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Intestacy laws in New South Wales

Given that more than half of the adults in NSW do not have a will, we look at how an intestate estate is generally distributed in this state.

According to a 2008 survey conducted by the Public Trustee NSW, 54 per cent of all adults in NSW do not have a will, with this figure rising to 93 per cent of adults between the ages of 18 to 24.1 A survey released by the NSW Law Reform Commission in 2006 showed that when making a will, 75 per cent of people who have a spouse and children choose to leave the whole of their property to their surviving spouse.2

New legislation in the form of changes to the NSW Succession Act 2006 (the Act) came into force on 1 March 2010, following the result of the two above-mentioned surveys. One of the main goals of these changes to intestacy laws was to produce the same result as would have occurred if the intestate had the foresight to make a will. In NSW the definition of intestate is “a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property” (section 102 of the Act). Each Australian state and territory has its own legislation prescribing how a person’s estate must be distributed if he or she dies intestate.

Upon intestacy, a person (generally a close family member) can apply to the Supreme Court for a Grant of Letters of Administration to the applicant. The Grant then authorises that person to collect the assets of the deceased and distribute them according to NSW intestacy laws. This would be the remaining estate after payment of the appropriate funeral and administration expenses, debts and other liabilities.

Entitlement to distribution of assets

The legislation provides a specific order of distribution of an estate’s assets, depending on the situation3:

1) Spouse and issue4. A spouse of an intestate is a person who was either married to the intestate immediately before the intestate’s death, or a person who was a party to a domestic partnership with the intestate immediately before the intestate’s death (see below). If an intestate leaves a spouse and no issue, the spouse is entitled to the whole of the estate. However, if an intestate leaves a spouse and issue, and the issue are also issue of the spouse, the spouse is entitled to the whole intestate estate (i.e. no sharing with the issue). This reflects the assumption that the intestate’s children will inherit in due course from the deceased’s spouse or partner.

If there is a spouse and issue, who are not issue of the spouse, the spouse is entitled (under Section 113 of the Act) to:

   a) the intestate’s personal effects, and
   b) a statutory legacy of $350,0005 indexed to the CPI (from the December 2005 quarter), and
   c) one half of the remainder of the intestate estate.

The issue receives the other half of remainder the estate.

2) If no spouse or issue, then assets are distributed in the following order:

   • parents in equal shares, or to a surviving parent
   • brothers and sisters (including half-brothers and half-sisters) in equal shares

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1 Public Trustee NSW, PT Connect Issue No. 15, 2008, page 2
2 Media release on 14 March 2006: Where there’s a will …by the NSW Law Reform
3 To receive a benefit in an intestate estate, a person must survive the intestate by at least 30 days.
4 Issue usually means children (included adopted children), but if the child predeceases the intestate leaving children of his or her own, the intestate’s grandchildren would take their deceased parent’s share, and so on.
5 This is a significant increase from the previous non-indexed statutory legacy entitlement of $200,000.
• nieces and nephews in equal shares
• grandparents in equal shares
• aunts and uncles in equal shares
• cousins (this is new for New South Wales, and reflects a compromise position across all jurisdictions) 6

3) If the above categories of entitled persons are exhausted, the estate is *bona vacantia* (vacant goods) and is paid to the State. However, a provision has been included whereby the State, upon written application, may waive its entitlement to an intestate estate in favour of:

• dependants of the intestate
• any organisation or person who has a just and moral claim; or
• any organisation or person for whom the intestate might have reasonably be expected to have made provision.

Domestic partners and multiple spouses

A domestic partnership is defined as “a relationship between the intestate and another person that is a registered relationship, or interstate registered relationship, within the meaning of the Relationships Register Act 2010, or a de facto relationship that has been in existence for a continuous period of two years, or has resulted in the birth of a child” (section 105 of the Act). A domestic partner may be someone of the same or opposite sex.

The new legislation permits multiple spouses to share in the spousal entitlement. The intestate may have been in a relationship with a married person and one or more domestic partners all at the same time. Where there is more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate, according to Division 3 of the Act. The estate would be shared in accordance with a distribution agreement between the spouses; or, in accordance with a court distribution order; or, in equal shares (under certain circumstances). If there is more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined under Section 113 above.

Indigenous persons

The legislation provides special provisions for the distribution of the intestate estates of Aboriginals or Torres Strait Islanders (by court order) according to the ‘laws, customs, traditions and practices of the indigenous community or group to which an indigenous intestate belonged’ (section 133 (1) of the Act).

Intestacy and life insurance

Whilst intestacy laws try to reflect community expectations as regards intestate distributions, they are no substitute for having a will. However, to assist clients who have not made a valid will, advisers can structure their life insurance to include a beneficiary nomination (both outside and inside super) to ensure these proceeds go directly to beneficiaries, bypassing the will (or lack of one) and possible delays in probate. Non-super beneficiary nominations have the added advantage of having a much wider range of beneficiaries than super death benefit nominations.

Summary

Given the high percentage of people in NSW not having a will, intestacy laws endeavour to reflect community expectations with regard to distributions of intestate estates. Whilst no substitute for having a will, beneficiary nominations is something that advisers can assist their clients with in respect of life insurance distributions.

Important information

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6 In NSW, in the period 2001-2005, the Public Trustee paid $24,289,946.86 into Treasury from 92 estates (averaging $264,000 each) where there were no next of kin closer than cousins. (Information supplied by Mr B Maher, Counsel, Public Trustee NSW (22 June 2005)).