

# Deceased Estate General Information

## Intestacy – Where there is no Will

This document is intended to provide potential administrators and beneficiaries with general information about a deceased estate and the administration process when a person dies without leaving a Will. Our role is to assist and guide our clients through the estate administration process. This document is of a general nature only and is not legal advice.

### Entitlement to benefit from an intestate estate

If a person dies without a valid Will, he or she is said to have died “intestate”. The person's estate is distributed according to the laws of intestacy set out in Part 3A of the Administration and Probate Act 1919 (SA). Here are some examples of how an estate is distributed under the laws of intestacy (this is not an exhaustive list):

If the intestate person is survived by:

1. a spouse or domestic partner and no children, the total estate passes to the surviving spouse or domestic partner;
2. a spouse or domestic partner, and children:
  - 2.1. if the total estate is worth \$100,000 or less, then the surviving spouse or domestic partner is entitled to all of it;
  - 2.2. if the total estate is worth more than \$100,000, then:
    - 2.2.1. the surviving spouse or domestic partner is entitled to the deceased's personal effects including motor vehicles, the right to purchase the deceased's home on certain conditions, an amount of \$100,000 from the net estate, one half of the balance then remaining; and
    - 2.2.2. the children of the deceased are entitled to the balance of the net estate equally (subject to a “bloodline” rule if any child does not survive the intestate person but leaves children who do survive, then those grandchildren will take their deceased parent's share);
3. a child or children but no spouse or domestic partner, the children are entitled equally to the estate (subject to the same “bloodline” rule);
4. none of the above, but is survived by parents, the parents share the estate equally if both are alive, or the survivor is entitled to the whole of the estate;
5. none of the above, but is survived by siblings, then those siblings share the estate equally (subject to a “bloodline” rule if any sibling does not survive the intestate person but leaves children who do survive, then the children of that sibling will take the sibling's share).

It is possible for both a spouse and a domestic partner of a person to inherit under the laws of intestacy. This could occur where a person separates from his or her spouse, forms a new relationship which is deemed to be a “domestic partnership”, and then dies without having divorced the spouse or having made a Will. In that case, the spouse and domestic partner share equally what would have gone to them if there was only one.

The intestacy distribution does not conclude here. It extends to wider family members. Ultimately the estate may pass to the State of South Australia if there are no relatives. It is obviously better to leave a Will than to leave it up to the laws of intestacy.

### Entitlement to administer an intestate estate

No person has authority to administer an intestate estate until that person is appointed as the "administrator" by the Supreme Court. The Probate Rules specify who is entitled to apply for Letters of Administration. They rank in roughly the same order as the persons who are entitled to benefit from the estate under Section 72 of the Administration and Probate Act. However, there are important differences.

Until a person is granted Letters of Administration by the Supreme Court, the estate of the intestate person vests in the Public Trustee of South Australia. However, the Public Trustee is unlikely to know that the person has died and will not take any steps to administer the estate unless a formal request is made.

### General summary of administrator's role

In summary, an administrator has four main functions:

1. To ensure that the deceased is buried or cremated. Often members of a deceased's family arrange this, regardless of whether they go on to be appointed as the administrator.
2. To determine the assets and liabilities of the deceased, and do the things necessary to take control of them.
3. To pay the deceased's debts and the expenses of administering the estate.
4. To distribute the deceased's estate in accordance with the laws of intestacy.

### Different ownership structures

A person may own assets in several different ways. How an asset is owned will determine if it is administered under the laws of intestacy or under a different legal process. The following is some general information about some different ownership structures, and consequences when the owner or controller dies:

1. **Assets in sole name** | A person's "estate" consists of the assets owned by the person in his or her sole name at death, or which are subsequently transferred to the estate as a matter of law. These assets are dealt with under the laws of intestacy.
2. **Assets owned jointly** | Assets owned by two more people jointly or as "joint tenants" do not form part of the estate of a deceased owner. The surviving owner is automatically entitled to the assets by right of survivorship. Jointly-owned assets are not transferrable under the laws of intestacy as long as at least one other owner survives. It is common for couples to own their assets jointly.
3. **Assets owned as tenants in common** | Ownership as "tenants in common" is different from joint ownership. This is where two or more people own an asset together, but they each own distinct shares in the asset. In this case the deceased's individual share does not pass automatically to the other owner/s, instead it forms part of his or her estate. A person can direct (before they die) that real estate is to be owned in this way. An interest in a business partnership is usually held this way.
4. **Superannuation** | A superannuation fund is a form of "trust" and is covered by specific legislation. When a superannuation fund member dies, the trustee of the fund often

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has discretion in choosing how to distribute the balance of the member's account. However, in most cases the trustee is restricted to transferring the balance either to a spouse, children or the person's estate. A member can usually make binding a nomination before they die to force the trustee to distribute the balance to particular eligible recipients.

5. **Discretionary trusts** | Discretionary trusts, often known as "family trusts", are commonly used to hold and operate businesses and investments. The trustee (who can be a company) holds the assets and income of the trust on behalf of various beneficiaries. The trustee generally has an absolute discretion about who will receive the benefit of the assets and income of the trust, with no obligation to pay or distribute anything to any particular beneficiary. How the trust is controlled is set out in the trust's governing deed. Control can often be passed on by a deceased controller in their Will, if they leave one.
6. **Companies** | A company is a legal entity which has all the legal powers of a natural person. It is owned by its shareholders and managed by its directors, but is separate from them. The assets of a company do not form part of a director's or shareholder's estate. However, if the person owns the shares in the company in their sole name, these shares form part of the estate. This applies to both shares in listed public companies and to shares in privately-held companies.

## Duties and obligations of administrators

Administrators have various duties and obligations, including:

1. To collect and "get in" the deceased's assets, and comply with any requirements to achieve this – for example, obtaining a grant of Letters of Administration.
2. To ensure no waste of assets – for example making sure the estate's assets are adequately insured, and that rent on a rental property continues to be paid.
3. To identify and deal with any claims made against the estate from a creditor or a potential beneficiary.
4. To pay the deceased's debts and the expenses of administering the estate such as funeral costs.
5. To notify relevant organisations of the deceased's death.
6. To administer the estate promptly.
7. To keep a proper account of the administration so they can justify their actions.
8. To distribute the estate assets in accordance with the laws of intestacy.
9. To account to the Public Trustee for the steps taken to administer the estate.
10. If any beneficiary is under 18 or otherwise lacks legal capacity, to pay or transfer his/her share of the estate to the Public Trustee to hold on trust.

### Rights and powers of administrators

Administrators also have various rights and powers given to them by law, including:

1. The right of indemnity and reimbursement from the estate assets in paying the deceased's debts, and the debts and expenses incurred in administering the estate. However, an administrator might have to pay debts and expenses they incur which exceed the estate's value, or which are not justifiable.
2. The right to seek a commission. This is a payment for the administrator's work. However, it is uncommon and difficult for an administrator to be paid a commission when administering a family member's estate as it requires an order from the Supreme Court, or the consent of all beneficiaries.
3. A limited power to sell assets as permitted by law.
4. The power to engage professionals such as lawyers and accountants to assist in administering the estate.

### Letters of Administration

Letters of Administration is a legal process which involves the Supreme Court appointing a person as administrator of an intestate estate. It is dealt with in the Probate Registry and usually does not require anyone to attend Court or to give evidence in person.

Sometimes in a relatively small estate it is possible for the deceased person's "next of kin" to administer the estate informally. However, Letters of Administration is required whenever an organisation holding or controlling a deceased person's assets requires it. It is always required where a deceased person owned an interest in land in their sole name. A grant of Letters of Administration gives legal protection to these organisations so they can confidently release the assets to the administrator.

Obtaining Letters of Administration can be a time-consuming, complex and expensive legal process. The process is usually undertaken with the assistance of lawyers. It is common for the Court to require further information or evidence before it will grant Letters of Administration to the administrator. This can lead to delays in administering the estate.

Letters of Administration is a similar legal process to "Probate", which applies where there is a Will validly appointing an executor. The word Probate is often misinterpreted as referring to a tax or duty payable on a deceased person's estate. Probate duty and death duty were abolished decades ago. However, there is still a Court filing fee associated with applying for Probate and Letters of Administration, based on the gross value of the estate involved.

### Some practical things administrators can do

An intended administrator usually engages lawyers to assist with the administration of an estate due to the complexity of the process. However, there are various tasks that administrators can do themselves. Generally, they should not do these things until they have received legal advice about their rights and obligations. These tasks might include the following:

1. Engaging a funeral director. Organising the funeral and the burial or cremation of the deceased.

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2. Gathering paperwork relating to assets and liabilities.
3. Locating any items or documents held in safe custody for the deceased.
4. Securing the deceased's property and assets.
5. Making sure the deceased's insurable assets remain adequately insured. This is extremely important. The administrator may be held liable by the beneficiaries if uninsured assets are damaged, lost or stolen.
6. Redirecting the deceased's mail to the administrator. We recommend it for at least a year.
7. Notifying organisations such as telephone providers, internet providers, electricity, gas suppliers, Department of Veterans Affairs, Centrelink, Medicare, private health insurers, RAA, SA Ambulance Service and the Australian Electoral Commission that the deceased has died.
8. Notifying the beneficiaries of the inheritance they stand to receive when it can be determined. Often an administrator instructs their lawyers to do this on their behalf.
9. Depositing any money received on behalf of the estate into the lawyers' trust account. Sometimes an administrator holds money in an estate account they manage themselves.

## Taxation matters

The deceased's income tax obligations need to be finalised as part of the estate administration, with the assistance of accountants. The administrator must make sure that any tax returns are filed for previous years, for the period of time between the previous 30 June and the date of death and (depending on the amount of income generated before the estate is finalised) for the administration of the estate. There may also be tax obligations to deal with in relation to companies, trusts and superannuation funds.

## Glossary – Some terms commonly used in deceased estates

**“Administrator”** is a person appointed by the Supreme Court to administer an estate and distribute the assets, where there is no executor appointed by a Will.

**“Beneficiary”** is a person who is or may be entitled to receive some benefit from an estate or trust.

**“Bequest”** and **“bequeath”** are old-fashioned terms referring to a gift of personal property made in a Will.

**“Binding Death Benefit Nomination”** is a nomination made to a superannuation fund which binds its trustee to pay a deceased member's benefits to a certain dependant(s).

**“Creditor”** is a person to whom another person owes a debt (for example, a bank which lends money to a borrower is a creditor).

**“Debtor”** is a person who owes a debt to another person (for example, a person who owes money to a deceased person).

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“**Devise**” is an old-fashioned term referring to a gift of real property made in a Will.

“**Domestic partner**” means a person in a “registered relationship” with another person, or a person declared by a Court to be in a “close personal relationship” with another person.

“**Estate**” means the combined assets and liabilities that a deceased person held in his or her sole name (rather than jointly, as a trustee or through a separate entity).

“**Executor**” is a person appointed in the Will of a deceased person to administer the estate and distribute the remaining assets.

“**Intestate**” means a person who has died without making a Will disposing of his or her estate, and “**intestacy**” means the situation where a person has died intestate.

“**Gross value**” means the value of something before any deductions are made.

“**Legacy**” is an old-fashioned term meaning a gift of money made in a Will.

“**Legal personal representative**” means a deceased person's executor(s) or, if there is no executor, the person's administrator.

“**Letters of Administration**” means a Court order which appoints the administrator of an estate where there is no Will, or the Will doesn't appoint an executor.

“**Net value**” means the value of something after any deductions (such as debts) are made.

“**Personal property**” is anything other than real property (for example, shares, a motor vehicle or money in a bank account).

“**Probate**” is an order of the Supreme Court that a deceased person's Will is the person's last Will, and that the executor is validly appointed.

“**Real property**” is an interest in land, or things affixed to land (such as buildings).

“**Residue**” means the assets of an estate remaining after all debts, expenses, taxes and specific gifts are made.

“**Spouse**” means a person who is legally married to another person.

“**Testator**” is a person who makes a Will.

“**Trust**” is an arrangement where a person (the “trustee”) holds assets and income on behalf of other persons (the beneficiary or beneficiaries), rather than for the trustee's own benefit.

“**Will**” is a document which contains a person's directions about the disposal of the person's estate after he or she dies, the appointment of executors, and certain other matters.

## Specific advice

Please contact us if you need specific advice or assistance in relation to a deceased estate, or in preparing estate planning documents such as Wills. Mellor Olsson practises in all aspects of succession law.

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