

# Worrall Moss Martin News

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## The Risks of Dying Intestate (Without a Valid Will)

Who receives your assets when you die is determined by the terms of your Will. If you die without a valid Will, you die 'intestate' and your assets will be distributed in accordance the law that governs intestacy.

Each state and territory of Australia has different legislation governing intestacy. This means that the answer to the question 'who will receive my estate when I die?' is different in each jurisdiction.

**The Law:** Intestacy legislation is complex and cannot be easily summarised. Determining which law applies, and how your assets will be distributed, is dependent on many factors, including:

- where your assets are located, and whether those assets are moveable or immovable;
- where you were living when you died;
- whether you were married or in a de facto relationship when you died;
- whether you had living children when you died, and whether those children are the children of your current spouse or de facto partner; and
- if you had no spouse, de facto partner or children, who your next of kin is.



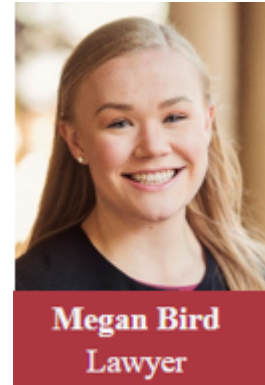
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**The Risks and Issues:** When you die intestate there are many issues that can lead to disputes and costly and drawn out litigation. Examples of these issues include:

- your assets are unlikely to be distributed in accordance with your wishes;
- your family members might not accept or recognise that you were in a de facto relationship;
- estranged family members may be entitled to your assets;
- the process that must be undertaken to administer your estate is more time-consuming, expensive and stressful;
- promises or indications you made about who is to receive your assets are irrelevant and unenforceable;
- you lose the ability to choose who will administer your estate, and (if applicable) who will be the guardians of your children;
- the ability to implement asset protection and tax minimisation strategies is lost, and could potentially lead to an overall imbalance in the distribution of your estate;
- assets may be held in a way that excludes them from the application of the law of intestacy (for example superannuation, trust assets and certain jointly owned properties and investment assets); and
- if you have no relatives who are entitled to your estate, it may go to the Crown (i.e. the Government). Interestingly in some jurisdictions, the base line now stops at cousins before the estate ends up with the Crown.



**Case Study - Tasmania v Queensland:** The following fictional case study provides an example of the differing laws of intestacy between Tasmania and Queensland.

- **Facts:** Raphael is in a relationship with Jane. Jane and Raphael have one child together, Mateo, who is five years old. Raphael owns a property valued at **\$700,000.00** (which he, Jane and Mateo live in); has savings in his bank account of **\$100,000.00**; owns a car; and has personal items.
- **Application if Raphael Died Without a Valid Will and Lived in Tasmania:** The provisions of the *Intestacy Act 2010* (Tasmania) apply with the effect that: Jane would receive the property, the savings in the bank account, the car and the personal items.
- **Application if Raphael Died Without a Valid Will and Lived in Queensland:** The provisions of the *Succession Act 1981* (Queensland) apply with the effect that: Jane would receive the personal items, assets to the value of **\$150,000.00** and half of the balance value of the estate. Mateo is entitled to the other half of the balance of the estate.

This case study is a simple case study. In circumstance where there are blended families and minors entitled to a share in the estate, the circumstances are much more complicated and the rights of other family members are much more difficult to determine.

**Key Points:** It is vital that you have a valid, and up-to-date, Will in place to avoid the issues raised above. It is also important that you:

- are aware of how the law operates, and seek legal advice if you are concerned about how your estate will be distributed on your death and whether your loved ones and family

members will be provided for in the way that you would like;

- update your estate planning documents regularly to avoid leaving your loved ones and family members in a position where they need to rely on intestacy provisions (or the decision of a Court) to determine how your estate is distributed; and
- seek legal advice if you are concerned about the estate of a family member or loved one that has died intestate, or if you are concerned that someone intends to make a claim against a family member or a loved one's estate.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. Please contact us if you, or your client, need expert advice and guidance about completing a Will or the administration of the estate of a person who died without a Will.

## Maintenance of Nature Strips - Am I Responsible?



We often have clients ask us 'who is responsible for the maintenance and upkeep of a nature strip?' The answer to this question is not simple, because each council in Tasmania has a different view.

**What is a Nature Strip?** The nature strip is an iconic feature of many Tasmanian streetscapes. A nature strip is generally a piece of publicly owned land between the front boundary of a house or other building and the street, typically planted with grass and trees. Nature strips often accommodate infrastructure for utilities like telegraph poles and street furniture including seats, rubbish bins and lighting.

**Who Owns the Nature Strip?** Nature strips are the property of local governments and councils.

**Who is Responsible for the Maintenance and Upkeep of Nature Strips?** Councils and residents often disagree about who is responsible for the maintenance and upkeep of nature strips. In many cases the onus for maintenance is placed on residents. The position of most Tasmanian councils is that:

- residents (who live in nearby properties) are encouraged to, or have the responsibility to, maintain nature strips (some Councils consider this as a 'civic duty' of residents);
- on request, and where local residents are frail or unable, the Council may provide assistance to maintain nature strips; and
- the maintenance, removal and upkeep of trees and the removal of hazards is the responsibility of the local council.

**What Restrictions are there in Relation to Nature Strips?** Development works that concern nature strips (including driveways, developing and landscaping) may require a permit from, or approval by, your local Council. Restrictions also exist in what gardening and development of nature strips can be undertaken. Restrictions may exist that: insist on no plants being planted within a metre of the kerb and within two metres of the footpath; restrict plantings by height; only allow plants indigenous to the local area; or only allow planting to prevent erosion on steep slopes.

Worrall Moss Martin Lawyers has specialist skills and experience in property law. If you have a question about the maintenance or development of a nature strip, or if you require assistance in maintaining a nature strip, we encourage you to contact your local Council. If there are any matters that Worrall Moss Martin Lawyers can assist you with, please contact us.

Links to several Tasmanian Councils, containing specific information about nature strips, are provided below:

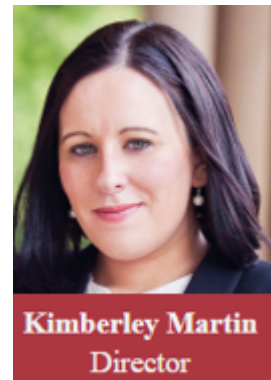
- Hobart City Council - <https://www.hobartcity.com.au/City-services/Vegetation-management-programs> and <https://www.hobartcity.com.au/City-services/Road-and-footpath-assets/New-vehicle-crossings>;
- Glenorchy City Council - <https://www.gcc.tas.gov.au/residents/living-in-glenorchy/nature-strips.aspx>;
- Clarence City Council - <https://www.ccc.tas.gov.au/living/home-property/nature-strips/>;
- Kingborough City Council: <https://www.kingborough.tas.gov.au/services/planned-works/footpaths-accesses/>; and
- Derwent Valley Council <https://www.derwentvalley.tas.gov.au/page.aspx?u=681>.

## What is a 'Memorandum of Wishes' or 'Letter of Wishes', and How They Can Assist Your Loved Ones and Advisors After You Die?

A memorandum of wishes (sometimes referred to as a letter of wishes) can be an important part of an estate plan as it enables you to provide non-binding guidance to your family, attorneys, guardians, executors, trustees, or any other people affected by your incapacity or death.

**What can be Included in a Memorandum of Wishes?** There are many things that you may wish to include in a memorandum of wishes. What is included will depend on your circumstances, views and wishes. Some examples of things that may be included in a memorandum of wishes are set out below.

- ***Objectives of the estate plan:*** You may wish to set out the circumstances that existed when you completed your estate planning (including your Enduring Power of Attorney, Instrument Appointing an Enduring Guardian, Will and other related documents). This can include explaining:
  - why certain people have been appointed to controlling roles (including as attorneys, guardians, executors, trustees and other controlling roles);
  - why certain family members have not been included as beneficiaries;
  - why unexpected beneficiaries have been included;
  - the reasons for making certain gifts;
  - the history or significance of certain assets (for example heirlooms);
  - your intention and expectations of your family, the people appointed to controlling roles, and the beneficiaries of your estate; and/or



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- why a particular scheme was adopted within the Will (for example taxation benefits, asset protection or family law reasons).
- ***Guidance about the care of children:*** You may wish to provide guidance to the people you have chosen to be the Testamentary Guardians of your children in the event of your incapacity or death. This guidance may cover things like religion, accommodation, education, travel and visits with family members or friends (including those who are interstate or overseas). Where a child has special needs, a memorandum of wishes is particularly important, and should be used to set out wishes, guidelines and other important information about the care and guidance that you anticipate your child will need during their life.
- ***Guidance about the distribution of chattel contents:*** You may wish to provide guidance about the division and distribution of your personal chattel contents in a non-binding way. This allows your beneficiaries to take your wishes into account without being bound by the terms of your Will. Gifts of items with high value (either sentimental or monetary), or things which absolutely must go to particular individuals, should be included in your Will, but often a separate memorandum of wishes concerning personal possessions is a better arrangement where you have a preference, but recognise the need to allow your beneficiaries flexibility.

If specific directions are not made in your Will and no wishes are provided to your Executors, there is a risk that: chattels intended for particular a person may be sold; more forceful individuals could end up with the most valuable or important items; or items promised to one person may end up being given away to someone else. Those issues often give rise to upset and hurt family members, and can create disputes between your beneficiaries.

Problems can also arise if your Will itself contains a comprehensive list of possessions. For example, some items may have been lost, destroyed, stolen, sold, or given away prior to your death. It also increases the likelihood of needing to update your Will, and may make the administration of your estate more complex.

- ***Details of advisors:*** You may wish to provide the details of advisors or other people that your Executors and/or Trustees should speak with. You may also wish to provide your views about what types of professional assistance you believe will be important (for example accountants, financial advisors or stock brokers).
- ***Guidance to Trustee:*** You may wish to provide guidance to the Trustees of any Testamentary Discretionary Trusts set up in the Will or the Trustees of any existing Trusts. This can include explaining your wishes about:
  - how distributions of income and/or capital of the Trusts should be applied (or not applied);
  - when your children should be brought on as additional Trustees and/or Protectors of the Testamentary Trusts;
  - when your children should be given the option of becoming sole Trustees and/or Protectors of the Testamentary Trusts; and
  - wealth training for your children (for example that the Trustee, to the best of their ability, ensure that the Willmaker's children undertake training, counselling and education in wealth management prior to becoming Trustees).

**Are the Directions/Wishes Set Out in the Memorandum of Wishes Binding?** No. A memorandum of wishes is not, and should not state that they are binding.

**Should I Reference the Memorandum of Wishes in My Will?** A memorandum of wishes should



not form part of the Will itself, and should not be referred to in the Will. If the Will refers to your memorandum of wishes, a Court or Probate Registry may require it to be produced as part of the Application for a Grant of Probate.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. Please contact us if you have any questions about memorandums of wishes or estate planning generally.

## Our Lawyers



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## Further Information

### Our Website

A wealth of information in relation to estate and commercial matters can be found at our website [www.pwl.com.au](http://www.pwl.com.au)

### Contributions

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at [info@pwl.com.au](mailto:info@pwl.com.au)

### Caution

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