Redchip LAWYERS

WHAT DOES IT MEAN TO DIE WITHOUT A WILL?

Estate Planning

The legal term for dying without a Will is to die *intestate*.

The outcome for dying without a Will is governed by the *Succession Act QLD 1981*.

Unfortunately the *Succession Act* makes your estate available for control by your creditors; it delays the administration of your estate and makes the administration of your estate more costly.

Your affairs are no longer determined by you bit are controlled by the S*uccession Act*.

WHO ADMINISTERS THE ESTATE?

The court allows an intestate estate to be administered by a spouse or a party entitled to the estate.

This could include a next of kin, a creditor, an estranged son, daughter or spouse. The public trustee could also apply. The court gives priority to a spouse and next of kin, but a delay in acting or an inability or unwillingness to act may result in a creditor or another unwanted party applying to administer an intestate estate.

WHO IS ENTITLED TO THE ESTATE?

The *Succession Act* sets out a formula for who is entitled to receive the assets of an intestate estate. Below is a table setting out whom the beneficiaries will be and the percentage of the estate to which they are entitled. Priority is given to spouses and children, and then the next of kin.

A spouse for the purpose of the *Succession Act* includes an estrange spouse and it also includes a de facto spouse, therefore if you are separated but not divorced then your estranged spouse will have an entitlement to your estate. A de facto spouse means a person you are living with as a couple on a genuine domestic basis to whom you are not married or related by family and with whom you have lived for at least two years ending on the date of death. The sexual orientation of the parties is irrelevant.

For the purposes of the *Succession Act* you could have two spouses – your estranged spouse and your de facto spouse, both of whom are entitled to make a claim against your estate, as described in the table below.

No. of Spouse	No. of Children	Entitlement
1	0	Spouse entitled to 100% of estate.
2	0	50% of the estate to each spouse.
1	1	Spouse entitled to $150,000 + household chattels + 50% of the residue of estate. Child entitled to 50% of the residue of estate.

No. of Spouse	No. of Children	Entitlement
1	2+	Spouse entitled to $150,000 + household chattels + 1/3 of residue of estate. Children are entitled to share in 2/3 of the residue of the estate,
2	1	Each spouse entitled to $75,000 + half household chattels and ¼ residue of the estate. Child entitled to ½ of residue of estate.
2	2+	Each spouse entitled to $75,000 plus half household chattels and 1/6 residue of the estate. Children are entitled to 2/3 of the residue of the estate.
0	1	Child entitled to 100% of estate.
0	2+	Children to share in the estate in equal shares.
0	0	The parents of the deceased entitled to 100% of the estate.
0	0	If no parent, then equally between the surviving brothers and sisters of the deceased, or if the brother or sister has predeceased leaving children then the deceased's siblings share to go equally between their children.
0	0	If no siblings and no children of siblings then to the grandparents in equal shares.
0	0	If no grandparents then to uncles and aunts of the deceased. If an uncle or aunt predeceases the deceased then their share to their children (the deceased's cousins) in equal shares.
0	0	If no uncles, aunts or cousins then 100% to the Crown.

As can be seen from this table, dying without a Will can result in your assets being distributed to people you would not choose as your beneficiaries, and in a fixed and inflexible manner.

DELAY

The administration of an intestate estate is delayed to enable proof of debts and entitlement to the estate to be established. Some of these delays are enshrined in law, for example, where a transmission of land application is lodged with the Department of Natural Resources and there is no grant of administration in Queensland then such an application can't be lodged until six months after the date of death if the estate is valued at less than $300,000. If a Will exists there is no such delay.

Some of the delays are as a consequence of the more cautionary approach taken when dealing with intestate estates. Especially instructions insist a grant of administration to be shown before allowing assets to be distributed or transferred. Typically banks will release funds if the bank account holds less than

$20,000 and a Will and a death certificate are provided. Without a Will a bank will require the production of a grant of administration.

COSTS

Costs to be married in the obtaining of a grant of administration include:

1. Advertising in the paper;
2. Court filing fees;
3. Legal fees.

Generally, they run into the thousands of dollars.

As described above, some institutions will not transfer title in an asset without a grant of administration where there is no Will. This refusal to act without a grant is based on a refusal to take the risk of transfer rig an asset without the legal requirement to do so. In the absence of a grant of administration no-one has a legal standing to deal with the assets. The institution could be liable to disappointed beneficiaries if they allow a party without a legal right to deal with the assets. Other institutions who won't deal with assets without a grant of administration are:

1. Public companies;
2. Department of Natural Resources if the estate of the deceased has a value which exceeds $300,000;
3. Life insurance companies;
4. Superannuation funds.

Accordingly, where the need to apply for a grant is necessary due to the absence of a Will, the estate administration costs will increase and the process for the administration will be substantially delayed.