

Did you know?



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Intestacy laws in Western Australia

In the prelude to *WA Will Week 2012*, the state's Public Trustee, Brian Roche, stated: "Through research we've conducted we know that only 48.8 per cent of the adult population aged older than 30 in WA have an up-to-date will."¹

Intestacy and life insurance

Whilst intestacy laws try to reflect community expectations regarding 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. In Western Australia these nominations have the added advantage of not being subject to family provision claims.

The Western Australian laws of intestacy are set out in the *Administration Act 1903 (WA)*. The rules in this Act apply to the estate of any person who was living in Western Australia at the time of his or her death and did not leave a will. These rules also apply to any property that was not covered by a will. Different rules may apply in relation to property that is located outside Western Australia or to property in Western Australia that belonged to a person who lived elsewhere at the time of his or her death. Bear in mind that the laws of intestacy may be overridden by successful family provision claims.

Upon intestacy, a person (generally a close family member) can apply to the Supreme Court of Western Australia 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 Western Australian intestacy laws. This would be the remaining estate after payment of the appropriate funeral and administration expenses, debts and other liabilities.

Spouses and de facto partners

The legislation refers to both spouses and de facto partners. A de facto relationship is defined as a relationship (other than a legal marriage) between two persons who live together in a marriage-like relationship. It does not matter whether the persons are different sexes or the same sex or whether either of the persons are legally married to someone else or in another de facto relationship.

According to the Act, if a de facto partner lived with the deceased for at least two years immediately before the death of the intestate (and there was no husband or wife), the de facto would have the same entitlements as a spouse. If the intestate dies leaving a husband or wife and a de facto partner, distribution of the estate will depend on the following:

- Where the de facto partner and deceased lived as de facto partners for at least two years immediately before the death of the intestate; and the intestate did not, during the whole or any part of that period, live with their spouse as husband and wife, the de facto will be entitled to one half of the spouse's share of the estate.
- Where all of the above applies, except the de facto and the intestate lived together as de facto partners for at least five years prior to death, the de facto will be entitled to the whole of the spouse's share of the estate.
- Where a de facto partner is entitled to intestate property and the intestate dies leaving more than one de facto partner, the de facto partners are entitled to that property in equal shares.

Entitlement to distribution of assets

The legislation provides a specific order of distribution of an intestate estate's assets, depending on the situation:

- A surviving spouse or de facto partner is entitled to all household chattels² included in the intestate property.

¹ Public Trustee, Department of the Attorney General, Government of Western Australia, 2012, viewed 6 June 2012, <http://www.publictrustee.wa.gov.au>.



- Surviving spouse or de facto partner, and children (referred to as “issue”³): Where the net value of intestate property² (excluding household chattels) does not exceed \$50,000, the surviving spouse or de facto partner is entitled to the whole intestate property. If value of property exceeds \$50,000, surviving spouse or de facto partner is entitled to \$50,000 plus one third of the remainder, and issue are entitled to the other two-thirds (if a child has died and has had children, those children take their parent’s share in equal proportion).
- Surviving spouse or de facto partner, and one of the following: a parent, a brother or sister, or child of a brother or sister⁵, (but issue): Where net value of intestate property (excluding household chattels) does not exceed \$75,000, the surviving spouse or de facto partner is entitled to the whole intestate property. If value of the property exceeds \$75,000, surviving spouse or de facto partner is entitled to \$75,000, plus one-half of the remainder. The other half will be distributed to the following:
 - Where the intestate is survived by one or both parents: if the value of that other half does not exceed \$6,000 or if no surviving brother, sister, or surviving child of a brother or sister, the parent/s are entitled to that other half.
 - In any other case, the parent/s are entitled to \$6,000 and of the remainder, the parent/s are entitled to one-half and the brothers and sisters of the intestate and the children of deceased brothers and sisters of the intestate are entitled to the other half.
 - Where there is no surviving parent of the intestate, the brothers and sisters of the intestate and the children of deceased brothers and sisters of the intestate are entitled to the other half.
- Surviving spouse or de facto partner (no issue, and no parent, brother, sister or child of a brother or sister): Surviving spouse or de facto partner is entitled to the whole of the intestate property.
- Surviving issue (but no spouse or de facto partner): Issue is entitled to the whole of the intestate property.
- Surviving parent/s and one or more of the following: brother or sister, or a child of a brother or sister (but leaving no spouse or de facto partner and no issue): If value of the intestate property does not exceed \$6,000, the parent/s are entitled to the whole of the intestate property. If the value exceeds \$6,000, the parent/s are entitled to \$6,000 and one half of the residue. The other half of the residue passes to surviving brothers, sisters and children of deceased brothers and sisters of the intestate.
- Surviving parents, (but no spouse or de facto partner and no issue, brother, sister or child of a brother or sister): Distribution is to parents, sharing equally if both are alive.
- Surviving one of more of the following: brother or sister, or a child of a brother or sister (but no spouse or de facto partner and no issue or parent): the brothers and sisters of the intestate and the children of deceased brothers and sisters of the intestate are entitled to the whole of the intestate property.
- Surviving grandparents, (but no spouse or de facto partner and no issue, parent, brother, sister or child of a brother or sister): Distribution in equal shares to surviving grandparents.
- Surviving uncle or aunt or a child of an uncle or aunt (but no spouse or de facto partner and no issue, parent, brother, sister, child of a brother or sister): the uncles and aunts of the intestate and the children of deceased uncles and aunts.
- If the intestate dies leaving no spouse or de facto partner, and no issue, parent, brother, sister, child of a brother or sister, grandparent, uncle, aunt or child of an uncle or aunt, the whole of the intestate property passes to the Crown.

We will cover other states’ intestacy laws in future weeks.

Summary

Intestacy laws in Western Australia differ from those in other states and territories, and the legislation provides for a specific order of distribution of an intestate estate’s assets. 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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² Household chattels means articles of personal or household use or adornment.

³ Issue usually means children (including 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.

⁴ The net value of that property at the date of death of the intestate.

⁵ Brother or sister includes half-brother or half-sister. In respect of distribution of intestate assets, it is immaterial whether a relationship is of the whole blood or of the half blood.