

## The importance of having a valid Will

*If a person dies without leaving a valid Will (intestate) then their assets will be treated in accordance with intestacy laws, which can sometimes result in unsatisfactory and unintended distributions of their estate.*

The distribution of assets on intestacy in Victoria is set out in the *Administration and Probate Act 1958 (Vic)*. Set out below are some examples of what can happen.

### Case study 1A: House in one spouse's name and children of the relationship

**A married couple – the husband is in business for himself and the wife is currently not working but looking after their two young children. Their house is in the wife's name only.**

The wife dies following a car accident and does not have a Will. In these circumstances, the wife's estate would pass to the husband in its entirety.

### Case study 1B: Children from a previous relationship

**If we take the couple from case study 1A, but introduce the following facts:**

- > The young children are from a previous relationship of the wife's.
- > The value of the property is \$1,000,000.
- > The wife was the owner of a share portfolio and bank accounts that together totalled \$300,000 at the date of her death.

In those circumstances, the wife's estate would pass on intestacy as follows:

- > any personal chattels including any car not used for business purposes would pass to her husband;
- > her husband would also be entitled to receive the sum of \$559,660 plus interest; and
- > the balance of the estate would be divided; one half distributed to the husband, being \$370,170, and the other half divided equally between the two children, who would each receive \$185,085.

This could be unsatisfactory if the family home is required to be sold or mortgaged to give effect to the payment of money to the husband.

As an alternative the husband could make a 'partner's property election' to acquire the property. This would result in the estate being distributed as follows:

- > The husband acquires the property, but is required to pay to the estate the difference between its value (\$1,000,000) and the amount of the estate to which he is entitled (\$559,660 plus one half of the balance of the estate after the lump sum is paid, being \$370,170), which is \$70,170.
- > The children each receive \$185,085, which will need to be held in trust for them until they reach 18 years of age.

This could be unsatisfactory, as the husband may need to mortgage the property or apply for a loan to raise money to pay the amounts to the children.

Alternatively, the husband might make a claim under Part IV of the Act seeking a larger proportion of his wife's estate for himself. This may or may not result in him obtaining a greater share of the estate, but in any event it will incur the unnecessary legal costs of making the claim and would still leave him exposed to any liability arising from his business.

A better result would have been for the wife to have had a Will which set up a testamentary discretionary trust under which her husband and the children were discretionary beneficiaries.

### **Case study 2: Child's estate going to estranged parent**

**A man who was one of three siblings, all aged in their 40s to 50s, died without a Will and without a spouse, domestic partner or children.**

The father of the three siblings had deserted his wife and the family some 30 years ago and they had very little, if any, contact with him since he left. The mother and father had divorced. The mother had died prior to the son's death, however his father was still alive.

By the laws of intestacy, the deceased's assets would pass to his father and mother in equal shares if both were living. However, as the mother had died and the only survivor was his father, the whole of the estate passed to his father despite the long-standing estrangement.

Under current laws, the deceased's siblings could not bring a Part IV claim against his estate unless they could establish a financially dependent relationship with their sibling, such as living with him immediately prior to his death. Such proceedings involve considerable expense and there would be no certainty that they would receive any of the estate.

In most cases a sibling would not be eligible to make a claim against their sibling's Will or estate.

### **Case study 3: Person dying with an unregistered domestic partner**

**A man dies intestate with an unregistered domestic partner. They were in a genuine relationship and living together for two years up until the man's death.**

The Act provides that the unregistered domestic partner would be the sole beneficiary of the deceased's estate, provided that:

- > there were no children of the deceased;
- > if there was a child or children, they were the child of both the deceased and the domestic partner; and
- > there was not also a registered domestic partner of either gender or a spouse (legally married).

### **Concluding comments**

Intestacy only affects assets that form part of the estate of a deceased person. The most common assets that are not part of a deceased's estate are:

- > **joint assets** – these pass to the surviving owner automatically upon death
- > **superannuation assets** – these will be distributed by the trustees of the fund in accordance with the superannuation fund's rules

All of the situations set out above could have achieved more satisfactory results if a properly drafted Will was in place. While it is not possible to prevent challenges, a Will gives the testator the opportunity to assert their own wishes as to how they would like the estate to be distributed.



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