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LAWYERS & NOTARIES

Who Gets Your Estate If You Die Without a Valid Will?

In Australia, many people die either without a Will or with a Will that does not validly dispose of the whole of their estate.[1] These people die either wholly or partially intestate. New legislation was recently introduced in NSW which makes significant changes to the distribution of a person's estate if he or she dies wholly or partly intestate. The changes made by the *Succession Amendment (Intestacy) Act 2009* NSW are part of a national reform relating to the law of wills, family provision, intestacy and the administration of estates.

The new laws became effective on 1 March 2010. They apply to the estate or the relevant portion of the estate of a person who dies on or after that date, either without a Will or with a Will which does not effectively dispose of the whole of their estate.

Some of the major changes are:

- in the distribution of an estate between a spouse or partner and any children of the intestate. Previously, when an intestate died leaving children and a spouse or partner, the spouse or partner was entitled to a statutory legacy of $200,000.00 plus the deceased's personal effects and half of the balance of the estate. The intestate's child or children were generally entitled to the remainder of the estate. If the net value of the estate exceeded the statutory legacy then the children were guaranteed a share of their parents estate. However, under the new law, if an intestate dies leaving a spouse or partner and children of that relationship then the entire estate goes to the spouse or partner and the children get nothing.

- if the intestate dies leaving a spouse or partner and children from a prior relationship, the estate is shared between the spouse or partner and the deceased's children from the prior relationship. The surviving spouse or partner will receive a legacy, the intestate's personal effects and half the balance of the estate. Children from the prior relationship share in the remaining half share of the estate. This means that any children from the relationship that the deceased was in when he or she died, again do not receive anything.

- when an intestate dies leaving a spouse or partner and children from a previous relationship, the surviving spouse or partner will no longer be automatically entitled to the deceased's house or their interest in the house, as was previously the case. Instead, the right of the surviving spouse to receive the intestate's interest in their principal place of residence is replaced by a right to acquire property from the estate at its market value at the date of

[1] The NSW Law Reform Commission estimated that there were approximately 20,000 intestate estates in 2003 alone. In May 2008, the NSW Public Trustee reported that while 87% of people over the age of 50 have a Will, only 23% of people aged between 18 and 34 have made a Will. Moreover, a number of the Wills, particularly home made ones, are wholly or partly invalid and/or no longer dispose of the estate as the deceased wishes at the time of death.

death, subject to certain conditions. This procedure is likely to be difficult to administer and lead to disputes in many cases.

- the statutory legacy for a surviving spouse or partner who is not entitled to the whole of an intestate's estate has been increased from $200,000.00 to $350,000.00. This amount will be automatically indexed in accordance with changes to the CPI.

- the category of people who can inherit the estate in the event of an intestacy has been extended to include cousins if there is no surviving spouse, partner, child, parent, sibling, grandparent, aunt or uncle.

- new provisions relating to the estates of Aboriginal people who die intestate have also been introduced.

If there are no qualifying beneficiaries, then the estate will pass to the Crown (i.e. the State of NSW).

In addition to the changes outlined above, the definition of "spouse" has been extended and now includes a person who was in a "domestic partnership" with the deceased at the time of their death. A "domestic partnership" means a de facto relationship that has been in existence for a continuous period of at least 2 years or has resulted in the birth of a child. The expanded definition of "spouse" has increased the possibility of a person dying with "multiple spouses". For example, a person could be separated from their husband or wife but not divorced, and living in a de facto relationship with another partner at the time of their death. In that case, the division of the deceased's assets will depend on whether there were children from:

- the prior relationship but not the current relationship at the time of death;
- the current relationship but not the prior relationship; or
- from both relationships.

If the deceased "left" multiple spouses but no children then the estate will be divided equally between the spouses. If there are children from the prior relationship only, those children will be entitled to a half-share in the balance of the intestate estate. If there are children from both the current and a prior relationship, all the deceased's children will share in the balance of the intestate estate.

Moreover, "multiple spouses" will have a number of options for determining how they should share their entitlement to the deceased's estate. These include:

- the spouses can enter into a "distribution agreement" on such terms as they agree. The likelihood of agreement in these circumstances without significant acrimony and grief in most cases appears extremely remote; or

- the court can make a "distribution order" on such terms as it considers just and equitable. Again, in addition to substantial costs, a good deal of acrimony and grief is likely to be involved in such proceedings.

While the new laws can be seen as a brave attempt to up-date the intestacy rules in line with modern family relationships and expectations, they are unlikely to meet the requirements of today's increasingly complex financial and social relationships. In cases where property is to be shared

between the eligible relatives of an intestate, particularly between surviving spouses under the expanded definition of that term, the process to be followed is relatively complicated. It is always advisable to have an effective Will in place which addresses your current particular circumstances and deals with your estate in accordance with your wishes.

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Disclaimer

Further Information

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