



# New Intestacy Rules

Chris Young summarises the upcoming changes to the rules effecting the distribution of estates where the deceased failed to dispose of their entire estate by way of a valid Will.

The *Succession Amendment (Intestacy) Act 2009* ('the Act') introduced new provisions which dictate how an estate will devolve if the deceased did not leave a Will or left a Will which dealt with only part of their estate.

The new provisions will replace the current rules and are likely to come into effect in March 2010.

## WHEN DO THE RULES APPLY?

There are two types of intestacy:

- **Full intestacy**

Where the deceased has not left a valid Will the entire estate passes under the rules of intestacy.

- **Partial intestacy**

Where the deceased has left a valid Will which did not dispose of their entire estate. The undisposed part of the estate passes under the rules of intestacy.

In the event of full or partial intestacy, the new rules of intestacy impose a strict order on the distribution of the intestate estate.

## HOW WILL THE INTESTATE ESTATE BE DISTRIBUTED?

The order and form of distribution will depend on the particular circumstances of the deceased. In general terms the order of priority is as follows:

- Spouses
- Children (or issue of such children if a child predeceases the deceased)
- Parents
- Siblings
- Nieces and nephews
- Grandparents
- Aunts and uncles (or their children, if an aunt or uncles predeceases the deceased)

In line with the old rules, once entitlement is established in one category all subsequent categories are ignored.



If there are no qualifying beneficiaries then the intestate estate will pass to the State of New South Wales ('the State'). Under the new rules the State may waive its entitlement in favour of the following limited class of potential beneficiaries:

- any person who was dependant on the deceased;
- any person who has a 'just and moral' claim on the deceased's estate;
- any person or organisation for whom the deceased might reasonably be expected to have made provision

## DEFINITION OF SPOUSE

The definition of 'spouse' has been expanded by the new rules and now includes a person who was in a 'domestic partnership' with the deceased at the time of the deceased's death.

'Domestic partnership' is defined as 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.

In determining whether a relationship is a 'de facto' relationship the Court will take into account all relevant circumstances, including:

- the couple's living arrangements;
- whether there was a sexual relationship;
- the couple's financial arrangements;
- whether property was owned, purchased or used jointly;
- how the couple presented their relationship in public.

This wider definition of 'spouse' has created the possibility of 'multiple spouses' which is discussed below.

## PRIORITY OF THE SPOUSE

The following example highlights a major difference in how a spousal interest is prioritised under the old and the new rules:

*'A' dies leaving his spouse and three adult children from that relationship. What are the spouse and the children entitled to?*

	Old Rules	New Rules
<b>Spouse</b>	Household chattels; The statutory legacy (the first \$200,000 of the intestate estate); A half-share in the balance of the intestate estate	Entire intestate estate
<b>Children</b>	A half-share in the balance of the intestate estate.	Nothing

Under the old rules the children would be guaranteed a share in a deceased parent's estate provided the net value of the estate exceeded the statutory legacy.



Under the new rules, the spouse is entitled to the entire intestate estate. The reason for this approach is three-fold:

- The new rules assume that a surviving spouse will make provision for their children on the second death.
- Research, undertaken by the NSW Trustee and Guardian, found that:
  - 3 out of 4 testators left their entire estate to their spouse;
  - 1 in 4 testators provided directly for their children on the first death;
  - 1 in 44 testators split the residue of their estate between their spouse and children.
- The approach echoes the current preference under family provision matters to give primacy to the surviving spouse.

## **CHILDREN FROM A PRIOR RELATIONSHIP**

The existence of children from a prior relationship does effect the prioritising of interests. In the majority of cases which involve children from a prior relationship, it is highly unlikely that such children will benefit from the estate of the surviving, non-parent spouse. The new rules reflect both the need for provision to be made for children from a prior relationship on the first death and a desire to treat all the deceased's children equally.

In such circumstances, the surviving spouse will be entitled to:

- the deceased's 'personal effects',
- a legacy of \$350,000 indexed from December 2005 ('the Statutory Legacy'); and
- a half-share in the balance of the intestate estate (together referred to as the 'spousal entitlement')

The remaining half-share of the intestate estate will be divided between all of the intestate's children in equal shares.

It should be noted that the definition of 'personal effects' has replaced the old definition of 'household chattels'. The new definition is wider and incorporates all of the deceased's personal *tangible* property subject to specific exclusions including, for example, business property, cash, and gold bullion.

From a practical viewpoint, the new definition includes categories of items excluded under the old rules, such as the deceased's motor vehicle, jewellery and original paintings.

## **SPOUSE'S RIGHT OF ELECTION**

Where there are children from a prior relationship, a spouse has the right to elect that the spousal entitlement is satisfied by the acquisition of specific assets. In the majority of cases this is likely to be an election for the surviving spouse to receive the deceased's interest in the family home.

If the asset in question forms part of a larger aggregate and the acquisition could substantially diminish the value of the remaining share of the intestate estate (or make the



administration of the intestate estate substantially more difficult) then the Court's authorisation is required.

The Court has the power to authorise the acquisition on 'just and equitable' terms. This can include the spouse paying the costs of the acquisition or compensating the estate for any loss in value.

## MORE THAN ONE SPOUSE

As noted above, the wider definition of 'spouse' makes it possible for the deceased to have multiple spouses at the time of his or her death.

The rules relating to the prioritising of multiple spouses where there are children of the current/prior relationships are the same as those for single spouse intestacies.

*'A' dies leaving multiple spouses. What are the spouses, and the children from the current and prior relationships, entitled to?*

	Multiple spouses with no surviving children	Multiple spouses with surviving children from <i>current</i> relationships	Multiple spouses with surviving children from <i>prior</i> relationships	Multiple spouses with surviving children from <i>current and prior</i> relationships
<b>Spouses</b>	The entire intestate estate is divided between the spouses in accordance with 'Division 3' of the Act (see below).	The entire intestate estate is divided between the spouses in accordance with 'Division 3' of the Act (see below).	Personal effects; The Statutory Legacy; and A half-share in the balance of the intestate estate are divided between the spouses in accordance with 'Division 3' of the Act (see below).	Personal effects; The Statutory Legacy; and A half-share in the balance of the intestate estate are divided between the spouses in accordance with 'Division 3' of the Act (see below).
<b>Children</b>	N/A	Nothing	A half-share in the balance of the intestate estate.	A half-share in the balance of the intestate estate is divided between ALL the deceased's children.

## 'DIVISION 3' DISTRIBUTIONS BETWEEN MULTIPLE SPOUSES

The possibility of multiple spouse intestacies requires a mechanism for determining priority between competing spousal interests.

This mechanism is contained in Division 3 of the Act which provides 3 options for determining how multiple spouses will share the spousal entitlement of the intestate estate.

- The spouses can enter into a 'distribution agreement' on such terms as they agree; or
- The Court can make a 'distribution order' on such terms as it considers 'just and equitable'; or



- The deceased's personal representatives may serve notice on the spouses stating that the spousal entitlement will be divided between the spouses in equal shares once the 3 month notice period has expired. Following the expiry of the notice period the spousal entitlement can be distributed provided that the spouses have not entered into a distribution agreement and no spouse has applied to the Court for a distribution order.

The practical application of this third option will undoubtedly become clearer as the new rules take effect. Difficulties are likely to arise at the 'who is entitled to become the deceased's personal representative' stage where the competing spouses will need either decide to agree (via a 'distribution agreement') or disagree (via a 'distribution order') well before the possibility of serving a notice arises.

### **LOOKING FORWARD**

The rules of intestacy attempt to impose the norms and conventions of modern day society on those who choose to forego their testamentary freedoms.

In practice, such measures are unlikely to meet the requirements of increasingly complex financial and social relationships.

It is always advisable to have a current Will in place which addresses your particular circumstances and structures your estate to meet your wishes.

### **HOW CAN TEECE HODGSON & WARD ASSIST?**

If you require further information or advice concerning the above please contact Richard Neal, Deborah Linwood or John Maitland using the following contact details:

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This legal update is intended to provide general information about current law relating to intestacy. It is not intended to be comprehensive or to provide advice and should not be acted or relied upon as doing so.

Professional advice appropriate to a specific situation should always be obtained.

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# Legal update

