preclude the former spouse or de facto partner from making a claim, however to do so must they must satisfy some major criteria. While a current spouse or de facto partner and children of a deceased are generally only required to establish that the deceased, in their will, has failed to make adequate provision for their proper maintenance, education and advancement in life in order to make a family provision claim, a former spouse or de facto partner is additionally required to establish under section 59(1)(b) of the Act that there are past or present factors that warrant them making the application for a share of the deceased's estate.

Even if a former spouse, or de facto partner is successful in establishing factors that warrant them making a family provision application, this does not mean that their claim will necessarily be successful. When determining if a former spouse, or de facto is eligible to a share of their former partner's estate, the Court will consider a range of issues including:

- the nature of the relationship between the former spouse or de facto partner and the deceased;
- the obligations and responsibilities owed by the deceased to the former spouse/de facto partner;
- the former spouse's/de facto partner's financial circumstances;
- any disability suffered by the former spouse/de facto partner;
- any provision made to the former spouse/de facto partner during the deceased's lifetime.

Some of these matters were considered in the 2017 NSW Court of Appeal case of Lodin v Lodin which involved a dispute over the $5 million estate of the late Dr Lodin. Dr Lodin left his entire estate to his only daughter Rebecca Lodin and made no provision for his former wife, Magdalena who was Rebecca's mother and who had custody of Rebecca following the separation. Magdalena commenced Supreme Court proceedings claiming provision be made for her from Dr Lodin's estate and was successful in securing a $750,000 award in her claim for a share of her former husband's estate despite the fact that they had been separated for 25 years, and their matrimonial property had been divided between them pursuant to orders made by the Family Court in 1992. In the initial decision, the Supreme Court held that there were factors warranting Magdalena, as the former spouse, being regarded as "a natural object of the deceased's testamentary bounty" which factors had not been discharged by the family law property settlement and thus warranting her making the application. The factors included the enduring impact of the relationship breakup on Magdalena's well-being, her custodial responsibility for their daughter Rebecca, the relatively modest size of the pool of assets at the time of their divorce, and the fact that the only other person with a claim on the large estate was their

daughter. The Court thought there was "something unbecoming" about a daughter being left with such a substantial inheritance while her mother was left with nothing.

Dr Lodin appealed. The Court of Appeal held that the initial judge had erred in concluding that there were factors warranting Magdalena making the family provision application. The starting point for this decision was that an ex-spouse is not normally regarded as a natural object of testamentary recognition by the deceased. They must show a social, domestic or moral obligation (beyond a mere financial relationship) on the deceased to have provided for them. Secondly, the Court held the initial judge should have adopted a two-step approach. The first step is to decide whether there are factors warranting the application being made by Magdalena. The second step is to decide whether the provision made by Dr Lodin for Magdalena was adequate and whether further provision should be ordered. The Court of Appeal held that the 'factors warranting' that were relied upon by the initial Judge were the 'ample size' of the estate and Magdalena's financial need. However, the Court held these were irrelevant to determining the first step, namely whether Magalena was a natural object of Dr Lodin's testamentary recognition, and as she failed the first step, the second step of what provision should be made for her did not need to be considered. The Court considered that the financial affairs between Dr Lodin and Magdalena were resolved by final orders of the Family Court in December 1992. The Court noted that the making of those Family Court orders does not necessarily constitute a fatal barrier to a family provision claim, but it is likely to terminate any obligation on the deceased to make testamentary provision for a former spouse.

A further factor that counted against Magdalena's claim was that Dr Lodin meticulously complied with his obligations to provide financial support for his daughter. The Court dismissed Magdalena's argument that her care of Rebecca was to Magdalena's detriment and enabled Dr Lodin to flourish financially. The level of support provided by Dr Lodin for Rebecca's maintenance and education was reasonably substantial. Furthermore, Dr Lodin gave additional financial support from time to time extending beyond his legal responsibilities.

In order to entirely preclude your former spouse or de facto partner from making a claim for provision under your will when you die, you and your former spouse/de facto can enter into a mutual deed of release in which you each promise not to bring such a claim against the other's Estate. In order for a mutual deed of release to be legally enforceable, an application must be brought in the Supreme Court of NSW for the mutual promises in the deed of release to be approved of and upheld by the Court. It is important to note that the mutual deed of release signed by the parties is not binding on the Supreme Court until it has been approved of by it.

A mutual deed of release is not suitable for every separating couple. It is generally only suitable for couples who have finalised their property settlement after separation and are able to be entirely financially independent of the other in the future. If you or your spouse remain financially dependent after separation, for example relying on ongoing spousal support, then a mutual deed of release will generally not be suitable.

If you would like to know more about Family Provision Claims or need advice about contesting an Estate, please contact Lisa Delalis or John Bateman on 02 4731 5899 or email willsestates@batemanbattersby.com.au.