Intestacy Kit – TAS (AITB)

This Intestacy Kit has been developed to assist families of Indigenous artists who passed away without making a will. If the artist did leave a will, see the Wills Kit. The development of this resource is made possible through the support of Copyright Agency Ltd (CAL) and DLA Piper.

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Below is an introduction to the Intestacy Kit.

For the complete Intestacy Kit please click here.

What is intestacy?

Usually, when an artist or other person passes away, their will is the document that sets out how they want their belongings to be distributed among their family and friends. If a person passes away without leaving a valid will, that person is said to have died "**intestate**". If they have a will but it only deals with some of that person's belongings, that person is said to have passed away "partially intestate".

If a person passes away intestate, the laws of intestacy will determine who is entitled to have that person's estate. If the person passes away partially intestate, then the law determines how to distribute those things that are not covered by the will.

In Tasmania, the laws of intestacy are set out in the *Intestacy Act 2010* (Tas) (the **Act**). The laws that otherwise govern succession and the distribution of estates are set out in the *Administration and Probate Act 1935* (Tas). The rules in the Act apply to the estate of any person who was living in Tasmania at the time of their death and did not leave a will. These rules will also apply to any property that was not covered by the deceased person's will if they did leave one.

Different rules may apply in relation to property that is located outside Tasmania or to property in Tasmania which belonged to a person who lived elsewhere at the time of their death.

The intestacy rules may require the deceased person's assets to be distributed in a way that is very different to the outcome that the family of the deceased person expect, and may also be very different to the result that the deceased person would have wanted. In particular, these rules may be very different from the traditional or customary way of dealing with the passing of an Indigenous person. **For that reason, it is usually sensible to prepare a will to make sure that the estate goes to the family and community members that the artist believes should receive them.**

In this information sheet, we focus on how the rules of intestacy will operate in relation to an Indigenous artist who was living in the Tasmania at the time he or she passed away.

What is the "Estate"?

The assets owned by a person at the time of their death are described as that person's "**estate**".

The estate can include real estate (property), cars, insurance policies, money in bank accounts, shares, artwork, furniture, jewellery and clothes and even debts owed to the person such as money due from the sale of artwork. Sometimes the estate will also include mining royalties or superannuation. The estate may also owe money, such as for credit card bills or car payments.

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Importantly, every artist's estate is likely to include copyright in the artwork created during his or her lifetime. Copyright can be an important source of income for an artist's family as it lasts for 70 years after the artist passes away. The estate can earn royalties for the right to reproduce the artist's paintings in auction catalogues, art books and merchandise long after the paintings themselves are sold and the artist has died.

In addition, with the passing of the *Resale Royalty Right for Visual Artists Act 2009 (Cth),* the artist's estate will include the entitlement to resale royalties on all eligible commercial resales of the artist's works which take place in the 70 years after the artist's passing.

For most Aboriginal visual artists, the most important assets in the estate are likely to be the following:

1. Money in any personal bank account held in the artist's name;
2. Money held by the art centre from the sale of paintings;
3. Paintings held by the art centre or a commercial gallery or dealer on consignment;
4. Resale royalties; and
5. Copyright including entitlements to licensing royalties from collecting societies or under licensing deals negotiated during the artist's lifetime.

As well as assets, the estate is also responsible for certain debts and other liabilities. The liabilities of the estate will include paying any costs associated with the funeral, and any other debts of the deceased artist such as any income tax that might be owed.

In this information sheet we only deal with the assets and liabilities listed above. If the estate contains assets or liabilities other than the ones mentioned above, we recommend you get legal advice as to the appropriate procedure to deal with them.

Who are the 'Beneficiaries'?

The intestacy rules identify certain surviving family members as the ones entitled to the artist's estate after he or she passes away[1]. Those family members are called the **'beneficiaries'** or the **'eligible relatives'.**

Who gets the property of an intestate Indigenous artist?

In many cases, where an Indigenous person passes away leaving very few belongings, the family and community will simply deal with those belongings in the way that they think is appropriate and questions of intestacy law may never arise.

The *Intestacy Act* sets out a series of rules for distributing intestate estates to a deceased person's spouse and next of kin. The rules are very precise and it is wise to get legal advice about exactly which distribution rules will operate in each particular circumstance.

According to the rules set out in the Act, where an Indigenous artist dies intestate, their estate will divided among the following surviving persons as follows:

When the deceased artist has a husband, wife or partner who is still alive?

The deceased's **spouse** is entitled to the whole estate if the artist has no children. A spouse means a person who:

- was married to the deceased person immediately before their death, meaning they met the formalities of a legal marriage set out in the *Marriage Act 1961* (Cth); or

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- was a party to a personal relationship with the deceased person that had been registered on the Tasmanian Relationships Register; or
- immediately before the deceased's death, was a party to a significant relationship with the deceased (whether or not registered) that:
  - had been in existence for a continuous period of at least 2 years; or
  - had resulted in the birth of a child.

For a couple to be recognised as **'married'**, the couple must have met the formalities of marriage set out in the *Marriage Act 1961 (Cth).* This means that a traditional Indigenous marriage may not be recognised and that a husband or wife in a traditional law marriage may not be considered as a spouse under the intestacy rules.

A **'registered personal relationship[2]**' means either:

- a significant relationship (a relationship between two adult persons who are a couple and who are not married to one another or related by family); or
- a caring relationship (a relationship other than a marriage or significant relationship) which is a relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care.

The meaning of 'couple' for the purposes of a **'significant relationship'** involves consideration of a number of circumstances including the sharing of a residence, sharing financial resources, common ownership of assets, shared performance of household duties, a sexual relationship and having a mutual commitment to a shared life. Not all these circumstances need to be present but the extent to which they are present or absent gives an overall indication of whether there is a couple relationship. If there has been a marriage under traditional Indigenous law, the couple may still be recognized as being in a significant relationship.

If the deceased artist is survived by a spouse and also by children, grandchildren or great grandchildren, then different rules apply depending on whether the children (grandchildren or great grandchildren) are also those of the spouse:

- If the children are also those of the surviving spouse, the spouse is entitled to the whole of the estate.
- If the children include children are **not** those of the spouse, the spouse is entitled to:
  - the deceased's personal effects; and
  - a CPI adjusted statutory legacy which was $350,000 as at 1 January 2012; and
  - one-half of the remainder (if any) of the deceased's estate.

    The remaining half (after the statutory legacy) is divided among the children.

When the deceased artist has more than one spouse or partner who is still alive?

The Act specifically contemplates that the deceased may have, at the time of their death, more than one spouse (for example, both a wife or husband and a partner, or two or more partners).[3] The Act provides that where the deceased had more than one spouse at the time of death, each spouse shall be entitled to share in the estate.

Where the deceased had more than one spouse at the time of death and all surviving children are children of one or more of the surviving spouses, the spouses are entitled to the whole of the estate.

Where the deceased had more than one spouse at the time of death as well as children who include children who are **not** children of a surviving spouse:

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o the spouses are entitled to share in the deceased's personal effects; and

o each spouse is entitled to a statutory legacy ($350,000 as at 1 January 2012); and

o the spouses are entitled to share one-half of the remainder (if any) of the intestate estate and the rest is divided equally among the children.

The spouses will share their entitlement in one of three ways[4]:

1) in accordance with a written "distribution agreement";

2) in accordance with a "distribution order" made by the Court; or

3) equally if they have not made an agreement or obtained a court order.

When there is no surviving spouse?

If the artist passes away and is not survived by a spouse or partner but there are surviving children, the children are entitled to the whole of the intestate estate as follows:

- adopted children are considered to be the children of their adopted parents, not their natural parents;
- a step child is not recognised for the purposes of intestacy and receives nothing;
- if a child of the deceased has died leaving a surviving child or children of that deceased child, then those grandchildren of the deceased are entitled to the share of the estate that would have gone to their deceased parent (in equal shares);
- if a grandchild would have been entitled to share in the estate but has not survived and leaves any surviving children, then those great-grandchildren of the deceased are entitled to equal shares of what the grandchild would have had (and so forth until the entitlement is exhausted).

What about traditional adoption under Indigenous laws?

Many Indigenous families have children who are adopted under traditional law. Such children will NOT be considered part of that family for the purpose of the intestacy laws.

For the purposes of the intestacy rules, adopted children are only considered to be the children of their adopted parents, not their natural parents, if the formal processes of the adoption legislation must have been complied with. This includes the adoption being facilitated by the relevant government department or an accredited adoption service provider, consent of each parent of the child being given to the adoption and an adoption order being issued by a court.

This is another good reason to make a will so that all children, including children adopted under traditional law can share in the artist's estate.

When the artist is not survived by a partner or any children, grandchildren or great grandchildren?

Where the deceased artist has no spouse or any direct descendants or **'issue'** (e.g. children and grandchildren), the deceased's surviving **parents** are entitled to the whole estate (in equal shares).

Where the deceased has no spouse, direct descendants (e.g. children and grandchildren) or parents, the deceased's surviving **brothers and sisters** (siblings) are entitled to the whole estate (in equal shares). If a sibling of the deceased has died, leaving any surviving children, then those nephews/nieces of the deceased are entitled to the share of the estate that would have gone to their parent.

Where the deceased has no spouse, direct descendants (e.g. children and grandchildren), parents, siblings or nephews/nieces the deceased's surviving **grandparents** are entitled to the whole estate (in equal shares).

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Where the deceased has no spouse, direct descendants (e.g. children and grandchildren), parents, siblings, nephews/nieces or grandparents, the deceased's parent's siblings (the deceased's **aunts and uncles**) are entitled to the whole of the intestate estate (in equal shares). If an aunt or uncle of the deceased has died, leaving surviving children, then any **cousins** of the deceased artist are entitled to the share of the estate that would have gone to their parent.

The intestacy rules do not provide for the deceased's estate to be distributed to anyone more remote than the first cousins of the deceased.

Where there is no next of kin as described above, the estate is described as *'bona vacanti'* and the intestate estate will belong to the State of Tasmania[5]. This could happen even though the artist is survived by children adopted under traditional law – they would have no entitlement to share in the estate. [6]

More details about the rules for distributing an intestate estate are set out in Parts 2 and 3 of the Act, and are summarised in SCHEDULE 1 of this Kit.

When can the intestacy rules be varied?

The rules for distribution of the property of a person who dies intestate are based on a relatively narrow range of family relationships, and these rules may be inappropriate for Indigenous communities that have a broader concept of family relationships.

However, in Tasmania, Part 4 of the Act contains express provisions that allow Aboriginal families to apply to the Court for orders allowing an intestate estate of an Aboriginal person in Tasmania to occur in a different way to that set out in Parts 2 and 3 of the Act. An application can be made either by the personal representative of an Indigenous estate, or a person claiming to be entitled to a share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which the deceased artist belonged.

The application must be made within 12 months of the grant of administration and before the intestate estate has been fully distributed. The Court may then order that the estate be distributed in a particular manner, having regard to the laws, customs, traditions and practices of the Indigenous community or group to which the deceased belonged. The Court must be satisfied that this manner of distribution is just and equitable.

Funeral Arrangements

Usually funeral arrangements are managed by the family and in accordance with any express wishes of the deceased person. If there is any disagreement within the family, the person appointed to manage the estate makes the final decision.

The family should consider that a very expensive funeral will mean that there is less money in the estate for the beneficiaries. The funeral should not cost more than the estate can afford.

The money required for funeral expenses must be paid before other any debtors are paid and before distributing any money to the beneficiaries.

How do the artist's beneficiaries get access to the artist's estate?

Where someone dies intestate, someone close to the deceased (often a beneficiary) must take responsibility for the **"administration"** of the deceased's estate. The administration of the deceased's estate will involve collecting the deceased's assets, finalising certain tax issues and then sharing out the assets to the appropriate beneficiaries according to the rules set out above.

For most artists, the most important assets held in the estate are likely to be those set out above namely:

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- Money held by the art centre from the sale of paintings;
- Paintings held by the art centre or a commercial gallery or dealer on consignment;
- Copyright (including entitlements to licensing royalties from collecting societies or under licensing deals negotiated during the artist's lifetime);
- Resale royalties; and
- Any personal bank account held in the artist's name.

In this information sheet we only deal with the assets listed above. The person who administers the artist's estate may also be responsible for other assets such as a house or car owned by the artist.

It will be important for the assets of the artist's estate to be valued. This is because the intestacy rules provide in some cases for assets to be distributed in a particular way depending on the value. This occurs in the case where there is a surviving spouse and children. Valuation may be difficult for paintings and the related copyright and resale royalty assets. It is important to remember that it is the asset's value at the date of the deceased's passing which is relevant. If that value is indeterminable (for example in the case of unlicensed copyright), the asset still needs to be considered in order to ensure that the rights in the asset pass to the appropriate family member.

If a person dies intestate, a person such as a beneficiary wishing to arrange for the administration of the deceased's estate has the following options:

Option 1: The Public Trustee can be asked to manage the estate.

Option 2: A beneficiary or other person can apply to the Supreme Court of Tasmania to be appointed as the formal administrator of the estate. This is called a **'Grant of Letters of Administration'**. The family may prefer that a family member or trusted friend carry out those responsibilities rather than the Public Trustee. A Grant of Administration is necessary where businesses or institutions which hold the deceased's assets are not be prepared to release them without such a Court order.

Option 3: A beneficiary or other person can locate the assets and distribute them according to the rules of intestacy without going through the formal process of applying to the Court. This may be possible for smaller estates where there is no real property (land) involved.

Whichever option is chosen, it is very important that all the correct beneficiaries are identified. SCHEDULE 2 to this Kit is a questionnaire that you can fill out and provide to Arts Law. Based on that information, we can advise you who will be the beneficiaries of the deceased artist under the Tasmanian intestacy laws.

Getting started when someone passes away intestate – Checklist

As can be seen from the above, there are a number of things to think about when managing the affairs of a deceased artist who made a will before passing away. The Federal government has some helpful information on its website – What To Do Following a Death.

Set out below is a checklist of matters to consider when embarking on one of the options outlined above:

a. Make sure there is no will.

b. Establish who the beneficiaries of the estate are when there is no will. Contact the Arts Law Centre if you need help with this.

c. You will probably need one or more certified copies of the Death Certificate. The official Death Certificate should be photocopied several times. You can then take those copies to the local police station and ask them to endorse them as certified copies.

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d. If the artist was receiving any benefits from Centrelink, advise Centrelink that the artist has passed away.

e. If the artist had a car or a driver's licence, advise the Department of Infrastructure, Energy and Resources that the artist has passed away.

h. What did the artist own at the date of passing away?

o Paintings

o Car

o Bank account

o House or property

o Personal belongings

o Shares, life insurance, superannuation

[1] Section 8 of the Act provides that if any family member passes away within 30 days of the artist, the intestacy rules operate as if that person did not survive the deceased.

[2] *Relationships Act 2003* (Tas) Part 2

[3] *Intestacy Act* Part 2 Division 3

[4] *Intestacy Act* section 26

[5] *Intestacy Act* section 37

[6] Section 36A of the *Public Trustee Act* 1930 (Tas) provides a time limit of 21 years for making claims for money paid improperly to the State (for example where the deceased artist did have next of kin who was not known at the time the estate was declared bona vacanti).

[7] Rule 26 of the *Probate Rules 1936* (Tas)

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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