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Buy - Sell Agreements

▶ [Charlotta van Otterdyk | Special Counsel](#)

Where there's a Business Will there's a way ...

What will happen to your business when you die? Whether or not you actually get around to preparing one, most people agree that they should have a Will to ensure that their personal assets pass the way that they want them to. Have you thought about your business in the same way? If you died tomorrow do you know what the effect would be on your business?

You may have some provisions in your Will about shares or units but do they cover your business appropriately? Your Will is not always the appropriate place to deal with business succession issues.

What if your business partner died? Would you be happy to run your business with an Executor who may have no knowledge of your business or any business experience at all.

Passing an interest in the business (be it a share, unit or power of appointment) to a Legal Personal Representative or beneficiaries under your Will may be problematic. The surviving owner may not want the family of the a deceased business partner involved in the business. Equally, those beneficiaries may not wish to be involved in the business. While these issues are being sorted out, the business can be damaged and its value diminished.

Perhaps your business needs its own "Will"!

Buy/Sell Agreements

A Buy/Sell Agreement can operate like a "Will" for your business. It is an agreement which sets out what is to happen on the death, disability, or even retirement or other exit of a business owner. Although often called Buy/Sell Agreements they can also take the form of Unitholder or Shareholder Agreements.



They are appropriate for most business structures be they partnerships, companies or trusts.

Commonly, Buy/Sell Agreements include the following:

- The ability for a remaining owner to buy out the exiting owner's interest in the business
- The event which triggers the Buy/Sell option
- The price which is to be paid for the interest of the outgoing owner
- Alternatively, the mechanism for determining the price of the interest
- How an option is to be exercised and in what timeframe
- The interest which is being disposed of - for example, shares, units, partnership
- Who is to acquire the interest.

A Buy/Sell Agreement is often linked to an insurance policy which provides the remaining owner with the funds to buy out the interest of the outgoing owner. As with any estate planning issues, our experience has show that a little time spent dealing with these matters early can save a lot of time, money and angst later. ■

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Transfer of Real Property between Spouses: Stamp Duty by State

► Michael Norbury | Partner & Effie Alexopoulos | Lawyer

Transferring real property between spouses is a commonly utilised estate planning tool. For instance, a husband who is at risk of attack by his business creditors may prefer to transfer his real property to his wife away from attack. Unfortunately a transfer of real property between spouses may attract stamp duty.

The following table sets out the stamp duty concessions available on the transfer of real property between spouses, where there is no marriage breakdown.

The location of the real property, not the residence of the spouses, determines whether the concession is available.

Thus, a Queensland same sex couple will be able to transfer part or the whole (at their choice) of their Victorian holiday house between them duty free, whereas they cannot transfer their Queensland principal residence between them duty free.

| Jurisdiction | Relationship | Property covered | Which transfer? |
|---|--|------------------------------|--|
| Victoria s 43 | Marriage and domestic relationship | All dutiable property | From one to other, from two to one; from one to both regardless of amount of consideration |
| New South Wales s 67 | Married and de facto couples | Principal place of residence | Property will be held as joint tenancy or tenancy in common in equal shares as a result of transfer. Applies regardless of amount of consideration |
| Tasmania s 55 | Marriage, significant relationship, caring partners | Principal place of residence | As for NSW |
| Western Australia s 97 | Marriage and de facto of two years standing | Principal place of residence | Transferor must be sole owner, otherwise as for NSW |
| South Australia s 71CB | Spouses, former spouses, domestic partners, former domestic partners | Principal place of residence | As for Victoria. Applies regardless of consideration |
| Queensland s 151 | Married and de facto couples | Principal Place of residence | Property will be held as joint tenancy or tenancy in common in equal shares as a result of transfer. Applies only to gifts |
| Northern Territory Item 7, Schedule 2 | Spouses | Principal Place of residence | Property will be held in equal shares as a result of transfer. No consideration for transfer |
| Australian Capital Territory s 72 Fixed duty of \$20 | Spouse or person with whom transferor has a domestic relationship | Principal Place of residence | Transfer must result in property being held as: <ul style="list-style-type: none">• joint tenants;• tenants in common in equal shares;• tenants in common in shares in proportion to contribution; or• tenants in common in proportions prescribed by regulations |



Preparing an Executor's Envelope

▶ **John Currie | Consultant | MacDonnells Law**

One thing a willmaker can do to simplify the Executor's task, is to leave an envelope containing some basic information. This should save substantial time, effort and cost.

The information left to the Executor varies according to the complexity of the willmaker's affairs – greater complexity requires more information.

The method of preparing the information is largely a matter of personal taste. Some people prefer to complete a comprehensive questionnaire, some a checklist, others may simply write a letter.

An Executor's envelope should be kept in a safe place, with a copy being held in another location.

Alternatively, forward a copy to the Executor marked "Not to be opened until death"

The envelope may be prepared quite informally, but should be updated regularly as circumstances change (e.g. change banks).

The sort of information that will be helpful to your Executor may include the following:

1. Copy of your Will (and any Codicils).
2. Contact details of your advisors including:

Your accountant who will need to deal with your tax for the period prior to your death.

Your solicitor who may be holding important documents or be involved in the conduct of other matters.

Your stockbroker so that your shareholdings may be readily traced.

Your Financial Planner, who may have details of your superannuation arrangements and perhaps details of your insurances.



Your banker to transfer accounts from your name to your estate. Also there may be loans to be repaid either from cash resources or from asset sales.

Your real estate agent or property manager.

3. Details of any trusts or companies that your Executor should be aware of. In some case it may be useful to have copies of trust Deeds or other records placed in your Executor's envelope.
4. List of bank or credit union accounts and term deposits.
5. Insurance details – especially any life policies.
6. Superannuation details – either SMSF or details relating to your fund membership(s) such as member numbers.
7. List of what you own and what you owe to ensure that investments are not overlooked. This should also specify relevant debts (eg details of mortgages over properties).
8. Details of any other arrangements that your Executor needs to know about (eg leases on rental properties, shareholders agreements or cross buyout arrangements that may be triggered on your death and which your Executor may need to complete).
9. Details of any personal guarantees that you may have signed – eg directors guarantees in support of hire purchase agreements or to landlords for premises or other third parties. Some guarantees may be extinguished on your death, others may continue as contingent liabilities.
10. Any other informal instructions or wishes that you may have. ■

John Currie is a Consultant with MacDonnells Law, Cairns Office, in the areas of estate planning, superannuation, wills and tax. A Meritas firm in Queensland, MacDonnells Law provides commercial and litigation advice throughout Queensland with offices in Townsville, Cairns and Brisbane. For more information about MacDonnells Law, view their website: www.macdonnells.com.au



Dying Without a Will - new intestacy laws in New South Wales



▶ [Sandra Rocha](#) | Senior Associate | [Swaab Attorneys](#)

Intestacy

A person who dies without a will is said to have died intestate.

New legislation

New South Wales (with effect from 1 March 2010) has amended its Succession Act ("the Act") to incorporate new laws relating to the distribution of intestate estates.

The changes were initiated after the result of two surveys by the New South Wales government: one showed that 75% of people who have a will leave everything to their spouse, while the other showed that 54% of people in New South Wales did not have a will.

Spouse entitlements

The main changes affect the rules relating to spouses. A "Spouse" now includes a married person or domestic partner. A "Domestic Partner" may be someone of the same or opposite sex.

The Act also makes provision for multiple spouses of the intestate. "Multiple spouses" is defined as meaning more than one spouse; a person may be married and have one or more domestic partners all at the same time.

Where there is only one surviving spouse and the only children are from the relationship with that spouse, the spouse will be entitled to the whole of the estate.

If there are children from a previous relationship, the current spouse receives \$350,000 (increased by CPI annually), the deceased's personal effects plus half of the residue (if any) of the estate. The children from the previous relationship receive the remaining half of the residue.

Where there are multiple spouses, there is provision for the multiple spouses to enter into a written agreement to share the estate, or in the absence of an agreement, for the distribution of the estate to be decided by the courts.

Other changes

1. Cousins will now be included in the potential beneficiary pool if there are no closer relatives.
2. Upon application to the Court, the estate of an intestate indigenous person can be distributed pursuant to the laws, customs, traditions and practices of the indigenous deceased person as opposed to the general intestacy laws.
3. Where the deceased has no living relatives entitled to the whole estate, an organisation such as a charity may apply to the court to be included in the distribution of the deceased's estate, where the organisation reasonably believes that the intestate would have made provision for that organisation, had a will been in existence.

Conclusion

The new provisions are highly technical and significantly alter the practice and procedure in New South Wales relating to the distribution of estates on intestacy or partial intestacy. ■

Sandra Rocha is a Senior Associate with Swaab Attorneys, in the areas of estate planning and private client services. Sydney Meritas firm Swaab Attorneys provides commercial and litigation advice throughout New South Wales. For more information about Swaab Attorneys, view their website: www.swaab.com.au

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