

# Legalquotes News

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## DYING WITHOUT A WILL - LEGAL CHANGES

It has been recently estimated that almost half of the Australian population do not have a legally valid Will. For those who die without a legally valid Will the distribution of their estate is set by a legal formula known as the "Intestacy Regime". The person who passes away without a Will is referred to as "dying intestate". From 1 March 2010 the rules surrounding intestacy have changed. Some of the new changes operate as follows:-

- If a person dies leaving a spouse but no children that spouse is entitled to the whole estate. A spouse includes a married spouse or someone who is in a domestic partnership with the deceased immediately before their death. A domestic partnership is a relationship, other than marriage, that is a defacto relationship and has been in existence for a continuous period of at least 2 years or has resulted in the birth of a child. Readers should be aware that this is not a general legal definition of a defacto spouse, rather it is the definition used by the Succession Act 2006 for the purposes of intestacy.
  - Where the intestate dies leaving one spouse and a child or children and the child or children are also the children of the surviving spouse then the spouse is also entitled to the whole estate.
  - However, where the intestate leaves a spouse and a child or children and that child or children are not the child or children of the spouse the spouse is entitled to the personal effects, an amount of \$350,000.00 (which will be adjusted with CPI) and half the remainder, if any, of the estate. Given the size of the average estate this may not leave a significant amount of assets available for the child or children.
  - The surviving spouse also has a "preferential" right to acquire property. If the spouse wants to acquire property (the home and land of the deceased) then the spouse must exercise his or her right to elect to acquire the property within 3 months of receiving notice from the Administrator of the deceased's estate. If the spouse is the Administrator, or one of them, then the election must be made within 3 months of obtaining a Grant of Administration. A Grant of Administration is the Order obtained from the Supreme Court validating that the deceased died without a Will and appointing someone to manage the estate's affairs and distribute the estate's assets in accordance with the Intestacy Formula to the beneficiaries.
  - If the spouse elects to purchase the property the price is the market value at the date of death and the Administrator of the estate must obtain a valuation. The price is to be paid from the money to which the spouse is entitled and if there is a shortfall the spouse must pay the difference from their own funds. The changes to this law also recognise that there may be situations in which there are multiple spouses (for example, a former wife or husband who has not been divorced and a new defacto partner). In these cases if there are no children then the spouses share the whole of the estate between them. However, where there is more than one spouse and children who are not the children of a surviving spouse then the spouses share the personal effects, the amount of \$350,000.00 and half the residue of the estate. If the spouses are unable to form an agreement as to the sharing of their entitlement then the Court will make an Order determining which way the property is distributed between the spouses.
  - If a person dies without leaving a Will and has no spouse or children their estate goes to (in order) the parents of the intestate, brothers and sisters including brothers and sisters of the whole blood or half blood, grandparents, aunts and uncles and the newly included category of cousins. Cousins are "first" cousins meaning that the deceased had an uncle or aunt who was the brother or sister of the parent of the deceased and that uncle or aunt has died before the Intestate leaving a child or children.
  - If there are no people included in the above categories the State of New South Wales is entitled to the whole of the estate, however, interested parties such as charities to whom the deceased regularly donated may make an application to the Minister to be considered as a beneficiary for the whole or part of the estate.
- Obviously, given the inflexibility of the legal formula the prospect of dying intestate for many people is not one which will in reality reflect their wishes as to the distribution of their property after death. As such it is always recommended that a person seeks legal advice to put in place a legally valid Will.



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