

# WHAT IF THERE IS NO WILL?



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## **WHAT IF THERE IS NO WILL?**

If there is no will the court grants Letters of Administration and appoints an administrator to deal with the estate, which is distributed in accordance with the rules of intestacy. The order of distribution can be found in Part 2 Division 2A Wills Probate Administration Act 1898. These rules apply to a total intestacy where the deceased has failed to dispose of the entire estate and also to a partial intestacy. A partial intestacy is the failure to include all property in a valid will or the failure of a specific gift or a residuary gift in a will.

The intestacy rules set out an order of priority by listing nine (9) potential classes of beneficiaries. If no beneficiary falls into the first class the whole estate will be divided equally between members of the second class, or, if no-one falls into the second class, go to the next class that has a member, and so on.

Once there is a person qualifying in a particular class the whole estate passes to that class and no classes lower in the order receive any distribution at all.

In order the nine (9) classes are:-

1. Spouse (or de facto) only
2. Spouse (or de facto) and issue
3. Issue only
4. Parents
5. Brothers and sisters
6. Half brothers and half sisters
7. Grandparents
8. Whole blood uncles and aunts
9. Half blood uncles and aunts

In default of all of the above the Crown takes the whole of the estate. If this occurs they may make an ex-gratia payment to dependents and any other person whom the intestate might be reasonably expected to have made provision.

The various classes are discussed in further detail below.

### **Spouse and no issue**

If there is a surviving spouse and no issue, the whole of the estate passes to the spouse.

### **Spouse and issue**

If the value of the estate (less household chattels) is less than the prescribed amount (currently \$200,000.00) then the spouse takes the whole estate.

If the value of the estate (less household chattels) exceeds the prescribed amount then the spouse receives:-

1. Household chattels
2. Prescribed amount plus interest
3. One-half of the remaining estate

The remaining estate is held in statutory trust for the issue of the deceased. Issue means natural offspring of the deceased that is children, grandchildren and their issue. The distribution is further complicated by reason of the spouse having a right to elect to take the deceased's interest in a shared home even if this reduces the share passing to the issue.

#### Issue and no Spouse

The whole estate is held in statutory trust for the issue.

#### No Issue and no Spouse

The whole estate passes to the intestate's parents in equal share but if only one parent survives then wholly to that parent.

#### No Issue, no Spouse and no Parents

The statutory order then provides:-

- a) Brothers and sisters of the full blood in statutory trust, then
- b) Brothers and sisters of the half-blood in statutory trust, then
- c) Grandparents in trust, if more than one in equal shares, then
- d) Uncles and aunts of the full blood in trust, if more than one in equal shares, then
- e) Uncles and aunts of the half-blood in trust, if more than one in equal shares.

#### Statutory Trust

For the issue of the intestate means:-

- a) The child (or children in equal shares) living out the death of the intestate, and
- b) The issue (living at the death of the intestate) of any child who predeceases the intestate. Such issue take per stirpes.

Where the statutory trust is for any other class of relative other than the issue of the intestate then this description applies mutatis mutandis.

#### Children

Biological and adopted children have the same rights under the intestacy rules and it makes no difference whether the children were born within a marriage or outside of marriage.

A step-child is not considered to be a child of the deceased under the intestacy rules.

### Adoption by a parent and their new partner

If one of the child's parents dies and the other marries someone else and the surviving parent and their new partner adopt the child, the child does not lose any rights as the child of the deceased parent for inheritance purposes.

### De-facto Spouses

If a person with a de-facto spouse dies intestate, the rights of that spouse may depend on the duration of the relationship.

If there is a Spouse and De-facto Spouse;-

1. If the de-facto relationship existed for two (2) continuous years prior to death; and
2. The intestate did not live with the legal spouse during any part of that period; then
3. The de-facto spouse takes the share the legal spouse would have taken.

### De-facto Spouse and Issue but no legal Spouse

1. If the de-facto relationship existed for two (2) continuous years prior to death then the de-facto spouse takes the spouse's share.
2. If the de-facto relationship existed for less than two (2) years prior to death then:-
  - Where the only children were the children of the relationship then the de-facto spouse takes the spouse's share
  - Where the only issue are grandchildren or remoter issue then the de-facto spouse takes the spouse's share
  - Where the children are not children of the de-facto relationship then the de-facto spouse cannot take.

### Same sex partners

Under the Property Relationships Act 1984 a same sex partner can be a de-facto spouse.

The above represents a general description of the intestacy rules and should not be relied upon as legal advice. Each individual circumstances must be carefully considered against the legislative provisions to determine how an estate should be distributed. There is no substitute for obtaining carefully considered legal advice in the circumstances where a deceased leaves an intestacy or partial intestacy.

Please call Peter Baltins for advice how these rules may apply to your circumstances.