

A QUICK GUIDE TO INTESTACY

Dying without a will means you are "intestate" and the situation is called an "intestacy". To avoid complete limbo, the law imposes rules on the division of your property, which are rigid, impersonal and inflexible. Unless assets are held jointly in such a way that your co-owner inherits automatically, the rules may mean your nearest and dearest doing rather worse than you intend, as well as unnecessarily paying more tax.

Your spouse and your estate

If you die without a will, your husband or wife will not necessarily inherit your assets. They would only get all your assets if you died without leaving any surviving descendants, parents, brothers/sisters or nephews/nieces (or their children). If any of those family members survive you, the following rules will apply.

Surviving spouse and children

In this case, your spouse would take:

- ◆ your "personal chattels": jewellery, furniture, cars, paintings, etc., but not including items you used in a business;
- ◆ a "statutory legacy" of £125,000;
- ◆ the right for life to live off or enjoy half of the rest of your assets.

The life interest in half of the rest of your estate allows your spouse to take the income or use the assets (e.g. live in a house) but not to sell the assets or spend the capital. This could leave them in a precarious financial position - usually, half of what is left does not produce much income; it may be a serious financial handicap not to be able to get hold of the capital.

Your children would get:

- ◆ the other half of the remainder split between them;
- ◆ the first half in equal shares when your spouse dies.

In both cases they would inherit at 18 (or when they marry, if under 18). Therefore your children have not only inherited assets your spouse might need for his or her own financial security, but have done so at a relatively early age; you might well have preferred to delay their inheritance to, say, 21 or 25. You might equally prefer them not to inherit outright, but rather in trust, to delay until they are a little older and settled in life.

Surviving spouse and parents, brothers/sister or their children

If you did not leave children, your spouse would get:

- ◆ your "personal chattels";

- ◆ a "statutory legacy" of £200,000;
- ◆ half of the rest of your estate outright.

The statutory legacy is larger, and half the remainder comes to your spouse outright. But the other half will pass to your parents - or, if they don't survive you, to your brothers and sisters (their children can take if one of them has died before you). Only if there were none of these blood relatives would your spouse take everything.

Our experience is that where clients are married with no children, they would prefer their spouse to take the whole of their estate rather than part of it to be parcelled out amongst their relatives. However, that is not how the rules work.

Other family members

If you die without a will and you aren't married (because you have never married or because you are widowed or divorced), your assets will go to any children you have, when they reach 18 (or marry earlier) - if one of them has died before you, their children take that share. Again, you might not want them to inherit so early, or outright.

If you don't have any descendants, your estate will be divided between surviving relatives and there is a strict 'pecking' order which determines precisely where your assets will go.

Should all the above fail, your estate will pass to the Crown, the Duchy of Lancaster or the Duke of Cornwall - so it goes to the government, not to any of your friends or to a charity you might have wanted to benefit.

Unmarried partners

The intestacy rules only take notice of spouses and close, usually blood relatives. A partner to whom you are not married is not treated like a spouse, and doesn't get any benefit under the rules. A partner has to apply to the court under the Inheritance (Provision for Family and Dependents) Act 1975 - even this is only possible if you have been cohabiting for at least 2 years - if they can't come to an agreement with the family members who are in line to take your assets under the rules.

This is a complicated and uncertain process, because the court has to weigh up a number of factors, such as your partner's financial needs and your moral obligations towards them - the sort of things you would take into account far more simply and cheaply in making the will. It also sets your partner against the rest of your family who would otherwise get your assets. Making a will would avoid much of this unpleasantness.

Basic tax

Broadly speaking, on death your estate is taxed at 40% on all the assets you leave, subject to two major exceptions in particular:

- ◆ anything you leave to or in trust for your spouse is usually not taxed;
- ◆ assets falling within the "nil rate band", currently £275,000 less big gifts made within 7 years of your death, are not taxed.

If you are married, it often makes good sense for you to pass assets equal to your nil rate

band at death to your children (or others), and leave the rest of your property to your spouse - thus incurring no inheritance tax. However, the intestacy rules do not take account of this. For example, if you have a large estate, a substantial sum could pass to your children on death. That leaves them with a large inheritance tax bill which could at least have been deferred until your spouse died.

Even though most people think that assets should be passed down to younger generations, the rules can allow your parents to inherit, passing them up a generation. This can lead to a double inheritance tax charge when your parents in turn pass them down. If you died intestate survived by your spouse and your father, say, then your father would get half of the remainder of your estate (after deducting personal chattels and the £200,000 statutory legacy). Any excess of that over the nil rate band would be taxed at 40%, and on your father's death it could form part of his estate and could be taxed again along with it.

If you had made a will passing to your spouse (perhaps subject to a legacy equal to the nil rate band to another recipient) it would all be exempt from inheritance tax on your death. The inheritance tax bill would be deferred until your spouse's death and would occur just once, not twice.

Am I intestate?

You are intestate if you do not have (for one reason or another) a valid will which applies to all your property. Broadly speaking, your will can cover all property except any held in trust (which will pass in accordance with the rules of the trust) or held "as joint tenants" (which will pass to the surviving joint tenant/s) - as opposed to property held "as tenants in common", where you have an identifiable share of the property.

Intestacy can arise not only where you fail to make a will at all, but also where you have attempted to make a will which is invalid or have made a will which doesn't cover all your property in all circumstances. This could occur if you did not comply with the formalities for signing a will, e.g. you did not sign in the presence of two witnesses or have got married since the will was made.

Summary

Making a will ensures that your assets will be given away as you intend, rather than leaving this up to a set of inflexible rules which divide your estate rigidly between your spouse and your blood relatives - or the State - taking no account of anyone else, such as a partner, friends or charities. It also means that you can select your executors - the people who will take control of your assets after your death and administer your estate. The administrative formalities of dealing with your assets are more straightforward for executors than if you are intestate.

A competent adviser will also ensure that full account is taken of inheritance tax which could be payable on your death, and that this is kept as low as possible.

In order to avoid dying intestate, we strongly recommend that you:

- ◆ make a will;
- ◆ follow exactly the instructions you are given for signing and dating it; and
- ◆ keep it under review at regular intervals - say every five years - so that it does not become out of date or let intestacy in "by the back door".

This note is intended to provide general information about Intestacy. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

If you would like any further information or specific advice please contact Nick Mills or Karen O'Brien.

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