

Spouses to inherit on intestacy

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Proposed changes to NSW intestacy law will simplify the asset distribution process when a person dies without a will. Also, the measures are designed to mirror the community's attitude when wills are drafted. The proposed changes are found in the *Succession Amendment (Intestacy) Bill 2009 (NSW)* which is currently awaiting Royal Assent. In the meantime, individuals should get themselves prepared for the significant changes which will result from the Bill. At this stage, however, it is unclear when the measures in the Bill will take effect.

Spouses and children of current relationship

Under current NSW intestacy law, spouses are entitled to the whole of the estate of a deceased individual if the value of the estate (excluding household chattels) does not exceed \$200,000 (section 61B(3) of the *Probate and Administration Act 1898 (NSW) (Act)*).

However, if the value of a deceased's estate (excluding household chattels) exceeds \$200,000, the estate of the deceased will be distributed between the deceased's spouse and their children. Spouses are entitled to any household chattels and a statutory legacy of \$200,000, with the remaining estate being shared equally between the spouse and children of the deceased (section 61B(3) of the Act).

The new proposed legislation will make a significant change in this respect. Under the proposed measures, a spouse will be entitled to the whole of the deceased's estate, unless children are of previous relationship (new sections 112 and 113). Further, it broadens the meaning of 'spouse' to include a person who was a party to a domestic relationship which is a de facto relationship that has been in

existence for not less than 2 years or has resulted in the birth of a child (new sections 104 and 105).

Separated partners will be considered spouses for the purposes of the proposed law, potentially inheriting the whole of a deceased's estate if the death occurs during the first 12 months of separation, before the divorce has been finalised.

The decision of NSW Parliament to amend the law appears to reflect community sentiment since 75% of individuals who actually draft a will leave all of their assets under the will to their spouse. No other jurisdiction in Australia has taken into account this fact in this intestacy law.

However, reflecting this in intestacy law effectively ignores the thoughts of the remaining 25% of the community who do not leave their whole of their estates to the spouse.

Accordingly, given the proposed new position under NSW intestacy law, it will now become more critical than ever for individuals who wish other relatives (such as children) to benefit under their estates to ensure that they have a legally binding will to ensure that those relatives are adequately provided for.

Spouses and children of previous relationship

The proposed law will draw a distinction between children of an earlier relationship and a current relationship. Where children are of a previous relationship, a spouse will be entitled to the intestate's personal effects (tangible personal property with few exceptions), a statutory legacy of \$350,000 adjusted by the CPI and 50% of the remaining intestate estate (new sections 106 and 113). The remaining 50% of the estate will be distributed amongst the deceased's children (new section 127).

Relatives

Under existing law, where the intestate has no spouse or children, the deceased's estate is to be distributed to (and in the order of) the intestate's parents, brothers

and sisters of the whole blood and then half blood, grandparents, and to uncles and aunts (sections 61B(4) to (6) of the Act).

If an uncle or aunt has predeceased the intestate, the surviving linear descendants of that uncle or aunt are entitled to take their parent's share (sections 61B(6)(d) and (e) and 61C(3) of the Act).

Conclusion

To avoid any of the positions which arise under NSW intestacy law, it is important to have a legally effective will in place. Given the proposed measures regarding under intestacy law, it may be critical now, more than ever before, to have a valid will in those instances where individuals do not wish to leave everything to their spouses (in particular, in the case of separated, but not divorced partners) and/or if you would like to leave something to your children or other relatives and/or others.