Succession – Notes + Scaffolds

Table of contents

Topic 1: Intestacy law in NSW 2
Topic 2: Formal Wills 12
Topic 3: Mental elements 16
Topic 4: Statutory wills 19
Topic 5: Informal wills, changing and revoking wills 22
Topic 6: Gifts by will 28
Topic 7: Jurisdiction of probate Court 32
Topic 8: Grants of representation 36
Topic 9: Powers and Duties of LPRs. 40
Topic 10: Administration of solvent estates. 45
Topic 11: Family provisions 50
Succession scaffolds 55

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Topic 1: Intestacy law in NSW

Key cases/legislation

Case name

Succession Act 2006 (NSW)

Main concept

These notes provide a detailed overview of intestacy law in New South Wales, drawing on key legislation, case law, and practical considerations for legal professionals.

Introduction

Definition: Intestacy arises when a person dies without a valid will that effectively disposes of all or part of their property (*s 102, Succession Act 2006 (NSW)*).

Terminology and definitions:

Total Intestacy
Occurs when no will exists, or the existing will is entirely invalid (e.g., due to lack of testamentary capacity or proper execution), or the will is valid but fails entirely (such as all beneficiaries passing before the deceased and there being no substitutional beneficiaries).

Intestate: A person who dies without a valid will (*s 102, Succession Act 2006 (NSW*)).

Partial Intestacy
Arises when a valid will exists but fails to dispose of all assets (e.g., the will fails to effectively dispose of the residue of the estate, or a specific gift lapses).

Relevance of Date of Death
The date of death dictates the applicable intestacy laws. Chapter 4 of the *Succession Act 2006* (NSW) applies to estates of individuals dying intestate on or after 1 March 2010.

Domicile
The deceased's domicile (permanent place of residence) is crucial for determining which jurisdiction's laws govern the distribution of assets.

- *Lex domicilii:* Governs movable (personal) property.
- *Lex situs:* Governs immovable (real) property.

Administrator: The individual appointed by the court to manage and distribute the intestate estate.

Grant of representation/grant of letters of administration: If someone dies without a will, they die intestate and without an executor, so the court must appoint an administrator to legally represent the estate.

Issue: Child of deceased.

Personal Effects: Tangible personal property of the intestate, excluding:

- Property used exclusively for business purposes.
- Money in the bank, banknotes or coins (unless part of a collection).
- Property held as an investment or hedge (e.g., bullion).

What is in the estate:

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- Personal effects
- Real property (depends)
- Money in the bank
- Investments etc

What is not in the estate (therefore not available in intestacy calculations):

- Superannuation
- Property held as joint tenants as per rule of survivorship.

Legislation

Governing Law: Primarily *Chapter 4* of the *Succession Act 2006 (NSW).*

While efforts have been made to harmonise succession laws across Australian states, jurisdiction remains state-based.

Key legislation

Succession Act 2006 (NSW):

- Chapter 4: Deals specifically with intestacy rules.
- Chapter 3: Addresses family provision claims, which can alter intestate distribution.

Probate and Administration Act 1898 (NSW):

- Section 63: Specifies who may apply for letters of administration in an intestate estate.
- Section 92: Notice of Intended Distribution

Trustee Act 1925 (NSW):

- Section 63: Provides for judicial advice to trustees (including administrators) on matters relating to the administration of the estate.

Interpretation Act 1987 (NSW):

- Section 21C: Defines "de facto relationship," a key factor in determining spousal entitlements.

Uniform Civil Procedure Rules (UCPR):

- Rule 54.3: Governs next-of-kin enquiries, enabling the court to determine rightful beneficiaries.

Influential Legislation:

- *Adoption of Children Act 1965:* Governs the rights of adopted children in intestacy. S95: Adopted children essentially have the same rights.
- *Children (Equality of Status) Act 1976:* Removes legal distinctions between legitimate and illegitimate children for succession purposes, ensuring equal inheritance rights.
- *Property (Relationships) Act 1984 (amended 1999*): Recognises the rights of de facto partners in property matters, impacting entitlements in intestacy.
- *Succession Amendment (Intestacy) Act 2006:* Amended intestacy rules, aligning them with contemporary social norms.

Initial Administrative Steps

1. **Confirm Death and Date of Death:** Obtain the death certificate and verify the date of death, as this dictates the applicable intestacy laws.

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Succession scaffolds

Intestacy

Issue

Identify precisely who is entitled on intestacy and in what shares, and any threshold issues (e.g., survivorship, spouse status incl. *de facto*, multiple spouses, non-estate assets, Aboriginal intestate scheme, family provision overlay).

"On **[date]**, **[Deceased]** died domiciled in NSW, leaving **[assets]** and **[relationships]**. The issues are:

(1) did **[X]** qualify as a **spouse** (married / domestic partnership / *de facto*)?
(2) Are other people entitled (issue etc)?
(3) any **multiple spouse** allocation?
(4) what are the **shares** under Ch 4?
(5) do **survivorship/parentage** rules affect entitlement?
(6) what sits **outside** the estate?
(7) any **Part 4.4 (Aboriginal)** application?
(8) any **family provision** risk?"

Rule

Work through the rules in the order below and cite as needed.

A. Thresholds: intestacy & survivorship

- Intestacy: intestate if no valid will or will fails to dispose of all property.
- 30-day survivorship: must survive the intestate by **30 days**; includes posthumous child who survives 30 days; exception if applying the rule would pass the estate to the State.
- Order of death uncertainty: presumption younger survives older (Conv Act s 35). *Re Plaister* applied the s 35 presumption.

B. Who is a "spouse"? *(s 104)*

A spouse is:
a) married to the intestate immediately before death, or
b) a party to a domestic partnership immediately before death.

Domestic partnership (s 105) = a **registered relationship** or a **de facto** relationship (**for 2 continuous years** immediately before death **or resulted in the birth of a child)**. Continuous = unbroken; must still exist right up to death.

De facto definition (Interpretation Act s 21C)

- A person is in a *de facto* relationship if they are **a couple living together** and **not married/related**; can exist **even if** one/both are married to or in another *de facto*/registered relationship.
- **Holistic factors (s21C(3))** to assess "relationship as a couple": duration; common residence; sexual relationship; financial (in)dependence; ownership/use/acquisition of property; mutual commitment; care/support of children; household duties; public reputation. **No single factor determinative.**

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