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New Intestacy Laws

In 1789, the American statesman, scientist and writer, Benjamin Franklin said:

“In this world, nothing is certain but death and taxes”.

New legislation which will substantially change intestacy laws in NSW, was introduced into the NSW Parliament on 1 April and passed by the Parliament on 2 June 2009. The legislation, called the Succession Amendment (Intestacy) Bill 2009 is likely to come into force by mid 2009.

The new provisions will have a substantial impact on the estates of many people now living in NSW or who leave property in NSW. The new laws will directly affect the distribution of the property of deceased persons who have not executed a valid Will or who have failed to execute a valid Will that effectively disposes of all of their property. If their Will only effectively disposes of some but not all of their property, the new laws will catch the Will as well.

A 2008 survey by the Public Trustee found that 54% of people in NSW do not have a Will. Many Wills may also not be effective to dispose of all or part of the person's estate; home made and will-kit Wills are notorious examples. Marriage automatically cancels any pre-existing Will unless the Will was made in contemplation of marriage. Divorce also cancels any provision in an existing Will which favours the divorced spouse. Adding all this together means that many people will die without an effective Will dealing with the whole of their estates, i.e. wholly or partly intestate.

Under the current law in NSW, the surviving spouse or partner of an intestate (even where there is issue such as children or grandchildren) is entitled to a statutory legacy of \$200,000.00. If there is a surviving spouse or partner but no issue, the surviving spouse or partner will be entitled to the whole of the estate. However, if there is a surviving spouse or partner on the one hand and any issue on the other then, under the present law, the surviving spouse or partner is entitled to one half of the residue while the surviving issue are entitled to the balance of the estate.

Under the new laws:

1. the statutory legacy for a surviving spouse will also be increased from \$200,000.00 to \$350,000.00 and indexed in accordance with the CPI;
2. the surviving spouse of an intestate will be entitled to all the deceased's personal effects. These are essentially articles of household or personal use;
3. a person who was in a domestic relationship with the deceased immediately before their death will be in the same position as a spouse. A domestic relationship is a defacto relationship that has been in existence for a continuous period of at least two years or has resulted in the birth of a child;

4. where the intestate is survived by a spouse or partner as described above then the spouse or partner will be entitled to the whole intestate estate even if there are issue of the deceased and the spouse or partner. This means that children of an intestate and their spouse or partner will be excluded from the estate; and
5. if the intestate is survived by a spouse or partner as well as issue from another relationship then the estate, after payment of the statutory legacy and transfer of the personal effects to the surviving spouse or partner, will be shared equally between the surviving spouse or partner on the one hand and the issue from the other relationship on the other.

The new laws will also introduce a number of further amendments which go significantly beyond the present intestacy laws. These include the right of a spouse to elect to obtain certain property from an intestate's estate within a certain period. They also introduce new rules about the division of an intestate's estate where the deceased is survived by more than one spouse (e.g. where they were married and also had a defacto partner at their death). Under the old law, the defacto partner of at least two years would generally take the whole of the estate in that case.

If an intestate dies without any living statutory relatives entitled to the estate (which will now also include cousins of the deceased), the State of NSW will be entitled to the whole of the estate.

If you wish to discuss who should inherit your property on death, estate planning, asset protection and how to minimise the likely taxes, please contact:



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