

THE INTESTACY RULES

This chapter aims to introduce you to the basic principles of intestacy – when someone dies without having made a valid will or a will which did not dispose of the whole of his estate.

8.1 TYPES OF INTESTACY

8.1.1 Total Intestacy

A **total intestacy** occurs where a person dies without having effectively disposed of his property by will (i.e. *he either did not make a will, or he did make a will but not a valid one, or he revoked his will*).

8.1.2 Partial Intestacy

A **partial intestacy** occurs where a person dies having made a valid will, but the will does not dispose of the *whole* of his estate (e.g. *if the will contains no residuary gift, or where there is a gift of residue but this has wholly or partially failed – such as where a residuary beneficiary has predeceased the testator and there is no effective substitutional gift*).

8.1.3 Distribution of Assets on Intestacy

Where a person dies wholly or partially intestate and leaves assets which are capable of being left by will, those assets will be distributed according to the rules contained in Part IV of the Administration of Estates Act 1925 (AEA).

For example, A's will leaves his estate to B and C in equal shares. B predeceases A and so the gift to him lapses. When A dies, C will receive his half-share under the will, while the other half will pass under the AEA to those entitled on A's intestacy.

8.2 ORDER OF ENTITLEMENT TO THE ESTATE

8.2.1 Overview and Definitions

Section 46 of the AEA (as amended by the Inheritance and Trustees' Powers Act 2014) applies a strict order of entitlement upon intestacy.

A surviving spouse or civil partner takes everything, *unless* there are issue (children, grandchildren etc.), in which case the issue may also be entitled.

If there is no surviving spouse or civil partner, the order of entitlement is set out differently (see the paragraph “No Surviving Spouse”, below).

Definitions

'Issue' – includes all children and remoter descendants of the deceased, whether legitimate, legitimated (e.g. adopted) or illegitimate (*Thurlow, Riddick and another v Kennard and others* [1972] Ch 379). Stepchildren of the deceased are not issue unless adopted.

'Spouse / Civil partner' – the person to whom the deceased was married or in a civil partnership at the time of their death, regardless of whether or not they were living together. A same-sex spouse has the same rights as an opposite-sex spouse. A divorced spouse, or dissolved civil partner, is excluded. Note, a cohabitee has no rights under the intestacy rules.

8.2.2 Surviving Spouse / Civil Partner with Children

Where there is a surviving spouse/civil partner **and** issue, *no other family members are entitled* other than the intestate's widow and children.

Spouse's/civil partner's entitlement

Where the net estate is not more than £322,000 ('statutory legacy'), everything goes to the surviving spouse/civil partner.

Where the net estate is over £322,000, the spouse/civil partner will receive:

- the personal chattels absolutely (not including items used solely or mainly for business purposes, e.g. a car used primarily for business purposes and only occasionally for private purposes would fall outside the definition);
- £322,000 free of tax and costs, with interest from the date of death until the legacy is paid ;
- half of the residue.

It should be noted that for deaths occurred after 1 January 1996, the spouse (or civil partner) must survive by a specified period of at least 28 days beginning with the day on which the intestate died in order to be entitled to inherit under the intestacy rules. If the spouse dies within that time, they are treated as having not survived the deceased. The next class of beneficiary becomes entitled, for whom there is no survivorship period.

Definitions

'Personal chattels' – are defined in s. 55(1) (x) of the AEA as tangible moveable property, other than any such property which:

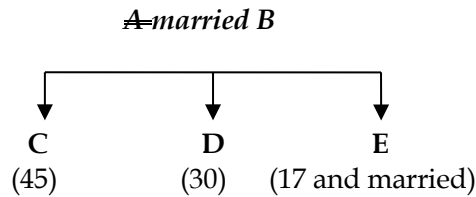
- (i) consists of money or securities for money; or
- (ii) was used at the time of death of the intestate solely or mainly for business purposes; or
- (iii) was held at the date of death of the intestate solely as an investment.

Issue's entitlement

The 'issue' are entitled to the remainder of the estate on the 'statutory trusts' defined in s. 47 of the AEA, which states that an issue's share will be held in trust on a per stirpes basis (see below) until they attain the age of 18 or get married (or enter into a civil partnership), whichever happens first. At such point, they will receive their inheritance.

Example 1:

A dies intestate leaving the following relatives:



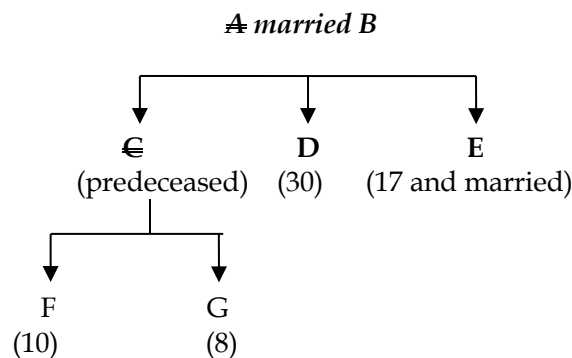
B, as A's surviving spouse, will receive all of A's personal chattels absolutely, a statutory legacy of £322,000 and half the residue, provided she survives A by 28 days.

A's children (C, D and E) are entitled equally to the remainder of the estate on the 'statutory trusts', i.e. provided they are 18 or over or married earlier.

Therefore, C, D and E will each have a vested interest in 1/3 of the half share of the residue. If E were not married, they would still be entitled to 1/3 of the half share, but this would be contingent upon them attaining the age of 18 and would be held in trust for them until this time.

Example 2:

A dies intestate leaving the following relatives:



B, as the surviving spouse, will receive A's personal chattels, a statutory legacy of £322,000 and half of the residue (assuming B survives A by 28 days).

The issue i.e. C, D and E would receive the other half of the residue on the statutory trusts. C has died, however. Therefore, D (over 18) and E (under 18 but married) would each receive a **vested** interest in 1/3 of the half share of the residue, while F and G would each share equally the 1/3 to which C would have been entitled. Again, this is on the statutory trusts i.e. once they reach 18 or marry earlier. Therefore, F and G will each have a **contingent** share only in A's estate.

If children or issue of the deceased survive the intestate but die without obtaining a vested interest, their interest normally fails and the estate is distributed as if they had never existed (in other words, they have yet to become absolutely entitled because a necessary contingency has yet to be met). Their share will be redistributed among the remaining beneficiaries. However, s. 3 of the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 provides that if they die without obtaining a vested interest but leaving issue (i.e. where an unmarried parent dies under the age of 18), they will be treated as having predeceased the intestate so that they can be replaced by their own issue.

8.2.3 Surviving Spouse/Civil Partner – No Children

Where there is a surviving spouse (or civil partner) but *no* issue then **the spouse/civil partner will receive the whole of the estate**. The 28-day survivorship rule, which requires a surviving spouse or civil partner to survive the deceased by at least 28 days in order to inherit, will apply in such cases, too.

8.2.4 No Surviving Spouse

If there are children, but no living husband, wife or civil partner, the children will share everything equally.

Although there is discretion to provide for those for whom an intestate ‘might reasonably have been expected to make provision’ under the Inheritance (Provision for Family and Dependents) Act 1975, if there is no surviving spouse, civil partner or issue, *the deceased’s parents are entitled to share in the deceased’s estate* (equally if both are alive). If both parents have predeceased, then intestacy rules follow the following order in respect of *remoter family members* – i.e.:

- (i) Brothers and sisters of the whole blood (i.e. who share the same parents as the deceased), but if none;
- (ii) Brothers and sisters of the half blood (i.e. who share only one parent with the deceased), but if none;
- (iii) Grandparents equally if more than one, but if none;
- (iv) Uncles and aunts of the whole blood (i.e. brothers and sisters of the whole blood of one of the intestate’s parents) but if none;
- (v) Uncles and aunts of the half blood (i.e. brothers and sisters of the half blood of one the intestate’s parents), but if none;
- (vi) The Crown, Duchy of Lancaster or Duke of Cornwall on *bona vacantia* (vacant goods – this is the name given to ownerless property).

For the above remoter classes of family relatives (aside from each of the grandparents who, like the intestate’s parents, will inherit equally), *members will take their benefits on the ‘statutory trusts’ defined in s. 47 of the AEA above.*

Example:

Ted dies intestate. His wife, Camilla, has died the year before, but the two left a son, Bob, aged 17.

As there is no surviving spouse, Ted’s entire estate will be held on trust for Bob until he either reaches the age of 18 or marries beforehand. If Bob dies before reaching the age of 18, Ted’s estate will pass to his parents. If they too are not alive, to his siblings, and so on, on the statutory trusts.

8.2.5 Special Rights of a Surviving Spouse

A surviving spouse (or civil partner) is entitled to a special election, which, if exercised, will affect the distribution described above with regard to surviving spouse with or without children. This special election is for appropriation of the matrimonial home to the surviving spouse, as described below.

8.2.5.1 *Appropriation of the Matrimonial Home (Schedule 2, Intestates Estates Act 1952)*

The matrimonial home, in which the surviving spouse was resident at the date of the intestate's death, if owned by the deceased, could have been owned in one of three ways:

- (i) Solely by the deceased; or
- (ii) Jointly by the deceased and surviving spouse as beneficial tenants in common; or
- (iii) Jointly by the deceased and surviving spouse as beneficial joint tenants.

Schedule 2 of the Intestates' Estates Act 1952 enables the surviving spouse to effectively purchase the matrimonial home – or the deceased's interest in the matrimonial home where they were beneficial tenants in common.

It is not an additional legacy – the spouse must 'purchase' the deceased's share of the matrimonial home out of her entitlement. If her statutory legacy and/or her share in the residuary estate is inadequate to purchase the deceased's interest, the deficiency may be made up out of the spouse's own resources. Therefore, if the deceased solely owned the matrimonial home, the spouse will be required to purchase the home in full. If the deceased and the spouse held the matrimonial home as tenants in common, the spouse will only be required to purchase the spouse's share. However, if the deceased and the spouse owned the matrimonial home as joint tenants, it will pass automatically to the spouse by survivorship (and there will be no need for an entitlement to purchase it).

8.3 THE STATUTORY TRUSTS

'Statutory trusts' is defined in s. 47 of the AEA as meaning that the rest of the estate will be distributed:

- (a) among all of the children – in equal shares;
- (b) to all children who were *living at the date of the intestate's death* (including any children *en ventre sa mère* i.e. persons conceived but not yet born);
- (c) on the death of any of the children, his/her share will pass to that beneficiary's own issue (i.e. children, grandchildren, great-grandchildren etc.) *in equal shares*;
- (d) contingent on the beneficiary (who is living at the date of the intestate's death) marrying or reaching the age of 18.

'Equal shares' is on a 'per stirpes' basis ('by branch', meaning that each branch of the family receives the share due to their ancestor) – rather than on a 'per capita' basis. The difference between the two can be illustrated by a simple example: if X dies intestate and one of his two children has predeceased him, but has left two children of his own, then on the 'per stirpes' basis each of the two grandchildren will receive one-quarter (i.e. one-half of their late parent's share of the estate), while the surviving intestate's child's share would remain as one-half of the estate; by contrast, on a 'per capita' basis, each of the two grandchildren would receive a full one-third of the intestate's estate, and the share of the surviving child would be reduced to one-third accordingly.

8.3.1 Statutory Trust for Sale

Section 33 of the AEA provides that an intestate's personal representatives hold any part of the intestate's estate not disposed of by will on a trust for sale. This means that a statutory

trust, with power (though not a duty) to sell any land, is automatically imposed in respect of all the property of the intestate.

The trust also provides that, from the proceeds of sale and/or from the intestate's ready money, the PRs must pay the funeral, testamentary and administration expenses, debts and other liabilities of the deceased.

Any balance remaining once all liabilities and expenses have been discharged including any pecuniary legacies left in the deceased's will is known as the 'residuary estate' and is shared amongst those entitled according to the statutory rules.

Section 33 also provides that personal chattels belonging to the deceased should not normally be sold except for 'special reason' where other assets are available to enable the PRs to discharge the debts and other liabilities of the estate. Personal representatives are entitled to discharge a debt from any part of the estate.

8.4 PROPERTY PASSING OUTSIDE THE ESTATE

Not all property in the deceased's estate passes on death under the terms of the deceased's will or intestacy. Such property will effectively pass *outside* of the will or the operation of the intestacy rules, although it will, nonetheless, remain part of the estate for IHT purposes. This property includes:

- **Jointly owned property**

If the deceased was a *beneficial joint tenant*, his share in the jointly owned property (house, bank account etc.) will pass to the surviving joint tenants by virtue of the right of survivorship. No account is taken of any will or the intestacy rules.

(By contrast, if the deceased was a beneficial tenant in common, the deceased's interest forms part of his estate, and will pass on his death under the terms of his will or the intestacy rules.)

- **Nominated property (statutory nominations)**

Where a person is entitled to certain types of property, he can make a statutory nomination in favour of a third party who he wishes to receive the property after his death. Such property can be paid *directly to the nominee on proof of death*.

The statutory provisions which permit these disposals apply to deposits not exceeding £5,000 in certain Trustee Savings Banks, Friendly Societies and Industrial and Provident Societies.

- **Gifts made in contemplation of, and conditional upon, the donor's death (*Donatio Mortis Causa*)**

Such gifts will pass directly to the donee on death (the donor retains the title to the gift until death) but will form part of the deceased's estate for IHT purposes.

8.5 PROPERTY WHICH DOES NOT FORM PART OF THE DECEASED'S ESTATE FOR EITHER SUCCESSION OR INHERITANCE TAX PURPOSES

- **Proceeds of life policies written in trust**

A person may take out a life assurance policy on his own life. If he expresses the policy to be for the benefit of a specified beneficiary (e.g. his spouse and/or children, pursuant to s. 11 Married Women's Property Act 1882), he will have created a trust in favour of such beneficiaries.

Alternatively, a life policy may be *assigned* to a named beneficiary. On the life assured's death, the policy will mature and the insurance company will pay the proceeds to the named beneficiary, regardless of the terms of the deceased's will.

If a life policy is written *in trust* or *assigned* in the above manner, its proceeds will 'belong' to the beneficiaries and will not pass into the estate. The proceeds can therefore simply be collected by the beneficiaries (or trustees for them) under the trust upon proof of the insured's death.

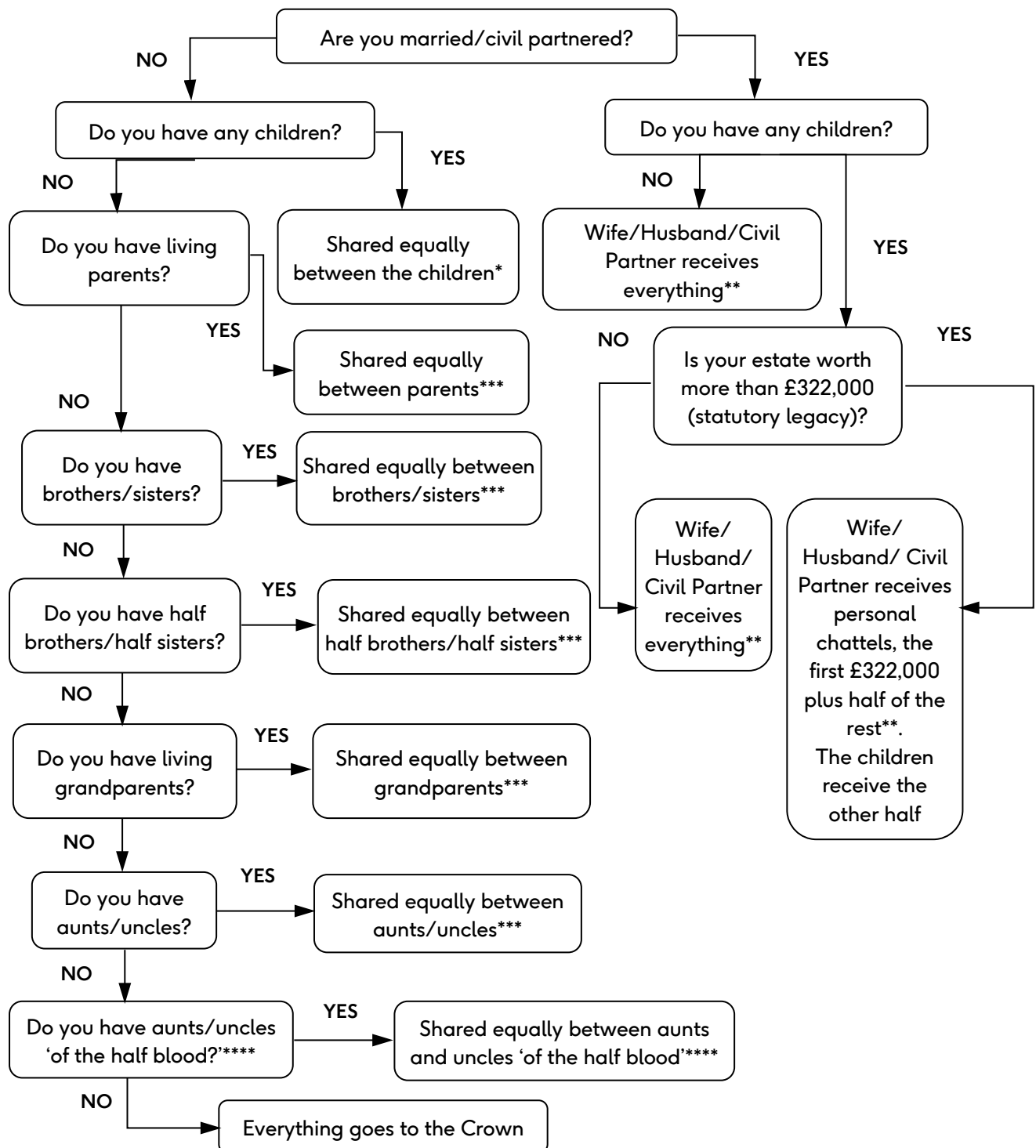
- **Discretionary occupational pension scheme benefits**

Occupational pension scheme benefits, where a lump sum is payable on the death of the employee 'in service', are payable at the discretion of the trustees of the scheme (albeit that the scheme usually allows the employee to indicate ('nominate') to the trustees which people he would like to benefit).

As the pension benefits do not belong to the employee during his lifetime, the deceased has no interest in the lump sum, and they will, therefore, pass on his death independently of the terms of his will. The trustees of the scheme will only require proof of death to release the proceeds.

In the case of both life policies written in trust and discretionary pension scheme benefits, the proceeds do not form part of the estate for IHT purposes also.

Intestacy Rules



* "Children" includes all children and remoter descendants of the deceased, whether legitimate, legitimated (e.g., adopted) or illegitimate, but not stepchildren of the deceased unless adopted. The issue's share will be held in trust on a per stirpes basis until they attain the age of 18 or get married (or enter into a civil partnership), whichever happens first.

** The Wife/Husband/Civil Partner must survive at least 28 days after the death of the intestate to be entitled to inherit. Otherwise, they are treated as having not survived the deceased. The next class of beneficiary becomes entitled, for whom there is no survivorship period.

*** When your estate has to be shared between your parents or grandparents and one of them has died before you, those still living receive the whole of your estate. In other cases, for example, where your sister or uncle would have been entitled to a share had they not already died, their children get their share. The same rules apply to the children of half-brothers and sisters, and half-uncle and aunts.

**** Your aunt or uncle 'of the half blood' is your parent's half-brother or sister. Only your blood relatives will receive anything if you die without a will. Step brothers or sisters aren't entitled to anything, neither are your aunts or uncles by marriage.