



## BRIESE LAWYERS FACTSHEET SEPARATION & YOUR WILL



*Once a relationship has irretrievably broken down, the focus is generally on finalising property matters and parenting arrangements. However, there are a number of significant issues that should be addressed and not doing so can have grave consequences for your family.*

### ESTATE PLANNING

#### Your Will

We suggest that after separation, you review your Will carefully to ensure that it accurately reflects what you want to happen to your estate in the event of your death.

The Will made during your relationship may no longer be appropriate, now that you have separated from your spouse. If you do not update your Will after separation, it will mean that any provision made for your former spouse will still be followed if you die. Further, if your former spouse has entered into a new relationship, it may mean that their new partner will have the benefit of the provision from your estate.

If you do not have a Will, get one. If you have separated and die without a Will, Queensland legislation will determine how your estate is to be distributed. The rules contained in the legislation may result in your former spouse receiving a significant portion of your estate.

When thinking about this issue, ask yourself "*do I want my former spouse to benefit from my death?*". If you do not want your former spouse to benefit under the terms of your Will, it is essential to review your Will immediately upon final separation.

#### Your Enduring Power of Attorney (EPOA)

If your former spouse is nominated as your Attorney on your EPOA, we recommend you review it and consider whether you would prefer to have another person making decisions on your health and finances in the event that you are incapacitated.

#### Examples

1. Greg recently formed a new relationship with Michelle. Greg separated from his former wife Marlene 18 months ago. He has four children from his marriage to Marlene, who has moved in with her new partner.  
Greg dies in a car accident. As he did not update his Will since his separation his estate, worth over \$1,000,000.00, was distributed in accordance with his most current Will and Marlene received the entire estate.
2. Mark's 5 year marriage recently ended and he has since started a new relationship with Katrina. Mark has been putting off updating his Will and EPOA since separation as he has just been too busy. Mark is involved in a serious car accident and is on life-support in hospital - it is not known whether he'll survive.  
Because Mark didn't update his EPOA, his former wife Anne is still able to make decisions regarding his personal, health and financial issues and as such, his new partner and his parents may be prevented from participating in the decisions at this very traumatic time.

#### How do you avoid these risks?

Simple - update your Estate Planning immediately upon separation.

Having a valid and up-to-date Will is the only way to ensure that your life's work is passed on to the people you choose and not passed on to someone on the basis of an outdated Will that was made when your personal circumstances were very different, and that you simply have not had the time to change.



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### **Divorce**

It is important to be aware that when you are granted a Divorce, any provision in your current Will for your former spouse is nullified. While on the face of it this might not appear to be a problem, it may mean that the other provisions for your other beneficiaries no longer accurately reflect your wishes in respect to the distributions and their proportions. Also, if your former spouse was named as an executor in your Will, then your estate may not have an executor as appointed by you.

### **JOINT TENANCY**

There are two ways that couples can own real estate, either as joint tenants or tenants in common. If you own property as joint tenants with your former spouse, you should consider 'severing' the joint tenancy, so that the property will be held as tenants-in-common.

If you do not sever the joint tenancy and you die, your share of the property will automatically pass to your former spouse and not through your estate, regardless of the provisions in your Will. However if you do sever the joint tenancy and the property is held as "tenants in common", the future ownership of your entitlement will be determined in accordance with your Will.

Severing the joint tenancy is a straight-forward process and does not require the consent of your former spouse. Severing the joint tenancy does not attract stamp duty and is a process that goes through the Titles Office. You should obtain experienced Family Law advice in considering your circumstances.

### **SUPERANNUATION - BINDING DEATH BENEFIT NOMINATIONS**

In regards to your superannuation, it is important to be aware that Death Benefits from superannuation funds do not by law form part of your estate, to be distributed according to your Will.

Instead, it is generally up to the discretion of the Trustee of your superannuation Fund to determine to whom the benefit should be paid, amongst a class of possible financial dependants of the late member of the Fund.

Any nomination of preferred beneficiaries will not be binding upon the Trustee unless the Fund permits a Binding Death Benefit Nomination to be given, and you have completed such a document in accordance with legislative requirements.

Upon separation, it is essential that you revoke any Binding Death Benefit Nomination in favour of your spouse and execute a new document to reflect your desired beneficiary/ies.

If you have not made a Binding Death Benefit Nomination with your Fund, you should consider doing so as generally, death benefits will be paid from a superannuation Fund in a manner as determined by the Fund Trustee. This is essential if the Fund offers binding nominations but also important for non-binding nominations, as otherwise the Trustee will most likely distribute your Death Benefit to your spouse, child/ren, and/or your estate in such proportions as the Trustee determines.

Advice in relation to separation and its effects on your Estate Planning may be obtained by contacting one of our Solicitors, who can offer practical legal advice and guidance.

Here at Briese Lawyers we will offer advice and assistance to help you put in order Estate Plans that suit your changed circumstances, meet your specific needs and protect the interests of your family and those you love.

Liability limited by a scheme approved under professional standards legislation



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