



COMMISSIONER'S PRACTICE

DA 29.3 SUPERSEDED

DUTIES – NOMINAL DUTY FOR CERTAIN DUTIABLE TRANSACTIONS RELATING TO DECEASED ESTATES

This Commissioner's Practice details how duty will be charged on transactions involving dutiable property comprised in a deceased estate.

Background

Section 10 of the *Duties Act 2008* ('Duties Act') imposes duty on dutiable transactions.

Section 11 of the Duties Act provides that dutiable transactions include a transfer or agreement for the transfer of dutiable property, a declaration of trust over dutiable property, or a vesting of dutiable property by or as a consequence of a court order.

Section 15 of the Duties Act defines dutiable property as Western Australian land, rights, chattels and business assets.

Section 26 of the Duties Act states that, unless otherwise provided, duty is chargeable at the general rate of duty as set out in Schedule 2 to the Duties Act.

Section 139 of the Duties Act provides that the following dutiable transactions relating to deceased estates are chargeable with nominal duty:

- under section 139(2)(a), a transfer or agreement for the transfer of dutiable property to the extent that the transfer gives effect to a distribution in the estate of a deceased person and there is no consideration for the agreement or transfer;
- under section 139(2)(b), a declaration of trust over dutiable property to the extent that it gives effect to a distribution in the estate of a deceased person; and
- under section 139(2)(c), a vesting of dutiable property by, or as a consequence of, a court order made under the *Family Provision Act 1972*¹ ('Family Provision Act'), or under section 65 of the *Trustees Act 1962* ('Trustees Act') on an application under the Family Provision Act.

Section 139(1) of the Duties Act defines *distribution* as meaning a distribution under a will or on intestacy. In the present context, the word 'under' has the meaning 'in accordance with'.²

The executor or administrator of a deceased estate is responsible for disposing of the assets of the estate in accordance with the will of the deceased, or the provisions of the *Administration Act 1903* ('Administration Act') if there is no valid will.

Section 30(1)(k) of the Trustees Act provides that a trustee of property (which includes the executor or administrator of a deceased estate) may appropriate any part of the property in or towards satisfaction of any share of the trust property to which a person is

¹ Formerly the *Inheritance (Family and Dependents) Provision Act 1972*.

² Source: Oxford English Dictionary and Macquarie Dictionary

entitled. This power is subject to the proviso that the appropriation cannot be made so as to adversely affect any specific gift.

Pursuant to section 10 of the Family Provision Act, an order of a court under the Family Provision Act, or under section 65 of the Trustees Act on an application under the Family Provision Act, takes effect as if it were a codicil to the will of the deceased person executed immediately before their death. In the case of intestacy, the order takes effect as a modification to the applicable rules of distribution (as set out in the Administration Act).

Foreign transfer duty

A transaction will generally be exempt from foreign transfer duty where it is eligible for a nominal duty assessment. For example, where the terms of a will direct residential property to be transferred to a beneficiary who is a foreign person and no consideration is paid, foreign transfer duty will not apply to the transaction if it is eligible for nominal duty.

Where nominal duty partially applies to the transaction but is also chargeable with transfer duty, foreign transfer duty will also apply on the dutiable value if it is residential property being transferred to a foreign person.

Commissioner's Practice

Distribution Under A Will

Specific gift of dutiable property

1. The courts have held that the guiding principle in respect of distributions made under a will is to give effect to the last wishes of the deceased. Where a will contains a devise of a specific item of dutiable property to a particular beneficiary, nominal duty will be charged to the extent that the transfer of the property is to that person. If the transfer is to any other person, duty will be charged at the applicable rate.

Example 1

Under the terms of a will, a brother and sister are gifted a one undivided half share each in property valued at \$500,000. They are also given a half share each in shares in ASX listed companies, also with a market value of \$500,000.

As the Transfer of Land giving effect to this devise is in accordance with the terms of the will, the transfer is chargeable with nominal duty of \$20. No duty is chargeable in respect of the shares because they are not dutiable property under the Duties Act.

Example 2

The same situation occurs as in example 1, however the brother and sister agree that the brother is to take the whole of the land and the sister is to take all of the shares. The property is transferred to them in accordance with their agreement.

The transfer of the property to the brother is chargeable with nominal duty of \$20 in respect of the one half share to which he is entitled under the will. The additional one half share transferred to him beyond his entitlement is chargeable at the applicable rate of duty on the value of this share, being \$250,000.

Residuary property

2. A will typically provides that the balance of estate property remaining after any specific gifts have been made and any liabilities have been satisfied is to be distributed to the residuary beneficiaries based on fractional or percentage interests. The executor is empowered under the Trustees Act to carry out this distribution.
3. Where the executor of a deceased estate transfers property that forms part of the residuary estate to a beneficiary who is entitled to a fraction or percentage of that residuary estate, nominal duty will be charged on the transfer of any dutiable property provided that the value of the dutiable property transferred is not greater than the value of that person's entitlement.
4. Where the executor transfers property to a residuary beneficiary and the value of dutiable property transferred is greater than the value of that person's entitlement, nominal duty will be charged on the value of the entitlement and duty at the applicable rate will be charged on the amount by which the value of dutiable property exceeds that person's entitlement.
5. Where the parties agree for the gross assets of the estate to be distributed subject to the beneficiaries assuming the estate's liabilities, those liabilities will form consideration. Duty will be charged at the applicable rate on the liabilities in respect of dutiable property.

Example 3

A deceased estate comprises dutiable and non-dutiable property with a gross value of \$3,000,000. The estate has liabilities amounting to \$600,000.

The deceased person's will contains specific gifts of various items of property with a total value of \$1,500,000. The balance of the estate comprises a home unit valued at \$600,000, and cash and shares worth \$900,000. The executor satisfies the liabilities from the cash and shares.

The will provides that, after satisfying all liabilities, the residue of the estate is to be distributed equally to the deceased person's three children. The executor transfers a one third share in the home unit to each of the children and distributes the remaining cash and shares equally.

As the transfer of the home unit to the children is a transfer of dutiable property in accordance with the will, the transfer is chargeable with nominal duty of \$20.

Example 4

The same situation occurs as in example 3, however the children agree that a half share each in the home unit is to be transferred to two of them and the third child is to receive the remaining cash and shares.

The transfer of the home unit to the two children is chargeable with nominal duty of \$20.

The provision in the will that the residuary property be transferred equally to the deceased person's three children does not require that each child must receive a one third share in each and every asset. Where an executor appropriates property in such circumstances, the transfer of dutiable property will be regarded as being in accordance with the will.

Example 5

The same situation occurs as in example 3, however, rather than the executor paying out the estate's liabilities of \$600,000, each child assumes one third of the liabilities along with the distribution of the assets. The result may vary depending on the basis for the debt.

Where the debt was incurred in relation to the acquisition of the home unit secured by a mortgage:

The transfer of the home unit to the children subject to the mortgage is chargeable with duty at the applicable rate on the entire value of the liabilities assumed (\$600,000) because the children are giving consideration for the acquisition of the home unit in the form of the liability assumed.

Where the debt was incurred in relation to the acquisition of the shares:

The transfer of the home unit to the children is chargeable with nominal duty of \$20. As shares are not dutiable property, there are no duty consequences in respect of the debt.

Where the debt was not incurred in respect of the acquisition of any particular asset:

The debt will be distributed across all of the residuary assets. The portion attributed to the home unit will be $\$600,000/\$1,500,000 \times \$600,000 = \$240,000$. The transfer of the home unit to the children is chargeable with nominal duty of \$20, plus duty at the applicable rate on the consideration of \$240,000.

Where the debt is assumed in consideration for the transfer, or agreement for transfer, of specific property to the children, the consideration will be applied to that property regardless of the purpose for which the debt was incurred.

Option to purchase

6. A will may provide for specific property to be transferred to a beneficiary, conditional upon payment of a sum of money.
7. This may be legally classified as a testamentary option to purchase or a testamentary conditional gift. Although the distinction may be difficult to apply in practice, the result is immaterial as the provisions of the Duties Act will apply equally regardless of the classification.
8. The exercise of a testamentary option to purchase does not create a contract between the option holder and the executor of the will even if the option holder and the executor decide to enter into a subsequent contract to better evidence or define the agreement for transfer. Rather, the option holder's title and interest in the subject property, and similarly the rights of the donee of a testamentary conditional gift, arise from the provisions of the will.
9. Both an option holder and a donee are regarded as beneficiaries under the will. The provisions of section 139 of the Duties Act may therefore apply to allow a partial nominal duty assessment in some circumstances.
10. The applicable rate of duty is charged on the consideration to be paid in these circumstances. Where the consideration to be paid is less than the value of the property to be transferred, the additional value of the transferrable property is treated as being a distribution under the will and is liable for nominal duty.

Example 6

A will provides for the disposition of certain dutiable property to a beneficiary, subject to payment to the estate of the sum equal to the value of the property. The beneficiary accepts the property and makes payment. The property has a value of \$750,000.

The transfer is chargeable with duty at the applicable rate on the consideration of \$750,000.

Example 7

A will provides for the disposition of certain dutiable property to a foreign beneficiary, subject to payment to the estate of \$100,000. The beneficiary accepts the property and makes payment. The property has a value of \$750,000.

The transfer is chargeable with duty at the applicable rate on the consideration of \$100,000. Foreign duty of 7 per cent is applied to that consideration. Nominal duty of \$20 is chargeable as the additional value of the property is treated as a distribution under the will.

Distribution on Intestacy

11. Where a person dies intestate, distribution of estate property will be made in accordance with the provisions of the Administration Act. These typically provide that household chattels and a certain monetary sum (plus interest thereon) will be distributed to a particular beneficiary, such as a surviving spouse. The balance of the net estate will then to be distributed to family members and relatives in specified fractional shares.
12. The administrator of an intestate estate is empowered under the Trustees Act to appropriate estate property in satisfaction of any person's share. In particular, the Administration Act allows a surviving spouse to elect to have a dwelling house that is their place of residence to be appropriated to them in satisfaction of their share of the estate.
13. Where the balance of the estate is distributed, duty will be charged similar to the application of duty to residuary property where there is a valid will (see paragraphs 2 to 5 above).
14. A transfer of household chattels will not be taken as a dutiable transaction unless transferred with other dutiable property from the estate.

Vesting Pursuant to Court Order

15. A vesting of dutiable property by, or as a consequence of, a court order³ is chargeable with nominal duty. The court order, being the relevant transaction record, is endorsed with this duty.
16. A transfer of dutiable property resulting from the vesting is not chargeable with duty.⁴

³ described in section 139(2)(c) of the Duties Act.

⁴ pursuant to section 42(12) of the Duties Act.

17. Remaining dutiable estate property that is not subject to the court order will be charged with duty in accordance with the relevant paragraphs of this Commissioner's practice.

Example 8

A will specifies that the assets of an estate are to be distributed equally between the deceased's wife and two children (one third share each). The assets consist of:

- residential property valued at \$500,000;
- commercial property valued at \$350,000; and
- cash of \$250,000.

The deceased's wife obtains a court order under the Family Provision Act vesting the residential property to her. The two children remain entitled to the reduced balance in equal shares. With the agreement of the children, the commercial property is transferred to one, and the cash to the other.

Nominal duty is charged on the court order. The transfer to the wife of legal title to the residential property is not chargeable with duty.

The value of the entitlement to property for each of the children is \$300,000, being one half of the aggregated values of the commercial property and the cash. For the transfer of the commercial property, duty will be charged at the general rate on \$50,000, plus nominal duty of \$20.

Deeds of Family Arrangement

18. The interest that a beneficiary or potential beneficiary has in an unadministered estate is not a right to any specific property, but a right to court action for due administration of the estate (legally known as a 'chose in action'). Although a chose in action of this nature is property, it is not dutiable property under the Duties Act. Any transaction concerning a beneficiary's interest of this nature (rather than concerning the underlying specific dutiable property), is not a dutiable transaction.
19. The executor/administrator and beneficiaries of a deceased estate may agree together to vary the distribution from that provided for in the will of the deceased or under the Administration Act. The parties will usually record that agreement in a 'Deed of Family Arrangement'.
20. A Deed of Family Arrangement may evidence or effect a dutiable transaction, for example, an agreement for the transfer of land. This transaction will be chargeable with duty but the subsequent transfer of the legal title to the land will not be chargeable.⁵
21. Generally speaking, Deeds of Family Arrangement relate to interests in the unadministered estate and are not chargeable with duty. In these circumstances duty (whether nominal or at the specified rate) will be chargeable in respect of any dutiable transactions giving effect to or arising from the Deed of Family Arrangement, e.g. as evidenced by a transfer of land instrument.

⁵ pursuant to section 42(1) of the Duties Act.

Example 9

A will provides for an estate to be divided equally between two children. The affairs of the estate are complex, so one child agrees to surrender their interest in the estate in consideration of receiving an immediate cash payment. The parties execute a Deed of Family Arrangement to evidence this agreement. No duty is chargeable on this.

The estate holds dutiable property, being land valued at \$3,000,000. When administration of the estate is completed, the transfer of this land to the remaining child will be charged with duty at the specified rate on \$1,500,000 plus nominal duty of \$20.

Disclaimers of Interests

22. Where a beneficiary under a will decides not to accept a testamentary gift, the disclaimer is not treated as a disposition of the property but operates as if the gift had never been made. The gift property will be dealt with under the remaining provisions of the will and will usually become part of the residue.
23. Disclaimer of a testamentary gift may be made at any time before the beneficiary has derived any benefit from, or accepted the benefit of (i.e. assented to), the gift. Assent may be in writing or may be implied from conduct. By accepting a benefit, a beneficiary will be taken to have assented to the gift.
24. A purported disclaimer that is made too late to be effective, such as where the beneficiary has already obtained a benefit from the asset, may result in further duty being chargeable.

Example 10

A will provides that a life interest in the former family home is to be given to the surviving spouse, with the estate in remainder to the children. The home is tenanted and the spouse receives the rent paid to her own benefit. When the estate is ready to be finalised, the spouse disclaims the life interest as she now wishes the entire interest in the home to go to the children.

A disclaimer in these circumstances is unlikely to be legally effective as a true disclaimer. By deriving a financial benefit from the home, the spouse will be taken to have accepted the gift under the will and the disclaimer will constitute a surrender of the life interest. This is a dutiable transaction and will be chargeable with duty accordingly.

Lodgment Requirements

Information required to be provided to the Commissioner to determine whether nominal duty applies is specified in the [Duties Information Requirements](#) accessible from the Duties section of the [State Revenue website](#).

Date of Effect

This Commissioner's Practice takes effect from 1 January 2019.

Nicki Suchenia
COMMISSIONER OF STATE REVENUE

1 January 2019

Commissioner’s Practice History

Commissioner’s Practice	Issued	Dates of effect	
		From	To
DA 29.0	19 February 2013	19 February 2013	22 August 2013
DA 29.1	23 August 2013	23 August 2013	27 February 2014
DA 29.2	28 February 2014	28 February 2014	31 December 2018
DA 29.3	1 January 2019	1 January 2019	16 June 2019

SUPERSEDED