## *Court Decision*

If a person dies without a will, the law says that their assets will be distributed to their family, as determined by a set formula (the 'intestacy' rules). The set formula is different in every Australian jurisdiction. There are a range of issues which will determine which jurisdiction's rules will apply.

The intestacy rules will also apply where a person dies without a valid will in relation to all of their assets. In this regard, it can in fact be possible to die 'partially intestate'. This simply means that there are assets in a person's estate that are not validly dealt with under the will in place at a person's death.

The following summary gives a broad example of the way in which the intestacy rules often work. If a person dies leaving:

(1) their spouse, but no children: their spouse receives everything;
(2) their spouse and children: their spouse receives the first $150,000 and one half of the balance of the estate if there is one child, or one third of the balance if there is more than one child. The deceased's children share the balance between them;
(3) children but no spouse: their children receive a share each, but only if 18 years of age or married;
(4) no spouse or children: the person's parents will share the estate (if both are alive then equally);
(5) no spouse, no children and no parents: their siblings share equally.

A spouse includes a legal and de facto spouse.

The amount received by each person will depend on the value of the estate and whether any other beneficiaries are entitled to the assets of the deceased.

If the person does not have any family members who qualify, then the assets may pass to the government.

It is necessary that someone apply to the court to be appointed as the administrator, to ensure that the person's estate is properly administered. This normally adds time and significant extra costs to the administration of the estate.

If the deceased has young children and a guardian is needed, an application to the court may also have to be made.

It is important to note that a person can in fact be possible to die 'partially intestate'. This simply means that there are assets in a person's estate that are not validly dealt with under the will in place at a person's death.

The intestacy rules are subject to other legal principles, perhaps most starkly demonstrated by the difference between owning something as joint tenants and tenants in common.

Practically, the distinction normally becomes most relevant at times when it is too late to implement a change – for example on death, litigation or relationship breakdowns.

Owning an asset as a joint tenant means the rule of 'survivorship' applies. This is because no owner owns a specific 'share' in the asset, rather all owners own the asset together, and the last surviving owner will own it absolutely.

In contrast where an asset is owned by two or more parties as tenants in common, each party has a discrete defined share in the asset.

This means, if an asset is owned (for example) 99% by one spouse and 1% by the other spouse it must be owned as tenants is common. This strategy is most often implemented where one spouse is 'at risk'

The main reasons that an at-risk spouse would retain a nominal percentage interest can include:

(1) Protection against spouse or relationship difficulties.

(2) Protection against the majority owner seeking to encumber the property. In particular, if there is (for example) a gambling issue that arises, no mortgage may be taken out over the property without the consent of the spouse who owns the nominal interest.

(3) For ease of security arrangements – often a financier will prefer to see the at-risk spouse's name on title documentation, even if their actual ownership interest is nominal.

(4) Stamp duty savings. This issue is not as relevant as in days gone by because generally there is no longer any substantial stamp duty benefit, even if both spouses retain an interest in the property.

In relation to stamp duty, it should be noted that in most states there are concessional provisions which apply where one spouse who owns 100% of a family home and transfers 50% (but no more or less) to their spouse, although the stamp duty concession will apply to either a joint tenancy ownership or tenants in common, as long as if it is tenants in common it is in equal shares (ie 50% each).

In an estate planning exercise it is critical to understand all aspects of the way in which property is owned jointly between parties.

One stark example of this, and an area where confusion often arises, relates to land owned registered on title as being owned as joint tenants is a partnership asset. In this instance, the asset it will be deemed in fact to be effectively owned as tenants in common.

If this deeming rule applies then the death of a partner essentially causes the value of their interest to pass under their will, and not by survivorship to the other owners.

The Partnership Acts in most states codify the rules in this regard. These rules generally state that unless the contrary intention appears, property bought with money belonging to the partnership is deemed to have been bought on account of the partnership and is considered partnership property.

The rules in this area were perhaps best explained in the case of Spence v FCT [1967] HCA 32.

In this case it was relevantly held –

'It is … a mistake to say she got it simply by virtue of her joint tenancy. The legal estate devolved in accordance with the joint tenancy.

To that extent the maxim which was mentioned – 'ius accrescendi inter mercatores locum non habet' – does not apply: see Lindley on Partnership, 11th ed. (1951), p. 428.

But it is applicable in equity; partners who hold as joint tenants in law hold beneficially as tenants in common.

That is an old rule.

It is more exactly stated today in terms of the Partnership Acts (the relevant provisions are ss. 30 and 32 in the Western Australian Act) the legal estate devolves according to its nature and tenure but in trust so far as necessary for the persons beneficially interested; and as between partners land which is partnership property is to be treated as personal estate.'

The 'old rule' reference in the quote above comes from cases such as Lake v. Craddock (1732) 3 P Wms 158; 24 ER 1011.