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To will or not to will?

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And, is your will up to date?

The importance of having a will is often underestimated. Dying without a will creates added complexities at a difficult time for your family and can result in your properties and assets

("the estate") passing to beneficiaries in a manner not in accordance with your wishes. Recent changes to the Victorian intestacy laws further impact the way an intestate estate is distributed.

What happens if I pass away without a will?

When a person passes away without a will, or has a will without formal arrangements for the estate, intestacy will arise. Without a valid will, the distribution of the estate is governed by the Administration and Probate Act 1958.

The law in Victoria has recently undergone major reforms introducing significant changes. Under the Administration and Probate and Other Acts Amendment (Succession and Related Matters) Act 2017, the new law applies to estates of people who pass away after 1 November 2017. Following is a summary of the effect of intestacy before and after the recent changes in Victorian intestacy law.

Before 1 November 2017

Previously, the intestate estate would be distributed to beneficiaries in the following order:

1. If you left a spouse or domestic partner, but no children, then your spouse or domestic partner would receive the whole estate.
2. If you left a spouse or domestic partner and children, your spouse would receive the first $100,000 and one third of the residue of the estate, while your children would receive the remaining two thirds of the residue of the estate equally.

After 1 November 2017

The intestate estate will be distributed in the following order:

1. If the deceased leaves one partner (with or without children from that relationship), the partner will receive the whole estate.
2. If the deceased leaves one partner and children born of a different relationship, the partner will receive all personal chattels, the first $451,909 (adjusted annually based on the Consumer Price Index for Melbourne) and one half of the residue of the estate, while the children will be entitled to the remaining balance of the residue of the estate equally. Where the residuary estate is worth less than $451,909, the partner will receive the whole estate and the children miss out.
3. If the deceased leaves more than one partner, then the partners (in absence of any distribution agreement) will share the estate equally among them.
4. If the deceased leaves no partners but there are children, the estate is divided equally between the children. Where a child has already died, their children will receive an equal

share of the estate.

5. If the deceased leaves no partners and no children, the estate is dividend equally between their parents. If the parents are not alive, then the estate is divided equally between their siblings.
6. As per Victoria's intestacy laws prior to 1 November 2017, in the event of no surviving lineal or collateral relatives, the Government will receive the entire estate.

Pros vs cons of the changes

Although the new intestacy laws in Victoria provide improved social stability and financial security to the surviving partner of an intestate, families with children from previous relationships could add to the complexity of an intestate estate.

There is also the potential for estranged partners emerging as an unmarried (de facto) partner of the deceased. Family members can deny and contest this, which can result in the diminishing value of the estate, along with damaged or severed relationships.

Other considerations...

A further issue with an intestate estate is that distributions differ between each Australian state and territory. The assets of an intestate are distributed according to the laws of each relevant jurisdiction.

For example, this can pose complications for a person who passes away intestate leaving assets in Victoria and New South Wales, as the assets in each state will be distributed according to the laws of each state.

To "will" or not to "will"?

Intestacy is best avoided by having a properly constructed will, whereby one can decide how their estate is to be distributed to the beneficiaries of their choosing and administered by the persons of their choosing.

Unintended consequences arising out of intestacy could result in close family members being left in dire financial circumstances, or left to manage difficult family interactions.

To ensure your peace of mind and confidence that your loved ones will be protected when you pass away, you may wish to ensure that you have a will and that it is properly drawn up. It is recommended that your will is also reviewed every three to five years and updated following any significant changes in your personal circumstances.

Should you have any questions regarding the preparation or review of your will please do not hesitate to contact your Fordham Partner.

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