FACT SHEET 2023 - 1

ESTATE PLANNING AND INTESTACY

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1. INTRODUCTION

The new year inevitably brings many new enquiries for preparation of wills and assistance with estate planning. Estate Planning covers many aspects relating to the control and transfer of your wealth before and after death. Documents such as wills, family trusts, power of attorney and power of guardianship can all be prepared and managed with estate planning. By having a plan in place, you can deal with loss of capacity during your lifetime and stipulate the exact way you wish your estate to be distributed after death. Stressful disagreements between family members and beneficiaries over your assets accumulated throughout your lifetime can be avoided through estate planning.

This Fact Sheet provides a general overview of the importance of estate planning, with reference to recent amendments to Western Australia's Administration Act 1903 (WA) (Act) which has made significant changes to entitlements when a person dies without a will.

2. What is Estate Planning?

Estate planning is not only about planning for post death. It includes making a will, to document your wishes for post death, and Enduring Power of Attorney and Enduring Power of Guardianship documents to document your wishes during your lifetime. An Enduring Power of Attorney provides for financial matters during your lifetime and an Enduring Power of Guardianship provides for lifestyle and health matters during your lifetime.

3. What is a will, and why does it matter if I have one?

A will is a legal document that sets out what you want to happen with your assets after you die. A will also sets out who you entrust to carry out your wishes. This person is the "Executor." For a will to be valid, it must meet the requirements laid out in the Wills Act 1970 (WA).

Wills ensure that your wishes are followed after death. Should you not have a will at the time of your death, your estate will be distributed according to the Act, which may mean that your wishes or intentions will not be followed. According to the Law Society of WA, almost half of Western Australians die without a valid will. See: https://www.lawsocietywa.asn.au/news/do-you-have-a-will-is-it-valid/

4. What happens if I don't have a will?

A person who dies without a will or a will which does not cover the entirety of their estate is said to have died intestate. When this occurs, Section 14 of the Act sets out the formula for dividing the estate amongst their surviving family members. The rules under the Act are complicated and vary based on the size of your estate and the surviving next of kin.

5.1 Definitions

Surviving Issue refers to a person's lineal descendants, including but not limited to their children, if they have any.

Intestacy is the state of dying without a valid Will, or any Will at all.

Household chattels means articles of personal or household use or adornment.

De facto partner refers to a partner (not husband or wife) who has lived with the deceased for a period of at least 2 years immediately before their death.

5.2 What is my surviving spouse or de facto partner entitled to if I leave no will?

If you die without a will, your estate will be distributed according to the Act. How an estate is distributed will vary depending on whether the death occurred before, on or after 30 March 2022, when the amendments to the Act came into effect.

Prior to the amendments, if a deceased left a surviving spouse or de-facto partner, and surviving issue, the spouse was entitled to household chattels, the first $50,000 and one third of the remainder. Surviving issue were entitled to two thirds of the remainder. If there was only one child, they would be entitled to two thirds of the remainder estate, with the spouse receiving the other third.

After 30 March 2022, if the deceased left a surviving spouse or de-facto partner, and surviving issue, the spouse was entitled to household chattels, the first $472,000 and one third of the remainder. Surviving issue are entitled to two thirds of the remainder. The Act also provides a formula for distribution of estates in other circumstances detailed in the Act.

5.3 What if I only leave a spouse or de facto partner and no children?

Where a person dies leaving a spouse but no children, the entitlement of the surviving spouse increases from $75,000 plus one half of the balance (prior to the amendment of the Act) to $705,000 plus one half of the balance due to the amendments made to the Administration Act. The other half of the estate is shared between the surviving parents, who now receive the first $56,500 (previously $6,000) and one half of the remaining balance. The deceased's siblings (or children of any deceased siblings) receive the other half of the balance.

5.4 Can the government just take my property if I die without a will?

A common misconception about intestacy rules is that if you die without a will, your estate will immediately pass to the State. The State is entitled to an intestates' property only where there is no surviving spouse, partner or issue. If a person leaves no surviving spouse, partner, issue, parent(s), sibling(s), children of those sibling(s), grandparent(s), aunt(s), uncle(s) or first cousin(s), the State is entitled to the deceased's estate.

Whilst these are uncommon circumstances, they demonstrate the importance of having a valid will.

5.5 What if I have a will when I die, but the value of my estate has changed since it was made?

If you die with a will which is outdated and does not reflect the extent or current circumstances of your estate, there is a risk that certain parts of the estate will be subject to intestacy provisions. Wills can be changed at any time prior to death so long as you have mental capacity, and you comply with the process for changing a will. You can make a 'codicil' (an addition to an existing will) which will need to be signed and witnessed in the same way as your will.

You should consider changing your will whenever your financial or personal circumstances change, or if there is a change in beneficiaries. For example, if you made a will when your children were young and named your parents as guardian and executor, when your children become adults, you will no longer need the guardian clause and you may want your children or a sibling to be executor instead. It is therefore a good practice to review your will every three to five years to ensure that it still reflects your current wishes.

5. CONCLUSION

Estate planning is an important tool which ensures the safe and smooth transfer of assets following one's death, and the honouring of the wishes of the deceased. For all your queries and concerns about estate planning services or administration of estate please call Janette Tavelli (0417 926 155), Michael Sonter (0419 900 299), or another Integra Legal team member on (08) 9218 8588.