



[Disclaimer – The articles in this newsletter are information only and do not constitute legal, superannuation or financial advice]

In this edition we are focusing on INTESTACY

What happens when a person with diminished mental capacity dies without a Will?

A person who dies without a Will, dies “intestate”.

Many people with cognitive disability lack the requisite mental capacity to make a Will. However, during their lifetime they may have accumulated (or have been bequeathed assets from a Deceased Willmaker) that are held in their personal name.

We are often asked about how these assets are distributed after the person with a disability dies.

When a person dies intestate in Victoria, there are legislative provisions set out in sections 70J-70ZK of the *Administration and Probate Act 1958* (Vic) that determine who will receive the assets of the deceased person. These are called the “Rules of Intestacy”.

Very simply, an order of largely bloodline family relatives is established to take the estate. The order is in priority of who was the closest to the deceased person, as follows:

Spouse - If the deceased person died leaving a **spouse** and no children, or children with that spouse, the total estate goes to that spouse. If the deceased person leaves a spouse and children from a former relationship, or the deceased leaves multiple spouses (with or without children) the rules become more complex. You should seek legal advice in these circumstances.

Children/Grandchildren - If the deceased person died leaving no spouse but has children, the estate is divided equally among the children. If there is a predeceased child who left children (ie. Grandchildren of the deceased person) the share that would otherwise have gone to the deceased child goes in equal sub-shares to the grandchildren, and so on down the line until the entitlement is exhausted.

Parents - If the deceased person died without a spouse and without children, then their estate would go equally between any surviving parents.

Siblings – If the deceased person died leaving no spouse, no children, and no parents, then their estate would be divided equally between any surviving siblings. If there is a predeceased sibling who left children (ie. nieces / nephews of the deceased person) the share that would otherwise have gone to the deceased sibling goes in equal sub-shares to the nieces and nephews, and so on down the line until the entitlement is exhausted.

Nieces/Nephews - If the deceased person died leaving no spouse, no children, no parents, no siblings, but leaves nieces and nephews, then their estate would go equally between any nieces and nephews.

Grandparents - If the deceased person died leaving no spouse, no children, no parents, no siblings, no nieces and nephews, but leaves surviving grandparents, then their estate would go equally between any surviving grandparents.

Aunts/Uncles - If the deceased person died leaving no spouse, no children, no parents, no siblings, no nieces and nephews, no grandparents, but leaves aunts and uncles, then their estate would go equally between any aunts and uncles. If there is a predeceased aunt or uncle who has left children (ie. cousins the deceased person) the share that would otherwise have gone to the deceased aunt or uncle goes in equal sub-shares to the cousins, and so on down the line until the entitlement is exhausted.

Cousins - If the deceased person died leaving no spouse, no children, no parents, no siblings, no nieces and nephews, no grandparents, no aunts and uncles, then their estate would go equally between any cousins. If there is a predeceased cousin who has left children (ie. second cousins the deceased person) the share that would otherwise have gone to the deceased cousin goes in equal sub-shares to the second cousins, and so on down the line until the entitlement is exhausted.

The Crown – if the deceased person died leaving no bloodline relatives their estate passes to the Crown.

Understanding the rules of Intestacy often gives comfort to the parents of persons with a disability who are unable to make a Will but who will hold assets in their personal name at the time of death.

However, in limited circumstances this can lead to unfairness. Applying to the Supreme Court of Victoria for the making of a **Statutory Will** on behalf of the person lacking capacity may be an option to consider. This is an uncommon, expensive and complex option, and is often unsuccessful. The Court will only order that a Statutory Will be made in very limited situations.

If Duncan.Legal can assist you with advice in relation to intestacy or the making of a statutory Will, please do not hesitate to contact us.

Who administers the estate of a person who dies intestate?

Because there is no Will, there is no Executor that is appointed to look after the estate of a person who dies intestate.

Usually the closest living relative, or a person with a special interest in the estate of the deceased person, applies to the Probate Division of the Supreme Court of Vic for a **Grant of Letters of Administration**.

The appointment of an applicant is not automatic, and the Court determines who is the most appropriate person to be given authority to deal with the estate.

A Grant of Letters of Administration is a document that gives a person the legal authority to deal with all of the affairs of a deceased person who dies intestate. The person that is granted authority is thereafter called the “Administrator” of the estate.

These days, the Grant is issued in electronic form.

NOTE - It is VERY important that there be no dealings with any of the assets of a deceased intestate person until the Court has made the Grant of Letters of Administration. Dealing with any of the deceased person’s assets before this and without authority is called “intermeddling”.

Small estates

People who die intestate because of a cognitive disability often only leave a very small estate.

If the total value of the estate is less than \$129,850 (up to 30 June 2025) it is considered a “small estate”. This threshold amount is increased annually at the commencement of the financial year.

For a fee of \$269.40 the staff at the Probate Office will prepare the paperwork to obtain a Grant. The only other expense to the estate is an advertising fee of \$35.90 (prices current to 30 June 2025).

If a person has died intestate, that person’s next of kin (who would be entitled to share in the estate under intestacy rules) can take advantage of this service.

However, the small estates service is only available where the circumstances are straight forward. An unregistered domestic partner and previous power of attorney cannot apply.

Please see the information available on the Supreme Court website for more information about the process. <https://www.supremecourt.vic.gov.au/wills-and-probate/support/small-estates>

Additional Information in relation to a previous Newsletter article: **Newsletter 23 (October 2024)**

ID REQUIREMENTS

Turning 16 Years Passports

Applying for an adult Australian passport can be an arduous experience. The level of proof of ID is understandably high. Required identity documents must include a current photograph and a signature.

These ID requirements can be difficult to provide for an adult passport application if your loved one with a disability doesn’t have a driver’s license, any form of photo ID and/or does not have the ability to make their own signature.

It may be worth considering applying for a Australian Child’s passport before your child with a disability turns 16. The identity requirements are considerably reduced as it is acknowledged that it is unlikely that photo ID would be at hand for minors.

For more information on passports & ID requirements, visit the Australian Passport Office website.

Thanks to Yvonne C for sharing her experience when applying for adult passports recently.

Proof of Age Card (Vic)



If your adult child is over 18 years and does not have photo ID, there is the option in Victoria to obtain a Proof of Age Card. This card looks a lot like a driver’s licence and can be very handy when photo ID is required.

The card costs \$10 and the application form is available from participating Vic Roads offices, participating Australia Post outlets & some pharmacies.

For further details on Victorian Proof of Age Cards, visit this website: <https://www.vic.gov.au/proof-of-age-card>

Adult Proof of Age & Photo ID Cards are also available in other states. Search your state for details.

Special Disability Trusts

Obtaining Letter of Eligibility – some tips

Before declaring a Special Disability Trust for your loved one with a disability, Centrelink (Services Australia) must assess the person to be a beneficiary of a Special Disability Trust (“SDT”).

The assessment cannot be done in-branch, it needs to be initiated over the telephone.

You need to call Centrelink on **132 717** and request a call back from a **Complex Assessment Officer**. These are the three golden words to use.

Unfortunately, many call centre staff are unfamiliar with Special Disability Trusts. They put you on hold while they read from a script on their screen. Presently that script is incorrect. The call centre staff member may direct you to complete and lodge a MODSTD form. This instruction is wrong.

If you decided to set up an SDT, a MODSTD form will need to be completed and lodged at a much later stage in the process, after a Special Disability Trust Deed has been declared.

Following your initial telephone call, if 2 weeks have elapsed and you have not received a return telephone call from a Complex Assessment Officer, call again and really push the point. If another 2 weeks lapse with no call back, call again. Keep record of contacts as the foundation of a complaint.

Following 3 approaches to Centrelink and with no response, it is time to **launch a complaint**. Complaints generally are dealt with very quickly. We recently supported clients with their complaint and they received a call back 2 hours after lodging it.

It is possible to launch your complaint either inside your MyGov Centrelink account or outside of it. To initiate a complaint, search **Centrelink complaints**.

Once contacted by a Complex Assessment Officer you will work through the process of having your loved one assessed.

Your ultimate goal is to receive a letter from Services Australia outlining that your loved one is eligible to be a beneficiary of a Special Disability Trust.

Obtaining this letter is crucial, and will form part of your application for approval of a Special Disability Trust that you create either now or through your Will.

Thanks to Kylie B who recently received a response to her formal complaint following multiple unreturned call back requests. The Complex Assessment Officer that did call her back, confirmed the information she was provided with was incorrect and that this issue will be addressed in an upcoming team meeting and updated on the intranet as part of their internal procedures. Let's hope this is the case!

Please let us know your experiences. It is through feedback that we can continue to help others efficiently navigate this process.

Webinars

In 2025 Duncan.Legal is again offering the opportunity for specialist schools and disability organisations to host 1 or more of our very popular webinars.

Scheduled in the evenings with a start-time of 7pm, we invite you to host an evening packed with information on:

- **Disability Estate Planning** (approx. 1 hour plus question time); or
- **Special Disability Trusts** (approx. 45 mins plus question time); or
- **Supported Decision Making** (approx. 45 mins plus question time)

Our **Disability Estate Planning** webinar is designed for people that have disability in their family. The **Special Disability Trusts** webinar provides information for people with beneficiaries that have moderate to extreme ID and the **Supported Decision Making** webinar is for families of people over 18 with mild ID.

Our live **Supported Decision Making** webinar has recently been extended to include Supportive Guardianship & Administration information.

If your organisation or school would like to book one of our informative webinars, please get in touch.



Estate Planning Audit

Disability Estate Planning can be a complex and daunting undertaking for many families. To assist you to understand the complexities and to provide you with some options, Duncan.Legal offers all clients an Estate Planning (EP) Audit with the **first ½ hour of the first appointment free-of-charge**. This initial appointment can be held in person or via teleconferencing (Zoom).

At the end of the appointment, we can provide you with a written estimate of the cost to update your estate plans (Wills & Powers of Attorney etc). There is no obligation to proceed.

Take the first step in your Estate Planning or update your existing plans to better reflect your family's situation! To arrange your EP Audit, contact Lee on 9077 7731 or email leesmart@duncanlegal.com.au



Duncan.Legal Webinar Recordings

‘Disability Estate Planning’ Webinar	\$99.00 (incl GST)
‘Special Disability Trusts’ Webinar	\$99.00 (inc GST)
‘Supported Decision Making’ Webinar	\$99.00 (inc GST)

Click to visit our [Webinar Shop](#)

The cost of ordering our informative webinars can now be claimed under the training for carers line item on a participant’s **NDIS Plan**, however the training must be relevant to a participant’s stated goal that is funded.

Contact us to request an invoice/receipt - the relevant line item for our webinars is:

Capacity Building – Improved Daily Living – Other Supports

15_038_0117_1_3 Training for carers in matters relating to caring for a person with a disability

Note: NDIS will not fund Estate Planning advice or the preparation of Estate Planning documentation.



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We welcome your inquiry and will get back to you as soon as possible.



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