

Changes to wills of people in same-sex marriages before 9 December 2017

Factsheet

On 28 November 2018 the law in NSW was updated to clarify what happens to the wills of people who entered an overseas same-sex marriage or divorced from an overseas same-sex marriage before 9 December 2017.

If you entered into an overseas same-sex marriage or divorce before 9 December 2017, we recommend you seek legal advice to see if the changes affect your will.

Reason for the change

When same-sex marriage was recognised in Australia on 9 December 2017 there were flow-on effects to other laws in NSW. One law that required change was the *Succession Act 2006*, which deals with wills in NSW.

The *Succession Act* automatically revokes parts of a will on the event of a marriage or divorce, subject to exceptions. The changes clarify the legal effect of an overseas marriage or divorce on wills, if that marriage or divorce occurred before 9 December 2017.

What the changes might mean for you

The recognition of your same-sex marriage or divorce in Australia will not revoke your will if:

- you entered an overseas same-sex marriage before 9 December 2017 and you executed your will after your marriage
- you divorced from an overseas same-sex marriage before 9 December 2017 and you executed your will after your divorce.

Some parts of your will may have been revoked on 9 December 2017 if:

- you entered an overseas same-sex marriage before 9 December 2017 and you executed your will before your marriage (unless the will was made in contemplation of your marriage). Some parts of your will won't be revoked, including a gift to your spouse, and an appointment of your spouse as an executor, trustee, advisory trustee or guardian.
- you divorced from an overseas same-sex marriage before 9 December 2017 and you executed your will before your divorce (unless a contrary intention appears in your will). Some parts of your will that may be affected and could be revoked by your divorce include:
 - a gift to your former spouse
 - an appointment of your former spouse as an executor, trustee, advisory trustee or guardian (unless your spouse is appointed as trustee for beneficiaries that include children)
 - a grant of a power of appointment that is only exercisable by, or in favour of, your former spouse (unless the power is for the benefit of you and your former spouse's children).

The changes will not affect your will if you entered a same-sex marriage after 9 December 2017. However, if you married or divorced from a same-sex marriage after 9 December 2017, you should seek legal advice about the validity of your will if your will was made before your marriage or divorce.



Background

The *Succession Act*

The *Succession Act 2006* sets out the legislative framework in relation to wills.

Section 12 of the Act has the effect that parts of a will are revoked if the person who made the will ('the testator') marries,¹ unless the will is made in contemplation of marriage.²

The following parts of a will are not revoked on the testator's marriage:

- a gift to the person to whom the testator is married at the time of their death
- an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of their death
- a will made in the exercise of a power of certain appointments.³

Section 13 of the Act has the effect that the following parts of a will are revoked if a testator divorces or annuls his or her marriage, unless a contrary intention appears in the will:

- a gift to the testator's former spouse
- an appointment of the testator's former spouse as an executor, trustee, advisory trustee or guardian
- a grant of a power of appointment that is exercisable by the testator's former spouse.⁴

The following parts of a will are not revoked on the divorce or annulment of the testator's marriage:

- the appointment of the testator's former spouse as trustee of property left on trust for the beneficiaries that include the former spouse's children
- the grant of power of appointment to the testator's former spouse that is exercisable in favour of the children of whom both the testator and former spouse are the parents.⁵

¹ *Succession Act 2006*, sections 12(1).

² *Succession Act 2006*, sections 12(3)-(4).

³ *Succession Act 2006*, section 12(2).

⁴ *Succession Act 2006*, section 13(1)-(2).

⁵ *Succession Act 2006*, section 13(3).

Changes to Australian marriage laws

On 9 December 2017 the Commonwealth Government changed the *Marriage Act 1961* (Cth) to legally recognise same-sex marriages in Australia.

This means that same-sex marriages, or divorces from same-sex marriages, were recognised in Australia on 9 December 2017, even if those marriages and divorces took place in other countries.

As a result, when same-sex marriage was recognised, sections 12 and 13 of the *Succession Act 2006* came into effect. This means that parts of wills made by people who entered or divorced from overseas marriages may have been automatically revoked on 9 December 2017.

Changes to the *Succession Act*

The NSW Government has changed the *Succession Act 2006* to ensure that a revocation under section 12 and 13 of the Act only has effect where a person executed a will before he or she entered into a same-sex marriage or divorced from a same-sex marriage.

The change also clarifies that if parts of a will were revoked under section 12 or 13 of the Act, that revocation took effect on 9 December 2017 rather than the date that a person's overseas marriage or divorce was solemnised.

No changes have been made to the legal effect of wills made by people who entered into a same-sex marriage after 9 December 2017.

For more information

We recommend you speak to your solicitor to obtain advice about your circumstances and the validity of your will.

Alternatively, Law Access offers free legal information online at

www.lawaccess.nsw.gov.au or over the phone on 1300 888 539.