

Queensland



SUCCESSION AMENDMENT ACT 1997

Act No. 54 of 1997

Queensland



SUCCESSION AMENDMENT ACT 1997

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Succession Amendment Act 1997

Act No. 54 of 1997

*An Act to amend the *Succession Act 1981**

[Assented to 16 October 1997]

The Parliament of Queensland enacts—**Short title**

1. This Act may be cited as the *Succession Amendment Act 1997*.

Commencement

2. This Act commences on a day to be fixed by proclamation.

Act amended

3. This Act amends the *Succession Act 1981*.

Amendment of s 5 (Definitions)

4. Section 5—

insert—

‘**“de facto spouse”**, of a deceased person, means a person who—

- (a) has lived in a connubial relationship with the deceased person for a continuous period of at least 5 years ending on the death of the deceased person; or
- (b) within the period of 6 years ending on the death of the deceased person, has lived in a connubial relationship with the deceased person for periods totalling at least 5 years that include a period ending on the death of the deceased person.’.

Insertion of new pt 3, div 1 hdg

5. Part 3, before section 34—

insert—

‘Division 1—Interpretation’.

Amendment of s 34 (Interpretation)

6. Section 34(1)—

insert—

‘**“building”** see section 34B(2).

“household chattels” see section 34A.

“interest”, in an intestate’s matrimonial home, see section 34B(3).

“matrimonial home” see section 34B(1).

“transfer value” see section 34B(4).’.

Insertion of new ss 34A and 34B and pt 3, div 2 hdg

7. After section 34—

insert—

‘Meaning of “household chattels”

‘34A.(1) “Household chattels” means all furniture, curtains, drapes, carpets, linen, china, glassware, ornaments, domestic appliances and utensils, garden appliances, utensils and effects and other chattels of ordinary household use or decoration, liquors, wines, consumable stores and domestic animals owned by the intestate immediately before the intestate’s death.

‘(2) “Household chattels” does not include a motor vehicle, boat, aircraft, racing animal, original painting or other original work of art, trophy, clothing, jewellery, or other chattel of a personal nature.

‘(3) A thing is taken to be owned by the intestate even if—

- (a) it is owned subject to a charge, encumbrance or lien securing the payment of money; or
- (b) the intestate only held an interest in the thing as grantor under a bill of sale or as hirer under a hire purchase agreement within the meaning of the *Hire-purchase Act 1959*, section 2(1) or a corresponding provision of a law of another State or the Commonwealth.

‘(4) This definition applies for the purposes of applying schedule 2 under this part.

‘Meaning of “matrimonial home” and related definitions

‘34B.(1) A “matrimonial home” means a building, or part of a building, designed to be used solely or principally as a separate residence for 1 family or person.

‘(2) A “building” includes a caravan, or mobile home, within the meaning of the *Mobile Homes Act 1989*.¹

‘(3) An “interest”, in an intestate’s matrimonial home, means—

- (a) an interest registered or registrable under an Act that is or includes a matrimonial home; or
- (b) if the matrimonial home is a caravan or mobile home—an interest in the caravan or mobile home and any interest in a relevant

¹ The *Mobile Homes Act 1989*, section 3—

‘“caravan” means—

- (a) a vehicle ordinarily fitted with wheels and designed for attachment to a vehicle; or
- (b) a vehicle designed for use as part of a motor vehicle; and designed for use for residence therein;

“mobile home” means a structure (other than a caravan) prescribed by regulation’.

Under the *Mobile Homes Regulation 1994*, the following structures are prescribed—

- ‘(a) a home that was originally designed and constructed to allow its transportation (whether wholly or in parts) regardless of whether later changes to the home, or land in the home’s immediate vicinity, have made transportation more difficult;
- (b) a home that is positioned on an approved site, regardless of whether later changes to the home, or land in the home’s immediate vicinity, have made its transportation more difficult.’.

agreement within the meaning of the *Mobile Homes Act 1989* for the caravan or mobile home.

‘(4) The **“transfer value”**, of an intestate’s interest in a matrimonial home, means the market value of the interest at the date of the intestate’s death, less the amount (if any) needed to discharge any mortgage, charge, encumbrance or lien to which the interest may be subject at the time of transfer.

‘Division 2—Distribution rules’.

Amendment of s 35 (Distribution of residuary estate on intestacy)

8. Section 35(1), ‘the provisions of subsection (2)’—

omit, insert—

‘subsection (2) and division 3,’.

Replacement of s 36 (Manner of distribution to issue)

9. Section 36—

omit, insert—

‘Distribution of spouse and de facto spouse’s entitlement

‘**36.(1)** If a spouse and a de facto spouse of an intestate are entitled to the whole or a part of the intestate’s residuary estate, the entitlement is to be distributed between them—

- (a) in accordance with a written agreement between the spouse and de facto spouse about distributing the entitlement between them (a **“distribution agreement”**); or
- (b) in accordance with an order made under this section distributing

² The *Mobile Homes Act 1989*, section 3—

‘**“relevant agreement”** means an agreement under which a person is entitled—

- (a) to position a mobile home on a site; and
- (b) to occupy the mobile home as the person’s only or principal place of residence’.

the entitlement between the spouse and de facto spouse (a “**distribution order**”); or

- (c) in equal shares as decided by the personal representative, if, at the time of distribution—
 - (i) the spouse and de facto spouse have been given a notice under subsection (3) and 3 months have passed since the last of the notices was given; and
 - (ii) the personal representative has no notice of a distribution agreement; and
 - (iii) the personal representative—
 - (A) has no notice of an application for a distribution order; or
 - (B) has been notified in writing by the spouse and de facto spouse that the personal representative may distribute their entitlement equally even though an application for a distribution order has previously been made; or
 - (C) has a copy of an order of the court striking out or discontinuing an application for a distribution order.

‘(2) However, for a distribution under subsection (1)(c), if the intestate is survived by issue, the entitlement under schedule 2 to the \$150 000 must be distributed in equal shares.

‘(3) A personal representative may give a spouse or de facto spouse a notice stating that the personal representative may be entitled to distribute any entitlement of a spouse and de facto spouse equally if the spouse or de facto spouse does not, within 3 months after the notice is given—

- (a) enter into a written agreement with the spouse or de facto spouse about distributing the entitlement between them and give the personal representative written notice of the agreement; or
- (b) apply to the court for an order distributing the entitlement between the spouse and de facto spouse and give the personal representative written notice of the application.

‘(4) If a spouse or de facto spouse asks the personal representative to give the notices that may be given under subsection (3), the personal representative must give the notices (including a notice to that person) as

soon as practicable.

‘(5) An intestate’s spouse, de facto spouse or personal representative may apply to the court for a distribution order.

‘(6) However, an application for a distribution order may not be made if there is a distribution agreement or distribution of the entitlement has commenced under subsection (1)(c).

‘(7) The court may order that the entitlement be distributed in the way it considers is just and equitable.

‘(8) In deciding what is just and equitable, no assumption is to be made in favour of an equal distribution as a starting point or otherwise.

‘(9) If the court considers it is just and equitable, it may order that an entitlement be distributed solely to a spouse or solely to a de facto spouse.

‘(10) A distribution order may include conditions.

‘(11) Nothing in this section requires a personal representative to distribute an entitlement at a time that would preclude the operation of section 44(3) in relation to the distribution.³

‘(12) To prevent any doubt, it is declared that the *Trusts Act 1973*, section 67(3)⁴ does not authorise a personal representative to distribute an entitlement of a spouse and de facto spouse before the time the personal representative becomes entitled to distribute the entitlement under subsection (1).

‘Distribution of issue’s entitlement

‘**36A.(1)** In this section—

“**survive**” means survive the intestate.

‘(2) If an intestate’s issue are entitled to the whole or a part of the intestate’s residuary estate, the entitlement is to be distributed among the issue as set out in this section.

³ Section 44(3) protects personal representatives from being sued for making distributions after specified times without notice of certain applications, or intended applications, about family provision.

⁴ Section 67 (Protection of trustees by means of advertisements)

‘(3) If the intestate had only 1 child and the child survived, the child takes.

‘(4) If the intestate had 2 or more children, all of whom survived, the children take in equal shares.

‘(5) If the intestate had 2 or more children, of whom some survived and the remainder did not survive and did not leave surviving issue, the surviving children take in equal shares.

‘(6) If subsections (3) to (5) do not apply, the entitlement is divided into as many equal shares as the intestate had children who survived or who did not survive but left surviving issue.

‘(7) The equal shares are then taken as follows—

- (a) the intestate’s surviving children (if any) take 1 share each;
- (b) for each child of the intestate who did not survive but left surviving issue—1 share is taken by representation by the child’s surviving issue.’.

Amendment of s 37 (Manner of distribution to next of kin)

10. Section 37, heading—

omit, insert—

‘Distribution of next of kin’s entitlement’.

Amendment of s 38 (Partial intestacies)

11. Section 38(2) and (3)—

omit.

Insertion of new pt 3, div 3

12. Part 3, after section 39—

insert—

‘Division 3—Provisions about matrimonial home

‘Election by spouse or de facto spouse to acquire matrimonial home

‘39A.(1) This section applies if—

- (a) an intestate has an interest in a matrimonial home that is not effectively disposed of by a will (whether or not the intestate leaves a will); and
- (b) at the time of the intestate’s death, the intestate’s spouse or de facto spouse (the **“resident”**) ordinarily resided in the matrimonial home.

‘(2) Subject to section 39B, the resident may, by written notice, elect to acquire the intestate’s interest in the matrimonial home at transfer value.

‘(3) The election must be made—

- (a) if the resident is a personal representative—within 3 months after the resident’s appointment as personal representative; or
- (b) if the resident is not a personal representative—within 3 months after the personal representative gives the resident a written notice stating that—
 - (i) if the resident wants to acquire the intestate’s interest in the matrimonial home, the resident must elect to do so in accordance with this section within 3 months after the notice is given; and
 - (ii) in certain circumstances, the resident must first obtain an order of the court under section 39B allowing the election to be made.

‘(4) The election must be given—

- (a) if the resident is not a personal representative—to the personal representative; or
- (b) if the resident is a joint personal representative—to each other personal representative; or
- (c) if the resident is the sole personal representative—to the registrar of the court.

‘(5) To enable the resident to decide whether to make an election, the resident may ask the personal representative to obtain a valuation of the intestate’s interest in the matrimonial home from a registered valuer and give a copy of it to the resident.

‘(6) The personal representative must promptly comply with the request.

‘(7) An election may only be revoked with the personal representative’s written consent.

‘**Restriction on right to elect to acquire matrimonial home**

‘**39B.(1)** This section applies if, apart from this section, an intestate’s spouse or de facto spouse (the “**resident**”) would be entitled to make an election under section 39A to acquire the intestate’s interest in a matrimonial home and—

- (a) the matrimonial home forms part of a building, and the deceased’s estate includes an interest in the whole of the building;
or
- (b) the matrimonial home forms part of a registered or registrable interest in land and—
 - (i) the deceased’s estate includes an interest in the whole of that interest; and
 - (ii) part or all of the land is used for agricultural purposes; or
- (c) the matrimonial home forms part of a building used as a hotel, motel, boarding house or hostel at the date of the intestate’s death;
or
- (d) part of the matrimonial home was used for purposes other than domestic purposes at the date of the intestate’s death.

‘(2) The resident may make an election under section 39A only if the court makes an order allowing the election to be made.

‘(3) The resident may apply to the court for the order.

‘(4) The application must be made—

- (a) if the resident is a personal representative—within 3 months after the resident’s appointment as personal representative; or

- (b) if the resident is not a personal representative—within 3 months after the resident is given the notice mentioned in section 39A(3)(b).

‘(5) The court may make the order only if it is satisfied the resident’s acquisition of the intestate’s interest in the matrimonial home is not likely to—

- (a) substantially diminish the value of the assets in the deceased’s estate; or
- (b) make disposal of the assets substantially more difficult.

‘(6) If the court makes an order allowing an election to be made, the time for making the election under section 39A is extended until 1 month after the order is made.

‘Acquisition of matrimonial home under election

‘39C.(1) This section applies if a spouse or de facto spouse (the “resident”) makes an election under section 39A to acquire an intestate’s interest in a matrimonial home at transfer value.

‘(2) On payment of the transfer value adjusted on an equitable basis to apportion any outgoings paid or payable, or rent or other amount received, that are ordinarily adjusted on sale, the resident is entitled to transfer of the intestate’s interest.

‘(3) However—

- (a) before payment of the transfer value, the transfer documentation must be stamped under the *Stamp Act 1894* at the resident’s expense; and
- (b) the resident is not entitled to a discharge of any mortgage, charge, encumbrance or lien over the intestate’s interest in the matrimonial home.

‘(4) At the resident’s option, money that may at the time of transfer be distributed to the resident from the deceased’s estate (whether under a will or on intestacy) may be set off to reduce the amount of the transfer value.

‘(5) A resident may acquire an intestate’s interest in a matrimonial home under this section even if the resident is a personal representative of the

intestate.

‘(6) If production of a document or other assistance by a person (other than the resident or personal representative) is necessary to effect the acquisition, the person must, at the personal representative’s request, give the assistance on payment of the person’s reasonable costs and outlays by the personal representative.

‘Personal representative not to dispose of intestate’s interest in matrimonial home pending election or if election made

‘39D.(1) This section applies if a spouse or de facto spouse is entitled to make an election under section 39A to acquire an intestate’s interest in a matrimonial home.

‘(2) The personal representative must not sell or otherwise dispose of the intestate’s interest in the matrimonial home—

- (a) if the time within which the election may be made has not ended;
or
- (b) contrary to an election under section 39A.

‘(3) However, subsection (2) does not prevent an intestate’s interest in the matrimonial home being disposed of as a last resort to pay a liability of the intestate.

‘(4) A disposal of the intestate’s interest in the matrimonial home in contravention of subsection (2) does not affect the validity of the disposal.’.

Amendment of s 40 (Definitions for pt 4)

13. Section 40, definition “**dependant**”, paragraph (d)—

omit, insert—

‘(d) a de facto spouse.’.

Insertion of new s 73

14. After section 72—

insert—

‘Application of amendments made by Succession Amendment Act 1997

‘73. To prevent any doubt, it is declared that the amendments of this Act made by the *Succession Amendment Act 1997* do not apply to the estate of a person who died before the commencement of the amendments.’.

Amendment of sch 2 (Distribution of residuary estate upon intestacy)

15.(1) Schedule 2, to part 2 column headings—

omit, insert—

‘SCHEDULE 2

**‘DISTRIBUTION OF RESIDUARY ESTATE ON
INTESTACY**

sections 35 to 37

**‘PART 1—INTESTATE SURVIVED BY SPOUSE OR
DE FACTO SPOUSE**

| Circumstance | Way in which the intestate’s residuary estate is to be distributed |
|--|---|
| 1. If the intestate is not survived by issue | 1. If there is a surviving spouse but no surviving de facto spouse, the spouse is entitled to the whole of the residuary estate. |
| | 2. If there is a surviving de facto spouse but no surviving spouse, the de facto spouse is entitled to the whole of the residuary estate. |

- 2.** If the intestate is survived by issue
- 1.** If there is a surviving spouse but no surviving de facto spouse, the spouse is entitled to—
- (a) \$150 000 and the household chattels; and
 - (b) the following part of the residuary estate then remaining—
 - (i) if there is only 1 child of the intestate who survived, or who did not survive but left issue who survived, the intestate— $\frac{1}{2}$;
 - (ii) otherwise— $\frac{1}{3}$.
- 2.** If there is a surviving de facto spouse but no surviving spouse, the de facto spouse is entitled to—
- (a) \$150 000 and the household chattels; and
 - (b) the following part of the residuary estate then remaining—
 - (i) if there is only 1 child of the intestate who survived, or who did not survive but left issue who survived, the intestate— $\frac{1}{2}$;
 - (ii) otherwise— $\frac{1}{3}$.
- 3.** If there is a surviving spouse and a surviving de facto spouse, the spouse and de facto spouse are entitled to the whole of the residuary estate in accordance with section 36.

3. If there is a surviving spouse and a surviving de facto spouse, the spouse and de facto spouse are entitled, in accordance with section 36, to—

- (a) \$150 000 and the household chattels; and
- (b) the following part of the residuary estate then remaining—
 - (i) if there is only 1 child of the intestate who survived, or who did not survive but left issue who survived, the intestate— $\frac{1}{2}$;
 - (ii) otherwise— $\frac{1}{3}$.

4. The issue of the intestate are entitled to the balance of the residuary estate in accordance with section 36A.

‘PART 2—INTESTATE NOT SURVIVED BY SPOUSE OR DE FACTO SPOUSE

Circumstance

Way in which the intestate’s residuary estate is to be distributed’.

(2) Schedule 2, part 2, item 1, after ‘estate’—
insert—
‘in accordance with section 36A’.