

DYING WITHOUT A WILL

What happens when you die without a Will?

Dying without a Will does not necessarily mean that your estate goes to the government automatically but it does mean that state laws decides who receives your assets. This is known as dying intestate.

When a person dies with a Will, the executor appointed under the Will makes an application to the Supreme Court to administer the estate and distribute the deceased's assets in accordance with the provisions of the Will. This process is known as applying for probate. On the other hand, when a person dies without a valid Will, the next of kin will have to apply to the Supreme Court for Letters of Administration to manage the estate.

This is required in order to access bank accounts, sell or transfer property owned by the deceased and to make decisions for the company in which the deceased is the sole director of.

Disadvantages of dying without a valid Will (intestacy)

1. The obvious disadvantage of dying intestate is that no special account can be taken of your particular wishes. The estate gets distributed according to a special statutory order found in s52 of the *Administration and Probate Act 1958 (Vic)*.

An example would be, if your estate is worth more than \$100,000 and you die leaving a domestic partner and child or children surviving, your partner gets the first \$100,000 together with a one third share of the residuary estate. The remaining two third share is distributed equally among the surviving children at the age of 18 years. Where your estate is worth less than \$100,000 and your partner is eligible, he/she will be entitled to the whole estate. Note that adopted children are regarded for the purposes of intestacy rules, as children of the adoptive parent(s).

As seen from above, the statutory order is fixed and no special account can be taken of your particular wishes.

2. The provisions of the *Administration and Probate Act 1958 (Vic)* also governs how the assets are to be administered, for instance the assets must be sold. The administrator of an intestate estate does not have the same discretionary powers a trustee has under a valid Will. For example, to maintain the asset in its same form of investment as the trustee sees fit. It may be that you do not wish for your assets to be sold but dying intestate does not allow for that flexibility.
3. Where you have minor children, you will have no control over who is chosen as guardian for your children.
4. Your estate may be administered by someone you would not have otherwise appointed to administer your estate.
5. The costs of administering your estate may be higher.
6. The estate will not necessarily be handled in the most tax efficient manner as the administrator will not have an opportunity for tax planning usually available to a Will maker.

What about domestic or de facto relationships?

In order for de facto partners to be able to inherit, your partner or de facto spouse must have been in a relationship with you for two years immediately before your death. (s51A of the *Administration and Probate Act 1958 (Vic)*). A domestic partner is someone who although not married, is living with a person on a genuine domestic basis, irrespective of gender and either:

- been registered as a domestic partner under the *Relationships Act 2008 (Vic)*;
- lived with you continuously for a period of two years immediately before your death; or

2/128 Centre Dandenong Road, Dingley VIC 3172
PO Box 250, DINGLEY VIC 3172
Ausdoc: DX 33401 Dingley

TELEPHONE: 03 8555 3895 FACSIMILE: 03 8555 3865

LYTTLETONS LAWYERS PTY LTD
ABN: 88 163 725 077

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lyttletonslawyers.com

- Is the parent of a child of yours who is under 18 years of age at the time of your death?

S35(2) of the *Relationships Act 2008* (Vic) and s4AA of the *Family Law Act 1975* (Cth) set out relevant factors the court will take into account in evaluating whether a domestic relationship exist. You should seek legal advice as to whether or not the Act applies in your specific case.

Once again, the safest way to ensure your partner can inherit from your estate is to make a valid Will.

Separated but not divorced?

Your estranged husband or wife would have the same rights to inherit as a spouse under the intestacy laws. You must take steps to change your Will or make a Will if you do not have one in place should you not wish for your estranged husband or wife to inherit your estate.

On the other hand, a divorce will make any disposition or gift made to your former spouse invalid.

What happens when there are no next of kin?

The general hierarchy of next of kin who are entitled to inherit on intestacy are in the following order:

1. Partner(s) and/or children or other issue;
2. Parents;
3. Siblings, or nieces and nephews when they take as representatives of their deceased parent
4. Grandparents;
5. Nieces and nephews when they take in their own capacity;
6. First cousins; great-nieces and great-nephews; great-aunts and great-uncles; great-great-grandparents; and
7. More remote kin.

Where one dies without a partner, children or other relatives to whom their estate can be distributed to, the estate belongs to the State of Victoria as *bona vacantia*, i.e. unclaimed goods or property that has no owner.

An application must be made to the court to appoint someone to administer the estate and there may be considerable cost to the estate where there are difficulties locating the beneficiaries.

Guarantees?

Depending on the situation, it may be that a surety or an insurance bond is required by the Registrar of Probates for the granting of letters of administration (Section 57 of the *Administration and Probate Act 1958* (Vic)).

How to find out if someone has made a Will?

If there is no Will with the deceased's personal papers and other important documents, one can make enquiries with the deceased's bank, solicitor, accountant or a likely trustee company to see if they hold a Will for safe keeping.

How to ensure your Will is valid?

The safest way to ensure your Will is valid is to engage a solicitor to draft the Will and sign and execute it at their office. Solicitors are also qualified to give advice in regards to how you can go about disposing your estate taking into account your wishes and priorities.

Summary

In summary, make a Will while you can. No one ever died from making a Will! If you die without a valid Will state laws decide who gets your assets. The failure to make a Will can lead to some complicated legal issues and a large legal bill for your family.

To make a Will or apply for Letters of Administration, please feel free to telephone our office at (03) 8555 3895.

Wen Hong
Solicitor
Lyttletons Lawyers

References

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